



2019

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### Recommended Citation

Blake R. Mills, *Crossing the Line: Techniques of Closing Argument That Are Out of Bounds in Criminal Trials*, 41 U. ARK. LITTLE ROCK L. REV. 395 (2019).

Available at: <https://lawrepository.ualr.edu/lawreview/vol41/iss3/2>

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## CROSSING THE LINE: TECHNIQUES OF CLOSING ARGUMENT THAT ARE OUT OF BOUNDS IN CRIMINAL TRIALS

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### I. INTRODUCTION

In soccer, the ball is not out of bounds until it has completely crossed the line.<sup>1</sup> Some players try to take advantage of this rule by dribbling the ball as close to the line as they can—or even on top of the line—when they attempt to advance the ball past the other team. However, the slightest misstep can lead to the ball going out of bounds. Other players end up kicking the ball out of bounds because they are not paying attention to the line. Some players purposefully kick the ball out of bounds as a last-ditch effort to prevent the other team from scoring.

Some prosecutors and defense attorneys take similar approaches in their closing arguments. Some get close to, or on the line and make a misstep in the heat of the argument. Others may make a mistake by not knowing where the line of permissible argument is. A few may cross the line deliberately in a desperate attempt to win the case. Although kicking the ball out of bounds may sometimes be a legitimate tactical move in soccer, it is never proper for an attorney to cross the line in closing argument.

The consequences of making an improper closing argument can range from irritating to catastrophic. Improper argument could lead to an objection from opposing counsel and an admonishment from the judge, causing the jury to wonder, “What was this lawyer trying to pull?”<sup>2</sup> Improper argument may also be a violation of ethical rules.<sup>3</sup> Finally, improper argument may lead to the reversal of the case on appeal,<sup>4</sup> with a retrial and a new closing argument years later. In order to help prosecutors and defense attorneys es-

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1. STANLEY LOVER, *SOCCER RULES ILLUSTRATED* 22 (2009).

2. Colonel Grant C. Jaquith, *A View from the Bench: Apply the Golden Rule, But Don’t Argue It*, *ARMY LAWYER*, May 2008, at 36, 39–40.

3. See, e.g., UTAH RULES PROF’L CONDUCT r. 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 an accused.”).

4. See, e.g., *State v. Akok*, 348 P.3d 377, 385 (Utah Ct. App. 2015).

cape these negative consequences, this Article will identify the most common forms of improper closing argument that must be avoided.

## II. ARGUMENT THAT IS OUT OF BOUNDS

Most of what an attorney presents in a jury trial is controlled by very specific statutes or evidentiary rules. That is not the case with closing argument. Indeed, most of the restrictions on closing argument come from case law. It is important to note upfront that the rules of closing argument apply equally to both the prosecution and the defense.<sup>5</sup> As the United States Supreme Court has stated:

It is clear that counsel on both sides of the table share a duty to confine arguments to the jury within proper bounds. Just as the conduct of prosecutors is circumscribed, “[t]he interests of society in the preservation of courtroom control by the judges are no more to be frustrated through unchecked improprieties by defenders.”<sup>6</sup>

### A. Personal Attacks Against Opposing Counsel

It is improper for an attorney to make a personal attack on opposing counsel during closing argument. These arguments generally amount to an attack on opposing counsel’s character and credibility.

A classic example of this sort of improper argument was made in *United States v. Young*.<sup>7</sup> In that case, the defense counsel’s argument included a number of personal attacks:

Defense counsel began his own summation by arguing that the case against respondent “has been presented unfairly by the prosecution,” and that “[f]rom the beginning” to “this very moment the [prosecution’s] statements have been made to poison your minds unfairly.” He intimated that the prosecution deliberately withheld exculpatory evidence, and proceeded to charge the prosecution with “reprehensible” conduct in purportedly attempting to cast a false light on respondent’s activities. Defense counsel also pointed directly at the prosecutor’s table and stated: “I submit to you that there’s not a person in this courtroom including those sitting at this table who think that Billy Young intended to defraud Apco.” Finally, defense counsel stated that respondent had been “the only

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5. *United States v. Young*, 470 U.S. 1, 8 (1985).

6. *Id.* (quoting *Sachar v. United States*, 343 U.S. 1, 8 (1952). *See also* *United States v. Wexler*, 79 F.2d 526, 530 (2d Cir. 1935) (stating that “the truth is not likely to emerge, if the prosecution is confined to such detached exposition as would be appropriate in a lecture, while the defense is allowed those appeals in misericordiam which long custom has come to sanction.”).

7. 470 U.S. at 4–5.

one in this whole affair that has acted with honor and with integrity” and that “[t]hese complex . . . regulations should not have any place in an effort to put someone away.”<sup>8</sup>

The United States Supreme Court had no hesitation finding that this argument was improper, noting that, “[d]efense counsel, like his adversary, must not be permitted to make unfounded and inflammatory attacks on the opposing advocate.”<sup>9</sup> The Court also stated that, “[T]he kind of advocacy shown by this record has no place in the administration of justice and should neither be permitted nor rewarded.”<sup>10</sup> Indeed, the Court found that the argument was so improper that it mitigated any potential harm from the prosecutor’s own improper conduct and thus ruled that the conviction should be upheld.<sup>11</sup>

Indeed, direct accusations that opposing counsel is lying will always be found to be improper. One such personal attack occurred in *State v. Lyles*.<sup>12</sup> In closing argument, the prosecutor stated, “How do you explain the keys were in [the defendant’s] pockets? Police Officer Yates didn’t lie. Defense counsel is either confused or she’s lying or trying to mislead you.”<sup>13</sup> The Missouri Court of Appeals found that this accusation that defense counsel was lying was improper and objectionable.<sup>14</sup>

A similar improper argument was made in *State v. Pham*.<sup>15</sup> In that case, the prosecutor stated in closing argument that defense counsel “did not want the truth” and “did not care about the truth.”<sup>16</sup> The prosecutor also stated, “Boy, if you’re going to be looking at the credibility of the witnesses, you might also start with some of these lawyers.”<sup>17</sup> The Kansas Court of Appeals found that this argument “constituted gross and flagrant misconduct that denied the defendant a fair trial.”<sup>18</sup>

Courts also frown on arguments that do not directly accuse opposing counsel of lying but are an attack on counsel’s character. For instance, the prosecutor in *State v. Campos*

began his rebuttal by discussing at length the idiom of a red herring as “a technique to confuse or distract.” In applying the idiom to this case, the prosecutor stated, “And is there any relationship with a red herring and the defense in this case? They would have you believe an almost unbe-

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8. *Id.* (citations omitted).

9. *Id.* at 9.

10. *Id.*

11. *Id.* at 17–20.

12. 996 S.W.2d 713, 716 (Mo. Ct. App. 1999).

13. *Id.*

14. *Id.*

15. 10 P.3d 780, 787–88 (Kan. Ct. App. 2000).

16. *Id.* at 787.

17. *Id.*

18. *Id.* at 787–88.

lievable story. Why? Simply to confuse and distract. . . . Why would they do that? Just a red herring. A ploy to confuse and distract.”<sup>19</sup>

The Utah Court of Appeals found that this argument was an improper attack on defense counsel’s character because it amounted to a claim that counsel intended to mislead the jury.<sup>20</sup> The court stated that “[a]rguing that the evidence does not support the defense theory and that the theory is thus a distraction from the ultimate issue is fundamentally different from arguing that defense counsel is intentionally trying to distract and mislead the jury.”<sup>21</sup>

Courts distinguish personal attacks on counsel from argument directed at defense theories. For instance, the Utah Court of Appeals held in *State v. Fouse* that when a defense attorney asserted in closing argument that the prosecution did not believe its own theory of the case, it was not improper for the prosecutor to state in rebuttal that the assertion was “asinine” and a “red herring.”<sup>22</sup> The court stated that the difference between this argument and the one in *Campos* was that “calling defense counsel’s theory a distraction or irrelevant is permissible but accusing opposing counsel of using such a distraction as part of a purposeful scheme to mislead the jury is not.”<sup>23</sup> Similarly, the Idaho Court of Appeals held in *State v. Norton* that a prosecutor referring to some of the defense arguments as “red herrings and smoke and mirrors” was not improper because the comments “were not directed at defense counsel personally, but were comments on defense theories.”<sup>24</sup> In addition, the Missouri Court of Appeals found in *State v. Kennedy* that the prosecutor referring to defense counsel as “Mr. Talking Loud But Saying Nothing” was not impermissible.<sup>25</sup> The court found that although this characterization was unflattering, it was a permissible declaration that the defense argument “contained sound, but no substance.”<sup>26</sup>

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19. 309 P.3d 1160, 1175 (Utah Ct. App. 2013).

20. *Id.*

21. *Id.*

22. 319 P.3d 778, 786–87 (Utah Ct. App. 2014).

23. *Id.* at 786 (citing *Campos*, 309 P.3d 1160). In fact, the Utah Court of Appeals referred to the argument of appellate counsel as a “red herring” in a case after it decided *Campos*. See *National Union Fire Ins. Co. of Pittsburgh v. Smaistrala*, — P.3d — (Utah Ct. App. 2018), No. 20160401-CA, 2018 WL 4178311, at \*8 n.8.

24. 254 P.3d 77, 90 (Idaho Ct. App. 2011).

25. 107 S.W.3d 306, 313 (Mo. Ct. App. 2003).

26. *Id.* The difference between this statement and the improper one in *Campos*, 309 P.3d 1160 (Utah Ct. App. 2013), is that this was merely an argument that the defense position was unsupported by any substance, while the statement in *Campos* was an accusation that the defense was trying to trick the jury. See *supra* text accompanying notes 19–21.

## B. Commenting on the Defendant's Exercise of Constitutional Rights

It is improper for a prosecutor to comment on a defendant's exercise of Fifth and Sixth Amendment rights during closing argument. This is erroneous because it implies that the jury should infer guilt or draw an adverse influence from this exercise of rights.

The leading case on the impropriety of commenting on a defendant's decision not to testify at trial is *Griffin v. California*.<sup>27</sup> During the closing argument of this capital murder case, the prosecutor listed all of the things the defendant knew and could have testified about, but didn't:

He would know that. He would know how she got down the alley. He would know how the blood got on the bottom of the concrete steps. He would know how long he was with her in that box. He would know how her wig got off. He would know whether he beat her or mistreated her. He would know whether he walked away from that place cool as a cucumber . . . because he was conscious of his own guilt and wanted to get away from that damaged or injured woman. These things he has not seen fit to take the stand and deny or explain. And in the whole world, if anybody would know, this defendant would know. Essie Mae is dead, she can't tell you her side of the story. The defendant won't.<sup>28</sup>

The United States Supreme Court held that this argument violated the defendant's Fifth Amendment privilege against compelled self-incrimination because commenting on a defendant's silence is "a penalty imposed by courts for exercising a constitutional privilege" that "cuts down on the privilege by making its assertion costly."<sup>29</sup>

Indirect comments on the defendant's decision not to testify are also improper. For instance, the prosecutor in *United States v. Carter* made repeated statements in closing argument that the government's evidence was "uncontroverted" and "uncontradicted."<sup>30</sup> The Court of Appeals for the Armed Forces held that these comments in closing argument were an "impermissible reference to the [defendant's] exercise of the privilege against self-incrimination" when "the defendant alone has the information to contradict the government evidence referred to or the jury 'naturally and necessarily' would interpret the summation as comment on the failure of the accused to testify."<sup>31</sup> However, not every comment that evidence is uncontradicted is improper. For instance, the Arizona Court of Appeals held in *State v. Blackman* that it was permissible for the prosecutor to argue in closing

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27. 380 U.S. 609 (1965).

28. *Id.* at 611.

29. *Id.* at 614.

30. 61 M.J. 30, 32–33 (C.A.A.F. 2005).

31. *Id.* at 34.

that the victim's testimony was "uncontradicted" because there were other people at the crime scene and the defendant was not the only person who could have contradicted or otherwise explained the evidence.<sup>32</sup>

It is also improper for a prosecutor to complain about a defendant's exercise of his right to have a trial. For example, the prosecutor in *State v. Thompson* stated in closing that the defendant's decision to go to trial amounted to him "hiding behind the law" and "sticking the law in somebody's eye."<sup>33</sup> The North Carolina Court of Appeals held that this amounted to improper argument because:

The exercise of the right to a jury trial is thus considered no less fundamental in our jurisprudence than reliance upon the right to remain silent. Accordingly, prosecutorial argument complaining a criminal defendant has failed to plead guilty and thereby put the State to its burden of proof is no less impermissible than an argument commenting upon a defendant's failure to testify. Indeed, we discern no distinction between the two in terms of intrusion upon a criminal defendant's constitutional rights. We therefore hold that reference by the State to a defendant's failure to plead guilty is violative of his Sixth Amendment right to a jury trial.<sup>34</sup>

### C. Expressions of Personal Opinion

Henry David Thoreau once opined that men should "not trouble [themselves] to get new things, whether clothes or friends . . . [they] should sell [their] clothes and keep [their] thoughts."<sup>35</sup> Such is the challenge for every prosecutor and defense attorney, who wonders why they should keep their thoughts to themselves when they are being paid to be opinionated. However, it is improper for an attorney to express a personal opinion in closing argument.

An example of this type of improper argument occurred in the case of *Bates v. Bell*, in which the defendant was convicted of first-degree murder and was sentenced to death after he escaped police custody in Kentucky, stole a firearm, and then crossed state lines and killed a person in Tennessee.<sup>36</sup> During closing argument of the sentencing hearing, the prosecutor contested the mitigation evidence offered by the defense attorneys through their expert—Dr. Griffin:

I don't really care what Griffin says. I don't care at all what [the defense attorneys say] because I believe this to be true, and I believe you share

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32. 38 P.3d 1192, 1209–10 (Ariz. Ct. App. 2002).

33. 454 S.E.2d 271, 276 (N.C. Ct. App. 1995).

34. *Id.*

35. HENRY DAVID THOREAU, WALDEN OR LIFE IN THE WOODS (1854).

36. 402 F.3d 635, 637–640 (6th Cir. 2005).

the same belief . . . You don't believe [the testimony about mitigating evidence], and I don't believe it; and I don't even believe [defense counsel] believe that . . . [The State's expert] says it is a character flaw; I tend to agree with him . . . You don't believe [Griffin's testimony], and I don't believe that . . . I don't believe [Griffin's testimony]. That is just not common sense. I don't give a darn how many articles that Dr. Griffin reads to develop his theory of what is right.<sup>37</sup>

The Sixth Circuit Court of Appeals held that this argument was improper.<sup>38</sup> The court stated that it is improper for prosecutors to “put forth their opinions as to credibility of a witness, guilt of a defendant, or appropriateness of capital punishment.”<sup>39</sup> This is because the “prosecutor’s opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government’s judgment rather than its own view of the evidence.”<sup>40</sup>

A similar improper argument was given in *State v. Alwin*, in which the defense had put on an expert to testify about eyewitness identification issues.<sup>41</sup> To counter this evidence, the prosecutor stated in closing argument, “[A]nd I completely disagree with the expert. I know that, you know, he’s got some fancy titles and stuff, that when you’re under stress, you focus less. I completely disagree. I think that a lot of people get hyperfocused [sic] when they stress.”<sup>42</sup>

The Idaho Supreme Court held that this was improper expression of personal opinion.<sup>43</sup> The court so held because the prosecutor did not attack the credibility of expert, but instead expressed a personal belief that he disagreed with the expert’s testimony when there was no other evidence that discussed individuals becoming “hyperfocused” when stressed.<sup>44</sup>

However, not all expressions of opinion are improper. For instance, the prosecutor in *State v. Stricklin*, in referring to evidence about cell phone calls, stated in closing argument:

At 11:13 . . . Stricklin has no more calls. From 11:13 until 12:34, he has no more calls. And the call that he wants you to believe he’s traveling while it’s being made, that call wasn’t answered at 12:34. Why are there

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37. *Id.* at 645–46.

38. *Id.* at 646.

39. *Id.*

40. *Id.* (quoting *United States v. Young*, 470 U.S. 1, 18–19 (1985)). Although this case dealt with an expression of personal opinion by a prosecutor, it is also improper for a defense attorney to make expressions of personal opinion during closing argument. See MODEL CODE OF PROF’L RESPONSIBILITY DR 7-106(C)(3) and (4) (AM. BAR ASS’N 1980); MODEL RULES OF PROF’L CONDUCT r. 3.4(e) (AM. BAR ASS’N 1984).

41. 426 P.3d 1260 (Idaho 2018).

42. *Id.* at 1272.

43. *Id.*

44. *Id.*



no more calls? The two of them are together. And in my mind . . . Stricklin turned his phone off. He had no incoming or outgoing calls at all between 11:13 and 12:34.<sup>45</sup>

The defendant argued on appeal that the prosecutor's use of "in my mind" was an improper expression of personal opinion.<sup>46</sup> The Nebraska Supreme Court held that the statement was not improper because rather than expressing an opinion on the veracity of evidence or the guilt of the defendant, the prosecutor was only providing an interpretation about what the cell phone evidence meant.<sup>47</sup>

#### D. Inflaming the Passions or Prejudices of the Jury

Because jurors are human beings, "there is no denying that in many instances emotion will influence the outcome."<sup>48</sup> However, it is improper for an attorney to use closing argument to inflame the passions and prejudices of the jury. "Defining exactly where an argument crosses over the line of propriety and inflames passions or prejudices is often difficult to establish and depends upon the context in which the comments were made."<sup>49</sup>

In *State v. Campos*, the victim was paralyzed from the waist down as a result of being shot by the defendant.<sup>50</sup> During closing argument, the prosecutor stated:

[T]his case is about] civilized society . . . [s]ociety versus the man who takes the law into his own hands. It's society versus the self-appointed accuser and self-appointed judge. . . . [O]ur whole system of law is based on the concept of justice. Which simply means when you commit a crime like this, when you gun down your fellow neighbor in the most tragic of ways, stealing from him his ability to run, his ability to bike, his ability to walk his daughter down the aisle, when you do something like that on the streets of our community then you should be held accountable. Hold Mr. Campos accountable for his actions and to do that, find him guilty on all counts.<sup>51</sup>

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45. 916 N.W.2d 413, 427 (Neb. 2018).

46. *Id.*

47. *Id.* See also, *Mintun v. State*, 966 P.2d 954, 960 (Wyo. 1998) (stating that "'I believe' and 'I think' are commonly used, colloquial phrases" and "a prosecutor's inadvertent and infrequent use of these phrases is not prejudicial").

48. RONALD WAICUKAUSKI ET AL., *THE 12 SECRETS OF PERSUASIVE ARGUMENT* 108 (2009).

49. Colonel Louis J. Puelo, *Bulletproof Your Trial: How to Avoid Common Mistakes that Jeopardize Your Case on Appeal*, ARMY LAWYER, Aug. 2008, at 53, 66.

50. 309 P.3d 1160, 1167 (Utah Ct. App. 2013).

51. *Id.* at 1173.

The Utah Court of Appeals held that this was improper argument that appealed to passion and prejudice.<sup>52</sup> The court stated that it was “most troubled by the prosecutor’s reference to Campos’s ‘stealing from [the victim] his ability to run, his ability to bike, his ability to walk his daughter down the aisle’ because the statement “was a direct appeal to the passions of the jury.”<sup>53</sup> The biggest problem with the argument was that the harm to the victim was combined with a request to hold the defendant accountable, making it appear to be a request for the jury to base its conviction on a need to punish, rather than on the evidence.<sup>54</sup>

However, not every reference to the impact of the crime on the victim is improper. For example, the defendant in *State v. Thompson* was charged with two counts of forcible sodomy.<sup>55</sup> The prosecutor stated in closing argument that the victim is “going to be dealing with the emotional and psychological scarring[ ] of this for a long time” and “[s]he’s going to have to deal with it for the rest of her life.”<sup>56</sup> The Utah Court of Appeals held that these comments about the long-term effects of the crimes on the victim were not improper because they were “a self-evident proposition well within the common understanding of lay jurors”<sup>57</sup> that were “not likely to inflame the passions of the jurors.”<sup>58</sup>

#### E. Send a Message

During a trial, jurors are reminded multiple times that they have a duty. A duty to not contact witnesses or visit the scene of a crime or accident. A duty to come on time and not make a decision until they have heard all of the evidence. Do they also have a duty to use their vote to send a message to deter future crimes? The answer is no, and it is improper for an attorney to say that they do.

The prosecutor in *United States v. Sanchez* asked the jurors to send such a message.<sup>59</sup> The defendant had testified that although he knowingly transported illegal drugs, he did so because drug traffickers had threatened his family.<sup>60</sup> In his closing argument, the prosecutor stated:

[W]hy don’t we send a memo to all drug traffickers, to all persons south of the border and in Imperial County and in California—why not our na-

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52. *Id.*

53. *Id.*

54. *Id.* at 1174.

55. 318 P.3d 1221, 1227 (Utah Ct. App. 2014).

56. *Id.* at 1245.

57. *Id.* (quoting *State v. Cummins*, 839 P.2d 848, 854 n.12 (Utah Ct. App. 1992)).

58. *Id.*

59. 659 F.3d 1252, 1254 (9th Cir. 2011).

60. *Id.* at 1255.

tion while we're at it. Send a memo to them and say dear drug traffickers, when you hire someone to drive a load, tell them that they were forced to do it. Because even if they don't say it at primary and secondary, they'll get away with it if they just say their family was threatened. Because they don't trust Mexican police, and they don't think that the U.S. authorities can help them. Why don't we do that?<sup>61</sup>

The Ninth Circuit Court of Appeals held that this argument was improper because “prosecutors may not point to a particular crisis in our society and ask the jury to make a statement with their verdict.”<sup>62</sup> This sort of “send a message” argument is improper because it asks the jury to convict “for reasons wholly irrelevant to [the defendant’s] guilt or innocence.”<sup>63</sup>

The prosecutor similarly made an improper “send a message” argument in *State v. Woodard*.<sup>64</sup> In regard to the charge of theft by deception, the prosecutor stated in closing argument:

This is a theft one nickel and three to 3- ½ cents at a time. We need to *send a message* to those who would fraudulently redeem bottles in large quantities from away, we need to *send a message* that you can't be ripping off Maine beverage distributors who will pass those costs along to Maine consumers. We ask you to find Tom Woodard guilty of theft by deception in the fraudulent redemption of bottles to Maine distributors.<sup>65</sup>

The Supreme Court of Maine held that this argument was improper because it was an “appeal to public perception or other social issues that go beyond the evidence introduced at trial.”<sup>66</sup> The court stated that “it is not the role of a jury in a criminal case to send messages about matters of public concern, even though that may be the effect of a verdict in some instances.”<sup>67</sup> Indeed, “[j]urors should not be invited to arrive at a verdict for any reason other than their evaluation of the evidence of a defendant’s guilt or innocence.”<sup>68</sup>

However, not every argument that appears to ask a jury to send a message will be deemed improper. For instance, the defendant in the death penalty case of *People v. Martinez* argued that the prosecutor improperly asked the jury to send a message to the community by stating in the closing argument of the penalty phase:

61. *Id.* at 1256.

62. *Id.* (internal quotations omitted) (quoting *United States v. Leon-Reyes*, 177 F.3d 816, 823 (9th Cir. 1999)).

63. *Id.* (internal quotations omitted) (quoting *United States v. Nobari*, 5741 F.3d 1065, 1076 (9th Cir. 2009)).

64. 68 A.3d 1250, 1253 (Me. 2013).

65. *Id.* at 1257 (emphasis in original).

66. *Id.* at 1260.

67. *Id.*

68. *Id.*

[W]hat the death penalty will do in this case is that it certainly will restore the confidence and the trust in the system's ability to deal with people that transgress it and that do it in situations that are so aggravated and without sufficient justifying or mitigating circumstances that the public can see justice is done. They can see and the families can see that justice means more than sympathy, and mercy, and warehousing, and rehabilitation, and that it takes into account the defendant's conduct and the method and manner of his crimes and the impacts that it's had on the ones who suffered.<sup>69</sup>

The California Supreme Court disagreed, stating that it is not improper for a prosecutor to

”devot[e] some remarks to a reasoned argument that the death penalty, where imposed in deserving cases, is a valid form of community retribution or vengeance—i.e., punishment—exacted by the state, under controlled circumstances, and on behalf of all its members, in lieu of the right of personal retaliation” because “[r]etribution on behalf of the community *is* an important purpose of all society's punishments, including the death penalty.”<sup>70</sup>

There was no impropriety because “the prosecutor did not solicit untethered passions nor did he dissuade jurors from making individual decisions;” rather, “he properly argued that the community, acting on behalf of those injured, has the right to express its values by imposing the severest punishment for the most aggravated crimes.”<sup>71</sup> It is important to remember that this argument was made in the sentencing phase of a death penalty case where punishment was the issue, rather than the guilt phase where a conviction must be based on facts.

#### F. Fear, Vengeance, or Community Protection

In 1964, Senator Barry Goldwater charged the Johnson Administration with being “soft on Communism.”<sup>72</sup> Certainly, no American would want to vote for someone that offered support to a sworn, feared enemy. Similarly, litigators may be tempted to use such strategies to convince jurors to render a verdict out of fear, a desire for vengeance, or the protection of community values. This is improper.

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69. 224 P.3d 877, 916 (Cal. 2010).

70. *Id.* (emphasis in original) (quoting *People v. Zambrano*, 163 P.3d 4 (Cal. 2007), *overruled on other grounds by* *People v. Doolin*, 198 P.3d 11 (Cal. 2009)).

71. *Id.* (internal quotations omitted) (quoting *Zambrano*, 163 P.3d 4).

72. *Goldwater Asserts Rivals Are 'Soft on Communism'*, N.Y. TIMES (Sept. 30, 1964), <https://www.nytimes.com/1964/09/30/archives/goldwater-asserts-rivals-are-soft-on-communism.html>.

This sort of fear-based argument was made in the child sexual abuse case of *State v. Smiley*.<sup>73</sup> In regard to whether the testimony of a child victim should have to be corroborated, the prosecutor stated:

If the system did work that way, kids would have to be told, we're sorry, we can't prosecute your case, we can't hold your abuser responsible because all we have is your word, and that's not enough. No one's going to believe a kid or a teen, and we need something else. We don't do that. That's not how the system works.<sup>74</sup>

The Washington Court of Appeals held that this statement amounted to an argument that “the State might as well give up prosecuting sex abuse cases if the victim’s word was not enough for conviction.”<sup>75</sup> This was improper because “the implication was clear: if the jury agreed with defense counsel and refused to convict without corroborating evidence, other children are in danger.”<sup>76</sup>

It is likewise improper to induce jurors to render a verdict out of a desire for vengeance. For instance, the prosecutor in *State v. Todd* “made several impassioned references” to what the victim “‘might have told [the jury]’ had she been alive to testify.”<sup>77</sup> The Utah Court of Appeals held that these comments were improper because they could cause the jury to “feel obligated to seek revenge for the victim.”<sup>78</sup> The court emphasized that “[t]he determination of guilt must not be the product of fear or vengeance but rather intellectually compelled after a disinterested, impartial and fair assessment of the testimony that has been presented.”<sup>79</sup>

Similarly, it is improper to urge jurors to render a verdict based on a general desire to protect community values or civic order. This type of closing argument was given in *People v. Ortega*.<sup>80</sup> The prosecutor stated:

I have to get you to care. Why should you care about this crime? This isn't a robbery. This isn't a homicide. Why should you care? You should care for this city. We do not want an open drug market in Acacia Park right in the heart of Colorado Springs. We do not want an open drug market directly across the street from Palmer High School. We want

73. 379 P.3d 149, 152 (Wash. Ct. App. 2016).

74. *Id.* at 154.

75. *Id.*

76. *Id.* at 154–55; *see also* Grant v. State, 194 So. 2d 612, 613 (Fla. 1967) (holding that it was reversible error for a prosecutor to argue in a death penalty case, “Do you want to give this man less than first degree murder and the electric chair and have him get out and come back and kill somebody else, maybe you?”).

77. 173 P.3d 170, 175 (Utah Ct. App. 2007).

78. *Id.* at 176 (citing Commonwealth v. Cherry, 378 A.2d 805 (1977)).

79. *Id.* at 176 (emphasis omitted) (quoting Cherry, 378 A.2d at 803).

80. 370 P.3d 181, 189 (Colo. App. 2015).

people to have jobs and to be productive members of society. We don't want them to be drug dealers.<sup>81</sup>

The Colorado Court of Appeals agreed that this argument was improper because the comments were an attempt to “persuade the jurors to convict [the] defendant in order to combat evil for the community.”<sup>82</sup> This is improper because a “prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking.”<sup>83</sup>

### G. The Golden Rule

Many prosecutors and defense attorneys were taught at least some version of the Golden Rule when they were young. This precept, which states: “Do unto others as you would have them do to you,”<sup>84</sup> is something that attorneys should adhere to as a general practice. However, when it comes to asking the jurors to put themselves in the shoes of one of the parties, this form of closing argument is impermissible. Golden Rule arguments are improper because they invite the jurors “to cast aside the objective impartiality demanded of [them] as [jurors] and judge the issue from personal interest.”<sup>85</sup>

An example of this improper argument occurred in the case of *State v. Lowery*, in which the defendant appealed his conviction for first-degree murder, attempted first-degree murder, and other related crimes.<sup>86</sup> In closing argument, the prosecutor invited the jury to imagine what the incident was like for the murder victim: “A glorious day . . . and in two minutes, you're going to be, in essence, dead.”<sup>87</sup> The prosecutor then referred to the victim of the attempted murder:

[He] tells you, as that's happening, he doesn't know what Terrance is doing in the back. He's not paying attention to him. It's his wedding night. He's with his bride. They're going to get something to eat. And then he hears a loud noise, glass breaking. Could you imagine being in the state of mind where he was and that happening? Think for yourself. What

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81. *Id.*

82. *Id.* (quoting *People v. Clemons*, 89 P.3d 479, 483 (Colo. App. 2003)).

83. *Id.* (quoting *United States v. Monaghan*, 741 F.2d 1434, 1441 (D.C. Cir. 1984)).

84. Forms of this precept are found in the teachings of Christianity, Confucianism, Buddhism, Hinduism, Islam, Judaism, Taoism, and Zoroastrianism. See *The Universality of the Golden Rule in World Religions*, TEACHINGVALUES.COM, <http://www.teachingvalues.com/goldenrule.html> (last visited March 29, 2019).

85. *United States v. Wood*, 40 C.M.R. 3, 8 (C.M.A. 1969) (citing *United States v. Begley*, 38 C.M.R. 488 (A.B.R. 1967), *overruled on other grounds by United States v. Shamberger*, 1 M.J. 377, 379 n.2 (C.M.A. 1976)).

86. 427 P.3d 865, 873 (Kan. 2018).

87. *Id.* at 886 (ellipsis in original).

would be your reaction in that moment as you're driving, just having been married, having a great time, your bride leaning her head on your shoulder as you're going down the street and then you hear this loud noise? How long would it take for you to figure out your world is about to become unglued?<sup>88</sup>

The Kansas Supreme Court held that this argument was improper.<sup>89</sup> The court stated that this argument “fit squarely within the definition of a ‘golden rule’ argument” because “[t]elling the jury to ‘[t]hink for yourself’” and “‘what would be your reaction’ had no purpose but to inflame the passions and prejudices of the jury and divert its attention from its duty.”<sup>90</sup>

Defense attorneys are likewise prohibited from making Golden Rule arguments. Indeed, the Maine Supreme Court held in *State v. Tarbox* that defense counsel’s closing argument was improper because “he suggested to the jurors that they place themselves in the shoes of a defendant falsely accused of a crime.”<sup>91</sup> The court stated that “[t]he use of such arguments, commonly called Golden Rule arguments, is ‘universally condemned’ because it threatens the essence of a fair trial.”<sup>92</sup>

However, not every request of the jury to engage in personalization is improper. For instance, the prosecutor in *Buszkiewicz v. State* asked the jurors to place themselves in the victim’s position by stating:

Where we’ve gotten into and off on a—on a tangent, so to speak, is how many times she was slapped. Well, I would submit to you, in your common affairs, if you were being slapped and you were in that situation, would you remember how many times and counting [sic] how many times? You think you know. Because it’s important when we come in to testify and talk to you, we’ve got to know how many times you got hit. You aren’t going to remember in your ordinary affairs the details, especially if you’ve been up all night and you had been drinking and then you come in here and you want me to recount how many times it happened.<sup>93</sup>

The Wyoming Supreme Court began its analysis by noting that “an argument which asks the jurors to draw inferences from the evidence based on how a reasonable person would act if placed in the position of the victim is not an improper [G]olden [R]ule argument.”<sup>94</sup> In addition, the court stated,

88. *Id.* (emphasis omitted).

89. *Id.*

90. *Id.*

91. 158 A.3d 957, 963 n.3 (Me. 2017) (citing *Seabury-Peterson v. Jhamb*, 15 A.3d 746 (2011)).

92. *Id.*

93. 424 P.3d 1272, 1277 (Wyo. 2018).

94. *Id.*

“rhetorical questions which ask the jurors to use their common sense and life experiences to weigh the trial evidence do not violate the rule even though the prosecutor may ask the jury what they would do in similar circumstances.”<sup>95</sup> The court then held that the argument was proper because it was not asking the jury to decide the case based on sympathy or bias, but was a request for the jury to “look at the evidence through the lens of their ordinary affairs” when determining whether a witness would be able to remember the number of slaps during a violent encounter.<sup>96</sup>

#### H. Outside the Record

It is improper for an attorney to argue facts that were not introduced into evidence during the trial. It is likewise improper for an attorney to argue that the jury should draw an impermissible inference from the evidence.

In *State v. Larrabee*, the trial court ruled that the prosecution could not introduce any evidence that the victim’s mother had been sexually abused by the defendant years ago.<sup>97</sup> However, the prosecutor stated in closing argument:

When he’s dragging [the victim’s mother] back to the house in Arizona, how come she doesn’t scream and say look what he’s doing to me? He’s sexually abusing me. He’s doing all these things. Why didn’t she come out herself and say [Defendant’s] doing these terrible things to me? Why didn’t she have that vengeance then? Why does she wait until she’s not in his life at all?<sup>98</sup>

The Utah Supreme Court held that this statement was “improper and inflammatory” because it alluded to evidence that was not introduced at trial.<sup>99</sup> The court stated that by insinuating that other evidence existed, the prosecutor “encourage[d] the jury to determine its verdict based on evidence outside the record.”<sup>100</sup>

A related form of closing argument that is improper is taking too much artistic license with the evidence. For instance, the prosecutor in *United States v. Moore* invited the jury to “imagine” the death of a victim in the last minutes of his life:

Scott Downing is bound with duct tape. It’s pitch black in the back of that U-haul. He does not know what’s going to happen to him. He

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95. *Id.* (citing *State v. Williams*, 162 A.3d 84, 94–95 (Conn. App. Ct. 2017); *State v. Bell*, 931 A.2d 198, 212–15 (Conn. 2007)).

96. *Id.* at 1277–78.

97. 321 P.3d 1136, 1142 (Utah 2013).

98. *Id.*

99. *Id.* at 1144–45.

100. *Id.* at 1143.



must—he must wonder if he’s going to live through this night. . . . He’s taken out of that U-haul. He tries to talk but he can’t. All he can do is mumble. He feels the grass under his body. He feels the gravel of the road. . . . And then a gun is placed to the back of his head and two bullets.<sup>101</sup>

The Court of Appeals for the District of Columbia Circuit held that this argument was improper:

[A] prosecutor may not take artistic license with the trial evidence, construct a more dramatic version of the events, provide conjecture about a victim’s state of mind, and then defend against a prosecutorial misconduct claim by maintaining the statements are “fact-based.” Sensationalization, loosely drawn from facts presented during the trial, is still a “statement[ ] of fact to the jury not supported by proper evidence introduced during trial.”<sup>102</sup>

### I. Personal Attacks on the Defendant

In 2009, President Barack Obama was speaking to a joint session of Congress when Representative Joe Wilson yelled out “you lie” during his message.<sup>103</sup> Was Mr. Wilson trying to get attention, be dramatic, or make a personal attack? Whatever his purpose, the result was that some of his constituents were so embarrassed and enraged by his actions they yelled the same phrase back at him in a subsequent gathering.<sup>104</sup> Whatever their place may be in a political setting, name-calling and insults are improper in closing argument.

A prosecutor who calls the defendant disparaging names during closing argument creates a great risk that a court will find that the argument was improper. For instance, the prosecutor in *State v. Barfield* engaged in a remarkably creative display of name-calling in closing argument by referring to the defendant as a “vicious dictator,” a “two-headed hydra,” a “tower of terror,” a “monster of mayhem,” and a “king of killers.”<sup>105</sup> The Nebraska Supreme Court stated that these sorts of comments have “no place in a courtroom” because they “create inflammatory prejudice.”<sup>106</sup>

101. 651 F.3d 30, 53 (D.C. Cir. 2011) (ellipsis in original)

102. *Id.* (quoting Gaither v. United States, 413 F.2d 1061, 1079 (D.C. Cir. 1969)).

103. Jonah Engel Bromwich, *Congressman Who Shouted ‘You Lie’ at Obama Hears the Same from Constituents*, N.Y. TIMES, (April 11, 2017), [www.nytimes.com/2017/04/11/us/politics/joe-wilson-you-lie-obama-town-hall.html](http://www.nytimes.com/2017/04/11/us/politics/joe-wilson-you-lie-obama-town-hall.html).

104. *Id.*

105. 723 N.W.2d 303, 313 (Neb. 2006), *overruled on other grounds by* State v. McCulloch, 742 N.W.2d 727 (Neb. 2007).

106. *Barfield*, 723 N.W.2d at 313 (quoting Kellogg v. Skon, 176 F.3d 447, 451–52 (8th Cir. 1999)); *see also* Steele v. United States, 222 F.2d 628, 631 (5th Cir. 1955) (stating that

Other courts have found similar incidents of name calling to be improper. This includes calling the defendant a “rabid dog,”<sup>107</sup> a “bastard,”<sup>108</sup> a “monster,”<sup>109</sup> an “animal,”<sup>110</sup> “unadulterated evil,”<sup>111</sup> a “terrorist,”<sup>112</sup> and someone who “can’t keep her knees together or her mouth shut.”<sup>113</sup> Courts likewise frown on calling witnesses names such as “just a \$6,000 excuse man” during closing argument.<sup>114</sup>

However, not every argument that appears to engage in name-calling will be deemed improper. For instance, the prosecutor in *Orellana v. State* called the defendant a “MS-13 thug” during closing argument.<sup>115</sup> The Texas Court of Appeals held that this characterization was not improper because it was a “reasonable deduction” from testimony that the defendant was a gang member who had threatened women and children with serious bodily harm and death.<sup>116</sup> The court held that this evidence met the very definition of the term “thug.”<sup>117</sup>

A similar result occurred in the first-degree murder case of *Commonwealth v. Clancy*.<sup>118</sup> In response to the defendant’s claim that he shot the victim in the heat of passion, the prosecutor stated in closing argument that the defendant was a “cold blooded killer.”<sup>119</sup> The Pennsylvania Supreme Court held that this argument was permissible because it specifically addressed an element of the offense that had to be proven—that the defendant’s “actions were willful, deliberate, and premeditated.”<sup>120</sup> The court stated that while inflammatory name-calling is generally improper, “offense-centric statements” that “speak to the elements of the particular charges . . . and the evidence necessary to prove these elements” are permissible.<sup>121</sup> The

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the prosecutor calling the defendant “Dr. Jekyll and Mr. Hyde, a man at home with his family suave and, . . . a benign little man, but yet, when he gets down in the dark streets of Houston, we find him having his hand in every kind of racket that you can imagine, a man who can do that is smart, he is cunning, he is crafty” was so improper that the court should have admonished the prosecutor on its own and directed the jury not to consider the argument).

107. *Bates v. Bell*, 402 F.3d 635, 643 (6th Cir. 2005).

108. *Gilcrease v. State*, 32 S.W.3d 277, 279 (Tex. Ct. App. 2000).

109. *Ponce v. State*, 299 S.W.3d 167, 174–75 (Tex. Ct. App. 2009).

110. *Wilson v. Sirmons*, 536 F.3d 1064, 1118 (10th Cir. 2008).

111. *Id.*

112. *United States v. Moore*, 375 F.3d 259, 260 (10th Cir. 2004).

113. *State v. Madonna*, 806 S.E.2d 356, 362 (N.C. 2017).

114. *State v. Huey*, 804 S.E.2d 464, 468–69 (N.C. 2017) (referring to the defendant’s expert witness).

115. 489 S.W.3d 537, 548 (Tex. Ct. App. 2016).

116. *Id.*

117. *Id.* (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2386 (1993); NEW OXFORD AMERICAN DICTIONARY 1809 (3d ed. 2010)).

118. 192 A.3d 44 (Pa. 2018).

119. *Id.* at 47–48.

120. *Id.* at 65.

121. *Id.*

distinction is that characterization based on the evidence and the law is permissible, but name calling that is “divorced from the record” or is “irrelevant to the elements of the crime at issue” is improper.<sup>122</sup>

#### J. Commenting on the Credibility of Witnesses

It is improper for an attorney to comment on the credibility of a witness during closing argument. Vouching for a witness’s credibility by a prosecutor is especially improper because it induces the jury “to trust the Government’s judgment rather than its own view of the evidence.”<sup>123</sup>

An example of improper comments on credibility occurred in *State v. Acuna Valenzuela*, when the prosecutor stated in rebuttal, “[T]he defendant wants you to stop at the manufactured testimony of [his two witnesses], and we ask that you fight a little harder past that. You have been presented with the truth.”<sup>124</sup> The Arizona Supreme Court held that even though the prosecutor did not expressly “argue that the State had provided the jury with the truth, the juxtaposition of ‘manufactured’ defense witness testimony against ‘the truth’ implied that the prosecution was indeed the party that had provided the jury ‘with the truth.’”<sup>125</sup> Essentially, the court ruled that this was the State “impermissibl[y] vouching” for itself.<sup>126</sup>

A similarly improper comment on credibility occurred in *State v. Hayden*.<sup>127</sup> In closing argument, the prosecutor stated that the social worker and detective he called as witnesses were “believable,” that the jury could “rely on” the detective’s testimony, and stated that he knew that the search of the defendant’s home “had been conducted properly” because the officers involved do “good work.”<sup>128</sup> The Montana Supreme Court held that by making these comments, the prosecutor had “impinged on the jury’s role by offering his own opinion as to witnesses’ testimony.”<sup>129</sup> The court held that in stating that the social worker and detective were “believable,” the prosecutor made “direct statements of [his] opinion that the jury must believe these witnesses” which constituted reversible error.<sup>130</sup>

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122. *Id.*; see also *Browning v. State*, 188 P.3d 60, 72 (Nev. 2008) (holding that it was not improper for the prosecutor to refer to the defendant and his actions as evil in closing argument because the comment “merely expressed the gravity of the” charged crime of first-degree murder).

123. *United States v. Berrios*, 676 F.3d 118, 133 (3d Cir. 2012) (quoting *United States v. Walker*, 155 F.3d 180, 184 (3d Cir. 1998)).

124. 426 P.3d 1176, 1197 (Ariz. 2018).

125. *Id.*

126. *Id.* (citing *State v. Vincent*, 768 P.2d 150, 155 (Ariz. 1989)).

127. 190 P.3d 1091 (Mont. 2008).

128. *Id.* at 1095.

129. *Id.* at 1097.

130. *Id.*

However, not every comment about witness credibility is improper. For instance, the prosecutor in *State v. Williams* stated in closing argument, “I’m going to suggest to you that the defendant made a lot of his story up as he testified on the stand” and “his version is false, his version is fabricated . . . you should . . . disregard his testimony.”<sup>131</sup> The Kansas Supreme Court stated that although “it is improper for a prosecutor to offer his or her personal opinion on a defendant’s credibility,”<sup>132</sup> a prosecutor is allowed to “make statements about a defendant’s trustworthiness ‘to point out inconsistencies in a defendant’s statements and to argue evidence that reflects poorly on a defendant’s credibility.’”<sup>133</sup> The court held that the prosecutor’s statements were proper when considered in context, because he started by emphasizing that it was the jury’s job to determine weight and credibility of testimony and he also gave “specific reasons why the trial evidence established the defense theory was infeasible.”<sup>134</sup> In short, “the prosecutor was advancing reasonable inferences based on the physical evidence, which supported his suggestion that [the defendant’s] testimony was unbelievable.”<sup>135</sup>

### III. INVITED RESPONSE

Prosecutors and defense attorneys should always keep in mind that their actions may open the door to argument from opposing counsel that would otherwise be deemed improper. This is known as the “invited response” doctrine that had its beginnings in the tax evasion case of *Lawn v. United States*.<sup>136</sup>

In *Lawn*, the defense attorney argued that the case was a persecution of the defendants that had been instituted in bad faith and also claimed that the prosecution’s two main witnesses were perjurers.<sup>137</sup> In rebuttal, the prosecutor stated, “We vouch for [the two witnesses] because we think they are telling the truth.”<sup>138</sup> The United States Supreme Court held that the prosecutor’s

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131. 429 P.3d 201, 205–06 (Kan. 2018).

132. *Id.* at 207 (citing *State v. Pribble*, 375 P.3d 966 (Kan. 2016)).

133. *Id.* (quoting *State v. Brown*, 331 P.3d 781 (Kan. 2014)).

134. *Id.*

135. *Id.*; see also *Bland v. Sirmons*, 459 F.3d 999, 1025 (10th Cir. 2006) (stating that it is not improper for a prosecutor to refer to a defendant as a liar based on “irreconcilable discrepancies between the defendant’s testimony and other evidence in the case”); *Commonwealth v. Coren*, 774 N.E.2d 623, 631 n.9 (Mass. 2002) (stating that “where the evidence clearly supports the inference that the defendant lied, the prosecutor may fairly comment on it”); *People v. Howard*, 575 N.W.2d 16, 28 (Mich. Ct. App. 1997) (holding that a prosecutor may characterize the defendant as a liar if the comment is based on the evidence produced at trial).

136. 355 U.S. 339, 359 n.15 (1958).

137. *Id.*

138. *Id.*

statement did not deprive the defendant of a fair trial because the comments of the defense “clearly invited the reply” by the prosecution.<sup>139</sup>

In *United States v. Young*, the Supreme Court clarified that the “invited response” doctrine “should not be read as suggesting judicial approval or encouragement of response-in-kind that inevitably exacerbates the tensions inherent in the adversary process.”<sup>140</sup> Indeed, the doctrine does not mean that otherwise improper comments from a prosecutor are proper if given in reply to the comments of a defense attorney, but it means that the “invited response” may not be prejudicial.<sup>141</sup> Thus, “if the prosecutor’s remarks were ‘invited,’ and did no more than respond substantially in order to ‘right the scale,’ such comments would not warrant reversing a conviction.”<sup>142</sup>

Courts have invoked the invited response doctrine to find that otherwise improper arguments are not reversible error. For example, the defendant in *Powell v. State* argued that the prosecutor engaged in improper argument when she stated, “If we think it’s a bad arrest, if we think there’s not enough evidence, what happens to that case? It goes. We don’t bring it to indictment if we think the person is innocent, if there is not enough evidence.”<sup>143</sup> The Georgia Supreme Court agreed that these comments were highly improper, but held that they did not amount to reversible error because they were an invited reply to the defense attorney’s speculative remarks in closing about the motives of the prosecutor for bringing charges.<sup>144</sup>

Similarly, the Tennessee Supreme Court upheld a death sentence under the invited response doctrine in *State v. Thomas*.<sup>145</sup> In that case, the defendant was convicted of murder, and the jury sentenced him to death after finding that the aggravating circumstance of his prior convictions for violent felonies outweighed any mitigating circumstances.<sup>146</sup> During closing argument of the penalty phase of trial, the prosecutor stated:

I’m going to start off this morning by apologizing . . . for wasting your time this week because you heard it, they’re both doing a lot of time already. Why in the world are we down here? Let’s just forget this murder. I’m sorry, Ms. Day, James Day’s death should be a freebie. I mean, they’re already doing a lot of time.<sup>147</sup>

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139. *Id.*

140. 470 U.S. 1, 12 (1985).

141. *See id.*

142. *Id.* at 12–13.

143. 733 S.E.2d 294, 297 (Ga. 2014).

144. *Id.* at 299–300.

145. 158 S.W.3d 361 (Tenn. 2005).

146. *See id.* at 375–76.

147. *Id.* at 414.

The defendant claimed that this was improper argument.<sup>148</sup> The court agreed that “community conscience arguments are generally improper,” but stated that “a prosecutor’s closing argument must be evaluated in light of the defense argument that preceded it.”<sup>149</sup> The court noted that the prosecutor’s statement was an obvious response to the defense’s attempt to invoke community conscience by arguing that there was no need for the death penalty because the defendant had already received long sentences for his prior convictions.<sup>150</sup> Thus, the court concluded that there was no reversible error.<sup>151</sup>

Prosecutors and defense attorneys must always be cognizant of the invited response doctrine when they prepare for and give closing arguments. They should keep in mind that if they are not careful in their own closing arguments, they may open the door to improper arguments from opposing counsel that are not deemed to be reversible error.

#### IV. CONCLUSION

No article could list every possible form of improper closing argument. However, this Article has identified the most common forms of improper argument that occur in every jurisdiction in the country. It is incumbent upon every prosecutor and defense attorney to learn the rules of closing argument and abide by them.

Not only are these forms of improper argument identifiable with proper study and training, they are also unnecessary and foolish. Because “studies demonstrate that most jurors have made up their minds before hearing closing argument,” it would seem that attorneys would understand that risks of crossing the line far outweigh any potential benefit.<sup>152</sup> “[W]hy would an attorney run the risk of reversal during closing argument, with improper comment, when the demonstrable consensus is that the efficacy of summation” is lower than the other parts of the trial?<sup>153</sup> A closing argument given in a new trial years later after reversal on appeal is likely to be even less effective.

In addition, an attorney who makes improper arguments always runs the risk that the jury may recognize that the arguments are improper and conclude that the attorney is engaging in unfair conduct. Research has shown that even strangers who observe one party acting unfairly towards

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148. *Id.*

149. *Id.* (citing *Darden v. Wainwright*, 477 U.S. 168, 179 (1986)).

150. *Id.*

151. *Thomas*, 158 S.W.3d at 415.

152. Craig Lee Montz, *Why Lawyers Continue to Cross the Line in Closing Argument: An Examination of Federal and State Cases*, 28 OHIO N. U. L. REV. 67, 68 (2001).

153. *Id.* at 69.

another will attempt to punish the person who is acting unfairly.<sup>154</sup> No attorney wants to be punished by a jury for an improper comment made during closing argument.

Of course, the most important reason for attorneys to avoid closing argument that are out of bounds is because they have an ethical duty to do so.<sup>155</sup> “Given the seriousness of these trials and the ramifications of appellate court reversals, the public, the victims of crime, and the defendants deserve no less.”<sup>156</sup>

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154. See DANIEL KAHNEMAN, THINKING FAST AND SLOW 308 (2011). In fact, studies have shown that this sort of altruistic punishment of unfair behavior increases activity in the pleasure centers of the brain. *Id.*

155. See UTAH RULES OF PROF'L CONDUCT r. 3.4(e); see also *supra* text accompanying note 3.

156. *Bell v. State*, 723 So. 2d 896, 897 (Fla. Dist. Ct. App. 1998) (Altembernd, C.J., specially concurring).