

## Prosecutorial Misconduct at Trial: A New Perspective Rooted in Confrontation Clause Jurisprudence

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### I. INTRODUCTION

Prosecutorial misconduct has infected every stage of the criminal process ranging from the initial charging decision through post-conviction proceedings. However, misconduct at the trial stage poses a unique set of difficulties for individuals accused of crimes, and is the focus of this Article. Trial misconduct includes, most commonly, improper opening statements, improper examination of witnesses, and improper closing arguments.

Trial misconduct is worthy of attention due to its tremendous negative effect on both the defendant and society more generally. With regard to the defendant, the misconduct may directly violate numerous constitutional and other rights. For example, a prosecutor's closing argument may incorporate factual assertions that are blatantly false or, even if true, that were never testified to or otherwise introduced at trial. Such misconduct violates the defendant's Fourteenth Amendment Due Process right to a fair trial as well as the Sixth Amendment right to confront his accuser.<sup>1</sup> Trial misconduct also compromises the appearance of a fair trial, which undermines the integrity of the criminal process and consequently harms society generally.<sup>2</sup>

The current legal framework for dealing with prosecutorial misconduct relies exclusively on judicial discretion. When a prosecutor commits misconduct, and the defendant requests a mistrial as the remedy, the trial judge is required to step into the shoes of the jury. The judge must weigh the evidence and decide whether, in light of

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<sup>1</sup> See, e.g., *Douglas v. Alabama*, 380 U.S. 415 (1965).

<sup>2</sup> See Kenneth Rosenthal, *Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence*, 71 TEMP. L. REV. 887, 958–59 (1998).

all the evidence against a defendant, the impact of the misconduct was significant enough to warrant the requested mistrial.<sup>3</sup>

This approach is not only flawed on a fundamental level, in that it transfers the jury's role to the judge, but also has proven completely ineffective in its application. Decades of court decisions have proved that judges will rarely grant a defendant's request for mistrial no matter how blatant or harmful the prosecutor's misconduct.<sup>4</sup> In the rare case that a mistrial is granted or a conviction is reversed on appeal, courts nearly always allow prosecutors to retry the defendant, often with a stronger case, in a subsequent trial or trials.<sup>5</sup> This use of judicial discretion consistently permits, and in fact encourages, even the most flagrant forms of prosecutorial misconduct.<sup>6</sup>

This Article proposes eliminating judicial discretion when dealing with prosecutorial misconduct. More specifically, upon a finding of prosecutorial misconduct and a defendant's subsequent motion for a mistrial, the mistrial should be granted without any judicial determination of whether the defendant would be found guilty absent the misconduct.<sup>7</sup> Further, in cases of intentional prosecutorial misconduct, subsequent retrial of the defendant should be barred.<sup>8</sup>

This proposal is supported by analogy to recent case law in Confrontation Clause jurisprudence, where the Supreme Court eliminated the use of judicial discretion in order to protect and ensure defendants' Sixth Amendment right to confrontation.<sup>9</sup> Before the recent Supreme Court case of *Crawford v. Washington*,<sup>10</sup> when a prosecutor would offer hearsay evidence against a criminal defendant at trial, the trial judge was required to use a judicial balancing test to determine whether that hearsay was reliable, and consequently, admissible.<sup>11</sup> After decades of watching lower courts find reliability in even "testimonial hearsay"<sup>12</sup>—the type of hearsay with the most "potential

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<sup>3</sup> *E.g.*, *State v. Bunch*, 529 N.W.2d 923, 925 (Wis. Ct. App. 1995) ("The trial court must determine, in light of the whole proceeding, whether the basis for the mistrial request is sufficiently prejudicial to warrant a new trial.")

<sup>4</sup> *See* Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 425 (1992).

<sup>5</sup> *See, e.g.*, Rosenthal, *supra* note 2, at 911.

<sup>6</sup> *See infra* Part III.B.1.

<sup>7</sup> *See infra* Part IV.A.

<sup>8</sup> *See infra* Part IV.A.

<sup>9</sup> *Crawford v. Washington*, 541 U.S. 36 (2004).

<sup>10</sup> 541 U.S. 36 (2004).

<sup>11</sup> *Id.* at 40 (discussing *Ohio v. Roberts*, 488 U.S. 56 (1980)).

<sup>12</sup> *Crawford*, 541 U.S. at 53.

for prosecutorial abuse”<sup>13</sup> —the Court in *Crawford* finally ended the use of judicial discretion. Instead, *Crawford* now requires testing the reliability of hearsay evidence through cross-examination in front of a jury, as the Framers of the Confrontation Clause intended.<sup>14</sup>

The pre-*Crawford* problem of admitting testimonial hearsay is closely analogous in every significant way to the problem of dealing with prosecutorial misconduct at trial.<sup>15</sup> In each situation, the defendant’s constitutional rights are compromised due to the potential for prosecutorial abuse or, in the case of prosecutorial misconduct, actual prosecutorial abuse. In each situation, the function of weighing evidence and evaluating its credibility and reliability has been improperly taken from the jury and transferred to the judge. In each situation, decades of court decisions prove that the use of judicial discretion has completely failed in protecting those basic constitutional rights. Finally, in each situation, the solution to the problem is the same: eliminate the use of judicial discretion and require that evidence, free of improper prosecutorial taint, be weighed and evaluated by the jury.

Part II of this Article provides examples of prosecutorial misconduct and discusses the harm caused by the misconduct. Part III details the existing legal framework for dealing with misconduct, and also illustrates how the use of judicial discretion is its fundamental flaw. Part IV proposes a better framework for dealing with prosecutorial misconduct at trial and discusses its rationale and logical support from Confrontation Clause jurisprudence. Part V anticipates and addresses the likely arguments in opposition to the proposed rule and includes a discussion of alternative curative measures, professional discipline of prosecutors, and judicial costs and efficiency. Part VI concludes the Article.

## II. UNDERSTANDING PROSECUTORIAL MISCONDUCT

Developing a framework for dealing with prosecutorial misconduct at trial first requires an understanding of the prosecutor’s role in the criminal process, what actions constitute prosecutorial misconduct, and the harmful impact of the misconduct.

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<sup>13</sup> *Id.* at 56.

<sup>14</sup> *Id.* at 67–68.

<sup>15</sup> *See infra* Part IV.B.

A. *The Prosecutor's Role and Examples of Misconduct*

1. The Problem with "Doing Justice"

In most of the case law and legal commentary addressing prosecutorial misconduct, judges and authors typically discuss the prosecutor's unique set of responsibilities in the criminal justice system. In addition to advocating for his client—the state or the federal government—the prosecutor also takes on a second role within the system.

This dual role requires the prosecutor to vigorously advocate on behalf of the government *and* to ensure the administration of justice. Therefore, the state prosecutor's [second] role, as "minister of justice," is often referred to as a "quasi-judicial" position. This quasi-judicial role mandates that the prosecutor be held to a particular standard of behavior commonly alluded to as the "do justice" standard.<sup>16</sup>

Although this lofty goal of "doing justice" is very noble, it is also very vague and impractical. Additionally, acting as "minister of justice" will, in some cases, directly conflict with the prosecutor's role as advocate. "Precisely how far the prosecutor is required to go in this direction [as minister of justice] is a matter of debate and varies in different jurisdictions."<sup>17</sup>

In reality, however, the problem of prosecutorial misconduct is much clearer. Prosecutors rarely, if ever, commit misconduct by failing to live up to some lofty, vague standard. Instead, prosecutors commit misconduct by violating "well-established" trial rules—rules set forth in case law, statutes, ethical codes, and court orders—many of which apply equally to both the prosecutor and the defense counsel.<sup>18</sup> As the Supreme Court of New Mexico noted, "[r]are are the instances of misconduct that are not violations of rules that every legal professional, no matter how inexperienced, is charged with knowing."<sup>19</sup>

In light of this practical reality, any discussion of an idealistic, dual role of the prosecutor is not only unnecessary, but also counterproductive. Such a discussion merely detracts from the real issue of

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<sup>16</sup> 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, 206 (2000) (citations omitted) (emphasis added).

<sup>17</sup> WIS. SUP. CT. R. 20:3.8.

<sup>18</sup> See Rosenthal, *supra* note 2, at 910 ("Regarding the existence of misconduct itself, the criteria are well-established, as set forth in a number of cases . . .").

<sup>19</sup> *State v. Breit*, 1996-NMSC-67, 122 N.M. 655, 930 P.2d 792, 803.

dealing with prosecutors' blatant, and usually intentional, violations of well-established rules of trial practice.<sup>20</sup> Consequently, this Article ignores the loftier debate, and instead focuses on the prosecutor's role as advocate and the requirement that he act within the bounds of clear, well-established precedent governing prosecutor behavior.

## 2. Examples of Misconduct throughout the Criminal Process

With this narrower, more practical view of prosecutorial misconduct as the proper focus, identifying misconduct becomes a far more manageable task.<sup>21</sup> Prosecutors commit misconduct at all stages of the criminal process, including before and after trial. For example, misconduct occurs as early as the charging decision itself when prosecutors criminally charge individuals based on improper considerations such as race, gender, or religion.<sup>22</sup> Misconduct also occurs when, after a prosecutor decides to charge a defendant, charging is delayed in order to gain an improper advantage or to harass the defendant.<sup>23</sup>

After charges have been filed, prosecutors engage in misconduct by including false information in the charging document in order to ensure a finding of probable cause and to keep the defendant in the criminal process.<sup>24</sup> Prosecutors also use their considerable power, and nearly unlimited discretion, to retaliate against defendants when defendants choose to exercise their constitutional rights. Most commonly, this includes bringing more severe charges as punishment when a defendant demands a jury trial or pursues and wins an appeal.<sup>25</sup>

Misconduct also occurs in other ways prior to trial. For example, prosecutors may withhold exculpatory or other discoverable evidence from the defendant in order to increase their chances of winning a

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<sup>20</sup> See Janet C. Hoeffel, *Prosecutorial Discretion at the Core: The Good Prosecutor Meets Brady*, 109 PENN ST. L. REV. 1133, 1136 (2005) (arguing that, with regard to the prosecutor's violation of discovery obligations, "[r]elying on the image of the prosecutor as 'doing justice' distracts from finding a real solution to the problem of non-disclosure").

<sup>21</sup> In one sense, identifying prosecutorial misconduct is very difficult in that most misconduct will never be detected. That which is detected is usually discovered by chance. See Rosenthal, *supra* note 2, at 959. However, assuming that the misconduct occurs above-board, as it necessarily would at jury trial, identifying what constitutes misconduct is quite easy when focusing on well-established rules of trial procedure.

<sup>22</sup> See, e.g., *State v. Kramer*, 2001 WI 132, 248 Wis. 2d 1009, 637 N.W.2d 35.

<sup>23</sup> See, e.g., *United States v. Gouveia*, 467 U.S. 180, 192 (1984).

<sup>24</sup> See, e.g., *State v. Mann*, 367 N.W.2d 209, 213 (Wis. 1985).

<sup>25</sup> See, e.g., *Bordenkircher v. Hayes*, 434 U.S. 357 (1982).

conviction.<sup>26</sup> In cases resolved by plea agreement, prosecutors may commit misconduct by breaching the terms of the agreement entered into with the defendant. Often the prosecutor will breach the terms covertly by having others do or say that which the prosecutor has promised not to do or say.<sup>27</sup> Even after conviction and sentencing, there are numerous additional opportunities for prosecutorial misconduct.<sup>28</sup>

### 3. Examples of Trial Misconduct

Despite the tremendous harm that can come from the misconduct illustrated above, the focus of this Article is on prosecutorial misconduct at trial. The reason is not that the harm of trial misconduct is any greater than that of other misconduct—what can be more harmful than bringing a citizen into the criminal process in the first place based on materially false information? Rather, this Article's focus is on trial misconduct because it poses a particular set of difficulties for the defendant and his counsel.

The problem with trial misconduct, unlike misconduct at other stages of the criminal process, is that although the misconduct itself is usually well conceived and calculated, its timing prevents defense counsel from making a reasoned, strategic decision on how to counter the misconduct. For example, with regard to trial misconduct in Arkansas, one commentator has written:

[I]n making the decision to object to improper argument, defense counsel is forced to make a number of subjective assessments concerning the potential prejudice which may result from the argument itself, or an adverse ruling on the objection by the trial court. . . . [C]ounsel is left with little time to consider whether an objection is appropriate; whether even a favorable ruling is likely to cure prejudice; and whether, in the context of the evidence developed at trial, relief in the form of mistrial is preferable to continuing to verdict.<sup>29</sup>

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<sup>26</sup> See Hoeffel, *supra* note 20, at 1134.

<sup>27</sup> See, e.g., *State v. Howland*, 2003 WI App 104, 264 Wis. 2d 279, 663 N.W.2d 340 (holding that when the district attorney agrees, pursuant to plea agreement, to make no specific sentencing recommendation, and then contacts the Division of Community Corrections multiple times to urge it to change its sentencing recommendation from probation to imprisonment, the district attorney's actions constitute an end-run around, and breach of, the plea agreement).

<sup>28</sup> See generally Fred C. Zacharias, *The Role of Prosecutors in Serving Justice After Convictions*, 58 VAND. L. REV. 171 (2005).

<sup>29</sup> J. Thomas Sullivan, *Prosecutorial Misconduct in Closing Argument in Arkansas Criminal Trials*, 20 U. ARK. LITTLE ROCK L. REV. 213, 215 (1998).

Examples of trial misconduct include: striking potential jurors based on race or some other protected classification;<sup>30</sup> referencing inadmissible facts in opening statements;<sup>31</sup> asking improper questions of witnesses to elicit inadmissible facts or make assertions that are untrue;<sup>32</sup> and making improper closing arguments.<sup>33</sup> Trial misconduct can also occur outside of the courtroom. For example, prosecutors have coerced and threatened witnesses to keep them from testifying for the defendant,<sup>34</sup> and have given key government witnesses “extraordinary favors” including “access to drugs, cash, clothing, and other amenities.”<sup>35</sup>

Improper closing arguments, however, are probably the most common and the most visible form of trial misconduct. This type of misconduct poses yet an additional problem for defense counsel: “[I]n most cases, the prosecutor’s final closing argument will be the last words that the . . . jury hears from either attorney.”<sup>36</sup> “Psychology teaches that . . . the last words a listener hears will also be long remembered. Again, human experience validates this psychological concept. There is no one among us who does not want to have the last word in an argument.”<sup>37</sup>

Indeed, the potential impact of misconduct in closing arguments is especially high. Furthermore, the means of committing misconduct in closing argument are limited only by a prosecutor’s imagination, and can range from the blatantly obvious to the subtle and deceptive. For example, prosecutors have argued that a defendant’s failure to testify is evidence of his guilt, thereby violating his Fifth Amendment right not to testify at trial.<sup>38</sup> A more subtle approach, but also a Fifth Amendment violation, is to argue that the defense did not rebut a particular piece of evidence, when the only way to do so would have been through the defendant’s testimony when the defendant chose not to testify.<sup>39</sup>

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<sup>30</sup> See, e.g., *Batson v. Kentucky*, 476 U.S. 79 (1986).

<sup>31</sup> See, e.g., *State v. Tew*, 195 N.W.2d 615 (Wis. 1972).

<sup>32</sup> See, e.g., *Howard v. Gramley*, 225 F.3d 784 (7th Cir. 2000).

<sup>33</sup> See, e.g., *Griffin v. California*, 380 U.S. 609 (1965).

<sup>34</sup> See, e.g., *Kitchen v. United States*, 227 F.3d 1014 (7th Cir. 2000); *United States v. Gardner*, 238 F.3d 878 (7th Cir. 2001).

<sup>35</sup> See *Rosenthal*, *supra* note 2, at 934 (citing *United States v. Boyd*, 55 F.3d 239, 244–45 (7th Cir. 1995)).

<sup>36</sup> Welsh White, *Curbing Prosecutorial Misconduct in Capital Cases: Imposing Prohibitions on Improper Penalty Trial Arguments*, 39 AM. CRIM. L. REV. 1147, 1149 (2002).

<sup>37</sup> LARRY S. POZNER & ROGER J. DODD, *CROSS-EXAMINATION: SCIENCE AND TECHNIQUES* 501 (The Michie Company 1993).

<sup>38</sup> See, e.g., *Griffin*, 380 U.S. at 610–11.

<sup>39</sup> See, e.g., *United States v. Cotnam*, 88 F.3d 487, 497 (7th Cir. 1996).

Other types of improper closing arguments include: making assertions that are false or, even if true, were not introduced into evidence;<sup>40</sup> diverting jurors' attention from the evidence by appealing to their fears or self-interest;<sup>41</sup> vouching for the credibility of government witnesses;<sup>42</sup> disparaging defense counsel or the defendant;<sup>43</sup> misstating the law;<sup>44</sup> shifting the burden of proof to the defendant;<sup>45</sup> and appealing to jurors' racial bias.<sup>46</sup>

*B. Misconduct—What's the Harm?*

1. Harm to the Accused

"Those who have experienced the full thrust of the power of government when leveled against them know that the only protection the citizen has is in the requirement for a fair trial."<sup>47</sup> Prosecutorial misconduct compromises, at a minimum, "an aspect of a fair trial which is implicit in the Due Process Clause of the Fourteenth Amendment by which the States are bound."<sup>48</sup>

This concept of a fair trial "requires that the procedures used to determine the guilt or innocence of the defendant comport with fundamental ideas of fair play and justice."<sup>49</sup> When a prosecutor violates rules of trial conduct—the very things that define fair play—the right to a fair trial is implicated. While any misconduct compromises the right, the more flagrant, intentional, and repetitive the misconduct, the greater the resulting harm.

In addition, misconduct violates numerous other constitutional and statutory rights. For example, if a prosecutor directly or indirectly comments in closing argument on the defendant's failure to testify, as described above, the Fifth Amendment right against self-incrimination is violated.<sup>50</sup> Likewise, when a prosecutor argues that a

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<sup>40</sup> See, e.g., *United States v. Brisk*, 171 F.3d 514, 524 (7th Cir. 1999).

<sup>41</sup> See, e.g., *United States v. Cunningham*, 54 F.3d 295, 300 (7th Cir. 1995).

<sup>42</sup> See, e.g., *United States v. Cheska*, 202 F.3d 947 (7th Cir. 2000).

<sup>43</sup> See, e.g., *United States v. Xiong*, 262 F.3d 672 (7th Cir. 2001).

<sup>44</sup> See, e.g., *Cunningham*, 54 F.3d at 300–01.

<sup>45</sup> See, e.g., *United States v. Cornett*, 232 F.3d 570 (7th Cir. 2000).

<sup>46</sup> See, e.g., *Aliwoli v. Carter*, 225 F.3d 826 (7th Cir. 2000).

<sup>47</sup> *Donnelly v. DeChristoforo*, 416 U.S. 637, 651 (1974) (Douglas, J., dissenting).

<sup>48</sup> *Id.* at 649.

<sup>49</sup> Michael T. Fisher, Note, *Harmless Error, Prosecutorial Misconduct, and Due Process: There's More to Due Process than the Bottom Line*, 88 COLUM. L. REV. 1298, 1299 (internal citations omitted).

<sup>50</sup> See, e.g., *Griffin v. California*, 380 U.S. 609 (1965) (finding comments on a defendant's failure to testify to be improper argument); *United States v. Cotnam*, 88



defendant charged with drug crimes was able to post bail precisely because he is a drug dealer, the comment not only affects “the fairness of the verdict,” but also has a “potential effect on the Eighth Amendment rights of defendants” to post bond.<sup>51</sup> “By analogy to comments on the exercise of the Fifth Amendment right not to testify, such comments are improper because they cut down on a constitutional privilege[,] here the privilege of posting bond once it is set[,] by making its assertion costly.”<sup>52</sup>

Perhaps the most harmful, yet often overlooked, type of prosecutorial misconduct is that which violates a defendant’s Sixth Amendment right to confront his accuser. When a prosecutor states or argues facts not in evidence, the jury hears and considers this information, yet the defendant has no opportunity to cross-examine or challenge the allegations because no witness was ever called to testify.<sup>53</sup> This Sixth Amendment violation can occur not only during the closing argument, but also during the opening statement and during the examination of witnesses.<sup>54</sup>

It is not so much the violation of these rights in the abstract that is harmful to the defendant. Instead, it is the very real consequences that the defendant suffers when these rights are violated. Most significantly, these consequences include false convictions<sup>55</sup> which in turn result in “lengthy incarceration, financial ruin, and, in a number of instances, sentences of death.”<sup>56</sup> Even in cases of acquittals, innocent defendants still suffer stress, anxiety, long periods of incarceration, and tremendous financial costs.

## 2. Societal Harm Generally

Prosecutorial misconduct harms not only the individual accused of the crime, but also society more generally. First, “[t]he reversal of a conviction entails substantial social costs: it forces jurors, witnesses,

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F.3d 487 (7th Cir. 1996) (finding indirect comments on a defendant’s failure to testify to be improper argument).

<sup>51</sup> *United States v. Vargas*, 583 F.2d 380, 388 (7th Cir. 1978).

<sup>52</sup> *Id.* (internal citations omitted).

<sup>53</sup> *See Douglas v. Alabama*, 380 U.S. 415 (1965); *see also United States v. Brisk*, 171 F.3d 514 (7th Cir. 1999) (holding that prosecutor committed misconduct when he argued that the defendant engaged in drug activities in front of his children when no such evidence was ever presented).

<sup>54</sup> *See, e.g., State v. Bannister*, 2006 WI App 136, 2006 Wisc. App. LEXIS 447, 720 N.W.2d 498 (Fine, J., concurring).

<sup>55</sup> *See Hoeffel, supra* note 20, at 1148 (citing studies that show a large number of convictions reversed due to prosecutorial misconduct, particularly misconduct involving concealing evidence or presenting false evidence).

<sup>56</sup> Rosenthal, *supra* note 2, at 958.

courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place.”<sup>57</sup> Even more costly than a reversal, when left unchecked the misconduct undermines the integrity of the system itself, thereby threatening the equally important *appearance* of a fair trial.

Beyond the drain on precious resources through wasted trial proceedings and protracted post-trial proceedings in the individual cases, there is an incalculable cost in damaged integrity [to the judicial system itself] that may be difficult to repair, and which affects the social fabric in a manner that implicates more widespread consequences.<sup>58</sup>

Simply stated, “[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.”<sup>59</sup> Conversely, “[i]ntentional wrongdoing in court by perhaps the most critical member of the government law enforcement team [the prosecutor] calls into question the fairness and integrity of the trial.”<sup>60</sup>

### III. THE EXISTING LAW AND ITS FUNDAMENTAL FLAW: JUDICIAL DISCRETION

#### A. *The Three-Step Test*

The current law governing prosecutorial misconduct at trial mandates a three-step analysis. First, when the defendant objects to the alleged misconduct by the prosecutor, *e.g.*, improper closing argument, the court must make a finding as to whether the prosecutor’s actions in fact constitute misconduct.<sup>61</sup> The judge implicitly makes this finding by either sustaining or overruling the defendant’s objection. This step of the analysis is usually not a problem and is not the subject of much debate. Courts are quite capable of identifying improper conduct and are usually willing to sustain objections, thereby finding that the misconduct occurred.<sup>62</sup>

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<sup>57</sup> Fisher, *supra* note 49, at 1301 (quoting *United States v. Mechanik*, 475 U.S. 66, 72 (1986)).

<sup>58</sup> Rosenthal, *supra* note 2, at 958.

<sup>59</sup> *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

<sup>60</sup> Paul J. Spiegelman, *Prosecutorial Misconduct in Closing Argument: The Role of Intent in Appellate Review*, 1 J. APP. PRAC. & PROCESS 115, 131 (1999).

<sup>61</sup> See, *e.g.*, *State v. Bunch*, 529 N.W.2d 923, 925 (Wis. Ct. App. 1995).

<sup>62</sup> *E.g.*, *Howard v. Gramley*, 225 F.3d 784, 789 (7th Cir. 2000) (“During the course of proceedings, the prosecutor made a variety of inappropriate remarks . . . . Howard objected to each of these and, in all cases, the trial judge sustained the objection

Second, after finding that the prosecutor committed the misconduct, the trial court must decide the proper remedy.<sup>63</sup> Assuming the defendant requests a curative instruction and the court grants the request, the problem is resolved and the trial moves on. However, when the defendant requests a mistrial, “[t]he trial court must determine, in light of the whole proceeding, whether the basis for the mistrial request is sufficiently prejudicial to warrant a new trial.”<sup>64</sup>

Under this standard, the trial court is required to step into the shoes of the jury, weigh the evidence and, if the court believes the defendant would be found guilty even without the misconduct, not grant the mistrial as a remedy.<sup>65</sup> This requires a tremendous amount of judicial discretion, including the analysis of “mannerisms, expressions, and demeanor of the parties in determining whether to grant a mistrial.”<sup>66</sup> If the defendant is convicted and subsequently appeals the trial court’s refusal to grant a mistrial, the appellate court engages in essentially the same analysis, and often will simply defer to the trial court’s decision.<sup>67</sup>

Third, in the rare case that a mistrial is granted, or a conviction is reversed on appeal, the trial court must later decide whether retrial of the defendant is barred by double jeopardy protections.<sup>68</sup> Under current federal law and most state law, double jeopardy protection only attaches when the court finds that the prosecutorial misconduct “was intended to provoke the defendant into moving for a mistrial.”<sup>69</sup> Even if the court determines that the prosecutor committed the mis-

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. . . .”); *see also* Rosenthal, *supra* note 2, at 910 (“Regarding the existence of misconduct itself, the criteria are well-established, as set forth in a number of cases . . . .”). *But cf.* State v. Smith, No. 2005AP1617-CR (Wis. Ct. App. May 17, 2006) (on file with author) (overruling the defendant’s objection to the prosecutor introducing facts not in evidence and shifting the burden of proof to the defendant).

<sup>63</sup> *See, e.g., Bunch*, 529 N.W.2d at 925.

<sup>64</sup> *Id.*

<sup>65</sup> *See, e.g., Howard*, 225 F.3d at 793 (weighing testimony of witnesses and holding that the prosecutor’s misconduct “did not go to the heart of the prosecution’s case”); *United States v. Martinez-Medina*, 279 F.3d 105 (1st Cir. 2002) (discussing the trial judge’s duty to determine the impact of the improper conduct); *United States v. Steward*, 977 F.2d 81 (3d Cir. 1992) (same); *United States v. Wadlington*, 233 F.3d 1067 (8th Cir. 2000) (same).

<sup>66</sup> Sullivan, *supra* note 29, at 257 (internal quotations and citations omitted).

<sup>67</sup> *See, e.g., Bunch*, 529 N.W.2d at 925 (“The decision whether to grant a motion for a mistrial lies within the sound discretion of the trial court” to which the appellate court will give “great deference.”) (citations omitted); *United States v. Haar*, 931 F.2d 1368 (10th Cir. 1991) (discussing the great level of deference afforded to the trial judge’s ruling).

<sup>68</sup> *See, e.g., Oregon v. Kennedy*, 456 U.S. 667 (1982).

<sup>69</sup> *Id.* at 679.

conduct with the intent to “prevail at trial by impermissible means” rather than provoke a request for mistrial, the defendant is offered no double jeopardy protection and may be retried.<sup>70</sup>

*B. The Problem with Judicial Discretion*

The use of judicial discretion, at both the trial and appellate level, to deal with prosecutorial misconduct is a fundamentally flawed concept. It essentially transfers the jury’s role to the judge, and allows the judge to make a finding of guilt by hypothetically weighing the evidence as though the misconduct had not occurred. That judicial finding of guilt is then used as the basis to hold that the misconduct does not warrant a new trial.

“[S]trong evidence of guilt [as determined by the judge] eliminates any lingering doubt that the prosecutor’s remarks unfairly prejudiced the jury’s deliberations.”<sup>71</sup> Consequently, if the defendant is “obviously guilty” in the eyes of the judge, he is therefore not entitled to a fair trial untainted by prosecutorial abuse.<sup>72</sup> “The absurdity of this rationale begs for a better solution.”<sup>73</sup>

Aside from being fundamentally flawed on the most basic level, the existing framework for dealing with prosecutorial misconduct is difficult, if not impossible, to apply with any level of accuracy or consistency. Judges weigh the evidence and attach varying levels of significance to each piece of evidence, but “no court knows what influenced a particular jury’s verdict of guilt in any particular case.”<sup>74</sup> This judicial determination of guilt, even if done in good faith, is nothing more than guesswork for what the jury would have done. In fact, several authors point to “sufficient empirical data to support an assertion that judges do a poor job of evaluating the importance jurors attach to specific issues and evidence.”<sup>75</sup>

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<sup>70</sup> Rosenthal, *supra* note 2, at 936. The absurdity of this rule is also addressed *infra* Part III.B.3.

<sup>71</sup> Rodriguez v. Peters, 63 F.3d 546, 558 (7th Cir. 1995) (quoting United States v. Gonzalez, 933 F.2d 417, 431–32 (7th Cir. 1991)).

<sup>72</sup> Gershman, *supra* note 4, at 426 (citations omitted).

<sup>73</sup> Tobin, *supra* note 16, at 235.

<sup>74</sup> United States v. Antonelli Fireworks Co., 155 F.2d 631, 647 (2d Cir. 1946) (Frank, J., dissenting).

<sup>75</sup> Robert L. Gernon, *Prosecutorial Misconduct in Kansas: Still Hazy After All These Years*, 41 WASHBURN L.J. 245, 252 (2002) (citing Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79 (1988) (internal quotations omitted)).

Even more problematic, judges actually refuse to exercise their discretion in good faith, and instead engage in “judicial hypocrisy”<sup>76</sup> by, on the one hand, condemning the misconduct and acknowledging its harm, and on the other hand, doing nothing to protect the very rights that have been violated.<sup>77</sup> In even the most extreme cases of prosecutorial misconduct, judges consistently find that the misconduct could not possibly have influenced the jury’s decision, and therefore refuse to grant mistrials.<sup>78</sup> The use of judicial discretion has become nothing more than a “judicial weapon to preserve convictions” as courts routinely dispense with the problem by finding “that the defendant is clearly guilty.”<sup>79</sup> This judicial finding of guilt, in turn, is used as the basis to label the misconduct as harmless and allow it to stand.

Finally, in the rare case that mistrial is granted or a conviction is reversed due to a prosecutor’s misconduct, the use of judicial discretion virtually guarantees the prosecutor the opportunity for successive prosecutions of the accused. This results from the courts’ willingness to repeatedly find that the misconduct was merely intended to win a conviction by improper means, rather than intended to provoke a mistrial. This is clearly a distinction without a meaningful difference and, as a practical matter, is a distinction that is impossible to draw. Yet it is this very distinction that is used to reward the government with the opportunity for successive prosecutions.

#### 1. The Courts’ Refusal to Ensure a Fair Trial

The first issue that must be decided by the trial court, and later by the appellate court upon review, is whether the prosecutor’s misconduct warrants a new trial for the defendant. The trial court, with the desire to avoid a second trial, and in light of what is often a “very

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<sup>76</sup> Interview with Terry W. Rose, Attorney, in Kenosha, Wis. (May 26, 2006).

<sup>77</sup> See *Darden v. Wainwright*, 477 U.S. 168, 189 (1986) (Blackmun, J., dissenting) (“Today’s opinion, however, reveals a Court willing to tolerate not only imperfection but a level of fairness and reliability so low it should make conscientious prosecutors cringe.”).

<sup>78</sup> See *id.* at 192 (allowing the prosecutor to employ a “relentless and single-minded attempt to inflame the jury,” including the expression of personal beliefs, commenting on the credibility of witnesses, arguing that the only way to prevent future crime is to impose the death penalty, calling the defendant “an animal,” and stating that someone should have “blown [the defendant’s] head off”); see also *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974); *United States v. Antonelli Fireworks Co.*, 155 F.2d 631 (2d Cir. 1946); *State v. Smith*, 1999 SD 83, 599 N.W.2d 344; *State v. Jackson*, 2005 WI App 176, 285 Wis. 2d 804, 701 N.W.2d 652.,

<sup>79</sup> Gershman, *supra* note 4, at 425.

close and ongoing relationship” with the prosecutor,<sup>80</sup> weighs the evidence and nearly always finds that the misconduct would not have affected the outcome of the trial. Then, upon appellate review, this same “approach allows the appellate court to act as fact-finder and disregard prosecutorial errors because of its own belief in the defendant’s guilt.”<sup>81</sup> Often, the appellate court refuses to even make such a determination and simply defers to the trial court’s ruling.<sup>82</sup>

This current system has the propensity to permit, and in fact encourage, even the most flagrant cases of prosecutorial misconduct. Upon finding misconduct, “at best, judges offer condemnation for the arguments and admonishment of the prosecutors,”<sup>83</sup> without providing any effective deterrent for future misconduct or any protection for the defendant’s rights. The courts’ admonitions, at best, ring hollow, and at worst, have the perverse effect of encouraging prosecutors to commit further acts of misconduct. As one California court acknowledged:

This court has had occasion to twice address at length [the prosecutor’s] attitude toward, and treatment of, the judge, opposing counsel, witnesses, defendants, jurors and others in the courtroom . . . .

Consequently, it is disheartening, to say the least, to learn that she takes “pride” in our admonitions, apparently because we did not reverse the judgment rendered. We most earnestly urge counsel to reconsider her approach lest in the future it becomes necessary for us to reverse otherwise sustainable convictions . . . .<sup>84</sup>

This particular court’s admonition illustrates that “[t]here is little doubt that prosecutors [commit the misconduct] with full knowledge that they are committing a constitutional violation . . . despite repeated criticism by the appellate courts.”<sup>85</sup>

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<sup>80</sup> Rosenthal, *supra* note 2, at 912.

<sup>81</sup> 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, 1351 (1997).

<sup>82</sup> See, e.g., *Williams v. State*, 742 S.W.2d 932, 935–36 (Ark. 1988) (“It is a serious matter when an attorney attempts to appeal to the prejudice of the jury by arguing matters outside of the record. However, we usually defer to the trial court in the exercise of discretion in such matters.”).

<sup>83</sup> Duffy, *supra* note 81, at 1344–45 (citations omitted).

<sup>84</sup> Spiegelman, *supra* note 60, at 123 (citing *People v. Congious*, No. B0202709 (Cal. Ct. App. Dec. 4, 1987)).

<sup>85</sup> Gershman, *supra* note 4, at 429.

## 2. An Intra-Court Illustration

The ineffectiveness of judicial discretion, as well as the outright “judicial hypocrisy” evident in these decisions, is highlighted even further when looking within a single state and, even more narrowly, within a single appellate district within that state. In contrast to looking across jurisdictions, this intra-court view better illustrates the prosecutors’ willingness to continually ignore the law, as well as the courts’ continued tolerance and even encouragement of that behavior. This phenomenon can be seen within any state and any appellate district, such as the California example, above. Another excellent illustration is Wisconsin’s second district appellate court and a string of its recent cases.

### (a) *State v. Jackson*: An Empty Warning to Prosecutors

In *State v. Jackson*<sup>86</sup> the defendant was convicted of four counts based on a sole act of alleged criminal recklessness. On appeal, the court agreed with the trial court that the prosecutor committed misconduct on multiple occasions throughout trial, from opening statement to closing argument.<sup>87</sup> The prosecutor’s misconduct included expressing a personal belief about the evidence, vouching for witnesses, disparaging defense counsel, and attempting to shift the burden of proof from the state to the defendant.<sup>88</sup> Just one of the numerous violations was the prosecutor’s argument to the jury that “my job is to tell you what the truth is [and] present all of the witnesses to you. . . . [Defense counsel’s] job is to try to get your attention focused somewhere else, use innuendo, try to make you speculate. Her job is to try and get the guy off. That’s it.”<sup>89</sup>

The appellate court analyzed the prosecutor’s numerous acts of misconduct by stepping into the shoes of the jury and weighing the evidence. This evidence, in its entirety, consisted only of three eyewitnesses.<sup>90</sup> First, even prosecutors have long acknowledged that eyewitness testimony is highly suspect and frequently leads to false convictions.<sup>91</sup> Second, the eyewitnesses in this case actually contradicted

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<sup>86</sup> 2005 WI App 176, ¶ 1, 285 Wis. 2d 804, ¶ 1, 701 N.W.2d 652, ¶ 1.

<sup>87</sup> *Id.* at ¶¶ 13–17.

<sup>88</sup> *Id.* at ¶¶ 8–13.

<sup>89</sup> *Id.* at ¶ 9.

<sup>90</sup> *Id.* at ¶ 14.

<sup>91</sup> The Wisconsin Model Policy and Procedure for Eyewitness Identification, co-authored by the Office of the Attorney General and the Wisconsin Department of Justice, states that “[r]esearch and nationwide experience have demonstrated that eyewitness evidence can be a particularly fragile type of evidence, and that eyewitnesses can be mistaken” and “can make significant identification errors . . . .” OFFICE

each other and had serious credibility issues. Of the three eyewitnesses, one testified that the perpetrator's description did *not* match that of the defendant.<sup>92</sup> Another who *did* identify the defendant admitted to receiving substantial consideration from the district attorney's office, on *five* of his own pending cases, in exchange for his testimony.<sup>93</sup> At least one of the witnesses who identified the defendant was also a convicted criminal and was impeached with the prior convictions.<sup>94</sup>

Given the highly speculative and contradictory nature of the evidence, it is difficult to imagine how the prosecutor's misconduct could *not* have harmed the defendant. Additionally, given the numerous violations that occurred from the beginning of the trial through closing arguments, it is difficult to imagine how the prosecutor could have done any *more* to violate the defendant's Due Process right to a fair trial. In fact, the court stated that:

Disparaging remarks directed at defense counsel are reprehensible. Such remarks can prejudice the defendant by directing the jury's attention away from the legal issues or by inducing the jury to give greater weight to the government's view of the case. Disparaging remarks that suggest that defense counsel has lied to or withheld information from the jury can further prejudice the defendant by causing the jury to believe that the defense's characterization of the evidence should not be trusted and, therefore, that a finding of not guilty would be in conflict with the true facts of the case. This kind of statement, if inflammatory in nature, might also detract from the dignity of judicial proceedings.<sup>95</sup>

Despite this condemnation, the court, acting as "super-jury,"<sup>96</sup> weighed the evidence and somehow concluded that "it is not reasonably likely that the prosecutor's misconduct affected the outcome of the trial, precluded a fair trial or prejudiced [the defendant]."<sup>97</sup> The court then sternly warned that "such conduct nevertheless reflects very poorly on the office of the district attorney . . . and devalues the trial process. At some point in the future, this type of

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OF THE ATTORNEY GEN. & THE WIS. DEP'T. OF JUSTICE, WISCONSIN MODEL POLICY & PROCEDURE FOR EYEWITNESS IDENTIFICATION 2 (2005).

<sup>92</sup> *Jackson*, 2005 WI App 176, at ¶ 15.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at ¶ 9 n.2 (citing *U.S. v. Xiong*, 262 F.3d 672, 675 (7th Cir. 2001)).

<sup>96</sup> Gershman, *supra* note 4, at 425.

<sup>97</sup> *Id.* at ¶ 16.



conduct may very well be grounds for a determination of prejudice and reversal of a conviction.”<sup>98</sup>

This case is a perfect illustration of the complete ineffectiveness of judicial discretion in ensuring a defendant’s Due Process right to a fair trial. Unfortunately, there is nothing unique about this holding; judges routinely permit this level of misconduct in other appellate districts within the state, as well as in other states and in the federal system.<sup>99</sup> What is enlightening, however, is a continued analysis of case law within this appellate district, especially in view of the court’s warning that this type of behavior will not be tolerated in the future.

(b) *State v. Mayo*: Saved by the Jury Instruction

A short time after *Jackson*, this same court again had the opportunity to review a case of prosecutorial misconduct. In *State v. Mayo*<sup>100</sup> the very same prosecutor’s office as in *Jackson* committed nearly identical prosecutorial misconduct, which again included improper closing argument. The prosecutor’s comments to the jury mirrored those of the prosecutor in *Jackson*: “[T]he defense attorney here . . . has one job. His job is to get his client off the hook. That’s his only job here, not to see justice done but to see that his client is acquitted, and he’s fighting hard for his client.”<sup>101</sup>

The prosecutor was seemingly undeterred by the court’s recent but apparently empty warning that “[a]t some point in the future, this type of conduct may very well be grounds for a determination of prejudice and reversal of a conviction.”<sup>102</sup> Consequently, the same prosecutor’s office was again rewarded for ignoring the ethical rules and the rules of trial practice. In *Mayo*, instead of enforcing its stern warning enunciated in *Jackson*, the court pointed to a jury instruction given by the trial court that stated “closing arguments do not constitute evidence.”<sup>103</sup> The court concluded that “juries are presumed to follow the instructions given to them,”<sup>104</sup> and consequently found the misconduct to be harmless.

The court’s reasoning, however, is seriously flawed. First, the jury instruction referred to by the court was not a curative instruction tailored to the specific misconduct, but rather was an instruction that

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<sup>98</sup> *Id.* at ¶ 17.

<sup>99</sup> *See, e.g., supra* notes 73–74.

<sup>100</sup> 2006 WI App 78, ¶ 5 2006 Wisc. App. LEXIS 276, ¶ 5, 713 N.W.2d 191, ¶ 5.

<sup>101</sup> *Id.* at ¶ 4.

<sup>102</sup> *Jackson*, 2005 WI App 176 at ¶ 17.

<sup>103</sup> *Mayo*, 2006 WI App 78, at ¶ 5.

<sup>104</sup> *Id.*

is “given in every case.”<sup>105</sup> By the court’s reasoning, then, the prosecutor may commit misconduct in closing arguments in every case, because the jury has been instructed that closing arguments are not evidence.

Second, the jury instruction is irrelevant. The issue was not the introduction of improper *evidence*, but rather the impact of improper *argument*. The court’s failure to recognize this distinction proves its inability and unwillingness to protect defendants’ rights. Instead, the court merely repeated its same empty warning that “the remarks are nevertheless deserving of condemnation. . . . [T]he remarks disparaged defense counsel and cast defense counsel, an equal participant in the proceeding, in a pejorative light.”<sup>106</sup> Furthermore, the court stated that “[t]he remarks reflect poorly on the prosecutor [and] [t]he remarks cannot be excused, as the State would have us do.”<sup>107</sup>

Not only has the court shown its unwillingness to exercise its discretion in such a way as to protect constitutional rights, but it has also hypocritically uttered the same useless words that have already been ignored by the very same prosecutor’s office. While this condemnation may satisfy the court, it only gives the prosecutor’s office more incentive to continue its misconduct in the future.<sup>108</sup> More importantly, it does nothing for the defendant whose rights have just been violated by the prosecutor under the court’s wandering eye.

(c) *State v. Graham*: The “Failure to Object”

When this particular court grows tired, or possibly embarrassed, of issuing its boiler-plate warning, it will find ways to side-step the issue of prosecutorial misconduct altogether. For example, in *State v. Graham*<sup>109</sup> the defendant appealed his conviction based on improper questions and argument by the prosecutor. One of the key issues at trial was Graham’s whereabouts on the date of his alleged “other act”<sup>110</sup> that was introduced as evidence.<sup>111</sup> This “other act” was very similar to the crime with which he was charged and, as the court ac-

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<sup>105</sup> See Wis. J.I. CRIMINAL 1, 160 (1999).

<sup>106</sup> *Mayo*, 2006 WI App 78, at ¶ 12.

<sup>107</sup> *Id.*

<sup>108</sup> See Spiegelman, *supra* note 60, at 123 (citing *People v. Congious*, No. B0202709 (Cal. Ct. App. Dec. 4, 1987) (“[I]t is disheartening, to say the least, to learn that she takes ‘pride’ in our admonitions, apparently because we did not reverse the judgment rendered.”)).

<sup>109</sup> 2006 WI App 214, ¶ 1, 287 Wis. 2d 509, ¶ 1, 704 N.W.2d 425, ¶ 1.

<sup>110</sup> See Wis. STAT. § 904.04(2) (2003–04) (permitting, under certain circumstances, the admission into evidence of “other crimes, wrongs or acts”).

<sup>111</sup> *Graham*, 2006 WI App 214, at ¶¶ 4, 5.

knowledged, was “highly probative . . . of Graham’s identity as the offender in this case.”<sup>112</sup>

Graham presented evidence, through a witness’s testimony and through his own testimony, that he was at the Luxor Hotel in Las Vegas at the time of the alleged “other act.”<sup>113</sup> On cross-examination of Graham’s witness, the prosecutor attempted to undermine Graham’s evidence by stating that “[w]e checked with the Luxor, and—.”<sup>114</sup> Defense counsel immediately interrupted and objected to this as “testimony” by the prosecutor, but the trial court refused to rule on the objection and allowed the prosecutor to continue along this path.<sup>115</sup>

Next, Graham himself testified that he was at the Luxor at the time of the alleged “other act,” and on cross-examination the prosecutor asked twice: “[y]ou don’t have any explanation as to why the Luxor would have no record of your ever staying at the Luxor Hotel?”<sup>116</sup> Defense counsel objected to both questions as providing prosecutorial “testimony,” but was overruled both times.<sup>117</sup> During closing argument, having succeeded with this testimonial tactic in cross-examination, the prosecutor further bolstered his case by telling the jury that “I was able to have members of my staff telephone the Luxor.”<sup>118</sup>

On appeal, the court acknowledged that the transcript was “devoid of any factual predicate for the prosecutor’s questions . . . regarding the records of the Luxor.”<sup>119</sup> The court found that the prosecutor had clearly made assertions that were impossible for the defendant to cross-examine, and also argued facts not in evidence in his closing argument.<sup>120</sup> However, instead of following through on its warning that such conduct “may very well be grounds for a determination of prejudice and reversal of a conviction,”<sup>121</sup> the court insulated the prosecutor from responsibility and actually cast the blame, in part, on defense counsel.

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<sup>112</sup> *Id.* at ¶ 27.

<sup>113</sup> *Id.* at ¶ 6.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* Defense counsel stated: “Judge, I object. This is testimony. He needs to call a witness.” *Id.*

<sup>116</sup> *Graham*, 2006 WI App 214, at ¶ 9.

<sup>117</sup> *Id.* Defense counsel “objected, stating ‘Judge, he [the prosecutor] can’t testify to these things.’” *Id.*

<sup>118</sup> *Id.* at ¶ 11.

<sup>119</sup> *Id.* at ¶ 16.

<sup>120</sup> *Id.* at ¶¶ 16–19.

<sup>121</sup> *Jackson*, 2005 WI App 176, at ¶ 17.

With regard to Graham's witness, it was undisputed that defense counsel objected the instant the prosecutor began to "testify" during the state's cross-examination, and the trial court refused to rule on the objection.<sup>122</sup> The appellate court held, however, that defense counsel's failure to renew the objection upon completion of the question that contained the prosecutorial "testimony" constituted a "failure to object."<sup>123</sup>

This holding not only avoids the real issue but is also contrary to well-established trial practice.<sup>124</sup> First, defense counsel objected immediately upon hearing the improper conduct.<sup>125</sup> Second, defense counsel is not required to repeat the same objection, particularly in such a short period of time, when the court fails to rule on an objection.<sup>126</sup> Rather, "[i]f there is no ruling, counsel should consider the objection overruled."<sup>127</sup>

With regard to Graham's own testimony, where the trial court did explicitly overrule the identical objection, the appellate court acknowledged the judicial error, but simply played "super-jury" by weighing the evidence and finding that the prosecutor's misconduct was harmless.<sup>128</sup> This finding was based on the other evidence presented at trial against the defendant, in particular, the "other acts" evidence which was "highly probative . . . of Graham's identity."<sup>129</sup> What the court chooses to ignore, however, is that the prosecutor's misconduct was employed specifically to prove that the defendant committed the "other act"—the very piece of evidence on which the court relies to negate the impact of the misconduct.

(d) *State v. Smith*: Moving for Mistrial

In the last of a string of cases, and shortly after *Graham*, this same appellate court again had the opportunity to address prosecutorial misconduct in *State v. Smith*.<sup>130</sup> In *Smith*, the defendant objected to improper closing arguments by the prosecutor but the trial court

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<sup>122</sup> *Graham*, 2006 WI App 214, at ¶ 6.

<sup>123</sup> *Id.* at ¶ 22 ("Thus, the substance of the information, albeit improper, was known to the jury by virtue of Graham's failure to object.")

<sup>124</sup> R. GEORGE BURNETT, et al., WISCONSIN TRIAL PRACTICE § 6, at 16 (1st ed. Supp. 2001).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Graham*, 2006 WI App 214, at ¶ 29.

<sup>129</sup> *Id.* at ¶ 27.

<sup>130</sup> No. 2005AP1617-CR (Wis. Ct. App. May 17, 2006) (on file with author).

overruled each and every objection.<sup>131</sup> These improper arguments included offering facts not testified to by witnesses, shifting the burden of proof to the defendant, and commenting on defense counsel's pre-trial strategy as evidence of the defendant's guilt.<sup>132</sup>

Instead of taking the opportunity to review the claim of prosecutorial misconduct, the appellate court again side-stepped the issue altogether and again used defense counsel as the reason for not addressing the underlying problem. This time, the court summarily dismissed the defendant's appeal,<sup>133</sup> holding that the issue was waived because defense counsel failed to move for a mistrial.<sup>134</sup>

It is true, and this very appellate court has held, that when a defendant objects to prosecutorial misconduct, and the court sustains the objection and issues a curative instruction, the defendant's failure to move for a mistrial must be construed as his choice to take the case to verdict rather than start over with a new trial.<sup>135</sup> The problem with the appellate court's application of this rule in *Smith*, however, is that in *Smith*, each and every one of defense counsel's objections had been *overruled* by the trial court.<sup>136</sup>

The appellate court's holding, therefore, violates the incredibly basic concept that a mistrial, like a curative instruction, is a remedy. In order to request a remedy, there must be a wrong as evidenced by a sustained objection. It is contrary to common logic to require the defendant to request a remedy—whether in the form of a curative instruction, a mistrial, a special rebuttal argument, or some other remedy—when the trial court has just found that no wrong has occurred and has overruled the defendant's objection. This concept is so fundamental, both commentators and other state courts, including California, agree that:

If the trial court overrules the objection, no further step should be required of defense counsel in terms of either the motion for mistrial or request for specific admonition to disregard precisely because the trial court has ruled that no misconduct has oc-

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<sup>131</sup> *Id.* at 2.

<sup>132</sup> *Id.* at 1.

<sup>133</sup> See WIS. STAT. § 809.21 (2003–04); *Smith*, No. 2005AP1617-CR, at 1.

<sup>134</sup> *Smith*, No. 2005AP1617-CR, at 2.

<sup>135</sup> *State v. Rockette*, 2006 WI App 103, ¶ 30, 2006 Wisc. App. LEXIS 483, ¶ 30, 718 N.W.2d 269, ¶ 30 (“Rockette made no motion for mistrial after the court addressed the objections. All we can assume is that Rockette was satisfied with the court's ruling and curative measure, and that he had no further objections. Rockette took his chances with the jury.”).

<sup>136</sup> *Smith*, No. 2005AP1617-CR, at 2.

curred. Consequently, *curative action could hardly be rationally contemplated by a court that has rejected the defense challenge.*<sup>137</sup>

[T]he absence of a request for a curative admonition does not forfeit the issue for appeal if the court immediately overrules an objection to alleged prosecutorial misconduct *and as a consequence the defendant has no opportunity to make such a request.*<sup>138</sup>

Further, in *Smith*, the mistrial would have to be requested “immediately after the claimed source of error, especially [because] the error [was] the misconduct of an attorney.”<sup>139</sup> Defense counsel, therefore, would have to move for the mistrial immediately after the trial court overruled the objection, thereby risking admonition by the court for what would have been an absurd request, and potentially diminishing defense counsel’s credibility in the eyes of the jury.<sup>140</sup>

These cases, which are not only from the same state but also from the same appellate court within the state, illustrate the courts’ inability to protect defendants’ constitutional rights. Additionally, these cases show that the courts’ ineffectiveness is not the result of a failed, but good faith effort. Instead, the ineffectiveness stems from bad faith rulings and “judicial hypocrisy” in condemning prosecutors for their harmful misconduct in one breath, and then approving and even encouraging the very same misconduct in the next. Finally, and perhaps most harmfully, the absurd rulings in *Graham* and *Smith* also highlight the lengths to which the courts will go to avoid the underlying issues of prosecutorial misconduct and the abuse of trial court discretion in dealing with the misconduct.

### 3. The Courts’ Refusal to Bar Retrial

Another problem with the application of judicial discretion is that, in the rare case that a mistrial is actually granted or a conviction is reversed, courts almost universally allow the prosecution to retry the defendant, often with a stronger, trial-tested case the second time around.

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<sup>137</sup> Sullivan, *supra* note 29, at 256 (emphasis added).

<sup>138</sup> People v. Najera, No. E034255, 2004 Cal. App. LEXIS 5712, at \*16 (Cal. Ct. App. June 16, 2004) (citing People v. Hill, 17 Cal. 4th 800, 820–21 (Cal. 1998)) (emphasis added) (internal quotations omitted).

<sup>139</sup> BURNETT et. al., *supra* note 124, at 22.

<sup>140</sup> Failure to immediately move for the mistrial after the overruled objection would likely have given the appellate court another reason to summarily dismiss the defendant’s claim. The court could then have held that anything other than an immediate motion for mistrial would have denied the trial court the opportunity to attempt to cure the misconduct by less severe means. *See id.*

Under *Oregon v. Kennedy*,<sup>141</sup> the Supreme Court of the United States held that the defendants' double jeopardy protections only extend to cases where the prosecutor's misconduct was committed "in order to goad the [defendant] into requesting a mistrial."<sup>142</sup> Therefore, upon a defendant's motion to dismiss a second prosecution, the court must again exercise its discretion and make a finding of fact. This time, the court must make the distinction between whether the prosecutor committed the misconduct "in order to goad the [defendant] into requesting a mistrial," or rather merely to engage in "harassment or overreaching."<sup>143</sup>

Under *Kennedy*, therefore, if the prosecutor merely intended to harass the defendant, overreach, or obtain a conviction by improper means, the prosecutor is rewarded by being able to retry the defendant in a second trial or even in subsequent trials. The problem for the defendant is as obvious as it is ridiculous. "It is almost inconceivable that a defendant could prove that the prosecutor's deliberate misconduct was motivated by an intent to provoke a mistrial instead of an intent simply to prejudice the defendant."<sup>144</sup> Not surprisingly, few courts have actually barred retrial under this incredible standard.<sup>145</sup>

#### IV. REMOVING JUDICIAL DISCRETION FROM THE FRAMEWORK

##### A. *Proposed Rule and Rationale*

The solution to this problem is that once the trial court finds that the prosecutor committed misconduct, judicial discretion must be eliminated in determining the proper remedy. If the defendant requests a mistrial based on the misconduct, the mistrial should be granted regardless of the judge's opinion about whether the defendant would be found guilty had the misconduct not occurred.<sup>146</sup>

This proposed rule will ensure a fair trial, free of prosecutorial abuse and manipulation of the trial process. This fairness is ensured

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<sup>141</sup> 456 U.S. 667 (1982).

<sup>142</sup> *Id.* at 673 (quoting *United States v. Dinitz*, 424 U.S. 600, 611 (1976)).

<sup>143</sup> *Id.* at 675.

<sup>144</sup> *Id.* at 688 (Stevens, J., concurring) (footnote omitted).

<sup>145</sup> See Rosenthal, *supra* note 2, at 894–95.

<sup>146</sup> See Duffy, *supra* note 81, at 1360 (arguing for a per-se reversible error rule in cases of religious arguments at sentencing hearings in capital cases); see also Tobin, *supra* note 16, at 237 (arguing for automatic reversal upon a finding of prosecutorial misconduct in closing arguments); see also White, *supra* note 36, at 1157–68 (arguing for a per-se reversal rule in capital cases not only to protect rights but also to regulate prosecutorial conduct).

because the jury, not the judge, will be weighing the evidence and making findings of fact.<sup>147</sup> Furthermore, in cases where a prosecutor believes he has a strong case, the rule will discourage misconduct because the prosecutor will not wish to risk a mistrial when he believes he will likely win a conviction.<sup>148</sup>

Second, upon declaration of a mistrial, the state should be barred from retrying the defendant upon a finding that the prosecutor's misconduct was intentional. This should not require a finding that the prosecutor intended to "goad the defendant into seeking a mistrial,"<sup>149</sup> but rather merely that he intended the conduct itself, and knew or should have known that the conduct was improper.<sup>150</sup> This finding would be made on an objective basis, and would necessarily include all violations of well-established trial rules and procedures.

This aspect of the proposed rule would offer legitimate, rather than illusory, double jeopardy protection by prohibiting successive prosecutions for the same allegations. Furthermore, in cases where a prosecutor believes he has a weak case, this rule will discourage misconduct because the prosecutor would rather take his chance with the jury's verdict than guarantee a mistrial and be barred from re-prosecuting the defendant.<sup>151</sup>

#### B. *The Confrontation Clause Analogy*

The rule proposed in this Article for dealing with prosecutorial misconduct is not unique in the larger realm of constitutional jurisprudence. When the use of judicial discretion fails to protect constitutional rights, that judicial discretion has been taken away to ensure that those rights are in fact protected. This principle has most re-

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<sup>147</sup> Gernon, *supra* note 75, at 252 (discussing Kansas case law and the view "that it is problematic to allow appellate judges to draw conclusions as to 'a defendant's guilt based on [the judge's] own view[] of the weight and credibility of the evidence.'") (quoting Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 127 (1988)).

<sup>148</sup> See Gershman, *supra* note 4, at 431.

<sup>149</sup> *Oregon v. Kennedy*, 456 U.S. 667, 673 (1982) (quoting *United States v. Dinitz*, 424 U.S. 600, 611 (1976)).

<sup>150</sup> Numerous states have already abandoned the illusory double jeopardy protection of *Oregon v. Kennedy*, and have instead adopted more sensible tests offering realistic double jeopardy protection to defendants. See, e.g., *State v. Breit*, 1996-NMSC-67, ¶ 32, 122 N.M. 655, 930 P.2d 792 (requiring that the prosecutor act in "willful disregard of the resulting mistrial, retrial, or reversal"); see also *State v. Kennedy*, 666 P.2d 1316, 1326 (Or. 1983) (requiring only that the prosecutor "intends or is indifferent to the resulting mistrial or reversal"); see also *Commonwealth v. Smith*, 615 A.2d 321, 325 (Pa. 1992) (requiring that the prosecutor intended to "prejudice the defendant to the point of the denial of a fair trial").

<sup>151</sup> See Gershman, *supra* note 4, at 431.



cently been expounded in *Crawford v. Washington*,<sup>152</sup> where the Supreme Court of the United States addressed the admission of hearsay evidence and the defendant's Sixth Amendment right of confrontation.

In *Crawford*, the Court revisited the decades-old practice of allowing hearsay evidence to be introduced at trial, against a defendant, without affording him the opportunity to cross-examine the declarant.<sup>153</sup> Pre-*Crawford*, the prosecutor was allowed to introduce such hearsay, despite the plain language of the Confrontation Clause, provided the trial judge first found the hearsay to be "reliable."<sup>154</sup> Reliability was determined through the use of a judicial balancing test by weighing the facts and circumstances surrounding the hearsay statement.<sup>155</sup>

The problem with this approach was that the use of judicial discretion failed miserably in protecting the defendant from even the most flagrant violations of the Confrontation Clause.<sup>156</sup> Judges would consistently admit into evidence even the most harmful and unreliable hearsay that had the "unique potential for prosecutorial abuse."<sup>157</sup> For example, courts would routinely find to be reliable, and consequently admissible, hearsay statements of third parties that implicated the defendant but were obtained through police interrogations of those third parties. Although this type of *ex parte* government interrogation was the "principal evil"<sup>158</sup> at which the Confrontation Clause was directed, the use of judicial discretion served to water down the Clause to the point where it provided no protection whatsoever.<sup>159</sup>

After decades of watching the judges abuse their discretion, the Supreme Court finally ruled that "[a]dmitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation."<sup>160</sup> Furthermore, allowing judicial discretion to replace "categorical constitutional guarantees"<sup>161</sup> amounts to a denial of

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<sup>152</sup> 541 U.S. 36 (2004).

<sup>153</sup> *See id.* at 38.

<sup>154</sup> *Id.*

<sup>155</sup> *See id.* at 41.

<sup>156</sup> *See id.* at 63–64.

<sup>157</sup> *Id.* at 56.

<sup>158</sup> *Crawford*, 541 U.S. at 50.

<sup>159</sup> *See id.* at 65 ("To add insult to injury, some of the courts that admit untested testimonial statements find reliability in the very factors that *make* the statements testimonial.").

<sup>160</sup> *Id.* at 61.

<sup>161</sup> *Id.* at 67.

constitutional rights.<sup>162</sup> “Vague standards are manipulable,”<sup>163</sup> and “[d]ispensing with confrontation because testimony is [deemed reliable by a judge] is akin to dispensing with jury trial because a defendant is obviously guilty.”<sup>164</sup>

The *Crawford* Court therefore held that with regard to untested, testimonial hearsay offered by the state against a defendant, the hearsay must be, or must have been at a previous time, subjected to cross-examination by the defendant.<sup>165</sup> Without the opportunity for actual cross-examination, the hearsay must be excluded from evidence.<sup>166</sup>

The pre-*Crawford* hearsay problem described above directly parallels today’s prosecutorial misconduct problem, and so too should the solutions.<sup>167</sup> First, whether by admitting untested, testimonial hearsay against a defendant, or by allowing a prosecutor to commit repeated acts of misconduct throughout trial, courts are violating defendants’ constitutional rights. Furthermore, the precise constitutional right being violated is often the same.

For example, many forms of prosecutorial misconduct violate not only the Fourteenth Amendment Due Process right to a fair trial, but also the Sixth Amendment right of confrontation specifically addressed in *Crawford*. “A prosecutor’s use of non-evidence (such as assertions in an opening statement or, under some circumstances, questions) to sway a jury, can deny a defendant his or her right to confrontation when those assertions are not backed by evidence produced at trial.”<sup>168</sup> It does not matter that the prosecutor’s statements are “not technically testimony.”<sup>169</sup> The reality is that the statements are “the equivalent in the jury’s eyes, thus triggering the right to confront.”<sup>170</sup>

Second, in both the pre-*Crawford* hearsay problem as well as today’s prosecutorial misconduct problem, the use of judicial discretion is a fundamentally flawed concept in that judges are allowed to usurp the role of the jury. In the pre-*Crawford* setting, judges were allowed

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<sup>162</sup> See *id.* at 67.

<sup>163</sup> *Id.* at 68.

<sup>164</sup> *Crawford*, 541 U.S. at 62.

<sup>165</sup> *Id.* at 61.

<sup>166</sup> *Id.* at 68.

<sup>167</sup> Cross-Amendment analogies are not uncommon. See, e.g., *United States v. Vargas*, 583 F.2d 380 (7th Cir. 1978) (drawing an analogy between Fifth and Eight Amendments as affected by prosecutorial misconduct).

<sup>168</sup> *State v. Bannister*, 2006 WI App 136, ¶ 20, 2006 Wisc. App. LEXIS 447, ¶ 20, 720 N.W.2d 498, ¶ 20 (citing *Douglas v. Alabama*, 380 U.S. 415, 418–20 (1965)).

<sup>169</sup> *Id.* (quoting *Douglas v. Alabama*, 380 U.S. 415, 418–20 (1965)).

<sup>170</sup> *Id.* at 21–22 (citing *Douglas v. Alabama*, 380 U.S. 415, 418–20 (1965)).

to determine the reliability, and consequently admissibility, of hearsay evidence.<sup>171</sup> In cases of prosecutorial misconduct, judges go even further and act as “super-jury” to determine the guilt of the defendant, and consequently use this finding to deny the defendant his right to a trial free of prosecutorial abuse.<sup>172</sup>

This use of judicial discretion is fundamentally flawed because our concept of justice depends not only on the final outcome—e.g., whether the hearsay is reliable or whether the defendant is guilty—but also on the *process* used to determine that outcome. Because the way in which we reach the result is just as important as the result itself, it is unacceptable to let the judge usurp the jury’s role. This is true whether the judge is determining the reliability of hearsay, thereby compromising confrontation rights, or determining a defendant’s guilt, which will in turn be used to condone the prosecutorial misconduct and compromise the right to a fair trial.

For example, with regard to the pre-*Crawford* rule of admitting testimonial hearsay without cross-examination, the Court stated:

Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause’s ultimate goal is to ensure reliability of evidence, *but it is a procedural rather than a substantive guarantee*. It commands, not that evidence be reliable, *but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination*. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.<sup>173</sup>

Likewise, permitting prosecutorial misconduct to stand because a judge has independently determined the defendant’s guilt poses the identical problem:

Due process is thus a set of fair procedures designed to determine truth in a manner consistent with the process goals of the system. Due process requires not only that criminal proceedings reach a correct outcome—that justice be done—but also that the correct outcome be reached only through the use of fundamentally fair procedures.<sup>174</sup> “[T]he question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury ac-

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<sup>171</sup> See *Crawford v. Washington*, 541 U.S. 36, 38 (2004).

<sup>172</sup> Gershman, *supra* note 4, at 425.

<sup>173</sup> *Crawford*, 541 U.S. at 61 (emphasis added).

<sup>174</sup> Fisher, *supra* note 49, at 1300 (citing *Snyder v. Massachusetts*, 291 U.S. 97, 137 (1934) (Roberts, J., dissenting)).

ording to the procedure and standards appropriate for criminal trials.”<sup>175</sup>

Third, prosecutorial misconduct is equally, if not more, harmful than Confrontation Clause violations. Pre-*Crawford*, when judges determined the reliability, and consequently the admissibility, of hearsay evidence, they were guarding against only the *possibility* of prosecutorial abuse in that the government *may have* influenced the reliability of the hearsay statement.<sup>176</sup> In the case of prosecutorial misconduct at trial, however, prosecutorial abuse is very present and real, rather than merely a possibility, and has a definite impact on the jury’s decision-making process and consequently on the defendant’s rights.<sup>177</sup>

Additionally, with regard to judicially determined reliability of hearsay, the Court in *Crawford* stated that “[w]e have no doubt that the courts below were acting in utmost good faith when they found reliability.”<sup>178</sup> In cases of prosecutorial misconduct, however, courts have routinely shown a lack of good faith. Instead, courts have acted hypocritically by repeating the same, empty warning to prosecutors, and have even gone so far as to divert blame to defense counsel while insulating prosecutors and trial judges from responsibility.

Fourth, after decades of use, both the pre-*Crawford* rule for admitting hearsay evidence, as well as today’s rule for dealing with prosecutorial misconduct have proven completely ineffective in their application. In cases of determining the reliability of hearsay, the Court stated that the most serious problem with the pre-*Crawford* judicial discretion approach was “its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude.”<sup>179</sup>

Likewise, with regard to using judicial discretion in cases of prosecutorial misconduct, the courts have continually permitted, and

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<sup>175</sup> Gershman, *supra* note 4, at 426 (quoting *Bollenbach v. United States*, 326 U.S. 607, 614 (1946) (emphasis added)).

<sup>176</sup> *Crawford*, 541 U.S. at 56 (“Involvement of government officers in the production of testimony with an eye toward trial presents unique *potential* for prosecutorial abuse . . .”) (emphasis added).

<sup>177</sup> See Tobin, *supra* note 16, at 221 (citing empirical studies of the effects on jurors of improper argument and the failure of so-called curative instructions to cure the problem).

<sup>178</sup> *Crawford*, 541 U.S. at 67.

<sup>179</sup> *Id.* at 63.

in fact encouraged, even the most egregious misconduct that clearly violates the Due Process right to a fair trial.<sup>180</sup>

Fifth and finally, the use of judicial discretion under the pre-*Crawford* rule for admitting hearsay, as well as under today's rule for dealing with prosecutorial misconduct, produces a bizarre and unacceptable result. In *Crawford*, the Court acknowledged that “[d]ispensing with confrontation because testimony is obviously reliable [via a judicial determination] is akin to dispensing with jury trial because a defendant is obviously guilty.”<sup>181</sup>

Likewise, with regard to prosecutorial misconduct, under the current rule the defendant is not entitled to a trial free of prosecutorial abuse as long as the judge believes the defendant would be found guilty even without the misconduct. Essentially, “if [a defendant] is obviously guilty as charged, he has no fundamental right to be tried fairly.”<sup>182</sup>

In both situations, just as the problems parallel one another, so too should the solutions. The use of judicial discretion must be eliminated, and replaced with what the Framers of the Constitution intended: a categorical constitutional guarantee to a fair trial in which the jury, not the judge, determines the weight and credibility of the evidence and the guilt or innocence of the defendant.

## V. CRITIC'S CORNER: ANTICIPATING THE OPPOSING ARGUMENTS

### A. *The Jury Instruction as a Curative Measure*

Courts routinely permit prosecutorial misconduct, especially in closing argument, by relying on the jury instruction as a curative measure. Most commonly, this is nothing more than an instruction that closing arguments are not evidence, which is supposed to cure the harm caused by the prosecutor's highly prejudicial argument.<sup>183</sup>

This supposed attempt to cure the harm, which is actually nothing more than encouragement for the misconduct, is incredibly

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<sup>180</sup> See, e.g., Spiegelman, *supra* note 60, at 123 (quoting *People v. Congious*, No. B0202709 (Cal. Ct. App. Dec. 4, 1987) (“[I]t is disheartening, to say the least, to learn that she takes ‘pride’ in our admonitions, apparently because we did not reverse the judgment rendered.”)).

<sup>181</sup> *Crawford*, 541 U.S. at 62.

<sup>182</sup> Gershman, *supra* note 4, at 426 (quoting Note, *Prosecutor Indiscretion: A Result of Political Influence*, 34 IND. L.J. 477, 486 (1959)).

<sup>183</sup> See, e.g., *State v. Mayo*, 2006 WI App 78, ¶ 5, 2006 Wisc. App. LEXIS 276, ¶ 5, 713 N.W.2d 191, ¶ 5 (“[T]he jury was instructed that closing arguments do not constitute evidence, and juries are presumed to follow the instructions given to them.”) (citing *State v. Traux*, 151 Wis. 2d 354, 362 (Wis. Ct. App. 1989)).

flawed on several levels. First, the curative instruction does nothing to address the problem. It is true that improper argument is not evidence, but it is also true that *proper* argument is not evidence. Therefore, the instruction, while true, is completely irrelevant. The harm comes not from whether the improper arguments are evidence, but rather from their prejudicial effect on the jury.

Second, the instruction is often read to the jury, as it should be, even in cases where the state makes a closing argument completely within the bounds of the law.<sup>184</sup> By that logic, then, improper argument should be acceptable in every case because the jury has already been instructed that it is not evidence. If that were so, rules governing closing argument should simply be eliminated, which would at least place defense counsel on a level playing field with the prosecutor.

Third, and most significantly, even if a special, tailored instruction were given to address the specific misconduct, it is likely that such an instruction will only draw more attention to prosecutor's argument, thereby further harming, rather than helping, the defendant.<sup>185</sup> "Curative' or 'limiting' instructions are more problematic because the instructions not only fail to cure prejudice, they generally emphasize the objectionable argument."<sup>186</sup>

This counter-productive effect of the so-called curative instruction is not only intuitively obvious, but is also supported by psychological research<sup>187</sup> and is recognized by many judges as well. "The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction."<sup>188</sup> "Indeed, the judge's cautionary instruction may do more harm than good: It may emphasize the jury's awareness of the cen-

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<sup>184</sup> See, e.g., Sullivan, *supra* note 29, at 214 (discussing the standard jury instruction in Arkansas that "argument does not constitute evidence and the jury is instructed not to consider it as such . . ."); see also Mayo, 2006 WI App 78, at ¶ 5 (discussing the mandatory criminal jury instruction in Wisconsin that "closing arguments do not constitute evidence . . .").

<sup>185</sup> See Tobin, *supra* note 16, at 221 (citing several empirical studies to support the proposition that curative instructions do more harm than good for the defendant).

<sup>186</sup> Duffy, *supra* note 81, at 1354 (internal citations omitted).

<sup>187</sup> Tobin, *supra* note 16, at 221 (citing several articles and scientific studies indicating that jurors are unable to follow curative instructions).

<sup>188</sup> *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (internal citation omitted) (citing *Skidmore v. Balt. & Ohio R. Co.*, 167 F.2d 54 (2d Cir. 1948)).

sured remark—as in the story, by Mark Twain, of the boy told to stand in the corner and not think of a white elephant.”<sup>189</sup>

Interestingly, the very same judges that are quick to rely on the curative instruction in criminal cases implicitly admit its complete ineffectiveness by their rulings in civil cases. For example, Judge Frank observed, in his dissenting opinion in *United States v. Antonelli Fireworks Co.*,<sup>190</sup> how his court members frequently reversed verdicts in civil cases where the plaintiff’s lawyer made improper comments, such as telling the jury that the defendant, from whom the plaintiff seeks money, is insured.<sup>191</sup> Judge Frank was rightly critical of this double standard, and argued that if reversal “is to be invoked to protect the pocketbook of an insurance company, it should be invoked in [criminal cases] to protect natural persons from being sent to jail unjustly.”<sup>192</sup>

#### B. *Bad Prosecutor: Prosecutorial Discipline in Disguise*

Those opposed to ensuring constitutional protections argue that rules such as the one proposed in this Article are nothing more than an improper means of disciplining prosecutors.<sup>193</sup> The rule proposed in this Article, however, is not designed in any way to accomplish prosecutorial discipline. Rather, its goal is to protect the fundamental rights of citizens accused of crimes, and to ensure “that the circumstances that gave rise to the misconduct won’t be repeated in other cases.”<sup>194</sup>

Implementing an effective system of prosecutorial discipline is, in itself, a noble goal. Unfortunately, the legal profession has shown little if any interest in punishing prosecutors for misconduct. “It is unclear why the electorate, the judiciary, and the legislature have taken such a ‘hands-off’ approach with the American prosecutor.”<sup>195</sup> Most likely, the answer is the political nature of judges and legislators. Due to the “lack of public outrage over prosecutorial misconduct,”<sup>196</sup>

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<sup>189</sup> *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 656 (2nd Cir. 1946) (Frank, J., dissenting) (footnote omitted).

<sup>190</sup> *See id.*

<sup>191</sup> *See id.* at 658.

<sup>192</sup> *Id.* (footnote omitted).

<sup>193</sup> *See, e.g.,* Peter G. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L. Q. 713, 827 (1999).

<sup>194</sup> Rosenthal, *supra* note 2, at 959 (quoting *United States v. Kojayan*, 8 F.3d 1315, 1324 (9th Cir. 1993)).

<sup>195</sup> Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 464 (2001).

<sup>196</sup> *Id.* at 465.

as well as the glamorization of the prosecutor in our society, it is little wonder why prosecutorial discipline is nearly non-existent.

Prosecutors enforce the law against people accused of committing crimes—an unpopular group in a country with one of the most punitive approaches to crime in the world. Because law enforcement is such a high priority in this country and the victims of prosecutorial misconduct are so unpopular, the electorate, legislature, and judiciary may be less concerned with fairness in the prosecutorial process.<sup>197</sup>

In any event, politically motivated or not, those with the power and authority to punish prosecutors are unwilling to do so. As of 1999, “one of the striking realities of the forty-five recent federal reversals is that despite findings of intentional misconduct and extensive criticism of prosecutors’ conduct, not one court ordered a prosecutor disciplined or referred a prosecutor for discipline.”<sup>198</sup> This sends the clear message that the courts have no intention of punishing or disciplining the offending prosecutors, despite the huge stakes that individual citizens face in the criminal process. As one commentator wrote, at least with regard to prosecutorial misconduct by withholding evidence, under the current system:

[T]he prudent prosecutor is unconcerned about an ethical violation. Even assuming the prosecutor is aware of his duty to disclose favorable evidence under the professional codes . . . he has never heard of a prosecutor being disciplined for his exercise of discretion in withholding evidence. . . . The message sent is that, although it is a rule on the books, the disciplinary authorities do not believe its violation worthy of condemnation.<sup>199</sup>

Another reason that so few ethical violations are reported to disciplinary bodies is that such a report by the trial court would “ring hollow if curative action had not been taken at trial.”<sup>200</sup> Yet another possible reason may again be political in nature. “[A]s a governmental figure of enormous power and prestige, the prosecutor is a person who professional bar organizations would not wish to alienate,” particularly “in today’s anti-crime climate.”<sup>201</sup>

While punishing ethical violations may be a worthy goal, the current environment in which we operate makes any such attempt fu-

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<sup>197</sup> *Id.* at 464 (footnote omitted).

<sup>198</sup> Spiegelman, *supra* note 60, at 169–70.

<sup>199</sup> Hoeffel, *supra* note 20, at 1146–47 (footnotes omitted).

<sup>200</sup> Sullivan, *supra* note 29, at 253.

<sup>201</sup> Gershman, *supra* note 4, at 445.



tile.<sup>202</sup> Therefore, rather than pleading with prosecutors to abide by ethical rules,<sup>203</sup> a better approach is simply to eliminate any advantage gained by the misconduct.

Under the existing framework, if a prosecutor has a strong case, the misconduct will only make it stronger.<sup>204</sup> 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. If, on the other hand, the prosecutor has a weak case and faces a likely acquittal, the misconduct will once again help the case. In this situation, the misconduct increases the chance of conviction or, even in the rare case of mistrial or reversal, gives the prosecutor a chance at a new trial.<sup>205</sup>

In either of the above scenarios, the prosecutor has tremendous incentive to commit misconduct. However, if the advantages gained by prosecutorial misconduct are removed, as they would be under the rule proposed in this Article, there would be no incentive for prosecutors to commit misconduct in the first place. This would thereby reduce or even eliminate the need for disciplinary action.

### C. A Word on Judicial Costs and Efficiency

Even the most flagrant cases of prosecutorial misconduct typically result in judicial tolerance, if not judicial encouragement, at the trial level, followed by affirmation at the appellate level. Proponents of this status quo frequently justify their position by pointing to the perceived costs of conducting a second, fair trial, free of the misconduct. Even some of those who are highly critical of prosecutorial misconduct seem to concede that the current, tolerant approach to dealing with prosecutorial misconduct "saves judicial resources."<sup>206</sup>

This cost and efficiency argument is flawed in several respects. First, it overstates the true cost of implementing a less tolerant approach to dealing with misconduct. For example, under a rule like the one proposed in this Article, not every defendant in every case

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<sup>202</sup> See, e.g., Ellen Yaroshefsky, *Zealous Advocacy in a Time of Uncertainty: Understanding Lawyers' Ethics: Wrongful Convictions: It is Time to Take Prosecution Discipline Seriously*, 8 D.C. L. REV. 275 (2004).

<sup>203</sup> See, e.g., Spiegelman, *supra* note 60, at 123 (citing *People v. Congious*, No. B0202709 (Cal. Ct. App. Dec. 4, 1987) (After multiple cases of misconduct by the same prosecutor, the court pleaded: "We most earnestly urge counsel to reconsider her approach . . .").

<sup>204</sup> See Gershman, *supra* note 4, at 431.

<sup>205</sup> See *id.*

<sup>206</sup> See *id.*

would request a mistrial in cases of prosecutorial misconduct. In fact, prosecutors often commit misconduct because they realize that the defendant has a strong case.<sup>207</sup> Under these circumstances, defense counsel will often want to proceed to verdict rather than risk a second trial. “[I]f grounds exist for a mistrial but it appears that the party harmed by the error will nonetheless prevail, a motion for mistrial could be a costly error.”<sup>208</sup>

Second, the cost and efficiency argument also understates, or even ignores, the immense costs currently being incurred under the existing three-step framework for dealing with misconduct. With the great number of cases currently being appealed for misconduct, the costs of attorneys, judges, transcripts, and other legal expenditures are exorbitant, but usually unaccounted for in the calculation. Furthermore, until the behavior is curtailed, society will continue to bear these costs.

Third, the current calculus of the cost and efficiency argument often ignores the deterrent effect of alternative, stricter approaches to dealing with misconduct.<sup>209</sup> By failing to account for the inevitable reduction in prosecutorial misconduct and related appeals, the expected litigation costs of the alternative methods are overstated.

Fourth and finally, the cost and efficiency argument ignores many costs associated with the current system because certain costs are, although very real, quite difficult to quantify. For example:

[E]ven on its own terms, the proposed calculus in the instance of prosecutorial misconduct falls short. What cost does corroded integrity in law enforcement’s preeminent office exact vis-à-vis the moral authority and ultimate viability of the criminal justice system? What message is transmitted in a society which is unwilling to enforce limits on prosecutor conduct otherwise beyond the reach of the law?<sup>210</sup>

While the very nature of this type of cost puts it beyond the scope of quantification, it is the significance and impact of this type of cost that renders a cost-benefit analysis highly ineffective, and largely irrelevant, when addressing the issue of prosecutorial misconduct.<sup>211</sup>

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<sup>207</sup> See *id.*

<sup>208</sup> R. GEORGE BURNETT, WISCONSIN TRIAL PRACTICE § 8, at 22 (1st ed. Supp. 2001).

<sup>209</sup> See, e.g., Fisher, *supra* note 49, at 1322 (addressing the goal of “[d]eterring the [p]rosecutor”).

<sup>210</sup> Rosenthal, *supra* note 2, at 961.

<sup>211</sup> See *id.*

## VI. CONCLUSION

Prosecutorial misconduct is wide-spread and has infected every aspect of the criminal trial. The current legal framework for dealing with misconduct at trial relies exclusively on the use of judicial discretion to determine the proper remedy, if any, for the misconduct. Essentially, if the trial court, and later the appellate court, believes that the defendant was guilty as charged, this belief is in turn used to hold that the prosecutorial misconduct could not, or did not, affect the jury's verdict of guilt. The misconduct is therefore allowed to stand, and the defendant is denied, among other constitutional rights, his Fourteenth Amendment Due Process right to a fair trial. Additionally, the general societal harm, including the damage to the integrity of the criminal justice system, is immense but immeasurable.

The current system is fundamentally flawed on the most basic level in that it allows the judge to usurp the role of the jury, weigh the evidence and make findings of guilt. In addition to its fundamental flaw, the current system, which relies exclusively on judicial discretion, has proven to be highly ineffective in its application. In fact, the trial and appellate courts have not only tolerated prosecutorial misconduct, but have actually encouraged it by issuing empty, repetitive warnings to prosecutors that the courts are unwilling to enforce. Even worse, courts will often go to extraordinary lengths, including diverting blame to defense counsel, to avoid dealing with the underlying misconduct. The result is that prosecutorial misconduct, even in its most flagrant forms, continues to flourish.

The solution to the problem is to eliminate the use of judicial discretion from the current framework of dealing with trial misconduct. Instead, upon a finding of misconduct, if the defendant requests a remedy of mistrial, a mistrial should be granted regardless of whether the trial court believes that the defendant would be found guilty even absent the misconduct. Furthermore, in cases of intentional misconduct—i.e., the prosecutor intended to commit the act that formed the basis of the misconduct, and knew or should have known that the act was improper—double jeopardy protections should bar retrial of the defendant.

This proposal is supported by analogy to recent case law in Confrontation Clause jurisprudence, specifically *Crawford v. Washington*. Prior to *Crawford*, in deciding whether a prosecutor could admit hearsay against a defendant at trial, the rule was that the defendant did not have the right to cross-examine his accuser as long as a trial judge decided that the hearsay being offered against him was "reliable." The *Crawford* Court held, however, that "[d]ispensing with confronta-

tion because testimony is obviously reliable [via a judicial determination] is akin to dispensing with jury trial because a defendant is obviously guilty.”<sup>212</sup>

Likewise, with regard to prosecutorial misconduct, the current rule is that a defendant is not entitled to a trial free of prosecutorial misconduct as long as the trial judge, or later the appellate judge, decided that there was strong evidence of the defendant’s guilt even without the misconduct. In other words, “if [a defendant] is obviously guilty as charged, he has no fundamental right to be tried fairly.”<sup>213</sup>

In order to preserve this most fundamental constitutional right, the use of judicial discretion must be replaced with a categorical, uncompromised right to a trial free of prosecutorial manipulation and abuse.

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<sup>212</sup> Crawford v. Washington, 541 U.S. 36, 62 (2004).

<sup>213</sup> Gershman, *supra* note 4, at 426 (quoting Note, *Prosecutor Indiscretion: A Result of Political Influence*, 34 IND. L.J. 477, 486 (1959)).