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SENSATIONAL PROSECUTIONS AND REVERSALS

IN these days when so much is being said about "lack of respect for law," it might be worth while to enquire into the extent of this lack of respect and what part of it is due to the failure of the officials, who are charged with its administration, themselves to obey the law.

In considering this question, it must, first of all, be borne in mind that this lack of respect does not, justly, extend to the law itself, but only to its administration. Moreover, it does not reach the civil law at all, but is confined to the criminal law. Unfortunately, however, the public bases its estimate of "law" almost wholly upon the administration of the criminal law, which vividly engages its attention by being so continually and sensationally emphasized in the press. And it must be admitted that the late Chief Justice Taft was right when he declared that the administration of criminal law in this country is our national disgrace.

The scope of this inquiry will be limited to the failure of prosecuting attorneys and the judges of trial courts to observe the law in the trial of criminal cases of major importance, and the reversals of convictions by higher courts on account of such double failure. The brutal "third degree" methods, which the Wickersham report found to be widespread and which the Chicago police had the hardihood to deny, while well calculated to bring the criminal law into

disrepute, will not be discussed here. Likewise, while the multitude of statutes regulating petty details of private behavior which have been jammed through legislatures terrified by organized, frenzied and ruthless minorities, have contributed largely to lessened public respect for law, that factor will be ignored in this survey. We repeat that we are now considering only the failure of prosecuting attorneys to observe the law in the trial of criminal cases, and of trial court judges to compel them to do so, as disclosed in the decisions of courts of last resort.

We hear of "vigorous prosecutors," "relentless law enforcers" and the like, and the public often wonders why convictions obtained by such officials are so often reversed by appellate courts, and straightway attributes the result to "legal technicalities" which permit the guilty to go unwhipped of justice. All this tends, of course, to bring our courts into more or less disrepute. It is disheartening, to be sure, in a case in which the guilt of the defendant is obvious and the jury has rendered a verdict convicting him, to see that verdict set aside by a higher court and a new trial ordered; but it should be remembered that a fair trial is more important than the conviction of any single offender.

Before considering certain adjudications of appellate courts in which convictions have been reversed, if one may be permitted to generalize, it might be said that the fundamental causes for such reversals may be classified under four heads, *viz*: (a) Sincere, but excessive, zeal of prosecuting attorneys; (b) Headline-seeking prosecutors; (c) Sheer ignorance of the proper function of a prosecuting attorney and of criminal law; (d) Timidity and indifference of trial court judges. And these causes are reflected in the decisions of appellate courts reversing convictions for one or more of the following errors of the prosecuting attorney not prevented, or, if possible, cured by the judge of the trial court: 1. Comment upon the failure of the defendant to

testify; 2. Offering evidence of crimes other than the one for which the defendant is on trial; 3. Improper argument to the jury by misstating the evidence, by drawing grossly unwarranted inferences therefrom, or by inflammatory appeals to the passions and prejudices of the jury. Under one or more of these heads, we shall find the reasons for these reversals of convictions. In the cases about to be noticed, we shall find the record of prosecutions conducted by men with such sincere, but excessive, zeal as to defeat their own purpose to secure convictions. We shall come upon instances in which prosecutors have offered, and trial courts have admitted, evidence of the defendant's offences wholly irrelevant to the crime for which he is on trial. We shall see convictions reversed on account of the prosecuting attorney, in his argument to the jury, applying inexcusable epithets to the defendant, making groundless inferences from the established facts, and employing coarse rhetoric to arouse latent passions and prejudices of the jury, all directly contrary to the duty which the law itself inexorably imposes upon prosecuting attorneys. The final result, however, of such unfair tactics will be that, while the prosecutor gained the verdict, and, likely, crashed the headlines, he lost the case. And, lamentably enough, we shall note many instances in which, upon the objection of defendant's counsel to such tactics, the trial judge either ignored the objection, or made such a pallid and half-hearted rebuke of the offending prosecutor as to amount almost to an approval. More than all this, it is an adverse reflection upon our system of justice when any judge permits such conduct of a trial.

Careful consideration of the cases presently to be noticed will, we think, show that these observations are well grounded. They will disclose that prosecuting attorneys, with the tacit or express approval of trial court judges, have repeatedly disregarded the plain rules of the criminal law

to the substantial prejudice of defendants and requiring reversal of convictions.

In *State v. Hess*¹ the defendant was convicted of arson in the lower court and the conviction was reversed by the Supreme Court of Missouri because the prosecuting attorney, in his argument to the jury, held up to them the horrors of mob law, which he strongly hinted might follow a verdict of acquittal. We give the record, from which it will be observed that the trial judge failed, upon objection, to stop this highly improper argument. Here is what the prosecuting attorney said, the objections made and the rulings of the court:

"If you by your verdict set this man free on this mountain of testimony that I have brought here before you for the last week, if you turn this man loose, then I say to you the courts of justice will be sowing the seeds of discord and dissatisfaction with our system of government. (Mr. Walsh: We object to that as improper. The Court: You may proceed. Mr. Walsh: We object to the court's failure to rule. The Court: Objection overruled. You may proceed. To which ruling of the court the defendant excepted.) I say you will be sowing the seeds of discord and dissatisfaction from which we are bound to reap a harvest of mob law and violence. (Mr. Walsh: We object to that as absolutely improper. The Court: You may proceed. Objection overruled.) I owe a duty when I come in here as prosecutor in this court to not only prosecute men that I believe guilty, but I, also, owe a duty to men I believe innocent to turn them free; and I am free to say that if in this case I did not *believe* this man guilty, I would not be trying him here today. (Mr. Walsh: I object to that. The Court: Objection overruled.) I would not have spent a week trying this case if I had believed him innocent. Do you believe these boys lied on that very night when they saw these fires? They went out there and turned in the fire alarm and told the police about it; told their story to the police. On the next morning didn't they come up here in this room on the third floor, and they laid the matter before the warrant officer, and told the story; and they don't issue warrants up there unless they find out crimes have been committed. (Mr. Walsh: We object to that as strictly against the court's instruction. The Court: That is very objectionable.)"

¹ 240 Mo. 147, 144 S. W. 489 (1912).

In regard to this unfair argument, the Missouri Supreme Court said:

"Most of the foregoing argument was improper and prejudicial to the defendant. To hold up before a jury the horrors of mob law is not a proper method of securing verdicts of conviction. Juries should convict on evidence that crimes have been committed, and not through fear that all law will be set aside and a reign of anarchy substituted."

The court then goes on to criticise the attorney's statement of his personal belief that the defendant was guilty, which is always improper, and finally reverses the conviction on account of the improper argument of the prosecutor.

In *State v. Miller*² there was a conviction of rape, which was reversed by the Missouri Supreme Court solely because of the prosecuting attorney's improper argument to the jury. This argument, in part, was:

"Gentlemen of the Jury, if you do not convict this man, you ought never be allowed to sit on another jury in Grundy county. There'll be no use of prosecuting bootleggers in this county, because these lawyers will make these kind of defenses for them."

In the face of objection by defendant's counsel, the trial court made no ruling, and there was other highly improper argument to the jury of the prosecuting attorney. In reversing the conviction, the Missouri Supreme Court said:

"We have held that there was abundant evidence to go to the jury as to defendant's guilt. On the other hand, we can appreciate the fact that the evidence was such as to call for a fair and unprejudiced consideration of the case by the jury. The prosecuting attorney did not permit such a consideration of the case. His conduct was prejudicial in the extreme."

In passing, it might occur to one to question what the crime of bootlegging had to do with the crime of rape for which the defendant was then being tried. It is by no means a wild guess that some members of the jury were intensely interested in successful prosecutions for violations of the liquor law, and that the prosecutor framed his argument accordingly.

² 263 Mo. 326, 172 S. W. 385 (1915).

In *State v. Accardo*³ a conviction of larceny was reversed solely on account of the improper argument of the prosecuting attorney in stating that he had made an independent investigation of the facts of the case and had found the defendant to be guilty. Here, in part, is what he said to the jury:

“When I examine into the facts of a case, and I am not satisfied from the evidence that the man is guilty, I don’t have to try him. I only try cases, gentlemen of the jury, and it is only proper for me to try cases when I am satisfied from the evidence that the accused is guilty.”

This kind of argument was preceded by the prosecuting attorney’s protestations of his impartiality and his desire to be fair. In disposing of this case, the Supreme Court of Louisiana said:

“The learned district attorney has here advised the jury that he has made a separate and independent investigation of the case in his official capacity, and found the defendant guilty. Upon what evidence this ex parte investigation of the case was based, whether upon the same evidence as that produced before the jury, or, also, on other evidence not produced, or, perhaps, not admissible before the jury, the learned district attorney does not say. Manifestly, he could not have been allowed to go upon the witness stand and throw into the scale against the accused the fact of his having made this investigation and reached the said conclusion of guilt. His own sense of justice would revolt against such a proceeding; and yet what practical difference is there between his testifying to such an investigation and of its result as a witness on the stand, and his bringing it to the attention of the jury by an unsworn statement made to them in his official capacity; especially in the impressive manner adopted in this case—driving it home to the breasts of the jurors by an elaborate protestation of impartiality and disinterestedness. The warning to the jurors not to regard, or be influenced by, the fact of such an ex parte impartial investigation having been made, and having resulted in the conviction of the accused, very far from curing the situation, aggravates it, as being calculated to throw the jurors off their guard and expose them to be all the more easily influenced. If the learned district attorney did not expect this statement to be regarded and to influence the jury, why did he make it?”

³ 129 La. 666, 56 So. 631 (1911).

In *People v. McGee*⁴ a conviction of bribery was reversed on account of the misconduct of the prosecuting attorney, who, by remarks in the presence of the jury and by unfair cross-examination of the defendant, created a situation which the appellate court summed up as follows:

"In fact from the course of procedure narrated above several exceedingly hurtful impressions must have been created in the minds of the jurors, among them, that the defendant was trying to conceal his identity, that he had been convicted of an assault with a deadly weapon, that he had committed perjury in denying that he had been convicted of a felony, and that his counsel was not acting in good faith in interposing his objections, but was really trifling with the court. In view of the foregoing untoward incidents it would seem to be an injustice to the defendant to allow the conviction to stand."

In *People v. Hail*⁵ a conviction of manslaughter was reversed on account of the unfairness of the argument of the prosecuting attorney to the jury, and here is what he said:

"Men have been acquitted who have committed cold-blooded murder; and if you were to acquit this man under the testimony here, you would be allowing a cold-blooded murderer with human gore yet dripping from his hands to go unwhipped of justice. Gentlemen, you cannot do it, you will not do it. *Should you do it you would be afraid to go out on the street and meet your fellow men.*"

The last sentence is underscored because it is a favorite trick of unfair prosecutors to hold up to juries the fear that, if they acquit, they will lose their standing in the community. The argument is always reprehensible, and appellate courts often condemn it. It is, of course, equally reprehensible for any prosecutor to attempt to induce a jury to convict upon his personal belief that the defendant is guilty and thus substitute his personal opinion for evidence.

In *Hillen v. People*⁶ a rule was laid down as to the proper conduct of a prosecuting attorney in the following words:

"A prosecuting attorney should not act as a partisan eager to convict, but as an officer of the court whose duty it is to aid in arriving at

⁴ 24 Cal. App. 563, 141 Pac. 1055 (1914).

⁵ 25 Cal. App. 342, 143 Pac. 803 (1914).

⁶ 59 Col. 280, 149 Pac. 250 (1915).

the truth and should neither endeavor to exclude competent evidence or introduce that which is of doubtful competency nor abuse the defendant, make baseless insinuations against his witnesses or commit acts of disrespect towards opposing counsel.”

*McBride v. People*⁷ was a case in which the defendant was convicted of obtaining money by false pretenses, and the conviction was reversed on account of statements made by the prosecuting attorney in his argument to the jury. The court said:

“In a prosecution for obtaining \$11,270 by false pretenses the prosecuting attorney’s twice repeated statement that the defendant had robbed the prosecuting witness, an old man, of \$35,000, where the evidence does not show that such amount was in controversy, was ground for reversal.”

The Colorado court concluded its opinion with these significant words:

“The defendant may, or may not, be guilty of the crime charged, and upon that we do not pass, but he was entitled to his constitutional right of fair trial, which we are convinced he did not have.”

In *Doran v. State*⁸ the defendant was convicted of the crime of seduction. During the course of his argument to the jury, the prosecuting attorney delivered himself of the following:

“The law in Mississippi on this subject is that the relatives of the young woman who is seduced take shotguns and go out and kill the seducer. Personally I think that is a good law. I would not blame the young men in this country when their sisters are seduced if they were to take pistols and go out and kill the seducer. If you do not enforce the statutes and convict the men charged with seduction, the time will come here in Arkansas when the men will take the law in their own hands and go out and kill the seducers of their mothers, their sisters, their wives and their daughters.”

The Arkansas court reversed the conviction on account of that language and the failure of the trial court to condemn it. It is easy to see how such intemperate language would have gratified the court room crowd, who knew or cared

⁷ 60 Col. 435, 153 Pac. 751 (1915).

⁸ 141 Ark. 442, 217 S. W. 485 (1920).

nothing for the constitutional guaranty of a fair trial; but it is difficult to conjecture what led the trial judge to refuse to rebuke it. Possibly, he had his own re-election in mind rather than the law.

*Spencer v. Commonwealth*⁹ was a case in which the defendant, a negro, was convicted of murder of a 13-year old white girl and his punishment fixed at death. During his argument to the jury, the zealous prosecuting attorney delivered himself of an oratorical gem winding up as follows:

"You ought to give him the death sentence. I could gladly see it, and it would do my soul good to see that fiend—that low down nigger—the very scum of the earth, who sits there, placed in the hottest place in hell, where he ought to be, and I would rejoice to hear his flesh broil and his bones crackle."

The by-standers applauded this language; but the Virginia court affirmed the conviction because the trial judge directed the jury to disregard the argument, and promptly reprimanded the spectators, which was supposed to cure the error.

In *Bullington v. State*¹⁰ in which the defendant was convicted with an assault with intent to kill his wife, the prosecuting attorney in his argument to the jury stated that the accused, who 14 years before had been acquitted of murder, was guilty then and escaped punishment; that his wife had separated from him on account of his drinking; that since he assaulted her, she was suing for divorce, alleging as her sole ground the assault with intent to kill; and that, if accused was not convicted she would have to live with him, and he could continually brow beat and mistreat her. There was no evidence that the wife had brought suit for divorce, or had separated from her husband 4 years before, while the evidence as to the former charge of murder was improperly received, it being too remote. The court held that these remarks of the prosecuting attorney were

⁹ 143 Va. 521, 129 S. E. 351 (1925).

¹⁰ 78 Tex. 187, 180 S. W. 679 (1915).

highly improper and inflammatory, being partly outside the record, and partly based on inadmissible evidence, and hence necessitated a reversal.

In *Brock v. State*¹¹ a conviction of murder was reversed because the prosecuting attorney argued to the jury that the defendant and one of his witnesses had conspired to kill the deceased, when there was no evidence to justify or excuse such an argument.

In *State v. McBrien*¹² the defendant's conviction of the crime of obtaining money by false pretenses was reversed for unwarranted remarks of the prosecuting attorney to the jury. The Missouri Supreme Court said:

"On a trial for obtaining a loan from a bank by false representations as to the property and debts of accused and his wife, the evidence showed that the accused had borrowed from various parties far more money than he could repay. Counsel for the state in his argument stated that accused was defrauding a Dutch farmer of S. county out of \$500. The farmer referred to had loaned accused \$500, but the evidence showed that the interest had been regularly paid and did not show when the loan was due or that it was not amply secured. Held, that the remark was not only improper as outside of the evidence, but, under the facts of the case, was highly prejudicial, especially where the court not only refused to strike out the remark or rebuke counsel, but virtually approved the remark by telling counsel to go ahead with his argument."

In the above case, we have an instance of a practice of trial judges that is all too common of allowing the prosecutor to violate the law governing the trial of criminal cases, under the guise of favoring the "enforcement of law," and "putting down wrong and crime," thereby earning from the unthinking the ill-deserved reputation of being the very pillars of "law and order." The result of such specious efforts is often a reversal of the conviction of a guilty man, because he has not had a fair trial. In such cases, a criminal trial resembles nothing so much as a sort of refined mob law.

¹¹ 101 Ark. 147, 141 S. W. 755 (1911).

¹² 265 Mo. 594, 178 S. W. 489 (1915).

In *State v. Helton*¹³ there was a conviction of the crime of abortion, which was reversed by the appellate court, for the reason, among others, that in his argument the special prosecuting attorney had called the defendant a "serpent." Defendant's counsel objected to the epithet, but the trial court merely told the prosecutor to "go ahead," as such courts frequently do. In the course of its opinion, the court said:

"Under the peculiar facts of this case, we find the foregoing remark, receiving as it did the express approval of the trial court, constituted reversible error. Improper arguments are a class of errors unto themselves, and no hard and fast rule can be laid down by which their vicious effects can be measured. When the evidence of guilt is overwhelming and the verdict is not unusually severe, it is difficult to say that the improper remarks produced any harmful effect. Such was our decision in the case of *State v. Baker*, 246 Mo. 359, 152 S. W. 46. Quite a different rule arises, in cases like the one at bar, where the evidence of guilt is very meager and unconvincing, and the prosecutor undertakes to secure a conviction by arousing prejudice in the minds of the jury through the use of epithets and other improper argument. *State v. Hess*, supra."

A constitutional guaranty, everywhere recognized, is that no defendant in a criminal case shall be compelled to give evidence against himself; and it is a universal rule that in a trial of a criminal case, the prosecutor may not comment upon the failure of the accused to testify. But, notwithstanding that this is a simple and fundamental rule in criminal cases, prosecuting attorneys are often prone to violate it directly or by subtle evasion; and this is another ground upon which convictions are often reversed.

In *Rowland v. Commonwealth*¹⁴ the rule is laid down thus:

"Attorney for the commonwealth must not comment upon the failure of a defendant to testify in his own behalf."

*State v. Volz*¹⁵ was a case in which defendant was convicted of carnal knowledge of a girl 16 years old, and there

¹³ 255 Mo. 170, 164 S. W. 457 (1914).

¹⁴ 202 Ky. 92, 259 S. W. 33 (1923).

¹⁵ 269 Mo. 194, 190 S. W. 307 (1916).

was no question of his guilt. Nevertheless, the comments by the special counsel for the state upon the failure of the defendant to testify, together with other unfair argument, resulted in a reversal of the conviction; and this despite the fact that the special counsel withdrew the remark and apologized for having made it. The record on the point illustrates it, and is as follows:

“Special Counsel—You saw the prosecuting witness on the stand. Will you believe her, or will you believe Hade? Compare the two Gentlemen of the jury, Volz (defendant) didn’t go on the witness stand. The defendant didn’t go on the witness stand. Think of it.

The Court—One moment.

Defendant’s Attorney—He knows better than that. He knows it can’t be referred to and I will lay the foundation now for a new trial and except to it. That is absolutely out of order.

Special Counsel—I merely commented on it. I said he didn’t go on the stand.

The Court—You ought to know and you do know, that there is a rule against referring to that fact.

Special Counsel—I withdraw the remark.

Defendant’s Counsel—He withdraws it after the injury is done and he has got it before the jury.

The Court—Do not refer to that fact again, directly or indirectly. You are not allowed to do it, and you ought to know that and not put the state in that position.

Special Counsel—In the heat of the argument I lost control of my better judgment.

The Court—Counsel has made the statement and it has been objected to which he ought not to have made, and for which the court reprimands him, because if he undertakes to prosecute in this court he ought to know something about the rules and practice of the law, and you, the jury, will utterly disregard that statement and let it have no weight with you at all in deciding the case.

Special Counsel—I desire to apologize. I didn’t mean to do anything improper.”

The language of the Missouri Supreme Court in disposing of the point is so appropriate that we set it out entire:

“There can be no question but that the remarks were highly improper. If the reference made to the defendants failure to take the stand

was the only improper remark made we would be inclined under the rulings in *State v. Taylor*, 134 Mo. 109, 35 S. W. 92 and *State v. Kelleher*, 201 Mo. 614, 100 S. W. 470, to say that the prejudice was likely cured by the severe reprimand made by the court. But the preceding remark of the special counsel in effect that defendant had refused to marry the prosecutrix which went unrebuked by the court was unsupported by the evidence. It would appear that counsel was in this manner trying to get before the jury facts which would not have been proper evidence had they been offered on the stand and which were of such a character as to inject prejudice into the case. It also appears that counsel in attempting to work poison into the case referred to the daughters of the jurors and appealed for a conviction not alone upon the legitimate ground of defendant's guilt, but also upon the ground that their daughters might thereby be protected. . . . We are of the opinion that, all the remarks considered, sufficient poison and prejudice was improperly injected to warrant a reversal of the judgment."

*State v. Nardini*¹⁶ was a case in which the defendant was convicted in the lower court for violation of the local option law. In the course of his argument to the jury, the counsel for the state commented upon the failure of the defendant to testify in his own behalf in the following language:

"Where is the man that he (counsel) represents? What is their reason for not putting him on the stand? Tell me."

And the appellate court held this to be reversible error. One can imagine what an outcry would follow about the "technicalities of the law" from those who are interested only in the enforcement of some law they specially favor.

In *Haley v. State*¹⁷ the defendant was convicted in the court below of murder. The Texas Court of Criminal Appeals reversed the conviction because the prosecuting attorney in violation both of the general rule and of a statute of Texas commented upon the failure of the defendant to testify in his own behalf. This is what the attorney for the state said to the jury:

¹⁶ 186 S. W. 557 (Mo. App. 1916).

¹⁷ 84 Tex. 629, 209 S. W. 675 (1919).

"The state has seen fit to put the two McKellers upon the witness stand to deny their guilt, but you did not put Mr. Haley upon the stand to deny his guilt."

In granting a reversal of the conviction, the Texas court said:

"A disregard of the command of the statute has been from the date of its passage uniformly held an imperative cause for reversal."

*Stefanos v. State*¹⁸ is a case which well illustrates the ineffective and timorous way in which many trial judges rebuke counsel for the state for commenting upon the failure of the accused to testify in his own behalf. The Florida Supreme Court says:

"During the argument of counsel the prosecuting attorney commented upon the failure of the accused to testify in his behalf. Exception was taken to the remarks of counsel by the defendant, and the court corrected the prosecuting attorney, and instructed the jury to disregard the statement; but he did so in such words as to render the correction of little value to the defendant. While we do not hold the transaction, as it appears, to have occurred, reversible error, we think that, when prosecuting attorneys do violate the plain language of the statute, their remarks should be expunged as far as possible, and removed from consideration by the jury."

The conviction was reversed because the trial court excluded vital and material evidence offered by the defendant, which went to the very gist of the case. Even at that, two of the judges of the Florida Supreme Court dissented.

In *Harwell v. State*¹⁹ the Mississippi Supreme Court reversed a conviction of unlawful manufacture of intoxicating liquors because the prosecuting attorney commented upon the failure of the accused to testify. There were several defendants, and, as both the objectionable remarks of the prosecutor and the appellate court are somewhat unusual, we quote at some length. It seems that after the state had rested its case, the defendants and their attorneys retired for consultation and afterward one of the defendants testi-

¹⁸ 80 Fla. 309, 86 So. 204 (1920).

¹⁹ 129 Miss. 858, 93 So. 366 (1922).

fied and the other did not. In commenting on this incident, the prosecuting attorney said to the jury:

"Gentlemen, I can imagine what took place in that room there, when these defendants went in there with their attorneys, after the state had rested its case. This is about what occurred. The attorneys said to the defendants: 'Boys, the state has made out a terribly strong case against you, and it looks like they have got you. What have you to say for yourselves?' Then I imagine the big fellow (referring to Henry Payne who did not take the stand in his own behalf) said: 'I know of nothing I could say to save myself, so I won't go on' (meaning on the stand). Then I imagine the little fellow, Harwell, said: 'Well, I am a young man, 22 years old. I cannot make it no worse so I will take a shot at it.'"

After quoting the Mississippi statute, the court said:

"The argument of the district attorney was in direct violation of this section, and it is clear, under all the authorities, that the judgment must be set aside at least as to the defendant Payne. . . . In matters of argument counsel must necessarily have a wide latitude. His illustrations may be as varied as the resources of his genius; his argumentation as profound as learning and logic can make it. He may give wing to his wit and play to his imagination, so long as he deals with the evidence in the case and the deductions to be drawn from the testimony: but he should never allow himself to imagine facts not in evidence, nor allow his wit to wing him out of the record. For the errors indicated, the judgment will be reversed and the cause remanded for a new trial."

In *Wells v. State*²⁰ defendant was convicted of the larceny of a calf, and the Criminal Court of Appeals of Oklahoma reversed the conviction because the prosecuting attorney had commented upon the failure of a co-defendant to testify. The court said:

"This conviction rests largely on circumstantial evidence. A seemingly rational explanation was made by the defendant of his possession of the property, making it a close question upon the facts for the consideration of the jury. For this reason the misconduct of the county attorney complained of, as disclosed by the bill of exceptions, may have been the decisive influence that caused the jury to bring in a verdict of guilty. Notwithstanding the fact that the court admonished the jury to pay no attention to the prejudicial remarks of the county

20 231 Pac. 1087 (Okla., 1925).

attorney, the prejudicial effect was probably not cured. . . . This being a close question on the evidence, the comments of the county attorney as to the co-defendant's failure to testify were prejudicial to both defendants. And for the error of the trial court in denying defendant Wells' motion for a new trial the cause is reversed and remanded."

In *Wilson v. United States*²¹ defendant had been convicted in the court below of a violation of the postal laws, and appealed to the United States Supreme Court, which reversed the conviction because the district attorney had commented upon the defendant's failure to testify, and the colorless criticism by the trial court. Here is what the district attorney said to the jury:

"I want to say to you that if I am ever charged with crime, I will not stop at putting witnesses on the stand to testify to my good character, but I will go upon the stand and hold up my hand before high Heaven and testify to my innocence of the crime."

Upon objection by defendant's counsel, the trial court made this insipid remark:

"Yes, I suppose the counsel should not comment upon the defendant not taking the stand. While the United States court is not governed by the state's statutes, I do not know that it ought to be the subject of comments by counsel."

And here is what the United States Supreme Court said on the subject:

"When the district attorney, referring to the fact that the defendant did not ask to be a witness, said to the jury: 'I want to say to you that if I am ever charged with crime, I will not stop by putting witnesses on the stand to testify to my good character, but I will go upon the stand and hold up my hand before high Heaven and testify to my innocence of the crime,' he intimated to them as plainly as if he had said in so many words that it was a circumstance against the innocence of the defendant that he did not go on the stand and testify. Nothing could have been more effective with the jury to induce them to disregard entirely the presumption of innocence to which by the law he was entitled, and which by the statute he could not lose by a failure to offer himself as a witness. And when counsel for defendant called the attention of the court to this language of the district attorney it was not met by any direct prohibition or emphatic con-

²¹ 149 U. S. 60, 13 Sup. Ct. 765, 37 L. Ed. 650 (1892).

demnation of the court which only said; 'I suppose the counsel should not comment upon the defendant not taking the stand.' It should have been said that the counsel is forbidden by the statute to make any comment which would create or tend to create a presumption against the defendant for his failure to testify. . . . The refusal of the court to condemn the reference of the district attorney and to prohibit any subsequent reference to the failure of the defendant to appear as a witness tended to his prejudice before the jury, and this effect should be corrected by setting the verdict aside and awarding a new trial."

The case of *Roden v. State*²² was one in which the defendant had been convicted of violating the prohibition laws, and the conviction was reversed because the prosecuting attorney stated to the jury that "The defendant would sell liquor to the boys," when there was no evidence to support such a statement.

In *State v. Leib*²³ defendant had been convicted of murder in the first degree, but the Iowa Supreme Court reversed the conviction because the prosecuting attorney had commented upon the fact that the defendant had failed to testify. Here is what the prosecuting attorney said to the jury: "Conclusively, this man killed John Kilpatrick and he says that he did. *He don't deny it.* He struck him over the head with that gun barrel, and he don't deny it, and he took three inches off the base of his skull."

Upon objection being made by defendant's counsel, the trial judge merely said that the remark was "ill-advised," but the Supreme Court regarded that bromidic observation insufficient and set aside the verdict and awarded the defendant a new trial. It is, of course, obvious that the prosecutor's remark was a comment upon the failure of the defendant to testify.

In *People v. Annis*²⁴ defendant had been convicted of assault and robbery; but the conviction was reversed by the Illinois Supreme Court solely because the state's attorney,

²² 3 Ala. App. 202, 58 So. 72 (1912).

²³ 198 Ia. 1315, 201 N. W. 29 (1924).

²⁴ 261 Ill. 157, 103 N. E. 568 (1913).

in his argument to the jury, commented upon the fact that the defendant had failed to testify. This is what he said:

"For some reason not known to me and not known to you, gentlemen, she did not testify and tell you anything about the case or say one word in her behalf."

Objection was made to the remark by defendant's counsel which was sustained by the trial court, but the Supreme Court held that this was insufficient to cure the error. In the course of its opinion, the court said:

"Paragraph 426 of the Criminal Code provides a defendant in a criminal case shall only be deemed a competent witness at his own request, 'and his neglect to testify shall not create any presumption against him, nor shall the court permit any reference or comment to be made upon such neglect.' The remarks of the assistant state's attorney were in palpable violation of the express provision of the statute, and we do not recall any case where remarks of the character here made were not held to be reversible error notwithstanding the action of the court in sustaining objections to the remarks. *Angelo v. People*, 96 Ill. 209, 36 Am. Rep. 132; *Austin v. People*, 102 Ill. 261; *Baker v. People*, 105 Ill. 452; *Quinn v. People*, 123 Ill. 333, 15 N. E. 46."

In *People v. Cahill*²⁵ defendant had been convicted of larceny of a watch from the person, and the Michigan Supreme Court reversed the conviction because the prosecuting attorney referred to the fact that the defendant had not taken the witness stand. In the course of the opinion, the court said:

"We cannot understand why prosecuting officers will persist in making arguments in criminal cases which they must know are improper and which will necessarily result in the reversal of the case, if a conviction is had."

In *Sturgis v. State*²⁶ defendant was convicted of selling intoxicating liquor, and the conviction was reversed on appeal because the prosecuting attorney referred to the failure of the accused to testify. The language of the prosecutor arouses interest from the fact that, under pretense of not referring to it, he did refer to it. Here is the record:

²⁵ 147 Mich. 201, 110 N. W. 520 (1907).

²⁶ 2 Okla. Cr. Rep. 362, 102 Pac. 57 (1909).

"The twenty-second assignment is as follows: 'In the course of his argument to the jury, the county attorney made reference to the fact that defendant had failed to testify in his own behalf. His statement was made that he did not intend to make any reference to the fact that defendants failed to testify in their own behalf, for the reason that, if he did, it would be reversible error. The defendant objected to this statement and saved his exceptions thereto.' This presents two questions for decision; First. Were the remarks of the county attorney improper? Second. Are they of such a character that their injurious effects could not be cured by their withdrawal? Under our statute we are compelled to answer both these questions in affirmative."

In *State v. Nicola*²⁷ defendant had been convicted of manslaughter, but the conviction was reversed solely because the prosecuting attorney referred to the fact of defendant's failure to testify. Here is what the counsel for the state said:

"There is another thing in this case that the defendant has not denied, and that is the writing of the letter to his brother on the day on which he killed his father."

Upon the objection of defendant's counsel to the statement, the trial court sought to cure the error by directing the jury to disregard it. Nevertheless, the Iowa Supreme Court reversed the conviction, not thinking that the direction of the lower court to the jury removed the prejudice. The appellate court said:

"In no case have we held that a direct reference to defendant's failure to testify upon the witness stand is not within the prohibition of the statute. A new trial should have been granted on this ground alone."

In *Boggs v. Commonwealth*²⁸ defendant's conviction for selling whiskey unlawfully was reversed solely because the prosecuting attorney had referred to his failure to testify, though the court held that the evidence was sufficient to sustain a conviction.

In *Gurley v. State*²⁹ a conviction of manslaughter was reversed solely because the prosecuting attorney had referred

²⁷ 169 Ia. 171, 151 N. W. 70 (1915).

²⁸ 128 S. W. 73 (Ky., 1910).

²⁹ 101 Miss. 190, 57 So. 565 (1912).

in a subtle way to defendant's failure to testify. The strong language of the Mississippi Supreme Court on the point is worthy of consideration. It said:

"No ingenuity, however artful, no subtlety, however refined, can escape the conclusion that this statement made by the prosecuting counsel held up to the jury the failure of the defendant to testify. It was a thrust, sharp and incisive as a rapier at the appellant that he should be condemned for his failure to testify. If the other man, Dr. Davis, were on trial, he would be more frank, and not be afraid to make a full disclosure; but this defendant was afraid of a full disclosure, and hence dared not testify. This was the necessary and inevitable effect produced upon the mind of the jury. If prosecuting counsel expect this court to punish violators of the law, they themselves must obey the law, the plain and positive requirements of the statute. In their zeal and earnestness to secure convictions they must confine themselves to legitimate argument, such, at least as has not been expressly prohibited by the Legislature, and also condemned by the court of last resort."

In *Commonwealth v. Green*³⁰ the defendant had been convicted in lower court of murder in the first degree, but the conviction was reversed by the Supreme Court of Pennsylvania on the ground that the prosecuting attorney had referred to the defendant's failure to testify. Here is what the counsel for the state said:

"There is no one on earth who can tell how these things came into the possession of the prisoner but the prisoner."

In the course of its opinion, the court said:

"The district attorney who tried the case may not have meant to breach the statute; but his remark was in the nature of an adverse reference to the neglect of the defendant to offer himself as a witness, which the jury might well have regarded as creating a presumption against the accused. The effect of the remark should have been corrected by setting aside the verdict and granting a new trial."

It would seem that, in view of the universal rule prohibiting prosecuting attorneys from commenting upon the failure of the defendant in a criminal case to testify, which rule is, in most if not all states incorporated into a statute with

³⁰ 233 Pa. 291, 82 Atl. 250 (1912).

which such officials are supposed to be familiar, and in view of the repeated admonitions of courts of last resort, the unfair and unlawful practice would cease; but it still goes on. It will be noted that most of the cases cited are from Western, Mid-Western and Southern states, and few from Eastern states. That is probably because the known practice of the trial judges in Eastern states to sternly rebuke such infractions of the rule, deters prosecutors from violating it. And it might well be added that, if trial court judges generally would follow that practice, the evil would be removed. It is rather disappointing, when a prosecuting attorney makes such comment and counsel for defendant objects to it, that the trial judge so often merely suggests that the offense be not repeated, or makes some colorless criticism that not only is wholly ineffective in removing the prejudice created, but is almost an approval of the pernicious practice. Others content themselves by merely admonishing counsel to "proceed and confine your remarks to the evidence," which is only a limping evasion of plain judicial duty. If prosecuting attorneys were aware in advance of the trial that any infraction of the rule by them would instantly provoke the stern rebuke of the court, and possibly result in a new trial, the practice would likely cease. In a word, the chief fault lies at the door of the trial judges, and could, by them, be remedied. It might be added that, in perhaps a large majority of criminal prosecutions, it is known to both the prosecuting attorney and to the trial judge that, in case of conviction, there will be no appeal, because of defendant's indigence. There is, it is true, a movement afoot to secure legislation that will remove this prohibition upon prosecuting attorneys, but, in view of the constitutional and other legal difficulties in the way of accomplishing it, no result may reasonably be anticipated other than to give associations of state's attorneys some newspaper notoriety, and gain for them the dubious and temporary repute of being

very pillars of "law and order." In reason, if there is nothing against the defendant except his own silence, he should go free.

Another unfair practice of prosecuting attorneys frequently resulting in reversals of convictions, consists in unwarranted inferences from the evidence, baseless insinuations, specious innuendoes, and the asking of highly improper questions of the defendant upon his cross examination. From the fact that a knowledge of all the evidence in the case is usually necessary to enable one to discern these abuses, it is difficult to exhibit them within reasonable limits of space. However, a few cases will be considered with that in view.

In *Turner v. State*³¹ defendant's conviction of manslaughter was reversed because the prosecuting attorney had stated to the jury that the defendant had not called any witnesses to prove her good character. Here is what he said:

"She says that she has witnesses to prove her good character. Why didn't old Sarah Turner (defendant) bring her witnesses here to testify to her good character, if she has witnesses to prove her good character? The state cannot introduce evidence of her bad character until the defendant has put in her good character."

To this statement the defendant objected, and the trial court did nothing to correct the error. In reversing the conviction, this is what the Mississippi Supreme Court said:

"The court does not seem to have sustained the exception or to have directed counsel to stop that line of argument; nor did the court give a single instruction directing the jury not to regard this statement. In 12 Cyc. 578, it is said: 'So it is prejudicial error entitling the defendant to be granted a new trial to allow counsel for the prosecution in his argument to the jury to comment on the failure of the defendant to offer evidence of his previous character.' In *McKnight v. United States*, 97 Fed. 208, 38 C. C. A. 115, it is said: 'Such argument made over objection with the consent of the court in effect destroys the presumption in favor of the accused, and allows the jury to infer that

³¹ 94 Miss. 458, 48 So. 409 (1909).

his character is bad, because he has not produced proof to the contrary.' To the same effect are many other authorities. Indeed, the proposition is elementary. We would not in a case where the right result had manifestly been reached, where guilt was overwhelmingly shown, reverse for this sort of error alone; but in this case the guilt is not so shown, and it is not at all clear from the testimony that the defendant is guilty of the crime charged. Reversed and remanded."

In *De Jean v. State*³² a conviction of crime was reversed because of the grossly unfair conduct of the prosecuting attorney, both in his argument to the jury and in his cross-examination of the defendant. The court said:

"Argument of the district attorney in a prosecution for crime, where the proof was only circumstantial and where the defendant's character, which was important on the question of guilt, had not been put in evidence, to the effect that defendant said that he had been a successful business man in a certain place for 25 years, had brought up a family there, had never been indicted for or convicted of crime, but that he had not brought a single witness to testify to his character, and that his son had not been present and had not testified in his behalf, was prejudicial error."

*Askew v. State*³³ was a case in which the defendant had been convicted of murder, and the conviction was reversed on account of the misconduct of the prosecuting attorney in arguing to the jury what witnesses who had testified on a former trial of the case would have testified to in the one then in progress, and in commenting on evidence that had been excluded by the trial court, and erroneous rulings. In passing upon the questions, the Texas court said:

"There was a direct reference and statement to the fact that there had been a former trial. There was an attempt to get before the jury the testimony of the two absent witnesses, relatives of appellant, showing that he had manufactured a defense, which was refused by the court, but placed before the jury by the statements of the district attorney over the rulings of the court. The court was requested to withdraw these remarks from the jury and instruct them not to consider the same, but this was refused by the court. The statements of the district attorney to the jury as to what these witnesses would have sworn was

³² 108 Miss. 146, 66 So. 411 (1914).

³³ 54 Tex. Cr. Rep. 414, 113 S. W. 287 (1908).

clearly outside the record, was not justified as evidence, and if it had been admitted through the mouth of a witness with objections reserved, it would have been clearly reversible error. Certainly it would not take any reasoning to show that it would be error for a district attorney to state as facts before a jury such matters as he could not and would not be permitted to introduce as evidence. This court has been a little cautious about reversing cases on arguments, but the court has not considered it right to affirm cases in the face of such arguments and statements as detailed in this bill of exceptions. If the prosecution will continue to transgress legal rules in trials of cases, it will force this court to reverse judgments of conviction. Accused parties are entitled to fair trial."

In *Thomas v. State*³⁴ there was a conviction of burglary which was reversed because of the misconduct of the prosecuting attorney in stating to the jury, with the apparent acquiescence of the trial court, that, if there was no evidence upon which the defendant could be convicted, the judge would have taken the case from the jury. It is too charitable to say that the prosecutor was ignorant of this impropriety, and nearer the probable truth to conclude that his object was to convey to the jury the idea that the judge regarded the evidence as being sufficient to support a verdict of guilt.

*Harris v. State*³⁵ is a case in which the grossly unfair conduct of the prosecuting attorney required a reversal of a conviction for bigamy. The fact was established by the evidence and unquestioned that defendant had married Miss Venia Chaney on July 16, 1912. The state claimed that he had been married to Miss Alice Ellison in December, 1911, under a different Christian name. The main question was one of identity, and the officer who issued the license for the prior marriage testified that he did not know whether the defendant was the man to whom he had issued it. Nevertheless, he and others were allowed to testify to the fact that a paper offered and excluded was a marriage

³⁴ 107 Ark. 469, 155 S. W. 1165 (1913).

³⁵ 72 Tex. Cr. Rep. 117, 161 S. W. 125 (1913).

license, and hearsay was also admitted over objection. Of course, the conviction had to be reversed.

In *State v. Brown*³⁶ there was a conviction of murder in the first degree for misconduct of the prosecuting attorney which was apparently sanctioned by the trial court. The defense was an alibi which was testified to by only one witness whose name was Fowler. Without any evidence to justify it, the prosecuting attorney denounced this witness, saying to the jury, "I tell you that that man Fowler deserves to be in the dock with the defendant. I say it is in the evidence in this case." When the defendant's counsel objected to that remark, the trial court impatiently said: "Don't argue it. You have argued your case once." The Missouri Supreme Court reversed the conviction on account of this misconduct. This trial took place in Kansas City, and we can imagine the evening papers coming out with flaring headlines to the effect that the prosecutor had stated that the alibi witness Fowler—"Deserved to be in the Dock with the Defendant," and the prosecutor's gratification over the notoriety. It would have been a wholesome thing for the same newspaper to have published the language of the Missouri Supreme Court in reversing the conviction on account of such prejudicial language; but the possibility that it did is too remote to consider.

*People v. Wong Loung*³⁷ was a case in which the defendant had been convicted in the lower court of murder in the first degree, and the conviction was reversed by the California Supreme Court because the special prosecutor, Philip M. Walsh, had insinuated to the jury that the Hop Sing Tong, of which defendant was a member, had procured the murder of a man to prevent his appearance in the case; and for other gross errors among which were that jurors had been permitted to read accounts of the trial in the Oak-

³⁶ 247 Mo. 715, 153 S. W. 1027 (1913).

³⁷ 159 Cal. 520, 114 Pac. 829 (1911).

land Tribune. Here is what appeared in that newspaper which was read by at least one of the jurors during the progress of the trial:

“Highbinder is before Jury.

‘Attorney Phillip M. Walsh Asks for the Life of a Noted Chinese.

‘Wong Loung, a noted highbinder of the Hop Sing Tong, is on trial before Judge Ogden and a jury today in the Superior Court on a charge of murder, accused of shooting Lee Chung, a Chinese. The case will probably be concluded late this evening.

‘Unusual interest has been manifested in the case by the Chinese residents of this city, on account of the record of the defendant. The latter was convicted before Judge Lawlor of San Francisco for the crime of murder and sentenced to 99 years in prison. The Supreme Court granted a new trial owing to errors in the instruction of the court to the jury. Before the defendant could be tried a second time the earthquake and big fire occurred, and the records in the case were destroyed necessitating the release of the defendant.

‘Attorney Patrick M. Walsh, of the firm of Allen & Walsh made the opening argument for the prosecution.’”

Just why the trial judge should have failed to grant a new trial is, perhaps, difficult to understand. At any rate, the Supreme Court granted one, on account, principally, of the action of the distinguished special prosecutor, who crashed the headlines. This, by the way, is a common occurrence. The actual trial of a criminal case attracts attention, while the review in the appellate court is practically unnoticed.

In *Jackson v. State*³⁸ there was a conviction of robbery which was reversed because the prosecuting attorney commented upon the failure of the defendant to call two witnesses who were equally accessible to the state. The court said:

“These witnesses were accessible to both parties, and the solicitor should not have undertaken to draw inferences unfavorable to the defendant by reason of their absence from the trial.”

³⁸ 19 Ala. App. 525, 98 So. 652 (1924).

*McDaniel v. State*³⁹ was a prosecution for forgery of which the defendant was convicted, but the conviction was reversed upon appeal because the solicitor for the state had commented upon the failure of accused to produce a witness who was equally accessible to the state.

*People v. Munday*⁴⁰ was a prosecution for conspiracy to obtain moneys from the public generally and from certain banks and trust companies by false pretenses, and the defendant was convicted. The case had certain political significance, and there were a number of reprehensible incidents connected with the trial, including the fact that a large number of women spectators were given seats on the rostrum beside the judge, and representatives of certain newspapers hostile to the defendant were permitted to interrupt the trial and take photographs and moving pictures of the defendant, the court and the jury. The state's attorney was permitted to comment on the failure of certain witnesses to testify, and the trial judge gave an instruction discrediting testimony of certain witnesses for the defendant. The conviction was reversed, though three of the judges dissented on the main ground that the evidence showed the defendant's guilt beyond question, and that the result would have been no different, if the lower court had made no errors. Since the gross impropriety of the trial judge inviting spectators to sit near him apparently as a part of the judicial personnel, and the equally reprehensible practice of taking photographs of the scene and incidents of the trial has become somewhat frequent in this modern and progressive age, it is interesting to read what the Illinois Supreme Court said about it. This is the language of the court on those points:

"Complaint is made of the action of the court in permitting representatives of various newspapers claimed to be hostile to plaintiff in

³⁹ 20 Ala. App. 407, 102 So. 788 (1924).

⁴⁰ 280 Ill. 32, 117 N. E. 286 (1917).

error to take photographs of the jury, the defendant and the court, and in suspending the progress of the trial at various times to permit these photographs and moving pictures to be taken. It does not appear that any objection was interposed on behalf of plaintiff in error to the taking of the photographs and moving pictures. On the contrary, it does appear from the record that it was expressly consented to. Whether or not the parties consented to the taking of photographs, and without regard to whether such acts were prejudicial, the court should not have permitted it. It is not in keeping with the dignity a court should maintain, or with the proper and orderly conduct of its business, to permit its sessions to be interrupted and suspended for such a purpose."

Of course, it would be unkind to suggest that, if defendant's counsel had been left out of the pictures, he would have objected. At any rate, the court condemned the pernicious practice. Upon the fact that a number of women spectators had occupied seats on the rostrum, the Illinois Supreme Court said:

"The court should not have permitted spectators to occupy the rostrum. While all trials are conducted publicly and ordinarily any one has the right to attend the sessions of the court, spectators should be confined to that part of the courtroom set apart for their use. They should not be invited, or permitted, to occupy positions that would tend to obstruct the orderly and dignified conduct of the business of the court or afford them unusual advantage to convey to the jury indications of their approval or disapproval of the events of the trial as they transpired. The trial of a case should consist only of the sober investigation of the matters in issue. It is not to be regarded as an entertainment or in any sense as a festive occasion. The court should not permit the conversion of the courtroom into a picture gallery or the trial of a case into a show."

*Mitchell et al. v. State*⁴¹ was a prosecution for murder in which defendants were convicted. On appeal to the Indiana Supreme Court the conviction was reversed on account of misconduct of the prosecuting attorney in his argument to the jury. The evidence was circumstantial, and the existence of certain footprints a quarter of a mile away from the scene of the killing had been testified to. In his argument, the prosecuting attorney said:

⁴¹ 193 Ind. 1, 138 N. E. 507 (1923).

"Do either one of the defendants now have the measurement put upon their shoes to show how large they are?"

And the court held this statement to be misconduct, since defendants did not have to submit their persons to measurement. The remarks of the Supreme Court are so appropriate that we set them out:

"The court admonished the jury that this was an improper remark; that they should not consider it. We would have to assume if this were the only question in the record, that the trial court's admonitions to the jury destroyed the effect of counsel's misconduct. This was misconduct, as the trial court correctly ruled. The defendants did not have to submit their persons to measurement. It is proper for an advocate to have zeal, but when he is representing the state in a criminal case he should not let his zeal carry him away, because it is his duty not to try to convict the defendants by improper methods. A good place for ardent zeal is in getting the material facts and marshalling them before the jury by competent witnesses. For instance in the present case it looks from here as though some evidence might have been adduced to show the identity between the footprints and the boots or shoes of some one."

In *State v. Scott*⁴² a conviction of murder was reversed on account of gross misconduct of the prosecuting attorney in asking improper questions of the defendant upon cross examination and in commenting upon defendant's failure to call witnesses to testify to his reputation for peacefulness, and intimating that he was afraid to risk the issue as to his reputation in that respect.

In *People v. Lewen*⁴³ defendant had been convicted of murder, and the Michigan Supreme Court set aside the verdict and granted a new trial solely because of improper argument of the prosecuting attorney to the jury; and here is what he said:

"And another thing, gentlemen, that has struck me in connection with the trial of this matter is this respondent comes here and asks for sympathy and pity and mercy from you. She says that she has lived here for five years or thereabouts, and yet there has not been one

⁴² 194 Ia. 777, 190 N. W. 370 (1922).

⁴³ 226 Mich. 273, 197 N. W. 548 (1924).

single witness produced here to testify as to her character or as to her reputation for truth and veracity; not a single one."

In the face of objections to such argument, the trial judge sat silent, for what reason or lack of reason does not appear, and we may only conjecture.

In *Beach v. State*⁴⁴ defendant's conviction of the theft of an automobile was reversed by the appellate court solely on account of misconduct of the prosecuting attorney in his argument to the jury. On cross examination of the defendant he was asked whether he had not been indicted in Knox County, which he denied, and there was no evidence that he had been. Notwithstanding in his argument the counsel for the state used this language:

"Defendant is a criminal, for he has been indicted in Knox county, and is the black sheep of the Beach family."

The trial court sustained objection of defendant's counsel to the language, and directed the county attorney to confine himself to the record, but the appellate court was of the opinion that this disposition of the objection did not dispel the prejudicial effect of the flagrant impropriety of the statement and set aside the conviction.

In *Jarrott v. State*⁴⁵ there had been a conviction of theft from the person, which was reversed by the appellate court because of unfair argument of the prosecuting attorney to the jury. In its opinion, the Texas court says:

"While appellant was testifying in his own behalf the state elicited the fact that he had been convicted for the illegal sale of whiskey, and was then under indictment for other charges of like character. This evidence was admitted solely upon the issue of defendant's credibility as a witness, and was properly limited to that purpose by the court's charge. During the argument, the county attorney made the following statement: 'If you will show me a man who will sell whiskey for profit, I will show you a man who will do anything.'"

⁴⁴ 85 Tex. Cr. Rep. 64, 210 S. W. 540 (1919).

⁴⁵ 96 Tex. Cr. Rep. 239, 257 S. W. 256 (1924).

"Objection was made to this argument because the county attorney was urging the jury to appropriate the former conviction and pending charges as circumstances against appellant to determine his guilt of the charge for which he was then being tried. We believe this argument ought not to have been indulged in. Prosecuting officers in their zeal should not so frame their argument as to induce a jury to appropriate for general purposes testimony which can be properly introduced only for a limited purpose. The effect of the argument was to tell the jury that one who had been selling whiskey for profit was likely to be guilty of the offense of theft from the person."

In *People v. Bimbo*⁴⁶ defendant was convicted of obtaining money by means of a confidence game, and the conviction was reversed because of the intemperate and unwarranted argument of the prosecuting attorney, and the feeble remonstrance of the trial judge. Miles J. Devine was defendant's attorney. The prosecuting attorney used this language to the jury:

"It is said it takes a thief to catch a thief, and it can now be said it takes a framer and a fixer to help a framer and a fixer. I apply this to the worthy gentleman who has just spoken (meaning Miles J. Devine). I do not apply this to his colleague who is a very likeable fellow, but sometimes keeps very sorrowful company."

The Illinois Supreme Court says:

"The only excuse offered for this intemperate language is that Devine, one of the attorneys for plaintiff in error, in his argument to the jury criticized the conduct of the assistant state's attorney in prosecuting this case while the rape case against the son of the prosecuting witness was still pending and that during the course of the remarks he characterized this case as a 'trumped up case' and a 'frame-up, pure and simple.' There is no doubt but that counsel for plaintiff in error made improper remarks to the jury, but no objection was made to them at the time, and the assistant state's attorney was not charged with 'trumping-up' or 'framing-up' the case. . . . Epithets, vituperation and the expression of the personal opinions of attorneys have no place in the argument of a case to a jury. . . . On account of the misconduct of the assistant state's attorney, the judgment of the criminal court will be reversed and the cause remanded."

⁴⁶ 314 Ill. 449, 145 N. E. 651 (1924).

In *People v. Sawhill*⁴⁷ there was a conviction of using a confidence game, which was reversed by the Supreme Court on account of improper argument of the state's attorney in referring to riots in other states because of public feeling at failure of justice. Here is what the state's attorney said to the jury:

"I do know, gentlemen of the jury, that only a few years ago because of failure of justice, that the court house in Cincinnati was wrecked by an outraged public. I do know that when the streets of the city of Omaha became unsafe for white women to walk at night that a million dollar building was practically torn down and a nigger hung to a lamp post."

And this is what the Supreme Court said about it:

"Objection was made to the reference to the Cincinnati and Omaha court houses, and the court held that such remarks were improper and the jury should disregard them. While these remarks were promptly stricken by the court on the trial as soon as objection was made, we do not think that the attorney for the state was in any way justified in making them. These references to the riotous proceedings in Omaha and Cincinnati had no bearing upon the character of the crime that was here under consideration. . . . We cannot say that these improper remarks did not influence the jury in this case even though promptly stricken by the court."

In *State v. Clark*⁴⁸ there had been a conviction of manslaughter, which was reversed by the Supreme Court. The prosecuting attorney persistently referred to the power of the court to parole the defendant, if convicted, after being admonished not to do so by the trial court, and the Supreme Court held it to be reversible error.

In *Golden v. State*⁴⁹ a conviction of grand larceny was reversed because the prosecuting attorney sought to raise a prejudice against the defendant by suggesting that he was a Jew. This is what the prosecuting attorney said:

⁴⁷ 299 Ill. 393, 132 N. E. 477 (1921).

⁴⁸ 196 Ia. 1134, 196 N. W. 82 (1923).

⁴⁹ 23 Okla. Cr. Rep. 243, 214 Pac. 946 (1923).

"We all know the ways of Jews dealing in business and having their business dealings. . . . These are God's chosen people, who, the Bible says, shall gather into their arms all the wealth of the world."

And here is what the reviewing court said:

"The spirit of our law is opposed to any discrimination against an accused because of his race, religion, wealth or social station, and we think it was highly improper for the county attorney to go outside the record and misquote the Scriptures in a manner calculated to inflame and prejudice the minds of the jurors against this defendant because he was a Jew, if indeed he did belong to the Jewish race. It should make no difference whether an accused is a Jew, an Englishman, a Frenchman or a native American citizen. The verdict of a jury should be predicated upon the testimony produced at the trial, free from racial and religious prejudices, in so far as the courts are able to accord such trial."

In *State v. Stockton*⁵⁰ a conviction for violating the local option law was reversed because of inflammatory remarks made by the prosecuting attorney to the effect that there was illegal traffic in liquor; that he was going to fight it; that he wanted the man higher up, the man that is keeping this stuff here among us, this infernal stuff, this poison; that he was going to ask every jury to assist him in stamping it out; that the defendant's witness, Tom Kunkle, did own a fine farm, but that he did not own it now, that he was sorry for poor old Tom Kunkle (inferring that Tom Kunkle, defendant's witness, had lost his farm by reason of imbibing too much liquor); that the whiskey proposition is here to be fought out by you (meaning the jury). In reading this opinion, one is amazed that the trial judge overruled all of defendant's objections to such outrageous remarks.

In *Clancy v. State*⁵¹ a conviction of assault and battery was set aside and new trial ordered because of the following language used by the county attorney in his argument to the jury:

⁵⁰ 228 S. W. 1082 (Mo. App., 1921).

⁵¹ 93 Tex. Cr. Rep. 384, 247 S. W. 865 (1923).

"I want to tell you that when this assault was committed the good citizenship of the town of Terrell was so outraged and believed in the guilt of the defendant that the officers had to take the defendant away from that town."

*Cannon v. State*⁵² was a conviction of assault to murder, which was reversed because of the failure of the trial judge to suppress the following argument of the prosecuting attorney:

"You ought to convict this defendant and send him to the penitentiary for 15 years. I say, the time has come in Hardin county when the citizens will rise up and say: 'We wont have our citizens butchered in any such manner.' Gentlemen of the jury, if you suspend this man's sentence and let him go loose, he may kill me or you; my life or your life will be in danger."

In *State v. Dixon*⁵³ the Missouri Supreme Court reversed a conviction of stealing for grossly unprofessional conduct of the county attorney, and that, if a reprimand from the trial court was not sufficient to neutralize the poison, the jury should have been discharged.

In *Watkins v. State*⁵⁴ a conviction of murder was reversed solely on account of the gross misconduct of the prosecuting attorney. The court said:

"Where a prosecuting attorney in argument imputed wrongdoing or perfidy to any trial jurors should they not take his view, and asserted facts not proved, such as that an absent person was in town and could have been found by defendant, imputed dishonesty to adversary counsel, and shook his finger under the nose of accused and addressed him in abusive terms, a conviction cannot stand.

"Where prosecuting attorney starts to use grossly improper argument, the trial judge should stop him at once without waiting for exceptions."

In *Thurman v. State*⁵⁵ there had been a conviction of theft, which the court reversed solely on account of the misconduct of the prosecuting attorney. The Texas court said:

⁵² 84 Tex. Cr. Rep. 479, 208 S. W. 660 (1919).

⁵³ 253 S. W. 746 (Mo., 1923).

⁵⁴ 140 Tenn. 1, 203 S. W. 344 (1918).

⁵⁵ 85 Tex. Cr. Rep. 276, 211 S. W. 785 (1919).

"In a trial for theft, district attorney's argument to the jury, repeatedly calling accused a thief, and stating the jury could tell by accused's looks that he was a thief and that he had lied, held reversible error as abusive and villifying."

In *State v. Farris*⁵⁶ there was a conviction of murder which was reversed upon appeal because of inflammatory remarks made by the prosecuting attorney in his argument to the jury, and this is what he said:

"If you don't hang under this evidence, you might as well tear down the courthouse in De Soto parish."

And this is what the Supreme Court of Louisiana said about it:

"The remark of the district attorney, 'If you don't hang under this evidence, you might as well tear down the courthouse in De Soto parish,' was improper, and, in effect, meant that 'If you do not convict, you have no regard for your oaths, and the duty imposed on you by the law as jurors in criminal cases,' and that the machinery of the courts for punishing crime would, in that event, be useless in De Soto parish. The counsel for the state has not the right to throw the force of such an appeal into the scale against an accused, but should confine himself to a discussion of the case as presented, with such reasonable comment thereon as the evidence may warrant. . . . For the reasons assigned, the verdict and sentence appealed from are annulled and set aside, and this cause is hereby remanded to the lower court to be proceeded with according to law."

In *State v. Connor*⁵⁷ there was a conviction of the defendant, Connor, of murder in the second degree and the jury assessed his punishment at imprisonment in the penitentiary for 25 years. The defendant had killed Earl Williams by shooting him. The conviction was reversed by the Supreme Court of Missouri because of misconduct of the prosecuting attorney in making direct and dramatic appeals to the sympathies of the jury. During his closing argument, the mother wearing deep mourning and the father of the deceased, and, also a young lady, sat in front of and close to the jury; and, while the prosecuting attorney was

⁵⁶ 147 La. 663, 85 So. 631 (1920).

⁵⁷ 252 S. W. 713 (Mo., 1923).

referring to the death of Earl Williams and what his absence meant to the father and mother, he turned to them, and the mother laid her head in the arms of the young lady and sobbed and wept, and the father fanned her, all of which continued throughout the closing argument. With this setting, the prosecuting attorney said to the jury:

"I don't know that I have the power to know why it is that a man can get so mad as to take the life of his fellow man; but I do know this that you men are not giving any credit to that plea of insanity, and if you are not going to give any credit to that plea of insanity, then it is going to be your duty to go in that jury room and find the defendant guilty of murder in the first degree, cold-blooded, deliberate murder, and bring back into this court room a verdict of murder in the first degree and a sentence of death. It is your solemn duty, because he snuffed out the life of a fellow man and sent him before the judgment bar of God and rushed his soul from this earth with the snap of a trigger. *O, men, vindicate the blood of Earl Williams!*"

In response to objection of defendant's counsel to this line of argument the trial court merely said, "Argue the evidence."

But this is what the Missouri Supreme Court said about it:

"The main issue before the jury was the sanity or insanity of the defendant at the time of the homicide. The remarks of the prosecuting attorney complained of were not relevant to that or any other issue in the case, nor were they a fair comment on the evidence. . . . While counsel eloquently declaimed, 'No more, men of the jury, no longer will Earl Williams work in the Jacksonville Coal Company mine, no more can he go home to his father and mother or sister,' he dramatically turned to the father and mother while the mother was weeping and sobbing and the father fanning her. Objections by defendant's counsel were unavailing. This stage performance would more befit a theatre than a court of justice. The perfervid appeals of counsel and dramatic allusions to the bereaved and grief-stricken parents evinced a studied purpose to inflame the prejudices and passions of the jury against the defendant.

"The remarks complained of were not relevant to any issue calculated to aid the jury in calmly weighing the evidence and in arriving at a just and dispassionate verdict. The further remarks that it was the solemn duty of the jury to find the defendant guilty and to vindicate the blood of Earl Williams were highly reprehensible. They

were intemperate, violent and bloodthirsty, and in strange contrast to the humane spirit of the law, which presumes the defendant to be innocent until his guilt is proven beyond a reasonable doubt. . . .

"If the parents of the deceased could not restrain their emotions, the court on its own motion should have had them removed from the presence and hearing of the jury. Their griefs should not have been paraded before the jury. Demonstrations of a character calculated to arouse the sympathies or passions of the jury should not have been permitted. The court erred in not rebuking counsel for improper remarks in the course of his argument. The appellant did not have a fair trial nor a trial before a fair and impartial jury. The judgment is reversed and the cause remanded."

*Beard v. State*⁵⁸ was a conviction of murder in the first degree, which was set aside by the appellate court because of misconduct of the prosecuting attorney, in his argument to the jury. He said to the jury:

"If you convict him and make a mistake, the Court of Appeals or the Supreme Court will correct it; and if you acquit him, that is the end of it."

Commenting on that argument, the Alabama court said:

"The only effect of this argument would be to lead the jury into the mistaken belief that their findings on the facts could be reviewed by a higher tribunal and thereby lessen the sense of responsibility resting on them, and while the judgment would not perhaps for this alone be reversed, it certainly should weigh in consideration of the motion for a new trial."

In *State v. McCaskill*⁵⁹ a conviction of manslaughter was reversed because the prosecuting attorney, in his opening statement to the jury, referred to the fact that, on a former trial of the case, the defendant had been convicted of manslaughter in violation of a statute expressly prohibiting such reference.

The case of *August v. United States*⁶⁰ was one in which the defendant was charged with the crime of attempting to bribe members of a draft board during the World War to exempt a person from military service, and he was con-

⁵⁸ 19 Ala. App. 102, 95 So. 333 (1923).

⁵⁹ 173 Ia. 563, 155 N. W. 976 (1916).

⁶⁰ 257 Fed. 388, 168 C. C. A. 428 (1918).

victed in the United States District Court for the Western District of Missouri, and appealed to the Circuit Court of Appeals, which reversed the conviction because of gross misconduct of the assistant district attorney in his inflammatory address to the jury. The case was tried on March 5, 6, 7, and 8, 1918, during the heat of the world conflict, and it would seem that, under such circumstances, the prosecuting attorney would have taken special care to avoid inflammatory argument to a jury. Instead, he made direct appeals to their passions, by referring to the alleged atrocities committed against the women and helpless children of France, Belgium, Serbia, Armenia, and Poland. His eloquent address is too long to set out here, but we give a part of it:

"But, today, gentlemen, the world is engaged in a war, the whole world is engaged in a war for humanity; a war which holds in its balance the very future of the race; a war for the rights, the sacred rights, of man, and the honor of womanhood, and the security and sanctity of little children; and we are engaged in the prosecution of one who, as I am convinced, was willing to place his influence and his efforts and his filthy gold in the scales against those things which all men hold most dear.

"This prosecution, gentlemen, will not affect only St. Joseph. It will not only affect Buchanan county. It will not only affect northwest Missouri, and reflect either dishonor or credit upon her; but the result of you gentlemen's deliberations will be heralded to every nook and corner of this land; yea, and in some way I doubt not it shall waft its way to the agents of hell opposed to us across the mighty waters, and there, gentlemen, the verdict of this jury will be read and heard by the war lords of Germany as a beat from the pulse of the American people. So I say that the gravity of this occasion cannot be measured, and I trust gentlemen, that you will consider this case carefully—and that you will consider very, very deliberately."

The jury obliged the eloquent attorney then representing our government, by returning the verdict that was to strike terror to the "war lords of Germany," and we may suppose that many in St. Joseph felt that it had helped win the war. However, the Circuit Court of Appeals, speaking through Carland, J., had this to say about it:

"The case was tried on March 5, 6, 7, and 8, 1918. On these dates it was not necessary to inflame the passions of jurors by talking about the enemies of our country, rather it was a time to caution jurors against allowing their prejudices and patriotism from swaying their judgment. But the Assistant United States Attorney so far transcended his duty as a prosecuting officer that we are clearly of the opinion that the conviction ought not to stand. The language used speaks for itself. It must have produced a situation in the minds of the jurors that destroyed a calm consideration of the rights of the defendant. *The United States cannot afford to convict her citizens in this manner.* . . . The judgment below is reversed and a new trial ordered."

*People v. Creasy*⁶¹ well illustrates the appropriate procedure for a trial judge to follow where the prosecuting attorney is guilty of misconduct during the course of the trial of a criminal case. The defendant had been convicted in the court below of the crime of murder in the first degree and prosecuted an appeal to the Court of Appeals of New York. The defendant Creasy had been keeping company with Miss Edith Lavoy, and there had been some talk of marriage between them. She died in her apartment in the evening from a revolver shot, when she and the defendant were the only persons in the room. The pistol belonged to the defendant. The sole question in the case was whether Miss Lavoy had been killed by the defendant, or had committed suicide, and there was some evidence to support each theory. In the complete absence of any evidence to justify it, the district attorney in his argument to the jury, drew inferences that the defendant had been attempting the seduction of the deceased, and had betrayed her. The New York court said:

"Finally, I am of the opinion the judgment of conviction must be reversed because the defendant did not have a fair trial. The law insures to every person accused of the commission of crime a fair trial, and by that is meant according to the rules of the common law, except in so far as the same have been modified by statute."

An examination of the reported decision of the case is necessary in order to appreciate to what lengths of unfair-

⁶¹ 236 N. Y. 205, 140 N. E. 563 (1923).

ness the prosecuting attorney went in his unfair attempt to secure a conviction. It seems that the New York Code of Criminal Procedure wisely provides that in capital cases it is the duty of the appellate court to reverse a conviction, unfairly secured, whether exceptions were taken to any of the proceedings or not. This should be the rule everywhere.

It would be misleading not to state that usually appellate courts reverse convictions of crime with great reluctance, especially where the evidence shows the guilt of the defendant beyond reasonable doubt. And an examination of the decisions will, also, reveal that courts of last resort have often resorted to many expedients to avoid granting new trials in criminal cases. Some appellate courts seem to have adopted the rule that where the evidence unquestionably establishes the defendant's guilt, it will be presumed that the misconduct of the prosecuting attorney did not operate to the defendant's prejudice, since a verdict of conviction is the only reasonable one that could have been rendered. This rule has a superficial plausibility, but is of more than doubtful validity because it ignores the vital question of whether the defendant has had a fair trial. Carried to its logical conclusion, this argument would justify mob law, provided that the right man was hung. Nevertheless, a few courts have applied this principle to affirm convictions secured by gross misconduct of the prosecuting officer. Cases might be cited showing hair-splitting legal reasoning to which reviewing courts have resorted to affirm convictions secured by devious and unfair means. This does not tend to "foster respect for law."

Of course, the results of a reversal of conviction are often deplorable. In some states, many years is required to finally dispose of an appeal in a criminal case. During that time, witnesses disperse, memories fail and public interest subsides; so that often on a re-trial, conviction would be extremely doubtful, if not impossible. Perhaps, another pros-

ecuting attorney has been elected, who is more interested in new cases than old, and he enters a *nolle prosequi*, rather than incur the expense of another trial; and the final result is that a guilty defendant goes free. This is a grave reproach to the administration of the law, which no fervent appeal to respect it will remove.

How, then, are these abuses committed by prosecuting attorneys to be corrected? It is quite true, of course, that, if these officials would follow the plain rules of the law with an eye single to the performance of their official duty, the evil would disappear. But, since human nature is what it is, possibly that is too much to expect. The quiet, unassuming and courageous performance of official duty does not usually intrigue the popular fancy. The public is interested in the active trial of a criminal case and not in its subsequent consideration and disposition by the court of last resort. So there is a temptation for the prosecutor to seize the opportunity for present, conspicuous victory, and accept the hazard of possible final defeat.

In final analysis, it seems clear that the duty of correcting this widespread evil rests upon the judges of the trial courts; and they certainly have the power to perform that duty, and restore public respect for, and confidence in, the administration of the criminal law. If it were known in advance that a trial judge would not countenance any unfair tactics on the part of the prosecuting attorney in the trial of a criminal case, such tactics would not be employed, and there would be a marked decline in reversals of convictions. The only way by which "respect for law" may be restored is to make the *administration* of the law respectable.

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