

# Prosecutorial Misconduct and Noble-Cause Corruption

**Randall Grometstein\***

## Introduction

According to Rule 3.8 of the ABA's Model Rules of Professional Conduct, “[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”<sup>1</sup> Yet a litany of complaints about prosecutorial misconduct suggests that many prosecutors today, at both the federal and state level, are viewed as acting only as advocates.<sup>2</sup> Prosecutorial misconduct has been identified as a cause of wrongful conviction.<sup>3</sup> The literature on prosecutorial misconduct is largely descriptive, however, and devoted to establishing the existence of the phenomenon in question. Here I draw on a relatively new line of thinking about professional ethics to propose that prosecutorial misconduct

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**Editor’s note: I secured the above information from your website, but I am unsure of your academic rank. Please modify the above as well as add whatever autobiographical information of your choosing.**

<sup>1</sup> AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 (1995) [hereinafter ABA].

<sup>2</sup> Jim McGee, *The Appearance of Justice*, WASH. POST, Jan. 10-15, 1993, cited in JOHN P. CRANK, IMAGINING JUSTICE 342 (2003).

<sup>3</sup> C. RONALD HUFF, ARYE RATTNER & EDWARD SAGARIN, CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY 70 (1996).

results from a naïve form of ethical reasoning called noble-cause corruption.<sup>4</sup> To its practitioners, this form of ethical reasoning appears to justify prosecutorial misconduct such as the failure to turn over exculpatory evidence to defense counsel.

I hypothesize that prosecutorial misconduct will be readily found in highly-publicized cases where the cause is especially noble, such as in sensational or notorious crimes and during a moral panic.<sup>5</sup> After examining the wrongful conviction literature and cases from the 1980s moral panic about organized child abuse in daycare, I conclude that there is support for this hypothesis.

## I. A Primer on Noble-Cause Corruption

### *A. Police and the Noble-Cause*

Michael Caldero and John Crank propose that police officers as a group believe in the noble cause — “the moral commitment to make the world a safer

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<sup>4</sup> MICHAEL CALDERO & JOHN P. CRANK, POLICE ETHICS: THE CORRUPTION OF NOBLE CAUSE (2004); JOHN P. CRANK, IMAGINING JUSTICE (2003); JOYCELYN M. POLLOCK, ETHICS IN CRIME AND JUSTICE: DILEMMAS AND DECISIONS (2004).

<sup>5</sup> Noble-cause corruption among police occurs in routine cases, and therefore it is likely that prosecutorial misconduct occurs in routine cases as well.

A December 2005 report from the National Institute of Justice addresses a survey of police officers to find out how familiar they were with ethical issues that arise in routine police practice. Using hypothetical scenarios, the survey asked respondents for their likely reaction to the scenarios (e.g., reporting a fellow officer for a DUI offense) and about the policies and procedures of their departments for dealing with those issues. The survey did not ask officers how frequently they had faced these issues but instead assumed that officers would be familiar with them. All scenarios involved routine police activities rather than the celebrated or sensational cases I discuss here. NATIONAL INSTITUTE OF JUSTICE, ENHANCING POLICE INTEGRITY (2005), available at [www.ojp.usdoj.gov/nij](http://www.ojp.usdoj.gov/nij) (last visited Oct. 29, 2006).

place to live. . . by getting the bad guys off the street.”<sup>6</sup> To accomplish this goal, officers engage in teleological reasoning, also known as the belief that the ends justify the means. Some of the means police officers employ include lying, whether in writing reports (using a “magic pencil”), talking to investigators, or testifying under oath (“testilying”); rationalizing excessive force against suspects; and disregarding or suppressing evidence that tends to show a suspect’s innocence.<sup>7</sup> Caldero and Crank explain that police officers engage in value-based decision-making, and modern hiring procedures ensure that candidates for police positions are already committed to the noble cause before they are hired.<sup>8</sup> New police officers find that a number of factors conducive to ends-oriented thinking, including “a justice environment that reinforces a crime-control perspective and tends to look the other way at the corruption of noble cause,” the police subculture itself, a system of plea-bargaining that emphasizes efficiency and effectiveness over due process, and prosecutors who are themselves committed to the noble cause.<sup>9</sup>

While economic corruption brings society’s condemnation, moral-cause corruption elicits a more ambivalent response from most observers. The term

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<sup>6</sup> CALDERO & CRANK, *supra* note 4.

<sup>7</sup> Cf. examples cited by Laura Dannen, Katie Liesener & Rachel Lux, *System to Stem Police Perjury Not Implemented*, BOSTON GLOBE, Oct. 24, 2005; Donovan Slack & Suzanne Smalley, *Penalties are Light for Police Charged with Misconduct*, BOSTON GLOBE, Oct. 12, 2005.

<sup>8</sup> CALDERO & CRANK, *supra* note 4, at 62-63.

<sup>9</sup> CALDERO & CRANK, *supra* note 4, at 62-63. Economic corruption such as graft and bribery may be an outgrowth of this type of ends-oriented thinking, according to Caldero and Crank. Noble-cause corruption occurs when police officers consider themselves above the law or when they act as if they are the law: “[T]he law becomes one of the many tools officers use to act out a moral standard. . . . Noble-cause corruption thus becomes a gateway for material-reward corruption.” *Id.* at 115.

“corrupt” may not seem applicable to officers who perjure themselves on the witness stand when they lack a motive to benefit themselves; their zeal to get the “bad guys” off the street may even inspire admiration; and, most importantly, many people fear that to condemn them is to condemn the noble causes they were striving to serve. This ambivalence poses an obstacle to creating adequate sanctions for officers who engage in noble-cause corruption.

### *B. Prosecutors and the Noble-Cause*

Rule 3.8 of the ABA's Model Rules of Professional Conduct sets standards for prosecutors, including an obligation to assist in obtaining counsel for the accused, a prohibition on asking an unrepresented accused to waive important pretrial rights, and the duty to disclose exculpatory evidence to the defense.<sup>10</sup>

Prosecutors who violate any of these rules are not necessarily doing so for self-interested reasons such as graft. Instead, highly moral prosecutors, emotionally

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<sup>10</sup> ABA Rule 3.8 provides: A criminal prosecutor shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause; (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining counsel, and has been given reasonable opportunity to obtain counsel; (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing; (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; (e) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.; (f) not subpoena a lawyer in a grand jury or other criminal procedure to present evidence about a past or present client unless the prosecutor reasonably believes: (1) the information sought is not protected from disclosure by any applicable privilege; (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and (3) there is no other feasible alternative to obtain the information; (g) except for statements that are necessary to inform the public of the nature of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused. ABA, *supra* note 1.

committed to the imperative of getting the “bad guys” off the street, might deem evading these requirements as a small price to pay to accomplish this goal.

Caldero and Crank observe that police officers’ anger against “bad guys” is fueled in part by “the smell of the victim’s blood”, which is to say, by contact with an injured, distraught or dead victim, and prosecutors may spend even more time than police officers with crime victims as they prepare a case for trial.<sup>11</sup> The pressures of plea-bargaining also add to the pressures of service to the noble cause.

## II. Noble-Cause Corruption, Ethical Reasoning, and a Hypothesis

Ethics is a field of study designed to help people choose the right course of action from among competing alternatives. According to Pollock, the two main types of ethical reasoning derive from the answers to the question “Do the ends justify the means?”<sup>12</sup> The deontologist answers no, thus emphasizing the importance of the means, whereas the teleologist answers yes, focusing on the ends.

<p style="text-align: center;"><b>Issue: Do the ends justify the means?</b></p> <p style="text-align: center;"><b>Deontologist: No, the means (rules) determine what is permissible.</b></p> <p style="text-align: center;"><b>Teleologist: Yes, if the ends are sufficiently important.</b></p>
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Fig. 1

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<sup>11</sup> CALDERO & CRANK, *supra* note 4.

<sup>12</sup> POLLOCK, *supra* note 4.

Hence, the question “Is it permissible to kill a human being?” might be answered in the negative by a pacifist or an opponent of the death penalty (deontologist) and in the affirmative by a soldier or a victim acting in self-defense (teleologist). Naturally, each of us is a deontologist with respect to some values and a teleologist with respect to others. Furthermore, the extremes of each position pose some obvious difficulties. At the rule-based (deontological) extreme, Jean Valjean is imprisoned for stealing to feed his starving children in *Les Misérables*, and Shylock turns to the law to demand his pound of flesh. At the ends-oriented (teleological) extreme, we find the Ministry of Truth rewriting history as political goals change in George Orwell’s *1984*. But as general concepts, teleology and deontology are useful. Jeremy Bentham, for example, described a system of punishment based on utilitarian (teleological) principles, in contrast to systems based on punishing sin. Furthermore, according to Pollock, there are intermediate positions available.<sup>13</sup> For example, a variation on traditional utilitarianism, which considers only whether the act in question will achieve a desired outcome, is rule utilitarianism, i.e., whether the act achieves a good result and whether the actor would be willing to allow everyone to do the same act to achieve the same goal. At the deontological pole, variations include ethical formalism, religion, natural law, the ethics of virtue and the ethics of care.

In practice, many people subscribe to what is called situational ethics, which Pollock describes as containing the following elements:

1. There are basic principles of right and wrong.

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<sup>13</sup> POLLOCK, *supra* note 4.

2. These can be applied to ethical dilemmas and moral issues.
3. These principles may call for different results in different situations, depending on the needs, concerns, relationships, resources, weaknesses and strengths of the individual actors.<sup>14</sup>

Pollock does not say so explicitly, but situational ethics includes a mix of deontological and teleological reasoning. This suggests an empirical question: In what situations do people apply deontological principles and in what situations, teleological principles? Anthropologists would not be surprised by the hypothesis that we reason deontologically with respect to members of our own group and teleologically with respect to outsiders, especially those perceived to be dangerous.<sup>15</sup> As I will discuss shortly, the in-group/out-group distinction may be an important element in understanding noble-cause corruption among police officers and prosecutors.<sup>16</sup>

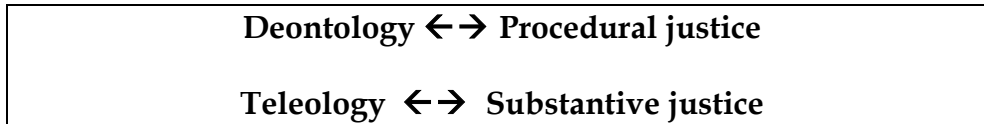
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<sup>14</sup> POLLOCK, *supra* note 4, at 47.

<sup>15</sup> One of the neutralizations described by Gresham Sykes and David Matza, the appeal to higher loyalties, appears to demonstrate the difference between in-group and out-group ethics. The delinquent juvenile “sacrifices the demands of the larger society for the demands of the smaller social groups to which the delinquent belongs such as the sibling pair, the gang, or the friendship clique.” Gresham M. Sykes & David Matza, *Techniques of Neutralization: A Theory of Delinquency*, 22 AM. SOC. REV. 664, 669 (1957). The delinquent feels he owes a primary loyalty to the smaller social group that trumps his obligation to society in general.

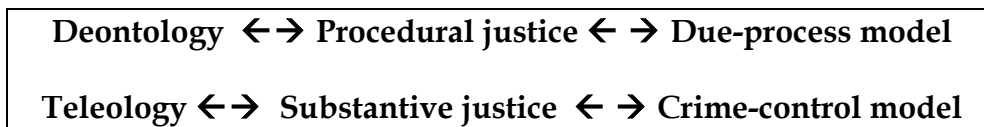
<sup>16</sup> Ethics offers guidance to individuals’ choices, but here we should note that the legal system—any legal system—is a deontological enterprise. Lawyers take an oath to uphold the law and are considered officers of the court to which they are admitted to practice. Police officers likewise swear an oath to uphold the law. The professional role of lawyers and criminal justice professionals involves—or should involve—a deontological commitment to the law and its rules. Noble-cause corruption appears to constitute a particular type of conflict between one’s personal and professional ethical values, or—in the case of prosecutors—a conflict between professional values and the perception of what the public wants.

Pollock points out the parallel between deontological reasoning and procedural justice, on the one hand, and teleological reasoning and substantive justice, on the other<sup>17</sup>:



**Fig. 2**

Caldero and Crank would add another parallel, i.e., to Herbert Packer's two models of the criminal justice system<sup>18</sup>:



**Fig. 3**

Many prosecutors and police officers subscribe to the crime-control model of the criminal justice system and thereby take a teleological view of the system. Consequently, the noble cause of getting the "bad guys" off the street justifies the occasional violations of due process that are necessary to accomplish that goal.

Defense lawyers emphatically disagree with the noble cause model. As

<sup>17</sup> POLLOCK, *supra* note 4.

<sup>18</sup> CALDERO & CRANK, *supra* note 4. See also Ken Roach, *Four Models of the Criminal Process*, 89 J. CRIM. L. & CRIMINOLOGY 671, 671-72 (1999) (footnotes omitted):

The essence of Packer's two models can be captured by evocative metaphors. The criminal process in the crime control model resembles a high speed "assembly-line conveyor belt" operated by the police and prosecutors. The end product of the assembly-line is a guilty plea. In contrast, the due process model is an "obstacle course" in which defense lawyers argue before judges that the prosecution should be rejected because the accused's rights have been violated. The assembly line of the crime control model is primarily concerned with efficiency while the due process model is concerned with fairness to the accused and "quality control."



deontologists, they agree with Blackstone's maxim that it is better to let the guilty go free than to unjustly convict an innocent person.

I hypothesize that people are likely to apply teleological reasoning, i.e., ends-oriented thinking, to an individual or a group perceived as dangerous or threatening. For criminal justice professionals, two types of situations would likely stimulate ends-oriented thinking: sensational or notorious crimes; and a moral panic. If some forms of prosecutorial misconduct are the product of teleological reasoning, then we should find evidence of such misconduct in these two types of prosecutions.

### III. Case Studies

#### A. *Wrongful Conviction Studies*

The literature on wrongful conviction has focused on capital crimes.<sup>19</sup> The crimes that give occasion to wrongful convictions are not only serious enough to warrant the death penalty, but also the kind that lead to great fear and anxiety on the part of the community. Take for instance the 1989 murder of Carole DiMaiti Stuart, eight months pregnant, who was shot as she and her husband drove home from a birthing class at a Boston hospital.<sup>20</sup> The public and the press as

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<sup>19</sup> JIM DWYER, BARRY SCHECK & PETER NEUFELD, *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* (2000); HUFF, ARYE RATTNER & EDWARD SAGARIN, *supra* note 3; MICHAEL L. RADELET, HUGO ADAM BEDAU & CONSTANCE E. PUTNAM, *IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES* (1992); U.S. DEPARTMENT OF JUSTICE, *CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL* (1996); SAUNDRA D. WESTERVELT & JOHN A. HUMPHREY, EDs., *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* (2002); C. Ronald Huff, *Wrongful Conviction: The American Experience*, 46 *CANADIAN J. CRIMINOLOGY* 107 (2004).

<sup>20</sup> RADELET, BEDAU & PUTNAM, *supra* note 19.

well the police and prosecutors felt it was imperative to find and arrest the black assailant described by the husband. The suspect who was arrested might well have been convicted had not Charles Stuart committed suicide after he was identified to the police as his wife's murderer.

Early work in the wrongful conviction area concentrated on establishing that the convictions were indeed wrongful. Since the advent of DNA testing, students of wrongful conviction cases have had more opportunity to consider the causes contributing to the phenomenon. Radelet, Bedau, and Putnam frequently note prosecutorial misconduct as a contributing factor in the 416 cases they discuss; indeed, they encounter "scores" of cases "in which shoddy police investigation, a pressured (if not exactly coerced) confession, evidence withheld from the defense, and overzealous prosecution all work against a defendant with no resources for self-protection."<sup>21</sup> If we focus on one form of misconduct – withholding exculpatory evidence from the defense – we find specific instances of this in at least twenty-one cases discussed by Radelet and his colleagues.

Dwyer, Scheck, and Neufeld, writing from the defense perspective, are even more interested in prosecutorial misconduct as a contributing factor to wrongful conviction.<sup>22</sup> In an appendix, they present data on sixty-two cases of DNA exoneration, twenty-six of which involved prosecutorial misconduct.<sup>23</sup> A subsequent chart of prosecutorial misconduct shows that forty-three percent of

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<sup>21</sup> RADELET, BEDAU & PUTNAM, *supra* note 19, at 153.

<sup>22</sup> DWYER, SCHECK & NEUFELD, *supra* note 19.

<sup>23</sup> DWYER, SCHECK & NEUFELD, *supra* note 19, at 263.

that misconduct consisted of suppression of exculpatory evidence.<sup>24</sup> Like Radelet and his colleagues, Dwyer, Scheck, and Neufeld distinguish among several types of prosecutorial misconduct, including knowing use of false testimony, improper closing arguments, evidence fabrication, false statements to jury, coerced witnesses, and other misconduct.<sup>25</sup>

Thus, the wrongful conviction literature supports the contention that prosecutorial misconduct—specifically, withholding evidence from the defense—is a significant factor in cases notable for the fear and anxiety that they arouse in the community. Withholding evidence, then, may indicate ends-oriented thinking by prosecutors enlisted in the noble cause of getting the “bad guys” off the street.

### ***B. Moral Panics***

Another type of situation likely to stimulate ends-oriented thinking by prosecutors is a moral panic. Moral panics are blamed on deviant persons characterized by sociologist Stanley Cohen as folk-devils.<sup>26</sup> A recent moral panic furnishes examples: the daycare sexual abuse cases of the 1980s and early 1990s.

The daycare cases of the 1980s and early 1990s have been recognized as constituting a moral panic.<sup>27</sup> Beginning in early 1984 with national coverage of

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<sup>24</sup> DWYER, SCHECK & NEUFELD, *supra* note 19, at 265.

<sup>25</sup> DWYER, SCHECK & NEUFELD, *supra* note 19, at 265.

<sup>26</sup> STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS* (2002); STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS* (1972).

<sup>27</sup> MARY DE YOUNG, *THE DAY CARE RITUAL ABUSE MORAL PANIC* (2004); PHILIP JENKINS, *MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA* (1998); PHILIP JENKINS, *PEDOPHILES AND PRIESTS: ANATOMY OF A CONTEMPORARY CRISIS* (1996); PHILIP JENKINS, *INTIMATE ENEMIES: MORAL PANICS IN CONTEMPORARY GREAT BRITAIN* (1992) [hereinafter JENKINS, *INTIMATE*

the McMartin Preschool investigation in Los Angeles and, a month later, with national coverage of the daycare case in Jordan, Minnesota, allegations of the organized sexual abuse of children appeared throughout the United States and Canada.<sup>28</sup> Based on allegations that children had been subject to sexual and satanic ritual abuse by their caretakers, they were not only sensational cases but also controversial and deeply divisive, with supporters and critics of the prosecution at odds with one another. In accordance with the hypothesis we are here considering, allegations of prosecutorial misconduct in general and the suppression of exculpatory evidence in particular, were frequent in these cases. For example, state attorneys general investigated prosecutors' conduct in the cases in Kern County, California, and Jordan, Minnesota; whereas U.S. Attorney General Janet Reno rejected calls to investigate the conduct of state prosecutors in the Wenatchee, Washington, case.<sup>29</sup> Subsequently, elected prosecutors were defeated at the polls partly because of accusations of professional misconduct in McMartin Preschool case<sup>30</sup> as well as the Jordan, Minnesota, case. Elsewhere,

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ENEMIES]; Jeffrey S. Victor, *Construction of Deviant Behavior: A Theory and Application to the Case of Ritual Child Abuse*, 41 SOC. PERSPECTIVES 541 (1998).

<sup>28</sup> The moral panic about organized child abuse spread to the United Kingdom, the Netherlands, Australia, New Zealand, and the rest of Europe. See JENKINS, *INTIMATE ENEMIES*, *supra* note 27 (discussing moral pains in the U.K.).

<sup>29</sup> Ms. Reno herself, as a state prosecutor, has been criticized for her conduct of three major daycare cases, including the still-imprisoned Frank Fuster of the Country Walk Babysitting case; the case of fourteen-year-old Bobby Fijnje, Old Cutler Presbyterian Church, who was acquitted of all charges; and Harold Grant Snowden, whose conviction was reversed by the Eleventh Circuit Court of Appeals in *Snowden v. Singletary*, 135 F. 3d 732 (11th Cir. 1998). Cf. Frontline, *Did Daddy Do It?*, available at [www.pbs.org/wgbh/pages/frontline/shows/fuster/etc/miami.html](http://www.pbs.org/wgbh/pages/frontline/shows/fuster/etc/miami.html) (last visited Oct. 29, 2006) 6/27/05)) and *The Child Terror*, available at <http://www.pbs.org/wgbh/pages/frontline/shows/terror/> (last visited Oct. 29, 2006).

<sup>30</sup> In the McMartin Preschool case, D.A. Robert Philiposian brought charges against seven defendants, but his successor Ira Reiner immediately dropped charges against five of those defendants, calling the evidence against them "incredibly weak." DEBBIE NATHAN & MICHAEL

prosecutors in several cases were fired following the proceedings, e.g., the Sequim, Washington, case of Cora and Ralph Pries. Prosecutors who failed to disclose to the defense the bizarre accusations of satanic abuse were criticized by judges, e.g., a mistrial was declared in the Terry Morrison/Gateway Christian School case in St. Louis, Missouri,<sup>31</sup> and an appellate court overturned the conviction of Mary Lou Gallup of the Gallup Christian Day School in Roseburg, Oregon.<sup>32</sup> Prosecutorial misconduct was also delineated in the following cases in which appellate courts overturned the convictions of the accused: *Nevada v. Babyan*,<sup>33</sup> *Felix and Ontiveros v. Nevada*,<sup>34</sup> *Utah v. Hadfield*,<sup>35</sup> and *California v. Stowe*.<sup>36</sup> In three cases, prosecutorial misconduct was so extreme that appellate courts directly criticized both prosecutors and trial judges. We turn to those cases now.

### 1. *California v. Pitts*<sup>37</sup>

*California v. Pitts* involved hundreds of charges of organized child abuse brought against seven defendants at a time when, according to journalist Edward Humes, "At least eight separate molestation rings, involving at least seventy-five adult suspects and approximately forty children, were uncovered in the space of

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SNEDEKER, SATAN'S SILENCE: RITUAL ABUSE AND THE MAKING OF A MODERN AMERICAN WITCH HUNT 95 (1995).

<sup>31</sup> Tim Poor, *Prosecutor Lied, Says U.S. Judge; Court Delays Trial in Child Rape Case*, ST. LOUIS POST-DISP., May 4, 1990.

<sup>32</sup> *Oregon v. Mary Lou Gallup*, 108 Ore. App. 508 (1991).

<sup>33</sup> 106 Nev. 155 (1990).

<sup>34</sup> 109 Nev. 151 (1993).

<sup>35</sup> 788 P.2d 506 (Sup. Ct. Utah 1990).

<sup>36</sup> 188 Cal. App. 3d 1605 (Cal. Ct. App. 1987).

<sup>37</sup> 223 Cal. App. 3d 606 (Cal. Ct. App. 1990).

a few months' time in 1984."<sup>38</sup> The prosecution soon realized that many of the accusations were unbelievable and were not disclosed to the defense. Instead, investigators used a "John Doe" file for the persons accused of satanic ritual – and "whose case never came to trial, who had no attorney and who therefore had no rights."<sup>39</sup> According to Nathan and Snedeker, the dummy file soon had the names of seventy-seven adults and sixty youngsters.<sup>40</sup>

The California Court of Appeal decision overturning the convictions of the "Pitts Seven" ran 135 pages partly because the appellate court detailed all the fantastic charges of sexual and ritual abuse. Another reason is that the court quoted pages of the trial transcript to illustrate its criticism of the prosecutors. The court summarized these criticisms as follows: misconduct during closing arguments; appeals to the passions of the jury; references to facts not in evidence; disparagement of defense counsel; improper imparting of information to the jury when making motions or objections; and, inevitably, trial court error, because the trial judge sided with the prosecution in its tactics. In Part I, Section B of its opinion, under misconduct during closing argument, the California Court of Appeal stated:

The prosecutorial misconduct was not confined to closing argument. Interspersed throughout trial, to an extent this court has never before seen, were comments by one or both prosecutors which disparaged defense counsel; questioned *their* tactics, competence, and/or ethics; accused them of wasting time; etc. We

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<sup>38</sup> EDWARD HUMES, *MEAN JUSTICE: A TOWN'S TERROR, A PROSECUTOR'S POWER, A BETRAYAL OF INNOCENCE* 283 (1999).

<sup>39</sup> HUMES, *supra* note 38, at 293.

<sup>40</sup> DEBBIE NATHAN & MICHAEL SNEDEKER, *SATAN'S SILENCE: RITUAL ABUSE AND THE MAKING OF A MODERN AMERICAN WITCH HUNT* 100 (1995)..

have reviewed the entire record and have identified instances too numerous to chronicle where misconduct clearly or arguably occurred. Thus, the examples we set forth herein, while necessitating extensive quotes from the record, should not be viewed as isolated conduct, but as representative samples of what occurred. To set forth all of the misconduct would literally take many hundreds of pages.<sup>41</sup>

The court's concluding statement spoke poorly of the prosecution:

We recognize that recently, at least, prosecutorial misconduct has usually been deemed harmless. If what occurred in the instant case can be deemed harmless, however, then prosecutorial misconduct will *never* be grounds for reversal, no matter what effect it might have on a defendant's right to a fair trial. That is simply not the law. The misconduct herein was prejudicial under any standard; reversal is required.<sup>42</sup>

The prosecutors in this case appeared to be motivated by a passionate commitment to the noble cause of convicting child molesters, and their disgust spilled over onto the lawyers for the defense. While the Kern County trial court is known for its harsh justice in general,<sup>43</sup> this behavior was extreme as well as consistent with noble-cause corruption.

Next, we turn to a second California case, a civil suit for damages brought by four individuals who were wrongly accused of organized child abuse at the height of the moral panic in 1984.

## **2. *Valentin et al. v. Los Angeles*<sup>44</sup>**

Two couples who were neighbors in a Los Angeles suburb were targets of a raid just six weeks after the child abuse indictments in the *McMartin* case

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<sup>41</sup> *Pitts*, 223 Cal. App. 3d at 707 (emphasis added).

<sup>42</sup> 223 Cal. App.3d at 817.

<sup>43</sup> *HUMES*, *supra* note 38, at 293.

<sup>44</sup> 78 Cal. App. 4th 212 (Ct. App. Cal. 2000).

caused a worldwide sensation.<sup>45</sup> Based on the testimony of several seven-to-twelve year olds who later recanted, the couples were accused of luring at least eleven boys and girls into their houses, where they allegedly subjected them to sodomy and oral sex. After a six-week preliminary hearing, all charges were dismissed in July 1985. In a subsequent account, the attorney for one couple said that sheriff's deputies had "invaded" their home with handguns and shotguns drawn, but with no warrant.<sup>46</sup> The deputy D.A. told them, "Confess to being a child abuser or I'm going to f\*\*\* up your life forever."<sup>47</sup> The couple denied knowing what he was talking about, so the deputy D.A. told the sheriff to arrest them. They were arrested and "paraded before a screaming mob."<sup>48</sup> A second couple was also arrested, although the couples did not know each other. The sheriff's department then issued a press release to the wire services and the *Los Angeles Times* identifying the couples by name and home address and included the children's claims that one couple boiled and ate babies. The accused were arrested on more than a dozen felony charges and held without bail for sixteen days. Before the preliminary hearing, all but two children recanted. Only one child testified, and the judge dismissed all the charges. Both couples filed suit, charging false arrest, false imprisonment, defamation and civil rights violations under § 1983.<sup>49</sup>

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<sup>45</sup> Gail Diane Cox, *L.A. Abortive Abuse Case Leads to \$10 Million Award*, NAT'L L.J., May 8, 1995, at A11.

<sup>46</sup> Margaret Cronin Fisk, *\$9.9M for a Couple's Ruined Reputations*, NAT'L L.J., May 28, 2001, at A13.

<sup>47</sup> Fisk, *supra* note 46.

<sup>48</sup> Fisk, *supra* note 46.

<sup>49</sup> Cox, *supra* note 45; Fisk, *supra* note 46.



While state law immunized prosecutors from liability for malicious prosecution, the California Court of Appeal held that under federal law such a plaintiff could recover damages that occurred after the prosecutor filed charges against her or him if the plaintiff can prove the prosecutor did not exercise independent judgment in filing the complaint.<sup>50</sup> Shortly thereafter, one couple settled for \$9.9 million. Earlier, the other couple had settled for \$4 million. Once again, the account of prosecutorial misconduct is consistent with noble-cause corruption.

Finally, let us examine the Saskatchewan foster children's case. Its primary cast – a police officer, a therapist, and a crown prosecutor – were successfully sued for malicious prosecution.

### **3. The Foster Children's Case, *D.K. v. Miazga*<sup>51</sup>**

In 1984, three foster children – two sisters and a brother – alleged sexual and ritual abuse by their foster families and friends. A therapist had earlier conducted many interviews with the children, during which she encouraged their disclosures but disregarded a recantation. Meanwhile, a police officer undertook an investigation but, as the court later observed, failed to investigate the allegations of ritualistic and satanic abuse. Working closely with the therapist and the police officer, the crown prosecutor charged twelve people with

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<sup>50</sup> *Valentin v. Los Angeles*, 78 Cal. App. 4th 212 (Cal. Ct. App. 2000).

<sup>51</sup> Darren Bernhardt, *Sex Scandal Spawns TV Movie*, CALGARY HERALD (Alberta, Canada), Mar. 29, 2004, at A6.

sexual assault, although subsequently the charges against all of them were stayed (dismissed). Thereafter, the children recanted their allegations.

While the police officer, therapist, and crown prosecutor stated that the charges were stayed due to the trauma to the children, the appellate court found to the contrary – that the charges were stayed due to inconsistencies in the children’s evidence. In the subsequent civil action brought by the criminal defendants, the court was particularly troubled by a medical report revealing that the two girls were involved in sexual activity with their brother after they no longer had contact with any of the accused; apparently the three protagonists had not reconsidered the original charges in light of this new information. The appellate court found that the protocol on which they had relied – directing that children reporting abuse were to be assumed to be telling the truth, did not have the force of law.

The appellate court therefore ruled that the plaintiffs’ civil action for malicious prosecution could proceed given the absence of reasonable grounds for an honest belief in their guilt. Hence, the court found malice in laying and proceeding with the charges. As to the therapist, she was integrally involved in the investigation and prosecution; and the investigating officer and crown prosecutor totally abrogated their duties to investigate and objectively assess the case against the plaintiffs. As a result of this ruling, the case was settled for CAN\$1.5 million in January 2004, although the provincial attorney general filed

an appeal requesting intervenor status.<sup>52</sup> Once again, the concept of noble-cause corruption helps make the prosecutor's actions comprehensible.

## IV. Conclusions and Recommendations

### A. Conclusions

Noble-cause corruption is a naïve extension of teleological or ends-oriented reasoning and is thus an ordinary form of ethical reasoning. Many people engage in this type of reasoning from time to time. Ends-oriented reasoning, however, is not what we expect criminal justice professionals to engage in; their obligation to enforce the law would seem to require rather a means orientation. Caldero and Crank suggest that reform efforts intended to diminish economic corruption among police have had the paradoxical effect of increasing noble-cause corruption by shifting the emphasis in hiring to candidates who are idealistic and eager to pursue the noble cause of getting the "bad guys" off the street.<sup>53</sup> There is no reason to think that prosecutors are any less idealistic than police; for example, they may be willing to accept relatively low salaries because of their commitment to the noble cause. Noble-cause corruption in prosecutors manifests itself in behaviors that are referred to as

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<sup>52</sup> Bernhardt, *supra* note 51.

<sup>53</sup> CALDERO & CRANK, *supra* note 4.

“prosecutorial misconduct,” and which are rarely sanctioned by courts<sup>54</sup> due in part to the ambivalence observers feel with regard to this misconduct.

The hypothesis that noble-cause corruption should be particularly recognizable in cases involving sensational or notorious cases was supported by an examination of the literature on wrongful convictions, which focuses primarily on capital offenses. Similarly, an examination of cases from the moral panic about organized child abuse in daycare also showed a number of instances of noble-cause corruption on the part of prosecutors, including two cases in which wrongfully accused people filed successful civil suits for damages resulting from the actions of the prosecutor. This hypothesis suggests that at least some types of prosecutorial misconduct are less the product of individual psychology and more the result of social and environmental cues. It is worth noting, however, that my hypothesis does not rule out the possibility that prosecutors behave like the police officers observed by Crank and Caldero to participate in noble-cause corruption in ordinary cases.<sup>55</sup> My hypothesis predicts only that we should be able to find particularly clear examples of noble-cause corruption when the cause is especially noble, as in sensational or notorious cases and during a moral panic.

### ***B. Recommendations***

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<sup>54</sup> Ken Armstrong & Maurice Possley, *The Verdict: Dishonor; How Prosecutors Sacrifice Justice to Win*, CHI. TRIB., Jan. 10, 1999.

<sup>55</sup> CALDERO & CRANK, *supra* note 4.

Because noble-cause corruption results in part from the effort to implement high moral standards, the interventions recommended by Caldero and Crank are largely organizational in nature and include having police managers model desired behaviors, providing ethics training sessions, encouraging potential police officers to get bachelor's degrees from institutions that employ full-time faculty, and adding a proactive component to internal affairs departments.<sup>56</sup> Similar organizational interventions with prosecutors should be considered.

Caldero and Crank observe that police officers encounter one type of ethical training at the police academy but learn a different ethical message from beat officers.<sup>57</sup> In turn, law school emphasizes due process as a means to an end, but rookie prosecutors may be learning a different lesson on the job. Training programs, especially those emphasizing the examination of ethical issues, are an important tool for helping people become aware of their ethical stance.

Previous scholarship establishing that prosecutorial misconduct is neither rare nor unimportant is a significant achievement.<sup>58</sup> If prosecutorial misconduct results at least in part from noble-cause corruption, then this refined concept will permit empirical investigation into its causes and prevalence. Above all, the concept of noble-cause corruption will assist individuals in examining their own thinking about these important issues.

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<sup>56</sup> CALDERO & CRANK, *supra* note 4.

<sup>57</sup> CALDERO & CRANK, *supra* note 4.

<sup>58</sup> *Cf.* Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309 (2001).

