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# Mitigating Foul Blows: Rethinking Procedural Barriers to Prosecutorial Misconduct Claims

Mary N. Bowman



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# MITIGATING FOUL BLOWS: RETHINKING PROCEDURAL BARRIERS TO PROSECUTORIAL MISCONDUCT CLAIMS

Mary Nicol Bowman<sup>i</sup>

## ABSTRACT

*For nearly eighty years, courts have offered stirring rhetoric about how prosecutors must not strike foul blows in pursuit of convictions. While courts are often quick to condemn prosecutorial misconduct, however, they rarely provide any meaningful remedy. Instead, courts routinely affirm convictions, relying on defense counsel's failure to object or concluding that the misconduct was merely harmless error. Jerome Frank summed up the consequences of this dichotomy best when he noted that the courts' attitude of helpless piety in prosecutorial misconduct cases breeds a deplorably cynical attitude toward the judiciary.*

*Cognitive bias research illuminates the reasons for, and solutions to, the gap between rhetoric and reality in prosecutorial misconduct cases. This article is the first to explore theories of cognition that help explain the frequency of prosecutorial misconduct and the ways that it likely affects jurors and reviewing judges more than they realize. As a result, the article advocates for sweeping changes to the doctrine of harmless error as applied in prosecutorial misconduct cases, as well as removal of the penalties that come from defense counsel's failure to object at trial. These solutions will help clarify the currently ambiguous law on what behavior constitutes prosecutorial misconduct, allow defense counsel to recognize that misconduct and raise timely objections, and provide reversal of convictions when misconduct may well have affected the outcome of the case, while still allowing courts to affirm when the misconduct was trivial.*

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## I. Introduction

Nearly eighty years ago, the United States Supreme Court first offered its now iconic description of the prosecutor's duties within the American criminal justice system: “[W]hile 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.”<sup>1</sup> This exhortation from Berger v. United States is frequently cited by courts reviewing claims of prosecutorial misconduct, defense counsel raising those claims, and academics commenting on prosecutorial behavior.<sup>2</sup> Yet “Berger . . . is routinely cited but largely ignored.”<sup>3</sup>

A striking gap exists between the strong rhetoric of Berger and other prosecutorial misconduct cases, the realities of prosecutors' behavior, and the judicial response to that behavior.<sup>4</sup>

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<sup>1</sup> Berger v. United States, 295 U.S. 78, 88 (1935). These obligations stem from the prosecutor's dual role: “[He] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.” *Id.*

<sup>2</sup> Bennett L. Gershman, “Hard Strikes and Foul Blows:” Berger v. United States 75 Years After, 42 LOY. U. CHI. L.J. 177, 179 (2010) (hereinafter “Hard Strikes”).

<sup>3</sup> *Id.* at 205-06. Gershman offers an excellent critique of the reasons why Berger has had so little impact despite its stirring rhetoric:

Berger's description of the flagrant misconduct of the prosecutor and its inspiring rhetoric about the proper use of prosecutorial power, however hortatory, had no role in deterring and punishing misconduct by prosecutors. It established no rule of law; it merely reiterated the contemporary understanding of the prosecutor's role to seek justice. Berger established no standards to guide prosecutors except for its broad command to prosecutors not to strike the types of foul blows committed by Singer. In view of its facts, and its ambiguous recognition that prosecutors are allowed to strike hard blows to win convictions, Berger could not serve as a meaningful precedent in those instances where prosecutors engage in less overtly prejudicial conduct.

*Id.* at 196.

<sup>4</sup> See, e.g., *id.* at 205-06 (noting “the dissonance between Berger's clarion call to prosecutors to play fairly and by the rules, and the reality of prosecutorial practice today”); *id.* at 206 (“Courts reverse some of these cases; editorial writers occasionally chastise some of these prosecutors; and academics continue to bemoan the sorry state of criminal justice, the inability of prosecutors to behave properly, and the failure of courts, lawmakers, and disciplinary bodies to make prosecutors accountable.”); Peter J. Henning, Prosecutorial Misconduct and Constitutional Remedies, 77 WASH. U. L.Q. 713, 721-22 (1999) (courts' labeling of behavior as prosecutorial misconduct is “almost cost-free” because

Despite the strong rhetoric courts often use to condemn misconduct, it appears that this behavior continues unabated.<sup>5</sup>

Current case law on prosecutorial misconduct poses significant substantive and procedural barriers for defendants seeking to challenge inappropriate prosecutorial behavior.<sup>6</sup> Substantively, case law on what constitutes prosecutorial misconduct versus what conduct is proper is, at best, extremely muddled.<sup>7</sup> While a defendant can sometimes object to prosecutorial misconduct at trial and have the trial court grant a remedy, trial courts do not always take adequate steps to remedy the problem.<sup>8</sup> And on appeal, the courts impose several procedural barriers that, singly and together, make it nearly impossible for a defendant to successfully challenge prosecutorial misconduct that the trial court failed to remedy.<sup>9</sup> Appellate courts will sometimes refuse to review claims of prosecutorial misconduct if defense counsel failed to object at trial, yet the courts' treatment of this failure to object does not match the realities faced by defense counsel in these situations.<sup>10</sup> Even when courts do find that the defense attorney properly objected and the prosecutor committed

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the harmless error doctrine allows courts to avoid providing any remedy for the misconduct when the courts conclude that it did not affect the outcome).

<sup>5</sup> See, e.g., Rosemary Nidiry, Note: Restraining Adversarial Excess in Closing Argument, 96 COLUM. L. REV. 1299, 1309 (1996).

<sup>6</sup> See, e.g. ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 130 (Oxford Univ. Press 2007) (The United States Supreme Court's "rulings have sent a very clear message to prosecutors – we will . . . make it extremely difficult for challengers to prevail; and as long as you mount overwhelming evidence against defendants, we will not reverse their convictions if you engage in misconduct at trial.").

<sup>7</sup> See, e.g., Charles L. Cantrell, Prosecutorial Misconduct: Recognizing Errors in Closing Argument, 26 AM. J. TRIAL ADVOC. 535, 537 (2003).

<sup>8</sup> Some judges and commentators argue that trial courts are in the best position to deal with prosecutorial misconduct, so trial court decisions should be given a great deal of deference. See, e.g., Hon. D. Brooks Smith, Policing Prosecutors: What Role Can Appellate Courts Play, 38 HOFSTRA L. REV. 835, 835 (2010) (trial judges are in a better position than appellate judges to ensure that prosecutors fulfill the duties of their office); Nidiry, supra note 5, at 1309 (discussing the ABA standards that emphasize trial judges' options for responding to prosecutorial misconduct, including "sustaining the objection for the record, instructing the jury to ignore the inappropriate comment, reprimanding the attorney, and declaring a mistrial."). However, that position fails to deal the fact that trial court judges very rarely take any action when defense counsel fails to object, as discussed in section III(B) below, and the actions that they do take may not fully remedy the problem, as discussed in section III(A) below, which discusses harmless error.

<sup>9</sup> See infra section III.

<sup>10</sup> For an excellent discussion of why defense counsel may fail to object to prosecutorial misconduct at trial, see generally Lara A. Bazelon, Hard Lessons: The Role of Law Schools in Addressing Prosecutorial Misconduct, 16 BERKELEY J. CRIM. L. 391, 441 (2011). See also infra section III(B)(2) regarding the inadequate judicial treatment of preservation of error.

misconduct, courts frequently refuse to impose any meaningful sanction on the prosecutor for that misconduct.<sup>11</sup> Instead, courts often rely on the doctrine of harmless error, concluding that the prosecution had such a strong case against the defendant that the misconduct was harmless.<sup>12</sup> This focus on the strength of the state's case incentivizes, or at least fails to create a disincentive, for prosecutors to commit misconduct at trial when they have a strong case.<sup>13</sup> Prosecutors also have incentives under the current system to commit misconduct when they have weak cases, as the risk of an appellate court ordering a new trial is less significant than the risk of an acquittal at trial.<sup>14</sup>

As a result, the current law on prosecutorial misconduct "has provided prosecutors with a comfort zone that fosters and perhaps even encourages a culture of wrongdoing."<sup>15</sup> In other words, these incentives facilitate rather than prevent prosecutorial misconduct.<sup>16</sup> To avoid these perverse incentives, the procedural barriers to prosecutorial misconduct claims need to change.

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<sup>11</sup> See, e.g., Lawton P. Cummings, Can an Ethical Person Be an Ethical Prosecutor? A Social Cognitive Approach to Systemic Reform, 31 CARDZOZ L. REV. 2139, 2150-51 (2010); Margaret Z. Johns, Unsupportable and Unjustified: A Critique of Absolute Prosecutorial Immunity, 80 FORDHAM L. REV. 509, 519 (2011) (both discussing the lack of meaningful sanctions against prosecutors who commit misconduct).

<sup>12</sup> See, e.g., Michelle Ghetti & Paul Killebrew, With Impunity: The Lack of Accountability for a Criminal Prosecutor, 13 LOYOLA J. PUB. INT. LAW 349, 353-54 (2012) (discussing Louisiana study of prosecutorial misconduct, including harmless error); Johns, supra note 11, at 512 (discussing statistics from a 2007 California study of prosecutorial misconduct).

<sup>13</sup> See, e.g., David Keenan et. al., The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct, 121 YALE L.J. ONLINE 203, 212 (Oct. 2011) ("By reducing the likelihood of reversal, the harmless error standard substantially weakens one of the primary deterrents to prosecutorial misconduct. Knowing that "minor" misconduct is unlikely to jeopardize a conviction on appeal, prosecutors may be more likely to bend the rules in the pursuit of victory."); Michael D. Cicchini, Prosecutorial Misconduct at Trial: A New Perspective Rooted in Confrontation Clause Jurisprudence, 37 SETON HALL L. REV. 335, 347 (2007) ("Under the existing framework, if a prosecutor has a strong case, the misconduct will only make it stronger. There is virtually no risk of reversal because the trial court and reviewing court will simply find that, given the strength of the State's case, the defendant would have been found guilty even without the misconduct, and therefore denying him a new trial will not prejudice him.").

<sup>14</sup> Id.

<sup>15</sup> DAVIS, ARBITRARY JUSTICE, supra note 6, at 130. See also Rodney J. Uphoff, On Misjudging and its Implications for Criminal Defendants, Their Lawyers, and the Criminal Justice System, 7 NEV. L.J. 521, 544 (2007) ("The expanded use of harmless error not only allows questionable verdicts to stand, it does little to discourage misconduct and sloppy practices in the administration of justice.").

<sup>16</sup> Bennett L. Gershman, Mental Culpability and Prosecutorial Misconduct, 26 AM. J. CRIM. L. 121, 132 (1998) (hereinafter "Mental Culpability").

But the causes of prosecutorial misconduct and its effect on jurors and judges go beyond rational decision-making based on incentives. Many scholars lament that prosecutors face strong incentives to win at all costs while facing little realistic threat of discipline or sanction if they cross ethical lines; that line of argument implicitly treats prosecutors as rational actors who make cost-benefit decisions about their behavior.<sup>17</sup> That account, while not wholly incorrect, is too narrow. Instead, “[p]rosecutors sometimes make biased decisions . . . because people generally are biased decision makers. A cognitive explanation for prosecutorial bias suggests that improving the values of prosecutors is not enough; an improvement in the cognitive process is required.”<sup>18</sup> Although much has been written in recent years about how cognitive biases impact various aspects of the criminal justice system,<sup>19</sup> very little has been written about how cognitive bias may impact prosecutorial misconduct.<sup>20</sup> Cognitive bias research

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<sup>17</sup> See Barbara O’Brien, A Recipe for Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making, 74 MO. L. REV. 999, 1002 (2009). See also Alafair S. Burke, Talking About Prosecutors, 31 CARDOZO L. REV. 2119, 2127-28 (2010) (hereinafter “Talking”) (arguing that the “rhetoric of fault” suggests that prosecutors care more about winning cases than doing justice, but that rhetoric is counterproductive to changing prosecutorial behavior). This fault-based rhetoric assumes that prosecutors make decisions based on rational cost-benefit allocations, so scholars propose remedies to change the prosecutors’ cost-benefit calculations. Alafair S. Burke, Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science, 47 WM. & MARY L. REV. 1587, 1590 (2006) (hereinafter “Improving Prosecutorial Decision Making”).

<sup>18</sup> Burke, Improving Prosecutorial Decision Making, *supra* note 17, at 1614.

<sup>19</sup> For just a few recent articles about the impact of cognitive bias on various aspects of the criminal justice system, see, e.g., Mary Nicol Bowman, Full Disclosure: Cognitive Science, Informants, and Search Warrant Scrutiny, \_\_ Akron L. Rev. \_\_ (forthcoming 2013) (regarding reliance on informants in search warrant applications); Song Richardson, Police Efficiency and the Fourth Amendment, 87 IND. L.J. 1143, 1145 (2012) (regarding searches and seizures); Anna Roberts, (Re)Forming the Jury: Detection and Disinfection of Implicit Juror Bias, 44 CONN. L. REV. 827 (2012) (regarding jury decision-making); Andrew E. Taslitz, Police are People Too: Cognitive Obstacles to, and Opportunities for, Police Getting the Individualized Suspicion Judgment Right, 8 OHIO ST. J. CRIM. L. 7, 64 (2010) (police investigations).

<sup>20</sup> Professor Alafair Burke has written several articles that apply cognitive science to prosecutorial decision-making, but none of her articles have focused specifically on prosecutorial trial misconduct. See, e.g., Alafair Burke, Prosecutors and Peremptories, 97 IOWA L. REV. 1467 (2012) (discussing cognitive bias impacts on jury selection); Alafair Burke, Revisiting Prosecutorial Disclosure, 84 IND. L.J. 481 (2009) (applying cognitive science to Brady disclosures); Alafair Burke, Neutralizing Cognitive Bias: An Invitation to Prosecutors, 2 N.Y.U. J. L. & LIBERTY 512, 517 (2007) (focusing on cognitive biases that can lead prosecutors to charge factually innocent suspects and then resist evidence of innocence). The one article to use cognition research to analyze prosecutorial misconduct issues is Lawton Cummings’ article in the

provides new ways of understanding the pervasiveness of prosecutorial misconduct.

Additionally, cognitive bias research sheds light on the way that prosecutorial trial misconduct may affect jurors and reviewing judges more than has previously been recognized. While much has been written in recent years about how judges and juries decide cases, this is the first article to apply that research to jury decision-making in the context of prosecutorial misconduct cases. In fact, the prevailing theories of jury decision-making leave significant room for jurors to be influenced by cognitive biases, which may be exploited by prosecutorial trial misconduct, and judges may be affected by other types of cognitive biases that will lead them to under-react to this situation.<sup>21</sup> The current procedural barriers to prosecutorial misconduct make it impossible for courts to account for these influences.

This article therefore calls on courts to use cognitive bias research to rethink their treatment of prosecutorial trial misconduct, particularly procedural barriers to these claims. Specifically, Part II provides an overview of the types of arguments that constitute prosecutorial trial misconduct, the widespread nature of this misconduct, and its impact on individual defendants and on the criminal justice system more generally. Part III explains the ways that the harmless error and plain error doctrines impede both clarity regarding proper behavior and remedies for improper behavior. Part IV summarizes cognitive bias research that explains why prosecutors may commit trial misconduct and how that misconduct might affect jurors and reviewing judges. Part V provides solutions to this problem, including significant changes to the harmless error doctrine and abandonment of the plain error approach when defense counsel fails to object at trial. These changes would help courts clarify what behavior really does constitute trial misconduct and to provide a meaningful remedy for defendants whose trials have been impacted by misconduct, while still affirming convictions in cases where the misconduct was unlikely to have affected the trial. Part VI, the conclusion, explains how these changes should help minimize future misconduct by prosecutors, provide a meaningful remedy for serious misconduct, and strengthen the credibility of the criminal justice system.<sup>22</sup>

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Cardoza Law Review, Can an Ethical Person Be an Ethical Prosecutor? A Social Cognitive Approach to Systemic Reform, *supra* note 11. It is discussed in more detail in section IV(A) below.

<sup>21</sup> See *infra* section IV(C).

<sup>22</sup> Prosecutorial misconduct “strikes at the heart of a defendant’s constitutional right to a fair trial and, more broadly, implicates the integrity of the criminal justice system as a whole.” Bazelon, *supra* note 10, at 441.

## **II. Understanding Prosecutorial Trial Misconduct’s Scope and Severity**

In order to understand why the current treatment of prosecutorial misconduct is inadequate, it is important to understand what types of behavior constitute prosecutorial trial misconduct and the pervasiveness and significance of this misconduct.

### **A. Defining Prosecutorial Trial Misconduct**

Prosecutorial misconduct means behavior by the prosecutor that is legally impermissible; the term does not apply to actions that are legally permissible but morally or ethically repugnant.<sup>23</sup> The word “misconduct” should not read to imply that the prosecutor must act deliberately in order to have committed misconduct.<sup>24</sup> Instead, behavior is misconduct because it violates the legal standards imposed on prosecutors.<sup>25</sup> Even with the term limited in that way, prosecutorial misconduct is an extremely broad term, covering a wide range of behaviors that can occur at any point, from before charges are filed to while a case is on appeal.<sup>26</sup> Common types of prosecutorial misconduct include violations of the Brady or Batson doctrines, improper argument during trial, and

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<sup>23</sup> George A. Weiss, Prosecutorial Misconduct After Connick v. Thompson, 60 DRAKE L. REV. 199, 203 (2011). For a discussion of prosecutorial ethics as opposed to legal misconduct, see DAVIS, supra note 6, at 143-161.

<sup>24</sup> Henning, supra note 4, at 720 (“Since Berger, courts have applied the prosecutorial misconduct designation almost reflexively, as a shorthand method of describing whether the government attorney acted outside the bounds of acceptable advocacy.”). There is, however, some debate over the breadth of the conduct that gets labeled “prosecutorial misconduct.” See, e.g., Bazelon, supra note 10, at 401 (“Because few prosecutors found to have committed misconduct are bad actors whose violations were deliberately or malevolently intended, ‘misconduct’ is loaded and an arguably misleading way to describe the problem.”); James A. Morrow & Joshua R. Larson, Without a Doubt, A Sharp and Radical Departure: The Minnesota Supreme Court’s Decision to Change Plain Error Review of Unobjected-to Prosecutorial Error in *State v. Ramey*, 31 HAMLINE L. REV. 351, 395-400 (2008) (arguing that courts should distinguish between unintentional and harmless “prosecutor error” and intentional severe “prosecutorial misconduct”).

<sup>25</sup> See, e.g., Gershman, Mental Culpability, supra note 16, at 133 (when analyzing prosecutorial misconduct claims, courts typically consider whether the behavior was objectively improper and whether it affected the outcome of the trial, but they do not consider the prosecutor’s subjective intent or motivation).

<sup>26</sup> See, e.g., DAVIS, supra note 6, at 125 (noting that prosecutorial misconduct can take many forms, including courtroom misconduct; mishandling physical evidence; failing to disclose exculpatory evidence; falsifying witness testimony; otherwise presenting false or misleading evidence; vindictive prosecution; and improper behavior in front of grand juries).

misconduct in presenting evidence.<sup>27</sup> The lines between these different types of misconduct are often very fine, and courts have sometimes struggled to define the lines between improper behavior and effective lawyering,<sup>28</sup> which makes it particularly important for courts to clear away the procedural barriers to effective review that are discussed below.

This article focuses on perhaps the most amorphous type of prosecutorial misconduct: trial misconduct.<sup>29</sup> Trial misconduct, as the name implies, occurs at trial in the presence of the jury. Trial misconduct is surprisingly hard to define,<sup>30</sup> in part because knowing what is improper requires a contrast with a discussion of what prosecutors are allowed to do.<sup>31</sup> In general, however, prosecutorial trial misconduct involves appeals to matters that the jury should not consider.<sup>32</sup>

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<sup>27</sup> Smith, *supra* note 8, at 835-36.

<sup>28</sup> Weiss, *supra* note 23, at 213.

<sup>29</sup> Professor Davis uses the similar term “courtroom misconduct,” which she defines as “making inappropriate or inflammatory comments in the presence of the jury; introducing or attempting to introduce inadmissible, inappropriate or inflammatory evidence; mischaracterizing the evidence or the facts of the case to the court or jury; committing violations pertaining to the selection of the jury; or making improper closing arguments.” DAVIS, ARBITRARY JUSTICE, *supra* note 6, at 125. While that formulation is helpful, this article does not deal with Batson violations in jury selection, as appellate courts use a different framework to review that type of misconduct than they do to review the other types of misconduct described in this article. See generally Henning, *supra* note 4 (discussing a variety of types of prosecutorial misconduct and how courts analyze them, including a discussion of how Batson analysis differs from other types of misconduct analysis). Additionally, while Davis is correct that prosecutorial trial misconduct can involve conduct other than improper remarks in closing argument, that type of comment is the most frequent and encompasses many of the types of misconduct she lists.

<sup>30</sup> See Weiss, *supra* note 23, at 213 (prosecutorial remarks at trial that violate due process is the broadest and hardest to define of all prosecutorial misconduct).

<sup>31</sup> See, e.g., Nidiry, *supra* note 5, at 1307-08 (“Generally, argument may discuss properly-admitted facts, including the probity of the evidence, the credibility of witnesses, and the application of the law, enhanced by suitable oratorical flourishes. Neither advocate is permitted to misstate testimony or ridicule opposing counsel, and neither should offer interpretations of the law. Counsel may not introduce any facts or evidence not already in the record, unless it is a common fact that can be assumed to be well-known to the jury. Counsel is also not permitted to assert her personal beliefs or opinions as to the weight of the evidence, and is prohibited from inflaming or prejudicing the jury.”).

<sup>32</sup> See Albert W. Alschuler, Courtroom Misconduct by Prosecutors and Trial Judges, 50 TEX. L. REV. 629, 643 (1972) (“I cannot define prosecutorial misconduct with precision, but I can suggest a simple and obvious test that seems applicable in most circumstances and that might lead to findings of error in many situations in which the courts today excuse prosecutorial conduct. The basic issue should be whether the prosecutor’s conduct was designed to induce a decision not based on a rational assessment of the evidence. If so, the conduct should be held improper.”). Professor Alschuler’s formulation includes an

Trial misconduct frequently involves statements made by the prosecutor during closing argument. In closing arguments, the prosecutor has the chance to sum up the evidence within a narrative framework to help the jury understand and interpret the evidence.<sup>33</sup> During closing arguments, prosecutors can properly sum up the evidence, offer reasonable deductions from it, and respond to arguments of opposing counsel.<sup>34</sup> “Closing argument is thus a dramatic departure from the earlier parts of the trial; counsel is released from the highly-regulated process of fact[-]finding and permitted to use evidence combined with rhetorical skills to convince the fact[-]finder that her inferences are correct.”<sup>35</sup> While reviewing courts often formally treat closing arguments as just being about a logical summation of the evidence, advocates and advocacy experts go beyond that narrow formulation to use rhetorical devices to move the jury, emotionally, toward a favorable decision.<sup>36</sup> In doing so, however, prosecutors often use rhetorical devices that cross permissible lines. Specifically, prosecutorial trial misconduct generally involves distorting the law or facts, asking the jury to consider impermissible matters, and making inflammatory arguments.

### *1. Distortions of the Record or Legal Standards*

Counsel cannot misstate either the facts or the law.<sup>37</sup> Regarding the facts, prosecutors must not argue outside of the

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intent component (“the prosecutor’s conduct was designed to . . .”) but otherwise is fairly similar to the ethical standard in the ABA Rules on prosecutors’ conduct: “The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence.” See Am. Bar Ass’n, ABA Standards for Criminal Justice Prosecution Function and Defense Function (3d ed. 1993), available at [http://www.abanet.org/crimjust/standards/pfunc\\_toc.html](http://www.abanet.org/crimjust/standards/pfunc_toc.html), Standard 3-5.8(d).

<sup>33</sup> Alschuler, *supra* note 32, at 306.

<sup>34</sup> Craig Lee Montz, Why Lawyers Continue to Cross the Line in Closing Argument: An Examination of Federal and State Cases, 28 OHIO N.U. L. REV. 67, 73 (2001).

<sup>35</sup> Nidiry, *supra* note 5, at 1306. See also Montz, *supra* note 34, at 73 (“Yet as much as the trial is a search for the truth, as an advocate, closing argument is an opportunity to convince the jury to believe your theory of the case as the correct one.”)

<sup>36</sup> See Ryan Patrick Alford, Appellate Review of Racist Summations: Redeeming the Promise of Searching Analysis, 11 MICH. J. RACE & L. 325, 330-31 (2006) (hereinafter “Appellate Review”) (describing the gap between judicial treatment and actual practice in summation, and noting that the courts’ ignoring the “extra-logical dimensions of prosecutorial argumentation” meant that courts significantly underestimated the prejudicial impact of racial prosecutorial misconduct). See also John B. Mitchell, Why Should Prosecutors Get the Last Word, 27 AM. J. CRIM. L. 139, 146-56 (2000) (discussing various studies about the importance of closing argument in juror decision-making).

<sup>37</sup> See Montz, *supra* note 34, at 111-13.

record.<sup>38</sup> For example, prosecutors commit misconduct when they exaggerate what the testimony shows, including forensic evidence.<sup>39</sup> They also cannot argue theories that are unsupported by (or even inconsistent with) the admitted evidence.<sup>40</sup> Prosecutors also should not suggest that inadmissible evidence exists<sup>41</sup> or that they have chosen not to present additional evidence.<sup>42</sup> These arguments are particularly problematic when the prosecutor references prior convictions or other highly inflammatory inadmissible material.<sup>43</sup> Somewhat related, although distinct, misconduct involves arguments that the prosecutor makes that are inconsistent with inadmissible evidence known to the prosecutor.<sup>44</sup> For example, prosecutors cannot prevent evidence from being admitted and then argue that the absence of that evidence supports the defendant's guilt.<sup>45</sup>

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<sup>38</sup> See Cicchini, *supra* note 13, at 342. Professor Cicchini argues that when a prosecutor comments on matters not in evidence, the prosecutor violates the defendant's Sixth Amendment right to confront witnesses against him. See *id.* at 343. Professor Sullivan also notes that Arkansas courts treat arguments that go beyond the record as particularly serious and as reversible error unless the trial court has taken steps to cure the error. J. Thomas Sullivan, Prosecutorial Misconduct in Closing Argument in Arkansas Criminal Trials, 20 U. ARK. LITTLE ROCK L. REV. 213, 233 (1998).

<sup>39</sup> See, e.g., Daniel S. Medwed, Closing the Door on Misconduct: Rethinking the Ethical Standards that Govern Summation, 38 HASTINGS CONST. L.Q. 915, 920 (2011). Professor Medwed notes that this type of misconduct is one of the most common that contributes to wrongful convictions. *Id.*

<sup>40</sup> See, e.g., *id.* at 921-24.

<sup>41</sup> Cantrell, *supra* note 7, at 548. Similarly, prosecutors should not refer to evidence known to be inadmissible, although Sullivan notes that courts often treat that error as harmless, notwithstanding the fact that such references undercut the trial court's role in determining what evidence will be admissible and the potentially powerful effect that such evidence can have on juries. Sullivan, *supra* note 38, at 237-39 (discussing both evidence known to the prosecutor and ruled inadmissible and evidence known only to the prosecutor).

<sup>42</sup> Cantrell, *supra* note 7, at 548-49. That ploy is designed to (or at least can have the effect of) making the prosecutor seem like a trusted ally of the jury, someone who would not waste the jury's time. *Id.* at 549.

<sup>43</sup> *Id.* at 549-50. Some of these attacks are at least arguably based on inferences from the record, but many of them are based instead on pure speculation, and they invite the jury to similarly speculate. See *id.* at 550-52.

<sup>44</sup> See Bazelon, *supra* note 10, at 392-94 (describing a case in which a defendant made an exculpatory statement to police, then provided a statement to internal affairs about alleged police brutality during the arrest; at trial, the defendant did not testify, and the jury heard about the allegation of brutality but not the earlier exculpatory statement, and the prosecutor improperly argued in closing that that the defendant in the internal affairs interview did not deny committing the crime).

<sup>45</sup> See, e.g., State v. Kassahun, 900 P.2d 1109 (Wash. 1995) (after court granted the state's motion in limine to preclude discovery of murder victim's gang affiliation, the prosecutor committed misconduct by implying that the defendant was untruthful because he failed to offer objective support for his belief that his business was being overrun by gangs); United States v. Golding, 168 F.3d 700

With respect to the law, the prosecution cannot suggest that the defendant has the burden to present evidence, essentially shifting the burden of proof to the defendant.<sup>46</sup> This type of misconduct often involves an indirect comment on a defendant's failure to testify, such as a reference to uncontested evidence.<sup>47</sup> Prosecutors are clearly forbidden from arguing directly that the jury can consider the defendant's failure to testify as evidence of guilt,<sup>48</sup> but the more common type of questionable argument raises the issue indirectly, for example by pointing out the defendant's failure to rebut a particular piece of evidence when the defendant was the only one capable of doing so.<sup>49</sup> Similar misconduct includes commenting on a defendant's post-arrest silence (his or her failure to provide police with an explanation or defense after arrest, regardless of whether the defendant testifies at trial) and suggesting that the defendant has a duty to put on evidence other than his or her own testimony.<sup>50</sup> "This is a dangerous area which courts monitor closely, and about which they admonish prosecutors regularly."<sup>51</sup> Even so, courts often find misstatements of the law to be harmless error because jurors are presumed to follow the properly given jury instructions rather than counsel's statements.<sup>52</sup>

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(4th Cir. 1999) (prosecutor threatened wife of defendant with possible criminal charges against her if she testified in her husband's favor at trial, then repeatedly argued to jurors that the absence of wife's corroborating testimony suggested the husband's guilt). See also Susan Bandes, Framing Wrongful Convictions, 2008 UTAH L. REV. 5, 16 (hereinafter "Framing") (describing her client Rosa Bennett's case, in which the prosecutor failed to notify the defense that Bennett had been arrested in a torn and bloody sweater, then argued that there was no physical evidence corroborating Bennett's story that the victim had attacked her on the night in question).

<sup>46</sup> See, e.g., Sullivan, supra note 38, at 232 n.103 (prosecutor improperly attempted to shift the burden of proof by suggesting that defendant failed to produce witnesses, but concluding that any error was harmless because the jury was later instructed on the state's burden of proof).

<sup>47</sup> Cantrell, supra note 7, at 537.

<sup>48</sup> The prosecutor violates a defendant's Fifth Amendment rights when directly referencing a defendant's failure to testify. Griffin v. California, 380 U.S. 609 (1965). But the line between improper indirect comments on silence and proper inferences from the record is often a very difficult one. See Cantrell, supra note 7, at 537, 538-40.

<sup>49</sup> Cicchini, supra note 13, at 341. See also Sullivan, supra note 38, at 231-32 (discussing the lines drawn in these types of cases from Arkansas).

<sup>50</sup> See Cantrell, supra note 7, at 540-42.

<sup>51</sup> Gershman, Mental Culpability, supra note 16, at 150. Professor Gershman notes that prosecutors "are adept at using language that conveys the illegitimate message . . . subtly[,]” which contributes to the difficulty of clearly distinguishing between proper and improper comments.

<sup>52</sup> See Montz, supra note 34, at 112-13.

## *2. Arguments that Rely on Prosecutor's Credibility or Improperly Attack Defense Counsel*

Prosecutors are supposed to keep the focus on the evidence and the inferences from the evidence, rather than relying on their own credibility or improperly attacking defense counsel's credibility. For example, prosecutors commit misconduct when relaying their own personal beliefs or opinions during closing argument.<sup>53</sup> Although some courts may forgive use of "I" statements from the prosecutor, it is generally misconduct for prosecutors to make "I" statements such as "I think" or "I believe."<sup>54</sup> The prosecutor also cannot present himself or herself as having expert knowledge about law enforcement or other matters and urge the jury to rely on that knowledge as part of its consideration of the case.<sup>55</sup> "This method employs a devastatingly powerful approach combining the stature of the prosecutor's office with his experience and knowledge of the case. He is, in effect, becoming a witness advising the jury as to the guilt of the defendant."<sup>56</sup>

Similarly, a prosecutor cannot "vouch for" prosecution witnesses. "Vouching occurs when the prosecutor interjects his personal opinion about the credibility of a witness or the strength of the evidence as a whole."<sup>57</sup> Instead, arguments about witness credibility are supposed to be clearly based on the evidence.<sup>58</sup> The line between proper and improper remarks is particularly challenging in this area.<sup>59</sup> For example, when a prosecutor calls a witness a "liar," the propriety of that remark depends on whether the reviewing court thinks that the evidence sufficiently supports that conclusion, so the same comment can be proper or improper,

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<sup>53</sup> Cantrell, *supra* note 7, at 542. See also Montz, *supra* note 34, at 108 ("It is improper and unethical for an attorney to "assert personal knowledge of facts in issue . . . or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused."). This prohibition against "I" language prevents prosecutors from making their own credibility an issue in the case and supports jurors in deciding cases based on the evidence and legal rules rather than on extraneous considerations. *Id.*

<sup>54</sup> See Cantrell, *supra* note 7, at 543 (some courts "allow 'I think' and 'I believe' statements so long as they are based on the evidence. In any event, a timely objection should be raised by defense counsel whenever the prosecutor employs the "I" pronoun. In the majority of cases one can safely predict the "I" pronoun signifies the beginning of testimony from the prosecution"); Montz, *supra* note 34, at 110-11 (noting that use of "I" language is typically found to be harmless error).

<sup>55</sup> See Cantrell, *supra* note 7, at 553-54.

<sup>56</sup> Cantrell, *supra* note 7, at 542.

<sup>57</sup> Montz, *supra* note 34, at 114-15.

<sup>58</sup> See Cantrell, *supra* note 7, at 544-45; Montz, *supra* note 34, at 115-16.

<sup>59</sup> See, e.g., Morrow & Larson, *supra* note 24, at 369-86.

depending on the evidence in the case.<sup>60</sup>

Relatedly, it is also generally improper for the prosecutor to attack the defense attorney's veracity or ethics.<sup>61</sup> "However, in the criminal context, it has been found that a prosecutor does have the right to comment on the defense counsel's argument during summation in limited circumstances without impermissibly attacking defense counsel."<sup>62</sup> For example, if defense counsel makes an argument based on his or her personal belief, then the prosecutor can respond in kind.<sup>63</sup>

### 3. *Inflammatory Arguments*

One of the most troubling types of inflammatory arguments involves appeals to race, ethnicity, or religious discrimination.<sup>64</sup> These cases involve a strikingly wide variety of conduct or images, including explicit appeals to racial prejudice,<sup>65</sup> use of animal imagery in connection with the defendant,<sup>66</sup> and use of caricatures linking race and violence.<sup>67</sup> While courts sometimes will call these appeals improper,<sup>68</sup> in other cases courts will go to great lengths to

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<sup>60</sup> See Montz, *supra* note 34, at 116-120 (collecting cases).

<sup>61</sup> See Cantrell, *supra* note 7, at 547; Montz, *supra* note 34, at 105 ("It is firmly established that the lawyer should abstain from any allusion to the personal peculiarities and idiosyncrasies of opposing counsel during closing argument.").

<sup>62</sup> Montz, *supra* note 34, at 106.

<sup>63</sup> See Cantrell, *supra* note 7, at 547-58.

<sup>64</sup> See, e.g., Andrea Lyon, Setting the Record Straight: A Proposal for Handling Prosecutorial Appeals to Racial, Ethnic, or Gender Prejudice During Trial, 6 MICH. J. RACE & L. 319, 320 (2001). See also Alschuler, *supra* note 32, at 639-40 (summarizing the courts' inconsistent treatment of cases involving race and religious appeals).

<sup>65</sup> See, e.g., Sherry Lynn Johnson, Racial Imagery in Criminal Cases, 67 TUL. L. REV. 1739, 1752 (1993) (describing cases with fairly explicit racial appeals, such as cases explicitly referencing racial crime statistics or referring to Native Americans being unable to handle liquor and therefore committing crimes). Johnson's article also details many other types of racial images found in the case law, although the article does not always indicate when courts found the prosecutor's remarks to be proper versus improper. *Id.* at 1751-59.

<sup>66</sup> See, e.g., Darden v. Wainwright, 477 U.S. 168, 179 n.7, 181 n. 12 (1986) (the prosecutor referred to the crime as the work of an animal and "a vicious animal," and said that the defendant "shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash."). See also Johnson, *supra* note 65, at 1747, 1752 (describing the use of animal imagery in various cases, including in the Rodney King Case).

<sup>67</sup> See generally Alford, Appellate Review, *supra* note 36, at 344-59 (discussing the earlier explicit forms of the "Black brute" caricature and the continuing power of that stereotype to drive both social policy decisions and criminal trial verdicts today, even when race is never explicitly referenced).

<sup>68</sup> See, e.g., State v. Monday, 257 P.3d 551 (Wash. 2012) (holding that the prosecutor improperly injected racial prejudice into the trial by using the term "po-leese" when questioning witnesses and invoking an alleged African-

ignore the racial overtones or to justify the remarks.<sup>69</sup> Although the United States Supreme Court stated in 1987 that “[t]he Constitution prohibits racially biased prosecutorial arguments,”<sup>70</sup> commentators suggest that racial appeals have simply become more subtle rather than disappearing from prosecutorial argument.<sup>71</sup>

Prosecutors sometimes inappropriately appeal to other types of prejudice as well. These appeals can relate to wealth/class, to patriotism, to the jurors as taxpayers or parents, etc.<sup>72</sup> These appeals may distance the jurors from the defendant in terms of a particular trait/topic or appeal to the emotion related to that trait.<sup>73</sup> “Each distinct group carries its peculiar set of biases. If the prosecution can successfully appeal to these dormant instincts, it may arouse the jury to convict in order to protect the shared values inherent to the groups. The obvious danger is that any doubts in the case will be resolved against the accused because he is not a member of the group.”<sup>74</sup>

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American anti-snitching code, and reversing the defendant’s conviction as a result).

<sup>69</sup> See, e.g., Johnson, *supra* note 65, at 1781-83 (discussing numerous cases in which the courts failed to acknowledge the racial overtones of various types of arguments); Alford, *Appellate Review*, *supra* note 36, at 343 (discussing the court ignoring the inherent racism in comparing the defendant to a gorilla, despite the known racial slur involved); Lyon, *supra* note 64 at 327-328 (discussing Smith v. Farley, 59 F.3d 659 (7th Cir. 1995), in which the Seventh Circuit “said that it was not clear the prosecutor’s references to ‘shucking and jiving’ regarding a Black witness on the stand, and to ‘Superfly’ regarding the Black defendant, would have been significant to a White jury”; the court suggested that these terms could be “accepted as a natural and racially neutral part of speech.”).

<sup>70</sup> McCleskey v. Kemp, 481 U.S. 279, 309 n.30 (1987).

<sup>71</sup> See Alford, *Appellate Review*, *supra* note 36, at 332-33. The exact scope of what constitutes race-based prosecutorial misconduct is an important but difficult question. As Alford notes, courts are not adept at drawing this line. *Id.* at 328, 339-44. When courts do find arguments to be racist, however, then the Equal Protection Clause is implicated, which shifts the burden to the state for proving that the error was harmless beyond a reasonable doubt, making it easier (at least ostensibly) for a defendant to obtain reversal. See *id.* at 338-39. At least one court has provided for heightened scrutiny of race-based prosecutorial misconduct based on the denial of the right to a trial by an impartial jury. See *Monday*, 257 P.3d at 557-58.

<sup>72</sup> See Cantrell, *supra* note 7, at 561-62.

<sup>73</sup> See *id.*

<sup>74</sup> *Id.* at 562. See also Ryan Patrick Alford, *Catalyzing More Adequate Federal Habeas Review of Summation Misconduct: Persuasion Theory and the Sixth Amendment Right to an Unbiased Jury*, 59 OKLA. L. REV. 479, 519 (2006) (hereinafter “Catalyzing”) (“The effect of fear within an inflammatory summation should also not be underestimated, particularly considering the racial dynamics of closing arguments in criminal trials. . . . When people’s mortality is made salient, they punish more severely those who transgress cultural norms. . . . They indulge in more racial/cultural stereotyping. And they attribute more

Although many inflammatory remarks reflect in-group versus out-group logic, there are other types of improperly inflammatory remarks as well. For example, prosecutors sometimes improperly appeal to law and order sentiments, such as urging the jury to “send a message” by convicting the defendant or arguing that the case is particularly important.<sup>75</sup> Similarly, the prosecutor generally should not use “war” imagery, such as talking about the “War on Drugs,” although such comments are sometimes upheld either as not being improper or as at least not leading to reversal.<sup>76</sup> Additionally, prosecutors should not appeal to jurors’ fears, for example by arguing that they should put themselves in the shoes of the victim or by arguing that failure to convict will put their own or others’ safety at risk.<sup>77</sup>

Professor Cantrell notes the particular danger posed by such inflammatory arguments: “The use of inflammatory argument employs a unique and serious risk. By appealing to the passions and prejudices of the jury, the prosecution introduces anger and fear into the deliberative process of determining guilt or innocence. This leads to irrational decision[-]making based on emotions rather than facts.”<sup>78</sup> Yet courts often allow prosecutors wide latitude in making inflammatory arguments.<sup>79</sup>

#### B. The Pervasiveness and Severity of Prosecutorial Trial Misconduct

Given the wide variety of improper arguments discussed above, it should not be surprising that prosecutorial trial misconduct occurs all too often. When it does, there can be very severe consequences for both individual defendants and the criminal justice system as a whole.

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blame to members of outgroups. Thus, fear provokes fallacious reasoning, and undercuts rational decision-making processes.”) (internal quotation omitted).

<sup>75</sup> Cantrell, *supra* note 7, at 554-55. But see Sullivan, *supra* note 38, at 228 (noting that Arkansas courts typically conclude that “send a message” arguments are proper rather than improper).

<sup>76</sup> See Cantrell, *supra* note 7, at 555.

<sup>77</sup> Id. at 555-56. Cantrell suggests that these bald appeals to fear are more likely to lead to reversal than other types of errors. See id. at 557. He does not, however, provide sufficient support for the idea that these types of appeals are likely to be found to be reversible error. See also Montz, *supra* note 34, at 102-104 (discussing the impropriety of “golden rule” arguments that ask the jury to put themselves in the position of one of the parties, such as feeling how terrifying the victim’s situation was, and asking the jury to decide based on “personal interest and bias rather than on the evidence.”).

<sup>78</sup> Cantrell, *supra* note 7, at 554.

<sup>79</sup> Sullivan, *supra* note 38, at 242.

In terms of pervasiveness, empirical research supports the idea that prosecutorial misconduct is widespread.<sup>80</sup> For example, the Northern California Innocence Project's recent study found that state and federal appellate courts in California concluded that prosecutorial misconduct had occurred in more than 700 cases over a 12 year period, which equates to more than one instance per week of prosecutorial misconduct.<sup>81</sup> This study almost certainly drastically understates the pervasiveness of the problem, in that it only dealt with misconduct that was found by appellate courts in available decisions; it did not include trial court decisions that prosecutorial misconduct had occurred or cases in which the courts declined to decide whether prosecutorial misconduct occurred.<sup>82</sup> Another study, conducted by the Center for Public Integrity, examined more than 11,000 cases in which prosecutorial misconduct allegations were reviewed on appeal; the appellate courts reversed convictions or granted other remedies in more than 2,000 of these cases, and they found misconduct had occurred but excused it as harmless error in hundreds more cases.<sup>83</sup>

In fact, the empirical research shows that appellate courts rarely reverse convictions based on prosecutorial misconduct. For example, the authors of a recent Louisiana study found that the appellate court reversed in only 7.5 percent (20/150) of cases in which the appellate court concluded that the prosecutor had committed misconduct.<sup>84</sup> In more than 22% of the cases in which the court found prosecutorial misconduct, the court concluded that the defendant had failed to object or otherwise was barred procedurally from relief, while in nearly 78% of the cases, the court concluded that the error was harmless.<sup>85</sup> Similarly, a 2007 California study showed that the California appellate courts reversed convictions in only eight percent of the cases in which

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<sup>80</sup> None of the empirical studies on prosecutorial misconduct distinguish trial misconduct from other types of prosecutorial misconduct. Given the lack of available data specifically dealing with trial misconduct, this section relies generally on the data for prosecutorial misconduct generally. It would be useful, however, for empirical research to be conducted that specifically focuses on prosecutorial trial misconduct as opposed to other types of prosecutorial misconduct.

<sup>81</sup> Johns, *supra* note 11, at 513 (discussing California Innocence Project work).

<sup>82</sup> See *id.*

<sup>83</sup> Angela J. Davis, Feature, The American Prosecutor: Power Discretion, and Misconduct, 23 CRIM. JUST. 24, 32-33 (2008) (hereinafter “Feature”). Again, this study only included cases in which the misconduct was discovered and litigated. Davis also discusses an extensive investigative report done by two reporters from the Chicago Tribune in the 1990s that involved similar findings to the studies described above. *Id.*

<sup>84</sup> Ghetti and Killebrew, *supra* note 12, at 353.

<sup>85</sup> *Id.* at 353-54.

they found that prosecutorial misconduct had occurred.<sup>86</sup> “So, thinking that a reversal is going to cure a wrong that was done within the system is . . . naïve.”<sup>87</sup>

Instead, prosecutorial misconduct can have significant consequences, not only for criminal defendants but for the entire criminal justice system.<sup>88</sup> For example, prosecutorial misconduct has been found to be a significant contributing factor in wrongful convictions.<sup>89</sup> “As the 2009 report of the Justice Project observed, ‘prosecutorial misconduct was a factor in dismissed charges, reversed convictions, or reduced sentences in at least 2,012 cases since 1970.’”<sup>90</sup> Similarly, another study found that 43 percent or 180 DNA exonerations involved allegations of prosecutorial misconduct.<sup>91</sup> In such cases, prosecutorial misconduct “may result in an innocent person going to prison and the actual wrongdoer remaining free to commit future crimes.”<sup>92</sup> Additionally, these wrongful convictions, and the role that prosecutorial misconduct plays in their occurrence, can undermine the criminal justice system’s overall effectiveness.<sup>93</sup>

The effect of prosecutorial misconduct can also be significant even when used against a defendant who actually committed the charged crime.<sup>94</sup> Prosecutorial misconduct

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<sup>86</sup> Johns, *supra* note 11, at 512. “This study was followed up by an annual report for 2010 documenting 130 judicial findings of prosecutorial misconduct in 102 cases, 26 of which resulted in reversals of convictions, orders for new trial, or orders barring prosecution evidence.” *Id.*

<sup>87</sup> Ghetty & Killebrew, *supra* note 12, at 354.

<sup>88</sup> See, e.g., Bazelon, *supra* note 10, at 441.

<sup>89</sup> Johns, *supra* note 11, at 510.

<sup>90</sup> *Id.* at 512 (quoting John F. Terzano et al., Justice Project, Improving Prosecutorial Accountability: A Policy Review 2 (2009), available at <http://amlawdaily.typepad.com/JusticeProjectReport.pdf>).

<sup>91</sup> *Id.* (citing Panelists Examine Why Prosecutors Are Largely Ignored by Disciplinary Officials, 74 U.S.L.W. 2526, 2526 (Mar. 7, 2006) (quoting Professor Ellen Yaroshefsky)).

<sup>92</sup> Peter A. Joy, The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System, 2006 WISC. L. REV. 399, 407. See also Johns, *supra* note 11, at 515 (discussing in more detail the terrible toll that wrongful convictions take on those wrongfully convicted, on the crime victims and their families, and on those who become future victims of crimes committed by the original perpetrator while the wrong person is incarcerated). Wrongful convictions can also have significant financial consequences as well. *Id.* at 515-16.

<sup>93</sup> Alschuler, *supra* note 32, at 638 (“When our system of criminal procedure fails to ensure a high degree of certainty of guilt, criminal punishment loses some of its effectiveness as an instrument of social control. For this reason, arguments by prosecutors that tend to make juries less deliberate, less reflective, and less dispassionate cheapen the criminal law.”).

<sup>94</sup> For a very good discussion of the need to go beyond concerns of factual innocence to broader concerns of systemic fairness, see Bandes, Framing, *supra* note 45, at 16-18.

“undermines the due process afforded to the accused,”<sup>95</sup> which in turn may make defendants think that they can never get a fair trial.<sup>96</sup> That in turn “promotes increased cynicism by participants of the justice system and the public alike.”<sup>97</sup> Defendants who go to trial take significant risks in terms of sentencing; those risks should not be compounded by inappropriate prosecutorial behavior.<sup>98</sup>

Prosecutorial trial misconduct is also very public, often done in front of juries, and it may affect the jurors’ perceptions of the criminal justice system, whether consciously or not. In fact, the public nature of these actions can undermine public respect for law enforcement and even the law itself.<sup>99</sup> “The undermining of the public’s confidence is exacerbated by the fact that minorities and the poor suffer the most from prosecutorial misconduct.”<sup>100</sup> This behavior can also paint all prosecutors in a negative light, even those who “uphold the law and live up to their obligations to seek justice.”<sup>101</sup>

For all these reasons, including the role prosecutorial misconduct plays in wrongful convictions, and its harmful effects on individual defendants and the justice system as a whole even when it is used against factually guilty defendants, prosecutorial trial misconduct is a serious problem, more serious than similar misbehavior committed by criminal defense counsel or in civil cases.<sup>102</sup> Similarly, prosecutorial trial misconduct is a significant problem, worthy of focused attention, even though very few cases

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<sup>95</sup> Joy, *supra* note 92, at 407.

<sup>96</sup> See Gershman, *Hard Strikes*, *supra* note 2, at 188.

<sup>97</sup> Gershman, *Mental Culpability*, *supra* note 16, at 132. See also Burke, *Prosecutors and Peremptories*, *supra* note 20, at 1475 (discussing the social science research about the importance of procedural justice in overall respect for and compliance with the law).

<sup>98</sup> See generally Steven P. Grossman, *An Honest Approach to Plea Bargaining*, 29 AM. J. TRIAL ADVOC. 101 (2005) (arguing that the differential sentencing of criminal defendants who go to trial versus those plead guilty imposes a punishment on defendants exercising their trial rights); Alschuler, *supra* note 32, at 631 (regarding vulnerability of defendants given their liberty interests at stake in trials).

<sup>99</sup> *Id.* at 633. Alschuler makes an interesting observation that despite the logic of holding prosecutors to a higher standard of courtroom decorum than defense counsel, in fact judicial practice is to be much quicker to hold defense counsel in contempt than to punish prosecutors for misconduct. *See id.*

<sup>100</sup> Johns, *supra* note 11, at 516.

<sup>101</sup> *Id.* at 514-16.

<sup>102</sup> See, e.g., Lyon, *supra* note 64, at 335-36. Cf. Montz, *supra* note 34; Nidiry, *supra* note 5, at 1318. While defense attorneys should generally follow the same types of rules about what is and is not proper argument (e.g. defense counsel should not be permitted to misstate the evidence or make explicitly racial appeals), improper argument by defense counsel is less serious. Arguments by prosecutors but not defense counsel bear the imprimatur of the state. And prosecutors but not defense counsel have a wider responsibility to pursue justice, not just victories for their clients.

actually go to trial and other types of prosecutorial misconduct may be even more common.<sup>103</sup> “The credibility of the justice system is on the line, and thus courts need to identify procedures for determining whether the argument appeals to improper prejudice and then determine what to do about it.”<sup>104</sup>

### **III. Courts Currently Rely too Heavily on Procedural Doctrines to Protect Prosecutors Who Engage in Misconduct**

Formally, courts often use a two-step analysis for prosecutorial misconduct claims, looking first to see “whether the conduct, viewed objectively, was improper,” and then looking to see “whether the probable impact of that conduct prejudiced the verdict.”<sup>105</sup> In other words, courts typically first look to see whether prosecutorial misconduct actually occurred, and if so, then courts look to see whether that misconduct was harmless error. That two-step process assumes, however, that defense counsel objected at trial to the alleged misconduct; if not, then courts also need to consider how the failure to object affects the analysis.<sup>106</sup>

In practice, however, the procedural issues (whether the error was properly preserved and whether any error was harmless) in prosecutorial misconduct cases often overwhelm the analysis of whether prosecutorial misconduct occurred at all: “The question in a given case may be not whether the prosecutor’s conduct was erroneous, but whether the error was so clear that an appellate court could consider it despite the absence of an objection at trial, whether the effect of the error was minimized or eliminated by the subsequent action of the court or prosecutor, or whether the error was serious enough to affect the integrity of the verdict.”<sup>107</sup> As a result of these procedural issues, court decisions are often unpredictable, and cases often lack significant precedential value.<sup>108</sup> And even when courts do declare conduct to be

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<sup>103</sup> See, e.g., Davis, Feature, supra note 83, at 32-33.

<sup>104</sup> Lyon, supra note 64, at 335.

<sup>105</sup> Gershman, Mental Culpability, supra note 16, at 133.

<sup>106</sup> See infra section III(B). This article focuses on the standards and procedures employed on direct review, rather than the standards used for habeas corpus review. For a discussion of the latter type of challenges to prosecutorial misconduct, see generally Alford, Catalyzing, supra note 74.

<sup>107</sup> Alschuler, supra note 32, at 638.

<sup>108</sup> Id. (“The sense that most clearly emerges from the decisions is that of unpredictability. Cases proceed on an ad hoc basis, and results do not follow a consistent pattern. Even if the alleged misconduct in one case seems similar to the alleged misconduct in another, the procedural context is invariably different. The force of precedent is therefore slight. The courts seem to enjoy an almost total freedom to reach any result on any given set of facts.”). See also Dustin D. Berger, Moving Toward Law: Refocusing Federal Courts’ Plain Error Doctrine

improper, they usually fail to provide any meaningful remedy.<sup>109</sup>

This section explains the doctrines of harmless error and preservation of error, showing how the current application of these doctrines in prosecutorial misconduct cases poses significant problems. These problems include muddying the courts' determinations of whether prosecutorial misconduct occurred, failing to provide adequate remedies for misconduct, and undercutting the courts' ostensible message against prosecutors engaging in such behavior. The discussion below starts with harmless error because that doctrine is a more common basis for courts' decisions, and then moves on to preservation of error.<sup>110</sup>

### A. Harmless Error

"[H]armless error is a doctrine born of the belief that some errors are created more equal than others and that the simple finding of error is not always a sufficient ground to justify the reversal of an otherwise valid conviction."<sup>111</sup> This section describes the evolution of the harmless error doctrine, the various tests courts use when applying it, and some of the critiques of the doctrine; these topics are discussed both generally and as applied to prosecutorial misconduct cases.

#### 1. *The Evolution of and Justification for Harmless Error Analysis*

Harmless error analysis is actually a fairly recent development in criminal law,<sup>112</sup> and its use has been greatly expanded over the last fifty years, so that it now may be the most

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in Criminal Cases, 67 U. MIAMI L. REV. 521, 526 (2013) (noting that decisions applying the Plain Error doctrine "do little to help future courts or defendants in deciding what kinds and levels of prosecutorial misconduct are sufficiently serious to warrant a remedy" and arguing that courts should take a more precedent-based approach to harmless error in prosecutorial misconduct cases).

<sup>109</sup> See, e.g., Brian Duffy, Note: Barring Foul Blows: An Argument for a Per Se Reversible Error Rule for Prosecutors' Use of Religious Arguments in the Sentencing Phase of Capital Cases, 50 VAND. L. REV. 1335, 1344-45 (1997) (although courts may offer "rhetorical flourishes" in condemning prosecutorial behavior, they almost always rely on contextual factors to conclude that any error was harmless).

<sup>110</sup> See, e.g., Ghetti and Killebrew, supra note 12, at 353 (one example study showing that appellate courts rely much more frequently on harmless error rather than preservation of error in refusing to reverse in cases involving prosecutorial misconduct).

<sup>111</sup> Sam Kamin, Harmless Error and the Rights/Remedies Split, 88 VA. L. REV. 1, 9 (2002).

<sup>112</sup> Id. at 10.

cited rule in criminal appeals.<sup>113</sup> Until 1919, U.S. courts followed the English rule and required reversal for “any error of substance,” whether constitutional or statutory.<sup>114</sup> Between 1919 and 1967, errors of constitutional magnitude remained grounds for per se reversal, while non-constitutional errors were subject to harmless error analysis.<sup>115</sup> Then in 1967, the Supreme Court first applied harmless error analysis to constitutional errors, in *Chapman v. California*, a case involving prosecutorial misconduct.<sup>116</sup> In *Chapman*, the court for the first time said that a constitutional error could be deemed harmless, but the state would have the burden of proving harmlessness beyond a reasonable doubt.<sup>117</sup> “The general trend in the courts has been to expand the harmless-error rule by reducing the number of errors that are reversible per se (that is, even if harmless) and . . . by reducing the burden of proof on the prosecution of convincing the appellate court that an error was harmless.”<sup>118</sup>

Currently, courts frequently rely on harmless error to affirm convictions in all types of cases.<sup>119</sup> In doing so, courts sometimes conclude that an error occurred but the error was harmless; in other cases, the court refuses to decide whether or not an error occurred at all because even if there was an error, the error was harmless.<sup>120</sup>

The primary justifications offered for expanded use of harmless error analysis involve protecting the finality of the trial result and avoiding the costs associated with a second trial that would lead to the same result.<sup>121</sup> Retrial costs extend beyond monetary costs to the time and energy involved and the psychological costs to victims who must relive their disturbing experiences.<sup>122</sup> The Supreme Court has noted that these societal costs are justified “when an error in the first proceeding has deprived a defendant of a fair determination of the issue of guilt or innocence[, but] the balance of interest tips decidedly the other way when an error has had no effect on the outcome of the

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<sup>113</sup> William M. Landes & Richard A. Posner, Harmless Error, 30 J. LEGAL STUD. 161, 161, 172 (2001).

<sup>114</sup> Kamin, supra note 111, at 10.

<sup>115</sup> Id.

<sup>116</sup> Id. at 11-12 (discussing *Chapman v. California*, 386 U.S. 18 (1967)).

<sup>117</sup> Id. at 11 (discussing *Chapman*).

<sup>118</sup> Landes & Posner, supra note 113, at 172.

<sup>119</sup> Id. at 184.

<sup>120</sup> Id. (“In 87 percent of the cases, the errors were held to be harmless—in 45 percent the appellate court found errors but held that they were harmless and in another 42 percent the court concluded that even if there was an error (which the court did not decide) it was harmless.”)

<sup>121</sup> Michael T. Fisher, Note, Harmless Error, Prosecutorial Misconduct, and Due Process: There's More to Due Process Than The Bottom Line, 88 COLUM. L. REV. 1298, 1301 (1988).

<sup>122</sup> United States v. Mechanik, 475 U.S. 66, 72 (1986).

trial.”<sup>123</sup>

## 2. How Courts Analyze Harmless Error

The courts use a variety of standards to measure whether an error was harmless.<sup>124</sup> “On direct review in the federal courts, the standard for determining if a non-constitutional error is harmless is whether the error ‘had substantial and injurious effect or influence in determining the jury’s verdict.’”<sup>125</sup> For constitutional errors, on the other hand, the prosecution must show that the error was harmless beyond a reasonable doubt.<sup>126</sup> The standards vary even more widely in state courts. Some states apply the constitutional/non-constitutional error distinction, while other states only use the non-constitutional standard that requires the defendant to prove prejudice.<sup>127</sup> Additionally, some courts apply the constitutional harmless error standard when a specific constitutional right is implicated but not for violations of the general right to a fair trial.<sup>128</sup>

The choice between the constitutional and non-constitutional standard is at least theoretically a very important one, as the constitutional harmless error standard shifts the burden of proof to the prosecution to show harmlessness beyond a reasonable doubt, rather than requiring the defendant to affirmatively show prejudice.<sup>129</sup> Yet courts may not always be following Supreme Court precedent about who should have the

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<sup>123</sup> *Id.*

<sup>124</sup> See Jason M. Solomon, Causing Constitutional Harm: How Tort Law Can Help Determine Harmless Error in Criminal Cases, 99 NW. U. L. REV. 1053, 1061 (2005) (describing the many different formulations that the Supreme Court has offered of harmless error analysis in cases decided in the 1990s). This article focuses on the standards that apply to direct review of convictions, rather than the standards that apply to habeas review. For a discussion of the standards that apply in habeas cases, see, e.g., Duffy, supra note 109, at 1342-44. For purposes of this discussion, I have also set aside how preservation of error concerns (such as the failure to raise a timely objection or ask for a mistrial) affects appellate review of harmless error analysis. That issue is discussed in more detail infra in section III(B).

<sup>125</sup> Lyon, supra note 64, at 321 (internal quotation and alterations omitted).

<sup>126</sup> *Id.* at 322. That standard comes from Chapman v. California, 386 U.S. 18 (1967).

<sup>127</sup> *Id.* at 323-24. See also Alschuler, supra note 32, at 664 (discussing the “bewildering variety of state standards” that apply in cases of non-constitutional harmless error analysis).

<sup>128</sup> See, e.g., Krista L. Nelson & Jacob J. Stender, Note, “Like Wolves in Sheep’s Clothing”: Combating Racial Bias in Washington State’s Criminal Justice System, 35 SEATTLE U. L. REV. 849, 854 (2012).

<sup>129</sup> See *id.* at 853-54 (discussing the Washington formulations of these standards, but the point holds for the federal formulations of the standards as well).

burden of showing whether the error was harmless.<sup>130</sup> Furthermore, some commentators suggest that who has the burden of showing harmless error rarely effects the court's decision about whether an error is harmless.<sup>131</sup>

Regardless of how the burden of proof is allocated, the courts generally take two different approaches to determining harmless error.<sup>132</sup> Under the error-based approach, courts examine whether the particular error was likely to have affected the outcome in the particular trial.<sup>133</sup> By contrast, under the guilt-focused approach, the courts imagine a hypothetical trial without the error and ask whether there was still enough evidence of guilt to affirm the conviction.<sup>134</sup> One empirical study suggests that the difference between approaches significantly affects case outcomes: “analyses where a guilt-based approach was used by the court during its analysis found the error harmless 93% of the time, while those using an error-based approach found the error harmless only 47% of the time.”<sup>135</sup>

Under either of these approaches, the courts generally look to a variety of factors in analyzing harmless error. Many courts consider whether the misconduct was severe, whether the trial court took corrective actions such as instructing the jury to disregard the misconduct, and whether the remaining evidence against the defendant was strong.<sup>136</sup> Courts sometimes also look at other factors, including whether the misconduct was invited by the

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<sup>130</sup> See Solomon, *supra* note 124, at 1068 (describing his empirical study of harmless error analysis in federal habeas cases, in which “more than one in four improperly placed the burden on the petitioner.”).

<sup>131</sup> See Keith A. Findley and Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WISC. L. REV. 291, 321(2006). Additionally, Professor Landes and Judge Posner criticize the distinction between constitutional and non-constitutional error, saying this distinction does not make sense because “there is nothing in the nature of a constitutional error that makes it affect any of the variables in our model.” Landes & Posner, *supra* note 113, at 172.

<sup>132</sup> See Solomon, *supra* note 124, at 1062.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 1071.

<sup>136</sup> See Joy, *supra* note 92, at 426 n.137 (citing cases). This approach is consistent with the iconic prosecutorial misconduct case discussed at the beginning of this article, Berger v. United States, 295 U.S. 78, 88 (1935). In *Berger*, the court concluded that it was “highly probable” that the misconduct affected the verdict because that misconduct was “pronounced and persistent” rather than “slight or confined to a single instance;” the trial court’s response to the misconduct was not forceful; and the remaining case against the defendant was weak. *Id.* at 85, 89.

other side and whether the misconduct was an isolated instance or was repeated throughout the trial.<sup>137</sup>

### *3. Critiques of Harmless Error Analysis, Particularly in Prosecutorial Misconduct Cases*

Given the doctrinal morass described above, it should be no surprise that the harmless error doctrine has been extensively criticized. Some commentators criticize the excessive malleability of the factors used in harmless error analysis,<sup>138</sup> noting that courts sometimes rely on precisely the same factor to reach opposite conclusions.<sup>139</sup> Professor Kamin notes the impossibility of a reviewing court being able to “unring a bell that has already rung” by mentally “travel[ing] back in time and imagin[ing] a world that never was” (how the case would have gone without the error); he notes that the courts’ harmless error conclusions “can be no better than science fiction.”<sup>140</sup>

Other commentators criticize the doctrine in terms of its ineffectiveness in reaching errors that probably really did affect the outcome in particular cases. For example, Professor Cicchini argues that the concept of harmless error is fundamentally flawed, in that evidence shows that judges are ineffective at evaluating what matters to juries in particular cases, and in fact judges simply use their discretion under harmless error analysis to preserve convictions.<sup>141</sup> The empirical research into wrongful conviction cases bears out these criticisms. For example, a study of the first 200 DNA exonerations revealed that half the courts upholding the convictions of people who turned out to be actually innocent referred to the likely guilt of the defendant, and in nearly a third of the cases, the courts specifically relied on harmless error analysis

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<sup>137</sup> See Bazelon, *supra* note 10, at 423. Occasionally, courts also consider the length of the jury’s deliberations and whether the jury acquitted the defendant of some charges or acquitted some co-defendants. See Alschuler, *supra* note 32, at 659-60.

<sup>138</sup> See, e.g., Kamin, *supra* note 111, at 7 (pointing out the malleability of harmless error analysis, based on his review of nearly 300 California Supreme Court decisions in death penalty cases, in which more than ninety percent of death sentences were upheld on appeal even though the courts found constitutional error in almost all cases).

<sup>139</sup> Alschuler, *supra* note 32, at 659 (e.g. courts sometimes conclude that an error was harmless in part because long deliberations show that the jury was careful, while in other cases courts use long deliberations as evidence that the case was extremely close such that the error was not harmless). See also *id.* at 660 (noting that courts sometimes rely on factors that have no logical relevance to whether or not the error was harmless).

<sup>140</sup> Kamin, *supra* note 111, at 20-21.

<sup>141</sup> Cicchini, *supra* note 13, at 347.

in upholding the convictions.<sup>142</sup> A similar study showed that in nearly thirty percent of DNA exonerations, appellate courts had relied on harmless error in upholding convictions prior to the discovery of the DNA evidence.<sup>143</sup>

Furthermore, the courts' routine reliance on harmless error in prosecutorial misconduct cases "strongly suggests that the courts do not care very much about prosecutorial misconduct."<sup>144</sup> Professor Bennett Gershman labels the harmless error rule "a jurisprudential fiasco" and notes that it "tacitly informs prosecutors that they can weigh the commission of evidentiary or procedural violations not against a legal or ethical standard of appropriate conduct, but rather, against an increasingly accurate prediction that the appellate courts will ignore the misconduct when sufficient evidence exists to prove the defendant's guilt."<sup>145</sup> Professor Angela Davis similarly notes that the harmless error rule "permits, perhaps even unintentionally encourages, prosecutors to engage in misconduct during trial with the assurance that so long as the evidence of the defendant's guilt is clear, the conviction will be affirmed."<sup>146</sup> Others note with concern that courts rely on harmless error analysis to excuse even serious and pervasive misconduct.<sup>147</sup> This system creates little incentive for prosecutors to change their behavior and avoid making improper comments<sup>148</sup> because future prosecutors committing the same impropriety in a later case that was held to be misconduct in an earlier one are no more likely than the prosecutor in the first case to see any meaningful consequences from the misconduct.<sup>149</sup> Then-Judge

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<sup>142</sup> See Keith A. Findley, Adversarial Inquisitions: Rethinking the Search for the Truth, 56 N.Y.L. SCH. L. REV. 911, 934-35 (2011/12). See also *id.* at 935 ("Judges simply cannot be expected to recognize or zealously pursue facts supporting claims of innocence when they objectively view the likelihood of innocence to be so remote; only zealous advocates can be expected to push for such evidence and such a perspective.").

<sup>143</sup> Johns, *supra* note 11, at 518 (of 65 cases, 19 involved conclusions that misconduct had occurred but was harmless). The courts in 31 of the 65 cases found that no misconduct occurred; in only twelve cases did the courts accept the existence of misconduct and conclude that this misconduct was not harmless. *Id.* All 65 people were actually innocent.

<sup>144</sup> Alschuler, *supra* note 32, at 660.

<sup>145</sup> Bennett L. Gershman, The New Prosecutors, 53 U. PITTS. L. REV. 393, 425 (1992) (hereinafter New Prosecutors).

<sup>146</sup> DAVIS, *supra* note 6, at 127.

<sup>147</sup> See, e.g., Johns, *supra* note 11, at 517; Alschuler, *supra* note 32, at 660.

<sup>148</sup> Kamin, *supra* note 111, at 15 (the use of harmless error analysis as currently formulated in prosecutorial misconduct cases means that these cases "merely inform[]prosecutors what they may and may not do without giving them any real incentive to change their behaviors.").

<sup>149</sup> *Id.* at 56-59 (contrasting the courts' approaches to harmless error with their approaches to qualified immunity and retroactivity; Kamin argues that the latter

Jerome Frank may have summed it up best when he noted courts “breed[] a deplorably cynical attitude toward the judiciary” when they adopt an “attitude of helpless piety” by using “vigorous language in denouncing” prosecutors’ conduct but refusing to reverse the resulting convictions.<sup>150</sup>

## B. Plain Error

The other major procedural doctrine that interferes with the courts’ treatment of prosecutorial trial misconduct involves the plain error doctrine, which limits appellate review of errors that were not objected to at trial. “It is well settled that a contemporaneous objection is generally required in order to preserve any error on appeal claiming improper closing argument.”<sup>151</sup> When there is no objection at trial, then courts apply the plain error rule to determine whether they should review the alleged error, and if so, how to analyze it, as explained below. Unlike harmless error, which is a relatively new doctrine, the doctrine of plain error has existed in various forms for nearly 120 years.<sup>152</sup> This section provides an overview of the plain error doctrine and critiques of that doctrine, both generally and as applied to prosecutorial trial misconduct.

### 1. *Justifications for and the Mechanics of the Plain Error Doctrine*

When defense counsel fails to object to a statement at trial, this failure to object makes it significantly harder to convince an appellate court that the behavior was misconduct that justifies reversal. In federal courts, the presence or absence of an objection changes the reviewing court’s analysis of whether any error mattered.<sup>153</sup> When a timely objection was made at trial, then under Federal Rule of Criminal Procedure 52(a), the government has the burden of showing that the error (in these cases, prosecutorial misconduct) did not prejudice the defendant. On the other hand, when there was no objection, then the defendant must show “plain error,” which requires both that the error was clearly contrary to

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two doctrines have significantly more of a future deterrent effect than harmless error analysis).

<sup>150</sup> United States v. Antonelli Fireworks Co., 155 F.2d 631, 661 (2d Cir.) (Frank, J., dissenting), cert. denied, 329 U.S. 742 (1946).

<sup>151</sup> Montz, supra note 34, at 75.

<sup>152</sup> See Tory A. Weigand, Raise or Lose: Appellate Discretion and Principled Decision-Making, 17 SUFFOLK J. TRIAL & APP. ADV. 179, 193 (2012) (quoting Wiborg v. United States, 163 U.S. 632 (1896) (“if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it’ even though no exception was made to the error at trial”).

<sup>153</sup> See Rule 52 of the Federal Rules of Criminal Procedure.

law and that the error was so prejudicial that it denied the defendant's right to a fair trial.<sup>154</sup>

The "plain error" rule applies in all federal and many state courts.<sup>155</sup> Other states take related but slightly different approaches.<sup>156</sup> For example, some state courts treat the failure to object at trial as a waiver of the issue on appeal: *i.e.* a reason to refuse to determine whether there was error at all, rather than whether the error affected the outcome.<sup>157</sup> This waiver, however, is generally not absolute; most courts will still review the question of whether the prosecutor committed misconduct, even if no objection was made, in limited circumstances.<sup>158</sup> For example, in Washington, courts will review the allegation of prosecutorial misconduct, notwithstanding the failure to object, if "the misconduct is so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice incurable by a jury instruction."<sup>159</sup> This "flagrant and ill-intentioned" standard unhelpfully blurs several related concepts from prosecutorial misconduct analysis: (1) it still uses the concept of "misconduct," which has to do with whether there was an error; (2) it brings in harmless error ideas by talking about whether there was prejudice and whether that prejudice was curable; and (3) it adds a new concept not typically covered in prosecutorial misconduct by referencing prosecutorial intent through the "flagrant and ill-intentioned" language.<sup>160</sup> This blurring of concepts is not limited to jurisdictions that use the "flagrant and ill-intentioned" standard, as typical plain error analysis includes questions of both whether there was error (was it plain, *i.e.* clearly contrary to law) and whether any error was

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<sup>154</sup> Morrow & Larson, *supra* note 24, at 355-56. Even when these showings are made, the court still has discretion over whether or not to remedy the unpreserved error. Berger, *supra* note 108, at 537.

<sup>155</sup> Morrow & Larson, *supra* note 24, at 355-56.

<sup>156</sup> See Weigand, *supra* note 152, at 230-243 (detailing many state variations in plain error analysis generally, not focused on prosecutorial misconduct cases).

<sup>157</sup> See, e.g., *State v. Fisher*, 202 P.3d 937, 947 (Wash. 2009) ("Defense counsel's failure to object to the misconduct at trial constitutes waiver on appeal unless the misconduct is "'so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice'" incurable by a jury instruction."). It would probably be more precise to describe use the word "forfeiture" rather than "waiver" in this context, as the failure to object is usually inadvertent rather than a knowing relinquishment of a known right. See Weigand, *supra* note 152, at 182-83.

<sup>158</sup> 108 A.L.R. 756 ("A comprehensive search much broader in scope than the annotation clearly indicates that in only one jurisdiction [Pennsylvania] . . . is a motion for mistrial [or other objection] always essential in order to insure review, upon appeal, of improper remarks of counsel made during the trial or argument of a case.").

<sup>159</sup> *Fisher*, 202 P.3d at 947 (internal quotations omitted).

<sup>160</sup> See Gershman, *Mental Culpability*, *supra* note 16, at 133.

harmless (requiring the defendant to bear the burden to prove prejudice).<sup>161</sup>

Many courts and commentators rely on both efficiency and fairness arguments to justify the plain error doctrine.<sup>162</sup> For example, they stress that defense counsel's timely objection gives the trial court the opportunity to remedy the misconduct immediately, such as by admonishing counsel against making improper arguments and instructing the jury to disregard the improper remarks.<sup>163</sup> Similarly, some writers have emphasized the role that the plain error doctrine plays in maintaining judicial impartiality, arguing that the burden should be on defense counsel rather than trial court judges to identify prosecutorial misconduct as it happens and urge any necessary corrective measures.<sup>164</sup> Additionally, proponents of the plain error rule have expressed concerns about defense attorney gamesmanship, arguing that the plain error rule is necessary to prevent defense counsel from deliberately failing to object when "she believed her case was going badly and the appellate court would award a new trial on appeal."<sup>165</sup> Therefore, proponents of this doctrine often approve of the extremely low rates of reversal in appellate cases in which trial counsel failed to object.<sup>166</sup> For example, Professor Montz argues that defense counsel's failure to object demonstrates that the prosecutorial comment must not have been very prejudicial.<sup>167</sup>

## *2. Criticism of the Plain Error Doctrine*

A number of commentators have criticized the plain error

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<sup>161</sup> See Morrow & Larson, *supra* note 24, at 356.

<sup>162</sup> See Derek Augustus Carter, *A Restatement of Exceptions to the Preservation of Error Requirement in Criminal Cases*, 46 U. KAN. L. REV. 947, 950 (1998) (summarizing various rationales for requiring preservation of error; those rationales include both efficiency and fairness concerns).

<sup>163</sup> See, e.g., Montz, *supra* note 34 at 75, 78; Alschuler, *supra* note 32, at 648.

<sup>164</sup> See Morrow & Larson, *supra* note 24, at 390-92.

<sup>165</sup> *Id.* at 388. See also Alschuler, *supra* note 32, at 648 ("Second, there is the moral notion that the defendant should not be allowed to "ride the verdict"; he should not be able to have a conviction set aside on the basis of secret, "hip-pocket" error while he can retain the benefit of a verdict of acquittal.").

<sup>166</sup> See, e.g., Montz, *supra* note 34, at 81 ("relief should rarely be granted on the assertion of plain error to matters contained in closing argument, for trial strategy looms as an important consideration and such assertions are generally denied without explication.") (internal quotation omitted).

<sup>167</sup> *Id.* at 80 (calling this "the irreducible paradox of appealing an unobjected-to but improper comment: how can the comment during closing be so egregious and inflammatory to warrant a new trial in light of the fact counsel failed to object to it during trial in the first place? In fact, it has been observed that the absence of objection by defense counsel during or after argument may provide some guidance as to whether a particular argument was prejudicial in the circumstances.").

doctrine generally and its application in prosecutorial trial misconduct cases in particular. Some commentators criticize the oft-repeated notion of defense attorney gamesmanship.<sup>168</sup> For example, Professor Bazelon notes that “counsel's ability to spot and call out this type of misconduct does not depend [thorough preparation but] upon knowledge of the relevant case law, careful attention to the word choice of one's opponent, and the confidence necessary to make this type of objection.”<sup>169</sup> If appellate courts have difficulty drawing clear lines between proper and improper comments even after a careful review of a written record of the prosecutor's comments and the other evidence produced at trial,<sup>170</sup> then it is even more difficult for defense counsel to quickly identify the problem and raise an objection in seconds at trial.<sup>171</sup> Even if defense counsel is troubled by the prosecutor's comments, these conditions make it difficult for defense counsel to articulate their objections.<sup>172</sup> One author even suggested that “If a trial attorney's attention is on preserving issues for appeal, then, psychologically speaking, the attorney has already lost the trial.”<sup>173</sup>

Even if defense counsel does pick up quickly enough on the impropriety of the prosecutor's remarks, she has to deal with other considerations that undercut the likelihood of her objection. After

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<sup>168</sup> See, e.g., Carter, *supra* note 162, at 951 (“First, the trial attorney is frequently inattentive, negligent, or inexperienced. Nothing is gained from sandbagging, except a disparaged reputation or an attorney grievance claim.”).

<sup>169</sup> Bazelon, *supra* note 10, at 424 (arguing that law school clinics should train students in detail about the lines between proper and improper prosecutorial comments so that those students will be more able to pick up on the need for objecting at trial).

<sup>170</sup> See section II(A) above regarding the difficult line-drawing on what does and does not constitute misconduct.

<sup>171</sup> See Sullivan, *supra* note 38, at 215 (noting how little time defense counsel have to consider the many issues raised by improper prosecutorial comments).

<sup>172</sup> Bazelon provides a great description of her first-hand experience with this situation when she was a young lawyer:

But what I remember best is the feeling I had when I heard the prosecutor ask the jury to infer my client's guilt based on a premise the prosecutor knew to be false. I froze, unsure what to do. . . . [W]hile I knew in my gut that this case was exceptional because the prosecutor's remarks were improper, I was too inexperienced and flustered to grasp, in the moment, why the remarks were improper or how to explain my position. I believed then, and continue to believe now, that the exposure of the prosecutor's conduct and the judge's remedial measures were key turning points in the case. But had my supervisor not elbowed me in the ribs, I doubt I would have objected at all, an unsettling realization that underscores the importance of educating and training future lawyers in how to respond appropriately to prosecutorial misconduct.

<sup>173</sup> Supra note 10, at 394.

<sup>173</sup> Carter, *supra* note 162, at 951.

all, the conventional wisdom within the field of trial advocacy is that attorneys should not object during closing arguments “unless things are terrible.”<sup>174</sup> As a general matter, counsel may be concerned about irritating the judge or jury by interrupting opposing counsel,<sup>175</sup> which can heighten jurors’ general tendencies to favor prosecutors over defense counsel.<sup>176</sup> Defense counsel may also be concerned about maintaining good relationships with prosecutors, which can be important for her ability to advocate successfully for future clients.<sup>177</sup> More specifically, defense counsel may be concerned about the jury’s likely reaction if her objection is overruled.<sup>178</sup> A trial court decision to overrule an objection to improper prosecutorial misconduct may actually encourage the jury to rely on those comments, although appellate courts rarely recognize that type of prejudice.<sup>179</sup>

Additionally, courts and some commentators overstate the value of a trial court’s decision to sustain an objection to prosecutorial trial misconduct. In fact, the misconduct may still prejudice the defendant: “[T]he defense attorney’s complaint, even if sustained by the court, may have exactly the opposite effect from the one intended. It may call attention to the prosecutor’s improper

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<sup>174</sup> See KENNEY F. HEGLAND, TRIAL AND PRACTICE SKILLS 199 (2d ed. 1994) (acknowledging “an unspoken convention that it’s not nice to object during your opponent’s opening or closing unless things are terrible”).

<sup>175</sup> See Carter, *supra* note 162, at 951. See also Alschuler, *supra* note 32, at 648 (arguing that requiring an objection in prosecutorial misconduct cases is particularly problematic, in part because “a jury is likely to resent repeated objections, and objection during an attorney’s closing argument often seems especially impolite.”).

<sup>176</sup> See Shari Seidman Diamond et. al., *Juror Reactions to Attorneys at Trial*, 87 J. CRIM. L. & CRIMINOLOGY 17, 45 (1996) (describing research that suggests that jurors rate prosecutors’ opening statements as more effective and organized than defense attorneys’). See also section II(A)(2), which discusses how jurors perceive prosecutors’ credibility versus defense counsel’s credibility.

<sup>177</sup> Bazelon, *supra* note 10, at 426. Bazelon also raises interesting questions about whether the type of crime (e.g. sexual abuse of a minor) might not only make the prosecutor more likely to resort to improper argument, but also might make defense counsel less likely to object. See *id.* at 430.

<sup>178</sup> Alford, *Appellate Review*, *supra* note 36, at 336-37 (“Nothing is so devastating as to have the court say, ‘Well, Mr. Geoghan, there is a certain leeway allowed in summation; your objection is overruled.’”).

<sup>179</sup> Sullivan, *supra* note 38, at 247 (“One aspect of the objection process often apparently ignored by the appellate courts is the prejudice which may result when the trial court overrules a proper objection or mistrial motion and permits the prosecution to continue an impermissible line of argument.”). Sullivan describes the reasoning from an Eighth Circuit Court of Appeals decision, which explained that the “prejudice inherent in the trial court’s error in overruling defense counsel’s timely and correct objection lies in the fact that the jury may ultimately reach its verdict or sentencing verdict based upon the improper reasoning advanced by the prosecution, especially in light of the trial court’s apparent approval of the prosecutor’s argument.” *Id.* at 247-48.

remarks and reemphasize them in the jurors' minds.”<sup>180</sup> That risk is particularly acute in prosecutorial misconduct cases, which often involve a prosecutor’s “vivid imagery” that is accessible to jurors.<sup>181</sup> The judge’s “curative instruction” may provide only an illusory remedy.<sup>182</sup>

Therefore, defense counsel face a no-win situation when deciding whether to object to prosecutorial trial misconduct.<sup>183</sup> If defense counsel fails to object, the appellate court will typically decide that the error was waived, yet if counsel does object, the court will either conclude that the trial judge’s overruling of the objection was harmless error or that the trial judge’s sustaining the objection effectively cured any error.<sup>184</sup>

In sum, the procedural doctrines of harmless error and plain error pose significant barriers that prevent individual defendants from receiving a meaningful remedy for that misconduct. The next section of the article details research into cognitive biases that sheds light on the present state of the law in this area and provides the foundation for the proposed remedies offered in the final section of the article.

#### **IV. Cognitive Science Sheds New Light on Causes and Effects of Prosecutorial Trial Misconduct**

“[T]he more we learn about human behavior, the less confident we should be about whether motivations are malicious, intentional, or even wholly conscious.”<sup>185</sup> Focusing on the cognitive dimensions surrounding prosecutorial misconduct is valuable, “not because all prosecutors are well intentioned, but because suggesting that only bad-intentioned prosecutors are at risk of poor decision making is simply too easy.”<sup>186</sup> Instead, a well-established body of cognitive science research shows that people’s decisions are impacted by cognitive biases, i.e. errors in

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<sup>180</sup> Alschuler, *supra* note 32, at 649.

<sup>181</sup> *Id.*

<sup>182</sup> Alford, *Appellate Review*, *supra* note 36, at 336-37.

<sup>183</sup> Alschuler, *supra* note 32, at 647 (noting that the plain error rule “leaves the defense attorney effectively boxed in when it comes to an appeal, whatever the prosecutor’s conduct.”).

<sup>184</sup> *Id.*

<sup>185</sup> Bandes, *Framing*, *supra* note 45, at 7.

<sup>186</sup> Burke, *Improving Prosecutorial Decision Making*, *supra* note 17, at 1614. The same reasoning applies to decisions made by jurors and judges in these cases as well. See also Bandes, *Framing*, *supra* note 45, at 21-22 (“Ironically, categorizing conduct as blameworthy may have a perverse effect at this level of processing as well. People will go to great lengths to avoid thinking of themselves as the kind of people who commit unethical behavior. This does not necessarily mean they will avoid the behavior. Instead, they may avoid facing its unethical nature or its harmful consequences, thereby entrenching the behavior and further insulating it from correction”).

how we process or remember information that skew decisions in a predictable direction.<sup>187</sup> These processing or memory errors interfere with decision-making, although they do not make poor decision-making inevitable.<sup>188</sup> This research “does not absolve actors in the criminal justice system from responsibility” but instead “demands that we become aware of these cognitive processes . . . and that we search for ways to neutralize them.”<sup>189</sup>

Cognitive science research provides a helpful lens for understanding both how we got to the problematic current state of the law and potential reforms to the procedural doctrines to improve the situation.<sup>190</sup> Although all individuals may be affected to some extent by the same types of biases, the roles people play in the system make certain types of biases more likely to affect specific actors within the system. This section therefore focuses first on the types of biases that are likely to affect prosecutorial behavior, and then it explains cognition theories suggesting that jurors and even reviewing courts may be more affected by prosecutorial misconduct than is currently recognized.

#### A. Prosecutorial Behavior May Be Affected By Confirmation Bias, Institutional Pressures, and Moral Disengagement Mechanisms

Although prosecutorial trial misconduct may be attributable to a variety of causes,<sup>191</sup> several types of cognitive biases may play a significant role in the pervasiveness and severity of that behavior. One of the most likely types of cognitive bias affecting prosecutors

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<sup>187</sup> See Findley & Scott, *supra* note 131, at 307-08. See also *id.* at n.126 (“In some contexts, biases may be desirable when they run in the direction of errors that are less costly than their opposites.”). See also Bowman, *supra* note 19.

<sup>188</sup> See, e.g., Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding, 153 U. PA. L. REV. 1251, 1292 (2005) (“As with all of our results, the data suggest potential obstacles to good decision making, more so than providing definitive evidence of poor decision making.”).

<sup>189</sup> Findley & Scott, *supra* note 131, at 322.

<sup>190</sup> In particular, I have saved for another day and another article a discussion of implicit racial bias and the ways in which that bias may account for racially biased appeals, as well as what that research and substantive law suggests about possible remedies for that specific type of misconduct. I am doing so, not because I do not think that those topics are not important, but because I think that they are important enough that they need separate treatment.

<sup>191</sup> For example, some prosecutors may cross the lines into improper argument because the lines between what is and is not proper are often blurry. See *supra* section II(A). Additionally, prosecutorial trial misconduct may stem from a prosecutor’s lack of experience or training. Montz, *supra* note 34, at 69. But many of the commonly accepted causes of prosecutorial misconduct, such as the role of the adversary system or the lack of remedies against misconduct, *see id.* at 69-70, contribute to the cognitive biases discussed in this section.

is confirmation bias. “Confirmation bias, as the term is used in psychological literature, typically connotes the tendency to seek or interpret evidence in ways that support existing beliefs, expectations, or hypotheses.”<sup>192</sup> Because of confirmation bias, people unwittingly select and interpret information to support their preexisting beliefs.<sup>193</sup> Confirmation bias also leads people to discount the significance of information that should undercut their preexisting beliefs.<sup>194</sup> Prosecutors are not immune from these cognitive tendencies to seek out and recall information that supports their beliefs and to discount contrary information.<sup>195</sup>

As a result, prosecutors can be overconfident in their conclusions about the guilt of particular defendants. “[P]rosecutors’ assessments of guilt can be flawed both by the information provided to them and the feedback they receive.”<sup>196</sup> The information provided to prosecutors may be incomplete because the police investigation may have been shaped by tunnel vision.<sup>197</sup> And the high rates of plea-bargains before trial and convictions post-trial reinforce prosecutors’ beliefs that the defendants they prosecute are guilty.<sup>198</sup>

Prosecutors may be particularly vulnerable to overconfidence in defendants’ guilt because of institutional pressures. Prosecutors are often under great pressure to win convictions; that pressure to convict can come from a variety of sources, including the way that the public view prosecutors, the need for prosecutors to campaign to keep their jobs, and the political process of funding prosecution offices.<sup>199</sup> The adversary system itself similarly exacerbates these pressures.<sup>200</sup> The relatively limited direct contact that prosecutors have with defendants and their families, combined with prosecutors’ near-daily contact with victims, police officers, and other witnesses,<sup>201</sup> likely shapes how prosecutors perceive their cases.

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<sup>192</sup> Findley & Scott, *supra* note 131, at 309.

<sup>193</sup> Barbara O’Brien, Prime Suspect: An Examination of Factors that Aggravate and Counteract Confirmation Bias in Criminal Investigations, 15 PSYCHOL. PUB. POL’Y & L. 315, 316 (2009) (hereinafter “Prime Suspect”).

<sup>194</sup> See Findley & Scott, *supra* note 131, at 313-15.

<sup>195</sup> Burke, Neutralizing Cognitive Bias, *supra* note 20, at 517.

<sup>196</sup> Findley & Scott, *supra* note 131, at 329.

<sup>197</sup> Id. at 330.

<sup>198</sup> See id. at 330.

<sup>199</sup> Cummings, *supra* note 11, at 2147-48.

<sup>200</sup> Findley & Scott, *supra* note 131, at 322-23 (“The adversary system has many virtues, but one byproduct of an adversary model is that it polarizes the participants, imposing pressures on them to dogmatically pursue their own perceived interests or their own assessments of the proper outcome of a case.”).

<sup>201</sup> See Susan Bandes, Loyalty to One’s Convictions: The Prosecutor and Tunnel Vision, 49 How. L.J. 475, 486-87 (2006).

Professor Cummings argues that the socio-cognitive Moral Disengagement Theory explains the ways in which some of these factors lead prosecutors to commit misconduct.<sup>202</sup> Moral Disengagement Theory posits that individuals generally do not act contrary to their perception of what is moral, so individuals use a series of “moral disengagement mechanisms” to adapt their view of what is moral.<sup>203</sup> Cummings argues that one moral disengagement mechanism that allows prosecutors to commit misconduct without believing that they are doing anything wrong is an excessive focus on obtaining convictions, without any counterbalancing emphasis on following ethical rules.<sup>204</sup> Another type of moral disengagement mechanism involves obscuring “the causal relationship between the individual’s conduct and the outcomes of the behavior.”<sup>205</sup> Professor Cummings applies that concept to prosecutors who may excuse bad behavior under theories about zealous advocacy and the adversarial system.<sup>206</sup>

The final type of disengagement mechanism involves depersonalizing the target of the conduct.<sup>207</sup> Cummings notes that “[d]efendants 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.”<sup>208</sup> And even the common practice of using of the term “defendant” rather than the individual’s name is a form of depersonalization, let alone the derogatory terms or images found in many prosecutorial misconduct cases.<sup>209</sup> Thus, confirmation bias may lead prosecutors to overestimate the likelihood of a defendant’s guilt, and Moral Disengagement Theory suggests ways that belief could lead prosecutors to commit misconduct in pursuit of convicting the guilty without believing that they are doing anything wrong.

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<sup>202</sup> See Cummings, *supra* note 11, at 2142.

<sup>203</sup> Id.

<sup>204</sup> Id. at 2151. Moral disengagement mechanisms are ways that individuals short-circuit their self-sensoring against immoral behavior and reconstruct their conduct as being morally justified. See id. at 2143.

<sup>205</sup> Id. at 2151-52.

<sup>206</sup> Id. at 2153.

<sup>207</sup> Id. at 2154.

<sup>208</sup> Id.

<sup>209</sup> See id. at 2154-55. See also id. at 2156 (“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 toward defendants.”).

## B. Prosecutorial Trial Misconduct May Influence Jury Reasoning

“Much research indicates that jurors, like all decision makers, may be affected by factors they do not mention or even perceive to have influenced them.”<sup>210</sup> The discussion in this section should not be read to mean that all jury decision-making involves reliance on biases; instead, this section is intended to explain how jury decisions can be more influenced by biases than either jurors or later reviewing courts recognize. This section begins by explaining how jurors likely make decisions in individual cases, using the well-accepted story model, as supplemented by current research on coherence-based reasoning. It then talks about how these models of juror decision-making leave room for cognitive biases (including confirmation bias) to affect juror decision-making in ways that jurors likely would not recognize, and how prosecutorial trial misconduct may exploit this potential for bias in ways that would be hard to detect.

### *1. Models of Jury Decision-Making: The Story Model and Coherence-Based Reasoning*

According to the story model of juror decision-making, which is well-accepted in both the psychological and legal literature, jurors use story construction to understand and interpret the information they receive throughout a criminal trial.<sup>211</sup> According to the story model, the key cognitive task for jurors deciding a case is not the mathematical estimation of probabilities about what occurred, but instead is the construction of stories to explain the evidence.<sup>212</sup> To do so, jurors use a three-step process: (1) they evaluate evidence through the construction of multiple stories that could explain the evidence; (2) they learn about the legal standards for the various verdicts they could reach; and (3)

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<sup>210</sup> Diamond *et. al.*, *supra* note 176, at 24.

<sup>211</sup> See, e.g., Michael S. Pardo, *The Nature and Purpose of Evidence Theory*, 66 VAND. L. REV. 547, 552 (2013) (“The well-confirmed model of jury behavior--the story model--posits that legal fact finders assimilate evidence into competing narratives of the events and select the most plausible or satisfying of the available accounts.”).

<sup>212</sup> Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281, 293 (2013) (“Experimental research has yielded the insight that jurors do not, by and large, estimate probabilities when determining the events that transpired in a case; rather, they draw conclusions based on whether information assembles into plausible narratives.”); Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARD. L. REV. 519, 520 (1991) (“We call our theory the Story Model because we propose that a central cognitive process in juror decision making is *story construction*.”) (emphasis in original).

they decide on the appropriate verdicts by classifying the most-likely story into the best-fitting verdict option.<sup>213</sup>

The first step, story construction, is crucial, because “one central claim of the model is that the story the juror constructs determines the juror’s decision.”<sup>214</sup> According to this model, individual jurors usually construct multiple stories rather than just a single story. To decide between the competing stories, “jurors rely on coverage (whether the story can accommodate all the evidence), coherence (whether the story makes sense), and uniqueness (whether there are other plausible explanations).”<sup>215</sup> If a single story accounts for all the evidence and arguments and makes strong sense to the juror, then the juror will have a high degree of confidence that the story is correct; on the other hand, if multiple explanations seem plausible or if even the “best” story does not account for all the evidence or make sense to the individual juror, then the juror will be less confident in selecting the best story.<sup>216</sup>

While the story model began as an explanation for individual decision-making, more recent scholarship connects the story model to empirical research on the group dynamics involved in jury deliberations.<sup>217</sup> Studies on how juries deliberate together have shown that juries “try to reconcile their individual narratives and arrive at a consistent story they can all agree on. The process is a combination of rational persuasion, sheer social pressure, and the psychological mechanism by which individual perceptions undergo change when exposed to group discussion.”<sup>218</sup> Other research suggests that when lawyers can get the majority of jurors to accept their story of what happened, they are likely to obtain a verdict in their client’s favor.<sup>219</sup>

Similarly, research into coherence-based reasoning shows that decision-makers do not use mathematical computations of individual pieces of information, but instead make decisions based

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<sup>213</sup> See *id.* at 520-21. Professor Hastie explains the three step process a bit more clearly in a later article: “Applications of the Story Model to criminal jury judgments have identified three component processes: (1) evidence evaluation through story construction, (2) representation of the decision alternatives (verdicts) by learning their attributes or elements, and (3) reaching a decision through the classification of the story into the best-fitting verdict category.” Reid Hastie, *Emotions in Jurors’ Decisions*, 66 BROOK. L. REV. 991, 995 (2001).

<sup>214</sup> Pennington & Hastie, *supra* note 212, at 521.

<sup>215</sup> Griffin, *supra* note 212, at 293.

<sup>216</sup> See Pennington & Hastie, *supra* note 212, at 527-28.

<sup>217</sup> Griffin, *supra* note 212, at 327.

<sup>218</sup> *Id.* (internal quotations omitted).

<sup>219</sup> Richard Lempert, *Telling Tales in Court: Trial Procedure and the Story Model*, 13 CARD. L. REV. 559, 561 (1991).

on “constructed representations of coherence.”<sup>220</sup> Coherence-based research is therefore consistent with the story model but goes beyond that model to account for decisions that are not well-suited to narrative structures, such as decisions about the extent of damages or culpability for failing to appreciate a risk.<sup>221</sup> The theory of coherence-based reasoning suggests that when decision-makers are faced with complex information that suggests different alternatives, they reinterpret the information: “the mental representation of the considerations undergoes gradual change and ultimately shifts toward a state of coherence with either one of the decision alternatives.”<sup>222</sup> Through this reinterpretation process, the decision-maker’s assessment of the case goes from hard to easy, and the decision-maker becomes more confident in the emerging decision.<sup>223</sup> “The fact that decisions are ultimately based on skewed mental models and backed by high levels of confidence facilitates the making of the decision, but at the same time it can also harbor problematic implications” and can substantially increase the risk of error in certain circumstances.<sup>224</sup>

## 2. How Prosecutorial Misconduct Can Exploit Jurors’ Cognitive Biases

These theories suggest that bias may affect juror decision-making as jurors draw on their own life experiences to construct and select the best story or theory of coherence.<sup>225</sup> According to the story model, jurors will not only rely on the evidence presented at trial in constructing stories, but they will also make inferences from that evidence based on the jurors’ own experiences and understandings of how the world works.<sup>226</sup> “Because all jurors

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<sup>220</sup> Dan Simon, A Third View of the Black Box: Cognitive Coherence in Legal Decision-Making, 71 U. CHI. L. REV. 511, 563 (2004). “Coherence-based reasoning applies to mental tasks in which the person must make a discrete decision or judgment in the face of complexity. Tasks are said to be complex when their constitutive considerations are numerous, contradictory, ambiguous, and incommensurate.” Id. at 516. Simon notes that most legal cases that are litigated and appealed are complex in this way and therefore likely to be resolved through coherence-based reasoning. Id.

<sup>221</sup> Id. at 563-64.

<sup>222</sup> Id. at 517.

<sup>223</sup> Id.

<sup>224</sup> Id. at 517, 549.

<sup>225</sup> Pennington & Hastie, supra note 212, at 525.

<sup>226</sup> See id. at 527. See also John B. Mitchell, Narrative and Client-Centered Lawyering: What is a True Believer to do when Theories Collide, 6 CLINICAL L. REV. 85, 116 (1999) (hereinafter “Narrative”) (“the ‘stories’ of the parties which [jurors] compare to their own may not at all be the story the parties are putting forth, but rather a limited tale responding only to the scope of the juror’s idiosyncratic narrative.”); Stacy Caplow, The Impossible Dream Comes True--A Criminal Law Professor Becomes Juror # 7, 67 BROOK. L. REV. 785, 810 (2002)

hear the same evidence and have the same general knowledge about the expected structure of stories, differences in story construction must arise from differences in world knowledge; that is, differences in experiences and beliefs about the social world.”<sup>227</sup> Thus, the typical emphasis that lawyers place on jury selection may well derive at least in part from lawyers’ desire to find jurors whose understandings and experiences will lead them to draw inferences that favor the lawyers’ clients.<sup>228</sup>

Some writers have expressed discomfort with the way that this process can hinder jurors’ evaluation of individual cases. For example, Professor Mitchell concludes that some defendants’ stories put them at inherently higher risk: “unless diverse defendants can tell their stories to the factfinders without being saddled with credibility problems touching critical story elements of their narratives that are due, not to the stories, but to the schemata of the factfinders, this group of defendants cannot receive a ‘fair trial.’”<sup>229</sup> Relatedly, Professor Griffin notes that jurors’ typical experiences may be poorly suited to help them analyze criminal cases.<sup>230</sup> She notes that “[t]rials make jurors choose, and narratives give them a false sense of completeness and closure when they do. The selected story of ‘what happened’ binds to receptors formed through a lifetime of stories. Once that bond is formed, other ideas are suppressed . . . .”<sup>231</sup>

That analysis is very similar to confirmation bias, discussed above, in that it suggests that jurors’ life experiences may make them predisposed to view the evidence in a particular way, which in turn may shape how they process and understand the information presented at trial. Similarly, although the story model suggests that the stories juries create based on the evidence evolve throughout the trial, another cognitive process closely related to confirmation bias may affect the extent to which those stories change. While confirmation bias leads people to seek information

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(describing her own experience on a jury in which the life experiences of other jurors contributed to the deliberations in ways that the lawyers would not have anticipated).

<sup>227</sup> Pennington & Hastie, *supra* note 212, at 525.

<sup>228</sup> See Todd E. Pettys, *The Emotional Juror*, 76 FORDHAM L. REV. 1609, 1629-30 (2007).

<sup>229</sup> Mitchell, *Narrative*, *supra* note 226, at 126. Cf. Caplow, *supra* note 226, at 810 (describing the influence of jury diversity in jury deliberations in a way that helped illuminate the weakness of a prosecution case). Caplow’s discussion provides a concrete illustration of one way in which jurors bring their own experiences into jury deliberations in ways that lawyers would not necessarily anticipate.

<sup>230</sup> Griffin, *supra* note 212, at 312. Of course, even when jurors have more relevant background knowledge, they may use that knowledge to make incorrect assumptions. See Caplow, *supra* note 226, at 819.

<sup>231</sup> *Id.*

consistent with their hypothesis, selective information processing leads them to “recall stored information and interpret new information to conform to their pre-existing views.”<sup>232</sup> Because of selective information processing, people more readily accept information that supports their hypothesis and find reasons to discount information that runs counter to that hypothesis.<sup>233</sup> Thus, jurors may be more willing to accept prosecutorial arguments at face value that are consistent with their preferred stories, even when those arguments are legally improper.<sup>234</sup>

Additionally, empirical research suggests another way that jurors may be affected by confirmation bias. That research suggests that the presumption of innocence is a legal fiction and that many jurors actually presume that the defendant is guilty before hearing any evidence.<sup>235</sup> If so, then confirmation bias may lead jurors to focus on evidence that suggests guilt and discount evidence that undercuts that conclusion.<sup>236</sup> That theory is also consistent with the research described above showing that jurors tend to find prosecutors inherently more credible than defense counsel, which is partly why prosecutorial “vouching” is so effective.<sup>237</sup> Additionally, prosecutorial misconduct that involves

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<sup>232</sup> Alafair Burke, Prosecutorial Passion, Cognitive Bias, and Plea Bargaining, 91 MARQ. L. REV. 183, 196 (2007) (citing Charles G. Lord et al., Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence, 37 J. PERSONALITY & SOC. PSYCHOL. 2098 (1979)).

<sup>233</sup> Bowman, supra note 19, at 154 and related text. “[F]or desired conclusions . . . it is as if we ask, ‘Can I believe this?’ but for unpalatable conclusions we ask, ‘Must I believe this?’” Findley & Scott, supra note 131, at 313-314 (quoting Thomas Gilovich, HOW WE KNOW WHAT ISN’T SO: THE FALLIBILITY OF HUMAN REASON IN EVERYDAY LIFE 84 (1991)).

<sup>234</sup> Of course, an important counterpoint to these preexisting biases is the extent to which jurors match their stories to the jury instructions to reach a verdict. See Pennington & Hastie, supra note 212, at 997-98 (describing the research supporting this part of the process as an important part of the story model of decision-making); Caplow, supra note 226, at 814 (describing her own experiences as a juror, which are show the importance of the burden of proof in her assessment of the evidence). Caplow’s experience illustrates the way that weakness in the prosecution’s case during the first day of trial, combined with knowledge that the government has to prove its case beyond a reasonable doubt, created the hypothesis that the defendant should be acquitted, which in turn seemed to shape the way that the jurors listened to and interpreted the rest of the evidence presented and shaped their deliberations. Id.

<sup>235</sup> See Findley & Scott, supra note 131, at 340-41. See also Josephine Ross, “He Looks Guilty”: Reforming Good Character Evidence to Undercut the Presumption of Guilt, 65 U. PITTS. L. REV. 227, 260 (2004) (noting that many jurors assume that most defendants are guilty, that a “weeding out process” exists to protect the innocent, and that prosecutors know more than they do about the defendant’s guilt).

<sup>236</sup> See supra section IV(A) regarding how confirmation bias affects information processing.

<sup>237</sup> See id.

dehumanizing the defendant may make it easier for jurors to conclude that the defendant deserves punishment, regardless of the specific evidence in the trial. Confirmation bias involves unconscious processes,<sup>238</sup> so jurors could be influenced by confirmation bias regarding the defendant's guilt without realizing that they were violating the presumption of innocence.

Additionally, lawyers can influence the stories that jurors create and accept, and they can do so in ways that minimize or that exacerbate cognitive biases. On the positive side, lawyers can use opening statements to create an effective story framework that provides context for the testimony that follows.<sup>239</sup> But if opening statements improperly play on jurors' beliefs in the defendant's guilt, that narrative can affect "what evidence is attended to, how it is interpreted, and what is recalled both during and after the trial."<sup>240</sup>

Lawyers can also properly use closing statements to show the evidence as a whole tells a compelling story and the other side's evidence or theories do not undercut the proffered story.<sup>241</sup> But when prosecutors improperly vouch for their own witnesses, attack the credibility of defense counsel, or otherwise appeal to jury prejudices, they may improperly shape juror narratives about the case. Furthermore, closing arguments are particularly useful for solidifying the support of jurors already inclined in one's favor and to provide ammunition for them to use in the jury room "so that they can become an extension of the advocate."<sup>242</sup> When the

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<sup>238</sup> Bowman, *supra* note 19, at notes 150-51 and related text.

<sup>239</sup> See Lempert, *supra* note 222, at 564. See also Caplow, *supra* note 230, at 790, 795-96 (describing how both the prosecutor and defense counsel in a particular case used opening statements to establish their theory of what happened, in a way that provided a framework for the jury to understand the significance of some of the evidence presented at trial); *id.* at 821 (providing more detail on this topic).

<sup>240</sup> Lempert, *supra* note 219, at 565.

<sup>241</sup> See *id.* at 569. Pennington and Hastie's research showed that the way information was presented could significantly affect jury verdicts. Pennington & Hastie, *supra* note 212, at 542-43 (discussing the difference in verdict rates when one side presented the evidence in story form and the other side presented the evidence chronologically). Although that experiment did not attempt to mimic the exact ways that information is presented at trial, see *id.* at 543, the experiment does support the idea that the "fit" between lawyers' strategies and the story model could affect the way that jurors understand and evaluate particular cases. Caplow's experiences bear out this reasoning, in that the defense counsel effectively told the defendant's story, while the prosecutor "offer[ed] analogies and parables" that did not resonate with the jury and failed to tell a compelling counter-story. Caplow, *supra* note 226, at 822-23. Caplow then effectively described how the government could have told a more effective story, both in summation and in the presentation of the evidence, in the same case. *Id.* at 823-25.

<sup>242</sup> H. Mitchell Caldwell *et. al.*, *The Art and Architecture of Closing Argument*, 76 TUL. L. REV. 961, 972 (2002). See also Caplow, *supra* note 230, at 824 ("In

prosecutor's argument is improper, jurors may still use it as ammunition.<sup>243</sup> And the inherent credibility advantage that prosecutors generally have may make jurors even more receptive to these arguments and may make it hard for defense counsel to counter such arguments.<sup>244</sup>

These types of appeals might be particularly powerful during closing arguments, as empirical research supports the common wisdom among trial advocates about the persuasive power of closing arguments on jurors.<sup>245</sup> Empirical research on “the recency effect” suggests that people tend to remember best and be influenced by the latest event in a sequence more than by earlier events.<sup>246</sup> The recency effect can be exacerbated by the “asymmetric rebound effect,” where powerful information can trigger a backlash against a strongly held belief.<sup>247</sup> If a defense attorney has succeeded in gaining sympathy or understanding for a defendant, and the prosecutor then uses inflammatory language or arguments in response, the result may be an “asymmetric rebound effect, whereby the jurors would become incensed that they were ‘suckered into believing that the defendant was deserving of sympathy and the protections of the Bill of Rights.’<sup>248</sup> That research is consistent with the empirical research showing that exposure to “anger-provoking stimuli increases the tendency to blame other people for ambiguous events and to neglect alternative explanations and possible mitigating circumstances.”<sup>249</sup> For these reasons, inflammatory prosecutorial arguments may significantly prejudice the defendant’s ability to receive a fair trial.<sup>250</sup>

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retrospect, the defense did a remarkable job of weaving a story from flimsy threads pulled from the much more tightly woven prosecution case. It might well be that the defense amounted to no more than the “Emperor’s new clothes,” illusory and insubstantial. Yet, such a story told to a more than receptive audience, a jury heading toward acquittal, gave us the arguments we needed to reach our verdict.”).

<sup>243</sup> See Ross, supra note 235, at 260-61 (describing how prosecutors press their credibility advantage through dehumanizing defendants and concluding that “The point is not that prosecutors sometimes cross the line, but in understanding that these lines exist on a continuum, where obvious illegitimate character assassination is sometimes different only in degree from legitimate argument.”).

<sup>244</sup> See id. at 260; Simon, supra note 220, at 573 (“Research on persuasion also shows that the effectiveness of a persuasive message depends upon the target’s perception of the source. Most notably, persuasion is adversely affected when the source is deemed to lack credibility. Thus, a juror is not likely to respond to the urging of an advocate for the disbelieved party, especially when the juror is already close to making up her mind.”).

<sup>245</sup> See Alford, Catalyzing, supra note 74, at 513-14.

<sup>246</sup> See id. at 513.

<sup>247</sup> Id. at 515.

<sup>248</sup> Id. at 516.

<sup>249</sup> Simon, supra note 220, at 582.

<sup>250</sup> Alford, Catalyzing, supra note 74, at 516.

When these things happen, it may be very difficult for jurors (and later reviewing courts) to assess whether the misconduct affected the verdict or was instead simply harmless error. Both the story model and coherence-based reasoning theories show that jurors make decisions by looking at the case holistically, so that it is impossible to judge the significance of any single piece of evidence or event in the trial. “[T]he elements of the story interact in ways that alter their individual significance: each merges with what came before and flows into what comes after. No one piece of evidence can be assessed in isolation, and . . . new pieces color both the information already before the jury and the testimony to come[.]”<sup>251</sup> Similarly, under coherence-based reasoning theory, the process of making a decision changes the way that the decision-maker evaluates the various pieces of information.<sup>252</sup> It therefore becomes impossible to separate out the significance of any one piece of information from its effect on the overall decision.

Thus, these theories suggest that jurors make decisions in ways that leave them open to being affected by cognitive biases, that prosecutorial trial misconduct can exploit these biases, and that it may be virtually impossible to assess the impact of a single piece of information on the ultimate conclusion that is reached.

### C. Affect Appellate Review of Prosecutorial Trial Misconduct May Be Affected By Hindsight and Outcome Biases

Finally, appellate judges may be particularly affected by hindsight and outcome biases; those theories likely play a significant role in appellate courts’ overreliance on harmless error. Hindsight bias is the tendency for people to think that a particular outcome (in this case the defendant’s conviction at trial) was either inevitable or at least more likely to occur than it really was.<sup>253</sup> Thus, hindsight bias means that when a judge knows that a defendant was convicted, the judge is more likely to think that the conviction was inevitable than it really was.<sup>254</sup> Hindsight bias is particularly dangerous on appeal because of a “base rate problem.”

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<sup>251</sup> Griffin, *supra* note 212, at 286. *See also* Simon, *supra* note 220, at 564 (“coherence-based reasoning provides a deeper theoretical explanation of holistic processing”); *id.* at 563-64 (“While narrative structures might not be essential for holistic processing, coherence shifts are likely to be particularly pronounced in their presence.”).

<sup>252</sup> *Id.* at 522-23, 537. For example, in one experiment, changes to information about the defendant’s character affected participants’ views on the appropriateness of regulating free speech over the internet. *Id.* at 537.

<sup>253</sup> Finley & Scott, *supra* note 131, at 317.

<sup>254</sup> *See* Solomon, *supra* note 124, at 1086.

appellate judges only see cases in which the defendant was convicted at trial because the state cannot appeal acquittals, so “every criminal defendant that appellate judges see is guilty, a convicted criminal before the law.”<sup>255</sup> Therefore, appellate judges may be inclined to overestimate the likelihood of that conviction and underestimate the potential impact of errors like prosecutorial misconduct.

Closely related is the idea of outcome bias. Outcome bias refers to the way that we judge a decision as good or bad in hindsight based on what we know about the outcome of the decision.<sup>256</sup> For example, subjects in one study more often rated a decision to have surgery as a good one when told that the patient survived the surgery than when told that the patient died.<sup>257</sup> This reasoning, while intuitively understandable, is flawed because information about what happened after a decision was made cannot help us learn to make better decisions later unless the decision-maker is clairvoyant.<sup>258</sup> Together, hindsight and outcome biases lead to overreliance on harmless error because they make convictions seem both inevitable and correct: “With hindsight knowledge that a jury found the defendant guilty beyond a reasonable doubt, judges are likely to be predisposed to view the conviction as both inevitable and a sound decision, despite a procedural or constitutional error in the proceedings.”<sup>259</sup>

The plain error rule exacerbates this problem by making it very hard for appellate courts to reverse based on unpreserved errors: “Given that appellate arguments premised on unpreserved error are likely to be common, but that the chance of success on these arguments is quite low, appellate courts will likely develop a cognitive bias in favor of rejecting appeals premised on unpreserved error.”<sup>260</sup> The plain error rule also exacerbates the problem because it encourages case-by-case decisions rather than precedential reasoning.<sup>261</sup> The process of articulating precedential reasoning may improve judicial decision-making, while the ability to offer conclusory analysis of fact-specific points may make judges’ reasoning more vulnerable to leaps in logic or other

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<sup>255</sup> Id.

<sup>256</sup> Finley & Scott, supra note 131, at 320.

<sup>257</sup> Id.

<sup>258</sup> Id. (citing Jonathan Baron & John C. Hershey, Outcome Bias in Decision Evaluation, 54 J. PERSONALITY & SOC. PSYCHOL. 569, 570, 572 (1988)).

<sup>259</sup> Id. at 320-21. See also Stephanos Bibas, The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel, 2004 UTAH L. REV. 1, 2 (applying similar reasoning to judicial review of ineffective assistance of counsel claims).

<sup>260</sup> Berger, supra note 108, at 541.

<sup>261</sup> Id. at 541-42.

reasoning problems.<sup>262</sup> Research has confirmed that judges are susceptible to these biases, and these biases “are likely reflected in the many cases in which appellate courts have expressed confidence that the . . . evidence of guilt was ‘overwhelming,’ even where DNA later proved that the defendants were in fact innocent.”<sup>263</sup>

## V. Proposed Solutions

While the problems identified above are daunting, cognitive bias research suggests that changes to the procedural barriers to prosecutorial trial misconduct claims may make a significant difference. This article focuses on changes to these procedural doctrines as a way of providing greater remedies for individual defendants who have been subjected to prosecutorial trial misconduct. Other scholars have written extensively about more systemic remedies,<sup>264</sup> and while some of their proposed approaches may well be very valuable and complementary to the solutions proposed in this article, I have chosen instead to focus more on remedies in individual cases. “The relief granted for prosecutorial misconduct should redress the harm suffered by the defendant rather than merely send the government a message about the impropriety of its conduct.”<sup>265</sup>

As described above in part I(B), prosecutorial misconduct has significant effects on individual defendants, and those harms should be addressed by reviewing courts. The typical remedy for misconduct that affects individual defendants is a new trial.<sup>266</sup> “[A]ppellate reversals serve important constitutional functions by condemning the infringement of the defendant’s rights; educating

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<sup>262</sup> *Id.* at 542.

<sup>263</sup> See, e.g., Keith A. Findley, Innocence Protection in the Appellate Process, 93 MARQ. L. REV. 591, 606 (2009).

<sup>264</sup> See, e.g., Joy, supra note 92, at 427 (arguing for a variety of ways to make prosecutors more accountable for misconduct, including measures to be implemented by prosecutors’ offices, bar associations, and others); Cummings, supra note 11, at 2156-58 (advocating for a variety of solutions, including “community prosecutors” who have responsibility for more than just obtaining convictions); Montz, supra note 34, at 131 (discussing with approval the proposal of a Florida judge for increased training of prosecutors). Others have encouraged naming prosecutors who have committed misconduct in judicial opinions. See, e.g., Adam M. Gershowitz, Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct, 42 U.C. DAVIS L. REV. 1059 (2009). Doing so may facilitate review by state bar associations, which has been a common solution advocated for by various commentators. See, e.g., Alford, Catalyzing, supra note 74, at 487-96.

<sup>265</sup> Henning, supra note 4, at 714-15.

<sup>266</sup> *Id.* at 797. In relatively unusual circumstances, the Double Jeopardy clause may prevent a retrial. See *id.* at 798-815. That remedy is beyond the scope of this article.

police investigators, prosecutors, and trial judges; and deterring them from future violations. Coherence-based reasoning highlights the extent to which these functions are compromised when errors are declared harmless.<sup>267</sup> Additionally, my sense is that focusing too much on systemic remedies, without also focusing more carefully on remedies for individual defendants, contributes to moral disengagement and diffusion of responsibilities, perpetuating the problems discussed in this article. Thus, while systemic remedies are certainly worth exploring, remedies for individual defendants are important as well.<sup>268</sup>

In order to facilitate meaningful remedies for individual defendants, this article proposes significant changes to harmless error analysis in prosecutorial misconduct cases and elimination of the penalty imposed under the plain error rule for defense counsel's failure to object at trial.<sup>269</sup>

#### A. Reformulating Harmless Error Analysis

The harmless error doctrine should be reconsidered in terms of the general approach to determining harmless error, the factors that courts rely on in making that determination, and the way that the burden of showing harmlessness gets allocated. Those changes would make it unnecessary to adopt the “per se reversal” approach for which some commentators advocate.

##### *(1) Courts Should Use an Error-Focused Rather than Guilt-Focused Approach*

Likely the least controversial proposal in this article is the use of an error-focused rather than a guilt-focused approach to analyzing harmless error. In other words, courts should focus on the possible effect of the misconduct on the trial rather than on the strength of the evidence against the defendant.<sup>270</sup> As described in

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<sup>267</sup> Simon, *supra* note 220, at 580. See also *id.* at 580-81 (“A basic finding of the research is that the variables that support the defeated alternative are dismissed, rejected, or ignored. In other words, the losing values and principles are devalued.”)

<sup>268</sup> See also Alschuler, *supra* note 32, at 668 (suggesting that “the courts’ ‘understanding attitude’ toward prosecutorial misconduct has added to the bulk of appellate litigation” and that increasing the reversal rate in prosecutorial misconduct would likely lead to a reduction in the number of instances of prosecutorial trial misconduct).

<sup>269</sup> Harmless error is discussed first because it is so much more commonly used, as explained in section III above, and the changes to harmless error analysis impact the utility of the plain error rule in these cases.

<sup>270</sup> See Findley & Scott, *supra* note 131, at 350 (noting that the guilt-focused approach to harmless error analysis allows “cognitive biases [to] contribute in powerful ways to a conclusion that the defendant was indeed guilty [] and that the error was therefore harmless.”). Additionally, the guilt-focused approach to

subsection III(A) above, there are two general approaches to determining whether an error was harmless: (1) the guilt-focused approach, in which the court pretends that the error did not occur and looks at the strength of the remaining evidence; and (2) the error-focused approach, which looks at whether and to what extent the error could have affected the outcome of the trial. While courts more commonly use the guilt-focused approach,<sup>271</sup> the cognitive bias research discussed clearly suggests two reasons that courts should use an error-focused approach instead.

First, hindsight bias makes the defendant's conviction seem more likely than it really was, and outcome bias compounds the error by making it seem like more of a sound decision than it really was.<sup>272</sup> Thus, the guilt-focused approach could lead courts to overestimate the strength of the evidence against the defendant. The error-focused approach, by contrast, frames the question of harmless error in a way that suggests that the error may in fact have affected the outcome of the case; that framing may help, at least in a small way, counter the tendency to assume that the conviction was inevitable.<sup>273</sup> Courts could still find an error to be harmless, but having to articulate their analysis in terms of how the error could have affected the reasoning is consistent with the well-accepted de-biasing strategy of having to articulate the opposite position.<sup>274</sup>

Second, coherence-based reasoning and the story model suggest that the guilt-focused approach is problematic. Specifically, the research supporting both those models show that decision-makers look at evidence holistically rather than evaluating each piece of information separately, and their assessments of the case as a whole taint their understanding of the significance of any single piece of evidence.<sup>275</sup> Thus, exposure to

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harmless error is problematic, even "outrageous," because it suggests that "that if one is obviously guilty as charged, he has no fundamental right to be tried fairly." Alschuler, *supra* note 32, at 661. The approach urged in this article avoids that outrageous claim.

<sup>271</sup> See, e.g., Hon. John M. Walker Jr., The Second Circuit Review: 1996-97 Term: Forward: Harmless Error Review in the Second Circuit, 63 BROOKLYN L. REV. 395, 397 (1997).

<sup>272</sup> See *supra* section IV(C). See also Findley & Scott, *supra* note 131, at 320-21 ("With hindsight knowledge that a jury found the defendant guilty beyond a reasonable doubt, judges are likely to be predisposed to view the conviction as both inevitable and a sound decision, despite a procedural or constitutional error in the proceedings.").

<sup>273</sup> See Solomon, *supra* note 124, at 1062 (noting that courts tend to find errors harmless significantly more often when using a guilt-focused rather than an error-focused analysis).

<sup>274</sup> See Findley & Scott, *supra* note 131, at 371; O'Brien, Recipe for Bias, *supra* note 17, at 1020 (a more thorough evaluation of alternatives can help counter cognitive biases).

<sup>275</sup> See *supra* section IV(B)(1); see also Simon, *supra* note 220, at 519.

prosecutorial misconduct may have affected the jurors' analysis of the strength of the remaining evidence; it may be a cognitive fiction to try to evaluate the remaining evidence while pretending that the error did not occur, as required under the guilt-focused approach. Similarly, appellate judges reviewing the evidence will likely be subject to similar coherence-shifts, so the same reasoning applies to judicial decision-making.<sup>276</sup> Additionally, focusing on the strength of the evidence, including disturbing details of the case, may arouse the judge's anger, which can also skew the reviewing judge's decision-making.<sup>277</sup>

For both these reasons, the error-focused approach is more consistent with cognitive theories of decision-making, although the error-focused approach is not without challenges. Specifically, because coherence-based reasoning suggests that information is evaluated holistically, courts should not move from one legal fiction to another by assuming that they can determine whether the error did in fact affect the outcome. Instead, courts should "holistically evaluate the seriousness of the error and its likely position in the constellation of facts that emerged at trial"<sup>278</sup> and ask whether it seems likely that the error affected the outcome.<sup>279</sup>

## *(2) Courts Should Rethink Relevant Factors for Harmless Error Analysis*

In order to implicate this shift from a guilt-focused to an error-focused analysis, courts will need to reevaluate the factors

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<sup>276</sup> See *id.* at 578 ("Since coherence effects occur without awareness, the judge will decide in accordance with her perception of the evidence, which, unbeknownst to her, has likely been skewed by the illicit variable."). Simon suggests, without much discussion, that improper attorney comments would not have the same effects as introduction of improper evidence on coherence-shifts, but he does conclude that coherence-based reasoning "provide some unique insights into the jurisprudential dilemma by adding weight to the error-based approach. These observations apply equally to evidentiary and non-evidentiary errors."). *Id.* at 580.

<sup>277</sup> *Id.* at 583 ("In close cases, with the defendant somehow implicated in the crime and with no one else to blame, there is a danger that the judge's mental representation of the case will shift toward supporting a conclusion of guilt").

<sup>278</sup> Griffin, *supra* note 212, at 319.

<sup>279</sup> The "likely affected the outcome" standard would apply when the defendant bears the burden of showing harmlessness; when the state bears the burden, the standard should be "whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *Id.* at 318. See also *infra* section V(A)(3) below (discussing who should bear the burden of proof on harmless error). This approach is also consistent with Posner and Landes's argument that from an efficiency standpoint, the best definition of harmless error is "when it has no (or, to be realistic, only a very slight) positive impact on the probability of conviction." Landes and Posner, *supra* note 113, at 174.

that contribute to harmless error analysis.<sup>280</sup> When considering whether an error likely affected the outcome at trial, the courts should rely primarily on two factors: the severity and pervasiveness of the misconduct, and the connection (if any) between the particular misconduct at issue and the disputed issues in the case. Courts could also consider, although with caution, curative measures taken by the trial court, such as jury instructions. Courts should not, however, consider the strength of the remaining evidence or whether defense counsel provoked the error. Each of these potential factors is explained below.

a. Crucial Factors: Severity and Pervasiveness, Connection to Trial Narratives

The most crucial factor involves two related parts: the severity and pervasiveness of the misconduct. Courts should focus primarily on the severity of the misconduct, while also looking at the closely related question of the pervasiveness of that misconduct.<sup>281</sup> The importance of these factors comes from use of the error-focused approach rather than the guilt-focused approach, as misconduct that is severe and pervasive is more likely to cause harm.<sup>282</sup>

Regarding severity, courts should cease their current practice of excusing serious misconduct. Under the current state of the law, “[a] finding of “harmless error” is not equivalent to a finding of trivial error. Indeed, harmless error cases often reveal serious prosecutorial misconduct.”<sup>283</sup> Yet repeated and pervasive misconduct can create “a poison which the defense could not drain from the case.”<sup>284</sup>

Of course, “severity” is a somewhat malleable concept, raising difficult line-drawing questions. A perfect resolution of that difficulty is impossible, but courts can approach this question from a number of angles. First, courts could increase their

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<sup>280</sup> See supra section III(A)(2) (detailing the factors that courts typically consider, including the severity of the misconduct, any corrective measures taken by the trial court, the strength of the remaining “untainted” evidence, the other side’s conduct that may have invited the misconduct, and the details of the jury deliberations).

<sup>281</sup> See, e.g., Griffin, supra note 212, at 319 (urging courts to focus on “the seriousness of the error and its likely position in the constellation of facts that emerged at trial.”).

<sup>282</sup> Cicchini, supra note 13, at 342 (“[T]he more flagrant, intentional, and repetitive the misconduct, the greater the resulting harm.”).

<sup>283</sup> Johns, supra note 11, at 517. See also id. (discussing an Innocence Project study documenting a number of cases where egregious misconduct was treated as harmless).

<sup>284</sup> Id. (quoting People v. McKenzie, 2007 Cal. App. Unpub. LEXIS 6271, 23, 2007 WL 2193548 (Cal. App. 1st Dist. Aug. 1, 2007)).

emphasis on the importance of the pervasiveness of the misconduct, something that courts already often consider.<sup>285</sup> For example, the Supreme Court in Berger concluded that the misconduct was not harmless because, among other things, it was “pronounced and persistent.”<sup>286</sup> Some commentators have similarly noted that courts currently consider pervasiveness as a factor in analyzing harmless error.<sup>287</sup> Under an error-focused approach, however, pervasiveness would become a more significant part of the court’s analysis, as the repetition of the misconduct would increase the likelihood that the jury would be influenced by it.

Furthermore, courts could distinguish between trivial misconduct and more severe misconduct.<sup>288</sup> Misconduct might be trivial in cases that were close as to whether the conduct was truly inappropriate.<sup>289</sup> Furthermore, misconduct might be treated as trivial when the violation was more about a technical wording issue rather than inflammatory or emotional appeals.<sup>290</sup> Other types of misconduct, such as misstatements about the presumptions of innocence or burdens of proof, would inherently be more serious as they could affect the jurors’ understanding of the relevant law.<sup>291</sup>

Additionally, courts should be particularly concerned about the potential effects of misconduct that involves depersonalization. As noted above in section IV(A), research into moral disengagement suggests that depersonalization is a powerful tool that allows actors to reach decisions that they would not otherwise reach. Prosecutors systematically depersonalize criminal defendants in a variety of ways.<sup>292</sup> Dehumanization can lead to moral exclusion, placing those stigmatized “outside the boundary in which moral values, rules, and considerations of fairness

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<sup>285</sup> See supra section III(A)(2).

<sup>286</sup> Berger v. United States, 295 U.S. 78, 89 (1935).

<sup>287</sup> See, e.g., Bazelon, supra note 10, at 423.

<sup>288</sup> See, e.g., Alschuler, supra note 32, at 663-665 (proposing that courts employ a sliding scale for distinguishing between trivial and severe misconduct).

<sup>289</sup> See id. at 665 (arguing that this approach would require the courts to offer more clarity about the extent to which they view instances of misconduct as trivial or serious).

<sup>290</sup> Cf. id. at 666 (noting that use of a sliding scale would discourage reversal for minor or technical violations that probably did not affect the verdict). See also Bazelon, supra note 10, at 423-24 (noting that courts do sometimes consider whether misconduct was “truly blatant and inflammatory”).

<sup>291</sup> See Berger, supra note 108, at 551 (discussing a case in which the prosecutor in closing argument told the jury it no longer had to apply the presumption of innocence, and questioning how the significant evidence of guilt could ever “moot the issue of whether the jury properly understood the applicable law?”).

<sup>292</sup> See Cummings, supra note 111, at 2153-56.

apply.”<sup>293</sup> Furthermore, this dehumanization can have subconscious, neurological effects, in that people may fail to activate the part of the brain typically involved in social perception when viewing members of highly stigmatized groups.<sup>294</sup> Thus, prosecutorial misconduct that involves dehumanizing images is inherently severe, even if it is not repeated and even if defense counsel failed to object.<sup>295</sup>

In assessing severity, courts should also look carefully at the connection between the particular misconduct and the disputed issue(s) in the case.<sup>296</sup> Courts should analyze the theories offered by both the prosecution and the defense to see if the misconduct “affects the entire narrative arc or merely a discrete or insignificant piece of it.”<sup>297</sup> For example, if the disputed issues in a particular case involved credibility disputes, then prosecutorial misconduct may well affect the outcome, particularly if the misconduct involved involving improper vouching for the prosecution’s witnesses or improper attacks on defense counsel’s credibility. Similarly, prosecutorial misconduct involving the defendant’s failure to offer evidence (shifting the burden of proof) would be more likely to affect the outcome if the disputed issue in the case was the identity of the person who committed the crime than if the defendant conceded involvement in the crime but challenged proof of intent. By contrast, highly inflammatory images or words can affect the entire trial, even if they are not linked directly to a specific count.<sup>298</sup>

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<sup>293</sup> Phillip Atiba Goff et. al., Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences, 94 J. PERSON. & SOCIAL PSYCH. 292, 293 (2008).

<sup>294</sup> *Id.* at 294 (“[T]hose who are the least valued in the culture were not deemed worthy of social consideration on a neurological level.”).

<sup>295</sup> If defense counsel did object, that factor could be slightly useful toward a finding of severity, in that defense counsel both noticed the misconduct and was willing to risk drawing attention to the misconduct or angering jurors by interrupting. See supra section III(B)(2), discussing reasons why defense counsel may not object. The lack of objection, in contrast, may provide some slight inference against severity, in that the failure to object could be read to suggest that defense counsel may have failed to pick up on the misconduct (and therefore a jury would similarly have been unlikely to do so as well). But the other reasons that defense counsel may not have objected mean that courts should not rely heavily at all on the lack of a defense objection when considering severity.

<sup>296</sup> See, e.g., Alschuler, supra note 32, at 662 (noting that harmless error should consider, among other things, “whether the prosecutor’s statement was so irrelevant to the case at hand”).

<sup>297</sup> Griffin, supra note 212, at 318-19. Griffin was talking about evidentiary errors rather than prosecutorial misconduct, but the narrative arc of the case is perhaps even more important in prosecutorial misconduct cases.

<sup>298</sup> See, e.g., State v. Glassmann, 286 P.3d 673, 681 (2012) (“In this case, the use of highly inflammatory images unrelated to any specific count was misconduct that contaminated the entire proceedings.”).

This focus on the severity of the misconduct and its interaction with trial narratives more accurately reflects both the importance of the error-focused approach, as explained by the cognitive bias research above, and promotes respect for the judiciary.<sup>299</sup> Although this approach is not without challenges, it still represents an improvement on the current guilt-focused approach taken by most courts. The current guilt-focused approach undercuts the expressive, educational, and deterrent functions of appellate review.<sup>300</sup> By focusing on instead on the severity of the misconduct, courts can “vindicate significant rights while discouraging reversals for minor or technical violations that probably did not affect the verdict.”<sup>301</sup> Similarly, courts could uphold convictions even in the face of severe errors if they were convinced that the particular circumstances of the case make it unlikely that the error affected the verdict.<sup>302</sup>

b. Factors that Should be Relied on only with Significant Caution: Jury Instructions and Other Curative Measures

Courts should also be far more cautious than they currently are about concluding that a trial court’s curative measures, especially jury instructions, make an error harmless. Under current law, courts often rely on the curative effect of jury instructions, presuming that juries will follow those instructions.<sup>303</sup> This presumption covers both general instructions given in every case, such as an instruction that attorneys’ comments are not evidence, and specific instructions to disregard comments that the trial court

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<sup>299</sup> See *id.* at 662-63 (“The danger of promoting a cynical disrespect for the judiciary seems greatest when affirmation follows truly outrageous misconduct.”).

<sup>300</sup> Simon, *supra* note 220, at 582. See also Fisher, *supra* note 121, at 1321 (“In order to properly protect the process values inherent in the right to due process, the due process fairness inquiry must remain separate from the determination of impact on the outcome. Otherwise, constitutional limitations on prosecutorial conduct would fluctuate with the strength of the state’s case against the defendant, with outrageously egregious conduct permissible when the defendant’s guilt seems apparent. When such outrageous conduct is permitted, criminal proceedings lose their appearance of fairness. This ends-justifies-the-means approach to defining due process is incompatible with the process goals of the criminal justice system.”).

<sup>301</sup> Alschuler, *supra* note 32, at 666.

<sup>302</sup> See Berger, *supra* note 108, at 552 (discussing circumstances that could be used to find that a typically serious error, such as a misstatement of the applicable law, may not actually be serious in the context of a particular case in which other factors suggest that the outcome was not affected).

<sup>303</sup> See Montz, *supra* note 34, at 100 (discussing cases in which courts concluded that errors in reading things not in evidence to the jury were harmless because of very carefully tailored jury instructions).

declared to be improper.<sup>304</sup> In fact, blanket presumptions about the effectiveness of limiting instructions are exercises in pure fiction.<sup>305</sup> Numerous judges and commentators have recognized this fiction, but courts continue to rely on limiting instructions as essential to the operation of the jury system.<sup>306</sup>

Yet cognitive bias research shows that this reliance on limiting instructions is based on a number of flawed assumptions, and more importantly, offers a potential way forward that can balance judicial economy with protecting a defendant's right to a fair trial. First, courts' reliance on limiting instructions rests on an incorrect assumption that any piece of evidence or information can be cleanly excised from the way that the trial's narrative unfolds.<sup>307</sup> As explained above in the sections on the story model of juror deliberation and coherence-based reasoning, however, information may influence decision-makers in ways that they do not realize and may taint their evaluation of other unrelated information.<sup>308</sup> Because of this imperceptible taint, despite jurors' best efforts, they cannot effectively disregard the improper information.<sup>309</sup> Social science research shows "that limiting instructions fall short when it comes to any highly salient or emotionally charged content."<sup>310</sup> Therefore, courts should stop repeating the fiction that an error is harmless in part because of typical limiting instructions.

Instead, courts should consider adopting proposals regarding limiting instructions that are more grounded in the social science research.<sup>311</sup> These proposals often include telling jurors why they have been told to disregard certain information and would generally allow jurors to deliberate on and reaffirm their commitment to ignoring that information.<sup>312</sup> Such an instruction would only be given in a prosecutorial misconduct case if the trial

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<sup>304</sup> See Cicchini, *supra* note 13, at 351-52 (instructions that prosecutor's arguments are not evidence). Cicchini goes on to argue that when the objection concerns the prosecutor's improper argument, then instruction on what constitutes proper evidence is irrelevant. *Id.* at 352.

<sup>305</sup> Griffin, *supra* note 212, at 321.

<sup>306</sup> *Id.* at 322-23 (summarizing critiques of limiting instructions from, among others, Justice Robert Jackson and Judge Learned Hand, and discussing the reasons that courts continue to rely on limiting instructions in spite of these long-standing and vigorous critiques).

<sup>307</sup> *Id.*

<sup>308</sup> See *supra* section IV(B). See also Griffin, *supra* note 212, at 324-25 (discussing the way that each new piece of evidence fits into the "shifting mosaic" of the case and the difficulties of untangling explicit and implicit influences on decision-making).

<sup>309</sup> See *id.* at 324.

<sup>310</sup> *Id.*

<sup>311</sup> See, e.g., *id.* at 330-32 (summarizing various proposals).

<sup>312</sup> See *id.*

court did conclude that at least some conduct was error; they would not be applied in cases where the trial court allowed the prosecutor to commit misconduct or where defendant failed to object. It could, however, be coupled with a general de-biasing instruction that would help minimize the impacts of cognitive bias on general deliberation, apart from the specific issue of prosecutorial misconduct.<sup>313</sup> Thus, this factor would need to be approached significantly more cautiously than under current case law.

Furthermore, courts should look carefully at the trial court's other actions. As explained in section III(A) above, when a trial judge overrules an objection to improper prosecutorial comments, the jury may see that as judicial approval of the comment. And even if the judge sustains an objection, the instruction to disregard might highlight the misconduct. Courts should therefore look carefully at the trial court's actions and should be cautious about concluding that they necessarily cured any prejudice to the defendant.

c. Factors that Should Not Be Used: Strength of the Other Evidence and Invited Error

Perhaps the biggest change to harmless error analysis proposed here is the rejection of both the strength of the other evidence and the invited error doctrine. The strength of the other evidence is often the most important factor under current formulations of harmless error analysis, as the guilt-focused approach is framed in terms of the strength of the other evidence.<sup>314</sup> But as explained above, cognitive bias research consistently demonstrates that decision-makers cannot effectively evaluate the strength of other evidence without their being some taint from the error. The story model and coherence based reasoning both show that jurors likely make decisions holistically rather than based on a mathematical calculation about the value of each thing that happens in the trial, and outcome and hindsight bias research shows that reviewing decision-makers are likely to underweight the potential taint from the error. For these reasons, courts should reject reliance on the strength of the rest of the evidence as a factor for harmless error. Presumably, if the other evidence is strong, then the prosecution should be able to obtain a conviction

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<sup>313</sup> See Simon, supra note 220, at 543-44, 548-49, 569-74 (discussing debiasing instructions).

<sup>314</sup> See supra section III(A)(2).

again upon retrial.<sup>315</sup> And defendants are entitled to a fair trial regardless of factual guilt.<sup>316</sup>

Additionally, courts should not use “invited error” as an excuse for serious and pervasive misconduct. The “invited error” or “invited response” rule allows courts to excuse prosecutorial trial misconduct that occurs during rebuttal closing: “If the prosecutor’s misconduct . . . was provoked by defense counsel’s own improper argument, reviewing courts will generally conclude that the prosecutor was simply “righting the scale” so that reversal of the defendant’s conviction is not required.”<sup>317</sup> The ABA Standards for Criminal Justice explicitly authorize such responsive arguments.<sup>318</sup> Analytically, the invited error doctrine relates to the question of whether the comments were misconduct: if the defense counsel provoked the response by making improper argument, then by definition it is not improper for the courts to respond. But courts often apply this doctrine under harmless error analysis by saying that they do not need to reverse because of the invited error doctrine.<sup>319</sup> In doing so, courts often use invited error to excuse as harmless even very significant prosecutorial misconduct.<sup>320</sup> When this happens, courts should not let defense misbehavior blind them to the real issues in the case, which should be (1) whether the prosecutor’s comments were proper, and (2) if not, whether the improper comments were likely to have affected the outcome of the case.<sup>321</sup>

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<sup>315</sup> Of course, subsequent events may make it hard for the prosecution to put on the exact same evidence, but the prosecutor who commits misconduct would be the one who would create that risk in a particular case.

<sup>316</sup> See, e.g., Cicchini, *supra* note 13, at 347 (describing the criticisms of the current doctrine, which seems to suggest that prosecutorial misconduct is acceptable when the state has a strong case).

<sup>317</sup> Bazelon, *supra* note 10, at 423.

<sup>318</sup> See Nidiry, *supra* note 4, at 1319 (quoting ABA Standards for Criminal Justice, *supra* note 6, Standard 3-5.8 commentary at 109) (“[A] prosecutor may be justified in making a reply to an improper argument of defense counsel if made without provocation by the prosecutor.”).

<sup>319</sup> See, e.g., Tara J. Tobin, Note: Miscarriage of Justice During Closing Arguments by an Overzealous Prosecutor and a Timid Supreme Court in State v. Smith, 45 S.D. L. REV. 186, 219 (2000) (“As an effective tool to affirm convictions despite the presence of prosecutorial misconduct, the invited response doctrine is utilized in all jurisdictions . . .”).

<sup>320</sup> Nidiry, *supra* note 5, at 1320-21 (“Despite the fact that the prosecutor is supposed to engage in a very measured response to improper defense counsel argument, in practice . . . limitations on invited response often give way, leaving prosecutors a blanket license for improper argument.”).

<sup>321</sup> See Alschuler, *supra* note 32, at 657-68.

### *(3) The Prosecution Should Bear the Burden of Proving Harmlessness*

Perhaps the most debated aspect of harmless error analysis in prosecutorial trial misconduct cases is how to allocate the burden of proof. As noted above in section III(A), under current law, the question turns on whether an error is classified as constitutional or non-constitutional. The prosecution has the burden of providing beyond a reasonable doubt that constitutional errors are harmless, while for non-constitutional errors, the defendant bears the burden of showing that the error likely affected the outcome. However, this approach has been roundly criticized on a variety of grounds. For example, Professor Landes and Judge Posner suggest that this approach is simply a historical anomaly and is not justified by any factors that should shape courts' approaches to harmless error.<sup>322</sup>

Although there is widespread dissatisfaction with the current approach to harmless error, proposals to fix the problem have varied greatly. For example, Professor Gershman suggests that courts should consider a prosecutor's subjective intent in evaluating whether prosecutorial misconduct affected the outcome of a case.<sup>323</sup> Other commentators argue for per se reversible error in at least some types of prosecutorial misconduct cases, such as where the prosecutor knew or should have known that his conduct was improper.<sup>324</sup> These approaches, however, focus courts too much on prosecutorial intent, overlooking the significant role that cognitive biases can play in shaping a prosecutor's actions.<sup>325</sup>

This article rejects these various proposals and instead advocates for a unitary standard that focuses on the likelihood that the error affected the conviction. Specifically, an error should be deemed to be harmless when it has only a slight chance of contributing to the defendant's conviction.<sup>326</sup> The prosecution

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<sup>322</sup> Landes & Posner, *supra* note 113, at 172. Another article suggests that advocates should try to reframe many prosecutorial misconduct arguments as Sixth Amendment violations to gain access to the constitutional harmless error standard, given how difficult it is for a litigant to win under the non-constitutional standard. *See generally* Alford, *Catalyzing*, *supra* note 74.

<sup>323</sup> *See generally* Gershman, *Mental Culpability*, *supra* note 16 (arguing that a prosecutor's subjective intent should be taken into account both in determining whether conduct was misconduct and whether the error was harmless).

<sup>324</sup> *See, e.g.*, Kamin, *supra* note 111.

<sup>325</sup> See section IV(A).

<sup>326</sup> See Landes & Posner, *supra* note 113, at 174. Landes and Posner argue that "an error is harmless when it has no (or, to be realistic, only a very slight) positive impact on the probability of conviction." They justify this approach on efficiency grounds, arguing that it would lead to the optimization of reversals as compared to other possible standards. *See id.* (discussing several other possible

would bear the burden of making this showing.<sup>327</sup> If the prosecution fails to meet this burden, then the defendant's conviction should be reversed.

This approach has several benefits. First, it reflects cognitive bias research by being error-focused.<sup>328</sup> Furthermore, placing the burden on the state minimizes the effect of hindsight bias.<sup>329</sup> This approach is unlikely to completely eliminate the effect of hindsight or outcome bias on harmless error analysis,<sup>330</sup> but the combination of focusing on the likely effect of the error on the verdict and requiring the prosecution to bear the burden of justifying affirmance should help combat these biases.

This approach is also supported by public policy considerations. “[I]t would be unfair to allow the prosecutor to break rules of conduct and then require that the defendant prove the misconduct changed the outcome of the proceeding.”<sup>331</sup> Prosecutorial misconduct may benefit the prosecution at trial, so the prosecution should bear the burden of showing that it did not actually receive a benefit from this behavior.<sup>332</sup> Additionally, the prosecution rather than the defendant is in a position to try to prevent misconduct from happening in the first place.<sup>333</sup> Under current law, however, prosecutors have incentives to commit

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definitions that could be used and explaining why they are less efficient than this definition).

<sup>327</sup> Landes and Posner did not specifically discuss who would bear the burden of meeting this standard, but the standard seems to implicitly place the burden on the State, in the same way that the State must show an error is harmless beyond a reasonable doubt under the current constitutional harmless error standard. Additional arguments for why the State should bear the burden of proof are discussed below.

<sup>328</sup> See *supra* section IV(A)(1).

<sup>329</sup> Findley & Scott, *supra* note 131, at 322 (“The effect of hindsight bias on appellate and postconviction review is likely to be even more pronounced in situations where the burden of persuasion is placed on the defendant.”)

<sup>330</sup> *Id.* at 320-21 (“To some extent, placing the burden of proving the harmless nature of an error on the beneficiary of the error--in criminal cases, requiring the government to prove harmless error beyond a reasonable doubt --might be intended to mitigate the effects of hindsight and outcome biases. Nonetheless, courts routinely find significant errors harmless, and that is partly because hindsight bias and outcome bias work in tandem with other values, such as a desire to respect finality and avoid wasteful retrials of obviously guilty defendants.”).

<sup>331</sup> Fisher, *supra* note 121, at 1320. Although defendants often bear a burden of showing that an error was not harmless (e.g. in cases involving the erroneous admission of evidence against the defendant), the value of finality and other interests outweigh the policy considerations at play in prosecutorial trial misconduct cases, as discussed in this paragraph. It is beyond the scope of this article to weigh the competing interests as needed for deciding whether the rule proposed in this article should apply in other contexts.

<sup>332</sup> See *id.* at 1317-18.

<sup>333</sup> *Id.* at 1319.

misconduct when they have a weak case<sup>334</sup> and when they have a strong case.<sup>335</sup> By contrast, use of an error-focused analysis with the burden of proof on the prosecution should incentivize prosecutors to take steps to avoid committing misconduct when possible.<sup>336</sup> Of course, this approach will not eliminate all misconduct, as cognitive biases likely play a significant role in prosecutorial misconduct, as explained above, but it should help change behavior in some cases.<sup>337</sup>

Additionally, this proposed harmless error standard avoids a significant barrier that *per se* reversal advocates face. In United States v. Hasting, the United States Supreme Court held that federal courts' supervisory powers are limited to cases of prejudicial error.<sup>338</sup> Under Hasting, federal courts cannot dispense with harmless error analysis, but must instead analyze harmless error before providing a remedy to an individual defendant.<sup>339</sup> Any imposition of a *per se* reversal remedy would require overruling of Hasting,<sup>340</sup> but the proposed standard this article advocates does not run afoul of Hasting.

Additionally, *per se* reversal in the absence of actual prejudice is bad policy in most prosecutorial misconduct cases.<sup>341</sup>

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<sup>334</sup> See Landes & Posner, *supra* note 113, at 184 (noting under current law that prosecutors have an incentive to commit intentional error when their case is weak, as the misconduct minimizes the likelihood of an acquittal, which cannot be appealed).

<sup>335</sup> See Cicchini, *supra* note 13, at 347.

<sup>336</sup> See Fisher, *supra* note 121, at 1320. See also Landes & Posner, *supra* note 113, at 174 (arguing that this approach to harmless error is most efficient).

<sup>337</sup> See Kamin, *supra* note 111, at 86: "That I advocate a rule that will result in a greater deterrent effect on prosecutors is not to imply that I believe all prosecutors are venal, careless, or incompetent. My beliefs are quite the contrary. Prosecutors, however, like the rest of us, are influenced, at least to some degree, by the costs and benefits society imposes on us. Not everyone would become a murderer if the state's prohibition on murder were done away with, but we have a prohibition on murder at least in part because we believe that fewer people will kill if we do. Thus, although I do not believe that most prosecutors misbehave as much as they believe they can get away with it, I do believe that if the likelihood of reversal were increased, they would engage in misconduct less often."

<sup>338</sup> 461 U.S. 499, 103 S. Ct. 197, 476 L. Ed. 2d 96 (1983).

<sup>339</sup> See, e.g., Henning, *supra* note 4, at 718 ("Similarly, violations of a defendant's constitutional rights that do not involve a structural error in the proceedings require a harmless error analysis. If the government can show beyond a reasonable doubt that the violation did not contribute to the conviction, then the court may not grant a remedy despite the violation. Therefore, the Constitution does not provide a remedy to deter future prosecutorial misconduct, absent a finding of harm to the defendant.").

<sup>340</sup> Kamin, *supra* note 111, at 77-78.

<sup>341</sup> As noted above, this article focuses on procedural barriers to meaningful remedies in cases that do not involve race-based appeals. There is some support for the idea that race-based prosecutorial misconduct should be treated differently than other types of misconduct. See, e.g., State v. Monday, 257 P.3d

Professor Alschuler noted long ago the foolishness of providing a retrial when doing so is merely an idle gesture.<sup>342</sup> “In such circumstances, the result of a new trial would be the same, and the insult to the dignity of the process would not be thereby undone.”<sup>343</sup> When a court has determined that the error really was harmless, then the societal interests in finality of judgments outweigh any value in forcing a retrial.<sup>344</sup> Additionally, if the courts were to adopt a *per se* reversal rule in prosecutorial misconduct cases, that might put undue pressure on courts’ analysis of whether certain behavior was in fact misconduct. Under current law, courts’ labeling of behavior as prosecutorial misconduct is “almost cost-free” because the harmless error doctrine allows courts to avoid providing any remedy for the misconduct when the courts conclude that it did not affect the outcome.<sup>345</sup> If the pendulum swings too far the other way, however, courts will be even more likely than they are now to conclude that prosecutorial behavior that should be misconduct is in fact proper.<sup>346</sup> Thus, the best approach to harmless error in prosecutorial misconduct is to require the prosecution to bear the burden of proving that the error did not impact the verdict, using the factors described in section V(A)(2) above.

#### B. Removing the Burdens Imposed by the Plain Error Doctrine When Defense Counsel Fails to Object to Prosecutorial Misconduct

In addition to the changes to harmless error analysis discussed above, courts should significantly change their approach to cases where defense counsel failed to object to alleged prosecutorial misconduct, removing the burdens imposed by the plain error doctrine.<sup>347</sup> Under the plain error doctrine, as explained

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551, 559 (Wash. 2011) (Madsen, C.J., concurring) (“Rather than engage in an unconvincing attempt to show the error here was not harmless, the court should hold instead that the prosecutor’s injection of racial discrimination into this case cannot be countenanced at all, not even to the extent of contemplating to any degree that error might be harmless.”). I hope to explore this issue in more detail in my next article.

<sup>342</sup> Alschuler, *supra* note 32, at 663.

<sup>343</sup> Fisher, *supra* note 121, at 1317.

<sup>344</sup> *See id.*

<sup>345</sup> Henning, *supra* note 4, at 721-22.

<sup>346</sup> *See supra* section II(A) regarding the difficult line-drawing questions courts often face in prosecutorial trial misconduct cases.

<sup>347</sup> *See* , e.g., Carter, *supra* note 162, at 947 (noting that “principles of fundamental justice frequently oblige the appellate courts to deviate from the preservation of error requirement and reverse unpreserved issues, especially in criminal cases.”). Although I think that Berger’s article on reformulating plain error analysis more generally is intriguing and potentially has merit, see *supra*

in section III(B) above, when defense counsel fails to object to alleged prosecutorial misconduct, that attorney will then bear a more difficult burden in convincing the appellate court both that there was an error and that the error should lead to a reversal. But appellate courts retain broad discretion to deviate from this approach.<sup>348</sup> That discretion is important for giving courts the necessary room to clarify the law and to ensure fair trials.<sup>349</sup> Courts often exercise this discretion to consider a wide variety of alleged errors<sup>350</sup> in order to explain the law clearly and to promote justice.<sup>351</sup> Both of those interests are implicated in cases involving prosecutorial trial misconduct. This article therefore proposes that courts should exercise that discretion in prosecutorial trial misconduct cases, to avoid confusing their analyses of whether a prosecutor committed misconduct and whether that misconduct was harmful.<sup>352</sup>

Most importantly, courts considering claims of prosecutorial misconduct should abandon the “plain” part of the plain error doctrine. Currently, courts can duck difficult questions of drawing clear lines about what constitutes prosecutorial misconduct by concluding that any error was not plain, without really analyzing whether an error occurred.<sup>353</sup> This approach to plain error exacerbates cognitive biases in judges by encouraging them to engage in conclusory rather than carefully reasoned decisions, and it can contribute to courts being overly confident about the lack of error and the harmlessness of that error.<sup>354</sup> The current approach also fails to reflect the reality that jurors may be

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note 108, it is beyond the scope of this article whether the court should similarly change its approach to plain error in other circumstances.

<sup>348</sup> Carter, *supra* note 162, at 948.

<sup>349</sup> Weigand, *supra* note 152, at 190.

<sup>350</sup> See generally Carter, *supra* note 162 (cataloging the wide variety of types of claims that appellate courts consider even when those claims were not preserved below).

<sup>351</sup> See Weigand, *supra* note 152, at 191.

<sup>352</sup> See *supra* section III(B) (explaining that as currently applied in prosecutorial trial misconduct cases, the plain error rule often leads to the confusion of whether there was error and whether it was harmful, and it sometimes also brings in prosecutorial intent when that would not otherwise be part of the courts’ analysis). See also Carter, *supra* note 162, at 980 (noting that authors who study wrongful convictions argue for the importance of appellate courts reviewing unpreserved issues and arguing that justice requires courts to be open to some various claims, even when they were not raised at trial); *id.* at 972 n. 173 (including prosecutorial misconduct within the “public policy” category of errors that should be reviewed notwithstanding a failure to object at trial).

<sup>353</sup> See *supra* section III(B).

<sup>354</sup> See Berger, *supra* note 108, at 541-42.

affected by subtle misconduct as well as more obvious misconduct.<sup>355</sup>

This approach would make it easier for courts to draw clearer lines regarding what behavior constitutes prosecutorial misconduct.<sup>356</sup> If appellate courts draw clearer lines about appropriate versus inappropriate behavior, this will assist prosecutors in avoiding, defense attorneys in identifying, and trial courts in remediating incidents of prosecutorial error.”<sup>357</sup> Specifically, trial courts in future cases will have clearer guidance about when objections should be sustained or overruled.<sup>358</sup> And future appellate courts will be able to debate the lines between proper and improper conduct more effectively if their decisions are not muddied by considerations of whether an error was plain.<sup>359</sup> As a result, prosecutors will be better able to understand the line between proper and improper conduct, and stay on the correct side of the line, when case law makes those lines clearer.<sup>360</sup> Additionally, the added clarifications between proper and improper comments can make it easier for defense counsel to object when prosecutors do cross the line. These benefits will only come, however, from appellate courts taking seriously their responsibilities to clarify the law and offer guidance to future litigants.<sup>361</sup>

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<sup>355</sup> See *id.* at 544-45 (discussing how other types of subtle errors can nevertheless effect the outcome of a trial); supra section IV(B)(1) (regarding the ways that juror decision-making can be effected by things that do not seem obvious at the time, including the way that one piece of information can taint a juror’s perception of analytically unrelated information).

<sup>356</sup> See Morrow & Larson, *supra* note 24, at 402-03 (arguing that courts should offer clearer guidance on the lines between proper and improper prosecutorial comments).

<sup>357</sup> *Id.* at 404.

<sup>358</sup> See Berger, *supra* note 108, at 548-49 (arguing that having courts focus on whether unpreserved conduct was error rather than whether any error was obvious is valuable because it ensures “that (1) the court creates a reference point for future cases that deal with the same issue; (2) the parties can determine whether the court ‘got it right,’ and, therefore whether to petition for further appellate review or reconsideration; and (3) the judges on the court can satisfy themselves, as much as possible, that the court’s opinion accurately appreciates the significance error and its consequences under the case’s particular facts.”).

<sup>359</sup> See *id.* at 549.

<sup>360</sup> Cf. *id.* at 545-46 (“[I]n many cases, the obviousness of the error may be difficult to discern because it requires the application of a legal rule that is facially clear but unclear when applied to the facts of the defendant’s case.”). This is yet another reason why a focus on the “plain” part of plain error is counterproductive, particularly regarding issues like prosecutorial misconduct that require such careful analysis of the facts.

<sup>361</sup> See, e.g., Alschuler, *supra* note 32, at 655 (noting the important role appellate courts play in helping lawyers and trial courts handle prosecutorial trial misconduct).

If courts could no longer rely on the “plain” part of plain error, they would still need to determine whether an error occurred and whether it was harmless.<sup>362</sup> Under the plain error doctrine, the defendant would have to bear the burden of showing harmless error.<sup>363</sup> This article proposes, however, that courts continue to place the burden of proof on the prosecution of showing harmlessness, as explained in section V(A)(3). This approach would account for the fact that defense counsel’s failure to object is often the result of factors other than gamesmanship, such as concerns over angering jurors.

Additionally, this approach would not entirely remove the incentives for defense counsel to object at trial. For example, defense counsel would still be likely to object when prosecutor’s statement was clearly misconduct and in situations where the trial court could provide a meaningful remedy for the misconduct.<sup>364</sup> And if defense counsel deliberately decided not to object for tactical reason, such as not drawing attention to the comment, courts could still meaningfully review the allegation of misconduct and consider whether it was likely to affect the verdict. The failure to object would likely make defense counsel’s argument on the severity of the misconduct more difficult, but it would not entirely foreclose review as it might under current law.<sup>365</sup> This approach would equalize the playing field between defendants whose lawyers failed to object to prosecutorial misconduct and those whose lawyers did raise objections, while continuing to provide some incentive for those objections to be raised.

It is possible that courts could still decide to increase these incentives for a contemporaneous objection by shifting the burden to the defendant to prove harmlessness when the defendant failed to object. While a unitary standard imposing the burden of proof on the prosecution would be preferable, that approach would be less troubling under the reformulated approach to the other facets of harmless error analysis proposed here, such as use of the error-focused approach and changes to the factors that contribute to a finding of harmless error. Either way, reviewing courts could still uphold convictions when they conclude that the error was not sufficiently serious to warrant reversal<sup>366</sup> without collapsing that

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<sup>362</sup> Carter, *supra* note 162, at 952.

<sup>363</sup> See *supra* section III(B).

<sup>364</sup> Cf. Alschuler, *supra* note 32, at 652 (noting differences between effectiveness and efficiency of remedies like mistrials when misconduct happens early in a trial versus late in the trial).

<sup>365</sup> See *supra* note 295.

<sup>366</sup> See generally Berger, *supra* note 108 (discussing the policy underpinnings that support having a focus on the seriousness of the error while arguing for a different formulation of that enquiry).

inquiry into a simplistic and cognitively biased judgment about the defendant's guilt.<sup>367</sup>

## VI. Conclusion

Although research strongly suggests that prosecutorial trial misconduct is pervasive and may have significant effects on juror and reviewing court decisions, the current legal standards impose excessive procedural barriers to individual defendants who seek remedy for misconduct in their individual cases. This article therefore proposed changes to harmless error analysis and the rejection (or at least weakening of) the plain error doctrine as applied in prosecutorial misconduct cases. Courts adopting the recommendations proposed in this article should, as a threshold matter, first consider whether the prosecutor's behavior was in fact misconduct.<sup>368</sup> If the prosecutor did engage in misconduct, then the court should consider whether the prosecutor's misconduct was harmless. In doing so, the court should reverse unless it concludes that the misconduct has only a slight chance of contributing to the defendant's conviction.<sup>369</sup> In making that determination, the court should rely primarily on the severity of the misconduct and how it relates to the trial's narratives; it should not consider the strength of the evidence against the defendant.<sup>370</sup> Furthermore, courts should exercise their discretion to waive the requirement of a contemporaneous objection, and should analyze all prosecutorial misconduct cases as if there had been such an objection.

In total, these changes are meant to have three effects: (1) to minimize the incentives in existing case law for prosecutors to commit misconduct, intentionally or unintentionally; (2) to encourage courts to draw clearer lines about what behavior is or is not misconduct, by removing the confusion on that issue caused by use of the plain error rule; and (3) to improve the courts' response to misconduct when it does occur, so that the courts more accurately gauge the severity and potential effects from that misconduct, rather than hiding behind procedural barriers to reversal.

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<sup>367</sup> Cf. *id.* at 546-47 (noting that under current formulations of harmless error, courts overestimate the weight of the evidence against the defendant and make that the sole criterion for upholding convictions).

<sup>368</sup> If courts use an error-focused approach to harmless error, they must first decide if an error occurred. See also Kamin, *supra* note 111, at 6 (correctly arguing that evaluating harmless error before the court determines whether there was error stifles the development of the substantive law on whether what conduct is actually proper). Similarly, as discussed in section V(B), courts could not use the plain error doctrine as a threshold matter to avoid analyzing whether a prosecutor's behavior constituted misconduct.

<sup>369</sup> See supra note 326.

<sup>370</sup> See supra section V(B)(2).

As to the first point, even though prosecutors may not consciously choose to engage in prosecutorial misconduct based on the incentives created by current case law, those incentives may put some pressure on their subconscious decision-making, as discussed in section IV(A) above. For example, those pressures may create more space for moral disengagement, and they may contribute to strengthening prosecutors' perceptions that the defendants they prosecute must be guilty. Similarly, courts repeatedly invoke the strength of the evidence against defendants in harmless error discussions, which suggests to prosecutors that the defendants really were guilty, even when cognitive bias research shows the inherent fallacy in trying to evaluate the strength of other evidence apart from the taint of an error. Therefore, it is good policy to remove incentives for prosecutors to commit trial misconduct, as doing so should reduce the subconscious cognitive biases that may contribute to prosecutorial misconduct, as we all reducing the incentives for prosecutors to intentionally commit misconduct.<sup>371</sup>

Additionally, reformulation of the plain error doctrine in particular should lead to more clarity in judicial decision-making about what is and is not misconduct.<sup>372</sup> That is true because courts will not have the option of ducking difficult line-drawing questions by reliance on the defense attorney's failure to object. And if the courts actually do provide more clarity about the lines between proper and improper conduct, then defense counsel will actually be in a better position to be able to object during the heat of trial, which should minimize concerns about waiver of the contemporaneous objection requirement.

Finally, and most importantly, these solutions should help provide more meaningful remedies for individuals who have been affected by prosecutorial misconduct. This approach contributes to "substantive justice," which involves both with getting the facts right and doing so without resorting to "means that are either legally forbidden or procedurally off-limits."<sup>373</sup> While I support other systemic approaches to combatting prosecutorial trial misconduct, I firmly believe in the importance of providing meaningful substantive justice to defendants whose cases were tainted by prosecutorial trial misconduct. Meaningful remedies in individual cases are essential for ensuring the health of the criminal justice system as a whole.

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<sup>371</sup> See Landes and Posner, *supra* note 113, at 176.

<sup>372</sup> See also Kamin, *supra* note 111, at 6 (arguing that changing harmless error analysis should also increase clarity of the substantive law on what constitutes prosecutorial misconduct).

<sup>373</sup> See Griffin, *supra* note 212, at 289-90.

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