Enlisting the Jury in the "War on Drugs": A Proposed Ban on Prosecutors' Use of "War on Drugs" Rhetoric During Opening and Closing Argument of a Narcotics Trial

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Fifty years ago, the Supreme Court held that a prosecutor may not use rhetoric intended to arouse the "passion and the prejudice" of jurors.¹ Prosecutors urging juries to convict a defendant in a narcotics trial, however, often refer to the large government effort against drugs. For example, one prosecutor asked a jury: "Isn't this [narcotics] case really one about a war? Haven't they invaded our shores?" Arguably, this and other examples of prosecutorial drug-related rhetoric during opening and closing argument of a narcotics trial are improper under current Supreme Court jurisprudence.⁵

Whether prosecutors should be permitted to use drug-related rhetoric is an important question for three reasons. First, wide disagreement exists among the courts on this topic. Several courts have found that drug-related comments constitute permissible courtroom argument,⁶ while other courts have held similar rhetoric impermissible.⁷ Furthermore, state courts,⁸ military

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¹ Viereck v United States, 318 US 236, 247 (1943).
² United States v Bascaro, 742 F2d 1335, 1353 (11th Cir 1984) (holding the comments proper).
³ See, for example, United States v Solivan, 937 F2d 1146 (6th Cir 1991); State v Draughn, 76 Ohio App 3d 664, 602 NE2d 790 (1992); Martinez v State, 826 SW2d 807 (Tex Ct App 1992).
⁴ For the purposes of this Comment, the phrase "drug-related rhetoric" refers to any comments alluding to the general drug problem in the United States. See Part II.
⁵ See Part II(A).
⁶ See, for example, United States v Ferguson, 935 F2d 1518 (7th Cir 1991); United States v McFarland, 911 F2d 739 (9th Cir 1990) (unpublished memorandum); United States v Magee, 821 F2d 234 (5th Cir 1987); Bascaro, 742 F2d at 1335.
⁷ See, for example, Arrieta-Agressot v United States, 3 F3d 525, 527 (1st Cir 1993); United States v Beasley, 2 F3d 1551 (11th Cir 1993); United States v Johnson, 968 F2d 768 (8th Cir 1992); Solivan, 937 F2d at 1146.
⁸ Compare, for example, State v Echevarria, 71 Wash App 595, 860 P2d 420, 421 (1993) (holding improper prosecutor's reference to "War on Drugs" during his opening statement) with People v Loferski, 235 Ill App 3d 675, 601 NE2d 1135 (1992) (describing a
courts, and even courts within a single jurisdiction disagree on this issue.

Second, a prohibition on drug-related rhetoric in the courtroom may require the reversal of convictions. A court must reverse a conviction because of improper prosecutorial comments unless it deems the error harmless in light of the evidence against the defendant. When defendants are convicted on closely balanced evidence, a court's decision about the propriety of the prosecutor's comments may form the crux of the appeal.

Third, and most important, clarifying the line between improper and proper prosecutorial rhetoric is essential to reducing the pervasive problem of prosecutorial "forensic misconduct."

Prosecutor's rhetoric equating "War on Drugs" to national war permissible as plea for "fearless administration of the law"): See Draughn, 602 NE2d at 790 (finding the comments improper); People v Williams, 65 Mich App 753, 238 NW2d 186, 187 (1975) (finding the comments improper); State v Crenshaw, 852 SW2d 181, 187 (Mo Ct App 1993) (finding the comments proper); People v Peterson, 248 Ill App 3d 28, 618 NE2d 388 (1993) (finding the comments proper); Martinez, 826 SW2d at 807 (finding the comments proper).

9 Compare United States v Schomaker, 17 MJ 1122, 1126-27 (NMCMR 1984) (holding improper a reference to Commandant's declaration of "war" on drugs) with United States v McCarthy, 37 MJ 595, 599 (AFCMR 1993) (holding not improper trial counsel's comments comparing "America's confrontation with Saddam Hussein" to the "War on Drugs").

In the Eleventh Circuit, compare Bascaro, 742 F2d at 1354 (stating that "in no is it impermissible 'to simply compare the duties of citizens serving on juries with those of citizens serving in the armed forces'") with Beasley, 2 F3d at 1559-60 (finding it "clearly improper" for the prosecutor twice during his argument to indicate that the jury was a participant in the war on drugs). In the Ninth Circuit, compare McFarland, 911 F2d at 739 (holding that comments equating a victory in the "War on Drugs" with a conviction were not improper) with United States v Bazua-Vizcarra, 927 F2d 611 (9th Cir 1991) (unpublished memorandum) (stating that "diatribes concerning the social ills caused by drug abuse have no place in a criminal trial"). In Illinois, compare People v Peterson, 248 Ill App 3d 28, 618 NE2d 388 (1993) ("The prosecutor's remarks relating to the war on drugs was permissive comment.") with People v Williams, 239 Ill App 3d 557, 607 NE2d 307 (1993) (stating that "we do not approve" of comments remarking that drugs are a "horrible problem in the community"). See also People v Loferski, 601 NE2d 1135, 1145 (Ill App Ct 1992) (stating that "although the analysis in these authorities [finding the rhetoric improper] is persuasive . . . it is the duty of this court to follow the decisions of our Supreme Court").

11 See, for example, Solivan, 937 F2d at 1155-57; Johnson, 968 F2d at 770-72.

12 See, for example, Solivan, 937 F2d at 1155-57.

13 See, for example, Ferguson, 935 F2d at 1531 n 5 (refusing to evaluate the evidence against the defendant because the remark was found proper). This Comment does not directly address the question of when reversal is appropriate; instead, this Comment focuses on the prior question of the permissible scope of prosecutors' comments. Of course, many of the issues involved in assessing the propriety of comments are relevant to the question of reversal. For example, both the question of propriety and the question of prejudice depend on the "tenor of the social and political environment at the time of the trial . . . ." Note, Prosecutorial Misconduct: The Limitations Upon the Prosecutor's Role as an Advocate, 14 Suffolk L Rev 1095, 1121 (1980).

14 The phrase "forensic misconduct" was first used in Note, The Nature and Conse-
Although the debate over the correct solution to this problem continues, all of the proposed solutions require the demarcation of a clear boundary between proper and improper rhetoric.

This Comment proposes that a court deem improper any use of “War on Drugs” rhetoric by prosecutors during opening and closing argument of a narcotics trial. Military rhetoric is particularly inappropriate during a narcotics trial. The use of military images to describe the government effort against drugs inappropriately appeals to the emotions of the jury, encourages arbitrary decisions, unfairly invokes the jurors’ allegiance to the government, and diserves the general obligation of the prosecutor to avoid striking rhetorical “foul blows.”

Part I of this Comment describes the general approaches the courts have adopted to limit the scope of drug-related prosecutorial rhetoric and discusses the difficulties with these approaches. Part II explores the current disagreement among the courts over the propriety of drug-related prosecutorial comments during opening and closing argument of a narcotics trial. Part III argues that a court should deem improper prosecutors’ use of “War on Drugs” rhetoric during opening or closing argument of a narcotics trial.

- For the purposes of this Comment, “War on Drugs rhetoric” refers to the use of military language to describe the government’s efforts against narcotics. See Part III.
I. PERMISSIBLE SCOPE OF PROSECUTORS' RHETORIC

A. The Supreme Court's General Approach to Prosecutors' Rhetoric

In *Berger v United States,* the leading Supreme Court decision addressing improper prosecutorial comments, the Court reversed a conviction because of a series of improper comments made by the prosecutor. In so doing, the Court articulated the general standard to which prosecutorial comments must adhere. Characterizing prosecutors as "representative not of an ordinary party to a controversy, but of a sovereignty," the Court explained that the government's "interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." The Court noted that a prosecutor's statements are "apt to carry much weight" in the jury's mind. Accordingly, the *Berger* Court announced a standard designed to constrain the rhetoric of a prosecutor: "[W]hile [the prosecutor] may strike hard blows, he is not at liberty to strike foul ones.

In *Viereck v United States,* the Court applied the *Berger* standard to a prosecutor's emotional closing argument. During World War II, Viereck had registered under the Foreign Agents Registration Act as "agent and United States correspondent" for a German newspaper. The government argued that he had instead financed and written propaganda against British foreign policy. In his closing argument to the jury, the prosecutor remarked:

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20 Specifically, the prosecutor "was guilty of misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court[; ...] of bullying and arguing with witnesses; and in general, of conducting himself in a thoroughly indecorous and improper manner." *Berger*, 295 US at 84.
21 Id at 88.
22 Id.
23 Id.
25 318 US 236 (1943).
26 Id at 247-48.
27 52 Stat 631 (1938). Adopted just before World War II, the act required "the registration of certain agents of foreign principals." *Viereck*, 318 US at 237. The purpose of the act was to help "identify agents of foreign principals who might engage in subversive acts or in spreading foreign propaganda." Id at 241.
28 *Viereck*, 318 US at 239.
29 Id at 240.
This is war. It is a fight to the death. The American people are relying upon you ladies and gentlemen for their protection against this sort of a crime, just as much as they are relying upon the protection of the men who man the guns in Bataan Peninsula, and everywhere else. They are relying upon you ladies and gentlemen for their protection. We are at war. You have a duty to perform here. As a representative of your Government I am calling upon every one of you to do your duty.  

Writing for the Court, Chief Justice Stone found that because "passion and prejudice are heightened by emotions stirred by our participation in a great war," these comments were "highly prejudicial" to the defendant's right to a fair trial and "offensive to the dignity and good order" of the courtroom. Quoting from Berger, the Court stated once again that while the prosecutor "may strike hard blows, he is not at liberty to strike foul ones." Although the Viereck Court reversed the lower court's decision on other grounds, the majority stated that these comments alone "might well have placed the judgment of conviction in jeopardy."  

The Berger and Viereck decisions were not universally applauded. Judge Learned Hand, whose opinion the Supreme Court reversed in Berger, believed that the prosecutor's role as advocate demanded a more lenient approach. Only a few months after the Berger decision, Judge Hand reiterated his disagreement with the Berger "foul blows" standard. In United States v Wexler, the prosecutor had accused the defendant of spending his life

30 Id at 247 n 3 (paragraph break omitted).
31 Id at 248.
32 Viereck, 318 US at 248.
33 Id, quoting Berger, 295 US at 88.
34 The Court reversed because the lower court improperly applied a version of the criminal statute that Congress passed after the defendant's registration. Viereck, 318 US at 247.
35 Id. One commentator has suggested that the comments made in Viereck would not be reversible error under current Supreme Court jurisprudence. Karen E. Holt, Hard Blows And Foul Ones: The Limited Bounds on Prosecutorial Summation in Tennessee, 58 Tenn L Rev 117, 132 n 107 (1990). Of course, the question of whether a court would reverse a conviction is distinct from the question of whether the court would describe the remarks as proper. See note 13. No commentator has suggested that the remarks in Viereck would be accepted as proper by the present Court.
36 79 F2d 526 (2d Cir 1935).
“cheating and robbing and assaulting and worse.”\(^{37}\) After noting the recent Berger decision, Judge Hand upheld the conviction, stating that “[i]t is impossible to expect that a criminal trial shall be conducted without some show of feeling.”\(^{38}\)

In remarks reminiscent of Judge Hand's position in Wexler, Justices Black and Douglas, dissenting in Viereck, also advocated a more lenient standard. They argued that although the prosecutor “should not seek to arouse passion or engender prejudice[,] . . . earnestness or even a stirring eloquence cannot convict him of hitting foul blows.”\(^{39}\) Justice Black quoted approvingly from an earlier Second Circuit decision that stated: “To shear him [the prosecutor] of all oratorical emphasis, while leaving wide latitude to the defense, is to load the scales of justice . . . .”\(^{40}\)

B. Contemporary Criticism of the Berger Standard

Although Berger and Viereck provide some guidance in defining the scope of proper prosecutorial argument, several commentators have complained about the general inadequacy of these judicial standards.\(^{41}\) Professor Albert Alschuler has argued that while the Berger Court’s “hard blows” language is “eloquent, . . . statements at this level of generality do not solve cases.”\(^{42}\) The Supreme Court itself more recently noted that “[t]he line separating acceptable from improper advocacy is not easily drawn.”\(^{43}\)

This lack of a precise definition for improper rhetoric has significantly hindered attempts by various courts to solve the

\(^{37}\) Id at 530.

\(^{38}\) Id at 529-30. At least one commentator does expect a lack of feeling. See Alschuler, 50 Tex L Rev at 636 (cited in note 19) (stating that “[t]he prosecutor should not think of oratory as part of his job at all”).

\(^{39}\) Viereck, 318 US at 253 (Black dissenting).

\(^{40}\) Id at 253 n 4, quoting Di Carlo v United States, 6 F2d 364, 368 (2d Cir 1925).

\(^{41}\) See, for example, Alschuler, 50 Tex L Rev at 634-35 (cited in note 19) (stating that “[f]or inflammatory argument, and appeals to prejudice . . . specific judicial standards are usually lacking”); Fred C. Zacharias, Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?, 44 Vand L Rev 45, 97 n 227 (1991) (stating that “[m]ost commentators agree that judicial standards defining the limits of oratorical flourish are lacking”); Note, 14 Suffolk U L Rev at 1106 (cited in note 13) (stating that “[t]he Berger opinion fails to provide adequate guidance to practicing attorneys or to courts reviewing the issue of trial misconduct”); Gershman, 60 NY State Bar J at 64 (cited in note 15) (describing the standards as unrealistic).

\(^{42}\) Alschuler, 50 Tex L Rev at 635 (cited in note 19).

\(^{43}\) United States v Young, 470 US 1, 7 (1985).
problem of prosecutorial forensic misconduct. The absence of workable standards makes it difficult to teach inexperienced prosecutors the limited scope of permissible rhetoric and for trial courts to monitor prosecutors' rhetoric. Furthermore, the lack of specific standards hampers attempts to sanction prosecutors because it is unclear to appellate courts precisely which comments are improper.

II. THE DISAGREEMENT AMONG COURTS CONCERNING PROSECUTORS' USE OF DRUG-RELATED RHETORIC DURING OPENING AND CLOSING ARGUMENT OF A NARCOTICS TRIAL

Both federal and state courts, as well as military courts, have disagreed on the propriety of prosecutorial comments that involve drug-related rhetoric. Some courts, including the First, Sixth, Eighth, and Eleventh Circuits, have found such comments improper. These courts have articulated four reasons for prohibiting such rhetoric. First, the prosecutor's role as a representative of the state makes rhetoric about the general drug problem inappropriate. Second, such comments may unfairly invoke the jurors' allegiance to the government. Third, the current social attitudes about drugs make any mention of the larger drug problem inflammatory. Fourth, because evidence of society's war on drugs is irrelevant to determining a defendant's guilt, prosecutors' use of drug-related rhetoric during opening and closing argument is similarly improper.

By contrast, the Fifth, Seventh, and Ninth Circuits have held that prosecutorial allusions to the larger government effort against illicit drugs are proper. These courts have used four different arguments to justify the use of drug-related rhetoric.

44 See note 14.

45 In Viereck, the Court noted that "[w]e think that the trial judge should have stopped counsel's discourse without waiting for an objection." Viereck, 318 US at 248. More recently, the Court has written: "We emphasize that the trial judge has the responsibility to maintain decorum in keeping with the nature of the proceeding." Young, 470 US at 10. Defense attorneys are often reluctant to object to excessive rhetoric for fear that in doing so they may emphasize those remarks to the jury. See Caldwell, 8 Am J Trial Advoc at 391-92 (cited in note 15).

46 Arrieta-Agressot v United States, 3 F3d 525 (1st Cir 1993); United States v Beasley, 2 F3d 1551 (11th Cir 1993); United States v Johnson, 968 F2d 768 (8th Cir 1992); United States v Solivan, 937 F2d 1146 (6th Cir 1991). See also United States v Barlin, 686 F2d 81 (2d Cir 1982); United States v Hawkins, 595 F2d 751, 754 (DC Cir 1978). But see United States v Bascaro, 742 F2d 1335, 1353 (11th Cir 1984).

47 United States v Ferguson, 935 F2d 1518 (6th Cir 1991); United States v McFarland, 911 F2d 739 (9th Cir 1990) (unpublished memorandum); United States v Magee, 821 F2d 234 (5th Cir 1987).
First, because the jury acts as the conscience of the community, the prosecutor must be permitted to remind it of the government’s efforts to reduce drug use in the community. Second, because prosecutors may comment on the gravity of the charged crime, reference to this country’s drug problem is relevant. Third, these comments are consistent with urging the jurors to perform the difficult task of enforcing the law. Fourth, courts have justified drug-related rhetoric when the prosecutor used the comments to refute defense counsel comments critical of government narcotics prosecutions.

A. Courts Holding Prosecutors’ Use of Drug-Related Comments Improper

Prosecutors’ use of drug-related rhetoric has been found improper for any one of four reasons. First, several courts have stated that the obligation of the prosecutor to function as more than simply an advocate for conviction requires her to refrain from making these comments. These courts have generally referred to Berger for guidance regarding this prosecutorial obligation. For example, in United States v Solivan, the Sixth Circuit considered the propriety of the prosecutor’s remark: “I am asking you to tell her and all of the other drug dealers like her... that we don’t want that stuff in Northern Kentucky.” The Solivan court quoted extensively from Berger regarding the role of the prosecutor and concluded that the prosecutor’s obligation under Berger to avoid foul blows prohibits drug-related rhetoric. Other courts have adopted this reasoning.

The second argument for disallowing drug-related rhetoric is that such language implicitly calls upon the patriotism of the jurors. In United States v Schomaker, the military court reversed a conviction because the prosecuting attorney stated in argument that “the Commandant [of the Marine Corps] has de-

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49 Id at 1148.
50 Id at 1150-52.
52 See, for example, State v Draughn, 76 Ohio App 3d 664, 602 NE2d 790, 793-96 (1992); Johnson, 968 F2d at 771. See also State v Echevarria, 71 Wash App 595, 860 P2d 420, 422 (1993) (not relying on Berger but on “his or her [the prosecutor’s] position as a ‘quasi-judicial officer’”). This concern for the proper decorum of a prosecutor is occasionally expressed as an ethical consideration. See People v Loferski, 235 Ill App 3d 675, 601 NE2d 1135, 1145 (1992). See generally Carol A. Corrigan, On Prosecutorial Ethics, 13 Hastings Const L Q 537 (1986); Zacharias, 44 Vand L Rev at 45 (cited in note 41).
clared a war on drugs . . . .

The court required a new sentencing hearing because it feared that the “issue of command influence” had undermined the fairness of the trial. The court noted that because military personnel decide the appropriate penalty for the defendant, reference to command policy could lead the military jurors to believe that it was their duty to sentence the defendant harshly.

Outside of military courts, prosecutors’ comments that remind citizens of the government’s efforts against drugs may call upon the jury’s allegiance to the government in much the same way that allusions to a command policy call upon the allegiance of the military officers. The Supreme Court recently rearticulated the Berger concern about the influence of the prosecutor: “[T]he prosecutor’s opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government’s judgment rather than its own view of the evidence.” Applying this Berger notion in the narcotics context, one court described a prosecutor’s drug-related rhetoric as “urging jurors to enlist in the war on drugs.” In both the military and civilian trial, the prosecutor’s drug-related rhetoric reminds the “neutral” decisionmaker of an important policy stance held by an authority to which the decisionmaker owes allegiance.

The third argument in support of prohibiting drug-related rhetoric is that the current social and political environment renders most comments about drugs highly prejudicial. For example, in People v Williams, a Michigan court held a prosecutor’s comments referring to the general drug problem impermissible because in “such an emotion-laden situation, sensibilities are easily inflamed.” The court’s goal was to prevent the jurors

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54 Id at 1126.
55 Id at 1124.
56 Id. See also United States v Grady, 15 MJ 275, 276 (CMA 1983).
57 One commentator has attributed the start of the United States’ extensive effort against drugs to President Reagan’s October 2, 1982 radio speech given in response to the House Select Committee on Narcotics Abuse and Control urging the President to “declare war on drugs.” Steven Wisotsky, Crackdown: The Emerging “Drug Exception” to the Bill of Rights, 38 Hastings L J 889, 890-892 (1987). Thus, jurors may believe that the President has called on them to help in the “War on Drugs.”
59 Arrieta-Agressot, 3 F3d at 527.
60 65 Mich App 753, 238 NW2d at 186 (1975).
61 The prosecutor made the following comments: “Ladies and gentlemen of the Jury, you have an opportunity to effect [sic] the drug traffic in this city. You have a voice. You have a chance to use it.” Id at 187.
62 Id at 188.
from deciding the case "on the basis of their desire to alleviate the drug problem."\(^{63}\)

Fourth, some courts have asserted that drug-related rhetoric is beyond the proper scope of opening or closing argument because evidence of the larger effort against drugs is not presented at trial.\(^{64}\) An Ohio appeals court in *State v Draughn*\(^{65}\) adopted this "beyond the evidence" approach. The court held that although a prosecutor should argue strongly for conviction, she "may not invite the jury to judge the case upon standards or grounds other than the evidence and law of the case."\(^{66}\) Under this standard, the court held that comments mentioning the "drug crack cocaine problem in this county" and the "young, brave men on our [local police unit]"\(^{67}\) were "clearly and flagrantly improper."\(^{68}\)

B. Courts Holding Prosecutors' Use of Drug-Related Comments Proper

Some courts and commentators have suggested that those courts that permit the prosecutor a wide scope of permissible argument have been motivated more by respect for precedent than by principled argument.\(^{69}\) These courts, however, have articulated four grounds for upholding the use of drug-related rhetoric. Arguably, each of these grounds is simply a different manifestation of the concern expressed by Judge Hand in *Wexler* and

\(^{63}\) Id. See *Hawkins*, 595 F2d at 754 ("Nor is the prosecutor at liberty to substitute emotion for evidence by equating, directly or by innuendo, a verdict of guilty to a blow against the drug problem."); *United States v Bazua-Vizcarral*, 927 F2d 611 (9th Cir 1991) ("Diatribes concerning the social ills caused by drug abuse have no place in a criminal trial. . . . [T]hey suggest to the jury that a conviction will somehow contribute to the 'war on drugs.'"). Another court noted that "[emotional] appeals encourage the jury to convict a defendant 'not only for what he had done but for what other thieves and criminals were doing.'" *United States v Monaghan*, 741 F2d 1434, 1441 n 31 (DC Cir 1984), quoting *Brown v Estelle*, 468 F Supp 42, 48 (N D Tex 1978).

\(^{64}\) See Caldwell, 8 Am J Trial Advoc at 386 (cited in note 15) (stating that "[t]he propriety of the remark depends upon whether it is supported by the evidence submitted at trial"). See also *Thomas v United States*, 619 A2d 20, 24 (DC App 1992) (vacated for rehearing en banc), citing *Irick v United States*, 565 A2d 26, 36 (DC App 1989).

\(^{65}\) 76 Ohio App 3d 664, 602 NE2d 790 (1994).

\(^{66}\) Id at 793.

\(^{67}\) Id at 795.

\(^{68}\) Id.

\(^{69}\) See, for example, *Loferski*, 601 NE2d at 1145 (observing that "cases that permit these remarks generally fail to articulate a rationale beyond the bald statement that such rhetoric has always been accepted"); Comment, 48 U Chi L Rev at 688 (cited in note 16).
by the Viereck dissenters that a prosecutor's oratory not be too restricted.

Three primary arguments for permitting prosecutorial use of drug-related rhetoric hinge on the prosecutor's need to urge the jury to perform its duty. First, some courts have permitted such rhetoric because the rhetoric appropriately reminds the jury to serve as the conscience of the community. In United States v Magee,70 for example, the Fifth Circuit found the drug-related rhetoric of the prosecutor proper,71 holding that the comments were simply a "suggestion by the prosecutor that the jury fulfill its role as the conscience of the community."72

A second justification for the use of drug-related rhetoric is that the rhetoric merely emphasizes the gravity of the defendant's alleged narcotics crime. This rationale underlies the Seventh Circuit's decision in United States v Ferguson.73 In Ferguson, the prosecutor argued:

[N]obody has to tell you about the scourge of drugs in our society today and the effect it is having on the social fabric today. . . . You may hear that people, individual people, don't have a chance to make a difference in the fight against drugs. . . . Detective Boyle, a fine law enforcement officer, stopped it. Here is your chance to do something.74

The Seventh Circuit held this comment proper, describing the rhetoric as a mere comment to the jury on the "gravity of this country's drug problem."75

Third, some courts have permitted the drug-related rhetoric as a plea to the jury to enforce the law. For example, in Martinez v State,76 the prosecutor stated about the police: "They're fight-

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70 821 F2d 234 (5th Cir 1987).
71 Id.
72 935 F2d 1518 (7th Cir 1991).
73 Id. at 1530.
74 Id at 1530-31, quoting United States v Zanin, 831 F2d 740, 743 (7th Cir 1987). The court stated that "[t]he government permissibly asked jurors to make a difference in the fight against this significant evil." Ferguson, 935 F2d at 1531. Several other courts have adopted similar reasoning. See Malley v Manson, 547 F2d 25, 28 (2d Cir 1976); People v Peterson, 248 Ill App 3d 28, 618 NE2d 388, 396 (1993). But see Arrieta-Agressot, 3 F3d at 527-28 (disapproving of the Ferguson decision).
75 826 SW2d 807 (Tex Ct App 1992).
ing the war on drugs and they’re working hard. . . . They’re our first line of defense in this war on drugs." The Texas court found no error because the prosecutor was “making a plea for law enforcement,” and it held that such a plea can permissibly describe the “respective parts played in that [drug] war by the police, prosecutors, court and jury.” Several other state courts have also relied on this rationale.

A fourth justification for allowing some prosecutorial comments about drugs is that these comments are permissible as a rebuttal to certain defense counsel arguments. For example, in United States v Bascaro, the prosecutor asked the jury: “Isn’t this case really one about a war? Haven’t they invaded our shores?” The Eleventh Circuit ruled these comments permissible in light of the defense counsel’s accusation that the government had no legitimate reason to prosecute the defendant.

III. PROHIBITING “WAR ON DRUGS” RHETORIC DURING OPENING AND CLOSING ARGUMENT OF A NARCOTICS TRIAL

A court should seek to eliminate the use of “War on Drugs” rhetoric by prosecutors during opening and closing argument of a narcotics trial. A court holding drug-related rhetoric impermissible should be particularly concerned about the use of military rhetoric during a narcotics trial. Moreover, a court allowing drug-related rhetoric should nevertheless restrict the use of “War on Drugs” rhetoric because the justifications for allowing drug-relat-
ed comments do not apply to the unique problems of military rhetoric.

In order to reduce the use of “War on Drugs” rhetoric, a court should forbid prosecutors’ invocation of the “metaphors and images of battle”66 to describe the government effort against illegal drugs. This per se prohibition is easy to apply, is not easily evaded, will improve the training of prosecutors, and applies to a significant number of cases. The prosecutor should not be permitted to use “War on Drugs” rhetoric even in response to defense counsel’s use of such rhetoric.

A. “War on Drugs” Rhetoric Should Not be Used by Prosecutors During Opening and Closing Argument of Narcotics Trials

1. The dangers of prosecutors’ use of military rhetoric.

Courts have recognized that rhetoric invoking the metaphors and images of battle is a particularly inappropriate form of prosecutorial argument. In Viereck, the Supreme Court emphasized that the military rhetoric at issue was “offensive to the dignity and good order with which all proceedings in court should be conducted.”67 Although the Supreme Court has never directly addressed the question of the propriety of military rhetoric in a narcotics trial, Viereck serves as powerful precedent for disallowing such rhetoric.

The unique danger posed by using military analogies was also addressed in the review of capital sentencing hearings in Brooks v Francis,68 Brooks v Kemp,69 and Hance v Zant.70 These cases examined the propriety of almost identical summations that included an “extended analogy between jurors and soldiers”71.

Well, I say to you that we’re in a war again in this country, except it’s not a foreign nation, it’s against the criminal element in this country, that’s who we’re at war with, and they are winning the war[...]. And, if we can send a seventeen-year old young man overseas to kill an enemy soldier, is it asking too much to ask

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66 The quoted language is from United States v Salas, 879 F2d 530, 541 (9th Cir 1989) (Ferguson concurring in part and dissenting in part).
68 716 F2d 780 (11th Cir 1983).
69 762 F2d 1383 (11th Cir 1985) (en banc).
70 696 F2d 940 (11th Cir 1983).
71 Brooks v Kemp, 762 F2d at 1396.
you to go back and vote for the death penalty in this case. . . . I submit to you that he's an enemy, and he's a member of the criminal element, and he's our enemy.92

The court in *Brooks v Francis* found only isolated portions of the remarks improper.93 In particular, the court stated: "We doubt that it is improper to simply compare the duties of citizens serving on juries with those of citizens serving in the armed forces."94 In *Hance*, the court found very similar comments improper because they were a "dramatic appeal to gut emotion [that] has no place in the courtroom."95

The Eleventh Circuit reviewed the *Francis* decision *en banc* in *Brooks v Kemp*. Although the majority concluded that the "war on crime" analogy was "troubling" and improper, it nonetheless found that the comments did not require a new sentencing hearing and thus upheld the *Francis* court's decision.96 In doing so, however, the *Francis* court noted that the role of a neutral and independent jury is "simply not analogous to the role of a soldier who is ordered to kill the enemy."97 The court thought that the principal flaw in the metaphor was that it masked the jury's power to make independent judgments.98

Judge Johnson, the author of *Hance*, believed that the comments justified a new sentencing hearing and thus dissented from the *en banc* opinion in *Kemp*.99 In particular, Judge Johnson argued that the majority had insufficiently considered the danger of military rhetoric in the courtroom:

[T]he suggestion that a "war" has been declared, and the attendant implication that jurors have a "duty" to fight it, removes from the jury the sense of responsibility for their decision . . . . And the evocation of a pitched battle . . . encourages the jury to reach its decision in a frenzied and emotional atmosphere which invites arbi-

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93 *Brooks v Francis*, 716 F2d at 789.
94 Id.
95 *Hance*, 696 F2d at 952.
96 *Brooks v Kemp*, 762 F2d at 1414-15.
97 Id at 1412.
98 Id at 1413.
99 Id at 1426 (Johnson dissenting).
trariness in judgment. . . . [This is] a jury that has been goaded into a froth of patriotic duty.\(^{100}\)

Although the majority in *Brooks* acknowledged that the military analogy was improper because it misconstrued the jury's power of discretion,\(^ {101}\) Judge Johnson thought that the "war on crime" analogy was so "fundamentally unfair" that a new sentencing hearing was required.\(^ {102}\)

2. *The dangers of prosecutors' use of military rhetoric during opening and closing argument of narcotics trials.*

As described in Part II(A) of this Comment, many courts have found drug-related rhetoric improper. These courts have argued that the role of the prosecutor, the role of the jury, current social attitudes, and the "beyond the evidence" limitation on argument require prosecutors to refrain from drug-related rhetoric. *Viereck*, the *Kemp* majority, and the *Kemp* dissent articulate strong arguments regarding the unique dangers presented by the use of military rhetoric in the courtroom. Combining the concerns about drug-related rhetoric with these concerns about military rhetoric produces four powerful reasons to forbid prosecutors' use of "War on Drugs" rhetoric during a narcotics trial.

First, describing the government effort against narcotics as a "war" increases the inflammatory nature of drug-related comments. In *Viereck*, the Court believed that military language reminding jurors of the ongoing war against Germany could incite the "passion and prejudice" of a jury deciding the fate of a German citizen.\(^ {103}\) Similarly, the court in *Williams* deemed the drug-related comments improper because "sensibilities are easily inflamed."\(^ {104}\) When prosecutors in a narcotics trial use military rhetoric to describe the ongoing "battle" against drugs, the combined use of military and drug-related rhetoric may create a "frenzied and emotional atmosphere" around the trial.\(^ {105}\)

\(^{100}\) *Brooks v Kemp*, 762 F2d at 1430 (Johnson dissenting).

\(^{101}\) Id at 1412.

\(^{102}\) Id at 1426 (Johnson dissenting).

\(^{103}\) *Viereck*, 318 US at 247-48.

\(^{104}\) *People v Williams*, 65 Mich App 753, 238 NW2d 186 (1975).

\(^{105}\) *Brooks v Kemp*, 762 F2d at 1430 (Johnson dissenting). The *Solivan* court reasoned that because comments referring to World War II were impermissible under *Viereck*, comments referring to society's current problems with drugs are, given "[t]he wider social-political context" of "an ongoing crisis, popularly termed the 'War on Drugs,'" also impermissible. *United States v Solivan*, 937 F2d 1146, 1152-53 (6th Cir 1991). In *Solivan*, the prosecutors did not use "War on Drugs" rhetoric. Id at 1148-49.
Second, prosecutorial use of “War on Drugs” rhetoric may unfairly call upon the jurors’ allegiance to the government. In Viereck, the prosecutor argued: “We are at war. You have a duty to perform here. As a representative of your Government I am calling upon every one of you to do your duty.”106 Similarly, in United States v Beasley,107 the prosecutor stated: “I want to say a few words about . . . [the] war on drugs . . . You’ve got a place in that war.”108 The military rhetoric and drug-related rhetoric combined once again, this time arguably creating a jury “goaded into a froth of patriotic duty.”109

Third, “War on Drugs” rhetoric alludes to facts beyond the evidence admitted at trial. The court in Draughn found drug-related comments improper because the facts of the larger drug problem were not presented as evidence in the trial.110 Similarly, facts supporting the accurate use of “War on Drugs” language to describe the government’s efforts against drugs are inadmissible at trial because this country is not literally at war with drugs.111

Fourth, the use of both military and drug-related rhetoric is evidence that a prosecutor is shirking her general duty under Berger to ensure “that justice shall be done.”112 One commentator has suggested that excessive advocacy often results when a prosecutor “consider[s] himself [or herself] engaged in a war against crime in which no holds are barred in the struggle to overcome powerful, unscrupulous opposition.”113 For example, in

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107 2 F3d 1551 (11th Cir 1993).
108 Id at 1559-60.
109 Brooks v Kemp, 762 F2d at 1430.
111 Some legal observers have argued that we are literally at war with drugs. See Wisotsky, 38 Hastings L J 889 (cited in note 57). In announcing her decision to request the assistance of the National Guard to help quell drug-related violence in the District of Columbia, Mayor Sharon Pratt Kelly declared, “We’ve got a war on our hands.” B. Drummond Ayres Jr., Washington Mayor Seeks Aid of Guard in Combating Crime, NY Times A1 (Oct 23, 1993). Several prosecutors have literally equated the war on drugs with the recent operations against Iraq. See Blocher v Fonville, 756 F Supp 306, 308 (S D Tex 1991); People v Peterson, 248 Ill App 3d 28, 618 NE2d 388, 395 (1993); State v Echevarria, 71 Wash App 595, 860 F2d 420, 421 n 1 (1993). See also United States v McCarthy, 37 MJ 595, 599 (AFCMR 1993). In the opinion of at least one commentator, the “legal system is evolving to take the paramilitary rhetoric of the War on Drugs at face value.” Wisotsky, 38 Hastings L J at 925 (cited in note 57). Of course, if this country is literally at war with drugs, then the precedential value of Viereck, which was decided during World War II, is even stronger.
113 Note, 54 Colum L Rev at 948 (cited in note 14).
Beasley, the prosecutor stated that "this [trial] is just another battle in that war [on drugs]. . . . Now, I've got a place in that war."114 The prosecutor combined military and drug-related rhetoric to portray himself as a soldier against drugs. Although the use of either military or drug-related rhetoric arguably violates the Berger foul blows standard, the combination of the two forms of rhetoric almost certainly violates this standard.

3. Courts that allow drug-related rhetoric should nonetheless disallow “War on Drugs” rhetoric.

The courts that have permitted certain forms of drug-related rhetoric have often failed to consider the unique dangers posed by the use of military rhetoric during narcotics trials. In *State v Hatcher*,115 the prosecutor argued that “there is a war against drugs going on in this country and I think the way you win a war is you fight each battle one at a time and this is obviously a battle.”116 The court held the comments proper because arguments of the “same type” had previously been approved.117

None of the cases relied upon by the *Hatcher* court, however, had involved military rhetoric. The court cited *State v Williams*,118 where the prosecutor argued that “[d]rugs are ruining this country,”119 and *State v Holt*,120 where the court did not mention any use of military rhetoric.121 In citing these cases, the *Hatcher* court completely ignored the unique dangers of military rhetoric.122

A court permitting prosecutors to use drug-related rhetoric need not permit the use of military language during a narcotics trial. Some courts have asserted that drug-related rhetoric should be permitted because it helps the jury to enforce the law, to perform its role as conscience of the community, and to assess the gravity of the crime. These arguments do not, however, require a court to permit “War on Drugs” rhetoric.

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114 *United States v Beasley*, 2 F3d 1551, 1559-60 (11th Cir 1993).
116 Id at 344.
117 Id.
118 747 SW2d 635 (Mo Ct App 1988).
119 Id at 638.
120 660 SW2d 735 (Mo Ct App 1983).
121 Id at 738.
122 For a similar example, see *Mcfarland*, 911 F2d at 739 (describing the use of “War on Drugs” rhetoric as “undramatic”).
First, because military rhetoric "removes from the jury the sense of responsibility for their decision,"123 this rhetoric does not encourage a jury to take seriously its role as enforcer of the law. Second, the "war" metaphor undermines the goal of encouraging the jury to act as the conscience of the community because it "invites arbitrariness in judgment."124 Third, other suitable methods exist for a prosecutor to highlight the gravity of the nation's drug problem. One such method is for a prosecutor to describe the drug problem in this country as a social, medical, or moral problem.125 Thus, even a court that is sympathetic to Wexler and wishes to permit the prosecutor a large amount of rhetorical freedom should prohibit "War on Drugs" rhetoric.

Some courts have allowed prosecutors to use drug-related rhetoric only in response to defense counsel comments critical of government actions. Although these defense comments no doubt prompt the prosecutor to defend government policy, the comments do not require the use of military language. Once again, the prosecutor can use medical, social, or moral imagery to defend the government's policies. Defense counsel comments critical of government narcotics policy may justify prosecutorial use of drug-related rhetoric as a response, but the comments do not justify permitting "War on Drugs" rhetoric.126

B. A Court Should Hold Improper Any Use of "War on Drugs" Rhetoric by Prosecutors During Opening and Closing Argument of a Narcotics Trial

1. The proposed rule.

A court should hold improper any use of "War on Drugs" rhetoric by prosecutors during opening and closing argument of a narcotics trial.127 "War on Drugs" rhetoric should be defined as speech "invoking the metaphors and images of battle"128 to describe the government's efforts against narcotics and should be held improper per se. This rule avoids the problem of generality

123 Brooks v Kemp, 762 F2d at 1430 (Johnson dissenting).
124 Id at 1430 (Johnson dissenting).
125 See Paul Finkelman, The Second Casualty of War: Civil Liberties and the War on Drugs, 66 S Cal L Rev 1389, 1390 n 6 (1993).
126 See Part III(B)(3).
127 The courts possess the power to prescribe rules that govern the scope of a prosecutor's rhetoric. See Donnelly v DeChristoforo, 416 US 637, 648 n 23 (1974). See also Young, 470 US at 24 n 3 (Brennan concurring in part and dissenting in part).
128 The quoted language is from United States v Salas, 879 F2d 530, 541 (9th Cir 1989) (Ferguson concurring in part and dissenting in part).
hindering the Berger foul blows standard and imposes a bright-line standard prohibiting the use of a specific and easily recognizable class of rhetoric.

Several of the cases discussed earlier illustrate how a ban on "War on Drugs" rhetoric would operate. For example, the comments at issue in Martinez v State\(^{129}\) are clearly military rhetoric: "They're fighting the war on drugs and they're working hard... They're our first line of defense in this war on drugs."\(^{130}\) Similarly, the rhetoric challenged in United States v Bascaro\(^{131}\) is also military rhetoric: "Isn't this case really one about a war? Haven't they invaded our shores?"\(^{132}\) Thus, a court would find both of these comments improper under the proposed rule.

Of course, occasional borderline cases will arise. For example, in Johnson, the court addressed the propriety of a comment that described the jury as a "bulwark" against an increase in drug use.\(^{133}\) Although close to qualifying, this word probably does not constitute the use of military rhetoric because it does not explicitly invoke the image of battle. The word "bulwark" is not inflammatory, does not directly call upon the allegiance of jurors, and does not suggest that the prosecutor has abandoned her duty under Berger.

The prosecutor's remarks in Ferguson probably do constitute military rhetoric. There the prosecutor argued that "[the jurors] have a chance to make a difference in the fight against drugs."\(^{134}\) This rhetoric employs a fighting metaphor to describe government policy against drugs. Urging the jury to participate in the "fight" is inflammatory, calls upon the allegiance of jurors, and suggests that the prosecutor may have disregarded her Berger duty. Accordingly, the proposed ban on "War on Drugs" rhetoric would include the remarks in Ferguson.

An important characteristic of the proposed rule is that it governs the propriety of the comments and not the extent of prejudice actually suffered by the defendant.\(^{135}\) If a great deal of doubt exists about whether military rhetoric was used to describe the government's efforts against drugs, then it is unlikely

\(^{129}\) Martinez, 826 SW2d at 807.
\(^{130}\) Id at 808.
\(^{131}\) United States v Bascaro, 742 F2d 1335 (11th Cir 1984).
\(^{132}\) Id at 1353.
\(^{133}\) United States v Johnson, 968 F2d 768, 769 (8th Cir 1992).
\(^{134}\) United States v Ferguson, 935 F2d 1518, 1530 (7th Cir 1991).
\(^{135}\) See note 13.
that the "War on Drugs" language was sufficiently prejudicial to warrant reversal or any other form of judicial response.\(^{136}\)

The proposed rule does not apply to all drug-related rhetoric. For example, the comments in \textit{Solivan} do not invoke military metaphors: "I'm asking you to tell her and all of the other drug dealers like her . . . [t]hat we don't want that stuff in Northern Kentucky."\(^{137}\) The proposed rule neither prohibits nor protects such comments. Instead, a court would continue to judge these comments under the existing standards that generally govern prosecutorial comments.\(^{138}\)

\textbf{2. The practical strengths of the proposed rule.}

The proposed rule has three significant advantages: the rule would not be easily evaded; it would improve the training of prosecutors; and it would resolve a significant number of cases. The proposed rule would not be easily evaded for two reasons. First, unlike other possible rules aimed at constraining prosecutorial rhetoric, this rule would not be undermined when a prosecutor conveyed a similar message but used language that did not technically violate the rule. For example, a prosecutor could evade a prohibition on calling a defendant a "drunk" by instead stating that the defendant was "always drinking liquor." A prosecutor would not similarly be able to evade the ban on military rhetoric. In fact, if a prosecutor were to evade the rule by using other rhetoric to imply the same point, a primary purpose of the rule—to eliminate the unique dangers posed by the use of military rhetoric—would be satisfied.

Second, the rule would not be easily evaded because the rule would allow the trial courts to monitor the prosecutor's rhetoric more closely. The Court in \textit{Viereck} commented: "We think that the trial judge should have stopped counsel's discourse without waiting for an objection."\(^{139}\) Under the general foul blows standard of \textit{Berger}, however, the courts have lacked specific guidance about when to stop prosecutors' rhetoric. A trial court in a jurisdiction adopting the proposed ban on "War on Drugs" rhetoric would know immediately that certain prosecutorial rhetoric is

\(^{136}\) Compare the prosecutor's use of the term "bulwark," \textit{Johnson}, 968 F2d at 769, with the rhetoric, "Isn't this case really one about a war?," \textit{Bascaro}, 742 F2d at 1363.

\(^{137}\) \textit{Solivan}, 937 F2d at 1148.

\(^{138}\) See Part I(A).

\(^{139}\) \textit{Viereck}, 318 US at 248.
improper and would be able to take any of the suggested curative steps.\textsuperscript{140}

The proposed rule would also improve the training that prosecutors receive regarding the proper scope of argument at trial. In \textit{Arrieta-Agressot v United States},\textsuperscript{141} for example, the court found improper "several paragraphs of 150-proof rhetoric,"\textsuperscript{142} and it blamed "those who superintend young prosecutors in the district in question" for the inexperienced prosecutor's errors in the case.\textsuperscript{143} The blame, however, may well lie in part with the courts, which have been unable to formulate a test that allows prosecutors to determine which comments are impermissible. By contrast, the proposed rule clearly describes one form of rhetoric that is improper and would make training about this particular form of rhetoric straightforward.

Significantly, the rule would affect a large number of cases. As Part II of this Comment illustrates, military language has been invoked during many narcotics trials. The frequent use of the "War on Drugs" metaphor in public\textsuperscript{144} discourse, combined with the frequency of drug arrests,\textsuperscript{145} suggests that the metaphor will continue to be used by prosecutors for some time. The rules governing public political dialogue, however, are different from the rules governing proper courtroom argument.\textsuperscript{146} An explicit ban on "War on Drugs" rhetoric during narcotics trials would aid prosecutors and courts in remembering and observing this important difference.

\textsuperscript{140} See note 15.
\textsuperscript{141} 3 F3d 525 (1st Cir 1993).
\textsuperscript{142} Id at 530. The comments were: "They are soldiers in the army of evil, in the army which only purpose [sic] is to poison, to disrupt, to corrupt." Id at 527.
\textsuperscript{143} Id at 530.
\textsuperscript{144} The phrase "War on Drugs" is omnipresent in current political debate. For example, the \textit{Chicago Tribune} used the phrase fifty-seven times during 1993 and 886 times between January 1985 and May 1994. The frequency was determined by conducting a Westlaw search for the term "War on Drugs" in the CHITRIB database. Five Supreme Court justices have used the phrase. See \textit{Bostick}, 111 S Ct at 2394 (Marshall dissenting); \textit{Florida v Bostick}, 111 S Ct 2382, 2389 (1991) (O'Connor majority opinion); \textit{California v Acevedo}, 111 S Ct 1982, 2002 (1991) (Stevens dissenting); \textit{Employment Division v Smith}, 110 S Ct 1595, 1617 (1990) (Blackmun dissenting); \textit{National Treasury Employees Union v Von Raab}, 489 US 656, 686 (1989) (Scalia dissenting).
\textsuperscript{146} The boundaries of acceptable public speech are, of course, governed primarily by the First Amendment. See Geoffrey R. Stone, \textit{The Rules of Evidence and the Rules of Public Debate}, 1993 U Chi Legal F 127.
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3. The proposed rule should apply regardless of the rules that govern defense counsel rhetoric.

In a very small number of cases, defense counsel has initiated the use of “War on Drugs” rhetoric. For example, in United States v Smith, the court found the use of military rhetoric by the prosecutor proper because the defense counsel accused the government of taking an “atomic bomb approach” to the case. Although it may seem sensible to ban the use of “War on Drugs” rhetoric by defense counsel as well, the prosecutor should be prohibited from using the “War on Drugs” rhetoric regardless of the rules governing defense counsel.

First, as the Supreme Court explained in United States v Young, defense counsel comments do not make a “response-in-kind” proper. The Young Court stated: “[T]he issue is not the prosecutor’s license to make otherwise improper arguments, but whether the prosecutor’s ‘invited response,’ taken in context, unfairly prejudiced the defendant.” A court should not use this rationale to transform “otherwise improper arguments” into proper ones. Thus, defense counsel’s use of “War on Drugs” rhetoric does not make proper the prosecutor’s use of such rhetoric in response.

Second, defense attorneys frequently use “War on Drugs” rhetoric for a different reason than prosecutors. In particular, defense counsel may use the military metaphor to reduce the level of emotion surrounding a trial. For example, in State v McKeehan, defense counsel argued: “Just because somebody has termed it a drug war does not mean that martial law has been imposed. . . . She does still have her constitutionally guaranteed rights.” This use of “War on Drugs” rhetoric attempts to reduce the emotions in the courtroom by refuting, not emphasizing, the military analogy. This use of rhetoric differs from

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147 918 F2d 1551 (11th Cir 1990).
148 Id at 1562. See also United States v Sepulveda, 15 F3d 1161, 1189 (1st Cir 1993) (permitting, though not approving, the use of “war on drugs” language in response to defense counsel’s use of military rhetoric).
149 The rules governing limitations on defense counsel argument are beyond the scope of this Comment.
151 Id at 12.
152 Id.
153 Id.
154 Of course, the “invited response” doctrine may affect the likelihood of finding prejudicial error as well as provide a reason to limit any sanction visited on the prosecutor.
155 824 SW2d 152 (Mo Ct App 1992).
156 Id at 155.
157 Justice Stevens has used the war metaphor sarcastically: “No impartial observer
the prosecutor’s response in McKeehan: “[W]e do have a war against drugs.”158 This rebuttal, though brief, should be held improper because it is inflammatory and calls upon the patriotic allegiance of jurors.

CONCLUSION

A court should not allow prosecutors to use rhetoric invoking the images of battle during opening and closing argument of a narcotics trial. The Supreme Court and several lower courts have recognized the danger of military rhetoric. Courts have also noted the dangers of drug-related rhetoric. The use of “War on Drugs” rhetoric creates a risk that jurors will make decisions based on emotions, allegiance to the government, and matters not in evidence. The prosecutor’s use of “War on Drugs” language also suggests that the prosecutor has abandoned her duty to avoid striking rhetorical foul blows.

An effective way to reduce the use of “War on Drugs” rhetoric is to forbid prosecutors from invoking the metaphors and images of battle during opening and closing argument of a narcotics trial. This per se prohibition would be easy to apply, would not be easily evaded, would improve the training of prosecutors, and would resolve a significant number of cases. This ban should apply regardless of the rules governing the scope of defense counsel’s argument.

could criticize this Court for hindering the progress of the war on drugs. . . . [T]his Court has become a loyal foot soldier in the Executive’s fight against crime.” California v Acevedo, 111 S Ct 1982, 2002 (1991) (Stevens dissenting). This distinction between using the metaphor to promote calm thinking and using the metaphor to increase emotions is also apparent outside of the courtroom. For example, opponents of current government policy have used the slogan “war is not a domestic policy,” which is different from the more common phrase, “we are at war with drugs.” Drug Policy Foundation Advertisement, Wired 137 (Jan 1994).

158 McKeehan, 824 SW2d at 155.