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Mitigating Foul Blows

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MITIGATING FOUL BLOWS

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I. INTRODUCTION

Nearly eighty years ago, the United States Supreme Court first offered its now iconic description of the prosecutor's duties within the American criminal justice system: "[W]hile he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."[1] This exhortation from *Berger v. United States* is frequently cited by courts reviewing claims of prosecutorial misconduct, defense counsel raising those claims, and academics commenting on prosecutorial behavior.[2] Yet a striking gap exists between the strong rhetoric of *Berger* and other prosecutorial misconduct cases, the realities of prosecutors' behavior, and the judicial responses to that behavior.[3] "*Berger* . . . is routinely cited but largely ignored."[4]

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[1] Berger v. United States, 295 U.S. 78, 88 (1935).

[2] Bennett L. Gershman, *"Hard Strikes and Foul Blows:"* Berger v. United States *75 Years After*, 42 LOY. U. CHI. L.J. 177, 179 (2010).

[3] *See, e.g.*, *id.* at 205 (noting "the dissonance between *Berger*'s clarion call to prosecutors to play fairly and by the rules, and the reality of prosecutorial practice today"); *id.* at 205–06 ("Courts reverse some of these cases; editorial writers occasionally chastise some of these prosecutors; and academics continue to bemoan the sorry state of criminal justice, the inability of prosecutors to behave properly, and the failure of courts, lawmakers, and disciplinary bodies to make prosecutors accountable."); Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713, 721–22 (1999) (reasoning that courts' labeling of behavior as prosecutorial misconduct is "almost cost-free" because the harmless error doctrine allows courts to avoid providing any remedy for the misconduct when the courts conclude that it did not affect the outcome).

[4] Gershman, *supra* note 2, at 206. Gershman offers an excellent critique of the reasons why *Berger* has had so little impact despite its stirring rhetoric:

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

Id. at 196.

Prosecutorial misconduct is behavior that violates the legal standards imposed on prosecutors.[5] The word "misconduct" should not be read to cover actions that are legally permissible but morally or ethically repugnant,[6] or to imply that the prosecutor must act deliberately.[7] Even with the term limited in that way, prosecutorial misconduct is an extremely broad term, covering a wide range of behaviors that can occur at any point, from before charges are filed to while a case is on appeal.[8] This Article focuses on perhaps the most amorphous type of prosecutorial misconduct: trial misconduct.[9] Trial misconduct, as the name implies, occurs at trial

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[5] Henning, *supra* note 3, at 721 ("Since *Berger*, courts have applied the prosecutorial misconduct designation almost reflexively, as a shorthand method of describing whether the government attorney acted outside the bounds of acceptable advocacy."). There is, however, some debate over the breadth of the conduct that gets labeled "prosecutorial misconduct." *See, e.g.*, Lara A. Bazelon, *Hard Lessons: The Role of Law Schools in Addressing Prosecutorial Misconduct*, 16 BERKELEY J. CRIM. L. 391, 401 (2011) ("Because few prosecutors found to have committed misconduct are bad actors whose violations were deliberately or malevolently intended, 'misconduct' is loaded and an arguably misleading way to describe the problem." (citations omitted)); James A. Morrow & Joshua R. Larson, *Without a Doubt, a Sharp and Radical Departure: The Minnesota Supreme Court's Decision to Change Plain Error Review of Unobjected-to Prosecutorial Error in* State v. Ramey, 31 HAMLINE L. REV. 351, 395–400 (2008) (arguing that courts should distinguish between "prosecutorial error," which occurs "when the prosecutor's conduct may be harmless or an honest mistake," and intentional "prosecutorial misconduct").

[6] *See* George A. Weiss, *Prosecutorial Accountability After* Connick v. Thompson, 60 DRAKE L. REV. 199, 203 (2011). For a discussion of prosecutorial ethics as opposed to legal misconduct, see ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 143–61 (Oxford Univ. Press 2007).

[7] *See, e.g.*, Bennett L. Gershman, *Mental Culpability and Prosecutorial Misconduct*, 26 AM. J. CRIM. L. 121, 133 (1998) (observing that when analyzing prosecutorial misconduct claims, courts typically consider whether the behavior was objectively improper and whether it affected the outcome of the trial, instead of considering the prosecutor's subjective intent or motivation).

[8] *See, e.g.*, DAVIS, *supra* note 6, at 125 (listing various forms of misconduct, including courtroom misconduct, mishandling of evidence, tampering with witnesses, and improper behavior during grand jury proceedings).

[9] Professor Davis uses the similar term "courtroom misconduct," which she defines as "making inappropriate or inflammatory comments in the presence of the jury; introducing or attempting to introduce inadmissible, inappropriate or inflammatory evidence; mischaracterizing the evidence or the facts of the case to the court or jury; committing violations pertaining to the selection of the jury; or making improper closing arguments." *Id.* While that formulation is helpful, this Article does not deal with *Batson* violations in jury selection, as appellate courts use a different framework to review that type of misconduct than they do to review the other types of misconduct described in this Article. *See* Henning, *supra* note 3, at 780–96 (discussing a variety of types of prosecutorial misconduct and how courts analyze them, including a discussion of how *Batson* analysis differs from other types of

in the presence of the jury.[10] Trial misconduct is surprisingly hard to define,[11] in part because knowing what is improper requires a contrast with a discussion of what prosecutors are allowed to do.[12] In general, however, prosecutorial trial misconduct involves appeals to matters that the jury should not consider.[13] As explained in more detail below, these improper appeals likely have a greater effect on jury deliberations than appellate courts currently recognize,[14] and prosecutorial trial misconduct is both severe and pervasive in American criminal trials.[15]

Despite *Berger*'s ringing denouncement of prosecutorial misconduct nearly eighty years ago, such behavior remains both severe and pervasive in large part because of the significant substantive and procedural barriers courts impose on defendants challenging inappropriate prosecutorial behavior.[16] Substantively,

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misconduct analysis). Additionally, while Davis is correct that prosecutorial trial misconduct can involve conduct other than improper remarks in closing argument, that type of conduct is the most frequent and encompasses many of the types of misconduct that she lists.

[10] *See* Henning, *supra* note 3, at 797 (discussing misconduct at trial and the prosecutor's role "in calling witnesses, introducing evidence, and arguing the case").

[11] *See* Weiss, *supra* note 6, at 213 (noting that prosecutorial remarks at trial that violate due process constitute a category of prosecutorial misconduct that is the broadest and hardest to define of all misconduct).

[12] *See, e.g.*, Rosemary Nidiry, Note, *Restraining Adversarial Excess in Closing Argument*, 96 COLUM. L. REV. 1299, 1307–08 (1996) (maintaining that prosecutors "may discuss properly-admitted facts, including the probity of the evidence, the credibility of witnesses, and the application of the law," and contrasting those tasks with actions that prosecutors should not take).

[13] *See* Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 643 (1972) ("I cannot define prosecutorial misconduct with precision, but I can suggest a simple and obvious test that seems applicable in most circumstances and that might lead to findings of error in many situations in which the courts today excuse prosecutorial conduct. The basic issue should be whether the prosecutor's conduct was designed to induce a decision not based on a rational assessment of the evidence. If so, the conduct should be held improper."). Professor Alschuler's formulation includes an intent component ("the prosecutor's conduct was designed to") but otherwise is fairly similar to the ethical standard in the ABA Rules on prosecutors' conduct: "The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence." AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION 106 (3d ed. 1993).

[14] *See infra* Part III.

[15] *See infra* Part II.C.

[16] *See, e.g.*, DAVIS, *supra* note 6, at 130 ("The [United States Supreme] Court's rulings have sent a very clear message to prosecutors—we will . . . make it extremely difficult for challengers to prevail; and as long as you mount overwhelming evidence against defendants, we will not reverse their convictions if you engage in misconduct at trial.").

case law on what constitutes prosecutorial misconduct versus what conduct is proper is, at best, extremely muddled.[17] Procedurally, appellate courts impose barriers that, singly and together, make it nearly impossible for a defendant to successfully challenge prosecutorial misconduct that the trial court failed to remedy.[18] Under the plain error doctrine, appellate courts often refuse to review claims of prosecutorial misconduct if defense counsel failed to object at trial, or they impose additional burdens on claims that they do review.[19] Furthermore, even when courts do find that the defense attorney properly objected and the prosecutor committed misconduct, courts frequently refuse to impose any meaningful sanction on the prosecutor for that misconduct.[20] Instead, courts often rely on the doctrine of harmless error, concluding that the prosecution had such a strong case against the defendant that the misconduct was harmless.[21]

Appellate courts therefore inadvertently facilitate rather than prevent prosecutorial misconduct.[22] The harmless error focus on the strength of the state's case incentivizes, or at least fails to create a disincentive, for prosecutors to commit trial misconduct

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[17] *See, e.g.*, Charles L. Cantrell, *Prosecutorial Misconduct: Recognizing Errors in Closing Argument*, 26 AM. J. TRIAL ADVOC. 535, 537 (2003) (discussing the confusion in applying the *Griffin* test for determining whether a prosecutor's comments are indirect references to the defendant).

[18] *See infra* Part IV (discussing how appellate courts fail to provide adequate remedies due to overreliance on procedural doctrines).

[19] *See infra* Part IV.A.*2* (explaining the inadequate judicial treatment of the plain error doctrine, which applies when defense counsel fails to object at trial to alleged prosecutorial misconduct).

[20] *See, e.g.*, Lawton P. Cummings, *Can an Ethical Person Be an Ethical Prosecutor? A Social Cognitive Approach to Systemic Reform*, 31 CARDOZO L. REV. 2139, 2150–51 (2010) (noting that courts rarely impose sanctions, even if the misconduct "leads to wrongful conviction"); Margaret Z. Johns, *Unsupportable and Unjustified: A Critique of Absolute Prosecutorial Immunity*, 80 FORDHAM L. REV. 509, 519 (2011) ("[P]rosecutors who engage in misconduct . . . are subject to discipline less than 1 percent of the time.").

[21] *See, e.g.*, Michelle Ghetti & Paul Killebrew, *With Impunity: The Lack of Accountability of a Criminal Prosecutor*, 13 LOY. J. PUB. INT. L. 349, 353–54 (2012) (discussing a Louisiana study of prosecutorial misconduct that indicated that courts find harmless error in approximately two-thirds of the cases involving misconduct); Johns, *supra* note 20, at 512 (discussing a 2007 California study indicating that courts found harmless error in 390 out of 433 cases of misconduct).

[22] Gershman, *supra* note 7, at 132.

when they have a strong case.[23] Prosecutors also have incentives under the current system to commit misconduct when they have weak cases, as the risk of an appellate court ordering a new trial is less significant than the risk of an acquittal at trial.[24] And in any event, if defense counsel fails to object, then prosecutorial trial misconduct is almost certainly cost-free.[25] So the current law on prosecutorial misconduct "has provided prosecutors with a comfort zone that fosters and perhaps even encourages a culture of wrongdoing."[26]

But the causes of prosecutorial misconduct and its effect on jurors and judges go beyond rational decisionmaking based on incentives. Many scholars lament that prosecutors face strong incentives to win at all costs while facing little realistic threat of discipline or sanction if they cross ethical lines; that line of argument implicitly treats prosecutors as rational actors who make cost-benefit decisions about their behavior.[27] That account,

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[23] *See, e.g.*, David Keenan et al., *The Myth of Prosecutorial Accountability After* Connick v. Thompson*: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203, 212 (2011), http://www.yalelawjournal.org/pdf/1018_hpkwev93.pdf ("By reducing the likelihood of reversal, the harmless error standard substantially weakens one of the primary deterrents to prosecutorial misconduct. Knowing that 'minor' misconduct is unlikely to jeopardize a conviction on appeal, prosecutors may be more likely to bend the rules in the pursuit of victory."); Michael D. Cicchini, *Prosecutorial Misconduct at Trial: A New Perspective Rooted in Confrontation Clause Jurisprudence*, 37 SETON HALL L. REV. 335, 367 (2007) ("Under the existing framework, if a prosecutor has a strong case, the misconduct will only make it stronger. There is virtually no risk of reversal because the trial court and reviewing court will simply find that, given the strength of the State's case, the defendant would have been found guilty even without the misconduct, and therefore denying him a new trial will not prejudice him.").

[24] *See* Cicchini, *supra* note 23, at 367 ("In this situation, the misconduct increases the chance of conviction . . . .").

[25] *See infra* Part IV.A.*2* (discussing the plain error doctrine, which limits appellate review of errors that were not objected to at trial).

[26] DAVIS, *supra* note 6, at 130; *see also* Rodney J. Uphoff, *On Misjudging and Its Implications for Criminal Defendants, Their Lawyers and the Criminal Justice System*, 7 NEV. L.J. 521, 544 (2007) ("The expanded use of harmless error not only allows questionable verdicts to stand, it does little to discourage misconduct and sloppy practices in the administration of justice.").

[27] *See* Barbara O'Brien, *A Recipe for Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making*, 74 MO. L. REV. 999, 1002 (2009); *see also* Alafair S. Burke, *Talking About Prosecutors*, 31 CARDOZO L. REV. 2119, 2127–28 (2010) (arguing that the "rhetoric of fault" suggests that prosecutors care more about winning cases than doing justice, and encouraging engagement with prosecutors about how to improve behavior). This fault-based rhetoric assumes that

while not wholly incorrect, is too narrow. Instead, "[p]rosecutors sometimes make biased decisions . . . because people generally are biased decision makers. A cognitive explanation for prosecutorial bias suggests that improving the values of prosecutors is not enough; an improvement in the cognitive process is required."[28] Although much has been written in recent years about how cognitive biases impact various aspects of the criminal justice system,[29] very little has been written about how cognitive biases may impact prosecutorial misconduct.[30] This Article is the first to use cognitive bias research to shed light on the pervasiveness of prosecutorial trial misconduct, the ways that prosecutorial trial misconduct may affect jurors and reviewing judges more than has

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prosecutors make decisions based on rational cost-benefit allocations, so scholars propose remedies to change the prosecutors' cost-benefit calculations. *See, e.g.*, Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1590 (2006) [hereinafter Burke, *Improving Prosecutorial Decision Making*] (summarizing common strategies, including "more stringent ethical rules, increased disciplinary proceedings and sanctions against prosecutors, and professional and financial rewards").

[28] Burke, *Improving Prosecutorial Decision Making*, *supra* note 27, at 1614.

[29] For just a few recent articles about the impact of cognitive bias on various aspects of the criminal justice system, see, e.g., Mary Nicol Bowman, *Full Disclosure: Cognitive Science, Informants, and Search Warrant Scrutiny*, 47 AKRON L. REV. 431, 453 (2014) (discussing reliance on informants in search warrant applications); L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1145 (2012) (discussing "the effects of implicit social cognitions on officer behavior"); Anna Roberts, *(Re)Forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 833–47 (2012) (explaining the role of implicit and explicit bias in the selection of jurors and in jury decisionmaking); Andrew E. Taslitz, *Police Are People Too: Cognitive Obstacles to, and Opportunities for, Police Getting the Individualized Suspicion Judgment Right*, 8 OHIO ST. J. CRIM. L. 7, 78 (2010) (summarizing a cognitive approach that examines the "individualized suspicion" inquiry that police officers make).

[30] Professor Alafair Burke has written several articles that apply cognitive science to prosecutorial decisionmaking, but none of her articles have focused specifically on prosecutorial trial misconduct. *See, e.g.*, Alafair S. Burke, *Prosecutors and Peremptories*, 97 IOWA L. REV. 1467, 1478–83 (2012) [hereinafter Burke, *Prosecutors and Peremptories*] (discussing cognitive bias impacts on jury selection); Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 494–96 (2009) (applying cognitive science to *Brady* disclosures); Alafair Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J. L. & LIBERTY 512, 517–18 (2007) [hereinafter Burke, *Neutralizing Cognitive Bias*] (describing cognitive biases that can lead prosecutors to charge factually innocent suspects and then ignore or undervalue evidence of innocence). The one article to use cognition research to analyze issues of prosecutorial misconduct is Lawton P. Cummings's article, *Can an Ethical Person Be an Ethical Prosecutor? A Social Cognitive Approach to Systemic Reform*, *supra* note 20, at 2146–56. It is discussed in more detail in Part II.B below.

previously been recognized, and the ways that appellate courts' overreliance on procedural doctrines prevents meaningful remedies from being provided to defendants whose cases are tainted by prosecutorial trial misconduct.

This Article therefore asks courts to use cognitive bias research to rethink their treatment of prosecutorial trial misconduct, and particularly procedural barriers to these claims. Specifically, Part II explains the types of arguments that constitute prosecutorial trial misconduct, discusses cognitive biases that likely affect prosecutors when they make improper arguments, and explains the severity and pervasiveness of prosecutorial trial misconduct in criminal cases. Part III explores the likelihood that juries are more affected by prosecutorial misconduct than has been recognized to date, drawing on prominent theories of jury decisionmaking and showing how prosecutorial trial misconduct likely exacerbates jurors' cognitive biases. Part IV describes appellate courts' failures to correct these problems, given their overreliance on the procedural doctrines of harmless error and plain error, and describes cognitive biases that likely affect appellate court review. Part V provides solutions to this problem, including significant changes to the harmless error doctrine and moderate changes to the plain error doctrine as used in prosecutorial misconduct cases. These changes would help courts clarify what behavior really does constitute trial misconduct and provide a meaningful remedy for defendants whose trials have been impacted by misconduct, while still affirming convictions in cases where the misconduct was unlikely to have affected the trial. Finally, Part VI explains how these changes should help minimize future misconduct by prosecutors, provide a meaningful remedy for serious misconduct, and strengthen the credibility of the criminal justice system.

II. PROSECUTORIAL TRIAL MISCONDUCT IS FREQUENT, SEVERE, AND LIKELY A RESULT OF THE INHERENT COGNITIVE PRESSURES OF PROSECUTORS' UNIQUE ROLES IN THE CRIMINAL JUSTICE SYSTEM

Prosecutors serve a unique dual role in the criminal justice system: to prevent the guilty from going free and the innocent from being convicted.[31] "[T]he more we learn about human behavior, the less confident we should be about whether motivations are malicious, intentional, or even wholly conscious."[32] Focusing on the cognitive dimensions surrounding prosecutorial misconduct is valuable, "not because all prosecutors are well intentioned, but because suggesting that only bad-intentioned prosecutors are at risk of poor decision making is simply too easy."[33] A well-established body of cognitive science research shows that people's decisions are impacted by cognitive biases, i.e., errors in how we process or remember information that skew decisions in a predictable direction.[34] Prosecutors are not immune

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[31] [The prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

Berger v. United States, 295 U.S. 78, 88 (1935).

[32] Susan A. Bandes, *Framing Wrongful Convictions*, 2008 UTAH L. REV. 5, 7.

[33] Burke, *Improving Prosecutorial Decision Making*, *supra* note 27, at 1614. The same reasoning applies to decisions made by jurors and judges in these cases as well. *See* Bandes, *supra* note 32, at 21–22 ("Ironically, categorizing conduct as blameworthy may have a perverse effect at this level of processing as well. People will go to great lengths to avoid thinking of themselves as the kind of people who commit unethical behavior. This does not necessarily mean they will avoid the behavior. Instead, they may avoid facing its unethical nature or its harmful consequences, thereby entrenching the behavior and further insulating it from correction.").

[34] *See* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 307–08 (listing several types of bias and noting that when circumstances lead people to certain expectations, "[t]his can lead to error biased in the direction of the expectation"). This research does not absolve people of responsibility for poor decisions, but instead suggests that if we understand the ways that they can skew decisionmaking, we can search for ways to neutralize their effects. *Id.* at 322. *See also* Bowman, *supra* note 29, at 449 (defining cognitive bias as "errors in how [people] process or remember information that skew decisions in a predictable direction").

from these cognitive biases, and their unique role in the criminal justice system imposes significant cognitive pressures on them.[35]

This section first explains the variety of different types of improper arguments that are commonly found in criminal appellate cases, as appellate courts' failures to draw clear lines between proper and improper behavior opens the door for cognitive biases to play a significant role in prosecutors committing misconduct. This section then discusses the various types of cognitive biases that likely affect prosecutors who commit misconduct, and it concludes by explaining the severity and pervasiveness of prosecutorial trial misconduct.

A. PROSECUTORIAL TRIAL MISCONDUCT INCLUDES MANY TYPES OF IMPROPER ARGUMENTS, AND COURTS SOMETIMES FAIL TO DISTINGUISH CLEARLY BETWEEN PROPER AND IMPROPER STATEMENTS

Given the fine line between proper argument and prosecutorial trial misconduct, even well-intentioned prosecutors may sometimes cross the line inadvertently, and the cognitive biases discussed later in this section make such line-crossing more common. In closing arguments, the prosecutor has the chance to sum up the evidence within a narrative framework to help the jury understand and interpret the evidence.[36] During closing arguments, prosecutors can properly sum up the evidence, offer reasonable deductions from it, and respond to arguments of opposing counsel.[37] While reviewing courts often formally treat closing arguments as just being about a logical summation of the evidence, advocates and advocacy experts go beyond that narrow formulation to use rhetorical devices to move the jury, emotionally, toward a favorable decision.[38] "Closing argument is thus a

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[35] *See infra* Part II.B.

[36] *See* Alschuler, *supra* note 13, at 643 (reasoning that proper arguments will likely encourage "a decision . . . based on a rational assessment of the evidence").

[37] Craig Lee Montz, *Why Lawyers Continue to Cross the Line in Closing Argument: An Examination of Federal and State Cases*, 28 OHIO N.U. L. REV. 67, 73 (2001).

[38] *See* Ryan Patrick Alford, *Appellate Review of Racist Summations: Redeeming the Promise of Searching Analysis*, 11 MICH. J. RACE & L. 325, 330–31 (2006) (describing the gap between judicial treatment and actual practice in summation, and noting that the courts' ignorance of the "extra-logical dimensions of prosecutorial argumentation" has led

dramatic departure from the earlier parts of the trial; counsel is released from the highly-regulated process of fact[-]finding and permitted to use evidence combined with rhetorical skills to convince the fact[-]finder that her inferences are correct."[39]

The subsections below explore some of the ways that prosecutors making closing arguments get carried away with rhetoric and make improper closing arguments. In doing so, it does not attempt to catalog every type of prosecutorial misconduct in closing; instead, it discusses several types to show both the fine line between proper and improper comments and how this misconduct can be far more harmful than courts typically recognize.

1. Arguments that Rely on Prosecutor's Credibility. One common type of improper rhetoric in closing rests on appeals to the prosecutor's inherent credibility or attacks on defense counsel's credibility. Closing arguments are supposed to be based on the evidence and inferences from the evidence.[40] But credibility arguments often deviate from that approach, with potentially devastating effects.

For example, prosecutors commit misconduct by offering their personal opinions, including "vouching" for prosecution witnesses. "Vouching occurs when the prosecutor interjects his personal opinion about the credibility of a witness or the strength of the evidence as a whole."[41] Most courts conclude that it is misconduct for prosecutors to make "I" statements such as "I think" or "I

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them to significantly underestimate the prejudicial impact of racial prosecutorial misconduct); *see also* John B. Mitchell, *Why Should the Prosecutor Get the Last Word?*, 27 AM. J. CRIM. L. 139, 146–56 (2000) (discussing various studies about the importance of closing argument in juror decisionmaking).

[39] Nidiry, *supra* note 12, at 1306; *see also* Montz, *supra* note 37, at 73 ("Yet as much as the trial is a search for the truth, as an advocate, closing argument is an opportunity to convince the jury to believe your theory of the case as the correct one.").

[40] *See* Cantrell, *supra* note 17, at 544–45 (stating that "[a]ny comment concerning the credibility of a witness must be based solely upon the evidence and fair inferences therefrom," and arguing that "[t]he line is crossed when the prosecutor clearly interjects *his* interpretations of the testimony"); Montz, *supra* note 37, at 115 (reasoning that a prosecutor asserting a personal opinion about the credibility of a witness constitutes misconduct because "it may lead the jury to convict on the basis of evidence not presented").

[41] Montz, *supra* note 37, at 114–15.

believe."[42] For example, prosecutors are generally not allowed to offer their personal opinion about the credibility of a witness or the guilt or innocence of the accused.[43] The prosecutor also cannot present himself or herself as having expert knowledge about law enforcement, nor can the prosecutor urge the jury to consider that knowledge.[44] These prohibitions are designed to prevent prosecutors from making their own credibility an issue in the case and to support jurors in deciding cases based on the evidence and legal rules rather than on extraneous considerations.[45]

Courts often fail, however, to draw clear lines in this area.[46] For example, some courts allow "I think" or "I believe" statements that are consistent with the evidence in the case.[47] Additionally, when a prosecutor calls a witness a "liar," courts sometimes treat the propriety of that remark as turning on whether the court thinks that the evidence sufficiently supports that conclusion,[48] so the exact same comment can be proper or improper depending, on the evidence in the case.[49] Even when courts label these statements as improper, however, they often treat these statements as harmless error.[50] In doing so, courts underestimate the power of these statements. Research consistently shows that

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[42] *See* Cantrell, *supra* note 17, at 543 (asserting that "[i]n the majority of cases," use of the word "I" signifies that the prosecution is offering improper testimony); *cf.* Montz, *supra* note 37, at 110–11 (noting that use of "I" language is typically found to be harmless error).

[43] Montz, *supra* note 37, at 108.

[44] *See* Cantrell, *supra* note 17, at 553 (discussing a case in which the court found that a prosecutor improperly presented himself as an expert witness when he emphasized his experience in law enforcement to rebut defense counsel's argument regarding typical criminal behavior).

[45] Montz, *supra* note 37, at 108.

[46] *See, e.g.*, Morrow & Larson, *supra* note 5, at 369–86 (concluding, upon discussion of the Minnesota Supreme Court's jurisprudence on prosecutorial vouching, that the "cases defining prosecutorial vouching are confusing and contradictory," and suggesting that the court more clearly define acceptable standards of conduct).

[47] Cantrell, *supra* note 17, at 543.

[48] *See* Montz, *supra* note 37, at 116–20 (collecting cases indicating that courts are split as to whether and under what circumstances counsel may refer to a witness as a liar).

[49] *See* Cantrell, *supra* note 17, at 545 (noting that the Second Circuit has held that calling a witness a liar is not improper where the testimony is disputed and the use is not inflammatory).

[50] *See, e.g.*, *Ex parte* Rieber, 663 So. 2d 999, 1014 (Ala. 1995) ("[E]ven if these comments were to be viewed as expressions of the prosecutor's personal opinions and, thus, as 'crossing the line' of permissible argument, they, nonetheless, would not constitute reversible error.").

jurors inherently find prosecutors to be more credible than defense counsel.[51] These statements play on those perceptions in powerful ways: "This method employs a devastatingly powerful approach combining the stature of the prosecutor's office with his experience and knowledge of the case. He is, in effect, becoming a witness advising the jury as to the guilt of the defendant."[52]

2. Distortions of the Record or Legal Standards. Counsel cannot misstate either the facts or the law.[53] Regarding the facts, prosecutors must not argue outside of the record.[54] For example, prosecutors commit misconduct when they exaggerate what the testimony shows, including forensic evidence.[55] They also cannot argue theories that are unsupported by, or even inconsistent with, the admitted evidence.[56] Prosecutors also should not suggest that inadmissible evidence exists[57] or that they have chosen not to

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[51] *See, e.g.*, Cantrell, *supra* note 17, at 542 (discussing the power of prosecutorial credibility); Mitchell J. Frank & Osvaldo F. Morera, *Trial Jurors and Variables Influencing Why They Return the Verdicts They Do—A Guide for Practicing and Future Trial Attorneys*, 65 BAYLOR L. REV. 74, 99–100 (2013) (discussing findings about the importance of credibility determinations).

[52] Cantrell, *supra* note 17, at 542.

[53] *See* Montz, *supra* note 37, at 111–14 (surveying cases discussing the impropriety of counsel's misstatement of the law in closing argument).

[54] *See* Cicchini, *supra* note 23, at 342 (summarizing several types of improper closing arguments, including those that "mak[e] assertions that are false or, even if true, were not introduced into evidence").

[55] *See, e.g.*, Daniel S. Medwed, *Closing the Door on Misconduct: Rethinking the Ethical Standards that Govern Summations in Criminal Trials*, 38 HASTINGS CONST. L.Q. 915, 920 (2011) (discussing how a prosecutor's exaggeration of forensic evidence during closing argument led in one case to an innocent man being found guilty of murder). Professor Medwed notes that this type of misconduct is one of the most common that contributes to wrongful convictions. *Id.*

[56] *See, e.g.*, *id.* at 921–24 (asserting that "prosecutors have aided in producing wrongful convictions by advancing novel arguments or theories during closing argument that were wholly unsupported by the evidence presented at trial," and describing one case in which the prosecutor argued a strained theory to persuade a jury to wrongly convict the defendant).

[57] *See* Cantrell, *supra* note 17, at 548 (discussing the tendency of prosecutors to "appeal to the jury's sense of fair play by implying that their hands are bound by the rules of the legal system, or that they are not allowed to bring a necessary witness to court"). Similarly, prosecutors should not refer to evidence known to be inadmissible, although Professor Sullivan notes that courts often treat that error as harmless, notwithstanding the fact that such references undercut the trial court's role in determining what evidence will be admissible and the potentially powerful effect that such evidence can have on juries. *See* J. Thomas Sullivan, *Prosecutorial Misconduct in Closing Argument in Arkansas Criminal*

present additional evidence.[58] These arguments are particularly problematic when the prosecutor references prior convictions or other highly inflammatory, inadmissible material.[59] Somewhat related, although distinct, misconduct involves prosecutorial arguments that are inconsistent with inadmissible evidence known to the prosecutor.[60] For example, prosecutors cannot prevent evidence from being admitted and then argue that the absence of that evidence supports the defendant's guilt.[61]

With respect to the law, the prosecution cannot suggest that the defendant has the burden to present evidence, essentially shifting the burden of proof to the defendant.[62] Prosecutors are clearly forbidden from arguing directly that the jury can consider the

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Trials, 20 U. ARK. LITTLE ROCK L. REV. 213, 237–39 (1998) (discussing both evidence known to the prosecutor that is ruled inadmissible and evidence known only to the prosecutor).

[58] Cantrell, *supra* note 17, at 548–49. This ploy is designed to (or at least can have the effect of) making the prosecutor seem like a trusted ally of the jury—someone who would not waste the jury's time. *Id.*

[59] *Id.* at 549–50. Some of these attacks are at least arguably based on inferences from the record, but many of them are based instead on pure speculation, and they invite the jury to similarly speculate. *See id.* at 550–52 (collecting cases in which the prosecution drew improper inferences either from evidence admitted for limited purposes or from facts lacking evidentiary support).

[60] *See* Bazelon, *supra* note 5, at 392–94 (discussing a case in which the prosecutor knew that the defendant had previously made an exculpatory statement in an interview that was inadmissible as evidence, but nonetheless argued in court that the defendant's failure to deny his guilt in another, admissible interview was clear evidence of his guilt).

[61] *See, e.g.*, United States v. Golding, 168 F.3d 700, 702–05 (4th Cir. 1999) (holding improper the prosecutor's argument to jurors that the absence of corroborating testimony from the defendant's wife suggested that the defendant was guilty, where the prosecutor had previously threatened the wife with criminal charges if she testified in the defendant's favor at trial); State v. Kassahun, 900 P.2d 1109, 1113, 1116 (Wash. Ct. App. 1995) (holding, after the trial court had granted the state's motion in limine to preclude discovery of murder victim's gang affiliation, that the prosecutor committed misconduct by implying that the defendant was untruthful because he failed to offer objective support for his belief that his business was being overrun by gangs); *see also* Bandes, *supra* note 32, at 16 (describing the case of Rosa Bennett, the author's client, in which the prosecutor failed to notify the defense that Bennett had been arrested in a torn and bloody sweater, then argued that there was no physical evidence corroborating Bennett's story that the victim had attacked her on the night in question).

[62] *See, e.g.*, Sullivan, *supra* note 57, at 232 n.103 (describing a case in which the court reasoned that even though the prosecutor improperly attempted to shift the burden of proof by suggesting that the defendant failed to produce witnesses, any error was harmless because the jury was later instructed on the state's burden of proof).

defendant's failure to testify as evidence of guilt.[63] Yet prosecutors often raise the issue indirectly, for example, by referring to uncontroverted evidence[64] or pointing out the defendant's failure to rebut a particular piece of evidence when the defendant was the only one capable of doing so.[65] Similar misconduct includes commenting on a defendant's post-arrest silence (his or her failure to provide police with an explanation or defense after arrest, regardless of whether the defendant testifies at trial) and suggesting that the defendant has a duty to put on evidence other than his or her own testimony.[66] "This is a dangerous area which courts monitor closely, and about which they admonish prosecutors regularly."[67] Even so, courts often find misstatements of the law to be harmless error because jurors are presumed to follow the properly given jury instructions rather than counsel's statements.[68]

3. Inflammatory Arguments. One of the most troubling types of inflammatory arguments involves appeals to race, ethnicity, or religious discrimination.[69] These cases involve a strikingly wide variety of conduct or images, including explicit appeals to racial prejudice,[70] use of animal imagery in connection with the

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[63] The prosecutor violates a defendant's Fifth Amendment rights indirectly by referencing a defendant's failure to testify. Griffin v. California, 380 U.S. 609, 165 (1965). But the line between improper, indirect comments on silence and proper inferences from the record is often a very difficult one. *See* Cantrell, *supra* note 17, at 537, 538–40 (discussing application of the *Griffin* test for determining prosecutorial misconduct).

[64] *See* Cantrell, *supra* note 17, at 537.

[65] *See* Cicchini, *supra* note 23, at 341; *see also* Sullivan, *supra* note 57, at 231–32 (discussing the lines that the Arkansas courts have drawn in these types of cases).

[66] *See* Cantrell, *supra* note 17, at 540–42 (noting that using a defendant's silence in this way amounts to a deprivation of due process).

[67] Gershman, *supra* note 7, at 150. Professor Gershman notes that prosecutors "are adept at using language that conveys the illegitimate message . . . subtly," which contributes to the difficulty of clearly distinguishing between proper and improper comments. *Id.* at 151.

[68] *See* Montz, *supra* note 37, at 112–13 (recognizing that courts presume that the jury follows the court's instructions).

[69] *See, e.g.*, Andrea D. Lyon, *Setting the Record Straight: A Proposal for Handling Prosecutorial Appeals to Racial, Ethnic or Gender Prejudice During Trial*, 6 MICH. J. RACE & L. 319, 320 (2001) (discussing the consequences of "foul blows" struck by prosecutors who improperly inject race or gender bias into jury deliberations); *see also* Alschuler, *supra* note 13, at 639–40 (summarizing the courts' inconsistent treatment of cases involving race and religious appeals).

[70] *See, e.g.*, Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739,

defendant,[71] and use of caricatures linking race and violence.[72] While courts sometimes will call these appeals improper,[73] in other cases courts will go to great lengths to ignore the racial overtones or to justify the remarks.[74] Although the United States Supreme Court stated in 1987 that "[t]he Constitution prohibits racially biased prosecutorial arguments,"[75] commentators suggest that racial appeals have simply become more subtle rather than disappearing from prosecutorial arguments.[76]

1752–53 (1993) (describing cases with fairly explicit racial appeals, such as cases specifically referencing racial crime statistics or referring to Native Americans being unable to handle liquor and therefore committing crimes). Johnson's article also details many other types of racial images found in the case law, although the article does not always indicate when courts found the prosecutor's remarks to be proper versus improper. *See id.* at 1751–59.

[71] *See, e.g.*, Darden v. Wainwright, 477 U.S. 168, 179 n.7, 181 n.12 (1986) (noting that the prosecutor referred to the crime as the work of "a vicious animal," and said that the defendant "shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash"); *see also* Johnson, *supra* note 70, at 1747, 1752 (describing the use of animal imagery in various cases, including in the Rodney King case).

[72] *See* Alford, *supra* note 38, at 344–59 (discussing the earlier, explicit forms of the "Black brute" caricature and the continuing power of that stereotype to drive both social policy decisions and criminal trial verdicts today, even when race is never explicitly referenced).

[73] *See, e.g.*, State v. Monday, 257 P.3d 551, 557 (Wash. 2011) (holding that the prosecutor improperly injected racial prejudice into the trial by using the term "poleese" when questioning witnesses and invoking an alleged African-American anti-snitching code, and reversing the defendant's conviction as a result).

[74] *See, e.g.*, Johnson, *supra* note 70, at 1781–83 (discussing numerous cases in which the courts failed to acknowledge the racial overtones of various types of arguments); Alford, *supra* note 38, at 343 (discussing how one court ignored the inherent racism in comparing the defendant to a gorilla, despite the known racial slur involved); Lyon, *supra* note 69, at 327–28 (discussing *Smith v. Farley*, 59 F.3d 659, 664 (7th Cir. 1995), in which the Seventh Circuit "said that it was not clear the prosecutor's references to 'shucking and jiving' regarding a Black witness on the stand, and to 'Superfly' regarding the Black defendant, would have been significant to a White jury;" the court also suggested that these terms could be "accepted as a natural and racially neutral part of speech").

[75] McCleskey v. Kemp, 481 U.S. 279, 309 n.30 (1987) (citing Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)).

[76] *See* Alford, *supra* note 38, at 332–33 (cataloging efforts by prosecutors to pander to racial basis). The exact scope of what constitutes race-based prosecutorial misconduct is an important but difficult question. As Alford notes, courts are not adept at drawing this line. *Id.* at 328, 339–44. When courts do find arguments to be racist, however, then the Equal Protection Clause is implicated, which shifts the burden to the state to prove that the error was harmless beyond a reasonable doubt. This burden-shifting makes it easier (at least ostensibly) for a defendant to obtain reversal. *See id.* at 338–39 (demonstrating how the Equal Protection Clause is implicated and arguing that "courts must consider racist argumentation *prima facie* evidence of a violation of [that clause]"). Additionally, at least one court has provided for heightened scrutiny of race-based prosecutorial misconduct based

Prosecutors sometimes inappropriately appeal to other types of prejudice as well. These appeals can relate to wealth or class, to patriotism, to the jurors as taxpayers or parents, etc.[77] They may distance the jurors from the defendant in terms of a particular trait or appeal to the emotion related to that trait.[78]

> Each distinct group carries its peculiar set of biases. If the prosecution can successfully appeal to these dormant instincts, it may arouse the jury to convict in order to protect the shared values inherent to the groups. The obvious danger is that any doubts in the case will be resolved against the accused because he is not a member of the group.[79]

Although many inflammatory remarks reflect in-group versus out-group logic, there are other types of improperly inflammatory remarks as well. For example, prosecutors sometimes improperly appeal to law and order sentiments, such as urging the jury to "send a message" by convicting the defendant or arguing that the case is particularly important.[80] Similarly, the prosecutor generally should not use war imagery, such as talking about the "War on Drugs," although such comments are sometimes upheld either as not being improper or as at least not leading to

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on the denial of the right to a trial by an impartial jury. *See Monday*, 257 P.3d at 557–58 (holding that this violation was not harmless error).

[77] *See* Cantrell, *supra* note 17, at 561–62 (discussing various prejudicial and improper appeals utilized by prosecutors).

[78] *Id.*

[79] *Id.* at 562; *see also* Ryan Patrick Alford, *Catalyzing More Adequate Federal Habeas Review of Summation Misconduct: Persuasion Theory and the Sixth Amendment Right to an Unbiased Jury*, 59 OKLA. L. REV. 479, 518 (2006) ("The effect of fear within an inflammatory summation should also not be underestimated, particularly considering the racial dynamics of closing arguments in criminal trials. . . . 'When people's mortality is made salient, they punish more severely those who transgress cultural norms. . . . They indulge in more racial/cultural stereotyping. And they attribute more blame to members of outgroups. Thus, fear provokes fallacious reasoning, and undercuts rational decision-making processes.' " (footnotes omitted) (quoting Neal R. Feigenson, *Emotions, Risk Perceptions and Blaming in 9/11 Cases*, 68 BROOK. L. REV. 959, 973 (2003))).

[80] Cantrell, *supra* note 17, at 554–55. *But see* Sullivan, *supra* note 57, at 228 (noting that Arkansas courts typically conclude that "send a message" arguments are proper).

reversal.[81] Additionally, prosecutors should not appeal to jurors' fears, for example, by arguing that they should put themselves in the shoes of the victim or by arguing that failure to convict will put their own or others' safety at risk.[82]

Professor Charles Cantrell notes the particular danger posed by such inflammatory arguments: "The use of inflammatory argument employs a unique and serious risk. By appealing to the passions and prejudices of the jury, the prosecution introduces anger and fear into the deliberative process of determining guilt or innocence. This leads to irrational decisionmaking based on emotions rather than facts."[83] Yet courts often allow prosecutors wide latitude in making inflammatory arguments.[84]

B. PROSECUTORIAL BEHAVIOR MAY BE AFFECTED BY CONFIRMATION BIAS, INSTITUTIONAL PRESSURES, AND MORAL DISENGAGEMENT MECHANISMS, GIVEN THE UNIQUE ROLE OF PROSECUTORS IN THE CRIMINAL JUSTICE SYSTEM

The lack of clarity between proper and improper arguments, as well as some prosecutors' lack of training,[85] may make prosecutors particularly vulnerable to various types of cognitive biases that likely contribute significantly to prosecutorial trial misconduct. Confirmation bias may lead prosecutors to overestimate the likelihood of defendants' guilt, institutional pressures make it

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[81] *See* Cantrell, *supra* note 17, at 556 (noting that some cases have upheld the use of war analogies "if the defense invites such a response" by, for example, comparing the government's case to a bomb).

[82] *Id.* at 555–57. Cantrell suggests that these bald appeals to fear are more likely to lead to reversal than other types of errors. *See id.* at 556 ("The personalization of fear to jurors is infinitely more reversible than generalized appeals to enforce society's laws."). He does not, however, provide sufficient support for the idea that these types of appeals are likely to be considered reversible error. *See also* Montz, *supra* note 37, at 102–04 (discussing the impropriety of "Golden Rule" arguments that ask the jurors to put themselves in the position of one of the parties, such as feeling how terrifying the victim's situation was, and asking them to decide based on "personal interest and bias rather than on the evidence").

[83] Cantrell, *supra* note 17, at 554.

[84] Sullivan, *supra* note 57, at 242.

[85] Prosecutorial trial misconduct may stem from a prosecutor's lack of experience or training. Montz, *supra* note 37, at 69. But many of the commonly accepted causes of prosecutorial misconduct, such as the role of the adversary or the lack of remedies against misconduct, contribute to the cognitive biases discussed in this Part. *See id.* at 69–70 (explaining that "[prosecutorial] misconduct may be a byproduct of the adversarial system").

seem crucial for prosecutors to obtain convictions, and moral disengagement theory suggests ways that beliefs could lead prosecutors to commit misconduct in pursuit of convicting the guilty without believing that they are doing anything wrong.

One of the most likely types of cognitive bias affecting prosecutors is confirmation bias. "Confirmation bias, as the term is used in psychological literature, typically connotes the tendency to seek or interpret evidence in ways that support existing beliefs, expectations, or hypotheses."[86] Because of confirmation bias, people unwittingly select and interpret information to support their preexisting beliefs.[87] Confirmation bias also leads people to discount the significance of information that should undercut their preexisting beliefs.[88] Prosecutors are not immune from these cognitive tendencies to seek out and recall information that supports their beliefs and to discount contrary information.[89]

Confirmation bias leads prosecutors to be overconfident in their conclusions about the guilt of particular defendants.[90] "[P]rosecutors' assessments of guilt can be flawed both by the information provided to them and the feedback they receive."[91] The information provided to prosecutors may be incomplete because the police investigation may have been shaped by tunnel vision.[92] And the high rates of plea bargains before trial and convictions post-trial reinforce prosecutors' beliefs that the defendants they prosecute are guilty.[93]

Prosecutors may be particularly vulnerable to overconfidence in defendants' guilt because of institutional pressures.[94] Prosecutors

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[86] Findley & Scott, *supra* note 34, at 309.

[87] Barbara O'Brien, *Prime Suspect: An Examination of Factors that Aggravate and Counteract Confirmation Bias in Criminal Investigations*, 15 PSYCHOL. PUB. POL'Y & L. 315, 316 (2009).

[88] *See* Findley & Scott, *supra* note 34, at 313–14 (noting that people resist change even where new information "wholly undermines their initial hypotheses").

[89] *See* Burke, *Neutralizing Cognitive Bias*, *supra* note 30, at 516–17 (providing specific examples of the influence of these cognitive tendencies on prosecutorial decisions).

[90] *See* Findley & Scott, *supra* note 34, at 371 ("Confirmation bias tends to produce, among other things, overconfidence about the accuracy of one's own judgments.").

[91] *Id.* at 329.

[92] *Id.* at 329–30.

[93] *Id.* at 330.

[94] See *id.* at 327–31 for an overview of the institutional pressures on prosecutors and how they may be vulnerable to flawed appraisals of defendants' guilt.

are often under great pressure to win convictions; that pressure to convict can come from a variety of sources, including the way that the public views prosecutors, the need for prosecutors to campaign to keep their jobs, and the political process of funding prosecutors' offices.[95] The adversary system itself similarly exacerbates these pressures.[96] The relatively limited direct contact that prosecutors have with defendants and their families, combined with prosecutors' near-daily contact with victims, police officers, and other witnesses, likely shapes how prosecutors perceive their cases.[97] Thus, institutional pressures and confirmation biases likely combine to overemphasize seeking convictions and to de-emphasize protecting the innocent.

Moral disengagement theory then suggests a mechanism for even well-intentioned prosecutors to cross the line and commit trial misconduct.[98] Moral disengagement theory posits that individuals generally do not act contrary to their perception of what is moral, so individuals use a series of "moral disengagement mechanisms" to adapt their view of what is moral.[99] Professor Lawton Cummings argues that one moral disengagement mechanism that allows prosecutors to commit misconduct without believing that they are doing anything wrong is an excessive focus on obtaining convictions, without any counterbalancing emphasis on following ethical rules.[100] Another type of moral disengagement mechanism involves obscuring "the causal relationship between

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[95] *See* Cummings, *supra* note 20, at 2147–48 (describing, among other pressures, the fact that "[p]rosecutors' careers are directly hampered or enhanced by their conviction rates").

[96] *See* Findley & Scott, *supra* note 34, at 322–23 ("The adversary system has many virtues, but one byproduct of an adversary model is that it polarizes the participants, imposing pressures on them to dogmatically pursue their own perceived interests or their own assessments of the proper outcome of a case.").

[97] *See* Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475, 486–87 (2006) (describing who prosecutors interact with and arguing that "the prosecutor will establish relationships, develop empathy, and build loyalties in ways that are bound to affect her conception of justice, and how it is best served").

[98] *See* Cummings, *supra* note 20, at 2142 (reasoning that certain features of the prosecutorial system encourage prosecutors to disengage their morality).

[99] *Id.* at 2142–43.

[100] *Id.* at 2151. Moral disengagement mechanisms are ways that individuals short-circuit their self-sensoring against immoral behavior and reconstruct their conduct as being morally justified. *See id.* at 2143 ("[These] mechanisms . . . operate to disengage an individual's moral self-sanctions from injurious conduct . . . .").

the individual's conduct and the outcomes of the behavior."[101] Professor Cummings applies that concept to prosecutors who may excuse bad behavior under theories about zealous advocacy and the adversarial system.[102]

The final type of disengagement mechanism involves depersonalizing the target of the conduct.[103] Cummings notes that "[d]efendants in the criminal justice system are systematically depersonalized from the prosecutor's perspective, because the prosecutor has intimate contact with all parties involved except the defendant."[104] And even the common practice of using the term "defendant" rather than the individual's name is a form of depersonalization, let alone the derogatory terms or images found in many prosecutorial misconduct cases.[105]

Therefore, prosecutors who are overconfident about their assessments of defendants' guilt may convey those beliefs to the jury by vouching for the prosecution witnesses or the strength of the case.[106] Prosecutors overly focused on obtaining convictions may use language suggesting that defendants have a duty to present evidence, or they may comment unfavorably on the defendants' silence.[107] Zealous prosecutors may go from dehumanizing defendants in small ways like avoiding the defendants' names[108] to more serious inflammatory appeals based on race or class,[109] or they may ask the jury to send a message by convicting.[110] These are easy moves to make given the lack of clarity in the case law regarding proper versus improper

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[101] *Id.* at 2151–52.

[102] *Id.* at 2153.

[103] *See id.* at 2154 ("[T]argets of harmful conduct are depersonalized and blamed for bringing about their own suffering." (footnote omitted)).

[104] *Id.*

[105] *See id.* at 2154–55 (describing the use of words such as "slime" or "dirt" to describe defendants); *see also id.* at 2156 ("Through depersonalization of defendants, the wielding of power over defendants, and the adversarial posture toward defendants, prosecutors are encouraged to morally disengage from harmful acts toward defendants.").

[106] *See* Montz, *supra* note 37, at 114–15.

[107] *See* Cantrell, *supra* note 17, at 539–40 (discussing one case in which the prosecutor asked jurors to ask themselves who else might have testified).

[108] Cummings, *supra* note 20, at 2154.

[109] Lyon, *supra* note 69, at 320.

[110] *See* Cantrell, *supra* note 17, at 554–55 (discussing prosecutors' use of law and order appeals to encourage juries to convict).

arguments,[111] the cognitive pressures that prosecutors face,[112] and the lack of appellate court punishment for crossing those lines.[113]

C. AS A RESULT, PROSECUTORIAL TRIAL MISCONDUCT IS PERVASIVE AND SEVERE

Prosecutorial trial misconduct is both pervasive and severe. In terms of pervasiveness, empirical research supports the idea that prosecutorial misconduct is widespread.[114] For example, the Northern California Innocence Project's recent study found that state and federal appellate courts in California concluded that prosecutorial misconduct had occurred in more than 700 cases over a twelve year period, which equates to more than one instance per week of prosecutorial misconduct.[115] This study almost certainly drastically understates the pervasiveness of the problem, in that it only dealt with misconduct that was found by appellate courts in available decisions; it did not include trial court decisions finding that prosecutorial misconduct had occurred or cases in which the courts declined to decide whether prosecutorial misconduct occurred.[116] Another study, conducted by the Center for Public Integrity, examined more than 11,000 cases in which prosecutorial misconduct allegations were reviewed on appeal; the appellate courts reversed convictions or granted other remedies in more than 2,000 of these cases, and they found misconduct had occurred but excused it as harmless error in hundreds more.[117]

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[111] *See supra* Part II.A.

[112] *See supra* notes 86–93 and accompanying text.

[113] *See infra* Part IV.

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

[115] Johns, *supra* note 20, at 512–13 (summarizing the findings of the Northern California Innocence Project); KATHLEEN M. RIDOLFF & MAURICE POSSLEY, N. CAL. INNOCENCE PROJECT, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009, at 2 (2010), *available at* http://www.innocenceproject.org/Content/Report_Prosecutorial_Misconduct_Often_Unpublished_in_California.php.

[116] Johns, *supra* note 20, at 513.

[117] Angela J. Davis, Feature, *The American Prosecutor: Power, Discretion, and Misconduct*, 23 CRIM. JUST. 24, 33 (2008); Steve Weinburg, *Breaking the Rules: Who Suffers When a*

Additionally, empirical research shows that appellate courts rarely reverse convictions based on prosecutorial misconduct. For example, the authors of a recent Louisiana study found that the appellate courts in Louisiana reversed in only 13.3% (20/150) of cases in which they concluded that the prosecutor had committed misconduct.[118] In more than 19% (29/150) of the cases in which courts found prosecutorial misconduct, the courts concluded that the defendant had failed to object or was otherwise procedurally barred from relief,[119] while in 67% (101/150) of the cases, the courts concluded that the error was harmless.[120] Similarly, a 2007 study by the California Commission on the Fair Administration of Justice showed that the California appellate courts reversed convictions in only 12% (53/443) of the cases in which they found that prosecutorial misconduct had occurred.[121] "So, thinking that a reversal is going to cure a wrong that was done within the system is . . . naïve."[122]

Instead, prosecutorial misconduct can have significant consequences, not only for criminal defendants but for the entire criminal justice system.[123] For example, prosecutorial misconduct has been found to be a significant contributing factor in wrongful convictions.[124] "As the 2009 report of the Justice Project observed,

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Prosecutor Is Cited for Misconduct?, THE CENTER FOR PUBLIC INTEGRITY (June 26, 2003, 12:00 AM), http://www.publicintegrity.org/2003/06/26/5117/breaking-rules. Again, this study only included cases in which the misconduct was discovered and litigated. Davis also discusses an extensive investigative report done by two reporters from the *Chicago Tribune* in the 1990s that involved similar findings to the studies described above. Davis, *supra*, at 35. *See generally* Ken Armstrong & Maurice Possley, *Part 1: The Verdict: Dishonor*, CHI. TRIB. (Jan. 11, 1999), *available at* http://www.chicagotribune.comnews/watchdog/chi-020103trial1-story.html#page=1.

[118] Ghetti & Killebrew, *supra* note 21, at 353.

[119] *Id.* at 353–54.

[120] *Id.* at 353.

[121] *See* Johns, *supra* note 20, at 512 (describing the results of the study, which analyzed cases spanning a decade). "This study was followed up by an annual report for 2010 documenting 130 judicial findings of prosecutorial misconduct in 102 cases, 26 of which resulted in reversals of convictions, orders for new trial, or orders barring prosecution evidence." *Id.* at 513.

[122] Ghetti & Killebrew, *supra* note 21, at 353.

[123] *See, e.g.*, Bazelon, *supra* note 5, at 441 (concluding that prosecutorial misconduct implicates both the constitutional right to a fair trial and "the integrity of the criminal justice system as a whole").

[124] Johns, *supra* note 20, at 510.

'prosecutorial misconduct was a factor in dismissed charges, reversed convictions, or reduced sentences in at least 2,012 cases since 1970.' "[125] Similarly, another study found that 43% of 180 DNA exonerations involved allegations of prosecutorial misconduct.[126] In such cases, prosecutorial misconduct "may result in an innocent person going to prison and the actual wrongdoer remaining free to commit future crimes."[127] Additionally, these wrongful convictions, and the role that prosecutorial misconduct plays in their occurrence, can undermine the criminal justice system's overall effectiveness.[128]

The effect of prosecutorial misconduct can also be significant even when used against a defendant who actually committed the charged crime.[129] Prosecutorial misconduct "undermines the due process afforded to the accused,"[130] which in turn may make defendants think that they can never get a fair trial.[131] That in turn "promotes increased cynicism by participants of the justice system and the public alike."[132] Defendants who go to trial take

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[125] *Id.* at 512 (quoting JOHN F. TERZANO ET AL., THE JUSTICE PROJECT, IMPROVING PROSECUTORIAL ACCOUNTABILITY: A POLICY REVIEW 2 (2009), *available at* http://amlawdaily.typepad.com/JusticeProjectReport.pdf).

[126] *Id.* (citing *Panelists Examine Why Prosecutors Are Largely Ignored by Disciplinary Officials*, 74 U.S.L.W. 2526, 2526 (Mar. 7, 2006)).

[127] Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 407; *see also* Johns, *supra* note 20, at 515 (discussing in more detail the terrible toll that wrongful convictions take on those wrongfully convicted, on the crime victims and their families, and on those who become victims of crimes committed by the original perpetrator while the wrong person is incarcerated). Wrongful convictions can also have significant financial consequences as well. *See id.* at 515–16 (discussing costs that the state bears from conducting trials, housing inmates, and sometimes paying damages in civil courts).

[128] Alschuler, *supra* note 13, at 638 ("When our system of criminal procedure fails to ensure a high degree of certainty of guilt, criminal punishment loses some of its effectiveness as an instrument of social control. For this reason, arguments by prosecutors that tend to make juries less deliberate, less reflective, and less dispassionate cheapen the criminal law.").

[129] For a very good discussion of the need to go beyond concerns of factual innocence to broader concerns of systemic fairness, see Bandes, *supra* note 32, at 16–18.

[130] Joy, *supra* note 127, at 407.

[131] Gershman, *supra* note 2, at 132.

[132] *Id.*; *see also* Burke, *Prosecutors and Peremptories*, *supra* note 30, at 1475 (discussing the social science research about the importance of procedural justice in overall respect for and compliance with the law).

significant risks in terms of sentencing; those risks should not be compounded by inappropriate prosecutorial behavior.[133]

Prosecutorial trial misconduct is also very public, usually occurs in front of juries, and may affect the jurors' perceptions of the criminal justice system, whether consciously or not. In fact, the public nature of these actions can undermine public respect for law enforcement and even the law itself.[134] "The undermining of the public's confidence is exacerbated by the fact that minorities and the poor suffer the most from prosecutorial misconduct."[135] This behavior can also paint all prosecutors in a negative light, even those who "uphold the law and live up to their obligations to seek justice."[136]

For all of these reasons, including the role prosecutorial misconduct plays in wrongful convictions, its harmful effects on individual defendants, and its harmful effects on the justice system as a whole—even when it is used against factually guilty defendants—prosecutorial trial misconduct is a serious problem, and it is more serious than similar misbehavior committed by criminal defense counsel or in civil cases.[137] Prosecutorial trial misconduct is a significant problem, worthy of focused attention,

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[133] *See generally* Steven P. Grossman, *An Honest Approach to Plea Bargaining*, 29 AM. J. TRIAL ADVOC. 101 (2005) (arguing that the differential sentencing of criminal defendants who go to trial versus those who plead guilty imposes a punishment on the defendants exercising their trial rights). *See also* Alschuler, *supra* note 13, at 631 (explaining how defendants are uniquely affected by misconduct because they are vulnerable given that their liberty is at stake in trials).

[134] Alschuler, *supra* note 13, at 632–33.

[135] Johns, *supra* note 20, at 516.

[136] *Id.* (quoting RIDOLFF & POSSLEY, *supra* note 115, at 6).

[137] *See, e.g.*, Lyon, *supra* note 69, at 335–36 (arguing that because "the prosecutor's primary responsibility is to the administration of justice" and bar associations do not provide sufficient accountability, the courts must remedy any misconduct in criminal proceedings). *Cf.* Montz, *supra* note 37, at 102–29 (canvassing types of improper closing arguments in civil and criminal trials); Nidiry, *supra* note 12, at 1318 (arguing that because "defense attorneys do not share the prosecutors special relationship with juries[,] [t]he effect of their adversarial excesses . . . may be somewhat mitigated"). While defense attorneys should generally follow the same types of rules about what is and is not proper argument (e.g., defense counsel should not be permitted to misstate the evidence or make explicitly racial appeals), improper argument by defense counsel is less serious. *See* Alschuler, *supra* note 13, at 632 (asserting that the statements of defense counsel carry comparatively little weight). Arguments by prosecutors but not defense counsel bear the imprimatur of the state. *Id.* And prosecutors but not defense counsel have a wider responsibility to pursue justice, not just victories for their clients.

even though very few cases actually go to trial and other types of prosecutorial misconduct may be even more common.[138] "The credibility of the justice system is on the line, and thus courts need to identify procedures for determining whether the argument appeals to improper prejudice and then determine what to do about it."[139]

III. JURIES ARE LIKELY AFFECTED BY PROSECUTORIAL MISCONDUCT MORE THAN CURRENTLY RECOGNIZED

Current appellate case law fails to adequately reflect the extent to which this misconduct likely affects jurors. "Much research indicates that jurors, like all decision makers, may be affected by factors they do not mention or even perceive to have influenced them."[140] This section begins by explaining how jurors likely make decisions in individual cases, using the well-accepted story model, as supplemented by current research on coherence-based reasoning. It then talks about how these models of juror decisionmaking leave room for cognitive biases (including confirmation bias) to affect juror decisionmaking in ways that jurors likely would not recognize, and how prosecutorial trial misconduct may exploit this potential for bias in ways that would be hard to detect.

A. MODELS OF JURY DECISIONMAKING: THE STORY MODEL AND COHERENCE-BASED REASONING

According to the story model of juror decisionmaking, which is well-accepted in both the psychological and legal literature, jurors use story construction to understand and interpret the information

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[138] *See, e.g.*, Davis, *supra* note 117, at 32–33 (describing the breadth of prosecutorial misconduct and lamenting that this misconduct is difficult to discover).

[139] Lyon, *supra* note 69, at 335.

[140] Shari Seidman Diamond et al., *Juror Reactions to Attorneys at Trial*, 87 J. CRIM. L. & CRIMINOLOGY 17, 24 (1996). The discussion in this section should not be read to mean that all jury decisionmaking involves reliance on biases; instead, this section is intended to explain how jury decisions can be more influenced by biases than either jurors or reviewing courts recognize.

they receive throughout a criminal trial.[141] According to the story model, the key cognitive task for jurors deciding a case is not the mathematical estimation of probabilities about what occurred, but instead is the construction of stories to explain the evidence.[142] To do so, jurors use a three-step process: (1) they evaluate evidence through the construction of multiple stories that could explain the evidence; (2) they learn about the legal standards for the various verdicts they could reach; and (3) they decide on the appropriate verdicts by classifying the most likely story into the best-fitting verdict option.[143]

The first step, story construction, is crucial, because "one central claim of the model is that the story the juror constructs determines the juror's decision."[144] According to this model, individual jurors usually construct multiple stories rather than just a single story.[145] To decide between the competing stories, "jurors rely on coverage (whether the story can accommodate all the evidence), coherence (whether the story makes sense), and uniqueness (whether there are other plausible explanations)."[146] If a single story accounts for all of the evidence and arguments and makes strong sense to the juror, then the juror will have a high degree of confidence that the story is correct; on the other hand, if

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[141] *See, e.g.*, Michael S. Pardo, *The Nature and Purpose of Evidence Theory*, 66 VAND. L. REV. 547, 552 (2013) ("The well-confirmed model of jury behavior—the Story Model—posits that legal fact finders assimilate evidence into competing narratives of the events and select the most plausible or satisfying of the available accounts.").

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

[143] Pennington & Hastie, *supra* note 142, at 520–21. Professor Hastie explains the three-step process more clearly in a later article: "Applications of the Story Model to criminal jury judgments have identified three component processes: (1) evidence evaluation through story construction, (2) representation of the decision alternatives (verdicts) by learning their attributes or elements, and (3) reaching a decision through the classification of the story into the best-fitting verdict category." Reid Hastie, *Emotions in Jurors' Decisions*, 66 BROOK. L. REV. 991, 995 (2001).

[144] Pennington & Hastie, *supra* note 142, at 521.

[145] *Id.* at 527.

[146] Griffin, *supra* note 142, at 293.

multiple explanations seem plausible, or if even the "best" story does not account for all of the evidence or make sense to the individual juror, then the juror will be less confident in selecting the best story.[147]

While the story model began as an explanation for individual decisionmaking, more recent scholarship connects the story model to empirical research on the group dynamics involved in jury deliberations.[148] Studies on how juries deliberate together have shown "that juries try to reconcile their individual narratives and arrive at a consistent story they can all agree on. The process is a combination of rational persuasion, sheer social pressure, and the psychological mechanism by which individual perceptions undergo change when exposed to group discussion."[149] Other research suggests that when lawyers can persuade the majority of jurors to accept their story of what happened, they are likely to obtain a verdict in their client's favor.[150]

Similarly, research into coherence-based reasoning shows that decisionmakers do not use mathematical computations of individual pieces of information, but instead make decisions based on "constructed representations of coherence."[151] Coherence-based research is therefore consistent with the story model, but goes beyond that model to account for decisions that are not well-suited to narrative structures, such as decisions about the extent of damages or culpability for failing to appreciate a risk.[152] The theory of coherence-based reasoning suggests that when

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[147] Pennington & Hastie, *supra* note 142, at 527–28.

[148] Griffin, *supra* note 142, at 327.

[149] *Id.* (quoting NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 137 (2007); HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 489 (1966)) (internal quotation marks omitted).

[150] *See* Richard Lempert, *Telling Tales in Court: Trial Procedure and the Story Model*, 13 CARDOZO L. REV. 559, 561 (1991) (describing a study indicating that jurors are more likely to return guilty verdicts when the state's evidence is presented as a story).

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

[152] *Id.* at 563–64.

decisionmakers are faced with complex information that suggests different alternatives, they reinterpret the information: "[T]he mental representation of the considerations undergoes gradual change and ultimately shifts toward a state of coherence with either one of the decision alternatives."[153] Through this reinterpretation process, the decisionmaker's assessment of the case goes from hard to easy, and the decisionmaker becomes more confident in the emerging decision.[154] "The fact that decisions are ultimately based on skewed mental models and backed by high levels of confidence facilitates the making of the decision, but at the same time it can also harbor problematic implications"[155] and "cause a substantial increase in the risk of error in certain circumstances."[156]

B. HOW PROSECUTORIAL TRIAL MISCONDUCT CAN EXPLOIT JURORS' COGNITIVE BIASES

These theories suggest that bias may affect juror decisionmaking as jurors draw on their own life experiences to construct and select the best story or theory of coherence.[157] According to the story model, jurors will not only rely on the evidence presented at trial in constructing stories, but they will also make inferences from that evidence based on their own experiences and understandings of how the world works.[158] "Because all jurors hear the same evidence and have the same general knowledge about the expected structure of stories,

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153 *Id.* at 517.

154 *Id.*

155 *Id.*

156 *Id.* at 549.

157 Pennington & Hastie, *supra* note 142, at 525.

158 *See id.* at 527 ("Some of [the juror's] inferences may be suggested by the attorneys and some may be constructed solely by the juror."); *see also* John B. Mitchell, *Narrative and Client-Centered Representation: What Is a True Believer to Do When His Two Favorite Theories Collide?*, 6 CLINICAL L. REV. 85, 116 (1999) ("[T]he 'stories' of the parties which [jurors] compare to their own may not at all be the story the parties are putting forth, but rather a limited tale responding only to the scope of the juror's idiosyncratic narrative."); Stacy Caplow, *The Impossible Dream Comes True—A Criminal Law Professor Becomes Juror # 7*, 67 BROOK. L. REV. 785, 810 (2002) (describing her own experience on a jury in which the life experiences of other jurors contributed to the deliberations in ways that the lawyers would not have anticipated).

differences in story construction must arise from differences in world knowledge; that is, differences in experiences and beliefs about the social world."[159] Thus, the typical emphasis that lawyers place on jury selection may well derive at least in part from lawyers' desire to find jurors whose understandings and experiences will lead them to draw inferences that favor the lawyers' clients.[160]

Some writers have expressed discomfort with the way that this process can hinder jurors' evaluation of individual cases.[161] For example, Professor Mitchell concludes that some defendants' stories put them at inherently higher risk: "[U]nless diverse defendants can tell their stories to the factfinders without being saddled with credibility problems touching critical story elements of their narratives that are due, not to the stories, but to the schemata of the factfinders, this group of defendants cannot receive a 'fair trial.' "[162] Relatedly, Professor Griffin notes that jurors' typical experiences may be poorly suited to help them analyze criminal cases[163]: "Trials make jurors choose, and narratives give them a false sense of completeness and closure when they do. The selected story of 'what happened' binds to receptors formed through a lifetime of stories. Once that bond is formed, other ideas are suppressed . . . ."[164]

That analysis is very similar to confirmation bias, discussed above, in that it suggests that jurors' life experiences may make them predisposed to view the evidence in a particular way, which

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[159] Pennington & Hastie, *supra* note 142, at 525.

[160] *See* Todd E. Pettys, *The Emotional Juror*, 76 FORDHAM L. REV. 1609, 1629–30 (2007) ("Trial lawyers widely regard the jury-selection process as critically important to the outcome of a case. . . . Because one [juror's] common sense and experiences may differ markedly from another's, different [jurors] may reach very different conclusions about the importance and implications of the same items of evidence.").

[161] *See, e.g.*, Mitchell, *supra* note 158, at 125.

[162] *Id.*; *cf.* Caplow, *supra* note 158, at 810 (describing how jury diversity in jury deliberations may help illuminate the weakness of a prosecution case). Caplow's discussion provides a concrete illustration of one way in which jurors bring their own experiences into jury deliberations in ways that lawyers would not necessarily anticipate.

[163] Of course, even when jurors have more relevant background knowledge, they may use that knowledge to make incorrect assumptions. *See* Caplow, *supra* note 158, at 819 (explaining how she made an incorrect assumption as a juror in a criminal trial, despite her experience as a criminal law professor).

[164] Griffin, *supra* note 142, at 312.

in turn may shape how they process and understand the information presented at trial. Similarly, although the story model suggests that the stories juries create based on the evidence develop throughout the trial, another cognitive process closely related to confirmation bias may affect the extent to which those stories change. While confirmation bias leads people to seek information consistent with their hypothesis, selective information processing leads them to "recall stored information and interpret new information to conform to their pre-existing views."[165] "Because of selective information processing, people more readily accept information that supports their hypothesis and find reasons to discount information that runs counter to that hypothesis."[166] Thus, jurors may be more willing to accept prosecutorial arguments at face value that are consistent with their preferred stories, even when those arguments are legally improper.[167]

Additionally, empirical research suggests another way that jurors may be affected by confirmation bias. That research suggests that the presumption of innocence is a legal fiction and that many jurors actually presume that the defendant is guilty before hearing any evidence.[168] If so, then confirmation bias may

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

[166] Bowman, *supra* note 29, at 23. "[F]or desired conclusions . . . it is as if we ask, 'Can I believe this?' but for unpalatable conclusions we ask, 'Must I believe this?'" Findley & Scott, *supra* note 34, at 314 (quoting THOMAS GILOVICH, HOW WE KNOW WHAT ISN'T SO: THE FALLIBILITY OF HUMAN REASON IN EVERYDAY LIFE 84 (1991)) (internal quotation marks omitted).

[167] Of course, an important counterpoint to these preexisting biases is the extent to which jurors match their stories to the jury instructions to reach a verdict. *See* Hastie, *supra* note 143, at 997–98 (describing the research supporting this part of the process as an important part of the story model of decisionmaking); Caplow, *supra* note 158, at 814 (describing her own experiences as a juror, which show the importance of the burden of proof in her assessment of the evidence). Caplow's experience illustrates the way that weaknesses in the prosecution's case during the first day of trial, combined with knowledge that the government has to prove its case beyond a reasonable doubt, created the hypothesis that the defendant should be acquitted, which in turn seemed to shape the way that the jurors listened to and interpreted the rest of the evidence presented and shaped their deliberations. *Id.*

[168] *See* Findley & Scott, *supra* note 34, at 340–41; *see also* Josephine Ross, *"He Looks Guilty": Reforming Good Character Evidence to Undercut the Presumption of Guilt*, 65 U. PITT. L. REV. 227, 260 (2004) (noting that many jurors assume that most defendants are

lead jurors to focus on evidence that suggests guilt and discount evidence that undercuts that conclusion.[169] That theory is also consistent with the research described above showing that jurors tend to find prosecutors inherently more credible than defense counsel, which is partly why prosecutorial vouching is so effective.[170] Additionally, prosecutorial misconduct that involves dehumanizing the defendant may make it easier for jurors to conclude that the defendant deserves punishment, regardless of the specific evidence in the trial.[171] Confirmation bias involves unconscious processes,[172] so jurors could be influenced by confirmation bias regarding the defendant's guilt without realizing that they were violating the presumption of innocence.

Additionally, lawyers can influence the stories that jurors create and accept, and they can do so in ways that minimize or exacerbate cognitive biases. On the positive side, lawyers can use opening statements to create an effective story framework that provides context for the testimony that follows.[173] But if opening statements improperly play on jurors' beliefs in the defendant's guilt, that narrative can affect "what evidence is attended to, how it is interpreted, and what is recalled both during and after the trial."[174]

Lawyers can also properly use closing statements to show that the evidence as a whole tells a compelling story and that the other side's evidence or theories do not undercut the proffered story.[175]

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guilty, that a "weeding out process" exists to protect the innocent, and that prosecutors know more than they do about the defendant's guilt).

[169] *See supra* Part II.B (explaining how confirmation bias affects information processing).

[170] *See supra* Part II.A.*1* (highlighting arguments that rely on a prosecutor's credibility).

[171] *See supra* notes 103–05 and accompanying text.

[172] Bowman, *supra* note 29, at 455 nn.150–51.

[173] *See* Lempert, *supra* note 150, at 564; *see also* Caplow, *supra* note 158, at 790, 795–96 (describing how both the prosecutor and defense counsel in a particular case used opening statements to establish their theory of what happened, in a way that provided a framework for the jury to understand the significance of some of the evidence presented at trial); *id.* at 821 (providing more detail on the importance of an opening statement).

[174] Lempert, *supra* note 150, at 565.

[175] *See id.* at 569 (summarizing several tactics that lawyers may use in their closing statements). Pennington and Hastie's research showed that the way information was presented could significantly affect jury verdicts. *See* Pennington & Hastie, *supra* note 142, at 542–43 (discussing the difference in verdict rates when one side presented the evidence in story form and the other side presented the evidence chronologically). Although that

But when prosecutors improperly vouch for their own witnesses, attack the credibility of defense counsel, or otherwise appeal to jury prejudices, they may improperly shape juror narratives about the case. Furthermore, closing arguments are particularly useful for solidifying the support of jurors already inclined in one's favor and for providing ammunition for them to use in the jury room "so that they can become an extension of the advocate."[176] When the prosecutor's argument is improper, jurors may still use it as ammunition.[177] And the inherent credibility advantage that prosecutors generally enjoy may make jurors even more receptive to these arguments and may make it hard for defense counsel to counter such arguments.[178]

These types of appeals might be particularly powerful during closing arguments, as empirical research supports the common wisdom among trial advocates about the persuasive power of

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experiment did not attempt to mimic the exact ways that information is presented at trial, *see id.* at 543, the experiment does support the idea that the "fit" between lawyers' strategies and the story model could affect the way that jurors understand and evaluate particular cases. Caplow's experiences bear out this reasoning, in that the defense counsel effectively told the defendant's story, while the prosecutor "offer[ed] analogies and parables" that did not resonate with the jury and failed to tell a compelling counter-story. Caplow, *supra* note 158, at 822–23. Caplow then effectively described how, in that case, the government could have told a more effective story, both in summation and in the presentation of the evidence. *Id.* at 823–25.

[176] H. Mitchell Caldwell et al., *The Art and Architecture of Closing Argument*, 76 TUL. L. REV. 961, 972 (2002); *see also* Caplow, *supra* note 158, at 824 ("In retrospect, the defense did a remarkable job of weaving a story from flimsy threads pulled from the much more tightly woven prosecution case. It might well be that the defense amounted to no more than the 'Emperor's new clothes,' illusory and insubstantial. Yet, such a story told to a more than receptive audience, a jury heading toward acquittal, gave us the arguments we needed to reach our verdict.").

[177] *See* Ross, *supra* note 168, at 260–61 (describing how prosecutors press their credibility advantage through dehumanizing defendants and concluding that "[t]he point is not that prosecutors sometimes cross the line, but in understanding that these lines exist on a continuum, where obvious illegitimate character assassination is sometimes different only in degree from legitimate argument").

[178] *See id.* at 260 (noting that jurors may assume that the prosecutor knows more than them); Simon, *supra* note 151, at 573 ("Research on persuasion also shows that the effectiveness of a persuasive message depends upon the target's perception of the source. Most notably, persuasion is adversely affected when the source is deemed to lack credibility. Thus, a juror is not likely to respond to the urging of an advocate for the disbelieved party, especially when the juror is already close to making up her mind.").

closing arguments on jurors.[179] Empirical research on the "recency effect" suggests that people tend to remember best and be influenced by the latest event in a sequence more than by earlier events.[180] The recency effect can be exacerbated by the "asymmetric rebound effect," the process by which powerful information can trigger a backlash against a strongly held belief.[181] If a defense attorney has succeeded in gaining sympathy or understanding for a defendant, and the prosecutor responds by using inflammatory language or arguments in rebuttal, the result may be an "asymmetric rebound effect, whereby the jurors would become incensed that they were 'suckered' into believing that the defendant was deserving of sympathy and of the protections of the Bill of Rights."[182] That research is consistent with the empirical research showing that exposure to "anger-provoking stimuli increases the tendency to blame other people for ambiguous events and to neglect alternative explanations and possible mitigating circumstances."[183] For these reasons, inflammatory prosecutorial arguments may significantly prejudice the defendant's ability to receive a fair trial.[184]

When these things happen, it may be very difficult for jurors (and later reviewing courts) to assess whether the misconduct affected the verdict or was instead simply harmless error. Both the story model and coherence-based reasoning theories show that jurors make decisions by looking at the case holistically, so that it is impossible to judge the significance of any single piece of evidence or event in the trial.[185]

> [T]he elements of the story interact in ways that alter their individual significance: each merges with what came before and flows into what comes after. . . . no

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[179] *See* Alford, *supra* note 79, at 513–14 (summarizing this empirical research and describing its effect on trial strategy).

[180] *Id.* at 513.

[181] *Id.* at 515.

[182] *Id.* at 516.

[183] Simon, *supra* note 151, at 582.

[184] *See* Alford, *supra* note 79, at 516 (asserting that this misconduct may prejudice defendants more than adverse pretrial publicity).

[185] *See supra* Part III.A.

> one piece of evidence can be assessed in isolation, and . . . new pieces color both the information already before the jury and the testimony to come . . . ."[186]

Similarly, under coherence-based reasoning theory, the process of making a decision changes the way that the decisionmaker evaluates the various pieces of information.[187] It therefore becomes impossible to separate out the significance of any one piece of information from its effect on the overall decision.

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

IV. APPELLATE COURTS CURRENTLY FAIL TO PROVIDE ADEQUATE REMEDIES BECAUSE OF OVERRELIANCE ON PROCEDURAL DOCTRINES

Appellate courts fail to adequately recognize the likely influence of cognitive biases on prosecutors committing misconduct or the way that such misconduct may subconsciously affect jurors' decisions. This failure derives in part from the structure of appellate court review and in part from cognitive biases affecting appellate judges.

A. PROBLEMS WITH THE PROCEDURES USED IN APPELLATE REVIEW

Formally, courts often use a two-step analysis for prosecutorial misconduct claims, determining first "whether the conduct, viewed objectively, was improper," and then "whether the probable impact of that conduct prejudiced the verdict."[188] In other words, courts

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[186] Griffin, *supra* note 142, at 286; *see also* Simon, *supra* note 151, at 564 ("[C]oherence-based reasoning provides a deeper theoretical explanation of holistic processing . . . ."); *id.* ("While narrative structures might not be essential for holistic processing, coherence shifts are likely to be particularly pronounced in their presence.").

[187] Simon, *supra* note 151, at 522–23, 537. For example, in one experiment, changes to information about the defendant's character affected participants' views "on the appropriateness of regulating free speech over the Internet." *Id.* at 537–38.

[188] Gershman, *supra* note 7, at 133.

typically first determine whether prosecutorial misconduct actually occurred, and if so, then courts ask whether that misconduct was harmless error. That two-step process assumes, however, that defense counsel objected at trial to the alleged misconduct; if not, then courts also consider how the failure to object affects the analysis.[189]

In practice, however, the procedural issues (whether the error was properly preserved and whether any error was harmless) in prosecutorial misconduct cases often overwhelm the analysis of whether prosecutorial misconduct occurred at all:

> The question in a given case may be not whether the prosecutor's conduct was erroneous, but whether the error was so clear that an appellate court could consider it despite the absence of an objection at trial, whether the effect of the error was minimized or eliminated by the subsequent action of the court or prosecutor, or whether the error was serious enough to affect the integrity of the verdict.[190]

As a result of these procedural issues, court decisions are often unpredictable, and cases often lack significant precedential value.[191] And even when courts do declare conduct to be improper, they usually fail to provide any meaningful remedy.[192]

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[189] *See infra* Part IV.A.*2*. This Article focuses on the standards and procedures employed on direct review, rather than the standards used for habeas corpus review. For a discussion of the latter type of challenges to prosecutorial misconduct, see generally Alford, *supra* note 79.

[190] Alschuler, *supra* note 13, at 638.

[191] *See id.* ("The sense that most clearly emerges from the decisions is that of unpredictability. Cases proceed on an ad hoc basis, and results do not follow a consistent pattern. Even if the alleged misconduct in one case seems similar to the alleged misconduct in another, the procedural context is invariably different. The force of precedent is therefore slight. The courts seem to enjoy an almost total freedom to reach any result on any given set of facts."); *see also* Dustin D. Berger, *Moving Toward Law: Refocusing the Federal Courts' Plain Error Doctrine in Criminal Cases*, 67 U. MIAMI L. REV. 521, 526 (2013) (noting that decisions applying the plain error doctrine "do little to help future courts or defendants in deciding what kinds and levels of prosecutorial misconduct are sufficiently serious to warrant a remedy," and arguing that courts should take a more precedent-based approach to harmless error in prosecutorial misconduct cases).

[192] *See, e.g.*, Brian C. Duffy, Note, *Barring Foul Blows: An Argument for a Per Se Reversible-Error Rule for Prosecutors' Use of Religious Arguments in the Sentencing Phase of Capital Cases*, 50 VAND. L. REV. 1335, 1344–45 (1997) (explaining that although courts may

This section explains the doctrines of harmless error and preservation of error, showing how the current application of these doctrines in prosecutorial misconduct cases poses significant problems. These problems include muddying the courts' determinations of whether prosecutorial misconduct occurred, failing to provide adequate remedies for misconduct, and undercutting the courts' ostensible message against prosecutors engaging in such behavior. The discussion below starts with harmless error because that doctrine is a more common basis for courts' decisions, and then moves on to preservation of error.[193]

1. Courts Rely Too Heavily on Harmless Error to Uphold Convictions. "[H]armless error is a doctrine born of the belief that some errors are created more equal than others and that the simple finding of error is not always a sufficient ground to justify the reversal of an otherwise valid conviction."[194] Courts sometimes conclude that an error occurred but that the error was harmless; in other cases, courts refuse to decide whether or not an error occurred at all because even if there was an error, the error was harmless.[195] Although harmless error analysis is a fairly recent development in criminal law,[196] its use has been greatly expanded over the last fifty years, so that it now may be the most cited rule

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offer "rhetorical flair" in condemning prosecutorial behavior, they almost always rely on contextual factors to conclude that any error was harmless).

[193] *See, e.g.*, Ghetti & Killebrew, *supra* note 21, at 353 (summarizing one study showing that, in cases involving prosecutorial misconduct, appellate courts rely much more frequently on harmless error than preservation of error in refusing to reverse).

[194] Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 9 (2002).

[195] William M. Landes & Richard A. Posner, *Harmless Error*, 30 J. LEGAL STUD. 161, 184 (2001) ("In 87 percent of the cases, the errors were held to be harmless—in 45 percent the appellate court found errors but held that they were harmless and in another 42 percent the court concluded that even if there was an error (which the court did not decide) it was harmless.").

[196] Kamin, *supra* note 194, at 10. Until 1919, U.S. courts followed the English rule and required reversal for "any error of substance," whether constitutional or statutory. *Id.* Between 1919 and 1967, errors of constitutional magnitude remained grounds for per se reversal, while non-constitutional errors were subject to harmless error analysis. *Id.* Then, in 1967, the Supreme Court first applied harmless error analysis to constitutional errors, in *Chapman v. California*, 386 U.S. 18 (1967), a case involving prosecutorial misconduct. *See* Kamin, *supra* note 194, at 11–12 (discussing *Chapman*, where the Court analyzed the prosecutor's comments on the defendant's failure to testify). In *Chapman*, the Court for the first time said that a constitutional error could be deemed harmless, but the state would have the burden of proving harmlessness beyond a reasonable doubt. *Id.* at 11.

in criminal appeals.[197] During this time frame, courts have greatly expanded the types of errors subject to harmless error analysis and have reduced the prosecution's burden of demonstrating harmlessness.[198]

The primary justifications offered for expanded use of harmless error analysis involve protecting the finality of the trial result and avoiding the costs associated with a second trial that would lead to the same result.[199] Retrial costs extend beyond monetary costs to the time and energy involved and the psychological costs to victims who must relive their disturbing experiences.[200] The Supreme Court has noted that these societal costs are justified "when an error in the first proceeding has deprived a defendant of a fair determination of the issue of guilt or innocence[, but] the balance of interest tips decidedly the other way when an error has had no effect on the outcome of the trial."[201]

The courts use a variety of standards to measure whether an error was harmless.[202] "On direct review in the federal courts, '[t]he standard for determining if a non-constitutional error is harmless is . . . whether the error had substantial and injurious effect or influence in determining the jury's verdict.' "[203] For constitutional errors, on the other hand, the prosecution must show that the error was harmless beyond a reasonable doubt.[204] The standards vary even more widely in state courts. Some states

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[197] Landes & Posner, *supra* note 195, at 161.

[198] *Id.* at 172.

[199] Michael T. Fisher, Note, *Harmless Error, Prosecutorial Misconduct, and Due Process: There's More to Due Process than the Bottom Line*, 88 COLUM. L. REV. 1298, 1301 (1988).

[200] United States v. Mechanik, 475 U.S. 66, 72 (1986).

[201] *Id.*

[202] *See* Jason M. Solomon, *Causing Constitutional Harm: How Tort Law Can Help Determine Harmless Error in Criminal Trials*, 99 NW. U. L. REV. 1053, 1061 (2005) (describing the many different formulations that the Court offered of harmless error analysis in cases decided in the 1990s). This Article focuses on the standards that apply to direct review of convictions, rather than the standards that apply to habeas review. For a discussion of the standards that apply in habeas cases, see, e.g., Duffy, *supra* note 192, at 1342–44. For purposes of this discussion, I have also set aside how preservation of error concerns (such as the failure to raise a timely objection or ask for a mistrial) affects appellate review of harmless error analysis. That issue is discussed in more detail *infra* in Part IV.A.2.

[203] Lyon, *supra* note 69, at 321 (quoting Hon. John M. Walker, Jr., *Harmless Error Review in the Second Circuit*, 63 BROOK. L. REV. 395, 399 (1997)) (internal quotation marks omitted).

[204] *Id.* at 322. That standard comes from *Chapman v. California*, 386 U.S. 18, 24 (1967).

apply the constitutional/non-constitutional error distinction, while other states only use the non-constitutional standard that requires the defendant to prove prejudice.[205] Additionally, some courts apply the constitutional harmless error standard when a specific constitutional right is implicated but not for violations of the general right to a fair trial.[206]

The choice between the constitutional and non-constitutional standard is at least theoretically a very important one, as the constitutional harmless error standard requires the prosecutor to prove harmlessness beyond a reasonable doubt, rather than requiring the defendant to affirmatively prove prejudice.[207] Yet courts may not always be following Supreme Court precedent about who should have the burden of showing whether an error was harmless.[208] Furthermore, some commentators suggest that who has the burden of showing harmless error rarely affects the court's decision about whether an error is harmless.[209]

Regardless of how the burden of proof is allocated, the courts generally take one of two approaches in determining harmless error.[210] Under the error-based approach, courts examine whether the particular error likely affected the outcome in the particular trial.[211] By contrast, under the guilt-focused approach, the courts imagine a hypothetical trial without the error and ask whether there was still enough evidence of guilt to affirm the conviction.[212]

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[205] Lyon, *supra* note 69, at 323–24; *see also* Alschuler, *supra* note 13, at 664 (discussing the "bewildering variety of state standards" that apply in cases of non-constitutional harmless error analysis).

[206] *See, e.g.*, Krista L. Nelson & Jacob J. Stender, *"Like Wolves in Sheep's Clothing": Combating Racial Bias in Washington State's Criminal Justice System*, 35 SEATTLE U. L. REV. 849, 854 (2012) (asserting that "[c]ourts apply this standard when constitutional rights other than the right to a fair trial are impacted by the prosecutor's actions").

[207] *See id.* at 853–54 (discussing the formulations of these standards by Washington courts). The point about who bears the burden holds for the federal formulations of the standards as well.

[208] *See* Solomon, *supra* note 202, at 1068 (describing his empirical study of harmless error analysis in federal habeas cases, in which "more than one in four improperly placed the burden on the petitioner").

[209] *See* Findley & Scott, *supra* note 34, at 321. Additionally, Professor Landes and Judge Posner criticize the distinction between constitutional and non-constitutional error. Landes & Posner, *supra* note 195, at 172.

[210] Solomon, *supra* note 202, at 1062.

[211] *Id.*

[212] *Id.*

One empirical study suggests that the difference between the two approaches significantly affects case outcomes: "[A]nalyses where a guilt-based approach was used by the court during its analysis found the error harmless 93% of the time, while those using an error-based approach found the error harmless only 47% of the time."[213]

Under either of these approaches, the courts generally look to a variety of factors in analyzing harmless error. Many courts consider whether the misconduct was severe, whether the trial court took corrective actions such as instructing the jury to disregard the misconduct, and whether the remaining evidence against the defendant was strong.[214] Courts sometimes also look at other factors, including whether the misconduct was invited by the other side and whether the misconduct was an isolated instance or was repeated throughout the trial.[215]

Given the doctrinal morass described above, it should be no surprise that the harmless error doctrine has been extensively criticized. Some commentators criticize the excessive malleability of the factors used in harmless error analysis,[216] noting that courts sometimes rely on precisely the same factor to reach opposite conclusions.[217] Professor Kamin notes the impossibility of a

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[213] *Id.* at 1071.

[214] *See* Joy, *supra* note 127, at 426 n.137 (collecting cases discussing these factors). This approach is consistent with the iconic prosecutorial misconduct case discussed at the beginning of this Article, *Berger v. United States*, 295 U.S. 78, 88 (1935). In *Berger*, the Court concluded that it was "highly probable" that the misconduct affected the verdict because that misconduct was "pronounced and persistent" rather than "slight or confined to a single instance," *see id.* at 89; the trial court's response to the misconduct was not forceful, *see id.* at 85; and the remaining case against the defendant was weak, *see id.* at 88.

[215] *See* Bazelon, *supra* note 5, at 423 (discussing the "invited response rule," which considers whether the defense counsel provoked the improper comments). Occasionally, courts also consider the length of the jury's deliberations and whether the jury acquitted the defendant of some charges or acquitted some co-defendants. *See* Alschuler, *supra* note 13, at 659.

[216] *See, e.g.*, Kamin, *supra* note 194, at 7 (pointing out the malleability of harmless error analysis, based on his review of nearly 300 California Supreme Court decisions in death penalty cases, in which more than 90% of death sentences were upheld on appeal even though the courts found constitutional error in almost all cases).

[217] *See, e.g.*, Alschuler, *supra* note 13, at 659 (observing that courts sometimes conclude that an error was harmless in part because long deliberations show that the jury was careful, while in other cases courts use long deliberations as evidence that the case was extremely close such that the error was not harmless); *see also id.* at 659–60 (asserting that courts sometimes rely on factors that have no logical relevance to whether the error was harmless).

reviewing court being able to "unring a bell that has already rung" by mentally "travel[ing] back in time and imagin[ing] a world that never was" (how the case would have gone without the error); he argues that the courts' harmless error conclusions "can be no better than science fiction."[218] Other commentators criticize the doctrine in terms of its ineffectiveness in reaching errors that probably really did affect the outcome in particular cases. For example, Professor Cicchini argues that the concept of harmless error is fundamentally flawed, in that evidence shows that judges are ineffective at evaluating what matters to juries in particular cases, and in fact judges simply use their discretion under harmless error analysis to preserve convictions.[219]

The empirical research into wrongful conviction cases bears out these criticisms. For example, a study of the first 200 DNA exonerations revealed that half of the courts upholding the convictions of people who turned out to be innocent referred to the likely guilt of the defendant, and in nearly a third of the cases, the courts specifically relied on harmless error analysis in upholding the convictions.[220] A similar study showed that in nearly 30% of DNA exonerations, appellate courts had relied on harmless error in upholding convictions prior to the discovery of the DNA evidence.[221]

Furthermore, the courts' routine reliance on harmless error in prosecutorial misconduct cases "strongly suggests that the courts do not care very much about prosecutorial misconduct."[222] Professor Bennett Gershman labels the harmless error rule "a

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[218] Kamin, *supra* note 194, at 21.

[219] Cicchini, *supra* note 23, at 347.

[220] *See* Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y.L. SCH. L. REV. 911, 934–35 (2011–2012) (summarizing the results of the study and noting the courts' skepticism of the innocence of improperly convicted defendants); *see also id.* at 935 ("Judges simply cannot be expected to recognize or zealously pursue facts supporting claims of innocence when they objectively view the likelihood of innocence to be so remote; only zealous advocates can be expected to push for such evidence and such a perspective.").

[221] *See* Johns, *supra* note 20, at 518 (noting that of sixty-five cases, nineteen involved conclusions that misconduct had occurred but was harmless). The courts in thirty-four of the sixty-five cases found that no misconduct occurred; in only twelve cases did the courts accept the existence of misconduct and conclude that this misconduct was not harmless. *Id.* All sixty-five people were actually innocent. *Id.*

[222] Alschuler, *supra* note 13, at 660.

jurisprudential fiasco" and notes that "it tacitly informs prosecutors that they can weigh the commission of evidentiary or procedural violations not against a legal or ethical standard of appropriate conduct, but rather, against an increasingly accurate prediction that the appellate courts will ignore the misconduct when sufficient evidence exists to prove the defendant's guilt."[223] Similarly, Professor Angela Davis notes that the harmless error rule "permits, perhaps even unintentionally encourages, prosecutors to engage in misconduct during trial with the assurance that so long as the evidence of the defendant's guilt is clear, the conviction will be affirmed."[224] Others note with concern that courts rely on harmless error analysis to excuse even serious and pervasive misconduct.[225] This system creates little incentive for prosecutors to change their behavior and avoid making improper comments[226] because future prosecutors committing the same impropriety in a later case that was held to be misconduct in an earlier one are no more likely than the prosecutor in the first case to see any meaningful consequences from the misconduct.[227] Then-Judge Jerome Frank may have summed it up best when he noted that courts "breed[ ] a deplorably cynical attitude towards the judiciary" when they adopt "an attitude of helpless piety" by using "vigorous language in denouncing" prosecutors' conduct, but refuse to reverse the resulting convictions.[228]

2. The Plain Error Doctrine Exacerbates this Problem by Muddying the Lines Between Whether Misconduct Occurred and Whether it Affected the Outcome. The other major procedural

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[223] Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 425 (1992).

[224] DAVIS, *supra* note 6, at 127.

[225] *See, e.g.*, Johns, *supra* note 20, at 517 (asserting that harmless error cases are often associated with serious prosecutorial misconduct); Alschuler, *supra* note 13, at 660 (noting that application of the harmless error doctrine is not confined to minor instances of prosecutorial misconduct).

[226] Kamin, *supra* note 194, at 15 (arguing that the use of harmless error analysis as currently formulated in prosecutorial misconduct cases means that these cases "merely inform[ ] prosecutors what they may and may not do without giving them any real incentive to change their behaviors").

[227] *Id.* at 56–61 (contrasting the courts' approaches to harmless error with their approaches to qualified immunity and retroactivity, and arguing that the latter two doctrines have significantly more of a future deterrent effect than harmless error analysis).

[228] United States v. Antonelli Fireworks Co., 155 F.2d 631, 661 (2d Cir. 1946) (Frank, J., dissenting), *cert. denied*, 329 U.S. 742 (1946).

doctrine that interferes with the courts' treatment of prosecutorial trial misconduct involves the plain error doctrine, which limits appellate review of errors that were not objected to at trial. "It is well settled that a contemporaneous objection is generally required in order to preserve any error on appeal claiming improper closing argument."[229] When there is no objection at trial, then courts apply the plain error rule to determine whether they should review the alleged error, and if so, how to analyze it. In prosecutorial misconduct cases, when defense counsel fails to object to a statement at trial, this failure to object makes it significantly harder to convince an appellate court that the behavior was misconduct that justifies reversal.

The plain error rule applies in all federal and many state appellate courts.[230] In federal courts, when a timely objection was made at trial, then under Federal Rule of Criminal Procedure 52(a), the government has the burden of showing on appeal that the error did not prejudice the defendant.[231] On the other hand, when there was no objection, then on appeal the defendant must show plain error, which requires both that the error was clearly contrary to law and that the error was so prejudicial that it denied the defendant's right to a fair trial.[232] Some states take related but slightly different approaches.[233] For example, some state courts treat the failure to object at trial as a waiver of the issue on appeal, i.e., a reason to refuse to determine whether there was error at all, rather than whether the error affected the outcome.[234]

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[229] Montz, *supra* note 37, at 76. Unlike harmless error, which is a relatively new doctrine, the doctrine of plain error has existed in various forms for nearly 120 years. *See* Tory A. Weigand, *Raise or Lose: Appellate Discretion and Principled Decision-Making*, 17 SUFFOLK J. TRIAL & APP. ADVOC. 179, 193 (2012) (" '[I]f a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it' even though no exception was made to the error at trial." (quoting Wiborg v. United States, 163 U.S. 632, 658 (1896))).

[230] Morrow & Larson, *supra* note 5, at 355–56.

[231] FED. R. CRIM. P. 52(a).

[232] Morrow & Larson, *supra* note 5, at 355–56. Even when these showings are made, the court still has discretion over whether to remedy the unpreserved error. Berger, *supra* note 191, at 537.

[233] *See* Weigand, *supra* note 229, at 230–42 (detailing many state variations in plain error analysis generally, without focusing on prosecutorial misconduct cases).

[234] *See, e.g.*, State v. Fisher, 202 P.3d 937, 947 (Wash. 2009) ("Defense counsel's failure to object to the misconduct at trial constitutes waiver on appeal unless the misconduct is 'so

This waiver, however, is generally not absolute; most courts will still review the question of whether the prosecutor committed misconduct, even if no objection was made, in limited circumstances.[235] For example, in Washington, courts will review the allegation of prosecutorial misconduct, notwithstanding the failure to object, if "the misconduct is 'so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice' incurable by a jury instruction."[236] This "flagrant and ill-intentioned" standard blurs several related concepts from prosecutorial misconduct analysis: (1) it still uses the concept of "misconduct," which has to do with whether there was an error; (2) it brings in harmless error ideas by talking about whether there was prejudice and whether that prejudice was curable; and (3) it adds a new concept not typically covered in prosecutorial misconduct by referencing prosecutorial intent through the flagrant and ill-intentioned language.[237] This blurring of concepts is not limited to jurisdictions that use the flagrant and ill-intentioned standard, as typical plain error analysis includes both questions of whether there was error (was it plain, i.e., clearly contrary to law) and whether any error was harmless (which requires the defendant to bear the burden of proving prejudice).[238]

Many courts and commentators rely on both efficiency and fairness arguments to justify the plain error doctrine.[239] For

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flagrant and ill-intentioned that it evinces an enduring and resulting prejudice' incurable by a jury instruction." (quoting State v. Gregory, 147 P.3d 1201, 1244 (2006))). It would probably be more precise to use the word "forfeiture" rather than "waiver" in this context, as the failure to object is usually inadvertent rather than a knowing relinquishment of a known right. *See* Weigand, *supra* note 229, at 182–83 (stating that waiver involves intentionally giving up a right, whereas forfeiture arises through neglect).

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

[236] *Fisher*, 202 P.3d at 947 (quoting *Gregory*, 147 P.3d at 1244).

[237] *See* Gershman, *supra* note 7, at 133 (asserting that courts generally do not consider intent in determining whether the conduct was improper).

[238] *See* Morrow & Larson, *supra* note 5, at 355–56 (noting that most state courts ask whether the error was plain, and if so, whether it denied the defendant a fair trial).

[239] *See* Derrick Augustus Carter, *A Restatement of Exceptions to the Preservation of Error Requirement in Criminal Cases*, 46 U. KAN. L. REV. 947, 950 (1998) (summarizing various rationales for requiring preservation of error, including rationales advancing both efficiency and fairness concerns).

example, they stress that defense counsel's timely objection gives the trial court the opportunity to remedy the misconduct immediately, such as by admonishing counsel against making improper arguments and instructing the jury to disregard the improper remarks.[240] Similarly, some writers have emphasized the role that the plain error doctrine plays in maintaining judicial impartiality, arguing that the burden should be on defense counsel rather than trial court judges to identify prosecutorial misconduct as it happens and urge any necessary corrective measures.[241] Additionally, proponents of the plain error rule have expressed concerns about defense attorney gamesmanship, arguing that the plain error rule is necessary to prevent defense counsel from deliberately failing to object when "she believe[s] her case [is] going badly and the appellate court [will] award a new trial on appeal."[242] Therefore, proponents of this doctrine often approve of the extremely low rates of reversal in appellate cases in which trial counsel failed to object.[243] For example, Professor Montz argues that defense counsel's failure to object demonstrates that the prosecutorial comment must not have been very prejudicial.[244]

On the other hand, a number of commentators have criticized the plain error doctrine generally and, in particular, its application in prosecutorial trial misconduct cases. Some commentators criticize

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[240] *See, e.g.*, Montz, *supra* note 37, at 75, 78 (recognizing that a timely objection allows courts to take these steps); Alschuler, *supra* note 13, at 648 (same).

[241] *See* Morrow & Larson, *supra* note 5, at 390–92 (contending that judges are unlikely to intervene sua sponte because they are more concerned with maintaining impartiality).

[242] *Id.* at 388; *see also* Alschuler, *supra* note 13, at 648 ("[T]here is the moral notion that the defendant should not be allowed to 'ride the verdict'; he should not be able to have a conviction set aside on the basis of secret, 'hip-pocket' error while he can retain the benefit of a verdict of acquittal.").

[243] *See, e.g.*, Montz, *supra* note 37, at 81 ("[R]elief should rarely be granted on the assertion of plain error to matters contained in closing argument, for trial strategy looms as an important consideration and such assertions are 'generally denied without explication.' " (quoting State v. Wood, 719 S.W.2d 756, 759 (Mo. 1986) (en banc))).

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

the oft-repeated notion of defense attorney gamesmanship.[245] For example, Professor Laura Bazelon notes that "counsel's ability to spot and call out this type of misconduct does not depend [upon thorough preparation]. Rather, it depends upon knowledge of the relevant case law, careful attention to the word choice of one's opponent, and the confidence necessary to make this type of objection."[246] If appellate courts have difficulty drawing clear lines between proper and improper comments even after a careful review of a written record of the prosecutor's comments and the other evidence produced at trial,[247] then it is even more difficult for defense counsel to quickly identify the problem and raise an objection in seconds at trial.[248] Even if defense counsel is troubled by the prosecutor's comments, these conditions make it difficult for defense counsel to articulate their objections quickly.[249] One author even suggested that "[i]f a trial attorney's attention is on preserving issues for appeal, then, psychologically speaking, the attorney has already lost the trial."[250]

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[245] *See, e.g.*, Carter, *supra* note 239, at 951 ("[T]he trial attorney is frequently inattentive, negligent, or inexperienced. Nothing is gained from sandbagging, except a disparaged reputation or an attorney grievance claim.").

[246] Bazelon, *supra* note 5, at 424. She also argues that law school clinics should train students in detail about the lines between proper and improper prosecutorial comments so that those students will be more able to pick up on the need for objecting at trial. *Id.*

[247] *See supra* Part II.A (explaining the difficult line-drawing on what does and does not constitute misconduct).

[248] *See* Sullivan, *supra* note 57, at 215 (noting how little time defense counsel has to consider the many issues raised by improper prosecutorial comments).

[249] Bazelon provides a great description of her first-hand experience with this situation when she was a young lawyer:

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

Bazelon, *supra* note 5, at 394.

[250] Carter, *supra* note 239, at 951.

Even if defense counsel does pick up quickly enough on the impropriety of the prosecutor's remarks, she has to deal with other considerations that weigh against a decision to object. After all, the conventional wisdom within the field of trial advocacy is that attorneys should not object during closing arguments "unless things are terrible."[251] Defense counsel may be concerned about maintaining good relationships with prosecutors, which can be important for her ability to advocate successfully for future clients.[252] Additionally, counsel may be concerned about irritating the judge or jury by interrupting opposing counsel,[253] which can heighten jurors' general tendencies to favor prosecutors over defense counsel.[254] More specifically, defense counsel may be concerned about the jury's likely reaction if her objection is overruled.[255] A trial court decision to overrule an objection to improper prosecutorial misconduct may actually encourage the jury to rely on those comments, although appellate courts rarely recognize that type of prejudice.[256] Additionally, courts and some

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[251] KENNEY F. HEGLAND, TRIAL AND PRACTICE SKILLS IN A NUTSHELL 199 (2d ed. 1994); *see also id.* (acknowledging "an unspoken convention that it's not nice to object during your opponent's opening or closing unless things are terrible" (emphasis omitted)).

[252] Bazelon, *supra* note 5, at 426. Bazelon also raises interesting questions about whether the type of crime (e.g., sexual abuse of a minor) might not only make the prosecutor more likely to resort to improper argument, but also might make defense counsel less likely to object. *Id.* at 430.

[253] *See* Carter, *supra* note 239, at 951 (cautioning that the attorney who objects frequently may "become a pest to the judge"); *see also* Alschuler, *supra* note 13, at 648 (arguing that requiring an objection in prosecutorial misconduct cases is particularly problematic, in part because "a jury is likely to resent repeated objections, and objection during an attorney's closing argument often seems especially impolite").

[254] Diamond et al., *supra* note 140, at 44 (describing research that suggests that jurors rate prosecutors' opening statements as more effective and organized than those of defense attorneys).

[255] WILLIAM F.X. GEOGHAN JR., THE PLAINTIFF'S APPROACH ON CLOSING ARGUMENT, ON PERSUASION: THE KEY TO SUCCESS ON TRIAL 68 (Grace W. Holmes ed., 1992) ("Nothing is so devastating as to have the court say, 'Well, Mr. Geoghan, there is a certain leeway allowed in summation; your objection is overruled.' ").

[256] Sullivan, *supra* note 57, at 247 ("One aspect of the objection process often apparently ignored by the appellate courts is the prejudice which may result when the trial court overrules a proper objection or mistrial motion and permits the prosecution to continue an impermissible line of argument."). Sullivan describes the reasoning from an Eighth Circuit Court of Appeals decision, and further explains that:

> [t]he prejudice inherent in the trial court's error in overruling defense counsel's timely and correct objection lies in the fact that the jury may ultimately reach its verdict or sentencing verdict based upon the improper

commentators overstate the value of a trial court's decision to sustain an objection to prosecutorial trial misconduct. In fact, the misconduct may still prejudice the defendant: "[T]he defense attorney's complaint, even if sustained by the court, may have exactly the opposite effect from the one intended. It may call attention to the prosecutor's improper remarks and reemphasize them in the jurors' minds."[257] That risk is particularly acute in prosecutorial misconduct cases, which often involve a prosecutor's "vivid imagery" that is accessible to jurors.[258] The judge's "curative instruction" may provide only an illusory remedy.[259]

Therefore, defense counsel face a no-win situation when deciding whether to object to prosecutorial trial misconduct.[260] If defense counsel fails to object, the appellate court will only review allegations of misconduct under the plain error standard that muddies concepts of whether there was an error and whether it mattered, yet if counsel does object, the court will either conclude that the trial judge's overruling of the objection was harmless error or that the trial judge's sustaining the objection effectively cured any error.[261]

B. THESE PROCEDURAL DOCTRINES ALLOW HINDSIGHT AND OUTCOME BIASES TO AFFECT APPELLATE REVIEW OF PROSECUTORIAL TRIAL MISCONDUCT CLAIMS

There are likely many causes of appellate courts' overreliance on the procedural doctrines of harmless error and plain error, but cognitive bias research illuminates at least some of these causes and sets up the suggestions discussed in the next section for reformulating those doctrines in prosecutorial trial misconduct cases.

> reasoning advanced by the prosecution, especially in light of the trial court's apparent approval of the prosecutor's argument.

Id. at 247–48.

257 Alschuler, *supra* note 13, at 649.

258 *Id.*

259 Alford, *supra* note 38, at 337.

260 Alschuler, *supra* note 13, at 647 (noting that the plain error rule "leaves the defense attorney effectively boxed in when it comes to an appeal, whatever the prosecutor's conduct").

261 *Id.*

First, appellate courts are likely affected by hindsight bias. Hindsight bias is the tendency for people to think that a particular outcome (in this case the defendant's conviction at trial) was either inevitable or at least more likely to occur than it really was.[262] Thus, hindsight bias means that when a judge knows that a defendant was convicted, the judge is more likely to think that the conviction was more inevitable than it really was.[263] Hindsight bias is particularly dangerous on appeal because of a "base rate problem": appellate judges only see cases in which the defendant was convicted at trial because the prosecution cannot appeal acquittals, so "[e]very criminal defendant that appellate judges see is guilty, a convicted criminal before the law."[264] Therefore, appellate judges may be inclined to overestimate the likelihood of that conviction and underestimate the potential impact of errors like prosecutorial misconduct.

Closely related is the idea of outcome bias. Outcome bias refers to the way that we judge a decision as good or bad in hindsight, based on what we know about the outcome of the decision.[265] For example, subjects in one study more often rated a decision to perform surgery as a good one when told that the patient survived the surgery than when told that the patient died.[266] This reasoning, while intuitively understandable, is flawed because information about what happened after a decision was made cannot help us learn to make better decisions later "unless the decision maker is clairvoyant."[267] Together, hindsight and outcome biases lead to overreliance on harmless error because they make convictions seem both inevitable and correct: "With hindsight knowledge that a jury found the defendant guilty beyond a reasonable doubt, judges are likely to be predisposed to view the

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[262] Findley & Scott, *supra* note 34, at 317.

[263] *See* Solomon, *supra* note 202, at 1086.

[264] *Id.*

[265] Findley & Scott, *supra* note 34, at 320.

[266] *Id.*

[267] *Id.* (quoting Jonathan Baron & John C. Hershey, *Outcome Bias in Decision Evaluation*, 54 J. PERSONALITY & SOC. PSYCHOL. 569, 569 (1988)).

conviction as both inevitable and a sound decision, despite a procedural or constitutional error in the proceedings."[268]

The plain error rule exacerbates this problem by making it very hard for appellate courts to reverse based on unpreserved errors: "Given that appellate arguments premised on unpreserved error are likely to be common, but that the chance of success on these arguments is quite low, appellate courts will likely develop a cognitive bias in favor of rejecting appeals premised on unpreserved error."[269] The plain error rule also exacerbates the problem because it encourages case-by-case decisions rather than precedential reasoning.[270] The process of articulating precedential reasoning may improve judicial decisionmaking, while the ability to offer conclusory analysis of fact-specific points may make judges' reasoning more vulnerable to leaps in logic or other reasoning problems.[271] Research has confirmed that judges are susceptible to these biases, and these biases "are likely reflected in the many cases in which appellate courts have expressed confidence that the . . . evidence of guilt was 'overwhelming,' even where DNA later proved that the defendants were in fact innocent."[272]

V. APPELLATE COURTS SHOULD REWORK THEIR APPROACHES TO PROCEDURAL DOCTRINES TO PROVIDE MEANINGFUL REMEDIES FOR PROSECUTORIAL TRIAL MISCONDUCT

While the problems identified above are daunting, cognitive bias research suggests that changes to the procedural barriers to prosecutorial trial misconduct claims may make a significant difference. This Article focuses on changes to these procedural doctrines as a way of providing greater remedies for individual defendants who have been subjected to prosecutorial trial misconduct. Other scholars have written extensively about more

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[268] *Id.* at 321; *see also* Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 2 (applying similar reasoning to judicial review of ineffective assistance of counsel claims).

[269] Berger, *supra* note 191, at 541.

[270] *Id.* at 541–42.

[271] *Id.* at 542.

[272] Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 MARQ. L. REV. 591, 606 (2009).

systemic remedies,[273] and while some of their proposed approaches may well be very valuable and complementary to the solutions proposed in this Article, I have chosen instead to focus more on remedies in individual cases. "The relief granted for prosecutorial misconduct should redress the harm suffered by the defendant rather than merely send the government a message about the impropriety of its conduct."[274] Furthermore, this Article focuses on appellate rather than trial level remedies.[275] "[A]ppellate reversals serve important constitutional functions by condemning the infringement of the defendant's rights; educating police investigators, prosecutors, and trial judges; and deterring them from future violations."[276] Additionally, my sense is that focusing too much on systemic remedies, without also focusing more carefully on remedies for individual defendants, contributes to moral disengagement and diffusion of responsibilities, perpetuating the problems discussed in this Article. Thus, while systemic and

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[273] *See, e.g.*, Joy, *supra* note 127, at 427 (arguing for a variety of ways to make prosecutors more accountable for misconduct, including measures to be implemented by prosecutors' offices, bar associations, and others); Cummings, *supra* note 20, at 2156–58 (proposing several solutions, including "community prosecutors" who have responsibility for more than just obtaining convictions); Montz, *supra* note 37, at 131 (discussing with approval the proposal of a Florida judge for increased training of prosecutors). Others have encouraged naming prosecutors who have committed misconduct in judicial opinions. *See, e.g.*, Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1062–63 (2009). Doing so may facilitate review by state bar associations, which has been a common solution advocated by various commentators. *See, e.g.*, Alford, *supra* note 79, at 487–96 (describing the institutional inadequacy of the steps taken by the judiciary in several states to address extreme prosecutorial misconduct).

[274] Henning, *supra* note 3, at 715.

[275] Some judges and commentators argue that trial courts are in the best position to deal with prosecutorial misconduct, so trial court decisions should be given a great deal of deference. *See, e.g.*, Hon. D. Brooks Smith, *Policing Prosecutors: What Role Can Appellate Courts Play?*, 38 HOFSTRA L. REV. 835, 835 (2010) (reasoning that trial judges are in a better position than appellate judges to ensure that prosecutors fulfill the duties of their office); Nidiry, *supra* note 12, at 1308 (discussing the ABA standards that emphasize trial judges' options for responding to prosecutorial misconduct, including "sustaining the objection for the record, instructing the jury to ignore the inappropriate comment, reprimanding the attorney, and declaring a mistrial"). However, that position fails to deal with the fact that trial court judges very rarely take any action when defense counsel fails to object, as discussed in Part IV.a.*2*, and the actions that they do take may not fully remedy the problem, as discussed in Part IV.A.*1*, which discusses harmless error.

[276] Simon, *supra* note 151, at 580.

trial-level remedies are certainly worth exploring, appellate court remedies for individual defendants are particularly valuable.[277]

In order to facilitate meaningful remedies for individual defendants, this Article proposes significant changes to harmless error analysis and moderate changes to the plain error doctrine as applied in prosecutorial misconduct cases.[278] These changes affect the standards used to evaluate harmless error and the way that the burden of proving harmlessness is allocated.

A. COURTS SHOULD USE AN ERROR-FOCUSED RATHER THAN A GUILT-FOCUSED APPROACH TO HARMLESS ERROR

The most fundamental change proposed here involves shifting from a guilt-focused approach to harmless error. As discussed above, courts frequently rely on the guilt-focused approach to harmless error, which looks at the strength of the evidence against the defendant.[279] But courts instead should use an error-focused approach, looking at the likely effect that the error had on the outcome of the trial. The latter approach is superior from a cognitive bias perspective, and it could easily be implemented if courts changed the factors that they consider in analyzing harmless error.

1. Why an Error-Focused Approach Is Superior to a Guilt-Focused Approach. As described in Part IV.A above, there are two general approaches to determining whether an error was harmless: (1) the guilt-focused approach, in which the court pretends that the error did not occur and looks at the strength of the remaining evidence; and (2) the error-focused approach, which looks at whether and to what extent the error could have affected the outcome of the trial. While courts more commonly use the guilt-

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[277] *See* Alschuler, *supra* note 13, at 668 (suggesting that "the courts' 'understanding attitude' toward prosecutorial misconduct has added to the bulk of appellate litigation" and that increasing the reversal rate in prosecutorial misconduct cases would likely lead to a reduction in the number of instances of prosecutorial trial misconduct).

[278] Harmless error is discussed first because it is so much more commonly used, as explained in Part IV.A, and the changes to harmless error analysis impact the utility of the plain error rule in these cases.

[279] *See supra* Part IV.A.*1*.

focused approach,[280] the cognitive bias research provides two clear reasons why courts should use an error-focused approach instead.[281]

First, courts commonly overestimate the strength of the evidence against the defendant because of hindsight and outcome biases.[282] Hindsight bias makes the defendant's conviction seem more likely than it really was, and outcome bias compounds the error by making it seem like more of a sound decision than it really was.[283] Thus, the guilt-focused approach could lead courts to overestimate the strength of the evidence against the defendant. The error-focused approach, by contrast, frames the question of harmless error in a way that suggests that the error may in fact have affected the outcome of the case; that framing may help, at least in a small way, counter the tendency to assume that the conviction was inevitable.[284] Courts could still find an error to be harmless, but having to articulate their analysis in terms of how the error could have affected the reasoning is consistent with the well-accepted de-biasing strategy of having to articulate the opposite position.[285]

Second, coherence-based reasoning and the story model suggest that the guilt-focused approach is problematic. Specifically, the research supporting both models show that decisionmakers look at evidence holistically, rather than evaluating each piece of information separately, and their assessments of the case as a whole taint their understanding of the significance of any single

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[280] *See, e.g.*, Walker, *supra* note 203, at 397.

[281] These critiques likely apply to harmless error analysis generally, not just for prosecutorial misconduct claims, but the soundness of applying them more broadly is beyond the scope of this Article.

[282] Findley & Scott, *supra* note 34, at 321.

[283] *See supra* Part IV.B (discussing the impact of these procedural doctrines on appellate review of prosecutorial misconduct claims); *see also* Findley & Scott, *supra* note 34, at 321 ("With hindsight knowledge that a jury found the defendant guilty beyond a reasonable doubt, judges are likely to be predisposed to view the conviction as both inevitable and a sound decision, despite a procedural or constitutional error in the proceedings.").

[284] *See* Solomon, *supra* note 202, at 1071 (noting that courts tend to find errors harmless significantly more often when using a guilt-focused, rather than an error-focused, analysis).

[285] *See* Findley & Scott, *supra* note 34, at 371 (summarizing research indicating that when people articulate reasons that counter their own position, the "illusion of validity" can be reduced); O'Brien, *supra* note 27, at 34 (proposing that a more thorough evaluation of alternatives can help counter cognitive biases).

piece of evidence.[286] Thus, exposure to prosecutorial misconduct may have affected the jurors' analysis of the strength of the remaining evidence; it is a cognitive fiction to try to evaluate the remaining evidence while pretending that the error did not occur, as required under the guilt-focused approach. Similarly, appellate judges reviewing the evidence will likely be subject to similar coherence-shifts, so the same reasoning applies to judicial decisionmaking.[287] Additionally, focusing on the strength of the evidence, including disturbing details of the case, may arouse the judge's anger, which can also skew the reviewing judge's decisionmaking.[288]

For both these reasons, the error-focused approach is more consistent with cognitive theories of decisionmaking, although the error-focused approach is not without challenges. Specifically, because coherence-based reasoning suggests that information is evaluated holistically, courts should not move from one legal fiction to another by assuming that they can determine whether the error did in fact affect the outcome. Instead, courts should "holistically evaluate the seriousness of the error and its likely position in the constellation of facts that emerged at trial"[289] and ask whether it seems likely that the error affected the outcome.

2. How an Error-Focused Approach Would Work. In order to implement this shift from a guilt-focused to an error-focused analysis, courts should change both the standard for when an

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[286] *See supra* Part III (asserting that juries are affected by prosecutorial misconduct more than currently recognized); *see also* Simon, *supra* note 151, at 519 (observing that "[j]urors with a slight initial inclination to acquit or convict are likely to amplify their perception of the case," a tendency that is strengthened by "evidence that is [only] weakly probative of guilt").

[287] *See* Simon, *supra* note 151, at 579 ("Since coherence effects occur without awareness, the judge will decide in accordance with her perception of the evidence, which, unbeknownst to her, has likely been skewed by the illicit variable."). Simon suggests, without much discussion, that improper attorney comments would not have the same effects as introduction of improper evidence on coherence-shifts, but he does conclude that coherence-based reasoning "provide[s] some unique insights into the jurisprudential dilemma by adding weight to the error-based approach. These observations apply equally to evidentiary and non-evidentiary errors." *Id.* at 580.

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

[289] Griffin, *supra* note 142, at 319.

error is harmless and the factors used to determine whether the standard has been met.

As for the standard that should be applied, an error should be deemed to be harmless when it has only a slight chance of contributing to the defendant's conviction.[290] This approach is error-focused in that it evaluates the likely effect the error had on the outcome. It is therefore superior to the current approach distinguishing between constitutional and non-constitutional errors, which is a historical anomaly.[291] It is also superior to other common proposals that focus more narrowly on prosecutorial intent,[292] which fail to account for the significant role that cognitive biases play in prosecutorial trial misconduct, although the analysis discussed below would allow courts to address cases involving intentional misconduct as well.

In implementing this standard, the courts should reevaluate the factors that contribute to harmless error analysis.[293] Specifically,

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[290] *See* Landes & Posner, *supra* note 195, at 174 (suggesting that this definition is the most appropriate one). Landes and Posner argue that "an error is harmless when it has no (or, to be realistic, only a very slight) positive impact on the probability of conviction." *Id.* They justify this approach on efficiency grounds, arguing that it would lead to the optimization of reversals as compared to other possible standards. *See id.* (discussing several other possible definitions that could be used and explaining why they are less efficient than this definition); *see also* Griffin, *supra* note 142, at 318–19 (arguing that courts should use a "likely affected the outcome" standard).

[291] Landes & Posner, *supra* note 195, at 172. Another article suggests that advocates should try to reframe many prosecutorial misconduct arguments as Sixth Amendment violations to gain access to the constitutional harmless error standard, given how difficult it is for a litigant to win under the non-constitutional standard. *See* Alford, *supra* note 79, at 524 (arguing that federal habeas review provides a good forum for prosecutorial misconduct claims).

[292] For example, Professor Gershman suggests that courts should consider a prosecutor's subjective intent in evaluating whether prosecutorial misconduct affected the outcome of a case. *See generally* Gershman, *supra* note 7 (arguing that a prosecutor's subjective intent should be taken into account both in determining whether conduct was misconduct and whether the error was harmless). Another intent-focused approach is offered by Professor Kamin, who argues for per se reversible error when the prosecutor knew or should have known that his conduct was improper. *See generally* Kamin, *supra* note 194 (discussing the history of harmless error and suggesting two revisions to the doctrine). As described in more detail below, however, courts applying the approach described in this Article would focus on some of the same factors that Gershman and Kamin argue should be considered, without minimizing remedies in cases in which the misconduct likely resulted from cognitive biases.

[293] *See supra* Part IV.A.*1* (detailing the factors that courts typically consider, including the severity of the misconduct, any corrective measures taken by the trial court, the strength of

the courts should rely primarily on two factors: the severity and pervasiveness of the misconduct, and the connection (if any) between the particular misconduct at issue and the disputed issues in the case. Courts could also consider, although with caution, curative measures taken by the trial court, such as jury instructions. Courts should not, however, consider the strength of the remaining evidence or whether defense counsel provoked the error. Each of these potential factors is explained below.

a. Crucial Factors: Severity and Pervasiveness of Misconduct, and Connection to Trial Narratives. The most crucial factor involves two related parts: the severity and pervasiveness of the misconduct. Courts should focus primarily on the severity of the misconduct, while also looking at the closely related question of the pervasiveness of that misconduct.[294] The importance of these factors comes from use of the error-focused approach rather than the guilt-focused approach, as misconduct that is severe and pervasive is more likely to cause harm.[295]

Regarding severity, courts should cease their current practice of excusing serious misconduct. Under current law, "[a] finding of 'harmless error' is not equivalent to a finding of trivial error. Indeed, harmless error cases often reveal serious prosecutorial misconduct."[296] Yet repeated and pervasive misconduct can create "a poison which the defense [cannot] drain from the case."[297] Of course, "severity" is a somewhat malleable concept, raising difficult line-drawing questions. A perfect resolution of that difficulty is impossible, but courts should approach this question from a number of angles. First, courts should increase their emphasis on the importance of the pervasiveness of the misconduct, something that courts already often consider.[298] For

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the remaining "untainted" evidence, the other side's conduct that may have invited the misconduct, and the details of the jury deliberations).

[294] *See, e.g.*, Griffin, *supra* note 142, at 319 (urging courts to focus on "the seriousness of the error and its likely position in the constellation of facts that emerged at trial").

[295] Cicchini, *supra* note 23, at 342 ("[T]he more flagrant, intentional, and repetitive the misconduct, the greater the resulting harm.").

[296] Johns, *supra* note 20, at 517; *see also id.* (discussing an Innocence Project study "documenting a number of cases where egregious misconduct was found to be harmless").

[297] *Id.* (quoting People v. McKenzie, No. A112837, 2007 WL 2193548, at *8 (Cal. Ct. App. Aug. 1, 2007)).

[298] *See supra* Part II.C.

example, the Supreme Court in *Berger* concluded that the misconduct was not harmless because, among other things, it was "pronounced and persistent."[299] Some commentators have similarly noted that courts currently consider pervasiveness as a factor in analyzing harmless error.[300] Under an error-focused approach, pervasiveness would become a more significant part of the court's analysis, as the repetition of the misconduct would increase the likelihood that the jury would be influenced by it.

Furthermore, courts should distinguish between trivial misconduct and more severe misconduct.[301] Misconduct might be trivial in cases that were close as to whether the conduct was truly inappropriate.[302] Misconduct might also be treated as trivial when the violation was more about a technical wording issue rather than inflammatory or emotional appeals.[303] Other types of misconduct, such as misstatements about the presumptions of innocence or burdens of proof, would inherently be more serious as they could affect the jurors' understanding of the relevant law.[304]

Additionally, courts should be particularly concerned about the potential effects of misconduct that involves depersonalization. As noted above in Part II.B, research into moral disengagement suggests that depersonalization is a powerful tool that allows actors to reach decisions that they would not otherwise reach. Prosecutors systematically depersonalize criminal defendants in a variety of ways.[305] Dehumanization can lead to moral exclusion,

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[299] Berger v. United States, 295 U.S. 78, 89 (1935).

[300] *See, e.g.*, Bazelon, *supra* note 5, at 423 ("The more numerous the instances [of misconduct], the more likely that the cumulative effect of the errors will require reversal.").

[301] *See, e.g.*, Alschuler, *supra* note 13, at 663–66 (proposing that courts employ a sliding scale for distinguishing between trivial and severe misconduct).

[302] *See id.* at 666 (arguing that this approach would require the courts to offer more clarity about the extent to which they view instances of misconduct as trivial or serious).

[303] *Cf. id.* (noting that use of a sliding scale would discourage reversal "for minor or technical violations that probably did not affect the verdict"); *see also* Bazelon, *supra* note 5, at 423 (noting that courts sometimes consider whether misconduct was "truly blatant and inflammatory").

[304] *See* Berger, *supra* note 191, at 550–51 (discussing a case in which the prosecutor in closing argument told the jury that it no longer had to apply the presumption of innocence, and questioning how the significant evidence of guilt could ever "moot the issue of whether the jury properly understood the applicable law").

[305] *See* Cummings, *supra* note 20, at 2154–56 (discussing, for example, use of blanket terms and terms distinguishing criminals from non-criminals).

placing those stigmatized "outside the boundary in which moral values, rules, and considerations of fairness apply."[306] Furthermore, this dehumanization can have subconscious, neurological effects, in that people may fail to activate the part of the brain typically involved in social perception when viewing members of highly stigmatized groups.[307] Thus, prosecutorial misconduct that involves dehumanizing images is inherently severe, even if it is not repeated and even if defense counsel failed to object.[308]

In assessing severity, courts should also look carefully at the connection between the particular misconduct and the disputed issue(s) in the case.[309] Courts should analyze the theories offered by both the prosecution and the defense to see if the misconduct "affects the entire narrative arc or merely a discrete or insignificant piece of it."[310] For example, if the disputed issues in a particular case involves credibility determinations, then prosecutorial misconduct may well affect the outcome, particularly if the misconduct involves improper vouching for the prosecution's witnesses or improper attacks on defense counsel's credibility. Similarly, prosecutorial misconduct involving the defendant's failure to offer evidence (shifting the burden of proof) would be more likely to affect the outcome if the disputed issue in the case was the

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[306] Phillip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292, 293 (2008) (quotation omitted).

[307] *Id.* at 294 (summarizing results from a study indicating that "[t]hose who are the least value in the culture were not deemed worthy of social consideration on a neurological level").

[308] If defense counsel did object, that factor could be slightly useful toward a finding of severity, in that defense counsel both noticed the misconduct and was willing to risk drawing attention to the misconduct or angering jurors by interrupting. *See supra* notes 251–59 and accompanying text (discussing reasons why defense counsel may not object). The lack of objection, in contrast, may provide some slight inference against severity, in that the failure to object could be read to suggest that defense counsel may have failed to pick up on the misconduct (and therefore a jury would similarly have been unlikely to do so as well). But the other reasons that defense counsel may not have objected mean that courts should not rely heavily at all on the lack of a defense objection when considering severity.

[309] *See, e.g.*, Alschuler, *supra* note 13, at 662 (noting that harmless error should consider, among other things, "whether the prosecutor's statement was so irrelevant to the case at hand").

[310] Griffin, *supra* note 142, at 319. Griffin was talking about evidentiary errors rather than prosecutorial misconduct, but the narrative arc of the case is perhaps even more important in prosecutorial misconduct cases.

identity of the person who committed the crime than if the defendant conceded involvement in the crime but challenged proof of intent. By contrast, highly inflammatory images or words can affect the entire trial, even if they are not linked directly to a specific count.[311]

This focus on the severity of the misconduct and its interaction with trial narratives more accurately reflects the importance of the error-focused approach, as explained by the cognitive bias research above, and it promotes respect for the judiciary.[312] Although this approach is not without its challenges, it still represents an improvement on the current guilt-focused approach taken by most courts. The current guilt-focused approach "undercuts the expressive, educational, and deterrent functions of appellate review."[313] By focusing instead on the severity of the misconduct, courts can "vindicate significant rights while discouraging reversals for minor or technical violations that probably did not affect the verdict."[314] Similarly, courts could uphold convictions even in the face of severe errors if they were convinced that the particular circumstances of the case make it unlikely that the error affected the verdict.[315]

b. Factors that Should be Relied on Only with Significant Caution: Jury Instructions and Other Curative Measures. Courts should also be far more cautious than they currently are about

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[311] *See, e.g., In re* Glasmann, 286 P.3d 673, 681 (Wash. 2012) (en banc) ("In this case, the use of highly inflammatory images unrelated to any specific count was misconduct that contaminated the entire proceedings.").

[312] *See* Alschuler, *supra* note 13, at 662–63 ("The danger of promoting a cynical disrespect for the judiciary seems greatest when affirmance follows truly outrageous misconduct.").

[313] Simon, *supra* note 151, at 582; *see also* Fisher, *supra* note 199, at 1321 ("In order to properly protect the process values inherent in the right to due process, the due process fairness inquiry must remain separate from the determination of impact on the outcome. Otherwise, constitutional limitations on prosecutorial conduct would fluctuate with the strength of the state's case against the defendant, with outrageously egregious conduct permissible when the defendant's guilt seems apparent. When such outrageous conduct is permitted, criminal proceedings lose their appearance of fairness. This ends-justifies-the-means approach to defining due process is incompatible with the process goals of the criminal justice system." (footnotes omitted)).

[314] Alschuler, *supra* note 13, at 666.

[315] *See* Berger, *supra* note 191, at 552 (discussing circumstances that could be used to find that a typically serious error, such as a misstatement of the applicable law, may not actually be serious in the context of a particular case in which other factors suggest that the outcome was not affected).

concluding that a trial court's curative measures, especially jury instructions, make an error harmless. Under current law, courts often rely on the curative effect of jury instructions, presuming that juries will follow those instructions.[316] This presumption covers both general instructions given in every case, such as an instruction that attorneys' comments are not evidence, and specific instructions to disregard comments that the trial court declared to be improper.[317] In fact, blanket presumptions about the effectiveness of limiting instructions are exercises in pure fiction.[318] Numerous judges and commentators have recognized this fiction, but courts continue to rely on limiting instructions as essential to the operation of the jury system.[319]

Cognitive bias research shows that this reliance on limiting instructions is based on a number of flawed assumptions, and more importantly, offers a potential way forward that can balance judicial economy with protecting a defendant's right to a fair trial. First, courts' reliance on limiting instructions rests on an incorrect assumption that any piece of evidence or information can be cleanly excised from the way that the trial's narrative unfolds.[320] As explained above in the sections on the story model of juror deliberation and coherence-based reasoning, however, information may influence decisionmakers in ways that they do not realize and may taint their evaluation of other unrelated information.[321] Because of this imperceptible taint, despite jurors' best efforts,

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[316] *See* Montz, *supra* note 37, at 99–100 (discussing cases in which courts concluded that errors in reading from transcripts not in evidence to the jury were harmless because of very carefully tailored jury instructions).

[317] *See* Cicchini, *supra* note 23, at 351–52 (discussing a case where the court held that jury instructions that prosecutors' arguments are not evidence cured an improper closing argument). Cicchini goes on to argue that when the objection concerns the prosecutor's improper argument, then instruction on what constitutes proper evidence is irrelevant. *Id.* at 352.

[318] Griffin, *supra* note 142, at 321.

[319] *Id.* at 322–23 (summarizing critiques of limiting instructions from, among others, Justice Robert Jackson and Judge Learned Hand, and discussing the reasons why courts continue to rely on limiting instructions in spite of these long-standing and vigorous critiques).

[320] *Id.*

[321] *See supra* Part III; *see also* Griffin, *supra* note 142, at 324–25 (discussing the way that each new piece of evidence fits into the "shifting mosaic" of the case and the difficulties of untangling explicit and implicit influences on decisionmaking (quoting United States v. Schipani, 289 F. Supp. 43, 56 (E.D.N.Y. 1968))).

they cannot effectively disregard the improper information.[322] Social science research shows "that limiting instructions fall short when it comes to any highly salient or emotionally charged content."[323] Therefore, courts should stop repeating the fiction that an error is harmless in part because of typical limiting instructions.

Instead, courts should consider adopting proposals regarding limiting instructions that are more grounded in the social science research.[324] These proposals include telling jurors why they have been told to disregard certain information and allowing jurors to deliberate on and reaffirm their commitment to ignoring that information.[325] Such an instruction would only be given in a prosecutorial misconduct case if the trial court did conclude that at least some conduct was error; it would not be applied in cases where the trial court allowed the prosecutor to commit misconduct or where the defendant failed to object. It could, however, be coupled with a general de-biasing instruction that would help minimize the impacts of cognitive bias on general deliberation, apart from the specific issue of prosecutorial misconduct.[326] Thus, this factor would need to be approached significantly more cautiously than under current case law.

Furthermore, courts should look carefully at the trial court's other actions. As explained in Part IV.A.*2* above, when a trial judge overrules an objection to improper prosecutorial comments, the jury may see that as judicial approval of the comment. And even if the judge sustains an objection, the instruction to disregard might highlight the misconduct. Courts should therefore look carefully at the trial court's actions and should be cautious about concluding that they necessarily cured any prejudice to the defendant.

c. Factors that Should Not Be Used: Strength of the Other Evidence and Invited Error. Perhaps the biggest change to the harmless error analysis proposed here is the rejection of both the

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[322] Griffin, *supra* note 142, at 324.

[323] *Id.*

[324] *See, e.g., id.* at 330–32 (summarizing various proposals).

[325] *See id.* at 330 (noting that these approaches may encourage jurors to "buy into the rationale for exclusion").

[326] *See* Simon, *supra* note 151, at 543–44, 548–49, 569–74 (discussing debiasing instructions).

strength of the other evidence and the invited error doctrine. The strength of the other evidence is often the most important factor under current formulations of harmless error analysis, as the guilt-focused approach is framed in terms of the strength of the other evidence.[327] But as explained above, cognitive bias research consistently demonstrates that decisionmakers cannot effectively evaluate the strength of other evidence without there being some taint from the error. The story model and coherence-based reasoning both show that jurors likely make decisions holistically rather than based on a mathematical calculation about the value of each thing that happens in the trial, and outcome and hindsight bias research shows that reviewing decisionmakers are likely to under-weigh the potential taint from the error. For these reasons, courts should reject reliance on the strength of the rest of the evidence as a factor for harmless error. Presumably, if the other evidence is strong, then the prosecution should be able to obtain a conviction again upon retrial.[328] And, defendants are entitled to a fair trial regardless of factual guilt.[329]

Additionally, courts should not use "invited error" as an excuse for serious and pervasive misconduct. The "invited error" or "invited response" rule allows courts to excuse prosecutorial trial misconduct that occurs during rebuttal closing: "If the prosecutor's misconduct . . . was provoked by defense counsel's own improper argument, reviewing courts will generally conclude that the prosecutor was simply 'righting the scale' so that reversal of the defendant's conviction is not required."[330] The ABA Standards for Criminal Justice explicitly authorize such responsive arguments.[331] Analytically, the invited error doctrine relates to the question of whether the comments were misconduct: if the

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[327] *See supra* notes 212–15 and accompanying text.

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

[329] *See, e.g.*, Cicchini, *supra* note 23, at 346–47 (describing the criticisms of the current doctrine, which seems to suggest that prosecutorial misconduct is acceptable when the state has a strong case).

[330] Bazelon, *supra* note 5, at 423.

[331] *See* AM. BAR ASS'N, *supra* note 13, at 109 ("[A] prosecutor may be justified in making such a reply to an improper argument of defense counsel if made without provocation by the prosecutor.").

defense counsel provoked the response by making improper argument, then by definition it is not improper for the courts to respond. But courts often apply this doctrine under harmless error analysis by saying that they do not need to reverse because of the invited error doctrine.[332] In doing so, courts often use invited error to excuse as harmless even very significant prosecutorial misconduct.[333] When this happens, courts should not let defense misbehavior blind them to the real issues in the case, which should be (1) whether the prosecutor's comments were proper, and (2) if not, whether the improper comments were likely to have affected the outcome of the case.[334]

B. COURTS SHOULD RETHINK ALLOCATION OF THE BURDEN OF PROOF IN PROSECUTORIAL TRIAL MISCONDUCT CASES

Although the courts should consistently take an error-focused approach to harmless error, as described above, the burden of proof for determining whether the misconduct affected the outcome should depend on whether the misconduct was objected to at trial. If so, then the prosecution should bear the burden of showing that the misconduct was harmless. If not, then the defendant should bear the burden of showing that the error did affect the outcome.

1. The Prosecution Should Generally Bear the Burden of Proving that Prosecutorial Trial Misconduct Was Harmless. When the defendant objects to alleged prosecutorial misconduct at trial and the appellate court concludes that the prosecutor did in fact commit misconduct, then the prosecution should bear the burden

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

[333] Nidiry, *supra* note 12, at 1320–21 ("The prosecutor is not free to make any response she desires to a defense excess; her response must be measured and can only go so far as to be equivalent to the defendant's impropriety. In practice, however, limitations on invited response often give way, leaving prosecutors a blanket license for improper argument." (footnotes omitted)).

[334] *See* Alschuler, *supra* note 13, at 658 (asserting that the central inquiry is "whether the prosecutor's behavior was likely to induce a decision not based on a rational assessment of the evidence").

of proving that the misconduct was harmless. Specifically, the prosecution would have to show that there was only a slight chance that the misconduct contributed to the defendant's conviction.[335] If the prosecution fails to meet this burden, then the defendant's conviction should be reversed. This approach has several benefits and is a better approach than requiring per se reversal in prosecutorial trial misconduct cases.

The first benefit of this approach is that placing the burden on the state minimizes the effect of hindsight bias.[336] Although this approach is unlikely to completely eliminate the effect of hindsight or outcome bias on harmless error analysis,[337] the combination of focusing on the likely effect of the error on the verdict and requiring the prosecution to bear the burden of justifying affirmance should help combat these biases.

This approach is also supported by public policy considerations. "[I]t would be unfair to allow the prosecutor to break rules of conduct and then require that the defendant prove the misconduct changed the outcome of the proceeding."[338] Prosecutorial

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[335] Landes and Posner argue that "an error is harmless when it has no (or, to be realistic, only a very slight) positive impact on the probability of conviction." Landes & Posner, *supra* note 195, at 174. They justify this approach on efficiency grounds, arguing that it would lead to the optimization of reversals as compared to other possible standards. *See id.* (discussing several other possible definitions that could be used and explaining why they are less efficient than this definition). Landes and Posner did not specifically discuss who would bear the burden of meeting this standard, but the standard seems to implicitly place the burden on the state, in the same way that the state must show that an error is harmless beyond a reasonable doubt under the current constitutional harmless error standard. *Id.* at 172. Additional arguments for why the state should bear the burden of proof are discussed below.

[336] Findley & Scott, *supra* note 34, at 322 ("The effect of hindsight bias on appellate and postconviction review is likely to be even more pronounced in situations where the burden of persuasion is placed on the defendant.").

[337] *Id.* at 321 ("To some extent, placing the burden of proving the harmless nature of an error on the beneficiary of the error—in criminal cases, requiring the government to prove harmless error beyond a reasonable doubt—might be intended to mitigate the effects of hindsight and outcome biases. Nonetheless, courts routinely find significant errors harmless, and that is partly because hindsight bias and outcome bias work in tandem with other values, such as a desire to respect finality and avoid wasteful retrials of obviously guilty defendants." (footnotes omitted)).

[338] Fisher, *supra* note 199, at 1320. Although defendants often bear a burden of showing that an error was not harmless (e.g., in cases involving the erroneous admission of evidence against the defendant), the value of finality and other interests in those cases outweighs the policy considerations at play in prosecutorial trial misconduct cases, as discussed in this

misconduct may benefit the prosecution at trial, so the prosecution should bear the burden of showing that it did not actually receive a benefit from this behavior.[339] Additionally, the prosecution rather than the defendant is in a position to try to prevent misconduct from happening in the first place.[340] Under current law, however, prosecutors have incentives to commit misconduct when they have a weak case[341] and when they have a strong case.[342] By contrast, use of an error-focused analysis with the burden of proof on the prosecution should incentivize prosecutors to take steps to avoid committing misconduct when possible.[343] Of course, this approach will not eliminate all misconduct, as cognitive biases likely play a significant role in prosecutorial misconduct, as explained above, but it should help change behavior in some cases.[344]

Requiring the prosecution to bear the burden of proving harmlessness is generally a better policy choice than imposing per

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paragraph. It is beyond the scope of this Article to weigh the competing interests as needed for deciding whether the rule proposed in this Article should apply in other contexts.

[339] *See id.* at 1317–18 (justifying placement of this burden on the state by reference to "common law policy . . . that the party benefiting from the prosecutorial misconduct—the State—should have the burden of proving its harmlessness").

[340] *Id.* at 1319.

[341] *See* Landes & Posner, *supra* note 195, at 184–85 (noting that under current law, prosecutors have an incentive to commit intentional error when their case is weak, as the misconduct minimizes the likelihood of an acquittal, which cannot be appealed).

[342] *See* Cicchini, *supra* note 23, at 347 (noting that judges often refuse to grant mistrials based on a finding that the defendant is clearly guilty regardless of the prosecutorial misconduct).

[343] Fisher, *supra* note 199, at 1323; *see also* Landes & Posner, *supra* note 195, at 174 (arguing that this approach to harmless error is the most efficient approach).

[344] Professor Kamin effectively describes the value in changing the incentives related to prosecutorial trial misconduct:

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

Kamin, *supra* note 194, at 86.

se reversal in prosecutorial misconduct cases.[345] Professor Alschuler noted long ago the foolishness of providing a retrial when doing so is merely an idle gesture.[346] "In such circumstances, the result of a new trial would be the same, and the insult to the dignity of the process would not be thereby undone."[347] When a court has determined that the error really was harmless, then the societal interests in finality of judgments outweigh any value in forcing a retrial.[348]

This approach is also consistent with the Supreme Court's decision in *United States v. Hasting*, which held that federal courts' supervisory powers are limited to cases of prejudicial error.[349] Under *Hasting*, federal courts cannot dispense with harmless error analysis, but must instead analyze harmless error before providing a remedy to an individual defendant.[350] Any imposition of a per se reversal remedy would require overruling *Hasting*,[351] but the proposed standard this Article advocates does not run afoul of *Hasting*.

Finally, and most significantly, if the courts were to adopt a per se reversal rule in prosecutorial misconduct cases, that might put undue pressure on courts' analysis of whether certain behavior was in fact misconduct. Under current law, courts' labeling of behavior as prosecutorial misconduct is "almost cost-free" because

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[345] *Contra id.* at 85–86 (proposing a per se prejudice rule). The word "generally" is important here, however, as there is some support for the idea that race-based prosecutorial misconduct should be treated differently than other types of misconduct. *See, e.g.*, State v. Monday, 257 P.3d 551, 559 (Wash. 2011) (en banc) (Madsen, C.J., concurring) ("Rather than engage in an unconvincing attempt to show the error here was not harmless, the court should hold instead that the prosecutor's injection of racial discrimination into this case cannot be countenanced at all, not even to the extent of contemplating to any degree that error might be harmless."). I intend to explore this issue in more detail in my next article.

[346] Alschuler, *supra* note 13, at 663.

[347] Fisher, *supra* note 199, at 1317.

[348] *Id.* at 1316–17.

[349] 461 U.S. 499, 505 (1983).

[350] *See, e.g.*, Henning, *supra* note 3, at 718 ("Similarly, violations of a defendant's constitutional rights that do not involve a structural error in the proceedings require a harmless error analysis. If the government can show beyond a reasonable doubt that the violation did not contribute to the conviction, then the court may not grant a remedy despite the violation. Therefore, the Constitution does not provide a remedy to deter future prosecutorial misconduct, absent a finding of harm to the defendant." (footnote omitted)).

[351] *See* Kamin, *supra* note 194, at 78 (recognizing that the per se rule he proposes would require overruling *Hasting*).

the harmless error doctrine allows courts to avoid providing any remedy for the misconduct when the courts conclude that it did not affect the outcome.[352] If the pendulum swings too far the other way, however, courts will be even more likely than they are now to conclude that prosecutorial behavior that should be misconduct is in fact proper.[353] Thus, the best approach to harmless error in prosecutorial misconduct is to require the prosecution to bear the burden of proving that the error did not impact the verdict, using the factors described in Part V.A.*2* above.

2. When Defense Counsel Failed to Object at Trial, then the Defendant Should Bear the Burden of Proving that Misconduct Affected the Outcome but Should Not Have Additional Penalties Imposed Under the Plain Error Doctrine. However, when the defendant fails to object at trial, then it is appropriate for the defendant to bear the burden of showing that there is at least a slight risk that the misconduct affected the outcome. The standard would not change, in that the court would still be looking at whether there was a slight chance that the error contributed to the defendant's conviction.[354] But the defendant would bear the burden of making that showing, in lieu of any other penalties for the failure to object.

When defense counsel fails to object at trial to misconduct, it is appropriate to make the defendant bear the burden of showing that the error was not harmless. This approach would continue to incentivize defense counsel to object at trial when possible. Defense counsel would still be likely to object when a prosecutor's statement was clearly misconduct and in situations where the trial court could provide a meaningful remedy for the misconduct.[355] And if defense counsel chose not to object for tactical reasons, such as not drawing attention to the comment, then the consequences of that tactical decision would be a shift in the burden of proof for harmless error analysis on appeal. Under this approach, the

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[352] Henning, *supra* note 3, at 722.

[353] *See supra* Part II.A (summarizing the difficult line-drawing questions courts often face in prosecutorial trial misconduct cases).

[354] *See supra* note 290 and accompanying text (arguing for the "slight chance" standard).

[355] *Cf.* Alschuler, *supra* note 13, at 652 (noting differences between the effectiveness and efficiency of remedies like mistrials when misconduct happens early in a trial versus late in a trial).

failure to object would likely make defense counsel's argument on the severity of the misconduct more difficult, but the appellate court could still consider whether the misconduct was likely to have affected the outcome of the trial, reversing if appropriate or affirming if the misconduct was unlikely to have affected the outcome.

But the burden of proving harmless error should be the only penalty imposed for the failure to object. As explained in Part IV.A.*2* above, courts applying plain error analysis under current law often impose additional burdens on the defendants by requiring them to show that the error was clearly contrary to law (i.e., "plain") or flagrant and ill-intentioned. Currently, courts can duck difficult questions of drawing clear lines about what constitutes prosecutorial misconduct by concluding that any error was not plain, without really analyzing whether an error occurred.[356] This approach to plain error can exacerbate cognitive biases in judges by encouraging them to engage in conclusory rather than carefully reasoned decisions, and it can contribute to courts being overly confident about the lack of error and the harmlessness of that error.[357] The current approach also fails to reflect the reality that jurors may be affected by subtle misconduct as well as more obvious misconduct.[358] Therefore, the courts should reject the "plain" part of plain error analysis, and instead should first consider whether there was an error (whether the prosecutor actually committed misconduct), and then whether the error was harmless (requiring the defendant to bear the burden of proof).[359]

This approach would make it easier for courts to draw clearer lines regarding what behavior constitutes prosecutorial misconduct.[360] If appellate courts draw clearer lines about appropriate versus inappropriate behavior, "this will assist

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[356] *See supra* notes 229–31 and accompanying text.

[357] Berger, *supra* note 191, at 541–42.

[358] *See id.* at 544–45 (discussing how other types of subtle errors can nevertheless affect the outcome of a trial); *supra* Part III (regarding the ways that juror decisionmaking can be affected by things that do not seem obvious at the time, including the way that one piece of information can taint a juror's perception of analytically unrelated information).

[359] Carter, *supra* note 239, at 952–53; Gershman, *supra* note 7, at 133.

[360] Morrow & Larson, *supra* note 5, at 402–03.

prosecutors in avoiding, defense attorneys in identifying, and trial courts in remedying incidents of prosecutorial error."[361] Specifically, trial courts in future cases will have clearer guidance about when objections should be sustained or overruled.[362] And future appellate courts will be able to debate the lines between proper and improper conduct more effectively if their decisions are not muddied by considerations of whether an error was plain.[363] As a result of clearer case law, prosecutors will be better able to understand the line between proper and improper conduct, and stay on the correct side of the line.[364] Additionally, the added clarifications between proper and improper comments can make it easier for defense counsel to object when prosecutors do cross the line. These benefits will only come, however, from appellate courts taking seriously their responsibilities to clarify the law and offer guidance to future litigants,[365] which requires deviating from the requirement of showing that unobjected-to error was plain.

Such an approach is within appellate courts' broad discretion to deviate from typical plain error analysis.[366] That discretion is important for giving courts the necessary room to clarify the law and to ensure fair trials.[367] Courts often exercise this discretion to

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[361] *Id.* at 404.

[362] *See* Berger, *supra* note 191, at 548–49 (arguing that having courts focus on whether unpreserved conduct was error rather than whether any error was obvious is valuable because it ensures "that (1) the court creates a reference point for future cases that deal with the same issue; (2) the parties can determine whether the court 'got it right,' and, therefore whether to petition for further appellate review or reconsideration; and (3) the judges on the court can satisfy themselves, as much as possible, that the court's opinion accurately appreciates the significance of error and its consequences under the case's particular facts" (footnote omitted)).

[363] *Id.* at 549.

[364] *Cf. id.* at 546 ("[I]n many cases, the obviousness of the error may be difficult to discern because it requires the application of a legal rule that is facially clear but unclear when applied to the facts of the defendant's case."). This is yet another reason why a focus on the "plain" part of plain error analysis is counterproductive, particularly regarding issues like prosecutorial misconduct that require such careful analysis of the facts.

[365] *See, e.g.*, Alschuler, *supra* note 13, at 655 (noting the important role appellate courts play in helping lawyers and trial courts handle prosecutorial trial misconduct).

[366] *See* Carter, *supra* note 239, at 948 (listing several exceptions to the preservation of error requirement in criminal cases); *see also id.* at 947 (noting that "principles of fundamental justice frequently oblige the appellate courts to deviate from the preservation of error requirement and reverse unpreserved issues, especially in criminal cases").

[367] Weigand, *supra* note 229, at 188–89.

consider a wide variety of alleged errors,[368] in order to explain the law clearly and to promote justice.[369] Both of those interests are implicated in cases involving prosecutorial trial misconduct. This Article therefore proposes that courts should exercise that discretion in prosecutorial trial misconduct cases to avoid confusing their analyses of whether a prosecutor committed misconduct and whether that misconduct was harmful[370] while still imposing some penalty on the defendant for the failure to object, in the form of the burden of proving that the error was not harmless.

VI. CONCLUSION

Although research strongly suggests that prosecutorial trial misconduct is pervasive and may have significant effects on juror and reviewing court decisions, the current legal standards impose excessive procedural barriers for defendants seeking remedies for prosecutorial trial misconduct. This Article therefore proposes changes to harmless error analysis and the plain error doctrine as applied in prosecutorial trial misconduct cases. If courts adopt these proposals, then they would consistently engage in a two-step analysis of prosecutorial trial misconduct claims. As a threshold matter, courts would first consider whether the prosecutor's behavior was in fact misconduct.[371] If the prosecutor did engage in

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[368] *See generally* Carter, *supra* note 239 (cataloging the wide variety of types of claims that appellate courts consider even when those claims were not preserved below).

[369] *See* Weigand, *supra* note 229, at 191 ("[T]he appellate court has a duty to dispense, administer, and promote justice regardless of any lack of preservation by counsel.").

[370] *See supra* Part IV.A.*2* (explaining that as currently applied in prosecutorial trial misconduct cases, the plain error rule often leads to the confusion of whether there was error and whether it was harmful, and it sometimes also brings in prosecutorial intent when that would not otherwise be part of the court's analysis); *see also* Carter, *supra* note 239, at 980 (noting that authors of studies on wrongful convictions argue for the importance of appellate courts reviewing unpreserved issues and arguing that justice requires courts to be open to some claims, even when they were not raised at trial); *id.* at 971 & n.173 (including prosecutorial misconduct within the "public policy" category of errors that should be reviewed notwithstanding a failure to object at trial).

[371] If courts use an error-focused approach to harmless error, they must first decide if an error occurred. *See* Kamin, *supra* note 194, at 6 (correctly arguing that evaluating harmless error before determining whether there was error stifles the development of the substantive law on what conduct is actually proper). Similarly, as discussed in Part V.B.*2*, courts could

misconduct, then the court should consider whether the prosecutor's misconduct was harmless. In doing so, the court should reverse unless it concludes that the misconduct has only a slight chance of contributing to the defendant's conviction.[372] In making that determination, the court should rely primarily on the severity of the misconduct and how it relates to the trial's narratives; it should not consider the strength of the evidence against the defendant.[373] The prosecution should bear the burden of proof in cases in which defense counsel objected to the misconduct, while the defendant should bear the burden of proof in the absence of an objection.

In total, these changes are meant to have three effects: (1) to minimize the incentives in existing case law for prosecutors to commit misconduct, intentionally or unintentionally; (2) to encourage courts to draw clearer lines about what behavior is or is not misconduct; and (3) to improve the courts' response to misconduct when it does occur.

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

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not use the plain error doctrine as a threshold matter to avoid analyzing whether a prosecutor's behavior constituted misconduct.

[372] *See supra* note 290 (explaining the "slight chance" analysis).

[373] *See supra* Part V.A.*2*.

misconduct, as well as reducing the incentives for prosecutors to intentionally commit misconduct.[374]

Additionally, these changes should lead to more clarity in judicial decisionmaking about what is and is not misconduct.[375] That is true because courts will not have the option of ducking difficult line-drawing questions by relying on the defense attorney's failure to object or by skipping straight to harmless error without deciding whether an error occurred. And if the courts actually do provide more clarity about the lines between proper and improper conduct, then defense counsel will actually be in a better position to be able to object during the heat of trial, which should minimize concerns about deviating from the typical plain error rule. Furthermore, defendants will still bear the burden of proving misconduct was not harmless when they fail to object at trial, which serves the goals underlying the plain error doctrine.

Finally, and most importantly, these solutions should help provide more meaningful remedies for individuals who have been affected by prosecutorial misconduct. This approach contributes to "substantive justice," which involves both getting the facts right and doing so without resorting to "means that are either legally forbidden or procedurally off-limits."[376] While other systemic approaches to combatting prosecutorial trial misconduct are potentially valuable as well, appellate courts should provide meaningful substantive justice to defendants whose cases were tainted by prosecutorial trial misconduct. Meaningful remedies in individual cases are essential for ensuring the health of the criminal justice system, and appellate courts are in the best position to evaluate the case as a whole and to mitigate prosecutorial foul blows.

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[374] *See* Landes & Posner, *supra* note 195, at 176 (arguing that the incentive to avoid or induce errors depends on the sanctions that an appellate court imposes).

[375] *See also* Kamin, *supra* note 194, at 6 (arguing that changing harmless error analysis should also increase clarity of the substantive law on what constitutes prosecutorial misconduct).

[376] Griffin, *supra* note 142, at 290.