Maine Law Review

Volume 46 | Number 2 Article 5

June 1994

Prosecutorial Summation: Where is the Line Between "Personal Opinion" and Proper Argument?

James W. Gunson
University of Maine School of Law

PROSECUTORIAL SUMMATION: WHERE IS THE LINE BETWEEN "PERSONAL OPINION" AND PROPER ARGUMENT?

I. INTRODUCTION

Prosecutorial forensic misconduct[1] has become front page news in Maine.[2] Since April of 1993, the Maine Supreme Judicial Court, sitting as the Law Court, has reversed convictions in three highly publicized cases based on remarks made by the prosecutor.[3] In *State v. Steen*,[4] the prosecutor asked the defendant to give his opinion concerning the veracity of other witnesses and suggested in closing argument that the favorable testimony given by the defense's expert witness resulted from the fee he had received.[5] The Law Court vacated the gross sexual assault conviction, finding that the prosecutor's questions and closing argument "clearly suggested" to the jury that the prosecutor believed that the witnesses were lying.[6] In *State v. Casella*,[7] the prosecutor's case was largely based on the premise that the defendant had duped his victims.[8] The Law Court vacated the multiple count theft conviction because the prosecutor "not less than forty-one times, asserted his opinion that Casella had lied."[9] In *State v. Tripp*,[10] the prosecutor stated in closing argument that the victim had told the truth because he had recounted his sexual abuse

---

1. Forensic misconduct is defined as "any activity by the prosecutor which tends to divert the jury from making its determination of guilt or innocence by weighing the legally admitted evidence in a manner prescribed by law." Comment, *The Nature and Consequences of Forensic Misconduct in the Prosecution of a Criminal Case*, 54 COLUM. L. REV. 946, 949 (1954).

2. Jason Wolfe, *Maine High Court Cracks Down on Prosecutors' Trial Remarks*, PORTLAND PRESS HERALD, Jan. 8, 1994, at 1A.

3. The *Casella* trial was moved from Androscoggin County to Cumberland County because of pretrial publicity in the Lewiston-Auburn area media. Brief for Appellee at 2, State v. Casella, 632 A.2d 121 (Me.), *withdrawn*, 629 A.2d 608 (Me. 1993) (No. CUM-92-426). The *Steen* rape case was a staple of the Portland area media throughout its prosecution. *See, e.g.*, Edward D. Murphy, *Rape Defendant Pleads No Contest*, PORTLAND PRESS HERALD, July 22, 1993, at 1B; Tess Nacelewicz, *Jury Finds Bay State Man Guilty of Sexual Assault*, PORTLAND PRESS HERALD, Feb. 2, 1992, at 4B; Tess Nacelewicz, *Man Gets Five-Year Term for Rape*, PORTLAND PRESS HERALD, Apr. 18, 1992, at 1B; *Victim Files Suit Against Rapist, USM Fraternity*, PORTLAND PRESS HERALD, Mar. 12, 1993, at 1B.

4. 623 A.2d 146 (Me. 1993).

5. *Id.* at 148-49.

6. *Id.*

7. 632 A.2d 121 (Me.), *withdrawn*, 629 A.2d 608 (Me. 1993). For a discussion of the history of this case, see *infra* note 165.

8. *Id.* at 124 (Rudman, J., dissenting).

9. *Id.* at 121.

10. 634 A.2d 1318 (Me. 1994).

in detail that would be foreign to a nine year old.[11] The Law Court vacated the conviction, finding that the prosecutor's statement was a "personal opinion" concerning the credibility of a witness.[12] Whether the Law Court is just "playing semantics"[13] or attempting to "reel in"[14] runaway prosecutors, the court's willingness to scrutinize prosecutorial statements and find impropriety could have a profound effect on prosecutorial summation in Maine.

The Law Court's eagerness to label prosecutorial inferences as improper "personal opinion," its apparent hostility to prosecutorial use of the term "lie" in any of its grammatical forms, and the summary fashion in which the court has discussed these issues has left many Maine district attorneys scratching their heads.[15] The opinions fail to establish a perceptible line dividing proper argument based on the lawyer's analysis of the reasonable inferences permissibly drawn from the evidence and improper summation based on personal beliefs.

Despite pronouncements that the issue on appeal in all three cases was the fairness of the trial,[16] the court emphasized the prosecutor's conduct, not the effect of that conduct on the jury's deliberations. This focus suggests that the court's interest is in issuing direct warnings to the prosecutor. Disappointed that prosecutors have repeatedly ignored its previous warnings,[17] the Law Court, in venting its frustration, misapplied and misconstrued the personal opinion limitation and redefined standards of review in order to sanction

---

11. *Id.* at 1319-20 n.5.

12. *Id.* at 1319.

13. John Healy, *Court Rejects Fraternity Rape Verdict*, PORTLAND PRESS HERALD, Apr. 7, 1993 at 1B.

14. Jason Wolfe, *Maine High Court Cracks Down on Prosecutors' Trial Remarks*, PORTLAND PRESS HERALD, Jan. 8, 1994, at 8A.

15. Janet Mills, District Attorney in Androscoggin, Franklin, and Oxford counties, summed up prosecutors' puzzlement, when she said, "My confusion is, what can we say?" Jason Wolfe, *Maine High Court Cracks Down on Prosecutors' Trial Remarks*, PORTLAND PRESS HERALD, Jan. 8, 1994, at 8A.

16. State v. Tripp, 634 A.2d at 1320 (Me. 1994) (in determining whether there is obvious error the court looks to determine the seriousness of the injustice done to the defendant); State v. Casella, 632 A.2d at 121 (defendant's contention on appeal is that "he was deprived a fair trial because the State repeatedly referred to him as a 'liar' during its closing argument"); State v. Steen, 623 A.2d at 148 ("Steen contends that: (1) the prosecutor's misconduct at trial denied him a fair trial . . . .").

17. *See e.g.*, State v. Marshall, 628 A.2d 1061, 1062 (Me. 1993) ("[T]he prosecutor is not only a party to a criminal action, but an agent of the state, cloaked with the responsibility of promoting justice, not just winning cases."); State v. Hinds, 485 A.2d 231, 237 (Me. 1984) ("[T]he prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence . . . .") (citing State v. Pineau, 463 A.2d 779, 780 (Me. 1983) (quoting AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO THE PROSECUTION FUNCTION § 5.8(d) (1971))); State v. Reilly, 446 A.2d 1125, 1128 (Me. 1982) ("With dismaying frequency we have been called upon to determine the propriety of prosecutorial tactics.").

prosecutors for their continued indiscretions. The court's eagerness to censure prosecutors threatens to restrict closing argument and undermine public confidence in the criminal justice system by creating the perception that convicted criminals are escaping incarceration because of technicalities.[18]

This Comment will examine these recent decisions. First, the Comment will explore the role of the prosecutor in closing argument. It will then canvass the limitations on prosecutorial argument imposed by the Law Court. Finally, this Comment will conclude that the opinions in *Steen*, *Casella*, and *Tripp* represent a departure from these judicially established limitations and unduly restrict the prosecutor's ability to cross-examine the defendant and raise legitimate inferences concerning the credibility of a defendant who has testified on his own behalf.[19]

II. THE ROLE OF THE PROSECUTOR IN CLOSING ARGUMENT

The prosecutor in a criminal trial occupies a unique position in the American adversarial system of criminal justice. As leaders of the law enforcement community, prosecutors must use their advocacy skills to wage "war against crime."[20] As elected representatives of the state, prosecutors have a duty to protect the rights of all of the state's citizens, including the accused.[21] These competing objec-

---

18. The tickler in a Portland Press Herald article exemplifies this perception: "Justices have ordered new trials for people convicted of serious crimes because of improper statements." Jason Wolfe, *Maine High Court Cracks Down on Prosecutors' Trial Remarks*, PORTLAND PRESS HERALD, Jan. 8, 1994, at 1A. The fact that after reversal in the three cases discussed in this Comment none of the defendants faced any additional incarceration further reinforces this perception. In *State v. Steen*, Jon Steen pleaded no contest to the same charge and was sentenced to time served. Edward D. Murphy, *Rape Defendant Pleads No Contest*, PORTLAND PRESS HERALD, July 22, 1993, at 1B. In *State v. Casella*, Anthony Casella, reached a plea bargain with the State, agreeing to plead guilty to two counts of felony theft and two reduced charges of misdemeanor theft in exchange for a sentence of time served. Stephen M. Greenlee, *Home Deal Turns Bitter for Couple*, PORTLAND PRESS HERALD, Dec. 5, 1993, at 10B. In *State v. Tripp*, on retrial for the three vacated counts, a jury deliberated for less than an hour before acquitting Linwood Tripp. *Maine's Evening News at Six* (WGME television broadcast, March 23, 1994) (notes of Author).

19. While this Comment's primary concern is expressions of personal opinion in closing argument, because the Law Court in *State v. Steen* and *State v. Tripp* found that the prosecutor's cross-examination technique improperly advanced her personal opinion that the defendant had lied, this Comment will also consider the propriety of the prosecutor's cross-examination of the defendant in the discussion of these two cases.

20. AMERICAN BAR ASSOCIATION, PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION 77 (1974).

21. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 cmt. (1992) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."). *See also* Donnelly v. DeChristoforo, 416 U.S. 637, 648-49 (1974) (Douglas, J., dissenting) (stating that it is not the function of prosecutor to "tack as many skins" as possi-

tives force the prosecutor "to operate with one hand on the throttle and the other poised firmly on the brake."[22]

While codes of professional responsibility and conduct exhort the criminal defense attorney to zealously represent each individual client,[23] the legal profession has long recognized that the special nature of the prosecutor's function requires the application of a different standard.[24] The touchstone enunciated by the courts and the profession is most simply stated as a requirement to do justice.[25] By this critical but vague precept prosecutors must evaluate performance and weigh decisions at each stage of the criminal trial process.[26]

---

ble to the wall, but to "vindicate the rights of the people as expressed in the laws and to give the accused a fair trial"); United States v. Wade, 388 U.S. 218, 256 (1966) (White, J., dissenting) ("Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent."); State v. Wood, 127 Me. 197, 200, 142 A. 728, 730 (1928) (holding that the state is not endeavoring to prove the respondent guilty, but to ascertain whether he is guilty or not).

22. Henry B. Vess, *Walking a Tightrope: A Survey of Limitations on the Prosecutor's Closing Argument*, 64 J. CRIM. L. & CRIMINOLOGY 22, 22 (1973).

23. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. (1992) (providing that a lawyer should act "with zeal"); MODEL CODE OF PROFESSIONAL RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT EC 7-1 (1986) (providing that a lawyer's duty is to represent his client zealously); ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION 4-1.2(b) (3d. ed. 1993) (stating that defense counsel must serve client with "courage and devotion").

24. "The public prosecutor cannot take as a guide for the conduct of his office the standards of an attorney appearing on behalf of an individual client." American Bar Association, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1218 (1958).

25. This precept traces its origins to Berger v. United States, 295 U.S. 78 (1935). In *Berger*, Justice Sutherland reversed the defendant's conviction and issued a strong proclamation that has become a benchmark of prosecutorial conduct:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Id. at 88.

The Law Court has favorably cited *Berger* on several occasions. *See, e.g.*, State v. Reilly, 446 A.2d 1125, 1128 (Me. 1982) (listing other instances where the Law Court has discussed *Berger*); State v. Dana, 406 A.2d 83, 88 (Me. 1979) (quoting language above); State v. Wyman, 270 A.2d 460, 463 (Me. 1970) (prosecutor's duty to bring about a just conviction). *See also*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 cmt. (1992) (stating that prosecutors are "minister[s] of justice"); MODEL CODE OF PROFESSIONAL RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT EC 7-13 (1986) (providing that prosecutors must "seek justice").

26. *See* Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice:*

The American Bar Association has translated the "do justice" standard into guidelines that establish the bounds of the prosecutor's closing argument to the jury.[27] The ABA Standards for Criminal Justice, The Prosecution Function, provide:

> (a) In closing argument to the jury, the prosecutor may argue all reasonable inferences from evidence in the record. The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw.
> (b) The prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.
> (c) The prosecutor should not use arguments calculated to appeal to the prejudices of the jury.
> (d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence.[28]

While Maine has no standards applicable solely to prosecutors, the American Bar Association standards are consistent with the Maine Bar Rules that contain similar language[29] and Maine case law.[30]

Can Prosecutors Do Justice?, 44 VAND. L. REV. 45 (1991).

27. At its 1992 mid-year meeting, the ABA approved substantial revisions to the ABA Standards for Criminal Justice. Included in these revisions was the adoption of a new Standard 3-1.1 entitled "The Function of the Standards":

> These standards are intended to be used as a guide to professional conduct and performance. *They are not intended to be used as criteria for judicial evaluation of alleged misconduct of the prosecutor to determine the validity of the conviction.* They may or may not be relevant in such judicial evaluation depending upon the circumstances.

ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION 3-1.1 cmt. (3d ed. 1993). This amendment makes Standard 3-5.8, Argument to the Jury, even more aspirational and relegates its operative effect to something more akin to an ethical imperative. Appellate courts have repeatedly cited to the ABA Standards as a yardstick by which to measure the prosecutor's conduct. It seems incongruous to promulgate standards that are intended to "guide professional conduct and performance" and then expressly limit their use by appellate courts which are evaluating the performance of the prosecutors. While the commentary to the ABA Standards for Criminal Justice has always indicated that the guidelines were not drafted as "per se rules applicable to post-conviction procedures," even the rules' drafters realize that the rules may be useful for this purpose. *See, e.g.*, AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, COMPILATION, at 64-65 (1974) (stating that while the "[s]tandards may also be useful in providing a yardstick for the evaluation of the effectiveness of a lawyer's conduct when it is called into question by an attack on the validity of a conviction because of his performance" their primary impact is intended to be on the conduct of the individual prosecutor). The adoption by the ABA of an explicit standard limiting the applicability of the guidelines can only be attributed to lobbying by a prosecutor's bar that had grown tired of being beaten by the judiciary with a "yardstick" the lawyers themselves had created.

28. ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION 3-5.8 (3d ed. 1993).

29. *See, e.g.*, ME. BAR R. 3.7(e)(2):

> In appearing in a professional capacity before a tribunal, a lawyer shall not:

These criteria acknowledge the substantial influence the prosecutor wields. The prosecutor's status is a product of both public attitudes and criminal procedure. The prosecutor has the power to determine whom to charge, when and with whom to plea bargain, and even what sentence to recommend to the sentencing judge. "At the local community level, the American prosecutor has more control over the lives and liberty of the individual citizen than any other single person or governmental agency in the United States."[31] The prosecutors' powers and status as elected officials[32] who represent the interests of the state tend to lead jurors to imbue their comments with a sense of trust and expectation of impartiality.[33] The criminal trial's procedural organization also results in the jury's placing even greater emphasis on prosecutors' remarks. Prosecutors make their closing arguments first and, through rebuttal of the defense's closing, have the final opportunity to influence the jury.[34] Improper arguments by prosecutors may not only infringe on enumerated rights of the defendant, such as the privilege against self-incrimination[35] and the right to confront witnesses,[36] but also may

---

(i) Intentionally misquote to a judge, jury, or tribunal the language of a book, statute, or decision or, with knowledge of its invalidity and without disclosing such knowledge, cite as authority, a decision that has been overruled or a statute that has been repealed or declared unconstitutional;
(ii) State or allude to any matter that the lawyer has no reasonable basis to believe is relevant to the case or will not be supported by admissible evidence;
(iii) Ask any question that the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person;
(iv) Assert personal knowledge of the facts at issue, except when testifying as a witness;
(v) Assert a personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but a lawyer may argue, on the lawyer's analysis of the evidence, for any position or conclusion with respect to the matters stated therein . . . .

30. *See infra* notes 41-114 and accompanying text. *See also* State v. Pineau, 463 A.2d 779, 781 (Me. 1983).

31. DAVID M. NISSMAN & ED HAGAN, THE PROSECUTION FUNCTION, at 2 (1982).

32. Generally, in Maine, voters elect district attorneys for four year terms. *See* ME. REV. STAT. ANN. tit. 30-A, § 251 (West Supp. 1993-1994). Only when vacancies occur for reasons other than the expiration of the term, may the governor appoint a substitute district attorney to serve until the next biennial election. *See* ME. REV. STAT. ANN. tit. 30-A, §§ 252, 253 (West Supp. 1993-1994).

33. *See* State v. Smith, 456 A.2d 16, 18 (Me. 1983) (quoting United States v. Gonzalez Vargas, 558 F.2d 631, 633 (1st Cir. 1977) ("the representative of the government approaches the jury with the inevitable asset of tremendous credibility . . . .")).

34. *See* ME. R. CRIM. P. 30(a): "The attorney for the state shall argue first. The attorney for each defendant shall then argue. The attorney for the state shall then be allowed time for rebuttal."

35. ME. CONST. art. I, § 6 provides:

In all criminal prosecutions, the accused shall have a right to be heard by

deny the defendant's fundamental right to due process.[37]

Restrictions designed to temper prosecutors' influence and power do not dilute their responsibility to use closing argument as effectively as defense counsel. Closing argument is the prosecutor's last and best chance to tie together all of the evidence that supports the case against the defendant. Operating within the parameters of the evidence presented, prosecutors may draw upon their oratorical skills and creative impulses[38] to "summarize the case from the perspective of [their] interpretation of all the evidence in the case and the inferences to be drawn therefrom."[39] To meet the obligations of their office during argument before the jury, prosecutors must earnestly and vigorously advance their cases, while at all times respecting the rights of the accused by avoiding language that would cause the jury to decide the guilt or innocence of the defendant on the

---

the accused and counsel to the accused, or either, at the election of the accused;

To demand the nature and cause of the accusation, and have a copy thereof;

To be confronted by the witnesses against the accused;

To have compulsory process for obtaining witnesses in favor of the accused;

To have a speedy, public and impartial trial, and, except in trials by martial law or impeachment, by a jury of the vicinity. The accused shall not be compelled to furnish or give evidence against himself or herself, nor be deprived of life, liberty, property, or privileges, but by judgment of that person's peers or the law of the land.

U.S. CONST. amend. V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

36. *See* ME. CONST. *supra* note 35. U.S. CONST. amend. VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

37. ME. CONST. art. 1, § 6-A provides that "[n]o person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of his civil rights or be discriminated against in the exercise thereof. *See also supra* note 35.

38. 1 CLUCHEY & SEITZINGER, MAINE CRIMINAL PRACTICE, § 30.2 at V-99 (1992): ("While counsel may be creative in argument, creativity must be exercised on the evidence that has been placed before the fact finder.").

39. State v. Liberty, 498 A.2d 257, 259 (Me. 1985).

basis of anything but the facts in evidence.[40]

III. "THE BOUNDS OF FAIRNESS": PERMISSIBLE PROSECUTORIAL ARGUMENT IN MAINE

The Law Court has imposed a variety of limitations on the prosecution's closing argument. These proscriptions can be categorized into four groups: arguments expressing personal beliefs or opinions, arguments designed to inflame the emotions of the jury, arguments based on facts outside the record, and arguments that attack the defendant's defense strategy.

In its eagerness to correct prosecutorial missteps, the Law Court in *Steen*, *Casella*, and *Tripp* labeled as "personal opinion" remarks by the prosecutor that should have been analyzed under other existing limitations on prosecutorial argument. Specifically, in *Casella*, the Law Court should have found that portions of the prosecutor's argument were designed to inflame the jury. In *Tripp*, the Law Court should have identified elements of the prosecutor's summation as an attempt to argue facts not in evidence. Because none of the prosecutorial arguments in these three cases involved comments attacking the defense strategy, the limitations on this type of argument will not be discussed herein.[41]

---

40. *See, e.g.*, United States v. Cotter, 425 F.2d 450, 452 (1st Cir. 1970)

> Essentially, the prosecutor is to argue the case. He may discuss the evidence, the warrantable inferences, the witnesses, and their credibility. He may talk about the duties of the jury, the importance of the case, and anything else that is relevant. He is not to interject his personal beliefs. The prosecutor is neither a witness, a mentor, nor a thirteenth juror. . . . He must not appeal to passion or prejudice of the jury directly, or, by the introduction of irrelevant matter, indirectly.

For an extreme view of the limits of prosecutorial argument see Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 636 (1972), who states that "[t]the prosecutor should not think of oratory as part of his job at all. He should avoid the 'glow and flow of the heat of forensics' and should, in fact, strive for more 'Chesterfeldian politeness.' " (citations omitted).

41. The following is a synopsis of the proscriptions pertaining to attacks on the defendant established by the Law Court. A prosecutor may not comment on the defendant's refusal to testify. State v. Banks, 78 Me. 490, 7 A. 269 (1886). The Law Court has held as a matter of law that any direct comment on the failure of a criminal defendant to become a witness, or any indirect comment that suggests that a jury must accept the state's evidence as true because it is undenied by a criminal defendant, is never harmless error. State v. Tibbetts, 299 A.2d 883 (Me. 1973). *But see* State v. Ingalls, 544 A.2d 1272 (Me. 1988) (improper prosecutorial comment on defendant's failure to testify not grounds for reversal merely because a single juror may have been influenced); State v. Turner, 433 A.2d 397 (Me. 1981) (ambiguous prosecutorial remarks that could easily be construed by the jury as a comment on defendant's failure to testify are not deemed harmful as matter of law, but to be deemed harmless, state must demonstrate beyond a reasonable doubt that the record contains no evidence that would support acquittal). Nor may a prosecutor argue an inference from the defendant's failure to call a witness. State v. Brewer, 505 A.2d 774 (Me. 1985). Finally the prosecutor may not disparage the defendant's defense strategy. State v. McDon-

A. Personal Opinion

The principle concern behind prohibiting prosecutors from offering their opinions in closing argument is to preclude the prosecutor from exploiting the power and credibility of the office to manipulate the jury's assessment of the evidence. This manipulation manifests in two ways. First, prosecutors may attempt to use their personal opinion to draw upon the office's inherent credibility in order to bolster the case. In its simplest form such an argument may be stated as "This is true, because I say it is true." This places the credibility of counsel at issue instead of the guilt of the defendant. This short-circuits the fact-finding function of the trial by telling the jury that prosecutors' opinions are due determinative weight because they are the state's representatives.[42]

Second, prosecutors may imply that their opinions are based on information unavailable to the jury, and should be believed because of the prosecutors' superior knowledge. This argument can be paraphrased, "This is so, because I know a lot more about this case than you do (but I can't tell you)." The jury may regard such expressions of the prosecutor's personal beliefs as the testimony of a witness or the opinion of an expert.[43] This situation may be especially damag-

---

ald, 472 A.2d 424 (Me. 1984) (while the prosecutor may attack the sufficiency of defense evidence, he is not at liberty to disparage the legal principles upon which the defense is based).

42. United States v. Flaherty, 668 F.2d 566 (1st Cir. 1981).

43. The development of Maine Bar Rule 3.7(e)(2)(v) indicates that its drafters intended this rule to proscribe argument where the attorney offers her opinion to inject additional "evidence" into the jury's deliberations.

Maine Bar Rule 3.7(e)(2)(v) states:

> In appearing in his professional capacity before a tribunal, a lawyer shall not: (v) Assert a personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but a lawyer may argue, on the lawyer's analysis of the evidence, for any position or conclusion with respect to the matters stated therein.

ME. BAR R. 3.7(e)(2)(v). Maine Bar Rule 3.7(e)(2)(v) represents a verbatim adoption of ABA Disciplinary Rule 7-106(C)(4). *See* ME. BAR R. 3.7(e) reporter's note ("Rule 3.7(e) sets forth the minimal standards of professional behavior before a court or tribunal. Paragraph (1) states positive mandates and paragraph (2) contains prohibitions . . . . Subparagraphs (ii), (iii), (iv), (v), and (vi) of paragraph (2) are identical to DR 7-106(C)(1), (2), (3), (4), and (6) respectively."). While the drafters of the Maine Bar Rules chose to divorce the Disciplinary Rules of the ABA Code of Professional Responsibility from their accompanying Canons and Ethical Consideration when they incorporated the ABA Disciplinary Rules into Rule 3, because of Maine Bar Rule 3.7(e)(2)(v)'s derivation from the Model Code, its scope and application is best understood by reviewing it in light of the applicable Disciplinary Rule, Ethical Consideration, and Canon. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble (1983) (stating that interpretative guidance in application of Disciplinary Rules is garnered from "the basic principles embodied in the Canons" and "in the objectives reflected in the Ethical Considerations.").

Disciplinary Rule 7-106 is part of Canon 7 of the ABA Model Code of Professional

ing to the defendant when prosecutors suggest their assessments are grounded in additional convincing evidence of guilt not introduced at trial.

The Law Court has condemned closing arguments that attempt to exploit the prosecutor's credibility or imply knowledge of facts not before the jury on the grounds that they are expressions of personal opinion.[44] In *State v. Tomah*,[45] the prosecutor attempted to use his personal opinion in closing argument to bolster his case. The prosecutor told the jury that he believed the police testified professionally, that he thought the tracking dog did a good job, that he knew that people did not forget the names of those with whom they were in the service, and that he thought he had stretched the defendant's credibility to the breaking point.[46] The Law Court found the prosecutor's statements erroneous because the remarks might have di-

---

Responsibility. Canon 7 states "[a] lawyer should represent a client zealously within the bounds of the law." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1983). Thus, the general concept governing the application of DR 7-106, and by implication, ME. BAR R. 3.7(e)(2)(v) is one of zealous advocacy.

Even more illuminating is Ethical Consideration 7-24 which states:

> In order to bring about just and informed decisions, evidentiary and procedural rules have been established by tribunals to permit the inclusion of relevant evidence and argument and the exclusion of all other considerations. The expression by a lawyer of his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused is not a proper subject for argument to the trier of fact. It is improper as to factual matters because admissible evidence possessed by the lawyer should be presented as sworn testimony.

MODEL CODE OF PROFESSION RESPONSIBILITY EC 7-24 (1983). This consideration indicates that the problematic "personal opinion" that the Disciplinary Rule prohibits is an opinion that introduces through argument additional unsworn evidence.

Finally, the representative source cited in Disciplinary Rule 7-106(C)(4) itself reinforces the intent that the rule's application was to limit solely those opinions that, in effect, allowed the attorney to "testify" to the jury. The Model Code cites People v. Dukes, 146 N.E.2d 14, 17-18 (Ill. 1957), where the opinion concluded:

> The record in the case at the bar was silent concerning the qualities and character of the deceased. It is especially improper in addressing the jury in a murder case, for the prosecuting attorney to make reference to *his knowledge* of the good qualities of the deceased where there is no evidence in the record bearing upon his character . . . . A prosecutor should never inject into his argument evidence not introduced at trial. (emphasis added).

Thus, the thrust of DR 7-106(C)(4) and Maine Bar Rule 3.7(e)(2)(v) was and is to advance a general standard of conduct: zealous advocacy. The rule only limits this advocacy where the attorney attempts to go beyond the bounds of established procedural and evidentiary law by introducing personal opinions that the jury might assume were based on knowledge outside that which was presented at trial.

44. State v. Walsh, 558 A.2d 1184, 1187 (Me. 1989) (citing United States v. Cresta, 825 F.2d 538, 555-56 (1st Cir. 1987), *cert. denied sub nom.* Impemba v. United States, 486 U.S. 1042 (1988)).

45. 586 A.2d 1267 (Me. 1991).

46. *Id.* at 1269.

verted the jury from its fact-finding mission.[47]

The Law Court has also held improper, statements indicating the prosecutor's personal belief in the defendant's guilt[48] and remarks representing the prosecutor's opinion as to the strength of the state's case.[49] Prosecutorial comments that begin with phrases such as "I believe" or "I think" are improper.[50] While the court expressed the opinion that jurors are sophisticated enough to understand that not every remark prefaced by these words is an expression of personal opinion,[51] the prudent prosecutor will recognize that "I believe" is a "dirty verb" better off avoided.[52]

Equally prohibited are expressions of personal opinion concerning the credibility of a witness. The weight to be given a witness's testimony is an assessment for the jury. The Law Court has condemned prosecutorial argument that either vouched for the veracity[53] or implied the falsity of testimony when the evidence did not support drawing such an inference.[54]

The Law Court has recognized the difference between prosecutors' statements of their belief in the defendant's guilt and their assessments that the evidence presented proves the defendant's guilt. The Law Court has deemed the latter argument wholly appropriate. While it is ultimately the jury's job to draw inferences, the Law Court has allowed the prosecutor the latitude to "argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated therein . . . ."[55] There is nothing improper, the court has found, about prosecutors attempting to persuade juries to draw an inference unfavorable to the defense, so long as the conclusion is based on evidence presented during the trial and not on the

---

47. *Id.* at 1269-70.

48. State v. Walsh, 558 A.2d at 1187 (prosecutor said he believed beyond a reasonable doubt that defendant was the right person); State v. Reilly, 446 A.2d 1125, 1128 (Me. 1982) (prosecutor argued defense counsel knew defendant was not telling truth).

49. State v. Tomah, 586 A.2d at 1269 (prosecutor told jury that if they sat on a jury for twenty years they would never see a more rock solid case).

50. State v. Walsh, 558 A.2d at 1187 (in opening statement prosecutor said he believed beyond a reasonable doubt that defendant was the right person); State v. Dube, 522 A.2d 904, 908 (Me. 1987) (prosecutor said he thought the state's witness was a very good witness).

51. State v. Walsh, 558 A.2d at 1187 (jurors read nothing more into "I believe" than they read into the prosecutor's decision to prosecute).

52. United States v. Tropeano, 476 F.2d 586, 588 (1st Cir.), *cert. denied*, 414 U.S. 839 (1973).

53. State v. Griatzky, 587 A.2d 234, 236 (Me. 1991) (prosecutor told jury that police officers were telling the truth); State v. Boyd, 401 A.2d 157, 161 (Me. 1979) (prosecutor opined that witness's testimony was credible).

54. State v. Diaz, 556 A.2d 1098, 1099 n.6 (Me. 1989) (prosecutor said defendant's expert could care less what the truth was and said what the defendant wanted him to say); State v. Smith, 456 A.2d 16, 17 (Me. 1983) (prosecutor asserted that defendant had lied).

55. State v. Harnish, 560 A.2d 5, 9 (Me. 1989) (quoting ME. BAR R. 3.7(e)(2)(v)).

prosecutor's personal convictions. Based on this analysis the court has permitted arguments in which the prosecutor called the testimony of defense witnesses "unbelievable"[56] and described the defendant as an "admitted thief and admitted liar."[57]

B. Arguments Designed to Inflame Jury Emotions

Prosecutorial argument aimed at inflaming the passions and sympathies of the jury are the paradigm example of prosecutorial misconduct in closing argument. Emotional argument introduces irrational and irrelevant issues into jury deliberations. This distracts the jury from their intended fact-finding mission and increases the probability of a verdict based on an emotional response rather than on a dispassionate determination of guilt or innocence.

A common means employed by prosecutors to inflame the jury's emotion is abusive name-calling. This type of attack can be highly effective[58] and the legal digests are full of case law finding these colorful terms both proper and improper.[59] Like other forms of prosecutorial misconduct, disparaging remarks are impermissible because they lighten the state's burden of proof by engendering in the jury feelings of prejudice, fear, and loathing towards the defendant. The remarks are also objectionable because they disturb the decorum of the court proceedings[60] and the dignity of the prosecutorial office.[61] The Law Court has found that disparaging remarks not based on the evidence are impermissible. For instance, in *State v. Boyd*,[62] the Law Court held that the state's characterization of the defendant as a "petty thief" denied him a fair trial.[63] The Law Court has also stated that it does not condone the use of pejorative

---

56. State v. Johnson, 472 A.2d 1367, 1373 (Me. 1983).

57. State v. Pendexter, 495 A.2d 1241 (Me. 1985). *See also* State v. Harnish, 560 A.2d at 9.

58. A study conducted by Duke University and the Law Enforcement Assistance Administration concluded that prosecutors who use tough, vivid, abusive, and direct language attain a higher conviction rate than those who are polite in their delivery. *See* NAT. L. J., Dec. 17, 1979, at 6, col 1.

59. *See, e.g.*, Thomas M. Flemming, Annotation, *Negative Characterization or Description of Defendant, by Prosecutor During Summation of Criminal Trial, as Grounds for Reversal, New Trial or Mistrial, Modern Cases*, 88 A.L.R. 4th 8 (1991).

60. *See* ME. BAR R. 3.7(e)(2)(vi) ("In appearing in a professional capacity before a tribunal, a lawyer shall not: Engage in undignified or discourteous conduct that is degrading to the tribunal.").

61. United States v. Rodriguez-Estrada, 877 F.2d 153, 159 (1st Cir. 1989) ("[T]he prosecutor's obligation to desist from the use of pejorative language . . . is every bit as solemn as his obligation to attempt to bring the guilty to account."); United States v. Giry, 818 F.2d 120, 123 (1st Cir.) ("[Pejorative] comments warrant especial condemnation when uttered by the government's attorney . . ."); *cert. denied* 484 U.S. 855 (1987); United States v. Williams, 496 F.2d 378, 384 (1st Cir. 1974) (disparaging comments inconsistent with dignity of government).

62. 401 A.2d 157 (Me. 1979).

63. *Id.* at 161.

terms "such as 'liar' " to describe a witness.[64]

The Law Court has condemned all prosecutorial tactics designed to turn a criminal trial into "a trial by combat rather than a civilized proceeding."[65] Further, it has denounced prosecutorial summation that appeals to jurors' sympathies through the use of emotionally charged and inflammatory remarks.[66] In particular, the Law Court has deemed improper those prosecutorial arguments that appealed to racial prejudice,[67] manufactured sympathy for the victim,[68] engendered animosity towards the defendant and appealed to the jury's self-interest,[69] and presented the jury with issues broader than the guilt or innocence of the defendant.[70]

C. *Arguing Facts Not in Evidence*

A jury, in reaching its determination of guilt or innocence, is limited to considering those facts brought out as evidence during counsels' presentation of their case.[71] The prosecutor should not use summation to put before the jury facts not presented in evidence. Argument that goes beyond the record makes the prosecutor a witness. This unsworn testimony, though worthless as a matter of law, may carry great weight with the jury because of the jury's regard for the prosecutor and may prejudice the fairness of the trial.[72] Prosecutors, therefore, must confine their arguments to the facts proved by direct evidence, to fair and reasonable inferences arising from these

---

64. State v. Reilly, 446 A.2d 1125, 1129 n.2 (Me. 1982).

65. State v. Haberski, 449 A.2d 373, 378 (Me. 1982), *cert. denied sub nom.*, Haberski v. Maine, 459 U.S. 1174 (1983).

66. State v. Burgoyne, 452 A.2d 393, 396 (Me. 1982).

67. State v. Dana, 406 A.2d 83, 86 (Me. 1979) (defense contended that prosecutor's reference to defendant's Native American heritage was intended to incite racial prejudice).

68. State v. Greene, 512 A.2d 330, 334 (Me. 1986) (prosecutor referred to complainant as "this poor little girl, eleven-year-old victim"); State v. Hebert, 480 A.2d 742, 750-51 (Me. 1984) (prosecutor asked the jury to "consider, also, that [the victim] had rights too"); State v. Conner, 434 A.2d 509, 511 (Me. 1981) (prosecutor said "[the victim] may be an elderly man, may not be handsome to everyone except to those who loved him, but that doesn't give [the defendant] the right to kill him, to treat him like a dog, and to have no more thought about it than he would if he'd crushed an insect.").

69. State v. Berkley, 567 A.2d 915, 921-22 (Me. 1989) (prosecutor argued defendant's arson affected juror's insurance rates).

70. State v. Pineau, 463 A.2d 779, 781 (Me. 1983) (prosecutor in an operating under the influence prosecution presented jury with a hypothetical that injected extraneous issues of fear and highway safety into deliberation).

71. United States v. Flaherty, 668 F.2d 566, 579 (1st Cir. 1981).

72. *See* ME. BAR R. 3.7(e)(2)(iv) ("In appearing in a professional capacity before a tribunal, a lawyer shall not:
(iv) Assert personal knowledge of the facts at issue, except when testifying as a witness[.]").

facts, and to the issues of the case.[73]

Based on this general rule the Law Court has found it improper for the prosecutor to move beyond the facts in evidence to matters outside the record. In *State v. Vigue*,[74] the prosecutor argued that his experience in law enforcement had taught him "the way criminals always work."[75] The Law Court found this line of argument improper because "by asserting special knowledge of a criminal *modus operandi*, the prosecutor was, in effect, supplying the jury with additional evidence . . . ."[76] The Law Court has also stated that it will "not condone" prosecutorial reference to prior consistent statements of a state witness not offered in evidence because such remarks go beyond the record.[77] Nor may the prosecutor refer in summation to what an absent witness would have testified.[78] In addition to prohibiting the prosecutor, in closing argument, from referring to matters not in the trial record, the Law Court has also disapproved of the prosecutor misstating the substantative evidence actually admitted[79] and the applicable law.[80]

While prosecutors are limited to argument based on the evidence presented, they are not "restricted to the difficult if not impossible task of providing verbatim renditions of all testimony alluded to."[81] Prosecutors are free to marshall the evidence and reasonably drawn inferences to prove the state's case. Their arguments must be limited to the evidence because forays outside the evidence make prosecutors powerful "witnesses" buoyed by the authority and prestige of the position.

IV. Judicial Response to Improper Argument

Even when the Law Court determines that a prosecutor's argument has travelled into forbidden terrain, there is no certainty that it will vacate the defendant's conviction. The parameters of the prosecutor's argument are further shaped by the actions of defense counsel and the error's prejudicial impact in light of all the circum-

73. State v. Viger, 392 A.2d 1080 (Me. 1978) (citing United States v. Quinn, 467 F.2d 624 (8th Cir. 1972)).

74. 420 A.2d 242 (Me. 1980).

75. *Id.* at 246.

76. *Id.* at 247. *See also* State v. Maclean, 560 A.2d 1088, 1091 (Me. 1989) (it was error for prosecutor to argue that defendant had been drinking "all day" when no evidence had been introduced to support this contention); State v. Marr, 551 A.2d 456, 458 (Me. 1988) (in a case where the state had presented no evidence of the effect of sexual abuse on young children, the prosecutor improperly discussed behavioral patterns of children subject to abuse).

77. State v. Terrio, 442 A.2d 537, 543 (Me. 1982).

78. State v. Prudenzano, 365 A.2d 418, 420 n.4 (Me. 1976).

79. State v. Reeves, 499 A.2d 130, 137 (Me. 1985) (prosecutor referred to a demonstrative aid as evidence).

80. State v. Bahre, 456 A.2d 860, 865 (Me. 1983).

81. State v. Doughty, 554 A.2d 1189, 1192 (Me. 1989).

stances of the trial. The Law Court evaluates the record for circumstances that may cause the court to stay its hand. Among the factors the court considers are the absence of objection by defense counsel to the prosecutorial remark complained of on appeal and the presence of circumstances that render any error harmless.

Generally, the Law Court has liberally applied these doctrines and refused to vacate convictions when the misconduct did not jeopardize the defendant's right to a fair trial.[82] The court recognized a distinction between improper argument that violated a defendant's right to a fair trial and improper prosecutorial conduct that exceeded the ethical bounds of acceptable professional conduct and required the court to rebuke the offending prosecutor, but did not require vacating the verdict.[83] The Law Court only granted a new trial in those cases in which the prosecutor's misconduct, misstatement, or error prejudiced the defendant's ability to receive a fair trial. In *Steen*, *Casella*, and *Tripp*, the court compounded its misapplication of the personal opinion limitation by not applying the level of deference traditionally accorded under the doctrines discussed below.

A. Absence of Objection by Defense

While the court has placed limitations on the scope of the prosecutor's argument, it has also recognized that the prosecutor, like other counsel, must be allowed to engage in vigorous advocacy when addressing the merits of the case in closing argument. In *Rolfe v. Rumford*,[84] the Law Court stated that in closing argument

> [t]he largest and most liberal freedom of speech is allowed, and the law protects [counsel] in it. The right of discussing the merits of the cause, both as to the law and the facts, is unabridged. The range of discussion is wide. He may be heard in argument upon every question of law. In his addresses to the jury, it is his privilege to descant upon the facts proved, or admitted in the pleadings; to arraign the conduct of the parties; impugn, excuse, justify or condemn motives, so far as they are developed in evidence, assail the credibility of witnesses, when it is impeached by direct evidence, or by the inconsistency or incoherence of their testimony, their manner of testifying, their appearance on the stand, or by circum-

82. See *infra* notes 95 and 107-11 for illustrative cases.

83. *See* State v. Dube, 522 A.2d 904, 911 (Me. 1987):

> No one should take our present affirmation as an endorsement of all aspects of the District Attorney's conduct now attacked by Dube's appellate counsel. Our affirmance means only that we find nothing in that conduct, when examined under the established rules of appellate review, that vitiates the validity and basic fairness of the jury's verdict declaring Dube guilty as charged. It means only that setting aside Dube's convictions in these circumstances is too high a price for the public to pay for improprieties committed by the District Attorney during the trial.

84. 66 Me. 564 (1877).

> stances. His illustrations may be as various as the resources of his genius; his argumentation as full and profound as his learning can make it; and he may, if he will, give play to his wit, or wings to his imagination.[85]

The Law Court has given the prosecutor license to argue, as expected by the jury, for the guilt of the defendant without couching her argument in neutral terms. The prosecutor's closing argument, however, is not without limitation. The scope and extent of summation is within the presiding trial court judge's control.[86]

If a prosecutor's summation transcends the bounds of proper argument, the burden is upon defense counsel to object at the earliest opportunity.[87] Recognizing that an immediate objection by defense counsel calls the jury's attention to the prosecutor's remark and may cause the jury to place even more emphasis on the prosecutor's comment, the Law Court has indicated that the error is also preserved for appeal when the defendant immediately makes his position known out of the presence of the jury.[88] By properly objecting, defense counsel gives the trial court the greatest opportunity to correct the error and allow a determination of the case on its merits.[89] Failure to raise an objection will cause the appellate court to review the alleged improprieties only for obvious error.[90]

---

85. *Id.* at 566-67 (citations omitted). *See also* State v. Martel, 103 Me. 63, 68 A. 454 (1907), *error dismissed sub nom.* Martel v. Maine, 218 U.S. 666 (1910):

> As is permitted to the debater in parliamentary contests, the legal advocate may employ wit, satire, invective, and imaginative illustration in his argument before the jury, both in civil and criminal trials, but in this the license is strictly confined to the domain of facts in evidence. This rule of the limitation of his privilege is so often violated by the lawyer in the excitement of trials, and by reason of the temptation to which he is exposed by the importance of the interest which he represents to become a partisan
>
> . . . .

Id. at 455.

86. State v. Liberty, 498 A.2d 257, 260 (Me. 1985) (trial court has discretion to ensure the fair and orderly conduct of trial); State v. Dana, 406 A.2d 83, 86 (Me. 1979) (appellate court should review ruling by an experienced trial justice with restraint and caution); State v. Viger, 392 A.2d 1080, 1084 (Me. 1978) (scope and extent of oral argument is within the sound discretion of the trial judge); Young v. Carignan, 152 Me. 332, 337, 129 A.2d 216 (1957) (discretionary authority of presiding justice to control argument is firmly established); Crosby v. Maine Central R.R., 69 Me. 418, 423 (1879) (within presiding judge's discretion to set scope of argument).

87. State v. Watson, 63 Me. 128, 138 (1873).

88. State v. Tibbets, 299 A.2d 883, 891 n.8 (Me. 1973) (motion for mistrial protected point for appeal).

89. *See* State v. Hinds, 485 A.2d 231, 237 (Me. 1984); State v. McKeough, 300 A.2d 755, 757 (Me. 1973); State v. Boisvert, 236 A.2d 419, 422 (Me. 1967); State v. Smith, 140 Me. 255, 284, 37 A.2d 246, 258 (1944).

90. *See, e.g.*, State v. Varney, 560 A.2d 565, 566 (Me. 1989); State v. Hebert, 480 A.2d 742, 750 (Me. 1984); State v. Langley, 242 A.2d 688, 690 (Me. 1968). *But see* State v. Reilly, 446 A.2d 1125, 1128-30 (Me. 1982) (noting the lack of defense objection to prosecutor's argument, but then proceeding to address the merits of the issue

Obvious errors are "errors or defects affecting substantial rights" that, because of their severity and potential to damage an accused's ability to receive a fair trial, may be noticed by the reviewing court absent an objection.[91] Functionally, obvious errors have been defined not as mere technical errors or the "ordinary backfires" of trial but as "blockbusters" that undermine the fundamental fairness of the trial.[92] The Law Court has articulated this higher standard of recognition for obvious error as the phrase "manifest injustice."[93] Accordingly, "to prevail [under the obvious error standard] an appellant must demonstrate that he suffered a significantly higher level of prejudice . . ." than required where the error was properly preserved.[94] In many cases where the defendant failed to object to the prosecutor's improper comment, the Law Court has used the obvious error doctrine to uphold the defendant's conviction because the impermissible comment did not rise to the level of "manifest injustice."[95]

B. The Harmless Error Rule

When the defense counsel properly objects and preserves the prosecutor's error, the Law Court attempts to determine whether the error influenced the jury to stray from its responsibility to be fair and unbiased. Rule 52(a) of the Maine Rules of Criminal Procedure embodies this requirement.[96]

Grounded in judicial efficiency and economy, the harmless error doctrine's objective is to "free criminal procedure from unnecessary technicality."[97] With respect to prosecutorial forensic misconduct, the purpose of harmless error inquiry undertaken by the court is to ascertain whether it is "highly probable that the jury's determina-

---

under what seems to be a preserved error standard).

91. ME. R. CRIM. P. 52(b): "Obvious Error. Obvious errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

92. United States v. Griffin, 818 F.2d 97, 99-100 (1st Cir.), *cert. denied*, 484 U.S. 844 (1987).

93. *See* State v. Greene, 512 A.2d 330, 334 (Me. 1986); State v. Spearin, 463 A.2d 727, 731 (Me. 1983). For other terms used by the Law Court to describe obvious error see 2 CLUCHEY & SEITZINGER, *supra* note 38, § 52.1 at IX-133 (1992).

94. State v. Dube, 522 A.2d 904, 907 (Me. 1987).

95. *See, e.g.*, State v. Shackleford, 634 A.2d 1292, 1295 (Me. 1993); State v. Marshall, 628 A.2d 1061, 1062 (Me. 1993); State v. Varney, 560 A.2d 565, 566 (Me. 1989); State v. Hebert, 480 A.2d 742, 750 (Me. 1984); State v. Farris, 420 A.2d 928, 935 (Me. 1980); State v. Pullen, 266 A.2d 222, 228-29 (Me. 1970).

96. ME. R. CRIM. P. 52. Maine Rule of Criminal Procedure 52(a) states:

> (a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

97. 3 GLASSMAN, MAINE PRACTICE: RULES OF CRIMINAL PROCEDURE ANNOTATED § 52.1 at 428 (1966).

tion . . . was unaffected by the prosecutor's comments."[98] In reaching its decision, the Law Court evaluates the improper conduct against the backdrop of the entire trial to determine how the misconduct affected the jurors.[99] In assessing the prosecutorial comment, findings of harmless error are common since the Law Court has stated that it will "not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through a lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations."[100]

The court frequently invokes the harmless error doctrine when the trial judge issues a curative instruction. In many cases where an objection is made, the Law Court considers the prosecutor's transgression "cured" if the trial court sustains the objection and either instructs the jury to disregard the argument, rebukes the prosecutor, or both.[101] The primary determining factor with regard to the efficacy of the curative instruction is the force and immediacy of the corrective action.[102] Great deference is given to the trial judge's ability to determine and implement appropriate measures to remove possible prejudice.[103] If the defendant does not object to the curative approach adopted by the trial judge, the defendant will be deemed to have acquiesced.[104] The Law Court has articulated suspicion about jurors' ability to disregard improper argument when so instructed.[105] This fiction is central to our adversary system, however, and the court has adhered to it despite its suspicion.[106] In cases where the trial judge has given prompt and complete curative in-

98. State v. Steen, 623 A.2d 146, 149 (citing State v. True, 438 A.2d 460, 467 (Me. 1981)).

99. *See* State v. Ingalls, 544 A.2d 1272, 1276 (Me. 1988) ("In applying the harmless error rule to an improper prosecutorial comment . . . our judgment must be based on our own reading of the record and on what seems to us to have been the impact of the [improper prosecutorial comment] on the minds of an average jury.") (quoting Harrington v. California, 395 U.S. 250, 254 (1969)).

100. State v. Hinds, 485 A.2d 231, 238 (Me. 1984) (citing State v. Gordon, 321 A.2d 352, 364 (Me. 1974)).

101. *See, e.g.*, State v. Burgoyne, 452 A.2d 393, 396 (Me. 1982) (judge admonished prosecutor and instructed jury); State v. Conner, 434 A.2d 509, 511 (Me. 1981) (after defense objection judge cautioned prosecutor and instructed jury to disregard characterization).

102. *See* State v. Reilly, 446 A.2d 1125, 1129 (Me. 1982) (instruction that was neither prompt nor specific inadequate to alleviate prejudice).

103. *See, e.g.*, State v. Beathem, 482 A.2d 860, 863 (Me. 1984); State v. Brown, 410 A.2d 1033, 1036-37 (Me. 1980).

104. *See, e.g.*, State v. Conner, 434 A.2d 509, 511 (Me. 1981); State v. Brown, 410 A.2d 1033, 1037 (Me. 1980).

105. *See* State v. Gordon, 321 A.2d 352, 363-64 (Me. 1974).

106. State v. Trafton, 425 A.2d 1320, 1324 (Me. 1981) ("In order for the jury system to function, it must be assumed that, absent unusual circumstances, a jury will follow a court's instructions where the instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them.").

structions, the Law Court has found it sufficient only to criticize the prosecutorial tactics without vacating the defendant's conviction.[107] The Law Court has also relied upon the harmless error doctrine to uphold convictions in the presence of prosecutorial misconduct when there was overwhelming evidence of the defendant's guilt;[108] the instances of misconduct were isolated;[109] the defense addressed the prosecutor's improper comment;[110] or, the prosecutor's argument was in reply to defense argument or was in keeping with the tenor of the entire trial.[111]

Many commentators have identified the harmless error as one of the foremost causes of the perpetuation of prosecutorial forensic misconduct.[112] As Senior Circuit Judge Aldrige pointed out after invoking the harmless error rule to uphold a conviction in the face of

---

107. *See, e.g.*, State v. Osgood, 505 A.2d 478, 480 (Me. 1986) (presiding justice's charge eliminated any adverse inference created by prosecutor's misstatement); State v. Beathem, 482 A.2d 860, 863-64 (Me. 1984) (general curative instruction sufficient to cure misleading argument); State v. Burgoyne, 452 A.2d 393, 396 (Me. 1982) (admonishment of prosecutor and instruction cured prosecutor's inflammatory closing argument); State v. Haberski, 449 A.2d 373, 379 (Me. 1982) (trial judge's prompt and complete curative instruction sufficient to cure improper conduct), *cert. denied sub nom.* Haberski v. Maine, 459 U.S. 1174 (1983); State v. Hilton, 431 A.2d 1296, 1302 (Me. 1981) ("Only where there are exceptionally prejudicial circumstances or prosecutorial bad faith will a curative instruction be deemed inadequate to eliminate the prejudice."); State v. Gordon, 321 A.2d 352, 364 (Me. 1974) (general curative instruction that prosecutor's statement is not evidence can salvage the fundamental fairness of the trial); State v. Mottram, 158 Me. 325, 184 A.2d 225, 234 (1962) (proper instruction cured prosecutorial error); State v. Martel, 103 Me. 63, 68 A. 454, 455 (1907) (proper instruction removes "any unjust influence being left upon the minds of the jury from anything said by the attorney for the state"), *error dismissed sub nom.* Martel v. Maine, 218 U.S. 666 (1910).

108. State v. Reeves, 499 A.2d 130 (Me. 1985); State v. Inman, 350 A.2d 582 (Me. 1976).

109. State v. Burgoyne, 452 A.2d 393, 396 (Me. 1982); State v. Conner, 434 A.2d 509, 511-12 (Me. 1981).

110. State v. Boyle, 560 A.2d 556, 557 (Me. 1989) (prosecutor's inaccuracies were properly addressed by defense counsel); State v. Doughty, 554 A.2d 1189, 1192 (Me. 1989) (any prejudice from prosecutor's remarks was remedied by defense counsel's careful explanation).

111. State v. Conner, 434 A.2d at 511-12 (argument which appealed to jury sympathy and highlighted callousness of shooting not improper where defense had claimed shooting was accidental); State v. Kimball, 424 A.2d 684, 691 (Me. 1981) (use of defense counsel's name in closing argument improper, but harmless since prosecutor's argument was a fair reply to defense's argument). *Cf.* State v. Niemszyk, 551 A.2d 842, 844 (Me. 1988) (stating that prosecutor's remark that police had done a good job not obvious error where remark was responsive to defense argument that denigrated police investigation).

112. *See* Vilna Bilaisis, *Harmless Error: Abettor of Court Room Misconduct*, 74 J. CRIM. L. & CRIMINOLOGY 457 (1983). *See also*, Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629 (1972) (harmless error is a procedural snare that deprives appellate review of its potential force); Bennett L. Gershman, *Why Prosecutors Misbehave*, 22 CRIM. L. BULL. 131 (1986) (harmless error is the most significant reason why prosecutors continue to misbehave).

prosecutorial misconduct:

> Although we do not reverse, we cannot avoid repeating that resorting to the harmless error rule has unhappy consequences. If every time the cat complains because junior has pulled its tail father says, "Don't do that again," but does nothing further because the cat appears unharmed, Dr. Spock and others would say that this is no good, for either junior or the cat.[113]

The Law Court has also recognized that there is a danger that its application of the harmless error rule might provide prosecutors with a false sense of security. Thus, the Law Court, when it has applied the harmless error rule, has repeatedly stated that its refusal to vacate the trial court's judgment should not be construed as a ratification of the prosecutor's remarks.[114]

V. *Steen*, *Casella*, and *Tripp*: Redefining Personal Opinion

Collectively, the decisions surveyed in Parts III and IV of this Comment demonstrate that the Law Court has attempted to strike a balance between the prosecutor's duty as advocate and the duty to preserve the fundamental fairness of the trial. These decisions acknowledge that not every characterization of evidence made by a prosecutor in the course of advocacy is interpreted by the jury as a personal opinion. The meaning attributable to the prosecutor's closing argument can only be determined by evaluating the context in which these remarks are made.

In *Steen*, *Casella*, and *Tripp* the court faced situations in which reasonable inferences could be drawn from the evidence that the defendant had not told the truth. The Law Court, however, examined portions of the prosecutor's remarks in isolation instead of in the framework of the evidence presented at trial, and failed to recognize the distinction between "personal opinion" and proper argument based on reasonable inferences from the evidence. By misapplying the "personal opinion" limitation and playing fast and loose with the applicable standard of review, the Law Court in these three cases unduly restricted prosecutorial summation.

A. State v. Steen: *Improper Suggestions*

In *State v. Steen*,[115] the defendant faced two counts of gross sex-

113. United States v. Skandier, 758 F.2d 43, 45 (1st Cir. 1985).

114. *See, e.g.*, State v. Dube, 522 A.2d 904, 911 (Me. 1987) ("No one should take our present affirmance as an endorsement of all aspects of the District Attorney's conduct . . . ."); State v. Reeves, 499 A.2d 130, 137 (Me. 1985) (court "strongly disapprove[d]" of prosecutor's conduct but found vacation of conviction inappropriate sanction); State v. Libby, 410 A.2d 562, 568 (Me. 1980) ("Our unwillingness to reverse the conviction should not be taken as approval of a prosecutorial comment such as that in issue here.") (McKusick, C.J., dissenting).

115. 623 A.2d 146 (Me. 1993).

ual assault[116] arising from an incident in the early morning hours of April 12, 1991. Both parties agreed that they had met at a fraternity party where they had danced and talked. Beyond this point, their stories diverged. Both the victim and the defendant took the stand to tell vastly differing accounts of what had happened that evening, and the trial became largely a contest of credibility.

The state's case consisted of the testimony of the victim, others in attendance at the party, and medical experts. The state's witnesses testified that the victim had repeatedly spurned the defendant's advances, that the defendant had forced his way into a bathroom the victim was using, and had sexually assaulted her, causing injuries consistent with forcible rape.[117] Additionally, the prosecutor introduced inculpatory statements made by the defendant in the hours immediately following his arrest.[118] The defendant, in contrast, testified that "every time he glanced at [the victim], she was . . . already looking at him," that she had danced "seductively" to entice him, and had engaged in consensual sex in the bathroom.[119] The defendant's expert witness attributed the victim's bruises to a drunken fall down a flight of steps[120] and testified that the injuries to the victim's genitalia were not inconsistent with consensual sex.[121]

On appeal, the defendant contended that the prosecutor's tactics during cross examination of the defendant and in closing argument had denied him a fair trial.[122] The defendant pointed out that, over his objection, the court allowed the prosecutor to ask the defendant twenty-four questions requiring him to give his opinion as to the veracity of other witnesses.[123] Also, over a defense objection, the prosecutor asked the defendant argumentative questions concerning

---

116. The statute provides in pertinent part: "A person is guilty of gross sexual assault if that person engages in a sexual act with another person and that person submits as a result of compulsion." ME. REV. STAT. ANN. tit. 17-A, § 253(1)(A) (West Supp. 1993-1994).

117. Brief of Appellee at 2-8, State v. Steen, 623 A.2d 146 (Me. 1993) (No. CUM-92-170).

118. *Id.* at 13.

119. Brief of Appellant at 10-15, State v. Steen, 623 A.2d 146 (Me. 1993) (No. CUM-92-170).

120. *Id.* at 23.

121. *Id.* at 21-23.

122. State v. Steen, 623 A.2d at 148.

123. *Id.* at n.2.

> For example, the prosecutor asked the following questions:
>
> Q. I want you to tell me which statements you say really happened and which statements you're saying Detective Drown is *lying* about.
>
> Q. So Detective Drown is *making this up*?
>
> Q. She [the complainant] is *lying* about this?
>
> Q. Well, you are saying that everything she said to this jury is a *lie*?
>
> Q. And everyone else who testified in this court room all week long was *lying*?

Id.

the inconsistencies in his own statements, such as "[s]o you made this one up own your own?"[124] Finally, in closing argument, the prosecutor attacked the credibility of the defense expert by stating:

> Now at trial [Steen] has got a theory for how [the vaginal tear suffered by the complainant] occurred. And what does he do to advance this theory? He calls Dr. Piver, a medical doctor, no less, flown up specially all the way from Maryland just to testify for Jon Steen. And Dr. Piver sits on this witness stand and he says that that tear, well, that tear wasn't big enough for rape, that tear must have been consensual. . . . *I suggest to you, ladies and gentleman, that his opinion is based on $2,500, the money the defendant paid him for his testimony.*[125]

The Law Court first examined the propriety of the prosecutor's cross-examination of the defendant. The prosecutor's questions, the court found, impermissibly attempted to push the defendant into saying other witnesses had lied, and thus invaded the jury's special province to determine who was telling the truth.[126] The Law Court then considered whether the prosecutor's statements in her cross-examination of Steen and in closing argument had improperly suggested to the jury her personal belief that Steen and his expert witness were lying. In the space of three sentences the court found, without any analysis or explanation, that the prosecutor had "clearly" suggested to the jury that these witnesses were lying:

> Although it is proper for the State to point out inconsistencies in a defendant's statement, it is impermissible for a prosecutor to assert that the defendant lied on the stand. The prosecutor through her cross-examination of Steen and her statements in closing remarks clearly suggested to the jury that she thought these witnesses were lying.
>
> Since we cannot find it highly probable that the jury's determination of Steen's guilt was unaffected by the prosecutor's comments, we vacate his conviction.[127]

Examination of the Law Court's analysis in this case reveals that its holding with respect to prosecutorial expression of personal opinion is a marked departure from existing Maine case law. In previous cases, the Law Court has found expressions of the prosecutor's personal convictions objectionable in two situations: when prosecutors introduce their own credibility into the jury's determination of guilt or innocence, or when they imply that their personal opinions are based on evidence unknown to the members of the jury.[128] Viewed in the context of the entire proceeding, neither the prosecutor's

124. *Id.* at 149 (emphasis omitted).
125. *Id.*
126. *Id.*
127. *Id.* (citations omitted).
128. *See supra* discussion accompanying notes 42-57.

questions nor her suggestion in closing argument qualify as expressions of personal opinion. In *Steen*, the prosecutor's statements did not inject her own credibility into the jury's determination nor did her statements imply that they were based on information not presented to the jury. The court, however, having identified what it believed to be an improper expression of personal opinion, summarily condemned the prosecutor's conduct without attempting to analyze the reasonableness of the prosecutor's remarks in light of the possible inferences that could be raised from the evidence presented at trial. By labeling the prosecutor's statements as "personal opinion," the court broadened the definition of "personal opinion" to include argumentative questions and ill-advised prefatory language.

Looking first at the questions the prosecutor asked Steen on cross-examination, what the Law Court found improper about these inquiries was the prosecutor's suggestion that Steen had "made this one up" and was having trouble "keep[ing] this all straight," which, it found, implied to the jury that Steen was lying.[129] In light of the evidence presented to the jury, these questions, while objectionable for their argumentative nature, were otherwise a proper assault on Steen's defense.[130]

At trial the jury was presented with no less than four versions of what Steen had said transpired: three progressively less inculpatory statements made after his arrest and his even less incriminating testimony on direct.[131] The Maine Rules of Evidence only prohibit eliciting an opinion concerning an ultimate issue when the answer would not be helpful to the trier of fact.[132] The Law Court's holding

---

129. The only indication that this is what the Law Court found objectionable is that in the published opinion the Law Court added emphasis to these portions of the prosecutor's excerpted remarks. *See* State v. Steen, 623 A.2d at 148-49.

130. *See* State v. Johnson, 472 A.2d 1367, 1373 (Me. 1984) (prosecutor's comment indicating that there were three versions of the events before the jury, that they all could not be true, and that only one version was true and the other two were patently false was not error and did nothing more than review the absurdities or discrepancies in the defendant's testimony, which cast an adverse light on his credibility) (citing State v. Smith, 456 A.2d 16, 17 (Me. 1983)).

131. At trial the jury was presented with testimony by the investigating officer that the defendant had related to him three versions of the alleged assault. When the investigator initially confronted the defendant, the defendant stated that he was sorry for the whole incident and that it was his fault. Further, he told the police that the victim had resisted. Brief of Appellee at 11, State v. Steen, 623 A.2d 146 (Me. 1993) (No. CUM-92-170). At the police station the defendant for the first time claimed that the victim's bruises had resulted from a fall down the steps at the fraternity house, but he still admitted that the victim had resisted. *Id.* at 12. In a written statement rendered at the police station, the defendant asserted that the victim had also fallen in the bathroom and that after initial resistance had been a willing participant in the sexual act. *Id.* at 13. Finally, at trial on direct the defendant had characterized the events in the bathroom as consensual. Brief of Appellant at 14, *Steen* (No. CUM-92-170).

132. ME. R. EVID. 701 states in part:

is sound if what the prosecutor was trying to do was elicit a conclusion from the witness that would not help the jury.[133] Here, the prosecutor's inquiries were not an attempt to elicit the defendant's opinion on an ultimate issue; they were an attempt to impeach the defendant through the use of his prior inconsistent statements. The Rules of Evidence permit the prosecutor to impeach a witness's credibility through the use of that witness's prior inconsistent statements.[134] Asking Steen about these inconsistencies drew the jury's attention to his apparently perjurious testimony.[135] While these questions were perhaps inartful, they were not inappropriate.

Steen's defense rested substantially on pitting his credibility against that of the victim. These questions drew the jury's attention to the variances in Steen's testimony and highlighted the implausibility of his story. While the Law Court rightly criticized the prosecutor's cross-examination tactics, the fact that the prosecutor asked pointed and forceful questions indicating her disbelief of the defendant's version of the incident could not have denied the defendant a fair trial.

The Law Court's citation to *State v. Smith*[136] for the proposition that "it is impermissible for a prosecutor to assert that the defendant lied on the stand" is an incomplete and incorrect statement of the law in Maine.[137] Such a statement is only impermissible when it is not supported by the evidence.[138] In *Steen*, the evidence indicated substantial inconsistencies between the defendant's testimony and his previous statements. When the evidence supports such an infer-

---

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

See also ME. R. EVID. 704:

> Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

133. *See* FIELD & MURRAY, MAINE EVIDENCE, § 704.1 at 281 (2d ed. 1987) ("Both Rules 701 and 702 embody a criterion of helpfulness for lay and expert witnesses alike. An opinion that amounts to no more than choosing up sides is plainly unhelpful.").

134. *See* ME. R. EVID. 607: "The credibility of a witness may be attacked by any party, including the party calling him."

135. At Steen's sentencing, the trial judge, Superior Court Justice William S. Broderick, in meting out a five year sentence to the defendant, said of Steen's testimony that, "In [his] twelve years of watching this type of trial that was the most obvious perjury [he had] ever seen." Tess Nacelewicz, *Man Gets Five-Year Term for Rape*, PORTLAND PRESS HERALD, Apr. 18, 1992, at B1.

136. 456 A.2d 16 (Me. 1983).

137. State v. Steen, 623 A.2d 146, 149 (Me. 1993).

138. *See* State v. Harnish, 560 A.2d 5 (Me. 1989) (prosecutor's comment must be fairly based on facts in evidence).

ence, the prosecutor must be free to cross-examine and argue that the defendant is not believable.[139] Any other holding gives the testifying defendant the functional equivalent of an irrebuttable presumption of truthfulness.

The court also found impermissible the prosecutor's use of the term "I suggest" to introduce an inference that the jury might draw from the evidence that the defense expert had received $2,500 for his appearance at trial. While "I suggest" is one of the prosecutorial "dirty verbs," which like the phrases "I think" and "I believe" are better left unsaid,[140] in this case its use was at worst impolitic. This isolated use of "I suggest" to introduce an otherwise legitimate inference concerning a defense witness's bias, drawn from the prosecutor's analysis of the evidence, was inadequate to cause the jury to believe that they should accept the assertion because it represented the prosecutor's personal conviction. Certainly, it would have been proper for the prosecutor to say, "Ladies and Gentleman, when you consider Dr. Piver's testimony, consider whether his opinion is based on $2,500, the money the defendant paid him for his testimony." The unfortunate addition of "I suggest," did not impermissibly inject the prosecutor's personal opinion into this part of the closing. Moreover, even if the remark were considered "personal opinion," very little prejudice could have resulted since the prosecutor's suggestion was not based on information unavailable to the jury, but was based on the doctor's own testimony.[141] The argument's language indicates that the prosecutor was merely calling for the jury to include the amount the witness was paid in their assessment of the witness' credibility, rather than attempting to sway the jury's analysis by introducing her personal belief into the summation. As the Law Court pointed out in *State v. Walsh*,[142] "[j]urors . . . are aware that the role of the prosecutor is to argue for guilt, and might just as well read nothing more into "I believe . . . ."[143]

By not examining the prosecutor's remarks within the framework of the entire trial, the Law Court failed to identify circumstances that rendered the prosecutor's actions harmless error.[144] There was overwhelming evidence of Steen's guilt, including his own admission. In addition, the prosecutor's argument and questions were a fair reply to a defense strategy that placed the defendant's credibility in competition with the victims. Finally, any expression of personal

---

139. State v. Johnson, 472 A.2d 1367 (Me. 1984) (remarks that draw the jury's attention to differing version of evidence are permissible).

140. *See supra* notes 50-52 and accompanying text.

141. *See* State v. Smith, 456 A.2d 16, 19 (Me. 1983) (favorable to State on question of prejudice that improper opinion of prosecutor was based only on facts in evidence and not secret information).

142. 558 A.2d 1184 (Me. 1989).

143. *Id.* at 1187.

144. *See supra* notes 98-111 and accompanying text.

opinion in closing argument was isolated and transitory. By failing to identify the prosecutor's missteps as harmless, the Law Court, in meting out punishment to the prosecutor, placed additional restrictions on the prosecutor's closing argument.

B. State v. Casella: *"Liar"—Inference or Epithet?*

In *State v. Casella*,[145] the Law Court faced the issue of whether a prosecutor's summation alone had prevented the defendant from having a fair trial. In *Casella*, the prosecutor's closing was problematic, but instead of identifying and discussing the actual errors, the Law Court, anxious to punish the prosecutor, mechanically applied the "personal opinion" label to a variety of mistakes and further broadened its definition of "personal opinion."

Casella appealed his conviction on four counts of theft by unauthorized taking[146] and one count of witness tampering.[147] Through his corporation, Case Equipment, Casella marketed the subli-color machine[148] in national magazines such as *Entrepreneur*.[149] Customers who called the advertised toll free number received literature extolling the machine and a phone call from Casella, or one of his salesmen, urging the customer to come to Maine for a demonstration.[150] In three of the incidents for which Casella was standing trial, Casella persuaded interested but still uncertain buyers to give him a check for the value of the machine, between $10,000 and $13,000, so that they could receive follow-up training during their initial visit instead of having to make a separate trip to Maine for the training

---

145. 632 A.2d 121 (Me.), *withdrawn*, 629 A.2d 608 (Me. 1993).

146. ME. REV. STAT. ANN. tit. 17-A, § 353(1) (West 1983).

147. ME. REV. STAT. ANN. tit. 17-A, § 454(1)(A)(2) (West Supp. 1993).

148. The subli-color machine allegedly transposed images onto t-shirts and mugs. State v. Casella, 632 A.2d at 121. These theft counts, however, were not the only time Anthony Casella's business had run afoul of the law. Casella moved his printing business to Maine in 1984, after the Massachusetts Attorney General began an investigation into his trade practices. *Printing Firm Targeted by FTC*, PORTLAND PRESS HERALD, July 20, 1989, at 40. Moreover, in July of 1989, the Federal Trade Commission brought suit in United States District Court against Anthony Casella's company, Case Equipment, alleging that Case had bilked customers nationwide out of thirty eight million dollars by selling the same Subli-color System that was at issue in the state prosecution. The FTC described the subli-color machine as "nothing more than an outdated mimeograph machine that tended to shake violently and jam." *Printing Equipment Dealer Faces Court Today*, PORTLAND PRESS HERALD, July 21, 1989, at 24. In August of 1991 Casella reached a settlement with the FTC, promising to pay $250,000 to the Federal Government and to stop selling printing equipment for ten years. *Printing Machine Salesman Guilty of Theft*, PORTLAND PRESS HERALD, Sept. 19, 1991, at 5D.

149. Brief of Appellant at 4, State v. Casella, 632 A.2d 121 (Me.), *withdrawn*, 629 A.2d 608 (Me. 1993) (No. CUM-92-426).

150. Brief of Appellee at 4, 21, 31, State v. Casella, 632 A.2d 121 (Me.), *withdrawn*, 629 A.2d 608 (Me. 1993) (No. CUM-92-426).

after purchase.[151] Casella promised each customer that he would return the check if they decided not to buy, and that he would cash the check only if they told him they wanted the machine.[152] In each instance, Casella cashed the check and shipped the equipment without regard for whether the customer had actually consented to the purchase.[153] The fourth theft count resulted from Casella's convincing a customer, who had told him she was not interested in the subli-color, that his company could deliver the machine she was interested in for substantially less money.[154] Based on Casella's statements, this customer sent Casella $10,000 and received in return a subli-color machine.[155]

At trial, the defendant characterized the four disputed transactions as business quarrels that belonged in civil court.[156] The prosecutor attempted to use discrepancies between the testimony of his witnesses and that of the defendant to demonstrate that Casella deceived his customers in order to take advantage of them.[157] The parties' strategies made the major issue at trial the credibility of the prosecution and defense witnesses. In closing argument, the prosecutor, advancing his central theme that Casella used deceptive tactics to steal from his customers, referred to the defendant as a "liar" and to the defendant's statements, both in-court and out-of-court, as "lies."[158] Defense counsel did not object to this characterization, but

---

151. *Id.* at 6, 22, 32.

152. *Id.*

153. *Id.* at 8, 24, 33. One customer did agree to buy the subli-color machine, but upon receipt found the machine was used and inoperable. *Id.* at 32-33.

154. *Id.* at 15-19.

155. *Id.*

156. *See* State v. Casella, 632 A.2d at 124 (Rudman, J., dissenting). *See also* Brief of Appellant at 2-3.

157. Brief of Appellee at 39.

158. State v. Casella, 632 A.2d at 121-22. The majority opinion points out that the prosecutor asserted his opinion, not less than 41 times, that Casella had lied. Here, in fuller context, are some of those instances:

> Now, as the trial in this case progressed and as the evidence came in, it became apparent that the theory of the defense is really the basic principal upon which Anthony Casella operated his business. It's this basic attitude toward these four victims that you've heard from and it's this. Anthony Casella will say anything. He will do anything. He will tell any lie to get your money. And once he's got it, once he's managed to separate you from your money, he ships the equipment whether you want it or not . . .

Brief of Appellee, App. at 9-10.

> In his way of thinking and acting in his world of lies and deception he's created the perfect crime. Once you've been hooked by him, once he's got your money, you're in a maze of deception you'll never get out of and you can never find your money.
>
> What Anthony Casella didn't count on ladies and gentlemen, was [the victims] who said "we are not going to let you get away with this. We're not giving up. We're not going away. How dare you steal from us and just ignore me."

moved for a mistrial immediately following the prosecutor's completion of his argument.[159] The trial judge denied the defense's motion for a mistrial and upon conviction the defendant appealed.[160]

In a four-to-three decision the Law Court held that the prosecutor had been overzealous in his summation to the jury.[161] The court reasoned that, since the trial was largely a credibility contest, the prosecutor's repeated references to the defendant as a "liar" had denied the defendant a fair trial.[162] The court held that it was clearly erroneous for the trial judge to deny the defendant's motion for mistrial.[163] Citing its recent decision in *State v. Steen*, the Law Court stated that it had repeatedly held that it was "improper for a prosecutor to express an opinion on the credibility of a defendant."[164] In this case, because the defendant had not admitted to lying, the court

---

> . . . But most of all, ladies and gentlemen, he didn't count on you. According to his theory of how things were supposed to work, this trial was not supposed to happen . . . . You were never suppose [sic] to learn what really happened . . . . You were never supposed to see the evidence. You were never suppose [sic] to hear him explain his lies.

Brief of Appellee, App. at 11-12.

> What do you look at to assess a person's state of mind? Well, you look at the very things you look at in every day life. And you use your common sense. You look at what a person says and what a person does. If a person is lying, that is telling you about his intent. That tells you about his lack of good faith. If a person is lying, he wants to hide something. And if he wants to hide something, he doesn't want you to know the truth and if he doesn't want you to know the truth, he doesn't want you to know what he's really thinking about. And that's how to tell that Anthony Casella meant to steal because remember what I said he'll say anything. He'll do anything. He will tell any lie that has to be told to get and keep the money. And that includes lying to his attorneys and lying to you on that witness stand.

Brief of Appellee, App. at 15.

> And he had one big problem and the name of that problem was Al Daniel. You saw and heard that man testify last Friday. I leave it to you to assess that man's credibility and believability. I won't belabor the contradictions, the inconsistencies, the lack of recall and recollection. At one point he said it was just an oversight it wasn't signed and then it all became Michael McMurray's fault. At one point he said he had mailed the check but then he testified on the stand Michael McMurray said, "don't take the check." All his fault. Anthony Casella was hoping he could explain himself out of Osterland's problem by blaming it on the inexperience of Al Daniel. The problem is that birds of a feather flock together. Anthony Casella and Al Daniel couldn't keep their lies straight.

Brief of Appellee, App. at 37. Considering the prosecutor's theory of the case, that Casella had perpetrated these thefts by deception, it seems inevitable that the prosecutor would refer to the statements Casella had made to his customers as lies. If Casella wasn't lying, there was no crime.

159. State v. Casella, 632 A.2d at 122.
160. *Id.*
161. *Id.*
162. *Id.* at 124.
163. *Id.* at 123-24.
164. *Id.* at 122-23.

held that the prosecutor's inference was an improper expression of opinion concerning the veracity of the witness which interjected the prosecutor's credibility into the jury's analysis of guilt or innocence.[165]

The dissent, by analyzing the prosecutor's closing more thoroughly, concluded that, "when read (1) in its entirety, [and] (2) in

---

165. *Id.* at 123. On November 9, 1993 the Supreme Judicial Court ordered the decision in *State v. Casella* published at 629 A.2d 608 (Me. 1993) withdrawn and replaced. The majority opinion had been modified in two places. The original opinion at 610 stated:

> On appeal, the State acknowledges that "the prosecutor attacked Casella's credibility by suggesting that Casella lied to the jury while on the witness stand" but argues that his "characterization of the defendant's testimony as 'lies' . . . was not an expression of personal opinion." We disagree. Absent an admission by the defendant that he had lied to the jury, the prosecutor's characterization of defendant's testimony can represent nothing other than his opinion. The prosecutor may well believe in the correctness of his opinion and his belief may even be well founded but it is an opinion nonetheless.

In the modified decision this passage was replaced with the following:

> On appeal, the State acknowledges that "the prosecutor attacked Casella's credibility by suggesting that Casella lied to the jury while on the witness stand" but argues that his "characterization of the defendant's testimony as 'lies' . . . was not an expression of personal opinion." We disagree. The prosecutor may well believe in the correctness of his opinion, and his belief may be well founded but it is an opinion nonetheless.

State v. Casella, 632 A.2d at 122. The original opinion at 611 stated:

> Here, Casella objects to the prosecutor's assertion that he had lied to the jury. Casella had not admitted lying to the jury, and thus the prosecutor's comments were not fairly based on the evidence. Absent an admission by Casella, it was for the jury, not the prosecutor, to determine which witnesses were telling the truth.

In the reissued decision this passage was replaced with the following:

> Here, Casella made no such admission. It was for the jury, not the prosecutor, to determine which witnesses were telling the truth.

State v. Casella, 632 A.2d at 123.

By removing the language concerning the prosecutor's comment not being "fairly based on the evidence" and the "absent an admission" language, the court forecloses a future prosecutor who comments on the credibility of the defendant from arguing that the attack was proper because the defendant had admitted his deceit. While the Law Court states that this case is distinguishable from State v. Pendexter, 495 A.2d 1241 (Me. 1985), where the defendant admitted lying, the language of the *Casella* opinion narrows *Pendexter*, allowing the prosecutor to raise the inference that the defendant has lied only in those rare cases where the defendant admits to lying on the stand. This is a departure from Law Court's previous decisions. In the wake of *Casella*, even where the prosecutor's belief that the defendant has lied is "well founded" on the evidence, it seems that the Law Court would find that the prosecutor is barred from arguing this inference to the jury. Thus, the natural and probable consequences of this rewrite, in particular, and the *Casella* decision as a whole is that, even in cases where the defendant has admitted to lying, the Law Court will be highly suspect of any comment made by the prosecutor concerning the credibility of a witness.

the context of the nature of the charges against Casella," the prosecutor's summation was fairly based on the evidence introduced at trial.[166] The dissent portrayed the prosecutor's description of the defendant as nothing more than an artful closing argument performed with allowable vigor and zeal that was well within the bounds of fairness prescribed by the court.[167] The dissenting justices added that even if they conceded that the prosecutor's summation was improper, they would sustain Casella's conviction based on the "overwhelming evidence of guilt" and the curative instructions offered by the trial judge.[168]

In *Casella*, as in *Steen*, the Law Court failed to recognize the distinction between a prosecutor improperly expressing a personal opinion, and properly suggesting to the jury a fair and reasonable inference drawn from the evidence. The majority ends its inquiry as soon as it identifies the impermissible "personal opinion." By ending its analysis at this point the court failed to place the comments in the context of the trial to determine whether the offending comments could possibly be a reasonable inference based upon the evidence presented. While it is impermissible for the prosecutor to state that the defendant has lied on the stand when the evidence does not support the inference, not every prosecutorial statement concerning the defendant's credibility is an impermissible expression of "personal opinion."[169] A proper analysis of the prosecutor's comments in this case demonstrates that the Law Court was only partially correct. The prosecutor's argument in this case was improper, not because it represented an expression of his personal convictions, but because portions of the argument were designed to inflame the jury and produce a conviction based on something other than an unprejudiced analysis of the evidence.

The prosecutor's comments that the defendant had lied were a proper attack on the plausibility of the defendant's alibi. During his trial, Casella took the stand and presented an alibi that asserted that the substance of the charges against him were little more than business disputes that his disgruntled customers had blown out of proportion.[170] His testimony contradicted the corroborated testimony of the prosecutor's witnesses and was also inconsistent with statements he had made to investigators.[171] Moreover, a proper interpretation of Maine Bar Rule 3.7(e)(2)(v) limits only those expressions of the prosecutor's opinion that indicate the opinion is not

166. *Id.* at 124.
167. *Id.*
168. *Id.* at 125.
169. *See supra* notes 55-57 and accompanying text.
170. *See supra* note 156.
171. Brief of Appellee at 45-50.

based on matters in evidence.[172] The Law Court has held that the prosecutor may comment on the adequacy of defense evidence,[173] and may argue for any position with respect to the credibility of a witness, so long as these arguments are based on an analysis of the evidence.[174] Within the parameters of permissible argument must be included the latitude to raise an inference based on discrepancies in the defendant's testimony that the defendant was not credible, when such an inference is warranted by the evidence.

In *Casella*, by suggesting that the defendant lied, just like he had lied to the victims while committing his crimes, the prosecutor was merely using popular and understandable terms to ask the jury to assess the plausibility of the defendant's alibi in light of the evidence. Rather than expressing a personal belief, the prosecutor was attempting to persuade the jury to draw the inference that he had suggested. The prosecutor repeatedly told the jury that they were the ultimate judges of "credibility and believability."[175] It comes as no surprise to the jury that the prosecutor believes in the strength of the case and the guilt of the accused.[176] In this context, prosecutorial

---

172. *See supra* note 43.

173. *See supra* note 41.

174. State v. Vigue, 420 A.2d 242, 246-47 (Me. 1981). *See also supra* notes 38-39, 55-57 and accompanying text.

175. The prosecutor prefaced each of his discussions of the substantive counts by reminding the jury that they were the ultimate arbiters of credibility:

> Count 1 involves Cindy Khoury. The young woman from Texas. You saw her. You heard her testimony. You determine. It's up to you. You determine whether you find her credible and believable. You decide whether her testimony was consistent with the evidence. It's your province.

Brief of Appellee, App. at 16.

> Count 2 involves Helen Piantedosi, the woman from New Hampshire. And you saw her. You heard her testimony. You determine, it's all up to you, you determine whether you found her credible and believable. You decided whether her testimony was consistent with the evidence.

Brief of Appellee, App. at 23.

> Count 3 involved Joanne Osterland of Connecticut. You saw her. You heard the testimony. You judge whether you find her credible and believable. It's up to you. You decide whether her testimony is consistent with evidence.

Brief of Appellee, App. at 31.

> Count 4 involved Teresa Monroe from California. You saw her. You heard her testimony. You judge whether you find her believable and credible. You decide whether her testimony is consistent with the evidence.

Brief of Appellee, App. at 39.

> That brings us to Anthony Casella. You had the opportunity to watch him. You had the opportunity to hear his testimony. You judge his credibility. You judge his believability. You determine whether his testimony is consistent with the evidence. You compare his testimony to that of Cindy Khoury, Helen Piantedosi, Joanne Osterland and Teresa Monroe and other witnesses who testified in this case.

Brief of Appellee, App. at 45.

176. State v. Walsh, 558 A.2d 1184, 1187 (Me. 1989). The entire criminal adjudicative process reinforces the prosecutor's belief in the defendant's guilt. *See generally*

comments that the defendant had lied to the jury did nothing more than suggest an inference based on the evidence, a proper subject for comment by the prosecutor, which the jury understood, from both the prosecutor's closing and the instructions, that they were free to accept or reject.[177]

The majority's cursory condemnation of the use of the term "lie" illustrates that this term is especially problematic for prosecutors. For instance, in *State v. Smith*,[178] the prosecutor characterized "apparently conflict[ing]" statements of the defendant as "lies."[179] While Webster's New Collegiate Dictionary defines a "lie" as an untrue or inaccurate statement that the speaker may or may not believe to be true,[180] the Law Court in *Smith* found that the prosecutor had impermissibly expressed his personal opinion.[181] The court has never fully explained why the prosecutor's use of "lie" or "liar" represents a "personal opinion." Senior Circuit Judge Coffin, writing for the First Circuit Court of Appeals, has offered one explanation of why the court abhors prosecutorial use of conclusory terms such as "lie." The prosecutor, Coffin suggests, by directly accusing the defendant of lying, approaches the precipice of prosecutorial misconduct because such comments may lead the jury to believe that the prosecutor's statement is a "personal opinion" based on information not in evidence.[182]

The Law Court's perfunctory designation of the prosecutor's closing argument in *Casella* as "personal opinion" failed to recognize more fundamental errors in the summation and squandered the opportunity to educate the state's prosecutors. The Law Court has previously stated that the use of "liar" may be objectionable for other, simpler reasons than that it is an expression of personal opin-

---

Randolph N. Jonakait, *The Ethical Prosecutor's Misconduct*, 23 CRIM. L. BUL. 550 (1987). Seeing defendants plead guilty in weak cases and being found guilty by juries, the prosecutor comes to believe that not only the convicted but even the accused are guilty. Additionally, having served as investigator, judge, and jury, in the protracted pretrial phases of each defendant's case, when the prosecutor enters the courtroom she is convinced of the defendant's guilt and inevitably endeavors to gain a conviction. Whitney North Seymour, Jr., *Why Prosecutors Act Like Prosecutors*, 11 REC. OF N.Y.C.B.A. 302, 312-13 (1956) (when prosecutors decide to prosecute it is only after they have satisfied themselves of the defendant's guilt); Carol A. Corrigan, *On Prosecutorial Ethics*, 13 HASTINGS CONST. L. Q. 537, 542 (1986) (no prosecutor should charge or handle a case at any stage of its progress through the system unless he is personally satisfied that the defendant is guilty).

177. *See, e.g.*, State v. Harnish, 560 A.2d 5, 10 (Me. 1989) ("When the prosecutor argued that Harnish had not told the truth . . . he was really doing nothing more than stating the principal factual issue before the jury. In context, the prosecutor was not asking the jury to accept his judgment on [the defendant's] credibility.").

178. 456 A.2d 16 (Me. 1983).

179. *Id.* at 17.

180. WEBSTER'S NEW COLLEGIATE DICTIONARY 656 (1979).

181. State v. Smith, 456 A.2d at 17.

182. *See* United States v. Garcia, 818 F.2d 136, 143-44 (1st Cir. 1987).

ion.[183] "Liar" is a pejorative term.[184] While the prosecutor may not have been expressing his personal opinion, by repeatedly using the term he disparaged the defendant and cultivated feelings of opprobrium and scorn about the defendant among the jurors. The Law Court has held that such appeals to the jury are impermissible.[185] Additionally, the Law Court noted that the prosecutor concluded by telling the jury that "they should not 'let Casella walk out of this courtroom thinking he could con you,' that they should 'do their duty and convict him,' and avoid becoming 'his next victim.' "[186] The court condemned these comments because it found that they "went directly to credibility."[187] While the comments were improper, it was not because they were comments on the credibility of the witness. The comments addressed the consequences of an acquittal and introduced issues broader than guilt or innocence for the jury to consider.[188] The prosecutor's remark also misrepresented the duty of the jury: the jury's duty is not to convict, but to engage in a dispassionate analysis of the evidence and arrive at a determination of the accused's guilt or innocence.[189] These comments improperly attempted to appeal to the jury's emotions and prejudice, thereby

---

183. *See supra* notes 58-64 and accompanying text.

184. One might contend that "liar" is merely invective, not disparaging, and therefore permissible. *See* State v. Martel, 103 Me. 63, 68 A. 454 (1907), *error dismissed sub nom.* Martel v. Maine, 218 U.S. 666 (1910). Thus an isolated use of "liar" may withstand judicial scrutiny while repeated use may be condemned because the court views persistent use of pejoratives as indicative of the prosecutor's bad faith. *See infra* note 198 at 270-71. This line between what is merely insulting and permissible and what is unduly inflammatory is difficult to demarcate. The line between proper and improper behavior "can only be located through a sense of fitness and taste and an appreciation of the prosecutor's proper role. Those who cannot discern that line with confidence had best stay a safe distance away from it." United States v. Spain, 536 F.2d 170, 175-76 (7th Cir.), *cert. denied*, 429 U.S. 833 (1976) (citations omitted).

185. *See supra* notes 64-70 and accompanying text.

186. State v. Casella, 632 A.2d 121, 123-24 (Me.), *withdrawn*, 629 A.2d 608 (Me. 1993).

187. *Id.* at 124.

188. *See supra* notes 66-70 and accompanying text. *See also* United States v. Maccini, 721 F.2d 840, 845 (1st Cir. 1983) (prosecutor's closing argument, which stated that a finding of not guilty would "aid and abet" the defendant and that it would be the "final irony" if the defendant "having orchestrated lies . . . were finally able to sell" his story to the jury, was improper because the argument was designed to inflame the jury).

189. *See, e.g.*, United States v. Young, 470 U.S. 1 (1985) (urging jury to do its job has no place in criminal justice). *See also*, United States v. Mandelbaum, 803 F.2d 42, 44 (1st Cir. 1986) ("[The] prosecutor had erred in urging a jury to 'do its job' and convict. . . . Cases are to be decided by a dispassionate review of the evidence admitted in court. There should be no suggestion that a jury has a duty to decide one way or the other; such an appeal is designed to stir passion and can only distract a jury from its actual duty: impartiality."); Carpintero v. United States, 398 F.2d 488 (1st Cir. 1968) (jury's duty is to consider and decide case on its merits).

reducing the prosecution's burden of proof and resulting in a conviction based on the jury's outrage rather than its reasonable belief in the defendant's guilt.

Having reached the conclusion that many of the elements of the prosecutor's argument were improper, the next step of the analysis is to determine whether the improprieties were sufficiently egregious to warrant reversal. Casella's counsel failed to object, but instead moved for a mistrial at the conclusion of the trial. Thus, as the Law Court pointed out, the trial court's decision to deny the motion for mistrial should be reviewed for abuse of discretion with reversal warranted only if the trial court's denial was clearly erroneous.[190] This high standard grants much deference to the trial judge and requires vacation of judgment only when the trial judge's ruling has "plainly and unmistakably" done an injustice.[191] The Law Court has stated that a trial court should grant a mistrial only "in the rare case when the trial cannot proceed to a fair result and no remedy short of a new trial will satisfy the interests of justice."[192]

In *Casella*, the trial judge, who had sat through the entire trial, determined that a new trial was not warranted. In addition, the trial judge included in his final instructions to the jury a "clear curative instruction" addressing the jury's use of closing argument in their deliberations.[193] Despite these actions by the trial judge, the Law Court's decision indicates that it found the trial judge's denial of the motion for mistrial an abuse of discretion and that the error prejudiced the defendant's ability to receive a fair trial.[194] In reaching this decision, the court granted little deference to the presiding judge who had the benefit of gauging the impact of the prosecutor's closing against the context of the entire trial.[195]

Under the abuse of discretion standard, it is difficult to identify the clear palpable abuse of discretion or error of law in *Casella* that would require review by the appellate court. As the dissent correctly concludes, under the abuse of discretion standard, in light of the tenor of the entire case, the appropriateness of the argument, and the curative instruction given by the judge in his instructions to the

190. While the Law Court had previously reviewed cases where there was no objection under a preserved error standard, it has usually explained why it did so. *See supra* notes 88 and 90.

191. Young v. Carignan, 152 Me. 332, 337, 129 A.2d 216, 218 (1957). *See also* 5 C.J.S. *Appeal and Error* § 772 (1993).

192. State v. Mason, 528 A.2d 1259, 1260 (Me. 1987).

193. State v. Casella, 632 A.2d at 125.

194. *Id.* at 123-24.

195. Previously the court has granted the judge much greater deference. *See supra* note 103 and accompanying text. *See also* State v. Mason, 528 A.2d at 1260 (in determining whether there is clear error, deference is given to the trial court's decision that curative instruction adequately protects against jury consideration of matters that the jury is instructed to disregard).

jury, it was not an improper or erroneous exercise of the trial court's discretion to deny the defendant's motion for a mistrial.[196]

The majority's willingness to apply a standard that it otherwise found difficult to satisfy and its preoccupation with quantifying the prosecutor's misconduct suggests that the court's primary mission in this case was to deter future misconduct rather than to ensure the fairness of the trial. The *Casella* majority emphasized the persistent nature of the prosecutor's description of the defendant as a liar.[197] If the function of appellate review was to assure the fairness of Casella's trial, the emphasis on whether a remark was made repeatedly would be irrelevant. The fact that a comment was made repeatedly or intentionally does not result in per se reversible error: a solitary comment could skew the fairness of a trial while a repeated comment may have no effect. By highlighting the prosecutor's recurring impropriety it seems as if the court is attempting to establish that the conduct was planned and intentional and, thus, that the prosecutor should be sanctioned.[198] This analysis, and its underlying purpose of vacating a conviction to "sanction" the prosecutor, gives short shrift to the actual issue of whether the defendant was denied a fair trial.

Application of the majority's analysis in *Casella* could have disastrous and unwanted consequences. The Law Court's opinion advances the theory that it is impermissible for the prosecutor even to suggest that he believes the defendant has lied on the stand and that any such statements will be closely scrutinized where "credibility is a crucial issue."[199] In any instance where the defendant testifies and denies the prosecution's case, credibility of the witnesses takes center stage. Following the Law Court's reasoning, any statement by the prosecutor that draws the jury's attention to these inconsistencies would impermissibly suggest to the jury that the pros-

---

196. State v. Casella, 632 A.2d at 125 (Rudman, J., dissenting). *But see* State v. Marr, 551 A.2d 456, 458 (Me. 1988) ("The court gave a full curative instruction concerning counsel's arguments as a part of its charge to the jury at the close of argument . . . . Because the curative instruction addressed the impropriety presented in the State's closing argument, the court . . . properly denied Marr's motion for mistrial.") (citing State v. Mason, 528 A.2d 1259, 1260 (Me. 1987)).

197. State v. Casella, 632 A.2d at 121 ("During his closing argument, the prosecutor, not less than forty-one times, asserted his opinion that Casella had lied. On at least seven of those occasions, the prosecutor's view related to Casella's in-court testimony.").

198. Richard G. Singer, *Forensic Misconduct by Federal Prosecutors—and How it Grew*, 20 ALA. L. REV. 227, 270 (1968). Singer notes:

> [I]t must be clearly understood that two separate and distinct points are raised by every such case [of allegedly improper statements]: whether the impropriety was planned, a question of the prosecutor's intent and good faith; and whether, regardless of the motive of the prosecutor, the conduct was in fact prejudicial to the defendant's rights.

199. State v. Casella, 632 A.2d at 123.

ecutor believes the defendant's testimony was incredible. Tactically, the unscrupulous defendant would benefit from taking the stand and fabricating an alibi that the prosecutor, under the holdings of *Steen* and *Casella*, would be unable to refute on cross-examination or closing argument because it might suggest to the jury the prosecutor's belief that the defendant lied.

The Law Court could not have intended to introduce this dynamic into the criminal trial process. The decisions discussed in Part II of this Comment consistently sought to strike a balance between the defendant's right to a fair trial and the prosecutor's duty to forcefully prosecute individuals indicted by the state's citizens. In *Casella*, the Law Court skewed this balance by broadening the definition of personal opinion and failing to recognize actual errors in the prosecutor's summation. The prosecutors' duty to ensure that a defendant receives a fair trial should not mean that closing arguments must be cloaked in terms of "antiseptic neutrality."[200] Prosecutors may, without undermining the fundamental fairness of the defendant's trial or their ethical obligations, comment on gross and obvious falsities in the defendant's testimony.

C. State v. Tripp: *Further Limits on Prosecutorial Argument*

State v. Tripp[201] again presented the Law Court with a case in which the defendant claimed the prosecutor denied him a fair trial through improper cross-examination and closing argument. In *Tripp*, the defendant was charged with six counts of gross sexual assault.[202] Like *Casella* and *Steen* before it, the credibility of the witnesses was the controlling issue. The guilt or innocence of the accused turned almost entirely on the jury's evaluation of the conflicting testimony of the defendant and the victim. The prosecutor again highlighted these discrepancies to the jury in closing argument, but unlike the two cases previously discussed, defense counsel failed to object or move for a mistrial. In this instance the Law Court's review was limited to obvious error.[203] Despite this higher

---

200. United States v. Hunnewell, 891 F.2d 955, 957 (1st Cir. 1989), *aff'd* 923 F.2d 839 (1st Cir. 1990). *See also* Palmariello v. Superintendent of M.C.I., Norfolk, 873 F.2d 491, 494 (1st Cir.), ("no defendant is entitled to a wholly sanitized description of the charged crime or to a prosecutorial summing-up confined to platitudes and euphemisms") *cert. denied sub nom.*, Palmariello v. Butler, 493 U.S. 865 (1989).

201. 634 A.2d 1318 (Me. 1994).

202. ME. REV. STAT. ANN. tit. 17-A, § 253(1)(B) (West Supp. 1993-1994) provides in pertinent part:

> 1. A person is guilty of gross sexual assault if that person engages in a sexual act with another person and:
>
> . . . .
>
> B. The other person, not the actor's spouse, has not in fact attained the age of 14 years.

203. *See supra* notes 87-95 and accompanying text.

standard, the Law Court found the prosecutor's actions sufficient to require reversal. Its decision reinforced its confused application of the "personal opinion" label, and redefined the obvious error standard of review.

In *Tripp*, a father stood accused of six counts of gross sexual assault against his son.[204] The prosecutor alleged that the assaults occurred over a three year period while the child was between five and eight years of age. Aside from the victim's graphic testimony there was no direct evidence and little circumstantial evidence corroborating the victim's accusations.[205] On direct examination the defendant stated that his son's incriminations were false and resulted from the boy's perception that the defendant had abandoned him.[206] On cross-examination the prosecutor asked the defendant a number of questions about whether the victim was lying.[207] During closing, the prosecutor attempted to have the jury infer from the victim's sexually explicit testimony, which the prosecutor asserted would be foreign to a nine year old, that the victim's testimony was more credible than the defendant's testimony. In advancing this argument, the prosecutor stated:

> What this case boils down to is the testimony of that nine-year-old boy who sat there and took the oath to tell the truth and who told you the truth. He told you what happened to him. He told you what his father did to him. He told you in incredible detail. He told you in detail, which I submit a child would not make up, a child would not fantasize. A child would not imagine. He told you things that a child would not lie about, a child would not be told to

---

204. State v. Tripp, 634 A.2d at 1319.
205. *Id.* at 1320.
206. *Id.* at 1321 (Clifford, J. dissenting).
207. The prosecutor asked the following questions:
Q. You heard your son testify?
A. Yes, I did.
Q. It's your testimony that he is lying?
A. Yes.
Q. When he talked about being in the outhouse and standing on the toilet seat with his hand up against the wall and your standing behind him he was lying?
A. Never happened.
Q. He talked about white fuzzy stuff coming out of your penis. He was lying?
A. Yes, sir.
Q. He talked about throwing up. He was lying?
A. Yes, he was.
Q. When he talked about the blood that he saw in the light of the flashlight in the car that was a lie?
A. Yes, sir.
Q. So your son lied about all this?
A. Yes.
Id. at 1319 n.4.

say, details of what happened.

I am going to talk about other evidence because that is other evidence in this case. I will come back and because it does all come down to [the victim] and Linwood Tripp, Sr., because one of them wasn't telling the truth. One of them was lying here to all of us.[208]

The prosecutor also suggested to the jury that when it set out to determine what weight to accord each witness's testimony it should consider who had the greater motivation to lie: the defendant, who was facing conviction, or the victim.[209]

On appeal the defendant claimed that the improper questioning as to the veracity of the witnesses and the prosecutor's prejudicial closing argument constituted obvious error.[210] The Law Court agreed in a five-to-one decision.[211] Relying on *Steen*, the court reiterated its holding that cross-examination that tries to push a defendant into saying other witnesses have lied is impermissible.[212] While this premise seems sound, its application is even more tenuous here than in *Steen*. As the majority's opinion indicates, the prosecutor did not "push" the defendant to say his son had lied. On the contrary, the defendant had volunteered this defense on direct examination.[213] For the same reasons indicated in the discussion of *Steen*,[214] the prosecutor's questioning was a proper attack on the plausibility of the defendant's alibi and not an attempt to solicit an unhelpful lay opinion.

---

208. *Id.* at 1319-20 n.5.

209. The prosecutor did this by presenting the jury with several rhetorical questions:

Did you hear the Defendant suggest any reason why his son would lie about these things? Did you hear him suggest any reason of how his son would know about these things? How would the boy have lied? How would that boy have know about these thing if they were not true? Why would he lie? Why would the boy lie? Why would the defendant lie? It's pretty obvious he's on trial here for a very serious crime. I submit to you that he has a very large motive to lie to you.

Brief for Appellant at 28-29 n.4, State v. Tripp, 634 A.2d 1318 (Me. 1994) (No. OXF-93-205).

210. State v. Tripp, 634 A.2d at 1320.

211. *Id.*

212. *Id.*

213. The majority opinion stated that, "[o]n direct examination defendant stated that the events described by his son were not true." *Id.* A footnote to this assertion contained the following excerpt from the defendant's direct examination:

Q. You heard the explicitness of the allegations that [the victim] has made?

A. Yes.

Q. They are not true?

A. No they are not.

Id.

214. *See supra* notes 130-39 and accompanying text. *See also* ME. R. EVID. 611(b): "A witness may be cross-examined on any matter relevant to any issue in the case, including credibility . . . ."

The court then turned to the issue of the prosecutor's closing argument. The Law Court found that by stating that "the nine year-old boy . . . took the oath to tell you the truth and . . . told you the truth" and then concluding this portion of the argument with "[o]ne of them was lying here to all of us," the prosecutor implicitly told the jury that "[he] believed that the victim told the truth and the defendant had lied."[215] Because in the Law Court's estimation this was a "close case" it found this assertion of "personal opinion" to be serious obvious error.[216]

In a lone dissent, Justice Clifford cautioned the court that reversal for obvious error should be "exercised cautiously."[217] Believing that the defense strategy had also capitalized on pitting the defendant's credibility against the victim's, the dissent found that the defendant should not be rewarded with a new trial when the prosecutor had forcefully attacked this strategy and prevailed.[218]

Tripp presented the Law Court with an opportunity to stem its emerging "personal opinion" doctrine and espouse proper and helpful limitations for the prosecutor that were consistent with earlier Maine cases. The court could only reverse Tripp's conviction if the error had worked a "manifest injustice" on the defendant's right to a fair trial. Instead of finding improper expression of personal opinion, the court could have identified the problems in the prosecutor's closing as argument of facts not in evidence and reprimanded the prosecutor accordingly. The court could then have relied on the jury's acquittal on three counts as an indication that there was no deprivation of due process that rose to the level of obvious error. The court did not take advantage of this opportunity to provide prosecutors with more concrete standards. Instead, by focusing on the prosecutor's conduct rather than the effect of the prosecutor's conduct on the defendant's right to a fair trial and by misapplying its prohibition on personal opinion, the court further restricted the inferences that a prosecutor may raise when the defendant takes the stand.

The Law Court in *Tripp* places the prosecutor in the impossible position of being prohibited from commenting either directly or implicitly on a testifying defendant's credibility. By again improperly applying *State v. Smith*,[219] the court's holding prevents the prosecutor from ever characterizing or even suggesting that the defendant who has testified is not credible. As in *Casella* and *Steen*, the defendant took the stand and directly contradicted the victim's testi-

---

215. State v. Tripp, 634 A.2d at 1321.

216. *Id.*

217. *Id.* (Clifford, J., dissenting) (quoting State v. True, 438 A.2d 460, 468 (Me. 1981)).

218. *Id.*

219. *See supra* note 136-38 and accompanying text.

mony, turning the trial into a credibility contest. Under these circumstances, the prosecutor, to be an effective advocate, must have the latitude to attack the defendant's credibility. Such an attack does not represent an improper personal opinion, but rather a reasonable inference based on the conflicting testimony heard by the jury. The court's finding that the prosecutor's comments rendered the trial unfair represents a departure from its precedents allowing the prosecutor to "strike hard blows" and underestimates the jury's ability to evaluate the evidence and the statements of counsel.

The prosecution's closing in *Tripp* asked the jury to use its common sense to assess the credibility of witnesses in light of the graphic testimony given by the victim and the defendant's vested interest in securing an acquittal. The court's assertion that the prosecutor had vouched for the credibility of the victim by stating that the victim had told the truth represents a conclusion that could only be reached by a formalistic analysis that removes the statement from the context of the trial. As the First Circuit Court of Appeals pointed out, "this kind of issue is a melancholy one, for there is always an equally, or more effective, way of making a point."[220] In this case, the prosecutor's use of the word "truth," which is conclusory, and thus problematic for the same reasons as "lie,"[221] was, at worst, artless; it was not impermissible. It is difficult to see how the use of a single phrase in the context of the entire closing argument rose to the level of "serious obvious error." This is readily apparent if the word "truth" is replaced by "story." If the prosecutor had said, "What this case boils down to is the testimony of that nine-year-old boy who sat there and took the oath to tell the truth and who told you [his story]," the Law Court would be unable to say that the prosecutor had asserted his personal opinion. It is just as probable that the jury assigned this meaning to the prosecutor's actual remark. Contrary to its own precedent,[222] however, the Law Court assigned the most damaging meaning to the prosecutor's remark.

This is not to say the prosecutor's summation was faultless. Portions of the prosecutor's argument cited by the Law Court present a different type of impropriety. It argues facts outside the record. Aside from a detective who testified that it was not uncommon for child sexual assault victims to present inconsistent portrayals of their abuse, the jury heard no evidence concerning how this type of abuse affects children, nor did they hear testimony regarding a nine year old's awareness and understanding of sex.[223] By arguing what a child may or may not know about sex, the prosecutor, in the rest of

220. United States v. Gonzalez Vargas, 558 F.2d 631, 633 (1st Cir. 1977).

221. *See supra* note 182 and accompanying text.

222. *See supra* note 100 and accompanying text.

223. Brief of Appellant at 22-24, State v. Tripp, 634 A.2d 1318 (Me. 1994) (No. OXF-93-205).

this passage, is not offering a personal opinion, but an unsworn expert opinion concerning the victim. The Law Court has previously held such argument improper, and sufficiently egregious to reverse dependent on the context of the remarks and the standard of review.[224]

Here the Law Court was reviewing the trial only for "obvious error." Reversal for "obvious error" is limited to errors that are "blockbusters" which affect the fundamental fairness of the trial.[225] In *Tripp*, the jury acquitted the defendant on three of the six gross sexual assault counts against him.[226] Even if one concedes that the prosecutor's conduct was improper, the acquittals indicate that the jury objectively considered whether the state had proven each element of each count. Based on the three verdicts of acquittal, it is unlikely that the cumulative effect of the prosecutor's improper questions and missteps in closing argument rose to the level of "manifest injustice."[227] Thus, in reaching its conclusion the Law Court not only misapplied "personal opinion," but also redefined and lowered the obvious error standard.[228]

VI. Conclusion

The decisions in *State v. Steen*, *State v. Casella*, and *State v. Tripp* make the line between "personal opinion" and proper argument based on reasonable inferences a moving target. Each case presented the Law Court with a situation in which the defendant, through his testimony, had made his credibility the trial's central issue. In each decision, the Law Court further restricted the prosecutor's ability to raise inferences to the jury based on the defendant's testimony. In each successive case, faced with less egregious conduct, and a higher standard of review, the Law Court reversed the judgment of the trial court, leaving the state's prosecutors unsure of what statement in their next summation will serve as grounds for reversal.

The prosecutor's task in a criminal trial is difficult enough with-

---

224. *See supra* notes 71-80 and accompanying text.

225. *See supra* notes 91-95 and accompanying text.

226. State v. Tripp, 634 A.2d at 1319.

227. *See, e.g.*, United States v. de Leon Davis, 914 F.2d 340, 345 (1st Cir. 1990) (appellant's acquittal on one count supports the conclusion that the jury was not influenced by the prosecutor's comment) (quoting United States v. Doe, 860 F.2d 488, 495 (1st Cir. 1988), *cert. denied sub nom.*, Andradés-Salings v. United States, 490 U.S. 1049 (1989)).

228. Compare the Law Court's result in *State v. Tomah*, *supra* notes 45-47 and accompanying text with *Tripp*. In *Tomah*, like in *Tripp*, the defendant contended that he was deprived a fair trial because the case turned on the jury's assessment of the defendant's credibility and the prosecutor had expressed his "personal opinion." The defendant did not object. Despite the numerous prosecutorial missteps detailed by the Law Court, it found that they did not rise to the level of manifest injustice.

out this added uncertainty. While prosecutors should not be permitted to use closing argument to hurl epithets at the defendant, the court must permit them the leeway to forcefully advance the state's position. The Law Court has a legitimate interest in limiting prosecutorial argument, both to ensure the fairness of criminal defendant's trial and to secure prosecutorial compliance with standards of professional conduct. The court must recognize, however, that, despite its frustration with prosecutors who have failed to heed repeated warnings, vacating a defendant's conviction should be used only in cases of egregious prosecutorial misconduct that deprives the defendant of a fair trial. Vacating a conviction not only punishes the prosecutor, but also burdens the entire criminal justice system by imposing the cost of retrial. Moreover, disciplinary proceedings under the Maine Bar Rules may provide a more individualized and therefore more effective punishment.

The Law Court can best assist prosecutors in balancing the competing objectives of total fairness and zealous advocacy not by merely sanctioning them but by enunciating lucid standards of conduct. The court can only produce such standards if it properly identifies the prosecutor's alleged misconduct and analyzes how the misconduct deprived the defendant a fair trial. This has not occurred in the Law Court's recent decisions. Instead, one finds a mere statement that the prosecutor's offending remarks were "personal opinion" with a citation to cases which say the same thing without giving any reasons. Such a mechanical application of the "personal opinion" label is inadequate and unhelpful.

The Law Court's willingness to reverse convictions for expressions of "personal opinion" will no doubt force it to revisit this topic in the near future.[229] Before attaching the label "personal opinion" to another closing argument, the Law Court should carefully analyze the argument in light of its own substantial body of case law and the context of the entire trial to determine if any part of the argument is sustainable as a reasonable inference based on the evidence presented. By providing a more thorough analysis of the prosecutor's impropriety the opinion would not only assist prosecutors and trial judges in delineating the bounds of fairness, but also would

229. As this Comment readied for publication, defense attorneys in another highly publicized criminal case, State v. Bennett, No. CUM-93-560 (Me. docketed Mar. 16, 1994), popularly known as the DeNan's murder case, prepared to appeal their clients' convictions based on the prosecutor's closing argument. The appellants contend that the prosecutor denied their clients a fair trial by appealing to the jury's fear and presented the jury with his personal opinion which suggested defense witnesses were lying. Jason Wolfe, *Verdicts Appealed in Fatal Fight*, PORTLAND PRESS HERALD, March 17, 1994 at 1B.

make whatever sanction the court imposed more effective as the court's expanded analysis would provide the prosecutor with a better understanding of the misconduct.

James W. Gunson