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Mental Culpability and Prosecutorial Misconduct

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Mental Culpability And Prosecutorial Misconduct

Bennett L. Gershman*

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I. Introduction

A prosecutor's courtroom conduct is hedged by an array of legal and ethical restrictions. Constitutional,¹ statutory,² judge-made,³ and ethical⁴

1. *See, e.g.*, *Oregon v. Kennedy*, 456 U.S. 667, 679 (1982) (holding that the Double Jeopardy Clause of the Fifth Amendment bars retrial where a mistrial occurred because of prosecutorial misconduct intended to goad defendant into seeking a mistrial); *Doyle v. Ohio*, 426 U.S. 610, 619 (1976) (holding that the Due Process Clause of the Fifth Amendment prevents prosecutors from using defendant's silence after arrest for impeachment purposes); *Miller v. Pate*, 386 U.S. 1, 7 (1967) (observing that the Due Process Clause of the Fourteenth Amendment bars prosecutors from deliberately misrepresenting evidence); *Griffin v. California*, 380 U.S. 609, 615 (1965) (holding that the Self-Incrimination Clause of the Fifth Amendment prohibits prosecutors from commenting on defendant's failure to testify)

2. *See, e.g.*, FED. R. EVID. 404(b) (providing that evidence of other crimes, wrongs, or acts is generally not admissible to prove the character of a person in order to show conformity therewith, but may be admissible if used for a proper purpose); FED. R. EVID. 410 (providing that evidence of withdrawn pleas, plea discussions, and related statements is generally not admissible in any civil or criminal proceeding against the defendant who entered the plea); FED. R. EVID. 608(b) (providing that specific instances of the conduct of a witness may be used to attack the witness's credibility if related to truthfulness, but may not be proved by extrinsic evidence); FED. R. EVID. 609 (providing that evidence of a felony conviction within ten years may be used to impeach credibility, and a conviction for crime of dishonesty must be allowed for impeachment); FED. R. EVID. 801(d)(1)(C) (providing that a prior statement of identification is admissible if the witness testifies and is subject to cross-examination); FED. R. CRIM. P. 26.2 (providing that prior statements of a witness relating to the subject matter of direct examination must be produced for purposes of cross-examination); FED. R. CRIM. P. 29.1 (providing for the order of closing arguments).

3. *See, e.g.*, *United States v. Young*, 470 U.S. 1, 14 (1985) (indicating that prosecutor's misconduct in vouching for the credibility of government witnesses was not excused by the fact that comments were provoked by defense counsel); *Lawn v. United States*, 355 U.S. 339, 359 n.15 (1958) (determining that the prosecutor's vouching for the credibility of government witnesses was not improper because no personal knowledge was implied, and defense counsel did not object); *Jencks v. United States*, 353 U.S. 657, 672 (1957) (describing the duty to provide defense with prior statements of witness); *Roviaro v. United States*, 353 U.S. 53, 65 (1957) (recognizing a duty to disclose informant's identity); *Mesarosh v. United States*, 352 U.S. 1, 14 (1956) (holding that a prosecution witness who gave false testimony "polluted" the integrity of trial); *Viereck v. United States*, 318 U.S. 236, 247-48 (1943) (finding prejudicial the prosecutor's inflammatory appeal to patriotism because it was calculated to stir up emotions already heightened by war); *Berger v. United States*, 295 U.S. 78, 89 (1935) (coining the classic statement of prosecutor's duty to strike hard blows, not foul blows).

4. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(1)(1983) [hereinafter MODEL RULES] ("A lawyer shall not knowingly make a false statement of fact or law to a tribunal."); *id.* Rule 3.3(a)(4) ("A lawyer shall not knowingly offer evidence that the lawyer knows to be false."); *id.* Rule 3.4(e) ("A lawyer shall not, in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of the accused."); *id.* Rule 8.4(c) ("It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."); *id.* Rule 8.4(d) ("It is professional misconduct for a lawyer to engage in conduct

rules regulate a prosecutor's behavior to ensure that defendants are convicted on the basis of reliable evidence in proceedings that are fair.⁵

that is prejudicial to the administration of justice"); *see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(4)(1981) [hereinafter MODEL CODE] ("A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."); *id.* DR 1-102(A)(5) ("A lawyer shall not engage in conduct that is prejudicial to the administration of justice."); *id.* DR 1-102(A)(6) ("A lawyer shall not engage in any other conduct that adversely reflects on his fitness to practice law"); *id.* DR 7-106(C) ("In appearing in his professional capacity before a tribunal, a lawyer shall not [1] allude to any matter where no reasonable belief of its relevance or that will be supported by admissible evidence, [2] ask questions where no reasonable basis for belief in its relevance or is intended to degrade witness, [3] assert personal knowledge of facts, [4] assert personal opinion as to justness of cause, credibility of witness, or guilt of accused, [5] fail to comply with rules of courtesy, [6] engage in undignified, discourteous, or degrading conduct, and [7] intentionally or habitually violate any established rule of procedure or evidence."); *id.* EC 7-13 (providing rationale for rule that prosecutor has a duty to seek justice, not merely to convict); *id.* EC 7-24 (explaining that a lawyer may not interject his personal opinion at trial); *id.* EC 7-25 (explaining that a lawyer may not disregard the rules of evidence and procedure); *see also* ABA STANDARDS FOR CRIMINAL JUSTICE: THE PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993) [hereinafter ABA STANDARDS] 3-5.5 (opening statement); *id.* 3-5.6 (presentation of evidence); *id.* 3-5.7 (examination of witnesses); *id.* 3-5.8 (closing argument to jury); *id.* 3-5.9 (reference to facts outside the record).

The ABA STANDARDS have not been made part of the MODEL CODE or MODEL RULES. The standards

are intended to be used as a guide to professional conduct and performance. They are not intended to be used as criteria for the judicial evaluation of alleged misconduct of the prosecutor to determine the validity of the conviction. They may or may not be relevant in such judicial evaluation, depending upon all the circumstances.

Id. 3-1.1.

The ABA Standards are far more comprehensive and specific than the *Model Rules* or *Model Code*, but are not as familiar or accessible. *See* Fred C. Zacharias, *Specificity in Professional Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 248 n.82 (1993) ("[T]he standards remain largely unknown and unused."). Citations to the standards are appended to West's Supreme Court Reporter and The Federal Reporter. A recent computer search revealed that the standards have been cited in 4708 federal and state cases; 591 of those citations relate specifically to the standards dealing with the prosecution function.

5. The classic tension in constitutional criminal procedure between the search for truth and procedural fairness predominates in any discussion of a prosecutor's trial conduct. Admittedly, the central purpose of a criminal trial is to ascertain the truth about the criminal accusation. *See* *Kyles v. Whitley*, 514 U.S. 419, 440 (1995) (observing that the criminal trial is the "chosen forum for ascertaining the truth about criminal accusations"); *Rose v. Clark*, 478 U.S. 570, 577 (1986) ("[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence" (quoting *United States v. Nobles*, 422 U.S. 225, 230 (1975))). By the same token, however, although a prosecutor "may strike hard blows, he is not at liberty to strike foul ones." *Young*, 470 U.S. at 7 (quoting *Berger*, 295 U.S. at 88). *See generally* Barbara Allen Babcock, *Fair Play: Evidence Favorable to the Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133 (1982) (observing how society's dedication to drama and the symbolism of the adversary system impair both fairness and truth); Tom Stacy, *The Search for Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369 (1991) (discussing

Judicial supervision of a prosecutor's conduct enforces these rules through a variety of sanctions.⁶

The typical approach by courts reviewing claims of prosecutorial misconduct is to determine (1) whether the conduct, objectively considered, violated an established rule of trial practice, and if it did, (2) whether that violation prejudiced the jury's ability to decide the case on the evidence.⁷

the judiciary's inconsistency in truth-furthering and truth-impairing procedures); Thomas L. Steffen, *Truth as Second Fiddle: Reevaluating the Place of Truth in the Adversarial Trial Ensemble*, 1988 UTAH L. REV. 799 (explaining the justice system's failure to acknowledge truth as the paramount value).

6. Sanctions may relate to the proceeding or to the prosecutor. See *United States v. Newton*, 44 F.3d 913, 918 (11th Cir. 1995) (distinguishing between misconduct by the prosecutor as a party and misconduct that implicates the prosecutor as a lawyer). Sanctions relating to the proceeding include reversal, dismissal, suppression of evidence, or declaration of a mistrial. See Lyn M. Morton, *Seeking the Elusive Remedy for Prosecutorial Misconduct: Suppression, Dismissal, or Discipline?*, 7 GEO. J. LEGAL ETHICS 1083, 1089-90 (1994). For other sanctions relating to the prosecutor, see *Donnelly v. DeChristoforo*, 416 U.S. 637, 648 n.23 (1974) (admonishment), *NORMAN DORSEN & LEON FRIEDMAN, DISORDER IN THE COURT* 186 (1973) (contempt), *United States v. Horn*, 811 F. Supp. 739, 752 (D.N.H. 1992) (removal), *Washington v. Stenger*, 760 P.2d 357, 360 (Wash. 1988) (disqualification), *United States v. Kelly*, 543 F. Supp. 1303, 1314 (D. Mass. 1982) (referral to a local grievance committee), *United States v. Hasting*, 461 U.S. 499, 506 n.5 (1983) (discipline under local court rules), *United States v. Modica*, 663 F.2d 1173, 1183-86 (2d Cir. 1981) (reprimand in a published opinion that identifies the prosecutor by name). For discussions regarding the availability and effectiveness of sanctions, see *United States v. Hasting*, 461 U.S. 499, 506 n.5 (1983); *United States v. Wilson*, 149 F.3d 1298, 1303-04 (11th Cir. 1998); *United States v. Kojayan*, 8 F.3d 1315, 1323-25 (9th Cir. 1993); *Modica*, 663 F.2d at 1185.

7. See *Young*, 470 U.S. at 12 (explaining that the reviewing court must consider "the probable effect the prosecutor's [misconduct] would have on the jury's ability to judge the evidence fairly"); *United States v. Thomas*, 114 F.3d 228, 246 (D.C. Cir. 1997) ("The touchstone of a prosecutorial misconduct claim is prejudice."); *United States v. Velez*, 46 F.3d 688, 691 (7th Cir. 1995) ("Because allegations of prosecutorial misconduct are based on notions of due process, the inquiry focuses on the fairness of the trial and not the culpability of the prosecutor.").

Courts frequently employ the terms prosecutorial misconduct and prosecutorial error interchangeably. See, e.g., *Oregon v. Kennedy*, 456 U.S. 667, 675-90 (1982) (referring to "prosecutorial error," "overreaching," "egregious prosecutorial misconduct," "deliberate misconduct," and "egregious prosecutorial error."); *United States v. Johnston*, 127 F.3d 380, 398 (5th Cir. 1997) (characterizing prosecutor's reference to defendant's failure to testify as both error and misconduct); *United States v. Guerra*, 113 F.3d 809, 815 (8th Cir. 1997) (referring to prosecutor's improper questions as error and misconduct); *United States v. Donato*, 99 F.3d 426, 432 (D.C. Cir. 1996) (finding that prosecutor's misstatement is error and misconduct). Whether to characterize a prosecutor's violation of a trial rule as an error or misconduct is unclear. Compare *United States v. Olano*, 507 U.S. 725, 732-33 (1993) (noting that error is a deviation from a legal rule), with *DeLuca v. State*, 553 A.2d 730, 731 (Md. App. 1989) ("Only a judge can commit error. Lawyers do not commit error."). Misconduct, although rarely defined, reasonably encompasses conduct that is qualitatively more serious than simple error. See examples listed *infra* note 99. More importantly, framing the claim as error rather than misconduct may require a reviewing court to undertake a different mode of analysis.

Under this objective standard, the courts do not consider a prosecutor's intent to violate a trial rule.⁸ Thus, if a guilty verdict that is significantly influenced, for example, by a prosecutor's asking prejudicial questions, offering inadmissible evidence, or making improper remarks to a jury is to be reversed, it will be reversed regardless of whether the prosecutor intended to strike a foul blow.⁹ As one court put it: "[I]t hurts the

Compare *United States v. Morsley*, 64 F.3d 907, 913 (4th Cir. 1995) (holding that a claim of prosecutorial misconduct must establish that prosecutor's conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process"), *with* *Donato*, 99 F.3d at 432 (holding that a claim of prosecutorial error must establish that error caused "substantial prejudice").

8. *See* *Smith v. Phillips*, 455 U.S. 209, 219 (1982) ("[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor."); *United States v. Boyd*, 55 F.3d 239, 241 (7th Cir. 1995) ("The Supreme Court has told us that we are not to reverse convictions in order to punish prosecutors."); *United States v. Ince*, 21 F.3d 576, 580 (4th Cir. 1994) ("Federal evidence law does *not* ask the judge, either at trial or upon appellate review, to crawl inside the prosecutor's head to divine his or her true motivation."); *McGrier v. United States*, 597 A.2d 36, 40 (D.C. 1991) ("[F]rom our standpoint the prosecutor's motive is essentially irrelevant. What matters instead is the effect of the disputed comment on the verdict.").

Deterrence and mental culpability go hand in hand. *See* HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 40 (1968) (hypothesizing that the deterrence model assumes a rational actor who contemplates misconduct based on the calculus: "How much do I stand to gain by doing it? How much do I stand to lose if I am caught doing it?"). Deterrence is one of the principal objectives of professional disciplinary rules. *See* CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 80-81 (1986). Codes of professional ethics occasionally define prohibited conduct by reference to a culpable mental state. *See* MODEL RULES, *supra* note 4, Rule 3.3(a) ("Lawyer shall not 'knowingly' make false statement of material fact, fail to disclose material fact, or offer evidence that lawyer knows to be false."); *id.* Rule 3.5(c) ("A lawyer shall not engage in conduct intended to disrupt a tribunal"); ABA STANDARDS, *supra* note 4, 3-5.5 (commanding that a prosecutor's opening statement should not allude to evidence unless good faith belief exists that evidence will be admissible); *id.* 3-5.6(a) ("Prosecutor should not knowingly offer false evidence."); 3-5.6(b) ("A prosecutor should not knowingly offer inadmissible evidence."); *id.* 3-5.7(c) ("A prosecutor should not call witness . . . who the prosecutor knows will claim a valid privilege."); *id.* 3-5.8(a) ("In closing argument to the jury, the prosecutor . . . should not intentionally misstate the evidence."); 3-5.8(c) ("The prosecutor should not make argument calculated to appeal to the prejudices of the jury."); *id.* 3-5.9 ("The prosecutor should not intentionally refer to or argue on the basis of facts outside the record.").

Deterrence of prosecutorial misconduct is also a concern of the courts. *See* *United States v. Hasting*, 461 U.S. 499, 507 (1983); *Modica*, 663 F.2d at 1184. To the extent that deterrence figures in the judiciary's review of a prosecutor's conduct, it is entirely appropriate from a utilitarian standpoint for courts to focus upon a prosecutor's intentional "foul blows." *See* *Johnston*, 127 F.3d at 403 ("[S]omewhere we must draw the line and send a message to prosecutors that the Constitution governs their actions at trial. This is such a case.").

9. The use of the term "intent" in this Article to describe a prosecutor's culpable mental state does not denominate the mere intentional doing of a trial action which later turns out to have been erroneous, as such general intent is almost always present. Rather, the term contemplates a specific intent by a prosecutor to consciously, purposefully, willfully, and deliberately violate a rule of trial practice or otherwise commit a foul blow, knowing it to be such. *See*

defendant just as much to have prejudicial blasts come from the trumpet of the angel Gabriel.”¹⁰ By the same token, absent consequential harm, an intentional effort by a prosecutor to unfairly prejudice a jury is treated as legally irrelevant.¹¹

While there are deviations from this objective approach to prosecutorial misconduct, the courts have offered no explanation for the difference.¹²

MODEL PENAL CODE § 2.02(2)(a)(i) (Proposed Official Draft 1962) (“A person acts purposely when his conscious object [is] to engage in conduct of that nature or to cause such a result.”); *see also* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 28, at 196 (1972) (distinguishing between general intent and specific intent); *Jones v. State*, 409 A.2d 729, 733 (Md. App. 1979) (Moylan, J., concurring) (“To be guilty of ‘bad faith,’ [a prosecutor] must have the specific intent deliberately to commit error and not simply the general intent deliberately to do an action which is determined to be error.”). A prosecutor’s motive in committing a violation may be relevant to demonstrating intent but is not a necessary requirement. Intent and motive are not synonymous, but can be confused. *See Kennedy*, 456 U.S. at 675 (asserting that prosecutor’s “intent” in engaging in misconduct must be to provoke defendant into moving for a mistrial rather than to inject enough prejudice into the case to obtain a conviction).

10. *United States v. Nettl*, 121 F.2d 927, 930 (3d Cir. 1941). *See also In re Friedman*, 392 N.E.2d 1333, 1335 (Ill. 1979) (finding that a praiseworthy purpose is no defense when prosecutor suborned perjury).

11. *See Wainwright v. Lockhart*, 80 F.3d 1226, 1234 (8th Cir. 1996) (assailing prosecutor’s “bigoted views and improper motive” in attempting to link inflammatory booklet about the “Bloods” gang with defendant, but finding the conduct not prejudicial); *Smith v. Farley*, 59 F.3d 659, 664 (7th Cir. 1995) (“The cost in judicial and prosecutorial resources that would be consumed in retrials designed to vindicate an abstract principle rather than to prevent the conviction of a possibly innocent defendant has been thought too high.”); *People v. Rice*, 505 N.E.2d 618 (N.Y. 1987) (finding egregious misconduct but no prejudice warranting reversal in case in which prosecutor deceived court and defense counsel into believing that the key witness was alive and would be called to testify, when in fact prosecutor knew that witness was dead).

12. This Article relies heavily on federal doctrine in the Supreme Court and the federal courts. These cases represent the national law, and are fairly representative of state criminal procedure doctrine generally. However, the increasing reliance by state courts on their own state constitutions has resulted in significant state departures from federal constitutional law to provide much greater protection of individual rights. *See generally Shirley S. Abrahamson, Reincarnation of State Courts*, 36 Sw. L.J. 951 (1982); *see also People v. Vilardi*, 555 N.E.2d 915, 920-21 (N.Y. 1990) (rejecting more limited federal due process standard governing prosecutor’s disclosure duty in favor of broader standard under state constitution’s due process clause). Moreover, some state appellate courts have exercised their supervisory power to reverse convictions for prosecutorial misconduct that did not necessarily prejudice the defense. *See State v. Fullwood*, 484 A.2d 435, 442 (Conn. 1984) (“This court, nonetheless, has supervisory power to vacate a judgment of conviction and to order a new trial to deter prosecutorial misconduct which, while not so egregious as to deprive the defendant of a fair trial, is ‘unduly offensive to the maintenance of a sound judicial process.’”) (quoting *State v. Ubaldi*, 462 A.2d 1001 (Conn. 1983)) (citations and internal quotation marks omitted); *State v. Salitros*, 499 N.W.2d 815, 820 (Minn. 1993) (“This power to reverse prophylactically or in the interests of justice comes from our power to supervise the trial courts.”); *see also Bennett L. Gershman, Supervisory Power of the New York Courts*, 14 PACE L. REV. 41, 64-100 (1994)

Some courts occasionally do consider a prosecutor's bad intentions in determining whether a violation was committed and whether remedial action should be taken, although even those courts do not do so consistently.¹³ Despite the courts' failure to offer a rationale for when they will consider a prosecutor's intent, patterns do emerge. Courts use the subjective test when a finding of intent is necessary to identify a violation in conduct that appears proper on its face, when a finding of intent clarifies otherwise ambiguous conduct, and when a finding of intent is used in the analysis of prejudice.¹⁴ However, the subjective approach is used haphazardly and not in every case that falls into these categories, again without explanation. Thus, the judiciary's sometime reliance upon an objective test of prosecutorial misconduct, and its sometime but less

(focusing on the exercise of supervisory power by New York state courts within the contexts of discovery rules, grand jury practice, and the creation of remedies for police misconduct).

13. Although claims of prosecutorial misconduct typically are based on notions of fundamental fairness embodied in due process, *see* *United States v. Velez*, 46 F.3d 688, 691 (7th Cir. 1995) ("[A]llegations of prosecutorial misconduct are based on notions of due process."), a prosecutor's courtroom conduct can implicate other constitutional protections which require courts to analyze a prosecutor's state of mind. One notable example is determining whether a prosecutor has violated equal protection guarantees by peremptorily challenging jurors in a racially discriminatory manner. *See* *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) ("[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."); *see also* *Hernandez v. New York*, 500 U.S. 352, 365 (1991) ("[E]valuation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.'") (quoting *Wainwright v. Witt*, 469 U.S. 412, 428 (1985)). To the extent that a prosecutor's discriminatory conduct implicates equal protection principles, it addresses topics that are beyond the scope of this Article. *See generally* *United States v. Armstrong*, 517 U.S. 456 (1996) (treating a claim of racial discrimination in prosecutor's singling out defendant for narcotics charge); *McCleskey v. Kemp*, 481 U.S. 279 (1987) (addressing a claim of racial discrimination in the exercise of prosecutorial discretion to charge defendants with capital murder).

14. The Supreme Court's application of differing standards of materiality in cases involving the suppression of evidence and subornation of perjury indicates that prosecutorial culpability is relevant to a due process analysis. *Compare* *United States v. Agurs*, 427 U.S. 97, 104 (1976) (observing that in situations when prosecutors knowingly elicit perjured testimony, "the constitution has applied a strict standard of materiality not just because they involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process"), *with* *United States v. Bagley*, 473 U.S. 667, 682 (1985) (stating that evidence is material "if there is reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different"). The Supreme Court's rationale for the distinction suggests that intentionally wrongful behavior by prosecutors should be analyzed more strictly than nonintentional behavior, particularly when the intentional behavior involves a corruption of the truth-seeking function of the trial. Moreover, there is no due process violation if a prosecutor is unaware that perjury has occurred. *See* *Sanders v. Sullivan*, 863 F.2d 218, 222 (2d Cir.1988) ("[T]o the extent these cases disapprove the principle that a due process violation occurs when, without more, perjured testimony is introduced at trial, we would concur.").

frequent use of a subjective test, often appears to be ad hoc, inconsistent, and confusing.¹⁵

The courts' contradictory approach to prosecutorial culpability inside the courtroom is puzzling. The reasons that the courts give for using an objective test are inadequate. Moreover, the fact that some courts do consider a prosecutor's intent demonstrates that courts are indeed capable of recognizing intent. Additionally, a prosecutor's wrongful intent to subvert the fact-finding process is always relevant both to the fairness and accuracy of a trial.

After many years of struggling with the problem of prosecutorial misconduct, the courts have become sufficiently experienced and knowl-

15. The judiciary's confusion occasionally is noticed in its characterization of the prosecutor's conduct. See e.g., *United States v. Hardy*, 37 F.3d 753, 758 (1st Cir. 1994) ("We do not believe that the prosecutor *intentionally intended* to influence the jury by commenting on Hardy's silence . . .") (emphasis added); *United States v. Carroll*, 26 F.3d 1380, 1387 (6th Cir. 1994) (formulating a new distinction between flagrant and "*non-flagrant improper prosecutorial remarks*") (emphasis added); *Blissett v. Lefevre*, 924 F.2d 434, 440 (2d Cir. 1991) ("[P]rosecutor's attempt to emphasize petitioners 'other crimes' in the face of the court's prior ruling was *improper misconduct*.") (emphasis added).

The judiciary's confusion occasionally manifests itself in unusual ways, such as amending published opinions to modify or delete language which originally had strongly rebuked a prosecutor. For example, in *United States v. Collicott*, 92 F.3d 973 (9th Cir. 1996), the court, in its original opinion, criticized the prosecutor in a footnote

for engaging in prosecutorial overkill, a practice employed by a few overzealous prosecutors who try to slip in damaging evidence through the back door which they cannot introduce through the front door, without focus on the rules of evidence or the consequences on appeal, hoping that this scattergun approach will hit some evidentiary target.

Id. at 984 n.14 (censored opinion dated August 19, 1996, on file with author). But in an amended opinion, the court deleted this entire statement from the footnote. *Id.* at 984 n.14 (amended opinion dated Oct. 21, 1996).

Similarly, the Second Circuit in *United States v. Reyes*, 18 F.3d 65 (2d Cir. 1994), originally condemned a prosecutor for intentionally distorting and misrepresenting evidence. See *id.* at 69 (original opinion dated February 17, 1994, on file with author). However, a subsequent version of the opinion deleted the remonstrance and stated: "We are assured by the Government and are fully convinced that the discrepancy . . . was not intentional." 18 F.3d 65, 69 (2d Cir. 1994) (amended opinion dated March 24, 1994).

Courts also amend decisions to delete the identity of an offending prosecutor. Compare *U.S. v. Kojayan*, Daily Appellate Report 10030, 10032 (9th Cir. 1993) (original opinion dated August 4, 1993, on file with author) (naming the prosecutor whom the court found had deliberately lied to the court and jury), with 8 F.3d 1315 (amended opinion dated November 1, 1993) (omitting name).

Courts also "depublish" opinions; that is, they excise opinions from the official court reporters that contained harsh criticism of a prosecutor. See, e.g., *United States v. Tarricone*, 11 F.3d 24, 26-27 (2d Cir. 1993) (on file with author) (rebuking a prosecutor for deliberately soliciting false testimony); *United States v. Escamilla*, 975 F.2d 568, 571 (9th Cir. 1992) (on file with author) (noting that prosecutor acted to unjustly enrich the government by improperly using defendant's plea agreement to prove his guilt).

edgeable to provide a clear and consistent approach to reviewing misconduct and are poised to provide clearer supervision. The significance of a prosecutor's intent to violate a rule in order to win a case has been apparent to courts, practitioners, and commentators at least since the Supreme Court's seminal opinion over sixty years ago in *Berger v. United States*.¹⁶ Plainly, a calculated effort by a prosecutor to corrupt the truth-seeking process and thereby gain an unfair advantage over a defendant is antithetical to core values in the administration of justice that command prosecutors to serve justice and treat defendants fairly.¹⁷

Moreover, the subject of prosecutorial misconduct inside the courtroom has been increasingly discussed by courts and commentators in recent years,¹⁸ and the judiciary's understanding of the relevance of a

16. 295 U.S. 78 (1935). *Berger* articulated the classic statement of the role of the prosecutor:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Id. at 88.

The admonition in *Berger* against a prosecutor's use of methods "calculated to produce a wrongful conviction," plainly addresses both the prosecutor's wrongful conduct and the accompanying intention to produce that result.

17. See generally Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197 (1988). Ethical codes uniformly recognize a prosecutor's role as a "minister of justice." See MODEL RULES, *supra* note 4, Rule 3.8 cmt. (describing prosecutor as "minister of justice"); MODEL CODE, *supra* note 4, EC 7-13 (stating that prosecutor must "seek justice"); ABA STANDARDS, *supra* note 4, 3-1.2(c) ("The duty of the prosecutor is to seek justice, not merely to convict."). No comparable duty is imposed upon defense counsel. Indeed, defense counsel may have an affirmative duty that is at odds with the ascertainment of truth and justice. See *United States v. Wade*, 388 U.S. 218, 258 (1967) (White, J., concurring) (asserting that defense counsel's "mission" may require conduct that "in many instances has little, if any, relation to the search for truth").

18. The expression "prosecutorial misconduct" is of fairly recent origin. The earliest opinion of the Supreme Court using the phrase is *Namet v. United States*, 373 U.S. 179 (1963). The earliest reported decision using the phrase in the headnote is *Ex parte Farrell*, 189 F.2d 540 (1st Cir. 1951). This expression increasingly has become a prominent part of criminal justice discourse. A recent computer search of the phrase disclosed that between 1960 and 1969, 56 cases used the term; between 1970 and 1979, 1446 cases used the term; between 1980 and 1989, 6143 cases used the term; between 1990 and the present, 9535 cases used the term. Search of WESTLAW, Allcases Library (Feb. 1, 1999). With respect to law reviews and journals, the expression was used in 285 publications prior to 1990, and 907 times between 1990 and the present. Search of WESTLAW, JLR Library (Feb. 1, 1999). As for newspapers

prosecutor's mental culpability presumably has become far better informed. Likewise, academic analysis has touched upon the extent to which a prosecutor's wrongful intent properly should figure in the judiciary's analysis of prosecutorial misconduct with increasing frequency.¹⁹

In addition, the judiciary's failure to offer a principled understanding

in the United States, the expression was used 651 times in the 1980s and 802 times in the 1990s. Search of WESTLAW, USNEWS Library (Feb. 1, 199). There are also two treatises using the expression in the title. See BENNETT L. GERSHMAN, *PROSECUTORIAL MISCONDUCT* (1985); JOSEPH F. LAWLESS, *PROSECUTORIAL MISCONDUCT* (1985). The increasing use of the expression has been criticized. See *McGrier v. United States*, 597 A.2d 36, 41 (D.C. 1991) (suggesting that the term "misconduct" is a "sinister name" that has been "overused" when applied to prosecutorial argument to jury); Bruce A. Green, *The Ethical Prosecutor and the Adversary System*, 24 CRIM. L. BULL. 126, 138 (1988) ("[T]his characterization is used much too loosely. . . . The term 'misconduct' has pejorative overtones—it suggests that the prosecutor has acted erroneously with intent if not with malice.").

19. See Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 646 (1972) (noting the relevance of prosecutorial intent because "a calculated and cold-blooded air may sometimes communicate itself and have an effect of its own"); Green, *supra* note 18, at 133 (suggesting that the term "misconduct" should be reserved for behavior that intentionally deviates from reasonably attainable standards of propriety); Randolph N. Jonakait, *The Ethical Prosecutor's Misconduct*, 23 CRIM. L. BULL. 550, 560 (1987) (arguing that mental culpability is not necessary and that "misconduct is any prosecutorial behavior that impedes the objective search for truth"); Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1367 (1987) (suggesting that intent-based analysis of constitutional claims are justified on grounds of fairness, systemic considerations, and inefficiency of harm-based schemes); Richard G. Singer, *Forensic Misconduct by Federal Prosecutors—and How It Grew*, 20 ALA. L. REV. 227, 272 (1968) ("If courts are to look at the intent of the prosecutor at all, it should be in connection only with the remedy to be applied to prevent such conduct in the future, not with possible reversal of the instant decision."); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 105 (1991) ("If the prosecutor's purpose is to focus jurors' attention on potentially inadmissible facts, she undermines adversarial justice."); Vilija Bilaisis, Comment, *Harmless Error: Abettor of Courtroom Misconduct*, 74 J. CRIM. L. & CRIMINOLOGY 457, 471 (1983) (arguing that reversal should be automatic whenever prosecutor has deliberately engaged in misconduct).

Ethics treatises refer only superficially to an attorney's culpable mental state, and even more sparingly to an attorney's culpable mental state while engaged in courtroom advocacy. See JOHN JAY DOUGLASS, *ETHICAL ISSUES IN PROSECUTION* 341 (1988) ("A violation of a rule of evidence is not *ipse dixit* unprofessional conduct unless it was a deliberate attempt to avoid the rule. Motive and intent play a role in determining whether the action of the prosecutor is unprofessional."); DAVID LUBAN, *LAWYERS AND JUSTICE* 16 (1988) ("Lawyers may advance arguments only when they can do so in good faith."); RICHARD H. UNDERWOOD & WILLIAM H. FORTUNE, *TRIAL ETHICS* § 11.6, at 328 (1988) (noting instances of prosecutor's misconduct and deliberate injection of inadmissible evidence); *id.* § 13.3, at 358 ("It is unethical for an attorney to deliberately misstate the evidence."); WOLFRAM, *supra* note 8, § 3.3.1, at 89 (declaring that there is no requirement that attorney have specific intent to violate ethical rule); *id.* § 13.10.4, at 766 (stating that prosecutor must engage in "forensic fairness," may "not employ forensic gambits," and must not pursue "plainly impermissible lines of questioning or argument").

of the legal significance of a prosecutor's mental culpability inside the courtroom contrasts sharply with the judiciary's more principled approach in analyzing a prosecutor's mental culpability outside the courtroom.²⁰

20. See *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) (holding that bad faith must be demonstrated when prosecution fails to preserve exculpatory evidence); *Blackledge v. Perry*, 417 U.S. 21, 28 (1974) (stating that a showing of bad faith entails showing that the prosecutor acted vindictively in seeking indictment); *United States v. Lovasco*, 431 U.S. 783, 796 (1971) (holding that bad faith must be shown when prosecution delays in bringing accusation); *Dickey v. Florida*, 398 U.S. 30, 37 (1970) (stating that bad faith is relevant in determining whether prosecutor denied defendant speedy trial); *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886) (opining that criminal charges motivated by "an evil eye" and "a mind so unequal and oppressive deny petitioner equal protection of the laws"); *United States v. Dardi*, 330 F.2d 316, 336 (2d Cir. 1964) (discussing whether prosecutor's "sole or dominating purpose" in using grand jury was to assist in pretrial discovery).

Analysis of mental culpability has become a fixture in many substantive areas of the law. See, e.g., *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (declaring that a due process violation requires more than mere negligence by government official); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (explaining that equal protection violation requires proof of discriminatory purpose). Good faith may be implicated as a basis for an exception to the exclusionary rule of the Fourth Amendment, see *Arizona v. Evans*, 514 U.S. 1, 14 (1995) (concluding that the exclusionary rule does not require suppression of evidence seized in violation of the Fourth Amendment where the erroneous information was due to a clerical error of court employees); *Illinois v. Krull*, 480 U.S. 340, 352-53 (1987) (holding that the exclusionary rule does not apply to evidence obtained by police acting in objectively reasonable reliance on a statute authorizing warrantless administrative searches); *United States v. Leon*, 468 U.S. 897, 921 (1984) (asserting that the exclusionary rule should not bar evidence obtained by officials acting in reasonable reliance on an invalid search warrant); *Massachusetts v. Sheppard*, 468 U.S. 981, 987-88 (1984) (same); as an affirmative defense of qualified immunity in actions under 42 U.S.C. § 1983, see *Harlow v. Fitzgerald*, 457 U.S. 800, 809 (1982) (holding that executive officials are usually entitled to only good-faith immunity); *Wood v. Strickland*, 420 U.S. 308, 322 (1975) (holding that school officials are not entitled to good-faith immunity if they reasonably should have known their actions had violated the constitutional rights of students); in asserting a defense to criminal liability based on ignorance or mistake, see *Cheek v. United States*, 498 U.S. 192, 202 (1991) (holding that good faith mistake of the law negates willfulness); *United States v. Barker*, 546 F.2d 940, 946 n.15 (D.C. Cir. 1976) (holding that the government agent's mistaken reliance on the magistrate's approval of a search is per se reasonable); in rules of professional responsibility relating to advice of counsel, see MODEL RULES, *supra* note 4, Rule 1.2(d) (mandating that counsel may not assist a client in criminal conduct, but may in good faith help a client determine the validity of a law); MODEL CODE, *supra* note 4, DR 7-106(A) (same); in contracts law, see U.C.C. §§ 61-201(19) (defining good faith), 2-103(b) (defining good faith in the case of a merchant) (1990); and in property law, see ROGER A. CUNNINGHAM, WILLIAM B. STOEBUCK, & DALE A. WHITMAN, *THE LAW OF PROPERTY*, § 11.10, at 833 (2d ed. 1993) (noting that recording acts protect subsequent conveyees only if they purchase property in good faith with no notice of prior conveyance).

The concept of good faith at the very least implies an absence of conscious wrongdoing. See *Leon*, 468 U.S. at 919 n.20 (stating that good faith requires objective reasonableness). But see LUBAN, *supra* note 19, at 16-17 (arguing that the concept of good faith in professional advocacy is "inherently circular" and its application has been "corrupted" by a cynical attitude on the part of lawyers that any conduct can be viewed as acceptable and in conformity with professional standards).

It would certainly seem anomalous that courts would analyze a prosecutor's mental culpability in circumstances in which courts lack direct knowledge or supervision of a prosecutor's conduct, but decline to analyze a prosecutor's mental culpability in cases in which the courts have first-hand knowledge of a prosecutor's conduct and supervise his conduct directly.

And finally, given a prosecutor's enormous power to subvert a defendant's right to a fair trial,²¹ the courts are hardly oblivious to the overriding systemic and societal interests in deterring prosecutors from intentionally striking foul blows.²² Indeed, the courts' failure to systematically address intentional conduct by prosecutors encourages further misconduct and promotes increased cynicism by participants of the justice system and the public alike.²³

This Article argues that a prosecutor's intent is always relevant to the courts' analysis of misconduct, and that the courts should always consider a prosecutor's intent in determining whether a rule was violated and whether the verdict was prejudiced. Part II of this Article examines the use of the objective test to analyze a prosecutor's trial conduct. Part II offers several reasons courts give for avoiding inquiry into a prosecutor's mental culpability, analyzes those reasons, and concludes that although the application of an objective test is sufficient to correct misconduct in some instances, it does not foreclose application of a subjective test as well. Part

21. See Zacharias, *supra* note 19, at 59 ("The literature is replete with discussions of ways in which a prosecutor can misuse her singular tools.").

22. See *United States v. Bagley*, 473 U.S. 667, 705 n.6 (1985) (Marshall, J., dissenting) ("A deliberate effort of the prosecutor to undermine the search for truth clearly is in the category of offenses antithetical to our most basic vision of the role of the state in the criminal process."). But see *United States v. Hasting*, 461 U.S. 499, 509 (1983) (arguing that the interests preserved by the doctrine of harmless error cannot be so lightly and casually ignored in order to chastise what the lower court viewed as prosecutorial overreaching).

It is ironic that the harmless error rule, although purporting to preserve important institutional and societal interests, has the perverse effect of actually encouraging prosecutors to commit misconduct intentionally. See Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 424-31 (1992) (arguing that the harmless error rule informs prosecutors that they can weigh the commission of evidentiary or procedural violations against the prediction that appellate courts will ignore the misconduct when sufficient evidence of the defendant's guilt exists).

23. Courts and commentators have decried the judiciary's failure to systematically address or condemn intentional violations by prosecutors as encouraging further misconduct and promoting a cynical attitude towards the justice system not only by participants but by defendants and the public as well. See *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 661 (2d Cir. 1946) (Frank, J., dissenting) (emphasizing that a judicial attitude of "helpless piety" in the face of prosecutorial misconduct, and the use of "purely ceremonial language" to express disapproval, merely encourages further prosecutorial excesses, and also "breeds a deplorably cynical attitude towards the judiciary"); Bilaisis, *supra* note 19, at 470 ("Lack of incentive for lawful behavior gives rise to repeated violations resulting in a systematic erosion of justice in the form of a high incidence of non-trivial errors.").

III discusses the use by some courts—although infrequently and inconsistently applied—of a subjective test to review a prosecutor's conduct, and analyzes the reasons that the subjective test is appropriate in all cases. Part IV attempts to rationalize the courts' use of a subjective test of a prosecutor's conduct. Part IV argues that a prosecutor's bad intentions are always relevant in analyzing a prosecutor's conduct, although not always necessary to a court's determination, and concludes that a prosecutor's wrongful intent invariably should be considered whenever evidence of a wrongful intent is available.

II. Objective Test of Prosecutorial Misconduct

A. *Description and Application of the Objective Test*

Courts typically do not consider a prosecutor's intent in determining whether a prosecutor's conduct was improper.²⁴ Rather, courts examine a prosecutor's conduct under a two-part test to determine, first, whether the conduct, viewed objectively, was improper, and second, whether the probable impact of that conduct prejudiced the verdict.²⁵ This standard has been used to review a broad array of allegations of misconduct, including questioning by prosecutors that elicits inadmissible testimony,²⁶ questioning of defendant and defense witnesses that elicits prejudicial evidence,²⁷ questioning or making comments that improperly bolsters the credibility of prosecution witnesses,²⁸ offering false, inadmissible, or misleading evidence,²⁹ presenting false or misleading displays or demon-

24. See *United States v. Ince*, 21 F.3d 576, 580 (4th Cir. 1994) ("Federal evidence law does *not* ask the judge, either at trial or upon appellate review, to crawl inside the prosecutor's head to divine his or her true motivation.").

25. See *United States v. Young*, 470 U.S. 1, 12 (1985).

26. See *United States v. Collicott*, 92 F.3d 973, 978-82 (9th Cir. 1996); *United States v. Wiedyk*, 71 F.3d 602, 607 (6th Cir. 1995); *United States v. Flores-Chapa*, 48 F.3d 156, 159 (5th Cir. 1995); *United States v. Reyes*, 18 F.3d 65, 67-68 (2d Cir. 1994); *United States v. Harvey*, 991 F.2d 981, 995-96 (2d Cir. 1993).

27. See *United States v. Cudlitz*, 72 F.3d 992, 997-98 (1st Cir. 1996) (explaining that the government improperly impeached the defendant by asking about prior similar crimes); *United States v. Mason*, 993 F.2d 406, 407 (4th Cir. 1993) (explaining that the government improperly cross-examined defense character witnesses by hypothetical questions assuming defendant's guilt).

28. See *Collicott*, 92 F.3d at 978-82.

29. See *United States v. Steele*, 91 F.3d 1046, 1051 (7th Cir. 1996) (agreeing with the district court that the prosecutor's conduct in waving report before jury that pretended to contain impeaching evidence and then failing to tell defense counsel of charade was "reprehensible"); *United States v. Frederick*, 78 F.3d 1370, 1376 (9th Cir. 1996) (finding improper the introduction of evidence that defendant committed other similar crimes); *United States v.*

strations,³⁰ offering inflammatory evidence,³¹ making false or misleading remarks,³² making inflammatory remarks,³³ misstating the evidence,³⁴ disparaging defense counsel,³⁵ asking questions or making comments that impair a defendant's exercise of his constitutional right to remain silent after being given *Miranda* rights,³⁶ asking questions or making comments

Catton, 89 F.3d 387, 389 (7th Cir. 1996) ("The prosecutor sat by in silence while [key prosecution witness] lied."); *United States v. Alzate*, 47 F.3d 1103, 1107-09 (11th Cir. 1995) (condemning the prosecutor for eliciting false testimony and failing to correct himself when he learned the truth); *Ince*, 21 F.3d at 579-82 (finding that the prosecutor's circumvention of the hearsay rule by impeaching one of his witnesses in order to introduce inadmissible evidence was reversible error).

30. See *McKinnon v. Carr*, 103 F.3d 934, 936 (10th Cir. 1996) (finding that it was "egregiously improper" for prosecutor to display and demonstrate set of handcuffs never introduced in evidence as similar to handcuffs that were never found); *United States v. Garcia*, 986 F.2d 1135, 1141-42 (7th Cir. 1993) (condemning prosecutor's practice of displaying opened marijuana containers emitting odor of marijuana during presentation of defendant's case).

31. See *United States v. Rose*, 104 F.3d 1408, 1414 (1st Cir. 1997) (describing prosecutor's submission of a photo depicting defendant with a gun pointed at another person's head); *Harvey*, 991 F.2d at 995-96 (finding improper the prosecutor's cross-examination of defendant with respect to possession of videos depicting gross acts of bestiality and sadomasochism that were irrelevant to issues at trial).

32. See *United States v. Forlorma*, 94 F.3d 91, 94-95 (2d Cir. 1996) (explaining that reversal may be warranted where prosecutor falsely asserted that a suit found in a bag containing heroin fit the defendant); *Catton*, 89 F.3d at 389 (stating that prosecutor's false assertion that the defendant had made damaging admissions could require a new trial only if the admissions were prejudicial); *United States v. Flores-Chapa*, 48 F.3d 156, 159 (5th Cir. 1995) (finding that repeated reference to testimony that had been excluded could be grounds for reversal).

33. See *United States v. Cannon*, 88 F.3d 1495, 1502 (8th Cir. 1996) (holding that reference to defendants as "bad people" and veiled appeal to ethnic prejudice during closing argument were improper and prejudicial to the jury); *Miller v. Lockhart*, 65 F.3d 676, 682 (8th Cir. 1995) (holding that reference to defendant as "mad dog" who could not be rehabilitated during penalty phase of trial was improper and prejudiced the court).

34. See *United States v. Donato*, 99 F.3d 426, 432 (D.C. Cir. 1996) (holding that prosecutor's exaggeration of the extent of defendant's crime in summation may have affected the integrity of the jury's verdict, requiring reversal); *United States v. Morsley*, 64 F.3d 907, 912 (4th Cir. 1995) (holding that falsely representing that defendant had confessed and that he had pled guilty constituted harmless error).

35. See *Hennon v. Cooper*, 109 F.3d 330, 333 (7th Cir. 1997) (noting that comments impugning defense counsel's honesty were improper); *United States v. Frederick*, 78 F.3d 1370, 1379-80 (9th Cir. 1996) (noting that prosecutor's implications that court and government were allied was a misstep); *United States v. Friedman*, 909 F.2d 705, 709 (2d Cir. 1990) (noting that repeated comments on lack of integrity of defense counsel was improper).

36. See *Doyle v. Ohio*, 426 U.S. 610, 618 (1976) (holding that use of defendant's silence after receiving *Miranda* warnings violates due process); *United States v. Moore*, 104 F.3d 377, 389 (D.C. Cir. 1997) (concluding that prosecutor violated Fifth Amendment by commenting on defendant's pre-trial silence); *Franklin v. Duncan*, 70 F.3d 75, 77-78 (9th Cir. 1995) (same); *United States v. Kallin*, 50 F.3d 689, 693 (9th Cir. 1995) (holding that prosecutor's repeated references to defendant's failure to come forward earlier with innocent explanation as well as his retention of counsel violated defendant's due process rights).

that impair a defendant's exercise of his privilege not to testify,³⁷ making comments that vouch for the integrity of the prosecution's case,³⁸ making comments that suggest the existence of unused evidence,³⁹ and making arguments that urge inconsistent theories of guilt.⁴⁰

After a violation has been established, a reviewing court then considers the probable impact of that violation on the verdict. The evaluation of prejudice occurs in one of four principal contexts: (1) harmless error analysis for preserved constitutional violations;⁴¹ (2) harmless error analysis for preserved nonconstitutional violations;⁴² (3) plain error analysis for both constitutional and nonconstitutional violations when the violation was not objected to;⁴³ and (4) collateral review of preserved constitutional violations.⁴⁴ The standards for plain error and collateral review of a prosecutor's conduct are relatively straightforward and appear to be applied consistently. The standards for harmless error

37. See *Griffin v. California*, 380 U.S. 609, 614 (1965) (holding that prosecutor insinuating defendant's guilt by his refusal to testify violates the Fifth Amendment); *United States v. Roberts*, 119 F.3d 1006, 1015 (1st Cir. 1997) (holding that prosecutor violated the *Griffin* rule as well as the rule against telling the jury that defendant has the burden of proving his innocence); *United States v. Hardy*, 37 F.3d 753, 758 (1st Cir. 1994) (noting that the natural implication of prosecutor's remark was that the defendants were hiding from the evidence).

38. See *United States v. Rudberg*, 122 F.3d 1199, 1204-06 (9th Cir. 1997) (observing that prosecutor vouching for witnesses' credibility by implying that government possessed extra-record knowledge and capacity to monitor truthfulness of witnesses' testimony affected the jury's ability to judge the evidence impartially); *United States v. Carroll*, 26 F.3d 1380, 1387-88 (6th Cir. 1994) (finding improper the prosecutor's expression of his personal belief in the witness's honesty).

39. See *United States v. Molina-Guevara*, 96 F.3d 698, 703 (3d Cir. 1996) (holding that the Confrontation Clause of the Sixth Amendment was violated when prosecutor informed jury that a witness who did not testify would have given inculpatory testimony).

40. See *Thompson v. Calderon*, 109 F.3d 1358, 1371 (9th Cir. 1996) (holding that the prosecutor may not pursue wholly inconsistent theories of a case at separate trials).

41. See *Chapman v. California*, 386 U.S. 18, 24 (1967) (stating that conviction may be reversed unless prosecutor demonstrates that error is harmless beyond a reasonable doubt); see also FED. R. CRIM. P. 52(a) ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

42. See *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946) (stating that the conviction must be reversed if the defendant demonstrates that an error either had a "substantial influence" on the verdict or leaves one in "grave doubt" whether it had such effect).

43. See *United States v. Olano*, 507 U.S. 725, 734-35 (1993) (explaining that reversal is justified only if the error is "obvious," "affect[s] substantial rights," and "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.") (alterations in the original) (internal quotation marks omitted); see also FED. R. CRIM. P. 52(b) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").

44. See *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993) (declaring that nonconstitutional *Kotteakos* standard is applicable to evaluate constitutional error on habeas corpus review).

review of a prosecutor's conduct, by contrast, are neither clearly enunciated nor consistently applied. The tests vary widely from court to court, sometimes consider a prosecutor's intent,⁴⁵ and are often contradictory⁴⁶ and confusing.⁴⁷

B. Judicial Reasons for Rejecting an Intent-Based Analysis

Courts offer a variety of justifications for their reluctance to examine a prosecutor's intent. First, according to some courts, an inquiry into a prosecutor's culpability is considered irrelevant in determining whether the prosecutor committed misconduct or whether a defendant has been harmed by the misconduct. The Supreme Court has observed, for example, that the pertinent consideration when prosecutors suppress evidence is "the character of the evidence, not the character of the prosecutor."⁴⁸ The Court has emphasized that reversing a conviction is not a permissible means to discipline a prosecutor.⁴⁹ A court may reverse a conviction for

45. Compare *Doyle v. Ohio*, 426 U.S. 610, 618 (1976) (holding that prosecutor's comment on defendant's pretrial silence violates due process without consideration of prosecutor's intent), with *United States v. Tenorio*, 69 F.3d 1103, 1107 (11th Cir. 1995) (holding that prosecutor's comment on defendant's pretrial silence was "intentional and egregious" and sufficient to warrant reversal).

46. Compare *United States v. Morgan*, 113 F.3d 85, 89 (7th Cir. 1997) ("If the [prosecutor's] comments did not render the defendant's trial unfair, there is no constitutional error and we cannot reverse, regardless of our desire to deter improper conduct."), and *United States v. Morsley*, 64 F.3d 907, 913 (4th Cir. 1995) (asserting that constitutional due process standard is applicable to review prosecutor's conduct, citing Supreme Court decisions that articulate such standard when a court reviews a prosecutor's conduct collaterally), with *United States v. Catton*, 89 F.3d 387, 388 (7th Cir. 1996) ("In a direct appeal from a criminal judgment rather than a collateral attack upon it, a showing that the trial was infected by false testimony needs not rise to the level of a constitutional violation in order to be a ground for a new trial. It is enough if the jury might have reached a different conclusion had the testimony not been given"). See also *United States v. Wihbey*, 75 F.3d 761, 771 n.6 (1st Cir. 1996) (observing that comments by prosecutors violating a defendant's failure to testify are constitutional errors but have been treated by different panels in the circuit as both constitutional and nonconstitutional errors).

47. See *United States v. Carroll*, 26 F.3d 1380, 1383-87 (6th Cir. 1994) (observing that the circuit court has used three different tests for prosecutorial misconduct within the past two years, declaring the existing doctrine "confusing" and "murky," and clarifying the doctrine by establishing a new test differentiating between "flagrant" and "non-flagrant" misconduct, with prosecutor's intent relevant to flagrant but not to non-flagrant misconduct). Compare *Morsley*, 64 F.3d at 913 (stating that prosecutor's intent is relevant to prejudice), and *United States v. Taylor*, 54 F.3d 967, 977 (1st Cir. 1995) (same), with *United States v. Melendez*, 57 F.3d 238, 241 (2d Cir. 1995) (explaining that while the severity of prosecutor's misconduct is relevant to prejudice, severity is undefined, and providing no indication that intent should be part of determination), and *United States v. Manning*, 23 F.3d 570, 574 (1st Cir. 1994) (same).

48. *United States v. Agurs*, 427 U.S. 97, 110 (1976).

49. See *United States v. Hasting*, 461 U.S. 499, 507 (1983) (stressing that a court may not

a prosecutor's infractions only if the impact of those infractions prejudiced the verdict.⁵⁰ If prejudice under an objective standard is the critical factor for reversal, then the relevant inquiries are the nature of the prosecutor's conduct, whether that conduct violated a rule of trial practice, and whether the likely effect of that violation caused sufficient prejudice to the defendant. A prosecutor's character, motivation, or intent would appear to be of no consequence.

Another reason the courts articulate for refusing to consider a prosecutor's intent is the marginal utility of reversing a conviction in terms of sending a message to errant prosecutors and deterring future misconduct.⁵¹ According to the courts, the benefit may indeed be slight if prosecutors view a conviction as the *sine qua non* of trial advocacy and appellate reversal as a legalistic technicality by judges who are "soft on crime."⁵² To such a prosecutor, an occasional reversal may be a modest cost that does little to diminish his public reputation as an aggressive crime

use its supervisory powers to discipline prosecutors without considering the harm caused by the misconduct).

50. See *United States v. Young*, 470 U.S. 1, 12 (1985) (asserting that a court must consider "the probable effect the prosecutor's [misconduct] would have on the jury's ability to judge the evidence fairly").

51. See *United States v. Modica*, 663 F.2d 1173, 1184 (2d Cir. 1981) (arguing that reversal of convictions is not likely to be effective in deterring prosecutors). Deterring prosecutorial misbehavior presumably has a similar theoretical basis as deterring police misbehavior—that is, "to compel respect for the constitutional guaranty [of a fair trial] in the only effectively available way—by removing the incentive to disregard it." See *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)) (internal quotation marks omitted).

52. See *Modica*, 663 F.2d at 1184 (arguing that reversal is not likely to deter prosecutors who lack the institutional concerns of other law enforcement officials). The judiciary's ambivalence over their power to deter misconduct is most noticeable in the judiciary's frequent bemoaning of unheeded condemnations of flagrant misconduct by prosecutors. See, e.g., *United States v. Levy-Cordero*, 67 F.3d 1002, 1009 (1st Cir. 1995) (criticizing the jurisdiction where prosecutors "persist in spiking their arguments with comments that put their cases at risk"); *Manning*, 23 F.3d at 576 ("For the third time in the last six months, we find ourselves in the regrettable position of vacating a conviction because a United States Attorney has failed to honor sufficiently these precepts [against striking foul blows]."); *United States v. Pallais*, 921 F.2d 684, 691-92 (7th Cir. 1990) (expressing frustration at futility of repeated rebukes of prosecutors); *United States v. Maccini*, 721 F.2d 840, 846 (1st Cir. 1983) (complaining about the government's "disregard of our directives"); *Modica*, 663 F.2d at 1174, 1183 (2d Cir. 1981) (expressing "frustration" at "unheeded condemnations"); *United States v. Rodriguez*, 627 F.2d 110, 112 (7th Cir. 1980) ("[The problem] continues to arise with disturbing frequency throughout this circuit despite the admonition of trial judges and this court."); *Eberhardt v. Bordenkircher*, 605 F.2d 275, 280 (6th Cir. 1979) (noting court's repeated condemnation of unethical conduct by prosecutors); *United States v. Agee*, 597 F.2d 350, 371 (3d Cir. 1979) (Gibbons, J., dissenting) (declaring that repeated warnings to prosecutors are becoming a familiar routine); *United States v. Morris*, 568 F.2d 396, 401 (5th Cir. 1978) (highlighting the "continuing problem" of prosecutorial misconduct).

fighter.⁵³ And the cost in terms of freeing a plainly guilty defendant may seem grossly disproportionate.⁵⁴

A third reason why courts hesitate to apply a subjective test are the alleged practical impediments to discovering the mental processes that accompany a prosecutor's challenged conduct. As Benjamin Cardozo observed, "The sphygmograph records with graphic certainty the fluctuations of the pulse. There is no instrument yet invented that records with equal certainty the fluctuations of the mind."⁵⁵ Courts recognize that delving into a prosecutor's mind is an inherently complex task, especially in light of the volatile and unpredictable character of courtroom advocacy.⁵⁶ Unless a prosecutor openly acknowledges an intention to engage in forbidden conduct,⁵⁷ or engages in such conduct after being warned,⁵⁸ a court that seeks to penetrate a prosecutor's mind must infer the existence of a conscious purpose from the conduct itself.

A fourth reason why courts choose not to analyze a prosecutor's mental state is the belief that a criminal trial is not the proper forum to impose professional discipline on attorneys.⁵⁹ Under this view, the purpose of a criminal trial is to determine a defendant's guilt under established rules and procedures, not to determine whether a prosecutor behaved unethically. The latter inquiry ordinarily is the function of professional disciplinary agencies. Moreover, to the extent that an appellate court seeks to determine whether a prosecutor has consciously violated a rule or deliberately prejudiced the case unfairly, the court could be seen as making a determination that the prosecutor violated a rule of professional ethics without affording the prosecutor an opportunity to

53. *But see* *United States v. Oshatz*, 912 F.2d 534, 541 (2d Cir. 1990) ("The only word in a judicial opinion that prosecutors understand is 'reversed'.").

54. *See* *United States v. Lotsch*, 102 F.2d 35, 37 (2d Cir. 1939) (L. Hand, J.) ("That was plainly an improper remark, and if a reversal would do no more than show our disapproval, we might reverse. Unhappily, it would accomplish little towards punishing the offender, and would upset the conviction of a plainly guilty man [I]t seems to us that reversal would be an immoderate penalty.").

55. *People v. Zachowitz*, 172 N.E. 466, 467 (N.Y. 1930).

56. *See* *Oregon v. Kennedy*, 456 U.S. 667, 679-80 (1982) (Powell, J., concurring) ("'Subjective' intent often may be unknowable."). *See also* WOLFRAM, *supra* note 8, § 3.3.1, at 89 ("Evidence about subjective states of mind is almost always inaccessible or unverifiable.").

57. *See* *Commonwealth v. Warfield*, 227 A.2d 177, 178 (Pa. 1967) (describing how the prosecutor, in violation of a judge's suppression order and with the specific intention of provoking a mistrial, announced to the jury that the defendant had confessed).

58. *See* *United States v. Small*, 74 F.3d 1276, 1282 (D.C. Cir. 1996); *United States v. Adams*, 74 F.3d 1093, 1098-99 (11th Cir. 1996); *United States v. Flores-Chapa*, 48 F.3d 156, 159 (5th Cir. 1995).

59. *See* *United States v. Modica*, 663 F.2d 1173, 1185 n.7 (2d Cir. 1981) (citing the fact that courts are reluctant to identify prosecutors who engage in misconduct).

answer the accusation.

C. *Critiquing the Objective Test of Prosecutorial Misconduct*

Although an objective test is the traditional method of analyzing a prosecutor's conduct, such test need not be the exclusive yardstick. First, the courts are wrong in holding that intent is irrelevant to harm. As a matter of logic, a prosecutor's attempt to intentionally distort the fact-finding process is relevant to the reliability of the verdict. The most obvious reason a prosecutor would intentionally strike a foul blow is to strengthen his case. In any such instance a court should examine the prosecutor's case skeptically. It is not unreasonable for a court to infer that if a prosecutor acts like it is necessary to violate procedural or evidentiary rules in order to win the case, then perhaps the prosecutor's case is vulnerable.⁶⁰ To the extent that some appellate courts include a prosecutor's intent as part of the harmless error calculation, these courts appear to do just that; that is, they have apparently concluded that a prosecutor's intentional violation should be considered as a relevant factor in analyzing the prejudicial impact of the prosecutor's conduct.

Second, appellate reversal for intentional violations in order to discipline prosecutors and deter future violations may not be a meaningless sanction. Reversal means that a prosecutor must try her case over again, not an attractive prospect.⁶¹ Moreover, although it has been contended that a police officer counts his arrests and not his convictions, the same cannot be said of a prosecutor; a reversal tarnishes his record.⁶² Indeed, a prosecutor's superiors may be adversely influenced by a reversal, particularly if it suggests incompetence, bad judgment, or malevolence.⁶³ In addition, a prosecutor's future in the legal profession may be affected by a reversal, particularly if the opinion contains a harsh appellate rebuke and identifies the prosecutor by name.⁶⁴ And finally, the media's

60. See *United States v. Boyd*, 55 F.3d 239, 242 (7th Cir. 1995) ("If the prosecutors did not think their case airtight (and so they tried to bolster it improperly), this is some indication that it was indeed not airtight.").

61. See *Alschuler*, *supra* note 19, at 647 ("[T]he burden of a retrial falls on the prosecutor himself. He is in effect told to 'go back and do it right'.").

62. See *id.* Having been acquainted with prosecutors my entire professional life, including ten years as a prosecutor myself, I can attest that prosecutors do keep a scorecard of wins and losses.

63. See *Brown v. Borg*, 951 F.2d 1011, 1017 (9th Cir. 1991) (discussing how outrageous misconduct in hiding crucial evidence and then lying about it resulted in the prosecutor being disciplined by superiors). See *Metro Digest*, *Deputy D.A. Gets 30-Day Suspension*, L.A. TIMES, Apr. 29, 1989, at 2.

64. See *Modica*, 663 F.2d at 1185 ("A reprimand in a published opinion that names the prosecutor is not without deterrent effect.").

treatment of a reversal may be highly detrimental to a prosecutor's career.⁶⁵ Although it might be unrealistic to expect that the courts will view the interest in deterrence as strong enough to override a clearly reliable verdict,⁶⁶ a reversal when guilt is less certain is neither an inappropriate nor an ineffective sanction.⁶⁷ Otherwise, routine affirmances in the face of serious and calculated misbehavior trivializes a prosecutor's obligation to serve justice and does little to discourage future misconduct.

Nor is a reversal for intentional misconduct a meaningless sanction from a systemic or societal standpoint. A trial has a symbolic as well as an adjudicative function. A trial represents our nation's highest commitment to the principle that even the most heinous offender will be treated in a fair and civilized manner. To the extent that courts routinely overlook a prosecutor's intentional impairment of that ideal, these courts cannot help but engender a cynical attitude toward the system of justice for the parties, participants, and public.

Third, it is hardly the case that a prosecutor's subjective intent invariably is uncertain or unknowable, or that courts are institutionally incapable of discovering that intent. To be sure, inquiring into a prosecutor's intent is a difficult task. Intent is rarely clear-cut. Mistakes, mixed motives, and lapses in judgment complicate the effort to unravel a prosecutor's psyche with any degree of reliability.⁶⁸ And given the dynamic "rough and tumble" of a jury trial,⁶⁹ it is to be expected that much rule-violating conduct is unplanned, inadvertent, and impulsive.⁷⁰

65. See Dan Christensen, *Was Counsel Guilty of Fraud; Demjanjuk Case Now Haunts Former Prosecutor*, LEGAL TIMES, Jan. 24, 1994, at 2 (discussing effects on prosecutor's career after misconduct was reported).

66. See *United States v. Hasting*, 461 U.S. 499, 507 (1983) (admonishing that a court may not reverse a conviction to discipline prosecutor and deter misconduct without considering the harmful effect of misconduct).

67. Compare *United States v. Johnston*, 127 F.3d 380, 403 (5th Cir. 1997) ("Nevertheless, somewhere we must draw the line and send a message to prosecutors that the Constitution governs their actions at trial. This is such a case."), with *United States v. Manning*, 23 F.3d 570, 574-75 n.2 (1st Cir. 1994) ("While we fervently hope that our decision might have the effect of deterring prosecutors from straying into forbidden territory in the future, we emphasize that today's result is in no way informed by a deterrent animus.").

68. See *United States v. Himelwright*, 42 F.3d 777, 781-82 ("Although [prosecutors] 'will hardly admit it, the reasons proffered to admit prior act evidence may often be potemkin village, because the motive, we suspect, is often mixed between an urge to show some other consequential fact as well as to impugn the defendant's character'" (quoting *United States v. Jemal*, 26 F.3d 1267, 1272 (3d Cir. 1994))).

69. See DOUGLASS, *supra* note 19, at 401 ("Errors during argument arise out of emotion, ignorance, or oratorical style. On many occasions, error arises only because the prosecutors get carried away with the sound of their own voices.").

70. But see *Davis v. Zant*, 36 F.3d 1538, 1544-49 (11th Cir. 1994) (finding that a

Moreover, prosecutors, as do all courtroom litigators, make honest mistakes. They misstate the evidence,⁷¹ make slips of the tongue,⁷² and engage in other inadvertent behavior.⁷³ Such conduct might appear under the volatile circumstances of a trial to be inexcusably negligent, even reckless,⁷⁴ but not necessarily indicative of a calculated plan to prejudice a defendant unfairly.⁷⁵

Moreover, courts recognize that adversarial litigation contemplates and even encourages aggressive advocacy.⁷⁶ To be sure, a prosecutor's conduct is subject to more stringent ethical standards than defense lawyers.⁷⁷ Nevertheless, prosecutors are not disabled from seeking to prejudice the fact-finder through conduct that approaches, without transgressing, the boundary of permissible behavior.⁷⁸ Courts occasional-

spontaneous outburst by the prosecutor was clearly designed to strike at the heart of the defense).

71. *See, e.g.*, *United States v. Karam*, 37 F.3d 1280, 1288 (8th Cir. 1994) (noting that prosecutor's mistaken reference to defendant's receipt of drugs was later corrected)

72. *See, e.g.*, *United States v. Wihbey*, 75 F.3d 761, 770 (1st Cir. 1996) (describing a reference to defendants' failure to testify as a slip of the tongue); *United States v. Gonzales*, 58 F.3d 506, 512 (10th Cir. 1995) (discussing whether a mistaken reference to a burden of proof may have been a slip of the tongue); *United States v. Malone*, 49 F.3d 393, 398 (8th Cir. 1995) (noting that a prosecutor confused one defendant's name with that of another defendant).

73. *See, e.g.*, *United States v. Etsitty*, 130 F.3d 420, 424 (9th Cir. 1997) ("This is a case of a misplaced word that was corrected quickly upon objection to eliminate any misunderstanding."); *United States v. Millar*, 79 F.3d 338, 343 (2d Cir. 1996) (commenting that a reference to an exhibit not admitted in evidence was unintentional and harmless oversight); *United States v. Adams*, 37 F.3d 383, 384 (8th Cir. 1994) (noting an inadvertent reference to defendant's failure to testify). *But see Kallin*, 50 F.3d at 694 ("The prosecutor's line of questioning and closing remarks were not inadvertent but were calculated so that an 'inappropriate inference of guilt from silence was stressed to the jury.'").

74. *See Demjanjuk v. Petrovsky*, 10 F.3d 338, 353 (6th Cir. 1993) ("[A] scheme, based on a subjective intent to commit fraud, is not required in a case such as this. Reckless disregard for the truth is sufficient.").

75. *See Etsitty*, 130 F.3d at 424 (holding that prosecutor's mischaracterization of identification evidence in summation was no reason to believe that the prosecutor intended to mislead the jury); *United States v. Thomas*, 114 F.3d 228, 246-49 (D.C. Cir. 1997) (finding that the prosecutor in opening remarks to the jury prejudicially overstated the evidence to be presented but that his remarks were not made in bad faith); *United States v. Morsley*, 64 F.3d 907, 912-13 (4th Cir. 1995) (observing that the prosecutor in closing argument to the jury seriously misrepresented the record but that it was not done deliberately).

76. *See United States v. Taylor*, 54 F.3d 967, 976-77 (1st Cir. 1995) ("[P]rosecutors need not pull their punches; they may—indeed, they should—present their cases to criminal juries zealously. Forcefulness in the pursuit of justice is to be admired rather than condemned."); *United States v. Wexler*, 79 F.2d 526, 529-30 (2d Cir. 1935) (L. Hand, J.) ("It is impossible to expect that a criminal trial shall be conducted without some show of feeling; the stakes are high, and the participants are inevitably charged with emotion. Courts make no such demand; they recognize that a jury inevitably catches the mood.").

77. *See* discussions and citations *supra* note 17.

78. *See Oregon v. Kennedy*, 456 U.S. 667, 674 (1982) ("Every act on the part of a

ly issue specific warnings to prosecutors to tread carefully when entering dangerous terrain.⁷⁹ However, to the extent that the ethical boundaries are relatively wide,⁸⁰ and the line delineating proper from improper advocacy frequently is hazy or indeterminate,⁸¹ the task of inferring an intent to violate the rules becomes even more elusive.⁸²

Nevertheless, the process of inferring intent from conduct and context is a familiar feature of substantive criminal law.⁸³ As I have discussed, a prosecutor's mental state is frequently examined in various procedural contexts outside the courtroom.⁸⁴ Moreover, the Supreme Court has recognized that the task of discovering a prosecutor's intent, "though certainly not entirely free from practical difficulties," is not unmanageable, explicitly observing that "[i]nfering the existence or nonexistence of [a prosecutor's] intent from objective facts and circumstances is a familiar process in our criminal justice system."⁸⁵ Courts therefore have been directed to use a subjective standard in determining whether a defendant's retrial should be barred under double jeopardy principles when a defense-requested mistrial was engineered by a prosecutor's misconduct that was intentionally designed to cause the mistrial.⁸⁶ If courts are capable of

rational prosecutor during a trial is designed to 'prejudice' the defendant by placing before the judge or jury evidence leading to a finding of his guilt.").

79. See, e.g., *United States v. Taylor*, 54 F.3d 967, 979 (noting the absence of a bright line between legitimate assessment of defense witnesses and impermissible encroachment on defendant's silence, and therefore "prosecutors must tread carefully on this terrain"); *United States v. Reyes*, 18 F.3d 65, 72 (2d Cir. 1994) (suggesting that prosecutors "notify the judge and defense counsel when they are about to elicit potentially incendiary evidence as to which there are arguable grounds for exclusion.").

80. See Zacharias, *supra* note 19, at 46 (noting that prosecutor's ethical duties are worded vaguely and "provide remarkably little guidance").

81. See *United States v. Small*, 74 F.3d 1276, 1283-84 (D.C. Cir. 1996) (observing that the line between acceptable and improper advocacy may not be clear in every case, but that the prosecutor crossed it).

82. The "invited response" rule has been interpreted to permit prosecutors to "respond in kind" to improper conduct of defense counsel. See *United States v. Young*, 470 U.S. 1, 11 (1985). A prosecutor is thus invited not merely to "right the scale," *id.* at 13, but to add a few solid punches of her own. See Rosemary Nidiry, *Restraining Adversarial Excess in Closing Argument*, 96 COLUM. L. REV. 1299, 1319-23 (1996) (suggesting that courts should focus equally on defense excesses as on prosecutorial excesses). Whether a prosecutor specifically intends to violate ethical rules or is merely trying to even the score is hard to know.

83. See LAFAVE & SCOTT, *supra* note 9, § 28 at 202-03 ("A person is presumed to intend the natural and probable consequences of his acts."); 1 LEONARD SAND ET. AL, MODERN FEDERAL JURY INSTRUCTIONS § 3A.01 (1990) (citing a familiar jury instruction on definition of intent).

84. See *supra* note 20 and accompanying text.

85. *Oregon v. Kennedy*, 456 U.S. 607, 675 (1982).

86. See *id.* at 676 (holding that retrial was barred by double jeopardy "where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial").

discerning a prosecutor's intent in the double jeopardy context, courts are equally capable of differentiating between a prosecutor's conduct at one end of a spectrum that appears to be innocent, inadvertent, or negligent, and conduct at the other end that appears to be deliberately designed to infect the verdict.⁸⁷

Nor do courts lack sufficient guideposts to determine whether a prosecutor engaged in intentionally wrongful behavior. A trial judge is well-situated to examine a prosecutor's demeanor and conduct.⁸⁸ And although an appellate court must infer the intent from a cold record, the court can reasonably consider the nature of the conduct itself,⁸⁹ the context,⁹⁰ whether the conduct was repeated or restrained,⁹¹ the timing,⁹² whether the conduct was an isolated occurrence or part of a larger pattern,⁹³ whether the conduct provided the prosecutor with an opportuni-

87. See *Fields v. State*, 626 A.2d 1037, 1049-55 (Md. App. 1993) (describing the spectrum of mental states within the "elusive concept" of prosecutorial overreaching).

88. See *Hernandez v. New York*, 500 U.S. 352, 365 (1991).

89. See *United States v. Reyes*, 18 F.3d 65, 72 (2d Cir. 1994) (noting that the prosecutor knew that he was about to elicit potentially incendiary evidence as to which there are arguable grounds for exclusion). Some types of conduct are obviously done with the intent to prejudice a jury unfairly, such as lying, see *Davis v. Zant*, 36 F.3d 1538, 1549 (11th Cir. 1994); *United States v. Kojayan*, 8 F.3d 1315, 1319 (9th Cir. 1993); *Brown v. Borg*, 951 F.2d 1011, 1015 (9th Cir. 1991); inflammatory evidentiary displays, see *United States v. Himelwright*, 42 F.3d 777, 786-87 (3d Cir. 1994); *United States v. Garcia*, 986 F.2d 1135, 1141-42 (7th Cir. 1993); personal vouching, see *United States v. Joselyn*, 99 F.3d 1182, 1197 (1st Cir. 1996); *United States v. Molina-Guevara*, 96 F.3d 698, 702-03 (3d Cir. 1996); and deprecating a defendant's reliance on constitutional rights, see *Gravley v. Mills*, 87 F.3d 779, 788 (6th Cir. 1996); *Franklin v. Duncan*, 70 F.3d 75, 78 (9th Cir. 1995); *United States v. Tenorio*, 69 F.3d 1103, 1106 (11th Cir. 1995).

90. See *United States v. Taylor*, 54 F.3d 967, 979 (1st Cir. 1995) ("When a prosecutor's comments, fairly viewed, are susceptible to two plausible meanings, one of which is unexceptionable and one of which is forbidden, context frequently determines meaning."); see also *United States v. Johnston*, 127 F.3d 380, 397 (5th Cir. 1997) (discussing the situation where a prosecutor asks a turncoat witness whether there are other people in courtroom who could back up his testimony and then makes a sweeping arm gesture toward defendant); *United States v. Williams*, 31 F.3d 522, 529 (7th Cir. 1994) (asserting that in the context of the argument, prosecutor's comment was based on evidence and was not a personal attack on defense counsel).

91. See *United States v. Kallin*, 50 F.3d 689, 694 (9th Cir. 1995) (observing that repeated instances of improper comment on defendant's silence and retention of counsel far exceeds repetitious conduct in other cases and demonstrates that conduct was not inadvertent); *United States v. Madden*, 38 F.3d 747, 753 (4th Cir. 1994) (highlighting that the prosecutor referred six times to defendant's drug use suggesting an illegitimate purpose to highlight defendant's bad character); *Davis*, 36 F.3d at 1547-48 (noting that prosecutor in closing argument repeated false statement five times).

92. See *Johnston*, 127 F.3d at 394 (noting that the prosecutor's eliciting inadmissible testimony, although temporarily "thwarted" by an objection, "came almost immediately after the objection").

93. See *Brecht v. Abrahamson*, 507 U.S. 619, 638 n.9 (1993) (suggesting that the "pattern

ty to reinforce his theory of the case,⁹⁴ and whether the prosecutor was forewarned by the court to desist.⁹⁵

Finally, the fear that a court is imposing discipline in the wrong forum and without sufficient process is misplaced. Courts do not impose disciplinary sanctions on prosecutors merely by identifying the prosecutor's misconduct as intentional. Courts do impose disciplinary sanctions on attorney misbehavior,⁹⁶ and occasionally recommend disciplinary action by professional disciplinary bodies.⁹⁷ Prosecutors who are later subjected to disciplinary proceedings thereby receive procedural protections just as would any other attorney subjected to such charges. Moreover, a court's finding that a prosecutor engaged in purposefully unethical behavior would carry no evidentiary weight in a disciplinary proceeding, nor would it relieve a disciplinary body of its burden of proving professional misconduct.⁹⁸

of prosecutorial misconduct" might constitute aggravating factor in harmless error analysis); *see also Johnston*, 127 F.3d at 391-94 (considering a pattern of misconduct involving discovery delays, improper questioning of witnesses to elicit inadmissible evidence, and comments on defendants' failure to testify); *United States v. Hardy*, 37 F.3d 753, 758 (1st Cir. 1994) (noting that prosecutor's summation was "not an isolated instance of misconduct"); *United States v. Crutchfield*, 26 F.3d 1098, 1103 (11th Cir. 1994) (holding that the prosecutor engaged in pattern of misconduct involving introduction of improper character evidence and disobedience of court's rulings).

94. *See Hardy*, 37 F.3d at 757-58 (arguing that the prosecutor's reference in summation to the defendant's "running and hiding" was used to analogize the defendants' conduct on the night of the crime, and the prosecutor's suggestion that they were still engaged in such conduct by running from the evidence was an unconstitutional comment on their failure to testify).

95. *See United States v. Small*, 74 F.3d 1276, 1283 (D.C. Cir. 1996) (noting that the trial court required the prosecutor to limit his opening statement to an evidentiary summary, making his failure to do so erroneous); *United States v. Adams*, 74 F.3d 1093, 1097-98 (11th Cir. 1996) (noting that the prosecutor referred to the defendant's military record despite a granted motion in limine limiting such references); *United States v. Flore-Chapa*, 48 F.3d 156, 159-61 (5th Cir. 1995) (observing that the prosecutor's statements were direct references to excluded hearsay evidence and thus constituted error).

96. *See, e.g., United States v. Hasting*, 461 U.S. 499, 506 n.4 (1983) (noting possible disciplinary measures that court could have taken); *United States v. Modica*, 663 F.2d 1173, 1185 (2d Cir. 1981) (same).

97. *See e.g., United States v. Best*, 913 F.2d 1179, 1183 (7th Cir. 1990) (discussing how it, the reviewing court, was alerting the Public Integrity Section of Department of Justice to possible misconduct by prosecutor).

98. *See MCCORMICK ON EVIDENCE* § 353, at 516 (John W. Strong, ed., 4th ed. 1992) ("[T]he risk that hearsay evidence is untrustworthy and that it might be relied upon by the [administrative] decision maker is, in general, so great that it must be excluded unless some other reason justifies its admission. The party against whom the evidence is admitted can neither confront nor cross-examine the out-of-court declarant to test its probative worth.").

III. Subjective Test of Prosecutorial Misconduct

Although there may be sound doctrinal, practical, and prudential reasons to analyze a prosecutor's conduct objectively, courts do not consistently employ that analysis. Nor do courts explain the rationale for deviating from that analysis. Rather, a review of the seemingly ad hoc case law reveals a pattern where courts occasionally apply a subjective standard (1) when a finding of intent is necessary to establish a violation because the conduct is proper on its face, (2) when a finding of intent helps clarify otherwise ambiguous conduct, and (3) when a finding of intent is used in the analysis of prejudice.

A. *Intent as Necessary to Establish a Violation*

Prosecutors can engage in courtroom conduct that on its face appears proper but is engaged in for an improper purpose, such as intentionally placing before the jury proof that a prosecutor knows is incompetent, or making knowingly false, misleading, or inflammatory arguments designed to divert the jury's attention from the facts of the case to extraneous matters. When facially proper conduct is carried out by a prosecutor with an intention to mislead the jury, then the prosecutor has engaged in misconduct. However to find such misconduct, a court would have to consider the prosecutor's intent. Courts addressing misconduct in the contexts discussed in this Part have considered a prosecutor's intent when an objective test would be inadequate to identify a violation, the potential for prosecutorial overreaching is considerable, and there exists a recognition by the courts that stronger disincentives to prosecutorial manipulation of the fact-finding process is required.⁹⁹

99. The focus on prosecutorial intent in the contexts described herein, in Part III.A., is consistent with other familiar principles that sanction a prosecutor's intentional use of false evidence to mislead the jury. *See Brooks v. Kemp*, 762 F.2d 1383, 1402 n. 26 (11th Cir. 1985) ("[T]here may be cases where the prosecutor's intentional conduct rises to a level equivalent to a knowing use of false evidence"). Indeed, the analysis used by courts in cases dealing with the prosecutor's intentional use of false evidence is also employed in cases involving subornation of perjury, *see Pyle v. Kansas*, 317 U.S. 213, 216 (1942); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935); *United States v. Boyd*, 55 F.3d 239, 242-43 (7th Cir. 1995); *United States v. Kelly*, 35 F.3d 929, 935 (4th Cir. 1994); *Brown v. Borg*, 951 F.2d 1011, 1015 (9th Cir. 1991), suppression of evidence, *see Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995); *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963); *United States v. Udechukwa*, 11 F.3d 1101, 1106 (1st Cir. 1993); *Ballinger v. Kerby*, 3 F.3d 1371, 1375 (10th Cir. 1993), and offering false physical evidence, *see Miller v. Pate*, 386 U.S. 1, 6 (1967); *United States v. Kessler*, 530 F.2d 1246, 1256 (5th Cir. 1976). The Supreme Court has described such conduct as a "corruption of the truth-seeking function of the trial process." *United States v. Agurs*, 427 U.S. 97, 104 (1976). The prosecutors in the cases described in this Part similarly distort the truth-seeking process by intentionally misleading the jury into believing that it may properly

1. *Subterfuges*.—Courts use an intent-based analysis in the so-called “subterfuge” cases, in which a prosecutor tries to introduce inadmissible hearsay evidence under the guise of impeachment.¹⁰⁰ A prosecutor in the prototypical subterfuge case calls a witness who has made a statement prior to trial that incriminates the defendant, but who has retracted that statement before trial. Knowing of the retraction,¹⁰¹ but desiring to place the original inculpatory statement before the jury anyway, the prosecutor puts the witness on the stand, questions the witness about the prior statement, and after the witness denies having made the statement, or claims that the statement is untrue, calls the person to whom the prior statement was made to elicit proof of the statement under the guise of impeaching the witness-declarant.¹⁰²

Viewed objectively, there is nothing facially improper about the prosecutor’s conduct.¹⁰³ However, if a court finds that the prosecutor knew prior to putting the witness on the stand that the witness would not

decide the defendant’s guilt on the basis of inadmissible and highly prejudicial evidence. See also *Davis v. Zant*, 36 F.3d 1538, 1550 (11th Cir. 1994) (holding that prosecutor’s “patently dishonest” misrepresentations in summation “brings this case close to the more traditionally established forms of misconduct such as the proscription against a prosecutor’s knowing use of false testimony”); *United States v. Teffera*, 985 F.2d 1082, 1089 n.6 (D.C. Cir. 1993) (reviewing when prosecutor in summation deliberately uses “phantom evidence” to falsely insinuate that codefendants made eye contact at time of arrest).

100. See *United States v. Peterman*, 841 F.2d 1474, 1479 (10th Cir. 1988) (citing cases); MCCORMICK, *supra* note 98, § 38, at 126; Don Johnsen, Note: *Impeachment With an Unsworn Prior Inconsistent Statement as Subterfuge*, 28 WM. & MARY L. REV. 295, 304 (1987). The leading federal case on subterfuge is *United States v. Morlang*, 531 F.2d 183 (4th Cir. 1975). For other cases reversing convictions for this violation, see *United States v. Ince*, 21 F.3d 576 (4th Cir. 1994); *United States v. Gomez-Gallardo*, 915 F.2d 553 (9th Cir. 1990); *United States v. Hogan*, 763 F.2d 697 (5th Cir. 1985); *Bradley v. State*, 636 A.2d 999 (Md. 1994); *State v. Hunt*, 378 S.E.2d 754 (N.C. 1989); *State v. Gage*, 302 N.W.2d 793 (S.D. 1981).

101. This scenario assumes, of course, that the prosecutor is aware before the witness takes the stand that the witness has decided to give testimony at variance with the witness’s prior statement. When the prosecutor claims that the witness’s turnabout has taken him by surprise, courts usually allow the prosecutor much greater latitude in impeaching the witness. See *United States v. Patterson*, 23 F.3d 1239, 1245 (7th Cir. 1994); *United States v. Webster*, 734 F.2d 1191, 1192-93 (7th Cir. 1984). These courts also require that the prosecutor demonstrate that he has been prejudiced by the witness’s retraction. See *United States v. Kane*, 944 F.2d 1406, 1412 (7th Cir. 1991). Some courts, however, would limit the prosecutor’s impeachment under such circumstances to the cancellation of any adverse answers given by the witness. See *United States v. Crouch*, 731 F.2d 621, 623 (9th Cir. 1984); *United States v. Shoupe*, 548 F.2d 636, 643 (6th Cir. 1977).

102. The rules of evidence expressly permit an attorney to impeach the credibility of his own witness. See FED. R. EVID. 607 (“The credibility of a witness may be attacked by any party, including the party calling the witness.”).

103. But see *Ince*, 21 F.3d at 580-81 (discussing how an objective approach might reveal impropriety); J. WEINSTEIN & M. BERGER, WEINSTEIN’S EVIDENCE § 607(1), at 6-7-17 (1985) (same).

contribute relevant information, then a court would be justified in scrutinizing the prosecutor's intent in calling that witness. The prosecutor's intent under such circumstances is suspect.¹⁰⁴ If the prosecutor offers no plausible explanation for his conduct, then a court would be justified in concluding that the prosecutor intended to manipulate the rules of evidence in order to place inadmissible evidence before the jury.¹⁰⁵

2. *False Insinuations*.—Another instance in which a court might use an intent-based analysis is when a prosecutor asks questions of a witness that imply the existence of a factual predicate that the prosecutor knows cannot be sustained by competent evidence.¹⁰⁶ Through cleverly framed questions a prosecutor may attempt to create in the minds of jurors damaging innuendos that appear to be based on evidence, and which often cannot be rebutted by testimony or cured by instructions. Examples of such conduct are questions that imply that the defendant or witness has a criminal record,¹⁰⁷ has engaged in other anti-social behavior,¹⁰⁸ is

104. A trial court at a minimum should require the prosecutor to make an offer of proof. *See, e.g., United States v. Crouch*, 731 F.2d 621, 622 & n.1, (9th Cir. 1984).

105. Courts have also examined a prosecutor's intent in similar contexts, for example, where the prosecutor pretends to refresh a witness's recollection in order to place prejudicial hearsay before the jury, *see United States v. Zackson*, 12 F.3d 1178, 1184 (2d Cir. 1993), where he introduces hearsay under the guise of eliciting sham "background" information about the history of the investigation, *see United States v. Reyes*, 18 F.3d 65, 69 (2d Cir. 1994); *United States v. Hernandez*, 750 F.2d 1256, 1257-59 (5th Cir. 1985), and where he elicits testimony that circumvents the hearsay rule by eliciting implied assertions from third parties that the defendant is guilty, *see Mason v. Scully*, 16 F.3d 38, 43 (2d Cir. 1994); *People v. Tufano*, 415 N.Y.S.2d 42, 43 (N.Y. App. Div. 1979).

106. *See Michelson v. United States*, 335 U.S. 469, 481 n.17 (1948) ("[T]he question may not be hypothetical nor assume unproven facts."); *United States v. Elizondo*, 920 F.2d 1308, 1313 (7th Cir. 1990) ("[I]t is improper conduct for the Government to ask a question which implies a factual predicate which the examiner knows he cannot support by evidence."); ABA STANDARDS, *supra* note 4, 3-5.7(d) ("A prosecutor should not ask a question which implies the existence of a factual predicate for which a good faith belief is lacking."). *People v. Malkin*, 164 N.E. 900 (N.Y. 1928), is one of the earliest cases describing this type of prosecutorial misconduct. The case is noteworthy as constituting one of the principal authorities cited by Justice Sutherland in his classic exposition of prosecutorial misconduct in *Berger v. United States*, 295 U.S. 78, 89 (1935). The defendants in *Malkin* were tried for an assault arising out of a labor dispute. *See* 164 N.E. at 902. The prosecutor was allowed to cross-examine the defendant to suggest that in spite of his denial, he was guilty of habitual acts of violence. *See id.* at 903. The prosecutor, in clear violation of rules of evidence, confronted the defendant during his interrogation with a succession of individuals. *See id.* at 904. According to the court, the prosecutor's questions "must have been intended to bring home to the jury the impression that the persons confronting the defendant on the stand were silently accusing him and that his denials were false and perjured." *Id.*

107. *See United States v. Cudlitz*, 72 F.3d 992, 998 (1st Cir. 1996) (citing prosecutor's insinuation that accomplice was involved in prior arson with defendant); *United States v. Wolf*,

fabricating a defense,¹⁰⁹ or which contain other sinister innuendos.¹¹⁰

Once again, such questions appear to be facially proper so that an objective analysis would not reveal any impropriety. A court needs to use a subjective test in order to determine if the prosecutor has intentionally tried to mislead the jury by innuendo.¹¹¹ For plainly, a prosecutor intentionally misrepresents the truth when he seeks to convey to the jury a false impression that he knows he cannot support by proof. The Supreme Court has cautioned prosecutors against "asking a groundless question to waft an unwarranted innuendo into the jury box."¹¹² Grounding such a rule on a subjective analysis of a prosecutor's conduct is a logical approach; otherwise, the potential for prosecutorial abuse under an objective standard would be boundless.¹¹³ Moreover, a prosecutor could readily avoid a charge of intentionally distorting the fact-finding process by making an adequate offer of proof to support the factual basis for his question.¹¹⁴ Absent such offer of proof, a court would be justified in concluding that the prosecutor intentionally sought to mislead the jury.

787 F.2d 1094, 1098 (7th Cir. 1986) (stating that prosecutor insinuates defendant's guilt of another crime without establishing factual foundation for questions); *State v. Holsinger*, 601 P.2d 1054, 1056 (Ariz. 1979) (discussing situation in which prosecutor asks witness: "Did I tell you that [defendant] had a long criminal record and that's why I wanted to get her?").

108. See *United States v. Shelton*, 628 F.2d 54, 57 (D.C. Cir. 1980) (holding that in a prosecution for assaulting a federal officer, it was reversible misconduct for the prosecutor to cross-examine the defendant with questions containing innuendos designed to show that the defendant was a member of the drug underworld involved in all sorts of skulduggery); *Commonwealth v. Bricker*, 487 A.2d 346, 348 (Pa. 1985) (observing that prosecutor asked defendant without any foundation in the evidence: "How's the drug business?").

109. See *Elizondo*, 920 F.2d at 1312-13 (discussing situation in which prosecutor insinuates that defense witness fabricated a report to establish an alibi for defendant).

110. See *United States v. Monteleone*, 77 F.3d 1086, 1090 (8th Cir. 1996) (finding that prosecutor lacked good faith basis to insinuate through cross-examination of defense character witness that defendant committed perjury before grand jury).

111. See *United States v. Myerson*, 18 F.3d 153, 162 n.10 (2d Cir. 1994) (stating that prosecutor has "a special duty not to mislead") (quoting *United States v. Universita*, 298 F.2d 365, 367 (2d Cir. 1962)) (internal quotation marks omitted).

112. *Michelson v. United States*, 335 U.S. 469, 481 (1948).

113. A standard that fails to consider a prosecutor's intent would provide witnesses and defendants with little protection, and would invite considerable prosecutorial abuse. It is unacceptable to allow prosecutors to ask questions based on nothing more than speculation, suspicion, or insight. See *Elizondo*, 920 F.2d at 1313-14. The range of damaging innuendos that even a careless prosecutor could float before a jury is limitless. Even a good faith test is unsatisfactory if it permits a prosecutor to escape sanction based on negligent conduct. See *id.* ("Neither a prosecutor's good faith belief that some basis for her question exists nor reassurances to appellate courts drawn from information never presented below will suffice.").

114. See, e.g., *United States v. Crouch*, 731 F.2d 621, 622 & n.1 (9th Cir. 1984); see also *Elizondo*, 920 F.2d at 1313-14 ("When, as in this case, the prosecution asks damning questions that go to a central issue in the case, these questions must be supported by evidence available or inferable from the trial record.").

3. *Abusing Claims of Privilege.*—Another instance in which a court may decide to consider a prosecutor's intent is when a witness called by the prosecutor invokes a privilege to refuse to answer questions, and then the prosecutor seeks to impress upon the jury the negative implications arising from the invocation of the privilege, namely, that the witness is hiding important information that would incriminate the defendant.¹¹⁵ A prosecutor engages in such misconduct, for example, when he calls to the stand a friend or associate of the defendant, or a person with whom the defendant is alleged to have engaged in the criminal transaction, anticipating that the witness will assert the Fifth Amendment privilege and refuse to testify, and then urges the jury to use that tacit implication of guilt against the defendant.¹¹⁶

Once again, an objective analysis would not reveal any impropriety. A court would have to determine objectively whether the witness's invocation of the privilege in front of the jury was a violation that prejudiced the defendant. If the judge took steps to cure the problem, it is highly unlikely that a court would find prejudicial error.¹¹⁷ Under a subjective analysis, however, a court could find that the prosecutor knew that the witness would invoke a privilege, and used the witness's silence to intentionally distort the truth-finding process by creating false evidence.

A prosecutor's wrongful intent can be inferred when a prosecutor "makes a conscious and flagrant attempt to build [her] case out of inferences arising from use of the testimonial privilege."¹¹⁸ Tell-tale

115. See *Namet v. United States*, 373 U.S. 179, 189 (1963); see also ABA STANDARDS, *supra* note 4, 3-5.7(c) ("A prosecutor should not call a witness in the presence of the jury who the prosecutor knows will claim a valid privilege not to testify.").

116. See *United States v. Maloney*, 262 F.2d 535, 537 (2d Cir. 1959) (observing that the prosecution may not call witnesses who they are sure will refuse to testify for the purpose of implicitly corroborating state witnesses); *People v. Giacalone*, 250 N.W.2d 492, 495 (Mich. 1977) (holding that it was reversible error for the trial court to permit the prosecutor to call a witness that had been linked as an accomplice to the defendant if it was known the witness would use his Fifth Amendment rights); *People v. Pollock*, 234 N.E.2d 223, 227 (N.Y. 1967) (granting defendants a new trial because the prosecution called a witness for the express purpose of eliciting his claim of privilege).

117. This occurrence is probably infrequent, especially with respect to witnesses who are friends or associates of the defendant. Moreover, a prosecutor usually knows in advance whether a witness plans to invoke a privilege and refuse to testify, or is willing to testify without some legal protection such as a grant of immunity or a cooperation agreement. *But see Namet*, 373 U.S. at 188 (acknowledging that the defense counsel had alerted prosecutor that witnesses would invoke privilege, but advising that "the prosecutor need not accept at face value every asserted claim of privilege, no matter how frivolous").

It should be pointed out that the defense also could call a witness who might be associated with the crime, and who could claim a privilege and refuse to testify, thereby raising a suspicion that he is person responsible for the crime. A subjective analysis of a prosecutor's conduct would apply equally to the conduct of defense counsel.

118. *Namet*, 373 U.S. at 186.

signs of intent include a prosecutor's making misrepresentations to the court about the witness's status,¹¹⁹ putting questions to the witness in front of the jury without first alerting the court to the potential danger,¹²⁰ refusing to grant immunity to the witness,¹²¹ and exploiting the privilege by arguing in summation that the witness's silence is evidence of the defendant's guilt.¹²² By contrast, a wrongful intent would not be inferred when a prosecutor demonstrates that she had no reason to believe that the witness would invoke a privilege,¹²³ reasonably believes that the claim of privilege is invalid,¹²⁴ or refrains from using the witness's silence to gain an unfair advantage over the defendant.¹²⁵ Moreover, even when a prosecutor has some reason to believe that a witness plans to invoke a privilege, that belief by itself would not necessarily establish a wrongful intent. A witness could change her mind when confronted by a prosecutor's questions.

4. *Commenting on Defendant's Silence.*—Courts have developed both an objective and subjective approach to determine whether comments by a prosecutor during summation violate a defendant's privilege not to testify. This is a dangerous area which courts monitor closely,¹²⁶ and about which they admonish prosecutors regularly.¹²⁷ Under an objective

119. See *Commonwealth v. Virtu*, 432 A.2d 198, 202-03 (Pa. 1981).

120. See *Fletcher v. United States*, 332 F.2d 724, 725-26 (D.C. Cir. 1964); *People v. Pollock*, 234 N.E.2d 223, 226 (N.Y. 1967). See also *Namet*, 373 U.S. at 190 n.9 (noting the government's concession that the defense might be entitled to a screening of the witness, outside the jury's earshot); Commentary to ABA STANDARDS, *supra* note 4, 3-5.7(c) (recommending that claims of privilege be heard by the trial judge outside the presence of the jury).

121. The suggestion is that the prosecutor did not really seek relevant information from the witness and was content with the witness's refusal to testify. Compare *Commonwealth v. Ross*, 441 A.2d 1298, 1299-1301 (Pa. Super. 1982) (finding no bad faith where witness was offered immunity), with *Virtu*, 432 A.2d at 201-02 (finding prosecutorial bad faith where immunity not offered).

122. See *Maloney*, 262 F.2d at 537.

123. See *United States v. Reeves*, 83 F.3d 203, 208 (8th Cir. 1996); *United States v. Victor*, 973 F.2d 975, 979-80 (1st Cir. 1992); *Perez v. Jones*, 935 F.2d 480, 483 (2d Cir. 1991).

124. See *Rado v. Connecticut*, 607 F.2d 572, 581 (2d Cir. 1979); *Stewart v. State*, 587 S.W.2d 148, 153 (Tex. Crim. App. 1979).

125. See *Namet*, 373 U.S. at 186 (noting as a reference in summation to a witness's refusal to testify a tell-tale sign that the prosecutor is trying to exploit invocation of privilege).

126. See *United States v. Taylor*, 54 F.3d 967, 979 (1st Cir. 1995) ("[P]rosecutors must tread carefully on this terrain.").

127. See *United States v. Hasting*, 461 U.S. 499, 504 (1983) (speculating that the lower court reversed the conviction to discipline the prosecutor and to warn other prosecutors over continuing violations of *Griffin* rule); *United States v. Skandier*, 758 F.2d 43, 44 (1st Cir. 1985) (criticizing Department of Justice brochure of instructions to U.S. Attorneys which advised prosecutors that it is permissible to use terms such as "uncontradicted" and "unrefuted").

approach, a prosecutor commits a violation when his remarks directly and explicitly call attention to the defendant's failure to testify,¹²⁸ or are of such a character that the jury would "naturally and necessarily" take it to be a comment on the failure of the accused to testify.¹²⁹ Prosecutors, however, are adept at using language that conveys the illegitimate message more subtly.¹³⁰ Courts therefore review oblique or indirect references to a defendant's failure to testify subjectively to determine whether a prosecutor's language was "manifestly intended" to violate the privilege.¹³¹ Thus, when the language viewed objectively does not constitute an explicit reference to a defendant's failure to testify, or would not necessarily be taken by a jury as constituting a prohibited reference, a court would need to determine whether a prosecutor's subjective intent was to direct the jury's attention to the defendant's failure to testify,¹³² or, conversely, whether the remark was inadvertent,¹³³ misspoken,¹³⁴ or

when a defendant fails to testify); *United States v. Lavoie*, 721 F.2d 407, 408-09 (1st Cir. 1983) ("The wary prosecutor plans his closing argument much as a sapper approaches a minefield.").

128. See *Anderson v. Nelson*, 390 U.S. 523, 523-24 app. at 526, 528 (1968) (condemning the prosecutor's comments on defendant's failure to testify); *Griffin v. California*, 380 U.S. 609, 611 (1965) (addressing prosecutor's statement that "[the victim] is dead, she can't tell you her side of the story. The defendant won't."); *United States v. Hardy*, 37 F.3d 753, 757 (1st Cir. 1994) ("*They're still running and hiding today. The time has come for them to stop running and hiding.*"); *United States v. Rodriguez*, 627 F.2d 110, 112, 114 (7th Cir. 1980) (reversing conviction due to prosecutor's remark that defendant "has been very quiet" during trial).

129. See *Hasting*, 461 U.S. at 515 & n.6 (Steven, J., concurring); *United States v. Knoll*, 16 F.3d 1313, 1323 (2d Cir. 1994); *United States ex rel. D'Ambrosio v. Fay*, 349 F.2d 957, 961 (2d Cir. 1965); see also *Hardy*, 37 F.3d at 758 (finding that prosecutor did not intend to influence the jury but "should have known that such a comment was improper").

130. Prosecutors employ a variety of expressions to suggest that the defendant failed to answer the government's proof, using words such as "uncontradicted," *United States v. Lee*, 935 F.2d 952, 957 (8th Cir. 1991); "uncontested," *United States v. Goldman*, 563 F.2d 501, 505 (1st Cir. 1977); "uncontroverted," *United States v. Palacios*, 612 F.2d 972, 973 (5th Cir. 1980); "can't be refuted," *United States v. Guiliano*, 383 F.2d 30, 33 (3d Cir. 1967); "undenied," *Burke v. Greer*, 756 F.2d 1295, 1299 (7th Cir. 1985); "unimpeached," *United States v. Hooker*, 541 F.2d 300, 307 (1st Cir. 1976); and "undisputed," *United States v. Fearn*, 501 F.2d 486, 489 (7th Cir. 1974).

131. See *United States v. Glantz*, 810 F.2d 316, 322 (1st Cir. 1987).

132. See *United States v. Johnston*, 127 F.3d 380, 397 (5th Cir. 1997) (finding "manifest intent" to improperly comment on witness's silence when the prosecutor asked turncoat witness whether there were persons in the courtroom who could corroborate his testimony and then made an arm gesture toward the defendant); *Eberhardt v. Bordenkircher*, 605 F.2d 275, 278 (6th Cir. 1979) (finding it "clear" what "the prosecutor hoped to achieve" by rhetorically asking what other available witnesses the defense could have called and then gesturing toward the defendant).

133. See *United States v. Adams*, 37 F.3d 383, 384 (8th Cir. 1984) (finding that the prosecutor's remark that "not one word of explanation about that event came from the mouth of this defendant" was inadvertent and thus did not constitute reversible error).

134. See *United States v. Wihbey*, 75 F.3d 761, 770 (1st Cir. 1996) (finding that the

otherwise did not constitute an intentional reference to the defendant's silence.¹³⁵

B. To Clarify Ambiguous Conduct

Some conduct by a prosecutor may be sufficiently ambiguous that finding a culpable intent would be necessary to reveal misconduct. This is often the case when a prosecutor harbors an honest intent to prove a relevant issue alongside a wrongful intent to prejudice a defendant unfairly.¹³⁶ A paradigmatic example of such a mixed intent is a prosecutor's use of evidence of a defendant's unrelated criminal or nefarious conduct.¹³⁷ Such evidence legitimately may be used to prove a consequential fact, such as a defendant's intent, motive, knowledge, identity, plan or preparation, but such evidence also has the capacity to impugn a defendant's character unfairly.¹³⁸ Likewise, a prosecutor's use

prosecutor's reference to defendants' failure to testify was a slip of the tongue); *United States v. Malone*, 49 F.3d 393, 398 (8th Cir. 1995) (finding that prosecutor's confusion of one defendant's name with that of another defendant did not deprive defendant of a fair trial).

135. *See United States v. Francis*, 82 F.3d 77, 78 (4th Cir. 1996) (finding that prosecutor's reference to "uncontradicted evidence" was not "manifestly intended to be . . . a comment on the failure of the accused to testify"); *United States v. Taylor*, 54 F.3d 967, 979 (1st Cir. 1995) (stating that prosecutor's reference to defendant's silence was most plausibly a comment on defendant's silence during commission of crime); *Feltrop v. Delo*, 46 F.3d 766, 775 (8th Cir. 1995) (determining prosecutor's reference to "unrefuted" evidence to be a comment on defendant's failure to offer medical evidence to refute state's evidence, and not an impermissible reference to defendant's failure to testify).

136. When a prosecutor's conduct appears to be suspicious, a prosecutor's clarification might dispel any suggestion of impropriety. *See United States v. Etsitty*, 130 F.3d 420, 424 (9th Cir. 1997); *United States v. Velez*, 46 F.3d 688, 693 (7th Cir. 1995); *United States v. Malone*, 49 F.3d 393, 398 (8th Cir. 1995); *United States v. Karam*, 37 F.3d 1280, 1288 (8th Cir. 1994); *Adams*, 37 F.3d at 384. *But see United States v. Alzate*, 47 F.3d 1103, 1110 (11th Cir. 1995) (finding that the prosecutor's self-serving explanation for his egregious misconduct did not dispel wrongful intent).

137. *See* FED. R. EVID. 404(b) (stating that evidence of defendant's unrelated criminal conduct is admissible when offered for proper purpose such as proving intent, knowledge, motive, plan, or identification); FED. R. EVID. 608(b) (allowing impeachment by use of defendant's prior criminal conduct if probative of defendant-witness's truthfulness); FED. R. EVID. 609 (discussing the situation in which the impeachment by evidence of conviction of crime is allowed); 18 U.S.C. § 922(g)(1) (1994) (stating that a prior felony conviction is inadmissible as an aggravating element in prosecution for possession of firearm).

138. *See United States v. Sampson*, 980 F.2d 883, 886 (3d Cir. 1992) ("The motive [in offering evidence of other crimes], we suspect, is often mixed between an urge to show some other consequential fact as well as to impugn the defendant's character"); *see also United States v. Oreto*, 37 F.3d 739, 744-45 (1st Cir. 1994) (finding that the prosecutor's coaching of an identification witness as to seating arrangements in the courtroom was "ostensibly for the purpose of reducing the witnesses' nervousness by familiarizing them with the courtroom layout" and was not prejudicial). A judge may give a cautionary instruction when admissible

of inflammatory evidence or rhetoric may be designed to persuade the jury to convict the defendant within the rules, but also may represent a calculated effort to incite the jury to convict the defendant on the basis of fear, passion, or prejudice.¹³⁹ Moreover, even if the evidence is subsequently ruled inadmissible, or the argument found improper, the prosecutor's intent probably is sufficiently equivocal that inferring an unfair purpose is difficult.¹⁴⁰

When a prosecutor's conduct is suspicious but not clearly improper, courts are more likely to inquire into a prosecutor's intent in an effort to determine what the prosecutor actually meant by the conduct or the remark. For example, if a court decides that a prosecutor's argument to a jury could have misled the jury to decide the case based on non-evidentiary considerations, a court is more likely to inquire whether that was the prosecutor's purpose, and, if so, to conclude that the prosecutor accomplished his purpose.

*Donnelly v. DeChristoforo*¹⁴¹ implicitly authorizes a court to use a subjective analysis in determining whether facially suspicious conduct was

evidence has the capacity to create unfair prejudice. *See* FED. R. EVID. 105 (governing the limited admissibility of evidence).

139. Whether inflammatory conduct represents a calculated effort to secure a conviction unfairly is hard to know. Most courts do not make an effort to determine whether a prosecutor's inflammatory conduct was intended to prejudice the jury unfairly. *See* *Darden v. Wainwright*, 477 U.S. 168, 179-81 (1986) (stating only that prosecutor's calling defendant an "animal," labelling the crime as "the work of an animal," and arguing that the defendant should not be let out of his cell without a leash were "offensive acts reflecting an emotional reaction to the case"); *Rodriguez v. Peters*, 63 F.3d 546, 560 (7th Cir. 1995) (noting that the prosecutor's assertion in closing argument that defense counsel was "lying to you" was "reckless and unsupportable"); *United States v. Frost*, 61 F.3d 1518, 1525 (11th Cir. 1995) (holding that the prosecutor's comparison of defendants' tactics to those that Gestapo used in World War II did not render their trial fundamentally unfair); *United States v. Himmelwright*, 42 F.3d 777, 786 (3d Cir. 1994) ("The object, or at least the effect, of this disproportionate emphasis by the prosecution, we believe, was to portray Himmelwright as a violence-prone postal worker who was a danger to society and who needed to be removed for the protection of the public"); *United States v. Locasco*, 6 F.3d 924, 946 (2d Cir. 1993) (stating that the reference in organized crime prosecution to jury's humanity concerns was "an intolerable attempt by the prosecution to instill fear of the defendants"). *But see* *United States v. Waldemer*, 50 F.3d 1379, 1384 (7th Cir. 1995) (examining whether the prosecutor made his argument "solely to inflame passions of jury"); *United States v. Ovalle-Marquez*, 36 F.3d 212, 220 (1st Cir. 1994) (examining whether the prosecutor's closing remarks served no purpose other than to inflame passions and prejudices of jury).

140. *See* *United States v. Morsley*, 64 F.3d 907, 912-13 (4th Cir. 1995) (holding that the prosecutor's misrepresentation "reaches the limit of tolerable trial error" but "we cannot say conclusively that the prosecutor made these remarks in a deliberate attempt to divert the jury's attention from the facts of the case"); *United States v. Taylor*, 54 F.3d 967, 979 (1st Cir. 1995) ("Where feasible, a reviewing court should construe ambiguity in favor of a proper meaning.").

141. 416 U.S. 637 (1967).

committed with the intention of violating a defendant's rights.¹⁴² The prosecutor in *Donnelly*, during his closing argument to the jury, made a remark that sounded like an insinuation that the defendant had sought to plead guilty but had been turned down.¹⁴³ The Court of Appeals for the First Circuit reversed the district court's denial of the defendant's petition for habeas corpus relief.¹⁴⁴ The court reasoned that the prosecutor's remark deliberately misled the jury by conveying the false impression that the defendant had tacitly admitted his guilt by seeking to plead guilty to a lesser charge.¹⁴⁵

The Supreme Court reversed.¹⁴⁶ The Court acknowledged that the prosecutor's remark was "admittedly an ambiguous one,"¹⁴⁷ and might have been intended to convey its most prejudicial meaning, as the circuit court had concluded.¹⁴⁸ However, according to the Court, there were other less damaging interpretations.¹⁴⁹ And when conflicting interpretations are present, "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning, or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations."¹⁵⁰

142. *See id.* at 642.

143. *See id.* at 640. The prosecutor's challenged comment was directed at DeChristoforo's motives for going to trial: "They [the respondent and his counsel] said they hope that you find him not guilty. I quite frankly think that they hope you find him guilty of something a little less than first-degree murder." *Id.* (alterations in original).

144. *See DeChristoforo v. Donnelly*, 473 F.2d 1236, 1241 (1st Cir. 1973).

145. *See id.* at 1240. The court of appeals inferred that the prosecutor had "turned [the co-defendant's] plea into a telling stroke against [DeChristoforo.]" *Id.* at 1239. A prosecutor's insinuation that a defendant had previously offered to plead guilty is a very serious violation. *See Standen v. Whitley*, 994 F.2d 1417, 1422 (9th Cir. 1993) (disapproving prosecutor's introduction of defendant's withdrawn guilty plea as evidence against him); *see also* FED. R. EVID. 410 (stating that withdrawn pleas of guilty are inadmissible); FED. R. CRIM. P. 11(e)(6) (same). Convictions have been reversed where a prosecutor cross-examined a defendant about his previously entered and withdrawn guilty plea. *See Kercheval v. United States*, 274 U.S. 220, 225 (1927); *People v. Spitaleri*, 173 N.E.2d 35, 37 (N.Y. 1961).

146. 416 U.S. at 639.

147. *Id.* at 645.

148. *See id.* at 647. According to the Court, the prosecutor's remarks constituted "a few brief sentences in the prosecutor's long and expectably hortatory closing argument which might or might not suggest to a jury that the respondent has unsuccessfully sought to bargain for a lesser charge." *Id.*

149. *See id.* at 644. The Court did not identify other hypotheses but stated that "it is by no means clear that the jury did engage in the hypothetical analysis suggested by the majority of the Court of Appeals," *id.*, and referred to the dissent in the state appellate court which found it "not logical" that a jury would conclude that because one of the defendants pleaded guilty, the defendant was thereby less firm in his denial of guilt. *See id.*

150. *Id.* at 647. The Court distinguished *Miller v. Pate*, 386 U.S. 1 (1967), and *Brady v. Maryland*, 373 U.S. 83 (1963), upon which the court of appeals had relied, as involving "misleading" and "manipulati[ve]" prosecutorial conduct—not the case in *Donnelly*. *See* 416

Notwithstanding the Court's restrictive interpretation of prosecutorial intent, *Donnelly* invites courts to scrutinize a prosecutor's intent when encountering facially suspicious conduct. Although courts typically interpret ambiguous conduct in favor of a prosecutor,¹⁵¹ there are exceptions. One notable example is *Davis v. Zant*,¹⁵² a murder case in which the Court of Appeals for the Eleventh Circuit construed a prosecutor's arguably innocent misstatement as an intentional effort to mislead the jury.¹⁵³ The prosecutor in *Davis* objected on hearsay grounds when the defendant, during his direct testimony, stated that another person had previously confessed to the murder.¹⁵⁴ Although the objection was proper, the prosecutor then added gratuitously that the defendant's assertion was false—an implicit representation that no other person had confessed to the murder—whereas the prosecutor knew that the co-defendant had confessed to the murder several months earlier.¹⁵⁵

The appellate court agreed that the prosecutor's misstatement, standing alone, could very well have been a "spontaneous," "innocent," and "understandabl[e] slip" made during the heat of a trial.¹⁵⁶ However, the prosecutor during his closing argument repeated several times that the defendant's reference to another person's confession was "a last minute fabrication,"¹⁵⁷ and a "first time defense"¹⁵⁸ that was "fabricated during the trial after the state had closed its evidence."¹⁵⁹ The court had little difficulty concluding that the prosecutor intentionally misrepresented the truth in order to mislead the jury.¹⁶⁰ The court compared the

U.S. at 647.

151. See *United States v. Taylor*, 54 F.3d 967, 979 (1st Cir. 1995) ("Where feasible, a reviewing court should construe ambiguity in favor of a proper meaning.").

152. 36 F.3d 1538 (11th Cir. 1994).

153. See *id.* at 1549.

154. See *id.* at 1546.

155. See *id.* at 1546. When the defendant testified on direct examination that a co-defendant had confessed to the murder, the prosecutor objected, stating: "That's not evidence. That's not true and it's not evidence." In fact, the co-defendant had made a detailed, tape-recorded confession which the trial court excluded from evidence. See *id.* at 1540.

156. *Id.* at 1548 ("Such a misstatement could understandably slip out in spontaneous response to Davis's improper insertion into the trial of the fact of [the co-defendant's] confession.").

157. *Id.* at 1547.

158. *Id.* at 1548.

159. *Id.* at 1549. See also *Agard v. Portuondo*, 117 F.3d 696, 709-14 (2d Cir. 1997) (holding that prosecutor's comments during closing argument indicating that, due to defendant's presence in courtroom, defendant had opportunity to tailor his testimony to match the evidence, violated defendant's right to confrontation, right to testify, and right to due process and fair trial).

160. See *Davis*, 36 F.3d at 1549 ("The prosecutor intentionally painted for the jury a distorted picture of the realities of this case in order to secure a conviction.").

prosecutor's deception to the rule forbidding the knowing use of false evidence,¹⁶¹ and then factored the prosecutor's deliberate misrepresentation into its decision to vacate the conviction.

Most courts construe ambiguous conduct in favor of a proper meaning, as illustrated by *United States v. Koon*,¹⁶² the federal civil rights trial of four police officers accused of assaulting Rodney King. In *Koon*, the Ninth Circuit interpreted the prosecutor's ambiguous statements during his closing argument, which sounded like an inflammatory appeal, in favor of the prosecutor.¹⁶³ Citing *Donnelly*, the court recognized that some of the prosecutor's remarks were indeed ambiguous, and could have constituted an intentional effort to prejudice the jury.¹⁶⁴ The court, however, found otherwise. It concluded that most of the challenged statements "were not designed to inflame the jury,"¹⁶⁵ and were not "calculated to incite the jury against the accused."¹⁶⁶ The court reached this conclusion by viewing the remarks from the "common sense" standpoint of the jurors,¹⁶⁷ as well as by a reluctance to "ascribe an unreasonable meaning" to the prosecutor's remarks.¹⁶⁸

Davis v. Zant suggests that courts have the ability to use a subjective approach to discern a prosecutor's intent from ambiguous conduct when the objective circumstances reveal a likelihood of intentional violation. The prosecutor's closing argument in *Davis* made it unmistakably clear that the prosecutor's false statement earlier in the trial was not inadvertent. *United States v. Koon*, by contrast, suggests that a court will not use a subjective approach to infer a bad intent from ambiguous conduct when the objective circumstances do not reveal a likelihood of intentional violation, and there are no other reasons to suggest otherwise.

161. *Id.* at 1550 ("[S]uch a patently dishonest argument brings this case close to the more traditionally established forms of misconduct such as the proscription against a prosecutor's knowing use of false testimony. . . . or the knowing use of false evidence.").

162. 34 F.3d 1416 (9th Cir. 1994), *rev'd on other grounds*, 518 U.S. 81 (1996).

163. *See id.* at 1443-45. The prosecutor appealed to the jury to be the conscience of the community, and asked the jury to decide what kinds of police conduct it found acceptable. *See id.* at 1444. These comments were found ambiguous and were analyzed under the subjective test of *Donnelly v. DeChristoforo*, 416 U.S. 637 (1967). *See id.* The prosecutor also argued that the defendant's conduct "caused horror and outrage throughout the world." *Id.* at 1445. This comment was found improper under the objective test but was found not to have substantially prejudiced the jury. *See id.*

164. *See id.* at 1443-44.

165. *Id.* at 1444.

166. *Id.* (quoting *United States v. Lester*, 749 F.2d 1288, 1301 (9th Cir. 1984)) (internal quotation marks omitted).

167. *See id.* at 1443. The court observed that a jury would most likely interpret the prosecution's references to mean that it is their job to follow the law and not that the law would collapse if they acquitted the defendants. *See id.* at 1444.

168. *Id.*

A court in analyzing a prosecutor's intention from ambiguous conduct, therefore, should begin by examining the prosecutor's conduct objectively to determine whether there is a likelihood that the prosecutor was acting intentionally to violate a rule. If a court finds from the objective circumstances that there is such a likelihood, a court should then attempt to determine whether the prosecutor's subjective intent was to commit a violation. A court in making this subjective determination should consider the conduct in the context in which it occurred, whether the conduct was repeated, whether the conduct was part of a pattern of other similar conduct, and whether the conduct provided an opportunity for the prosecutor to reinforce his theory of the case.

C. Intent as a Factor in Remedy

Courts evaluate the prejudicial effect of a prosecutor's violation inconsistently. Most courts claim to use an objective approach that does not consider the prosecutor's intent.¹⁶⁹ Some courts, by contrast, formally adopt a subjective test that explicitly considers a prosecutor's intent as one of the factors in a harmless error or plain error analysis.¹⁷⁰ Other courts, although not formally adopting a subjective test, occasionally consider a prosecutor's intent in evaluating the overall seriousness of the violation.¹⁷¹ Even an appellate court that uses an objective test might scrutinize a prosecutor's conduct more closely when the conduct intentionally violates a rule.¹⁷²

169. See *United States v. Young*, 470 U.S. 1, 12 (1985); *United States v. Cannon*, 88 F.3d 1495, 1502 (8th Cir. 1996); *Rodriguez v. Peters*, 63 F.3d 546, 558 (7th Cir. 1995); *United States v. Bermea*, 30 F.3d 1539, 1563 (5th Cir. 1994); *United States v. Friedman*, 909 F.2d 705, 709 (2d Cir. 1990); *United States v. Monaghan*, 741 F.2d 1434, 1443 (D.C. Cir. 1984). Apparently neither the Third Circuit nor the Ninth Circuit Courts of Appeals have adopted a formal standard of review, although both circuits appear to use an objective test to review allegations of prosecutorial misconduct. See *United States v. Vaulin*, 132 F.3d 898, 900-01 (3d Cir. 1997); *United States v. Frederick*, 78 F.3d 1370, 1375 (9th Cir. 1996).

170. See *United States v. Taylor*, 54 F.3d 967, 977 (1st Cir. 1995); *Davis*, 36 F.3d at 1546; *United States v. Carroll*, 26 F.3d 1380, 1385 (6th Cir. 1994); *United States v. Harrison*, 716 F.2d 1050, 1052 (4th Cir. 1983).

171. See *Vaulin*, 132 F.3d at 901 (finding that the prosecutor's improper questions were not "intentional misconduct"); *United States v. Johnston*, 127 F.3d 380, 395 (5th Cir. 1997) ("Based upon the large number of instances of similar improper questioning we conclude that the prosecutors intentionally used such questioning as part of their trial strategy."); *Frederick*, 78 F.3d at 1380 n.8 (noting that prosecutor committed "serious errors" but they were "simply mistakes made in the heat of the trial" and were not the result of "bad faith").

172. See *Brecht v. Abrahamson*, 507 U.S. 619, 638 n.9 (1993) ("Our holding does not foreclose the possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas corpus relief, even if it

Courts that use a subjective test in evaluating prejudice draw a parallel to one of the more traditional forms of courtroom misconduct, namely, the knowing use of false evidence.¹⁷³ Thus, a prosecutor who intentionally places before a jury false or misleading evidence or argument is seen as violating the established rule that forbids prosecutors from knowingly misrepresenting the truth.¹⁷⁴ Although the Supreme Court has never explicitly recognized such an equivalence, there are indications that the Court would consider a prosecutor's intentional violation of a trial rule as an aggravating factor in conducting a harmless error review.¹⁷⁵

Moreover, an intent-based analysis is used to determine whether an indictment should be dismissed under the double jeopardy clause after a mistrial has been declared because of a prosecutor's misconduct. In *Oregon v. Kennedy*,¹⁷⁶ a plurality of the Supreme Court ruled that a defendant who obtains a mistrial based on a prosecutor's wrongful conduct is protected from a retrial when the prosecutor's conduct was "intended to 'goad' the defendant into moving for a mistrial."¹⁷⁷ Admittedly, the several opinions in that case disagreed over whether a prosecutor's subjective intent to cause a mistrial should be the exclusive focus, or whether an objective standard for prosecutorial "overreaching" should be employed.¹⁷⁸ The Justices agreed, however, that some level of mental

did not substantially influence the jury's verdict."); *United States v. Kalfayan*, 8 F.3d 1315, 1318 (9th Cir. 1993) ("In determining the proper remedy, we must consider the government's willfulness in committing the misconduct and its willingness to own up to it."); *United States v. Modica*, 663 F.2d 1173, 1186 n.7 (2d Cir. 1981) ("We refrain from naming the prosecutor in this case because his remarks, though ill-advised, were not instances of deliberate misconduct.").

173. See *Miller v. Pate*, 386 U.S. 1, 7 (1967) (confirming "that the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence"); *Mooney v. Holohan*, 294 U.S. 103, 112-13 (1935) (asserting that due process is violated by a criminal conviction obtained by a prosecutor's knowing use of perjured testimony).

174. See *Davis*, 36 F.3d at 1548 n.15.

175. See *Brecht*, 507 U.S. at 638 n.9 ("Our holding does not foreclose the possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief.").

176. 456 U.S. 667 (1982).

177. *Id.* at 676. Lower courts have disagreed as to whether the prosecutor's intentional misconduct must be to provoke a mistrial or to prevent an acquittal. Compare *United States v. Doyle*, 121 F.3d 1078, 1086 (7th Cir. 1997) ("*The only relevant intent is intent to terminate the trial, not intent to prevail at this trial by impermissible means.*") (quoting *United States v. Oseni*, 996 F.2d 186, 188 (7th Cir. 1993), with *United States v. Wallach*, 979 F.2d 912, 916 (2d Cir. 1992) (finding that double jeopardy should bar retrial in a case in which prosecutor's misconduct intentionally was undertaken to prevent defendant's acquittal as well as to provoke a mistrial).

178. Compare *Kennedy*, 456 U.S. at 676 (Rehnquist, J., Burger, C.J., White, J., and

culpability would be a necessary condition to invoke the double jeopardy bar.

IV. Mental Culpability and Prosecutorial Misconduct

As I have discussed, the relevance of a prosecutor's intent in the context of his or her conduct in the courtroom has not been closely analyzed by the courts. Rather, the opinions reflect either uncertainty or a lack of principle over whether a prosecutor's intention to violate a rule in order to unfairly prejudice a defendant should matter, or the circumstances under which it should be considered. The judiciary's treatment of this very important question is exemplified by confusing terminology, gratuitous condemnation, and contradictory methodologies.

Despite the inconsistencies, a general pattern emerges. The courts typically employ an objective test to determine whether a prosecutor violated a rule, but occasionally use a subjective test to make that determination without explaining the inconsistency. It appears that some courts use the subjective test when the objective test is inadequate to reveal misconduct. These courts use the subjective test when the prosecutor's conduct is either facially proper, or is suspicious so that a court needs to consider the prosecutor's intent. Similarly, most courts do not consider a prosecutor's intent in evaluating prejudice, but some courts do consider a prosecutor's intent when evaluating prejudice, again without explanation.¹⁷⁹

O'Connor, J.) ("Only where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy."), *with id.* at 679-80 (Powell, J., concurring) ("Because 'subjective' intent often may be unknowable, I emphasize that a court in considering a double jeopardy motion should rely primarily upon the objective facts and circumstances of the particular case."), *with id.* at 688-89 (Stevens, J., Brennan, J., Marshall, J., and Blackmun, J., concurring) ("I would not subscribe to a standard that conditioned such a bar on the determination that the prosecutor harbored such intent when he committed prejudicial error. 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.), and *id.* at 689 ("To invoke the exception for overreaching, a court need not divine the exact motivation for the prosecutorial error.").

179. The judiciary's confusion over whether to review a prosecutor's conduct objectively or subjectively is further exemplified by its failure to clearly distinguish between prosecutorial error and prosecutorial misconduct. Adversarial litigation assumes, and even tolerates, a certain amount of error-producing conduct. See *Kennedy*, 456 U.S. at 674-75 ("Given the complexity of the rules of evidence, it will be a rare trial of any complexity in which some proffered evidence by the prosecutor or by the defendant's attorney will not be found objectionable by the trial court."); *Lutwak v. United States*, 344 U.S. 604, 619 (1953) ("A defendant is entitled to a fair trial, not a perfect one."). Prosecutors often deviate from procedural and evidentiary rules regulating trial practice without necessarily intending to violate those rules or to prejudice

In the small number of cases in which courts reverse convictions based on prosecutorial misconduct, the courts generally rely on an objective analysis in analyzing allegations of prosecutorial misconduct. This approach is based upon the principle that the overriding function of a criminal trial is to make an accurate determination of a defendant's guilt and that a prosecutor's intent is irrelevant to that determination. But, as I have demonstrated, a prosecutor's intent to corrupt a trial is logically relevant to a defendant's guilt. Clearly, if a court is able to find that a prosecutor intentionally struck a foul blow, a court would be entirely justified in taking a much harder look at the prosecutor's case. For it is entirely reasonable for a court to conclude that if a prosecutor believes it is necessary to strengthen a case by violating the rules of evidence or procedure, then perhaps the case is weak.¹⁸⁰

Moreover, contrary to their contention, the courts are capable of finding that a prosecutor acted intentionally, and they do so, albeit in an ad hoc and inconsistent manner. Further, the courts' failure to explain why they do analyze intent in some cases and not in others leaves their refusal to do so without analytical support at best, and is irresponsible at worst. The courts have gained sufficient familiarity with prosecutorial excesses over the years to be able to formulate and apply consistently a principled analysis of a prosecutor's mental culpability when reviewing allegations of prosecutorial misconduct.

Courts should follow two principles consistently. First, courts should always consider a prosecutor's intent in determining whether a violation was committed when an objective analysis is unable to make that determination. Second, courts should always consider a prosecutor's intent in determining the extent of the prejudice from the prosecutor's violation. The use of an objective standard to identify trial error may be adequate in

the fact-finder improperly. Characterizing the prosecutor's deviation as error, or the judge's failure to cure the violation as error, is both legally and linguistically correct. *See United States v. Olano*, 507 U.S. 725, 732-33 (1993) (noting that error is a deviation from a legal rule). In such instances, an objective approach to identifying the error may be appropriate. However, when the circumstances indicate that a prosecutor has violated a rule with the specific intent of accomplishing that result, to label such conduct as prosecutorial error rather than prosecutorial misconduct is inaccurate and misleading. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 647-48 (1973) (noting the distinction between "ordinary trial error of a prosecutor" and "egregious misconduct" amounting to a "denial of constitutional due process").

180. *See United States v. Boyd*, 55 F.3d 239, 242 (7th Cir. 1995) ("If the prosecutors did not think their case airtight (and so they tried to bolster it improperly), this is some indication that it was indeed not airtight."). Moreover, prosecutorial misconduct is related to adjudicatory accuracy in another way—it distorts the jury's assessment of the proof. *See United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 659 (2d Cir. 1946) (Frank, J., dissenting) ("If government counsel in a criminal suit is allowed to inflame jurors by irrelevantly arousing their deepest prejudices, the jury may become in his hands a lethal weapon directed against defendants who may be innocent.").

most cases in which the prosecutor's violation is apparent from the face of the record. Appellate courts in reviewing claims of prosecutorial misconduct should be informed by the actions of the trial judge. For the trial judge is well-suited to determine whether a prosecutor violated the rules, and whether he or she did so intentionally.¹⁸¹ Moreover, the trial judge is able to determine whether a prosecutor's conduct appeared to be planned. When a prosecutor engages in questionable behavior, the trial judge should require the prosecutor to make an offer of proof and provide an explanation for his conduct.

Moreover, trial courts and appellate courts should presume that a prosecutor's conduct is planned,¹⁸² and should use that presumption in considering the prosecutor's intent. Prosecutors typically are well-trained in adversarial combat before they venture into a courtroom.¹⁸³ And trial advocacy manuals are replete with adjurations directed at a lawyer's trial

181. See *Hernandez v. New York*, 500 U.S. 352, 365 (1991) ("Evaluation of the prosecutor's state of mind based on demeanor and credibility lies peculiarly within a trial judge's province."); *United States v. Modica*, 663 F.2d 1173, 1184-85 (2d Cir. 1981) ("The district judge is in an especially well-suited position to control the overall tenor of the trial."). See also *United States v. Vaulin*, 132 F.3d 898, 901 (3d Cir. 1997) ("The district court did not conclude that the prosecutor engaged in intentional misconduct in asking these questions and this record does not cause us to disagree with that conclusion.").

182. See *United States v. Wihbey*, 75 F.3d 761, 772 (1st Cir. 1996) (observing that prosecutor's "witness vouching seems to have been intentional, in that it was part of a clearly planned oration"); *Miller v. Lockhart*, 65 F.3d 676, 684-85 (8th Cir. 1995) (discussing instance in which prosecutor's "egregious" summation characterizing defendant as "mad dog" who should be "put to death" was a "well-planned theme that was neither isolated nor ambiguous"); *United States v. Hardy*, 37 F.3d 753, 758 (1st Cir. 1994) ("In his closing argument, the prosecutor had constructed an analogy based on the facts of the case, with certain rhetoric significantly repeated, which appeared to be planned."). But see *Donnelly v. DeChristoforo*, 416 U.S. 637, 646-47 (1974) (observing that prosecutor's closing argument "like all closing arguments of counsel, are seldom carefully constructed *in toto* before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear").

183. Prosecutors' offices typically conduct intensive training programs for new attorneys in which the nuts and bolts of trial preparation and presentation is carefully taught. Occasionally the lectures or materials may prove to be embarrassing. For example, a recently discovered training videotape from the 1980s revealed an assistant district attorney teaching his colleagues how to exclude blacks from a jury. See Michael Janofsky, *Under Siege, Philadelphia's Criminal Justice System Suffers Another Blow*, N.Y. TIMES, April 10, 1997, at A14. In another instance, a chief felony prosecutor in Texas wrote a column answering a young prosecutor's question about jury selection. The column described tactics that would be effective in empanelling a jury that would be "substantially convinced of the defendant's guilt before hearing any evidence." Robert H. Fisher, *Legally Speaking*, MADDVOCATE: A MAGAZINE FOR VICTIMS AND THEIR ADVOCATES, Winter 1991, at 31. The author added: "That is a goal to be sought, and achieving it will make the prosecutor's mission easier." *Id.* The author of this Article testified as an expert in a disciplinary proceeding against a supervisory prosecutor who had conducted lectures to the younger assistants in his office about tactics to inflame juries and get away with it. See *In the Matter of the Discipline of an Attorney*, 2 Mass. Attorney Discipline Reports 110 (1980).

preparation as being indispensable to success.¹⁸⁴ As the party bearing the burdens of production and proof, a prosecutor knows in advance her theory of the case, what evidence she plans to introduce, what questions she plans to propound to her witnesses, what specific areas of cross-examination she will develop from prospective defense witnesses, what specific questions she intends to ask the defendant should he or she take the stand, what general arguments she plans to make to the jury in opening and closing statements, and the precise language and rhetorical themes she intends to use to convey those arguments most persuasively. Moreover, certain types of rule-violating conduct by prosecutors are so blatantly improper and so frequently encountered that there could be no question that the conduct is anything but premeditated, and courts in these instances should presume that the violation was intentional. Consider, for example, the familiar instance where a prosecutor attempts to bolster his case by injecting into the proceedings expressions of personal beliefs or opinions about the evidence.¹⁸⁵ Prosecutors should be presumed to know this fundamental legal and ethical precept.¹⁸⁶ An objective test is usually adequate to identify the violation. However, a subjective test would enable a court to factor the prosecutor's intent to violate the rule into the evaluation of harmfulness.

There are additional reasons for courts to consider a prosecutor's intent. Unlike the courts' claim that reversing convictions has inadequate deterrent value, identifying and sanctioning a prosecutor's intentional violations is probably the most potent judicial tool to send a message of disapproval and prevent future violations.¹⁸⁷ Prosecutors do read the

184. See, e.g., ROGER HAYDOCK & JOHN SONSTENG, *TRIAL: THEORIES, TACTICS, TECHNIQUES*, ch. 3 (1990) (discussing the importance of planning and preparation); JAMES W. JEANS, *TRIAL ADVOCACY*, ch. 6 (1975) (discussing the importance of trial preparation); ROBERT E. KEETON, *TRIAL TACTICS AND METHODS* § 1.5, at 7 (2d ed. 1973) ("There is no substitute for thorough preparation of each case for trial.").

185. See BENNETT L. GERSHMAN, *TRIAL ERROR AND MISCONDUCT* § 2.8(c), at 190 (1997).

186. See ABA STANDARDS, *supra* note 4, 3-5.8(b) ("The prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant."); MODEL CODE, *supra* note 4, DR7-106(c)(4) ("In appearing in his professional capacity before a tribunal, a lawyer shall not assert his personal opinion as to the justness of a cause, as to the credibility of a witness . . . or as to the guilt or innocence of an accused.").

187. See *United States v. Johnston*, 127 F.3d 380, 403 (5th Cir. 1997) ("Nevertheless, somewhere we must draw the line and send a message to prosecutors that the Constitution governs their actions at trial."); *United States v. Kalfayan*, 8 F.3d 1315, 1325 (9th Cir. 1993) ("In a situation like this, the judiciary—especially the court before which the primary misbehavior took place—may exercise its supervisory power to make it clear that the misconduct was serious, that the government's unwillingness to own up to it was more serious still and that steps must be taken to avoid a recurrence of this chain of events.").

advance sheets, and are not impervious to judicial rebukes either as repeat actors in the process or as future employers. The courts' supervisory power over a prosecutor's conduct does not need to be broadened to more effectively deter prosecutorial excesses. Although the Supreme Court ruled in *United States v. Hasting*¹⁸⁸ that a federal court may not use its supervisory power to discipline errant prosecutors when the violation is harmless,¹⁸⁹ *Hasting* does not foreclose a court's consideration of a prosecutor's intent as one of the factors in evaluating the extent of the harm that the prosecutor's conduct caused, and by reversing the conviction, sending a message of disapproval. Indeed, the Supreme Court's jurisprudence concerning governmental misconduct generally has expressly recognized that such conduct can be prevented through the imposition of sanctions for conduct that is undertaken in intentional disregard of constitutional or other legal rules.¹⁹⁰

Moreover, prejudice to a defendant and deterrence of a prosecutor's violations are not the only interests that would be served by the subjective approach. A rational and fair system of justice needs to assure both the defendant and the community that the justice system has not miscarried. As is so often noted, the appearance of justice is as important as its actuality.¹⁹¹ A prosecutor who intentionally manipulates legal processes and misleads a jury into making a decision for reasons unrelated to guilt needs to be held accountable, because he or she not only denies the defendant a fair trial, but undermines public confidence in the fairness and rationality of the judicial system. Society recognizes correctly that prosecutors play a central role in vindicating the rule of law. The public trusts prosecutors to zealously perform their role properly. When prosecutors intentionally flaunt legal and ethical rules in order to secure a conviction, and courts take no action, people lose faith in the justice system.

188. 461 U.S. 499 (1983).

189. See *id.* at 507 ("[T]he interests preserved by the doctrine of harmless error cannot be so lightly and casually ignored in order to chastise what the court viewed as prosecutorial overreaching.").

190. See *United States v. Payner*, 447 U.S. 727, 735-36 n.8 (1980) (agreeing that the twofold purpose of supervisory power is to deter governmental misconduct and preserve judicial integrity).

191. See *Offutt v. United States*, 348 U.S. 11, 14 (1954) ("[J]ustice must satisfy the appearance of justice.").

V. Conclusion

Cursory familiarity with the advance sheets suggests that courtroom misconduct by prosecutors is probably increasing. This conclusion is attributable, in part, to contemporary attitudes about fighting crime aggressively and, in part, to a culture of prosecutorial overzealousness that is responsive to judicial doctrines that overlook serious errors in the interests of preserving guilty verdicts. Courts under current conventions of appellate review typically evaluate claims of prosecutorial misconduct under an objective standard. Courts determine initially whether the conduct violated an established rule of trial practice and if so, whether the violation, by itself or in combination with other trial errors, caused sufficient prejudice to a defendant to warrant a new trial. The prosecutor's mental culpability, or subjective intent to prejudice a defendant unfairly, ordinarily is considered irrelevant under that analysis.

There are several instances, however, when a prosecutor's intention to harm a defendant unfairly is relevant. This Article described three categories in which courts do recognize a prosecutor's mental culpability. Although a prosecutor's conduct that seriously undermines a defendant's right to a fair trial is sanctionable under any circumstances, harmful conduct that is undertaken with a conscious purpose to unfairly prejudice a defendant routinely should be recognized by courts in determining whether a violation was committed and whether the impact on the verdict requires a reversal. Courts, when the trial record permits the inference, should explicitly identify a prosecutor's mental culpability in determining whether the conduct was improper, and should expressly include in the determination of harmless error or plain error a prosecutor's subjective intent to cause harm. The judiciary's consistent recognition of a prosecutor's mental culpability, when such finding is available, would provide much stronger disincentives to prosecutorial violations, and likely result in a reduction in the incidence of violations.