

PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT: THE ROLE OF INTENT IN APPELLATE REVIEW

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Almost seventy years ago, Roscoe Pound observed that:

The number of new trials for grave misconduct of the public prosecutor which may be found in the reports throughout the land in the past two decades is significant. We must go back to the seventeenth century—to the trial of Raleigh or to the prosecution under Jeffreys—to find parallels for the abuse and disregard of forensic propriety which threatens to become staple in American prosecutions.¹

Pound's fears that prosecutorial misconduct would become commonplace appear to have come true.² Judges³ and commentators⁴ have been criticizing the performance of

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1. ROSCOE POUND, CRIMINAL JUSTICE IN AMERICA 187 (1930).

2. BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 10.1, at 10-2 (updated 1996) (noting that misconduct has in fact “become staple in American prosecutions” and that “such misconduct shows no sign of abating or being checked by institutional or other sanctions”).

3. See, e.g., *Darden v. Wainwright*, 477 U.S. 168, 205-06 (1986) (Blackmun, J. dissenting); *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 661 (2d Cir. 1946) (Frank, J., dissenting).

4. See, e.g., Francis A. Allen, *A Serendipitous Trek Through the Advance-Sheet Jungle: Criminal Justice in the Courts of Review*, 70 IOWA L. REV. 311, 333-36 (1985); Albert Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 644 (1972) (courts have been reviewing allegedly improper arguments since “at least the 1850’s”); David Crump, *The Functions and Limits of Prosecution Jury Argument*, 28 SW. L.J. 505 (1974); Mark S. Davies, *Enlisting the Jury in the “War on Drugs”: A Proposed Ban on Prosecutors’ Use of “War on Drugs” During Opening and Closing Argument of a Narcotics Trial*, 1994 U. CHI. LEGAL F. 395 (1994); J. Allison DeFour, *Prosecutorial Misconduct in Closing Argument*, 7 NOVA L. REV. 443, 448 (1983); James Joseph Duane, *What Message are We Sending to Criminal Jurors When We Ask Them to “Send a Message” With Their Verdict?*, 22 AM. J. CRIM. L. 565 (1995); Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393 (1992); Bennett L. Gershman, *Why Prosecutors*

prosecutors in closing arguments and the failure of courts to control them ever since.

Perhaps the most often cited judicial expression of exasperation with court handling of improper prosecutorial argument was uttered more than fifty years ago by Judge Jerome Frank of the Second Circuit:

This court has several times used vigorous language in denouncing government counsel for such conduct as that of the United States Attorney here. But, each time, it has said that, nevertheless, it would not reverse. Such an attitude of helpless piety is, I think, undesirable If we continue to do nothing practical to prevent such conduct, we should cease to disapprove it. . . . Government counsel, employing such tactics, are the kind who, eager to win victories, will

Misbehave, 22 CRIM. L. BULLETIN 131 (1986); Martin Hobbs, *Prosecutor's Bias, an Occupational Disease*, 2 ALA. L. REV. 40 (1949); John H. King, Jr., *Note, Prosecutorial Misconduct: The Limitations Upon the Prosecutor's Role as an Advocate*, 14 SUFFOLK U. L. REV. 1095 (1980); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct With Financial Incentives*, 64 FORDHAM L. REV. 851, 890-902 (1995); Lyn M. Morton, *Note, Seeking the Elusive Remedy for Prosecutorial Misconduct: Suppression, Dismissal, or Discipline?*, 7 GEO. J. LEG. ETHICS 1083, 1084-86 (1994); Rosemary Nidiry, *Restraining Adversarial Excess in Closing Argument*, 96 COLUM. L. REV. 1299 (1996); Richard G. Singer, *Forensic Misconduct by Federal Prosecutors—And How it Grew*, 20 ALA. L. REV. 227 (1968); Walter W. Steele, Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 SW. L.J. 965 (1984); Henry B. Vess, *Walking a Tightrope: A Survey of Limitations on a Prosecutor's Closing Argument* 64 J. CRIM. L. & CRIMINOLOGY 22 (1973); Welsh S. White, *Prosecutors' Closing Arguments at the Penalty Trial*, 18 N.Y.U. REV. L. & SOC. CHANGE 297 (1991); *Note, The Nature and Consequences of Forensic Misconduct in the Prosecution of a Criminal Case*, 54 COLUM. L. REV. 946 (1954); *Note, The Permissible Scope of Summation*, 36 COLUM. L. REV. 931 (1936).

Commentators on the law of specific states share a similarly disappointed view of both the behavior of prosecutors and the failure of courts to control it. *See, e.g.*, J. Thomas Sullivan, *Prosecutorial Misconduct in Closing Argument in Arkansas Criminal Trials*, 20 U. ARK. LITTLE ROCK L.J. 213 (1998) (Arkansas); Candice D. Tobin, *Note and Comment, Prosecutorial Misconduct During Closing Argument: Florida Case Law*, 22 NOVA L. REV. 485, 510 (1997) (Florida); Peder D. Hong, *Summation at the Border: Serious Misconduct in Final Argument in Criminal Trials*, 20 HAMLIN L. REV. 43 (1996) (collecting hundreds of cases of serious misconduct in Minnesota); R. Marc Kantrowitz et al., *Closing Arguments: What Can and Cannot be Said*, 81 MASS. L. REV. 95, 107 (1996) (sharply critical of prosecutors and defense attorneys in Massachusetts); Michael J. Ahlen, *The Need for Closing Argument Guidelines In Jury Trials*, 70 N.D. L. REV. 95 (1994) (observing that procedures make it difficult to obtain ruling on merits in North Dakota); David E. Overby, *Improper Prosecutorial Argument in Capital Cases*, 58 U. MO. K.C. L. REV. 651 (1990) (Missouri). *But see* James W. Gunson, *Comment, Prosecutorial Summation: Where is the Line Between "Personal Opinion" and Proper Argument*, 46 ME. L. REV. 241 (1994) (criticizing the Law Court in Maine for venting frustrations with continued misconduct by prosecutors by reversing three convictions in which the arguments were proper).

gladly pay the small price of a ritualistic verbal spanking. The practice of this court—recalling the bitter tear shed by the Walrus as he ate the oysters—breeds a deplorably cynical attitude towards the judiciary.⁵

Despite long-standing and widespread dissatisfaction, there does not seem to be any substantial change in the perception of the performance of prosecutors or courts. The volume of reported appellate cases of misconduct in argument remains high; there are frequent findings of improper argument, but only occasional reversals;⁶ and the volume of scholarly criticism is, if anything, increasing.

The history of “helpless piety” has produced an air of resignation among the defense bar⁷ and many commentators,⁸ with

5. *Antonelli Fireworks*, 155 F.2d at 661 (Frank, J., dissenting).

6. No overall calculation of reversal rates has been done in this article. However, the experience of the First Circuit in dealing with the Office of the United States Attorney for the District of Puerto Rico between 1987 and the present (discussed *infra* in section III) provides one piece of evidence. Over this twelve-year period, the First Circuit found twenty-five instances of improper argument by prosecutors in this office and reversed three times—a reversal rate of 12% once the court found impropriety.

In a study of 700 criminal and cases, Professor J. Alexander Tanford found an overall reversal rate of 24% for all cases and 19% for criminal cases. See J. Alexander Tanford, *Closing Argument Procedure*, 10 AM J. TRIAL ADVOC. 47, 137 n.406 (Summer 1986). Professor Tanford contends that the evidence does not support claims that appellate courts take violations of the rules of closing argument less seriously than other errors. *Id.* at 137. The overall reversal rate calculated by Professor Tanford seems rather high and his methodology is not sufficiently explained to evaluate it. A true overall reversal rate would include cases of alleged error where the court found no improper conduct and those cases where it found the error was not properly preserved. A rate calculated with these inclusions would presumably be lower. In any case, the issue is not whether courts take intentional misbehavior less seriously than other errors. The question is whether they are focusing on the threats to the integrity of the system posed by intentional wrongdoing by trusted law enforcement officials. This raises concerns much more serious than many other kinds of errors.

7. For example, this author was told repeatedly by colleagues in the defense bar over the nine-year period in which he represented Shawn Hill not to expect relief from the California Supreme Court even if the prosecutorial misconduct was flagrant. This author was even advised to limit oral argument on this issue because of the unlikelihood of success. The pessimism was well founded; before the *Hill* case, the California Supreme Court had gone 14 years without reversing a case for prosecutorial misconduct. See *People v. Holt*, 690 P.2d 1207 (Cal. 1984).

8. See, e.g., JOSEPH F. LAWLESS, JR., PROSECUTORIAL MISCONDUCT § 13.21 cmt. (1985) (“From a pragmatic perspective, counsel must consider the plight of the trial judge having to deal with a rambunctious prosecutor in the midst of a heated murder trial. The moment the assistant prosecutor is held in contempt, his boss will be in the appellate court asking for and probably obtaining a stay order and meeting the press to castigate the judge for interfering with a dedicated prosecutor trying to “put away two ruthless killers.”); Gershman, *The New Prosecutors*, *supra* note 4, at 453-55 (suggesting creation of a commission separate

concerns raised about whether appellate courts care about misconduct by prosecutors.⁹ However, the California Supreme Court's recent dramatic reversal in *People v. Hill*¹⁰ and a review of the forty-five reversals by federal courts of appeals in the last decade in cases involving improper prosecutorial argument demonstrate that many courts that routinely review the work product of the criminal justice system care deeply about wrongdoing by prosecutors. Some courts are willing to take strong measures, including reversals and, in *Hill*, even a disciplinary referral to the State Bar,¹¹ but they lack a coherent rationale and consistent doctrinal vocabulary for articulating their concerns about intentional wrongdoing by prosecutors.

In particular, this article examines the curious role that the prosecutor's intent plays in these decisions. Despite the widespread perception that the prosecutor's intent is essentially irrelevant to the decision to reverse,¹² twenty-eight of the forty-five federal opinions and *Hill* use language suggesting that the prosecutor knew that the conduct was improper; in thirteen other opinions the conduct was such that the prosecutor knew or should have known it was wrong. When misconduct is the product of intentional or deliberate behavior, it presents a threat to the integrity of the criminal justice system. Reading these opinions

from courts to regulate prosecutors because of the failure of courts and disciplinary authorities to do so); Meares, *supra* note 4, at 890-92 (suggesting compensating prosecutors for *not* engaging in misconduct because efforts to discipline them have failed).

9. See Alschuler, *supra* note 4, at 675 (arguing that the "key to the problem lies with the appellate courts," and that "[i]f appellate judges would consistently demand careful and dignified trial procedures as a prerequisites to criminal conviction, their concern would be effectively communicated to the trial courts"); Nidry, *supra* note 4, at 1299 (arguing that although action by trial courts is certainly needed, present studies suggest that it will take more leadership by appellate courts to change prosecutors' behavior).

10. 952 P.2d 673 (Cal. 1998).

11. *Id.* at 703; see BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 13.1, n.4 ("Literally hundreds of truly egregious instances of prosecutorial misconduct have been noted in this book. To my knowledge, none of these cases resulted in punishment of the prosecutor by his superiors to say nothing of punishment by courts or bar associations."); Alschuler, *supra* note 4, at 644-77; Meares, *supra* note 4, at 853, 890-91 (suggesting that sanctions are so ineffective, financial compensation for good behavior should instead be used as a means of reducing misconduct); Singer, *supra* note 4, at 272-79; Steele, *supra* note 4, at 966-67; Note, *Misconduct of Judges and Attorneys During Trial: Informal Sanctions*, 49 IOWA L. REV. 541, 543 (1964); Note, *The Nature and Consequences of Forensic Misconduct*, *supra* note 4, at 976-83.

12. See, e.g., Gershman, *The New Prosecutors*, *supra* note 4, at 440 ("The prosecutor's motive to unfairly prejudice a defendant is ordinarily not relevant.").

makes it clear that many courts are deeply concerned when prosecutors—law enforcement officials whose role is not merely to secure convictions, but to assure that justice is done—*intentionally* violate the law in order to secure convictions. Yet, current doctrine clouds the power of federal courts to consider intent in deciding whether to reverse. This leaves an undesirable separation between doctrine and the considerations that actually motivate courts to reverse.

This article is the first of a two-part series. This first part is a report on improper prosecutorial argument in the 1990s, examining the California Supreme Court's recent reversal of a murder conviction and death sentence primarily because of pervasive prosecutorial misconduct during closing argument; and the forty-five opinions of federal appellate courts issued since December 31, 1989 in which a conviction has been overturned and improper prosecutorial argument was a principal, contributing, or alternate ground for the decision.¹³ The report describes the nature

13. By circuit, these cases are:

First Circuit: United States v. Roberts, 119 F.3d 1006 (1st Cir. 1997); United States v. Hardy, 37 F.3d 753 (1st Cir. 1994); United States v. Manning, 23 F.3d 570 (1st Cir. 1994); United States v. Udechukwu, 11 F.3d 1101 (1st Cir. 1993); Arrieta-Agressot v. United States, 3 F.3d 525 (1st Cir. 1993).

Second Circuit: Agard v. Portuondo, 117 F.3d 696 (2d Cir. 1997); United States v. Forlorna, 94 F.3d 91 (2d Cir. 1996); United States v. Friedman, 909 F.2d 705 (2d Cir. 1990); Floyd v. Meachum, 907 F.2d 347 (2d Cir. 1990).

Third Circuit: United States v. Molina-Guevara, 96 F.3d 698 (3d Cir. 1996); Lesko v. Lehman, 925 F.2d 1527 (3d Cir. 1991).

Fourth Circuit: United States v. Wilson, 135 F.3d 291 (4th Cir. 1998); United States v. Mitchell, 1 F.3d 235 (4th Cir. 1993).

Fifth Circuit: United States v. Johnston, 127 F.3d 380, 393-402 (5th Cir. 1997); United States v. Flores-Chapa, 48 F.3d 156 (5th Cir. 1995).

Sixth Circuit: Gravley v. Mills, 87 F.3d 779 (6th Cir. 1996); United States v. Carroll, 26 F.3d 1380 (6th Cir. 1994); Martin v. Parker, 11 F.3d 613 (6th Cir. 1993); United States v. Payne, 2 F.3d 706 (6th Cir. 1993); United States v. Solivan, 937 F.2d 1146 (6th Cir. 1991); Sizemore v. Fletcher, 921 F.2d 667 (6th Cir. 1990).

Seventh Circuit: United States v. Cotnam, 88 F.3d 487 (7th Cir. 1996); Freeman v. Lane, 962 F.2d 1252 (7th Cir. 1992).

Eighth Circuit: United States v. Cannon, 88 F.3d 1495 (8th Cir. 1996); Miller v. Lockhart, 65 F.3d 676 (8th Cir. 1995); United States v. Johnson, 968 F.2d 768 (8th Cir. 1992); United States v. Roark, 924 F.2d 1426, 1434 n.10 (8th Cir. 1991).

Ninth Circuit: United States v. Frederick, 78 F.3d 1370 (9th Cir. 1996); United States v. Kojayan, 8 F.3d 1315 (9th Cir. 1993); United States v. Foster, 985 F.2d 466 (9th Cir. 1993) (reversal based on improper questioning of defendant regarding post-arrest silence; reference to silence in closing argument cured by admonition following timely objection); Commonwealth v. Mendiola, 976 F.2d 475 (9th Cir. 1993), *overruled on other*

of the arguments that were found improper in these cases and the confused state of doctrine concerning whether these improprieties required reversal. The report concludes with a case study of the office of the United States Attorney for the District of Puerto Rico, which squarely raises the problem of “prosecutorial recidivism”—the tendency of the same prosecutor or office to engage in misconduct repeatedly, even in the face of admonishments from the court.

The second article in this two-part series¹⁴ proposes changes in doctrine and practice that would allow the intent of the prosecutor, evident either by the improper argument in a single case or by a pattern of repeated misconduct, to play an appropriate role in appellate decision-making and also provide an appropriate basis for regulating the conduct of prosecutors to reduce or eliminate misconduct.

I. THE ROLE OF INTENT IN THE CURRENT CONTEXT

A. *People v. Hill*

In *People v. Hill*,¹⁵ a unanimous California Supreme Court reversed a death penalty conviction for one count of murder, one count of attempted murder and three counts of robbery aggravated by the use of a deadly weapon, primarily because of “the outrageous and pervasive misconduct on the part of the state’s

grounds by George v. Camacho, 119 F.3d 1393 (9th Cir. 1997); *United States v. Kerr*, 981 F.2d 1050 (9th Cir. 1992); *United States v. Smith*, 962 F.2d 923 (9th Cir. 1992); *Brown v. Borg*, 951 F.2d 1011 (9th Cir. 1991).

Tenth Circuit: *United States v. Novak*, 918 F.2d 107 (10th Cir. 1990) (misconduct during opening statement); *Mahorney v. Wallman*, 917 F.2d 469 (10th Cir. 1990).

Eleventh Circuit: *United States v. Alzate*, 47 F.3d 1103 (11th Cir. 1995); *Davis v. Zant*, 36 F.3d 1538 (11th Cir. 1994); *United States v. Crutchfield*, 26 F.3d 1098 (11th Cir. 1994) (misconduct during opening statement); *United States v. Blakey*, 14 F.3d 1557 (11th Cir. 1994); *Nelson v. Nagle*, 995 F.2d 1549 (11th Cir. 1993); *Presnell v. Zant*, 959 F.2d 1524 (11th Cir. 1992).

D.C. Circuit: *United States v. Donato*, 99 F.3d 426 (D.C. Cir. 1996); *United States v. Teffera*, 985 F.2d 1082, 1089 n.6 (D.C. Cir. 1993); *United States v. Doe*, 903 F.2d 16 (D.C. Cir. 1990).

14. Appearing in a forthcoming issue of *The Journal of Appellate Practice and Process*.

15. 952 P.2d 673 (Cal. 1998).

representative at trial: the public prosecutor” in arguments to the jury and behavior during the trial.¹⁶ The court found that this pervasive prosecutorial misconduct, together with other errors by the trial court,¹⁷ constituted cumulative error that “created a negative synergistic effect, rendering the degree of overall unfairness to defendant more than that flowing from the sum of the individual errors.”¹⁸ In deciding to reverse, the court found that “defendant was deprived of that which the state was constitutionally required to provide and he was entitled to receive: a fair trial,”¹⁹ without formally considering whether the strength of the evidence against Hill was strong enough to render the errors it found harmless. Chief Justice George concurred on the ground that the pervasive misconduct combined with the erroneous rulings of the trial court on that misconduct was sufficient by itself to justify reversal.²⁰

1. *Hill Prosecutor’s History of Misconduct*

Prior to the trial in *Hill*, the prosecutor’s practice of misconduct at trial had been documented in three appellate court decisions. In 1974, in *People v. Mendoza*,²¹ the court cited four separate instances of misconduct by her as grounds for reversing a conviction for child molestation. Without mentioning her by name, the court found that the prosecutor’s closing argument was improper because it made thinly veiled references to defendant’s failure to testify;²² made unjustified inferences and dwelt on

16. *Id.* at 679.

17. These included: (1) allowing defendant to be shackled throughout the trial without determining for itself whether shackling was necessary, (2) not excusing the bailiff from further courtroom duties after he testified against defendant, (3) failing to instruct the jury to consider the testimony of the bailiff as it would any other witness, and (4) instructing the jury that it need not find defendant intended to kill to sustain the robbery-murder-special-circumstance allegation. *Id.* at 681.

18. *Id.* at 699.

19. *Id.*

20. *Id.* at 703.

21. 37 Cal. App. 3d 717, 726-27 (Ct. App. 1974).

22. “[T]his is a serious offense; you should give it great, great thought. Since olden days, I guess it is from the time when the defendant was not capable of taking the stand, you know, he couldn’t be a witness in those days, there is a cautionary instruction that says to you, ‘The charge is easily made; hard to defend against.’” *Id.* at 726.

suppositions not reflected in evidence;²³ misstated the law;²⁴ and urged the jury to “take . . . [defendant] off the streets.”²⁵

Three years later, in *People v. Kelley*,²⁶ the same prosecutor was involved in a rancorous trial in which she was cited by an appellate court for eighteen separate instances of misconduct. These included making personally abusive statements in front of the jury to and about opposing counsel; threatening opposing counsel;²⁷ unjustifiably moving that opposing counsel be cited for misconduct; refusing, without apparent basis, to stipulate to undisputed facts; using “dirty glares” and “sinister looks” to suggest to the jury that opposing counsel were doing something wrong;²⁸ and engaging in such heated exchanges with opposing counsel that the court twice adjourned early to avoid dealing with the unpleasantness. Despite all of this misconduct, the *Kelley* court did not reverse because the evidence against defendant was strong

23. The prosecutor argued:

It is the very little, small, mild people, some of whom, rather than even being prosecuted, go to psychiatric care, who maybe ultimately molest, sexually attack, and even kill their granddaughters, friends who come to the house to see them, or the child is found in Griffith Park. These are things that happen all the time. . . . There are more, many more articles in newspapers; you have all read them, that say ‘Hey, you know, we didn’t think this guy was too dangerous. He looked kind of meek.’ And we don’t know how fragile Mr. Mendoza is. There is no evidence as to how fragile he is, but he looked sort of meek. We didn’t really know; we didn’t really realize, and this is after death and worse that leaves injury on these kids.

Id. at 726.

24. A “child molestation case, that is 288 of the Penal Code, requires very little evidence.” *Id.* at 727.

25. *Id.*

26. 75 Cal. App. 3d 672, 680-91 (Ct. App. 1977).

27. *Id.* at 681-82. These included: “Excuse me, if you interrupt me again, I’m going to kick you in the ankle.” *Id.* As described by the court:

The deputy district attorney, in objecting on the ground of relevancy to a particular line of cross-examination by deputy public defender Nierenberg, stated that when the time came the deputy public defender wanted to go on vacation she was not going to speed up the process of putting on relevant evidence.

THE COURT: We don’t need threats being made here as to what you are going to do.

[THE PROSECUTOR:] I know, but I just—

THE COURT: Will you please let me finish, for a change?

[THE PROSECUTOR:] All right.

Id.

28. See *id.* at 683-84.

and “prosecutorial misconduct did not prejudice appellant’s case, but to the contrary may have helped it by generating jury sympathy to produce a hung jury on nine of twelve counts.”²⁹ Although the court reminded her of her responsibilities as a public prosecutor and found that she had committed extensive misconduct, the opinion did not mention the prosecutor by name. The court did, however, name her opposing counsel whose demeanor it also criticized. No professional discipline of either attorney was mentioned.

Then, in an unpublished opinion filed in December of 1987,³⁰ just a few months before the trial in *Hill* began, the California Court of Appeals found it necessary to admonish the prosecutor by name for her misconduct:

Although we have determined the denial of appellant’s right of confrontation was sufficiently egregious in itself to require reversal, we nevertheless feel compelled to comment upon the conduct of the deputy district attorney. This court has had occasion to twice address at length her attitude toward, and treatment of, the judge, opposing counsel, witnesses, defendants, jurors and others in the courtroom [citing *Kelley* and *Mendoza*].

Consequently, it is disheartening, to say the least, to learn that she takes “pride” in our admonitions, apparently because we did not reverse the judgment rendered. We most earnestly urge counsel to reconsider her approach lest in the future it becomes necessary for us to reverse otherwise sustainable convictions because, in view of her declaration here, further instances of objectionable behavior could be regarded as premeditated. We suggest that she reflect on the possibility that others, even opposing counsel and members of the judiciary, are also striving as sincerely as is she, to serve the law to the best of our mere mortal abilities.³¹

Thus, the court warned the prosecutor that repetitions of her conduct could result in reversals in the future, mentioned her by name, condemned her behavior in strong terms, and even pleaded

29. *Kelley*, 75 Cal. App. 3d at 690.

30. *People v. Congious*, No. B020979, 2d Dist., Div. 2 (December 4, 1987) (unpublished opinion).

31. *Id.*

with her to reform her conduct. It did not, however, order or recommend any discipline, such as a fine, suspension, or disbarment.

2. *The Hill Trial*

The unpublished opinion in *Congious* was issued in December of 1987, during pretrial proceedings in *Hill*. Despite the strong rebuke from the appellate court, the prosecutor was allowed to continue to try a death penalty case. If her supervisors believed that the most recent stinging rebuke from the appellate court would rein in this prosecutor, they were mistaken.³² The opinion describing the prosecutor's conduct during the *Hill* trial reads like a manual on conduct a prosecutor should avoid. Specifically, the California Supreme Court found that the prosecutor engaged in the following improper conduct:

(a) *Misstating evidence*. The Court found that the prosecutor seriously distorted evidence in her closing arguments at both the guilt and penalty phases in the following ways:

i. *Distorting crucial blood evidence*. During the guilt phase, the prosecutor argued to the jury that blood evidence on a knife allegedly the murder weapon was "classified down, right down to the different classifications as" the murder victim's blood, when in fact the serologist had only been able to classify the blood as type O, a blood grouping possessed by forty-eight percent of the population.³³ When defense counsel objected that the prosecutor had confused the blood evidence relating to the murder with the blood evidence relating to an attempted murder of a different victim on a different day (blood evidence that had

32. Subsequent to the decision in *Hill*, a magistrate found that this same prosecutor had deliberately caused a mistrial to try and obtain a more favorable ruling on the admissibility of evidence. The magistrate found that the prosecutor was "a loose cannon" who "the District Attorney cannot or will not control," and whose "course of conduct has made her a local legend in her own time." *Mercado v. Block*, No. CV89-0408-PAR(B) (May 1, 1989) (report and recommendations of magistrate) (on file with author). In addition, the magistrate recommended that the district court refer the prosecutor to the local bar. *Id.* The magistrate's recommendations were not followed by the district judge. *See Mercado v. Block*, 925 F.2d 1470 (9th Cir. 1991).

33. *People v. Hill*, 952 P.2d 673, 685 (Cal. 1998).

received much more sophisticated enzyme testing and that had been identified as a rare type of AB blood possessed by only four people out of 100,000), the trial judge overruled the objection and prosecutor continued to argue her totally misleading statement of the blood evidence.³⁴

ii. *Misrepresenting eyewitness testimony.* The prosecutor's closing argument in the guilt phase blatantly denied that an eyewitness had testified that the perpetrator the witness saw was no more than five-foot-five inches tall when the witness had clearly testified to this fact (defendant was five foot ten inches tall).³⁵

iii. *Falsely characterizing a surgical scar as a knife wound.* During the trial, the prosecutor had asked the attempted murder victim, Ron Johnson, to display a ten-inch scar on his chest to the jury. In closing argument, the prosecutor argued:

You saw the scar. Take a look at it, and you will remember how far across the chest it went. If you stick it in him two times and rip his chest open, you are planning to kill him.³⁶

Even when defense counsel, in his closing, asked the jury to look at the hospital records that demonstrated that Johnson's wound was two centimeters in length and that the ten-inch scar on his chest was caused by surgery, the prosecutor stuck to her guns, telling the jury in her rebuttal argument:

You will also see that his scar was not by reason of a doctor cutting him from side to top. The lawyer that had that malpractice action would be doing a pretty good job. He would make quite a few bucks. That was a terrible scar.³⁷

In fact, the hospital records did confirm that on entry to the hospital, the larger of Johnson's wounds was two centimeters in length, as defense counsel had stated.³⁸

34. *Id.*

35. *Id.* at 686.

36. *Id.*

37. *Id.*

38. *Id.*

(b) *Referring to facts not in evidence.* The prosecutor often referred to facts not in evidence, including suggestions in guilt-phase closing argument (without evidence in the record to support the argument) that no similar crimes had been committed in that location since defendant was arrested. She stated that she could have produced an expert to testify that the substance found in murder victim Margetts' truck was fake rock cocaine after defense counsel had argued that her failure to do so created reasonable doubt. She also argued without evidence that a defense witness, Delores Smith, who testified that she saw the events preceding the murder from the apartment window of her friend Linda Hill, was biased because Ms. Hill had the same last name as the defendant and was therefore probably a relative of defendant.³⁹ The pattern continued during the penalty phase arguments in which the prosecutor argued to the jury that defendant called his knives his "uzis" (a type of assault rifle) even though she had been unable to get a prosecution witness to so testify.⁴⁰ In the penalty phase, she also argued that

everything [defendant] ever did one way or another, he got away with. He has killed. He has stabbed. He has robbed. He has gone to prison for it. He has not been rehabilitated under any guise or thought.⁴¹

In fact, defendant's prior convictions did not involve homicide, stabbings of any kind, or robbery.⁴² She also argued without any evidence in the record what prison conditions are like, what defense lawyers always argue, and that "some people in state prison can, I guess, be rehabilitated. I haven't seen too many, and I have been around a lot."⁴³

(c) *Misstating the law.* The prosecutor also argued in the guilt phase that if they believed defense counsel's argument that there was reasonable doubt about the perpetrator's intent prior to the stabbing, the jurors would "have to walk that murderer, that robber out of the courtroom." Actually, defense counsel's

39. *Id.* at 688.

40. *Id.* at 693.

41. *Id.*

42. *Id.*

43. *Id.*

argument went to the degree of murder and even if accepted would have resulted in a conviction for second degree murder, not acquittal.

When confronted with a defense contention that defendant committed a theft, not a robbery, the prosecutor argued that “pretend[ing] to sell them something in order to get money . . . is robbery.” The court found that this argument “subtly undermin[ed]” the force or fear element of robbery. The prosecutor further argued that “there has to be some evidence on which to base a doubt” in response to defense arguments that the prosecution had failed to prove its case beyond a reasonable doubt.⁴⁴

(d) *Making rude and derisive comments about opposing counsel in front of the jury.* The court’s opinion noted the following instances of such misconduct during the guilt phase: (i) a retort in response to a request to stipulate that the length of the jury box was twenty feet; the prosecutor replied “I certainly will not,” followed by a statement in front of the jury that defense counsel was “unprofessional” and “contemptuous” for even asking her to stipulate; (ii) an outburst in front of the jury in response to defense counsel’s cross examination of the prosecution’s fingerprint expert on whether mistakes were ever made in identifying fingerprints, in which the prosecutor demanded that defendant’s prints be rolled in front of the jury and signed by defense counsel; (iii) audibly laughing during defense counsel’s examination of witnesses; (iv) getting out of her chair during defense counsel’s examination of witnesses, standing in his line of sight, staring at him and making faces at him.⁴⁵ In addition, the court described her behavior during the penalty phase as follows:

When defense counsel interjected that he could not hear [the prosecutor’s] closing argument, she cracked: “Is it all right if I continue whether or not he hears?” When defense counsel stated the court had ruled a defense penalty phase witness should be allowed to see the medical records from a hospital, [the prosecutor] replied: “No. The court didn’t.

44. *Id.* at 689.

45. *Id.* at 690-91.

And I don't pay attention to you." Twice during bench conferences, defense counsel asked [the prosecutor] to keep her voice down so the jury would not hear their discussion. [The prosecutor] expressed indignation and refused in both instances to agree to lower her voice.⁴⁶

(e) *Intimidating defense witnesses.* The court was concerned with the prosecutor threatening defense witness Reginald Berry with a perjury prosecution if he testified differently from his statements to the police. (Berry in fact testified at trial that he was at the scene moments before the murder and that defendant was not the man attempting to sell drugs to the victim just before the stabbing.)⁴⁷

3. *The Relevance of the Prosecutor's Intent in Hill*

During oral argument in *Hill* before the California Court of Appeals, this author was asked whether it was "necessary" for the court to take judicial notice of the appellate opinions citing the prosecutor for her misconduct in the past. That question provided the genesis of this article. In one sense, the question asked whether the misconduct of the prosecutor in this case was sufficient by itself to warrant reversal without considering her past record. But in a larger sense, it asked whether evidence that the prosecutor had *in other cases prior to the present case* deliberately engaged in misconduct at trial and in closing argument was relevant to the court's decision to reverse the conviction in *Hill*. To be relevant, the prosecutor's intent in the *Hill* trial would have to be relevant.

The court really never answered its own question. On the one hand, the opinion stated that cases that "hold or suggest a showing of bad faith is required to establish prosecutorial misconduct in argument to the jury . . . are inconsistent with *Bolton* and its progeny and are overruled,"⁴⁸ and suggested replacement of the term "prosecutorial misconduct" with the term "prosecutorial error." This was a strong indication that the court thought the

46. *Id.* at 694.

47. *Id.* at 691.

48. *Hill*, 952 P.2d at 684 n.1 (citing *People v. Bolton*, 589 P.2d 396 (Cal. 1979)).

prosecutor's intentions were irrelevant in determining the propriety of the prosecutor's conduct.⁴⁹

On the other hand, the court clearly indicated it found that the prosecutor's methods were deceptive and reprehensible,⁵⁰ and that her behavior, "at times childish and unprofessional and at other times outrageous and unethical, betrayed her trust as a public prosecutor."⁵¹ It chastised her throughout the opinion, criticizing her by name over 120 times, and reported her to the State Bar for consideration of disciplinary proceedings.⁵² More importantly, the court took judicial notice of the prosecutor's three prior citations for misconduct, noting that it was addressing "an institutional concern as well":

We are confident the prosecutors of this state need no reminder of the high standard to which they are held, and that the rule prohibiting reversals for prosecutorial misconduct absent a miscarriage of justice in no way authorizes or justifies the type of misconduct that occurred in this case.⁵³

Other than this language, the court in no way explained in its decision what relevance the prosecutor's past misconduct had to its reversal. Despite the court's expression of confidence that prosecutors did not need a "reminder" that there are enforceable limits on their conduct, the statement itself suggests that the court thought otherwise. Such a reminder is, of course, an acknowledgement of the conscious, intentional choices that prosecutors make whenever they argue to the jury, and an expression of the court's concern that prosecutors might take the cynical attitude that because reversals are rare, they are free to engage in argument that violates established standards.⁵⁴

49. Indeed, the court quoted *Bolton*, which had in turn quoted an influential student note for the proposition that "this emphasis on intentionality is misplaced. '[I]njury to appellant is nonetheless an injury because it was committed inadvertently rather than intentionally.' " *Hill*, 952 P.2d at 683-84 (quoting *Bolton*, 589 P.2d at 398, which in turn quoted Note, *The Nature and Consequences of Forensic Misconduct in the Prosecution of a Criminal Case*, 54 COLUM. L. REV. 946, 975 (1954)).

50. *Hill*, 952 P.2d at 698.

51. *Id.*

52. *Id.* at 703 n.13.

53. *Id.* at 699-700.

54. Taking judicial notice of her past behavior may also have been relevant to provide a context in which to place her behavior. For example, claims of dirty glares and stares may not sound credible unless you know that the prosecutor has been cited for such conduct before.

B. *United States Supreme Court Doctrine*

The United States Supreme Court has also taken a somewhat inconsistent approach to prosecutorial intent. Although there are indications in some of its prosecutorial misconduct decisions that the prosecutor's intent was a factor in its analysis,⁵⁵ the Court has only once spoken directly to the role of intent in deciding whether prosecutorial arguments to the jury are either error or prejudicial. In *Miller v. Pate*,⁵⁶ the Court held that the *knowing* use of false evidence violates due process, without much explanation as to why the prosecutor's *knowing* use or intent was significant.

In the related context of disclosing exculpatory evidence to the defense under *Brady v. Maryland*,⁵⁷ however, the Court has been emphatic that the "touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor,"⁵⁸ and that "[i]f the suppression of the evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor."⁵⁹ This language certainly suggests an antipathy to considering intent, but it reflects decisions on disclosure cases that are not directly on point. Even in the disclosure cases, however, the fact that the prosecutor's use of false evidence was knowing makes the standard of materiality of the evidence easier for the defense to meet.⁶⁰

Moreover, her past conduct may have been relevant to the court's decision to refer her for discipline.

55. See *Berger v. United States*, 295 U.S. 78, 88 (1935) ("as much prosecutor's 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") (emphasis added).

56. 386 U.S. 1 (1967).

57. 373 U.S. 83 (1963).

58. *Smith v. Phillips*, 455 U.S. 209, 218 (1982).

59. *United States v. Agurs*, 427 U.S. 97, 110 (1976) (footnote and citation omitted); *Smith*, 455 U.S. at 219 n.10 and accompanying text (1982).

60. Compare *Agurs*, 427 U.S. at 103 (holding that where use of false evidence is knowing, it is material and grounds for reversal "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury"); *Giglio v. United States*, 405 U.S. 150, 154 (1972) (similar); and *Napue v. Illinois*, 360 U.S. 264, 271 (1959) (similar) with *United States v. Bagley*, 473 U.S. 667, 682 (1985) (holding that in the absence of evidence that the prosecutor knew or learned that evidence introduced was false, the failure to disclose evidence is material and grounds for reversal only "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different").

Both the California Supreme Court and the United States Supreme Court are clearly correct that prosecutorial conduct that prejudices the defense should result in reversal regardless of what the prosecutor intended and that, as the California Supreme Court has suggested, in such situations appellate courts should focus on the effect of the argument and not require any showing of bad faith on the part of the prosecutor.⁶¹ It does not follow, however, that the intention of the prosecutor is irrelevant to determinations of whether reversible error has occurred.

Intentional wrongdoing in court by perhaps the most critical member of the government law enforcement team calls into question the fairness and integrity of the trial and cries out for effective judicial supervisory action to prevent or deter such behavior. The United States Supreme Court, however, has limited the power of the federal courts of appeals to do so in three separate ways. First, the Court has ruled that whatever power federal courts have on direct appeal to regulate the conduct of trials occurring in federal court, they have no such supervisory power in habeas corpus proceedings challenging the state convictions.⁶²

Second, *United States v. Hasting*⁶³ made clear that even on direct appeal the supervisory powers of the courts of appeals are limited; it held that reversals are appropriate only after harmless error review is conducted and results in a conclusion that the error is not harmless beyond a reasonable doubt. This holding could make the supervisory power to reverse in order to deter future misconduct superfluous: if an error is prejudicial, then there is no need to invoke the supervisory power to justify reversal; if the error is harmless, then *Hasting* suggests there is no supervisory power to reverse, at least in cases where it is clear beyond a reasonable doubt that the error is harmless.⁶⁴

61. For example, in *United States v. Forlorna*, 94 F.3d 91 (2d Cir. 1996), the court reversed a conviction because of the prosecutor's inaccurate claim that clothes in the suitcase carried by the defendant fit the defendant, even though the court found no evidence the prosecutor knew his statement was inaccurate. The court reversed because "the prejudicial effect on the jury of a misleading argument is equally great regardless whether the attorney knows it is baseless." *Id.* at 95; see also Duane, *supra* note 4, at 622-23.

62. See *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (holding that appropriate standard of review on writ of habeas corpus is "the narrow one of due process, and not the broad exercise of supervisory power") (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1974)).

63. 461 U.S. 499, 507 (1983).

64. *But cf.* *Brecht v. Abrahamson*, 507 U.S. 619, 638 n.9 (1993) (stating court "does not

The third way in which the Court has limited the lower courts' power to use reversal to enforce their own rules is by limiting plain error review. In *United States v. Young*,⁶⁵ the Tenth Circuit, two to one, reversed a fraud conviction for plain error when the prosecutor vouched for the credibility of government witnesses in response to improper defense argument because "the rule is clear in this Circuit that improper conduct on the part of opposing counsel should be met with an objection to the court, not a similarly improper response."⁶⁶ The Supreme Court reversed, holding that plain error doctrine should be reserved for "particularly egregious errors" that "seriously affect the fairness, integrity or public reputation of judicial proceedings."⁶⁷ Although it agreed with the lower court that the prosecutor's remarks were improper and constituted error, it ruled that the lower court had erred in failing to evaluate that error by viewing it "against the entire record."⁶⁸ More important for present purposes than the reasons for its conclusion that the errors did not "undermine the fundamental fairness of the trial and contribute to a miscarriage of justice,"⁶⁹ is the clear message of *Young* that the lower courts should not exercise their power to recognize plain error solely in order to enforce compliance with their own rules. As in *Hasting*, the Court required actual prejudice to the defendant to justify a reversal.

II. FEDERAL REVERSALS IN THE 1990S

Given the limitations on the lower courts set by the Supreme Court decisions upholding convictions against claims of prosecutorial misconduct, it is a wonder that appellate courts reverse on these grounds at all. Since 1990, however, federal

foreclose the possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict"). In a subsequent article, the author argues that the direct appeal doctrine after *Hasting* still leaves room for reversals that take account of intentional misconduct and the need to deter it.

65. 736 F.2d 565, 570 (10th Cir. 1983), *rev'd*, 470 U.S. 1, 15 (1985).

66. *Young*, 736 F.2d at 570.

67. *Young*, 470 U.S. at 15.

68. *Id.* at 16.

69. *Id.*

courts of appeal have overturned convictions in at least forty-five cases in which improper prosecutorial argument was the sole ground, an alternate ground, or a ground contributing to a cumulative error reversal. The cases include reversals on direct appeal of federal convictions and cases where federal post-conviction relief was granted in whole or in part.

Three things are striking about these reversals. First, there was relative unanimity in the decisions; only five of the decisions drew a dissent⁷⁰ and only two a concurrence.⁷¹ Thus, 129 of the 135 judges who heard these cases were in agreement on the impropriety of the prosecutor's conduct, the necessity for reversal, and the rationale for reversal. On the issue of propriety of the conduct challenged, there was only a single dissent.⁷² Second, the doctrine guiding the courts' decisions is extraordinarily complex and courts have had great difficulty articulating clear rationales and standards governing the evaluation of the improper conduct and the role of the prosecutor's intent within that process. Although the intentional nature of the misconduct seems to influence courts to reverse, the doctrinal basis for such consideration is cloudy at best. Third, in not one of these cases did the court take the step of ordering that a prosecutor be disciplined for the conduct.

A. *Prosecutorial Arguments That are Improper*

The first step in evaluating a claim of prosecutorial misconduct in argument is to determine whether the argument violates established rules of proper argument. Those established rules have evolved from and been influenced by common law principles, professional standards, ethical standards and constitutional requirements. In finding arguments improper, the forty-five appellate reversals broke virtually no new ground. The only true question of first impression arose in *Agard v.*

70. *Agard v. Portuondo*, 117 F.3d 696, 716-21 (2d Cir. 1997); *United States v. Johnston*, 127 F.3d 380, 404-05 (5th Cir. 1997); *Gravley v. Mills*, 87 F.3d 779, 790-95 (6th Cir. 1996); *Martin v. Parker*, 11 F.3d 613, 617 (6th Cir. 1993); *Mahorney v. Wallman*, 917 F.2d 469, 474-76 (10th Cir. 1990).

71. See *United States v. Payne*, 2 F.3d 706, 716 (6th Cir. 1993); *Agard*, 117 F.3d at 715-16.

72. *Agard*, 117 F.3d at 716-21.

Portuondo,⁷³ in which a divided Second Circuit held that it violated the Confrontation Clause for a prosecutor to argue that the defendant in a rape case was the only witness who got to listen to the other witnesses and therefore could fabricate his testimony to match theirs. *Agard* was, in fact, the only case of the forty-five in which there was a disagreement over whether the conduct was improper. Only three other cases involved prosecutorial misconduct that was arguably not covered by a specific holding that the particular form of argument was improper.⁷⁴ The other forty-one reversals relied on well-settled principles of argument and constitutional law. Thus, it appears that in forty-one of the forty-five reversals, prosecutors should have known their arguments were improper.

The specific arguments that federal courts have both held improper and found resulted in reversible error are discussed below. They are grouped in two categories: violations of basic principles of argument and violations of constitutional protections.

1. Violations of basic rules of proper argument

The standards for proper argument begin with the basic concept that closing argument is an opportunity for the parties to present their view of the appropriate inferences to be drawn from the evidence: "The most elementary rule governing the limits of argument is that it must be confined to the record evidence and the inferences that can reasonably be drawn from it."⁷⁵ Departures from appropriate, acceptable argument therefore include: (1) referring to matters not in evidence;⁷⁶ (2) referring to evidence

73. *Id.*

74. *Nelson v. Nagle*, 995 F.2d 1549 (11th Cir. 1993) (holding that reading capital jury a portion of state supreme court opinion urging no mercy for murderers violated Eighth Amendment); *Presnell v. Zant*, 959 F.2d 1524 (11th Cir. 1992) (same); *Lesko v. Lehman*, 925 F.2d 1527 (3d Cir. 1991) (holding that comment at penalty phase that defendant, who testified at the penalty phase, did not say he was sorry violated Fifth Amendment rights).

75. ABA STANDARDS FOR CRIMINAL JUSTICE 3-5.8, cmt. at 107 (1993).

76. *See United States v. Molina-Guevara*, 96 F.3d 698 (3d Cir. 1996) (unanimous reversal of drug conviction because prosecutor's argument that government agent who did not testify would have given inculpatory testimony and improper vouching for credibility of government agent who did testify violated confrontation clause and constituted constitutional error that was not harmless beyond a reasonable doubt); *Miller v. Lockhart*, 65 F.3d 676 (8th Cir. 1995) (death penalty conviction unanimously overturned on habeas because of racial discrimination in jury selection, but court goes on to rule that closing argument in penalty phase was due

excluded by the court;⁷⁷ (3) “vouching” by either improperly buttressing the credibility of government witnesses⁷⁸ or by giving personal views on the case;⁷⁹ (4) distorting the record by misstating

process violation as well because of numerous improper arguments including: (1) with no evidence of it, that family of victims was waiting for death verdict; (2) cost of incarceration should not be borne by taxpayers; (3) defendant never said he was sorry; (4) argument with no evidence that defendant had escaped from prison previously; (5) argument that defendant was a mad dog who could escape; (6) urging jury not to reach a compromise and give him life without parole because he could escape); *United States v. Manning*, 23 F.3d 570 (1st Cir. 1994) (unanimous reversal for, among other improper arguments, argument—without evidence in record to support it—that partial prints on drugs and weapons implicated defendants); *United States v. Blakey*, 14 F.3d 1557 (11th Cir. 1994) (unanimous reversal for arguing facts not in evidence—that defendant was a professional criminal); *United States v. Teffera*, 985 F.2d 1082, 1089 n.6 (D.C. Cir. 1993) (holding that alternate ground for reversal was prosecutor’s repeated references in closing argument to alleged eye contact between codefendants at time of arrest—an argument that was not supported by evidence, was clearly improper, and would merit reversal despite any curative instructions because “phantom evidence” was a key part of closing argument).

77. *See United States v. Frederick*, 78 F.3d 1370 (9th Cir. 1996) (unanimous reversal of a conviction for aggravated sexual assault because of cumulative errors, including the prosecutor’s use during closing argument of testimony previously stricken by the court); *United States v. Flores-Chapa*, 48 F.3d 156 (5th Cir. 1995) (unanimous plain error reversal and acquittal because of prosecutor’s improper reference both in summation and in questioning of witnesses to excluded post-arrest hearsay statement by son-in-law implicating his alleged co-conspirator father-in-law where statement was virtually only evidence linking father-in-law to conspiracy).

78. *See United States v. Cotnam*, 88 F.3d 487 (7th Cir. 1996) (unanimous reversal for prosecutor’s improper reference to the defendant’s failure to testify and for improper vouching, where the prosecutor told jury that “[p]art of the plea agreement is also that Mr. Martin testify truthfully,” submitted that “he has testified truthfully,” and on at least four other occasions argued that Martin was credible or forthright); *United States v. Carroll*, 26 F.3d 1380 (6th Cir. 1994) (unanimous reversal for arguing that plea agreement by government witness ensured that his testimony was truthful); *United States v. Manning*, 23 F.3d 570, 572 (1st Cir. 1994) (unanimous reversal for pervasive misconduct including vouching for credibility of key government agents by telling jury that government witnesses were “bound by their oath and the limits of honesty,” “bound by the truth,” and therefore could not lie); *United States v. Smith*, 962 F.2d 923, 934 & 936 (9th Cir. 1992) (plain error reversal for “repeated comments aimed at establishing his own veracity and credibility as a representative of the government,” particularly a comment that “if I did anything wrong in this trial, I wouldn’t be here. The court wouldn’t allow that to happen,” which “placed the imprimatur of the judicial system itself on” prosecutor’s credibility); *Floyd v. Meachum*, 907 F.2d 347, 350-51, 354 (2d Cir. 1990) (unanimous granting of habeas petition because defendant denied a fundamentally fair trial by cumulative errors, including prosecutor’s improper vouching that “invited the jury to view its verdict as a vindication of the prosecutor’s integrity rather than as an assessment of guilt or innocence based upon the evidence presented at trial”).

79. *See United States v. Kerr*, 981 F.2d 1050, 1052-53 (9th Cir. 1992) (unanimous plain error reversal where prosecutor asked jury whether they asked if the witnesses were “hoodwinking me” when he presented their testimony, and also gave his personal opinion of the credibility of witnesses).

the evidence⁸⁰ or by impermissibly using evidence properly presented;⁸¹ (5) misstating the law;⁸² (6) making derisive comments about opposing counsel in front of the jury;⁸³ and (7) appealing to passion and prejudice through appeals to racial, ethnic or religious prejudice;⁸⁴ war on drugs rhetoric;⁸⁵ the vilification of defendant;⁸⁶ and other inflammatory appeals.⁸⁷

80. *See* *United States v. Donato*, 99 F.3d 426 (D.C. Cir. 1996) (unanimous reversal for prosecutor's inaccurate statement of evidence concerning the motive of defendant to commit crime; court also holds that judge's comments to defendant and constant criticism of defense counsel were reversible); *United States v. Forlorna*, 94 F.3d 91 (2d Cir. 1996) (unanimous reversal because prosecutor repeatedly claimed incorrectly that evidence showed that clothes found in suitcase carried by defendant fit defendant where defendant claimed he was carrying case for someone else).

81. *See* *United States v. Mitchell*, 1 F.3d 235 (4th Cir. 1993) (unanimous plain error reversal for cross-examination and continuing argument that defendant's brother had been convicted of the same crime and the jury obviously had not believed brother's testimony at brother's own trial, so this jury should not believe him either, and also that prior conviction of brother was substantive evidence against defendant, when brother's conviction was admitted solely for purposes of impeachment).

82. *See* *United States v. Roberts*, 119 F.3d 1006, 1011 (1st Cir. 1997) (unanimous plain error reversal for cumulative errors, including prosecutor's misstatement of the burden of proof and government's duty to prove guilt beyond a reasonable doubt where prosecutor told jury that when the defense does go forward with evidence, "the defendant has the same responsibility [as the government] and that is to present a compelling case"); *Mahorney v. Wallman*, 917 F.2d 469 (10th Cir. 1990) (2-1 overturning of state conviction on habeas for prosecutorial misconduct in voir dire and in closing arguments, where prosecutor stated that presumption of innocence was designed to protect those who were not guilty and that original presumption of innocence had been removed by the evidence in this case); *Floyd v. Meachum*, 907 F.2d 347 (2d Cir. 1990) (state conviction unanimously overturned because of broad range of improper remarks by the prosecutor including misstatement of law of what constitutes proof beyond a reasonable doubt).

83. *See* *United States v. Frederick*, 78 F.3d 1370, 1379 (9th Cir. 1996) (reversal for cumulative error including comments backhandedly complimenting defense counsel on his skill in confusing the alleged victim of sexual assault when cross-examining her, and telling the jury that defense counsel will ask the jury to "look at little bits and pieces" of the evidence, while the government and the judge will ask the jury to consider "all of the evidence—a "serious misstep" contributing to reversal); *Sizemore v. Fletcher*, 921 F.2d 667, 671 (6th Cir. 1990) (unanimous overturning of state murder conviction on habeas where, among other improprieties, prosecutor implied that defendant's attorneys were helping him to generate an alibi and to "get . . . [his] story straight"); *United States v. Friedman*, 909 F.2d 705, 708 & 709 (2d Cir. 1990) (unanimous reversal where prosecutor told jury that some people "go out and investigate drug dealers and prosecute" while "there are others who defend them, try to get them off, perhaps even for high fees"—a remark that "undermine[d] the presumption of innocence, the Government's obligation to prove guilt beyond reasonable doubt, and the standards of propriety applicable to public prosecutors").

84. *See* *United States v. Doe*, 903 F.2d 16 (D.C. Cir. 1990) (unanimous reversal for constitutional error when prosecutor made summation referring to Jamaicans taking over Washington, D.C. drug trade).

2. *Constitutional violations*

Arguments improper under the previous standards are ordinarily considered trial error not amounting to a constitutional violation. Some improprieties in argument, however, do rise to the level of constitutional violations. All constitutional violations are not created equal. The Supreme Court has held that denials of specific benefits of the Bill of Rights, such as the right to counsel, or of specific rights, such as the privilege against self incrimination, are entitled to “special care to assure that prosecutorial conduct in no way impermissibly infringes them,” whereas claims that the prosecutor’s remarks rendered a trial so unfair as to violate the due process clause must meet a greater

85. See *Arrieta-Agessot v. United States*, 3 F.3d 525, 527 & 530 (1st Cir. 1993) (unanimous reversal for plain error when prosecutor used “150-proof” war on drugs rhetoric in light of two previous decisions condemning such argument); *United States v. Johnson*, 968 F.2d 768 (8th Cir. 1992) (unanimous reversal of drug convictions because of prosecutor’s appeal to jury to be “bulwark” against drug dealing); *United States v. Solivan*, 937 F.2d 1146 (6th Cir. 1991) (unanimous reversal because prosecutor’s appeal to community conscience in context of war on drugs and suggestion that drug problem facing jurors’ community would be increased if they did not convict violated defendant’s constitutional right to a fair trial).

86. See *United States v. Cannon*, 88 F.3d 1495 (8th Cir. 1996) (unanimous reversal because of argument that twice called defendants “bad people” and made thinly veiled reference to them not being locals in rebuttal closing argument where objections were overruled); *Martin v. Parker*, 11 F.3d 613 (6th Cir. 1993) (state child molestation conviction overturned on habeas, 2-1, because prosecutor compared defendant to Adolf Hitler and made repeated references, despite trial judge’s warnings, to prior sexual misconduct by defendant and made racial remarks as well).

87. See *United States v. Payne*, 2 F.3d 706, 711 (6th Cir. 1993) (unanimous reversal because prosecutor’s references to the plight of poor children, Christmas time, and the GM layoff were inflammatory and prejudicial in postal employee’s trial for obstruction and desertion of mails); *Commonwealth v. Mendiola*, 976 F.2d 475, 487 (9th Cir. 1993), *overruled on other grounds by* *George v. Camacho*, 119 F.3d 1393 (9th Cir. 1997) (unanimous reversal for among other things, prosecutorial misconduct in implicitly threatening the jury’s safety, holding “[t]he prosecutor’s suggestions that Mendiola would walk out of the courtroom right behind them, if acquitted, and presumably retrieve the missing murder weapon was particularly improper because the prosecutor knew that his witness, the informer Reyes, was responsible for the missing gun”); *United States v. Roark*, 924 F.2d 1426, 1434 (8th Cir. 1991) (unanimous reversal because of “government’s attempt to tie Appellant’s guilt directly to his association with the Hells Angels Motorcycle Club constitutes reversible error”); *Sizemore v. Fletcher*, 921 F.2d 667, 669 (6th Cir. 1990) (unanimous overturning of state murder conviction on habeas where prosecutor’s argument, among other improprieties, appealed to class biases against defendant’s wealth, which allowed him to afford seven lawyers).

burden of fundamental unfairness to establish constitutional error.⁸⁸

The constitutional violations for which federal appellate courts in the 1990s overturned convictions include: (1) commenting on accused's failure to testify in violation of Fifth Amendment rights under *Griffin v. California*;⁸⁹ (2) depriving defendant of the Sixth Amendment right to confront witnesses against him;⁹⁰ (3) undermining the eighth amendment right to a reliable death verdict;⁹¹ and (4) denying due process rights by

88. See *Darden v. Wainwright*, 477 U.S. 168, 193 (1986); *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974).

89. 380 U.S. 609 (1965). Cases finding *Griffin* violations include *United States v. Johnston*, 127 F.3d 380, 393-98, 401-02 (5th Cir. 1997) (2-1 reversal of conviction of one defendant in multi-defendant trial because (1) closing argument telling jury not to consider defendants' silence was intended to call attention to defendants' failure to testify and (2) deliberate questioning was designed to bring out inadmissible hearsay prejudicial to that defendant); *United States v. Roberts*, 119 F.3d 1006 (1st Cir. 1997) (unanimous plain error reversal for cumulative errors including prosecutor's comments to jury that they should not take into consideration in any way the fact that defendant did not testify, when the court saw this as a deliberate attempt to call attention to defendant's failure to testify); *United States v. Cotnam*, 88 F.3d 487, 493 (7th Cir. 1996) (unanimous reversal for cumulative error, including prosecutor's improper comment on defendant's failure to testify by arguing repeatedly that government evidence was uncontroverted and reminding jury that defendant "doesn't have to put evidence on"); *United States v. Hardy*, 37 F.3d 753 (1st Cir. 1994) (unanimous reversal for indirectly commenting on defendant's failure to testify where prosecutor argued that defendant was "still running and hiding" during trial); *Freeman v. Lane*, 962 F.2d 1252, 1254 (7th Cir. 1992) (unanimous overturning of state conviction on habeas for repeated remarks that evidence was "unrebutted and uncontradicted"); see also *Lesko v. Lehman*, 925 F.2d 1527 (3d Cir. 1991) (closing argument in penalty phase of death case that defendant should be executed because he failed to say he was sorry for the crime when he testified at the penalty phase violated his Fifth Amendment right not to testify against himself; this, combined with an argument that the jury should show defendant the same mercy as he showed his victims, resulted in the granting of habeas corpus relief); *Floyd v. Meachum*, 907 F.2d 347, 351, 353-54 (2d Cir. 1990) (prosecutor juxtaposed "Fifth Amendment burden of proof beyond a reasonable doubt" with the argument that "if there was confusion in this case, from whence did that come?"; court found these references to the Fifth Amendment "puzzling," and that in context the references "could well have been interpreted by the jury as comment on Floyd's failure to testify").

90. *Agard v. Portuondo*, 117 F.3d 696, 706-14 (2d Cir. 1997) (2-1 decision overturning state rape conviction on habeas where prosecutor argued in summation that only defendant had opportunity to listen to other witnesses and therefore fabricate his testimony; this violated his right to confrontation, penalizing him for exercising his right to be present at trial, his right to testify and his right to due process); *United States v. Molina-Guevara*, 96 F.3d 698 (3d Cir. 1996) (unanimous reversal where prosecutor's argument that a government agent who did *not* testify would corroborate what the agent who did testify violated the defendant's constitutional right to confront the witnesses against him).

91. See *Nelson v. Nagle*, 995 F.2d 1549 (11th Cir. 1993) (unanimous overturning of state

making arguments known to be false;⁹² (5) undermining the presumption of innocence or burden of proof beyond a reasonable doubt;⁹³ (6) arguing that post-Miranda silence impeaches a defendant who has testified, a violation of due process under *Doyle v. Ohio*;⁹⁴ (7) appealing to racial or ethnic prejudice;⁹⁵ and (8) engaging in what would normally be non-constitutional error, but in a manner so prejudicial that it denies the general right to due process.⁹⁶

death sentence on habeas where prosecutor read quote from state supreme court opinion arguing against mercy for murderers); *Presnell v. Zant*, 959 F.2d 1524 (11th Cir. 1992) (same).

92. See *United States v. Wilson*, 135 F.3d 291, 296-302 (4th Cir. 1998); *United States v. Alzate*, 47 F.3d 1103 (11th Cir. 1995); *Davis v. Zant*, 36 F.3d 1538 (11th Cir. 1994); *United States v. Udechukwu*, 11 F.3d 1101 (1st Cir. 1993); *United States v. Kojayan*, 8 F.3d 1315 (9th Cir. 1993); *Brown v. Borg*, 951 F.2d 1011 (9th Cir. 1991).

93. In two of the cases discussed above under misstatements of law, *supra* note 83, the misstatements were concerning the burden of proof beyond a reasonable doubt and therefore violated the constitutional presumption of innocence. See *Mahorney v. Wallman*, 917 F.2d 469 (10th Cir. 1990) (2-1 overturning of state conviction on habeas for prosecutorial statements in voir dire and closing arguments that presumption of innocence was designed to protect those who were not guilty and that original presumption of innocence had been removed by the evidence in this case); *Floyd v. Meachum*, 907 F.2d 347, 351 (2d Cir. 1990) (State conviction unanimously overturned because of broad range of improper remarks by the prosecutor, including comment that “[t]he burden of proof beyond a reasonable doubt is a shield for the innocent . . . not a barrier to conviction for the guilty.”).

94. 426 U.S. 610 (1976). Cases finding *Doyle* error in argument include *Gravley v. Mills*, 87 F.3d 779, 782 (6th Cir. 1996) (2-1 overturning of state conviction on habeas because of prosecutor’s repeated references to post-Miranda in cross-examination of defendant and in closing argument); *United States v. Foster*, 985 F.2d 466, 468-69 (9th Cir. 1993) (unanimous reversal for *Doyle* violation in cross-examining defendant about post-Miranda silence on claim that she participated in drug manufacture under duress; her silence also mentioned in closing argument).

95. See *United States v. Doe*, 903 F.2d 16, 25 (D.C. Cir. 1990) (comments that Jamaicans are taking over the city were constitutional violation because “racial fairness of the trial is an indispensable ingredient of due process”).

96. See *Martin v. Parker*, 11 F.3d 613 (6th Cir. 1993) (cumulative errors in comparing defendant to Adolph Hitler, referring, in violation of a pretrial court order, to other alleged molestations by defendant, and other improper conduct denied defendant due process right to a fair trial); *Sizemore v. Fletcher*, 921 F.2d 667, 670-71 (6th Cir. 1990) (due process violation in the combination of repeated appeals to class bias and the suggestion that defendant’s high priced lawyers were helping him to concoct an alibi); *United States v. Payne*, 2 F.3d 706, 714 (6th Cir. 1993) (prosecutor’s repeated remarks were “part of a calculated effort used to evoke strong sympathetic emotions for Christmas-time activity, the poor, pregnant women, diaperless children and laid-off employees” so serious as to deny defendant’s constitutional rights, presumably to a fundamentally fair trial); *United States v. Johnson*, 968 F.2d 768 (8th Cir. 1992) (single set of remarks inviting jury to act as a “bulwark” against drugs denied constitutional right to a fair trial); *United States v. Solivan*, 937 F.2d 1146, 1148 (6th Cir. 1991) (single set of remarks asking jury to “tell her and all of the other drug dealers like

B. *The Role of Intent in Reversals*

1. *The frequency of intentionally improper argument*

The nature of the misconduct in the forty-five federal reversals indicates that in a majority of the cases, the prosecutors intentionally violated rules of proper argument. In twenty-eight of the reversals—including fifteen direct appeals,⁹⁷ six direct appeals involving plain error review,⁹⁸ and seven habeas cases⁹⁹—the court

her . . . that we don't want that stuff in Northern Kentucky" denied constitutional right to a fair trial).

97. See *United States v. Wilson*, 135 F.3d 291, 302 (4th Cir. 1998) (holding that the prosecutor's decision to argue that defendant had committed an uncharged, unproven and essentially irrelevant murder "appears to have been a deliberate, calculated decision to assert facts not in evidence in order to divert the jury from the real issues in the case"); *United States v. Johnston*, 127 F.3d 380, 393-98, 401-02 (5th Cir. 1997) (holding comment on defendant's silence was intended to call jury's attention to his failure to testify); *United States v. Cotnam*, 88 F.3d 487, 499 (7th Cir. 1996) (holding remarks that evidence was "uncontroverted" were manifestly intended to indicate to the jury that defendant, who did not testify, was "the only one who could have controverted it"); *United States v. Alzate*, 47 F.3d 1103 (11th Cir. 1995) (knowing false argument while deliberately suppressing exculpatory evidence that would demonstrate falseness); *United States v. Hardy*, 37 F.3d 753 (1st Cir. 1994) (analogy between defendants running from police and "still running and hiding" at trial was deliberate *Griffin* violation); *United States v. Crutchfield*, 26 F.3d 1098, 1102 (11th Cir. 1994) (deliberate disobedience of court order not to refer to sales to certain customers and clearly improper attempts to impeach witnesses with inadmissible bad acts); *United States v. Blakey*, 14 F.3d 1557 (11th Cir. 1994) (improper argument, including that defendant was a "professional criminal" when he was not and prosecutor conceded this at trial); *United States v. Udechukwu*, 11 F.3d 1101 (1st Cir. 1993) (knowing use of false evidence); *United States v. Kojayan*, 8 F.3d 1315 (9th Cir. 1993) (repeated and deliberate false denials and argument by government that it was unable to produce key witness for cross examination); *United States v. Payne*, 2 F.3d 706, 714 (6th Cir. 1993) (argument about Christmas, the plight of the poor and hard economic times "part of a calculated effort used to evoke strong sympathetic emotions"); *Commonwealth v. Mendiola*, 976 F.2d 475 (9th Cir. 1993) (inflammatory and knowingly false argument made to jury); *United States v. Solivan*, 937 F.2d 1146, 1153 (6th Cir. 1991) (inflammatory remark designed with purpose and effect to inflame jurors' emotions); *United States v. Roark*, 924 F.2d 1426, 1432 (8th Cir. 1991) ("relentless attempt to convict Appellant through his association with the [Hells Angels] motorcycle club"); *United States v. Novak*, 918 F.2d 107, 109-11 (10th Cir. 1990) (opening argument referring to evidence prosecutor never introduced was not in good faith); *United States v. Friedman*, 909 F.2d 705, 709 (2d Cir. 1990) (prosecutor's remarks "invited" jury to ignore presumption of innocence and requirement of proof beyond a reasonable doubt).

98. See *United States v. Roberts*, 119 F.3d 1006 (1st Cir. 1997) (comments intended to call attention to defendant's failure to testify); *United States v. Flores-Chapa*, 48 F.3d 156, 159 (5th Cir. 1995) (referring to excluded hearsay evidence in closing argument after repeated adverse rulings and warnings by trial court); *Arrieta-Agessot v. United States*, 3 F.3d 525, 530 (1st Cir. 1993) ("Almost any argument made in summation can be described as

used language suggesting that the prosecutor made arguments he or she knew or should have known were improper. In eleven additional cases—including eight direct appeals,¹⁰⁰ one plain error

deliberate; but the several paragraphs of 150-proof rhetoric in this case oversteps the bounds by a wide margin.”); *United States v. Mitchell*, 1 F.3d 235, 242 & 244 (4th Cir. 1993) (“[G]iven the extent of the improper argument which ran throughout appellant’s trial, we believe no other conclusion is possible than our finding that the improper argument was deliberately placed before the jury in an attempt ‘to divert attention to extraneous matters.’ . . . Not content with its case against the appellant, the prosecution *chose* to use improper suggestion on cross-examination and improper jury argument to obtain a conviction.” (emphasis added)); *United States v. Kerr*, 981 F.2d 1050, 1053 (9th Cir. 1992) (holding that an “experienced United States Attorney *deliberately* introduced into the case his personal opinion of the witnesses’s credibility” (emphasis added)); *United States v. Smith*, 962 F.2d 923, 935-36 (9th Cir. 1992) (“[P]rosecutor’s deliberately vouching for that witness on behalf of the court would pose a clear threat to the integrity of judicial proceedings.”).

99. See *Gravley v. Mills*, 87 F.3d 779, 788 (6th Cir. 1996) (holding that “by repeatedly driving home references to Gravley’s silence and implying that such silence was evidence that Gravley was lying, the prosecutor crossed the line”); *Davis v. Zant*, 36 F.3d 1538, 1546-47 (11th Cir. 1994) (knowingly false argument); *Martin v. Parker*, 11 F.3d 613 (6th Cir. 1993) (violation of court order not to refer to other bad acts by defendant and comparison of defendant to Hitler); *Freeman v. Lane*, 962 F.2d 1252, 1261 (7th Cir. 1992) (remarks indirectly commenting on defendant’s silence were “studied”); *Brown v. Borg*, 951 F.2d 1011 (9th Cir. 1991) (knowingly false argument); *Sizemore v. Fletcher*, 921 F.2d 667, 670 (6th Cir. 1990) (“repeated and deliberate statements clearly designed to inflame the jury and prejudice the rights of the accused”); *Floyd v. Meachum*, 907 F.2d 347, 355 (2d Cir. 1990) (holding “the prosecutorial misconduct here was severe, as demonstrated by the *studied pattern of improper remarks* throughout the prosecutor’s truncated initial summation and her expansive rebuttal” (emphasis added)).

100. See *United States v. Donato*, 99 F.3d 426 (D.C. Cir. 1996) (holding that argument that it would have “cost a fortune” for defendant to turn in leased car earlier was improper without mentioning intent); *United States v. Molina-Guevara*, 96 F.3d 698 (3d Cir. 1996) (argument that witness who did not testify would corroborate witness who did testify violates basic principle that argument is confined to matters in evidence and reasonable inferences therefrom); *United States v. Cannon*, 88 F.3d 1495 (8th Cir. 1996) (holding that prosecutor’s references to defendants as “bad people” and thinly veiled references to them as not being local residents violate basic principle to avoid appeals to prejudice); *United States v. Frederick*, 78 F.3d 1370 (9th Cir. 1996) (closing argument that government agents had testified that victim’s trial testimony was consistent with her statement during earlier out-of-court interviews when this was untrue violated basic principle that argument is confined to the evidence; improper comments about defense lawyer clearly inflammatory); *United States v. Manning*, 23 F.3d 570 (1st Cir. 1994) (vouching, inflammatory rhetoric of kind clearly prohibited by prior decisions); *United States v. Foster*, 985 F.2d 466, 469 (9th Cir. 1993) (impeachment of defendant during cross-examination and closing argument on basis of post-Miranda silence in violation of clear precedents); *United States v. Teffer*, 985 F.2d 1082, 1089 n.6 (D.C. Cir. 1993) (prosecutor’s repeated references in closing argument to alleged eye contact between co-defendants at time of arrest clearly improper); *United States v. Johnson*, 968 F.2d 768, 770 (8th Cir. 1992) (prosecutor request that jury “stand as a bulwark” against drugs violates basic principle that argument be confined to evidence and avoid inflammatory remarks).

case,¹⁰¹ and two habeas cases¹⁰²—although the court did not discuss the prosecutor's intent, the improper argument was clearly prohibited by prior decisions and was therefore conduct that the prosecutor knew or should have known was improper. In two other cases, even though the courts found that the prosecutors engaged in the improper conduct inadvertently, it would appear that the conduct was clearly outside the bounds set by previous decisions.¹⁰³ In only four cases does it appear that the prosecutor made arguments that were not clearly prohibited by case law or settled principles of argument.¹⁰⁴

In sum, in forty-one of the forty-five recent reversals the impropriety of the argument was well established and consequently the prosecutor knew or should have known the arguments made were improper. Thus, over ninety percent of the reversals involved conduct from which prosecutors obeying the settled rules of closing argument should have refrained. Significant for this analysis, however, is that in twenty-eight of these cases the reviewing court found that the prosecutor knew or should have known that the argument made was improper,

101. See *United States v. Doe*, 903 F.2d 16, 24 (D.C. Cir. 1990) (holding that remarks like "the city is being taken over by people just like this" is a clear violation of the principle that argument not appeal to racial passions).

102. See *Miller v. Lockhart*, 65 F.3d 676 (8th Cir. 1995) (numerous improper arguments in penalty phase of capital case, including argument without support in record that defendant had previously escaped from prison, violated basic principle confining argument to the evidence); *Mahorney v. Wallman*, 917 F.2d 469 (10th Cir. 1990) (*voir dire* and closing arguments that presumption of innocence was designed to protect those who were not guilty and stating that original presumption of innocence had been removed by the evidence was clearly improper statement of the law).

103. See *United States v. Forlorma*, 94 F.3d 91 (2d Cir. 1996) (holding that inaccurate argument that clothes in suitcase fit defendant was inadvertent, and noting that prosecutor should have investigated chain of custody in preparing exhibits for trial); *United States v. Carroll*, 26 F.3d 1380, 1389-90 (6th Cir. 1994) (prosecutor vouched "blatantly" for credibility of government witness, but court finds "no indication that . . . [remarks] were deliberate"; precedents so clear that prosecutor should have known remarks were improper).

104. See *Agard v. Portuondo*, 117 F.3d 696, 706-14 (2d Cir. 1997) (issue of first impression: whether comment on defendant's ability to listen to witnesses and "tailor" his story violated confrontation clause); *Nelson v. Nagle*, 995 F.2d 1549 (11th Cir. 1993) (no clear precedent against argument quoting old Supreme Court opinion that murderers should get no mercy); *Presnell v. Zant*, 959 F.2d 1524, 1529 (11th Cir. 1992) (same); *Lesko v. Lehman*, 925 F.2d 1527 (3d Cir. 1991) (holding as improper without a discussion of intent a comment that defendant did not say he was sorry at penalty phase and that jury should show him same mercy he showed victims).

suggesting that to a majority of the deciding courts the prosecutor's intent was significant, although in varied ways.

2. *Intent in doctrine*

The bases on which the twenty-eight opinions that considered the fact that the prosecutor knew or should have known the conduct was improper include: (a) the prosecutor's knowledge or intent as part of the definition of improper conduct; (b) intent as a consideration in determining whether improper argument is reversible error; and (c) intentional wrongdoing as a factor in considering whether to reverse for plain error. Each of these doctrinal bases for considering intent is considered below. This discussion focuses primarily on the reversal of federal convictions on direct appeal. The role of intent may also arise in the post-conviction context, but federal habeas courts are authorized to grant relief in review of state court convictions only upon a showing of violation of a federal constitutional right.¹⁰⁵ Thus, intent is relevant in this context only insofar as it implicates a constitutional error.

a. The prosecutor's knowledge or intent as part of the definition of improper conduct. In three categories of cases, the court's definition of improper prosecutorial behavior includes an element of intentional conduct: opening statement referring to evidence not introduced at trial; commenting on the failure of the defendant to testify; and the knowing use of false evidence. The requirement of intent in each category is discussed below in the context of the cases that found that the prosecutor's conduct was improper.

(1) Opening Statement Referring to Evidence Not Introduced at Trial. Although the prosecutor's opening statement may not be thought of as argument, in many respects misconduct in opening statements reflects the same concerns that force a court to characterize a closing argument as improper. This is particularly true when the prosecutor in the

105. 28 U.S.C. § 2254.

opening statement alludes to facts that may not ultimately be admitted at trial.

In *United States v. Novak*,¹⁰⁶ the court held that when a prosecutor refers to evidence in opening argument that is not later introduced at the trial, courts “look to whether the prosecutor acted in good faith and . . . at the impact the statements had on the particular trial”¹⁰⁷ in deciding whether to overturn a conviction. There is no discussion of the rationale for considering good faith in *Novak*. The rule appears designed to excuse, or at least mitigate the significance of, assertions in opening argument that turn out to be unsupported by evidence introduced at trial, but which the prosecutor had reason to believe would have evidentiary support.¹⁰⁸

In *Novak*, the court found that prosecutor violated the good faith standard by intentional conduct. The prosecutor stated in opening argument that “a citizen reported and provided information to the various DEA agents that the defendant . . . was selling cocaine from his house” and also stated he would introduce evidence that cocaine was 91% pure, but the prosecutor failed to introduce evidence to back up either claim. The court found that “the prosecutor should have been well aware”¹⁰⁹ that the citizen’s tip was inadmissible hearsay because the government had resisted the defendant’s efforts to require disclosure of the name of the informant. With respect to the purity of the cocaine, the court found that prosecutor was aware that no evidence could be offered to support the purity of the cocaine because the cocaine was admitted pursuant to a stipulation that included no reference to purity and which was the only evidence concerning the content of the drugs. During the trial, however, the government relied on hypothetical questions concerning the purity of the cocaine in questioning witnesses. This attempt to “capitalize on evidence which was inadmissible,”¹¹⁰ together with the attempt to use the citizen’s tip, was sufficient to meet the requirement of lack of good faith.

106. 918 F.2d 107 (10th Cir. 1990).

107. *Id.* at 109.

108. See ABA CRIMINAL JUSTICE STANDARDS 3-5.5 cmt. (1993) (curative instructions appropriate where failure to prove is through “honest inadvertence” of prosecutor).

109. *Novak*, 918 F.2d at 109.

110. *Id.* at 110.

(2) *Commenting on the failure of defendant to testify.* A prosecutor's remarks amount to impermissible comments on the failure of the defendant to testify "if the prosecutor's manifest intent was to comment on the defendant's silence or if the character of the remark was such that the jury would naturally and necessarily construe it as a comment on the defendant's silence."¹¹¹ A court must find one of these alternatives—manifest intent or necessary effect—to hold that the conduct was improper. None of the cases in the study explained why manifest intent is significant, but it appears to be a test that could insulate from a finding of violation remarks that may be intended, but are not *manifestly* intended, to comment on a defendant's failure to testify.

Nevertheless, in three recent cases, courts have found that the prosecutor's conduct rose to the level of manifest intent. In *United States v. Johnston*, the court found that the prosecutor's closing argument telling the jury *not* to consider a defendant's failure to testify was made with manifest intent because it was a direct comment on the failure to testify even though it did not ask the jury to infer guilt from that silence.¹¹² This was especially so because the prosecutor then cautioned the jury they could not say, "Well, if they testified, well, maybe they would have explained this."¹¹³ In addition the prosecutor had, in redirect of a government witness (who had been challenged on cross examination to tell the jury whether anyone could corroborate his claims concerning the drug conspiracy at issue), gestured toward the defendants and asked, "Aren't there some people in this courtroom that can back up what you say?"¹¹⁴ The court found that the prosecutor made this remark and gesture with "manifest intent to comment on the defendants' failure to testify."¹¹⁵

In *United States v. Roberts*,¹¹⁶ the First Circuit reversed a conviction for conspiracy to possess anabolic steroids because of plain error in closing argument, including improper comments on

111. *United States v. Johnston*, 127 F.3d 380, 396 (5th Cir. 1997).

112. *Johnston*, 127 F.3d at 399.

113. *Id.*

114. *Id.* at 397.

115. *Id.*

116. 119 F.3d 1006 (1st Cir. 1997).

defendant's failure to testify. The prosecutor had used a rhetorical device the court found improper:

You know, the thing in this case is that the *defendant has no obligation to testify and you should take that fact into consideration in no way whatsoever*. But with respect to the rest of the case the defendant has the same responsibility and that is to present a compelling case, if they are to go forward.¹¹⁷

The court saw these comments as a deliberate attempt to emphasize improper, prejudicial information to the jury, but did not specifically discuss whether there was manifest intent or necessary effect.

In context, the jury, quite reasonably, could have interpreted the prosecutor's comments in this case as rhetorical flourishes meant to invite them to do just what the introductory comments literally said they should not do. Why else would the prosecutor be saying anything at all about a forbidden subject matter?¹¹⁸

In *United States v. Cotnam*,¹¹⁹ the court held that remarks that defendant did not have to put evidence on and that government evidence was "uncontroverted" were "manifestly intended to indicate to the jury that" defendant, who did not testify, was "the only one who could have controverted it."¹²⁰

In a fourth case, the court relied on the "naturally and necessarily construe" alternate test instead of the "manifest intent" test, but still found a way to comment on the prosecutor's intent. In *United States v. Hardy*,¹²¹ the First Circuit reversed a firearms-related conviction because of an improper comment on the defendants' failure to testify and four other prejudicial remarks, including a comment on the defendants' senseless violence, a reference to the danger to others because defendants discarded weapons in an attempt to avoid police, the prosecutor's vouching for government witnesses, and disparaging remarks about defense counsel.

117. *Id.* at 1011 (emphasis added).

118. *Id.* at 1015.

119. 88 F.3d 487 (7th Cir. 1996).

120. *Id.* at 499.

121. 37 F.3d 753, 756-759 (1st Cir. 1994).

With regard to the defendants' failure to testify, the prosecutor remarked in closing argument that defendants, who had fled from the police at the time of their arrest, were "still running and hiding today."¹²² The court found a *Griffin*¹²³ violation because "[t]he natural and necessary implication of the prosecutor's remark was . . . that the defendants were running from the evidence presented against them, and hiding behind their right to silence during the trial."¹²⁴ In a later portion of the opinion dealing with whether the remarks were prejudicial, however, the court made clear that it found the prosecutor should have known such remarks were improper:

We believe that the comments were, in a sense, deliberate. In his closing argument, the prosecutor had constructed an analogy based on the facts of the case, with certain rhetoric significantly repeated, which appeared to be planned. We do not believe that the prosecutor intentionally intended to influence the jury by commenting on Hardy's silence, and we hope that our belief is not misplaced. We do believe, however, that when preparing or reviewing his proposed closing, the prosecutor should have known that such a comment was improper.¹²⁵

(3) *Knowingly false arguments.* As long ago as 1935, the Supreme Court held that the use by the prosecutor of evidence known to be false was a serious violation of due process of law.¹²⁶ In 1967, in *Miller v. Pate*,¹²⁷ the Court held that it was a denial of due process for a prosecutor to knowingly introduce underwear supposedly belonging to defendant with red stains on it and argue falsely that underwear was stained with blood when the prosecutor knew that the stains were red paint. By "deliberately misrepresent[ing] the truth," the prosecutor violated the "Fourteenth Amendment [which] cannot

122. *Id.* at 757.

123. *Griffin v. California*, 380 U.S. 609 (1965) (holding that Fifth Amendment forbids comment on defendant's failure to testify).

124. *Hardy*, 37 F.3d at 758.

125. *Id.* at 758 (emphasis added).

126. *Mooney v. Holohan*, 294 U.S. 103 (1935).

127. 386 U.S. 1 (1967).

tolerate a state criminal conviction obtained by the knowing use of false evidence.”¹²⁸

The Court in *Miller* overturned the conviction without discussing the strength of the other evidence against defendant or otherwise considering whether this wrongful behavior affected the result in the trial. In subsequent cases, however, knowing use of false evidence has become a branch of due process law requiring disclosure of exculpatory evidence under *Brady v. Maryland*.¹²⁹ Under *United States v. Agurs*,¹³⁰ the constitutional duty to disclose is determined by the materiality of the information not disclosed and does not arise unless “omission [of disclosure] is of sufficient significance to result in the denial of the defendant’s right to a fair trial.”¹³¹ The standard for materiality differs depending on the circumstances surrounding the failure to disclose. Ordinarily, evidence not disclosed is material “only if the omitted evidence creates a reasonable doubt that it did not otherwise exist.”¹³² However, in cases where the prosecutor “knew, or should have known” that evidence presented was perjured or false, a conviction based on such error “must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.”¹³³ This standard is equivalent to a requirement that there be reversal “unless the failure to disclose . . . would be harmless beyond a reasonable doubt.”¹³⁴ Thus, because the knowing use of false testimony corrupts the “truth-seeking function of the trial process” it is subject to an elevated standard of materiality.¹³⁵

The requirement that the prosecutor knew or should have known the evidence was false for this elevated standard of materiality to apply seems in tension with the later statement in *Agurs* that “[i]f the suppression of the evidence results in

128. *Id.* at 6, 7. Interestingly, in later disciplinary proceedings brought by the Illinois State Bar against the prosecutor, hearing officers found that there was blood in addition to the paint on the shorts, and refused to discipline the prosecutor. See GERSHMAN, *supra* note 12, § 13.7; Alshuler, *supra* note 4, at 651-72.

129. 373 U.S. 83 (1963).

130. *United States v. Agurs*, 427 U.S. 97, 103-104 (1976).

131. *Id.* at 108.

132. *Id.* at 112.

133. *Id.* at 103.

134. *United States v. Bagley*, 473 U.S. 667, 680 (1985).

135. *See id.* at 678-80, 710 (1985) (quoting *Agurs*, 427 U.S. at 104).

constitutional error, it is because of the character of the evidence, not the character of the prosecutor.”¹³⁶ To the extent these two ideas can be harmonized, they seem to suggest that the prosecutor’s use of evidence with knowledge it is false amounts to improper conduct regardless of the prosecutor’s subjective intentions or motivations; once such an impropriety is established, a conviction must be reversed unless the use of the false evidence was harmless beyond a reasonable doubt.

The subtle differences between knowing use of false evidence and the prosecutor’s intent seem to have escaped the courts that encountered such conduct in the context of closing arguments. In each of the following six cases, the prosecutor made closing arguments that the prosecutor knew were based in some way on evidence that was false; in each of them, the court commented extensively and disapprovingly on the intentional nature of the prosecutor’s actions.

In four of the six cases, the court analyzed the arguments directly as *Brady* violations, in whole or in part. In *United States v. Alzate*,¹³⁷ the Eleventh Circuit reversed a drug conviction where defendant’s defense was one of duress, but a government agent testified that defendant had admitted in the interrogation room that he was being paid \$8,000 to transport the cocaine with which he was caught. Defendant claimed a language barrier between the agent and him confused the interrogation, and that his statement about the \$8,000 was made in reference to a question about the value of another box of cocaine in the interrogation room, not in answer to whether he was paid to transport cocaine. The government agent testified that there was only one box of cocaine in the interrogation room. The prosecutor then represented at sidebar that there was only one box, cross-examined defendant in ways that suggested that defendant’s story was implausible because there was only one box of cocaine in the interrogation room, and argued eight times to the jury in closing that defendant’s sole purpose in carrying the cocaine was to obtain \$8,000. However, before putting on his rebuttal evidence, the prosecutor learned from the agent that there were two boxes of cocaine in the interrogation room, a fact that would have

136. *Agurs*, 427 U.S. at 110.

137. 47 F.3d 1103 (11th Cir. 1995).

buttressed defendant's credibility. Nonetheless, he presented rebuttal witnesses and let the case go to the jury without disclosing this fact.

In explaining its reversal, the court expressed exasperation at the prosecutor:

The reason matters went awry is that . . . the representative of the Government of the United States in that courtroom, chose to keep silent and not disclose his knowledge that statements he had made to the court and jury were false. . . . Thus, . . . [the prosecutor] urged the jury to deliver a verdict that spoke the truth, after he himself had chosen not to reveal it.¹³⁸

Because the court saw this violation as a failure to disclose, improper under the *Brady* line of cases, it had a clear doctrinal basis—the knowing failure to disclose that evidence was false—in which to place its conclusion.¹³⁹ Under settled law, knowing failure to disclose that evidence introduced was false requires reversal “if there was any reasonable likelihood that the false testimony could have affected the judgment of the jury.”¹⁴⁰

In *United States v. Udechukwu*,¹⁴¹ the First Circuit reversed a drug conviction because the prosecutor had deliberately failed to disclose evidence that tended to corroborate defendant's duress defense. Defendant admitted carrying drugs, but claimed that she had done so under threats from a drug trafficker whose name she gave to the agents who arrested her. Although the prosecutor was aware that there was a drug trafficker with a nearly identical name operating in the area from which defendant transported the drugs, the prosecutor argued in closing that the defense was an incredible fabrication unsupported by any evidence. Doctrinally, the court characterized the prosecutor's behavior as “a kind of double-acting prosecutorial error,” violating both the *Brady* duty to disclose information and the prosecutor's duty not to deliberately mislead the jury in closing argument.¹⁴²

138. *Id.* at 1108.

139. *Id.* at 1109.

140. *Id.* at 1110 (quoting *Agurs*, 427 U.S. at 103).

141. 11 F.3d 1101 (1st Cir. 1993).

142. *Id.* at 1106 (At that time, “whether it was deliberate or accidental” was one of the factors used by the First Circuit in deciding whether to reverse.).

In *United States v. Kojayan*,¹⁴³ the Ninth Circuit reversed and remanded a drug conviction for a hearing on whether the case should be dismissed for outrageous misconduct by the prosecutor and his supervisors. Prior to trial, the defense requested information on the whereabouts of an alleged co-conspirator and whether that individual had entered into a cooperation agreement with the government. The government rebuffed the request. At trial, the Assistant United States Attorney introduced a statement of the co-conspirator incriminating defendants and represented to the court that the co-conspirator would not testify because he would claim the privilege against self incrimination, when in fact the witness had a cooperation agreement with the government that obligated him to testify truthfully for the government.¹⁴⁴ When the defense argued that the jury should not rely on the hearsay statement of the co-conspirator because the government could have called the witness, the prosecutor argued to the jury that the defense's contention was

a classic example of asking the jury to speculate The government can't force someone to talk. They have to agree to talk after they have been arrested. Well, you can figure out defendant Nourian was arrested. He has Fifth Amendment rights. He has the right to remain silent. The government can't force anyone to talk. It is against their Fifth Amendment rights. Don't be misled that the government could have called Nourian.¹⁴⁵

The government continued to deny the existence of the cooperation agreement after a guilty verdict, at a motion for a new trial, and on appeal in both its brief and at oral argument. The agreement was disclosed only after the appellate panel issued an order giving the government the opportunity to "rethink its position."¹⁴⁶ Even then, the government did not accept responsibility for the false statements.¹⁴⁷ Doctrinally, the court saw this as a *Brady* violation and specifically cited *United States v. Agurs*,¹⁴⁸ in finding the error prejudicial. Moreover, the court found

143. 8 F.3d 1315 (9th Cir. 1993).

144. *Id.* at 1318.

145. *Id.* at 1317-18.

146. *Id.* at 1320.

147. *Id.* at 1323.

148. 427 U.S. 97, 103 (1976).

the behavior sufficiently outrageous to remand to the district court to consider whether retrial should be barred.

In *Brown v. Borg*,¹⁴⁹ the Ninth Circuit granted habeas relief where the state prosecutor, in order to obtain a conviction for felony murder based on robbery, used evidence that a murder victim's wallet and jewelry were not with him when admitted to a hospital and then relied on that evidence in closing argument to obtain a conviction when he knew that the wallet and jewelry had been given to the victim's family and provided no evidence of robbery. Although the prosecutor disclosed the false evidence in post-verdict state court proceedings, the state court remedy of reduction of conviction to second-degree murder was not sufficient because the misrepresentation could have contributed to the jury's assessment of the defendant's motivations to kill the victim. The court, seeing this as a *Brady* case, held that the knowing use of false evidence placed the case under a higher standard of scrutiny than ordinary failure to disclose.¹⁵⁰ The prosecutor's intent, however, was clearly relevant to the court:

The prosecutor's actions in this case are intolerable. Possessed of knowledge that destroyed her theory of the case, the prosecutor had a duty not to mislead the jury. Instead, she kept the facts secret in the face of a long-standing rule of constitutional stature requiring disclosure, and then presented testimony in such a way as to suggest the opposite of what she alone knew to be true: that the wallet and chains had not been stolen . . . Such conduct perverts the adversarial system and endangers its ability to produce results. In response to the threat that such misconduct poses to the rule of law, the Constitution requires [such] convictions . . . to be overturned unless the misconduct can be proven to be harmless beyond a reasonable doubt.¹⁵¹

In counterpoint to its obvious displeasure with the conduct of the prosecutor in this case, the court noted, however, that "when exculpatory evidence is withheld, attention focuses on the effect

149. 951 F.2d 1011 (9th Cir. 1991).

150. *Id.* at 1015 (citing *United States v. Bagley*, 473 U.S. 667 n.9 (1985)).

151. *Id.*

on the defendant's right to due process; the prosecutor's intentions are irrelevant."¹⁵²

In the two other cases involving closing arguments based on evidence the prosecutor knew to be false, the courts discussed the intentional wrongdoing not as part of its analysis of *Brady* issues, but instead under the tests that govern errors in prosecutorial argument.

In *United States v. Wilson*,¹⁵³ the Fourth Circuit reversed a conviction for selling drugs where the prosecutor argued that the defendant had murdered a potential buyer; evidence in the record showed only that the defendant had shot at a passing car. In addition, not only had the trial court specifically excluded testimony concerning the fate of the driver, the prosecutor had discovered that another person had been convicted of killing the driver of that car and failed to disclose this information to the defense. The court had little difficulty in concluding that the argument was improper; it referred to matters not in evidence—indeed a matter excluded by the court—and was vulnerable to attack based on exculpatory information not disclosed by the prosecutor.¹⁵⁴

In deciding whether the improper conduct should be the basis for reversal, the court ignored the *Brady* violation and treated the case as one of improper prosecutorial argument. It found that the prosecutor's decision to argue that the defendant had committed an uncharged, unproven and essentially irrelevant murder "appears to have been a deliberate and calculated decision to assert facts not in evidence in order to divert the jury from the real issues in the case."¹⁵⁵ Because the Fourth Circuit's four-factor test for determining prejudice from misconduct in argument includes "whether the comments were deliberately placed before the jury to divert attention to extraneous matters,"¹⁵⁶ the court had a basis other than *Brady* for considering prosecutorial intent. However it reached its ultimate conclusion based on the potential prejudice resulting from the conduct, not on the intention of the prosecutor: "The risk is too great that Talley was convicted because the jury

152. *Id.*

153. 135 F.3d 291 (4th Cir. 1998).

154. *Id.* at 296-302.

155. *Id.* at 302.

156. *Id.* at 299.

thought he was a murderer, a reason wholly irrelevant to his guilt or innocence on the changes in the indictment.”¹⁵⁷

In *Davis v. Zant*,¹⁵⁸ an Eleventh Circuit habeas case, the court overturned a state murder conviction based in part on defendant’s confession prior to trial. Defendant testified that he had confessed to protect his girl friend who was the real killer. When he tried to testify that his girl friend had confessed to the killing, the prosecutor objected on hearsay grounds and stated in front of the jury that this was not true. The prosecutor then argued five times in closing that the defense contention that the girl friend was the killer was a fabrication for trial even though the prosecutor knew that girl friend had long ago confessed to the murder and even though the prosecutor had stated in pretrial proceedings that he expected this to be the defense. The court was understandably outraged at the prosecutor’s behavior.

These misstatements portrayed the core of the defense case as an afterthought fabricated during trial after the state closed its evidence. The statements were not only clearly false, but the record in this case establishes beyond doubt that the misrepresentations were intentional and known to the prosecutor to be false.¹⁵⁹

In its decision the court focused on whether the impropriety was “deliberate or accidental,” a factor in the Eleventh Circuit’s test for reversal on direct appeal, not its test for whether to grant a habeas corpus petition. It did so in part because although a previous opinion of the Eleventh Circuit en banc had suggested that the prosecutor’s intent was usually irrelevant in habeas corpus cases, that opinion allowed for an exception in cases where the prosecutor’s intentional misconduct was equivalent to the knowing use of false evidence.¹⁶⁰

b. Intent as a consideration in deciding whether improper argument is reversible on direct appeal. Once a court decides that conduct is improper, it must then decide whether the

157. *Id.* at 302.

158. 36 F.3d 1538 (11th Cir. 1994).

159. *Id.* at 1538.

160. *Id.* at 1550 (citing *Brooks v. Kemp*, 762 F.2d 1383, 1402 n.26 (11th Cir.) (en banc), vacated on other grounds, 478 U.S. 1016 (1986), reinstated, 809 F.2d 700 (11th Cir. 1987) (en banc)).

impropriety results in reversible error. The issue arises either where the error has been properly preserved, or where unpreserved claims are reviewed under the plain error doctrine.

The standards governing federal appeals are complicated and the courts of appeals' decisions are in a state of considerable confusion over them. In direct federal appeals, the issue of whether to reverse turns on harmless error analysis. If a prosecutorial argument is shown to have deprived a defendant of constitutional rights, the judgment must be reversed unless the error was "harmless beyond a reasonable doubt."¹⁶¹ With regard to appeals not involving deprivation of constitutional rights, under federal statute the reviewing "court shall give judgment . . . without regard to errors or defects which do not affect the substantial rights of the parties."¹⁶² In *Kotteakos v. United States*,¹⁶³ the Supreme Court held that under the predecessor to this statute, lower court judgments should be reversed only if the error below "had substantial and injurious effect or influence in determining the jury's verdict."¹⁶⁴

The *Kotteakos* standard seems clearly applicable to appeals challenging prosecutorial argument as non-constitutional error. *Kotteakos* cited with approval the application in *Berger v. United States*¹⁶⁵ and *United States v. Socony-Vacuum Oil Co.*,¹⁶⁶ of the harmless error statute to the issue of prosecutorial misconduct.¹⁶⁷

161. *Chapman v. California*, 386 U.S. 18, 24 (1967). In *Darden v. Wainwright*, 477 U.S. 168, 181 (1986), and *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974), the Court held that where constitutional violations not involving a specific constitutional right are claimed, the *Chapman* test does not apply because there is no constitutional error unless the prosecutors actions "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly*, in particular, based this elevated standard on the fact it was a habeas corpus case, not a direct appeal involving the court's supervisory powers and "the distinction between ordinary trial error of a prosecutor and that sort of egregious misconduct held . . . to amount to a denial of constitutional due process." 416 U.S. at 647-48. Because federal direct appeals allow courts to reverse for "ordinary trial error" and because federal appellate courts do have supervisory powers over direct appeals, the *Darden-Donnelly* standard will not be discussed further.

162. 28 U.S.C. § 2111; see also FED. R. CRIM. P. 52(a) ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

163. 328 U.S. 750, 776 (1944) (applying 28 U.S.C. § 391, which included substantially the same language).

164. *Id.*

165. 295 U.S. 78 (1935).

166. 310 U.S. 150 (1940).

167. *Kotteakos*, 328 U.S. at 757 n.8 (*Berger*); *id.* at 763-64 (*Socony-Vacuum*).

Nonetheless, not a single one of the twenty-five direct appeals in this study even mentioned *Kotteakos* or its harmless error standard.¹⁶⁸

Rather than referring to the overall standard of review, the lower courts appear to be guided by core prejudice analysis—the impact of the improper argument on the result. Even here, however, there is a clear split in the circuits over whether the prosecutor’s intentional wrongdoing is a consideration explicitly relevant to reversal.

(1) *The three-factor test.* The Second,¹⁶⁹ Third,¹⁷⁰ Fifth,¹⁷¹ Seventh,¹⁷² Eighth,¹⁷³ Tenth,¹⁷⁴ and D.C. Circuits¹⁷⁵ have

168. Instead, courts have articulated more than a dozen different overall standards that supposedly govern their review in direct appeals and none of them is, without further explanation, compatible with *Kotteakos*. In *United States v. Carroll*, 26 F.3d 1380, 1385-86 (6th Cir. 1994), the Sixth Circuit noted the confusion in that one circuit alone, which had at least three tests for reversal. Even *Carroll*, which adopted a new, unified approach, did not discuss *Kotteakos* or the harmless error statute.

169. *United States v. Friedman*, 909 F.2d 705, 709 (2d Cir. 1990) (in assessing whether in the context of the whole trial, misconduct was prejudicial the court focused on three factors: the severity of the misconduct, the measures adopted to cure the misconduct, and the certainty of conviction absent the misconduct).

170. *United States v. Zehrbach*, 47 F.3d 1252, 1265 (3d Cir. 1995) (“In determining prejudice, we consider the scope of the objectionable comments and their relationship to the entire proceeding, the ameliorative effect of any curative instructions given, and the strength of the evidence supporting the defendant’s conviction.”).

171. *United States v. Anchondo-Sandoval*, 910 F.2d 1234, 1237 (5th Cir. 1990) (observing that once misconduct is found, the court considers three factors to determine whether defendant is entitled to reversal: (1) the magnitude of the prejudicial effect of the statements; (2) the efficacy of any cautionary instruction; and (3) the strength of the evidence of the defendant’s guilt).

172. In *United States v. Cotnam*, the Seventh Circuit expanded on the three-factor test and included two additional factors relating to the conduct of defense counsel:

(1) the nature and seriousness of the prosecutorial misconduct, (2) whether the prosecutor’s statements were invited by impermissible conduct of defense counsel, (3) whether the trial court instructed the jury to disregard the statements, (4) whether the defense was able to counter the improper statements through rebuttal, and (5) the weight of the evidence against the defendant.

88 F.3d 487, 498 (7th Cir. 1996); *see also* *United States v. Whitaker*, 127 F.3d 595, 606 (7th Cir. 1997) (essentially the same factors).

173. *United States v. Hernandez*, 779 F.2d 456, 460 (8th Cir. 1985) (“There are three factors that the courts usually consider to determine the prejudicial effect of prosecutorial misconduct: (1) the cumulative effect of such misconduct; (2) the strength of the properly admitted evidence of the defendant’s guilt; and (3) the curative actions taken by the trial court.”).

174. *United States v. Lonodog*, 929 F.2d 568, 572 (10th Cir. 1991) (quoting *United States v. Martinez-Nava*, 838 F.2d 411, 416 (10th Cir. 1988)) (“In determining whether the

adopted some form of a three-factor test that does not explicitly mention deliberateness or intent. A common articulation of the test weighs “the severity of the misconduct, the measures adopted to cure it, and the certainty of conviction absent the misconduct.”¹⁷⁶

Whatever the articulation of the test, it is clearly aimed at determining the impact of the improper comments on the verdict.¹⁷⁷ The “severity of the misconduct” measures the likely effect of the remarks themselves on the jury. The “measures adopted to cure it” assesses whether curative instructions were given; if so, these are usually considered to be effective in curing or at least mitigating the prejudice. The final factor weighs the strength of the other evidence against the accused; the stronger the evidence against the accused, the less likely that the prejudice from the remarks affected the verdict. None of these factors explicitly or implicitly considers the prosecutor’s intent.

misconduct affected the outcome, we consider: ‘the curative acts of the district court, the extent of the misconduct, and the role of the misconduct within the case as a whole.’ ”).

175. *United States v. Edelin*, 996 F.2d 1238, 1243 (D.C. Cir. 1993) (noting that in determining whether to reverse a conviction on grounds of misstatement in closing argument, the court must determine whether the remarks were improper and whether they substantially prejudiced the jury, and consider measures taken to cure the prejudice and the certainty of conviction absent the remarks); *see also* *United States v. North*, 910 F.2d 843, 895 (D.C. Cir.), *opinion withdrawn and superseded in part on rehearing*, 920 F.2d 940 (D.C. Cir. 1990) (discussing history of somewhat different tests).

176. *United States v. Friedman*, 909 F.2d 705, 709 (2d Cir. 1990).

177. The Ninth Circuit has no settled checklist of considerations and relies on an overall standard: reversal if it appears more probable than not that the alleged misconduct affected the jury’s verdict. *See* *Commonwealth v. Mendiola*, 976 F.2d 475, 487 (9th Cir. 1993), *overruled on other grounds by* *George v. Comacho*, 119 F.3d 1393 (9th Cir. 1997); *United States v. Simtob*, 901 F.2d 799, 806 (9th Cir. 1990) (reversing for improper prosecutorial vouching during trial). The Ninth Circuit’s test appears to be an adaptation of *Kotteakos*, 328 U.S. 750, 776 (1944), but neither the court’s decision, nor the variations of it are discussed.

(2) *The Leon four-factor test*. Four circuits have taken a different approach. They apply some version of a test first articulated in 1976 in *United States v. Leon*¹⁷⁸ as a way of assessing whether prosecutorial misconduct was harmless. *Leon* created a checklist of the following four factors to be considered in assessing whether improper prosecutorial argument warrants reversal:

- (1) the degree to which the remarks complained of have a tendency to mislead the jury and to prejudice the accused;
- (2) whether they were isolated or extensive;
- (3) whether they were deliberately or accidentally placed before the jury; and
- (4) the strength of the competent proofs introduced to establish the guilt of the accused.¹⁷⁹

Courts in the First,¹⁸⁰ Fourth,¹⁸¹ Sixth,¹⁸² and Eleventh¹⁸³ circuits have adhered to some version of this four-factor test.

178. 534 F.2d 667, 679 (6th Cir. 1976).

179. *Id.*

180. The First Circuit, in *United States v. Brown*, 938 F.2d 1482, 1489 (1st Cir. 1991), articulated the test as follows:

In deciding whether a new trial is required—either because prosecutorial misconduct likely affected a trial's outcome or to deter such misconduct in the future—we consider “the severity of the misconduct, whether it was deliberate or accidental, the likely effect of the curative instruction and the strength of the evidence against appellant.”

Id. (quoting *United States v. Cox*, 752 F.2d 741, 745 (1st Cir. 1985), which in turn quotes *United States v. Capone*, 683 F.2d 582, 586-87 (1st Cir. 1982)); accord *United States v. Udechukwu*, 11 F.3d 1101, 1106 (1st Cir. 1993) (includes fifth factor: “the context in which it occurred”). But see *United States v. Manning*, 23 F.3d 570, 574 (1st Cir. 1994) (listing the following factors for consideration of whether improper comments warrant a new trial: (1) the severity of the misconduct; (2) *the context in which it occurred*; (3) whether the judge gave any curative instructions; and (4) the strength of the evidence against the defendant (emphasis added to show change from “deliberate or accidental” to “context”). In *United States v. Hardy*, the court found constitutional error and used the same *Manning* version of the four-factor test to assess prejudice, but discussed the fact that the prosecutor “should have known” that his argument was improper in considering the “severity of the misconduct” factor. 37 F.3d 753, 758 (1st Cir. 1994).

181. *United States v. Wilson*, 135 F.3d 291, 299 (4th Cir. 1998) (“Several factors are relevant to the determination of prejudice, including: (1) the degree to which the prosecutor’s remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.”); accord *United States v. Adam*, 70 F.3d 776, 780 (4th Cir. 1995); *United States v. Mitchell*, 1 F.3d 235, 241 (4th Cir. 1993).

182. The Sixth Circuit originally decided and adhered to *Leon*. A number of panels have

The consideration included in the minority rule (the four-factor test) not present in the majority rule (the three-factor test) is whether the improper argument was “deliberately or accidentally placed before the jury.”¹⁸⁴ Therefore, the critical difference between the majority rule and the minority rule is the relevance of intent.

The doctrinal basis for considering whether the prosecutor’s conduct was deliberate is uncertain. The *Leon* court, which formulated the four-factor test, clearly considered the improper nature of the prosecutor’s conduct important to its decision to reverse, but it did not offer a coherent or extensive explanation why the prosecutor’s intent was relevant. It noted that the circuit had condemned “prosecutorial overkill” requiring the court to reverse “in the exercise of our supervisory authority.”¹⁸⁵ The cases it cited focused on the prejudice from the prosecutor’s improper remarks, not on their deliberateness.¹⁸⁶

now modified this approach. See *United States v. Carroll*, 26 F.3d 1380 (6th Cir. 1994), discussed under the *Bess-Carroll* approach below.

183. In *Hance v. Zant*, 696 F.2d 940, 950 n.7 (11th Cir. 1983), the court adopted the four-factor *Leon* tests for federal habeas review of state convictions. However, in *Brooks v. Kemp*, the court questioned *Hance*:

Hance also listed as a factor whether the remarks were deliberately or accidentally placed before the jury. While that factor may be more clearly, or more frequently, relevant for a court with supervisory powers over the conduct of the prosecutor, there may be cases where the prosecutor’s intentional conduct rises to a level equivalent to a knowing use of false evidence.

762 F.2d 1383, 1402 n.26 (11th Cir.) (en banc), *vacated on other grounds*, 478 U.S. 1016 (1986), *reinstated*, 809 F.2d 700 (11th Cir. 1987) (en banc) (citations omitted).

Thus, *Brooks* suggests that deliberateness may be an appropriate factor on direct appeal where the court has “supervisory power.” After *Brooks*, two panels of the Eleventh Circuit have suggested that the four *Leon* factors are appropriate even in a habeas case. See *Davis v. Zant*, 36 F.3d 1538, 1545 (11th Cir. 1994); *Walker v. Davis*, 840 F.2d 834, 838 (11th Cir. 1988).

184. This is the formulation in the First, Sixth and Eleventh Circuits. In the Fourth Circuit, the standard is more focused: “whether the comments were deliberately placed before the jury to divert attention to extraneous matters.” See *United States v. Wilson*, 135 F.3d 291, 299 (4th Cir. 1998) (emphasis added).

185. *United States v. Leon*, 534 F.2d 667, 679 (6th Cir. 1976).

186. See *United States v. Smith*, 500 F.2d 293, 296 (6th Cir. 1974) (stating it is relying on supervisory powers, but resting decision on effect of improper remarks on jury, not prosecutor’s intent); *United States v. Bowen*, 500 F.2d 41 (6th Cir. 1974) (declining to reverse under supervisory powers, mentioning lack of bad faith in improper argument and affirming because of overwhelming evidence); *United States v. Peak*, 498 F.2d 1337 (6th Cir. 1974) (prejudice, not intent, basis for opinion); *United States v. Calvert*, 498 F.2d 409 (6th Cir. 1974) (same).

However the First Circuit supplied a rationale in *United States v. Capone*,¹⁸⁷ where the court stated that reversals for prosecutorial misconduct are appropriate either when, despite a curative instruction, the misconduct was likely to have affected the trial's outcome, or when a sanction is necessary to deter future prosecutorial misconduct.¹⁸⁸ The court then held that the facts in *Capone* "suggest[] that the appeal to passion was less than deliberate, making it inappropriate to reverse these convictions as a 'disciplinary sanction.'"¹⁸⁹

The First Circuit's position that reversal may be used as a tool to discipline prosecutors and to deter future misconduct is the most plausible explanation why a court would include the prosecutor's intent in the considerations that influence its decision to affirm or reverse,¹⁹⁰ but it is also doctrinally suspect. Although appellate courts have supervisory responsibility over the attorneys who practice in courts over which they have jurisdiction and have supervisory power to fashion remedies to deter illegal conduct,¹⁹¹ the power of appellate courts to do so would appear limited by *United States v. Hasting*.¹⁹² The Supreme Court held in *Hasting* that courts must conduct harmless error analysis and should not reverse in order to deter future misconduct where the error was harmless beyond a reasonable doubt and "where means more narrowly tailored to deter objectionable prosecutorial conduct are available."¹⁹³

In response to this concern, at least two of the circuits that follow the *Leon* test are modifying their approach. The First Circuit has specifically acknowledged that *Hasting* limits its power to reverse in order to deter future misconduct. In *United*

187. 683 F.2d 582, 586-87 (1st Cir. 1982) (declining to reverse a conviction for an improper remark that the wounded police officer was waiting for the jury's decision).

188. *Id.*

189. *Id.*

190. The only other explanation would be using the prosecutor's intentions as an indication of the effect the prosecutor's words had on the jury. *Cf. Brooks v. Kemp*, 762 F.2d 1383, 1431, 1435 (11th Cir. 1985) (Clark, J., concurring and dissenting) (intent, in the sense of the natural and probable consequences of remarks, reflects likely effect), *vacated on other grounds*, 478 U.S. 1016 (1986), *reinstated*, 809 F.2d 700 (11th Cir. 1987).

191. *United States v. Payner*, 447 U.S. 727, 735 n.7 (1980).

192. 461 U.S. 499 (1983).

193. *Id.* at 506 n.5 and accompanying text.

States v. Manning,¹⁹⁴ the court did not include “whether it was deliberate or accidental” in its list of considerations relevant to assessing prejudice and indicated that its revised list is aimed at determining “whether the misconduct likely affected the trial’s outcome.”¹⁹⁵ The court then explained that although the line of authority in the First Circuit “speaks of the need to deter future prosecutorial misconduct . . . as an additional legitimate basis for reversal,” the court’s “power to act solely on this basis has . . . been significantly circumscribed by [*Hasting*].”¹⁹⁶ The court added that “while we fervently hope that our decision might have the effect of deterring prosecutors from straying into forbidden territory in the future, we emphasize that today’s result is in no way informed by a deterrent animus.”¹⁹⁷

If the panel in *Manning* meant to eliminate consideration of the deliberateness of the prosecutor’s conduct from the factors considered in deciding whether to reverse, it failed to do so. In *United States v. Hardy*,¹⁹⁸ for example, the court adopted *Manning*’s revised list eliminating the “deliberate or accidental” factor, but nonetheless used the “severity of the misconduct” as a basis for considering prosecutor’s intent in arguing to the jury that the defendants were still “running and hiding” during the trial.¹⁹⁹ Thus, even the explicit elimination of deliberateness as an explicit factor in reversal analysis did not prevent the court from considering it.

The Sixth Circuit is in the process of modifying its approach. In *United States v. Carroll*,²⁰⁰ a panel of the Sixth Circuit reviewed the history in that circuit of inconsistent approaches to standards and methods used to determine whether or not to reverse,²⁰¹ including the *Leon* four-factor approach, the *Thomas* test—reversible error if misconduct is “so pronounced and persistent that it permeates the entire atmosphere of the trial,”²⁰² and the *Bess*

194. 23 F.3d 570 (1st Cir. 1994).

195. *Id.* at 574.

196. *Id.* n.2.

197. *Id.*

198. 37 F.3d 753 (1st Cir. 1994).

199. *Id.* at 758.

200. 26 F.3d 1380 (6th Cir. 1994).

201. *Id.* at 1383-87.

202. *United States v. Thomas*, 728 F.2d 313, 320 (6th Cir. 1984).

test—not reversible error “if it is not flagrant, where proof of guilt is overwhelming, where counsel does not object and/or where the trial judge steps in and admonishes the jury.”²⁰³ In an attempt to rationalize the standards and bring some consistency within the circuit, the court in *Carroll* disavowed the *Thomas* test as “an unfortunate retreat from . . . *Leon* and *Bess* standards,”²⁰⁴ and proposed to synthesize the *Leon* and *Bess* tests as follows: the first three *Leon* factors²⁰⁵ would be used to distinguish “flagrant” from “non-flagrant” prosecutorial error;²⁰⁶ if the error is found non-flagrant, prosecutorial error can result in reversal only when (1) the proof against the defendant was not overwhelming, (2) opposing counsel objected to the conduct, and (3) the district court failed to give a curative instruction.²⁰⁷ The court in *Carroll* found the clearly improper vouching in that case non-flagrant, but nonetheless reversed because its tests for reversing non-flagrant errors was met. The *Carroll* approach has now been followed by three panels of the Sixth Circuit.²⁰⁸ Neither *Carroll* nor its progeny have yet found any misconduct to be flagrant. No case has yet explained what the precise consequences of a finding of flagrancy would be. Presumably, some standards more receptive to reversal would apply to flagrant misconduct. But the rationale for considering the intent of the prosecutor in finding flagrancy and the consistency of that rationale with *Hasting* are yet to be developed.²⁰⁹

203. *United States v. Bess*, 593 F.2d 749, 757 (6th Cir. 1979).

204. *Carroll*, 26 F.3d at 1386.

205. The three factors are the degree to which the remarks complained of have a tendency to mislead the jury and to prejudice the accused, whether they were isolated or extensive, and whether they were deliberately or accidentally placed before the jury. *United States v. Leon*, 534 F.2d 667, 679 (6th Cir. 1976).

206. *Carroll*, 26 F.3d at 1385-86 (no discussion of consequences for appellate review of a finding that the argument was “flagrant”).

207. *Id.* at 1385-1386.

208. See *United States v. Monus*, 128 F.3d 376, 394 (6th Cir. 1997); *United States v. Cobleigh*, 75 F.3d 242, 247 (6th Cir. 1996); *United States v. Brown*, 66 F.3d 124, 127 (6th Cir. 1995).

209. The second installment of this article, appearing in a forthcoming issue of *The Journal of Appellate Practice and Process*, will suggest that elevating the standard of review to harmless beyond a reasonable doubt in cases of flagrant misconduct would both effectuate the deterrence sought by appellate courts and be consistent with *Hasting* (which only bars reversals where the improper argument was harmless beyond a reasonable doubt).

For present purposes, it is sufficient to acknowledge that the prosecutor's wrongdoing is an important consideration for appellate courts, but that the legitimacy of considering the prosecutor's intent is clearly called into question by *Hasting*. However, even when courts acknowledge the limitations of *Hasting*, they continue to write opinions that suggest that the *intention* of the prosecutor affects their decision to reverse.²¹⁰ Moreover, courts in circuits that have adopted the *Leon* test consider the intentional nature of the misconduct a factor weighing in favor of reversal.²¹¹ Even in circuits that do not include the prosecutor's intent as a specific factor in their analysis of prejudice, intentional behavior and the need to deter such behavior clearly influence courts to reverse.²¹²

Two things are therefore clear from this discussion. First, many courts are influenced to reverse when they find that prosecutors are making arguments they knew or should have known were improper. Second, the doctrinal framework, which does not clearly allow courts to reverse a conviction solely to deter future misconduct, is in need of rethinking and clarification. The tests currently articulated by the courts will not function properly

210. See, e.g., *United States v. Hardy*, 37 F.3d 753, 758 (1st Cir. 1994) (reversal for *Griffin* error mentions intent as part of its analysis of the severity of the misconduct).

211. See, e.g., *United States v. Wilson*, 135 F.3d 291, 299 (4th Cir. 1998) (using and applying factor "whether the comments were deliberately placed before the jury to divert attention to extraneous matters"); *United States v. Blakey*, 14 F.3d 1557, 1560 (11th Cir. 1994) (discussing without cites to *Leon* tests, fact that prosecutor knew argument was false); see also *United States v. Roberts*, 119 F.3d 1006, 1015-16 (1st Cir. 1997) (reversing for plain error without mentioning *Leon* tests, but discussing intentional nature of argument prejudicing defendant, including improper comments on defendant's membership in a motorcycle gang); *United States v. Mitchell*, 1 F.3d 235 (4th Cir. 1993) (applying Fourth Circuit version of *Leon* tests in a plain-error case).

212. See, e.g., *United States v. Johnston*, 127 F.3d 380, 402-03 (5th Cir. 1997) ("We are very reluctant to set aside a jury verdict rendered after a long, expensive, contentious trial, at which the district judge performed a creditable job of managing overzealous counsel. Nevertheless, somewhere we must draw the line and send a message to prosecutors that the Constitution governs their actions at trial. This is such a case."); *Commonwealth v. Mendiola*, 976 F.2d 475, 487 (9th Cir. 1993), *overruled on other grounds by* *George v. Comacho*, 119 F.3d 1393 (9th Cir. 1997) (Prosecutor's suggestions that Mendiola would walk out of the courtroom right behind them, if acquitted, and presumably retrieve the missing murder weapon was particularly improper because the prosecutor knew that his witness, the informer Reyes, was responsible for the missing gun and admonished that "[a] prosecutor's use of illegitimate means to obtain a verdict brings his office and our system of justice into disrepute.").

if they do not allow for consideration of those factors that clearly influence the judges.

c. Intentional prosecutorial misconduct in plain error cases. In federal courts, proper preservation of claims of improper closing argument requires defense counsel to object during the argument or, perhaps, move for a mistrial after argument. Rule 52(b) of the Federal Rules of Criminal Procedure gives appellate courts the power to consider improprieties not objected to below: “Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” Supreme Court decisions have made it clear that, to qualify as plain error, challenged conduct must not only meet the stated requirements of being “error,” “plain,” and “affecting substantial rights,”²¹³ but must also be so extreme as to “seriously affect the fairness, integrity or public reputation of judicial proceedings.”²¹⁴

In the 1990s, federal courts of appeals have found plain error in seven cases involving prosecutorial argument. Of these, only one opinion has directly connected the conclusion that the prosecutor’s improper arguments were intentional with the “fairness, integrity or public reputation of judicial proceedings” language. In *United States v. Smith*,²¹⁵ the Ninth Circuit reversed a conviction for plain error because the prosecutor had repeatedly vouched for government witnesses. The court was concerned, in particular, with the prosecutor’s argument that “if I did anything wrong in this trial, I wouldn’t be here. The *court* wouldn’t allow that to happen.”²¹⁶ The court found that these comments were plain error because the “prosecutor’s deliberately vouching for that witness on behalf of the court would pose a clear threat to the integrity of judicial proceedings.”²¹⁷

213. In *United States v. Olano*, 507 U.S. 725, 735 (1993), the Court stated that normally “the defendant must make a specific showing of prejudice to satisfy the ‘affecting substantial rights’ prong of Rule 52(b).”

214. *Johnson v. United States*, 117 S. Ct. 1544, 1549 (1997); *United States v. Olano*, 507 U.S. 725, 732 (1993); *United States v. Young*, 470 U.S. 1, 15 (1985).

215. 962 F.2d 923 (9th Cir. 1992).

216. *Id.* at 928 (emphasis added).

217. *Id.* at 936.

Although five of the six other plain error reversals referred pointedly to the intentional misconduct of the prosecutor, none of these articulated any connection between intentional misconduct and the fairness, integrity or public reputation of judicial proceedings.

In *United States v. Roberts*,²¹⁸ discussed above with regard to the definition of *Griffin* error, the court also found intentional misconduct, not only in the prosecutor's comments to the jury regarding the defendant's failure to testify, but also his comments regarding the defendant's membership in a motorcycle gang. The prosecutor argued at trial:

It was brought out throughout the course of the trial that the reason that Tibbetts was afraid of the problems, is that Tibbetts was aware that Roberts [the defendant] was the treasurer, I believe, of the Sarasins Motorcycle. That fact should not qualify [sic] you in any way in reaching your verdict because if you do, you will have decided the case for the wrong reasons, *whether he is a member of a motorcycle gang or whatever, has nothing to do with the facts of this case.*²¹⁹

This prosecutor's rhetorical device—similar to the device used in the same case to call attention to defendant's failure to testify—was characterized by the court as a deliberate attempt to emphasize improper, prejudicial information to the jury. “Why else would the prosecutor be saying anything at all about a forbidden subject matter?”²²⁰ The court then recited appropriate plain error doctrine,²²¹ but made no attempt to organize its opinion around its requirements. Instead, it rested its ultimate decision to reverse on its conclusion that the “instances of prosecutorial misconduct, in combination, undermined the fundamental fairness of the trial.”²²² It appears that the planned nature of the prosecutor's remarks contributed to this finding of fundamental unfairness, but the court made no explicit statement of this connection.

218. 119 F.3d 1006 (1st Cir. 1997).

219. *Id.* at 1015 (emphasis added).

220. *Id.*

221. *Id.* at 1014.

222. *Id.* at 1016.

In *United States v. Flores-Chapa*,²²³ the Fifth Circuit reversed a drug conviction for plain error because of the prosecutor's repeated improper references to an excluded post-arrest hearsay statement by the defendant's son-in-law that was the crucial link implicating the defendant, an alleged co-conspirator. The court reversed and dismissed because the properly admitted evidence was not sufficient to implicate the defendant. It did not directly discuss whether the plain error affected the "fairness, integrity or public reputation of judicial proceedings." Without linking its discussion to any of these standards, the court made clear that the prosecutor made the arguments knowing them to be improper. "Despite two sustained objections, a specific warning to government counsel and two specific instructions to the jury, the government again made reference to the excluded testimony during its closing argument."²²⁴ The court found that the remarks were plain error and that they "affected substantial rights," which it equated with prejudice to the defendant because "the government itself not only elicited the original hearsay, but then repeated the excluded evidence in front of the jury."²²⁵

In *Arrieta-Agressot v. United States*,²²⁶ the First Circuit reversed a drug conviction for plain error when the prosecutor had adopted a "war-on-drugs" theme in his initial closing argument and throughout his rebuttal. The court quoted several paragraphs of the arguments, which included:

Nobody has a right to poison the people and poison our children. . . . I know the pain, the suffering that is brought to many families by the use of drugs, by the use of marijuana, by the addiction to marijuana.

. . . [W]e are here today because we want to say no to drugs. We want to say no to what is corrupting and disrupting the society, because marijuana not only disrupts and corrupts our society but it also corrupts and disrupts any society in the world.

But thank God . . . we had the Coast Guard . . . protecting us . . . [t]o save you all from the evil of drugs. Because the

223. 48 F.3d 156 (5th Cir. 1995).

224. *Id.* at 159.

225. *Id.* at 161.

226. 3 F.3d 525 (1st Cir. 1993).

defendants are not soldiers in the army of good. They are soldiers in the army of evil, in the army which only purpose [sic] is to poison, to disrupt, to corrupt.²²⁷

In view of two prior decisions in which the First Circuit had specifically condemned similar, though milder, versions of such war-on-drugs rhetoric,²²⁸ the court expressed consternation that not only did the prosecutor at trial engage in this argument, but that the office defended the arguments on appeal.²²⁹

In reaching its decision to reverse, the court noted that:

Although the extent of the prejudice is the paramount issue, we think it necessary to say that the nature of the misconduct also plays a part in our judgment. Almost any argument made in summation can be described as deliberate; but the several paragraphs of 150-proof rhetoric in this case overstep the bounds by a wide margin.²³⁰

The court expressed its concern that the prosecutor's supervisors had not exercised more control over the inexperienced prosecutor who tried the case. The opinion in no way connected its concern about intentional wrongdoing to any plain error standards.

In *United States v. Mitchell*,²³¹ the Fourth Circuit reversed as plain error the prosecutor's cross-examination of defendant's brother and continuing improper argument. The prosecutor argued that (1) because the defendant's brother had been convicted of the same crime as defendant and the other jury obviously had not believed the brother's testimony at his own trial, this jury should not believe him either; and (2) the prior conviction of his brother was substantive evidence against defendant. The intentional nature of this conduct was a clear component of its finding that the error here was "particularly egregious": "[n]ot content with its case against the appellant, the prosecution *chose* to use improper suggestion on cross-examination and improper jury argument to obtain a conviction."²³² The court did not, however, connect

227. *Id.* at 527.

228. See *United States v. Machor*, 879 F.2d 945, 955 (1st Cir. 1989); *United States v. Doe*, 860 F.2d 488, 494 (1st Cir. 1988).

229. *Arrieta-Agressot*, 3 F.3d at 527-28.

230. *Id.* at 530.

231. 1 F.3d 235 (4th Cir. 1993).

232. *Id.* at 244 (emphasis added); see also *id.* at 242 (noting "[g]iven the extent of the improper argument, . . . we believe that no other conclusion is possible than our finding that the improper argument was deliberately placed before the jury in an attempt 'to divert

intentional wrongdoing to the requirements for reversal for plain error, relying instead on Fourth Circuit standards for determining whether error was prejudicial.

In *United States v. Kerr*,²³³ the Ninth Circuit reversed for plain error because the prosecutor vouched for government witnesses by giving his personal opinion of their credibility. The court was concerned with the intentional nature of the conduct: "Here an experienced United States attorney *deliberately* introduced into the case his personal opinion of the witnesses' credibility. He repeatedly ignored his special obligation to avoid improper suggestions and insinuations."²³⁴ Again, the court did not, however, connect the intentional wrongdoing to criteria for plain error reversals.

The only plain error case in which the court did not directly discuss the intent of the prosecutor was *United States v. Doe*.²³⁵ In *Doe*, the D.C. Circuit unanimously reversed for plain error a drug conviction after the prosecution introduced expert evidence about the pattern that Jamaicans followed in taking over the drug trade in Washington, D.C. and then in summation suggested that the jury resolve issues of whether the Jamaican defendants or the government witnesses in whose apartment they were staying had engaged in the drug trade because the defendants' conduct fit the pattern that Jamaicans followed. The court found that remarks like "the city is being taken over by people just like this"²³⁶ amounted to constitutionally impermissible "[a]ppeals to racial passion."²³⁷

The court made virtually no attempt to explain why the argument met plain error standards, merely acknowledging that plain errors must be "particularly egregious errors" and finding that it was "plainly the case here" that the arguments "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings."²³⁸ The court also avoided discussing the intent of the prosecutor directly. Nonetheless, in its conclusion the court

attention to extraneous matters' ") (quoting *United States v. Harrison*, 716 F.2d 1050, 1052 (4th Cir. 1983).

233. 981 F.2d 1050 (9th Cir. 1992).

234. *Id.* at 1053.

235. 903 F.2d 16 (D.C. Cir. 1990).

236. *Id.* at 23.

237. *Id.* at 25.

238. *Id.* at 26 (footnote and internal citations omitted).

referred to the prosecution's "temptation to relax rigid standards" in narcotics cases, and emphasized that the "courtroom is not the proper place in which to fight such a war,"²³⁹ certainly suggesting the court's concern that the prosecutor knew that the conduct was wrong.

The performance of the courts in the plain error cases is curious because it would appear that intentional misconduct by the prosecutor is a likely basis for finding that such error seriously affects the integrity and public reputation of the trials in those cases. Yet, although six of the seven opinions explicitly discussed the prosecutor's intent, only one of the seven opinions made this connection. The failure of the other six opinions to do so suggests an uncertainty about the role of intent in plain error doctrine that should be clarified.

III. RECIDIVIST PROSECUTORS: THE FAILURE OF SANCTIONS

People v. Hill and the following case study both illustrate the problem of "prosecutorial recidivism"—the tendency of the same prosecutor or office to engage in such misconduct repeatedly, even in the face of admonishments from the court. A pattern of recidivism is important in two respects: First, it provides some basis and incentive for an appellate court to infer that the misconduct is intentional, or at least knowing, and to punish that conduct more severely. Second, recidivist prosecutors should be a red flag to appellate courts, signaling that current sanctions may not be adequately preventing future misconduct. Although intentional misconduct is always troubling, when the same prosecutor or the same office repeatedly misbehaves after warnings from appellate courts, the conduct is more disturbing because it suggests that the prosecutors believe they are a law unto themselves beyond meaningful judicial control.

Other than censuring through reversals, the commonsense remedy for recidivist prosecutors is to reveal them by naming them, by reprimanding them in published opinions, and even by referring them to local bars for discipline. However, one of the striking realities of the forty-five recent federal reversals is that

239. *Id.* at 28 (quoting *United States v. Edwardo-Franco*, 885 F.2d 1002, 1011 (2d Cir. 1989), which in turn quoted *Krulewitch v. United States*, 336 U.S. 440, 457 (1949) (Jackson, J., concurring)).

despite findings of intentional misconduct and extensive criticism of prosecutors' conduct, not one court ordered a prosecutor disciplined or referred a prosecutor for discipline. Most courts appear to believe that their disapproval of the conduct, especially when combined with a reversal, is a sufficient means to deter future misconduct. In only six of the federal reversals did the court's opinion mention the prosecutor by name,²⁴⁰ a step thought to be publicly embarrassing and a more severe admonishment.²⁴¹ In contrast, in *People v. Hill*, the California Supreme Court named the prosecutor over 120 times and referred her for disciplinary proceedings before the California State Bar.²⁴²

The prosecutor in *Hill* appears to be the most serious repeat offender mentioned by name in reported decisions. Based on this author's research, she joins the select company of only five other prosecutors and one prosecutorial office who have been cited by appellate courts for repeated acts of misconduct in argument. These prosecutors are: (1) an Assistant United States Attorney in Corpus Christi, Texas, cited by the United States Court of Appeals for the Fifth Circuit for repeated acts of misconduct from 1978 to 1981;²⁴³ (2) an assistant United States Attorney for the Eastern District of New York, who in 1973 was cited by the Second Circuit Court of Appeals, which noted his misconduct in three prior cases;²⁴⁴ (3) a Washoe County, Nevada, assistant district

240. *United States v. Flores-Chapa*, 48 F.3d 156, 159 (5th Cir. 1995); *United States v. Alzate*, 47 F.3d 1103, 1107-08 (11th Cir. 1995); *Davis v. Zant*, 36 F.3d 1538, 1548 (11th Cir. 1994); *Sizemore v. Fletcher*, 921 F.2d 667, 669 (6th Cir. 1990); *United States v. Friedman*, 909 F.2d 705, 708 (2d Cir. 1990); *Floyd v. Meachum*, 907 F.2d 347, 349-50 (2d Cir. 1990).

241. See Meares, *supra* note 4, at 897. In *United States v. Kojayan*, 8 F.3d 1315 (9th Cir. 1993), the court included the prosecutor's name in the original draft of the opinion, but on motion of the prosecutor, the name was removed from the published version. See Judith Resnick, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 U.C.L.A. L. REV. 1471, 1521 n.180 (1994); see generally GERSHMAN, *supra* note 2, § 13.4.

242. *People v. Hill*, 952 P.2d 673, 703 n.13 (Cal. 1998).

243. See *United States v. Singleterry*, 646 F.2d 1014, 1019 (5th Cir. 1981) (citing *United States v. Okenfuss*, 632 F.2d 483, 484 (5th Cir. 1980), and *United States v. Handy*, 591 F.2d 1125, 1132 (5th Cir. 1979), and noting that the same prosecutor's misconduct in *United States v. Garza*, 608 F.2d 659, 663-66 (5th Cir. 1979), had required reversal).

244. See *United States v. Drummond*, 481 F.2d 62, 62-63 n.1 (2d Cir. 1973) (citing *United States v. Fernandez*, 480 F.2d 726, 741-42 n.23 (2d Cir. 1973), *United States v. Miller*, 478 F.2d 1315, 1317-18 (2d Cir. 1973), and *United States v. Echavarria*, 486 F.2d 1397 (2d Cir. 1973) (unpublished)).

attorney who in 1984 had two entirely separate cases consolidated for appeal, had both reversed for prosecutorial misconduct, and became the only prosecutor in reported decisions ever fined by an appellate court for misconduct in argument at trial;²⁴⁵ (4) an assistant Florida State Attorney, who was cited two times in 1993 by the Florida Court of Appeals;²⁴⁶ and (5) a prosecutor in Missouri who in three cases in the early 1980s made essentially the same closing argument to juries, that “if you think he did it and if that thought is reasonable, beyond a reasonable doubt, then we have proved it.”²⁴⁷

The entire office of the United States Attorney for the District of Puerto Rico was cited twenty-four times between 1987 and 1998 by the United States Court of Appeals for the First Circuit for improper closing argument. The experience of the First Circuit in trying to control the closing arguments of the prosecutors in that office is a lesson on how resistant prosecutors can be to appellate court efforts, and instructive on the need for sanctions less than reversal but more than verbal spanking. Although this article focuses on reversals in the 1990s, an artificial cutoff in 1990 would not accurately describe the record because a high volume of misconduct in arguments in Puerto Rico began to appear in the appellate reports in 1987. Since 1987, there have been at least twenty-five decisions, two of which are unpublished, in which the First Circuit has found improper arguments by an Assistant United States Attorney trying a case in the District of Puerto Rico.²⁴⁸ Of

245. See *McGuire v. State*, 677 P.2d 1060, 1062 (Nev. 1984) (citing *Williams v. State*, No. 14754, 808 P.2d 26 (Nev. 1984) (unpublished)).

246. See *Klepak v. State*, 622 So. 2d 19 (Fla. Dist. Ct. App. 1993); *Landry v. State*, 620 So. 2d 1099 (Fla. Dist. Ct. App. 1993); see also Tobin, Note and Comment, *supra* note 4, at 498 n.118.

247. See *State v. Shelby*, 634 S.W.2d 481, 483 (Mo. 1982) (citing prior misconduct in *State v. Burnfin*, 606 S.W.2d 629, 631 (Mo. 1980), and *State v. Jones*, 615 S.W.2d 416, 418 (Mo. 1981).

248. In chronological order, they are:

1. *United States v. Giry*, 818 F.2d 120, 132-34 (1st Cir. 1987) (although analogy to plan to kill judge and comparison to Peter's denial of Christ were comments that “warrant especial condemnation,” neither warrant reversal because, though deliberate, judge's instructions were clear and evidence of conspiracy was strong).

2. *United States v. Mejia-Lozano*, 829 F.2d 268, 273-74 (1st Cir. 1987) (prosecutor improperly vouched for a prosecution witness and “edged across [the] border to forbidden terrain,” though it was not plain error).

3. *United States v. Santana-Camacho*, 833 F.2d 371, 374-75 (1st Cir. 1987) (reversing as plain error an argument, contrary to evidence and potentially crucial to prosecution for

transporting an illegal alien, that defendant was himself an illegal immigrant).

4. *United States v. Acevedo-Ramos*, 842 F.2d 5, 9 (1st Cir. 1988) (prosecutor's "not my friend outburst" in response to defense counsel's reference to him as such was obviously spontaneous, and cannot be characterized as deliberate, even assuming that it was misconduct).

5. *United States v. Doe*, 860 F.2d 488, 492-95 (1st Cir. 1988) (holding that long summation in which highly inflammatory rhetoric used urging jurors to get "mad" at defendants was "fundamental violation . . . designed to encourage the jury to decide on an improper basis" in violation of ethical rules, but not plain error in light of overwhelming evidence).

6. *United States v. Rodriguez-Estrada*, 877 F.2d 153, 158 (1st Cir. 1989) (holding that prosecutor's vouching, by assuring that government witness was telling the truth, calling defendant a "liar" twice and a "crook," and boasting that he had courage to call these names was clearly improper, but not reversible because counterbalanced by improper argument by defense, strong and clear instructions by trial judge, the jury's acquittal on other counts, and overwhelming evidence).

7. *United States v. Machor*, 879 F.2d 945, 956 (1st Cir. 1989) (holding comments like drugs "are poisoning our community and our kids die because of this" were improper, but not plain error because isolated, curative instructions were given and evidence overwhelming).

8. *United States v. de Leon Davis*, 914 F.2d 340, 344-45 (1st Cir. 1990) (holding comments that defendant's other trips to Spain were those of international drug trafficker "approach[ed] the outer limit of permissible argument" and "conjecture, but not wild speculation" were not reversible error where repetitions of "not evidence" jury instructions cured error and jury acquitted on one count).

9. *United States v. Rodriguez-Cardona*, 924 F.2d 1148, 1153-54 (1st Cir. 1991) (holding improper references to "brutal" drug killings and "deadly trade of narcotics trafficking," and to defendant's "greediness" and "evilness" were not plain error given strength of evidence and lack of objection even though "the prosecutor's remarks might have, under other circumstances, placed the conviction at risk").

10. *United States v. Quesada-Bonilla*, 952 F.2d 597, 601-02 (1st Cir. 1991) (holding closing argument that jury should do justice for victim in this case was improper but not reversible because there was no particular need to require a new trial in this case as a "sanction" to deter future misconduct).

11. *United States v. Hodge-Balwing*, 952 F.2d 607, 610-11 (1st Cir. 1991) (holding that any possible prejudice from prosecution argument that might be interpreted as comment on defendant's silence was cured by strong instruction, and other improper arguments were not objected to and not plain error even though prosecutor "strayed beyond the permissible evidentiary borders").

12. *United States v. Nickens*, 955 F.2d 112, 120 (1st Cir. 1992) ("While we disapprove of many of the prosecutor's statements, we do not think they amounted to plain error." Prosecutor undoubtedly violated "fundamental precepts" when she called defendant a "liar" and stated her personal beliefs, but not reversible because of invited response doctrine, lack of objection, and clear instructions.).

13. *United States v. Soto-Alvarez*, 958 F.2d 473, 477-78 (1st Cir. 1992) (holding prosecutor's incorrect argument that passport of alleged coconspirator showed trip to Venezuela was not plain error because any prejudice affected count which court reversed on other grounds).

14. *United States v. Panet-Collazo*, 960 F.2d 256, 260 (1st Cir. 1992) (holding remark that jury should give judge opportunity to decide on sentencing by finding defendant guilty

was not plain error).

15. *United States v. Morales-Cartagena*, 987 F.2d 849, 854-55 (1st Cir. 1993) (holding minor misstatement of fact in closing argument was not plain error).

16. *United States v. Ortiz-Arrigoitia*, 996 F.2d 436, 441 (1st Cir. 1993) (argument accusing defense counsel of attempting to confuse and intimidate jurors not so prejudicial as to require reversal in this case, but questions why “after numerous warnings from this court, the prosecuting attorneys in the District of Puerto Rico persist in spiking their arguments with comments that put their cases at risk”).

17. *Arrieta-Agressot v. United States*, 3 F.3d 525, 530 (1st Cir. 1993) (holding “150-proof” war on drugs rhetoric as reversible error in light of previous decisions which had made clear that milder versions of such conduct were improper; court notes that responsibility lies not so much with inexperienced trial attorney, but with supervisors who did not even concede error on appeal).

18. *People v. Udechukwu*, 11 F.3d 1101, 1106 (1st Cir. 1993) (reversing for deliberate non-disclosure of evidence tending to corroborate defense of duress and for deliberate arguing that defense was untrue because there was no evidence to corroborate it as a theme of closing argument).

19. *United States v. Tuesta-Toro*, 29 F.3d 771, 777 (1st Cir. 1994) (statement about credibility of government turncoat witness was not plain error because “[a]ny vouching which may have occurred was so faint as to be virtually indiscernible even to the trained ear”).

20. *United States v. Levy-Cordero*, 67 F.3d 1002, 1008-09 (1st Cir. 1995) (misconduct in using good and evil analogy and vouching for witnesses was deliberate, came at the end of government’s summation, and court gave no curative instruction, but it was an isolated event, there was strong evidence against defendant, and general instructions were somewhat curative; “[n]otwithstanding our decision in this regard, we repeat our concern that, ‘after numerous warnings from this court, the prosecuting attorneys in the District of Puerto Rico persist in spiking their arguments with comments that put their cases at risk’ ”).

21. *United States v. Cartagena-Carrasquillo*, 70 F.3d 706, 712-14 (1st Cir. 1995) (holding references to Lent, the cross, and catholicism of prosecutor and jurors when defendant may have been a member of minority religious sect was “flatly improper,” but not reversible because defense counsel objected but did not pursue curative instruction at a sidebar following the argument and evidence of guilt was “very strong”).

22. *United States v. Laboy-Delgado*, 84 F.3d 22, 30 (1st Cir. 1996) (prosecutor’s remark that former wife of co-conspirator turned informer fled to protect herself was improper but sustaining of objections and instructions cured any prejudice).

23. *United States v. Fernandez*, Nos. 95-1864, 95-2067, 1996 WL 469009, at 16-17 (1st Cir., Aug. 20, 1996) (unpublished opinion) (recognizing numerous misstatements of evidence, including remarks disparaging defense as trying to confuse the jury, but holding not plain error).

24. *United States v. Rodriguez-Carmona*, No. 95-2277, 1997 WL 157738, at *4 (1st Cir., Mar. 26, 1997) (unpublished opinion) (holding vouching describing government’s investigation “could fairly be understood to imply that the government had an additional source of information” and other remarks may have suggested that prosecutor’s experience showed that defendant was guilty; but not reversible because “both of the remarks challenged here appear to be instances of accidental overkill rather than a deliberate attempt to mislead the jury”).

25. *United States v. Gonzalez-Gonzalez*, 136 F.3d 6, 9-10 (1st Cir. 1998) (prosecutor’s remark—“Don’t let yourselves be confused by the definition of reasonable

these, only three resulted in reversals—two in 1993²⁴⁹ and one in 1987.²⁵⁰ Thus, the other twenty-two decisions affirmed convictions even though the court found improprieties by the prosecutor.

In this series of cases, the First Circuit has sent messages to the prosecutors in Puerto Rico in a variety of ways including the following: condemning only the conduct in the particular case; admonishing the individual prosecutor who engaged in the conduct;²⁵¹ reproaching supervisors for failing to give proper guidance to trial attorneys;²⁵² identifying that the problem as a recurrent one in the office;²⁵³ threatening reversals for similar conduct in future;²⁵⁴ suggesting, but not ordering, discipline of the prosecutor;²⁵⁵ and actually reversing.²⁵⁶ Given that in 1998, even

doubt”—was not plain error because it was not clear how jury took it, there were curative instructions, and strong evidence; court notes history of misconduct in argument in prosecutor's office).

249. *Udechukwu*, 11 F.3d at 1101; *Arrieta-Agessot*, 3 F.3d at 525.

250. *Santana-Camacho*, 833 F.2d at 371.

251. *de Leon Davis*, 914 F.2d at 344-45 (only case of the 25 that named the prosecutor); *Doe*, 860 F.2d at 495 (“Notwithstanding the affirmance of the convictions, we strongly admonish the conduct of the government's representative in this case.”); *see also Quesada-Bonilla*, 952 F.2d at 602 (approving reprimand of attorney by district court and citing reprimand as reason reversal not necessary).

252. *Levy-Cordero*, 67 F.2d at 1009 (“When, as in this case, a visiting Justice Department prosecutor conducts the trial, we nevertheless expect the resident United States Attorney to insure that the expectations of the court concerning closing argument be made known.”); *Arrieta-Agessot*, 3 F.3d at 530 (“[T]he unhappy outcome in this case—including the expense of retrial, the waste of the trial court's time, and the burden on the appellants—is less a reproach to the individual assistant U.S. attorney than to those who superintend young prosecutors in the district in question.”); *see also Fernandez*, 1996 WL 469009 at *18 (quoting *United States v. Procopio*, 88 F.3d 21, 32 (1st Cir. 1996), for proposition that “a pattern of faults does suggest a failure in supervision”).

253. *See Gonzalez-Gonzalez*, 136 F.3d at 10 (“We do note a long history of improper statements in closing argument from federal prosecutors in Puerto Rico. . . . In light of this history, the government gains no advantage under the first factor.”) (citations omitted); *Levy-Cordero*, 67 F.2d at 1008 (“[W]e repeat our concern that, ‘after numerous warnings from this court, the prosecuting attorneys in the District of Puerto Rico persist in spiking their arguments with comments that put their cases at risk.’ ”); *Ortiz-Arrigoitia*, 996 F.2d at 441 (“[A]fter numerous warnings from this court, the prosecuting attorneys in the District of Puerto Rico persist in spiking their arguments with comments that put their cases at risk.”).

254. *See, e.g., United States v. Fernandez*, Nos. 95-1864, 95-2067, 1996 WL 469009, at *17 (1st Cir., Aug. 20, 1996) (describing decision not to reverse as “close call”); *United States v. Rodriguez-Cardona*, 924 F.2d 1148, 1154 (1st Cir. 1991) (“[T]he prosecutor's remarks might have, under other circumstances, placed the conviction at risk.”).

255. *United States v. Doe*, 860 F.2d 488, 492 (1st Cir. 1988) (“Rather than reversal on appeal, the proper remedy would have been a reprimand or the imposition of sanctions by the district court.”). The court itself took no steps to discipline the prosecutor or direct the district court to do so.

after more than a decade of fairly strong action by an appellate court, a panel of the court still felt it necessary to note the “long history of improper statements in closing argument from federal prosecutors in Puerto Rico”²⁵⁷ as a factor in considering whether to reverse for improprieties in closing argument, the First Circuit appears to have not been fully successful in reforming the behavior of this office.

It appears that a major flaw in the First Circuit’s exercise of supervisory power over the past decade has been its reliance on admonitions rather than outright reversals or, at least, lesser sanctions. The court’s approach to the problem of improper arguments in Puerto Rico has been to assume that the prosecutors in that district shared the court’s view that their role was to assure a just result, not obtain convictions at any cost, and that prosecutors would not only heed the letter of specific precedents, but comply with the spirit and rationale of appellate court rulings. For six years, in sixteen cases, the court looked at the cases in isolation, not even mentioning the pattern of behavior by the entire office.

In the cases in 1987, the court relied on its disapproval as the way to regulate prosecutorial conduct. At first it used phrases like “warrant especial condemnation,”²⁵⁸ and “edged across the border to forbidden terrain,”²⁵⁹ to convey its message of disapproval in cases it did not reverse. Oddly, in the one case in which it did reverse, the tone was much less condemnatory, with the court stating the issue before it as “whether the prosecutor’s error in mischaracterizing defendant’s own entry into the United States as ‘illegal’ amounted to plain error within Fed.R.Crim.P. 52(b).”²⁶⁰ Instead of condemning the prosecutor, the court seemed much more concerned with defense counsel to whom it gave a stern lecture on proper procedure:

Under Fed.R.Crim.P. 51, a party is expected “at the time the ruling or order of the court is made or sought, [to make]

256. See *People v. Udechukwu*, 11 F.3d 1101 (1st Cir. 1993); *United States v. Arrieta-Agressot*, 3 F.3d 525 (1st Cir. 1993); *United States v. Santana-Camacho*, 833 F.2d 371 (1st Cir. 1987).

257. *Gonzalez-Gonzalez*, 136 F.3d at 10.

258. *United States v. Giry*, 818 F.2d 120, 133 (1st Cir. 1987).

259. *United States v. Mejia-Lozano*, 829 F.2d 268, 273 (1st Cir. 1987).

260. *United States v. Santana-Camacho*, 833 F.2d 371, 373 (1st Cir. 1987).

known to the court the action which that party desires the court to take. . . .” At the time the Assistant United States Attorney misrepresented the evidence concerning Santana’s status, Santana’s counsel should have pointed out the mistake to the district court and requested corrective action. Had he done so, the district court would doubtless have cleared up the mistake, and, failing that, redress on appeal would have been easily obtainable. Unfortunately, however, no objection whatever was registered.²⁶¹

Nonetheless, the court reversed, holding that the prosecutor’s statements constituted plain error. The reversal in *Santana* resulted from the court’s conclusion that the false statement that, in a case charging defendant with knowingly transporting an illegal alien, the defendant was himself an illegal alien “was so major and so prejudicial that it could have caused a miscarriage of justice.”²⁶² No mention was made of the impact of unsupported or false arguments on the integrity of the judicial system or of the need to deter such conduct.

In 1988, the court took a stronger rhetorical stance. In *United States v. Doe*,²⁶³ the court declined to reverse for plain error even though the prosecutor’s remarks, urging the jury to get “mad” at defendants for all the evils drugs inflicted on society, were “clearly improper,”²⁶⁴ “fundamental violations”²⁶⁵ and “designed to encourage the jury to decide on an improper basis.”²⁶⁶ The court reasoned that the evidence of guilt was so overwhelming, the defense so implausible (that defendants’ ship was boarded by pirates and they were forced by the pirates, who later fled, to take on eight million dollars worth of marijuana), and the jury sufficiently discerning (having acquitted on one count) that “the prosecutor’s egregious misconduct had no effect on the outcome

261. *Id.*

262. *Id.* The court was also at pains not to criticize the trial judge:

Here, we find no fault with the trial judge, who was entitled to assume that the prosecutor would not misstate the evidence and that, if he did, defense counsel would call the misstatement to the court’s attention.

Id. This seems unduly charitable to the trial judge. He should have paid close enough attention at trial to know that there was no evidence that defendant was an illegal alien.

263. 860 F.3d 488, 492-495 (1st Cir. 1988).

264. *Id.* at 492.

265. *Id.* at 494.

266. *Id.*

of appellants' trial."²⁶⁷ Despite the affirmance in *Doe*, or perhaps because of it, the court was forceful in its condemnation of both the prosecutor and, indirectly, of the trial judge. The prosecutor's remarks that defendants were "four innocent bastards," which had been objected to at trial, should have been dealt with directly by the trial judge. "Rather than reversal on appeal, the proper remedy would have been a reprimand or the imposition of sanctions by the district court."²⁶⁸

The court was even more emphatic about the unobjected-to portions of the prosecutor's long, inflammatory argument blaming defendants for taking "a license to kill our youth in the United States, to poison the minds of our people"²⁶⁹ and telling the jury:

I am mad when I see these people trying to destroy our society and I think that you should be mad too. I think when you have the opportunity to see drug smugglers before you that you should be mad. I don't know if you have children or your children's children, but we are here to protect you.²⁷⁰

The court recognized this argument as an ethical violation,²⁷¹ and then noted that "[w]hile such behavior, as violations of local rules, may provide cause for the district court to sanction the prosecutors, it may also constitute reversible error when it is not stopped by the trial judge and followed by a strong and succinct curative instruction."²⁷² After explaining that reversal was not appropriate in this case, it concluded by stating, "Notwithstanding the affirmance of the convictions, we strongly admonish the conduct of the government's representative in this case."²⁷³ In short, the court admonished, but did not name the prosecutor; adverted to, but did not actually refer the matter for disciplinary proceedings in the district court; and suggested that trial judges should intervene *sua sponte* to stop such arguments and give a curative instruction. The court appeared to assume that its strong

267. *Id.* at 495.

268. *Id.* at 492.

269. *Id.* at 493.

270. *Id.*

271. *Id.* at 494 (citing MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(e), incorporated as Puerto Rican local rule 211.4(B)).

272. *Id.*

273. *Id.* at 495.

words, without specific action, would be enough to deter future improper argument.

If the court expected its opinion in *Doe* to change behavior, it was to be disappointed. Between 1989 and 1993, various panels of the First Circuit found improper the arguments of a prosecutor in Puerto Rico on ten occasions. Curiously, after *Doe*, the court adopted a milder tone, indicating in individual cases that conduct was improper, but never reversing and never mentioning any overall pattern among prosecutors in the district. Ironically, in *United States v. Rodriguez-Cardona*,²⁷⁴ the court issued a stern warning to prosecutors about using other-crimes evidence excessively:

We notice that this is a recurrent problem, particularly in criminal appeals from the District of Puerto Rico, where the government's representation unnecessarily continues to push Rule 404(b) to its outer limits. We have issued fair warning on this subject, and future conduct of this nature may imperil otherwise valid convictions.²⁷⁵

Yet, there was no mention of the recurring pattern of improper closing argument in the same district and no similar warning to desist from improper closings other than an indication in one case "that the prosecutor's remarks might have, under other circumstances, placed the conviction at risk."²⁷⁶

It was not until June of 1993 that the court finally noted a recurring pattern. In *United States v. Ortiz-Arrigoitia*,²⁷⁷ the court commented: "We do not understand, however, why, after numerous warnings from this court, the prosecuting attorneys in the District of Puerto Rico persist in spiking their arguments with comments that put their cases at risk."²⁷⁸ Although this was the sixteenth case between 1987 and 1993 in which a panel of the First Circuit found improper a closing argument by a federal prosecutor in Puerto Rico, the opinion cited only three cases²⁷⁹ and

274. 924 F.2d 1148 (1st Cir. 1991).

275. *Id.* at 1153.

276. *Id.* at 1154.

277. 996 F.2d 436 (1st Cir. 1993).

278. *Id.* at 441.

279. *United States v. Nickens*, 955 F.2d 112, 120 (1st Cir. 1992); *United States v. Soto-Alvarez*, 958 F.2d 473, 477-78 (1st Cir. 1992); *United States v. de Leon Davis*, 914 F.2d 340, 344-45 (1st Cir. 1990).

did not mention that two of them apparently involved the same prosecutor.²⁸⁰

In September of 1993, in *Arrieta-Agressot v. United States*,²⁸¹ a panel of the First Circuit reversed a conviction on the grounds that the prosecutor's "several paragraphs of 150-proof rhetoric" in closing argument "overstep the bounds by a wide margin" and were plain error.²⁸² "[G]iven the potency of the misstatements and the presence of direct exculpatory testimony,"²⁸³ the court concluded, "the prosecutor's repeated appeals to impermissible considerations might well have altered the verdict."²⁸⁴ The court thought it "crystal clear that inflammatory language of this ilk falls well outside the bounds of permissible argument"²⁸⁵ and noted that in two cases from the Puerto Rico "we sharply rebuked the prosecutor[s] for making . . . [similar] comments because . . . [i]t is hard enough for a jury to remain dispassionate and objective amidst the tensions and turmoil of a criminal trial, and this is not the occasion for superheated rhetoric from the government urging jurors to enlist in the war on drugs."²⁸⁶

The court saved its strongest criticism for the supervisors of the trial attorney. First, it noted that it was "remarkable, in light of *Machor, Doe*, and the slew of other recent cases in this circuit, that the government defends as proper its closing argument in this case."²⁸⁷ Then, in assigning responsibility for the result, the opinion pointed directly at the supervisors:

[T]he prosecutor was inexperienced at the time of the trial, as he candidly told us at oral argument, and we do not dwell further on personal fault. In fact, the unhappy outcome in this case—including the expense of retrial, the waste of the trial court's time, and the burden on

280. The court in *de Leon Davis* mentioned the prosecutor by name in quoting the transcript of the offending remarks. 914 F.2d at 344. In *Nickens*, the name of the same female prosecutor was listed as one of the government attorneys who briefed the case. 955 F.2d 112, 114 (1st Cir. 1992). This is often an indication that she was the trial attorney. In addition, the opinion in *Nickens* referred to the prosecutor as "her." *See id.* at 116.

281. 3 F.3d 525 (1st Cir. 1993).

282. *Id.* at 530.

283. *Id.* at 529.

284. *Id.*

285. *Id.* at 527.

286. *Id.* (citing *United States v. Machor*, 879 F.2d 945, 956 (1st Cir. 1989)).

287. *Id.* at 527-28.

appellants—is less a reproach to the individual assistant U.S. attorney than to those who superintend young prosecutors in the district in question.

....

There is ample basis for the prosecutor's view that the drug problem facing this country is "corrupting and disrupting the society." But federal prosecuting attorneys ought to be mindful of the harm done when those in power ignore the rules governing their own conduct while demanding strict compliance from others.²⁸⁸

Four months later, a different First Circuit panel (with no common judges) reversed another conviction from the District of Puerto Rico. In *United States v. Udechukwu*,²⁸⁹ defendant had claimed that she was coerced by a drug trafficker into carrying the drugs for possession of which she was being prosecuted. The prosecution investigated the claim and had information corroborating the existence of a prominent drug trafficker in Aruba with a name strikingly similar to the man defendant claimed coerced her. Instead of revealing this information to the defense, the prosecutor used a "persistent theme in closing argument suggesting the nonexistence of this information—and even the opposite of what the government knew."²⁹⁰ The court held that this was reversible error because the combination of the failure to disclose the corroborating information and the statements in the closing argument at trial that cast doubt on the existence of the drug trafficker damaged defendant's credibility, which was crucial to her duress defense.²⁹¹ Perhaps because the panel saw this as primarily a *Brady* case, as opposed to a misconduct-in-closing-argument case, the opinion made no mention of any pattern of misconduct in argument by prosecutors in Puerto Rico.

The impact of these two reversals and the strong language, particularly in *Arrieta*, is difficult to assess. The First Circuit has not had occasion to reverse another conviction from the District of Puerto Rico because of improper argument, though it has reversed

288. *Id.* at 530.

289. 11 F.3d 1101 (1st Cir. 1993).

290. *Id.* at 1105.

291. *Id.*

three cases from other districts for that reason since 1993.²⁹² On the one hand, the lack of reversals by a court ready to reverse in an appropriate case suggests there may have been some improvement in prosecutor's arguments after the reversals. The number of cases in which the appellate court found the argument of a prosecutor from Puerto Rico improper went from thirteen in the five-year period from 1989 through 1993 to seven in the almost five-year period since January 1, 1994. Moreover, none of the cases since 1993 have involved the war on drugs rhetoric that resulted in the reversal in *Arrieta* or the combination of withholding evidence and false argument condemned in *Udechukwu*.

Clearly, however, three panels of the First Circuit remain dissatisfied with the overall performance of the prosecutors in Puerto Rico. In *United States v. Levy-Cordero*,²⁹³ the court found similarities between the prosecutor's remarks regarding religion and good and evil there and the improper arguments in *Arrieta* in that they "improperly appeal to the jury to act in ways other than as dispassionate arbiters of the facts."²⁹⁴ Moreover, the court felt constrained to note that even though it was not reversing:

[W]e repeat our concern that, "after numerous warnings from this court, the prosecuting attorneys in the District of Puerto Rico persist in spiking their arguments with comments that put their cases at risk." When, as in this case, a visiting Justice Department prosecutor conducts the trial, we nevertheless expect the resident United States Attorney to insure that the expectations of the court concerning closing argument be made known.²⁹⁵

In *United States v. Fernandez*,²⁹⁶ an unpublished opinion in 1996, the court found numerous misstatements of evidence, though "a close call," did not amount to plain error, but noted that

292. *United States v. Roberts*, 119 F.3d 1006 (1st Cir. 1997) (reversing for plain error for commenting on defendant's failure to testify, telling jury that defendant has burden of proving innocence, and giving argument not supported by the evidence); *United States v. Hardy*, 37 F.3d 753 (1st Cir. 1994) (reversing for *Griffin* error in arguing that defendants were "still running and hiding"); *United States v. Manning*, 23 F.3d 570 (1st Cir. 1994) (reversal for pervasive misconduct including urging jury to "take responsibility for your community").

293. 67 F.2d 1002, 1008 (1st Cir. 1995).

294. *Id.* at 1008.

295. *Id.* at 1009 (quoting *United States v. Ortiz-Arrigoitia*, 996 F.2d 436, 441 (1st Cir. 1993) (citing *Udechukwu* and *Arrieta* as examples of the risk prosecutors are facing when they argue improperly).

296. Nos. 95-1864, 95-2067, 1996 WL 469009, at *16-17 (1st Cir., Aug. 20, 1996).

it was “concerned by the sheer quantity of errors, however minor, in this case,” that the prosecution “should weigh carefully its words when it next approaches the floor for argument,” and that “a pattern of faults does suggest a failure of supervision.”²⁹⁷

Finally, in 1998, in *United States v. Gonzalez-Gonzalez*,²⁹⁸ the court, although it rejected the argument that a prosecutor’s remarks urging the jury not to be “confused by the definition of reasonable doubt” was plain error, again felt it necessary to “note a long history of improper statements in closing argument from federal prosecutors in Puerto Rico” and made research into that history easier by including citations to two recent unpublished opinions to its list of cases in which improper arguments were made.²⁹⁹

The history of the substantial efforts by the First Circuit to restrain the closing arguments of the prosecutors in Puerto Rico is thus mixed. On the one hand, it appears progress has been made, especially since the two reversals in 1993. This suggests that appropriate use of the power to reverse is a useful tool for appellate courts to gain credibility with prosecutors. On the other hand, the court’s assumption that admonishing prosecutors would change their behavior appears to have placed too much faith in the willingness of the prosecutors to abide by rulings unless they suffered consequences.

What was missing from the appellate court’s responses during the decade was any meaningful sanction short of reversal. Given the constraints of the Supreme Court’s requirement that appellate courts apply harmless error analysis and its limitations on the use of supervisory power as a justification for reversal, the sanction of reversal is available in only a limited number of cases. It is precisely in the cases in which reversal is not available that appellate courts need some means to affect the conduct of prosecutors.

Yet the First Circuit did little but admonish prosecutors. In only one case did the court even see fit to use the informal sanction of naming the prosecutor in its opinion as a sanction.³⁰⁰ In *Doe*, the one case in which court mentioned the possibility of

297. *Id.* at *18 (quoting *United States v. Procopio*, 88 F.3d 21, 29 (1st Cir. 1996)).

298. 136 F.3d 6, 9-10 (1st Cir. 1998).

299. *Id.* at 10.

300. *See United States v. de Leon Davis*, 914 F.2d 340, 344-45 (1st Cir. 1990).

discipline under district court rules, the court made no direct order that anything actually be done. Thus, it is not surprising that prosecutors continue to engage in improper argument.

The picture of prosecutorial recalcitrance that emerges from the continuing saga of the First Circuit and the government attorneys who make up the office of the United States Attorney for the District of Puerto Rico is a daunting one for any court, policy maker, or commentator concerned with controlling such behavior. It suggests that it takes a commitment not only to enforce the law through reversals, but also through an arsenal of sanctions below the level of reversal that could impose meaningful restraints on prosecutors in cases where reversal appears unwarranted.

IV. CONCLUSION

This study of *People v. Hill*, recent federal reversals, and the case study of a recidivist prosecutorial office has reached the following conclusions: First, the standards of proper prosecutorial misconduct in argument are sufficiently clear that virtually all courts that reversed were unanimous in their view that the conduct was improper. Thus, the arguments that resulted in reversals were almost always ones that prosecutors knew or should have known were improper. Second, once conduct is found improper, doctrine concerning when reversal is appropriate is complex, is misunderstood by the courts of appeals, and is particularly convoluted and conflicting on the role of intent in reversals. Third, the case study of recidivist prosecutors suggests that if courts wish to control the conduct of prosecutors, they need to consider the history of the prosecutor or office and have available an integrated arsenal of weapons, including both reversals and lesser sanctions.

In the second of this two-part series, the author will further explore reversal doctrine; suggest a coherent, comprehensive system for conducting harmless error analysis; propose clarifications of doctrine that would allow courts to take into account the fact that the prosecutor knew or should have known that his or her conduct was improper (and do so within the existing limits on court power to reverse only for prejudicial error); and propose an integrated system of reversal doctrine and

lesser sanctions that would allow courts to effectively discourage misconduct in argument.