I BELIEVE, THE GOLDEN RULE, SEND A MESSAGE, AND OTHER IMPROPER CLOSING ARGUMENTS

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I. INTRODUCTION

Closing argument provides counsel with an opportunity to put the entire case together for the jury in a mosaic tapestry of facts, inferences, and law. The jury has patiently endured voir dire, openings, directs, crosses, redirects, the admission of exhibits, and the tedious instructions by the judge. The jury wants, expects, hopes that counsel’s closings will make their responsibilities easier by explaining how it all fits coherently together so that the jurors can confidently decide the issues presented to them without having to go through the controversy, confusion, and conflict depicted in the movie Twelve Angry Men.

To this end, counsel has a great deal of latitude in framing closing arguments seeking to assist the jury to connect the facts of the case to the issues presented in the jury verdict form. Latitude, however, does not mean that the gloves are off, no rules apply, and anything goes. Nor does it mean that opposing counsel must sit patiently, quietly, passively for his or her turn. Objections, though uncommon for closings, are appropriate when improper lines are crossed. Counsel may be unsure whether an argument may be improper, or may be reluctant to object during closing lest the judge overrule or worse yet, reprimand counsel for interrupting closings. Unlike the evidentiary rules applied to the presentation of evidence, which are largely statutory and supplemented by common law analysis, objections appropriate for closings remain less studied, discussed, or analyzed. Additionally, counsel may be concerned that interrupting an opponent’s closing may be met with annoyance by the jurors or reciprocal objections during their own closing. Consequently, many objectionable arguments in closing go unchallenged until a last chance appeal. This Article seeks to review from a principled perspective the importance of properly objecting during closing, discussing many of the appropriate grounds for objecting during closing, and why the objections may make sense. These perspectives must then be filtered through the experienced ears

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of the trial attorney who must balance what, when, and why an objection may be professionally made.

II. ANALYSIS
A. FIRST PRINCIPLE: COUNSEL HAVE ETHICAL DUTIES TO REFRAIN FROM IMPROPER CLOSING ARGUMENTS

Advocates advocate. On occasion, an overly zealous advocate may advocate unethically. Counsel should always frame the closing arguments with proper ethical principles in mind. Many of the cases addressing the issue of improper remarks during closings are criminal cases involving the issue of prosecutorial misconduct. There are several reasons why this is true. First, “[p]rosecutors are held to a high standard regarding their conduct, given ‘the possibility that the jury will give special weight to the prosecutor’s arguments, not only because of the prestige associated with the prosecutor’s office, but also because of the fact-finding facilities presumably available to the office.’”

Second, the prosecutor is in a position of public trust. The United States Supreme Court has described this trust relationship, applied to closings, as follows:

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.

Many of the cases addressing improper comments during closing remind the prosecutors of this public duty and repeat the admonition: “while he may strike hard blows, he is not at liberty to strike foul ones.”

While the prosecutor may have enhanced ethical duties to argue appropriately, the criminal defense attorney has reciprocal duties. In-

1. State v. Todd, 173 P.3d 170, 175 (Utah Ct. App. 2007) (quoting ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-5.8 cmt. (1983)).
deed, many of the cases where the appellant court refuses to reverse on the basis of improper closing arguments by the prosecutor, the rationale for the refusal is because the defense attorney has invited the error or reply by an improper attack on the prosecution's case. The appellate courts often infer that where prosecutors have responded reasonably in closing argument to defense counsel's attacks, it is less likely that the jury would be led astray.

The American Bar Association ("ABA") Standards for Criminal Justice provide:

The prohibition of personal attacks on the prosecutor is but a part of the larger duty of counsel to avoid acrimony in relations with opposing counsel during trial and confine argument to record evidence. It is firmly established that the lawyer should abstain from any allusion to the personal peculiarities and idiosyncrasies of opposing counsel. A personal attack by the prosecutor on defense counsel is improper, and the duty to abstain from such attacks is obviously reciprocal.

B. SECOND PRINCIPLE: OBJECT TO IMPROPER CLOSING OR FACE THE DIFFICULT Plain ERROR STANDARD OF REVIEW

Whether an "improper closing remark" rises to the level of reversible misconduct essentially depends upon three common questions and two standards of review. The three questions are: (1) was the closing remark improper; (2) did the opposing party object to the remark or should it have been obvious to the court; and (3) was the remark prejudicial?

4. See United States v. Young, 470 U.S. 1, 8-10 (1985) (describing the proper scope available to prosecutor and defense counsel); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 242 (1940) (stating that it was proper for the prosecution to rebut statements made by defense counsel in closing); United States v. Lawn, 355 U.S. 339, 359 n.15 (1958) (stating that the prosecution's statements that they thought the witnesses were telling the truth were not improper because the defense counsel had challenged these witnesses during the course of the trial); Crumpton v. United States, 138 U.S. 361, 364 (1891) (finding that the defense counsel has a duty to object to improper arguments at the time of closing). See infra note 195, Twelfth Principle: Misconduct by One Party During Closing Often Will Be Attenuated By The Doctrine of Invited Reply or Invited Error.

5. See Young, 470 U.S. at 10 (quoting and relying on the ABA Standards of Criminal Justice § 4-7.8).

6. See United States v. Hale, 448 F.3d 971, 986 (7th Cir. 2006) (detailing that the court looks to whether the prosecutor's remarks were improper); see also United States v. Wesley, 422 F.3d 509, 515 (7th Cir. 2005) (examining whether a prosecutor's remarks were improper).

7. See e.g., Hale, 448 F.3d at 986 (looking at prosecutor's remarks in light of the entire record and whether it was obvious to counsel); United States v. Washington, 417 F.3d 780, 786 (7th Cir. 2005) (laying out the criteria used to evaluate improper closing arguments); State v. Dunn, 850 P.2d 1201, 1208-09 (Utah 1993) (requiring the appellant to show the following in order to justify a reversal under a plain error standard of
The United States Court of Appeals for the Seventh Circuit in *United States v. Hale*\(^8\) outlined a six-factor test for examining whether an improper remark by a prosecutor during closing prejudiced the accused:

1. whether the prosecutor misstated the evidence;
2. whether the remarks implicated the specific rights of the accused;
3. whether the defendant invited the response;
4. the efficacy of curative instructions;
5. the defendant's opportunity to rebut; and most importantly
6. the weight of the evidence.\(^9\)

If the opponent objects to the "wrongful" remark during closing, the court will review the court's ruling on an abuse of discretion standard of review.\(^10\) If the opponent did not object, the issue will be reviewed under the plain error standard of review.\(^11\) An error is not plain unless it is of such an obvious nature that "the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely [objection]."\(^12\) Additionally, under a plain error review the court is unlikely to reverse unless theobjecting party has been deprived of a fair trial.\(^13\)

C. **Third Principle: Counsel May Only Argue Facts in Evidence or Fair Inferences**

A cardinal principle for closings is that counsel may not argue or allude to facts not introduced into evidence or unfair inferences from the facts admitted during the trial.\(^14\) If counsel argues facts or inferences not in evidence, the closing remark is improper because the "actions or remarks call to the attention of the jurors matters they would not be justified in considering in determining their verdict."\(^15\) The courts will give "considerable latitude [in their] closing arguments."\(^16\)

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\(8\). 448 F.3d 971 (7th Cir. 2006).
\(9\). Hale, 448 F.3d at 986.
\(10\). United States v. Sandoval, 347 F.3d 627, 631 (7th Cir. 2003).
\(12\). United States v. Frady, 456 U.S. 152, 162-64 (1982).
\(14\). State v. Larrabee, 321 P.3d 1136, 1142-43 (Utah 2013); see also State v. Hopkins, 782 P.2d 475, 478 (Utah 1989) (prohibiting counsel from arguing facts not in evidence at closing).
\(16\). State v. Bakalov, 979 P.2d 799, 817 (Utah 1999) (citation omitted) (internal quotations omitted); State v. King, 248 P.3d 984, 992 (Utah 2010).
including all reasonable inferences and deductions therefrom,\textsuperscript{17} even extending to a critique of the "the plausibility of a defense theory."\textsuperscript{18} Conversely, counsel may neither argue matters not admitted at trial,\textsuperscript{19} nor spin evidence where there is no basis for the inference spun.\textsuperscript{20}

D. \textbf{FOURTH PRINCIPLE: A PROSECUTOR MAY NOT ARGUE ANYTHING THAT JEOPARDIZES THE EXERCISE OF CONSTITUTIONAL RIGHTS}

1. \textit{The Sixth Amendment Right to Trial}

The Sixth Amendment right to jury trial is fundamental. Accordingly, in a criminal case the prosecution cannot condemn the defense for exercising the right to trial. The issue comes up most commonly in sentencing proceedings, especially for capital crimes, where the defendant may have pled not guilty to a crime for which guilt is clear. For example, the United States Court of Appeals for the Eleventh Circuit in \textit{Cunningham v. Zant}\textsuperscript{21} described the prosecutor's closing arguments as "outrageous" because, in part, he argued that he was "offended" that Cunningham, in the guilt-innocence phase of the trial, had exercised his Sixth Amendment right to jury trial.\textsuperscript{22} The court on appeal condemned the argument as follows:

By these comments and others, the prosecutor improperly appealed to the jury's passions and prejudices. He sought to inflame the jury and to misinform them as to the role that certain fundamental rights guaranteed by the Sixth Amendment play in our legal system and to suggest that Cunningham was somehow not entitled to those rights. A prosecutor may not make an appeal to the jury that is directed to passion

\begin{itemize}
  \item \textsuperscript{17} State v. Dibello, 780 P.2d 1221, 1225 (Utah 1989); see also State v. Lafferty, 749 P.2d 1239, 1255 (Utah 1988) (stating that counsel has considerable freedom "to discuss fully from their standpoints the evidence and the inferences and deductions arising therefrom."); see also State v. Dunn, 856 P.2d 1201, 1223 (Utah 1993).
  \item \textsuperscript{18} United States v. Salley, 651 F.3d 159, 165 (1st Cir. 2011); United States v. Glover, 558 F.3d 71, 78 (1st Cir. 2009). See also United States v. Taylor, 54 F.3d 967, 978 (1st Cir. 1995).
  \item \textsuperscript{19} State v. Olola, 339 P.3d 164, 166-68 (Utah Ct. App. 2014) (citing Larrabee, 321 P.3d at 1136); Hopkins, 782 P.2d at 478.
  \item \textsuperscript{20} State v. King, 248 P.3d 984, 992 (Utah 2010).
  \item \textsuperscript{21} There was no basis in the evidence for characterizing what the alleged victim really meant when she said "what if I lied?" as "What people would think . . . if they thought I was a liar" . . . [A]nd his characterization of the abuse as lasting for mere seconds contradicted the testimony that the abuse occurred for a period of two to three minutes.
  \item \textsuperscript{22} Cunningham v. Zant, 928 F.2d 1006, 1019-20 (11th Cir. 1991).
\end{itemize}
or prejudice rather than to reason and to an understanding of the law.23

2. The Fifth Amendment Right Against Self Incrimination

The United States Supreme Court in Griffin v. California24 held "that the Fifth Amendment, in its direct application to the Federal Government and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."25 Anything that the prosecutor argues in closing that is "manifestly intended or [is] of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify" is improper.26 Additionally, the Court in Doyle v. Ohio,27 held that the prosecution cannot comment on post-Miranda silence.28 Taken together it has become "bedrock principle that a prosecutor may not comment on a defendant's exercise of the right to remain silent."29 The courts have consistently held "[e]ven an indirect or inferential comment on a defendant's silence can transgress the Fifth Amendment."30 In this regard, even attempting to argue his demeanor sitting through the trial would be improper.31

In comparison, the United States Supreme Court in Brecht v. Abrahamson32 held that the United States Constitution does not prohibit the use for impeachment purposes of a defendant's silence prior to arrest, prior to Miranda warnings being given, or prior to the accused asserting his right to remain silent pre-arrest.33 In Brecht, the

23. Cunningham, 928 F.2d at 1020 (the other improper remarks included appeals to religious symbols and beliefs, including an analogy to Judas Iscariot) (citing United States v. Rodriguez, 765 F.2d 1546, 1560 (11th Cir. 1985)).
28. Doyle v. Ohio, 426 U.S. 610, 614 (1976) (holding that the prosecution violated the Fifth Amendment by asking and arguing a post-Miranda inquiry, "Mr. Wood, if that is all you had to do with this and you are innocent, when Mr. Beamer arrived on the scene why didn't you tell him?").
29. United States v. Taylor, 54 F.3d 967, 978 (1st Cir. 1995).
30. Taylor, 54 F.3d at 978.
31. See United States v. Pearson, 746 F.2d 787, 796 (11th Cir. 1984) (finding that a prosecutor's statements about the defendant's leg movements and nervous demeanor constituted indirect comments about the defendant's lack of testify, and thus violated the defendant's right to not be convicted except on the basis of evidence entered at trial).
Court discussed the propriety of an argument of pre-arrest silence as follows:

The first time petitioner claimed that the shooting was an accident was when he took the stand at trial. It was entirely proper—and probative—for the State to impeach his testimony by pointing out that petitioner had failed to tell anyone before the time he received his Miranda warnings at his arraignment about the shooting being an accident. Indeed, if the shooting was an accident, petitioner had every reason—including to clear his name and preserve evidence supporting his version of the events—to offer his account immediately following the shooting.34

The United States Supreme Court also clarified in Salinas v. Texas35 that the prosecution may argue an accused's refusal to answer questions prior to being taken into custodial care unless the accused has specifically invoked his Fifth Amendment right to remain silent.36 Based upon the Court's ruling in Salinas, if an accused voluntarily talks with the government during an investigation the prosecutor may argue that the accused did not act or speak during that interview in a manner consistent with an innocent person without violating the Fifth Amendment proscription.

For example, in United States v Zarauskas,37 the prosecutor properly argued in rebuttal closing:

Now, the defendant says there's not one shred of evidence, not one shred, that the defendant knew that these tusks were illegal. Well, if he thought they were illegal—or if they thought—if he thought they were legal, why couldn't he give a straight answer? Two hours and nine minutes, not once did he raise his voice or say, I didn't do what you're saying I did.38

In approving this rebuttal, the court made several points. First, the court noted that the prosecutor never commented on the accused's failure to testify.39 Second, the court observed that the prosecutor's closing remarks were directed exclusively to a pre-arrest voluntary interview between the government and the defendant that even the defense referenced in the defense closing.40 Third, the court explained that the Fifth Amendment does not prohibit the prosecution from replying to the defense's argument:

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34. Brecht, 507 U.S. at 628.
35. 133 S. Ct. 2174 (2013).
39. Id. at *8.
40. Id. at *7.
This exchange is a textbook example of an able defense lawyer attempting to 'present[ ] tailored defenses insulated from effective challenge.' The defense posed the rhetorical question - what is the ordinary human reaction to being accused of a crime he did not commit? The obvious answer is to deny committing the crime. But, having demanded an answer, the defense seeks to prohibit it. Once the defense proposed his theory and pressed the prosecution to answer his question, the prosecution was free to respond. In his rebuttal, the prosecutor did not comment on Mr. Zarauskas' failure to testify at trial. He responded only to the defense assertions about the admitted interview, and therefore, his 'remarks [were] made to rebut specific statements by defense counsel, and [were] proportionate to that end.' By advancing [his] theor[ y], [Mr. Zarauskas] opened the door to the statement at issue.41

Arguments that the “defense had not successfully rebutted in­criminating evidence,” generally “do not trespass upon the accused's right to remain silent.”42 A prosecutor may properly comment upon a defendant's failure to present witnesses so long as it is not phrased to call attention to a defendant's own failure to testify.43

E. FIFTH PRINCIPLE: DO NOT INFLAME THE Passions OR Prejudices OF THE JURY

Another cardinal principle of closing arguments is that a prosecu­tor may not inflame the passions or prejudices of the jury.44 In Darden v. Wainwright,45 the United States Supreme Court con­demned the prosecutor’s appeal to passions and prejudices in the fol­lowing closing argument:

He shouldn’t be out of his cell unless he has a leash on him and a prison guard at the other end of that leash . . . I wish [Mr. Turman] had had a shotgun in his hand when he walked in the back door and blown [Darden’s] face off. I wish that I could see him sitting here with no face, blown away by a shot­gun. I wish someone had walked in the back door and blown his head off at that point. He fired in the boy’s back, number five, saving one. Didn’t get a chance to use it. I wish he had

41. Id. at *12.
42. United States v. Sepulveda, 15 F.3d 1161, 1187 (1st Cir. 1993) (citing Lockett v. Ohio, 438 U.S. 586, 595 (1978)).
43. United States v. Castillo, 866 F.2d 1071, 1083 (9th Cir. 1988). “The Govern­ment commented on Castillo’s failure to produce evidence and witnesses, not his failure to testify.” Castillo, 866 F.2d at 1083.
44. See State v. Campos, 309 P.3d 1160, 1174 (Utah Ct. App. 2013) (explaining that the prosecutor should not be asking the jurors to put themselves in the victim’s place or to become the victim’s "partisan").
used it on himself. I wish he had been killed in the accident, but he wasn’t. Again, we are unlucky that time.46

The United States Court of Appeals for the District of Columbia Circuit explained: “[a] prosecutor may not make comments designed to inflame the passions or prejudices of the jury.”47

1. Counsel May Not Ask the Jurors to Personalize with the Victim

Virtually all courts hold that counsel, especially prosecutors, improperly appeal to passion and prejudice when they excessively personalize with the victim.48 In this regard, counsel may not “ask[] jurors to put themselves in the victim’s place,”49 state “how a victim would have testified had he or she been alive to testify,”50 or suggest[] that the jury should find the defendant guilty “out of vengeance or sympathy for the victim.”51 For the same reason, it would be improper to discuss the victims’ family members, children, and friends,52 or use enlarged photos of the victim or a poem to memorialize the victim during closing.53 Nor should the prosecutor “contend[] that the jury has a duty to protect the alleged victim—to become her partisan.”54 In the context of civil trials asking “a jury to place themselves in the plaintiff’s position and do unto him as they would have him do unto them” is a form of the impermissible “Golden Rule Argument.”55

2. Counsel May Not Dehumanize the Defendant

a. Calling the Accused Names or Making Dehumanizing Remarks Are Improper

A prosecutor who uses disparaging names or comparisons to describe the defendant or his or her actions risks committing prosecutorial misconduct by appealing to the passion and prejudices of

48. See State v. Thompson, 318 P.3d 1221, 1244-45 (Utah 2014) (stating that certain statements made by a prosecutor affected the objective detachment needed).
49. Thompson, 318 P.3d at 1245.
50. Id.
51. Id.
52. United States v. Dominguez, 835 F.2d 694, 700-01 (7th Cir. 1987).

This type of argument, where the jurors are asked to put themselves in the place of plaintiff, is commonly known as the ‘Golden Rule Argument’ and, upon objection being made, is normally considered objectionable and incompetent for the reason that it constitutes an appeal to the jury to abandon their position of impartiality and to exercise their discretion in the guise of an interested party. Boop, 193 N.E.2d at 716.
the jurors. For example, the prosecutor committed misconduct in *United States v. Moore* by comparing the defendant to a 9/11 “terrorist” on the eve of the first anniversary of those events. Similarly, the United States Court of Appeals for the District of Columbia Circuit in *United States v. Jones*, condemned the prosecutor calling the defendant an “executioner.”

The Nebraska Supreme Court in *State v. Barfield* provided a colorful example of improper characterizations. In *Barfield*, the prosecutor referred “to the defendant in turn as a ‘vicious dictator,’” a “two-headed hydra,” a “tower of terror,” a “monster of mayhem,” and a “king of killers.” Without deciding whether these hyperboles alone would justify reversal, the court condemned such dehumanization of the accused.

b. Predator/Prey Metaphors Are Improper

While using a demeaning caricature of the accused as a predator and the victim as the prey often is criticized by the courts as improper, seldom will an appellate court reverse a conviction solely on such demeaning name calling. In *Darden v. Wainwright*, the United States Supreme Court set the pattern regarding the use of name calling in closing arguments. In *Darden*, the Court held a closing argument replete with derogatory statements about the defendant, including statements that called the defendant an animal who should only be let out of his prison cell on a leash was “undoubtedly . . . improper.”

The United States Court of Appeals for the Ninth Circuit has stated that “[n]ame calling is not an admirable style of argument and we do not condone it, but this court has been reluctant to find it cause for reversal.” The United States Court of Appeals for the Tenth Cir-

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56. 375 F.3d 259 (3d Cir. 2004).
58. 482 F.2d 747, 753 (D.C. Cir. 1973).
60. 723 N.W.2d 303 (Neb. 2006), disapproved of on other grounds, State v. McCulloch, 742 N.W.2d 727 (Neb. 2007).
62. *Barfield*, 723 N.W.2d at 310, 313.
63. Id.
64. 477 U.S. 168 (1986).
66. Id. at 181 n.11. “As far as I am concerned, and as Mr. Maloney said as he identified this man this person, as an animal, this animal was on the public for one reason.” Id.
67. United States v. Berry, 627 F.2d 193, 200 (9th Cir. 1980). See *Hein v. Sullivan*, 601 F.3d 897, 913 (9th Cir. 2010) (calling the defendants “a pack of wolves” did not require reversal). See also People v. Chapin, 697 N.Y.S.2d 713, 739 (N.Y. App. Div. 1999) (calling the defendant a “predator” was improper, but “not so egregious to warrant
cuit held that the prosecutor calling the defendant a “wild animal that stalks its prey,” “a predator who lurks in the shadows,” a “monster who selects the most helpless victims,” and a “Mafia style killer,” though “highly questionable at best,” did not justify reversing a verdict.68 The United States Court of Appeals for the Fifth Circuit characterized a prosecutor's description of a video of the murder scene as “nothing less than predators stalking someone who was about to be killed” as “colorful pejoratives” that were not “so inflammatory” to be improper.69 The United States Court of Appeals for the Sixth Circuit in Bates v. Bell,70 reversed, in part, because the prosecutor repeatedly called the defendant a “rabid dog.”71

State courts are split between holding references to defendants as animals preying on victims as improper, although commonly not sufficient for a reversal,72 and characterizing such statements as a fair comment on the evidence presented.73

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68. Banks v. Workman, 692 F.3d 1133, 1149 (10th Cir. 2012). See also Jackson v. McKune, 121 Fed. Appx. 830, 833 (10th Cir. 2005) (calling a defendant a “wild animal preying on victims” did not constitute reversible error).


70. 402 F.3d 635 (6th Cir. 2005).


72. See e.g., Commonwealth v. Miles, 681 A.2d 1295, 1302-03 (Pa. 1996) (describing the defendant’s actions as like “animals of prey” not sufficient to reverse the conviction); People v. Ivory, 776 N.E.2d 763, 772-73 (Ill. App. Ct. 2002) (prosecutor’s reference to the defendant as “a wolf in sheep’s clothing” and argument that he “was part of a pack of predators,” though improper, was not reversible error); State v. Webb, 697 S.E.2d 662, 664-65 (S.C. Ct. App. 2010) (comparing the defendant to “hyenas” described as “vicious animals, predatory scavengers always looking for the easy prey” and asking the jury to “cage this wild animal” insufficient to justify reversal); Chapin, 687 N.Y.S.2d at 739 (calling the defendant a “predator” always improper, but “not so egregious to warrant reversal in light of the totality of the evidence.”); Brown, 675 N.Y.S.2d at 462 (calling the defendant a “predator” did not justify a reversal under the context of the case); Trull, 509 S.E.2d at 195 (referring to the defendant as a “predator” was “not so grossly improper as to require the trial court to intervene.”); Commonwealth v. Scarfo, 611 A.2d 242, 283 (Pa. 1992) (calling the defendant “a vicious vermin” and arguing “we have all the wolves and the leader of the pack in this room here on trial for the cowardly killing of the old, beaten, infirm[ ] prey of [the victim] improper and reversible error to admit.”)

73. State v. Redcap, 318 P.3d 1202, 1212-18 (Utah 2014) (the prosecutor referring to the defendant and other inmates as zoo animals and the defendant as a predator was deemed a fair inference from the evidence, especially because there was no suggestion of a threat to the community); Jones v. State, 389 S.W.3d 253, 257-58 (Mo. Ct. App. 2012) (calling the defendant “a predator” not determined to be improper unless it suggests a personal danger to the jurors or their families).
3. **Counsel May Not Ask the Jury to “Send a Message” by Their Verdict**

It would be inappropriate for a prosecutor to ask the jury to consider societal interests beyond the scope of the specific trial in providing a verdict. The common practice of asking the jurors to “send a message” to other criminals by their verdict is improper. For example, in *United States v. Sanchez*, the prosecutor closed his rebuttal argument with the following “send a message” exhortation:

> [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 nation 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?

The court in *Sanchez* explained several reasons why this closing argument was improper. First, “[p]rosecutors may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence.” Second, “prosecutors may not ‘point to a particular crisis in our society and ask the jury to make a statement’ with their verdict.” The court concluded “by his ‘send a memo’ statement, the prosecutor was encouraging the jury to come to a verdict based not on Sanchez's guilt or innocence, but on the ‘potential social ramifications’ of the verdict.”

Stated differently, “[r]eference to the jury's societal obligation is inappropriate when it suggests that the jury base its decision on the impact of the verdict on society and the criminal justice system rather

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74. *Thompson*, 318 P.3d at 1245; *Campos*, 309 P.3d at 1174. “Furthermore, ‘reference to the jury's societal obligation’ is inappropriate when it suggests that the jury base its decision on the impact of the verdict on society and the criminal justice system rather than the facts of the case.” *Id.*
76. 659 F.3d 1252 (9th Cir. 2011).
77. *United States v. Sanchez*, 659 F.3d 1252, 1256 (9th Cir. 2011).
78. *Sanchez*, 659 F.3d at 1256 (quoting *United States v. Koon*, 34 F.3d 1416, 1443 (9th Cir. 1994)).
79. *Id.* (quoting *United States v. Leon-Reyes*, 177 F.3d 816, 823 (9th Cir. 1999)).
80. *Id.* at 1257 (citing *United States v. Weatherspoon*, 410 F.3d 1142, 1149 (9th Cir. 2005)).
than the facts of the case." The case of *State v. Campos* provides another example of an improper argument based on the verdict's impact to society. The prosecutor in *Campos* began his closing argument with the theory that the case was about civilized society versus the defendant: "[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."

The prosecutor concluded his closing argument with the emotional appeal:

[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.

Reversing on appeal, the Court held that these arguments crossed the line of permissible argument by asking for communal vengeance rather than a judgment consistent with the jury instructions.

Also, the Utah Supreme Court in *Thompson* disapproved the following "send a message" argument: "[Y]our [guilty] verdict is vital, because it sends a message to [Thompson] that what he did was wrong, that you know that what he did was wrong, and that you're not going to stand for it. That the people of Utah won't stand for that kind of crime."

"Send a message" closings are inappropriate because they focus on social, rather than personal, justice.

4. **Counsel May Not Offer Arguments That Invoke Fear or Vengeance Rather Than Individual Justice**

It is improper for a prosecutor to invoke the juror's fears or sense of vengeance as part of a closing argument. Courts generally have held that "the determination of guilt must not be the product of fear or vengeance but rather intellectually compelled after a disinterested,

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81. *Thompson*, 318 P.3d 1221, 1246 (determining, "The statement was thus impossibly calculated to inflame the passions of the jurors and diverted the attention of the jurors from their duty to impartially apply the law to the facts of this case"); see also *State v. Olola*, 339 P.3d 164, 168 (Utah Ct. App. 2014) (detailing that "the prosecutor's statement urging jurors to convict Olola 'before somebody gets killed' was improper.").
82. 309 P.3d 1160 (Utah Ct. App. 2013).
84. Id. at 1173.
85. Id.
86. *Thompson*, 318 P.3d at 1245.
impartial and fair assessment of the testimony that has been presented." 87 The rationale for this proscription is that appeals to fear, vengeance, passions, and prejudice "divert the jury from its duty to decide the case on the evidence." 88 For example, the United States Court of Appeals for the Sixth Circuit in Bates v. Bell 89 reversed in part because the prosecutor appealed to the fears of the jury by suggesting that refusing to sentence the defendant to death would likely sentence future victims to death. 90

The same rationale extends to civil cases. For example, in Guar- anty Service Corp. v. American Employers' Insurance Co., 91 the court found improper a defense insurance company characterizing a plaintiff "as a 'greedy' insured," and arguing that "exaggerated insurance claims cause increased insurance premiums." 92 This concern for social issues, especially social issues that may personally affect the jurors, is inappropriate.

5. Arguing Local Bias Is an Improper Appeal to Prejudice

Counsel should not make an "us-against-them" plea-pitting "the community" against a nonresident corporation. 93 For example, in Whitehead v. Food Max of Mississippi, Inc., 94 the court chastised:

the Whiteheads' counsel made statements that appealed to local bias. On numerous occasions, he reminded the jury that Kmart is a national, not local, corporation, with its principal place of business in Troy, Michigan. And, he contrasted that with his status as a Mississippi resident and, implicitly, his clients' similar status: "as a little old lawyer down here in Mississippi, to take on a national corporation, I knew I had to bring in the best experienced person in security that I knew; and 'n]ow when I, as a lawyer here in Mississippi, bring a legal action against a national corporation—having done this a few years—they are tough cases' . . . The problem is—way up there in Troy, Michigan—where they decide to write a two or three inch thick loss prevention manual, they don't think about the customers' safety and security in the parking lot.

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87. See, e.g., State v. Todd, 173 P.3d 170, 176 (Utah Ct. App. 2007) (stating that the determination of guilt must be made after a logical assessment rather than an impassioned one).
88. Todd, 173 P.3d at 175. See also State v. Wright, 304 P.3d 887, 902 (Utah Ct. App. 2013) (stating that statements appealing to juror's emotions divert their attention away from the evidence).
89. 402 F.3d 635 (6th Cir. 2005).
91. 893 F.2d 725 (5th Cir. 1990).
93. Guar. Serv., 893 F.3d at 729.
94. 163 F.3d 265 (5th Cir. 1998).
Because they are more concerned about profits and not people.\textsuperscript{95}

The United States Court of Appeals for the Fifth Circuit condemned the argument as follows: "That this blatant appeal to sectionalism would be made in a federal court in this day and time is nothing short of amazing."\textsuperscript{96} The court concluded:

It goes without saying that such conduct and comments have no place in a federal court. Worse still, they prevent a fair trial. "Arguments which invite a jury to act on behalf of a litigant become improper 'conscience of the community' arguments when the parties' relative popular appeal, identities, or geographical locations are invoked to prejudice the viewpoint of the jurors." . . . When such arguments are used, as here, against out-of-state parties, they carry the potential of substantial injustice.\textsuperscript{97}

6. \textit{Arguing that the Jurors Should Consider the Potential Effects of a Verdict on Them Is Another Variation of the Improper Golden Rule Argument}

Counsel should not threaten the jury with potential consequences for themselves, their family, or their community if they acquit an accused or grant a verdict for either party. This is a form of the improper "Golden Rule" argument.\textsuperscript{98} Counsel also should not "[threaten] the jury in a criminal case that they will be branded as condoning crime if they acquit an accused. . . . The jury is not on trial."\textsuperscript{99}

7. \textit{Arguing Inapplicable Iconic Cases Is Improper}

It is improper for counsel to refer to iconic cases during closing and ask the jury to make an unfair or improper analogy to the notorious nature of the case. For example, defense counsel in \textit{Boyle v. Christensen},\textsuperscript{100} a negligence case involving claims of pain and suffering and loss of consortium, misrepresented the infamous McDonald's coffee case as an example of the consequences of what could go wrong if the

\textsuperscript{95} Whitehead v. Food Max of Mississippi, Inc., 163 F.3d 265, 276 (5th Cir. 1998).
\textsuperscript{96} \textit{Whitehead}, 163 F.3d at 276.
\textsuperscript{97} \textit{Id.} at 277.
\textsuperscript{98} Hodge v. Hurley, 426 F.3d 368, 384-85 (6th Cir. 2005) (stating, "the prosecutor's suggestion that the jury try to 'put [itself] in the place of someone that might run into [Hodge] at night' is a version of the impermissible 'golden rule argument.'"). \textit{See also} State v. Lumpkin, No. 91AP-67, 1992 WL 40555, at *2 (Ohio Ct. App. Feb. 25, 1992) (explaining that "the reference to appellant's propensity to shoot someone in the future borderlined on a threat to the jury that an acquittal would affect them personally.").
\textsuperscript{100} 251 F.3d 810 (Utah 2011).
jury relied on a per diem damage award for which the plaintiff had argued. Specifically, the defense argued:

Ladies and gentlemen, they want a lot of money for this. A lot of money. What's been written on the board is called a per diem analysis. ... How many days has it been since the accident? How many days for the rest of his life. And how much per day is that worth? That's what's been done here. That's how we get verdicts like in the McDonald's case with a cup of coffee.

In reversing for this improper argument the court made several points. First, the court observed:

Few cases have ever achieved as much notoriety among the general public of this country as the McDonald's coffee case, fueled by its wide-ranging and repeated publicity in national and local news media. It has been mocked in extremely popular entertainment television, including The Tonight Show, The Late Show, and Seinfeld. It has been debated on talk shows, parodied in television commercials, mentioned in congressional debates, and is firmly lodged in the public consciousness. ‘What made the headlines and what is most commonly recalled by the general populace about the ... case is the size of the verdict and the source of the injury—$2.9 million for spilled coffee.’ In U.S. popular culture, the case has come to symbolize greedy plaintiffs and lawyers who file frivolous lawsuits and win hugely excessive sums in a broken legal system.

Second, the court explained the reasonable basis of the McDonald's punitive damage award based upon the actual facts of the case. Third, the court noted that the “McDonald's coffee case had nothing to do with a ‘per diem,’” argument, the point for which the case was argued. Fourth, the court summarized the cumulative effect of the improper remark:

Here, a number of factors convince us there was a reasonable likelihood of a better verdict for Mr. Boyle absent the improper reference to the McDonald's coffee case: (1) the iconic nature of the case that has aroused such public passion, as described earlier in this opinion; (2) the fact that the trial judge did not sustain the objection, thus allowing the jury to believe it was proper to consider the McDonald's coffee case when deciding the verdict; (3) the misrepresentation of the

103. Id. (citations omitted).
104. Id. at 817-18.
105. Id. at 818.
McDonald's coffee case as a per diem analysis that could have convinced the jury it was similar to the case at hand when it was not; and (4) the size of the pain and suffering damages awarded by the jury, which certainly could have been the product of entirely rejecting a per diem analysis in response to the McDonald's coffee case comparison.  

The court concluded:

The erroneous reference 'might be compared to a drop of ink placed in a vessel of milk. It cannot long be seen, but it surely remains there to pollute its contents.' . . . We therefore reverse the court of appeals decision . . . and remand the case to the district court for a new trial.

The Boyle case provides an excellent example of all the things that would be improper about arguing an iconic case as part of a closing argument.

F. SIXTH PRINCIPLE: COUNSEL MAY NOT EXPRESS PERSONAL OPINIONS, INCLUDING PERSONAL OPINIONS ON CREDIBILITY

1. Permissible Inferences

Counsel may argue credibility in terms of what the jury can infer only from the facts of the case. Statements such as "she told the truth," "you know she told the truth," "[s]he had nothing to gain by lying," or "[y]ou could see her, you could see that she was forthright," all would be proper arguments because they explicitly or implicitly ask the jury to make permissible inferences from the evidence.

2. Impermissible Personal Opinions of Counsel

Counsel may not express a personal opinion about any of the issues in the case. The United States Supreme Court has held that when a prosecutor expresses his or her personal opinion of the defendant's guilt, he or she not only violates his or her ethical duties, but the prosecutor also creates two improper inferences:

such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize

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106. Id.
107. Id. at 819 (citation omitted).
109. Boyd v. French, 147 F.3d 319, 329 (4th Cir. 1998) (determining, "A prosecutor should refrain from stating his personal opinions during argument"); Bates v. Bell, 402 F.3d 635, 644 (6th Cir. 2005) (opining, "It is well-established law that 'a prosecutor cannot express his personal opinions before the jury.'") (quoting United States v. Galloway, 316 F.3d 624, 632-33 (6th Cir. 2003)).
the defendant's right to be tried solely on the basis of the evidence presented to the jury; and 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. 110

The case of United States v. Zehrbach 111 provides a useful example. 112 In Zehrbach, the prosecutor improperly argued:

I suggest you shouldn't believe Drizos and Smith because they're guilty of exactly the same bankruptcy fraud that these two defendants are guilty of. And don't you assume that they are not going to get what's coming to them either. 113

The United States Court of Appeals for the Third Circuit held the remarks improper for several reasons. The court held the first sentence improper because it "reflected the prosecutor's opinion concerning the guilt of [the defendants]." 114 The sentence also improperly suggested that the prosecutor believed that the uncharged witnesses were also guilty of a crime. 115 The second sentence also was improper: because it referred to information outside of the record and sought to influence the decision of the jury on an illegitimate basis. This Court has long acknowledged a defendant's 'right to have his guilt or innocence determined by the evidence presented against him, not by what has happened'—or by what may happen—"with regard to a criminal prosecution against someone else." 116

This prohibition against expressing an opinion on the truthfulness of the case 117 extends to any "impermissible conduct as any expression of belief which indicates that the prosecutor is relying on information other than that which has been presented in court." 118 In Brooks v. Kemp, 119 for example, the court found inappropriate a prosecutor's argument that stressed the prosecutor's "practice of only seeking death only in a few cases was improper," 120 because it suggested

110. United States v. Young, 470 U.S. 1, 11-12, 18, 19 (1985) (stating "[i]t is unprofessional conduct for the prosecutor to 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.").
111. 47 F.3d 1252 (3d Cir. 1995).
113. Zehrbach, 47 F.3d at 1259.
114. Id. at 1266.
115. Id.
116. Id. (citations omitted).
117. See ABA Canons of Professional Ethics, Canon 15. "It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause." Id.
118. Patriarca v. United States, 402 F.2d 314, 321 (1st Cir. 1968).
119. 762 F.2d 1383 (11th Cir. 1985).
120. Brooks v. Kemp, 762 F.2d 1383, 1410 (11th Cir. 1985).
that the defendant was “particularly deserving of the death penalty . . . ”\textsuperscript{121}

3. \textit{Impermissible Vouching for Witnesses}

“Vouching” for the credibility of witnesses is also improper. “Vouching constitutes an assurance by the prosecuting attorney of the credibility of a Government witness through personal knowledge or by other information outside of the testimony before the jury.”\textsuperscript{122} The courts discourage vouching because:

[s]uch conduct threatens to ‘convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant,’ thereby ‘jeopardiz[ing] the defendant’s right to be tried solely on the basis of the evidence presented to the jury,’ and ‘induc[ing] the jury to trust the Government’s judgment rather than its own view of the evidence.’ For a prosecutor’s conduct to constitute vouching, (1) ‘the prosecutor must assure the jury that the testimony of a Government witness is credible,’ and (2) ‘this assurance [must be] based on either the prosecutor’s personal knowledge, or other information not contained in the record.’\textsuperscript{123}

For example, in \textit{Hodge v. Hurley},\textsuperscript{124} a child-rape case where the case turned on credibility, the prosecution argued during closing that Hodge “is lying to extricate himself from what he’s done,”\textsuperscript{125} that the government witness “is absolutely believable, her family is absolutely believable,”\textsuperscript{126} and that the defense expert and defense counsel had

\textsuperscript{121} Brooks, 762 F.2d at 1413. See also Conner v. State, 303 S.E.2d 266, 276 (Ga. 1983) (explaining “[t]he portion of the prosecutor’s argument referring to his prior criminal experience and the frequency with which he had sought the death penalty was not supported by any evidence and, moreover, was irrelevant to any issue in the case. The argument was therefore improper.”); United States v. Cain, 544 F.2d 1113, 1116 (1st Cir. 1976). “It is, of course, elementary that statements of counsel as to personal belief or opinion are improper.” Cain, 544 F.2d at 1116; Greenberg v. United States, 280 F.2d 472, 474 (1st Cir. 1960).

In vigorous language [the prosecutor] expressed his personal opinion of the trustworthiness of the government’s evidence and the consequent guilt of the accused. Upon objection interposed, the court ruled in the presence of the jury that the prosecutor had a right to argue ‘his belief in the evidence.’ Counsel continued . . . The argument was then repeated.

\textit{Greenberg}, 280 F.2d at 474; \textit{Harris v. United States}, 402 F.2d 656, 657 (D.C. Cir. 1968). “Reasonably, there is a total fabrication. I would submit, ladies and gentlemen, it is a lie.” \textit{Harris}, 402 F.2d at 657.

\textsuperscript{122} United States v. Berrios, 676 F.3d 118, 133 (3d Cir. 2012) (citing United States v. Walker, 155 F.3d 180, 184 (3d Cir. 1998)) (citations omitted).

\textsuperscript{123} \textit{Berrios}, 676 F.3d at 133.

\textsuperscript{124} 426 F.3d 368 (6th Cir. 2005).

\textsuperscript{125} Hodge v. Hurley, 426 F.3d 368, 377 (6th Cir. 2005).

\textsuperscript{126} Hodge, 426 F.3d at 377.
both "lied." The state court on appeal without citing any specific testimony concluded:

The comments spoken by the prosecuting attorney here were in the context of contrasting the defense and prosecution witnesses. The prosecutor did not claim to have personal knowledge of any witness's truthfulness. We find the prosecutor's comments on the credibility of witnesses were within the bounds of [Ohio law].

On writ of habeas corpus, the United States Court of Appeals for the Sixth Circuit rejected the state court's analysis: "We disagree with the state court's conclusion that no misconduct occurred. It is patently improper for a prosecutor either to comment on the credibility of a witness or to express a personal belief that a particular witness is lying."

Hurley reminds us that while counsel may argue issues of credibility during closing argument, counsel may not express personal opinion on issues of credibility or personally "vouch" for a witness's credibility. The test for improper vouching is whether the jury could reasonably believe that the prosecutor was indicating a personal belief in the witness'[s] credibility," either by "making explicit personal assurances of the witness'[s] credibility," or by "indicating that information not presented to the jury supports the testimony."

When an attorney argues in closing, in regards to witnesses: "'I think he was credible'... 'you heard from [Specialist]—who I think came across as a very reliable witness'... 'I think [the witness] was very candid' and, 'I think [another witness] was candid. I think he was honest,'... 'I don't think [he] was credible. I think he was being dishonest with you,'" counsel has improperly provided "'[e]xpressions of personal opinion'" which amounts to "a form of unsworn, unchecked testimony" that would "tend to exploit the influence of the prosecutor's office and undermine the objective detachment

127. Id. at 377, 383.
128. Id. at 377.
129. Id. See also Bates, 402 F.3d at 646. "To be certain, prosecutors can argue the record, highlight the inconsistencies or inadequacies of the defense, and forcefully assert reasonable inferences from the evidence. But, they cannot put forth their opinions as to credibility of a witness, guilt of a defendant, or appropriateness of capital punishment." Id.; United States v. Carroll, 26 F.3d 1380, 1389 (6th Cir. 1994). "We cannot overstate the extent to which we disapprove of this sort of improper vouching by prosecutors." Carroll, 26 F.3d at 1389.
130. See e.g., Thompson, 318 P.3d at 1241 ("In closing arguments, a prosecutor may draw 'reasonable inferences based upon the demeanor of the witness'.")
131. Id. at 1241 (stating that "a prosecutor engages in misconduct when he or she expresses personal opinion or asserts personal knowledge of the facts").
132. Id. (citing State v. Carter, 776 P.2d 886, 892 (Utah 1989) (citation and internal quotation marks omitted)).
133. Id.
that should separate a lawyer from the cause being argued.”134 These statements are impermissible because “they induce the jury to trust the prosecutor’s judgment rather than to form their own view of the evidence.”135

4. Referencing Body Language of Witnesses Is Permissible, But Interpreting the Body Language for the Jury Is Impermissible

Although counsel may draw the jury’s attention to verbal and non-verbal responses of witnesses that may relate to credibility, counsel may not provide evaluative arguments about body language that amount to expert testimony on issues of credibility. For example, the court in *State v. Thompson*136 held a prosecutor’s “expert” advice to the jury on reading body language constituted prosecutorial misconduct.137 Counsel improperly argued:

And I hope you observed him. I hope you observed his body language. It was very negative. [Thompson] had his hands out before him like this, blocking. I think that’s a classic sign of someone who’s hiding. And if you noticed, when I would ask him a question of particular significance about the acts he performed on [A.T.], he would shut his eyes and shake his head ‘no.’ To me that’s a classic sign of his dishonesty. He couldn’t look me in the eyes and tell me the answer to the question.138

The court explained that: “by instructing the jurors as an expert on how to interpret Thompson’s body language, the prosecutor impermissibly intruded on the jurors’ role as the fact-finders.”139

5. Arguing That a Witness Lied

Arguing that a witness “lied” raises similar questions of whether the jury is likely to infer that counsel is expressing a personal belief or a fair inference from the evidence presented.140 There are at least four reasons why arguing that the witness lied during their testimony is inappropriate.141

134. *Id.*
135. *Id.* at 1243.
137. *Thompson*, 318 P.3d at 1243-44.
138. *Id.* at 1243.
139. *Id.* at 1244.
140. *Id.* at 1242-43.
141. *See United States v. Schmitz*, 634 F.3d 1247, 1268-69 (11th Cir. 2011) (explaining four reasons why it is inappropriate to argue that a witness lied during their testimony).
First, the rules of evidence related to credibility permit testimony on whether a witness has a reputation for being untrustworthy, but not on whether a witness is lying in the case at issue. Second, an opinion that another witness is lying invades the domain of the jury, who decides issues of credibility. Third, the fact that a witness may disagree factually on an event with another witness does not mean another witness is lying in reporting contrary facts. Different witnesses may have had different perspectives on the facts perceived, may have misremembered the facts, or may have different understanding of either the question asked or the answer given. Fourth, an opinion that another witness is lying is argumentative of an intent to deceive. Accordingly, it would be inappropriate for a prosecutor to argue a witness was lying in closing argument unless the witness admitted to that fact. The courts almost universally condemn as misconduct counsel calling parties or witnesses liars.

G. SEVENTH PRINCIPLE: DO NOT MISUSE EVIDENCE ADMITTED FOR A LIMITED PURPOSE BY ARGUING A NON-ADMISSIBLE PURPOSE

Only the criminal defendant can put his or her general character into evidence, unless character is an issue in the case under Federal Rule of Evidence 405(b). Consequently, a prosecutor should not argue the defendant's bad character or misuse character evidence admitted for a limited Federal Rule of Evidence 404(b) purpose, unless the defense has opened the door.

A character-evidence remark during closing, arguing essentially "once a drug dealer, always a drug dealer," would constitute prosecutorial misconduct. For example, the United States Court of Appeals for the Seventh Circuit in United States v. Simpson reversed and remanded a drug conviction because during closing the prosecution argued that Simpson had "done 'so many' [crack cocaine] deals that he could not remember the [deal] for which he stood trial."

142. See Schmitz, 634 F.3d at 1269 (explaining that conflicting testimony is not indicative of an intent to deceive, and using that to argue a witness was lying is argumentative).
143. Id. at 1267-69.
144. United States v. Rodriguez, 765 F.2d 1546, 1559-60 (11th Cir. 1985) (condemning but not requiring a reversal when the prosecutor improperly argued "[Ramirez is] a liar . . . Ladies and gentlemen, he's [Ramirez] phony. Rodriguez is phony. They have disrespect of the law. They disregard people. They spit on the country that's accepted them.").
146. 479 F.3d 492 (7th Cir. 2007).
147. United States v. Simpson, 479 F.3d 492, 503 (7th Cir. 2007).
H. Eighth Principle: A Prosecutor Should Not Take Artistic License with the Evidence During Closing

A prosecutor cannot take artistic license with the evidence in the case, especially if it would sensationalize the evidence and encourage a verdict as a matter of passion, rather than reason. For example, in United States v. Moore, 148 the prosecution tried to paint a dramatic picture of the death of one of the victims by “imagining” a factual scenario that had no factual basis in the evidence presented, other than the drowning death of a victim. 149 The prosecution argued:

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 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. 150

In holding the argument improper on appeal, the United States Court of Appeals for the District of Columbia Circuit in Moore explained:

In summarizing evidence supporting conviction, 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.' 151

I. Ninth Principle: Do Not Make Disparaging Remarks About Opposing Counsel

A closing argument is improper when a prosecutor is “permitted to make unfounded and inflammatory attacks on the opposing advocate,” 152 rather than arguing the facts of the case. 153 A “smoke and

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150. Moore, 651 F.3d at 53.
151. Id. (quoting Gaither v. United States, 413 F.2d 1061, 1079 (D.C. Cir. 1969)).
mirror" argument must focus on the evidence presented, rather than the lack of credibility of opposing counsel.\textsuperscript{154}

The case of United States v. Young\textsuperscript{155} provides a classic example of disparaging remarks from both counsel and a reprimand by the United States Supreme Court, which still resulted in a refusal to reverse the verdict under a plain error standard of review.\textsuperscript{156} In Young, "[d]efense counsel began his closing argument by arguing that the case against respondent ha[d] been presented unfairly by the prosecution," and that "[f]rom the beginning to this very moment the [prosecution's] statements [had] been made to poison your minds unfairly."\textsuperscript{157} Defense counsel improperly argued:

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 one in this whole affair that has acted with honor and with integrity' and that '[t]hese complex [Department of Energy] regulations should not have any place in an effort to put someone away.'\textsuperscript{158}

In rebuttal, the prosecutor answered the challenge by expressing his personal opinion in the prosecution's case:

I think [defense counsel] said that not anyone sitting at this table thinks that Mr. Young intended to defraud Apco. Well, I was sitting there and I think he was. . . . I think he did. If we are allowed to give our personal impressions since it was asked of me.\textsuperscript{159}

Finally, the prosecutor argued the following in response to the "integrity" challenge presented by the defense:

I don't think you're doing your job as jurors in finding facts as opposed to the law that this Judge is going to instruct you, you think that's honor and integrity then stand up here in Oklahoma courtroom and say that's honor and integrity; I don't believe it.\textsuperscript{160}

\begin{itemize}
\item \textsuperscript{155} 470 U.S. 1 (1985).
\item \textsuperscript{156} United States v. Young, 470 U.S. 1, 6 (1985).
\item \textsuperscript{157} Young, 470 U.S. at 6.
\item \textsuperscript{158} Id. at 4-5 (citations omitted).
\item \textsuperscript{159} Id. at 5.
\item \textsuperscript{160} Id. at 5-6.
\end{itemize}
The United States Court of Appeals for the Tenth Circuit reversed and remanded holding that the remarks constituted both prosecutorial misconduct and plain error.\textsuperscript{161} Reversing on appeal, the Supreme Court agreed that the prosecution’s response to defendant’s accusations constituted misconduct, but reversed the Tenth Circuit that it did not constitute plain error.\textsuperscript{162} The Court made several points. First, the Court acknowledged that a prosecutor should “refrain from improper methods calculated to produce a wrongful conviction . . . .”\textsuperscript{163} Second, the Court observed that under the ABA Code of Professional Responsibility, “[i]t is unprofessional conduct for the prosecutor to 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.”\textsuperscript{164} Third, the Court noted:

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.’ Defense counsel, like the prosecutor, must refrain from interjecting personal beliefs into the presentation of his case.\textsuperscript{165}

Similarly, “[d]efense counsel, like his adversary, must not be permitted to make unfounded and inflammatory attacks on the opposing advocate,” even though such remarks may be unreviewable if there is an acquittal.\textsuperscript{166} Fourth, the Court reprimanded both counsels: “The kind of advocacy shown by this record has no place in the administration of justice and should neither be permitted nor rewarded; a trial judge should deal promptly with any breach by either counsel.”\textsuperscript{167} Notwithstanding the clear misconduct, the Court held that the doc-

\begin{itemize}
  \item \textsuperscript{161} \textit{Id.} at 7.
  \item \textsuperscript{162} \textit{Id.} at 20.
  \item \textsuperscript{163} \textit{Id.} at 7 (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).
  \item \textsuperscript{164} \textit{Id.} at 7 (citing ABA Standards for Criminal Justice § 3-5.8(b) (2d ed. 1980)).
  \item \textsuperscript{165} \textit{Id.} at 8-9.
  \item \textsuperscript{166} \textit{Id.} at 9.
  \item \textsuperscript{167} \textit{Id.} See also Chicago & N.W. Ry. Co. v. Kelly, 84 F.2d 569, 576 (8th Cir. 1936).
\end{itemize}

Counsel referred to the defense as ‘a trumped up case,’ ‘the miserable defense that the railroad company has put up here,’ ‘a trumped up case like that, on testimony that you must know is not true, and on testimony which they admit was not true, in the last trial,’ and ‘the only reason that they put in that kind of evidence, in my opinion, is to keep down the damages this man has honestly sustained.’

trine of invited reply and the standard required by the plain error doctrine did not justify reversal of the conviction:

When reviewed with these principles in mind, the prosecutor's remarks cannot be said to rise to the level of plain error. Viewed in context, the prosecutor's statements, although inappropriate and amounting to error, were not such as to undermine the fundamental fairness of the trial and contribute to a miscarriage of justice.168

The United States Court of Appeals for Tenth Circuit in United States v. Linn169 also condemned disparaging remarks about opposing counsel during closing:

[C]omments by prosecutors to the effect that a defense attorney's job is to mislead the jury in order to garner an acquittal for his client is not only distasteful but borders on being unethical. . . . Such comments only serve to denigrate the legal profession in the eyes of the jury and, consequently, the public at large.170

The case of State v. Barfield171 provides an example of a prosecutor improperly attacking opposing counsel.172 In rebuttal argument, in response to the defense attorney calling a prosecution witness a liar, the prosecutor argued:

You know, in 20 years as a prosecutor the hardest thing I think I've had to do is sit there with a straight face when a criminal defense lawyer had to look up the definition of “lie” in a dictionary. Why, I thought that was printed on the back of their business cards.173

In reversing on appeal, the Nebraska Supreme Court justified the necessity of a new trial as follows:

we similarly conclude that to leave such conduct uncorrected would result in damage to the integrity, reputation, and fairness of the judicial process. We again emphasize that the remarks made by the prosecutor, especially the prosecutor's statement to the effect that defense lawyers are liars, are of a very serious nature. In addition, the prosecutor's unacceptable remarks do not reflect a single, isolated instance, but were numerous. Moreover, because the disparaging remark as to defense attorneys was made during rebuttal, defense counsel had no opportunity to respond to and mitigate the

168. Young, 470 U.S. at 16.
169. 31 F.3d 987, 993 (10th Cir. 1994).
170. United States v. Linn, 31 F.3d 987, 993 (10th Cir. 1994) (citations omitted).
171. 723 N.W.2d 303, 313-15 (Neb. 2006).
173. Barfield, 723 N.W.2d 303, 311, disapproved of on other grounds, McCulloch, 742 N.W.2d 727.
last impression left with the jury before deliberations: that defense counsel, like all defense lawyers, was a liar. 174

It is improper to suggest opposing counsel has orchestrated an intentional deception in the case. An argument that the opposing counsel has offered a "red herring" argument to intentionally deceive is improper. For example, in State v. Campos, 175 the prosecutor argued in closing:

And is there any relationship with a red herring and the defense in this case? They would have you believe an almost unbelievable story. Why? Simply to confuse and distract. . . . Why would they do that? Just a red herring. A ploy to confuse and distract. 176

The Utah Supreme Court, reversing on appeal, held:

The prosecutor's comments here crossed the line from permissible argument of the evidence to an impermissible attack on defense counsel's character. The prosecutor argued not only that the claim of self-defense was a distraction, but also that it was a technique or ploy to confuse and distract the jury. That is, the prosecutor argued that defense counsel intended to mislead the jury. Arguing 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. 177

Referring to defense counsel's theory as a red herring may be appropriate if the reference could be classified as a comment on the strength of "the evidence and the inferences and deductions arising therefrom," rather than an attack on opposing counsel's integrity. 178

J. Tenth Principle: Do Not Argue Religious Doctrine

Religion is part of our cultural, and is represented plentifully in our literary, history. Accordingly, it may be permissible to use a scriptural reference for poetic or analogy purposes, 179 but not for judgment-

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174. Id. at 315.
175. 309 P.3d 1160 (Utah 2014).
176. State v. Campos, 309 P.3d 1160, 1174 (Utah Ct. App. 2014), cert. denied, 320 P.3d 676 (holding that a prosecutor's use of "red herring" and "smoke and mirrors" referred to the weakness of the argument, rather than a suggestion that counsel was intentionally trying to deceive).
177. Campos, 309 P.3d at 1175, cert. denied, 320 P.3d 676 (suggesting that impugning defense counsel's character and wrongly accusing defense counsel of misleading witnesses constitute prosecutorial misconduct).
179. Bussard v. Lockhart, 32 F.3d 322 (8th Cir. 1994) (quoting Proverbs from the Bible on the issue of reasonable inference suggested by flight as acceptable where it is
tal effect. In *Bennett v. Angelone*, a murder case, the prosecutor closed with reference to biblical injunctions arguably applicable to the issue of capital punishment:

Some will say that society shouldn't take a life because that's murder also. That's not true. Vengeance is mine saith the Lord, but later when he covered the Earth with water and left only Noah and his family and some animals to survive, when he saw the damage what has been done to the Earth, God said 'I'll never do that again' and handed that sword of justice to Noah. Noah is now the Government. Noah will make the decision who dies. 'Thou shall not kill' is a prescription against an individual; it is not against Government. Because Government has a duty to protect its citizens.

In rebuttal the prosecutor continued his religious sermon:

Our Government has decided that the death penalty is legitimate and is morally right. The law says for a wantonly, outrageous, or vile murder, a person may be put to death. When Jesus was being tormented by the Roman soldiers before his death, they asked him jokingly, is it lawful to pay tribute unto Caesar? Jesus said give those things that are Caesar's unto Caesar, and those things that are God's to God. The moral being follow the law and leave the rest to Heaven.

On appeal the court made several points. First, the court explained: "Federal and state courts have universally condemned such religiously charged arguments as confusing, unnecessary, and inflammatory." Second, the court observed that the biblical references were not poetic license, but instead "the Commonwealth's attorney improperly drew on his reading of biblical law to justify the morality of merely for more poetic, but accurate, explanation of state law; distinguishing this from misusing Bible "to invoke the wrath of God . . . or to suggest that the jury apply divine law as an alternative to the law of Arkansas".

181. Bennett, 92 F.3d 1336, 1346 (4th Cir. 1996).
182. Bennett, 92 F.3d at 1346.
183. *Id.* (citing Cunningham v. Zant, 928 F.2d 1006, 1019-20 (11th Cir.1991)).
the state's death penalty. Such statements, worthy of the profoundest respect in proper contexts, have no place in our non-ecclesiastical courts and may not be tolerated there.\textsuperscript{184} Third, the court concluded that notwithstanding the clearly erroneous argument, the comments did not make the trial constitutionally unfair.\textsuperscript{185}

K. Eleventh Principle: Do Not Argue the Golden Rule

A classic, but impermissible, closing argument asks the jurors to put themselves in the shoes of the victim or plaintiff, to do unto others as you would have them do unto you. The United States Court of Appeals for the First Circuit discussed the “Golden Rule” in Forrestal v. Magendantz,\textsuperscript{186} a medical malpractice case.\textsuperscript{187} In Forrestal, the plaintiff started out his closing with, “I want you to picture yourself as if Jesse was your little boy.”\textsuperscript{188} Counsel then asked the jury to put themselves “in the shoes of Jesse” or “in the shoes of his mother and father.”\textsuperscript{189} After a successful objection, counsel continued: “then say, members of the jury, if this were my child, what amount of money would I accept for my child to have Jesse's injuries and afflictions.”\textsuperscript{190} The court explained why this was improper as a violation of the “Golden Rule” argument:

There can be little doubt that suggesting to the jury that it put itself in the shoes of a plaintiff to determine damages is improper argument. This so-called Golden Rule argument has been universally condemned because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence.\textsuperscript{191}

Similarly, in Ivy v. Security Barge Lines, Inc.,\textsuperscript{192} plaintiff's counsel, in a wrongful death action, improperly argued:

'Now, it is a happy situation that we are not often faced with having to determine or go to court because of the loss of a son. This, fortunately, does not happen very often. And in our system of justice the only way that we have of compensating anyone for a wrong that was done to them, and there is just no

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\item Bennett, 92 F.3d at 1346.
\item Id. at 1347. "Thus, we ultimately are convinced that the Commonwealth's improper arguments—though clearly such did not so infect the sentencing proceedings as to render them constitutionally unfair." Id.
\item Forrestal v. Magendantz, 848 F.2d 303 (1st Cir. 1988).
\item Id.
\item Id. at 309.
\item Id. at 308 (citing Ivy v. Security Barge Lines, Inc., 585 F.2d 732, 741 (5th Cir. 1978)).
\item 585 F.2d 732, 741 (5th Cir. 1978), cert. denied, 446 U.S. 956 (1980).
\end{enumerate}
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question of the wrong in this case, the only way we have to compensate them is with money. That is not adequate, but it is the only thing they have, and it is the only thing available. If my son were killed, I don’t know, I don’t know what the compensation would be. I think probably I would have to go to Mandeville, or someplace to the mental institution. But, at any rate, Johnny Ivy was lost and his parents are entitled to recover for his death. Just as you would be entitled if your sons were wrongfully killed, and I would be entitled if my son were killed. But to put a dollar value on a son’s life, you know... What is grief worth? Grief. What is the permanent lack of a smile?... This loss has got to be adequately compensated. And I can only suggest to you that when you determine the amount of damages to be awarded to Mr. and Mrs. Ivy that you place yourselves in their position, that you put yourself in their shoes. And I can only suggest to you that an award of less than $100,000 per parent would not be adequate. There is just no way to adequately compensate them, but that is the best way we have.'193

In reversing and remanding, the court explained:

We need only note that counsel clearly argued the Golden Rule, that the jurors should put themselves in the shoes of the plaintiff and do unto him as they would have him do unto them under similar circumstances. Such an argument is universally recognized as improper because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence.194

193. Ivy, 585 F.2d at 741 n.10 (citations omitted). See also Chicago & N.W. Ry. Co. v. Kelly, 84 F.2d 569, 576 (8th Cir. 1936).

It is unnecessary, we think, to go any further with the analysis of the argument of counsel for the plaintiff. He asked the jury to place themselves in the position of the plaintiff’s mother or son or husband; in position which would have disqualified them to act as jurors. This has been held to be improper. Kelly, 84 F.2d at 576.

194. Ivy, 585 F.2d at 741. See also Klein v. Herring, 347 So. 2d 681, 682 (Fla. Dist. Ct. App. 1977) (explaining that “[a]n argument that jurors should put themselves in the plaintiff’s place, commonly known as the golden rule argument, is impermissible and constitutes reversible error.”); Bullock v. Branch, 130 So. 2d 74, 76 (D. Fla. 1961).

It is hard to conceive of anything that would more quickly destroy the structure of rules and principles which have been accepted by the courts as the standards for measuring damages in actions of law, than for the juries to award damages in accordance with the standard of what they themselves would want if they or a loved one had received the injuries suffered by a plaintiff. In some cases, indeed, many a juror would feel that all the money in the world could not compensate him for such an injury to himself or his wife or children. Such a notion as this—the identifying of the juror with a plaintiff’s injuries—could hardly fail to result in injustice under our law, however profitable it might be deemed by many plaintiffs in personal injury suits.

L. Twelfth Principle: Misconduct by One Party During Closing Often Will Be Attenuated by the Doctrine of Invited Reply or Invited Error

The courts often identify improper arguments in closing but refuse to reverse under the doctrine of reply or invited error. In Lawn v. United States, a tax evasion case, the Court refused to overturn criminal convictions for income tax evasion, in part, because of the invited reply doctrine. In his closing argument, defense counsel attacked the Government for "persecuting" the defendants, argued the case had been filed in bad faith, and that the Government's witnesses were perjurers. The prosecution, in rebuttal, personally vouched for the credibility of the challenged witnesses. In refusing to reverse, the Court held that defense counsel's "comments clearly invited the reply." The Lawn invited reply doctrine has become the standard response whenever an opponent opens the door to borderline comments and thereby invites an equally improper response. When misconduct is mutual, the courts are less likely to find any reversible error.

III. Conclusion

In conclusion, counsel has a specific opportunity in closing to wax eloquent by outlining the facts as applied to the law presented by the court. Counsel, however, may not take liberal discretion in forming closing arguments as an open-ended invitation to a free for all. Instead, counsel should consider the principles outlining improper arguments and ethically frame the closing argument in a way that works with the facts admitted and inferences reasonably drawn therefrom.

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Now, Gentlemen, what are you going to do about this? How much are you going to give this woman? I want you, when you go back to the jury room, to figure on what she is entitled to. . . . What is your hearing worth? Now think about it that way. Apply the Golden Rule when you come to answer this question. What's your ear worth? . . . What would you sell your ear for? Either one of them? Now think about it that way.'

Red Top Cab, 270 S.W.2d at 275.


196. Lawn v. United States, 355 U.S. 359, 359 n.15 (1958). See also United States v. Young, 470 U.S. 1, 11 (1985) (stating, "To help resolve this problem, courts have invoked 'invited response' or 'invited reply' rule, which the court treated in Lawn v. United States.").

197. Lawn, 355 U.S. at 359-360, n.15.

198. State v. Redcap, 318 P.3d 1202, 1213 (Utah Ct. App. 2014) (citing United States v. Schwartz, 655 F.2d 140, 142 (8th Cir.1981)). "It is well settled that prejudicial error does not result from . . . improper remarks made during closing argument when such remarks were provoked by the opposing counsel." Redcap, 318 P.3d at 1213; State v. Wright, 304 P.3d 887, 902 (Utah Ct. App. 2013) (explaining that when the defense "encouraged the jury to view the facts . . . in a manner that supported [its] theory," a prosecutor was "entitled to argue from the evidence at trial that [a witness] had a different motivation" for testifying).
If an opponent fails this ethical and legal duty, then counsel should object, ask to strike or for a reprimand, and consider a motion for a new trial if necessary. Counsel should always remember that civility as well as integrity matter in closing as a means of efficacy as well as a requirement of the law. Advocates should advocate, but they must do so consistent with the law, rather than appealing to the passion and prejudice of the jurors. Opponents should vigilantly monitor the closing to ensure that justice is served and the profession elevated even in the heat of the battle.