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Closing Argument Procedure

J. Alexander Tanford†

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I. Introduction

Legal scholars have paid little attention to closing arguments. There are few publications that touch on this phase of the trial process, most focusing on the substance of prosecution arguments in criminal cases. As a result, too few of the legal principles and doctrines of closing argument procedure are understood, especially in civil trials. The purpose of this article is to set out a more comprehensive picture of this body of law than has been done previously, and to define and analyze its major doctrines.

For purposes of this article, a study was made of a one percent random sample of appellate opinions concerning proper closing argument procedure. Approximately 700 cases comprised the sample. All the relevant statutes and codified rules were also studied. There were...
several reasons for using a large random sample of opinions. First, all major doctrines of closing argument procedure had to be accounted for, and it was not certain that even the combined existing publications articulated all of them. The use of this size sample provided reasonable assurances that all major legal doctrines would be found, even if not previously identified. Second, the use of a representative sample made it possible to distinguish between cases containing genuine issues arising regularly in various jurisdictions, and \textit{sui generis} cases. Therefore, several issues intuitively appearing unlikely to be considered by the courts were included, such as whether counsel's failure to request argument constitutes a waiver, what happens if a juror is sleeping or intoxicated during argument, and whether multiple parties on one side of a case may be limited to a single argument. The third advantage of a random sample is that it allows making of more reliable and less intuitive generalizations about what appellate courts do. Such generalizations involve whether courts agree or disagree on how an issue should be resolved, which are majority and minority solutions to doctrinal puzzles, and how treatment of an issue has changed over time. All three are important when exploring a relatively unknown field.

This article will attempt to organize, describe, and analyze the basic legal doctrines of closing argument procedure. It begins with the fundamental procedural right to be heard, which is the right to give a closing argument, and secondary rules facilitating or restricting that right, including rules regulating the mechanical aspects of argument. It then sets forth a tentative scheme of the doctrines regulating the content of argument in order to examine the procedures for enforcing those rules in the trial court and at the appellate level. Throughout the article, the focus is on the scope of judicial discretion built into the procedural rules of closing argument.

3. For example, several opinions discussed whether the trial judge must grant a request for a recess in which to prepare for closing argument; an issue not mentioned in any other source of which the author is aware. \textit{See} text accompanying notes 113-118.


5. This study does not contain an empirical component examining the extent to which real trial judges enforce or ignore the rules of argument. Obviously such a study is necessary before the mechanisms by which closing arguments are regulated can be fully understood. This seems intuitively true for any area of law. However, before an effective study on how judges actually implement the rules of argument procedure can be made, one must know ordinary legal rules.

II. Closing Argument Procedure

A. The Right to Be Heard

Every party in a civil or criminal trial has the right to be heard in argument on the merits of the case. The right to argue is derived from various clauses of the federal constitution, provisions in state constitutions, statutes, court rules, the nature of the adversary system, and even natural law. Regardless of where the courts derive the right to argue, they are uniform in defining it: every party in a civil or criminal case has the right to argue the case to the jury, if there is any issue for the jury to decide.

1. Scope of the Right to Argue

The extent of the right to argue is not well settled. The consensus is that the right may be exercised by a party either personally or...
through counsel. It includes the right to argue the facts in evidence, to argue how the law is to be applied, and to utilize oratorical skills. It extends to all civil and criminal cases surviving a motion for a directed verdict in jury and nonjury trials. It includes the right of the party with the burden of proof to argue last. The right is waivable, its denial is reversible error, and it is subject to reasonable limitations and regulations.

No real controversy exists over whether the right to be heard may be exercised by a party personally or through counsel. Some cases, statutes, and court rules state the right to argue is given to the attorney or is derived from a party's right to counsel. However, the right to counsel says more about the expectation that a "proper" trial is one where the parties have lawyers rather than who has the right to argue. The cases, statutes, and court rules give no indication that the right would be denied to an unrepresented party. Additionally, a party does not appear to have two rights to argue—one to argue personally and one by counsel.

17. 5 F. BUSCH, supra note 1, at 412-20 (listing cases to support the proposition); see also Silver v. New York Life Ins. Co., 116 F.2d 59 (7th Cir. 1940).
18. E.g., Mo. R. Crim. P. 27.02(1).
20. Id. at 862.
21. See Herring v. New York, 422 U.S. 853, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975) (right derives partly from right to counsel; counsel has right to closing summation); United States v. Spears, 671 F.2d 991, 992 (7th Cir. 1982) (argument is an integral part of right to counsel); Turley v. Kotter, 263Pa. Super. 523, 398, A.2d 699, 704 (1979) (argument is part of right to representation by an attorney in civil cases); Mont. Code Ann. § 46-16-401(6) (1983) (counsel may argue); Va. Code Ann. § 8.01-379 (1984) (counsel's right to argument is preserved); Civil Dist. Ct. R. 14 (in all arguments, counsel shall be heard); Me. R. Crv. P. 51(a) (counsel for each party shall be allowed one hour for argument); Mich. Ct. R. 2.507(E) (attorney for the party is entitled to make a closing argument); Mo. R. Crim. P. 27.02 (the attorney shall make an argument).
22. See Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) (defendant has constitutional right to proceed without counsel); Americus v. McGinnis, 128 Wash. 28, 221 P. 987 (1924) (civil plaintiff represented self; his right to address jury held to be absolute).
23. Compare Poindexter v. State, 268 Ind. 167, ____., 374 N.E.2d 509, 514 (1978) (when defendant has been competently represented throughout trial, it is proper for the court to determine whether argument is best made by counsel or by defendant) with Americus v. McGinnis, 128 Wash. 28, 221 P. 987 (1924) (plaintiff had absolute right to argue despite fact that associate counsel also argued; double argument issue not discussed).
The right to argue includes the privileges to argue the facts in evidence,\textsuperscript{24} to argue how the law is to be applied,\textsuperscript{25} and to employ oratorical and rhetorical skills.\textsuperscript{26} Most descriptions of the argument’s scope recognize that all three components may be properly included in a closing argument.

\[\text{[A]rgument may properly include a full discussion of the issues in the case, the credibility of the several witnesses . . ., the probative value of the evidence as satisfying or failing to satisfy the required burden of proof, [and] the application of the law to the evidence. . . . It is the function of argument, and the inestimable privilege of the advocate, to discuss the evidence and the law with the jury so that it will understand the full significance of the former and the applicability and justice of the latter . . . . Such an argument, so long as it is supported by the facts and circumstances properly in evidence, may be couched in vigorous and pungent phrases, embellished with oratorical flourishes, and illuminated by pertinent illustrations.}\textsuperscript{27}

A few appellate cases state that closing arguments must be limited to a review of the facts, and that arguments concerning the law are not permitted. However, such statements cannot be taken literally. They mean only that an attorney may not argue about \textit{what the law is}, as in an appellate court, but must accept the law as it is contained in the judge’s instructions.\textsuperscript{28} A few courts have sporadically attempted

\begin{itemize}
\item \textsuperscript{24} Wilhelm v. State, 272 Md. 404, _, 326 A.2d 707, 714 (1974).
\item \textsuperscript{25} HAW. REV. STAT. § 635-52 (1976).
\item \textsuperscript{26} Wilhelm, 326 A.2d at 714.
\item \textsuperscript{27} 5 F. BUSCH, supra note 1, at 411-12, 431; see also Powell v. Sears, Roebuck & Co., 598 S.W.2d 449 (Ark. Ct. App. 1980) (essence of argument is to offer counsel the opportunity to focus attention on facts and law that support theory); HAW. REV. STAT. § 635-52 (1976) (parties may sum up facts and argue law of the case).
\item \textsuperscript{28} A full discussion of the permissible extent of argument concerning the law is beyond the scope of this article. It will be examined in detail in a forthcoming article. In general, the limitations on arguing law can be stated as follows: it is improper to argue against the court's instructions, to discuss legal issues not germane, to argue novel theories of law, and to misstate the law or to state the law in a confusing manner; but it is permissible to state the law consistent with the court's instructions and to argue how the facts are to be applied to it. See Commonwealth v. Gwaltney, 479 Pa. 88, 387 A.2d 848 (1978); see also Goodrum v. State, 240 Ga. 678, 242 S.E.2d 158 (1978) (may read statute to jury); Martin v. Allstate Ins. Co., 92 Ill. App. 3d 829, 416 N.E.2d 347 (1981) (counsel may state belief as to what court will instruct based on pretrial conference, unless misleading); Morris v. State, 270 Ind. 245, 384 N.E.2d 1022 (1979) (proper to read one of court's instructions to jury); Bergel v. Kassebaum, 577 S.W.2d 863 (Mo. Ct. App. 1978) (a party has right to argue based on instructions but not to differ from them); State v. Monk, 286 N.C. 509, 212
\end{itemize}
to prevent the use of oratorical tricks and rhetorical devices, but most permit them. 29

Both civil and criminal litigants enjoy the right to argue. The right exists in both jury and nonjury trials. It is strongest in criminal trials, jury or nonjury, where constitutional status was given to a defendant’s right by the Supreme Court in *Herring v. New York*. 30 The right to argue is also fairly strong in civil jury trials, where a party’s right has occasionally been elevated to constitutional stature. Additionally, it has also been codified in many jurisdictions, and all modern cases deny

S.E.2d 125 (1975) (both sides can argue law but may not argue law not relevant to case); *cf.* People v. Pineiro, 129 Cal. App. 3d 915, 179 Cal. Rptr. 883 (1982) (no error even if a prosecutor misstates the law); S.D. CODIFIED LAWS ANN. § 15-14-18 (1984) (counsel may argue and comment upon law as given in instructions, but may not argue that law governing the case is other than that given in instructions).

In the author’s sample of 729 cases, only one contains broad language that seems to prohibit legal argument altogether. Clemons v. State, 320 So. 2d 368 (Miss. 1975) (states that attorneys may not “instruct” on law, but case involved a prosecutor who misstated law and then argued about it when the judge sustained an objection). Two other cases in the sample hold it within the trial court’s discretion to prevent argument about law: State v. Stawicki, 93 Wis. 2d 63, 286 N.W.2d 612 (Wis. Ct. App. 1979), which is probably bad law, since State v. Lenarchick, 74 Wis. 2d 425, 247 N.W.2d 80 (Wis. 1976) states clearly that it is error to exclude all comments on the law; People v. Boalbey, 90 Ill. App. 3d 738, 413 N.E.2d 553 (1980) (judge may deny the right to read law to jury), which conflicts with Martin v. Allstate Ins. Co., 92 Ill. App. 3d 829, 416 N.E.2d 347 (1981). Thompson states that counsel “ought not to be allowed to argue questions of law,” 1 S. THOMPSON *supra* note 1, at 721, but makes it clear in subsequent paragraphs that he is referring to arguments concerning the clarity of the judge’s instructions, not to the general right of counsel to state the law in accordance with the instructions and to argue about its application. *Id.* at 721-25. Busch cites three other cases as prohibiting argument concerning law, 5 F. BUSCH, *supra* note 1, at 471 n.18, but the cases do not support such a broad prohibition.

29. See also Thorsen v. City of Chicago, 74 Ill. App. 3d 98, 104-05, 392 N.E.2d 716, 721 (1979) (“[T]he partisanship and heat of battle inherent in a lawsuit militate in favor of granting a certain latitude to attorneys in representing their clients.”). *Compare* Ferguson v. Moore, 98 Tenn. 342, 351, 39 S.W. 341, 343 (1897) (tears have always been considered legitimate arguments before a jury) *with* People v. Dukes, 12 Ill. 2d 334, 146 N.E.2d 14 (1957) (reversible error to shed tears during argument).

The majority position is stated in cases such as State v. Reilly, 446 A.2d 1125 (Me. 1982) (prosecutor may employ wit, satire, inventive and imagination); Wilhelm v. State, 272 Md. 404, 326 A.2d 707 (1974) (there are no well-defined bounds beyond which the eloquence of an advocate shall not soar; he may indulge in oratorical conceit or flourish and in metaphorical allusion); People v. Galloway, 54 N.Y.2d 396, 430 N.E.2d 885, 446 N.Y.S.2d 9 (1981) (broad bounds of rhetorical comment permitted in closing argument); Houston Lighting & Power Co. v. Fisher, 559 S.W.2d 682, 684 (Tex. Civ. App. 1977) (counsel must be indulged the privilege of flights of oratory).

30. 422 U.S. 853, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975) (The Supreme Court struck down on constitutional grounds a New York statute that gave trial judges the power to dispense with summations in nonjury trials.).
the judge power to prohibit argument. In civil bench trials, however, the right to argue is not as universally recognized. A few courts have held that argument in civil bench trials is only a privilege, not a right, and that the judge has discretion to dispense with it. Finally, the prosecution in a criminal trial undoubtedly has the right to make an

31. A few cases assert constitutional grounds. See, e.g., United States ex rel. Wilcox v. Pennsylvania, 273 F. Supp. 923 (E.D. Pa. 1967) (right to argue is a due process right in civil and criminal cases); Neston v. George, 354 Pa. 19, 46 A.2d 469 (1946) (right to argue in civil case is part of constitutional right to representation by counsel and due process). In the sample of 729 cases, none suggested that the judge could dispense with arguments in a civil jury trial. Explicit statements that the right exists can be found in civil cases going back 150 years. See, e.g., McCullough v. Langer, 23 Cal. App. 2d 510, 73 P.2d 649 (1937); Sodousky v. McGee, 27 Ky. (4 J.J. Marsh) 267 (1830); Lyman v. Fidelity & Cas. Co., 65 A.D. 27, 72 N.Y.S. 498 (1901). Busch cites twenty-six cases from the early 1900's for the proposition that refusal to hear argument in civil cases is not always error but none supports the point. 5 F. Bussch, supra note 1, at 410. All involve directed verdicts, waivers of argument, failure to preserve the issue for appeal, or limitations on the number of attorneys who could argue.


33. In the sample, only three opinions held that arguments in civil bench trials were discretionary. All are from intermediate appellate courts; none cited any prior authority. Belmont Elec. Serv. v. Dohnn, 516 P.2d 130 ( Colo. Ct. App. 1973) (one sentence, no citations or discussion); Roberson v. Roberson, 40 N.C. 193, 252 S.E.2d 237 (1979) (court admits that no authority existed to support holding); Federal Land Bank of Baltimore v. Fetner, 269 Pa. Super. 455, 410 A.2d 344 (1979) (denial of final argument approved in case where judge had encouraged discussion of issues as trial progressed). Busch cites thirteen additional cases from the early 1900's in support of the proposition that arguments are discretionary in civil nonjury trials, 5 F. Bussch, supra note 1, at 410, only two of which actually support the point: Warner v. Close, 120 Mo. App. 211, 96 S.W. 491 (1906); and Eldridge v. Rogers, 40 Wyo. 89, 275 P. 101 (1929). The others either are not on point or are decided on harmless error grounds. The North Dakota Supreme Court, in Fuhrman v. Fuhrman, 254 N.W.2d 97, 101 (N.D. 1977), while rejecting the proposition that arguments in bench trials are discretionary, cited Annotation, Argument of Counsel—Denial—Prejudice, 38 A.L.R.2d 1396, 1419, 1431-39 (1954), in support of a statement that the courts in other states are divided on the point. The cases cited in that annotation are essentially the same as those cited by Busch.
argument, although case law on the point is extremely rare and only indirect statutory authority exists.44

The right to argue a case's merits exists only if a genuine issue must be resolved by the trier of fact, if it is a jury. Frequently, this limitation is appended to general descriptions of the right, without further explanation.35 This may mean the judge has discretion to send a case to the jury without argument if he or she thinks the evidence and law are all on one side, or it may mean that the right to argue extends only to cases that go to the jury and are not decided by a directed verdict. No case in the sample gave a detailed explanation, but several cases in support of this limitation clarify how it operates.36 However, the right of argument does not supersede the court's power to grant a directed verdict. If the court is legally obligated to grant a directed verdict (or judgment of acquittal) where the facts and law permit only one result, it may do, even though the parties are deprived of the opportunity to make closing arguments.37 However, cases concerning the denial of the right to argue make it reasonably clear that trial judges lack the power to dispense with arguments and still send cases to the jury.38

The party with the burden of proof usually has the right to argue twice. He may make both the opening and the concluding arguments. This principle is firmly rooted in the concept of formal adversary

34. The closest cases are Shelby v. State, 258 Ind. 439, 281 N.E.2d 885 (1972) (right to argue forcefully is given to both sides), and Fuhrman v. Fuhrman, 254 N.W.2d 97 (N.D. 1977) (dictum). The absence of case law undoubtedly is because it would be virtually impossible for the state to appeal a decision to dispense with argument. The existence of the prosecution's right to argue is implicit in statutes and rules of criminal procedure that set the order of argument or make an opening argument mandatory. See, e.g., Ark. Stat. Ann. § 43-2132 (1977); Conn. Gen. Stat. Ann. § 54-88 (West 1960); Idaho Code § 19-2101(5) (1979); Kan. Stat. Ann. § 22-3414(4) (1979); Minn. R. Crim. P. 26.03(11)(h); Mo. R. Crim. P. 29.1(a) (the state shall have the right to open the argument).

35. 5 F. Busch, supra note 1, at 408; 1 S. Thompson supra note 1, at 703.

36. See 5 F. Busch, supra note 1, at 412-20 (citing cases supporting limitation of genuine issue).


38. See Herring v. New York, 422 U.S. 853, 858, 95 S. Ct. 2550, 2553 45 L. Ed. 2d 593, 598 (1975) (defense has right to argue no matter how strong the case appears to the presiding judge); Fuhrman v. Fuhrman, 254 N.W.2d 97 (N.D. 1977) (reversing judge's denial of argument; judge had stated that argument was unnecessary because evidence was clear); Word v. Commonwealth, 30 Va. (3 Leigh) 743 (1831) (jury trial; court convinced that evidence was all on one side and unimpeached, resolution obvious, and argument useless; nevertheless error to prevent defendant from arguing).
argument and is found in appellate argument and in debating. The side that must establish the affirmative proposition has the first argument and also an opportunity for rebuttal.\(^{39}\) In a trial, historically the principle has been known as the right to open and close. The party with the burden of proof begins the voir dire, makes the first opening statement, presents its evidence first, makes the first argument (the right to open), and also makes the concluding or rebuttal argument (the right to close).\(^{40}\) Much has been written generally about the right to open and close, analyzing which party should be given this position of advantage.\(^{41}\) With the demise of complicated common-law pleading and the growth of codification of trial procedures,\(^{42}\) most of the intricacies of the right to open and close have disappeared. These events caused the order of arguments to become routinized. The plaintiff normally has the first and last argument\(^{43}\) except in three situations: (1) in civil cases, when the defendant concedes a prima facie case and proceeds solely on an affirmative defense;\(^{44}\) (2) in four southeastern states, when a criminal defendant presents no evidence;\(^{45}\) and (3) in six states that have a statute or rule that limits each party to a single argument.\(^{46}\)

\(^{39}\) E.g., Mo. R. Crim. P. 27.02(1) (appellate rule); see also H. Summers, F. Whan & T. Rousse, How to Debate: A Textbook for Beginners app. 5 at 344-45 (3d ed. 1963) [hereinafter How to Debate] (high school debate rules).

\(^{40}\) E.g., Ariz. R. Civ. P. 51(c) (party with burden of persuasion has right to open and close).

\(^{41}\) See, e.g., 5 F. Busch, supra note 1, at 412-20; 1 S. Thompson supra note 1, at 213-44 (covering topics such as “Cases of Replevin of Cattle Distrained for Rent with Avowry of Rent in Arrear”).

\(^{42}\) At least thirty-two states now have statutes or rules of procedure that dictate the order of argument.


\(^{44}\) See, e.g., Silver v. New York Life Ins. Co., 116 F.2d 59 (7th Cir. 1940) (defendant earned right to open and close by “substantially” admitting all allegations); cf. N.C. Super. & Dist. Ct. R. 10 (if defendant presents no evidence, he has the right to open and close).

\(^{45}\) The states are North Carolina, South Carolina, Georgia, and Florida. See, e.g., Ga. Code Ann. § 17-8-71 (1982) (prosecuting attorney opens and closes unless defendant introduces no evidence at all); Fla. R. Crim. P. 3.250 (defendant who offers no testimony other than his own is entitled to concluding argument). North Carolina extends this rule to civil cases. N.C. Super. & Dist. Ct. R. 10.

\(^{46}\) See, e.g., Ky. R. Civ. P. 43.02 (defendant first, plaintiff concludes); Ky. R. Crim. P. 9.42(f) (defendant first, commonwealth concludes); Minn. R. Crim. P. 26.03(11)(h)-(i) (prosecution first, defendant concludes).
2. Waiver of the Right to Argue

The law recognizes that a party may explicitly or implicitly waive his right to argue. To the extent statutes and rules address the matter, most specifically provide for waiver. Case law also assures a party’s right to waive argument. Therefore, if a party expressly waives argument, the case may go to the jury without it. The decision to give or waive argument is left to the party; whether the judge and jury do or do not want to hear arguments is irrelevant.

Two waiver issues regularly appear and are resolved in various ways in different jurisdictions. The first is whether a waiver may be implied from a party’s conduct (particularly by silence). The second is whether the party with the right to open and close may waive the opening argument but still give a concluding argument.

A number of civil and criminal appellate cases have dealt with the issue of implied waiver. All agree that the right to argue may be waived either expressly or "by fair inference from the conduct of counsel." There is a split on whether waiver may be implied from counsel’s inaction, such as silence or failure to affirmatively request

47. E.g., Mo. R. Crim. P. 27.02(1).
48. See Tanford, supra note 1, at n.304 (in press) (discussing the split of authority on implicit waiver).
49. "When the evidence is concluded, unless the case is submitted to the jury on either side, or on both sides, without argument, the district attorney . . . must open and conclude the argument." Nev. Rev. Stat. § 175.141 (1986) (emphasis added). See also Wyo. Stat. § 7-11-201(vii) (1977) (unless the case is submitted without argument, counsel for state goes first and last); Mo. R. Crim. P. 27.02(1) (each side may waive its right to argument). N.J.R. Gen. App. 1:7-1(b) (parties may make closing statements). In total, statutes and rules in twenty-one states make it clear that parties are not required to argue. Cf. Ga. Code Ann. § 17-8-71 (1982) (statute says the prosecution shall argue first and last; no mention of waiver); Alaska R. Civ. P. 46(g) (one provision says arguments shall be given unless waived by mutual agreement, but another provision discusses consequences of a waiver by one side only).
50. See, e.g., United States v. Spears, 671 F.2d 991 (7th Cir. 1982); Chandler v. Miles, 193 A. 576 (Del. Super. Ct. 1937); People v. Gore, 25 Mich. App. 654 (1970); Fuhrman v. Fuhrman, 254 N.W.2d 97 (N.D. 1977); Commonwealth v. Miller, 236 Pa. Super. 253, 344 A.2d 527 (1975). For examples of explicit waiver, see Key Hotel Corp. v. Crowe, Chizek & Co., 172 Ind. App. 15, 359 N.E.2d 262 (1977) (court stated it assumed that both sides waived argument and asked if they were ready for a decision; defense replied, "We are, your honor."); Garner v. State, 16 Md. App. 353, 297 A.2d 304 (1973) (court asked if there was any argument; defense replied, "No argument.").
51. See Shippy v. Peninsula Rapid Transit Co., 197 Cal. 290, 240 P. 785 (1925) (jurors voted on whether to hear argument; reversed).
argument. The problem is exacerbated by procedural rules requiring a contemporaneous objection to trial errors to preserve the issue for appeal. Therefore, a case in which a party has made neither a request to argue nor an objection to the submission of the case without argument presents two waiver issues: has the party waived his right to argue (true waiver) and/or has he "waived" his right to appeal on that issue (procedural default)?

The distinction between true waiver and procedural default is not merely semantic. A true waiver precludes appeal, since one cannot appeal for the denial of a right voluntarily given up. Procedural default, however, is merely a rule of bureaucratic convenience. Not all jurisdictions require contemporaneous objections and others recognize that errors affecting the fundamental fairness of a trial may be taken up on appeal despite procedural default. Therefore, if one has only defaulted his right to appeal, at least some courts go ahead and decide the underlying issue—whether the party was denied its right to argue. If it is the right to argue that has been waived, then there is nothing to appeal.

An unresolved issue is whether a party's silence can be an implied waiver of its right to argue. Direct precedent is sparse and conflicting. In the sample, only three cases dealt directly with the question, and each reached a different result: one case implied that silence can never be a waiver, one held that silence is a waiver, and one compromised, holding that silence is a waiver only if a party had a realistic opportunity to request argument but failed to do so.

53. See, e.g., United States ex rel. Spears v. Johnson, 463 F.2d 1024 (3d Cir. 1972) (defendant neither requested argument nor objected; proper timely objection required, so court refuses to decide issue on merits).

54. See, e.g., United States v. Spears, 671 F.2d 991 (7th Cir. 1982) (defendant did not object to denial of argument at trial, so court may consider issue only if plain error affecting fundamental rights; court determines that denial of argument is plain error, so issue may be presented for first time on appeal; court goes on to find implied waiver of argument because of conduct of attorney); see infra text accompanying notes 323-39 (procedural default discussed more fully).

55. Id.


57. State v. Mann, 361 A.2d 897 (Me. 1976); see also Piatt v. Head, 35 Kan. 282, 10 P. 822 (1886) (silence after a request is waiver); Commonwealth v. Miller, 236 Pa. Super. 253, 258, 344 A.2d 527, 529 (1973) (dissent states opinion that sitting silently would be a waiver; not apropos, because counsel had requested argument).

58. United States v. Spears, 671 F.2d 991 (7th Cir. 1982); see also Fuhrman v. Fuhrman, 254 N.W.2d 97 (N.D. 1977) (failure to request argument not a waiver when counsel had no realistic opportunity to assert right—no discussion of issue).
In criminal cases, since *Herring v. New York* gave the right to argue constitutional status, the standard for waiver of other constitutional rights, especially other sixth amendment rights, should apply. When the right to counsel is involved, the most frequently cited statement of the waiver doctrine is from *Johnson v. Zerbst.* The *Johnson* court stated, "'[c]ourts indulge every reasonable presumption against waiver' of fundamental constitutional rights . . . [and] we 'do not presume acquiescence in the loss of fundamental rights.'" A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. This presumption against waiver of a sixth amendment right can be overcome only if the record shows the defendant was informed of the right and had the opportunity to exercise or waive.

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60. Id. at 464 (quoting Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393, 57 S. Ct. 809, 812, 81 L. Ed. 1177, 1180 (1936); Hodges v. Easton, 106 U.S. 408, 412, 1 S. Ct. 307, 311, 27 L. Ed. 169, 171 (1882)).
62. Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) (knowing and intelligent relinquishment of benefits); Carnley v. Cochran, 369 U.S. 506, 82 S. Ct. 884, 8 L. Ed. 2d 70 (1962) (presuming waiver from silent record impermissible); *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938) (cited continually in sixth amendment cases); see *Von Moltke v. Gillies*, 332 U.S. 708, 68 S. Ct. 316, 92 L. Ed. 390 (1948) (strong presumption against waiver); see also *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973) (Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938) has been applied to those rights which preserve the fairness of trial—right to counsel, to confrontation, to a jury trial, to a speedy trial, to be free from double jeopardy, and to the waiver of trial rights in "trial-type situations").
63. In *United States v. Spears*, 671 F.2d 991 (7th Cir. 1982), the court of appeals pays lip service to the waiver doctrine but neither discusses nor requires that the defendant be informed of his right to argue. If precedent is ignored, an argument could be made that if the defendant is represented by counsel, counsel is presumed to know of the right to argue and the defendant need not be informed of it; a lesser waiver standard could be used, from seventh amendment cases (right to jury trial waived unless requested), or fourth amendment cases, e.g., *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973) (defendant need not be informed of his right to refuse to consent to a warrantless search). The problem with this approach is that it ignores a series of unambiguous decisions that the full informed consent requirement must be followed when sixth amendment rights are involved because they address the defendant's fundamental right to a fair trial. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 241, 93 S. Ct. 2041, 2055, 36 L. Ed. 2d 854, 871 (1973) (and cases cited therein, carefully distinguishing the waiver of fourth amendment rights from the waiver of sixth amendment rights). Nor does the fact that defendant is represented by counsel justify a relaxation of the informed consent requirement. See *McCarthy v. United States*, 394 U.S. 459, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969) (Rule 11 case; failure of trial judge to address the defendant personally concerning
Waiver is implied from silence or acquiescence only if the defendant refuses to explicitly assert or waive the privilege. Thus, silence in the face of a specific request by the trial judge to proceed with argument could be an implied waiver. However, finding waiver from failure to request argument, in the absence of an on-the-record colloquy informing the defendant of his right and requesting that he assert or waive it, would be contrary to fifty years of unambiguous Supreme Court precedent.

In civil cases, it is less clear whether the right to argue is constitutionally based, therefore the appropriate waiver standard is more elusive. Given the frequency of emphasis on the necessity of closing arguments for a fair trial, it is doubtful that mere silence should be considered a valid waiver. Without suggesting that there is a single waiver of trial rights vitiates guilty plea, discussed in C. Whitebread, Criminal Procedure 409-10 (1980); see also Bordenkircher v. Hayes, 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978) (guilty plea that waives trial rights must be voluntary choice among known alternatives).

64. The requirement of a realistic opportunity to exercise a sixth amendment right is hardly debatable. See, e.g., United States v. Spears, 671 F.2d 991 (7th Cir. 1982).


first principle governing implied waiver, it would be inconsistent to view a mere failure to assert a right as a waiver, at least in the absence of clear evidence that a party had an opportunity to assert the right. 68 On the other hand, courts in civil cases have not imposed a duty on trial judges to inform parties of trial rights as a condition of an effective waiver. The rights to a jury trial and to open and close the evidence, for example, usually are waived if the attorney fails to properly assert them. 69 Thus, in civil cases it is probable that a valid waiver exists if a party has the opportunity to request argument but fails to do so.

The second and more common waiver issue is whether a party may waive only part of its right to argue. The situation arises when the party with the right to open and close (usually the plaintiff) seeks to waive opening argument but still give the concluding argument. If the partial waiver is permitted, the plaintiff will be able to respond to and refute the defendant’s argument. However, the defendant will be denied the opportunity to respond to plaintiff's argument. It is obvious that this practice is unfair to the defendant, as he is deprived of opportunity to respond.

It is the constant effort of unfair and disingenuous advocates, who represent the side of the issue which has the right to open and close, to attempt, by waiving the opening argument, to put the other party at the disadvantage of making his argument without knowing the argument which he will have to meet, the prosecuting counsel thus acquiring the advantage of delivering his entire argument in conclusion without giving to the defending counsel any right of reply to the positions which he may take. This practice ought never to be tolerated . . . for it is but just that the defendant should have a right to reply to the positions taken by the prosecution, and a spirit of fair play would dictate that the party which has the burden of opening should have the advantage of closing. 70

68. See, e.g., McCormick on Evidence § 52 (E. Cleary ed. 3d ed. 1984) [hereinafter McCormick] (failure to object to a question that seeks inadmissible testimony is a waiver of that issue unless counsel did not have an opportunity to interpose the objection); Prosser and Keeton on the Law of Torts § 18 (W. Keeton ed. 5th ed. 1984) [hereinafter Prosser & Keeton] (silence implies consent only where reasonable person would have spoken if he objected).

69. See, e.g., United States v. Moore, 340 U.S. 616, 71 S. Ct. 524, 95 L. Ed. 582 (1951); General Tire & Rubber Co. v. Watkins, 331 F.2d 192 (4th Cir. 1964); Shores v. Murphy, 88 So. 2d 294 (Fla. 1956); Fed. R. Civ. P. 38(1). See also 5 F. Busch 419 n. 21 (claim of right to open and close must be asserted promptly).

70. S. Thompson § 934. See also Central of Ga. R. Co. v. Sellers, 129 Ga. App. 811, 201 S.E.2d 485 (1973) (trial should be as far removed as possible from the appearance of rule manipulation and gamesmanship).
Many states have responded by enacting statutes or trial rules. With two ambiguous exceptions, all appear to prohibit partial waiver, and require the plaintiff to make a first argument if he wants to argue at all. The common law has developed less clearly, but exhibits a recent trend toward prohibiting partial waiver. This trend is obviously sound, based on the fact that partial waivers generally are disfavored in the law to the extent that they permit a party to "waive" the burdens but claim the benefits of trial procedure.

3. Denial of Right to Argue: Serious or Harmless Error?

If a party is completely denied his right to argue, the judge commits error. This may only be an ordinary error that must be properly preserved in order for the party to appeal, or it may be plain error. It may be a serious infringement of a party’s rights constituting per se error, or it may be harmless. One can discern how important courts

71. KAN. STAT. ANN. § 22-3414(4) (1981) (prosecutor may commence argument); WASH. R. CRIM. P. 6.15(d) (prosecution may address jury first).

72. ARK. STAT. ANN. § 43-2132 (1977) (party who refuses to open shall be refused the conclusion); GA. CODE ANN. § 17-8-71 (1982) (party with right to open shall open); IDAHO CODE § 19-2101 (1979) (prosecuting attorney must open); IND. CODE § 34-1-21-1 (1982) (party with burden of proof shall disclose in the opening all points relied on); MONT. CODE ANN. § 46-16-401(6) (1984) (county attorney must commence); NEV. REV. STAT. § 175-141(5) (1986) (district attorney must open); OKLA. STAT. ANN. tit. 22, § 831 (West 1958) (state shall commence); WYO. STAT. § 7-11-201(vii) (1977) (counsel for state shall commence); ALASKA R. CIV. P. 46(g) (if plaintiff waives opening, he may not reply); CAL. CIV. PROC. CODE § 607(7) (West 1984) (plaintiff must commence argument); IOWA R. CIV. P. 195 (party with burden of issue shall disclose all points relied on in opening); LA. CIV. DIST. CT. R. 14 (opening must include the whole case); ME. DIST. CT. CRIM. R. 30 (attorney for state shall argue first); MO. R. CRIM. P. 27.02(1) (state’s attorney shall make opening argument); TENN. R. CRIM. P. 29.1 (state may not waive opening argument unless all argument is waived); TTEX. R. CT. 269(b) (counsel shall present whole case in opening); Vt. R. CRIM. P. 29.1 (prosecution shall open).

73. See, e.g., Reagan v. St. Louis Transit Co., 180 Mo. 117, 79 S.W. 435 (1904) (waiver of first argument is waiver of all argument); 5 F. BUSCH, supra note 1, at 477 (party with right to open has obligation to open). Older cases were more likely to permit a partial waiver. See, e.g., McCullough v. Langer, 23 Cal. App. 2d 510, 524, 73 P.2d 649, 656-57 (1937) (dictum implying that plaintiff may waive first argument and still give a final argument); Chandler v. Miles, 193 A. 576 (Del. Super. Ct. 1937) (implying right to waive opening).

74. For example, a criminal defendant has the fifth amendment right to decline to testify. He may not give some exculpatory testimony and then decline to answer cross-examination questions. Once the right has been waived, it is gone. See, e.g., United States v. Doremus, 414 F.2d 252 (6th Cir. 1969) (and cases cited therein); see also MCCORMICK, supra note 68 § 93 (no partial waiver of attorney-client privilege).
think argument is to a proper trial by examining how frequently cases are reversed when argument has been denied. The more often judgments are reversed, the more important the right.

Forty percent of the cases in which a party claimed denial of the right to argue were reversed on appeal, a considerably higher reversal rate than the usual twenty-four percent.\(^{75}\) Only eight percent of the cases were affirmed under the harmless error doctrine, half the usual rate.\(^{76}\) In cases of denial, no judgment was affirmed because of procedural default, e.g., failure to preserve the issue, although fifteen percent of cases in the survey generally were affirmed on such grounds.\(^{77}\) Two opinions were emphatic that argument is so fundamental to a fair trial that its denial is plain error.\(^{78}\)

A recurring issue concerns whether the denial of the right to argue can be harmless error, and if so, under what circumstances. In criminal cases, since the defendant's right to argue is a sixth amendment right, one must look to the harmless constitutional error doctrine of *Chapman v. California*.\(^{79}\) *Chapman* stands for two things. First, the denial of constitutional rights fundamental to a fair trial and affecting substantial rights can never be harmless,\(^{80}\) despite overwhelming evidence. The Supreme Court listed the right to counsel as an example for this proposition. Second, errors may be harmless, but only if the state proves beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. This harmless constitutional error rule is different from the ordinary harmless error rule.\(^{81}\) Despite retrenchment in other areas, the current Supreme Court has reaffirmed

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\(^{75}\) See infra note 406 (for discussion of reversal rates).

\(^{76}\) In the sample of argument cases, 116 out of 692 (17\%) were affirmed under the rubric of harmless error. See People v. Berger, 284 Ill. 47, 119 N.E. 975 (1918) (no discussion); State v. Tereau, 304 Minn. 71, 229 N.W.2d 27 (1975) (because of strength of case); cf. People v. Manske, 399 Ill. 176, 77 N.E.2d 164 (1948) (no explicit statement, but uses harmless error language).

\(^{77}\) In the sample, 102 of 692 cases were affirmed because of procedural default. 78. United States v. Spears, 671 F.2d 991 (7th Cir. 1982); State v. Mann, 361 A.2d 897 (Me. 1976); see also United States ex rel. Spears v. Johnson, 463 F.2d 1024 (3d Cir. 1972); Key Hotel Corp. v. Crowe, Chizek & Co., 172 Ind. App. 15, 359 N.E.2d 262 (1977); Fuhrman v. Fuhrman, 254 N.W.2d 97 (N.D. 1977). In all the cases the court decided whether there had been a denial of the right to argue on the merits despite procedural default.

\(^{79}\) 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

\(^{80}\) Id. at 23.

the vitality of the Chapman doctrine. Given the language in Herring that a "denial of the opportunity for final argument . . . is a denial of the basic right of the accused to make his defense", that "no aspect of [partisan] advocacy could be more important than the opportunity finally to marshal the evidence . . . before submission of the case to judgment", and that "there can be no justification for a statute that empowers a trial judge to deny absolutely the opportunity for any closing summation at all", it seems inconceivable that the denial of the right to argue could ever be harmless constitutional error. Therefore, the two cases in the sample applying the harmless error test to closing arguments in criminal cases cannot be considered good law.

In civil cases, the question is more difficult because the courts have not clearly elevated closing arguments to a constitutional right. Although argument is part of the due process right to be heard, the Chapman rule of harmless constitutional error applies only to criminal cases, and the courts have not articulated a similar rule for determining harmless error in a civil trial. Nevertheless, the first part of the Chapman standard may be applicable to civil cases. Certain constitutional rights are so fundamental to a fair trial that their denial cannot be harmless error. Reasons making the right to argue a fundamental right in criminal cases also apply to civil cases. The fundamental role of argument makes it inappropriate to apply the ordinary harmless error test used to affirm minor procedural irregularities.

A related question concerns the result when a trial judge refuses to allow part of an argument. The few scattered cases on this issue suggest the obvious answer. If a party is prevented from arguing an important and material issue, that party has been denied the right to argue his case, just as if he had been refused argument altogether.

83. Herring v. New York, 422 U.S. 853, 859, 95 S. Ct. 2550, 2554, 45 L. Ed. 2d 593, 599 (1975); see also United States v. Spears, 671 F.2d 991 (7th Cir. 1982) (denial so fundamental it requires reversal whether or not defendant is prejudiced).
84. Herring, 422 U.S. at 862.
85. Id. at 863.
86. See, e.g., King v. Kaplan, 94 Cal. App. 2d 679, 211 P.2d 578 (1949) (plaintiff denied an opportunity to argue main theory of negligence); Sando v. Smith, 237 Ill. App. 570 (1925) (defense denied opportunity to argue "a material question"); Aetna Oil Co. v. Metcalf, 298 Ky. 706, 183 S.W.2d 637 (1944) (defendant denied opportunity to argue amount of damages).
The question arises whether the denial of closing argument is so serious that it is always plain error, or whether a claim of error must be preserved by a proper request or objection. Denial of a constitutional right does not decide the question. The federal courts have clearly held that even constitutional errors normally must be preserved properly to be considered on appeal.87 Procedural default rules requiring timely objections have routinely been upheld, even when barring potentially meritorious constitutional claims on appeal.88 However, the courts have made it clear that, at least on direct appeal, there are limits to procedural default. Errors which "are obvious, or ... otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings" may be considered by appellate courts despite procedural default.89 Most of the cases in the sample suggest that, given the fundamental role of argument, its denial is appropriately considered plain error in both civil and criminal trials.

Clearly the cases demonstrate that the principle granting a party the right to argue its case has been singled out and treated differently from other rules of closing argument procedure. It is the only principle to be elevated to the status of a constitutional right.90 Its denial is less likely to constitute harmless error and more likely to result in reversal than other summation errors. The doctrine of procedural default, otherwise a device for avoiding too many costly retrials, might not apply at all. The evidence makes it obvious that a party's right to argue is being treated as the most important legal principle of closing argument procedure.


88. See, e.g., Wainwright v. Sykes, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977) (federal courts will not review a Miranda issue unless state procedural rules have been strictly complied with); Estelle v. Williams, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976) (federal courts will not grant habeas corpus for a due process violation if the defendant failed to object at trial); cf. County Court of Ulster County v. Allen, 442 U.S. 140, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979) (if state procedural rules allow constitutional issues to be raised on appeal even in the absence of a timely objection at trial, the federal courts also may hear the claim).


B. Procedural Rules Facilitating Exercise of the Right to Argue

Courts are not hostile toward the exercise of the right to argue. To the contrary, judges accept that partisan argument is an indispensable (and sacred) component of a fair trial. In the exceptional cases discussed in the next section, courts reluctantly impose significant procedural limitations on the free exercise of the right of argument. Indeed, procedures that facilitate argument, such as allowing preparation time, preventing disruption, giving trial judges discretion to expand the normal scope, are common.91

As a matter of customary practice, a party is entitled to a reasonable time following the close of the evidence to prepare for argument. Although a reasonable preparation time is a matter of judicial discretion, it generally is an abuse of discretion for a trial judge to refuse to allow at least a few minutes' recess before argument for the attorneys to gather their thoughts.92 However, considerations of efficiency impose limits on this doctrine. Long recesses disrupt court schedules and delay trials, and need not be granted.93 Expensive new trials need not be ordered for the mere refusal to allow preparation time. Therefore, to be reversible error, the refusal must amount to a denial of the right to argue.94 If it appears from the record that a party was able to give a reasonably effective argument despite the lack of preparation time,

91. The author's conclusion that courts routinely facilitate argument is partly intuitive. Surprisingly few cases appeared in the sample in which a party complained on appeal that his opponent had been unfairly allowed the benefit of procedures to facilitate argument. Lawyers usually are creative in their allegations of error. The author concludes that the paucity of appeals is because the courts routinely indulge all reasonable procedural requests by both sides related to argument—a conclusion borne out by my own trial experiences. The conclusion is reinforced by recurrent language in appellate opinions about the importance of argument and the need for trial judges to have discretion to facilitate argument.

92. See Commonwealth v. Cooper, 230 Pa. Super. 204, 327 A.2d 177 (1974) (better practice is to permit time to prepare; counsel's failure to request brief recess apparently waived issue; implies that if counsel had requested fifteen-minute recess, it would have been error to refuse it); see also Commonwealth v. Mervin, 230 Pa. Super. 552, 326 A.2d 602 (1974) (held proper to allow 45 minutes to prepare).


94. United States v. Dawson, 467 F.2d 668 (8th Cir. 1972).
then there has been no prejudice to the party. The error is harmless,\textsuperscript{95} despite the fact that the party could have given a better argument with more preparation time.

The second procedural mechanism for facilitating argument is the prohibition against interruption and disruption of argument. Simply stated, no one may interfere with or disrupt argument except the judge or opposing counsel, and they may interrupt only if they have a legal basis for objection.\textsuperscript{96} The trial judge may not interfere with or attempt to nullify an attorney's argument. He or she may not make uncalled-for negative comments about the argument,\textsuperscript{97} tell the jury to disregard a legally proper argument,\textsuperscript{98} or otherwise interrupt argument except to make \textit{sua sponte} rulings preventing illegal arguments\textsuperscript{99} and for valid procedural reasons.\textsuperscript{100} Excessive interference effectively denies the right to argue, and therefore either amounts to reversible error,\textsuperscript{101} or violates

\textsuperscript{95} See United States v. Dawson, 467 F.2d 668 (8th Cir. 1972) (fifteen-minute recess refused; better practice is to allow preparation time, but in this case counsel was able to fully summarize defendant's position, so no reversible error); Commonwealth v. Cooper, 230 Pa. Super. 204, 327 A.2d 177 (1974) (based on review of record, "obvious" that defense attorney was able to make effective argument; not reversible error to order immediate arguments).

\textsuperscript{96} The legal bases for objection are varied. They are summarized in J. Tanford \textit{supra} note 1, at 142-47, and in Table 2, \textit{infra}. An analysis of the substantive law of closing argument will be the subject of forthcoming articles.

\textsuperscript{97} See State v. Hardy, 189 N.C. 799, 128 S.E. 152 (1925) (judge criticized attorney for making his argument).

\textsuperscript{98} See King v. Kaplan, 94 Cal. App. 2d 697, 211 P.2d 578 (1949) (instructed jury to disregard proper argument); Messer v. State, 120 Fla. 95, 162 So. 146 (1935) (instructed jury to decide case on evidence and not to be concerned with counsel's arguments); Svensson v. Lindgren, 124 Minn. 386, 145 N.W. 116 (1914) (instruction to forget arguments at the start of deliberations).

\textsuperscript{99} See Battle v. United States, 209 U.S. 36, 28 S. Ct. 422, 52 L. Ed. 670 (1908) (court interrupted defendant's argument and asked attorney not to make argument that tended to degrade the administration of justice—that white man should be believed before black man—interruption held to have been fully justified); People v. Ott, 84 Cal. App. 3d 118, 148 Cal. Rptr. 479 (1978) (interruption to give instruction on law to correct counsel's misstatement is "right and . . . duty" of trial court).

\textsuperscript{100} See Turley v. Kotter, 263 Pa. Super. 523, 398 A.2d 699 (1979) (granting directed verdict on liability, after defense argued against liability; valid legal procedure despite fact that it nullified part of defense argument and made the defense attorney look bad).

\textsuperscript{101} See 5 F. Busch, \textit{supra} note 1, at 411 (citing cases for proposition that telling jury to disregard argument is equivalent to denial of argument). See \textit{generally} People v. Gallo, 54 Ill. 2d 343, 297 N.E.2d 569 (1973) (court interrupted defense argument to question attorney and involve him in frequent discussions; held harmless error because record showed the defendant made full and complete argument); Martin v. Philadelphia Gardens, 348 Pa. 232, 35 A.2d 317 (1944) (general proposition that excessive interference denies due process).
the prohibition against the judge's showing partiality. Additionally, the judge is not permitted to suggest to the jury what he thinks the correct verdict would be; he must remain neutral.\textsuperscript{102}

Also it is improper for the opposing attorney to interrupt or interfere with argument except to assert valid objections.\textsuperscript{103} Attorneys may not interrupt in responding to their opponent's arguments,\textsuperscript{104} may not make noise or attempt to distract the jury,\textsuperscript{105} may not make groundless objections for the purpose of disruption,\textsuperscript{106} and may be required to remove distracting charts, exhibits, and demonstrative evidence.\textsuperscript{107} Similar to the rule against judicial interference, this procedural rule is subject to the harmless error test on appeal, and a judgment will not be reversed unless the interruptions effectively prevented a party from making a complete closing argument.\textsuperscript{108}

Theoretically, there should be similar rules preventing interference from other persons present in the courtroom such as jurors, parties, witnesses, and the public audience. However, this author was unable to find any cases on this issue.\textsuperscript{109} Additionally, the judge's general power to preserve order, including the power to clear the courtroom and even bind and gag a defendant in order to prevent disruption of

\textsuperscript{102} The author does not mean to imply that this is a bad rule. It prohibits both the good judge from helping the jury reach a correct verdict and also the bad judge from coercing a bad verdict. The risk of the latter, given the political way in which our judges are selected, may outweigh the benefits of the former.

\textsuperscript{103} See generally Ariz. R. Civ. P. 51(d) (interruption not permitted except to raise question of law).


\textsuperscript{105} See Wyo. Local R. of Dist. Cts. 17 (X) (counsel shall not walk about nor make comments so as to divert the jury's attention); see also Wyo. Unif. R. Dist. Ct. 801(A)(B)(1)-(5); cf. Coburn v. State, 461 N.E.2d 1154 (Ind. Ct. App. 1984) (prosecutor cried during defendant's summation; matter for trial court's discretion; appeals court will not reverse if trial court did not think it serious enough to warrant mistrials).


\textsuperscript{107} See 5 F. Busch, supra note 1, at 548 (local practice requires removal of charts and exhibits before opponent argues; no citations).


\textsuperscript{109} The closest case is Shippy v. Peninsula Rapid Transit Co., 197 Cal. 290, 240 P. 785 (1925), a fascinating case in which the trial judge asked the jurors if they cared to hear argument, and ten of the twelve answered "no". The California Supreme Court held that the denial of argument under these facts was reversible error.
the trials, undoubtedly carries over to closing argument. On a less spectacular level, attorneys should be able to demand that jurors remain awake, not make verbal comments on the arguments, and not read newspapers or talk among themselves; otherwise, the right to argue is meaningless. However, it is extremely unlikely that juror interruption would ever be grounds for reversal on appeal. The difficulties arise in proving juror inattentiveness resulting in prejudice. The one exception appears to be intoxication: if a juror is inebriated during argument, a mistrial or new trial is justified because the problem is not easily remedied at the time.

C. Procedural Rules Inhibiting Exercise of the Right to Argue

Generally, the right to present a closing argument is given an expansive reading. Appellate opinions usually proclaim that attorneys

110. See, e.g., Illinois v. Allen, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970) (three constitutional ways to handle an obstreperous defendant—bind and gag him, cite him for contempt, or remove him from courtroom); Fed. R. Crim. P. 43(b)(2) (defendant may be removed from courtroom for persisting in disruptive conduct).

111. Of the few appellate opinions that address this issue, all but one have rejected the position that juror inattention is ground for reversal. See Dolan v. State, 40 Ark. 454 (1883) (juror fell asleep for short time during argument, not reversible error); Newman v. Los Angeles Transit Lines, 120 Cal. App. 2d 685, 262 P.2d 95 (1953) (insufficient proof that jurors were sleeping); Baxter v. People, 8 Ill. 368 (1846) (juror fell ill, had chills, lay down on mattress during argument; not ground for new trial because jurors not comprehending all of argument is commonplace); Ferman v. Estwing Mfg. Co., 31 Ill. App. 3d 229, 334 N.E.2d 171 (1975) (juror refused to look at counsel, kept eyes closed and groaned audibly; no prejudice); McClary v. Stat, 75 Ind. 260 (1881) (juror falling asleep for short time during argument is not sufficient ground for new trial); State v. Jones, 187 Kan. 496, 357 P.2d 760 (1960) (juror fell asleep during argument; failure of counsel to object at time; no reversal); Braunie v. State, 105 Neb. 355, 180 N.W. 567 (1920) (juror appeared to pay no attention to argument; no showing of prejudice); Wofford v. State, 494 P.2d 672 (Okla. Crim. App. 1972) (juror was inattentive, yawned, and cleaned fingernails, was chosen jury foreman; no prejudice); see also People v. Spady, 64 Cal. App. 567, 222 P. 191 (1923) (juror leaving seat to adjust window during testimony held not prejudicial). But see Goldring v. Escapa, 338 So. 2d 871 (Fla. Dist. Ct. App. 1976) (The one case in which a new trial was ordered. A juror was intoxicated, made grimacing motions, waved his hands, and attempted to talk with other jurors during the trial.).

112. See Myers v. State, 111 Ark. 399, 163 S.W. 1177 (1914); State v. Crocker, 239 N.C. 446, 80 S.E.2d 243 (1954) (dictum); cf. People v. Groves, 188 Cal. App. 2d 785, 10 Cal. Rptr. 661 (1961) (alternative remedy is to substitute an alternate juror); State v. Tatlow, 34 Kan. 80, 8 P. 267 (1885) (alternative remedy is to grant recess until juror sobered up). But see People v. Leary, 105 Cal. 486, 39 P. 24 (1895) (not sufficient ground for new trial); Hatfield v. State, 243 Ind. 279, 183 N.E.2d 198 (1962) (use of prescribed tranquilizers during trial insufficient to warrant new trial).
should be given wide latitude and considerable leeway in argument. Yet despite the preference for free exercise of the right of argument, several procedural restrictions have become well established. Rules and rulings limit the time available for argument, the number and sequence of arguments, the number of attorneys who may participate, the scope of certain arguments, the method of delivery, and the attorney's ability to present what he thinks is an appropriate argument. This section will explore these procedural constraints and procedural devices restricting argument.

1. Limiting the Length of Arguments

Three devices limit the length of arguments: time limits, restrictions on the number of attorneys for each party who may argue, and restrictions on the number of arguments an attorney may make.

In most jurisdictions, the trial judge has discretion to limit the time available for argument. A reasonable exercise of this discretion is "not subject to review." The trial judge is free to set reasonable limits in the absence of a statutorily mandated minimum or maximum time. The judge takes into account the length and complexity of the trial, the amount of evidence, and similar factors. Routinely, appellate courts approve all time limits, however short, by stating the need for institutional efficiency. Those courts rarely pay serious consideration to whether short or long arguments better serve the interests of verdict accuracy. The general pattern of appellate approval evidences that

113. The spectre of an appellate court reviewing a trial judge's exercise of discretion and approving it by citing the principle that the reasonable exercise of discretion is "not subject to review" is ludicrous. Of course the exercise of discretion is reviewable; it is just difficult to reverse. In only two instances have courts really established rules of unreviewability. The federal courts have consistently held that a judge's decision about the sequence of arguments is not subject to review. See Day v. Woodworth, 54 U.S. (13 How.) 363 (1851); Anderson-Tully Co. v. United States, 189 F.2d 192 (5th Cir. 1951); Silver v. New York Life Ins. Co., 116 F.2d 59 (7th Cir. 1940). The North Carolina court, in State v. Collings, 70 N.C. 241 (1874), refused to review time limits. The State legislature promptly responded by enacting a statute prohibiting time limits. See S. Thompson, supra note 1, at 711-12. That statute has since been repealed and the case overruled.

114. For example, Georgia statutes provide for a thirty-minute maximum in misdemeanor cases, but a one-hour minimum in felonies, and a two-hour minimum in capital felonies and civil cases. Ga. Code Ann. §§ 9-10-180, 17-8-72-73 (1982); see also S.C. Code Ann. § 40-5-330 (1977) (two hours); Me. R. Civ. P. 51(a) (one hour); R.I. R. Civ. P. 51 (one-hour minimum).

the time allowed for closing argument is steadily shrinking, despite the fact that litigated issues seem to be becoming more complex.116

Jurisdictions follow one of four time limit versions. In most states, the trial judge has complete discretion to set limits as long as at least some argument is allowed.117 A few states have created a bright line rule requiring certain minimum time and giving the judge discretion to allow more time but not less.118 At least three states set an ideal time and give the judge discretion to allow either more or less time.119 Finally, at least two states have rules prohibiting any time limits.120

Within applicable statutory boundaries, trial courts have discretion to limit the time for argument. The courts should consider the factual or legal complexity of the dispute, the amount of evidence presented, the length of the trial, and the seriousness or importance of the case.121 In reviewing time limits, appellate courts often refer to the simplicity or complexity of the facts. They discuss whether the evidence is direct or circumstantial, uncontradicted or conflicting, and whether the factual issues are few or numerous.122 Appellate courts also take into account

117. See, e.g., In re Guardianship of Baby Boy M., 66 Cal. App. 3d 254, 135 Cal. Rptr. 866 (1977); Chandler v. Miles, 38 Del. 431, 193 A. 576 (Del. Super. Ct. 1937); Federal Land Bank of Baltimore v. Fetner, 269 Pa. Super. 455, 463, 410 A.2d 344, 349 (1979); Brooks v. State, 187 Tenn. 67, 213 S.W.2d 7 (1948); see also ALASKA R. CIV. P. 46(h) (the court may fix the time allowed); Mo. R. CRIM. P. 27.02(1) (the court shall fix the length of time).
118. See ME. R. CIV. P. 51(a) (counsel shall be allowed one hour; additional time if good cause shown); see also State v. Nyman, 55 Conn. 17, 10 A. 161 (1886) (ordering new trial for restricting argument to less than full time specified in statute); GA. CODE ANN. § 9-10-180 (Supp. 1986) (counsel shall be limited to two hours) (interpreted by Lovett v. Sandersville R.R., 199 Ga. 238, 33 S.E.2d 905 (1945), as setting the minimum time; no discretion to restrict argument to less than two hours); GA. CODE ANN. § 9-10-181 (1982) (explicitly permits an extension of time).
119. See, e.g., W. VA. CODE § 56-6-24 (1966) (two hours; more or less time may be allowed); MASS. R. CRIM. P. 24(a)(2) (similar); MASS. R. CIV. P. 51(a) (each side allowed thirty minutes; court may reasonably reduce or extend the time); VT. R. CIV. P. 51 (one hour; court may grant more time or limit to less time).
120. OKLA. STAT. ANN. tit. 22, § 831(6) (West 1986) (in criminal cases, court shall not limit time for argument); see also IOWA R. CIV. P. 195 (court may limit time in bench trials but not in jury trials). The Iowa rule is unique in having been continuously in force since the nineteenth century. It is cited in 1 S. THOMPSON supra note 1, at 712 as MILLER REV. CODE IA. § 2783.
121. E.g., Brooks v. State, 187 Tenn. 67, 213 S.W.2d 7 (1948).
122. See, e.g., Kelley v. State, 7 Ark. App. 130, 644 S.W.2d 638 (1983) (simple case, event lasted less than one minute); Reagan v. St. Louis Transit Co., 180 Mo. 117, 79 S.W. 435 (1904) (conflicts in evidence); Brooks v. State, 187 Tenn. 67, 213 S.W.2d 7 (1948) (complexity of case, whether evidence direct or circumstantial, whether evidence contradicted); see also ALASKA R. CIV. P. 46(h) (parties shall be given adequate time for argument, having due regard for the complexity of the case).
the number and complexity of the issues involved. Additional factors considered include the number of witnesses, the quantity of documents presented, and the length of the trial or lapse of time between the evidence and arguments. Finally, appellate courts consider the seriousness of the case; for example, holding that more time may be needed in capital cases and jury trials than misdemeanors and bench trials.

The question remains whether there is some irreducible minimum amount of time that must be allowed, or some amount of time that is presumptively sufficient. Time limits of fifteen, ten, or even five minutes are sometimes proper and sometimes erroneous. Five to fifteen minute limits have been upheld while ninety minute limits have been struck down. State rules of procedure sanction everything from


124. See, e.g., United States v. Davila, 693 F.2d 1006 (10th Cir. 1982) (number of witnesses and exhibits); Moses v. Proctor Coal Co., 166 Ky. 805, 179 S.W. 1043 (1915) (number of witnesses); Brooks v. State, 187 Tenn. 67, 213 S.W.2d 7 (1948) (amount of testimony and number of witnesses); State v. Mayo, 42 Wash. 540, 85 P. 251 (1906) (length of transcript, number of witnesses).


126. See In re Guardianship of Baby Boy M., 66 Cal. App. 3d 254, 135 Cal. Rptr. 866 (1977) (nonjury v. jury trial); State v. Mayo, 42 Wash. 540, 85 P. 251 (1906) (capital v. noncapital crimes); see also GA. CODE ANN. §§ 17-8-72, 17-8-73 (1982) (thirty minutes for misdemeanors, one hour for noncapital felonies, two hours in capital cases). A review of the time limits cited in F. BUSCH, supra note 1, at 422-30, indicates that trial judges generally award two to four hours in murder cases, but not more than one and one-half hours in other kinds of cases.

127. At least one court thought so, and cited the fact that Cicero had been able to defend Caius Rabirius on a charge of murder in half an hour as presumptive evidence that any case can be argued in that length of time. State v. Page, 21 Mo. 257 (1855); see also Louis P. Hyman & Co. v. H. H. Snyder Co., 159 Ky. 354, 167 S.W. 146 (1914) (ten minute limit is per se error).


thirty minutes to two hours. Yet, a historical trend from longer to shorter time limits is evident in the cases. The trend falls short of creating a bright line rule, but provides some insight into the proper exercise of discretion.

The earliest reported appellate opinions reviewing time limits appear in the 1850's. Subsequently, the stated legal rule has remained constant: the setting of reasonable time limits is a matter of judicial discretion, reviewable only for abuse of that discretion. However, the appellate interpretation of the legal rule determining where to draw the line between reasonable and unreasonable restrictions, and when to reverse judgments, has changed over time. Appellate courts have become increasingly tolerant of the imposition of time limits, reversing fewer and fewer cases. In the nineteenth century, despite the rule of discretion, over twenty percent of all cases appealed because of time limits were reversed. This percentage is well within the expected reversal rate for cases generally. In the first half of this century that rate dropped to fifteen percent and has fallen to around five percent since 1950. A similar decline in the reversal rate occurred in cases involving time limits of more than one-half hour: down from five percent to one percent. These data are summarized in Table 1.

In the absence of a contrary statute or practice rule, the trial judge also has discretion to limit the number of attorneys and the

130. Statutes currently in force prescribe everything from thirty minutes to two hours. See supra note 134.
131. Corboy, The Right to Trial by Jury, 4 AM. J. TRIAL ADVOC. 65 (1980) (Author argues that the jury system is too important to limit based on motion that judicial time is a "luxury" or "scarce resource").
133. The table summarizes 300 appellate cases (not part of the sample). Some of the more interesting cases are: People v. Fernandez, 4 Cal. App. 314, 87 P. 1112 (1906), overruled, People v. Burton, 359 P.2d 433 (1961) (defense "limited" to two hours; error); Hunt v. State, 49 Ga. 255 (1873) (a thirty-minute limit in a felony is per se error); and any of the South Carolina cases trying to interpret a statute that provided for two hours of argument; State v. Tighe, 27 Mont. 327, 71 P. 3 (1903) (any limit in capital case is error). Compare State v. Cash, 138 S.C. 167, 136 S.E. 222 (1927) (statutory two-hour limit interpreted as minimum requirement, one-hour limit reversed) with State v. Blackstone, 113 S.C. 528, 101 S.E. 845 (1920) (statutory two-hour limit interpreted as minimum allowed; twenty-minute limit upheld).
134. See GA. CODE ANN. § 17-8-70 (1982) (maximum of two counsel per side, only one in conclusion); IDAHO CODE § 19-2103 (1979) (two counsel per side in capital cases); MISS. CODE ANN. §§ 11-49-9 (civil), 99-17-11 (criminal) (1972) (maximum of two attorneys per side); NEV. REV. STAT. § 175-151 (1986) (in capital cases, two counsel allowed); TEX. CODE CRIM. PROC. ANN. art. 36.08 (Vernon 1981) (in felony
TABLE 1
Cases Reversed on Appeal for Abuse of Discretion in Setting Time Limits on Argument

<table>
<thead>
<tr>
<th></th>
<th>Reported case raising time limit issue*</th>
<th>All time limits</th>
<th>Time limits of more than 30 minutes</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Number reversed</td>
<td>Percent reversed</td>
</tr>
<tr>
<td>1850-1900</td>
<td>57</td>
<td>12</td>
<td>21.1%</td>
</tr>
<tr>
<td>1900-1950</td>
<td>147</td>
<td>23</td>
<td>15.6%</td>
</tr>
<tr>
<td>1950-present</td>
<td>96</td>
<td>5</td>
<td>5.2%</td>
</tr>
</tbody>
</table>

*Estimate

number of arguments. Basic procedural fairness is satisfied when each party is given one opportunity to argue; anything beyond that is discretionary. This obvious point rarely has been the subject of appellate review. The issue arose in only six cases in the sample. In each, the appellate court upheld the decision of the trial judge. However, many arguments had been permitted as being within the trial judge's discretion.  

At one time, argument was more important than it is now. In 1889, four pages in a noted source on trial procedure were devoted to a discussion of limiting attorneys, 136 in 1960, only three sentences were deemed necessary. 137 Several factors appear to account for its demise as an important issue. In the nineteenth century, it was common for a party to be represented by both the senior and junior counsel. The expectation was that both would argue: junior counsel first, and senior counsel last. 138 To restrict

cases; at least two arguments per side permitted); W. VA. CODE § 56-6-24 (1966) (maximum of two attorneys per side); WIS. STAT. ANN. § 805.10 (West 1977) (maximum of two attorneys per side); IOWA R. CRIM. P. 18 (defendant entitled to have two attorneys argue); PA. R. CRIM. P. 1116(b) (one argument per party). In one old case, a state statute prohibiting time limits was interpreted as also prohibiting limits on the number of attorneys. State v. Miller, 75 N.C. 73 (1876). 135. Complaints that too few arguments were permitted were summarily dispensed with, see Moldovan v. Allis Chalmers Mfg. Co., 83 Mich. App. 373, 268 N.W.2d 656 (1978); Varela v. State, 561 S.W.2d 186 (Tex. Crim. App. 1978); as were complaints that too many arguments had been allowed, see also Holmes v. Black River Elec. Coop., 274 S.C. 252, 262 S.E.2d 875 (1980); Roberts v. State, 571 P.2d 129 (Okla. Crim. App. 1977).

136. 1 S. THOMPSON, supra note 1, at 709-13.
137. 5 F. BUSCH, supra note 1, at 420.
a party to one argument meant either that junior counsel was denied the experience of arguing in an important case or that the party was denied the full services of the senior. In some circumstances it was common for the entire bar of a county to appear on one side or the other in important cases. Because circuit courts often sat only for fixed terms, if lawyers were still arguing at the end of the term, a mistrial would be required and that case postponed until the next term.\textsuperscript{139} Theoretically, if arguments were unlimited, a person able to hire enough attorneys could effectively prevent his case from ever being sent to the jury. None of these circumstances exists today. The use of junior and senior counsel, or multiple counsel in any configuration, is rare. Courts now sit in continuous session, so lengthy argument cannot force a mistrial. Questions about limiting the number of arguments for these reasons are of little importance.

The issue of the number of arguments still occurs in multi-party lawsuits. Assume that an injured plaintiff is represented by a single attorney suing a car dealer, a car manufacturer, and a component part manufacturer for negligence and product liability. Each defendant hires its own law firm, and each law firm assigns both a litigation partner and an associate to the case. When time comes for closing arguments, seven attorneys request permission to argue. If the judge only limits each attorney to one hour, the defendants can argue for six hours, the plaintiff only for one. Even if the judge sets the time limit per party at one half hour, the defendants may argue for three hours to the plaintiff's one. If the judge sets a one-hour time limit per side, then each individual defendant is allowed only twenty minutes, to the plaintiff's hour. However, the defendant may have to make a more complicated argument. While the plaintiff may be content to argue liability and damages, each defendant must also argue about the allocation of responsibility among the several defendants. If the judge sets no limits on the number of attorneys who may argue, the plaintiff may be outnumbered six to one and arguments may last several days. If the judge limits the number of attorneys to one per party, it may prejudice a defendant whose counsel had divided the issues among several attorneys. If the judge limits the three defendants to a single attorney-spokesperson, the other defendants may be deprived of their rights to be heard since their interests may not exactly be the same.

In multiple party lawsuits, several rules of thumb have developed. First, it is a fundamental requirement that each party participate in

\textsuperscript{139} 1 S. Thompson, \textit{supra} note 1, at 712.
the process. If parties have diverse interests, each is entitled to argue. However, when the interests of coparties are identical, the judge may limit them to a single argument.\textsuperscript{140} If the right to argue allows several defendants to argue against a single plaintiff, the court must use its discretion to assure some kind of fair balance. A fair balance can be brought by imposing limits on the defendants so that the plaintiff is not overwhelmed by the sheer volume of their arguments. Also, assuring the defendants enough time to adequately argue their positions will create a balance. Some combination of time limits and restrictions on the number of defense attorneys usually is appropriate, but the court need not give each attorney the same amount of time, nor balance exactly the total number of arguments or time allotted to each side.\textsuperscript{141}

2. Regulating the Sequence of Arguments

A combination of common law, statutes, rules of procedure, and judicial discretion regulates the sequence of arguments. Most jurisdictions provide a standard model for the proper order of arguments. However, the trial court is given discretion to vary that order in unusual cases. Also, the proper scope of each successive argument is specified and enforced to varying degrees by procedural sanctions that may be imposed if an attorney exceeds or falls short of the requirements.

The standard practice has three arguments: plaintiff first, then defendant, followed by plaintiff's rebuttal. Only six states deviate from this practice and permit only two arguments. In all but one, the

\textsuperscript{140} See 5 F. Busch, supra note 1, at 421; 1 S. Thompson, supra note 1, at 710 (even if parties were joined involuntarily as defendants, the court may restrict the number of attorneys who argue if their interests are identical). \textit{E.g.}, S.D. Codified Laws Ann. § 15-14-2 (1969). A strange variation of this statute is found in a few states that only mentions \textit{defendants} with separate defenses, \textit{e.g.}, Ky. R. Crv. P. 43.02(e). Statutes also can be found that appear to give a right to argue to coparties without regard to whether their interests are diverse, \textit{e.g.}, Iowa R. Crim. P. 18 (codefendants may be heard by one counsel each), and which simply dump the whole problem into the lap of judicial discretion, \textit{e.g.}, ME. R. Civ. P. 51(a) (when multiple parties are involved, the order and division of the arguments shall be subject to the direction of the court). \textit{See also} Sodousky v. McGee, 27 Ky. (4 J.J. Marsh) 267 (1830). This issue is addressed by statute in many states. One common form specifies that if several parties appear with separate interests and different counsel, each is entitled to argue.

\textsuperscript{141} See Lemons v. St. John's Hosp., 5 Kan. App. 2d 161, 613 P.2d 957 (1980) (plaintiff given forty minutes, two defendants given thirty minutes each; upheld as within trial court's discretion); Aultman v. Dallas Ry. & Terminal Co., 152 Tex. 509, 260 S.W.2d 596 (1953) (within court's discretion to give plaintiff fifty minutes, one defendant thirty minutes, and a second defendant twenty minutes).
The standard three-argument format is familiar. It appears in formal debates, appellate arguments, and the complaint-answer-reply sequence of civil pleadings. It permits each side the opportunity both to state its position and to respond to the opponent’s argument. The more limited two-argument format undoubtedly evolved from a desire to save time in the crowded trial courts. This conclusion is strengthened by the fact that Massachusetts, New York, New Jersey and Pennsylvania are four of the six states that follow this practice. Allowing only two arguments may save time, but it creates an imbalance in argument. The side required to go first is denied the opportunity to respond to the opponent’s argument, however outrageous it may be. The side going second gets to both state its own position and respond to the opponent’s argument. Several courts have commented on the unfairness of such a practice.

The flexibility of the plaintiff-defendant-plaintiff sequence varies depending on jurisdiction and type of case. In civil cases, the rule is flexible. In most states, whichever party has the primary burden of proof determines the order, regardless of whether they are plaintiff or defendant. In a small number of states, the order is fixed according to the plaintiff/defendant designation, but may be reversed if the defendant presents no evidence. However, in criminal cases the rule is more likely to be inflexible. In a majority of states, the prosecution

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142. KY. R. CRIM. P. 9.42(f); KY. R. CIV. P. 43.02(e); N.J. GEN. APP. 1:7-1(b); N.Y. CIV. PRAC. R. 4106; PA. R. CRIM. P. 1116(b). Only Minnesota gives the defendant the final argument. MINN. R. CRIM. P. 26.03 subdiv. 11(h-i).

143. See, e.g., Heddenendorf v. Joyce, 178 So. 2d 126 (Fla. Dist. Ct. App. 1965); People v. Davis, 58 Mich. App. 159, 227 N.W.2d 269, 271 n.2 (1975); Misch v. C.B. Contracting Co., 394 S.W.2d 98 (Mo. Ct. App. 1965); State v. Hamric, 151 W. Va. 1, 24, 151 S.E.2d 252, 267 (1966). While the author recognizes that the three argument model is not universal, it will be used as the standard reference throughout this section.

144. It is senseless for the author’s purposes to try to distinguish between the party with the burden of going forward and the party with the ultimate burden of persuasion. The statutes and cases are not sufficiently precise. See, e.g., Chandler v. Miles, 38 Del. 431, 193 A. 576 (Del. Super. Ct. 1937) (party “with the affirmative” has right to open and close); Wright v. Dilbeck, 122 Ga. App. 214, 176 S.E.2d 715 (1970) (party with “burden of proof” has right to open and close); IND. CODE § 34-1-21-1 (1983) (party having the “burden of the issue” shall have the opening and closing); NEB. REV. STAT. § 25-1107 (1979) (party “required first to produce his evidence” shall open and close); ARIZ. R. CIV. P. 51(c) (party having “burden of proof on the whole case” entitled to first and last argument); see also Silver v. New York Life Ins. Co., 116 F.2d 59 (7th Cir. 1940) (burden “seems to be on defendant,” so it was entitled to open and close).

always argues first and last, regardless of who has the burden of proof. The order is set assuming the prosecution has the burden. Flexibility is found in four southeastern states where the normal order may be reversed if a defendant presents no evidence. In Texas, the judge has discretion to set the order for all arguments except the last argument which is the prosecution's. In Arkansas, the trial judge apparently has the authority to reverse the normal order of the argument.

Most states have different rules for civil and criminal cases. In civil cases, the party with the burden of proof argues first and last, but in criminal cases the prosecution always opens and closes regardless of the burden of proof. In criminal trials where the defendant assumes the burden of proof, for example, by relying on self-defense or insanity, he is not permitted to open and close the argument. The defendant is precluded from opening and closing even when he admitted all elements of the offense the state must prove.

Lawyers, judges, and legislators certainly think the order of arguments makes a difference. Going first and last is seen as the position of advantage. Statutes and case law refer to a party earning the right or privilege to speak first or last. Evidence in social science literature supports this perception. Since bearing the burden of proof is an

147. TEX. CODE CRIM. PROC. ANN. art. 36.07 (Vernon 1981); see Martinez v. State, 501 S.W.2d 130 (Tex. Crim. App. 1973) (specifically rejecting principle that order of argument is to be determined by who has burden of proof).
148. The Arkansas statute appears to permit a criminal defendant to open and close if he has the burden of proof. ARK. STAT. ANN. § 43-2132 (1977). The author found no case interpreting it.
149. See W. LAFAYE & A. SCOTT, CRIMINAL LAW 46-51 (1972) (for a discussion of shifting burdens of going forward and persuasion in the criminal law).
150. See, e.g., Little v. State, 157 Ga. App. 462, 278 S.E.2d 17 (1981) (noting that the order and extent of argument is well within the court's discretion); Moss v. Mittel, 253 Ky. 504, 69 S.W.2d 1046 (1934) (denial of right is reversible error); State v. McCaskill, 47 N.C. App. 289, 267 S.E.2d 331 (1980) (defendant lost right to open and close); Reagan v. St. Louis Transit Co., 180 Mo. 117, 79 S.W. 435 (1904) (going first and list is a privilege); State v. Rodgers, 269 S.C. 22, 235 S.E.2d 808 (1977) (request is substantial); CONN. GEN. STAT. ANN. § 54-88 (West 1985) (State shall be entitled to open and close); see also W. BEST, RIGHT TO BEGIN AND REPLY 84-85 (Am. ed. 1880).
obvious disadvantage, it seems only fair that whoever has the burden of proof should be given the advantage of opening and closing the argument. This occurs in civil but not in criminal cases.

This difference in civil and criminal cases may have a historical explanation. The right to open and close the argument, in both types of cases, was one part of a broader right to go first and last throughout the trial. The party with the burden of proof conducted the first voir dire, gave the first opening statement, presented its evidence first and last, and argued first and last. Therefore, it was necessary to decide who bore the burden of proof before the trial started. In civil cases, a judge could usually tell from the pleadings who would bear the ultimate burden of proof. In criminal cases, the defendant filed no pleadings, therefore, it was impossible to discern who bore the burden before the trial. Since the prosecution usually bore the burden, it always went first. This rule still exists despite erosion of the underlying premises. However, many states now require criminal defendants to raise affirmative defenses by filing special pleadings. Therefore, now the trial judge can tell before trial when a defendant will bear the burden of proof. Also, many states have now abandoned the rule that the order of arguments must remain the same throughout civil trials.

Perpetuating the rule in criminal cases allows the prosecution to have a double advantage in the form of no burden of proof and the right to argue first and last.

The standard three-argument sequence assumes the plaintiff states his position in the first argument, the defendant then responds to plaintiff's argument and states his position, and finally the plaintiff responds briefly to the defendant’s argument. Attorneys usually follow this structure because it is generally thought to be the most effective tactical approach. But unresolved is the appropriate judicial response

152. See, e.g., Moss v. Mittel, 253 Ky. 504, 69 S.W.2d 1046 (1934) (right to open and close should be set at beginning of trial and not changed); Sirgany v. Equitable Life Assurance Society, 173 S.C. 120, 175 S.E. 209 (1934) (defendant had burden of proof under pleadings but did not request right to open and close argument until after all evidence was presented; request not timely); see generally W. Best, Right to Begin and Reply (Am. ed. 1880).

153. See, e.g., Horney v. McKay, 138 Neb. 309, 293 N.W. 98 (1940) (defendants failed to request right to open and close argument at the close of the evidence); Phoenix Mut. Life Ins. Co. v. Bernfield, 101 S.W.2d 1025 (Tex. Civ. App. 1937) (order of argument set after all the evidence); see also La. Civ. Dist. Ct. R. 14 (the judge may designate the sequence of arguments); Tex. R. Crv. P. 269 (order of argument may be determined by which party has burden of proof on the issues actually submitted to the jury).

154. See J. Tanford, supra note 1, at 173-74.
if any attorney deviates from this model. An attorney may decide that he will gain tactical advantage by waiving argument, saving important arguments for rebuttal to preclude response, or addressing only part of the controversy. This kind of manipulation of the rules may not be within the wide latitude given to attorneys.

The most common situation exists where the plaintiff tries to sandbag: waive his first argument or give a minimal argument to comply with the rule and wait until after the defendant has spoken to present his full argument. Allowing such a maneuver creates an imbalance in argument. By his actions the plaintiff unilaterally deprives the defendant of the opportunity to respond to the plaintiff's argument, while preserving his own opportunity to respond to the defense argument. It would be unfair to tolerate such gamesmanship in analogous situations. One cannot imagine a petitioner informing an appeals court that he or she decided to make the respondent argue first, or a plaintiff deciding not to file a complaint until after the defendant files a non-amendable answer. However, many states permit the practice in closing argument. At least ten states have rules or statutes that make the first argument optional, and others have reached that conclusion by common law.

While only the plaintiff has the opportunity to manipulate the sequence of arguments, both sides may try to manipulate the scope for tactical reasons. A plaintiff may give an incomplete first argument, saving crucial issues until rebuttal when the defense cannot respond. A defendant, realizing the plaintiff's maneuver, may restrict the scope of its own argument or waive it altogether. Where there is nothing to rebut, plaintiff does not get the opportunity to make the final argument.

155. There are two common forms of such a rule. Some rules state that the party with the burden of proof may (but is not required to) open the argument. See, e.g., Kan. Stat. Ann. § 22-3414 (1981) (prosecuting attorney may commence); Wash. Crim. R. 6.15 (prosecution may address the jury). Others state ambiguously that a party "shall have the opening" of the argument, usually construed to mean that first argument is waivable. See, e.g., Hickman v. Layne, 47 Neb. 177, 66 N.W. 298 (1896); see also Potapoff v. Mattes, 130 Cal. App. 421, 19 P.2d 1016 (1933) (statute provided that plaintiff "must" commence, but no error found in case where plaintiff waived first argument).

156. See, e.g., Chandler v. Miles, 38 Del. 431, 193 A. 576 (Del. Super. Ct. 1937) (opening may be nominal or real); State v. Rodgers, 269 S.C. 22, 235 S.E.2d 808 (1977) (prosecution not required to give first argument); Brown v. State, 475 S.W.2d 938 (Tex. Crim. App. 1971) (no requirement that prosecution give full first argument); see also State v. Rosa, 170 Conn. 417, 365 A.2d 1135 (1976) (a single violation of scope of rebuttal is not error); Bailey v. State, 440 A.2d 997 (Del. 1982) (rule against sandbagging honored more in breach than in observation).
Several states permit this result,157 sending the jury off to deliberate without aid of meaningful discussion by counsel on the issues.

Even in those jurisdictions limiting these tactics and requiring a fair three-argument format, the rules are not always enforced. In some jurisdictions, there are no sanctions for rule violations.158 In others, rule violations are ignored.159 In many instances, the violations are dismissed as procedural, as within the discretionary control of the trial judge, or as harmless error.160

A few jurisdictions actively restrict such blatant tactics. Some require the plaintiff to make a full and fair first argument unless he waives argument altogether. A full and fair argument raises the main issues and points on which the plaintiff relies. The defendant is then given the opportunity to discuss all material issues. The plaintiff, in rebuttal, responds to the defense argument and raises new arguments he inadvertently omitted in his first argument. Finally, the defendant may be given surrebuttal if any new issues have been raised in the plaintiff’s final argument.161

Nevertheless, the predominant judicial attitude toward manipulation of the order and scope of closing argument is one of tolerance. In the sample, thirteen cases presented situations where one party appealed


because the other party disregarded or manipulated rules concerning the sequence of arguments. Two cases were reversed and four were affirmed under the harmless error doctrine. However, in eight cases the court conceded that the rules had been manipulated but found nothing wrong with that. 162

Some jurisdictions treat civil and criminal cases differently. In criminal cases, some states' attorneys are permitted to withhold all or part of their argument until after the defendant speaks. Withholding deprives the defendant of an opportunity to respond directly to the prosecutor's arguments, but does not allow the defendant to prevent the state from closing by waiving his argument. The defense may waive, but the state will be allowed to argue anyway. These jurisdictions also generally prohibit surrebuttal by the defense. 163 The prosecutor may always employ tactical maneuvers in order to assure that the defendant cannot respond to his argument, but the defense is not allowed to make the countermoves available to civil defendants.

Three other unusual aspects of the rules are worth noting. In the federal courts, the rule has evolved that the discretion to regulate the sequence and scope of arguments is entirely vested with the lower trial court and will not be reviewed on appeal even for abuse of that discretion. 164 Several populous northeastern states take an opposite approach, and have established an inflexible routine that each side gets one argument, and there is no rebuttal or surrebuttal. 165 In unusual or complex cases involving multiple burdens of proof or multiple parties, all jurisdictions have abandoned any pretense of adhering to

162. One of the two courts that reversed a judgment seemed less than enthusiastic about doing so. Shaw v. Terminal R.R. Ass'n, 344 S.W.2d 32, 37 (Mo. 1961) (declined to set hard and fast rule).

163. See State v. Williams, 353 So. 2d 1299 (La. 1977) (if prosecutor raises new issues in final argument, defense not entitled to surrebuttal); Brown v. State, 475 S.W.2d 938 (Tex. Crim. App. 1971) (similar); see also Grassmyer v. State, 429 N.E.2d 248 (Ind. 1981) (statute prohibits sandbagging; court found no error when prosecutor referred to a confession for the first time in rebuttal, stating that it was permissible for the prosecutor to argue in “greater detail” during rebuttal).

164. See Day v. Woodworth, 54 U.S. (13 How.) 363 (1851); Hale v. United States, 410 F.2d 147 (5th Cir. 1969); Anderson-Tully Co. v. United States, 189 F.2d 192 (5th Cir. 1951); Silver v. New York Life Ins. Co., 116 F.2d 59 (7th Cir. 1940); see also La. Civ. Dist. Ct. R. 14 (the judge shall designate the sequence of arguments).

rules in favor of complete trial court discretion to set the sequence and permissible scope of argument.\textsuperscript{166}

**D. Enforcing the Rules of Argument in the Trial Court**

**1. Procedure for Claiming Benefits**

To maximize his closing argument, a party may wish to assert procedural rights, exercise privileges, and request discretionary benefits permitted by law. Each party has the right to argue, and one party in each trial has the right to open and close. In several jurisdictions, a party has a right to a minimum amount of time for argument, to have two attorneys argue, and to surrebuttal if his opponent does not argue on all the crucial points. Generally, a party \textit{must} be given these procedural rights if they are properly requested. In contrast, many jurisdictions grant the judge discretion to decide whether to confer additional procedural benefits such as a recess in which to prepare, an additional argument, and an extension of time, all of which the judge may or may not give to a party after a proper request.

The requirements of a proper request are set out in general terms in the common law and are not codified nor specific.\textsuperscript{167} These characteristics distinguish proper requests from most other procedural rules regulating how a party requests rights and benefits (such as demanding a jury trial, obtaining discovery, or suppressing illegally seized evidence) which generally are spelled out in great detail in codified rules of civil and criminal procedure. The common law generally imposes two

\begin{footnotesize}
\begin{enumerate}
\item See, \textit{e.g.}, Sequoia Mfg. Co. v. Halec Const. Co., 117 Ariz. 11, 570 P.2d 782 (Ariz. Ct. App. 1977) (trial court discretion to set order in case involving third-party complaint; no discussion of any guiding principles); Wright v. Dilbeck, 122 Ga. App. 214, 176 S.E.2d 715 (1970) (discusses right to open and close in multi-party cases, then bases affirmance on trial court discretion); Shedlock v. Marshall, 186 Md. 218, 46 A.2d 349 (1946) (if multiple parties are involved, cannot follow usual rules, so trial court has discretion); ARIZ. R. CIV. P. 51(c) (in simple cases, the party with the burden of proof may open and close, but if there are several parties, the court sets the order of argument); ME. R. CIV. P. 51(a) (in simple cases, plaintiff goes first and is limited to fifty minutes, defendant argues next for one hour, and plaintiff then has ten minutes for rebuttal; but if there are multiple parties, the court sets the order and division of arguments).

\item There is one exception. Statutes in several states establish strict procedures for requesting additional time. \textit{See, \textit{e.g.}}, CONN. GEN. STAT. ANN. \textsection{} 52-209 (West Supp. 1986) (one hour limit \textquoteleft\textquoteleft unless the court, on motion for special cause, \textit{made} before the commencement of an argument, allows a longer time\textquoteright\textquoteright).
\end{enumerate}
\end{footnotesize}
requirements: the request must be explicit and must be made at the proper time.\textsuperscript{168} While the request must be explicit, the survey did not reveal any suggestion that it had to be made in writing or adhere to any particular format. An oral request appears to be sufficient.\textsuperscript{169} There is some indication that the request must be reasonably specific and that, at least when made for a discretionary benefit, a general objection is insufficient.\textsuperscript{170}

Little specific guidance exists as to the proper time when a request must be made, except that it must be made in advance.\textsuperscript{171} The one firm rule that seems to have survived in some states concerns request for more time: if the time allotted for argument by statute or by the judge in the exercise of his discretion is inadequate, an attorney may be required to request more time \textit{before} the arguments begin.\textsuperscript{172} Additionally, an attorney may be required to renew the request after expiration of the allotted time,\textsuperscript{173} but it appears this rule has disappeared.

\textsuperscript{168} Busch states that a party must also protest (take an exception to?) the court's refusal to permit its exercise, 5 F. BUSCH, supra note 1, at 423, but the author could find no indication in the cases that such a protest or exception was required.

The one exception may be a criminal defendant's right to be heard in argument. While some post-\textit{Herring} cases have held that the court is not obligated to grant argument absent an explicit request, \textit{see} United States v. Spears, 671 F.2d 991 (7th Cir. 1982), most have held that failure to request argument does not constitute a valid waiver of the right nor relieve a trial judge of his obligation to provide an opportunity for the defendant to be heard.

\textsuperscript{169} \textit{See generally} People v. Trolia, 107 Ill. App. 3d 487, 437 N.E.2d 804 (1982) (request for additional time); Durden v. State, 406 N.E.2d 281 (Ind. Ct. App. 1980) (request for further argument on new jury instruction required); Moldovan v. Allis Chalmers Mfg. Co., 83 Mich. App. 373, 268 N.W.2d 656 (1978) (court looked to see if the record showed any kind of request to have two attorneys argue); Horney v. McKay, 138 Neb. 309, 293 N.W. 98 (1940) (appellate court looked to see if any kind of request to open and close appeared on the record).

\textsuperscript{170} \textit{See} Commonwealth v. Cooper, 230 Pa. Super. 204, 327 A.2d 177 (1974) (defendant objected to being forced to make an immediate closing argument because he was not ready, but judge was not required to grant a short recess, because counsel did not specifically request one); \textit{see also} GA. CODE ANN. § 9-10-181 (1982) (in request for more time, counsel must state how much additional time will be required).

\textsuperscript{171} \textit{See} United States \textit{ex rel.} Spears v. Johnson, 463 F.2d 1024 (3d Cir. 1972) (request not made until habeas corpus petition; not timely); Horney v. McKay, 138 Neb. 309, 293 N.W. 98 (1940) (request to open and close can be made at close of evidence); Commonwealth v. Cooper, 230 Pa. Super. 204, 327 A.2d 177 (1974) (implies that request made immediately before argument would have been sufficient).

\textsuperscript{172} CONN. GEN. STAT. ANN. § 52-209 (West Supp. 1986); GA. CODE ANN. § 9-10-181 (1982); S.D. CODIFIED LAWS ANN. § 15-14-17 (1984); MASS. R. CIV. P. 51.

\textsuperscript{173} Busch cites three cases in support of his statement that a party must renew the request after using up the allotted time, 5 F. BUSCH, supra note 1, at 423 n.32,
2. Objection Procedure

Violations of the law of closing argument most commonly occur when an attorney goes too far in the heat of the argument and makes an improper argument or violates proper procedures. If the other party wishes the law enforced, he must make an objection. Although the trial judge has the power to make *sua sponte* objections, the judge is not required to do so. The burden of initiating procedures to enforce the rules of argument rests on the aggrieved party, similar to objections to improper evidence. These objection procedures can be quite complex. However, the judge may or may not choose to rule only on procedurally proper objections. In practice, most judges probably are not sticklers for procedural detail.

Proper objection procedures are spelled out almost exclusively in the common law. In general they are as follows: (1) the judge must permit a party the opportunity to object; (2) the party must make a timely objection; (3) the objection must state specific grounds; and (4) the party must make specific request for a remedy. Several jurisdictions have an additional rule requiring objections to be made out of the hearing of the jury.

Within our adversarial system, the concept that a party must have an opportunity to make an objection is so fundamental that there is little explicit law on the subject. The system simply assumes that the partisan objection is an integral component of a trial. Enforcement of the rules depends at least in part on the presence or absence of an objection. Only one statute explicitly gives a party the right to object but this supposed "rule" does not appear in any of the cases in the sample, nor can this author find any additional support for this proposition. It sounds like taking an exception. Cf. Frazier v. State, 170 Tex. Crim. 432, 342 S.W.2d 115 (1961) (defendant who does not use all allotted time cannot complain that it was too short).


175. One occasionally sees in the opinions some vague suggestion that the judge may have the obligation to intervene *sua sponte* when necessary to preserve a fair trial, but the courts cannot agree on exactly when that is. Viereck v. United States, 318 U.S. 236, 63 S. Ct. 561, 87 L. Ed. 734 (1943) (dictum) (appeals to wartime prejudices); Aetna Life Ins. Co. v. Kelley, 70 F.2d 589 (8th Cir. 1934) (intemperate attack on credibility of witnesses); Hillson v. Deeson, 383 So. 2d 732 (Fla. Dist. Ct. App. 1980) (counsel asserting personal opinions); State v. Rollie, 585 S.W.2d 78 (Mo. Ct. App. 1979) (when argument is glaringly offensive); State v. Thompson, 290 N.C. 431, 226 S.E.2d 487 (1976) (adverse inference from failure to call spouse as witness). This author suggests that such language appear in an opinion when the appellate court has decided to reverse despite the absence of an objection and ruling, and it is trying to articulate something the judge did or did not do as the error.
during closing argument. In the one sample case in which a party was prevented from making an objection, the judgment was reversed on appeal. The other procedural rule facilitating the opportunity to state an objection is that the judge must be present during argument in order to hear the objection.

The second requirement is that the objection must be timely. Most jurisdictions adhere to the contemporaneous objection rule found in the law of evidence: a party is supposed to object at the time of the rule violation as soon as the grounds become apparent. In some jurisdictions, objections at other times also may be proper. Occasional cases in the sample approved objections made before argument and renewed at the close of argument, made for the first time at the completion of argument, and made after the jury had retired.

In all jurisdictions, a contemporaneous objection is proper, despite the mistaken belief that objections should not be made until the end of argument. The real issue is what happens when an objection is

176. W. VA. TRIAL CT. R. VI(a) (counsel may interrupt argument to object and obtain a ruling).
178. See Caplan v. Reynolds, 191 Iowa 453, 182 N.W. 641 (1921); Poe v. Arch, 26 S.D. 291, 128 N.W. 166 (1910). But see Miller v. North Carolina, 583 F.2d 701 (4th Cir. 1978) (record showed trial judge not on bench; did not seem to disturb the court of appeals). Texas has a statute that adds one additional requirement—counsel may "ask leave of the court to rise and present his . . . objection." TEX. R. CRIM. P. 269(g).
179. See, e.g., Hartman v. Shell Oil Co., 68 Cal. App. 3d 240, 137 Cal. Rptr. 244 (1977); Caplan v. Reynolds, 191 Iowa 453, 182 N.W. 641 (1921); Houston v. Commonwealth, 641 S.W.2d 42 (Ky. Ct. App. 1981); Watts v. State, 630 S.W.2d 737 (Tex. Crim. App. 1982). It is suggested in 1 S. THOMPSON, supra note 1, at 737-38 that an objection must always be made at the time of the misconduct, but the cases do not support so absolute a statement.
180. United States v. Pool, 660 F.2d 547 (5th Cir. 1981); see Henslee v. Marta, 142 Ga. App. 821, 237 S.E.2d 225 (1977) (Court approved objection made before argument; not necessary to renew the objection.; see also Crum v. Ward, 146 W. Va. 421, 122 S.E.2d 18 (1961) (proper objection should be made before argument begins; not necessary to renew it).
made at some other time. In a majority of jurisdictions, an "untimely" objection is not sufficient to require judicial action. In the course of lengthy arguments, the trial judge may have forgotten exactly what was previously said or done. If the trial judge were required to rule on an untimely objection, the trial might have to be stopped while the court reporter read back through the stenographic transcript; this would be an inefficient use of the court's time. However, the courts are not prohibited from acting without a timely objection. All jurisdictions permit the judge the discretion to rule on an untimely objection "in the interests of justice". Many even permit objections to the most serious rule violations, coupled with motions for mistrial, to be made after arguments are over.\textsuperscript{184}

The third requirement is that the objecting attorney state specific grounds for his objection. A vague or general objection\textsuperscript{185} does not compel the court to take action; the judge can safely ignore an objection if the attorney cannot state a legal basis for it. This requirement is universally stated but seldom explained.\textsuperscript{186} Only one appellate court in the sample of cases offered a justification for the rule: a specific objection gives the trial court an opportunity to rule intelligently and avoids unnecessary retrials.\textsuperscript{187} Implicit in this statement is that it is thought that a ruling by the judge actually repairs the damage caused by improper argument,\textsuperscript{188} and that one is willing to let the attorneys' relative abilities affect the trial's outcome. As in the case of the timeliness requirement, serious errors may be corrected in the judge's discretion despite an inadequate objection or no objection. Several cases create an exception to the specificity requirement: if an argument is clearly improper or manifestly prejudicial, or if in the context the error was so obvious that the judge could not reasonably have failed


\textsuperscript{186} See, e.g., Gilmore v. Union Constr. Co., 439 S.W.2d 763 (Mo. 1969); Jones v. State, 644 S.W.2d 530 (Tex. Crim. App. 1982); Wis. STAT. ANN. § 805.11 (West 1977). \textit{But see} Bew v. Williams, 373 So. 2d 444 (Fla. Dist. Ct. App. 1979) (at trial, defendant objected but stated no grounds; court of appeals refers to it in passing as a "proper objection"; propriety of objection \textit{not} an issue).


\textsuperscript{188} The empirical evidence suggests otherwise—judicial "corrective" action may in fact increase the prejudice. \textit{See infra} text accompanying notes 358-60.
to understand the reason for the objection, then a general objection obligates the judge to take corrective action.\(^{189}\)

The fourth requirement is that the attorney request an appropriate remedy. An objection by itself technically only requires a ruling. While a judge might go further and try to remedy a procedural error by allowing more time to argue, or reduce the impact of an improper argument by admonishing the attorney, instructing the jury to disregard it, or declaring a mistrial, the judge is not required to take any action absent a specific request.\(^{190}\) In general, courts expect an attorney to follow a predictable, routinized pattern from an objection to a request for a corrective remedy to a mistrial motion. If the objection is sustained, the attorney should request a specific procedural remedy or move that an improper argument be struck and the jury instructed to disregard it.\(^{191}\) If the judge overrules the objection, refuses to strike the argument, does not instruct the jury, or otherwise fails to adequately cure the error, the aggrieved party must move for a mistrial.\(^{192}\)

It is far from clear whether an attorney’s request for a remedy must be made at the same time as the objection. The majority rules seem to be as follows: (1) motions to strike the offending argument or to admonish the attorney must be made at the same time as the objection;\(^{193}\) (2) requests for a curative instruction must be made at the time of the objection if the general instructions have been given prior to argument,\(^{194}\) but may be made at any time prior to instructions if the


192. See Bew v. Williams, 373 So. 2d 446 (Fla. Dist. Ct. App. 1979) (if instruction insufficient to cure, attorney must move for mistrial); State v. Terrio, 442 A.2d 537 (Me. 1982) (court need not grant mistrial if defendant does not request it); Barnes v. Quality Beef Co., 425 A.2d 531 (R.I. 1981) (if instruction to disregard is inadequate, attorney must move for mistrial). But see State v. Dupre, 408 So. 2d 1229 (La. 1982) (no motion for mistrial necessary if judge overrules objection).


instructions follow argument;\textsuperscript{195} and (3) motions for mistrial may be made at any time prior to jury deliberations, since they may be based on cumulative errors or on the judge's failure to adequately correct an error through the jury instructions.\textsuperscript{196}

In a number of jurisdictions, there is a fifth requirement: arguments supporting or opposing an objection must be made out of the hearing of the jury. Generally it is proper to make an objection, state the grounds for it, and request an immediate remedy in open court.\textsuperscript{197} However, any argument on how the judge should rule addresses a question of law and should not be heard by the jury.\textsuperscript{198} The reasons are fairly obvious. Such arguments do not address the merits of the case, they may require discussion concerning the impact of the objectionable argument, and they may emphasize the very argument the judge eventually rules to be illegal. In most jurisdictions, however, when an attorney objects that an opponent's argument is factually inaccurate, he is permitted to explain the inaccuracy in front of the jury.\textsuperscript{199}


\textsuperscript{197} See Wexler v. Martin, 367 So. 2d 111 (La. Ct. App. 1979) (improper for counsel to argue points of law in front of jury); Wyo. Dist. Ct. R. 17(n) (when making objection, only the legal ground may be stated in jurors' presence).

\textsuperscript{198} See Baron Tube Co. v. Transport Ins. Co., 365 F.2d 858 (5th Cir. 1966) (proper to refuse to permit attorney to read law in support of objection in presence of jury); Rowley v. Rousseau, 81 Ill. App. 3d 193, 400 N.E.2d 1045 (1980) (error to object to defendant's argument implying he would pay loss personally by stating in jurors' presence that insurance company would pay); MINN. CRV. TRIALBOOK § 31 (any objection to final argument shall be argued outside jurors' hearing); Wyo. Dist. Ct. R. 17(n) (objections may not be argued in presence of jury).

\textsuperscript{199} See Powers v. Illinois Cent. Gulf R.R., 92 Ill. App. 3d 1033, 416 N.E.2d 1161 (1981) (plaintiff argued in rebuttal that defendant had conceded $80,000 in lost future earnings; defendant objected on the ground that he had said $80,000 total damages); Edwards v. Lacy, 412 S.W.2d 419, 421 (Mo. 1967) (court gives the following example: plaintiff improperly argues that the last time the case was tried, plaintiff won; defense says, "Objection; the last time resulted in a nonsuit").
How seriously do the trial courts take these technical requirements? This is a separate question from the extent to which appellate courts require proper objections to preserve error. In the trial court, the judge has the power and discretion to enforce the rules of argument despite a faulty objection or no objection. If the judge takes sua sponte action, he or she can be reversed for an incorrect ruling but not for failure to follow proper procedures. If the judge takes no action, he or she can be reversed if plain error (to which no objection is necessary) was committed, but again not on procedural grounds alone. Because discretion is given to the trial judge, it is not possible to fully examine on appeal the judge’s action in the absence of a proper objection without observing trials in action or reading trial transcripts. Although the answer cannot be found in appellate opinions, those opinions give some indication of what should go on at trial. It appears that, in contrast to the rather rigid treatment of technical requirements on appeal, requirements are treated loosely at the trial court level. It is considered both proper and desirable for a trial judge to be primarily concerned with the propriety and fairness of the closing arguments and not with whether a technically correct objection has been made. This attitude is the opposite of that of the appellate courts.

3. Responses to Rule Violations

After an objection has been made to an improper argument, several avenues of response are open to the opposing attorney and the judge.

200. See infra text accompanying notes 323-34 (for general discussion of the extent which instructions “cure” error).
201. See, e.g., United States v. Pool, 660 F.2d 547 (5th Cir. 1981); Commonwealth v. Smith, 387 Mass. 900, 444 N.E.2d 374 (1983) (trial courts should not make a fetish out of formal objection requirements). The sample included dozens of cases in which it was apparent from the appellate opinion that the trial judge had made a ruling or tried to correct an error despite inadequate objections. In none of these is there the slightest indication that the trial judge should have required rigid adherence to objection procedures. See, e.g., United States v. Socony-Vacuum Oil Co. Inc., 310 U.S. 150, 237, 60 S. Ct. 811, 851, 84 L. Ed. 1129, 1177 (1940) (trial judge gave curative instruction despite absence of objection or request); Butler v. Rose, 686 F.2d 1163, 1170 (6th Cir. 1982) (trial judge instructed jury despite late objection and no request); People v. Rhoads, 110 Ill. App. 3d 1107, 443 N.E.2d 673 (1982) (trial court admonished prosecutor despite absence of request for any remedy); State v. Dupre, 408 So. 2d 1229 (La. 1982) (trial judge sustained objection and instructed jury to disregard argument, despite late objection and no request); State v. Davenport, 33 Wash. App. 704, 657 P.2d 794 (1983), rev’d, 675 P.2d 1213 (Wash. 1984) (attorney requested mistrial but not a curative instruction, trial judge gave instruction).
While the attorney could simply ignore the objection and forge ahead, the rules at least implicitly require that he stop so that the error may be corrected. The attorney may employ a self-help remedy such as withdrawing, apologizing for, or correcting an improper argument, or he may defer to the trial judge. The judge must rule on the objection and select an appropriate remedy. Possible remedies are admonishing the offending attorney, giving the jury a curative instruction, or granting a mistrial. A judge has some discretion in selecting an appropriate remedy, but there are limits to that discretion depending on the seriousness of the error.

Courts appear to treat responses as falling into three categories: weak responses, ordinary responses, and drastic responses. All attorney self-help actions, withdrawal, apology and correction, and those judicial remedies not focusing directly on the impropriety of the challenged argument, sustaining the objection, or generally instructing the jury on how to decide the case properly without singling out any particular improper arguments, are considered weak responses. Judicial corrective actions that focus directly on improper arguments while permitting the trial to continue—admonishing the attorney, instructing the jury to disregard an argument, or promptly correcting an attorney's misstatement—are considered ordinary responses. The most drastic response is the judge's declaration of a mistrial.

The appropriate level of response depends on how serious the error is. In one sense, generalizations concerning the relative seriousness of argument errors are impossible to make. Courts are inconsistent. Particular errors considered serious in one jurisdiction are seen as inconsequential in others. However, it is possible to posit a tentative and somewhat vague hierarchy of types of errors. Without understanding that there are different degrees of error, it is impossible to make sense out of the cases.

202. See generally Clemons v. State, 320 So. 2d 368 (Miss. 1975) (attorney continued to argue, ignoring objections; conduct held "reprehensible" but not reversible error). Continuing to argue also may increase the likelihood of a mistrial, or that an error will rise to such a level that it becomes reversible. See infra text accompanying notes 295-311, and 380-89.

203. Compare People v. Dukes, 12 Ill. 2d 334, 146 N.E.2d 14 (1957) (weeping during argument is reversible error) with Ferguson v. Moore, 98 Tenn. 342, 39 S.W. 341 (1897) (shedding tears is not reversible error).
This article classifies closing argument errors according to category and level of seriousness. Errors fall generally into four categories: improper procedures, improper marshalling of the evidence, improper arguments concerning the law and its application, and improper emotional appeals. Within each category errors occur at three levels of seriousness: trivial, intermediate, and egregious. While their boundaries are imprecise, this hierarchy is not arbitrary; it corresponds to the way courts treat violations of closing argument rules. Trivial errors rarely warrant reversal, egregious errors almost always require reversal, and intermediate errors sometimes require reversal. It is beyond the scope of this article to delve very deeply into this hierarchy. It is enough to understand that courts treat errors differently. Across jurisdictions, some agreement exists concerning where most errors fit into this scheme. A general classification is suggested in Table 2.  

a. Responses by the Attorney

Because of the nature of the adversary system, the first response to an objection should come from the attorney who made the challenged argument. If the challenged attorney believes the objection to be valid, he may withdraw the argument, apologize for it, and/or attempt to correct the error on his own by further explanatory argument. These actions are more than just courtesies or good tactics to avoid being reprimanded by the judge. They are court-approved procedures for handling improper arguments. In many cases these procedures are deemed to neutralize the effect of an improper argument and cure the error.

In the survey, twenty-two cases addressed the extent to which attorney self-help is an appropriate response to closing argument errors. The cases covered situations in which attorneys withdrew improper arguments, attempted to explain, clarify, or correct them, or apologized for or discontinued them. Only two of the cases were reversed where the attorney’s self-help was an inappropriate response to the error: one involved an argument concerning the relative wealth of the parties, and the other a so-called

204. A full analysis of the substantive law of closing argument will be the subject of forthcoming articles. For now, the reader will have to rely on the author’s promise to substantiate this in the future, because few court opinions explicitly articulate this kind of hierarchy. One of those rare cases is Standard Fire Ins. Co. v. Reese, 584 S.W.2d 835 (Tex. 1979), which separates “curable” errors from “incurable” errors such as appealing to racial prejudice, using epithets like liar, cheat or fraud, and making an unsupported charge of perjury.
<table>
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<th>Intermediate</th>
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<td>1. Attorney prevented from arguing major issue.</td>
<td>1. Attorney completely prevented from arguing.</td>
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<td>2. Sandbagging.</td>
<td>2. Judge showing favoritism to one side.</td>
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<td>2. Attributing testimony to wrong witness.</td>
<td>2. Referring to material facts from attorney's personal knowledge.</td>
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<td><strong>Errors in Arguments about Law</strong></td>
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<td>2. Attacking other attorney's tactics or ethics.</td>
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<td>3. Insulting witnesses.</td>
<td>3. Referring to public clamor.</td>
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<td>4. Asking for verdict as example to other wrongdoers.</td>
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<td>5. Suggesting defendant will commit more crimes if released.</td>
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<td>6. Asking jurors to put themselves in client's shoes (Golden Rule).</td>
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"Golden Rule" arguments, both of which are generally considered to be intermediate errors, but among the most serious at that level. In the other twenty cases, the attorneys' self-help actions were held to be appropriate and adequate substitutes for judicial intervention. The cases involved mostly trivial errors, such as obviously inadvertent misstatements of fact, the use of exaggerated colorful language, the injection by an attorney of his own or the government's credibility into the case, and attacks on the credibility of the other attorney. In two cases, the attorney's self-help was held to be appropriate for the intermediate errors of misusing evidence admitted for a limited purpose and misstating the law. Prompt attorney self-help is an appropriate response in the case of trivial errors, but is not adequate for most serious errors.

b. Responses by the Trial Judge

The opposing attorney has the option of responding; the trial judge does not. Unless the attorneys' self-help in trivial error situations relieves the judge of his obligations, the judge must respond to an objection. He must rule on it and select the appropriate remedy, which may be admonishing the attorney, correcting a misstatement, instructing the jury to disregard the argument, or granting a mistrial. The standard rhetoric that the judge has broad discretion in choosing an appropriate remedy is misleading. What constitutes an appropriate response will be decided by the common law. The trial judge has fairly wide discretion to decide how he will instruct the jury,

205. Missouri Pac. R. Co. v. Foreman, 194 Ark. 490, 107 S.W.2d 546 (1937) (attorney argued: if you return a verdict for the plaintiff, there will not be a meal missed by a railroad official); Chicago, R.I. & P.R.R. v. American Airlines, 408 P.2d 789 (Okla. 1965) (attorney asked jurors to put themselves in plaintiff's position and award what they would want for themselves).

206. See State v. Chapman, 410 So. 2d 689, 705 (La. 1981) ("the defendant pleaded guilty—I mean, not guilty").


208. See United States v. Socony-Vacuum Oil Co. Inc., 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129 (1940) (we—attorney and government officials—believe in justice of our case); Kessner v. McDonald, 46 Ill. App. 3d 333, 360 N.E.2d 1178 (1977) (our office thinks this is a no-liability case).


if an instruction is the appropriate response, but he does not have the discretion to select an inappropriate remedy. He may neither take drastic action for trivial errors, nor respond weakly to egregious errors.

The trial judge must rule on objections. Ideally, he should make a ruling on every objection. However, there does not appear to be any enforcement device to encourage compliance with this rule. Only one case considered a judge's failure to rule on a procedural error. Additionally, that was the only case in which a trial judge was criticized for failure to rule. In fact, in several cases the appeals courts criticized the attorneys for failing to secure definitive rulings. Failure to rule is generally ignored on appeal or considered the equivalent of overruling the objection. Only if the underlying argument was serious enough to require corrective action will the failure to sustain and take further corrective action result in the judgment being reversed. The focus is on the adequacy of the corrective action rather than on the ruling. This is apparent from the number of cases in which the judge ruled incorrectly on the objection but took corrective action. The erroneous ruling is universally ignored. Considering the seriousness with which appellate courts take other procedural devices, this one exception is surprising.

If the trial judge decides that an argument is improper, he or she must select an appropriate response. Although the objecting attorney should request the remedy he believes appropriate, the primary burden of selection falls on the trial judge. If the argument is improper, the trial judge may: (1) sustain the objection but take no further action, (2) give general instructions to the jury about the proper way to deliberate, (3) admonish or reprimand the offending attorney, (4) give a specific instruction to the jury to disregard the argument, or (5) grant a mistrial. Not all responses are ap-

212. See, e.g., Edwards v. Lacy, 412 S.W.2d 419, 421 (Mo. 1967).
215. See, e.g., Edwards v. Lacy, 412 S.W.2d 419 (Mo. 1967) (objection to "Golden Rule" argument not ruled on; no error, because such argument not considered a serious error in Missouri); Halford v. Yandell, 558 S.W.2d 400 (Mo. Ct. App. 1977) (objection to gross misstatement of law not ruled on; reversible error because court did not correct a serious misstatement of the law on a crucial issue).
216. See, e.g., Moore v. State, 240 Ga. 807, 243 S.E.2d 1 (1978); State v. Caldwell, 322 N.W.2d 574 (Minn. 1982); People v. Fielding, 158 N.Y. 542, 53 N.E. 497 (1899); Norlin Music, Inc. v. Keyboard "88", 425 A.2d 74 (R.I. 1981). In all of these cases the trial judge erroneously overruled an objection but undertook some corrective action. On appeal, the courts only looked to the sufficiency of the judge's remedy, and either ignored the erroneous ruling or stated that it did not matter.
appropriate in all situations. The weaker responses are not adequate for egregious errors, mistrials are not appropriate except for serious errors, and creative efforts to fashion other kinds of remedies are discouraged.  

Overly broad language in some cases suggests that the scope of a trial judge's discretion to select an appropriate remedy is very wide, and that the trial judge has virtually unbridled discretion to select a remedy. A critical reading of the cases, however, suggests otherwise. The trial judge apparently has some discretion in selecting from among equivalent responses, may have broader discretion when the objecting attorney does not make a request, and has some discretion in choosing between instructions and granting a mistrial for moderately serious errors. Also, the trial judge probably has discretion in responding after an attorney undertakes corrective action for a trivial error. This discretion is limited, at least generally, and the trial judge is required, under penalty of reversal, to select from a limited list of remedies deemed appropriate by the appellate courts for particular errors.

The ordinary response is for the judge to instruct the jury to disregard an improper argument. Such an instruction is almost always considered an appropriate response whether the error is trivial, intermediate, or egregious, and is never considered too drastic a remedy. It is the most common rem-

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217. See, e.g., Minneapolis, S.P. & S.S.M. Ry. v. Moquin, 283 U.S. 520, 51 S. Ct. 501, 75 L. Ed. 1243 (1931) (reversing the trial judge's use of remittitur to correct error resulting from an appeal to passion and prejudice); Waldron v. Waldron, 156 U.S. 361, 15 S. Ct. 383, 39 L. Ed. 453 (1895) (corrective instruction inadequate to cure serious error); Powell v. United States, 455 A.2d 405 (D.C. 1982) (general instructions insufficient to cure series of moderately serious errors); Bishop v. Watson, 367 So. 2d 1073 (Fla. Dist. Ct. App. 1979) (error to grant new trial for a nonserious error—mistatement of law that could have been corrected).


219. In the sample, seventy-two discussed the appropriateness of an instruction to disregard. In 82% of them (59/72), the instruction was sufficient to cure the error and in 18% (13/72) it was insufficient. In no case was the instruction considered too harsh a remedy. See People v. Vanda, 111 Ill. App. 3d 551, 444 N.E.2d 609 (1982) (usual, any error is cured by instruction to disregard); Parker v. Kangerga, 482 S.W.2d 43 (Tex. Civ. App. 1972) (instruction to disregard ordinarily overcomes harm caused by improper argument).

Cases holding an instruction to disregard to be an inadequate remedy involve arguments raising the possibility of appeal, pardon, or parole. Howell v. State, 411 So. 2d 772 (Miss. 1982) (argument repeated several times); introducing new "evidence" on a crucial issue, State v. Barnes, 598 S.W.2d 179 (Mo. Ct. App. 1980) (state's case weak); and commenting on the defendant's failure to testify, Ledford v. State, 568
edy and can be considered the presumptively correct judicial response. Under most circumstances the trial judge should instruct the jury promptly to disregard an improper argument. The interesting issues concern the circumstances under which the judge may take weaker or more drastic corrective action.

Weaker responses include sustaining an objection but taking no other action, giving general instructions to the jury on how to properly deliberate without focusing on or criticizing the improper argument, and admonishing the attorney rather than the jury. These weak responses were found inappropriate more often than instructions to disregard. In the survey, fifty percent of the cases in which the judges merely sustained objections were reversed. Thirty-one percent of the cases in which only general instructions were given were reversed, a number significantly higher than the eighteen percent reversal rate for cases in which instructions to disregard were given. This sample lacked enough cases discussing admonitions to the attorney for a precise comparison, but several opinions suggest that in some situations an admonition would not be appropriate but an instruction to disregard would be adequate.

The weakest response, then, is for the judge to sustain an objection but take no other action. This remedy has been held to be adequate only when the judge is responding to the most trivial improper arguments: saying unkind things about the opposing attorney, misstating unimportant facts, etc.

S.W.2d 113 (Tenn. Crim. App. 1978) (state's case weak). Under the circumstances, in all these cases the judge should have granted a mistrial. To be effective, the instruction must unambiguously tell the jury to disregard an improper argument. See Buckeye Cellulose Corp. v. Vandament, 256 Ark. 434, 508 S.W.2d 49, 51 (1974) (court said: "I suppose it is improper... [and] probably is not a proper argument... [and] you are instructed to disregard it"); held inadequate).

220. In the sample, 139 opinions discussed the appropriateness of the remedy selected by the trial judge to correct an improper argument. In seventy-two of those cases, the discussion concerned an instruction to disregard.

221. E.g., Missouri Pac. R. Co. v. Foreman, 194 Ark. 490, 107 S.W.2d 546 (1937) (admonition did not cure; jury should have been instructed to disregard argument); see also People v. Rhoads, 110 Ill. App. 3d 1107, 443 N.E.2d 673 (1982) (admonishing attorney was adequate where defendant never asked for instruction to disregard).


223. People v. Rhoads, 110 Ill. App. 3d 1107, 443 N.E.2d 673 (1982) (misstating facts related primarily to the defendant's character); State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975) (going beyond the record to suggest a reason for lack of fingerprints; court calls it a "minor transgression").
referring to other well-known cases, and referring to a juror by name. If the improper argument constitutes a more significant error, one that is either intermediate or egregious, then merely sustaining an objection is an insufficient response.

The next weakest response is the trial judge's permitting an improper argument to stand, but giving the jury a relevant general instruction on how to deliberate properly. One such instruction tells the jurors that arguments are not evidence and that they must base their verdict only on the facts in evidence. If the attorney misstated the law, the court may give an instruction that correctly states the law without pointing out the attorney's error. If the attorney improperly appealed to emotions, the judge may give the jury a general instruction not to let passion or prejudice affect its judgment. Such general instructions may be given immediately following an objection or at the end of arguments. However, the instruction's timing does not appear to have an impact on the question of sufficiency. The trial judge may tailor the instruction to the particular error, instruct the jurors to consider only their own recollection of the facts after counsel has misstated evidence, instruct the jurors to disregard sympathy and decide the case dispassionately if counsel has made an emotional appeal, or inform the jurors of the correct law and instruct them to follow it if counsel misstated the law. However, the trial judge need not specifically tailor general instructions, but may simply tell the jurors that arguments are not evidence

226. See State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975) (prosecutor implied that defendant had a criminal record despite no evidence of it; sustaining objection without an instruction to disregard does not cure); Fortenberry v. Fortenberry, 582 S.W.2d 188 (Tex. Civ. App. 1979) (one argument circumvented court's evidence ruling, another appealed to self-interest of jurors; neither cured by merely sustaining objections).
227. See United States v. Morris, 568 F.2d 396 (5th Cir. 1978); Calloway v. Lemley, 382 So. 2d 540 (Ala. 1980); State v. Chapman, 410 So. 2d 689 (La. 1981); State v. Caldwell, 322 N.W.2d 574 (Minn. 1982).
229. See Osborn v. Brown, 361 So. 2d 82 (Ala. 1978); Jones v. State, 381 So. 2d 983 (Miss. 1980); MINN. CIV. TRIALBOOK R. 31.
or that they should disregard any part of argument that goes beyond the evidence, to cure all kinds of errors.\textsuperscript{232}

A general instruction is better than no instruction at all. Like merely sustaining an objection, it is an appropriate response to trivial errors such as aggrandizing one's own witnesses,\textsuperscript{233} saying unkind things about one's opponent,\textsuperscript{234} misstating evidence or inviting speculation about missing evidence of only tangential relevance,\textsuperscript{235} injecting general social values,\textsuperscript{236} or injecting one's personal credibility into the case without implying that counsel has knowledge of unintroduced evidence.\textsuperscript{237}

Unlike merely sustaining an objection, giving a general instruction sometimes is an adequate response to an intermediate error. The cases are evenly split. Thirty-one opinions in the sample explicitly discussed the adequacy of general instructions to cure intermediate errors. Eighteen opinions concluded that they were not sufficient. A consistent rationale is not apparent. Some jurisdictions consistently follow one rule or the other,\textsuperscript{238} but the decisions from a particular state are more likely to go both ways.\textsuperscript{239} Additionally, the cases are not reconcilable by looking at the category of improper argument. The holdings are inconsistent, whether the error involves misstating evidence,\textsuperscript{239} misstating law,\textsuperscript{240} or appealing to emotions.\textsuperscript{241} In fact,

\begin{itemize}
\item \textsuperscript{233} United States v. Morris, 568 F.2d 396 (5th Cir. 1978).
\item \textsuperscript{234} People v. Trolia, 107 Ill. App. 3d 487, 437 N.E.2d 804 (1982).
\item \textsuperscript{235} People v. Barney, 111 Ill. App. 3d 669, 444 N.E.2d 518 (1982); Jones v. State, 381 So. 2d 983 (Miss. 1980).
\item \textsuperscript{237} Joseph v. Monroe, 419 A.2d 927 (Del. 1980).
\item \textsuperscript{238} For example, all four decisions in the sample from Alabama held that general instructions were sufficient. Calloway v. Lemley, 382 So. 2d 540 (Ala. 1980); Osborn v. Brown, 361 So. 2d 82 (Ala. 1978); Walker v. Cardwell, 348 So. 2d 1049 (Ala. 1977); Southern Ry. Co. v. Jarvis, 266 Ala. 440, 97 So. 2d 549 (1957).
\end{itemize}
this author could find no logical rationale to explain the holdings. This author’s opinion is that the holdings resulted from courts weighing the seriousness of the error and finding that general instructions were appropriate for the relatively less serious. One might speculate that a general instruction would be found adequate more often in criminal than in civil cases because of the reluctance of appellate courts to free convicted defendants. It was considered whether a general instruction would more likely be adequate for isolated errors than multiple errors, or whether the nature of the attorney’s request for a remedy could explain the apparently random results. The cases do not confirm any of these hypotheses, leading to the unfortunate conclusion that whether a general instruction is likely to be considered an adequate remedy for an intermediate error in any particular case is arbitrary and random.

The third weak response is a prompt admonition to the attorney making the improper argument. This response is infrequently used; only ten cases in the sample discuss this remedy, and only five of those explicitly address the issue of appropriateness. In four of the five cases, this remedy was held to be appropriate. This remedy was approved in all cases where it was used in response to intermediate errors. The two cases presenting egregious errors split. One upheld the use of an admonition when an attorney made a racist argument; the other held it an inadequate response to an

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instruction adequate) *with* Moss v. Mittel, 253 Ky. 504, 69 S.W.2d 1046 (1934) (misquoted witness; instruction did not cure); State v. Chapman, 410 So. 2d 689 (La. 1981) (misstated facts; instruction did not cure).


242. *Compare* Zamora v. Romero, 581 S.W.2d 742 (Tex. Civ. App. 1979) (plaintiff argued that a few thousand dollars would not mean anything to the defendant; general instruction adequate) *with* Missouri Pac. R. Co. v. Foreman, 194 Ark. 490, 107 S.W.2d 546 (1937) (defense argued that if a verdict were returned for plaintiff, there would not be a meal missed by a railroad official; instruction not adequate).

243. In the others, either the court simply included boilerplate dicta that admonishment is one of a number of available remedies, see, e.g., Wilhelm v. State, 272 Md. 404, 326 A.2d 707 (1974), or the opinion focused on the propriety of a more powerful remedy, see Thundereal Corp. v. Sterling, 368 So. 2d 923 (Fla. Dist. Ct. App. 1979) (mistrial); Ledford v. State, 568 S.W.2d 113 (Tenn. Crim. App. 1978) (instruction to disregard).


attorney's attempt to interject his own knowledge of facts not proved on a crucial issue.\textsuperscript{246}

Despite the small number of cases, the admonition can reasonably be categorized as a more effective response than a general instruction, although it is a weaker response than a specific instruction to disregard. Admonitions were approved on appeal more often (80\%) than general instructions (69\%). A weaker response than an instruction to disregard is amply illustrated by two of the cases. One approved an admonition only because an instruction to disregard was not requested,\textsuperscript{247} and the other (despite the absence of a request) held that an admonition was inadequate under the circumstances, because the trial judge should have instructed the jury to disregard the improper argument.\textsuperscript{248}

The only response more drastic than an instruction to disregard is the declaration of a mistrial. This remedy is appropriate only in response to egregious errors, and even then, not for all egregious errors. Three principles concerning mistrials are stated frequently in the cases: (1) mistrials are required for certain egregious errors, (2) mistrials are forbidden for non-egregious errors, and (3) the judge has discretion to choose between granting a mistrial and giving an instruction to disregard. Plainly, the two absolute rules are incompatible with the rule of discretion.

Cases indicate there must be absolute rules that some kinds of arguments so reduce the likelihood of a fair trial that mistrials are required. Opinion after opinion includes pronouncements that where improper remarks are of such character that their prejudicial impact cannot be removed from the minds of jurors, a new trial must be ordered.\textsuperscript{249} Of course, those opinions usually conclude that the case on appeal did not present such a serious error,\textsuperscript{250} leaving one to wonder if the boilerplate language has any concrete meaning.

More helpful are the cases that explicitly decide whether mistrials are required following particular improper arguments. Courts have held that mistrials are mandatory for improper arguments such as going beyond the record and introducing new facts likely to prejudice the jury for or against

\textsuperscript{246} Missouri Pac. R. Co. v. Foreman, 194 Ark. 490, 107 S.W.2d 546 (1937).
\textsuperscript{247} People v. Rhoads, 110 Ill. App. 3d 1107, 443 N.E.2d 673 (1982).
\textsuperscript{248} Missouri Pac. R. Co. v. Foreman, 194 Ark. 490, 107 S.W.2d 546 (1937).
\textsuperscript{250} In the sample, eleven cases contained boilerplate language that mistrials are to be granted for serious errors, but in seven of them the court held that the argument reviewed was not of such a serious kind.
a party;\textsuperscript{251} making an unsupported charge of perjury;\textsuperscript{252} commenting on a criminal defendant's failure to testify;\textsuperscript{253} appealing to racism;\textsuperscript{254} appealing to sympathy or passion;\textsuperscript{255} suggesting that wealth, insurance, or ability to pay should affect the verdict;\textsuperscript{256} arguing that a verdict will raise the jurors' taxes or insurance premiums;\textsuperscript{257} using unwarranted epithets like liar, cheat, and fraud;\textsuperscript{258} and suggesting that a defendant could be paroled or pardoned from a long jail term.\textsuperscript{259}

Yet for each of these improper arguments, which are each a serious error, other cases exist, sometimes from the same state, holding that mistrials are not required.\textsuperscript{260} In explaining the discrepancy, some opinions suggest that it really is a matter of judicial discretion when a serious closing argument error has so indelibly stained the fairness of the trial that a mistrial must be granted.\textsuperscript{261} This author does not believe that that is an accurate statement. There are too many cases in which a trial judge's exercise of discretion is reversed on appeal—not only in outrageous cases under the rubric of "abuse of discretion," but also in run-of-the-mill cases where the appellate court declines to give any weight at all to the trial court's supposed advantageous perspective.\textsuperscript{262}

\textsuperscript{251} See Waldron, 156 U.S. at 383 (party's adultery); Coleman v. State, 420 So. 2d 354 (Fla. Dist. Ct. App. 1982) (accuracy of witness's description); State v. Mayfield, 506 S.W.2d 363 (Mo. 1974) (demonstrating that a shotgun could have been concealed by using a different one with a short barrel); Houston Lighting & Power Co. v. Fisher, 559 S.W.2d 682 (Tex. Civ. App. 1977) (imaginary testimony); Lopez v. State, 643 S.W.2d 436 (Tex. Crim. App. 1982) (party's criminal record).

\textsuperscript{252} State v. Caldwell, 322 N.W.2d 574 (Minn. 1982); Standard Fire Ins. Co. v. Reese, 584 S.W.2d 835 (Tex. 1979).

\textsuperscript{253} State v. Caldwell, 322 N.W.2d 574 (Minn. 1982).

\textsuperscript{254} State v. Wildon, 404 So. 2d 968 (La. 1981); Standard Fire Ins. v. Reese, 584 S.W.2d 835 (Tex. 1979); Schotis v. North Coast Stevedoring Co., 163 Wash. 305, 1 P.2d 221 (1931).


\textsuperscript{256} White v. Piles, 589 S.W.2d 220 (Ky. Ct. App. 1979).


\textsuperscript{258} Standard Fire Ins. Co. v. Reese, 584 S.W.2d 835 (Tex. 1979).

\textsuperscript{259} GA. CODE ANN. § 17-8-76 (1982) (mistrial mandatory).


\textsuperscript{262} The best example is State v. Mayfield, 506 S.W.2d 363 (Mo. 1974), in which the prosecutor referred to and used evidence outside the record. The trial judge denied
A pattern does not exist in the cases. Mistrials are not restricted to cases where egregious errors have been committed. At the risk of oversimplification, mistrials are required when one of the more serious errors is committed and specific aggravating factors also are present. In the sample of cases, mistrials were mandated both for egregious errors, such as arguing that facts not in evidence could resolve a crucial issue, and also for intermediate errors involving emotional appeals, such as encouraging the jury to decide a contested issue according to passion or prejudice, and making an unsupported charge of perjury. Such errors require mistrials when one or more of the following aggravating factors are present: (1) the argument was made in bad faith, with knowledge of its impropriety; (2) the infraction is repeated; (3) the argument encourages the jurors to decide the case contrary to the facts and the law; (4) the jurors are told they will be affected personally by the verdict; or (5) the improper argument bolsters an otherwise weak case.


265. See State v. Hoffman, 328 N.W.2d 709 (Minn. 1982); Standard Fire Ins. Co. v. Reese, 584 S.W.2d 835 (Tex. 1979) (dictum).


Mistrials are not appropriate for trivial errors. They appear to be too drastic a response to intermediate errors that are procedural, factual, or legal, rather than emotional. Even for egregious errors, granting a mistrial is inappropriate if one of several mitigating factors is present: (1) the opponent failed to object or request a mistrial—not because this may be a procedural default, but because it supposedly shows that the attorney did not think the error seriously prejudicial;271 (2) the improper argument was made in retaliation for an opponent’s improper argument, or to offset prejudice inherent in the case;272 and (3) if the error was that counsel injected new, unproved facts whether similar evidence was properly before the jury273 or the matter is within common knowledge and experience.274

The scope of the trial judge’s discretion is best understood in light of this model. It is not accurate to say that the judge has discretion to grant or deny a mistrial. Discretion is not involved in the first part of the test: the error either will support a mistrial or it will not; and the common law has already made that determination. The judge may not declare a mistrial275 if the error is neither egregious nor involves emotional appeals. If the error is egregious or is an intermediate, emotional appeal error, then the judge must decide if it has made an accurate verdict unlikely. If so, a mistrial is required; if not, a mistrial is inappropriate, and judicial discretion is irrele-


273. See State v. Wren, 643 S.W.2d 800 (Mo. 1983); Beam v. Beam, 18 Wash. App. 444, 569 P.2d 719 (1977). This factor is inextricably bound up with the harmless error test; see infra text accompanying notes 378-97.

274. See Standard Fire Ins. Co. v. Reese, 584 S.W.2d 835 (Tex. 1979) (argument that plaintiff drove past 1000 doctors to find this one obviously only a figure of speech to emphasize that plaintiff had selected his own expert witness).

vant. Whether an accurate verdict has become unlikely is not purely a question for judicial discretion, but one of limited discretion to determine if the effects of the improper argument have been aggravated or mitigated according to general common law rules.

The limited scope of discretion can be illustrated by several examples, all of which involve an attorney’s going beyond the record and arguing facts not in evidence. First, suppose the prosecutor in a criminal case states his own personal opinion of the defendant’s guilt, asking the jury to use that information to help resolve the question of guilt or innocence. The judge may not use his discretion to grant a mistrial, because the courts consider this only an intermediate error, not an egregious one, and it does not appeal to emotions. No further inquiry is required.\(^2\)

Second, suppose the prosecutor does commit an egregious error, for instance, raising new facts in his argument that relate directly to a crucial contested issue. The trial judge may not use his discretion to make an intuitive judgment about whether an accurate verdict has become unlikely and grant or refuse a mistrial accordingly. If a mitigating factor was present, such as retaliation, a mistrial is inappropriate.\(^2\)

If an aggravating factor was present, such as a weak prosecution case that rests on the testimony of a single witness, the mistrial must be granted.\(^2\)

Third, suppose the prosecutor again commits an egregious error by creating new evidence on a crucial issue, but this time his case, although far from overwhelming, turns on three witnesses instead of one. Additionally, the attorney is retaliating for an improper defense argument. Now the trial judge must use his discretion first, to decide if the prosecution’s case is weak or strong; and if he decides it is weak, to balance one aggravating factor against one mitigating factor and decide if an accurate verdict is still possible.

Asserting the theory that aggravating factors should always outweigh mitigating factors is tempting. The accuracy and impartiality of the verdict should perhaps be the primary concern, so that new trials should be granted whenever both aggravating and mitigating factors are present. The cases do not support such an idealistic position. Some courts seem to favor finality, institutional convenience, and even upholding convictions at all costs, cau-

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277. See also United States v. Young, 470 U.S. 1, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985) (The Court condemned the retaliation doctrine, yet finds that no new trial is required because the defendant’s similar improper argument mitigated the harm caused by the prosecutor’s improper argument.).

tioning against granting mistrials in all but the clear cases. Since compromise is impossible (there is no such thing as a half-mistrial), the mistrial cases that fall into this gray area will inherently remain inconsistent, with some courts favoring new trials and others being reluctant to ever grant them.

Procedural errors are one area where the court has a great deal of discretion in fashioning a remedy. Unless the procedural error results in a party being denied the right to be heard, in which case a new trial is required, the judge has virtually unlimited discretion in selecting a remedy for a procedural error. For procedural errors affecting the sequence and number of arguments, the ordinary response of instructing the jury to disregard the error is not appropriate. It does not redress the problem if one party has been procedurally hampered in the exercise of his right to be heard. The question facing the judge is how best to restore the balance so that both parties have similar opportunities to argue. Different situations require different remedies. Imposing a restriction on one party, giving the other party more time or an additional opportunity to argue, or giving both parties additional argument may be acceptable. Fashioning an appropriate procedural remedy for a procedural error must, by the nature of the problem, be left to the judge's discretion.281

c. Responses that Aggravate the Error

This article has focused on responses by the attorney and trial judge that tend to ameliorate the harmful effect of an improper argument. In some cases, responses to objections have the opposite effect, tending to aggravate the situation. This section will look at four recurring situations: (1) when an attorney ignores the judge's ruling and continues or repeats an improper argument; (2) when an attorney criticizes the ruling and makes an argument that

279. E.g., State v. Wren, 643 S.W.2d 800 (Mo. 1983) (mistrials are to be employed sparingly).
280. See supra text accompanying notes 98-110.
281. See, e.g., Hall v. Weare, 92 U.S. 728, 23 L. Ed. 500 (1875) (order of argument is discretionary and not subject to appellate review); United States v. Patterson, 678 F.2d 774 (9th Cir. 1982) (extending time limit by five minutes within discretion); Stephens v. Shelbyville Cent. Schools, 162 Ind. App. 229, 318 N.E.2d 590 (1974) (discretion to give defendants a few minutes of surrebuttal to answer new matters brought up by plaintiff for first time in rebuttal); Weinbauer v. Berberich, 610 S.W.2d 674 (Mo. Ct. App. 1980) (discretion to widen scope of rebuttal to allow argument as to matters inadvertently omitted from first argument); Cowan v. McElroy, 549 S.W.2d 543 (Mo. Ct. App. 1977) (discretion to give both sides further argument when judge gives new instruction during deliberations).
asks the jury to ignore it; (3) when the judge gives a proper corrective instruction but overrules the objection; and (4) when a judge compounds an error by phrasing an instruction poorly.

The conduct of the attorney does not appear to affect the seriousness of the error. If an attorney makes an improper argument, the judge takes some remedial action, and the attorney accepts the ruling, the error usually is considered cured and will withstand an appeal. In the sample, almost eighty percent of such cases were affirmed. In those cases in which the attorney ignored or evaded the rulings there was no increase in reversal rate; again close to eighty percent were affirmed. Even when attorneys directly contravened the judges' rulings, repeated improper arguments after an objection had been sustained, or tried to get the jury to ignore rulings, the judgments were affirmed at the usual rate. Only one appellate court even commented on such conduct by attorneys, and while it "disapproved" of an attorney disregarding a ruling, it found no error.

If the judge aggravates an error by overruling a proper objection, his erroneous ruling does not have a significant impact on the outcome of the case where the judge employs a proper remedy to correct it. Obviously, if the judge overrules a proper objection and takes no corrective action, the judgment will be reversed on appeal unless it is harmless error. However, if he attempts to respond properly to the error, but in the process does something that aggravates it, the case is no more likely to be reversed on appeal than if he did not aggravate the error. The focal question is whether the judge took steps to cure an error, not how he ruled. If the judge does

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282. E.g., James v. State, 563 S.W.2d 599 (Tex. Crim. App. 1978) (prosecutor who was denied permission to reopen argument to address punishment, stated in front of jury that he felt a life sentence should be imposed; no error).


284. E.g., Brokapp v. Ford Motor Co., 71 Cal. App. 3d 841, 139 Cal. Rptr. 888 (1977) (argument contradicted evidence as to marks on a power steering belt; attorney marked belt with crayon; judge ordered marks removed and admonished attorney; attorney resumed and told jury that if they looked closely at belt they could still see marks).


287. See, e.g., Gordon v. Nall, 379 So. 2d 585 (Ala. 1980) (trial judge overruled objection to argument appealing to prejudice; reversed because trial court did not seek to cure the error); Williams v. State, 259 Ark. 667, 535 S.W.2d 842 (1976) (error in argument reversible unless trial court removes prejudice by corrective action); Halford v. Yandell, 558 S.W.2d 400 (Mo. Ct. App. 1977) (court did not rule on
undertake some corrective action such as admonishing the attorney or instructing the jury, then the fact that he incorrectly overruled the objection seems to be irrelevant, despite the mixed signals the jurors received on the argument’s propriety.\footnote{288}

In only one situation does a response aggravating the harm of an improper argument appear to affect the likelihood of reversal. This occurs when the judge compounds the error by the way he words a corrective instruction. In one such case, the judge sent mixed signals to the jury, implying that the argument was proper, while reluctantly instructing them to disregard it.\footnote{289} In the other, the court inadvertently compounded the problem by explicitly telling the jury what the attorney had been insinuating.\footnote{290} However, it should not be assumed that an instruction aggravating an error will necessarily be considered as increasing the harm. In several other cases where the judge did a similarly inept job of correcting an error, the appellate courts gave it no weight at all.\footnote{291}

E. Enforcing the Rules of Closing Argument Through the Appellate Process

A party who loses at trial and believes that infractions of closing argument rules contributed to that loss, may appeal.\footnote{292} Theoretically, a party

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\footnote{288. See, e.g., \textit{Laguna v. Prouty}, 300 N.W.2d 98 (Iowa 1981) (objection overruled; not error since court gave general instruction); \textit{State v. Parker}, 425 So. 2d 683 (La. 1982) (objection overruled at the time, jury given general instruction later; error cured just as if court had properly sustained the objection); \textit{Norlin Music, Inc. v. Keyboard "88" Inc.}, 425 A.2d 74 (R.I. 1981) (court overruled objection but gave jury a corrective instruction; case reversed because instruction inadequate; refusal to sustain held not usually grounds for reversal).

\footnote{289. \textit{Buckeye Cellulose Corp. v. Vandament}, 256 Ark. 434, 436, 508 S.W.2d 59, 51 (1974) ("I suppose it's improper argument . . . it \textit{is} the law but probably is not a proper argument to present to the jury. In any event, you are instructed to disregard it"). (emphasis added).}

\footnote{290. \textit{Ramsey v. Greenwald}, 91 Ill. App. 3d 855, 414 N.E.2d 1266 (1980) (the case was tried on special interrogatories; attorney made indirect suggestion that if the jury wanted to return a plaintiff's verdict, they had to answer one interrogatory in a certain way; court instructed jury not to tie the two interrogatories together).

\footnote{291. \textit{See Calloway v. Lemley}, 382 So. 2d 540, 542 (Ala. 1980) (court said, "The jury heard what was said in that regard, \textit{it's not for the court to say}, but I'll overrule, and I'll caution the jury that this is argument"); held adequate instruction) (emphasis added); \textit{Joseph v. Monroe}, 419 A.2d 927 (Del. 1980) (court gave ambiguous instruction on whether argument proper or improper; held adequate); \textit{see also State v. Chapman}, 410 So. 2d 689, 706 (La. 1981) (jury instructed to "disregard . . . any evidence that wasn't heard in this courtroom, but . . . I'll overrule"; held harmless error).

\footnote{292. The one exception is found in the federal courts, where the trial judge's
appeals because the trial judge failed to properly enforce the rules of argument, not because the other attorney broke the rules. The appellate courts are supposed to decide whether the trial judge ruled correctly on objections and responded appropriately to errors. For that reason, appellate courts require as a threshold matter that the appellant first bring any claim of error to the attention of the trial judge by an objection, request, or motion. Failure to comply with this hierarchical procedure may mean a procedural default. The appeals court might not hear the appeal. Even if a claim has been preserved properly, and an appellate court finds that closing argument rules were violated, it need not reverse the judgment. Appellate courts have reasonably broad power to characterize errors not only as waived, but also as invited, cured, or harmless, and thereby avoid reversal. Often confused, these four classifications are similar but analytically distinct. They have evolved for different reasons, reflect different principles, and technically are appropriate in different situations. This section will examine all four of these reversal-avoidance doctrines, as well as some secondary doctrines developed to temper their harsh application.

Our system generally assumes that its rules of procedure and its substantive laws can and will be enforced by the appellate courts. The extent to which they are, and the situations in which (and reasons put forward to explain why) they sometimes are not, sheds interesting light on contradictory principles that have shaped this field of law. It will be seen that the appellate courts do not always enforce the rules; indeed, the rules of closing argument go unenforced on appeal more often than they are enforced.²⁹³

1. Avoiding Review: Procedural Default

The requirements for preserving an issue for appeal are easily and often stated. The courts say, as a threshold matter, an attorney must make a proper objection, request an appropriate remedy from the trial judge, and supply the appeals court with a record of the improper argument; otherwise, he may not appeal. The implication is brutal: the courts seem to say they will enforce the legal rules of closing argument if an appellant's attorney follows proper procedures. However, except in extraordinary circumstances, the courts will not enforce the rules if the attorney neglects some possibly trivial procedural formality. The client can suffer from an unfair verdict

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²⁹³ In the sample, of 692 cases, 163 (24%) were reversed because of trial court errors, and 340 (49%) were affirmed despite errors.
resulting from improper argument and have no way to appeal. The party is said to have "waived" his right to appellate review, although rarely will he have knowingly given up anything. This doctrine, correctly known as procedural default, has taken on added importance since the United States Supreme Court announced that such procedural technicalities can take precedence even over substantive constitutional errors.  

The first of these requirements is that a proper objection must have been made. A proper objection is one that follows the guidelines discussed earlier; it is timely and specifies the grounds on which it is based. If an adequate objection is not made, then any claim of error based on that improper argument has been "waived", and the appellate court will not review it. This is not a waiver in the usual sense. The failure to properly preserve an issue for appeal is rarely the result of the client intelligently and voluntarily relinquishing the right to appeal. It usually results from the attorney's ignorance, incompetence, or neglect. It is therefore more correctly termed a procedural default. An exception to this default doctrine is made for "plain errors"; the courts will review cases for the most serious kinds of errors, even if objections were not made. In the sample, this general rule was stated in ninety-eight opinions from thirty-two different jurisdictions; no case explicitly said otherwise.
If the requirement of a proper objection were "real", one would expect that in those cases in which objections were not made, the appellate courts would less often reach the merits and more often rule against the appellant on procedural grounds. The overall reversal rate should therefore be significantly lower in cases where the appellant did not properly object than in cases where proper objections were made. The sample identified 116 cases in which no objection had been made. Twenty-nine were reversed because of closing argument error. In other words, the courts of appeals reversed twenty-five percent of those cases in which no objection had been made. This is the same rate of reversal as for all cases in the sample. Therefore, the rule requiring a contemporaneous specific objection may be meaningless; appellate courts seem to selectively invoke or ignore it in order to justify a result.

The common law states a second default rule: no claim of closing argument error is preserved unless the appellant makes an explicit request for a remedy in the trial court. Failure to request a remedy is a procedural default, and the argument will be reviewed only for plain error. The courts of timely objection is a factor in determining whether the argument was actually prejudicial. Three southeastern states have an exception to the rule that permits a review of the whole record, despite the absence of objections, in death penalty cases. See Potts v. State, 241 Ga. 67, 243 S.E.2d 510 (1978) (in capital case, court reviews all errors that might have influenced sentencing whether objected to or not); State v. Pinch, 306 N.C. 1, 292 S.E.2d 203 (1982) (prosecutor's argument in capital case subject to limited review for gross improprieties despite lack of objection); State v. Butler, 277 S.C. 543, 290 S.E.2d 420 (S.C. 1982) (court will review record in death penalty cases despite absence of objections). Two opinions suggest that the rule should be applied only loosely. United States v. Pool, 660 F.2d 547 (5th Cir. 1981) (court rejects "senseless technicalities"); Hughes v. State, 437 A.2d 559 (Del. 1981) (court will ignore the rule in the interests of justice). An Illinois court creates an exception for reviewing multiple unobjected-to errors for whether their cumulative effect warrants reversal. See Manninger v. Chicago & Northwestern Transp. Co., 64 Ill. App. 3d 719, 381 N.E.2d 383 (1978).

298. In the sample generally, 163 of 692 cases were reversed—a rate of 24%. When no objection was made (so that supposedly no issues were preserved for appeal), the reversal rate was 25%. When an objection was made, but it was either untimely or nonspecific (so that supposedly no issue was preserved for appeal), the reversal rate was actually greater than for cases in which the error had been preserved—ten of twenty-eight, or 35%.

299. See People v. Boyd, 88 Ill. App. 3d 825, , 410 N.E.2d 931, 954 (1980) (court used same analysis in deciding whether to reverse for a preserved error as it did for whether to review and reverse for an unpreserved error).

appear to pay some attention to this rule, and actually consider a proper request to be a procedural prerequisite to appeal. In the cases in which requests were not made, only twelve percent were reversed. This is half the rate for cases generally.\textsuperscript{301} While a number of appellate courts ignore this rule and reach the merits, it does appear to be a real procedural default rule that results in a number of cases being affirmed that would otherwise be reversed.\textsuperscript{302}

In theory, the default rule should work as follows. If the underlying error is \textit{trivial} it would not be reversible even if properly preserved, so failure to request a remedy is irrelevant.\textsuperscript{303} If the underlying error is \textit{intermediate}, it may be reversible if properly preserved and the judge refused to give the jury a corrective instruction. If the attorney neglected to request a remedy, however, he cannot complain on appeal that he did not get something at trial he never asked for, such as an instruction,\textsuperscript{304} nor can he ask for something for the first time on appeal, e.g., a new trial, that he did not request from the trial judge.\textsuperscript{305} If the trial error is egregious and requires a mistrial, then it also constitutes "plain error"—the exception to the default doctrine for which no objection and request for remedy are required.\textsuperscript{306} Thus, the doctrine of nonreviewability for failure to request a remedy actually affects the outcome on appeal only for intermediate errors.

\textsuperscript{301} The sample contained fifty-one cases in which it was clear that the appellant had not requested any remedy. Only six were reversed.

\textsuperscript{302} See, e.g., Russell v. Guider, 362 So. 2d 55 (Fla. Dist. Ct. App. 1978) (argument was clearly improper, but party's failure to request remedy is a waiver); State v. Purvis, 525 S.W.2d 590 (Mo. Ct. App. 1975) (argument contravened law, usually reversible error, but appellant who did not ask for mistrial cannot complain about not getting relief he did not request); Queen City Land Co. v. State, 601 S.W.2d 527 (Tex. Civ. App. 1980) (argument improper, but point waived because no objection or request for corrective instruction).

\textsuperscript{303} See Spadaccini v. Dolan, 63 A.D.2d 110, 407 N.Y.S.2d 840 (1978) (claim of error for not allowing defense to reopen summation waived for failure to request it); Queen City Land Co. v. State, 601 S.W.2d 527 (Tex. Civ. App. 1980) (attorney characterized party as "greedy;" held improper argument, but point waived for failure to object or request a curative instruction).


\textsuperscript{305} See Russell v. Guider, 362 So. 2d 55 (Fla. Dist. Ct. App. 1978) (blatantly improper emotional argument, but failure to move for mistrial is a waiver); State v. Terrior, 442 A.2d 537 (Me. 1982) (reference to matter not in evidence improper, but defendant did not ask for mistrial, so error waived).

\textsuperscript{306} See Williams v. State, 259 Ark. 667, 535 S.W.2d 842 (1976) (commenting on defendant's not testifying; reversed despite absence of timely request for mistrial); State v. Wilson, 404 So. 2d 968 (La. 1981) (racial remarks; mistrial mandatory whether or not there is an objection or request for mistrial).
The final prerequisite to appeal is that the offending argument, and usually the court's response, must be recorded so that a transcript can be supplied to the appellate court. The necessity for a transcript is obvious. Before the court can review the propriety of an argument, it must determine that the argument was made. The appellant bears the burden of proving that his opponent in fact made a particular argument, and usually can meet this burden only by supplying a transcript. For most allegations of impropriety, the entire arguments of both sides must have been transcribed. The record must contain a party's own complete argument when a party is appealing a prohibitory ruling, because it is harmless error if the appellant made an adequate argument despite the restriction. The transcript must include the opponent's complete argument when a party complains that part of it was improper, so that the appellate court can decide if the argument was illegal, if it was corrected or modified, or if the party waived the point because he did not object to a similar argument. Both arguments must be provided in most cases so that the court can determine if an illegal argument was retaliatory, or similar to an argument the appellant made and therefore harmless. Thus, a party must be sure that the complete arguments are recorded.

307. See, e.g., Hartman v. Shell Oil Co., 68 Cal. App. 3d 240, 137 Cal. Rptr. 244 (1977) (allegation that defense made improper argument is without merit since the words are not in the transcript); Feller v. State, 442 N.E.2d 698 (Ind. 1982) (burden on appellant to present record; failure to do so bars raising issue on appeal); FED. R. APP. P. 10 (transcript usually required if proceedings recorded; if not recorded, court-approved statement may be substituted).

308. See Kelly v. State, 7 Ark. App. 130, 644 S.W.2d 638 (1983) (cannot review complaint about restrictive time limit); Raffile v. Stamford Housewrecking, Inc., 168 Conn. 299, 362 A.2d 879 (1975) (unable to review effect of court's restricting party's use of exhibits); Bing Fa Yuen v. State, 43 Md. App. 109, 403 A.2d 819 (1979) (unable to review complaint that defendant was prevented from reading excerpts of official transcript).


310. See Misch v. C.B. Contracting Co., 394 S.W.2d 98 (Mo. Ct. App. 1965) (whether plaintiff exceeded scope of rebuttal cannot be determined unless all arguments included in record); Commonwealth v. Nicholson, 308 Pa. Super. 370, 454 A.2d 581 (1982) (both arguments must be included to review entire context where argument probably was retaliatory); cf. Chicago, R.I. & P.R.R. v. American Airlines, 408 P.2d 789 (Okla. 1965) (duty of appellee to include appellant's argument in record if appellee hopes to defend an illegal argument as retaliatory; improper arguments presumed erroneous unless appellee proves they are retaliatory) (emphasis added).
for assurance of appealing any errors. Since an appellate court cannot decide the issue without knowing the argument, this particular procedural default rule is almost always adhered to and is not controversial.

One other pattern emerged from an analysis of the appellate courts' use of procedural default. Although the doctrine supposedly applies equally in civil and criminal cases, there is a disparity in how often it is applied. In eighty-nine cases in the sample it could be reasonably certain that an intermediate error had been committed and that the appellant had not properly preserved his claim of error for appeal. Only fourteen percent of the criminal cases were reversed. The doctrine was invoked less often to affirm civil judgments, and thirty-six percent were reversed.

2. Avoiding Reversal Despite Error

The appellate courts in the sample found errors in over seventy percent of the cases decided. They found relatively serious closing argument errors in about fifty-five percent, yet only twenty-four percent were reversed. Procedural default accounts for only another fifteen percent. The remaining two hundred and forty cases, making up more than one-third of all cases in the sample, were affirmed despite the presence of error, for one of three reasons: courts found the error to have been invited, cured, or harmless. Harmless error was the most frequently used reversal-avoidance doctrine, followed by cured error cases and invited error cases. However, invited error appears to be the strongest of the three. Over ninety percent of cases in which the courts could have invoked invited error were in fact affirmed, compared to seventy-eight percent of potential cured error cases, and fifty-six percent of potential harmless error cases. These three doctrines will be discussed in the order of their strength.

a. Invited Error

The most interesting doctrine that appellate courts use to avoid reversal is invited error, or retaliation. The retaliation doctrine states that an im-

311. Several of the more outrageous decisions turn on this point. See Harris v. State, 237 Ga. 718, 230 S.E.2d 1 (1976) (in death penalty case, defense had requested that arguments be transcribed, but court did not summon reporter; argument errors waived for failure to have them transcribed); Fitzer v. Bloom, 253 N.W.2d 395 (Minn. 1977) (defendant requested that arguments be recorded after plaintiff had begun; held that trial court acted "responsibly" in denying request since not made prior to start of argument).

312. The numbers total more than 240 because many courts had opportunities to assert, and did assert, several reasons for affirming a judgment despite the presence of error.
proper argument cannot be grounds for reversal if it was invited by the appellant's own improper closing argument. The ambivalence of the courts toward this doctrine is well illustrated by a recent opinion of the United States Supreme Court:

The situation brought before the Court of Appeals was but one example of an all too common occurrence in criminal trials—the defense counsel argues improperly, provoking the prosecutor to respond in kind, and the trial judge takes no corrective action. Clearly two improper arguments—two apparent wrongs—do not make for a right result. Nevertheless, a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements... must be viewed in context [to determine] whether the prosecutor's conduct affected the fairness of the trial. To help resolve this problem, courts have invoked what is sometimes called the "invited response" or "invited reply" rule, which the Court [approved] in Lawn v. United States, 355 U.S. 339 (1958)... This Court's holding in Lawn was no more than an application of settled law. 313

In the sample, the retaliation doctrine was the reason for affirming sixty cases from twenty states, five federal circuits, and the Supreme Court. In only three cases were there even slight suggestions that this doctrine might have limits, however, no jurisdiction has rejected it. 314

Such universal acceptance of the invited error rule is extraordinary, considering that it stands for the proposition that two wrongs do make a right. If one improper argument is made, there is a twenty-four percent chance the case will be reversed on appeal, but if two improper arguments are made—one by each side—so that it becomes twice as likely that the jury's verdict will rest on improper grounds, the chance of reversal drops toward zero. On one level these may seem like "offsetting fouls" that cancel each other out and justify the invited error doctrine. However, both arguments are improper because they tend to cause the jury to disregard the law and

313. United States v. Young, 470 U.S. 1, 10-12, 105 S. Ct. 1038, 1044-45, 84 L. Ed. 2d 1, 9-10 (1985). The majority opinion by Burger criticizes the doctrine and also appears to approve it.

314. United States v. Young, 470 U.S. 1, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985) (The Court criticizes the retaliation doctrine but does not disavow it. The Court reverses the underlying Tenth Circuit opinion that had outlawed retaliation.); Werner v. Lane, 393 A.2d 1329 (Me. 1978) (retaliatory "foul blows" have no place in a court of justice, although general rule restated); Busch & Latta Painting Corp. v. State Hwy. Comm'n, 597 S.W.2d 189 (Mo. Ct. App. 1980) (dictum) (suggesting that the retaliation doctrine might not apply to misstatements of law).

evidence. The more times the attorneys argue about the defendant's ability to pay, the more are likely the jurors to decide the case on an impermissible basis instead of deciding whether and to what extent the plaintiff was injured.

The invited error doctrine was invoked to affirm cases involving closing argument errors of all levels of seriousness. While courts occasionally expressed qualms about applying the doctrine in cases involving the most serious kinds of errors, they applied it nonetheless.

At the trivial error end of the spectrum, it is often hard to distinguish which affirman device is being used. Appellate decisions concerning such minor errors often give multiple reasons for affirming judgments, only one of which is retaliation. At the more serious error levels, the uniqueness of the retaliation doctrine emerges. In cases involving intermediate errors, while many opinions still confuse the various alternative reversal avoidance doctrines, one can begin to see that the retaliation doctrine is used to affirm some cases that otherwise probably would have been reversed. In

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316. See, e.g., United States v. Flemino, 691 F.2d 1263 (8th Cir. 1982) (Minor misuse of evidence was admitted for limited purpose. The Court held that the government has a right to respond, that the remark may have been proper, that it may have been harmless error, and that the error may have been cured.) (emphasis added).

317. Some cases seem to imply that the retaliation doctrine is merely part of the harmless error doctrine. This author submits that such opinions are wrong. See Commonwealth v. Bradshaw, 385 Mass. 244, 277, 431 N.E.2d 880, 900 (1982); People v. Galloway, 54 N.Y.2d 396, 430 N.E.2d 885, 446 N.Y.S.2d 9 (1981); State v. Lee, 631 S.W.2d 453 (Tenn. Crim. App. 1982). Others treat the retaliation and harmless error doctrines as if they were the same, and do not distinguish between them. See Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2991, 57 L. Ed. 2d 973 (1978); Thunderreal Corp. v. Sterling, 368 So. 2d 923 (Fla. Dist. Ct. App. 1979); People v. Gangestad, 105 Ill. App. 3d 774, 434 N.E.2d 841 (1982); State v. Morris, 404 So. 2d 1186 (La. 1981). For a good illustration of the majority view that the two doctrines are distinct, see People v. Blackman, 88 A.D.2d 620, 450 N.Y.S.2d 38 (1982). In that case, four errors were collectively found to constitute harmful error because of the close factual issue, and the case reversed. A fifth error was singled out as not reversible because it was invited.

318. See, e.g., People v. Walker, 91 Ill. 2d 502, 440 N.E.2d 83 (1982) (prosecutor argued that defendant could be paroled unless given death penalty; sentence vacated, but court suggests that it could be a proper retaliatory argument if the defendant argued that a life sentence meant no release); Williams v. North River Ins. Co., 579 S.W.2d 410 (Mo. Ct. App. 1979) (defendant suggested that verdict for plaintiff would raise jurors' insurance premiums; argument would not be harmless error and could not be cured by an instruction, but would be permissible in retaliation) (emphasis added); see also Pierce v. State, 34 Md. App. 654, 369 A.2d 140 (1977) (prosecutor made improper argument attacking the integrity of defense attorney; court holds the argument not justified as retaliation, but case could be affirmed under harmless error principles); Commonwealth v. Gwaltney, 497 Pa. 505, 442 A.2d 236 (1982) (improper for attorney to express personal opinion of witness's credibility except to retaliate).
cases involving egregious errors, retaliation emerges as the only reversal avoidance doctrine strong enough to permit seriously flawed judgments to stand.\(^{319}\)

The "true" retaliation doctrine must be distinguished from its misuse—cases in which the language of invited error is used but the principle involved is something else. The true retaliation doctrine permits only reasonably commensurate responses in kind, with the effect of correcting or negating the prejudice caused by an opponent's improper arguments.\(^{320}\) Yet, the sample contained a significant number of cases in which courts affirmed improper arguments going far beyond any reasonable response and/or lacking any logical relation to the provoking argument under the rubric of invited error. A court held a prosecutor's argument that the defense attorney could not get anyone to say anything on the defendant's behalf was invited by a defense argument that the state had not called *res gestae* witnesses.\(^{321}\) A court affirmed a case in which a prosecutor told the jury that a

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\(^{319}\) The sample contained forty-eight cases in which appellate courts explicitly discussed invited error concepts. In only three is there any indication—all dicta—that there might be situations in which the doctrine would be insufficient justification to affirm a flawed judgment. Werner v. Lane, 393 A.2d 1329 (Me. 1978) (overall not a fair trial because of many errors; court criticizes notion of invited error in opinion); State v. Barnes, 598 S.W.2d 179 (Mo. Ct. App. 1980) (causing the introduction of dramatic, new probably misleading evidence from the audience; no discussion); Busch & Latta Painting Corp. v. State Hwy. Comm'n., 597 S.W.2d 189 (Mo. Ct. App. 1980) (concept might not apply to misstatements of law; issue not reached). The doctrine has been invoked, for example, in cases in which the prosecutor commented on, and asked the jury to infer guilt from, a defendant's constitutionally protected silence. Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978); Lincoln v. Commonwealth, 217 Va. 370, 228 S.E.2d 688 (1976), and made reference to race, nationality, or religion; State v. Lee, 631 S.W.2d 453 (Tenn. Crim. App. 1982).

\(^{320}\) See United States v. Young, 470 U.S. 1, 11-14, 105 S. Ct. 1038, 1045, 84 L. Ed. 2d 1, 10-11 (1985) (discusses doctrine in terms such as: "responded reasonably", "response-in-kind", and "respond . . . in order to 'right the scale' "); United States v. Suttiswad, 696 F.2d 645, 652-53 (9th Cir. 1982) (defense argued "major investigative failure" because agent did not check for fingerprints; prosecutor's response was that such an additional search might have turned up defendant's fingerprints also; held "fair rebuttal"); People v. Devin, 93 Ill. 2d 326, 444 N.E.2d 102 (1982) (defense argued that another person was probably guilty because he had gone to see a lawyer; prosecution properly responded that defendant also had talked to a lawyer); Thorsen v. City of Chicago, 74 Ill. App. 3d 98, 392 N.E.2d 716 (1979) (party cannot complain about improper remarks invited by their own "like remarks"); Commonwealth v. Smith, 387 Mass. 900, 444 N.E.2d 374 (1983) (retaliation only available to correct errors); Commonwealth v. Gwaltney, 497 Pa. 505, 442 A.2d 236 (1982) (retaliation must be commensurate); Girard v. State, 631 S.W.2d 162 (Tex. Crim. App. 1982) (invited error rule permits prosecutor to go outside record to retaliate only if defense went outside record).

codefendant had been sentenced to death on the ground that the argument was invited by an innocuous defense statement that the prosecutor had a duty to the people of the state. An appellate court failed to reverse a case in which a prosecutor commented on the defendant’s not testifying, on grounds that the comment was invited by a defense argument that the state was overzealous. Another court upheld a prosecutor’s questioning of personal and professional integrity, holding it to be invited by the defense’s attack on the credibility of witnesses. An appellate court held that a prosecutor’s unconstitutional comment on the defendant’s failure to testify was invited by the defendant’s proper explanation that he need not take the stand. In other opinions, prosecutors were permitted to make improper arguments in “retaliation” for proper ones, or which aggravated rather than corrected improper ones. These cases have only one thing in common, they are all criminal cases in which the appellate courts uphold convictions.

The retaliation doctrine is being applied differently in civil and criminal cases, so that fewer criminal defendants receive new trials. The courts misuse the doctrine, permitting excessive retaliation, far more often in criminal cases. In the sample, courts reversed only ten percent of criminal cases in-
volving excessive retaliation, but reversed fifty percent of civil excessive retaliation cases. In intermediate error cases, those in which the outcome is most likely to be affected, the numbers are not quite as dramatic, but one can still see a significant difference. Only twenty-three percent of criminal appellants were successful despite the prosecution's claim that his error was invited, while thirty-three percent of civil appellants prevailed over the assertion of the doctrine.\textsuperscript{328} No court articulates a deliberate anti-defendant bias, but it appears harder for a criminal defendant to get a new trial than a civil litigant.

\textbf{b. Cured Error}

The "cured error" doctrine also permits a judgment to be affirmed despite the presence of closing argument errors. In practice, this is a less powerful doctrine than invited error. The concept is straightforward: appropriate remedial action by the trial judge or the offending attorney may reduce the likelihood that an improper argument will affect the jury's verdict, thereby eliminating the need for a new trial. The doctrine enjoys overwhelming support among appellate courts. Courts recognized it in seventy-nine cases from twenty-six jurisdictions in the sample. No opinion explicitly rejects it or even questions its basic validity,\textsuperscript{329} despite the fact that it rests on the shaky premise that anything can cause a juror to forget what he or she has just heard.

This article has already discussed the types of responsive actions attorneys and judges can take during trial to reduce harm of an improper argument.\textsuperscript{330} An attorney who commits the error may withdraw it, apologize, or correct a misstatement. A judge deciding that an improper argument was made may admonish the attorney or give the jury a corrective instruction. The appellate courts assume that such remedial action reduces the likelihood that the jury's verdict will be influenced by the improper argument.

The concept of cured error rests on the questionable premise that jurors will in fact be able to disregard an improper argument. Lawyers have long analogized this to "unringing a bell," and argued, for example, that it is unrealistic to think that any sensible juror would acquit a defendant who has confessed to child molesting, no matter how many times the juror is told to disregard the confession. Justice Jackson stated, "The naive as-

\textsuperscript{328} In criminal cases, six of twenty-six were reversed; in civil cases, three of nine were reversed.

\textsuperscript{329} Several opinions from Florida appear in the sample, all of which confirm the \textit{principle} of cured error but label it part of the harmless error doctrine. \textit{See, e.g.}, Coleman v. State, 420 So. 2d 354 (Fla. Dist. Ct. App. 1982).

\textsuperscript{330} See \textit{supra} text accompanying notes 205-47.
Amusement that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction.\textsuperscript{331} The evidence from social scientists also appears to undercut this premise. In one experiment, model jurors actually gave more weight to improper information when told to disregard it.\textsuperscript{332} The weight of published research indicates, while jurors follow positive instructions, such as those describing the elements of an offense, reasonably well, they ignore instructions to limit their use of or to disregard potentially prejudicial information.\textsuperscript{333} Nevertheless, the pattern is that cases involving intermediate errors are reversed if no corrective action was taken, and affirmed if the trial judge gave an instruction to disregard the improper argument,\textsuperscript{334} despite the fact that bad verdicts seem equally likely in both kinds of cases.

Weak remedial action may cure trivial errors, ordinary remedial action may cure intermediate errors, and only the most drastic remedial action may cure egregious errors. In fifteen identified cases, only the weakest kinds of corrective action were taken: the attorney clarifying or withdrawing the argument, the judge sustaining an objection without taking further action, or the judge giving a general “this is argument not evidence” instruction. All

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\textsuperscript{331} Krulewitch v. United States, 336 U.S. 440, 453, 64 S. Ct. 716, 723, 93 L. Ed. 790, 795 (1949) (Jackson, J., concurring). The gap between lawyers and judges is illustrated by a 1968 survey in which fifty-seven percent of judges, but only two percent of lawyers believed that jurors could follow an instruction that a defendant’s prior record could not be used to assess guilt. Note, To Take the Stand or Not to Take the Stand: The Dilemma of the Defendant with a Criminal Record, 4 COLUM. J.L. \\& SOC. PROBS. 215 (1968).

\textsuperscript{332} Kalven, A Report on the Jury Project of the University of Chicago Law School, 24 INS. COUNSEL J. 368, 377-78 (1958). In that experiment, jurors’ average verdicts increased from $34,000 to $37,000 when they found out that an insurance company would pay the bill. However, when jurors were told to disregard that information, their average verdicts did not go back down, but jumped to $46,000.


\textsuperscript{334} See Williams v. State, 259 Ark. 667, 535 S.W.2d 842 (1976) (we will always reverse where attorney goes beyond record and brings up new prejudicial facts, unless court’s action removes prejudice); Parker v. Kangera, 482 S.W.2d 43 (Tex. Civ. App. 1972) (an instruction to disregard ordinarily overcomes harm or prejudice caused by improper argument). Of the sixty-one cases in the sample in which an attorney committed an intermediate error and some corrective action was taken, forty-six were affirmed (seventy-five percent).
cases but one were affirmed. In the other twelve cases, the judges used ordinary remedies, giving specific instructions to disregard improper argument, and all were affirmed. In forty-three cases in the sample it could be identified both that an intermediate error occurred and exactly what remedy was used. The weaker remedies were less often effective in avoiding reversal: only sixty-seven percent of the cases in which the judge took weak action were affirmed and only seventy-four percent of cases in which the court responded with an ordinary remedy were affirmed. The sample also contained four cases involving attempts to correct serious errors. While the number is too small to draw definitive conclusions, the trend is as expected: corrective action of any kind was still effective only fifty percent of the time.

When dealing with a concept such as reducing harm to an "acceptable" level, one tends naturally to think of the harmless error doctrine. Is cured error really any different from harmless error? In at least one jurisdiction, and in a scattering of opinions from other states, courts have treated them


Dicta from other opinions also suggest that corrective action is least effective in serious error cases. See Waldron v. Waldron, 156 U.S. 361, 383, 15 S. Ct. 383, 388, 39 L. Ed. 453, 459 (1895) (as general rule, instruction removes cause for reversal unless error is serious); Williams v. North River Ins. Co., 579 S.W.2d 410 (Mo. Ct. App. 1979) (serious error would not be curable by instruction); Parker v. Kangerga, 482 S.W.2d 43 (Tex. Civ. App. 1972) (except where serious, errors are deemed cured where withdrawn, corrected, or jury instructed to disregard).
The articulable difference between them is that the harmless error test assumes that there has been an error, but views it in the context of the whole trial to decide whether to reverse, while the cured error test views a potential error in the context of any corrective action, to determine whether any cognizable error occurred at all.

If this author's theory is correct that the cured error doctrine is both a separate and more powerful reversal avoidance device than harmless error, then cases should exist in which an error is prejudicial, not harmless, yet the judgment is affirmed because of the trial judge's curative action. Indeed, several cases appeared where, because of the trial judge's corrective actions, appellate courts affirmed judgments despite the presence of errors universally held to be harmful. Those cases involved direct comment on a criminal defendant's failure to testify, appeals to racial prejudice, arguments raising the wealth and insured status of defendants, and statements to the jury that the defendant had a similar case pending against it. Appellate courts reversed several other cases because errors were harmful, but stated that they would have affirmed if curative instructions had been given. Other opinions contain dicta that any error can be cured by appropriate remedial action.

339. In the sample three cases from Florida treat cured error and harmless error as the same. E.g., Coleman v. State, 420 So. 2d 354 (Fla. Dist. Ct. App. 1982). An article written on Florida's law of closing argument suggests, but is not explicit, that the two are part of a single standard of review. DeFoor, supra note 1, at 472-74 (1983); see also People v. Scott, 108 Ill. App. 3d 607, 439 N.E.2d 130 (1982) (error may be cured by instruction if other evidence of guilt overwhelming); Johnson v. Zadworny, 6 Mass. App. Ct. 934, 381 N.E.2d 1119 (1978) (general instruction did not cure because close case, little other evidence); Ledford v. State, 568 S.W.2d 113, 117 (Tenn. Crim. App. 1978) (cautionary instruction was not sufficient to cure error so thoroughly as to render it harmless); Saltzburg, The Harm of Harmless Error, 59 VA. L. REV. 988 (1974) (cure is considered only one factor in harmless error analysis).


The question bears examination whether the cured error doctrine shows the same pattern of differential application between civil and criminal cases that was seen for invited error. It does; it is used to affirm a significantly higher percentage of criminal cases than civil. In the sample thirty-four were criminal cases and twenty-seven were civil cases involving both intermediate errors\(^{346}\) and attempts to cure those errors during trial. Appellate courts granted new trials in only eighteen percent of the criminal cases, but thirty-three percent of the civil cases. There is nothing in the sample cases to suggest that the errors in criminal trials are less serious or the corrective action more effective than in civil cases.\(^{347}\)

One significant aberrational case appeared in the sample. Despite ubiquitous judicial pronouncements that jurors are presumed to follow their instructions and are able to disregard an argument when told to do so, in State v. Monroe,\(^{348}\) one court stated the exact opposite. In that case, the judge improperly sustained an objection to a valid defense argument. If, as courts keep saying, the instruction really was effective, the jurors would have ignored the defendant's argument, depriving him of his right to be heard, and a new trial would have to be granted. Despite the fact that courts have "presumed" jurors follow their instructions when such a fiction prevents a new trial, in this case such a presumption would have required a new trial. The court abandoned the presumption and found that such court action does not erase it. The rationalization is different but the result was the same—the defendant's conviction was affirmed.

c. Harmless Error

The third, and best known, reversal avoidance device is the harmless error doctrine. It is hardly unique to the review of closing argument errors, and has been written about often,\(^{349}\) presumably because it illuminates how the justice system balances truth-seeking, fairness, and efficiency. This au-

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346. Since almost all cases involving only trivial errors are affirmed, and no civil cases involving serious errors showed up on the sample, cases involving intermediate errors made the best comparison.


349. See, e.g., Saltzburg, supra note 339.
Harmless error is the least powerful of the three reversal avoidance doc-
trines discussed in this section. Courts generally do not consider it unless
neither invited nor cured error concepts are applicable. Those two doctrines
allow the court to take the position that no cognizable error occurred at all,
while under the harmless error doctrine, an error must be conceded. It must
be admitted that the trial was unfair to some extent in order to affirm.

The author selected a subsample of 253 harmless error cases assuming the
validity of that hierarchy. The subsample includes opinions that discuss
harmless error explicitly, and all cases not decided on some other basis such
as procedural default, invited error, cured error, cumulative error, or the
complete absence of error, whether or not those opinions explicitly refer to
the harmless error test. This was necessary because, unlike the other doc-
trines which tend to be explicitly accepted or rejected, harmless error con-
cepts are often only implicit. This is especially true in cases that were
reversed. Few opinions state explicitly that the court considered harmless
error but found otherwise.

In the subsample 140 appellate opinions invoked the harmless error doc-
trine as one of the reasons for affirming. Those opinions come from the
United States Supreme Court, seven federal circuits, and thirty-six states.
In no opinion does a court question the validity of the doctrine nor its appl-
icability to closing argument errors.350 There are, however, differences in

350. The one notable exception was United States v. Hastings, 660 F.2d 301 (7th
Cir. 1981), which explicitly refused to consider a harmless-error analysis. It was
promptly reversed by the Supreme Court. United States v. Hastings, 461 U.S. 499,
103 S. Ct. 1974, 76 L. Ed. 2d 96 (1983). In another opinion, a different court stated
it did not tacitly approve of harmless error but affirmed the case nonetheless because
it did not believe the error had influenced the jury. State v. Dupre, 408 So. 2d 1229
(La. 1982).

A scattered few cases have suggested that harmless-error analysis is inappropriate
in certain narrow situations: (1) constitutional law violations, e.g., Bryant v. State,
205 Ind. 372, 186 N.E. 322 (1933) (trial court refusal to let jury consider state
constitutionality of statute under facts presented); United Coin Meter Co. v. Lasala,
98 Mich. App. 238, 296 N.W.2d 221 (1980) (complete denial of right to be heard);
refusal to talk to police); (2) violations of specific statutory provisions, e.g., Raybestos
time limits); Americus v. McGinnis, 128 Wash. 28, 221 P. 987 (1924) (statutory right
to pro se representation); Peot v. Ferraro, 83 Wis. 2d 727, 266 N.W.2d 586 (1978)
(statutory limit to amount recoverable); (3) attempts to define "reasonable doubt,"
e.g., Clemons v. State, 320 So. 2d 368 (Miss. 1975); State v. Shelby, 634 S.W.2d 481
(Mo. 1982); and, (4) for some inexplicable reason, the per diem rule, e.g., Worsley
the ways it is defined. While courts agree that it is a balancing test with the seriousness of the error weighed against the strength of the other evidence, they differ on how the scales are preset and by how much they must tip. Some courts start with a presumption that all errors are reversible,\textsuperscript{351} others with no presumption,\textsuperscript{352} and others with a presumption that all errors are harmless.\textsuperscript{353} Some will usually reverse, unless the evidence is overwhelming;\textsuperscript{354} others will sometimes reverse, whenever there is a realistic possibility that the error affected the verdict;\textsuperscript{355} and others will rarely reverse, unless they are reasonably certain that the verdict was affected.\textsuperscript{356} Most, however,

\textit{a per diem} argument when it should have); Crum v. Ward, 146 W. Va. 421, 122 S.E.2d 18 (1961) (trial court reversed for allowing \textit{per diem} argument when it should not have).

351. \textit{See, e.g.}, Miller v. North Carolina, 583 F.2d 701 (4th Cir. 1978) (for constitutional errors); Powell v. United States, 455 A.2d 405 (D.C. 1982) (unless assured error had no effect); State v. Willie, 410 So. 2d 1019 (La. 1982) (court must presume that factor influenced jury); People v. Leverette, 112 Mich. App. 142, 315 N.W.2d 876 (1982) (must reverse unless evidence overwhelming); State v. Caldwell, 322 N.W.2d 574 (Minn. 1982) (if error serious, presumed reversible unless court is certain it was harmless); Clemons v. State, 320 So. 2d 368 (Miss. 1975) (in absence of full record, presume that error reversible); Kopp v. C.C. Caldwell Optical Co., 547 S.W.2d 872 (Mo. Ct. App. 1977) (errors generally will be reversible).

352. \textit{See, e.g.}, Ott v. Fox, 362 So. 2d 836 (Ala. 1978) (statements are to be taken in context and read as a whole to determine if reversible or harmless error); Southern Ry. Co. v. Jarvis, 266 Ala. 440, 97 So. 2d 549 (1957) (no hard and fast rules); State v. Caldwell, 322 N.W.2d 574 (Minn. 1982) (for intermediate errors, no presumption); State v. Darnell, 639 S.W.2d 869 (Mo. Ct. App. 1982) (to determine if error reversible, consider it in context).


355. \textit{See, e.g.}, Berger v. United States, 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (1935) (reverse where case not strong, prejudice "probable"); People v. Haskett, 30 Cal. 3d 841, 640 P.2d 776, 150 Cal. Rptr. 640 (1982) (reverse where reasonably probable that result was affected); Power v. United States, 455 A.2d 405 (D.C. 1982) (reverse unless assured that judgment not substantially swayed by error); State v. Johnson, 324 N.W.2d 199 (Minn. 1982) (reverse where there is reason to believe defendant was prejudiced).

356. \textit{See, e.g.}, Aetna Life Ins. Co. v. Kelley, 70 F.2d 589 (8th Cir. 1934) (reversed if error affected verdict); People v. Smith, 111 Ill. App. 3d 895, 444 N.E.2d 801 (1982) (reverse only if errors were material factor in conviction); State v. Sparks, 298 S.E.2d 857 (W. Va. 1982) (will not be reversed unless clear prejudice).
make no serious attempt to define harmless error, but appear to bend the doctrine to fit the case.\textsuperscript{357}

The harmless error doctrine does not necessarily lead to inconsistent results. However, in cases involving relatively trivial errors and relatively strong evidence supporting the verdict, there certainly is little controversy. Courts affirmed eighty-seven percent of such cases under the harmless error rule. Of the seven cases that courts reversed for trivial errors, all but two cases were reversed because extrinsic evidence indicated the juries actually had been affected by the error, and all were civil cases.\textsuperscript{358}

At the other end of the spectrum are cases involving relatively serious errors. Here, appellate courts also seem to consistently apply the harmless error rule. Indeed, thirty-three out of forty-three cases involving serious errors were reversed, while only ten were affirmed. In all but three of the cases, the court either "wrongly" decided the case (i.e., it was an aberrational case finding no error where most other courts would have found serious error),\textsuperscript{359} or referred repeatedly to the overwhelming strength of the evidence.\textsuperscript{360}

The harmless error doctrine becomes incomprehensible in the broad middle range of intermediate errors. Not only do descriptions of the proper balancing test differ, but the results are inconsistent. Virtually identical cases


\textsuperscript{360} E.g., People v. Modesto, 66 Cal. 2d 695, 427 P.2d 788, 59 Cal. Rptr. 124 (1967) (no possibility of a not guilty verdict).
are handled differently.361 Half the courts seem to reach decisions intuitively,362 their opinions being devoid of any allusion to the kinds of factors that supposedly influence the outcome of harmless error balancing, such as the strength of the winner's case,363 the seriousness of the error,364 whether similar arguments, explanations or instructions had been made,365 the importance or materiality of the issue,366 or the size of the resulting verdict.367

361. Compare Peot v. Ferraro, 83 Wis. 2d 727, 266 N.W.2d 586 (1978) (defendant argued for damages in excess of statutory limits, knowing they would have to be lowered by court; reversed) with Austin v. Ford Motor Company, 86 Wis. 2d 628, 273 N.W.2d 233 (1979) (identical argument; cites Peot but affirms because practice is widespread); compare State v. Thomas, 307 Minn. 229, 239 N.W.2d 455 (1976) (argument inviting jurors to disregard defendant's constitutional rights, commonly made by prosecutors despite previous cases condemning it will constitute reversible error) with United States v. Hastings, 461 U.S. 499, 103 S. Ct. 1974, 76 L. Ed. 2d 96 (1983) (argument inviting jurors to penalize defendant's exercise of constitutional right, commonly made by prosecutors despite cases condemning it affirmed because harmless error test cannot be ignored in order to discipline unethical prosecutors); Austin v. Ford Motor Company, 86 Wis. 2d 628, 273 N.W.2d 233 (1979) (argument seeking to circumvent law is harmless error because practice is widespread); compare Girard v. State, 631 S.W.2d 162 (Tex. Crim. App. 1982) (improper argument not harmless because absent reasonable doubt) with State v. Kroll, 87 Wash. 2d 829, 558 P.2d 173 (1977) (improper argument harmless because hotly contested battle); compare Hines v. State, 425 So. 2d 589 (Fla. Dist. Ct. App. 1982) (prosecutor asked jurors to tell community they would not tolerate violence; reversed) with State v. Sugar, 390 So. 2d 1329 (La. 1982) (prosecutor told jurors they should not let this happen in community, must make streets safe; "flirted with reversible error" (408 So. 2d at 1331)); People v. Galloway, 54 N.Y.2d 396, 430 N.E.2d 885, 446 N.Y.S.2d 9 (1981) (prosecutor told jurors they represented community, should make streets safe; affirmed).

362. See, e.g., United States v. Ziak, 360 F.2d 850, 853 (7th Cir. 1966) ("Only because of our abiding confidence that the intelligence of the jurors in fact rejected this performance, do we refrain from reversing . . . ."); State v. Mayes, 286 N.W.2d 387, 392 (Iowa 1979) (error, some prejudice, but "not sufficient prejudice to reverse"); State v. Sparks, 298 S.E.2d 857 (W. Va. 1982) (remarks improper but did not result in "injustice"). In the sample, seventy-four of 147 opinions (fifty percent) articulated some reason why an error was or was not harmless; seventy-three did not.


364. See, e.g., United States v. Berry, 627 F.2d 193 (9th Cir. 1980).


One pattern does emerge clearly from the harmless error cases: the doctrine is invoked far more often to affirm criminal convictions than civil judgments. Of the potential harmless error cases in the sample, sixty-four percent of the criminal cases were affirmed, but only forty-two percent of the civil cases were affirmed. This pattern is similar to the other already discussed reversal avoidance doctrines. Once again, no significant difference exists between civil and criminal cases in the nature of the errors being committed, or in the strength of the winners’ cases that would account for the discrepancy in outcome.

3. Limits on Reversal Avoidance Procedures: Getting to the Merits

The two preceding sections have examined procedural rules used by appellate courts to avoid reversing trial court judgments. These doctrines may have seemed unfair because they permit verdicts to stand despite being tainted by relatively serious errors or because they permit the attorneys to get away with rule violations. Courts recognize that overly strict adherence to these rules can cause injustices in individual cases, and use two rules to limit the scope of the reversal avoidance doctrines: plain error and cumulative error.

a. Plain Error

The plain error doctrine is not unique to closing argument cases. It relieves a party of the burden of procedural default and permits appellate review of serious errors of all kinds despite lack of objection at trial. Attaching the label “plain error” or “fundamental error” permits an appellate court to review an allegation that a serious error has been committed—one that significantly reduces the likelihood that the jury will return an accurate verdict. The court need not affirm on procedural grounds a judgment based on a questionable verdict, but may invoke plain error to reach the merits and reverse on substantive grounds.

The concept of plain error is firmly imbedded in the rules of appellate procedure and appears to be regularly applied to the more serious closing argument errors. Appellate courts employed it to reverse twenty-three cases from two federal circuits and thirteen states in the sample of cases, but al-

368. The numbers become even more dramatic when one looks only at intermediate errors: seventy percent (60/86) of criminal but only thirty-eight percent (23/61) of civil cases are affirmed.

cluded to it in almost every case in which the court discussed procedural default. One can get a good overall sense of how procedural default and plain error relate by looking at the numbers of cases in the sample. In 137 cases, it was clear that the appellant had not properly preserved the issue for appeal: fifty-seven cases cited procedural default as a reason for affirming, while only twenty-three cases cited the plain error doctrine as a reason for reversing.

United States v. Young contains the most recent statement of the plain error doctrine as applied to closing argument errors:

[T]he dispositive issue under the holdings of this Court is not whether the prosecutor's remarks amounted to error, but whether they rose to the level of "plain error . . . ."

The plain error doctrine of Federal Rule of Criminal Procedure 52(b) tempers the blow of a rigid application of the contemporaneous objection requirement. The Rule authorizes the Courts of Appeals to correct only "particularly egregious errors," those errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings." In other words, the plain error exception to the contemporaneous objection rule is to be "used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." Any unwarranted extension of this exacting definition of plain error would skew the Rule's [careful balance]. Reviewing courts are not to use the plain error doctrine to consider trial court errors not meriting appellate review absent timely objection . . . .

Especially when addressing plain error, a reviewing court cannot properly evaluate a case except by viewing such a claim against the entire record. 370

To Chief Justice Burger's description, this author would append three comments: the plain error doctrine is ubiquitous. It does not stem solely from the Federal Rules of Criminal Procedure; its definition is hardly "exact- ing" nor is it even particularly well understood by the courts that use it. It is applied considerably more sparingly in criminal than civil cases.

To understand the rule, one first must distinguish between procedural default and waiver. A party's failure to object and to preserve an issue for appeal may merely be an act of neglect, ignorance, or incompetence, or it may be a deliberate, intentional decision to forgo the point. The former is

370. 470 U.S. 1, 14-16, 105 S. Ct. 1038, 1046-47, 84 L. Ed. 2d 1, 12-13 (1985) (citations omitted). Fed. R. Crim. P. 52(b) provides that "plain errors . . . affecting substantial "rights" may be taken up on appeal "although they were not brought to the attention of the court."
procedural default, which may be excused by the plain error doctrine; the latter is a waiver and precludes the use of plain error.\textsuperscript{371}

Despite the simplicity with which the plain error doctrine is stated, it is not easily applied. While courts agree on its definition, they do not always agree on whether it should be invoked for particular closing argument errors. One would expect most cases involving failure to object to egregious errors would be reviewed anyway under the plain error doctrine, and that does appear to be the result. Of the nine such cases in the sample in which courts explicitly considered the question, the doctrine was invoked and the judgment reversed in seven.\textsuperscript{372} Likewise, one would not expect to find any cases involving only trivial errors that were reversed for plain error, and no such cases appeared in the sample.

Once again, the interesting cases are those involving intermediate errors. Despite Burger's implicit claim that the definition of plain error is exact and relatively clear, no discernible patterns exist in these cases. Several examples should suffice. A Massachusetts case in which a prosecutor commented on the defendant's failure to testify was reversed as plain error; a similar Texas case was not.\textsuperscript{373} In two cases where attorneys made pleas for sympathy for the victim, appellate courts considered such remarks seriously prejudicial and plain error; in two others, similar remarks were not considered inflammatory enough for plain error.\textsuperscript{374} Several state courts found plain error when an attorney aroused the jurors' prejudices concerned...

\textsuperscript{371} Courts seldom draw this distinction clearly. See Johnson v. United States, 318 U.S. 189, 63 S. Ct. 549, 87 L. Ed. 704 (1943) (prosecutor committed serious error, defense objected but later withdrew the objection; cannot be reviewed as plain error because it was an express waiver, not just inadvertence); United States v. Spears, 671 F.2d 991 (7th Cir. 1982) (defense was denied opportunity to argue, normally per se error; cannot be reversed for plain error because counsel implicitly waived right to argue).

Indeed, most courts use the two concepts imprecisely; e.g., Wainwright v. Sykes, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 584 (1977) (failure to object is a waiver); Clary Ins. Agency v. Doyle, 620 P.2d 194 (Alaska 1980) (objection waived for failure to object); Brown v. State, 639 S.W.2d 505 (Tex. Crim. App. 1982) (failure to object waived error).


ing the wealth and power of corporations; the Supreme Court did not. 375
Relatively less serious errors, such as attorneys stating their personal op-
inions concerning the proper outcome, making nasty remarks about the op-
posing attorney, and asking rhetorical questions of individual jurors, have
been held to be so serious that plain error is invoked. 376 While the relatively
more serious errors of appealing to religious and ethnic prejudices, telling
jurors that the defendant had been found guilty by two other juries and sug-
gest that a defendant had committed similar crimes in the past, have ex-
plcitly been found not to be serious enough for plain error. 377

One can see the pattern of differential application of plain error between
civil and criminal cases. Not surprisingly, appellate courts dispense plain
errors more frugally in criminal cases than in civil. Chief Justice Burger's
opinion in United States v. Young, warning that the rule is to be used "spar-
ingly," cautioning against any "unwarranted extension" of it, and criti-
cizing courts that give defendants "extravagant protection," is a classic
example of judicial attitudes. 378 Since the sample contained more criminal
cases than civil, and more opinions in criminal cases discussed plain error,
if the courts applied the doctrine neutrally, one would also expect to see
more reversals in criminal cases. That is not the case. Plain error is invoked
to reverse fewer criminal cases than civil. 379 It is increasingly evident that

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U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129 (1940).
told jury he had cried and been convinced since the start); Paulsen v. Gateway Transp.
and his youth); State v. Butler, 277 S.C. 543, 290 S.E.2d 420 (S.C. 1982) (prosecutor
told jury that the case was one of his strongest in years); Orchin v. Fort Worth
Poultry & Egg Co., 43 S.W.2d 308 (Tex. Civ. App. 1931) (responded to argument
that witness had personal interest because employed by party by asking jurors if they
would fire an employee for telling truth).
377. E.g., People v. Haskett, 30 Cal. 3d 841, 640 P.2d 776, 180 Cal. Rptr. 640
(1982) (prosecutor suggested that defendant may have committed similar crimes in the
past, no evidence of it); People v. Modesto, 66 Cal. 2d 695, 427 P.2d 788, 59 Cal.
Rptr. (1967) (prosecutor said that two other juries had found defendant guilty); Higgins
religious, ethnic, and geographic prejudice).
378. 470 U.S. 1, 16, 105 S. Ct. 1038, 1047, 84 L. Ed. 2d 1, 13 (1985) (citations
omitted).
379. The sample contained more criminal cases than civil cases that went to verdict
(396 to 296), and opinions in more criminal than civil cases explicitly discussed plain
error (fifteen to twelve), yet fewer criminal than civil judgments were reversed (six to
nine).
whatever the doctrine, criminal convictions are more likely to be affirmed than civil judgments.

b. Multiple Errors

Closely related to plain error are the doctrines of cumulative error and repeated error.380 Just as plain error permits a court to temper the blow of an overly strict application of procedural default rules, cumulative and repeated error concepts permit a court to reverse judgments containing excessive invited, cured, and harmless errors.

The concept behind these two closely related doctrines is the same. While one or two isolated errors may be harmless, cured, or excused because they were invited,381 one can not so easily ignore a larger number of errors. The difference is that the cumulative error doctrine applies when an argument contains several different errors, and the repeated error doctrine refers to the same improper argument being made several times. This author considers these doctrines together because they are conceptually similar and because only six cases of "repeated error" reversals appeared in the sample.

The subsample for this section consisted of all opinions that alluded to multiple errors as a reason for reversing and all cases which were affirmed despite the presence of multiple errors,382 whether or not the court explicitly considered one of the multiple error doctrines. In all, there were thirty-nine

380. Some opinions, in fact, treat all three doctrines as if they were one. See, e.g., Edwards v. Sears, Roebuck & Co., 512 F.2d 276 (5th Cir. 1975) (errors taken together were serious enough to warrant review despite absence of objection); Simmons v. Southern Pac. Transp. Co., 62 Cal. App. 3d 341, 133 Cal. Rptr. 42 (1976) (referring to flagrant and repeated misconduct).


382. Based on having read hundreds of closing argument cases, this author has intuitively (but not arbitrarily) defined "multiple error" cases as those in which the court finds three or more argument errors but calls all of them harmless, waived, cured, or invited. This is a little misleading, since the courts do not define "multiple errors" numerically. However, it is the only way this author can include cases in the subsample where courts had opportunities to invoke multiple error concepts but declined them.
such cases. Appellate courts affirmed seventeen, but reversed twenty.\textsuperscript{383} Among the cases reversed were those containing errors that, if committed singly, would have been harmless\textsuperscript{384} or cured.\textsuperscript{385} No case appeared in the sample in which multiple \textit{invited} errors wanted reversal. This is not surprising, since the invited error doctrine is the \textit{strongest} reversal avoidance device. While multiple error concepts theoretically apply to invited errors as well as to other kinds, it may be that in practice the invited error doctrine is simply too strong to be overcome. In the small subsample of multiple error cases, courts affirmed or reversed on other grounds all four of the cases containing invited error,\textsuperscript{386} but the number is too small to draw any reliable conclusions about whether multiple invited errors can ever be reversible.

Little else can be said about the multiple error doctrine. No appellate opinion discusses anything beyond what has already been mentioned. Following the most detailed statement concerning the multiple error doctrine is:

\begin{quote}
Each of the... errors was, in all likelihood, harmless, especially in light of the overwhelming evidence against appellant and would not normally warrant this Court's intervention... However, the harmless error analysis is not unlimited. We cannot ignore the numerous errors that occurred... and still label them "harmless." Ultimately, sufficient harmless errors must be deemed "harmful."\textsuperscript{387}
\end{quote}

This is hardly an in depth discussion of the doctrine's parameters and how to apply it! However, it is possible to draw a few inferences from the ways in which courts use multiple error concepts. If the errors are minor, the case is not likely to be reversed even if several are present; but if the case involves several intermediate errors, the likelihood of reversal is high. All six cases

\textsuperscript{383} The remaining two opinions were decided on other grounds and did not reach the reversible error question.

\textsuperscript{384} \textit{E.g.}, People v. Dowdell, 88 A.D.2d 239, 453 N.Y.S.2d 174 (1982) (each error harmless, especially in light of overwhelming evidence, but we cannot ignore the numerous errors that occurred and still label them harmless).

\textsuperscript{385} \textit{E.g.}, Basden v. Kiefner Bros., Inc., 92 Ill. App. 3d 218, 414 N.E.2d 951 (1980) (corrective instruction did not cure error because improper argument was repeated); People v. Davis, 58 Mich. App. 159, 227 N.W.2d 269 (1975) (if remarks repeated, instruction does not cure error).

\textsuperscript{386} See, \textit{e.g.}, United States v. Young, 470 U.S. 1, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985); Commonwealth v. Bradshaw, 385 Mass. 244, 431 N.E.2d 880 (1982). In People v. Blackman, 88 A.D.2d 620, 450 N.Y.S.2d 38 (1982), the court reversed a conviction because of the cumulative effect of four errors that otherwise would have been harmless; but it separately holds a fifth error to have been invited and \textit{not} one of the multiple errors warranting reversal.

in the sample that involved multiple minor errors were affirmed,\(^{388}\) while over eighty percent of the cases involving multiple intermediate errors were reversed.\(^{389}\) The other conclusion that can be drawn is that, once again, the law is applied differently in civil and criminal cases. While all seven civil cases involving multiple intermediate errors were reversed; only ten out of fourteen criminal cases were reversed.

c. Excessive Verdicts

In eight opinions from different courts, appellate judges looked at the excessiveness of the verdict in deciding whether to reverse for closing argument errors. In each case where the verdict was found excessive, the court reversed the judgment. Remittitur is not considered an adequate substitute remedy. Not a single opinion appeared in the sample of 700 cases in which courts approved the use of remittitur as a substitute remedy.\(^{390}\) However, it is not clear whether reversing for the excessiveness of the verdict is an independent doctrine or is merely a variation of several already discussed. If a verdict is excessive, then the error obviously has affected the jury, and it cannot be considered harmless.\(^{391}\) An excessive verdict affects a party’s sub-

\(^{388}\) See, e.g., United States v. Young, 470 U.S. 1, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985) (prosecutor stated his personal opinion on the issues three different times; conviction affirmed); People v. Constant, 645 P.2d 843 (Colo. 1982) (repeated reference to defendant laughing during trial).

\(^{389}\) Seventeen were reversed, four affirmed. Compare Hance v. Zant, 696 F.2d 940 (11th Cir. 1983), cert. denied, 463 U.S. 1210 (1983), overruled on other grounds, Brooks v. Kemp, 762 F.2d 1383 (1985) (en banc) (prosecutor stated personal opinion on the merits, discussed consequences of conviction, and made two “safe streets” arguments; death sentence reversed) with DeBolt v. State, 604 S.W.2d 164 (Tex. Crim. App. 1980) (prosecutor stated personal opinion, discussed consequences of conviction, and made a “safe streets” argument; death sentence affirmed); compare People v. Johnson, 102 Ill. App. 3d 122, 429 N.E.2d 905 (1981) (prosecutor misstated law, indirectly commented on defendant’s failure to testify, and attempted to weaken the burden of proof; conviction reversed) with State v. Jensen, 308 Minn. 377, 242 N.W.2d 109 (1976) (prosecutor alluded to unintroduced evidence, misstated law, commented indirectly on defendant’s failure to testify, attempted to weaken the state’s burden of proof, and suggested that defendant’s not guilty plea was not a denial of guilt; conviction affirmed).


substantial rights and thus warrants application of the plain error doctrine.\textsuperscript{392} An excessive verdict shows that any attempt to cure the effect of the error has failed.\textsuperscript{393} It could be argued that an excessive verdict shows that the argument went beyond the level of invited retaliation necessary to "right the scale." This author concludes, therefore, that this is merely part of those other doctrines, although no opinion explicitly addresses the question.

F. "It Isn't Error But Don't do it Again"

One final characteristic of appellate review of closing argument errors deserves brief mention. Sometimes, two contradictory messages concerning whether a particular argument is error appear in the same opinion. Such an opinion typically uses reasoning which concludes that although the argument is not condoned, it was within the court's discretion to overrule the objection.\textsuperscript{394}

There are enough such opinions to warrant taking the issue seriously. Twenty-three cases from two federal circuits and seventeen different states contain such contradictions. They cannot all be dismissed as distorted harmless error cases. Rather, they are cases where the courts appear hold that the arguments are improper but are reluctant to label them as error. While courts could have affirmed many of these cases under the traditional harmless error test, they have for some reason chosen this strange alternate route. It is as if they wish attorneys would stop making a particular argument, but deliberately refuse to label it error so that no one will be able to appeal on it in the future.

The likely explanation for this phenomenon is two-fold. First, it is clear that some judges are uncomfortable invoking reversal avoidance doctrines, especially harmless error. Their inherent senses of fairness probably are

\textsuperscript{392} See School Bd. of Palm Beach County v. Taylor, 365 So. 2d 1044 (Fla. Dist. Ct. App. 1978) (no objection made, verdicts would not be overturned were they not excessive).


bothered by admitting that an error occurred but affirming the verdict any-
way. If the improper argument could be characterized as something other
than and slightly less serious than an actual error, it is easier to affirm. Thus
courts point out the "better practices," disapprove" of some argu-
ments, and "do not condone" others, label arguments as "ill-ad-
vised", "better left unsaid," and even "condemn" arguments, while
stopping short of calling them error. One court even explicitly states that,
while an argument came close to being improper, it was not improper.

The second part of the explanation lies in the fact that judges and attor-
neys are largely unaware of the existence of a law of closing argument. They
are faced on appeal with what appears to them to be a sui generis issue con-
cerning attorney misconduct. They focus their attention on whether the
conduct is proper or improper, with little appreciation for the fact that the
issue probably has been decided previously. Because they may never have
thought of closing argument in terms of legal rules, they assume that mis-
conduct in argument, while not to be condoned, amounts to something less
than "legal error." They reserve that concept for violations of the legal rules
of more familiar bodies of law.

III. Conclusion

The picture of closing argument procedure that emerges is a more com-
plex, more rule-bound, and less discretionary one than previously had been

395. See, e.g., United States v. Dawson, 467 F.2d 668 (8th Cir. 1972); Roberts v.
Power Co., 181 Wis. 56, 194 N.W. 31 (1923).
396. See, e.g., United States v. Ziak, 360 F.2d 850 (7th Cir. 1966); McCullough v.
Langer, 23 Cal. App. 2d 510, 73 P.2d 649 (1937); State v. Pepples, 250 N.W.2d 390
(Iowa 1977).
Sanderson, 22 N.C. App. 669, 207 S.E.2d 341 (1974); Frank Realty, Inc. v. Heuvel,
400. State v. Thomas, 307 Minn. 229, 239 N.W.2d 455 (1976); People v. Higgins,
402. Indeed, thirteen of the fourteen cases that are not just poorly articulated,
harmless, invited, cured, or waived error cases, contain no citation of authority to
support the court. Three opinions contain inapplicable citations but none on the point
being discussed, e.g., State v. Pepples, 250 N.W.2d 390 (Iowa 1977); two cite cases
that reach different results and distinguish them, but cite no cases in support, e.g.,
Biegler v. Kirby, 281 Or. 423, 574 P.2d 1127 (1978); and seven cite no cases at all,
e.g., United States v. Ziak, 360 F.2d 850 (7th Cir. 1966); Hines v. State, 249 Ga.
257, 290 S.E.2d 911 (1982); In re Maier's Estate, 236 Iowa 960, 20 N.W.2d 425
described. Most writers who have generalized about this body of law have
downplayed the role of procedural rules and emphasized the importance of
trial court discretion.\footnote{403}{Much of the existing literature contains sweeping
generalizations concerning the scope of judicial discretion, such as: "The argument of counsel is subject to the supervisory direction and control of the trial court, which has a wide discretion in such regard. [T]here exist no hard and fast rules to which counsel must adhere . . . ." J. Stein, \textit{supra} note 1, § 13. Such statements obviously are overbroad.}\footnote{404}{See, \textit{e.g.}, R. Bowers, \textit{Judicial Discretion of Trial Courts} (1931).}\footnote{405}{See, \textit{e.g.}, Crump, \textit{supra} note 1, at 537. "One of the most striking features of the law governing arguments is the infrequency with which appellate courts reverse a conviction on the ground of argument error." Crump's statement was not supported by any evidence.}\footnote{406}{In the primary sample, 24\% of the cases were reversed on appeal for violations of the rules of closing argument. That compares favorably to the general reversal rate for all kinds of cases, which the author calculated to be 22-27\%. The lower figure comes from the National Center for State Courts, State Court Caseload Statistics Annual Report (1980), derived by adding up the appropriate reports from the twenty-two states that reported the figure. It represents 32,385 cases of all kinds. The higher figure is based on the author's random sample of 469 appellate opinions in all kinds of cases from state and federal courts, drawn in the same way as the closing argument sample. In civil cases, the reversal rate is higher: 30\% for closing argument errors, 31-39\% for cases generally. In criminal cases, the reversal rates were 19\% for closing argument errors, and 14-17\% for errors generally.}\footnote{407}{The author believes the merits of the adversary system are overrated. However, most appellate judges who write opinions seem to share the views of those who tout the adversarial system as the best vehicle for producing accurate results. See S. Landsman, \textit{The Adversary System} (1984). The debate over whether this really is the best procedure overall for finding the truth is beyond the scope of this article.}

to the extent that those writers make empirical assertions about how they think trial courts work in practice, they may be
correct; this author has not tried to explore that issue. However, to the ex-
tent that they make assertions about the structure of closing argument law,
their statements are either misleading or wrong. Although discretion cer-
tainly is an important component of closing argument procedure, it is the
ordinary sort of delimited discretion found in most well-developed systems
of legal rules.\footnote{404}{This author found no evidence of any sweeping legal prin-
ciple that the predominant tool for controlling closing arguments should be
the trial judge's exercise of discretion. This author also found no evidence
to support the related claim by some writers that appellate courts take vi-
olations of the rules of closing argument less seriously than other kinds of
legal errors.\footnote{405}{To the contrary, appeals based on closing argument law er-
rors proved just as likely to result in reversal as appeals based on other
claims.}\footnote{406}{The author did find a generally shared ideology of trials. At its heart seems
to be the notion that partisan adversarial presentations facilitate the search
for truth.\footnote{407}{According to this principle, giving lawyers relatively unre-
stricted freedom in closing argument promotes just results. However, appellate courts seem also, though less explicitly, to recognize that the appearance of justice is important. A party's opportunity to participate in closing argument is important for its own sake as a legitimating ritual. These complementary notions are bounded by one other important principle of the judicial system: efficiency. Thus there exists a rule structure that tends to limit but not eliminate partisan argument.

Within this more or less shared ideology, individual rules of closing argument procedure seem to be trying to accommodate the competing, often incompatible, values that flow from our complex views of what purposes a trial is supposed to serve. Certainly one expects closing arguments to facilitate the truth-seeking function of the trial. This principle is well illustrated by the rules requiring the trial judge to promptly correct misstatements of law and fact, and to try to minimize the deleterious impact of arguments appealing to emotions or urging the jurors to disregard the evidence. At the same time, one wishes to preserve the participatory aspect of the process, so that no one can say fair hearing was not given. Closing argument procedure accommodates this need well. For example, the law gives great protection to a party's right to participate in closing argument, even elevating it to a constitutional right in criminal cases. This protection is given equally to those who would aid the truth-seeking process and those who would use the opportunity to obstruct truth-finding and thwart justice. The need for efficiency in the court system is also recognized. Closing argument procedure, like other bodies of law, emphasizes values associated with that principle. Trial judges have discretion to impose time limits on arguments, and appellate judges are encouraged to dispose of appeals on merit-avoiding grounds like procedural default, cured error, and invited error. The rules of closing argument procedure reflect an uneasy balance among these principles, apparently willing to tolerate some degree of risk of inaccurate or unfair verdicts in order to operate the system efficiently and preserve its adversarial nature.

One can make another generalization about appellate opinions concerning the law of closing argument procedure: criminal defendants do not fare as well as civil litigants. In the instances where courts created different

408. More than twice as many cases containing violations of closing argument rules are affirmed under these doctrines than are reversed. In the sample, of all cases in which the court admitted errors had occurred, 68% were affirmed anyway, 32% reversed.

409. That criminal defendants do not fare well in the appeals courts may or may not be significant. The possibility that this is symptomatic of a pervasive bias against defendants has been suggested. See Davies, Affirmed: A Study of Criminal Appeals
rules for civil and criminal cases, civil litigants invariably benefitted from the more favorable variation. For example, a civil defendant who admits the case against him and relies on an affirmative defense earns the right to open a close; a similarly situated criminal defendant does not. A civil defendant in many states may waive argument to deprive the plaintiff of rebuttal; a criminal defendant may not. Overall, for violations of rules that are supposed to operate similarly in civil and criminal cases, criminal defendants are significantly less likely to win reversal for rule violations than civil litigants. In the sample of appellate decisions, only nineteen percent of defendants won new trials, whereas a full thirty percent of civil litigants were successful.410

The legal structure within which closing arguments take place is a complex one. It has been the subject of scholarly analysis too infrequently. This analysis attempts to bring some order to the rules of closing argument procedure, more as a preliminary step toward understanding the trial process than as an end in itself. Many individual legal issues touched upon in this article beg for more detailed research and analysis. The author trusts that this article will aid those who pursue these issues in the law reviews and in the courts, so that we may develop a more sophisticated jurisprudence of trials.

and Decision-Making Norms in a California Court of Appeal, A.B.F. Res. J. 543 (1982). It remains to be seen whether defendants also fare poorly when judges have to make decisions under these rules at the trial court level.

410. One argument is that the difference in appeals rates is attributable to the fact that the state bears such a heavy burden of proof in criminal cases. Marginal cases where the evidence is not strong will result in an appealable verdict in a civil case, and if error were present, it would more likely be reversible because of weak evidence. In a criminal case, such marginal cases supposedly result in unappealable verdicts of acquittal, as jurors give defendants the benefit of the doubt. Thus, the argument runs, errors in cases that get to the court of appeals are more likely to be found harmless in criminal cases because the evidence will be stronger. Some of the basis for this argument is undercut by R. SIMON, THE JURY: ITS ROLE IN AMERICAN SOCIETY 55-57 (1980), who discovered that when asked to quantify the different burdens of proof, jurors in civil cases had a mean of 77%, and in criminal cases the mean was 79%. The argument also is undercut when one eliminates harmless error cases from the two samples. When the excess harmless error cases in civil appeals were eliminated in the sample, the remaining cases were reversed at a slightly greater disproportionate rate: 32% in civil cases, 14% in criminal.
TABLE 3
Frequency of Appellate Reversals of Trial Court Results

<table>
<thead>
<tr>
<th>Percent of case reversed:</th>
<th>All cases</th>
<th>Civil cases</th>
<th>Criminal cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Closing argument cases</td>
<td>24%</td>
<td>30%</td>
<td>19%</td>
</tr>
<tr>
<td>(n = 692)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cases that resulted in</td>
<td>27%</td>
<td>39%</td>
<td>17%</td>
</tr>
<tr>
<td>verdict in trial court</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>(n = 469)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>All cases appealed</td>
<td>31%</td>
<td>39%</td>
<td>18%</td>
</tr>
<tr>
<td>(n = 1313)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>All cases, sporadic data</td>
<td>22%</td>
<td>31%</td>
<td>14%</td>
</tr>
<tr>
<td>on state courts</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>(n = 32,385)</td>
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</tbody>
</table>

Table 4
Success Rate for Criminal Appeals Compared to Civil Appeals in Cases of Intermediate Closing Argument Errors

<table>
<thead>
<tr>
<th>Percentage of successful criminal appeals</th>
<th>Percentage of successful civil appeals</th>
</tr>
</thead>
<tbody>
<tr>
<td>All closing argument cases containing intermediate errors¹</td>
<td>22%</td>
</tr>
<tr>
<td>Procedural default cases²</td>
<td>14%</td>
</tr>
<tr>
<td>Invited error cases³</td>
<td>23%</td>
</tr>
<tr>
<td>Cured error cases⁴</td>
<td>18%</td>
</tr>
<tr>
<td>Harmless error cases⁵</td>
<td>30%</td>
</tr>
<tr>
<td>Plain error cases⁶</td>
<td>40%</td>
</tr>
<tr>
<td>Multiple error cases⁷</td>
<td>71%</td>
</tr>
</tbody>
</table>

1. In criminal cases, 38 of 72 were reversed, in civil cases 61 of 134 were reversed
2. Subsample described supra at text following note 280.
3. Subsample described supra at text accompanying note 297.
4. Subsample described supra at text accompanying note 315.
5. Subsample described supra at text following note 318 and at footnote 337.
6. Subsample described supra at footnote 347.
7. Subsample described supra at text accompanying notes 350-51, and 357.