Reconceptualizing Prosecutorial Misconduct Through Moral Disengagement Theory: A Social Cognitive Approach

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How does the court have confidence that the Public Integrity Section has integrity?

I. INTRODUCTION

On July 29, 2008, prosecutors with the Public Integrity Section of the Department of Justice secured an indictment from a federal grand jury in the District of Columbia against then Senator Theodore (“Ted”) Stevens, accusing him of making false statements on his Senate financial disclosure forms in order to hide $250,000 in gifts from oil contractors in his home state of Alaska. Three months later, after less than a day of deliberations, a jury convicted then Senator Stevens on seven felony counts. Eight days later, Ted Stevens, the longest-serving Republican in the history of the United States Senate, narrowly lost his bid for re-election. The conviction, however, would not hold, and rather than providing a banner of achievement for the

1 Visiting Associate Professor of Law, The George Washington University Law School.
elite Public Integrity unit, the Stevens case became a symbol of ethical violations within the very
government office charged with prosecuting public corruption.⁶

During the five-week trial, Federal District Court Judge Emmet Sullivan repeatedly
scolded the prosecutors for making false representations to the court and for withholding
exculpatory evidence from the defense, in violation of their ethical duties.⁷ For instance, at trial,
a memorandum surfaced showing that the oil services company’s Chief Executive Officer,
William Allen, stated in a government interview that “he believed Senator Stevens would have
paid bills relating to the renovations if they had been sent to him.”⁸ However, rather than turning
over the interview memorandum to the defense, as required by Brady and its progeny,⁹ the
government re-interviewed Allen, procuring a statement from Allen wherein Allen stated that he
believed that Senator Stevens would not have paid the bill.¹⁰

Two months after the conclusion of the trial, an agent with the Federal Bureau of
Investigations who had worked on the Stevens case filed an official Complaint with the
Department of Justice, alleging that that “a fellow agent and prosecutors contrived to improperly

⁶ See Neil A. Lewis, Dismayed Lawyers Lay Out Reasons for Collapse of the Stevens Conviction, N.Y.

⁷ See Neil A. Lewis, Tables Turned on Prosecution in Stevens Case, N.Y. TIMES, Apr 7, 2009,
in Stevens Case].

⁸ See Memorandum in Support of Senator Stevens’s Motion for New Trial at 32, United States v. Stevens,
Crim No. 08-231 (EGS) (D. D.C. Dec. 5, 2008) (moving for a new trial on the basis of false proffers of evidence,
withholding of exculpatory evidence, and improper admittance of hearsay) [Hereinafter Stevens’s Motion for
New Trial]; see also Neil A. Lewis, Agent Claims Evidence on Stevens was Concealed, N.Y. TIMES, Feb. 10, 2009,
Stevens Case was Concealed].

⁹ In Brady v. Maryland, the United States Supreme Court announced “that the suppression by the
prosecution of evidence favorable to an accused upon request violates due process where the evidence is material
either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” 373 U.S. 83, 87
(1963). In United States v. Bagley, the Supreme Court announced a materiality standard for Brady material that
applies uniformly, whether the defendant makes a request or not, stating that “[t]he evidence is material only if there
is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would
have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.”

¹⁰ Stevens’s Motion for New Trial, supra note _____ at 33.
conceal evidence from the court and the defense." Among other allegations, the agent stated that a fellow agent had an improper relationship with the government’s star witness, William Allen, and that prosecutors illicitly sent a joint defense and prosecution witness home to Alaska after the witness performed poorly in a mock cross-examination. When prosecutors failed to produce documents related to the agent’s complaint, Judge Sullivan held the prosecution team in contempt, requiring the Department of Justice to appoint a new prosecution team.

The Stevens conviction was dealt its final blow in March of 2009 when the new prosecution team discovered and revealed to Judge Sullivan exculpatory evidence that went to the very heart of the prosecutors’ case that had never been revealed to the defense. Within days of this discovery, United States Attorney General Eric Holder moved to dismiss the charges and announced that the government would not seek a new trial, stating that lawyers reviewing the

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11 See Lewis, Agent Claims Evidence on Stevens was Concealed, supra note ___.
12 Id.
14 As evidence that he intended to pay for the work performed on his home by the oil services firm, Stevens presented a copy of a letter he had written to William Allen, in which he requested a bill for the renovation work done to his home by Mr. Allen’s company. Stevens’s Motion for New Trial, supra note ___ at 36. In the handwritten note, Stevens stated “You owe me a bill,” and admonished that Allen “Remember Torricelli [a New Jersey senator who was criminally convicted for accepting improper gifts], my friend. Friendship is one thing, compliance with the ethics rules entirely different.” See Erika Bolstad & Richard Mauer, US Attorney General Ends Stevens Prosecution, ANCHORAGE DAILY NEWS, Apr. 1, 2009, http://www.adn.com/news/politics/fbi/stevens/story/743906.html [Hereinafter Bolstad & Mauer, US Attorney General Ends Stevens Prosecution]. Stevens testified that he told Allen that Bob Persons, their mutual friend, would speak to Allen about payment of the bill. Id. At trial, Allen discredited the letter, testifying that he did subsequently speak with Persons about the bill, but that Persons told him not to worry about the bill and that Stevens only sent the letter to create a false record in order to “cover his ass.” See Stevens’s Motion for New Trial, supra note ___ at 37; see also Lewis, Tables Turned on Prosecution in Stevens Case, supra note ____. However, the new prosecution team uncovered the prosecutors’ notes from an interview with Allen prior to trial in which he did not recall any such conversation with Persons. See Lewis, Tables Turned on Prosecution in Stevens Case, supra note ___. Further, the interview notes from the concealed interview were not transcribed on the forms used for memorandums of interviews, as other interviews with Allen had been recorded. See Bolstad & Mauer, US Attorney General Ends Stevens Prosecution, supra note ___.

case discovered evidence that prosecutors concealed evidence that should have been revealed to the defense for use at trial.\textsuperscript{15}

Unfortunately, the ethical violations by the prosecutors in the Stevens case are not the confined misbehavior of a few. Rather, in the words of Judge Sullivan, they reflect a “‘troubling tendency’... among prosecutors to stretch the boundaries of ethics restrictions... to win cases.”\textsuperscript{16} The misconduct of this elite group of prosecutors charged with pursuing public corruption aptly gives rise to the questions that plague the legal community with regard to prosecutorial misconduct: How can government attorneys engage in unethical conduct purportedly in the pursuit of enforcing ethics violations by others? And, how can we prevent such misconduct in the future?

\textsuperscript{15}See Motion of the United States to Set Aside the Verdict and Dismiss the indictment with prejudice, United States v. Stevens, Crim No. 08-231 (EGS), (D. D.C. April 1, 2009); see also Neil A. Lewis, Justice Department Moves to Void Stevens Case, N.Y. TIMES, Apr. 1, 2009, http://www.nytimes.com/2009/04/02/us/politics/02stevens.html?_r=1&scp=10&sq=&st=nyt; see also Neil A. Lewis & David Johnston, Dismayed Layers Lay Out Reasons for Collapse of the Stevens Conviction, N.Y. TIMES, Apr. 6, 2009, http://www.nytimes.com/2009/04/07/us/politics/07stevens.html; see also James Oliphant, Ted Stevens’ charges dismissed as judge excoriates prosecutors, LOS ANGELES TIMES, Apr. 8, 2009, http://articles.latimes.com/2009/apr/08/nation/na-stevens8; see also Statement of Attorney Eric Holder Regarding United States v. Theodore F. Stevens, Department of Justice, Apr. 1, 2009, http://www.usdoj.gov/opa/pr/2009/April/09-ag-288.html (U.S. Attorney General Holder stated “After careful review, I have concluded that certain information should have been provided to the defense for use at trial. In light of this conclusion, and in consideration of the totality of the circumstances of this particular case, I have determined that it is in the interest of justice to dismiss the indictment and not proceed with a new trial.”). In addition to throwing out the conviction, Judge Sullivan took the “extraordinary step of naming a special prosecutor to investigate whether the government lawyers who ran the Stevens case should themselves be prosecuted for criminal wrongdoing.” See Lewis, Tables Turned on Prosecution in Stevens Case, supra note _____; see also Stevens Case Closed: Prosecutors Under Fire, MSNBC, Apr. 7, 2009, http://www.msnbc.msn.com/id/30086797/ (Judge Sullivan stated that “the misconduct was too serious to be left to an internal investigation by the Justice Department, which... dragged its feet before investigating.”).

\textsuperscript{16}Lewis, Tables Turned on Prosecution in Stevens Case, supra note __________; see, also John Farmer, Prosecutors Gone Wild, N.Y. TIMES, Apr. 2, 2009, http://www.nytimes.com/2009/04/03/opinion/03farmer.html?adxml=1&adxmlx=1251831691-TfGGA/j93W3z9wPKrgMiQ (discussing several high-profile prosecutorial misconduct cases, including that of Shish-Wei-Su to whom New York City paid $3.5 million to compensate him for the nearly 13 years that he wrongfully spent in prison due to the prosecution’s knowing eliciting of false testimony from a key witness; that of Michael Nifong, the county district attorney was disbarred and convicted of criminal contempt for his overzealous prosecution of students in the famous Duke University rape case in 2006).
Dispositional explanations,\textsuperscript{17} such as greed or lack of veracity fall flat, as a rich body of literature from the field of social cognitive psychology has demonstrated that while some “individuals have certain personality characteristics that predispose them to psychological processes that make it easier” to engage in wrongdoing, most wrongdoing “arises from a combination of situational and psychological factors present in the majority of individuals.”\textsuperscript{18}

Social cognitive theory, a specialty within the field of psychology that considers both cognitive and situational influences upon peoples’ behavior,\textsuperscript{19} is a natural fit to analyze the flawed decision-making of prosecutors, and a growing literature of legal scholarship has used social cognitive theory as such a lens.\textsuperscript{20} However, such scholarship to date has focused solely on prosecutors’ biased assimilation of evidence that can result in “tunnel vision,”\textsuperscript{21} disbelief of

\textsuperscript{17} This cognitive bias/tendency to assume that wrongdoing is the result of dispositional factors is referred to by social cognitive psychologists as the “fundamental attribution error.” Lee Ross, \textit{The intuitive psychologist and his shortcomings: Distortions in the attribution process}, 10 \textit{ADVANCES IN EXPERIMENTAL SOC. PSYCHOL} 173–220 (Leonard Berkowitz ed., New York Academic Press 1977).

\textsuperscript{18} Tsang, Jo-Ann, \textit{Moral Rationalization and the Integration of Situational Factors and Psychological Processes in Immoral Behavior}, 6 \textit{REV. GEN. PSYCHOL.} 25, 25 (2002) (Presenting “a model of evil behavior demonstrating how situational factors that obscure moral relevance can interact with moral rationalization and lead to a violation of moral principles”).

\textsuperscript{19} See, e.g Id.

\textsuperscript{20} See Keith A. Findley & Michael S. Scott, \textit{The Multiple Dimensions of Tunnel Vision in Criminal Cases}, 2006 \textit{Wis. L. Rev.} 291 (2006) (Arguing that cognitive biases can lead to “tunnel vision” whereby prosecutors unconsciously “focus on a suspect, select and filter the evidence that will build a case for conviction, while ignoring or suppressing evidence that points away from guilt”) [Hereinafter Findley 2006]; see also Alafair S. Burke, \textit{Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science}, 47 \textit{WM. & MARY L. REV.} 1587 (2006) (Examining cognitive biases that can affect prosecutorial decision-making and proposing reforms to mitigate such biases) [Hereinafter Burke 2006]; see also Alafair Burke, \textit{Revisiting Prosecutorial Disclosure}, 84 \textit{IND. L.J.} 481 (2009) (Proposing “prophylactic open file rule to effectuate defendants’ Brady rights,” arguing that current materiality standard under Brady “acts upon cognitive biases from which prosecutors, like all human decision makers, suffer.”) [Hereinafter Burke 2009].

\textsuperscript{21} “Tunnel vision” refers to the phenomenon whereby a police officer or prosecutor, as the result of cognitive biases may unconsciously “focus on a suspect, select and filter the evidence that will build a case for conviction, while ignoring or suppressing evidence that points away from guilt” supra Findley 2006, note _; see also Susan Bandes, \textit{Loyalty to One’s Convictions: The Prosecutor and Tunnel Vision}, 49 \textit{HOW. L.J.} 475 (2006) (While Bandes briefly considers moral disengagement, she focuses instead on cognitive neuroscience and cognitive biases neuroscience to examine prosecutors’ “refusal consider alternative theories or suspects during the initial investigation, or to accept the defendant’s exoneration as evidence of wrongful conviction” due to “fierce loyalty to a particular version of events) [Hereinafter Bandes 2006]; see also Burke 2006, supra note_____ (Examining cognitive biases that can affect prosecutorial decision-making and proposing reforms to mitigate such biases); see also Burke 2009, supra note _____ (To bolster proposal of “prophylactic open file rule
defendants’ post-conviction evidence of innocence, and inflated plea bargaining positions. Therefore, while this prior scholarship has aptly studied bounded rationality in the prosecutorial decision-making context, it has not considered social cognitive research on situations that can lead to what can be called “bounded morality.”

While social cognitive research has demonstrated that individual decision-makers are highly motivated to maintain their “self-respect,” which is derived from compliance with their own set of internalized moral standards, Albert Bandura and others have identified eight moral disengagement mechanisms that operate to disengage an individual’s moral self-sanctions that would otherwise inhibit the individual from engaging in injurious conduct. Empirical studies have shown that a person’s level of moral disengagement, as a dispositional trait, is an accurate predictor of the person’s level of aggression and anti-social behavior, and that an individual’s

to effectuate defendants’ Brady rights,” argues that current materiality standard under Brady “acts upon cognitive biases from which prosecutors, like all human decision makers, suffer.”); see also Alafair S. Burke, Neutralizing Cognitive Bias: An Invitation to Prosecutors, 2 N.Y. U. J. L. & LIBERTY 512 (2007) (same as previous); see also Myrna Raeder, What Does Innocence Have to do With It?: A Commentary on Wrongful Convictions and Rationality, 2003 MICH. ST. L. REV. 1315, 1327 (2003) (considering biases which lead to tunnel vision by prosecutors).

22 Alafair Burke, Prosecutorial Passion, Cognitive Bias, and Plea Bargaining, 91 MARQ. L. REV. 183 (2007) (Examining cognitive biases that can affect prosecutorial decision-making in plea bargaining) [Hereinafter Burke 2007]; see also supra Findley 2006, note ____.

23 See Burke 2007, supra note ____ (Examining cognitive biases that can affect prosecutorial decision-making in plea bargaining).


26 Bandura 1996, supra note __________; see also A. Bandura, et al., Sociocognitive self-regulatory mechanisms governing transgressive behavior, 80 J. PERSONALITY AND SOC. PSYCHOL., 125 (2001) [Hereinafter Bandura 2001]; see also G.M. Barnes, et al., Shared predictors of youthful gambling, substance use, and
level of moral disengagement can be affected by the social structures within which the person operates.\(^{27}\)

Legal scholars have applied moral disengagement theory on a social systems level to identify conditions structured into the criminal justice system that encourage moral disengagement in capital juries\(^{28}\) and in mental health professionals who are involved in capital cases.\(^{29}\) However, legal scholars have not considered prosecutorial misconduct within the framework of moral disengagement theory. This Article seeks to fill that gap left by prior scholarship. Specifically, this Article employs social cognition research on moral disengagement to argue that certain structural factors within the criminal justice system may encourage moral disengagement in prosecutors.\(^{30}\)

Part II provides a brief overview of moral disengagement theory. Part III examines moral disengagement mechanisms in depth and argues that certain key structural factors within the prosecutorial system in the United States lead to prosecutorial misconduct by systematically encouraging moral disengagement in prosecutors. Part IV concludes the article.

\(^{27}\) See, e.g., Osofsky 2005, supra note _____ (Finding “gradual transformation of members of the [psychological] support team from being moral engagers to moral disengagers with increasing participating in executions”); see also Celia Moore, Moral Disengagement in Processes of Organizational Corruption, 80 J. BUS. ETHICS 129 (2008) (examining how “mechanisms of moral disengagement help to initiate, facilitate, and perpetuate corruption in organizations”) [Hereinafter Moore 2008].


\(^{30}\) This Article is the first in a two-part series examining prosecutorial misconduct through the moral disengagement framework. The second article in this series will propose reforms, which are aimed at mitigating the detrimental affects of moral disengagement in prosecutors.
II. OVERVIEW OF MORAL DISENGAGEMENT THEORY

A discussion of moral reasoning and moral control pre-supposes that the decision-maker has an internalized code of ethics. In social cognitive theory, an individual’s moral standards are constructed through the process of “socialization” whereby the society’s standards are adopted “from information conveyed by direct tuition, evaluation of social reactions to one’s conduct, and exposure to the self-evaluative standards modeled by others.”

Early in life, people learn to regulate their behavior to comply with both personal and social standards. During early stages of development, behavior is regulated by external sanctions. During maturation and socialization, however, people develop personal moral standards, which take the place of external sanctions in regulating behavior. Once formed, moral standards regulate moral conduct through the affective self-reactions of anticipatory self-respect and anticipatory self-sanctions. Through self-regulation, a person will engage in actions that conform to her personal conceptions of morality, in order to gain self-respect and maintain self-worth, and she will refrain from engaging in behavior that is contrary to her internal moral standards, so as to avoid self-condemnation. Mark Twain put it aptly when he stated, “A man cannot be comfortable without his own approval.”

31 Bandura, 1996, supra note __________.
32 Bandura 1999, supra note _________ at 2 (documenting how moral disengagement mechanisms contribute to the perpetration of inhumanities).
33 Id.
34 Id.
36 Bandura 1999, supra note ______ at 2; see also Bandura 2007, supra note ____ (people tend to “do things that give them satisfaction and a sense of self-worth, and refrain from behaving in ways that violate their moral standard because such conduct will bring self-condemnation.”).
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However, development of a set of moral standards “does not create a fixed internal regulator of conduct.”

Rather, “[s]elf-reactive influences do not operate unless they are activated,” and there are many processes by which self-sanctions can be disengaged from transgressive conduct such that individuals do not exercise moral self-control. Bandura and others have identified and studied the mechanisms that operate to disengage an individual’s moral self-sanctions from injurious conduct and thereby “neutralize moral control.”

These moral disengagement mechanisms can be grouped into three categories: those that operate at the behavior locus, those operating at the agency locus, and those operating at the outcome or recipient locus. The first set of disengagement mechanisms, which operate at the behavior locus, serve to reconstrue the conduct as moral. These mechanisms “transform harmful practices into worthy ones through social and moral justification, exonerative social comparison, and sanitizing language.”

The second set of disengagement mechanisms, which operate at the agency locus, obscure the causal relationship between the individual’s conduct and the outcomes of the behavior. Through these mechanisms, “people are absolved of the sense of personal accountability for harmful practices by displacement and diffusion of responsibility.”

The third set of disengagement mechanisms, which operate at the outcome or recipient locus, 

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38 Bandura 1991, supra note __________.

39 Bandura Handbook, supra note ________.

40 Bandura 2007, supra note _______ (Examining the selective disengagement of moral self-sanctions as an impediment to reversing ecological degradation); see also Bandura 1991, supra note _________; see also Bandura 1996, supra note _______; see also Bandura 1999, supra note _______; see also Bandura 2007, supra note __________ (Examining the selective disengagement of moral self-sanctions as an impediment to reversing ecological degradation); see also Osofsky 2005, supra note ___ at 372; see also Bandura Failures, supra note _________.


42 Id.

43 Bandura 2007, supra note _______ (Examining the selective disengagement of moral self-sanctions as an impediment to reversing ecological degradation).

44 Id.
distort the outcomes of the individual’s conduct or degrade the targets of the individual's conduct. These mechanisms are particularly potent when present in combination and will “operate in concert rather than isolatedly at both the individual and social systems level.”

In Bandura’s social cognitive model, an individual’s thoughts and self-sanctions, her conduct, and her social environment are “interacting determinants of each other.” Bandura and others have developed extensive questionnaires to measure an individual’s “level of moral disengagement” as both a general dispositional characteristic as well as within situational context. Empirical work has shown that an individual’s level of moral disengagement, i.e., the person’s tendency to engage in moral disengagement mechanisms, is an accurate predictor of the person’s level of aggression and anti-social behavior.

In addition, an individual’s level of moral disengagement from self-sanctions for engaging in particular conduct can be affected by the role the individual plays within the particular social structure. For example, Osofsky, Bandura, and Zimbardo recently conducted a study of randomly selected prison personnel and showed that members of execution teams, who were not self-selected, but rather, assigned to such duty, showed higher levels of moral disengagement than those less involved or not involved in the execution process. Osofsky’s study also found that when members of the emotional support teams began their employment

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with the prison, they displayed high levels of moral engagement; yet, they became morally disengaged as their involvement in the execution process increased.\textsuperscript{51} As Bandura and others have concluded, “moral disengagement operates not only at the individual level, but does so with even more profound and pervasive impact at the broader level of social systems.”\textsuperscript{52}

Once self-sanctions are disengaged from harmful conduct towards a target, the actor will then engage in a process Bandura calls “gradualistic moral disengagement”\textsuperscript{53} whereby “the level of reprehensibility [of the individual’s conduct] progressively increases.”\textsuperscript{54} Through this process, an individual will initially “perform questionable acts that [she] can tolerate with little self-censure,”\textsuperscript{55} and repeat performances of the same act will produce less “discomfort and self-reproof” after each performance.\textsuperscript{56} Gradual escalation\textsuperscript{57} of harmful behavior was demonstrated

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\textsuperscript{51} Id.
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\textsuperscript{53} Bandura Handbook, supra note \underline{________} at 90.
\textsuperscript{54} Id.
\textsuperscript{55} Id
\textsuperscript{56} This phenomenon is supported by Festinger’s cognitive dissonance theory. According to cognitive dissonance theory, mental tension is created when one engages in behavior conflicts with her beliefs. In order to reduce the tension caused by the dissonance, individuals will modify their beliefs, aligning their beliefs with their behavior. \textit{See, e.g.}, David Crump, \textit{The Social Psychology of Evil: Can the Law Prevent Groups from Making Good People Go Bad?}, 2008 B.Y.U.L.REV. 1441, 1444 (2008) [Hereinafter Crump 2008]; see also Daryl J. Bem, \textit{Self-Perception: An Alternative Interpretation of Cognitive Dissonance Phenomena}, 74 PSYCHOL. REV.183, 187 (1967). Belief modification that is motivated by dissonance reduction not only changes the way current behavior is perceived, but often results in permanent changes in future behavior. \textit{See Jeff Stone & Nicholas C. Fernandez, How Behavior Shapes Attitudes: Cognitive Dissonance Processes, ATTITUDES AND ATTITUDE CHANGE} 316 (William D. Crano & Radmila Prislin eds., Psychology Press 2008) (“The psychological processes by which people restore consistency among cognitions can lead to enduring and meaningful changes.”).
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\textsuperscript{57} Escalation is also supported by the process of desensitization and over compensation. Primarily studied the context of exposure to violence, desensitization in that context has been defined as “a reduction in emotion-related physiological reactivity to real to violence.” Nicholas L. Carnagey, et al., \textit{The Effect of Video Game Violence on Physiological Desensitization to Real-Life Violence}, 43 J. EXPERIMENTAL SOC. PSYCHOL. 489, 490 (2007).\textsuperscript{57}
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in Philip Zimbardo’s famous Stanford prison experiment. In his study, Zimbardo recreated a prison environment in the basement of a Stanford University building. “[N]ormal, healthy, male college students” were recruited to participate in the study, randomly assigned to act either as prisoners or guards, and given great latitude in determining how to behave. The guards adjusted their attitudes to fit their role as prison guards and “imposed increasingly degrading punishments upon ‘prisoners[,]’” so much so that Zimbardo was forced to end the experiment prematurely. Zimbardo’s study has come to exemplify the power of situational influences to overwhelm individual moral control and induce otherwise moral people to engage in egregious

Many studies have found that the more one is exposed to depictions of violence, the less one will become emotionally aroused by violence. See Bruce D. Barthalow, et al., Chronic Video Game Exposure and Desensitization to Violence: Behavioral and Event-Related Brain Potential Data, 42 J. EXPERIMENTAL SOC. PSYCHOL. 532, 5337 (2006) (finding that exposure to violence can result in violence desensitization, which places individuals at an increased risk of future violent conduct).

According to Zyglidopoulos, et. al., the escalation of corrupt conduct takes place because people tend to overcompensate when rationalizing their behavior. See Stelios C. Zyglidopoulos, et al., Rationalization, Overcompensation and the Escalation of Corruption in Organizations, 84 J. BUS. ETHICS 65 (2009). Using the case of the 2001 Enron corruption as an example, the authors observed that the Enron executives used rationalizations that were out of proportion to the initial fraud. Id. The executives used grandiose statements like “we do this because we are saving this great firm” and “we do this because we are saving our great economy” to justify their behavior. Id. The authors explained that these explanations, despite their apparent pompous assertions, are not irrational; rather, they are the natural consequence of uncertainty. Id. There is no standard upon which one can measure their rationalization, creating great ambiguity when rationalizing conduct. Id. One can never be sure whether the rationalization that is used is enough to personally relieve the guilt associated with doing a wrongful act. Id. As a result, people are likely to take a “better safe than sorry” approach, providing rationalizations that are overly inclusive and more than necessary to justify the act. Id. As the authors explained, however, over-rationalization creates a problem because “[w]hen the rationalization is bigger than the initial corrupt act, the way is paved for further and more extensive corruption since such acts already have . . . an ideological cover.” Id. The rationalization allows the actor to engage in further corrupt acts that surpass the scope of original rationalization. Id. To justify these further acts the actor is forced to provide yet another rationalization, which will again overcompensate for the wrong. Id. As such, the actor progresses down a slippery slope of misconduct, over-rationalization, and even greater misconduct. Id.

58 Crump 2008, supra note _______ at 1445.
60 Id. at 6-7.
61 Crump 2008, supra note _______ at 1446.
conduct, particularly in a group setting, “within the context of socially approved roles, rules, and norms, a legitimizing ideology, and institutional support.”

III. MORAL DISENGAGEMENT IN PROSECUTORS

To a certain extent, disengagement from self-sanctions is necessary for a prosecutor to fulfill her role. While a person’s moral self-sanctions may otherwise be activated if she deprived another person of her liberty or life, the prosecutor’s self-sanctions must be disengaged from this otherwise inhibited conduct in order for her to function within her role as prosecutor. The criminal justice system provides this exoneration to prosecutors by providing moral justification for the behavior (the pursuit of justice), diffusing and displacing responsibility (through judge and jury), and degrading defendants (dehumanizing them through lack of contact and derogatory labels, and blaming them for their plight).

While these moral disengagement mechanisms provide some social benefit by allowing individuals to serve as prosecutors free of inhibitory self-sanctions, they co-exist with other systemic characteristics that may act in concert with the mechanisms to produce detrimental effects. Specifically, while encouraging prosecutors to morally disengage from self-sanctions for harmful conduct towards defendants, prosecutors are afforded almost unfettered discretion in deciding who to prosecute, for what charges, whether to engage in plea discussions, and whether

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62 For a detailed examination of group effects on individual misconduct, see P. Zimbardo, THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL (Random House 2007).

to seek the death penalty. In addition, prosecutors operate in an environment where they are motivated to obtain convictions and appear “hard on crime.”

Section A below provides an overview of the role of the prosecutor in the United States, including a consideration of prosecutorial discretion and the prosecutor’s competing motivations. Section B analyzes three mechanisms of moral disengagement inherent in the prosecutorial system: moral justification, diffused and displaced responsibility, and degradation of defendants.

A. The Dual Roles of the Prosecutor

Prosecutors in the United States have dual roles, which can often lead to competing loyalties. The Supreme Court defined the prosecutor’s special duty to “do justice” as one with a “twofold aim . . . that guilt shall not escape or innocent suffer.” The Court explained this dual role by stating that a prosecutor:

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. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

These dual roles, one as minister of justice, and one as zealous advocate, can sometimes conflict.

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64 For a discussion of the powers of the prosecutor, see, e.g., Angela A. Davis, ARBITRARY JUSTICE, THE POWER OF THE AMERICAN PROSECUTOR (Oxford University Press 2007) [Hereinafter Davis 2007].
65 See Bandes 2006, supra note .
66 Berger v. United States, 295 U.S. 78, 88 (1935); see also MODEL RULES OF PROF’L CONDUCT R. 3.8, cmt. (describing the role of prosecutor as that of a “minister of justice”).
67 Berger, 295 U.S. at 88.
1. Special Duties as Minister of Justice

As a comment to the Model Rules explains, the prosecutor’s role as a “minister of justice” is a responsibility that “carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.”68 One of the primary special duties of a prosecutor, arising from her minister of justice role is to disclose exculpatory material to the defense.

In 1963, the Supreme Court held in Brady v. Maryland that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”69 While the Court expanded the holding of Brady v. Maryland to apply to evidence the defense did not request,70 the Court limited the reach of Brady in United States v. Bagley, wherein the Court announced a narrow standard for materiality under Brady, stating that:

[t]he evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A “reasonable probability” is a probability sufficient to undermine confidence in the outcome.71

While the Bagley materiality standard governs the prosecutor’s constitutional duty to disclose exculpatory evidence and serves as the standard for post-trial remedy for prosecutorial

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69 373 U.S. 83, 87 (1963). In United States v. Bagley, the Supreme Court announced a materiality standard for Brady material that applies uniformly, whether the defendant makes a request or not, stating that “[t]he evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” 473 U.S. 667, 682 (1985).
misconduct, the ethics rules require prosecutors disclose to the defense any evidence that “tends to negate the guilt of the accused or mitigates the offense,” or mitigates the defendant’s sentence.\footnote{Model Rules of Prof’l Conduct R. 3.8(d); see also ABA Standards for Crim. Just., Prosecution Function and Def. Function R. 3-3.11(a) (1993); see also Kyles, 514 U.S. at 437 (“the rule in \textit{Bagley} requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate.”).}

Another duty specific to prosecutors arises from the unique power exerted by prosecutors, the power to charge. Prosecutors have the discretion to determine whether to bring a charge, what charges to file, and whether to engage in plea discussions.\footnote{For a discussion of the powers of the prosecutor, see, e.g., Angela A. Davis, \textit{Arbitrary Justice, The Power of the American Prosecutor} (Oxford University Press 2007) [Hereinafter Davis 2007].} In exercising this discretion, prosecutors are instructed to “refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.”\footnote{Model Rules of Prof’l Conduct R. 3.8(a); see also ABA Standards for Crim. Just., Prosecution Function and Def. Function R. 3-3.9(a) (3d ed. 1993) (“A prosecutor should not institution, or cause to be instituted, or to permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause.”). In addition, Rule 3.8 requires prosecutors to act as a guardian of defendants’ rights, in that prosecutors must take reasonable effort to ensure that an accused has been informed of his or her rights and may not attempt to procure a waiver of any important pretrial rights from a person who is not represented by counsel. Model Rules of Prof’l Conduct R. 3.8(b)-(c). Moreover, the Rules also charge prosecutors with the role of ensuring that only those who are guilty are punished by requiring that prosecutors disclose favorable evidence to the accused, both during and after trial, and take steps to remedy a conviction if the prosecutor learns that a conviction was wrongfully obtained. Model Rules of Prof’l Conduct R. 3.8 (d) & (g)-(h). Finally, prosecutors are under a duty not to increase the public condemnation of an accused person in that the prosecutor must refrain from making extrajudicial statements that will heighten the public’s contempt for the accused. Model Rules of Prof’l Conduct R. 3.8(f).} However, as Bruce Green has noted, this standard “adds nothing to the standard already established by law” (that criminal charges be supported by probable cause), and does not instruct a prosecutor to pursue leads that could produce exculpatory evidence.\footnote{Bruce Green, \textit{Prosecutorial Ethics as Usual}, 2003 U. ILL. L. REV. 1573, 1589-1590 (2003).}
2. Motivation to Obtain Convictions

Extensive scholarly work has focused on the pressures that induce prosecutors to engender what has been called a “conviction psychology,” which is the “desire to seek convictions, even when doing so may subvert justice.” Such work has focused primarily on the institutional pressures that lead to the conviction mentality. Prosecutors’ careers are directly hampered or enhanced by their conviction rates. In some jurisdictions, the prosecutors who obtain “the highest conviction rates (and, thus, reputations as the best performers) stand the greatest chance for advancement internally.” Prosecutors offices keep track of individual prosecutors’ conviction rates as a “motivational device—for example, by internally distributing attorneys’ ‘batting averages,’ or listing each lawyer by name on a bulletin board with a series of stickers reflecting the conclusions of their recent cases (green for convictions and red for acquittals).” Prosecutors offices also use conviction records to justify their budgets.

Contributing to the institutional pressure to convict is the public pressure to convict. As Findley and Scott have discussed, while the public views the police force as having a broader mandate, the public sees the role of the prosecutor as limited to prosecuting offenders. It is

76 See, e.g., G.T. Felkenes, The Prosecutor: A Look at Reality, 7 SW. U. L. REV. 98, 99, 114 (1975) (“the prosecutor who displays ‘conviction psychology’ thinks of the defendant as guilty, and reasons that an innocent person would not be introduced into the system. He sees the judicial system as the means through which he must work in order that the guilty might receive their proper punishment. . . The result of these attitudes is a deterioration of the ideal purpose of the prosecutor—to seek justice.”).

77 supra Findley 2006 at 328, note ________.


79 D. Medwed, The Prosecutorial Ethic: A Tribute to King County Prosecutor Norm Maleng, 84 WAS. L. REV. 35 (2009) [Hereinafter Medwed 2009].

80 Id.

81 Findley 2006, supra note ____at 327.
understandable, then, that prosecutors rely on their conviction rates as evidence that they are capable and tough on crime in both their campaigns for re-election as well as in their future political campaigns. 82 This focus on conviction rate can be self-reinforcing. As Daniel Medwed has discussed, “[a]s members of organizations that hail convictions, prosecutors may begin to internalize the emphasis placed on conviction rates and view their win-loss record as a symbol of their self-worth.” 83 Empirical data confirms that “the more experience a prosecutor has, the more likely he or she is to express an interest in obtaining convictions over an interest in doing justice.” 84

3. Misconduct

Thanks in large part to the Innocence Project and DNA testing, prosecutorial misconduct has become the subject of commentary in recent years. The term “prosecutorial

82 See, e.g., Stephanos Bibas, Plea Bargaining Outside the Shadow of Trial, 117 HARV. L. REV. 2464, 2472 (2004) (discussing prosecutors’ use of conviction rates in their campaigns for re-election as district attorneys, as well as future campaigns for higher political office); see also Medwed 2004, supra note at 151-56 (discussing prosecutors’ focus on conviction rates in re-election campaigns as well as in campaigns for higher office).

83 Medwed 2004, supra note at 138.

84 supra Findley 2006 at 329, note (discussing Felkenes study, which reported survey data of district attorneys).

85 The innocence project was created in 1992 as a non-profit legal clinic associated with Benjamin Cardozo School of Law. About the Innocence Project, Innocence Project, http://www.innocenceproject.org/about/. Students in the clinic work to exonerate people who have been wrongfully convicted through the use of DNA evidence. Id. Through the years the Innocence Project has expanded beyond the one clinic, with the founding of The Innocence Network “a group of law schools, journalism schools and public defender offices across the country that assists inmates trying to prove their innocence whether or not the cases involve biological evidence which can be subjected to DNA testing.” Id. The Innocence Project also consults with governmental officials and conducts research regarding the use of DNA to prevent wrongful convictions. Id.

86 DNA is an abbreviation for Deoxyribonucleic acid. Barbara Jansen Cohen, MEDICAL TERMINOLOGY, AN ILLUSTRATED GUIDE 61 (5th ed. 2008).

87 See, e.g., Medwed 2009, supra note (arguing for a more active role by prosecutors in the post-conviction process where factual innocence of a defendant is in question; pointing out that since 1989, over 200 prisoners have proven their innocence through post-conviction DNA testing).
misconduct” encompasses a broad range of behavior. It can refer to prosecutorial conduct that violates the prosecutor’s special duties, such as cases where a prosecutor conceals exculpatory evidence or brings charges based on vindictiveness or bias. Prosecutorial misconduct can also refer to conduct that violates an ethical duty shared by all attorneys, such as when a prosecutor introduces false evidence or engages in witness tampering. This article does not attempt to chronicle the many forms of prosecutorial misconduct. Rather, this article considers the institutional factors within the criminal justice system that may encourage the moral disengagement in prosecutors and lead to prosecutorial misconduct.

B. Systemic Factors Encouraging Moral Disengagement in Prosecutors

1. Moral Justification

The prosecutor’s duty to see that “justice shall be done” provides a strong moral justification for the prosecutor’s actions as a zealous advocate on behalf of “the people,” including victims, police, and the public. This moral justification necessarily provides an exonerative umbrella for the prosecutor’s actions. However, this powerful, yet vague, moral justification may encourage moral disengagement that will allow prosecutors to engage in ethically suspect conduct while justifying such acts as a means to their moral end.

88 For a description of many of the forms of prosecutorial misconduct, see Davis 2007, supra note at 125.


A recent empirical study by Reynolds and Ceranic found that students with a strong sense of moral superiority were the most likely to cheat. Reynolds explained that those who considered themselves most moral believed their cheating was justified because they would contribute the most value to society if successful. Reynolds also discussed the need for specific guidelines and training to ensure that those with high moral purpose do not pursue illegitimate means in order to accomplish their moral ends.

Rather than providing such specific guidance to prosecutors, the Model Rules provide little explanation of what it means to be a minister of justice, allowing prosecutors to interpret it for themselves. As Zacharias has argued, “[t]o the extent a prosecutor may determine what constitutes justice with reference to any of her constituencies, she can rationalize most conduct.” Instead, the prosecutorial system encourages prosecutors to “convict at all costs” through what Bandura refers to as “[i]mplicit agreements, insulating social arrangements and authorization by indirection.” As Bandes has explained, “the prosecutor works within a particular institutional environment, which will generate explicit procedures, but will also transmit implicit institutional expectations.” According to the ethical rules, the prosecutor’s role as a “minister of justice” is a responsibility that “carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of

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93 See id.


95 Zacharias 1991, supra note ____ at 103.

96 Bandura 1999, supra note ____ at 6.

97 See Bandes 2006 at 484, supra note __________.
sufficient evidence.” However, prosecutorial violations of this obligation are not enforced, and “prosecutors rarely receive ethical sanctions for their misconduct, even when it leads to wrongful conviction.”

For example, Armstrong and Possley, writers for the Chicago Tribune, studied eleven thousand cases involving prosecutorial misconduct between 1963 and 1999. The study revealed “widespread, almost routine” concealment of exculpatory evidence and presentation of false evidence. Yet, none of the prosecutors who engaged in the misconduct, even in the most egregious cases, were convicted of a crime or barred from practicing law. The prosecutorial system therefore sends the implicit message that prosecutors must procure convictions at all costs and that violation of explicit procedures will be condoned.

While the prosecutor’s lofty moral mandate as a “minister of justice” is phrased in vague, sweeping terms, it is accompanied by wide discretion, and is provided along side the institutional incentives to engage in the most punitive actions available against the defendant, obtain convictions and advocate for harsh sentences. When an institution provides a moral justification for harmful behavior, an individual’s “detrimental conduct is made personally and socially acceptable by portraying it as serving socially worthy or moral purposes. People then can act on a moral imperative and preserve their view of themselves as a moral agent while

98 MODEL RULES OF PROF’L CONDUCT R. 3.9 cmt.
99 Jane Campbell Moriarty, Misconvictions, Science and the Ministers of Justice, 86 Neb. L. Rev. 1 (2007); see also Davis 2007, supra note ___ at 131; see also Armstrong 1999, supra note ___________; see also E. Yaroshesky, Wrongful Convictions: It is Time to Take Prosecution Discipline Seriously, 8 D.C. L. Rev. 275 (2004) (“With rare exception, there has been no discipline for egregious instances of misconduct that led to these convictions”).
100 see also Armstrong 1999, supra note __________
101 MODEL RULES OF PROF’L CONDUCT R. 2.8 cmt.
102 Zacharias 1991, supra note ____ at 46.
inflicting harm on others.” 103 This not only reduces self-sanctions but can even result in feelings of personal pride for actions that would otherwise be immoral.104 As Bandura noted, “[o]ver the centuries, much destructive conduct has been perpetrated by ordinary, decent people in the name of righteous ideologies, religious principles and nationalistic imperatives.” 105

2. Displacing and Diffusing Responsibility

The criminal justice system further encourages moral disengagement by prosecutors by displacing and diffusing responsibility for harm caused by stretching or crossing ethical lines in the pursuit of convictions. “Moral control operates most strongly when people acknowledge that they cause harm by their detrimental actions. [Displacement] operates by obscuring, or minimizing the agentive role in the harm one causes.” 106 Individuals are able to pardon their conduct by perceiving their actions as being ordered by others. 107

Perhaps the most famous study demonstrating displacement of responsibility is that conducted by Stanley Milgram.108 In Milgram’s seminal study, an authoritative experimenter instructed subjects to administer increasingly intense shocks to “learners,” confederates who provided incorrect answers, as a test of the effects of punishment on learning. Milgram found that of forty subjects, 26 were willing to comply with the experimenter’s command to progress to a dangerously high voltage level.

103 Bandura 1999, supra note ______ at 3.

104 White 2009, supra note ______ at 47; see also McAlister 2006, supra note ___ at 142 (evaluating the public acceptance of the use of military force against terrorists, both before and after the terrorist attacks on the New York City Twin Towers, using the lens of moral disengagement).

105 Bandura 1999, supra note ______ at 3.

106 Id. at 5

107 White 2009, supra note _______ at 47.

While prosecutorial misconduct is not directly authorized, as was the conduct in the Milgram experiment, through intense pressure to convict at all costs, and lack of sanctions for violation of ethical rules, such misconduct is implicitly authorized. As Bandura explains, obedient functionaries within implicit authorizing systems, in contrast to actors within “direct authorizing systems . . . do not cast off all responsibility as if they were mindless extensions of others. [Otherwise], they would perform their duties only when told to do so.” Bandura explains that “[i]t requires a strong sense of responsibility, rooted in ideology, to be a good functionary. . . . The best functionaries are those who honor their obligations to authorities but feel no personal responsibility for the harm they cause. They work dutifully to be good at their [wrongdoing].”\textsuperscript{109}

Similar to displacement of responsibility, the “exercise of moral control is also weakened when personal agency is obscured by diffusing responsibility for detrimental behavior.”\textsuperscript{110} One’s sense of responsibility can be diffused, and thereby diminished, by dividing an enterprise into detached subfunctions.\textsuperscript{111} In his seminal study on disinhibition of aggression through diffusion of responsibility and dehumanization of victims, Bandura found that subjects who were told that the level of shock a victim received would be based on an average shock administered by multiple subjects, were willing to administer a higher shock than those subjects who were told that they would be the sole determinant of the shock amplitude administered.\textsuperscript{112} Thus, diffusion of responsibility disinhibited subjects to engage in more injurious behavior.\textsuperscript{113} When later surveyed, the subjects in Bandura’s diffused responsibility condition used significantly fewer

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\textsuperscript{109} Bandura 1999, supra note _____ at 7.
\textsuperscript{110} Id. at 7
\textsuperscript{111} Id.
\textsuperscript{112} Albert Bandura, et. al, Disinhibition of Aggression through Diffusion of Responsibility and Dehumanization of Victims, 9 J. RESEARCH IN PERSONALITY 253, 259 (1975) (demonstrating increased subject aggressiveness when subjects where told the magnitude of a shock was based on a group average and when the victim was referred to in terms of dehumanizing terminology) [Hereinafter Bandura 1975].
\textsuperscript{113} Id. at 257.
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justifications to explain their actions, while subjects in the personal responsibility condition provided more self-exonerating justifications for the shocks.114

The criminal justice system obscures personal responsibility by dividing the truth finding function. As Bandes explains, the adversary system “is built on the notion that if each adversary acts zealously on behalf of his client, the truth will come out.”115 Because the adversary system parcels out “the search for justice” between “two adversaries acting zealously, with the judge or jury making the final determination,” the prosecutor may “come to believe that the obligation to truth will be safeguarded by the system in general.”116 This freedom from the personal responsibility to safeguard the defendant’s rights may disinhibit the prosecutor to pursue his case with increased zealousness and to pursue a conviction, even at the expense of compliance with ethical rules.

3. Degrading Defendants

The criminal justice system further encourages moral disengagement in prosecutors by degrading defendants. At the recipient locus, targets of harmful conduct “are marginalized and depersonalized,”117 and blamed for bringing about their own suffering.118 Social psychologists have described the dehumanization as one of the “most powerful cognitive processes that can distance people from the moral implications of their actions.”119

114 Id. at 262.
115 See Bandes 2006 at 488, supra note ___________.
116 See Bandes 2006, supra note ___________ at 488; see also Haney 1997, supra note ___________ at 1476 (discussing the role of distal responsibility in allowing capital juries to condemn defendants to death, and reporting that jurors tend to focus on the judge’s instructions indicating that the jury’s decision is only a ‘recommendation.’).
117 Bandura 2007, supra note ____.
118 McAlister 2006, supra note ____ at 142.
119 Haney 1997, supra note ____ at 1458.
Self-censure for harmful conduct “can be disengaged by stripping people of human qualities [such that] they are no longer viewed as persons with feelings, hopes and concerns, but as subhuman objects.”¹²⁰ For example, in a 1975 experiment, college students were told they would work with students from another school on a group task.¹²¹ In one condition, they overheard an assistant calling the other students "animals" and in another condition, "nice."¹²² The study found students were more apt to deliver what they believed were increased levels of electrical shock to the other students if they had heard them called "animals."¹²³

Defendants in the criminal justice system are systematically depersonalized from the prosecutor’s perspective, because the prosecutor has intimate contact with all parties involved, except the defendant. As Stanley Fisher has explained,

In her daily routine, [the prosecutor] is constantly exposed to victims, police officers, civilian witnesses, probation officers and others who can graphically establish that the defendant deserves punishment and who have no reason to be concerned with competing values of justice. At the same time, the prosecutor is normally isolated from those—the defendant, his family and friends, and often, his witnesses—who might arouse the prosecutor’s empathy or stimulate concern for treating him fairly.¹²⁴

In the vacuum of humanizing information about the defendant, the prosecutor places her theory of her case, which can be tainted by the “fundamental attribution error,” the tendency to

¹²⁰ Bandura 1999, supra note _____ at 8. See also White 2009, supra note _____ at 47.

¹²¹ Bandura 1975, supra note _____ at 259 (demonstrating increased subject aggressiveness when subjects were told the magnitude of a shock was based on a group average and when the victim was referred to in terms of dehumanizing terminology).

¹²² Id.

¹²³ Id.; see also White 2009, supra note _____ at 52-56 (corporations frequently blame and attribute negative qualities to the users of their harmful products).

“provide[] causal explanations for the behavior of others in largely dispositional or personal as opposed to situational or contextual terms.”

Intensifying this dehumanizing effect is the use of blanket labels in the place of individual names, such as “the defendant” or the “perp,” and the use of derogatory labels. Martha Duncan has argued that “metaphors of filth” permeate the criminal justice system, and cited thirty-four appellate cases where prosecutors’ references to defendants as “slime,” “scum,” “filth,” or “dirt” was in issue. As Craig Haney explains, the use of such “imagery cognitively reinforced the separation of the ‘criminals’ from the ‘noncriminals’ who employed the terminology.”

Compounding this effect, “wielding institutional power changes the power-holders in ways that are conducive to dehumanization.” As Bandura explains, “[t]his happens when persons in positions of authority have coercive power over others with few safeguards for constraining their behavior. Power-holders come to devalue those over whom they wield control.”

Prosecutors have enormous power over defendants, the power to charge, to engage in plea discussions, and to dismiss charges.

The adversarial process can further lead to degradation of defendants by attributing blame for misconduct to defendants’ provocation. As Bandura explains, “[c]onflictful transactions typically involve reciprocally escalative acts.” Thus, an actor in such an adversarial process may “select from the chain of events a defensive act by the adversary and portray it as initiating

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125 Haney 1997, supra note ______ at 1458.
127 Haney 1997, supra note ______ at 1463.
128 Bandura 1999, supra note ______ at 9.
129 Id. at 8
130 Id.
provocation.”

Through this self-exoneration process, “not only are one’s own injurious actions excusable but one can even feel self-righteous in the process.” \(^{132}\) Through depersonalization of defendants, the wielding of power over defendants, and the adversarial posture toward defendants, prosecutors are encouraged to morally disengage from harmful acts towards defendants. Once the prosecutor’s moral self-sanctions for harmful behavior towards the defendant are disengaged, moral control is weakened, and in a response to ever-present motivation to pursue convictions, the prosecutor may engage in escalative harmful acts towards the defendant without moral inhibition.

**IV. CONCLUSION**

Not only does the criminal justice system contain processes that encourage prosecutors to disengage their self-sanctions from conduct that harms defendants, but it does so while providing additional motivation (above the pursuit of justice) for prosecutors to obtain convictions. The criminal justice system provides these motivations while also affording prosecutors a high level of discretion. Such conditions provide the “perfect storm” for encouraging prosecutors to stretch the bounds of their ethical duties to defendants. Once the prosecutor begins to stretch her ethical boundaries, she will progressively increase her level of misconduct \(^{133}\) through the process of “gradualistic moral disengagement.” \(^{134}\) Reforms aimed at minimizing prosecutorial misconduct will be most effective if they take into account the forces of moral disengagement at work in the

\(^{131}\) Id.

\(^{132}\) Id.

\(^{133}\) Bandura Handbook, *supra* note ______ at 90.

\(^{134}\) Id.
criminal justice system and provide systemic correctives to the moral disengagement encouraged in the prosecutorial function.