Closing the Door on Misconduct: Rethinking the Ethical Standards That Govern Summations in Criminal Trials

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Introduction

Closing argument is a pivotal moment in a criminal trial. It represents the last opportunity for prosecutors to convince jurors of the defendant's guilt and for defense lawyers to show reasonable doubt. As a result, criminal lawyers may be tempted to conclude with sweeping arguments that pull at the heartstrings of their target audience, the jury.[1] Scholars dating back to Aristotle have warned that the most persuasive arguments often contain an appeal to emotion—and that emotionally laden rhetoric can distract people from making rational choices.[2]

Legal ethicists have struggled with the issues surrounding closing arguments, trying to reconcile the need to stamp out overly-emotional appeals with the desire to empower advocates to summarize the

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1. *See* 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, 514 (2006) (empirical studies suggest jurors put tremendous stock in closing arguments); *see also* John B. Mitchell, *Why Should the Prosecutor Get the Last Word?*, 27 AM. J. CRIM. L. 139, 151–56 (2000).

2. *See* Todd E. Pettys, *The Emotional Juror*, 76 FORDHAM L. REV. 1609, 1609 (2007). As Pettys notes, "an emotion can prompt us to act if we perceive that the action will either reduce the unpleasant physiological sensations associated with the emotion or sustain the emotion's pleasant physiological sensations." *Id.* at 1624.

evidence as forcefully and creatively as they wish. These efforts have fallen short. The American Bar Association ("ABA") Task Force to Revise the Prosecution and Defense Standards has set out to change this circumstance. The Task Force has submitted proposed revisions to the Standards Committee of the ABA ("Proposed Standards"). The Standards Committee has responded to the Task Force's proposals related to prosecutors' summations, and plans to address the defense standards in the near future.

Part I of this Essay discusses the ABA's ethical standards governing closing arguments as they currently stand, highlighting their advantages and disadvantages. Next, Part II analyzes the proposed amendments to those standards. Part III then considers some questions that remain unanswered.

I. The Current *Standards for Criminal Justice* and Summation

Legal ethics can generally be divided into two categories: rules and standards. Ethical rules are binding; a lawyer's violation of them may lead to disciplinary action. Ethical standards are non-binding resolutions intended to offer guidance and promote best practices. The ABA's Model Rules of Professional Conduct, which most states have adopted in whole or in part,[3] contain just one provision (Rule 3.8) targeted directly at the "special responsibilities" of prosecutors. Rule 3.8 defines the boundaries of appropriate behavior surrounding a host of prosecutorial functions, including the charging and discovery processes.[4] Noticeably absent from Rule 3.8 is any reference to closing argument. The Model Rules are likewise silent regarding the explicit ethical obligations of criminal defense attorneys in making summations. The rule that is arguably most pertinent, Rule 3.4, provides only general guidance about trial behavior for all attorneys.[5]

3. *See also* Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 282 (2007) ("Forty-seven states and District of Columbia have adopted some version of the *Model Rules of Professional Conduct* as the code of ethical conduct for lawyers.").

4. MODEL RULES OF PROF'L CONDUCT R. 3.8 (2008).

5. Rule 3.4 states that a "lawyer shall not . . . in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused." MODEL RULES OF PROF'L CONDUCT R. 3.4 (2008).

Drafters of ethical standards have often tried to fill this void. The most recent edition of the ABA's *Standards for Criminal Justice: Prosecution Function and Defense Function*, completed in 1993, provides advice to prosecutors and defense lawyers in making closing arguments. The standards are essentially identical for the two sides. This approach is admirable in many respects: A blatant stab at equal treatment for all advocates in the criminal trial process. Yet this balanced approach ignores the reality that summation misconduct varies considerably for prosecutors and defense lawyers given their different systemic roles and, just as important, differences in how jurors perceive those roles.

A. Prosecutors and Closing Argument

Prosecutors enjoy wide latitude to comment on the evidence during their summations. The rationale is that prosecutors bear the burden of proof in a criminal case and therefore should not be unduly constrained at the end of the proceedings in arguing the merits to the jury.[6] In some states, the defense gives its summation before the prosecution's turn.[7] But in many jurisdictions, prosecutors are entitled to present their closing argument first, followed by the defense, and then to rebut the defense attorney's summation.[8] The ability to speak both first and last during the summation phase is a formidable advantage, a one-two punch of epic proportions based on the psychological concepts of "primacy" and "recency."[9] By going first, prosecutors can set the stage for the final act by framing the key issues and anticipating the defense's chief arguments. This initial crack at the jury puts the defense on the ropes. The chance for rebuttal argument allows prosecutors to inflict a knockout blow on

6. Prosecutors have a particularly wide berth during rebuttal closing argument where, pursuant to the "Invited Response Doctrine," prosecutors may respond directly to the defense attorney's closing arguments. *See, e.g.*, Michael Lyon, *Avoiding the Woodshed: The Third Circuit Examines Prosecutorial Misconduct in Closing Argument in United States v. Wood*, 53 VILL. L. REV. 689, 699–701 (2008); Note, Rosemary Nidiry, *Restraining Adversarial Excess in Closing Argument*, 96 COLUM. L. REV. 1299, 1300, 1333–34 (1996).

7. *See, e.g.*, N.Y. CRIM. PROC. LAW § 260.30 (2002).

8. *See, e.g.*, James W. McElhaney, *Trial Notebook–Rules of Final Argument*, 9 LITIG. 45, 46 (1993). *See also* CAL. PENAL CODE § 1093(e) (2004) ("When the evidence is concluded, unless the case is submitted on either side, or on both sides, without argument, the district attorney, or other counsel for the people, and counsel for the defendant, may argue the case to the court and jury; the district attorney, or other counsel for the people, opening the argument and having the right to close.").

9. *See generally* Mitchell, *supra* note 1, at 156–95.

the cusp of jury deliberations by reinforcing their basic themes as well as responding to novel contentions raised by the defense. Psychological studies indicate that last words are long remembered by listeners.[10] And prosecutors can choose these last words essentially as they see fit.[11]

Yet prosecutors can abuse this freedom. Juries may trust and respect prosecutors due to their public positions as government officers who, for over 150 years, have borne the title of "ministers of justice."[12] Certain tactics by prosecutors during summations can exploit this trust and respect to tilt the scales of justice unfairly against the defendant. For this reason, courts have paid special attention to the problem of prosecutorial misconduct during summations, spending decades musing over the distinction between "hard blows" versus "foul ones."[13] Drafters of ethical standards have taken a similar tack in striving to map the borders of proper summation behavior.[14]

Delineating the full range of prosecutorial misconduct that crops up during closing argument exceeds the scope of this Essay. That being said, it is useful to highlight what Michael Cassidy has called the "cardinal sins" of prosecutorial misconduct in summation:[15]

> • A prosecutor may not offer his personal opinion about the guilt or innocence of the defendant. This behavior invades the province of the jury. Worse yet, it may imply the prosecutor has access to information that was not presented at trial that substantiates guilt. A prosecutor may argue *why* a defendant is guilty but must stop short of interposing his own personal belief.[16]

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10. *See generally id.*; *see also* Michael D. Cicchini, *Prosecutorial Misconduct at Trial: A New Perspective Rooted in Confrontation Clause Jurisprudence*, 37 SETON HALL L. REV. 335, 341 (2007).

11. *See, e.g.*, R. MICHAEL CASSIDY, PROSECUTORIAL ETHICS 101–07 (2005). *See also* Charles L. Cantrell, *Prosecutorial Misconduct: Recognizing Errors in Closing Argument*, 26 AM. J. TRIAL ADVOC. L. REV. 535 (2003); Bennett L. Gershman, *Misuse of Scientific Evidence by Prosecutors*, 28 OKLA. CITY U. L. REV. 17, 35–38 (2003); Nidiry, *supra* note 6, at 1306–08.

12. *See* Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 39 n.10 (2009).

13. As the U.S. Supreme Court proclaimed in 1935, prosecutors "may strike hard blows" but not "foul ones." Berger v. United States, 295 U.S. 78, 88 (1935).

14. *See, e.g.*, CASSIDY, *supra* note 11, at 101–07; Nidiry, *supra* note 6, at 1311–14, 1324.

15. CASSIDY, *supra* note 11, at 102. *See also* Cantrell, *supra* note 11; Gershman, *supra* note 11, at 35.

16. *See* CASSIDY, *supra* note 11, at 102.

• A prosecutor may not insert his personal view about the credibility of a particular witness. This is known as "vouching" for a witness. Just as the determination of guilt or innocence is a job properly assigned to the jury, so is the assessment of witness credibility. When a prosecutor improperly vouches for the credibility of a witness, the statement carries with it the weight of his status as a government official and may be overvalued by the fact-finder. It is perfectly acceptable (and common practice) for a prosecutor to argue that certain witnesses should or should not be believed. In doing so, prosecutors should steer the jurors to objective criteria—witness demeanor, motivations to testify, consistencies or inconsistencies in their testimony—and not to the prosecutor's subjective impression of witness credibility.[17]

• It is unethical for a prosecutor to argue facts not presented at trial or misstate the nature of the evidence. For instance, a prosecutor may neither misquote the words offered by witnesses nor embellish the factual testimony introduced into evidence.[18]

• A prosecutor may commit a due process violation during summation by engaging in inflammatory arguments geared toward rousing jury passions or prejudices. Examples of inflammatory comments include appealing to jurors' sense of patriotism, urging jurors to preserve public safety through convicting the defendant, and introducing racial or ethnic bias into the decision-making dynamic.[19]

• A constitutional violation may occur where a prosecutor during closing argument comments on a criminal defendant's refusal to testify at trial. The Fifth Amendment of the U.S. Constitution provides that a criminal defendant enjoys a privilege against self-incrimination, signifying he has no obligation to testify at trial. Any indirect or direct reference by a prosecutor during summation to a defendant's failure to testify insinuates that the defendant has something to hide, thereby compromising the privilege and undermining his choice not to take the stand.[20]

17. *Id.* at 102–03.
18. *Id.* at 103–04.
19. *Id.* at 104.
20. *Id.* at 105.

- Finally, a prosecutor may encroach upon a defendant's Sixth Amendment right to counsel by mocking or impugning the integrity of defense counsel during closing argument.[21]

Prosecutorial over-reaching during closing argument is among the most common forms of error in criminal cases and has contributed to a rash of wrongful convictions.[22] In their 2009 study of trial transcripts from 137 DNA exonerations, Brandon Garrett and Peter Neufeld identified eighteen cases where prosecutors exaggerated the implications of forensic scientific testimony during summation.[23] The case of Drew Whitley illustrates this phenomenon.[24]

In August 1988, a man wearing a nylon mask demanded money from a night manager finishing her shift at a restaurant in Duquesne, Pennsylvania. When the victim failed to comply, the assailant chased her into the parking lot and shot her to death. Another restaurant employee identified Drew Whitley as the culprit. The Whitley case went to trial based on this eyewitness identification and some forensic evidence. The police had retrieved a trench coat, hat, and nylon stocking from the parking lot. A technician from the county crime lab testified at trial that the hairs found in the clothing were similar to those of Whitley, but did not declare them to be a match. During closing argument, however, the prosecutor insisted the hairs were identified as belonging to Whitley. The jury found Whitley guilty of murder. Many years later, Whitley's attorney petitioned the court to have the hairs from the crime scene subjected to DNA testing. Those tests excluded Whitley as the source of the hairs, prompting the prosecution to drop all charges against him in May 2006.[25]

Exaggerating the nature of forensic evidence is just one of several ways in which prosecutorial tactics during summation might

21. *Id.* at 106.

22. As Bennett Gershman notes, "[w]hen courts and commentators talk about prosecutorial misconduct, they are often referring to the prosecutor's argument to the jury." BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT 462 (2007). *See also* Cicchini, *supra* note 10, at 341–42; Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 1–9 (2009).

23. *See* Garrett & Neufeld, *supra* note 22, at 85–89. *See also* Robert Aronson & Jacqueline McMurtrie, *The Use and Misuse of High-Tech Evidence by Prosecutors: Ethical and Evidentiary Issues*, 76 FORDHAM L. REV. 1453, 1474 (2007).

24. *See* INNOCENCE PROJECT, Profile of Drew Whitley, www.innocenceproject.org/Content/Drew_Whitley.php (last visited Nov. 22, 2010). *See also* Garrett & Neufeld, *supra* note 22, at 87–88.

25. *See supra* note 24 and accompanying text.

lead to miscarriages of justice. On other occasions, 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. Take the plight of Jeffrey Deskovic.[26]

On the morning of November 17, 1989, the police found fifteen-year-old Angela Correa dead in a wooded area of a park in Peekskill, New York. Leaves covered her partly naked body. She had evidently been beaten, raped, and strangled. She had last been seen on November 15—by a man walking his dog in the park—and the medical examiner estimated her time of death as between 3:30 and 4:30 that afternoon. Next to her body the police found three different types of hair, plus a note written from Angela to "Freddy" dated November 15, 1989. Over the next two months the police interviewed scores of Angela's classmates at Peekskill High School, including Freddy Claxton who was presumed to be the "Freddy" referred to in the note and who had a solid alibi for the entire afternoon of November 15.[27]

Jeffrey Deskovic, a sixteen-year-old student at Peekskill High, did not have an alibi. In fact, he was allegedly absent from school that afternoon. Witnesses described him as strangely distraught over Correa's death. This conduct piqued the curiosity of law enforcement, provoking detectives to interview Deskovic eight times from December 1989 through January 1990. Deskovic behaved oddly during these encounters. He even tried to assist the police by conducting his own investigation, which mainly involved giving the police his thoughts about possible suspects.[28]

At the end of one grueling interview session on January 25—six straight hours of questioning and three polygraph examinations—Deskovic allegedly "confessed" to the crime. Curled up in the fetal position under a table, Deskovic gave a bizarre account of the incident, noting that he "sometimes hears voices and they make [him do] things [he] shouldn't" and that he had recently "realized" he

26. The following description of the Deskovic case derives from the Innocence Project's synopsis of his wrongful conviction and a report on the case prepared at the request of Westchester County District Attorney Janet DiFiore. *See* INNOCENCE PROJECT, Profile of Jeff Deskovic, http://www.innocenceproject.org/Content/Jeff_Deskovic.php (last visited Jan. 18, 2011); *see also* REPORT ON THE CONVICTION OF JEFFREY DESKOVIC (June 2007), http://truthinjustice.org/Jeffrey-Deskovic-Comm-Rpt.pdf.

27. *See* REPORT ON THE CONVICTION OF JEFFREY DESKOVIC, *supra* note 26, at 1–2.

28. *Id.*; *see also* Profile of Jeff Deskovic, *supra* note 26.

might be responsible for the crime. This interrogation was not recorded despite the availability of an audiotape recorder. The police arrested Deskovic that day. Without any eyewitnesses or scientific evidence connecting Deskovic to the crime scene, prosecutors subsequently filed charges against him for a number of crimes, including rape and murder.[29]

The police continued their investigation after Deskovic's arrest by subjecting the evidence collected from the crime scene to a battery of forensic tests. In March 1990, just days after the prosecution had obtained an indictment against Deskovic, the police received the results of DNA tests conducted on the seminal fluid obtained from Correa's vaginal cavity. The results conclusively excluded Deskovic as the source of the semen. Tests also uncovered no link between Deskovic and the hairs found next to Correa's corpse. Yet the police did not drop the case against Deskovic in response to these discoveries. And neither did Westchester County prosecutors.[30]

The case went to trial. The prosecutor acknowledged the "wrinkles" posed by the DNA and hair evidence in presenting the case to the jury, but used hard-hitting trial strategies to clear them up. The government advanced strained and alternative theories of the case, vacillating between arguing that (1) Deskovic had acted with an unknown accomplice or (2) that the semen had been supplied by a consensual sexual partner (most likely Freddy Claxton) and that jealousy had propelled Deskovic into a murderous rage. These theories did not make much sense. The accomplice theory clashed with the core hypothesis that Deskovic was an awkward loner fixated on Correa; the consensual partner contention had no evidentiary support in the record. After the close of evidence, the court criticized the accomplice theory, leading the prosecutor to withdraw his request to argue it during summation. That did not prevent the prosecution from elaborating upon its consensual partner theory during closing, which is precisely what it did. The prosecutor insisted in summation that "in all probability" Freddy Claxton was the source of the semen; the note to "Freddy," in effect, was characterized as a love letter. The problem was that this theory of the case was entirely unproven—and arguably contradicted by the evidence.[31]

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29. *See* Profile of Jeff Deskovic, *supra* note 26; REPORT ON THE CONVICTION OF JEFFREY DESKOVIC, *supra* note 26, at 2–3.

30. *See* Profile of Jeff Deskovic, *supra* note 26; REPORT ON THE CONVICTION OF JEFFREY DESKOVIC, *supra* note 26, at 2, 10, 20, 30.

31. *See* REPORT ON THE CONVICTION OF JEFFREY DESKOVIC, *supra* note 26, at 21–22.

> • First, the prosecution had traced Correa's movements throughout November 15, a timeline that left little room for Correa to have engaged in sexual activity. Although the prosecution intimated that Correa had had sex before the 15th and that the semen had remained in her body, that theory seemed dubious at best, especially given that it hinged on the proposition that she had not bathed or washed in the interim.
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> • Second, there was no evidence that Correa was involved in a consensual sexual relationship with *anyone* in November 1989, let alone Freddy Claxton. Numerous police interviews with Claxton, legions of other Peekskill High students, and members of Correa's family failed to hint that Correa was sexually active at the time.
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> • Third, even assuming that Claxton and Correa had a clandestine sexual relationship, Claxton had a verified alibi for November 15. From the time that school let out until well after Correa's death, Claxton and *four* friends were playing basketball.[32]

The prosecutor's efforts to attribute the semen to Claxton likely sounded reasonable to the jurors. In the end, the jury found Deskovic guilty of rape and murder, and his conviction was affirmed on appeal.[33]

Deskovic maintained his innocence from behind bars. Prosecutors ignored his pleas to run the DNA samples through state and federal databases to check for a match. Only in 2006, after fifteen years of incarceration, did his luck change. The Innocence Project in New York City accepted his case for investigation that year and managed to convince the new chief prosecutor in Westchester County to conduct the requisite tests. Tests performed on the semen from the Correa case in September 2006 produced a match to the biological profile of Steven Cunningham, a convicted murderer imprisoned for strangling the sister of his live-in girlfriend. When confronted with this evidence, Cunningham confessed to raping and killing Correa by himself.[34]

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32. *Id.* at 22–23.

33. *See id.* at 23; Profile of Jeff Deskovic, *supra* note 26; *see also* People v. Deskovic, 607 N.Y.S. 2d 957 (App. Div. 1994).

34. *See* Profile of Jeff Deskovic, *supra* note 26; REPORT ON THE CONVICTION OF JEFFREY DESKOVIC, *supra* note 26, at 4.

The prosecutors' closing arguments in the Whitley and Deskovic trials probably violated several of Cassidy's "cardinal sins," most notably the prohibition against arguing facts not presented at trial and misstating the nature of the evidence. The summations in these cases, moreover, contravene the ABA's *Criminal Justice Standards.* Standard 3-5.8, entitled "Argument to the Jury," is the guideline designed to address prosecutorial misbehavior during summation. It offers four chief admonitions:

> (a) In closing argument to the jury, the prosecutor may argue all reasonable inferences from evidence in the record. The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw.
>
> (b) The prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.
>
> (c) The prosecutor should not make arguments calculated to appeal to the prejudices of the jury.
>
> (d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence.[35]

These provisions and the Commentary to Standard 3-5.8 address most of Cassidy's "cardinal sins." Standard 3-5.8 specifies that prosecutors may not offer their personal views on the guilt of the defendant or vouch for witnesses; may only argue reasonable inferences from the record without any misrepresentations; and may not appeal to juror prejudices. Furthermore, the Commentary clarifies that prosecutors should not "use arguments which are, in essence, personal attacks on defense counsel."[36] Regrettably, neither Standard 3-5.8 nor the Commentary explicitly mentions the impropriety of a prosecutor citing a defendant's failure to testify, even if such conduct arguably falls within the rubric of subsection (d) as behavior that would "divert" the jury from its obligation to focus solely on the evidence.

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35. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-5.8 (3d ed. 1993) [hereinafter 1993 ABA STANDARDS FOR CRIMINAL JUSTICE].

36. 1993 ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 35, § 3-5.8, Commentary.

Standard 3-5.8 touches on the major aspects of prosecutorial misbehavior during closing argument. The bottom line, however, is that it provides insufficient practical guidance when it comes to evaluating prosecutorial behavior during summation—to distinguishing hard blows from foul ones. The Commentary cites "[p]rosecutorial conduct in argument" as "a matter of special concern because of the possibility the jury will give special weight to the prosecutor's arguments, not only because of the prestige associated with the prosecutor's office, but also because of the fact-finding facilities presumably available to the office."[37] The Commentary only proceeds to give "broad guidelines" about misconduct by prosecutors in summation, and prefaces its discussion by observing that "[t]o attempt to spell out in detail what can and cannot be said in argument is impossible since it will depend largely on the facts of each case."[38]

I applaud the effort to single out prosecutorial conduct in argument as "a matter of special concern," but blanch at the reluctance to give more detail. Without fleshing out the contours of what is permissible, these standards fail to offer much aid to prosecutors in adhering to them.[39] Even if ethical standards are not binding, egregious disregard of them might violate ethical rules that ban lawyers from making false statements to a tribunal, exhibiting unfairness to opposing counsel or disrupting judicial proceedings.[40]

Providing more precise guidance about summations is essential. Commentators have traditionally decried the reluctance of ethics committees to take on prosecutors.[41] While this state of affairs is attributable to many factors,[42] undoubtedly the vagueness of the

37. *Id.*

38. *Id.*

39. *See* Garrett & Neufeld, *supra* note 22, at 85.

40. *See* MODEL RULES OF PROF'L CONDUCT R. 3.3-3.5 (2008).

41. *See, e.g.*, Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 707–08, 730–31 (1987); Ellen Yaroshefsky, *Wrongful Convictions: It is Time to Take Prosecution Discipline Seriously*, 8 D.C. L. REV. 275 (2004).

42. Ethics investigations usually start with the submission of a formal complaint against a particular lawyer. Because prosecutors represent "the People," no individual has a strong incentive for filing an ethics complaint against them aside from criminal defendants whose allegations are understandably treated with a measure of skepticism. *See* Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 445 (1992); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 749–50, 758 (2001). Criminal defendants have the motivation to file complaints, to be sure, but may not have the resources to pursue their claims with the requisite tenacity. *See* Zacharias, *supra*, at 749–50. Criminal defense lawyers may opt not to file complaints for fear of

pertinent ethical standards and rules is one of them.[43] Simply put, Standard 3-5.8 provides little deterrent to prosecutors intent on flouting its goals.

Consider the career of former Oklahoma prosecutor Robert "Cowboy Bob" Macy. For more than twenty years, Macy served as chief district attorney in a part of the state that covered Oklahoma City.[44] His office amassed a record number of capital murder convictions during his reign, including fifty-four in which he personally served as the lead prosecutor.[45] Early in Macy's tenure, the Oklahoma Court of Criminal Appeals cited him repeatedly for misconduct during summation. Macy often ended his signature "fire and brimstone" closing arguments by collapsing into tears in front of the jury box.[46] In reaction to those occasions where the appellate court found his theatrics to be reversible error, Macy battled back by waging public and private campaigns to unseat particular judges whose appointments where subject to retention elections.[47] Even after several scandals erupted in Oklahoma City—including the DNA exoneration of one of the men Macy had put on death row—Macy emerged unscathed. He rode off into the sunset of early retirement.[48]

The usual checks on summation misconduct (reversal, shame, and political accountability) may not suffice to counter the handful of overzealous prosecutors that resemble Cowboy Bob Macy. For them, the imposition of disciplinary action in the form of suspension or disbarment might be the answer. And for disciplinary action to be viable, ethical standards and rules must grow sharper teeth.

B. Defense Attorneys and Summation

Prosecutorial misconduct during summation has captured the attention of appellate judges, scholars, and ethicists because of the

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antagonizing adversaries upon whom they rely for favorable plea offers and scheduling accommodations. *Id.* at 749–50. Ethics boards may also fear retaliation from prosecutors, many of whom carry political clout. *See* Gershman, *supra*, at 445; Zacharias, *supra*, at 761.

43. *See* Gershman, *supra* note 42, at 445; Zacharias, *supra* note 42, at 725. Disciplinary authorities tend to enforce only direct breaches of specific prohibitions contained in professional codes; this poses a problem in the sphere of prosecutorial misconduct because the codes neglect to address many of the transgressions branded as such in cases and commentary. Zacharias, *supra* note 42, at 725.

44. *See* Alford, *supra* note 1, at 492–95.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

special influence wielded over the jury by these quasi-judicial officials as well as the simple fact that this behavior is well-documented in the case law.[49] In appealing trial convictions, defense attorneys often allege summation errors by the prosecution. This creates a record of acceptable and unacceptable prosecutorial conduct for commentators to track.

Misconduct by the defense, in contrast, largely escapes appellate review.[50] By virtue of the Double Jeopardy Clause, prosecutors are generally barred from re-trying defendants after acquittals and, as a logical corollary, from appealing issues that cropped up during those trials. One way in which defense misconduct during summation sometimes comes to light on appeal is when a defendant claims prosecutorial overreaching occurred during the state's rebuttal argument, and the government's response is to contend that the rebuttal was warranted under the "Invited Response Doctrine," i.e., that the defense's own summation opened the door for the government's aggressive rebuttal.[51] The lack of appellate case law on defense misconduct during summation has complicated the task for ethical code drafters seeking to define the contours of proper closing arguments by the defense.

Further complicating matters is the defense attorney's role in the criminal justice system. Unlike prosecutors, defense attorneys need not harmonize their zealous advocacy with any competing responsibility to serve as "ministers of justice." Defense lawyers focus solely on advocacy. They are not required to carry a burden of proof at trial. They strive only to produce a reasonable doubt about their clients' guilt—and courts (and ethicists) are understandably wary of stopping defense attorneys from trying to do so considering the profound consequences of a criminal conviction.[52] As a result, the line between "hard blows" and "foul ones" for defense counsel is even blurrier than the one demarcating appropriate prosecutorial behavior from misconduct.

Some observers complain that defense attorneys should not receive greater leeway than that afforded to prosecutors. Judge

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49. *See* Nidiry, *supra* note 6, at 1314–15.

50. *Id.* at 1315.

51. *Id.* at 1315 n.102.

52. *Id.* at 1315; Murray L. Schwartz, *The Zeal of the Civil Advocate*, AM. B. FOUND. RES. J. 543, 553 (1983); JACOB A. STEIN, CLOSING ARGUMENTS: THE ART AND THE LAW 1-34 (2d ed. 2005). *See also* 1993 ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 35, § 4-7.7, Commentary.

Learned Hand famously lamented in 1935 that "[t]he truth is not likely to emerge, if the prosecutor is confined to such detached exposition as would be appropriate in a lecture, while the defense is allowed those appeals in misericordiam which long custom has come to sanction."[53] One of the challenges facing legal ethicists is how best to deter inappropriate closing arguments by defense counsel without unduly interfering with the zealous advocate's right to demonstrate a reasonable doubt in a case where the defendant's liberty, and possibly his life, hangs in the balance.

Standard 4-7.7 of the ABA's *Criminal Justice Standards* tackles the issues related to closing arguments by the defense. By and large, it mirrors the admonitions for prosecutors.

> (a) In closing argument to the jury, defense counsel may argue all reasonable inferences from evidence in the record. Defense counsel should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw.
>
> (b) Defense counsel should not express a personal belief or opinion in his or her client's innocence or personal belief or opinion in the truth or falsity of any testimony or evidence.
>
> (c) Defense counsel should not make arguments calculated to appeal to the prejudices of the jury.
>
> (d) Defense counsel should refrain from argument which would divert the jury from its duty to decide the case on the evidence.[54]

Standard 4-7.7(a) is perhaps the most important of these proscriptions. Although "attorneys are entitled to reasonable latitude in arguing inferences from the evidence," the Commentary cautions that "[t]he rules of evidence may not be subverted by putting to the jury, in argument or opening statements, matters not in the record."[55] It is permissible for a defense attorney to harp on the prosecution's failure to present a particular witness or introduce an item of evidence, yet it may constitute a misrepresentation to make this claim

53. United States v. Wexler, 79 F.2d 526, 530 (2d Cir. 1935).

54. 1993 ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 35, § 4-7.7.

55. 1993 ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 35, § 4-7.7, Commentary.

when counsel knows the reason for the failure is that the evidence is inadmissible.[56]

Standard 4-7.7(b) asserts that defense attorneys may not offer their personal beliefs about their clients' guilt or innocence. The Commentary notes that "a lawyer's personal belief has and should have no real bearing upon the ultimate issues to be decided at trial."[57] What is more, "this prohibition is essential to the maintenance of the appropriate independence of the lawyer from identification with his or her client."[58]

As with prosecutors, defense attorneys may not advance arguments aimed at prompting the jury to digress from deciding the case based only on the evidence. One notable exception is the Commentary's concession that defense attorneys may argue "jury nullification" (the doctrine permitting jurors to acquit when their conscience moves them regardless of the strength of the evidence) in jurisdictions permitting that type of argument.[59]

It is unclear whether Standard 4-7.7 has done much to clamp down on defense misconduct during summation. Misconduct of this sort is difficult to detect and, to some extent, the system tolerates allowing defense attorneys an extra amount of freedom during summation. But this does not mean ethical rules and standards should turn a blind eye to overly aggressive defense tactics in closing arguments. To its credit, the ABA Task Force is giving this issue a fresh look.

II. Proposed Revisions to the *Standards for Criminal Justice* and Summation

A. Appropriate Closing Arguments by Prosecutors Redefined

The ABA's Task Force has proposed several alterations to Standard 3-5.8 that offer more specific guidance for quelling prosecutorial misconduct during summation. These recommended changes reflect a sincere effort to give these rules sharper teeth, if not fangs. The proposed new language (renumbered as Standard 3-7.8) is as follows:

56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*

> (a) In closing argument to the jury, the prosecutor may argue all reasonable inferences from evidence in the record. The prosecutor should carefully review the evidence in the record, and not knowingly misstate the evidence or argue for inferences or conclusions that the prosecutor knows are not true or not supported by the record.
>
> (b) The prosecutor should not imply special or secret knowledge of the truth or witness credibility, or argue in terms of the prosecutor's personal opinion. The prosecutor may, however, state that the evidence demonstrates that the defendant is guilty and that the evidence shows that the government's witnesses testified accurately.
>
> (c) The prosecutor should not make arguments calculated to appeal to improper biases of the jury. The prosecutor should make only those arguments that are consistent with the jury's duty to decide the case on the evidence, and should not seek to divert the jury from that duty by *ad hominem* disparagement or appeals to improper bias or extreme emotion.
>
> (d) When the prosecutor makes a rebuttal argument to a trier of fact, the prosecutor should only respond to issues raised in the defense argument, and not present or raise new issues. The prosecutor should not intentionally reserve entirely new arguments or points solely for rebuttal, unless the defendant has an opportunity to respond. Also in rebuttal, the prosecutor may fairly respond to arguments made in the defense closing, but should object to defense arguments it believes were improper and seek relief from the court, rather than respond with arguments the prosecutor knows to be improper.[60]

Allow me to address these proposals systematically. Proposed Standard 3-7.8 represents a vast improvement over the existing guidelines that govern prosecutorial summation practices. First, subsection (a) adds language suggesting that a "prosecutor should carefully review the evidence in the record," an affirmative obligation

60. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-7.8 (Proposed Revisions 2010) [hereinafter PROPOSED PROSECUTION STANDARDS]; Rory K. Little, *The ABA's Project to Revise the Prosecution and Defense Function Standards*, 62 Hastings L.J. 1113 (Appendix: ABA Standards for Criminal Justice: Proposed Revisions to Standards for the Prosecution Function) (2011) [hereinafter Little, App.: Proposed Prosecution Standards].

missing from the present standard.[61] Second, that subsection lowers the mental state applicable to improper misstatements of the record. The standards currently demand only that a "prosecutor should not intentionally misstate the evidence."[62] The proposed amendment inserts "knowingly" for "intentionally."[63] This is significant. Prosecutors now can presumably circumvent the standard by engaging in "willful blindness"[64]—deliberately refusing to review the evidence in advance and later claiming that any misstatement was unintentional. Even if the precise definitions of willful blindness vary from state to state, many jurisdictions specify that the conscious avoidance of learning about the strong possibility of one's wrongdoing is the equivalent of the criminal mental state of knowledge.[65]

Here is a classic example of willful blindness. Suppose A is asked by B, a stranger, to take a package to C in exchange for a ridiculously large sum of money. A is suspicious but refuses to look inside the package. A has no affirmative knowledge that the package contains, say, cocaine. Under the doctrine of willful blindness, knowledge is imputed to A by virtue of his purposeful avoidance of confirming his suspicions about the illegality of his conduct.[66] By requiring careful review in conjunction with prohibiting any "knowing" misstatement of the evidence, Proposed Standard 3-7.8(a) would likely cover this type of conduct by prosecutors who act like ostriches and refuse to confirm whether they are mischaracterizing the evidence. Misstatements of material aspects of the evidence, just the kind of information that a careful review should detect, would probably satisfy the "knowingly misstate the evidence" standard.

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61. PROPOSED PROSECUTION STANDARDS, *supra* note 60, § 3-7.8(a); Little, App.: Proposed Prosecution Standards, *supra* note 60.

62. 1993 ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 35, § 3-5.8(a).

63. PROPOSED PROSECUTION STANDARDS, *supra* note 60, § 3-7.8(a); Little, App.: Proposed Prosecution Standards, *supra* note 60.

64. *See generally* Shawn D. Rodriguez, *Caging Careless Birds: Examining Dangers Posed by the Willful Blindness Doctrine in the War on Terror*, 30 U. PA. J. INT'L L. 691, 714–21 (2008) (discussing the general theory of willful blindness in American criminal law).

65. *Id.* at 716 (noting that "willful blindness can perhaps best be sufficiently understood as the conscious or deliberate avoidance of culpable knowledge—an avoidance which is equally punishable for acquiring positive culpable knowledge").

66. This hypothetical resembles a well-known federal case, United States v. Jewell, 532 F.2d 697 (9th Cir. 1976).

Likewise, Proposed Standard 3-7.8(b) offers more concrete guidance than the existing provision. Instead of repeating the general warning contained in the present version of the Standards that prosecutors "should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant,"[67] the proposed revisions repackage this proscription in more concise language and illustrate the reason behind this rule by clarifying that "[t]he prosecutor should not imply special or secret knowledge of the truth or witness credibility."[68] Equally important, Proposed Standard 3-7.8(b) explains what prosecutors are allowed to do—to state that the evidence shows the defendant's guilt and that witnesses testified accurately.[69]

Proposed Standard 3-7.8(c) is a fusion of Standards 3-5.8(c) and (d) with several admirable modifications. The proposal retains the language indicating "[t]he prosecutor should not make arguments calculated to appeal to improper biases of the jury," and goes beyond the point of abstraction by spelling out that "[t]he prosecutor should make only those arguments that are consistent with the jury's duty, and should not seek to divert the jury from that duty by *ad hominem* disparagement or appeals to improper bias or extreme emotion."[70] This would condemn emotional outbursts like Cowboy Bob Macy's fits of tears in far more certain terms than the language of the analogous provision in the current standards.[71] Curiously, the proposal cautions prosecutors against appealing to jurors' "improper biases" in lieu of the present standard's reference only to "prejudices."[72]

Additionally, Proposed Standard 3-7.8(d) contains precise direction on the tactics that prosecutors may deploy during rebuttal closing arguments. The amendments demonstrate that rebuttal is not

67. 1993 ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 35, § 3-5.8(b).

68. PROPOSED PROSECUTION STANDARDS, *supra* note 60, § 3-7.8(b); Little, App.: Proposed Prosecution Standards, *supra* note 60.

69. PROPOSED PROSECUTION STANDARDS, *supra* note 60, § 3-7.8(b); Little, App.: Proposed Prosecution Standards, *supra* note 60.

70. PROPOSED PROSECUTION STANDARDS, *supra* note 60, § 3-7.8(c); Little, App.: Proposed Prosecution Standards, *supra* note 60.

71. The current rules caution only that "[t]he prosecutor should not make arguments calculated to appeal to the prejudices of the jury" and "should refrain from argument which would divert the jury from its duty to decide the case on the evidence." 1993 ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 35, § 3-5.8(c)–(d).

72. PROPOSED PROSECUTION STANDARDS, *supra* note 60, § 3-7.8(c); Little, App.: Proposed Prosecution Standards, *supra* note 60.

an opportunity to sandbag the defense with new arguments unless there is an opportunity for the defense to respond.[73] The proposal also makes an effort to nip some of the more pernicious aspects of the "Invited Response Doctrine" in the bud. At present, prosecutors are theoretically entitled to respond to improper defense arguments with improper ones of their own in rebuttal while claiming these comments were "invited" by the defense.[74] Proposed Standard 3-7.8(d) recognizes the failings of this tit-for-tat practice, suggesting prosecutors should object to improper closing arguments by the defense when they occur and ask for relief from the courts as opposed to launching barbs themselves during rebuttal.[75]

All told, the Task Force's proposed revisions appear to take enormous steps toward curtailing prosecutorial misconduct during closing arguments. Whether they go far enough remains to be seen. The effectiveness of these revisions also hinges on how they are interpreted in complex, fact-specific scenarios that are bound to arise.

The ABA's Standing Committee on Criminal Justice Standards is currently considering the Task Force's recommendations. So far, the Standards Committee has scrutinized most of the Task Force's proposals regarding prosecution functions, and drafted the following proposed language for the rules governing prosecutors' closing arguments ("Committee Standards"), tentatively renumbered as Standard 3-6.8:

> (a) The prosecutor's closing should present arguments and a fair summary of the evidence that proves the defendant guilty beyond reasonable doubt.
>
> (b) The prosecutor may argue all reasonable inferences from evidence in the record, unless the prosecutor knows an inference to be false. The prosecutor should review the evidence in the record to the extent time permits before delivering the closing, and should not knowingly misstate the evidence.
>
> (c) The prosecutor should not imply special or secret knowledge of the truth or witness credibility, or express the

73. PROPOSED PROSECUTION STANDARDS, *supra* note 60, § 3-7.8(d); Little, App.: Proposed Prosecution Standards, *supra* note 60.

74. *See supra* note 51 and accompanying text.

75. PROPOSED PROSECUTION STANDARDS, *supra* note 60, § 3-7.8(d); Little, App.: Proposed Prosecution Standards, *supra* note 60.

> prosecutor's personal opinion as such. The prosecutor may, however, state that the evidence demonstrates that the defendant is guilty and that the evidence shows that witnesses testified accurately.
>
> (d) The prosecutor should not make arguments that appeal to improper biases or extreme emotion, or that contain *ad hominem* disparagement. The prosecutor should make only those arguments that are consistent with the trier's duty to decide the case on the evidence, and should not seek to divert the trier from that duty.
>
> (e) When the prosecutor makes a rebuttal argument, the prosecutor should only respond to issues raised in the defense argument, and not present or raise new issues. If the prosecutor believes that a defense argument was improper, the prosecutor should seek relief from the court, rather than respond with improper argument.[76]

Although Committee Standard 3-6.8 embraces the bulk of the Task Force's most inspired suggestions, it is lacking in some respects. The Committee deserves acclaim for retaining the Task Force's requirement that prosecutors may not "knowingly" misstate the evidence.[77] I praise the Committee as well for largely adopting the Task Force's expanded definitions of inappropriate vouching, expressions of personal belief, and appeals to improper biases or emotion.[78] The Committee's description of what constitutes sound rebuttal argument also generally reflects the Task Force's noble vision of a rebuttal devoid of new arguments and outlandish comments under the guise of the Invited Response Doctrine.[79]

But the Committee refrained from echoing one of the Task Force's boldest suggestions. The Committee shunned the Task Force's recommendation that prosecutors must "carefully review" the record prior to summation. Committee Standard 3-6.8(b) instead indicates only that prosecutors "should review the evidence in the record to the extent time permits."[80] This strikes me as inadequate. It gives prosecutors, long hailed as "ministers of justice," an out—an

76. COMMITTEE STANDARDS § 3-6.8 (manuscript currently on file with author).

77. COMMITTEE STANDARDS, *supra* note 76, § 3-6.8(b).

78. COMMITTEE STANDARDS, *supra* note 76, § § 3-6.8(c)–(d).

79. COMMITTEE STANDARDS, *supra* note 76, § 3-6.8(e).

80. COMMITTEE STANDARDS, *supra* note 76, § 3-6.8(b).

opportunity to chalk up a skimpy review of the record to lack of time. And absent a requirement of careful review, prosecutors may have greater wiggle room to contend they did not "knowingly" misstate the evidence when they do make a material misstatement.

B. Defense Attorneys and Closing Arguments Going Forward

The Task Force's proposed revisions to the *Defense Function Standards* governing closing arguments flesh out the skeletal framework of the current standards and, in particular, offer much-needed additions geared toward the controversial Invited Response Doctrine. The Standards Committee has not yet studied these proposals, but intends to do so in the coming year. Proposed Standard 4-7.7 provides that:

> (a) In closing argument to the jury, defense counsel may argue all reasonable inferences from the evidence that is in the record. Defense counsel should know or review the evidence in the record to the extent reasonably possible. Defense counsel should not knowingly misstate the evidence in the record, or argue inferences that have no good-faith support in the record.
>
> (b) Defense counsel should not argue in terms of counsel's personal opinion. Counsel may, however, state that the evidence demonstrates that the defendant is not guilty or should be acquitted for some other lawful reason, and that the evidence suggests that defense witnesses testified accurately or that prosecution witnesses testified falsely.
>
> (c) Defense counsel should not make arguments calculated to appeal to improper prejudices of the jury.
>
> (d) Defense counsel should not argue to the jury that the jury should not follow its oath to consider the evidence and follow the law. Unless prohibited by law in the jurisdiction, however, defense counsel may argue that interests of fairness or justice with support in the record should lead the jury to acquittal.
>
> (e) Defense counsel may respond fairly to arguments made in the prosecution's initial closing argument, and should object and request relief from the court regarding prosecution arguments it believes are improper, rather than responding with jury arguments that counsel knows are improper.

> (f) Because the prosecution often has the last word in the form of rebuttal argument, defense counsel should anticipate this and craft the defense closing argument to anticipate the government's rebuttal.
>
> (g) If defense counsel believes the prosecution's rebuttal closing argument has been improper, defense counsel should object and consider requesting relief from the court, including the opportunity to reopen argument so that defense counsel may respond before the jury.[81]

Proposed Standards 4-7.7(a)–(c) include subtle, yet significant, adjustments. Subsection (a) indicates that defense attorneys "should know or review the evidence in the record to the extent reasonably possible."[82] This falls shy of the suggestion that prosecutors "carefully" review the evidence, but nonetheless creates an innovative (and welcome) ethical duty for defense counsel. This subsection also swaps "intentionally" for "knowingly" regarding misstatements of the evidence,[83] a shift that may deter defense lawyers from engaging in willful blindness. Similarly, banning defense attorneys from arguing inferences lacking good-faith support in the trial record is an upgrade over the vague warning against misleading the jury about the inferences it may draw from the evidence.[84]

Proposed subsection (b) is modified along the lines of the comparable standard for prosecutors. It condemns arguments in the form of personal opinion and just as clearly condones statements regarding what the evidence demonstrates.[85] The Task Force recommends keeping subsection (c) largely intact, except for the inclusion of "improper" before "prejudices."[86] This is an interesting

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81. STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION § 4-7.7 (Proposed Revisions 2010) [hereinafter PROPOSED DEFENSE STANDARDS]; Rory K. Little, *The Role of Reporter for a Law Project*, 38 Hastings Const. L.Q. 747 (Appendix: ABA Standards for Criminal Justice: Proposed Revisions to Standards for the Defense Function) (2011) [hereinafter Little, App.: Proposed Defense Standards].

82. PROPOSED DEFENSE STANDARDS, *supra* note 81, § 4-7.7(a); Little, App.: Proposed Defense Standards, *supra* note 81.

83. PROPOSED DEFENSE STANDARDS, *supra* note 81, § 4-7.7(a); Little, App.: Proposed Defense Standards, *supra* note 81.

84. PROPOSED DEFENSE STANDARDS, *supra* note 81, § 4-7.7(a); Little, App.: Proposed Defense Standards, *supra* note 81.

85. PROPOSED DEFENSE STANDARDS, *supra* note 81, § 4-7.7(b); Little, App.: Proposed Defense Standards, *supra* note 81.

86. PROPOSED DEFENSE STANDARDS, *supra* note 81, § 4-7.7(c); Little, App.: Proposed Defense Standards, *supra* note 81.

addition, the consequences of which are discussed in Part III of this Essay.

Another notable provision is Proposed Standard 4-7.7(d). The current standards omit any reference to the issue of defense attorneys calling for jury nullification, leaving the matter for the Commentary alone. Subsection (d) changes this. The upshot is a denunciation of defense attorneys trying to seduce juries into violating their oath by blatant nullification, while at the same time acknowledging the propriety of appeals in certain jurisdictions to "fairness or justice" to warrant an acquittal where there is support in the record for such a result.[87]

As a final matter, Proposed Standards 4-7.7(e)–(g) admirably grapple with the interconnected problems of the Invited Response Doctrine and prosecutorial rebuttal. Subsection (e) seeks to solve this problem altogether by restricting the manner in which defense counsel may respond to arguments made in the prosecution's initial closing argument that the attorney deems improper. Instead of reacting to improper prosecutorial argument in kind, subsection (e) advises defense attorneys to object and request appropriate relief from the court.[88] Moreover, subsection (f) encourages foresight on the part of defense attorneys by urging them to formulate closing arguments that anticipate the government's rebuttal.[89] Last, but not least, subsection (g) deals with the issue of how defense counsel should react when she perceives there to be prosecutorial overreaching during rebuttal. The stance taken by the Task Force is that defense lawyers should object and seek relief from the courts, including the possibility of granting the defense the chance to reply to the prosecution's rebuttal.[90]

87. PROPOSED DEFENSE STANDARDS, *supra* note 81, § 4-7.7(d); Little, App.: Proposed Defense Standards, *supra* note 81. There is ample case law on the topic of defense lawyers urging jurors to nullify. *See, e.g.*, United States v. Sepulveda, 15 F.3d 1161, 1190 (1st Cir. 1993) (holding that a trial judge may block defense attorneys' attempts to "serenade a jury with the siren song of nullification").

88. PROPOSED DEFENSE STANDARDS, *supra* note 81, § 4-7.7(e); Little, App.: Proposed Defense Standards, *supra* note 81.

89. PROPOSED DEFENSE STANDARDS, *supra* note 81, § 4-7.7(f); Little, App.: Proposed Defense Standards, *supra* note 81.

90. PROPOSED DEFENSE STANDARDS, *supra* note 81, § 4-7.7(g); Little, App.: Proposed Defense Standards, *supra* note 81.

III. Lingering Questions

Let me be clear in stating that the proposed revisions fill many of the holes left open by the existing standards. One of the greatest virtues of the current standards (the breadth and flexibility of the prohibitions) is also one of the greatest deficits (uncertainty surrounding how to apply such sweeping provisions in practice). The suggested changes aim to solve this problem by combining general proclamations with far more detail about what is and is not forbidden. That being said, some holes—or more accurately cracks—in the protection afforded by the proposed standards are worth exploring.

A. Prosecutorial Reliance on Forensic Scientific Evidence during Closing Argument

Scores of forensic scientific methodologies have emerged over the years to benefit the prosecution of crime. Some forensic identification specialties, like fingerprinting, are well-known. Others are less so, like the field of "hair microscopy," which compares hairs retrieved from a crime scene against those obtained from the primary suspect.

Juries generally give significant weight to forensic evidence and expect its appearance in every case, a phenomenon possibly hastened by the proliferation of the television program "CSI."[91] Yet juror reliance on scientific evidence predates the popularization of crime scene investigative techniques through the mainstream media. One study from 1987 found that nearly "one quarter of the citizens who had served on juries which were presented with scientific evidence believed that had such evidence been absent, they would have changed their verdicts—from guilty to not guilty."[92] This is bothersome. Evaluating the multi-faceted features of complex scientific evidence is frequently beyond the ken of the average juror. This creates an inherent risk that jurors wowed by intricate terminology and the aura of respectability surrounding the expert witness will accept forensic evidence at face value. Mindful of the persuasive power of forensic science and ill-equipped to second-guess the science itself, prosecutors regularly rely on forensic evidence to

91. Anecdotes about the "CSI Effect" are legendary, but it is unclear whether this phenomenon actually exists. *See, e.g.*, Hon. Donald Shelton et al., *A Study of Juror Expectations and Demands Concerning Scientific Evidence: Does the "CSI Effect" Exist?*, 9 VAND. J. ENT. & TECH. L. 331, 333 (2006).

92. *See* Paul C. Giannelli & Kevin C. McMunigal, *Prosecutors, Ethics, and Expert Witnesses*, 76 FORDHAM L. REV. 1493, 1494 n.7 (2007).

cement their cases when it is available.[93] And, more on point for this Essay, prosecutors may dwell on that evidence during their closing arguments. This raises important ethical issues in cases where the underlying basis for the forensic evidence is questionable.

Unreliable forensic science surfaces repeatedly in studies of wrongful convictions. A 2010 report issued by the Innocence Project in New York City concluded that *fifty-two percent* of the first 250 DNA exonerations of innocent prisoners involved the presentation of erroneous forensic evidence at trial.[94] Twenty-one percent of these 250 miscarriages of justices derived partly from faulty microscopic hair analysis.[95] Fingerprint evidence, long hailed as the gold standard of forensic evidence, has contributed to the conviction of the innocent as well.[96] Even DNA testing is not entirely immune to the virus of unreliability. Defective DNA comparisons at trial have led to wrongful convictions on at least five occasions.[97]

Other methodologies less refined than DNA and fingerprinting are even more susceptible to error. In one much-ballyhooed death penalty case, Cameron Todd Willingham was convicted in 1992 of murdering his three young daughters, all of whom died in a fire in his Corsicana, Texas home. At trial, two local arson experts testified for the prosecution that Willingham had set the fire intentionally. In the ensuing years, investigative reports by journalists and forensic scientists alike debunked the arson testimony from Willingham's trial. Those reports proved too little too late. Willingham was executed in 2004.[98]

One prominent example of flawed forensic science is Composite Bullet Lead Analysis ("CBLA"). Starting with the investigation into the assassination of President John F. Kennedy, the FBI and state law enforcement agencies began to develop a method of linking bullets

93. *See id.* at 1528.

94. *See* INNOCENCE PROJECT, 250 EXONERATED: TOO MANY WRONGLY CONVICTED 28–29 (2010), www.innocenceproject.org/docs/InnocenceProject_250.pdf [hereinafter 250 EXONERATED].

95. *See id.* at 30.

96. *See, e.g.*, Simon A. Cole, *More than Zero: Accounting for Error in Latent Fingerprint Identification*, 95 J. CRIM. L. 7 CRIMINOLOGY 985 (2005).

97. *See* 250 EXONERATED, *supra* note 94, at 31. *See also* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 84 (2008).

98. *See* David Grann, *Trial by Fire: Did Texas Execute an Innocent Man?*, THE NEW YORKER, Sept. 7, 2009; Steve Mills & Maurice Possley, *Man Executed on Disproved Forensics*, CHI. TRIB., Dec. 9, 2004; *see also Fire that Killed His Three Children Could Have Been Accidental*, CHI. TRIB., Dec. 9, 2004.

found at a crime scene to a box of ammunition in the possession of a suspect.[99] Investigators would conduct tests on the lead alloy of the bullets to determine whether the concentrations of seven elements normally present in bullet lead (arsenic, tin, cadmium, antimony, bismuth, silver, and copper) were "analytically indistinguishable" between the two samples.[100] The chief problem with this forensic discipline revolved around pinpointing when two items were "analytically indistinguishable."[101] Although courts routinely admitted this evidence for decades, there had been few scientific studies on the subject, and by the early 2000s the methodology was increasingly under attack. A federal district court excluded CBLA evidence as unreliable in 2003. This served as a critical step on the path to CBLA's demise. The National Academy of Sciences published a 2004 report criticizing the scientific underpinnings of this evidence, prompting the FBI to cease CBLA testing in 2005.[102] Several state courts have subsequently refused to admit CBLA evidence.[103]

It is well within bounds for prosecutors during summation to refer to the forensic scientific evidence introduced in the case. In fact, any prosecutor worth his salt *should* cite this evidence during closing argument. Potential ethical pitfalls lie in situations where (a) the prosecutor overstates or misstates the nature of the expert witness's testimony or (b) there is reason to believe that the underlying science is flawed, e.g., hair microscopy or CBLA. Overstating or misstating the findings contained in an expert witness's testimony—as in the Whitley case described above[104]—would likely violate Proposed Standard 3-7.8(a). If a prosecutor conducted the requisite careful review of the record prior to closing argument and later insisted that, contrary to the record, the expert witness found a match to the defendant, that behavior would almost surely comprise a knowing misstatement of the evidence. At the very least, it would point to a less-than-careful review of the record. Either way, this action would violate subsection (a) of the Task Force's proposal.

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99. *See* Paul C. Giannelli, *Composite Bullet Lead Analysis: An Update*, 23 ABA CRIM. JUST. 24 (2008).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *See supra* notes 24–25 and accompanying text.

It is less clear whether this conduct would violate Committee Standard 3-6.8(b). A prosecutor who scarcely reviewed the record due to time constraints could claim he did not "knowingly" misstate the evidence and remain within the ethical boundaries drafted by the Committee.[105] This is one reason why the Task Force's requirement of a careful review of the record by prosecutors in advance of summation is superior to the Committee's less demanding suggestion.

Referring to *unreliable* forensic science during closing argument by prosecutors is a trickier matter from an ethical standpoint. Judges, not prosecutors, shoulder the basic responsibility of screening out unreliable evidence. Even if a prosecutor wanted to admit unreliable forensic evidence at trial, the judge ideally would exclude it. But as with so many aspects of criminal law, the ideal world does not square with the real one.

Prior to 1993, the admission of scientific evidence hinged on whether a particular discipline had gained "general acceptance" in the relevant scientific community.[106] This was a boon for the forensic sciences. As long as a discipline had achieved general acceptance it frankly did not matter whether its scientific underpinnings were untested or poorly supported. It also gave judges an excuse to avoid a thorough vetting of the evidence. Courts did not have to examine the underlying science with any modicum of rigor; all they had to do was determine whether the discipline had achieved acceptance and then swing the door wide open to its admission.[107]

A 1993 U.S. Supreme Court case, *Daubert v. Merrell Dow,* appeared to usher in a new era where judges would carefully test the reliability and relevance of any proposed scientific evidence before trial.[108] Although *Daubert* suggested that judges should consider "general acceptance" in weighing the propriety of admitting scientific evidence, the opinion indicated that this issue took a backseat to more pertinent factors concerning the validity of the science itself and the procedures guiding its production.[109] Only the most meritorious of forensic evidence would seemingly survive this gate-keeping function of the court. This led to renewed attacks on such generally accepted

105. COMMITTEE STANDARDS, *supra* note 76, § 3-6.8(b).

106. *See* Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

107. *See* Michael J. Saks, *Scientific Evidence and the Ethical Obligations of Attorneys*, 49 CLEV. ST. L. REV. 421, 422–23 (2001).

108. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

109. *Id.*

disciplines as handwriting evidence, hair microscopy, fingerprinting, and bite mark analysis.[110]

Yet the promise of *Daubert* remains unfulfilled in criminal cases nearly twenty years later. While judges appear to be circumspect in evaluating scientific evidence in civil cases in the post-*Daubert* world, a similarly exacting level of scrutiny is missing in the criminal context. Weak forensic science continues to pour into criminal trials. This may be attributable to a number of variables, such as judicial inertia and the failure of the defense bar to mount effective challenges to scientific evidence.[111] Whatever the underlying reasons, this disturbing pattern means prosecutors occasionally succeed in admitting unreliable forensic evidence at trial. And once that evidence is admitted, prosecutors may emphasize it in summation. Whether this behavior is ethically unsound depends primarily on the extent to which the prosecutor is aware of the unreliability.

> • *Scenario 1.* Prosecutor Is Aware of Unreliability. Assume that a particular prosecutor has either read studies casting serious doubt on the reliability of a forensic scientific discipline or received training to that effect. If that prosecutor introduces forensic scientific evidence of that kind and later asserts its importance in implicating the defendant during closing argument, has he violated the canons of ethics? Provided that the data pointing to the unreliability of the science is extensive and compelling, this conduct would seemingly violate Proposed Standard 3-7.8(a)'s bar on arguing "for inferences or conclusions that the prosecutor knows are not true"[112] as well as Committee Standard 3-6.8(b)'s prohibition on arguing an inference that a prosecutor knows "to be false."[113]
>
> But the devil is in the details. Suppose the studies about the forensic discipline are conflicting, with some scholars maintaining that the underlying science is sound. In that case, a prosecutor citing such forensic evidence in his summation might stand on solid ethical footing under the Proposed Standards.

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110. *See, e.g.*, Paul C. Giannelli, *Admissibility of Scientific Evidence*, 28 OKLA. CITY U.L. REV. 1, 7–8 (2003).

111. *See, e.g.*, Keith A. Findley, *Innocents at Risk: Adversary Imbalance, Forensic Science, and the Search for Truth*, 38 SETON HALL L. REV. 893, 896 n.12, 934–36 (2008); Jane Campbell Moriarty, *Misconvictions, Science, and the Minister of Justice*, 86 NEB. L. REV. 1, 18–19 (2008); D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 ALBANY L. REV. 99 (2000).

112. PROPOSED PROSECUTION STANDARDS, *supra* note 60, § 3-7.8(a); Little, App.: Proposed Prosecution Standards, *supra* note 60.

113. COMMITTEE STANDARDS, *supra* note 76, § 3-6.8(b).

As a normative matter, that is probably the correct result. A prosecutor is entitled to focus on the reasons favoring the accuracy of the forensic evidence when there is support for that position, even if there is debate on the issue. The defense attorney can always cite the science's flaws during his summation.

• *Scenario 2.* Prosecutor Has Consciously Avoided Learning About Unreliability. Imagine that a prosecutor refuses to bone up on forensic science, putting his head in the sand and presenting all sorts of scientific evidence at trial, some of which can be classified as "junk science." Further imagine that the prosecutor focuses on this evidence in his summation, knowing full well that jurors are often overwhelmed by the mystique of science. In instances where the unreliability of the science is well-documented, e.g., CBLA, then the prosecutor has possibly violated Proposed Standard 3-7.8(a) and Committee Standard 3-6.8(b) under a willful blindness theory.

• *Scenario 3.* Prosecutor is Reckless or Negligent Regarding the Unreliability. What if the prosecutor neither knows about the unreliability of the forensic science nor makes a conscious effort to avoid getting up to speed on the unreliability, but then urges jurors during summation to adopt inferences about forensic evidence based on outdated and misguided beliefs about its accuracy? Presumably he sits comfortably inside the lines drawn by the Task Force and Committee Standards. However, what if he is reckless or negligent in failing to educate himself about the latest studies on forensic science? Suppose he neglects to attend in-house training sessions or read the latest scientific studies because he believes it would detract from the demands of his caseload. It appears as if that is acceptable behavior under both the current and the proposed rules. The question is whether it should be. Perhaps we should expect—and ask—more from prosecutors during closing argument, especially when it comes to the hot-button topic of forensic evidence and its unique ability to influence jurors.

B. Asymmetry in Requirements to Review the Record Prior to Summation

The Proposed Standards impose new obligations on prosecutors to review the trial record before their closing arguments. Proposed

Standard 3-7.8(a) asks prosecutors to "carefully review" the record.[114] The comparable provision for defense lawyers requires that "[d]efense counsel should know or review the evidence in the record to the extent reasonably possible."[115] This discrepancy may be justified based on the different roles played by each side. Prosecutors are quasi-judicial officers representing the state who must balance their zealous advocacy with their duty to serve as ministers of justice. Defense lawyers are zealous advocates, plain and simple. In short, we expect more of prosecutors and the Proposed Standards may simply embody that expectation.[116]

But is there any strong reason not to require defense lawyers to conduct a similarly searching review of the evidence prior to closing argument? A careful review would enhance the overall quality of the argument and circumvent potential problems where a defense lawyer who has made a misstatement during summation claims that he reviewed the record "to the extent possible," which consisted of only a cursory review because of competing time demands.

To be sure, requiring prosecutors to conduct a careful review of the record—let alone urging defense lawyers to do the same—may be unrealistic. The Standards Committee seems to have reached this conclusion by replacing the Task Force's careful review requirement for prosecutors with an admonition that they only study the record "to the extent time permits."[117] Call me naïve, but I think that is a mistake. Raising the bar for closing argument preparation might spur prosecutors and defense attorneys to reach higher and improve their performance accordingly. Keeping the bar low, while acknowledging the day-to-day pressures of trial practice, will do little to enhance the quality of summations and deter material misstatements.

C. "Improper" Biases and Prejudices

The Proposed Standards bar criminal lawyers, both prosecutors and defense attorneys, from appealing to the biases and prejudices of

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114. PROPOSED PROSECUTION STANDARDS, *supra* note 60, § 3-7.8(a); Little, App.: Proposed Prosecution Standards, *supra* note 60.

115. PROPOSED DEFENSE STANDARDS, *supra* note 81, § 4-7.7(a); Little, App.: Proposed Defense Standards, *supra* note 81.

116. *See, e.g.*, Commonwealth v. Kozec, 505 N.E.2d 519, 522 (Mass. 1987) (suggesting it is inappropriate for prosecutors to "'fight fire with fire'" and noting that "the prosecutor, as a representative of the government, must hold himself to a consistently high and proper standard.").

117. COMMITTEE STANDARDS, *supra* note 76, § 3-6.8(b).

jurors.[118] For the reasons noted above, the proposed changes are preferable to the standards currently in force. One interesting, and quite possibly innocuous, amendment is the addition of "improper" to modify the biases and prejudices to which advocates may not appeal in their closing arguments.[119] This adjective seems superfluous at first blush. After all, are there any *proper* biases or prejudices for jurors? Upon reflection, I suppose there are. A libertarian juror, for instance, might have a general bias against the idea of government intrusion into a person's private affairs. Would it be appropriate for a defense attorney's summation to include indirect appeals to this bias? I think so. Some jurors may have a prejudice in favor of police officers, a feeling that derives not from any family ties to law enforcement but rather from a worldview that appreciates the stresses and sensitivities of police work. Would a prosecutor overstep the bounds of ethics if her closing argument contained references to the dedication of the police officers in the case? I doubt it. On balance, the inclusion of "improper" in the Proposed Standards seems fine—and potentially helpful.

D. Prosecutorial References to a Defendant's Refusal to Testify

One modest suggestion is to add a new subsection to the prosecution standards specifying that a prosecutor's closing argument may not refer to the defendant's refusal to testify and thereby insinuate that he has something to hide. This compromises the Fifth Amendment privilege against self-incrimination. Granted, this conduct would appear to violate Proposed Standard 3-7.8(b) and Committee Standard 3-6.8(c) by implying that the prosecutor has secret or special knowledge about the defendant's case.[120] It may also offend Proposed Standard 3-7.8(c) and Committee Standard 3-6.8(d) by diverting the jury from deciding the case purely on the evidence.[121] Yet drafting a separate subsection to address this issue would help

118. PROPOSED PROSECUTION STANDARDS, *supra* note 60, § 3-7.8(c); Little, App.: Proposed Prosecution Standards, *supra* note 60; PROPOSED DEFENSE STANDARDS, *supra* note 81, § 4-7.7(c); Little, App.: Proposed Defense Standards, *supra* note 81.

119. *See supra* note 118 and accompanying text.

120. PROPOSED PROSECUTION STANDARDS, *supra* note 60, § 3-7.8(b); Little, App.: Proposed Prosecution Standards, *supra* note 60; COMMITTEE STANDARDS, *supra* note 76, § 3-6.8(c).

121. PROPOSED PROSECUTION STANDARDS, *supra* note 60, § 3-7.8(c); Little, App.: Proposed Prosecution Standards, *supra* note 60; COMMITTEE STANDARDS, *supra* note 76, § 3-6.8(d).

make the impropriety of this conduct crystal clear, especially if supplemented by a discussion in the Commentary.

E. Thoughts on the Commentary: The Balance between the General and the Specific

The effectiveness of any changes to the ethical standards may hinge on whether the Commentary provides sufficient examples of how to interpret them. Although the amendments to the Commentary are not yet available in draft form, I am confident they will dovetail nicely with the proposals. I suspect the new version will resemble the existing Commentary by giving concrete examples of what is and is not permissible to supplement the broad language of the standards. At a minimum, I hope the Commentary reinforces two of the points raised above by (1) clarifying that "knowing" misstatements of the evidence include misstatements stemming from willful blindness, and (2) offering examples that chart the boundaries between appeals to "improper" versus proper juror bias or prejudice.

I would also encourage drafters of the Commentary to err on the side of inclusion in considering whether to mention various fact-specific examples. One interesting aspect of closing argument is that the appellate case law contains a treasure trove of representative summation missteps (at least those made by prosecutors) related to improper vouching, bald appeals to emotion, and the use of personal opinion. While I respect the current Commentary's acknowledgement that "[t]o attempt to spell out in detail what can and cannot be said in argument is impossible since it will depend largely on the facts of each case,"[122] that approach is something of a cop-out. Ethical standards are non-binding. They are geared toward giving guidance to prosecutors and criminal defense lawyers in making tactical decisions about how to structure their closing arguments. Fact-specific examples about inappropriate strategies serve to inform those choices. Just because it may be impossible to make the list of examples comprehensive does not mean that the Commentary should neglect to offer as much detail as possible. In the end, prosecutors and defense lawyers want to convince the jury of the merits of their respective cases during summation, but presumably only through fair play. The goal of the ABA's *Criminal Justice Standards* should be to encourage criminal lawyers in this process by

122. 1993 ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 35, § 3-5.8, Commentary.

offering clear, concrete direction about the scope of proper behavior.[123]

Conclusion

Closing arguments can greatly influence the outcome of criminal cases. Prosecutors and defense lawyers alike are generally permitted to take the gloves off, so to speak, and battle for the jury's attention. Some punches inevitably strike below the belt. The ABA Task Force to Revise the Prosecution and Defense Standards has attempted to catalogue and define foul blows during summation. For the most part, the Task Force has done an exceptional job of refereeing in this area. I anticipate that its proposed revisions, with only a few minor adjustments, will ultimately go a long way toward promoting greater fair play during this critical stage of the criminal trial process.

123. One potential problem with offering too much detail is the possibility that some lawyers may seek refuge in the examples—that they may feel entitled to pursue lines of argument that are not specifically labeled as improper. The Commentary can address this concern simply by emphasizing that the list of examples is illustrative, not exhaustive.

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