The Function and Limits of Prosecution Jury Argument

David Crump
THE FUNCTION AND LIMITS OF PROSECUTION JURY ARGUMENT

by

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Recently we have had an alarming number of improper jury arguments to consider and it is hoped that the warning signal has been heard. Needless to say, the prosecutor sees all his trial work go for naught if the case has to be reversed because of improper jury argument.

To receive the stamp of approval of this court, jury arguments need to be within the areas of: (1) summation of the evidence, (2) reasonable deduction from the evidence, (3) answer to argument of opposing counsel, and (4) plea for law enforcement. The arguments that go beyond these areas too often place before the jury unsworn, and most times believable, testimony of the attorney.¹

To recognize the powerful effect of jury argument in criminal cases, one need only observe a skillful defense attorney make the presumption of innocence come to life by looking each juror in the eye and inducing each to think as though he himself were the accused.² Likewise, one need only hear a state’s attorney expose the falsehood and unreasonableness of a claimed defense and express the indignation that a serious crime should evoke to see how argument can crystallize an otherwise indeterminate jury verdict. The words used are seldom eloquent, and the reasoning is often that of time-worn formulas,³ but vigorous argument by counsel can nevertheless be a valuable aid to the jury in reaching a decision in a difficult criminal case.

At the same time, argument in criminal cases is readily susceptible to abuse. A few calculated words by either side can quickly deprive the other of a fair trial,⁴ and unfortunately it is not at all unusual to observe attorneys on both sides of the docket brazenly engage in clear violations of the rules governing argument.⁵ These abuses of argument are aggravated by poor de-

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² Alejandro v. State, 493 S.W.2d 230, 231-32 (Tex. Crim. App. 1973). The prosecutor’s improper remarks in this possession of marijuana case included (1) a request that the jury deny probation because the district’s probation officer already had 350 probationers to supervise and (2) a statement that the jury should incarcerate the defendant because he could get a junior college education in the Texas Department of Corrections.

³ As to the importance of forceful jury argument for the defense, consider the following: “Your final argument in a homicide presentation is the point at which the case is won or lost. This is the point toward which you should have been building from the outset.” F. Bailey & H. Rothblatt, Crimes of Violence: Homicide & Assault § 424 (1973).

⁴ In Lopez v. State, 500 S.W.2d 844 (Tex. Crim. App. 1973), the court reversed the conviction partly because of brief remarks to the effect that the defendants were “lying” in pleading not guilty. The court considered that such remarks had the effect of denying the accused the presumption of innocence.

⁵ Argument rules are so openly flouted that standard reference works encourage improper remarks. See, e.g., R. Erwin, Defense of Drunk Driving Cases § 38.03[4]
velopment and enforcement of restrictions, for in spite of the number of decisions concerning argument that flood continuously from the appellate courts of most jurisdictions in this country, the amount of study that has been applied to the subject is surprisingly small. There is, therefore, a need for a comprehensive review of laws of argument that actually influence opposing attorneys' conduct.

Accordingly, this Article considers the function of prosecution jury argument in criminal cases and surveys the rules that limit it. An initial section briefly examines the legitimate purposes of adversary argument to establish a basis for analysis. Subsequent sections describe the laws regulating the content, procedure, and format of prosecution remarks. A final section contains the author's conclusions regarding the efficacy of argument rules. Throughout, the emphasis is upon Texas decisions, but in most instances the Texas law regulating argument is also compared or contrasted to the law of other jurisdictions.

I. THE LEGITIMATE FUNCTIONS OF CRIMINAL JURY ARGUMENT: A BASIS FOR ANALYSIS

Rational analysis of the evidence in light of the law is generally regarded as the main component of argument of counsel. The rational aspect of argument implies at least three separate functions. First, argument should serve to help the jury better understand the court's charge, which may contain such confusing concepts as "malice aforethought" or "constructive possession," by illustrating it with simple examples. Secondly, once the charge has been ex-
plained, counsel on both sides may legitimately use argument to select, arrange, and interpret those portions of the evidence that are relevant to their theories of the case. 3

Thirdly, counsel may guide the jury in judging the credibility of witnesses. 10 These types of argument can usually be rationally based without resort to inflammatory emotional remarks, and in the opinion of some commentators they apparently comprise the only proper subjects of argument. 11

Greater problems arise when the attorneys rely on emotionally based arguments concerning social policy, but there are at least three instances in which argument of this nature is appropriate. First, the attorneys can legitimately use emotional arguments to give the jury the determination to ignore prejudicial distractions, because many distractions are emotionally rooted and cannot be removed by logic. 12 Secondly, emotional argument may properly re-

thing. See Chaberski, Inside the New York Panther Trial, 1 CIV. LIB. REV. 111, 118 (1973); cf. A. AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES—II, § 446 (2d ed. 1971) (urging the defender to argue that the prosecutor must "carry the ball . . . the length of the field and over the goal line"). Prosecutors use parallel techniques. Cf. DALLAS COUNTY DISTRICT ATTORNEY'S OFFICE, PROSECUTION COURSE 46 (1972), which illustrates arguments explaining areas of the law that are crucial: "a. 'Intoxication' is not necessarily drunk. b. 'Malice' is not premeditation. c. 'Possession' is not ownership. d. 'On or about' means accessible. e. 'Assault' does not require a touching. f. 'Carnal knowledge' requires only penetration." See also Record at 269-70, United States v. Wilkerson, 469 F.2d 963 (5th Cir. 1972), in which the prosecutor illustrated constructive possession by arguing, "I possess a shoe box that is home right now in my closet."

9. This process actually consists of selective interpretation of the evidence to mold the judge's instructions favorably to an advocate's position. Thus a prosecutor's argument in a driving-while-intoxicated case might accomplish the following:

B. Recount all the many facts upon which the officers based their judgments of intoxication.

C. Describe the care and the precautions used in the test which verified the officers' beliefs.

D. Stress the point that there is no big mystery about detecting intoxication.

G. Stress that the arresting officer stopped defendant because the car was being operated in an erratic or dangerous manner.

DALLAS COUNTY DISTRICT ATTORNEY'S OFFICE, supra note 8, at 493-94. The defense may focus upon some allegedly fatal flaw in the prosecution's case. Thus defense counsel in the Mitchell-Stans trial focused on the fact that the prosecution had shown no "fix" by financier Robert Vesco: "'John Mitchell is either a corrupt, attempted fixer and a liar,' said Peter E. Fleming Jr., Mitchell's counsel, 'or he is neither . . . . Vesco sure did get a lot for his money,' Fleming said sarcastically. 'We go home at night and joke with Mr. Mitchell about what a lousy fixer he is.'" NEWSWEEK, May 6, 1974, at 25. The defense also attacked the entire case as "a vision engendered in the heat of a national trauma," "Mulligan stew," "chicken hash," "Christmastime," and "an Easter-egg hunt." Id.

10. Argument about credibility can be enormously helpful to the jury; in the Mitchell-Stans trial, for example, credibility considerations similar to those argued by defense counsel appear to have been the jury's primary preoccupation. NEWSWEEK, May 6, 1974, at 23-25. For an illustration of defense arguments used to debunk accomplice testimony, confessions, identifications, and experts, see C. TESSMER, CRIMINAL TRIAL STRATEGY 124-29 (1968). The prosecution uses arguments that are roughly analogous. See, e.g., Pierron v. State, 475 S.W.2d 775 (Tex. Crim. App. 1972) ("Who's got the most to lose? Sergeant Cuccia or these five defendants?").

11. See Alschuler 636; 6 AM. JUR. TRIALS Prosecution Summations § 2 (1967).

12. The jury's propensity to be distracted by factors other than the law and the evidence has been well documented by Kalven and Zeisel. The jury is clearly racially prejudiced and prejudiced against persons charged with particular offenses (e.g., drug offenses). It is demonstrably prejudiced in favor of young persons, old persons, parents of young children, attractive women, handicapped persons, veterans, clergymen, police officers, persons whose family is present, persons who weep at trial, and a host of others.
mind the jury to take both sides of the case seriously, so that it will act in accordance with the judge's instructions on the law. Finally, argument should aid the jury in setting community and social standards by which to resolve the questions of degree that are at the heart of every criminal case. This function is appropriate because the jury's task is not the answering of factual questions in a vacuum but the combining of facts with social policy decisions such as what constitutes a "reasonable" doubt or when an act is "reckless." Thus emotional argument is proper within limits because the jury is not, and has never been intended to be, a mere factual computer.

In the adversary context, these legitimate functions of argument do not always prevail, because in many cases at least one advocate discovers that the law or evidence is strongly against his objectives. Therefore, an attorney may use argument to divert the jury from its legitimate function. For ex-

See Kalven & Zeisel 191, 193-218. The same kinds of prejudices operate as to victims as operate upon defendants. See id. at 248-49.

Thus the attorney defending an unpopular accused must make the jury know and feel that they are bound not to judge by reference to unpopular characteristics. See generally H. Sacks, Defending the Unpopular Client (1961). The prosecutor's function in this regard is no less appropriate: Many very important criminal cases involve popular white-collar defendants or crimes perpetrated against unpopular victims, and the prosecutor must neutralize the jury's prejudices to secure equal justice. For example, the Houston Post, Nov. 17, 1973, at 1, col. 1, reported the following:

A jury sentenced former Dallas policeman Darrell Cain to five years in prison and said he murdered 12-year-old Santos Rodriguez with malice.

... Cain killed the Mexican American youth during questioning as a burglary suspect. . . .

"What would you have done if Santos Rodriguez had killed Darrell Cain under the same circumstances?" [Assistant District Attorney John] Sparling asked the jury in an impassioned voice. "You would have thrown the book at him. You would have locked him up and bent the key."

A prosecutor who relied on cold logic in such a case would not have been arguing effectively, because "in white collar cases [the defense can] create reasonable doubt where reasonable doubt might not otherwise exist." F. Bailey & H. Rothblatt, Defending Business and White Collar Crimes § 210, at 251 (1969).

13. Without such a reminder, jurors sometimes act in the most surprising way to ignore the fundamental rights of defendants. Thus Kalven and Zeisel persuasively document jurors' disregard of certain defenses or even of the privilege against self-incrimination or presumption of innocence. See Kalven & Zeisel 241 n.31, 283, 389, 395. Likewise, they indicate that the jury is likely to acquit despite the evidence in some special types of cases because "substantial harm, it seems, has been viewed by the jury as somehow trivial." Id. at 283. In other words, a jury is likely to ignore overwhelming evidence of guilt in such diverse offenses as driving while intoxicated, minority race murders, and even serious crimes by one spouse against another, simply because jurors view the resulting harm as de minimis. Id. at 266, 276, 283, 330, 341.

As a counterweight to jurors' tendencies to ignore rights of the defendant, Bailey and Rothblatt urge the defense attorney to "humanize" his client. See F. Bailey & H. Rothblatt, supra note 2, § 433. The prosecutor is allowed a parallel right to counteract the de minimis problem by emphasizing the importance of the case to the victim, to the community, and to justice. See, e.g., Minafee v. State, 482 S.W.2d 273, 276 (Tex. Crim. App. 1972) (argument approved); cf. Dallas County District Attorney's Office, supra note 8, at 494 (urging the prosecutor to "[c]lose [a driving-while-intoxicated case] with an appeal for safe streets").

14. In setting the threshold of "reasonable doubt," or in deciding what constitutes "reasonable force" in a self-defense case, the jury acts very much like a legislature: It decides the balance between the standard of proof required to protect the innocent and the need for control of crime, and it decides how to balance the self-defender's plight against the right of the deceased to life. The jury must make this balance; it is implicit in the use of the word "reasonable" in the judge's instructions. See P. Devlin, Trial by Jury 164 (3d ed. 1966). See also Kalven & Zeisel 182-90; 221-41.

15. There has been considerable debate as to the reason for these diversions. Commentators have placed the blame upon the prosecutor's occupational bias, see, e.g.,
ample, an attorney who finds the law unfavorable may intentionally misrepresent the law, issue an invitation to the jury to ignore the judge’s instructions, or attempt distraction by injecting prejudicial matter. Similarly, an attorney may attempt to mitigate unfavorable evidence by going outside the record, making unwarranted conclusions, or emphasizing matter calculated to inflame or confuse. Striking a balance between the abuses of such argument and the beneficial effects of vigorous adversary comment has long been a difficult problem for the courts. The result has been the creation of two kinds of regulation: a broad, vaguely defined set of principles limiting the content of argument to proper subjects and a set of procedures for conducting argument and for enforcing argument rules.

II. LEGAL LIMITS UPON THE CONTENT OF PROSECUTION ARGUMENT

The varieties of improper argument, as one commentator has said, are “limited only by the ingenuity of the prosecutor,” and, one might add, that of the defense counsel. Nevertheless, there are a limited number of general categories of argument that account for the bulk of problems in regulation of argument content.

A. Argument Diverting the Jury from Its Lawful Function

Distortion of the Burden of Proof. Perhaps no kind of argument abuse is more tempting to the criminal lawyer, nor more dangerous to the criminal justice system, than distorting the burden of proof in his favor. Both the prosecution and the defense have traditional formulas explaining the burden of proof that make it appear slightly lower or higher. Discussion of this kind is and ought to be permissible, because it serves the function of educating the jury in the law and the meaning of the burden of proof. However,
conduct by the prosecutor that seriously detracts from the jury's understanding of the burden usually constitutes reversible error. Thus, for example, it is almost universally recognized that it is improper for the prosecutor to inform the jury that an erroneous conviction can be reversed on appeal,\(^1\) that the executive may pardon or parole the defendant,\(^2\) that erroneous conviction is not serious because the sentencing judge or jury can mitigate the sentence imposed,\(^3\) or that the legislature intended that the defendant be convicted.\(^4\)

For similar reasons, it is improper for the prosecutor to imply that the trial judge's procedural rulings should have an effect on the jury's consideration of guilt or innocence.\(^5\) Nor may the prosecutor mention the safeguards afforded the accused prior to and during trial in such a way as to suggest that the evidence has already been sufficiently weighed.\(^6\) Thus it is error to argue that the grand jury's true bill indicates a determination by a certain number of citizens that there is evidence of defendant's guilt\(^7\) or to refer to the power of the defense attorney to offer evidence in such a way as to shift the burden by implication to the defense.\(^8\) Each of these arguments, besides being irrelevant to the task of the jury, invites it to surrender its function of measuring the evidence against the reasonable doubt standard.

The question whether the prosecutor may communicate to the jury his personal belief in the defendant's guilt raises a number of problems. In its worst form, such a statement can amount to a suggestion that the jury accept a lower standard of proof by surrendering some of its authority to the prosecutor himself.\(^9\) It also allows the prosecutor to become a "witness" who cannot be "confronted" by the defendant.\(^10\) Therefore, a statement of belief in the

\(^{18}\) See notes 19-40 infra.

\(^{19}\) Crow v. State, 33 Tex. Crim. 264, 26 S.W. 209 (1894) (held reversible error).

\(^{20}\) See generally Alschuler 634; Columbia Note 956.

\(^{21}\) Heartfield v. State, 470 S.W.2d 895 (Tex. Crim. App. 1973) (error held cured); accord, Frazee v. State, 17 M. App. 320, 301 A.2d 211 (1973) (argument that defendant would be "put on probation" if jury convicted held reversible error). However, the prosecutor in Texas can circumvent this prohibition by exploring the question during voir dire. See, e.g., Reeves v. State, 491 S.W.2d 157 (Tex. Crim. App. 1973) (defendant "certainly does qualify" for probation—held no error).


\(^{23}\) See, e.g., Thomas v. State, 496 S.W.2d 96 (Tex. Crim. App. 1973) (error held not preserved).

\(^{24}\) See, e.g., Ramos v. State, 419 S.W.2d 359 (Tex. Crim. App. 1967); accord, United States v. Cummings, 468 F.2d 274 (9th Cir. 1972).


\(^{27}\) The argument may be coupled with a suggestion that the prosecutor is a neutral observer or an expert. For example, in People v. Vasquez, 8 Ill. App. 3d 679, 291 N.E.2d 5 (1973), the prosecutor followed a statement of unsupported personal belief in the defendant's guilt with the argument that "I am just the thirteenth juror in the case, ladies and gentlemen, nothing more . . . ." 291 N.E.2d at 7. The court reversed.

\(^{28}\) In other words, it is a violation of U.S. CONST. amend. VI. Such a theory is persuasively advanced in Carlson, _Argument to the Jury and the Constitutional Right of Confrontation_, 9 CRIM. L. BULL. 293 (1973).
guilt of the accused other than on the basis of the evidence is usually clear
ground for reversal.29 The greatest difficulties arise when the prosecutor
states, "I think [or I know] that the defendant is guilty," and neglects to
state explicitly that his belief is based on the evidence presented at trial. In
Texas this statement appears to be acceptable only if it is clearly juxtaposed
and related to a summation of the evidence.30 If it appears to be based
upon matters not in the record, or even if it is open to that interpretation,
it is error.31

Similar problems arise when the prosecutor offers his experience at evalu-
ating the evidence as a substitute for proof beyond a reasonable doubt. Some
comment based upon the prosecutor's experience is appropriate, since it may
aid the jury in arranging or interpreting the evidence. Thus the prosecutor
may usually tell the jury that the case is a strong one,32 and he may explain
basic principles he has gained from his experience if they relate to the evi-
dence.33 He may not, however, refer to convictions in other cases based
upon similar facts,34 inform the jury of his discretionary practices for screen-
ing innocent persons out of the criminal process,35 or vouch for the credibility
of the government's witnesses.36

guilty" considered error) (dictum); accord, United States v. Wasko, 473 F.2d 1282 (7th
Cir. 1973). See generally Columbia Note 955-56. It is similarly improper for the de-
fense attorney to express personal belief in innocence. See Alschuler 657.

The Supreme Court has recently held, however, that a statement of personal belief
of this kind is not necessarily a constitutional violation. Donnelly v. DeChristoforo,

30. In Sikes v. State, 500 S.W.2d 650 (Tex. Crim. App. 1973), the court indicated
severe misgivings but found no reversible error where the prosecutor argued: "I think
old [defendant] is just as guilty as he can be." The court noted that the remark was
directly joined with a review of the evidence, was followed by a statement that the belief
was based on the evidence, and contained no suggestion of superior knowledge.

31. See, e.g., cases cited note 29 supra.

32. See, e.g., Brummett v. State, 384 S.W.2d 708 (Tex. Crim. App. 1964) ("I've
never seen a better case of driving while intoxicated"—held no error); cf. Leary v.
United States, 383 F.2d 851, 856 (5th Cir. 1967) (prosecutor felt "strongly" about case
—held not plain error). But see State v. Farrell, 61 N.J. 99, 293 A.2d 176 (1972),
where repeated references to the strength of the case, plus extra-evidentiary references,
were held to be reversible error in spite of the trial court's instructions to disregard these
references.

33. Professor Alschuler states that "clearly, the prosecutor must not assert that as
an oldtimer in the criminal courts, he knows a guilty man when he sees one." Alschuler
634 n.22. In Texas, however, it appears the prosecutor may do exactly that—indirectly.
See, e.g., Shipp v. State, 482 S.W.2d 870 (Tex. Crim. App. 1972) ("It has been my ex-
perience" that the strong prosecution cases are answered with "desperate" defenses—held
"permissible adversary comment"). Nevertheless, only general references of this kind
are permitted. The prosecutor still may not express an opinion of guilt, see note 29
supra and accompanying text, nor may he offer his knowledge as a substitute for evi-

co-indictee previously convicted held reversible error). Likewise, it is improper to men-
tion results of previous trials of the same cause, O'Clair v. State, 385 S.W.2d 243 (Tex.
Crim. App. 1964) (error held cured), or to make even indirect reference to rejected pre-
(held reversible error) (dictum), accord, Wilson v. State, 253 Ark. 10, 484 S.W.2d 82
(1973).

held cured). But cf. Henderson v. United States, 218 F.2d 14, 21 (6th Cir. 1955)
("And if I don't believe he is guilty, no one is going to make me stand here and prose-
cute him—no one is going to do it"—held reversible error).

believe if they could not believe police officers whose salary they paid—held reversible
In a few instances, references to the actions or character of the accused have been held reversible error on the ground that they undermine the burden of proof. One example from the Texas cases is the statement by a prosecutor that the defendant's not guilty plea was a lie, a remark that the Texas Court of Criminal Appeals considered had the effect of denying the accused the presumption of innocence. In some jurisdictions, references to the seriousness, prevalence, or inexcusable nature of the crime with which the defendant is charged have been construed as requests that the jury accept a lower standard of proof for deterrence reasons. This kind of comment is not simple to characterize. It does inject a possible reason for the jury to lower the burden of proof, but it may also legitimately be used to remind the jury to convict if the evidence is sufficient. The Texas view appears to be that such comment, if made without suggestion of jury misconduct, is acceptable.

Remarks affecting the burden of proof should be carefully scrutinized by the courts. Proof beyond a reasonable doubt is a precisely worded formula, providing both a bulwark against conviction of the innocent and an avoidance of impossible standards of absolute proof. Entirely prohibiting comment on the meaning of the burden would be self-defeating, but the courts should jealously guard against any inference that the evidence has been or will be examined by some other entity to which the jury can surrender its function. Likewise, even indirect invitations to convict upon less than proof beyond a reasonable doubt or adverse comment on the severity of the burden ought to result in prompt reversal. In general, the Texas courts in recent cases have met the standards suggested here: They have sanctioned argument illustrating and simplifying the law, argument calling upon the jury to follow the law, and argument aiding the jury to resolve issues of social policy, but they have been careful to prevent serious distortion of the burden of proof.

**Argument Detracting from Law Contained in the Charge.** Although misstatement of the law probably occurs most frequently in defense argument, there have been cases in which it has been done by the prosecution. Suggestion to the jurors that they may disregard a defense even though it is established by the evidence, or, conversely, that they may convict even if the evidence

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38. See, e.g., People v. Booth, 11 Ill. App. 3d 203, 296 N.E.2d 369 (1973) ("professional criminal" remark held error but harmless); Sizemore v. State, 507 P.2d 1330 (Okla. Crim. App. 1973) ("If based upon this evidence, a man can go free, the next time you read a paper and scoff about crime in the street, don't wonder why"—held error but harmless and cured).
39. See generally Columbia Note 958.
40. See notes 109-15 infra and accompanying text.
ment in the state's case is not fully established, is usually reversible error. Texas courts have also found error in misstatements about the effect of probation and the role of the grand jury. Similarly, it is improper for the prosecutor to criticize the law governing the case or to point out what portions of the charge were requested by the defense. Such comments can be, in effect, indirect invitations to the jury not to follow those portions of the court's instructions.

Correct statement of law that is not contained in the charge poses a slightly different problem. Sometimes, it may be necessary for a full understanding of the issues for an attorney to explain some incidental legal questions outside the charge, and, as a result, this kind of argument has been held acceptable in a few cases in Texas. However, it is error for the prosecutor to argue law that does not bear on the issues, and consequently the Texas Court of Criminal Appeals has held it improper for the prosecutor to argue the range of possible sentences at the guilt-innocence stage or to explain the rules of evidence that resulted in certain evidence being excluded at trial.

Yet another problem is posed by argument that calls attention to historical antecedents of Anglo-Saxon law, the Constitution, the Bible, the texts of appellate opinions, or other extraneous sources. If such a reference is general, it is perhaps tolerable as part of a plea for justice or as an aid to resolution of policy issues. But a suggestion to the jury that it act upon such principles when they are not properly related to the charge serves no appropriate argument function and should be regarded as error.

Comment on the Failure of the Accused To Testify. In Griffin v. California the Supreme Court of the United States squarely held that the fifth amendment guarantee against self-incrimination prohibits comment by the

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42. See, e.g., Cadenhead v. State, 369 S.W.2d 44 (Tex. Crim. App. 1963) (in a negligent homicide case, argument urging the jury to convict because of acts of negligence not stated in the charging instrument held reversible error).
44. See, e.g., Harris v. State, 475 S.W.2d 922 (Tex. Crim. App. 1972) (error held cured).
45. See, e.g., Carnathan v. State, 478 S.W.2d 922 (Tex. Crim. App. 1972) (error held cured). In Joyner v. State, 436 S.W.2d 141 (Tex. Crim. App. 1968), the prosecutor criticized the actions of both courts and legislature as leading to "anarchy." The court held this remark "poor taste" but harmless error; later, on rehearing, it reversed on other grounds. 436 S.W.2d 141 (Tex. Crim. App. 1969).
47. See, e.g., Wood v. State, 486 S.W.2d 771 (Tex. Crim. App. 1972) (statement that police officers by law are on duty twenty-four hours—held no error); Sloan v. State, 409 S.W.2d 412 (Tex. Crim. App. 1966) (explanation that "an affidavit is under oath"—held no error); cf. Singleton v. State, 479 S.W.2d 672 (Tex. Crim. App. 1972) (held that it was not error for the prosecutor to define the term "sober" by referring to the dictionary in driving-while-intoxicated case). In Singleton the court adhered to the questionable proposition that it is not error for the prosecutor to argue law that goes beyond the charge so long as there is no statement conflicting with the charge.
49. See, e.g., Steam v. State, 487 S.W.2d 734 (Tex. Crim. App. 1972) ("We couldn't bring you all the circumstances surrounding the arrest"—held reversible error).
50. Thus, it is improper for either attorney to read religious tracts to the jury or to argue that the jurors should be guided by "what Jesus would have said" about their verdict. See, e.g., Turner v. State, 462 S.W.2d 9 (Tex. Crim. App. 1969), rev'd as to death penalty, 403 U.S. 947 (1971).
Prosecutor on the failure of the accused to testify. Despite this definitive decision, the *Griffin* principle probably accounts today for more appellate decisions than any other single subject in the realm of argument content. The reason for this surprising fact is the infinite variety of contexts in which the question may arise and the genuine difficulty of recognizing what constitutes a comment on the failure of the accused to testify.

Probably the greatest number of these questions arise from prosecution argument that indirectly calls attention to the silence of the accused. For example, when the defense rests without putting on any evidence, the prosecutor may wish to point out that the state's evidence is "uncontradicted" or "unchallenged." At first blush, these statements appear to circumvent the rule of *Griffin* by allowing the prosecutor to do indirectly what he cannot accomplish directly. But the question is not that simple. The comments disapproved in *Griffin* served no function other than to inform the jury that they should take the defendant's silence as a circumstance of guilt. By contrast, a comment that the state's evidence is "uncontradicted" serves the function of guiding the jury in judging the credibility of the state's witnesses and of simplifying the evidence. Thus this statement has a purpose apart from any inference about the silence of the accused.

As might be expected, the cases have been divided on the question of the propriety of this "uncontradicted evidence" comment. Some jurisdictions apparently disapprove its use, while others allow it without restrictions. But in the majority of jurisdictions an intermediate approach prevails, under which the prosecutor may remind the jury that the state's evidence is uncontradicted so long as there exists some witness other than the defendant whom the defendant *could* have called to contradict it. Texas adopts this approach, but with a proviso that loosens it considerably: the remark is not to be construed as a comment on the failure of the accused to testify unless that is its "natural and necessary" meaning. Thus in a circumstantial case, or a case in which no witness is available who observed the defendant in the commission of the alleged offense, an uncontradicted-evidence comment in

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52. The importance of *Griffin* problems nationally is reflected in recent issues of *The Prosecutor*, the journal of the National District Attorneys Association, which contain more notes on *Griffin*-comment cases than on any other argument subject. *See*, *e.g.*, 9 *The Prosecutor* 325-26; *id.* at 250-51. In Texas the importance of *Griffin* is indicated by the 1974 supplement to the *Texas Digest*, which devotes more than a third of its coverage of argument to the subject. 12 *Tex. Digest Criminal Law* §§ 721(3)-(6), 730(10)-(11) (Supp. 1974).

53. A portion of the argument is reproduced in 380 U.S. at 611.


55. Compare, *e.g.*, People v. Sibley, 93 Ill. App. 2d 38, 236 N.E.2d 5 (1968) (indicating that such a remark would be acceptable if no personal reference to defendant was made, even if no other witness could have testified), *with* Commonwealth v. Davis, 452 Pa. 171, 305 A.2d 715, 718 (1973) (where the court said, "[I]t would be an act of sophistry to take repeated references to "uncontroverted" government evidence as anything other than a comment on the failure of "appellant ... to rebut the evidence against him.").

56. *See*, *e.g.*, Garcia v. United States, 315 F.2d 133 (5th Cir. 1963); Girdner v. State, 508 P.2d 683 (Okla. 1973).

57. *See*, *e.g.*, Hill v. State, 480 S.W.2d 670 (Tex. Crim. App. 1972). *Contra*, Childers v. State, 277 So. 2d 594 (Fla. App. 1973) (argument held to be improper if it "could ... fairly" be interpreted as comment on failure to testify).
Texas violates *Griffin*, although the decisions sometimes seem inconsistent. Actually, the real effect of the Texas approach appears to be that a direct *Griffin* comment is error, but indirect comment, even if highly suggestive and without proper argument function, will often be accepted.

Besides the "uncontradicted evidence" comment, there are many other contexts in which the *Griffin* problem lingers. For example, it has been held improper for the prosecutor to address the defendant with rhetorical questions in closing argument or to call attention to the defendant's silence at the time of his arrest. On the other hand, it has been held acceptable for the prosecution to comment adversely upon the defendant's failure to call available witnesses other than himself, to point out that the defense counsel cannot refer in his argument to what the defendant "would have said" had he testified, to invite defense counsel to explain incriminating circumstances, and to comment on fifth amendment claims by defense witnesses. In Texas the prosecutor is also allowed to read to the jury the court's instructions on disregarding failure to testify or to mention the privilege against self-incrimination in both argument and *voir dire*, even though these remarks appear to raise serious *Griffin* problems.

The defendant's failure to supply physical evidence of a non-testimonial nature raises a different question. The law in most jurisdictions is that such

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58. This principle is of long standing in Texas. See Barrera v. State, 165 Tex. Crim. 387, 307 S.W.2d 948 (1957); Friemel v. State, 148 Tex. Crim. 454, 188 S.W.2d 175 (1945) (held reversible error).

59. With regard to circumstantial cases, see Rodriguez v. State, 417 S.W.2d 165 (Tex. Crim. App. 1967) (remark that "this is what's called a recent unexplained possession of stolen goods case" held not error). Other decisions strain the "no other witness" rule to the breaking point. See, e.g., Bass v. State, 427 S.W.2d 624 (Tex. Crim. App. 1968) (reference to lack of testimony from "that side of the table," held not error because it could have referred to some witness other than defendant); Alvear v. State, 170 Tex. Crim. 378, 341 S.W.2d 426 (1961) (since defendant's confession was in evidence, "uncontradicted evidence" comment held not error even though only defendant and state's witnesses were present).

60. For a recent example, see Cherry v. State, 507 S.W.2d 549 (Tex. Crim. App. 1974) ("Now, what defenses are available to a person in a case like this? Number one, alibi. I was somewhere else, I was with someone else . . . ."—remark held a "direct *Griffin* comment because word "I" negated reference to other witnesses).

61. See cases cited note 59 supra and note 76 infra. But the court has reversed when indirect comments became sufficiently prejudicial. See Kilpatrick v. State, 172 Tex. Crim. 315, 356 S.W.2d 941 (1962) (comment on non-testifying accused was "sworn in" at beginning of trial as potential witness).


65. See Meyer v. State, 416 S.W.2d 415 (Tex. Crim. App. 1967) ("He makes the insinuation that this defendant has told him that he wasn't guilty, but he won't take the stand under oath and tell you that" held not error). This comment is really an application of the invited argument doctrine.


evidence is outside the umbrella of fifth amendment protection\textsuperscript{69} and that comment is, therefore, acceptable.\textsuperscript{70} Paradoxically, in contrast to its permissive approach to Griffin comments generally, the Texas Court of Criminal Appeals leaves the impression that it disapproves of this kind of remark. Although the cases are inconclusive, the most conspicuous examples of such disapproval are decisions implying a prohibition upon comment on the accused's failure to submit to chemical intoxication tests.\textsuperscript{71} The law in this area is such that a trial judge might be justified in allowing comment,\textsuperscript{72} but the implications of the existing decisions discourage such a clarification of the law.\textsuperscript{73} Nevertheless, since juries are usually aware of the existence of these tests, comment on the wrongful\textsuperscript{74} refusal of the defendant to submit to intoxication tests would appear to serve several legitimate functions of argument, including aiding jurors to understand the law, to interpret the evidence, and to judge credibility, and it would also make possible more evenhanded enforcement of the breathalyzer statute itself.\textsuperscript{75}

In short, the Texas application of the Griffin principle has been barely satisfactory. The rule that argument constitutes a Griffin comment only if that is its sole logical meaning is unduly technical\textsuperscript{76} and it should be replaced

\textsuperscript{69}. See, e.g., Schmerber v. California, 384 U.S. 757 (1966). See also Olson v. State, 484 S.W.2d 756 (Tex. Crim. App. 1969), which indicates that non-testimonial evidence is likewise unprotected by the Texas Constitution.

\textsuperscript{70}. See, e.g., United States v. Nix, 465 F.2d 90 (5th Cir. 1972) (comment on failure to submit handwriting exemplar).

\textsuperscript{71}. See, e.g., Saunders v. State, 172 Tex. Crim. 17, 353 S.W.2d 419 (1962).

\textsuperscript{72}. The breathalyzer statute itself contains nothing that directly or indirectly prohibits evidence of, or comment upon, refusal to submit to the test. To the contrary, the statute expresses a clear policy penalizing the refusal and creating implied consent to the test upon use of Texas roads. Tex. Rev. Civ. Stat. Ann., art. 67011-5, § 1-2 (Supp. 1974). The opinion in Olson v. State, 484 S.W.2d 759 (Tex. Crim. App. 1972), vastly increases the admissibility of non-testimonial evidence in Texas. One law review commentator states that after Olson: "It is highly improbable that an accused now has the option to refuse a chemical test . . . . Even if the option still exists, it is questionable whether a refusal will be excluded as evidence in a subsequent trial."

\textsuperscript{73}. See, e.g., Singleton v. State, 479 S.W.2d 672 (Tex. Crim. App. 1972), where a reference to chemical tests was held not reversible, but the court did not clearly indicate whether it was error.

\textsuperscript{74}. See note 72 supra as to wrongfulness of refusal. Cf. People v. Sudduth, 65 Cal. 2d 543, 421 P.2d 401, 55 Cal. Rptr. 393 (1966), which held that the refusal is "wrongful" and therefore does not qualify for Griffin protection.

\textsuperscript{75}. The majority of jurisdictions that have ruled on the question do permit prosecution evidence and comment on refusal to submit to intoxication tests. See, e.g., People v. Sudduth, 65 Cal. 2d 543, 421 P.2d 401, 55 Cal. Rptr. 393 (1966); State v. Lynch, 274 A.2d 443 (Del. Super. 1971); City of Westerville v. Cunningham, 15 Ohio St. 2d 121, 239 N.E.2d 40 (1968). New York has so provided by statute. N.Y. VEH. & TRAF. LAW § 1194 (McKinney 1959), as amended, (Supp. 1973).

In those minority jurisdictions that disallow comment upon refusal, the reason is usually reliance upon pre-Schmerber authority, or express statutory exclusion, or both. See, e.g., State v. Gillis, 160 Me. 126, 199 A.2d 192 (1964).

\textsuperscript{76}. The Texas approach invites unfavorable comparison with decisions of other courts. For example, in Orozco v. State, 428 S.W.2d 666 (Tex. Crim. App. 1967), the prosecutor argued that the reason the case was circumstantial was that the defendant did not confess. The Texas Court of Criminal Appeals decided that this was not a violation of Griffin because there was no direct reference to failure to testify. The United States Supreme Court reversed. 394 U.S. 324 (1968). As another example, in Bannon v. State, 406 S.W.2d 908 (Tex. Crim. App. 1965), the prosecutor argued that the state had proven all that was required by virtue of evidence allowed by the rules, then immediately read the judge's instructions on defendant's failure to testify. The Texas Court of Criminal Appeals affirmed the conviction, but a federal district court later saw through this
by the principle often expressed in other jurisdictions that oblique comments can be as harmful as direct ones if sufficiently suggestive. On the other hand, the Texas decisions that imply a "privilege" approach to the wrongful withholding of non-testimonial evidence are contrary to the better reasoned authority, result in misleading the jury, and should be rejected.

B. Arguments Circumventing the Rules of Evidence

Remarks Outside the Record. Neither attorney in a criminal case may argue matters of fact that are not contained in the evidence or deducible from it. An inference, suggestion, or hypothesis need not be the only possible deduction in order to be proper in argument, but it must be reasonable. Thus the Texas Court of Criminal Appeals has reversed lower court verdicts because the prosecutor informed the jury about the defendant's criminal record when it was not in evidence, gave the contents of an inadmissible confession, or described offenses outside the record. Credibility arguments are subject to similar restrictions: An attorney may make deductions from the evidence, but he may not offer his own assurances that the witness is or is not truthful. There appear to be certain unwritten exceptions to these principles, such as the latitude accorded the attorneys in basing credibility arguments upon the demeanor of witnesses, which cannot easily be made part of the record. Argument outside the record can be one of the worst kinds of forensic misconduct. It poses a serious threat to the fairness of a criminal trial because

prosecutorial ploy and granted habeas corpus sub nom. Smith v. Decker, 270 F. Supp. 223 (N.D. Tex. 1967). For a contrast with other states, compare Spann v. State, 126 Ga. App. 370, 190 S.E.2d 924 (1973) ("We have a man that has no excuse"—held reversible error under Griffin), with Suber v. State, 440 S.W.2d 293 (Tex. Crim. App. 1969) ("What in the world kind of an excuse have you heard that could excuse the kind and character of conduct" of defendant—held no error).

77. E.g., United States v. Driscoll, 454 F.2d 792 (5th Cir. 1972).

78. The courts have difficulty applying this rule consistently. For arguments upheld as reasonable deductions, see Rodgers v. State, 486 S.W.2d 794 (Tex. Crim. App. 1972) (identification of black defendant more reliable since made by witness who was also black); Griffin v. State, 487 S.W.2d 81 (Tex. Crim. App. 1972) (reference to defendant as "dealer" or "pusher" reasonable deduction from defendant's testimony he purchased pills for resale). For arguments rejected as not reasonable deductions, see Thurman v. State, 382 S.W.2d 492 (Tex. Crim. App. 1964) (where evidence showed only that witness had seen bullet holes, prosecutor's assertion that defendants shot at witness not a reasonable deduction, but harmless error); cf. People v. Jones, 48 Mich. App. 334, 210 N.W.2d 396 (1973) (argument that defendant, who admitted being "junkie," was seller of narcotics since "junkie" means seller held not reasonable deduction and plain error). See generally Alschuler 634 & nn. 20, 21; Columbia Note 950-51, 954-56.


81. See, e.g., Kemph v. State, 464 S.W.2d 112 (Tex. Crim. App. 1971) (reference to defendant's "seduction of a fifteen-year-old" when evidence showed only that defendant was dating a fifteen-year-old sister of the murder victim—held reversible error); accord, Racin v. State, 290 Ala. 213, 275 So. 2d 655 (1973) (argument that defendant was making money from drugs when evidence showed defendant gave drugs to friends—held reversible error).

82. See Scott v. State, 170 Tex. Crim. 348, 340 S.W.2d 818 (1960) (reasonable deduction that testimony of a defense witness was perjured).

it injects into the jury's deliberations what is in effect unsworn, untested, and often entirely credible testimony of the prosecutor in evasion of evidentiary rules that have been elaborately designed to ensure reliability. Past Texas decisions have not always reflected the gravity of this problem, but recently the court of criminal appeals, particularly in the significant case of *Alejandro v. State,* has indicated that the court is more willing to reverse on this ground than before.

The major exception to the rule against outside-the-record comment is that attorneys may state propositions that are within the "common knowledge" or "common experience" of lay jurors. For example, it has been held proper for the prosecutor to call the jury's attention to facts outside the record such as that glass surfaces reflect light, that heroin is an addictive drug or that fingerprints cannot be taken from certain types of surfaces. Such remarks help the jury to understand better the law and evidence presented in the case and to weigh the credibility of the witnesses.

Nevertheless, serious problems sometimes arise in determining just what propositions are common knowledge. Indeed, the courts have accepted some statements as common knowledge that appear highly questionable or even palpably fallacious. Although interpretation of the common knowledge rule probably should not require that the argument pass muster as scientific truth, it should not be possible to influence the jury by matters known only by attorneys or by matters that appeal to popular prejudices. Perhaps a good test for the validity of this kind of argument might be that common knowledge propositions may be stated if they do not depend upon the credibility of counsel or upon external authorities but can be independently verified by lay jurors from their own experience.

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84. *See generally* Carlson, *supra* note 27.
85. *See* Alschuler 666-68.
90. Perhaps the most spectacular argument accepted as "common knowledge" was one prosecutor's remark in a rape case that, "A snake crawls on his own belly, but these human vultures crawl on the bellies of our helpless and defenseless women." *Hill v. State,* 144 Tex. Crim. 423, 157 S.W.2d 369, 373 (1941). In an equally striking case, an appellate court recognized as "common knowledge" the "business acumen of the Jewish race." *Rosenthal v. United States,* 45 F.2d 1000, 1003 (8th Cir. 1930). For a modern Texas example, see *Rodgers v. State,* 486 S.W.2d 794 (Tex. Crim. App. 1972) (identification of black defendant more reliable since made by black witness).
91. There is a tendency for prosecutors to disguise improper remarks by using the words "it's common knowledge that . . ." or "it's a reasonable deduction that . . ." *See, e.g.,* Hughes v. State, 493 S.W.2d 166 (Tex. Crim. App. 1973) (remark that "it is a matter of common knowledge that there is in Texas a Board of Pardons and Paroles held error but invited and harmless"); Lookabaugh v. State, 171 Tex. Crim. 613, 352 S.W.2d 279 (1961) (remark that it was a "reasonable deduction" that defendant had been to jail before was held reversible error where it was totally outside record).
92. Statements appealing to popular prejudice have particularly been tolerated in drug cases. *See, e.g.,* Muncy v. State, 168 Tex. Crim. 640, 330 S.W.2d 626 (1959) ("this weed [marijuana] . . . is the first step toward addiction").
93. *Cf. Reynolds v. State,* 505 S.W.2d 265 (Tex. Crim. App. 1974) (holding comment reversible error because subject of comment not such a "common occurrence that its recognition requires no expertise").
References to Evidence Not Admitted or Not Offered. A statement by the prosecutor that there is evidence of defendant's guilt which he has not been able to introduce is usually highly improper. Even the implication that such evidence exists is often prejudicial enough to be considered reversible error. Such an implication serves none of the proper functions of argument, and it injects into the jury's deliberations precisely the kind of unreliable or improper considerations that the rules of evidence were contrived to avoid. On the other hand, the prosecution or defense in Texas is allowed to argue that it has brought "all the evidence" it could before the jury.

Comments about admissible evidence that is not offered at trial pose a different problem. Remarks of this nature are a staple item in the arsenal of defense argument. Thus defense counsel frequently points out that there exists evidence that the state has not developed which could show innocence. Also, the prosecutor may comment upon the failure of the defense to call available witnesses other than the defendant. Many jurisdictions, recognizing the government's burden of proof, limit such comment to evidence that could be presumed to be helpful to the defense, but Texas law has not always so confined the prosecution's argument.

Attacks on the Defendant's Race, Religion, or Other Circumstances of Life. It is surprising in the 1970's to find racial slurs used by the prosecution or suggestions that minority-race defendants do not belong to the same community as the members of an all-white jury. Nevertheless, some courts have tolerated such remarks on grounds that they have had an arguable relationship to the issues in the case. These cases appear tenuous.

94. See, e.g., Stearn v. State, 487 S.W.2d 734 (Tex. Crim. App. 1972) ("We couldn't bring you all the circumstances surrounding the arrest"—held reversible error); cf. Morgan v. State, 502 S.W.2d 695 (Tex. Crim. App. 1973) ("I don't know what else he's done. We can't present that to you"—error held cured).

95. See Bowers v. State, 171 Tex. Crim. 613, 350 S.W.2d 27 (1961) (on rehearing) (argument that "after it was all over," jurors would have "a little different light on the matter"—held reversible error); cf. Linzy v. State, 478 S.W.2d 950 (Tex. Crim. App. 1972) ("That's where the testimony had to end, for reasons that we can't go into"—error held cured).


97. See, e.g., Patterson v. State, 387 S.W.2d 390 (Tex. Crim. App. 1965) (trial court's refusal to allow defense comment on state's failure to call witness held reversible error).

98. Compare Jackson v. State, 454 S.W.2d 733 (Tex. Crim. App. 1970) (argument defendant should have called twelve to fifteen eye-witnesses held proper even though no showing of availability or favorableness to defense), with Morgan v. State, 49 Ala. App. 330, 272 So. 2d 256 (1972) (argument defense should have called witness held reversible error where witness equally available to state and not presumptively favorable to defense).


Any argument even impliedly inviting the jury to convict for racial reasons ought to result in swift reversal. Likewise, adverse remarks about the religion or nationality of the accused still occur and should also be treated with disapproval. There do exist circumstances in which the prosecutor should not be color-blind, such as when he argues for equal treatment or pleads against a racially based acquittal, but these circumstances are relatively easy to differentiate.

Remarks about wealth, lifestyle, political beliefs, and personality are difficult to categorize because they may, in a few situations, be supported by the record and made the subject of relevant, fair comment. Unfortunately, however, the bulk of such remarks reaching the appellate courts are variants of such terms as "hippie" or "Communist" and have nothing to do with any proper function of argument. The Texas courts nearly always disapprove, but it appears they will reverse only in cases reaching unusually harmful proportions.

Comment About Defendant's Character and Extraneous Criminality. The approach of the Texas courts has generally been to allow relatively free comment about the character or external criminality of the defendant when supported by evidence properly within the record. Since the rules of evidence limit the introduction of such matter to evidence that has a bearing on the issues, there is some justification for this approach. Thus the prosecutor may argue about extraneous offenses or about defendant's criminal record whenever evidence of these matters has been properly introduced, so long as he does not make remarks indicating that impeaching evidence shows a criminal disposition or otherwise inviting the jury to consider the evidence unlawfully.

102. E.g., United States ex rel. Haynes v. McKendrick, 481 F.2d 152, 161 (2d Cir. 1973) ("[r]acially prejudicial remarks are . . . so likely to prevent a jury from deciding a case in an impartial manner . . . that a good argument for applying a more absolute standard may be made").

103. See, e.g., Yanez v. State, 403 S.W.2d 412 (Tex. Crim. App. 1966) ("Latin American punk"—held no reversible error where defendant's counsel objected and was sustained and court instructed the jury to disregard the statement).

104. See, e.g., Repka v. State, 455 S.W.2d 256 (Tex. Crim. App. 1970) (argument that wealthy man should be treated same as poor—held no error). See also note 12 supra.

105. For example, in a political assassination political beliefs may supply motive, and in a tax evasion case involving defendant's net worth wealth would clearly be relevant. See, e.g., Gilkie v. State, 168 Tex. Crim. 635, 331 S.W.2d 50 (1960) (argument defendant's wealth inconsistent with testimony—held no error).


Texas, however, goes considerably farther than these evidence rules in allowing argument about criminality. It is permissible, for example, for the prosecutor to label the accused as a "professional criminal,"109 "gangster,"110 or "cold-blooded" killer,111 so long as the record furnishes adequate support for these inferences. Likewise, the prosecutor may indicate that the accused was engaged in concerted activity,112 committed crimes more serious than the one charged,113 or derived great profit from his actions,114 so long as these are reasonable inferences from the evidence. The prosecutor is also given latitude to describe the offense in colloquial terms. Thus he may refer to murder as "assassination" or an assault as "beating up" the victim if the colloquial meanings of these terms conform to the facts.115 Generalized derogatory classification of the defendant with such terms as "grim reaper,"116 "outlaw,"117 "beast,"118 "mad dog,"119 or "animal"120 has usually met with disapproval, although reversal appears to occur only in very inflammatory cases.121 Character abuse is one of the most inconsistently treated problems in the law of argument, probably because of the difficulty of devising standards for measuring it.122

The line of prohibition in Texas appears to be firmer where argument about the accused's criminality ceases to be a fair deduction from the evidence and becomes exaggeration. Thus it is error for the prosecution to im-

114. Cf. Bourg v. State, 484 S.W.2d 724 (Tex. Crim. App. 1972) (defendant "is just as big a pusher as we have ever had in Jefferson County, Texas, and he needs to go to the penitentiary"—held no error).
118. See Grant v. State, 472 S.W.2d 531 (Tex. Crim. App. 1971) (error held cured, even though prosecutor persisted after objection sustained).
121. For examples of cases aggravated enough to cause reversal, see note 106 supra.
122. From jurisdictions nationwide, Professor Alschuler has compiled the following:

It has been held reversible error to call the defendant 'doubly vicious because he demanded his full constitutional rights, a 'cheap, scaly, slimy crook,' a 'leech of society,' a user of 'Al Capone tactics of intimidation,' and a 'junkie, rat and "sculptor" with a knife.' Courts have, however, found no error in cases in which the defendant was called 'animalistic,' 'lowdown, degenerate and filthy,' 'a mad dog,' 'a rattlesnake,' 'a trafficker in human misery,' 'a blackhearted traitor,' 'a hired gunfighter,' 'a creature of the jungle,' 'a type of worm,' or 'a brute, a beast, an animal, a mad dog who does not deserve to live.'

Alschuler 642 (footnotes omitted). See also Singer 244.
ply that the defendant committed or intended to commit extraneous offenses not inferable from the evidence. It is also error to compare defendants to infamous persons not related to the case—to refer to them, as did one prosecutor, as "latter-day Bonnie and Clydes," for example. However, it should be added that even here there are some cases that give the prosecutor latitude for obvious hyperbole.

Many other jurisdictions are less permissive with the prosecutor. One court, for example, held that it was reversible error for the prosecutor to refer to the defendant as a "cold-blooded killer," even though the evidence showed a brutal and deliberate murder. The court regarded the remark as an expression of the prosecutor's opinion on guilt and implied that the prosecutor should characterize the evidence only in neutral terms. Other courts, while not taking so restrictive a view, have disapproved inferences of extraneous misconduct such as characterization of the defendant as a "professional" criminal or of defense contentions as "bold-faced lies."

It is not easy to appraise the Texas rules of argument in this area. On the one hand, the Texas approach seems superior to that of courts that restrict the prosecutor to neutral summation. It is overly nice to say that the prosecutor may summarize the evidence but may not use the term "cold-blooded killer" in a brutal murder case or call defense testimony a "bold-faced lie" if that is clearly what it is. These remarks serve a number of valid functions, including interpreting the evidence, guiding credibility determinations, and resolving judgmental social policy questions. Even arguments about "professional" criminality, if indicated by the evidence, arguably serve legitimate functions of argument in a few cases. But on the other hand, the Texas court should be attentive—as it has not always been—to the question whether the inference is reasonably deducible from cognizable evidence, and it should be more careful not to condone exaggeration.

124. Overstreet v. State, 470 S.W.2d 653 (Tex. Crim. App. 1971) (error held cured); cf. Starnes v. State, 507 P.2d 920 (Okla. 1973), in which references to the defendant as a sex pervert and his comparison to Richard Speck resulted in a reviewing court's reforming defendant's sentence even though the remarks were not heard by the jury but only by the sentencing judge.
125. For example, in Bolding v. State, 493 S.W.2d 181 (Tex. Crim. App. 1973), the court upheld an argument comparing the defendant to Adolf Hitler. The argument, in substance, likened the defendant to Hitler because both committed criminal acts through subordinates, and the court regarded the remarks as legitimate use of "historical" analogy rather than character abuse.
127. United States v. Curtiss, 330 F.2d 278 (2d Cir. 1964) (bold-faced lies); People v. Booth, 11 Ill. App. 3d 203, 296 N.E.2d 369 (1973) ("professional criminal" argument strongly disapproved as invitation to convict for crimes not in issue, but held harmless in context of overwhelming case); cf. United States v. Jones, 482 F.2d 747 (D.C. Cir. 1973) (reference to homicide defendant as "executioner" held improper).
128. See notes 9, 10, 14 supra.
129. Thus, in Valdez v. State, 462 S.W.2d 24 (Tex. Crim. App. 1970), the prosecutor referred to defendant and his companions as "expert thieves" to explain how they were able to strip valuable items from the inside of a locked car in rapid time, leaving the car locked without fingerprints or scratches, and why they had numerous items from other cars in their possession.
130. See notes 92, 114, 125 supra and authorities therein cited.
Comments About Defendant’s Counsel and Defendant’s Version of the Facts. A prosecutor may not make comments concerning the defendant’s counsel in such a way as to impugn his character, imply that representing the defendant is somehow improper, unfairly criticize proper defense objections or trial tactics, or otherwise interfere with the defendant’s right to be represented by effective counsel. However, there are situations in which it is the approach or even the required task of defense counsel to mislead the jury, and the prosecutor is given some latitude to explain this defense tactic. Thus it has been held proper for the prosecutor to characterize a defense as “trumped up” or as “a smokescreen,” so long as he refers to the evidence in so doing. In Texas it has even been held proper for the the prosecutor, in criticizing defensive theories, to comment adversely about the defense attorney’s motivation to get his client acquitted. The limits on such comment are reached when the prosecutor begins to accuse the defense attorney of extraneous impropriety, disloyalty, or the like.

The recent Texas cases on this subject appear to be reasonable in light of the purposes of argument. In connection with the jury’s need to understand the evidence and to judge credibility, it seems that adverse comment about opposing counsel ought to be allowed within fair limits. It also appears sensible to permit the prosecutor to explain his opponent’s role as an adversary, provided the comment does not imply that this role is improper or in-
However, the comment should be restricted even more stringently than comment about the defendant's character, and epithets, slurs, or associations of the attorney with the offense charged have no legitimate purpose and should be regarded as highly improper.

C. Argument Appealing to Emotions or Community Sentiments: 
   The Prosecutor's "Call to Duty" and "Plea for Justice"

It is uniformly recognized in the decisions that the prosecutor may make a "legitimate plea for justice" and that the defense may make those "appeals in misericordiam which long tradition has come to sanction." The resolution of problems created by such remarks, however, depends heavily upon the philosophy one holds about the proper purposes of argument. It is therefore not surprising to find that the rules of permissible comment vary widely from jurisdiction to jurisdiction. Many courts, viewing neutral evidentiary analysis as the major proper ingredient of argument, narrowly limit the scope of the plea for law enforcement. In Texas there is apparently an approval of the use of emotional argument to aid in sharpening issues and in calling the jury to act according to the law by convicting when there is sufficient evidence, for the Texas rules concerning the prosecutor's plea for justice are wider than those of many other jurisdictions.

References to the Victim. In Texas it can generally be said that references to the victim, like references to the criminality of the defendant, are permissible if they are supported by the evidence or if they constitute reasonable deductions from the evidence. This principle apparently holds true even if

People v. O'Farrell, 161 Cal. App. 2d 13, 325 P.2d 1002 (1958) ("for a reasonable fee, defense counsel will give you a reasonable doubt"—held improper but cured by court instruction to disregard); Goff v. Commonwealth, 241 Ky. 428, 44 S.W.2d 306 (1931) (defense counsel "fighting so hard" because "employed with a big, fat fee"—held improper). A few courts have disapproved comment attacking the prosecutor's motivation. See, e.g., Hogan v. State, 191 Ark. 437, 86 S.W.2d 931 (1935) (prosecutor trying defendant for political reasons).

137. See Alschuler 647 (approving comment on defense motivation in reply to improper remarks).

138. Thus, the Texas court has disapproved reference to defense counsel's "reputation for getting people off." See Smith v. State, 397 S.W.2d 70 (Tex. Crim. App. 1965) (held harmless error); cf. Shaw v. State, 166 Tex. Crim. 399, 313 S.W.2d 888 (1958) ("he represents all the drunks in town"—held not reversible error).

139. Thus, while the court in Alejandro v. State, 493 S.W.2d 230 (Tex. Crim. App. 1973), announced intention to limit severely the proper subjects of prosecution argument, it recognized the propriety of the "plea for law enforcement." See note 1 supra and accompanying text. See also Berger v. United States, 295 U.S. 78, 88 (1935).


141. In addition to allowing wide latitude to emotional content, the Texas court is relatively permissive toward emotional displays and emotional delivery in both prosecution and defense argument. Thus in one Texas case the defendant complained that the prosecutor noisily jumped for approximately two minutes on a piece of paper on the floor as a demonstrative aid to his emotional description of the defendant's similar treatment of the victim. The court of criminal appeals concluded that no impropriety had been shown. Wright v. State, 422 S.W.2d 184 (Tex. Crim. App. 1967) (error also not preserved). Apparently, there are few limits in Texas upon tone of voice, loudness, handling of exhibits, or emotionally demonstrative conduct in argument.

In other jurisdictions, courts have found reversible error in a prosecutor's weeping openly before the jury during argument or other similar vivid displays, especially when accompanied by borderline argument content. See People v. Dukes, 12 Ill. 334, 146 N.E.2d 14 (1957), noted in 49 J. CRIM. L. 69 (1958).
the comment has no direct relation to the case, for its function is not only that of evidence summation but also that of a plea for justice. The operation of the wide Texas limits around this kind of argument may be illustrated by one case in which the prosecutor argued that the murder victim was a fine, clean-cut young man who was going to college and playing football, as contrasted with the defendant, who had a "bad habit" of carrying a pistol. The court held that these comments were proper because they were reasonably deducible from the evidence. 

Similarly, it has been held proper in Texas for the prosecutor, as part of his plea for justice, to mention the age or pregnancy of a victim or the financial deprivation that resulted to the victim because of the crime. It is permissible to depict the defendant as remorseless or indifferent to the suffering of his victims if that is a reasonable deduction from the evidence, and in cases without identifiable victims, courts have even tended to uphold speculation outside the evidence concerning the harm defendant's conduct might have done to others. By contrast, in other jurisdictions references to these matters are more severely restricted even though supported by the evidence. The more restrictive decisions disallow pleas for sympathy with the sufferings of the victim, bereavement of the victim's relatives, or even the age, poverty, or disadvantageous circumstances of the victim. The farther such comments depart from factual issues the jury must decide, the more likely they are to result in disapproval in most jurisdictions.

In Texas, the line of disapproval is apparently drawn where the comment departs from the evidence. Thus it was held improper for the prosecutor to argue: "Was he [the defendant] out there at the [decedent's] funeral? Did he help with the funeral expenses of this woman he cared so much about?"

144. See, e.g., Shelton v. State, 397 S.W.2d 850 (Tex. Crim. App. 1965) (argument that defendant decided victim no longer had right to live).
145. See, e.g., Fausett v. State, 468 S.W.2d 92 (Tex. Crim. App. 1971) (remark in heroin possession case that "There is no telling how many people have been ruined by this . . . killer. . . . [O]n the streets, he will destroy for his own gain"); accord, State v. Knight, 63 N.J. 187, 305 A.2d 793 (1973) (argument about effects of heroin on society upheld).
146. See, e.g., Racine v. State, 290 Ala. 225, 275 So. 2d 655 (1973) (comment on potential drug victims held reversible error).
147. Jurisdictions differ widely, but disallowance of such pleas appears to be the majority view. See Lowman v. State, 38 Ala. App. 612, 91 So. 2d 697 (1956) (decedent's wife and six children left hungry—held reversible error); Breniser v. State, 267 So. 2d 23 (Fla. App. 1972) (jurors should have sympathy for victim's family rather than for defendant—held reversible error); People v. McLean, 2 Ill. App. 3d 307, 276 N.E.2d 72 (1971) (request for sympathy of victim who was young and had a family—held reversible error). Contra, Kinslow v. State, 85 Ark. 514, 109 S.W. 524 (1908) (suggestion jurors consider own wives and children being made widows and orphans); People v. Wilson, 131 Ill. App. 2d 731, 264 N.E.2d 492 (1970) (family of rape victim entitled to protection just like jurors' mothers, sisters, and daughters).
148. Compare McReynolds v. Commonwealth, 177 Va. 933, 15 S.E.2d 70 (1941) (held reversible error to ask jurors to consider deceased's white-haired mother, palsied with age and unable to attend trial, in determining defendant's claim of justification), with People v. McCottrell, 117 Ill. App. 2d 1, 254 N.E.2d 284 (1969) (argument that anyone who would rape a 65-year-old woman had to be a hardened criminal held not a plea for sympathy and not error, but rather reference to the defendant's conduct in response to defense counsel's argument that the defendant was a young innocent boy from a good family).
Did he help bury her? in a case in which there was no evidence about the funeral expenses of the murder victim. But this line is often hard to draw. For example, Texas courts have differed whether comments comparing the death of a victim to the death of President Kennedy are error, although such comments seem clearly improper under the laws of most other jurisdictions. References to Crime Generally. References to the extent of crime in the community are even more freely accepted in Texas than arguments about the victim. For example, it has been held proper for the prosecutor to argue that "crime is on the increase in the community," even though such a proposition was not, and obviously could not have been, introduced into evidence. However, the Texas Court of Criminal Appeals will not accept argument of this nature if it is unduly explicit and statistical. Thus in one case it was held to be reversible error for the prosecutor to tell the jury that "sixty percent" of all the crime in the county was caused by narcotics, and in another the court disapproved the argument that the community was the "murder capital of the world.

It is also considered proper in Texas for the prosecutor to argue the relationship between the jury's verdict and the deterrence of crime. Thus, arguments that the verdict will "set the price of life in Reeves County," or that it will demonstrate "whether the jury will support law enforcement," or that an acquittal will "open the door to rape" have been upheld. However, arguments relating to external criminal acts or conditions in the country or in other communities, such as referring to "riots" or "anarchy" in certain cities in the mid-1960's, are usually error. Many jurisdictions take a stricter view than Texas and regard nearly all arguments about the effect of the verdict as improper because these arguments undermine the burden of proof or the presumption of innocence.

References to Community Rights or Sentiments. It is generally proper for the prosecutor to call attention to the rights of "law abiding" citizens or to the jury's position in the community. It is not proper, however, for the prose-

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152. White v. State, 492 S.W.2d 488 (Tex. Crim. App. 1973). See also Lopez v. State, 500 S.W.2d 844 (Tex. Crim. App. 1973) ("I believe that same week these officers were killed there were eleven killed in America"—held reversible error).
158. See generally Columbia Note 958; cf. authorities cited in note 38 supra.
159. See e.g., Meadowes v. State, 368 S.W.2d 203 (Tex. Crim. App. 1963); cf. United States v. Miller, 478 F.2d 1315 (2d Cir. 1973) ("be fair to the public interest in law enforcement; that is, be fair to yourselves"—argument held proper).
The distinction is made because reference to the jury’s task or to the rights of the community is considered merely encouraging the jury to do its duty, while statements that exert pressure for a particular result on the grounds of community sentiment have the danger of eroding the burden of proof and other procedural protections of the accused. Great difficulty, however, lies in differentiating between legitimate pleas for justice and appeals to community expectations.

For example, it has been held proper for the prosecutor in Texas to ask for a conviction on the ground that it will help the county to “become a better county.” The court has also approved a prosecutor’s argument that when people in the community ask, “Why don’t ‘they’ do something about it?” those people “are talking about you [the jurors].” The court held that this comment was not an appeal to community sentiment but to respect for the rights of the community; and indeed, the court has several times repeated its approval of this argument. In one other recent decision of significance, the court approved an argument that the prosecutor’s office “represents” the people of the jurisdiction. The court based its decision on the absence of any explicit statement that those people expected or demanded conviction.

This Texas approach appears consistent with the general thrust of decisions nationwide, although there are some courts that confine the prosecutor’s argument more narrowly, particularly with reference to comments about the role of the prosecutor.

The Law Governing the Plea for Justice—An Evaluation. The entire notion of the plea for enforcement of the law is one of the most difficult questions presented in the field of argument. On the one hand, references to the victim, to crime in the community, and to the rights of law-abiding citizens usually have no logical relation to the resolution of any contested issue before the jury, nor do they clarify the function of the jury. Yet it is important to remember that the reasons we have juries go beyond their role as impartial fact finders. We have juries, in part, to expound the social conscience of people.

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165. For cases disapproving remarks, see, e.g., People v. Pearson, 2 Ill. App. 3d 861, 277 N.E.2d 544 (1972) (indication community wanted conviction held reversible error); People v. Farrar, 36 Mich. App. 294, 193 N.W.2d 363 (1971) (implication of civic duty to support police held improper); State v. Agner, 30 Ohio App. 2d 96, 283 N.E.2d 443 (1972) (calling for conviction to meet public demand held reversible error). For cases approving remarks, see, e.g., Holbrook v. State, 126 Ga. App. 569, 191 S.E.2d 348 (1972) (“You are the conscience of the community and the business men in this town look to you”); State v. Crawford, 478 S.W.2d 314 (Mo. 1972) (“You are going to decide in this case whether the community wants this type of conduct”). As to the role of the prosecutor, see note 27 supra.
the community. Therefore, it is difficult to conceive of rules that would totally bar prosecution argument on the traditional subjects of the plea for justice.

Perhaps the best way to analyze the plea for law enforcement is to look to the function that it is supposed to fill: the sharpening of the issues and the furnishing to the jury of the determination to convict if there is adequate evidence. Under this analysis, the reason for mentioning the victim, crime, or the community is twofold. First, it provides a touchstone against which the jury can measure such social-policy issues as "reasonableness." Secondly, it reemphasizes the importance of the jury's following the law in considering conviction as well as in considering acquittal.

By contrast, it is not the function of the plea to prejudice the rights of the defendant or to lower the burden of proof. Consequently, while it may be relevant and appropriate to request that the jury consider the harm the defendant has done to the victim, such an argument becomes less valid when it contains a complete eulogy of the victim as some Texas cases seem to permit. A reference to the rights of the community may be useful, but an implication that the prosecutor represents the side of the people is less so because it misstates the prosecutor's role. The Texas law appropriately gives the prosecution the right to make an effective plea for justice, but it appears that in a few cases it allows the rhetoric of the plea to exceed its purposes.

D. Argument Concerning Sentencing and Other Consequences of Conviction

In the Trial on Guilt or Innocence. It is not proper for the prosecutor to mention any considerations relating to sentencing at the guilt or innocence phase of the trial. Thus it is improper in Texas at this stage of the trial for the prosecutor to explain the range of possible prison terms or to argue that if the defendant is found guilty he may be granted probation. These arguments are harmful because they detract from the jury's weighing the evidence according to the law. It should be noted that the defense has considerable latitude in arguing that the jury should not subject the defendant to liability for imprisonment or to being branded a criminal, but even the defense is not allowed to comment upon such collateral consequences of conviction as driver's license revocation, automatic sentencing under recidivist statutes, deportation, or the like.

In the Sentencing Phase of the Trial. There is perhaps no place where argument reigns more supreme than in the sentencing hearing where juries are

166. See note 14 supra.
167. See note 13 supra.
169. See, e.g., Jordan v. State, 500 S.W.2d 638 (Tex. Crim. App. 1973) (reference by the defense to recidivist sentencing at guilt-innocence stage held improper and invited prosecution response); Leslie v. State, 408 S.W.2d 116 (Tex. Crim. App. 1966) (motion in limine held properly granted to prevent comment by the defense about driver's license revocation as consequence of conviction).
allowed to assess sentences. The jury ordinarily has no experience with different types of possible sentences,\textsuperscript{170} little understanding of probation or parole, no notion of punishments other persons have received for greater, lesser, or similar offenses, and no access to evidence of the kind that would be readily available to a sentencing judge about the defendant's prospects for rehabilitation.\textsuperscript{171}

Not surprisingly, therefore, the Texas rules on argument concerning sentencing present an often inconsistent picture. For example, it is impermissible for the prosecutor to explain to the jury that the Board of Pardons and Paroles will be able to parole the defendant following a portion of his sentence,\textsuperscript{172} but opposing attorneys are given considerable latitude to argue the legal effect of probation and in the process will inevitably violate one of the cardinal limitations on argument by mentioning a large amount of law that is not contained in the judge's instructions. However, neither attorney may mention the kind of supervision actually provided probationers or the practices followed by the probation officer in recommending revocation.\textsuperscript{173} The mention of prison conditions, facilities, and services is theoretically prohibited, but as a practical matter many defense attorneys attempt to capitalize on popular conceptions about prisons.\textsuperscript{174} Although the attorneys are given latitude to argue the defendant's susceptibility to rehabilitation, such argument tends to be standardized and hollow, centering on such issues as whether the defendant has employment, whether he goes to church, or whether he has a family. It is not permissible for either attorney to make any references to penalties that have been assessed in other cases.\textsuperscript{175}

As a result of these limitations, argument on sentencing usually consists of debate about the gravity of the offense, expositions upon the defendant's

\textsuperscript{170} Judge Jerome Chamberlain says that "the jury is as totally unequipped to fashion a proper sentence as the twelve would be to perform brain surgery on the poor soul." Chamberlain, \textit{A New Look at Sentencing from a Court that Doesn't Exist}, 37 \textit{TEx. B.J.} 235, 236 (1974). Texas is the only state that allows the defendant, in every case except capital murder, to elect whether judge or jury will sentence.

\textsuperscript{171} See \textit{TEX. CODE CRIM. PROC. ANN.} art. 37.07 (1965 & Supp. 1974). For example, the trial judge may properly refuse to allow the jury to hear psychiatric or psychological testimony on the defendant's prospects for rehabilitation. Williams v. State, 481 S.W.2d 119 (Tex. Crim. App. 1972). Similarly, evidence about the sociological, economic, political, and overall condition of defendant's neighborhood is inadmissible. Tezzeno v. State, 484 S.W.2d 374 (Tex. Crim. App. 1972). See generally Crampton, \textit{Changes in the Punishment Hearing at the Bifurcated Criminal Trial}, 37 \textit{TEx. B.J.} 153 (1974). By contrast, a sentencing judge may call upon the resources of the probation department to gather information of this nature.

\textsuperscript{172} The reason is that parole decisions are the province of the parole board and not of the jury. There appears to be an exception allowing comments on parole in capital cases, on the ground that capital cases involve the question whether the defendant should ever have the possibility of returning to society. See Columbia Note 957; cf. Alschuler 634. Moreover, decisions allow circumvention of the limitation on mentioning parole. See Dorsey v. State, 450 S.W.2d 332 (Tex. Crim. App. 1969), in which the prosecutor argued that the only way the defendant could be held until rehabilitated was if he got a sentence of ninety-nine years or life. The court found no error.


\textsuperscript{174} See, e.g., Hefley v. State, 489 S.W.2d 115 (Tex. Crim. App. 1973) (defense argument that prisoners are put "in steel cages like animals in a zoo . . . in the company of hardened criminals").

\textsuperscript{175} See Abels v. State, 489 S.W.2d 910 (Tex. Crim. App. 1973) (upholding trial court's refusal to allow defense counsel to argue that prosecutor recommended probation in a similar case).
criminal record, and general discussion of the purposes of punishment.\(^\text{176}\)

Thus it is proper for the prosecutor to argue that the defendant should be incarcerated for a lengthy period of time to protect society,\(^\text{177}\) that the jury should set a high sentence in order to deter others,\(^\text{178}\) that confinement will rehabilitate the defendant by helping him to consider his crime,\(^\text{179}\) or that the jury should serve the ends of retributive justice by considering what other persons will think of their verdict.\(^\text{180}\) It is also proper for the attorneys to make sentencing recommendations of specific terms of years and to give their reasons for doing so.\(^\text{181}\) In addition, "pleas for justice" are used in a manner similar to that in the guilt-innocence stage, with the addition of new techniques suited to the sentencing phase.\(^\text{182}\) The limits in this area appear to be reached when the prosecutor bases his sentencing recommendations on evidence of extraneous offenses\(^\text{183}\) or on arguments that divert the jury from its proper function.\(^\text{184}\)

Unfortunately, the bulk of jury argument on sentencing in Texas is emotional and illogical in nature. To some extent, the prevalence of this kind of argument is symptomatic of the inherent disadvantages of jury sentencing, but some of it is attributable to the restrictive rules of evidence and argument at this stage of trial and to inadequate submission of instructions to the jury. In all, the rules surrounding the penalty phase in Texas appear to divert the jury from dispassionate sentencing toward emotional reactions of sym-

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\(^{176}\) Although it is proper for the prosecutor to argue the evidence of extraneous offenses, the defendant's criminal record, and defendant's likelihood to repeat the crime (even though speculative), it is not proper for the prosecutor to argue that the jury should punish the defendant for extraneous offenses by adding that punishment to the penalty for the offense at trial. Klueppel v. State, 505 S.W.2d 572 (Tex. Crim. App. 1974) (held reversible error).

\(^{177}\) Asay v. State, 456 S.W.2d 903 (Tex. Crim. App. 1970) (defendant should receive maximum sentence so that he could not within short time repeat indecent exposure offense). See also Forgey v. State, 171 Tex. Crim. 355, 350 S.W.2d 32 (1961) (defendant should be given death sentence so he could not be released to carry out threats against wife and child of murdered man).

\(^{178}\) Pogue v. State, 474 S.W.2d 492 (Tex. Crim. App. 1971) (remark about "stemming crime wave").


\(^{182}\) When seeking the death penalty, prosecutors sometimes use the "Christ-and-the-thieves" argument: Christ did not save the two thieves from their sentence of death, and neither should the jury in this case. The equally inane, but effective, "Sergeant York" argument places the jury in the position of someone morally opposed to killing who, when called to the service of his country, does his duty. Conversely, defense attorneys sometimes argue the story of Christ's saving the adulteress from stoning and invite any juror who is without fault to cast the first stone. These arguments have been widely tolerated despite the possibility that they violate the rule against appeal to religious or patriotic community sentiments. Interviews with Guerinot and Tucker, supra note 17.

\(^{183}\) Klueppel v. State, 505 S.W.2d 572 (Tex. Crim. App. 1974); see note 175 supra.

\(^{184}\) Thus the prosecutor may not argue to the jury that they should leave the question of probation to the judge, even though the judge has authority to probate penitentiary sentences under ten years in Texas, since such an argument diverts the jury from full independent consideration of the matter, which is its duty. State v. Blount, 509 S.W.2d 615 (Tex. Crim. App. 1974).
pathy or repugnance, and this diversion is reflected in the character of the argument.

III. RULES GOVERNING THE FORMAT AND PROCEDURE OF ARGUMENT

From the foregoing, it should be clear that Texas allows vigorous, hard-hitting content in prosecution argument. It can be reasonably argued that the rules even permit argument that is too vigorous in certain instances. However, this latitude given the prosecutor need not necessarily result in unfair trials since the defense is also given similar latitude, and argument content can usually emerge with a fair balance. But content is not the total picture. The format and procedure of argument, including the order in which the opponents address the jury, the availability of a right to answer the opposition’s arguments, the allowance of displays of emotion, and the procedures for enforcing the rules, also each has an incalculable effect on the fairness and balance of argument. In Texas, format and procedure probably affect that balance of fairness more profoundly than do rules regarding content.

A. The Order of Argument

The Prosecutor’s Right of Reply: The Open Door Doctrine. When the defense attorney broaches a subject that the prosecutor cannot legitimately mention, a situation results that challenges the normal rules of argument. Some courts take the position that in this circumstance the prosecution’s only proper remedy is to make an objection to the trial court. However, a majority of jurisdictions, including Texas, have adopted variations of what is called the doctrine of “invited argument,” “retaliation,” “provocation,” or “the open door.” Simply put, these doctrines amount to the principle that defense argument which invites or justifies prosecution response creates a right of reply for the prosecutor, even though the subject would ordinarily be outside the realm of proper prosecution comment.

The clearest situation in which the doctrine of the open door applies is when the attorney for the defense engages in actual misconduct. For example, if the defense attorney makes remarks outside the record, the prosecutor is sometimes allowed to respond with limited remarks outside the record. Certain other situations arise in which defense remarks, although not

185. See, e.g., Dugan Drug Stores, Inc. v. United States, 326 F.2d 835 (5th Cir. 1964). However, those courts that have adopted this approach have generally discarded it quickly. See, e.g., Helms v. United States, 340 F.2d 15 (5th Cir. 1964).
186. See generally Alschuler 656-68; Columbia Note 972-74.
187. Thus, in Langham v. State, 473 S.W.2d 515 (Tex. Crim. App. 1971), defense counsel gave a totally outside-the-record explanation for his client’s decision to testify. The prosecutor’s response that the defendant decided to testify because he knew certain witnesses had been subpoenaed by the state was likewise outside the record but was upheld as invited argument. Cf. Helms v. United States, 340 F.2d 15 (5th Cir. 1964) (extra-evidentiary reference to defendant’s corruption of police officer held response to defense argument). However, courts usually place strict limits on this kind of response. See, e.g., Lott v. State, 490 S.W.2d 600 (Tex. Crim. App. 1973), in which the prosecutor’s argument that the defendant would be sent to a specific prison unit for young offenders was held reversible error, and not invited by defense counsel’s comments about prison conditions which did not go outside the record as substantially as those of the prosecutor.
directly improper, leave such a misleading picture that prosecution reply in normally forbidden areas is imperative. For example, if the defense calls attention to the prosecution's failure to supply evidence which in fact could not be offered because it was inadmissible, the prosecutor may usually explain the rule that excludes such evidence or even refer to the existence of the evidence. These applications of the open door doctrine make sense in terms of the purposes of argument, since they help the jury to avoid being misled about the evidence.

Although some cases appear to limit the doctrine to these relatively clear instances, other jurisdictions, including Texas, take a far broader view of the open door doctrine. The Texas cases on the subject are not entirely consistent. The court of criminal appeals has usually rejected egregiously inappropriate applications of the open door doctrine, but unfortunately it appears that there remain many instances in which the doctrine is used to allow the prosecutor to transcend the rules merely because it is the most convenient way to reply to a defense argument that is ostensibly proper. From an empirical examination of opinions it appears that the more illogical or outlandish the original defense argument, even if not unfair or improper, the more likely the court is to hold that it opens the door to prosecution reply that would normally be error. However, a few recent cases indicate that the court is reexamining the doctrine with a view to its proper limitation.

Such a reexamination appears desirable. Certainly, there are many instances in which the open door doctrine furthers the purposes of argument. But a proper, limited defense argument, even if unsound, should not be a license for the prosecution to go outside the rules on the theory that "retalia-

188. A good example of a proper operation of this rule is provided by Scott v. State, 170 Tex. Crim. 237, 340 S.W.2d 52 (1960). The defense alluded to an extra-evidentiary confession of the defendant and argued that the state was suppressing evidence. The prosecutor, in response, offered to allow the defense to introduce the confession, which was declined. There was held to be no error. Cf. Sifford v. State, 505 S.W.2d 866 (Tex. Crim. App. 1974) (defense comment that he would have been happy to have the state introduce certain evidence held to open door to remark that defense objection kept the evidence out); Radosevich v. State, 171 Tex. Crim. 333, 350 S.W.2d 198 (1961) (defense argument in driving-while-intoxicated case that state had introduced no blood test held to open door to prosecutor's comment that the defendant had refused to submit to the test).

189. See generally Alschuler 656-68; Singer 246-50; Columbia Note 972-74. Alschuler indicates that a proper "open door" doctrine would reach only "a small minority of the results the courts have reached." Alschuler 657. The author of the Columbia Note suggests that it would be better to allow prosecution appeals from adverse jury verdicts than to suffer the open door decisions the courts have made. Columbia Note 974.

190. See, e.g., Smith v. State, 506 S.W.2d 602 (Tex. Crim. App. 1974) (defense remark that accused had lived clean life did not open door to prosecutor's mentioning specific prior arrests and acts of misconduct).

191. For example, in Minifie v. State, 482 S.W.2d 273 (Tex. Crim. App. 1972), the court held certain remarks of the prosecutor improper, but held that they were invited by defense argument that the state's principle witness was not credible. In Meadowes v. State, 368 S.W.2d 203 (Tex. Crim. App. 1973), defense comment upon the state's failure to call a witness was held to open the door to prosecution response that the witness was in jail serving a two-year sentence and happened to be the defendant's supplier of narcotics. Cf. Hull v. United States, 324 F.2d 817 (5th Cir. 1963) (defense remark that government sometimes overcharges held to have invited prosecution response that there could have been forty-five counts in case instead of fifteen).

tion" was somehow "provoked" by the defense attorney's poor logic. The test might more appropriately focus upon the question whether the defense opened the door to the inquiry so strongly as to make an unfair impression on the jury that could not adequately be dealt with other than by the kind of response the prosecution actually made.

The Right to Open and Close Final Argument: A Powerful Prosecution Advantage. The Texas Code of Criminal Procedure provides that "the State shall have the right to close" argument, and the forensic tradition of allowing the state both to open and to close final argument is generally followed throughout the nation. The reason for this tradition is apparently the notion that the party with the burden of proof should have some advantage in argument. In practice, tremendous advantage is gained by the prosecution because of this right to open and close. Psychologically, it means that the jury is more likely to give its greatest attention to the argument of the prosecution, and forensically it allows the prosecutor, but not the defense attorney, to reply fully to his opponent.

There is a tendency for the prosecutor to accentuate these inherent advantages by giving a brief opening argument (or waiving opening altogether) and saving his most convincing points for his closing. The potential unfairness of this tactic is clear since it not only accords the prosecutor's arguments their greatest emphasis but also places them beyond the answer of the defense. Most jurisdictions have therefore adopted rules that limit the scope of the prosecution's closing argument. Some hold, for example, that it is improper for the prosecutor to argue on closing any subject not either developed in his opening or raised by the defense in its argument. Others allow the prosecutor only to answer the arguments of the defense in closing. Even with these limitations, closing remains a powerful weapon, and skillful prosecutors contrive to get the most out of it.

Surprisingly, Texas adopts neither of these limitations upon closing argument. Because of the statutory provision for the state's right to close, the Texas court has regarded this right as paramount, and it has expressly held that there is no duty upon the prosecutor to make his opening complete or

193. TEX. CODE CRIM. PROC. ANN. art. 36.07 (1966).
194. See 6 AM. JUR. TRIALS Prosecution Summations § 8, at 882 (1967).
195. Id.
196. Since inferences of guilt "are subject to conflicting points of view," "emphasis on them in the final portion of the prosecution's argument, when the defense will no longer have an opportunity to comment on them, is normally most effective." Id. For an analysis of the psychological advantages attendant upon opening and closing, see Lawson, Experimental Research on the Organization of Persuasive Arguments: An Application to Courtroom Communications, 1970 LAW & THE SOC. ORDER 579. See also Costopoulos, Persuasion in the Courtroom, 10 DUG. L. REV. 384 (1972); Hayes, Applying Persuasion Techniques to Trial Proceedings, 24 S.C.L. REV. 380 (1972).
197. One writer has stated: "Generally, the courts which have treated the propriety of a prosecutor's raising new points during closing summation have held such argument to be improper." Annot., 26 A.L.R.3d 1409, 1410 (1969). See, e.g., Moore v. United States, 344 F.2d 558 (D.C. Cir. 1965) (held harmless error); State v. Peterson, 423 S.W.2d 825 (Mo. 1968) (held reversible error).
199. 6 AM. JUR. TRIALS Prosecution Summations § 8, at 882-83 (1967).
limit his closing. The decisions even extend this principle to those instances in which the state does not have the burden of proof. These cases foster and preserve the notion that the prosecutor has the privilege to withhold major points from his opening so as to surprise the defense upon closing.

This notion that the prosecution may freely structure its opening and closing so as to prevent any answer by the defense is nothing short of astonishing. First, it appears to be an unreasonable construction of the Texas Code of Criminal Procedure. Secondly, there are compelling reasons, both legal and practical, militating against the Texas approach to closing. At its worst, the approach could violate due process, since the prosecutor’s purpose in withholding opening is to deny the defendant notice and an opportunity to reply to opposing contentions. It also appears to violate the right of confrontation in some cases. It further seems to contravene the Code of Professional Ethics of the American Bar Association. Finally, the rule is contrary to the construction of similar statutes in other states. See notes 197-98 supra. The Texas construction also fails to harmonize the Code with other provisions of law. First, it is in direct conflict with Canons of Professional Responsibility of the American Bar Association in force at the time the construction was adopted. See note 205 infra. Secondly, it provides less protection to the criminal defendant than to the civil. See note 206 infra and accompanying text. Other jurisdictions that have faced this situation have construed the criminal practice to include those protections of the defendant that are present in the civil practice. See, e.g., State v. Hale, 371 S.W.2d 249, 256-57 (Mo. 1963).

In non-criminal proceedings, “notice and opportunity for a hearing” are rudiments of procedural due process. Bell v. Burson, 402 U.S. 535 (1971) (driver’s license revocation); cf. Arnett v. Kennedy, 94 S. Ct. 1633, 40 L. Ed. 2d 15 (1974) (termination of government employment). Due process also encompasses a “right of reply” in appropriate instances. Id. at 1680, 40 L. Ed. 2d at 74 (dissenting opinion). In any event, it is clear that the “prosecutor” must be “advance” notice, see In re Guilt, 387 U.S. 1 (1967) (juvenile proceeding), and the “opportunity to be heard” must be “at a meaningful time and in a meaningful manner.” When the prosecutor closes argument with emotional displays, asks why the defense has not called witnesses, states that incriminating details are withheld, it is submitted that severe due process problems arise if there is no defense response, even though each of these arguments would be within the rules.

201. Thus the prosecution is allowed to close the argument in the sentencing hearing, when neither side has a burden of proof, and likewise, the prosecutor’s closing has been preserved in cases in which the only contested issue is sanity, upon which the defense actually has the burden. See State v. Martinez, 501 S.W.2d 150 (Tex. Crim. App. 1973).
202. Although the Code provides for the state’s right to close, it says nothing concerning any right to withhold opening. The construction of the statute allowing such withholding of opening is contrary to the construction of similar statutes in other states. See notes 197-98 supra. The Texas construction also fails to harmonize the Code with other provisions of law. First, it is in direct conflict with Canons of Professional Responsibility of the American Bar Association in force at the time the construction was adopted. See note 205 infra. Secondly, it provides less protection to the criminal defendant than to the civil. See note 206 infra and accompanying text. Other jurisdictions that have faced this situation have construed the criminal practice to include those protections of the defendant that are present in the civil practice. See, e.g., State v. Hale, 371 S.W.2d 249, 256-57 (Mo. 1963).
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204. The rules of argument actually allow for considerable injection of new factual matter under the guise of “reasonable deduction,” “common knowledge,” and “invited argument.” When these new facts come to light only upon closing, insulated from both cross-examination and defense response, it seems fair to characterize the prosecutor as a “witness against” the defendant who cannot be “confronted.” See Carlson, supra note 28. The Texas court has recently decided that denial of confrontation can result from outside-the-record statements by jurors during deliberation, a case that does not appear nearly so strong as “prosecutor testimony.” Hartman v. State, 507 S.W.2d 557 (Tex. Crim. App. 1974).
205. At the time the Code of Criminal Procedure was adopted, the canons provided that “lie is not candid or fair for the lawyer knowingly . . . to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.” ABA CANONS OF PROFESSIONAL ETHICS No. 22. The canons were replaced in 1970; a parallel Ethical Consideration now provides that “All litigants and lawyers should have access to tribunals on an equal basis.” ABA CODE OF PROFESSIONAL RESPONSIBILITY No. 7 & E.C. 7-35.
trary to a provision in the Texas Rules of Civil Procedure\textsuperscript{206} which limits closing in civil cases, and the anomalous result is that an insurance company defending against a claim for money damages has a fully protected right of reply while an accused on trial for his life in a criminal case does not. When one remembers that the prosecution’s powerful right of closing without full opening is accompanied by a relatively broad scope of argument content as well as a wide open door doctrine of prosecution reply, neither of which is necessarily harmful by itself, it becomes evident that the combination can lead to unfairness.

Actually, many defects in the Texas law governing argument could probably be cured by slight variances from the traditional formula of the government’s absolute right to open and close final argument. For example, discretion in the trial court to allow defense surrebuttal upon points treated unfairly by the prosecution might go far to alleviate the harm done by improper prosecution argument when it occurs, decrease its frequency, and reduce the number of cases which must be reversed.\textsuperscript{207} Such a provision for defense surrebuttal could be regulated by the same guidelines as those for the prosecution’s open door privilege, so that both parties would have a right of reply.

\section*{B. Enforcing the Rules: Correction and Prevention of Error in Argument}

The vagueness of the rules is a key problem in the law governing argument. An almost greater problem, however, is presented by the clear inadequacy of the means for enforcing the rules that do exist. To counteract this defect, commentators have suggested new remedies ranging from civil damage actions to restructuring of adversary roles, as well as expanded use of such traditional sanctions as contempt, reprimand, and bar discipline.\textsuperscript{208} Although several of these suggestions may be appropriate in extraordinary cases, the majority of cases will continue to be influenced by preventive action by the trial court or by appellate reversal, the two main sanctions in effect today.

\textit{Correction and Prevention by the Trial Court.} An attorney’s first recourse against improper argument is objection in the trial court, which should cause the trial judge to adjudicate whether the argument is within the rules.\textsuperscript{209} Further, since the word “sustained” will not usually give complete relief, the attorney is entitled upon request to an instruction to the jury that it shall disregard the offending argument,\textsuperscript{210} and the court has authority to order a

\textsuperscript{206} TEx. R. Civ. P. 269(b).
\textsuperscript{207} A few courts have expressly recognized defense surrebuttal in limited instances. State v. Hale, 371 S.W.2d 249 (Mo. 1963); cf. Martin v. State, 236 Ark. 409, 366 S.W.2d 281 (1963).
\textsuperscript{208} See generally Alschuler 644-77; Singer; Columbia Note 959-80. These commentators have written an excellent review of argument rule enforcement nationwide, and hence this section of this Article gives only abbreviated attention to jurisdictions other than Texas.
\textsuperscript{209} See TEx. CODE CRM. PROC. ANN. art. 38.05 (1965). Although applicable by its terms to evidence objections, this section describes the procedure for argument objections also.
\textsuperscript{210} In Fryson v. State, 301 A.2d 211 (Md. App. 1973), the trial court merely sustained objection to an improper argument. The failure to grant an instruction to disre-
mistrial. The court's power also extends to granting preventive orders and citing the offending attorney for contempt.

It has been suggested that argument could be improved by more active trial court enforcement. For example, the court might conceivably erase a forceful improper remark more thoroughly by adding a countervailing comment or reprimand to its instruction to disregard. Although the Code of Criminal Procedure appears to preclude such comment, the Texas Court of Criminal Appeals has impliedly approved it in some cases. In addition, the trial court has some authority to prevent abuse of the prosecution's right to close by exercise of discretion over argument format.

While some expansion of the role of the trial judge thus appears justified, it should not be regarded as a panacea. The trial judge must rule too quickly and is too close to the pit of combat for high levels of judicial activism to be acceptable. The Texas Code properly reflects a concern for the influence and partisanship of judicial comments at the trial level.

**Appellate Review and Avoidance Techniques.** When prosecution argument is seriously improper, is objected to at trial, and is not adequately cured by action of the trial judge, the defense may be able to secure reversal on appeal. Appeal is probably the main tool through which restrictions on prosecution argument are enforced today. Reversal is a serious deterrent to the

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211. See Nichols v. State, 378 S.W.2d 335 (Tex. Crim. App. 1964). For jeopardy reasons, the court should not order a mistrial except on a defense motion.


213. Alschuler 653; Singer 274 n.194; cf. United States v. Sawyer, 347 F.2d 372, 374 (4th Cir. 1965) (suggesting duty of judge to interrupt, admonish, and give countervailing instruction sua sponte).

214. TEX. CODE CRIM. PROC. ANN. art. 38.05 (1965) states that the judge shall rule without comment and shall not "at any stage . . . make any remark calculated to convey to the jury his opinion of the case."

215. See, e.g., Bradley v. State, 489 S.W.2d 896 (Tex. Crim. App. 1972), where the trial judge not only firmly instructed the jury to disregard an improper argument, but additionally reread and emphasized a portion of his instructions dealing with the subject of the argument. The error was held cured.

216. See Brown v. State, 475 S.W.2d 938 (Tex. Crim. App. 1971). This discretion would appear to allow the trial judge to prevent abuse by (1) apportioning the prosecutor's opening and closing so that closing is too short for full argument, (2) requiring an opening on points that will be covered in closing, or, possibly, (3) allowing surrebuttal, although this authority is questionable. Each of these approaches has, at certain times, been used by a few Harris County judges. Interviews with Tucker and Guerinot, note 17 supra.

217. It is crucial to remember that the trial judge is perfectly as capable as the prosecutor of misconduct. See generally Alschuler 677-85. The only appellate decision Alschuler found concerning contempt against a prosecutor resulted in reversal, because the trial court had convicted the prosecutor of remarks criticizing the judge which were made outside the presence of the court and jury. Brutkiewicz v. State, 280 Ala. 218, 191 So. 2d 222 (1966); Alschuler 674. And the judge's comments may themselves prejudice the case so as to require reversal if the court is not extremely careful. Id. at 649 & n.93.
prosecutor, since it means the expense of a new trial on a case that is significantly older, possible jeopardy limits set on the verdict, and defense access to useful impeachment material. However, one of the most striking features of the law governing argument is the infrequency with which appellate courts reverse a conviction on the ground of argument error. Calling upon a veritable arsenal of avoidance techniques, the courts today affirm a majority of even those cases in which they actually find that argument improprieties are present.\textsuperscript{218}

Chief among these avoidance techniques is the stringent doctrine of preservation of error. Except in cases of "plain" or "fundamental" error,\textsuperscript{219} an appellate court will not take cognizance of any question absent its preservation by timely and specific objection.\textsuperscript{220} In Texas, if an objection is sustained the defense must additionally request an instruction to the jury to disregard and a mistrial to preserve the right to appeal the error. Furthermore, it is incumbent on the defense to secure separate rulings on the objection itself and on each request for relief.\textsuperscript{221} The Texas preservation doctrine thus assumes extraordinary diligence of counsel.\textsuperscript{222} It also puts the defense to the

\textsuperscript{218} For an excellent discussion of this tendency in the federal courts, see Singer.\textsuperscript{219} It is difficult to recognize fundamental error in argument because the decisions are few and the courts, in reversing, rarely refer to the doctrine explicitly. See, e.g., Bray v. State, 478 S.W.2d 89 (Tex. Crim. App. 1972) (reversal in spite of clear non-compliance with preservation, but without indication whether the error was fundamental).\textsuperscript{220} In Texas, as in the majority of jurisdictions, compliance with the preservation doctrine must be accomplished immediately after the offending argument. A particularly graphic example is provided by Bothwell v. State, 500 S.W.2d 128 (Tex. Crim. App. 1973), in which defense counsel made immediate objection, immediately thereafter moved for an instruction to disregard, but waited until the prosecutor had moved to another argument subject before rising to move for a mistrial. The court of criminal appeals held this delay a waiver of the error and affirmed the conviction. As to specificity, the objection must not only apprise the court that the argument is improper, but must state the principle of law that makes it so. See Stone v. State, 171 Tex. Crim. 201, 346 S.W.2d 323 (1961). The uncertainty of argument rules often makes this requirement difficult to fulfill.\textsuperscript{221} See, e.g., Powell v. State, 475 S.W.2d 934 (Tex. Crim. App. 1972); Moon v. State, 465 S.W.2d 172 (Tex. Crim. App. 1971). The following formidable list expresses the hypertechnicality of the Texas requirements:

1. First, you must make an objection. . . . The objection must be made at the first opportunity. . . . 2. Your objection must be done with specificity. . . . You cannot just say: "I Object, Your Honor." . . . 5. You must Get a ruling from the trial court. Overruled or sustained. 6. If your objection is sustained, you must then get a ruling from the trial court to instruct the jury to disregard. 7. You must then make motion to strike from the Record. 8. You must then move for a mistrial. 9. You must then object and except for failure to grant your motion for mistrial. 10. If your objection is overruled, you must then object and except to the Judge's ruling. 11. You must be prepared to later renew your objection, whether it is sustained or not, when the State makes the second pass.

Speech by Marvin Teague, Houston Bar Ass'n, Mar. 15, 1974. The rule that it is the responsibility of the defense counsel to secure a ruling, rather than of the court to give it, enables trial judges to prevent review by non-responsive answers to objections. "The jury has heard the evidence," "Let's move along," "This is just argument," and "Stay within the record, counsel," are all staple non-rulings. Utterance of any of these formulas puts the defense counsel in an unenviable position. He must either persist in demanding a ruling, annoying both judge and jury, or forego review.\textsuperscript{222} One of the greatest tragedies of the preservation doctrine as it is applied in Texas is the implication in appellate opinions that the final conviction is somehow the fault of the defense counsel, who may have given a vigorous and competent defense while failing only to comply with requirements for preservation that are virtually unattainable during a jury trial. One commentator has put it thus: "The Court of Criminal
Hobson's choice of foregoing review or aiding the prosecution's argument, since the repetition of requests for relief usually appears obstructionist to the jury.\textsuperscript{223} Although the advantages of the preservation doctrine seem worth keeping,\textsuperscript{224} it would be more appropriate, as some commentators have suggested, to allow an attorney to object either during or immediately following the conclusion of his adversary's argument.\textsuperscript{225}

A second important avoidance technique is the doctrine of cured error. When an objection to an improper prosecution remark is sustained, an instruction to disregard is given, or the prosecutor retracts the offending remark, many appellate courts conclude that the error is cured.\textsuperscript{226} In Texas the cured error doctrine results in a severe reduction of the number of argument improprieties that are actually subjected to review, because the court of criminal appeals considers an instruction to disregard sufficient to cure error except in “extreme cases” where it appears that the remark was “clearly calculated to inflame and prejudice the minds of the jury” and is of “such character that the impression it makes cannot easily be withdrawn.”\textsuperscript{227} It appears reasonable to confine reversal to remarks that cannot easily be withdrawn,\textsuperscript{228} but the test would be more appropriate if it did not place such a severe burden on the defense to show “calculated” and “extreme” prejudice.\textsuperscript{229}

Finally, the appellate courts often obviate review by finding that error is not sufficiently harmful to require reversal. The pervasiveness of this avoidance device as applied to criminal jury argument is illustrated by the following statement in a recent Texas case: “Generally, to constitute reversible er-

\textsuperscript{223} See Alschuler 656; Singer 243. Prosecutors in some cases have not been above taking advantage of this appearance of obstruction. See, e.g., Jones v. State, 437 S.W.2d 822, 824 (Tex. Crim. App. 1969) (“However, it's getting pretty close to home, as you can see him [defense counsel] jumping up every couple of minutes here”).

\textsuperscript{224} See, e.g., Turner v. State, 482 S.W.2d 277, 279 (Tex. Crim. App. 1972) (prosecutor's suggestion jury convict because of "crisis in this country" held cured by instruction to disregard); Powell v. State, 475 S.W.2d 934 (Tex. Crim. App. 1972) (prosecutor's retraction).

\textsuperscript{225} Terry v. State, 481 S.W.2d 870 (Tex. Crim. App. 1972).

\textsuperscript{226} It would not make sense to reverse because of a slight misstatement that has been completely removed. Thus, in Gonzales v. State, 414 S.W.2d 181 (Tex. Crim. App. 1967), the prosecutor mistakenly referred to "the defendant" but corrected the remark immediately to refer to another witness when the slip was objected to. The court appropriately applied the cured error doctrine.

\textsuperscript{227} For example, in Mistrat v. State, 471 S.W.2d 831, 833 (Tex. Crim. App. 1971), a marijuana case, the prosecutor injected a totally unrelated inference that the defendant was "one of the biggest pimps in Dallas and had a long string of girls." It is impossible to conceive of any action of the trial court that could remove this blast from the jury's thoughts, but the appellate court held that an instruction to disregard did exactly that.
ror because of argument of the prosecution there must be a violation of some mandatory statute or some new fact has been injected into the case or the argument must have been manifestly improper and harmful.\textsuperscript{230} This is not a standard for recognizing improper remarks but rather a standard for determining whether remarks which have already been found improper require reversal and thus it allows affirmance of many convictions in which there has been argument error. The Texas Court of Criminal Appeals has even altered the standard in some cases to set up a virtual presumption of harmlessness which is almost impossible to overcome.\textsuperscript{231} In a few cases the court has gone so far as to recognize a substantial risk that the improper remark influenced the jury but nevertheless has held the error "not so obviously prejudicial as to require reversal."\textsuperscript{232} For all of these reasons, it would improve the enforcement of argument rules in Texas if the court were to confine the harmless error doctrine more tightly. The court might accomplish this result by employing the sliding scale proposed by one commentator or by following another's suggestion that the "harmless beyond a reasonable doubt" standard, which is applicable to error of constitutional magnitude, be more generally applied.\textsuperscript{233}

Above all, it should be recognized that the doctrines of preservation, cured error, and harmless error are not merely appellate procedures floating in a vacuum. They exercise a heavy influence upon improper argument at the trial level. The Texas preservation doctrine, for example, lifts much of the responsibility for restraint from the prosecutor and places it squarely on the defense counsel. The resulting appearance of obstruction by the defense encourages borderline prosecution argument content. Furthermore, inappropriate or inconsistent use of avoidance doctrines leads to uncertain enforcement of argument rules and contributes to the vagueness of the rules themselves. This defect particularly occurs when the courts mass together several avoidance doctrines on the same point, sometimes with the implication that the argument was not error in the first place.\textsuperscript{234} The persistent labelling of


\textsuperscript{232} For example, in Hernandez v. State, 507 S.W.2d 209 (Tex. Crim. App. 1974), the trial court itself made an erroneous remark by advising counsel, "You can try that on appeal," in the presence of the jury. The appellate court recognized that this remark conveyed to the jury the impression that the judge regarded appeal, and therefore conviction, as the likely result. Nevertheless, the court considered the error harmless.

\textsuperscript{233} Professor Alschuler suggests that the courts evolve different standards for reversal depending upon the type of error, but that they express clearly the standard for each type and apply it with a degree of uniformity. Alschuler 665-66. Professor Singer advocates the extension of Chapman v. California, 386 U.S. 18 (1967), to non-constitutional error and the adoption of rules for automatic reversal in some instances. Singer 278.

\textsuperscript{234} For example, in Griffin v. State, 487 S.W.2d 81 (Tex. Crim. App. 1972), the court was asked to review an argument in which the prosecutor called the defendant a "pusher" of narcotics. The court indicated that the remark was a reasonable deduction from the evidence, but concluded that any error was not preserved since there was no timely objection and, in addition, was justified by the invited argument doctrine.
arguments as “error, if any” that is “not preserved,” “cured,” or “harmless” encourages the prosecutor to limit himself in argument not by what is error but by what will avoid reversal. These doctrines are probably essential to proper appellate review, but their confinement within narrower limits would seem a way to improve attorneys’ performance in argument.

IV. CONCLUSION

The purposes served by argument are indispensable. From the relatively basic task of simplifying the law and interpreting the evidence to the more difficult tasks of clarifying the philosophical issues and calling upon the jury to do justice and ignore prejudicial distractions, vigorous argument, even upon controversial emotional issues, serves proper functions and results in better jury trials. But vigorous argument stands always at the edge of a precipice, easily able to fall into idioms that would distract the jury from the law or the evidence. And the pressures that urge the opposing attorneys toward the edge are inherent in the adversary system. Therefore, argument needs strong, yet realistic, regulation in order to be a positively helpful procedure. Realistic rules would include supervision over argument content that disallows exaggeration of fact or distortion of law but permits vigorous argument. Even more, however, workable regulation of argument would include an attempt to create argument procedure and format in which each side can respond to the other and can understand and enforce the rules.

The Texas law governing content of argument properly allows for vigorous, hard-hitting comment by both sides. It should be perfectly proper for the prosecutor to call a cold-blooded murderer a cold-blooded murderer, a thief a thief, and a person who has engaged in vicious, animalistic conduct vicious and animalistic, always with the limitation that the statement be supported by properly admitted evidence. The majority of recent Texas cases appear reasonable in this regard, but there are a sufficient number of decisions that condone palpable exaggeration, and these tendencies should be eliminated. Additionally, there are other areas that could be substantially improved. The Texas courts should give greater attention to the Griffin principle, to abuses of comment on extraneous criminality, to excesses of rhetoric in the plea for justice, and to the much-neglected sentencing hearing. The courts should also take some care to indicate what comment by the defense is proper and what is not, since the lack of effective regulation of defense argument creates a vicious cycle in which abuses by the defense lead to abuses by the prosecution.

However, even though the Texas rules regarding argument content need improvement, they are not the most pressing problems in the Texas law governing argument today. Rather, it is in the areas of argument procedure and format that the most serious defects persist. For example, the open door doctrine is applied too indiscriminately to be fair. Fortunately, there are indications that this doctrine is undergoing a reevaluation. Another problem is the Texas appellate court’s pervasive use of avoidance techniques to prevent review of both content and procedure questions. Such an approach prevents
fair enforcement of argument rules and robs the decisions defining proper argument of a great deal of their meaning, with the result that compliance with the rules is rendered less likely and less feasible.

But the most glaring deficiency today in Texas law governing argument is the prosecution's unrestricted right to close without full opening. Hard-hitting prosecution argument is a good thing, but it is good only if the defense has the correlative right to expose any fallacies or weaknesses it happens to raise. Significantly, the Texas rule appears designed not to create such a free exchange but instead to prevent defense criticisms of the prosecution theory of the case. The prosecutor's closing should remain strong, but adoption of a rule requiring the prosecutor to open fully and limited provision for defense surrebuttal in proper cases would make the entire argument process fairer.

Argument in criminal cases is too powerful, too visible, too important to be ignored. Today there are broad trends of reform in the criminal law, some of which may have their beneficial effects upon argument in an indirect way. Even so, courts, commentators and attorneys should recognize the significance of argument and turn direct attention to its defects. At the same time, appraisal of argument should include recognition of its essential role in the jury trial process and attempt to preserve its benefits.