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CRIMINAL LAW—MIRRORING THE TRIAL: MAKING SENSE OF THE LAW OF CLOSING ARGUMENT IN CRIMINAL CASES

Alex J. Grant*

The law of closing arguments in criminal cases has proven to be a minefield for prosecutors and judges. Whereas criminal convictions can be overturned because of improper argument by the government, acquittals obtained through improper argument by defense counsel cannot be reviewed because of the Double Jeopardy clause. Two rules, the prohibition against vouching and the proscription against the expression of personal opinions, have proven to be very difficult to apply in a coherent manner, to the point that argument about the credibility of witnesses has been prohibited in some jurisdictions. Jury nullification arguments by the defense tend to creep into a criminal trial during summation, and they present a difficult dilemma for the ethical prosecutor. Sometimes error in closing argument occurs when the prosecutor attempts to respond to appeals for jury nullification, that is, for a verdict outside the law and the evidence presented in the courtroom. An effective means of policing closing arguments and of preventing jury nullification would be a rule that requires closing arguments to mirror the trial. This “mirroring” principle means that the scope of closing argument should be the same as the scope of the facts and law presented during the trial. This principle would set out logical boundaries of proper and improper argument, and it would help trial judges identify and thwart pleas for jury nullification.

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INTRODUCTION

The law of closing arguments in criminal trials is, in many respects, a series of hazy lines,¹ which courts have labored to apply in a consistent or coherent fashion. For the practitioner, that is to say, the prosecutor,² it represents a minefield of maxims, or as the United States Court of Appeals for the First Circuit has said, “fundamental verities.”³ In the most famous formulation, a prosecutor may strike “hard blows” but not “foul ones.”⁴ The prosecutor may be a vigorous advocate, “so long as he does not stray into forbidden terrain.”⁵ Verbal formulations such as these have not done much, and reported decisions have done precious little, to stake out the boundaries of this “forbidden terrain.” As a result, the federal and state case reports in every jurisdiction continue to collect criminal cases in which convictions are overturned, or nearly overturned, by what is said during closing argument.⁶

This Article is directed toward a couple of species of improper argument, the prohibitions against vouching, and the expressions of personal opinion. Left to the side are more obvious sins, such as commenting on a defendant’s failure to testify during a trial,⁷ referencing the defendant’s post-arrest silence,⁸ or injecting racial or similar prejudice

1. *See* *United States v. Innamorati*, 996 F.2d 456, 483 (1st Cir. 1993) (“The line between the legitimate argument that a witness’s testimony is credible and improper ‘vouching’ is often a hazy one . . .”).

2. This law is directed at prosecutors because improper argument by defense counsel which results in an acquittal can never be reviewed on appeal because the double jeopardy clause of the Constitution of the United States of America would bar a retrial. *United States v. Wilson*, 420 U.S. 332, 352 (1975).

3. *United States v. Taylor*, 54 F.3d 967, 976–77 (1st Cir. 1995).

4. *Berger v. United States*, 295 U.S. 78, 88 (1935).

5. *Taylor*, 54 F.3d at 976 (quoting *Palmariello v. Superintendent of M.C.I. Norfolk*, 873 F.2d 491, 494 (1st Cir. 1989)).

6. *See, e.g.*, *United States v. Freisinger*, 937 F.2d 383, 386 (8th Cir. 1991) (“This [c]ourt has previously commented on the frequency with which it has had to address the ‘acceptable limits of closing argument.’” (quoting *United States v. Pierce*, 792 F.2d 740, 742 (8th Cir. 1986))); Daniel S. Medwed, *Closing the Door on Misconduct: Rethinking the Ethical Standards That Govern Summations in Criminal Trials*, 38 HASTINGS CONST. L.Q. 915, 920 (2011) (“Prosecutorial over-reaching during closing argument is among the most common forms of error in criminal cases . . .”); Rosemary Nidiry, Note, *Restraining Adversarial Excess in Closing Argument*, 96 COLUM. L. REV. 1299, 1310 (1996) (“Prosecutorial misconduct in closing argument has been relatively well documented and extensively litigated.”).

7. *See, e.g.*, *United States v. Sepulveda*, 15 F.3d 1161, 1186 (1st Cir. 1993) (calling it “bedrock” that the prosecutor may not comment on the defendant’s right to remain silent).

8. *See* *Wainwright v. Greenfield*, 474 U.S. 284, 295 (1986) (holding that prosecutor’s comment on the defendant’s post-arrest silence improper in cross-examination and closing argument); *Doyle v. Ohio*, 426 U.S. 610, 615–19 (1976) (“[U]se for impeachment purposes of

into the proceedings.⁹ These latter categories of forbidden summation are fundamentally sound prohibitions tied to the law, such as the defendant's right to remain silent under the Fifth Amendment.¹⁰ The former categories (vouching and personal opinions), as they are defined by many courts, can be untethered from the law and essentially constitute a code of politeness with fine distinctions which can often be discerned only after the fact.¹¹ The more damning critique made in this Article is that this code of politeness or good manners can be, in the extreme form adopted by some jurisdictions, essentially at war with the notion of argument itself.¹² This extreme form, found in the rule that a lawyer may not comment on the credibility of the defendant or witnesses, forces the sides to avoid the central issues of the trial. These issues often are the credibility of witnesses and the dueling narratives of truth presented by the parties which the jury must choose from.¹³

This Article identifies another source of uncertainty in the law of closing arguments: appeals, subtle or otherwise, by the defense for jury nullification. Jury nullification has a long history in the American legal system; a robust debate among scholars, practitioners, and even judges continues about whether jury nullification is ever proper, and if so, under what circumstances. What cannot be denied is that jury nullification, or at least the potential for it, exists.¹⁴ Jury nullification exists in the shadows, generally unaddressed by the court during a trial, and it can rear its head in closing argument, where the defense has more latitude than in other parts of the trial. The prosecutor is then left with a conundrum in how to respond. The perceived injustice of the charging decision, of the

petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment.”).

9. *See, e.g.*, *United States v. Doe*, 903 F.2d 16, 24–25 (D.C. Cir. 1990) (“Federal courts have long condemned racially inflammatory remarks during governmental summation.”). Although never reviewed and condemned by an appellate court, the defense argument in the civil rights-era Emmett Till murder trial was an extreme example of injecting racial prejudice into a closing argument. Defense counsel said to the all-white jury, “every last Anglo-Saxon one of you has the courage to free these men,” and warned that their “forefathers would turn over in their graves if these boys were convicted on such evidence as this.” Shaila Dewan & Ariel Hart, *F.B.I. Discovers Trial Transcript in Emmett Till Case*, N.Y. TIMES (May 18, 2005), <https://www.nytimes.com/2005/05/18/us/fbi-discovers-trial-transcript-in-emmett-till-case.html>.

10. *See Doyle*, 426 U.S. at 617–18.

11. *See infra* Sections I.C.3–5.

12. *See infra* Section I.C.5.

13. *See id.*

14. *See* Arie M. Rubenstein, Note, *Verdicts of Conscience: Nullification and the Modern Jury Trial*, 106 COLUM. L. REV. 959, 960 (2006) (noting that the phenomenon of jury nullification occurs when “some juries still acquit even when the evidence indicates that the defendant has violated the law”).

potential punishment to the defendant, or of the law itself may be the elephant in the room, but the prosecutor has limited means to address what may be on the minds of everyone in the courtroom.

As a practicing prosecutor, I find all of this to be a problem that needs fixing. Closing arguments are often the culmination of a long process that includes a police investigation, a grand jury investigation, a careful review of the charging decision by the prosecutor's office, painstaking efforts to provide discovery to the defense, pretrial litigation in the form of motions to suppress evidence, the parties' intensive preparation for trial, and the admission, at trial, of the government's evidence that may support a finding of guilt beyond a reasonable doubt. The reversal of a conviction because of a misstep during summation, which may consist of a few words or phrases delivered inartfully and/or extemporaneously, is an outcome that should be avoided at all costs. Of course, the prosecutor must be faithful to both the law and the ethics rules, but the solution does not lie in emphasizing the general maxims which tend to be exercises in circular reasoning. Nor is it to be found, as some observers have suggested, in formulating slightly more specific "guidelines" for counsel to follow.¹⁵

Instead, this Article argues that a firmer foundation is needed for the law of closing arguments, at least with respect to the admonitions against the expressions of personal opinion and vouching. At present, many decisions about improper argument have a Justice Potter Stewart "I know it when I see it" quality,¹⁶ an approach that will continue to generate the uncertainty that produces frequent appellate litigation on the subject. This Article proposes that the scope of closing argument should be governed by the scope of the earlier stages of the trial. This would be a workable principle that would be fair to the parties and help guide the advocate trying her level best to seek justice. Thus, if the trial has been a "he said, she said" controversy, it would be proper to address the credibility of witnesses head-on. Likewise, if the defendant is charged with deliberately speaking untruths (i.e., lying), the prosecutor should be allowed to argue that the defendant was dishonest and untruthful without stepping through a minefield of forbidden and allowed verbal formulations.

This principle would also help to prune the rule against expressions of personal opinion down to its essential core without ensnaring statements which articulate what is obvious—that is, the prosecutor trying the case believes the defendant to be guilty. If the prosecutor seeks to

15. See Michael J. Ahlen, *The Need for Closing Argument Guidelines in Jury Trials*, 70 N.D.L. REV. 95, 105–07 (1994); Nidiry, *supra* note 6, at 1327–34.

16. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (indicating he could not define hard-core pornography, but he knew it when he saw it).

assure the jury that there are facts known to him but not introduced during the trial which cinch the defendant's guilt, that is clearly improper. On the other hand, it should not matter that a prosecutor who sticks to arguing the case presented at trial has ventured into "I believe" or "I submit" statements.

Finally, requiring the closing argument to mirror the scope of the trial would help address the issue of jury nullification in a constructive way. Many facts that go into the charging decision of the prosecutor's office, or as the Supreme Court has termed it, the "moral[] reasonable[ness]" of a conviction,¹⁷ are not known to the jury. If the moral righteousness of the case is to be contested during the trial, the prosecutor would have many things to say that would not be admitted into evidence under traditional notions of relevance. When the defense suggests that a conviction is not just—as opposed to attacking the government's evidence or its application to the law—it necessarily presents an incomplete picture. A prosecutor arguing within the scope of the evidence presented at the trial is at a disadvantage when the defense does not do so. At present, it is unclear how a prosecutor can respond to a plea for jury nullification, or how a jury is to consider such a plea.

The "mirroring" principle presented in this Article is a coherent way for the trial judge to manage the presentation of evidence and the subsequent argument.¹⁸ It would also encourage the trial judge to think ahead to the closing argument. In other words, if evidence about an issue is not presented or is precluded from being presented during the trial, the issue is not ripe for argument at the end of the trial. Under this principle, the trial judge will ideally keep jury nullification out of the trial and instruct the jury to decide the case based on admitted evidence and applicable law. To the extent the trial judge wishes to crack open the door to jury nullification, as some trial judges have, the mirroring principle forces the judge to think about whether to allow a fight on jury nullification on equal terms based on evidence presented at the trial. The implications of doing this, which this Article explores, should give any trial judge pause before allowing a bald appeal for jury nullification.

17. *Old Chief v. United States*, 519 U.S. 172, 188 (1997).

18. *See infra* Part III.

I. THE LAW OF CLOSING ARGUMENT

A. *The Prosecutor's Charge*

The Supreme Court's words in *Berger v. United States* about the heavy responsibilities and high purpose of a federal prosecutor have been cited in thousands of published cases and appellate briefs, attaining "near-iconic status for its description of the prosecutor's duty to serve justice, play by the rules, and not hit below the belt."¹⁹ One of my former federal prosecutor colleagues had the words printed and taped to his office door—a daily inspiration to all who passed by. There has been no better statement about the role of the public prosecutor, and it came in a case involving improper closing argument by counsel for the government in a criminal case:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.²⁰

As an expression of the prosecutor's purpose, it is perfect. As a guide to argument during summations in a criminal trial, the distinction between "hard blows" and "foul ones" begs the question of what is foul and what is fair. The United States Court of Appeals for the First Circuit, in a more recent case, has said that "[w]e start with certain fundamental verities. 'A prosecutor is permitted vigorous advocacy, so long as he does not stray into forbidden terrain.'²¹ Such verities, repeated in similar form elsewhere,²² only warn the practitioner about the obvious—that there are

19. Bennett L. Gershman, "Hard Strikes and Foul Blows:" *Berger v. United States 75 Years After*, 42 LOY. U. CHI. L.J. 177, 178–79 (2010).

20. *Berger v. United States*, 295 U.S. 78, 88 (1935).

21. *United States v. Taylor*, 54 F.3d 967, 976 (1st Cir. 1995) (quoting *Palmariello v. Superintendent of M.C.I. Norfolk*, 873 F.2d 491, 494 (1st Cir. 1989)).

22. See, e.g., *United States v. Bennett*, 874 F.3d 236, 252 (5th Cir. 2017) ("'[W]e allow prosecutors to use expressive language and 'a bit of oratory and hyperbole' in arguments.' . . . At the same time, it is well-established that a prosecutor may 'not express his

limits in closing argument. Such *on the one hand—on the other hand* formulations leave the reader thirsting for more clarification.²³ Courts have reduced these general statements to some rules or maxims, such as the rule against vouching for a witness's credibility, but as will be described below, these maxims have also been wanting.²⁴ Elaboration on these standards has been left to case-by-case adjudication of alleged errors.²⁵

The law of closing arguments in criminal cases is essentially directed at prosecutors because, unlike a conviction, an acquittal cannot be appealed.²⁶ A wrongful acquittal obtained from improper argument by defense counsel is as immune from appeal under the Double Jeopardy clause as an acquittal fairly won.²⁷ It is in this vein that the rules developed for closing arguments are analyzed from the perspective of the prosecutor.

B. *The Prime Directive: Arguing Within the Evidence*

The purpose of this Article is not to canvass all of the rules governing closing arguments, but to concentrate on a couple which have been applied badly or are simply misconceived. It is sensible to first examine the rule that the prosecutor (and defense counsel) should not argue facts outside the evidence introduced in court.²⁸ This is the most basic rule of closing argument because it flows from the central assumption of our legal system: that the outcome of the case is to be determined based on the evidence presented in court at trial, judged against the legal standards

personal opinion on the merits of the case or the credibility of witnesses.”” (quoting *United States v. Boyd*, 773 F.3d 637, 645 (5th Cir. 2014)).

23. See, e.g., *United States v. Garza*, 608 F.2d 659, 666 (5th Cir. 1979) (using a series of general oppositional statements to define prosecutor's duty such as “[a] prosecutor can be vigorous without being venomous”).

24. See generally Richard Collin Mangrum, *I Believe, the Golden Rule, Send a Message, and Other Improper Closing Arguments*, 48 CREIGHTON L. REV. 521 (2015) (discussing twelve principles concerning restrictions on closing arguments).

25. Peter W. Agnes, Jr., *An Ounce of Prevention is Worth a Pound of Cure: A Collaborative Approach to Eliminate Improper Closing Arguments*, 87 MASS. L. REV. 33, 36 (2002).

26. *United States v. Wilson*, 420 U.S. 332, 352 (1975).

27. See Nidiry, *supra* note 6, at 1300; see also *Evans v. Michigan*, 568 U.S. 313, 326 (2013) (holding an acquittal based on error of law induced by the defendant himself still enjoys protection under the Double Jeopardy Clause).

28. See *Commonwealth v. Beaudry*, 839 N.E.2d 298, 301–02 (Mass. 2005); see also *Commonwealth v. Johnston*, 7 N.E.3d 424, 444 (Mass. 2014) (“Argument based on facts not in evidence is improper.”); *Commonwealth v. Storey*, 391 N.E.2d 898, 906 (Mass. 1979) (“[I]t is . . . beyond dispute that a prosecutor commits error when he uses closing argument to argue or suggest facts not previously introduced in evidence.”).

supplied by the trial judge.²⁹ As one commentator has put it, “When we, the inhabitants of the United States, want to resolve a legal dispute, we have a trial. . . . We have relied on trials for our entire history as a nation.”³⁰ Our entire books of state and federal rules of both criminal and civil procedure, our rules of evidence, and the guarantees of the Constitution of the United States concerning the rights of the accused all presuppose the existence of such a trial,³¹ as opposed to say, one of its predecessors, trial by battle.³² Having made the trial the central event of our legal process in criminal cases, it would be rather illogical to allow lawyers to argue facts that have not been brought into this carefully constructed proceeding.

This rule, which I will call the “prime directive” because it flows from this first principle of how guilt and innocence is to be determined in our legal system, does not restrict the prosecutor to a mere recitation of the evidence. The prosecutor is allowed to draw fair inferences from the evidence, to refer to the jury’s experience and common sense, and to use “analogy, example and hypothesis” in aid of his or her argument.³³ This rule against arguing outside the evidence is straightforward to apply because the latitude given to the advocate to make an argument is distinct from the prohibition against the advocate conjuring up facts not introduced at the trial.

29. See *Holbrook v. Flynn*, 475 U.S. 560, 567 (1986).

Central to the right to a fair trial . . . is the principle that “one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.”

Id. (quoting *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978)).

30. Edward L. Rubin, *Trial by Battle. Trial by Argument.*, 56 ARK. L. REV. 261, 261 (2003).

31. See generally Michael Sudman, *The Jury Trial: History, Jury Selection, and the Use of Demonstrative Evidence*, 1 J. LEGAL ADVOC. & PRAC. 172, 173–76 (1999) (tracing the tradition of the jury trial and trial rights guaranteed by the Sixth and Seventh Amendments of the United States Constitution).

32. See Rubin, *supra* note 30, at 261 (contrasting modern trials with the medieval practice of trial by battle, whereby a legal dispute would be resolved through “armed conflict between two opponents”).

33. *Commonwealth v. Ridge*, 916 N.E.2d 348, 368 (Mass. 2009) (quoting *Leone v. Doran*, 292 N.E.2d 19, 31–32 (Mass. 1973), *modified on other grounds*, 297 N.E.2d 493 (Mass. 1973)); see *Criminal Justice Standards for the Prosecution Function*, Standard 3-6.8 to 3-6.9 (AM. BAR ASS’N 2015), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/ [hereinafter *Prosecution Function*].

C. *The Rules Against Vouching and Personal Opinion*

1. Vouching: A Solid Core and Ambiguous Outer Layer

The rules against vouching and expressions of personal opinion are separate, but they are treated together here because the misapplications of these rules share similar features. In the classic form, improper vouching occurs when the prosecutor uses the prestige of his position or office to assure the jury the credibility of the government's witnesses or other evidence,³⁴ such as when the prosecutor assures the jury the police are telling the truth because he knows the officers and works with them.³⁵ A prosecutor who argues for the credibility of police officers because they would not "put their pensions . . . on the line" to make a false case against a defendant is guilty of improper vouching because he is lending the prestige of the police department to the officers' testimony.³⁶ Similarly, vouching occurs when the prosecutor assures the jury that the police would not invent a case against the defendant because the police have so many real drug cases to investigate,³⁷ or when the prosecutor tells the jury that the government would not put witnesses on the stand if they were lying.³⁸

This rule—and these obvious examples of vouching—are best understood as stemming from the restrictions of the "prime directive" discussed above. In a true case of vouching, the prosecutor is taking the jury outside the evidence introduced at trial.³⁹ If the prosecutor vouches for a police witness by noting his familiarity with the witness, he is invoking other cases and other sets of facts not relevant to the case against the particular defendant on trial. The defense is ill-equipped to challenge these assurances because it would know little about the entire course of dealings between the prosecutor and the witness. For example, putting an officer's pension or job on the line necessarily raises questions about what the rules are for when an officer might lose her pension or job.⁴⁰ These

34. Stephen A. Saltzburg, *Proper and Improper Closing Argument*, 26 CRIM. JUST. 62, 63 (2011).

35. Agnes, *supra* note 25, at 43 n.87 (noting the temptation of prosecutors to vouch for the credibility of police officers they know well in drug cases).

36. *Commonwealth v. Kelly*, 629 N.E.2d 999, 1001 (Mass. 1994) (alteration in original).

37. *See, e.g., Commonwealth v. Gallego*, 542 N.E.2d 323, 325 (Mass. App. Ct. 1989).

38. *See, e.g., United States v. Cresta*, 825 F.2d 538, 556 (1st Cir. 1987).

39. Mangrum, *supra* note 24, at 539 (quoting *United States v. Berrios*, 676 F.3d 118, 133 (3d Cir. 2012)) (noting that vouching occurs when prosecutor assures the jury of the credibility based on her "personal knowledge or by other information" not contained in the record).

40. *Kelly*, 629 N.E.2d at 1001–02 (explaining the impropriety of a prosecutor's comments at closing argument suggesting that officers had risked their pensions by testifying).

rules are collateral to the issues in the trial. Likewise, an argument that invokes the scourge of drugs in the community at large is not pertinent to whether a particular drug defendant committed the charged crime.⁴¹ In each of these examples of improper vouching, the closing argument did not mirror the evidence at trial.⁴² The harm from such vouching is apparent. Imagine for a moment the introduction of evidence and cross-examination on these topics of argument—past cases, past dealings between the prosecutor and police officers, pensions, and the overall drug problem in the community—which would be necessary to make it a fair fight. The trial would be sidetracked with, for example, a debate on just how drugs are affecting a particular community—the kind of complicated policy dispute that a trial is ill-equipped to resolve, let alone entertain, for the purpose of illuminating the issue of the officer’s credibility.⁴³

If courts found violations of the rule against vouching only when the prosecutor argued outside the evidence, then the boundary between proper and improper argument would be clear. However, some courts have found vouching when it is plain that the prosecutor has done nothing more than argue inferences about evidence that was introduced at trial.⁴⁴ In some formulations, vouching can occur even when the prosecutor argues facts adduced during trial but expresses a personal belief about a witness’s credibility or the evidence.⁴⁵

The United States Court of Appeals for the First Circuit has gone further by stating that impermissible vouching can occur even where the prosecutor did not (a) “suggest that he had special knowledge about the witness[’s] credibility,” (b) indicate that special circumstances like the witness’s plea agreement guaranteed that the witness was credible or (c) express his personal belief about the witness’s truthfulness.⁴⁶

41. See, e.g., *United States v. Solivan*, 937 F.2d 1146, 1153 (6th Cir. 1991) (providing one example of many cases condemning “war on drugs” rhetoric in closing arguments). The *Solivan* court observed that this language is “designed to divert rather than focus the jury upon the evidence.” *Id.* (citing *United States v. Barlin*, 686 F.2d 81, 93 (2d Cir. 1982)).

42. See, e.g., *Gallego*, 542 N.E.2d at 325 (“Here the prosecutor departed from *this* case, where she belonged, to invoke supposed facts which were not only extraneous but carried the emotional charge of an overwhelming drug menace.”); see also *Kelly*, 629 N.E.2d at 1002 (finding that the argument about pensions went outside the evidence found at trial).

43. See, e.g., *Gallego*, 542 N.E.2d at 325 (including an argument about the drug problem generally in Boston).

44. See, e.g., *People v. Knapp*, 624 N.W.2d 227, 241 (Mich. Ct. App. 2001) (holding that an argument that the victim’s testimony was honest based on the evidence introduced during the trial was deemed to be vouching).

45. See *Medwed*, *supra* note 6, at 919; see also *Mangrum*, *supra* note 24, at 539.

46. *United States v. Wihbey*, 75 F.3d 761, 772 (1st Cir. 1996).

Nonetheless, the following prosecutor's statement, "what they have done is testified truthfully" (referring to witnesses at the trial), was deemed to be "inappropriate," albeit not reversible error.⁴⁷

This expansive notion of vouching ensnared another prosecutor when the First Circuit found that statements made in response to attacks on the credibility of the government's witnesses "may have crossed the line into improper vouching."⁴⁸ The statement "the government suggests . . . that they were up there telling the truth," was held not to have impacted the fairness of the trial and did not constitute plain error.⁴⁹ The First Circuit has also admitted that "[t]he line between the legitimate argument that a witness's testimony is credible and improper 'vouching' is often a hazy one."⁵⁰ When it said that the prosecutor's fairly subdued, logical "statement that '[t]he testimony of the witnesses in this case is well corroborated . . . [a]nd as a result, you know that the witness's testimony is true'—fell in the grey area."⁵¹

Commonwealth v. Caillot demonstrates the difficulty in applying a rule that conflates the prohibition against vouching with the rule against expressions of personal belief.⁵² In this case, the Massachusetts Supreme Judicial Court stated its general rule that "[a] prosecutor engages in improper vouching if he 'expresses a personal belief in the credibility of a witness, or indicates that he . . . has knowledge independent of the evidence before the jury.'"⁵³ *Caillot* held, however, that the challenged statement—"[w]hat [the witness] did was he told the truth based on the evidence in this case, based on what could be corroborated"—would have been understood by the jury as an argument that the witness's testimony was credible because it was corroborated by evidence admitted at the trial.⁵⁴ As a result, it was not improper. The court did say that the "better course" would have been to avoid using the phrase, "he told the truth."⁵⁵ Although *Caillot* did not suggest a substitute phrasing, the prosecutor was justified in arguing that the witness told the truth, and a slightly different

47. *Id.* (alteration in original).

48. *United States v. Sullivan*, 85 F.3d 743, 751 (1st Cir. 1996) (citing *Wihbey*, 75 F.3d at 771–73).

49. *Id.*

50. *United States v. Innamorati*, 996 F.2d 456, 483 (1st Cir. 1993).

51. *Id.* (alterations in original).

52. *Commonwealth v. Caillot*, 909 N.E.2d 1, 14–15 (Mass. 2009).

53. *Id.* at 14 (alteration in original) (quoting *Commonwealth v. Wilson*, 693 N.E.2d 158, 172 (Mass. 1998)).

54. *Id.* at 14–15.

55. *Id.* at 15.

formulation with the same meaning would have been, it seems, entirely proper.⁵⁶

The fine distinctions in cases like these show the difficulty in defining a rule against vouching when it is expanded beyond the logic of the prime directive. Vouching that goes outside the evidence at trial represents a well-defined core to the rule. Other vouching infractions exist in a “grey area,”⁵⁷ in which courts are reluctant to reverse convictions where it is clear that the prosecutor was guilty of, at most, inartful phrasing that did not unfairly affect the trial.⁵⁸

This “grey area” of vouching is often subsumed within the separate rule against statements of personal belief. For the sake of understanding this often murky area of the law, it would be best if the vouching rule were confined to vouching based on facts or reputation known outside the courtroom.⁵⁹ Statements about the credibility of witnesses or the strength of the government’s case that are based on facts known inside the courtroom are better analyzed separately, as the American Bar Association’s (ABA) Standards for the Prosecution Function do.⁶⁰ Such statements, whether they are deemed to be improper or not, should be tested against the rule that prohibits injecting personal opinions into closing argument.

2. The Rule Against Personal Opinion

Courts, commentators, and the American Bar Association have consistently articulated a distinct rule against the expression of personal opinions, separate and apart from arguing outside the evidence and vouching.⁶¹ It has been left to case-by-case adjudication to determine

56. *Id.*

57. *United States v. Innamorati*, 996 F.2d 456, 483 (1st Cir. 1993).

58. *See Agnes*, *supra* note 25, at 34–35 (noting the reluctance of courts to reverse for certain types of closing argument errors).

59. *See, e.g., United States v. Martin*, 815 F.2d 818, 823 (1st Cir. 1987) (no improper vouching where “[t]he prosecutor did not ‘place the prestige of the government behind the witness’ nor indicate that ‘information not presented to the jury supports the testimony.’” (quoting *United States v. Sims*, 719 F.2d 375, 377 (11th Cir. 1983))).

60. *Prosecution Function*, *supra* note 33, Standard 3-6.8(b) (“The prosecutor should not argue in terms of counsel’s personal opinion, and should not imply special or secret knowledge of the truth or of witness credibility.”).

61. *See Michael D. Cicchini, Combating Prosecutorial Misconduct in Closing Arguments*, 70 OKLA. L. REV. 887, 902 (2018); *see also United States v. Rodriguez-Adorno*, 695 F.3d 32, 40–41 (1st Cir. 2012) (distinguishing the rule against personal opinion and the question of whether counsel’s argument implies knowledge unknown to the jury); *United States v. Auch*, 187 F.3d 125, 131 (1st Cir. 1999) (articulating prohibitions against personal opinion and

what this prohibition adds to the law of closing argument.⁶² The First Circuit Court of Appeals has said that the prosecutor “may discuss the evidence, the warrantable inferences, the witnesses, and their credibility. . . . [But h]e is not to interject his personal beliefs.”⁶³ This formulation of the rule is not uncommon; courts generally state that the prosecutor may comment on evidence but may not offer a personal opinion about the evidence.⁶⁴ But how is this to be done?

The rule against personal opinion is frequently implicated when the prosecutor comments on the credibility of witnesses.⁶⁵ These comments, unless made disingenuously or without any reflection by the prosecutor on whether she believes them (which would be unethical),⁶⁶ do reflect her personal opinions.⁶⁷ In some jurisdictions, the prosecutor is allowed to tread a narrow path between suggesting that certain witnesses are worthy of belief, if those suggestions do not appear to be the overt opinion of the prosecutor.⁶⁸ In other jurisdictions, the artificiality of this distinction has been rejected in favor of a flat rule against commenting on a witness’s credibility.⁶⁹ Both versions of this rule, as discussed below, seem to be unworkable.

referring to facts outside the evidence); *Prosecution Function*, *supra* note 33, Standard 3-6.8 to 3-6.10.

62. See *United States v. Farnkoff*, 535 F.2d 661, 668 (1st Cir. 1976). In one case, the First Circuit found error for an “indiscreet” statement even though it did not refer to facts outside the evidence. *Id.* The statement “I suggest to you, I ask you to consider these things, come to the decision which I think you should come to, based upon the evidence, that the defendant is guilty as charged” was improper because “[w]e have long put ourselves on record as disagreeing with those circuits which permit the prosecutor to add the weight of his own—or the government’s—thumb to the scales of justice quite apart from any . . . connotation or implication of knowledge of additional facts.” *Id.* (emphasis added) (quoting *United States v. Cotter*, 425 F.2d 450, 453 (1st Cir. 1970)).

63. *Cotter*, 425 F.2d at 452.

64. See *Nidiry*, *supra* note 6, at 1307–08; see also *Commonwealth v. Sylvia*, 921 N.E.2d 968, 979 (Mass. 2010) (“The prosecutor should not have injected his personal observations or beliefs . . .”); *Commonwealth v. Finstein*, 687 N.E.2d 638, 641 n.1 (Mass. 1997) (explaining that the trial judge gave specific guidance to counsel before closing arguments on how to avoid expressions of personal opinion).

65. See, e.g., *Rodriguez-Adorno*, 695 F.3d at 40–41; *Auch*, 187 F.3d at 131–32.

66. See MODEL RULES OF PROF’L CONDUCT r. 3.3 (AM. BAR ASS’N 2018).

67. James W. Gunson, *Prosecutorial Summation: Where is the Line Between “Personal Opinion” and Proper Argument?*, 46 ME. L. REV. 241, 271 & n.176 (1994) (noting that “the prosecutor believes in the strength of the case” and that the criminal legal “process reinforces the prosecutor’s belief in the defendant’s guilt”).

68. See *infra* Sections I.C.3–4.

69. See *infra* Section I.C.5.

The United States Supreme Court, in *United States v. Young*, confronted what it deemed to be improper arguments by both defense counsel and the federal prosecutor.⁷⁰ The prosecutor responded to inflammatory rhetoric by defense counsel by engaging in a number of missteps: attacking defense counsel, putting untoward pressure on the jury by telling its members to “do your job,” and offering his “personal impressions.”⁷¹ The *Young* court found this conduct to be completely inappropriate, but not grounds for reversal.⁷² The Court acknowledged that “[t]he line separating acceptable from improper advocacy is not easily drawn; there is often a gray zone.”⁷³ The Court made it clear, however, that there had been error,⁷⁴ perhaps because there were several species of closing argument errors. The Court found it easy to conclude that the prosecutor had violated the existing ABA standard, which prohibited the prosecutor from expressing “his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant”⁷⁵ since the prosecutor had explicitly offered his “personal impressions” about the evidence and the defendant’s guilt.⁷⁶ *Young* made no attempt to signal whether the prosecutor could have properly given, in substance, the same view of the evidence without labeling them “personal impressions.”⁷⁷

3. Attempts by Federal Courts to Give Meaning to the Rule Against Personal Opinions

A number of federal courts have taken the rule against personal opinions to be a matter of phraseology.⁷⁸ In *United States v. Nersesian*, the United States Court of Appeals for the Second Circuit found the prosecutor had erred by repeatedly using “I” statements, that is, prefacing remarks about the evidence with, “I believe on the basis of what you’ve

70. *United States v. Young*, 470 U.S. 1, 2 (1985).

71. *Id.* at 17, 32.

72. *Id.* at 16.

73. *Id.* at 7.

74. *Id.* at 34–35.

75. *Id.* at 8 (quoting STANDARDS FOR CRIMINAL JUSTICE § 3-5.8(b) (AM. BAR ASS’N 1980)).

76. *Id.* at 17.

77. *Id.*

78. *See, e.g.*, *United States v. Carroll*, 26 F.3d 1380, 1387 (6th Cir. 1994) (drawing a distinction, although it was not dispositive on the facts, between “I suggest” and “I believe”). This section of the Article discusses in some depth several examples of this phenomenon from the First, Second, and Eighth Circuits.

heard.”⁷⁹ *Neresian* also disapproved of the prosecutor posing questions such as “was [the witness] correct?” and answering that question in the affirmative.⁸⁰ Acknowledging that the “[o]ccasional use of . . . rhetorical devices is simply fair argument,”⁸¹ the Second Circuit admonished prosecutors to use different language to make the same points:

It is a perfectly acceptable practice for a prosecutor to use language in addressing the jury such as “you are free to conclude,” “you may perceive that,” “it is submitted that,” or “a conclusion on your part may be drawn,” to mention only a few examples of unobjectionable phraseology. It is obligatory for prosecutors to find careful ways of inviting jurors to consider drawing argued inferences and conclusions and yet to avoid giving the impression that they are conveying their personal views to the jurors.⁸²

Neresian was a stand-alone “personal belief” rule violation: the prosecutor was arguing the evidence and was not vouching. *Neresian* acknowledged that compliance with the rule was a matter of “phraseology” and not substance. Using the passive voice “it is submitted” was proper but prefacing a sentence with “I submit” was not.⁸³

The United States Court of Appeals for the First Circuit has, in similar fashion, sketched out a series of fine distinctions applying the rule against personal opinions where the prosecutor has not otherwise committed error by addressing facts outside the evidence. Conclusory statements that the government has proven the defendant guilty beyond a reasonable doubt—in the context of having argued the evidence introduced at trial—have been found to be error or very nearly error.⁸⁴ When accompanied by the phrasing, “I think,” such a statement has been deemed to be a statement of personal belief.⁸⁵ The First Circuit has noted that substituting “I think” with “[t]he government submits” would have fixed the problem.⁸⁶

79. *United States v. Neresian*, 824 F.2d 1294, 1327–28 (2d Cir. 1987) (emphasis omitted).

80. *Id.* at 1327 (alteration in original).

81. *Id.* at 1328 (alterations in original) (quoting *United States v. Modica*, 663 F.2d 1173, 1181 (2d Cir. 1981)).

82. *Id.*

83. *Id.* at 1330. Acknowledging the degree of this violation, the Second Circuit held that the closing argument errors, despite being numerous (the defense counted sixty-five) did not warrant reversal of the convictions. *Id.* at 1327.

84. *United States v. Smith*, 982 F.2d 681, 684 n.2 (1st Cir. 1993).

85. *See id.*

86. *Id.*

A prosecutor was found to have gone “too far” with first person statements like “I think her testimony was very clear” and “[i]t seems to me, and I submit to you, that [the witness] is right on the money. Same guy, just thinner.”⁸⁷ In this instance, the court noted the tension with another First Circuit case in which it said, “although it is the jury’s job to draw the inferences, there is nothing improper in the Government’s suggesting which inferences should be drawn.”⁸⁸ The First Circuit did not attempt to elaborate on the distinction between properly suggesting what inferences should be drawn and improperly suggesting that a witness was “clear” or “right on the money.” These latter statements, found to be error, were clearly within the context of an argument that a trial witness had accurately identified the defendant in a photo array.⁸⁹ The critical factor, it seems, was the use of the first person in the statement.

The First Circuit has, however, found error even where prosecutorial arguments were not couched in the first person. In one case, a prosecutor’s argument that a witness had told the truth and had been an honest man in court was deemed to be improper personal opinion, even though, as the court acknowledged, it was in the context of defense arguments that the witness had lied.⁹⁰ A prosecutor who asked and answered his own question—“Was [the passenger] credible? Was he honest? Of course, he was . . .”—was held to have crossed the line in arguing for a witness’s credibility.⁹¹ Similarly, a prosecutor who claimed that “John Fitzgerald gave you honest, candid, truthful testimony” was found to be in error.⁹² The First Circuit acknowledged that the statement was “*not* expressly a personal opinion and could have been intended, and perhaps understood, as merely a description of what the prosecutor was urging the jury to conclude based on the evidence. And, in fairness, it followed a rather strong attack on Fitzgerald’s honesty in defense counsel’s own closing argument.”⁹³ In the First Circuit, it appears that straightforward assertions of a witness’s credibility can transform an argument about the evidence into untoward expressions of personal opinion.

In each of these examples, the First Circuit found error, but not reversible error. In each case, the court analyzed the potential harm in terms of whether the prosecutor had suggested that he had knowledge of

87. *United States v. Castro-Davis*, 612 F.3d 53, 67 (1st Cir. 2010) (emphasis omitted).

88. *Id.* (quoting *United States v. Mount*, 896 F.3d 612, 625 (1st Cir. 1990)).

89. *See id.*

90. *See United States v. Auch*, 187 F.3d 125, 131 (1st Cir. 1999).

91. *United States v. Rodriguez-Adorno*, 695 F.3d 32, 40 (1st Cir. 2012) (alteration in original).

92. *United States v. Gomes*, 642 F.3d 43, 46 (1st Cir. 2011) (emphasis omitted).

93. *Id.*

facts outside the record or had tried to use the prestige of the prosecutor's office to bolster the argument. In each case, these elements were lacking. Without these substantive concerns underlying these findings of prosecutorial misconduct, it is difficult to discern an organizing principle that justifies this rule. Adding to the ambiguity in this area, the First Circuit has allowed the government to suggest inferences to the jury, which seem to permit the government to interpret and draw conclusions about a witness's credibility or whether the government has met its burden of proof.⁹⁴ For example, in arguing that a defendant knew he had transported stolen documents, a prosecutor asked and answered his own question: "Did Mr. Mount know that they were stolen when he brought them to Boston? I suggest to you that the answer, again, is clearly yes."⁹⁵ The prosecutor later prefaced his review of the evidence with, "How do we know that he stole the documents?"⁹⁶ Thus, there was the use of the first person ("I" and "we") and a conclusory statement of guilt—formulations which have been condemned in other cases.⁹⁷ Of course, the argument was tied to the evidence at trial, but then again, other similar arguments tied to the evidence have been censured by the First Circuit as prosecutorial error.⁹⁸

A series of cases from the United States Court of Appeals for the Eighth Circuit also demonstrate the fitful experience of federal courts attempting to allow argument about the credibility of witnesses while also giving stand-alone meaning to the rule against statements of personal belief. A 1991 case, *United States v. Freisinger*, ruled that a prosecutor's use in closing argument of the phrases "I submit that" and "I submit to you," even though "couch[ed] . . . in less brazen language," were still improper statements of personal opinion.⁹⁹ *Freisinger* also disapproved of the assertion "[t]hey came here and told the truth."¹⁰⁰ The Eighth Circuit counseled that "[t]his kind of argumentation is not only improper, it is unnecessary. Counsel can just as easily argue issues of credibility

94. See, e.g., *United States v. Barbosa*, 666 F.2d 704, 709 (1st Cir. 1981) ("[T]he government told you [what] it was going to prove. And that, in fact, is what the government proved.").

95. *United States v. Mount*, 896 F.2d 612, 625 (1st Cir. 1990).

96. *Id.*

97. See *United States v. Carpenter*, 736 F.3d 619, 632 (1st Cir. 2013) (allowing multiple statements of "that's fraud" as "permissible comments on the evidence in the case").

98. See, e.g., *United States v. Castro-Davis*, 612 F.3d 53, 67 (1st Cir. 2010); *United States v. Smith*, 982 F.2d 681, 684 (1st Cir. 1993).

99. See *United States v. Freisinger*, 937 F.2d 383, 386–87 (8th Cir. 1991).

100. *Id.* at 386.

without injecting personal views.”¹⁰¹ *Freisinger* maintained that these first-person formulations and the conclusory statement of credibility “suggests that the government may know something that the jury does not,”¹⁰² but it made no attempt to articulate how, beyond the phraseology, the prosecutor was arguing outside the evidence. If the solution was, as the Second Circuit suggested in *Neresian*, to switch from the first-person active voice to the passive voice, then it is hard to see how the prosecutor was arguing outside the evidence.

However justified, *Freisinger* set a strict standard in how a prosecutor chooses her words. Yet, the Eighth Circuit backtracked significantly from that approach in its 2004 and 2009 decisions.¹⁰³ In each case, the prosecutor used the words “I submit” to preface remarks about the evidence.¹⁰⁴ In the 2004 decision, *United States v. Beaman*, the Eighth Circuit found that this formulation, even though used eighteen times in summation, was not plain error.¹⁰⁵ In a more nuanced reading of the rules against vouching and personal opinion, it said that using the “I submit” language was “a questionable practice because, depending on the context, it may either properly suggest how the jury should view the trial evidence, or improperly suggest that the government knows more than the jury has heard.”¹⁰⁶ Because the prosecutor was “referring to testimony and other trial evidence,” it was not an obvious error, leaving unsaid whether it was error at all.¹⁰⁷

The 2009 decision, *United States v. Bentley*, went further in removing the automatic opprobrium given to first person statements. It stated that while the use of the phrases “‘we know’ and ‘I submit.’ . . . has been often criticized (and discouraged) by this court and others, it is not always improper.”¹⁰⁸ Acknowledging the per se disapproval given in *Freisinger* and the milder warning given in *Beaman*, the Eighth Circuit in *Bentley* said that this wording “is only improper when it suggests that the government has special knowledge of evidence not presented to the jury, carries an implied guarantee of truthfulness, or expresses a personal

101. *Id.*

102. *Id.* at 386–87.

103. *United States v. Bentley*, 561 F.3d 803, 803 (8th Cir. 2009); *United States v. Beaman*, 361 F.3d 1061, 1061 (8th Cir. 2004).

104. *Bentley*, 561 F.3d at 811; *Beaman*, 361 F.3d at 1065.

105. *Beaman*, 361 F.3d at 1065.

106. *Id.*

107. *See id.*

108. *Bentley*, 561 F.3d at 811.

opinion about credibility.”¹⁰⁹ The *Bentley* court saw no problem with a chart used by the prosecutor to show the “ten things we learned during th[e] trial.”¹¹⁰ The prosecutor told the jury that “we know” a certain fact and then explained how each fact was based on evidence introduced during the trial.¹¹¹ Using the words “I submit” to discuss the trial evidence was likewise deemed not to be error.¹¹² Only the conclusory statement, “I submit he’s guilty of all crimes,” approaches the line between proper and improper,¹¹³ and it did not meet the plain error standard.¹¹³

Subsequent decisions by the Eighth Circuit seem to have completed the evolution from a rule meant to censure certain forms of expression, to a far more pragmatic rule that looks to context and whether the argument strays from the evidence or seeks to leverage the prestige of the prosecutor’s office.¹¹⁴ Thus, using an “I” statement to say that a witness told the truth is now proper in the Eighth Circuit where the statement is simply a way of arguing the evidence: “I think it was very clear that he did as best he could to remember the dates, and times, the amounts. And you’re the judges of his credibility, but based on that testimony, we ask that you believe him.”¹¹⁵ The allowance of such a statement can only be understood as the triumph of contextualized analysis over wooden rules focused on the form and not the substance of the prosecutor’s argument.

4. The “L” Word in the Federal Courts: Per Se Misconduct or Fair Commentary

The use in closing arguments of the “L” word, meaning “lie,” “lying,” or “liar,” has given rise to particular rules that vary across the federal circuits. Stemming from the general rule against expressing personal opinions, the “liar” rule illustrates how courts have attempted to regulate closing argument both by the denomination of forbidden words and phrases and by a more contextual analysis.

The First Circuit has adopted, and continues holding to, a per se rule that the prosecutor cannot call the defendant, or the defendant’s witnesses,

109. *Id.* at 812.

110. *Id.*

111. *Id.*

112. *See id.*

113. *See id.*

114. *See United States v. Gollhofer*, 820 F.3d 979, 988 (8th Cir. 2016) (finding use of first-person pronouns did not make statements into expressions of personal belief); *United States v. Sevilla-Acosta*, 746 F.3d 900, 905–06 (8th Cir. 2014) (rejecting the challenge to the prosecutor’s argument that used an analogy and first-person narrative to argue the evidence).

115. *Sevilla-Acosta*, 746 F.3d at 906.

liars or argue that they lied in their testimony before the jury or in out-of-court statements admitted into evidence. In *United States v. Rodriguez-Estrada*, the defendant was accused of a smorgasbord of crimes of dishonesty, and he was convicted of embezzlement, withholding information from a bankruptcy court, and false statements.¹¹⁶ The prosecutor argued that he was a “crook” and twice called the defendant a “liar.”¹¹⁷ The First Circuit did not elaborate on whether or not the labels were applied in the context of arguing the evidence of the alleged massive fraud, but said, “[t]hat these statements were improper is so clear as not to brook serious discussion.”¹¹⁸

In 2018, faced with an invitation to revisit its per se rule against the “L” word, in light of the different approach taken by other circuits, the First Circuit held firm and expanded the prohibition to other witnesses called by the defendant.¹¹⁹ Thus, it was misconduct to say that the defendant, who gave inconsistent stories, was a “good storyteller” and that his testimony was “malarkey.”¹²⁰ It was also error to say that the defense witness who changed his testimony during the trial on a crucial point was an “unmitigated liar.”¹²¹ The court refused to “condone” the use of “liar,” and it indicated that the use of other wording (“malarkey”) did not help.¹²² The First Circuit, in finding the prosecutorial error harmless, noted that the use of these terms “were based on the inconsistency and outlandishness of [the defendant’s and the defendant’s witness’] stories, making it less likely that the jury would infer that the prosecutor had ‘private knowledge of the defendant’s guilt.’”¹²³ This made it clear that the violation was simply the use of the pejorative words, not any concern that the prosecutor was arguing outside the evidence, which ostensibly was the rationale for the “L” word rule in the first place.¹²⁴

In acknowledging that not all federal courts have adopted a per se rule against certain words, the First Circuit noted that many circuits are united

116. *United States v. Rodriguez-Estrada*, 877 F.2d 153, 154–55 (1st Cir. 1989).

117. *Id.* at 158.

118. *Id.*

119. *United States v. Saad*, 888 F.3d 561, 569 (1st Cir. 2018).

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 571 (quoting *United States v. Gomes*, 642 F.3d 43, 47 (1st Cir. 2011)).

124. *See United States v. Garcia*, 818 F.2d 136, 143–44 (1st Cir. 1987) (“[W]e think a prosecutor would be well advised to avoid directly accusing a defendant of lying—since jurors could believe the government has knowledge outside the evidence about the defendant’s veracity . . .”).

in recognizing the context in which closing arguments are made.¹²⁵ This was a curious way to attempt to find common ground since the First Circuit's "L" word rule is meant to de-contextualize the analysis by establishing a prohibition that applies even where the evils of arguing outside the evidence or vouching are plainly absent.¹²⁶ For its part, the Second Circuit has held that arguing that the testimony of a defense expert was "built on the lies of the defendant,"¹²⁷ and that the expert's process was "garbage in, garbage out" and did "not come within hailing distance of" constituting reversible error.¹²⁸ It affirmed the use of the word "lie" so long as it is not inflammatory or intemperate and so long as the prosecutor is arguing the accuracy of underlying, contested facts.¹²⁹ The Eighth Circuit found no misconduct in a fraud case when the prosecutor said that the defendant "exhibits all the signs of a liar" and accused the defendant of "still making false representations to [the jury] today."¹³⁰ Other circuits have found the use of the word "lie" or its derivatives is not per se improper.¹³¹

5. How Two Jurisdictions Have Given Expansive Scope to the Rule Against Expressions of Personal Belief

The preceding discussion of how federal courts have grappled with the rule against personal opinions demonstrates the difficulty in developing a workable reading of this prohibition. Two jurisdictions, Maine and Kansas, have taken the rule to perhaps its logical conclusion: a prohibition on arguing the credibility of the defendant or any other witness.¹³² This approach does not attempt to square the rule against personal opinions with the allowance of argument about the credibility of witnesses. It eschews both the fraught exercise of picking through forbidden and permitted phrases, as well as the fully contextualized analysis based on compliance with the prime directive.

125. *Saad*, 888 F.3d at 570.

126. *Id.* at 571 (finding no prejudice because there was no suggestion the prosecutor had suggested he had information unknown to the jury but still demining it inappropriate).

127. Brief for the United States of America at 50, *United States v. Coriaty*, 300 F.3d 244 (2d Cir. 2002) (No. 01-1450), 2002 WL 32297937, at *50.

128. *United States v. Coriaty*, 300 F.3d 244, 255 (2d Cir. 2002).

129. *See id.* at 255–56.

130. *United States v. Shoff*, 151 F.3d 889, 893 (8th Cir. 1998) (alteration in original).

131. *See, e.g., United States v. Moreland*, 622 F.3d 1147, 1161–62 (9th Cir. 2010) (citing cases in other circuits).

132. *See Gunson, supra* note 67, at 241–43; Steven Leben, *Commenting on Credibility in Kansas: A Constructive Criticism of State v. Pabst*, 56 U. KAN. L. REV. 871, 871 (2008).

a. *Maine*: “My confusion is, what can we say?”¹³³

The Maine Supreme Judicial Court issued three decisions in a nine-month period during 1993 and 1994 which vacated convictions due, in whole or in part, to what it found to be the expression of personal opinion by prosecutors in closing argument.¹³⁴ In two of the three cases, the prosecutor also engaged in clearly improper cross-examination by asking the testifying defendant whether one or more prosecution witnesses, who offered different versions of events than the defendant, were lying.¹³⁵ This raised the question of whether the closing argument mis-steps, standing alone, might have constituted harmless error, but the Maine court left no doubt that the closing remarks were error.¹³⁶

In *State v. Tripp*, the defendant was charged with sexually assaulting his nine-year old son.¹³⁷ His son and an outcry witness described the alleged rapes in detail, and the defendant took the stand and firmly denied that these events took place.¹³⁸ The defendant went further and suggested a motive for the son to fabricate a story.¹³⁹ During closing arguments, both the prosecutor and the defense attorney noted the obvious conflict in testimony and said that one of them, the defendant or the son, was lying, with each advocate having a different view of who was lying.¹⁴⁰ The prosecutor also maintained that the son “told you the truth. He told you what happened to him. He told you what his father did to him.”¹⁴¹ *Tripp* held that by arguing both that the son was telling the truth and that the defendant was lying, “the clear implication [was] that the prosecutor believed that the victim told the truth but defendant lied.”¹⁴²

State v. Steen, another sexual assault case, stated flatly that “it is impermissible for a prosecutor to assert that the defendant lied on the stand.”¹⁴³ It cited a prior case, *State v. Smith*, in which the Maine court

133. Gunson, *supra* note 67, at 242 n.15 (quoting Jason Wolfe, *Maine High Court Cracks Down on Prosecutors’ Trial Remarks*, PORTLAND PRESS HERALD, Jan. 8, 1994, at 8A).

134. See generally Robert W. Clifford, *Identifying and Preventing Improper Prosecutorial Comment in Closing Argument*, 51 ME. L. REV. 241, 244–49 (1999).

135. *Id.*

136. *Id.* at 245–48 (suggesting that improper cross-examination was the more serious error in two of the three cases).

137. *State v. Tripp*, 634 A.2d 1318, 1319 (Me. 1994).

138. *Id.* at 1319.

139. *Id.* at 1321.

140. See *id.* at 1320–21.

141. *Id.* at 1321 (emphasis omitted).

142. *Id.*

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

had offered a more nuanced, if elusive, view of the rule against personal opinions:

Although the prosecutor may properly attack defendant's credibility by analyzing the evidence and highlighting absurdities or discrepancies in defendant's testimony, and may present his analysis in summation with vigor and zeal, he may not properly convey to the jury his personal opinion that a defendant is lying.¹⁴⁴

The combined effect of *Steen* and *Tripp* seemed to extinguish any daylight that might have previously existed between properly attacking the defendant's credibility and improperly offering a personal opinion of the defendant's credibility. Any comment on whether the defendant's testimony was truthful was prohibited. *Steen* went further still by holding that the prosecutor's argument on the credibility of the defendant's expert witness was improper.¹⁴⁵ By saying "I suggest to you, ladies and gentlemen, that his opinion is based on \$2,500, the money the defendant paid him for his testimony," the prosecutor had "clearly suggested" that the expert had lied.¹⁴⁶ The zone of protection from prosecutorial argument thus expanded from the defendant himself to the defendant's witnesses.

The third case, *State v. Casella*, was a 4-3 decision in a fraud case in which the defendant testified.¹⁴⁷ There was no claim of improper cross-examination. Instead, the prosecutor asserted in closing argument that the defendant had lied in court just as he had lied to his victims in order to obtain their money.¹⁴⁸ The majority opinion counted forty-one times the prosecutor had used the words lie, lying, and liar.¹⁴⁹ It did not matter, as the dissent pointed out, that this occurred all in reference to evidence introduced about his fraudulent activities and the defendant's in-court testimony.¹⁵⁰ *Casella* said, "[w]e have repeatedly held that it is improper for a prosecutor to express an opinion on the credibility of a defendant."¹⁵¹ The government contended on appeal that the attack on the defendant's credibility was permissible because "its closing argument was based on

144. *State v. Smith*, 456 A.2d 16, 17 (Me. 1983).

145. *Steen*, 623 A.2d at 149.

146. *Id.* at 149 (emphasis omitted). The prosecutor probably would have conceded that he had been suggesting that the witness had given false testimony because it was influenced by the \$2,500 fee. *See id.*

147. *State v. Casella*, 632 A.2d 121, 121-22 (Me. 1993).

148. *Id.*

149. *Id.* at 121.

150. *Id.* at 125 (Roberts, J., concurring).

151. *Id.* at 122.

the facts in evidence and thus was not improper.”¹⁵² The court disagreed. In distinguishing a prior decision which had suggested that referring to the defendant as an “admitted liar” was allowed, *Casella* said that such commentary was appropriate only if the defendant himself had admitted, on the stand, to lying.¹⁵³ If the truthfulness of the defendant’s testimony was a matter of dispute, then the prosecutor could not give his view of whether the defendant had lied.¹⁵⁴

These decisions caused consternation among prosecutors in Maine,¹⁵⁵ prompting one elected District Attorney to ask, “My confusion is, what *can* we say?”¹⁵⁶ One commentator, although critical of the decisions, recognized that the decisions had redefined the rule against personal opinion in Maine.¹⁵⁷ According to the commentator, the cases “place[d] the prosecutor in the impossible position of being prohibited from commenting either directly or implicitly on a testifying defendant’s credibility,” even where the defendant had contradicted the government’s witnesses.¹⁵⁸ Justice Robert Clifford, who dissented in *Tripp* and *Casella*, wrote an article analyzing these decisions and other closing argument cases in Maine.¹⁵⁹ While attempting to harmonize *Steen*, *Tripp*, and *Casella* with prior decisions that allowed some room for argument on matters of credibility of the defendant or his witnesses, Justice Clifford recognized that this trilogy represented a different approach to the rule against personal opinion.¹⁶⁰ He suggested that the results could have changed with some tweaking of the prosecutor’s phraseology, consistent with many of the federal court decisions discussed above. In other words, the prosecutor could argue that the defendant or a defense witness was lying or that a government witness was truthful by saying, “I submit that

152. *Id.* at 123.

153. *See id.*

154. *Id.* (citing *State v. Steen*, 623 A.2d 146, 149 (Me. 1993)).

155. Clifford, *supra* note 134, at 241.

156. Gunson, *supra* note 67, at 242 n.15 (emphasis added).

157. *See id.* at 242–43.

158. *Id.* at 279.

159. *See* Clifford, *supra* note 134.

160. *Id.* at 242. Justice Clifford said, with some diplomacy, that, [E]xcept in a few of its opinions, particularly *Casella*, and a 1983 case, *State v. Smith*, when emphasis was placed on the pejorative language used by the prosecutors without full consideration of the context in which the language was used, the court has correctly addressed the cases that have come before it.

Id. (emphasis omitted) (footnotes omitted).

a witness is not credible,' or 'I suggest that our witness is telling the truth.'"¹⁶¹

While these distinctions in verbal formulation might have been important to Justice Clifford, the logic of *Steen*, *Tripp*, and *Casella* suggests that making minor changes to the form, but not the substance, of the closing argument would be insufficient.¹⁶² Moreover, *Casella* had batted away the government's contention that the closing argument was proper so long as it was grounded in the evidence introduced at trial. Because "[i]t was for the jury, not the prosecutor, to determine which witnesses were telling the truth," the topic was off-limits.¹⁶³ The rule against personal opinion had clearly gone beyond the prohibition against arguing outside the evidence and had been given independent significance by prohibiting altogether remarks about the credibility of defense witnesses.¹⁶⁴

b. *Kansas: The end of argument for both sides?*

The Kansas Supreme Court touched the apogee of restrictions on closing argument when in 2000 it flatly stated "that it is improper for a lawyer to comment on a witness'[s] credibility."¹⁶⁵ In that case, *State v. Pabst*, the prosecutor contended in closing argument that the defendant, who had testified on his own behalf in a murder trial, had lied.¹⁶⁶ This testimony was central to the case.¹⁶⁷ Pabst admitted he shot his fiancée to death but laid out a scenario that made the shooting into an accident.¹⁶⁸ This contradicted the physical evidence in the case and formed the basis for the prosecutor's argument that the accident story was a fiction.¹⁶⁹ After couching the accusation of lying in the first person—"I look into each one of your eyes and I tell you he lied"—the defense objected, and

161. *Id.* at 263 (citation omitted).

162. *But see id.* Ironically, the "I suggest" language would probably draw a rebuke among courts that apply the rule against personal opinion as a rule of forbidden or allowable verbal formulations. The use of the first person, standing alone, has proven fatal for several closing arguments, as discussed above.

163. *See State v. Casella*, 632 A.2d 121, 123 (Me. 1993).

164. *See id.* (rejecting government's argument that it was enough that the prosecutor engaged in fair comment on the evidence).

165. *State v. Pabst*, 996 P.2d 321, 326 (Kan. 2000).

166. *Id.* at 324–26.

167. *See Leben*, *supra* note 132, at 872 ("[T]he key question for the jury to determine was whether there was any shred of truth in anything that the defendant said had occurred.").

168. *Pabst*, 996 P.2d at 324.

169. *See id.* at 324–26.

the trial court sustained the objection.¹⁷⁰ The prosecutor rephrased his remarks by saying, “The State tells you he lied,” which the trial judge permitted.¹⁷¹

The Kansas Supreme Court said the eleven references to the defendant lying were prosecutorial misconduct requiring a new trial, regardless of whether the remarks about lying were phrased in the first person or third person.¹⁷² *Pabst* might have applied the rule against personal opinion to reach this result by pointing to the use of the first person, or it might have defined the prosecutor’s sin as simply using the “L” word. Or, it might have applied the rule against vouching to find that the assurance—“[w]e didn’t lie to you[, w]e didn’t hide anything”¹⁷³—had improperly placed the government’s witnesses and the government on one righteous team. Instead, *Pabst* held that the prosecutor erred because Kansas’s Rules of Professional Responsibility (which are based on the Model Rules of Professional Conduct) and the ABA’s Standards for Prosecutors “clearly and unequivocally say that it is improper for a lawyer to comment on a witness’[s] credibility.”¹⁷⁴ It specifically overruled its own precedent, *State v. McClain*, which had said, “[c]ounsel may comment on the credibility of a witness where his remarks are based on the facts in evidence.”¹⁷⁵

This was the broadest possible holding, and because it was grounded in the ethical rules applicable to all lawyers, it applies to criminal defense lawyers. *Pabst* could have said that lawyers can comment on credibility issues, but that those words, in this context, were personal opinions. By removing the credibility of witnesses from the arena of closing argument, *Pabst* avoided the spectacle of condemning one verbal formulation but endorsing another formulation that says the same thing. Of course, it is worth asking what is left of closing argument if the lawyers cannot address whether the witnesses are telling the truth or not. In *Pabst* itself, what did the Kansas Supreme Court think the lawyers were going to talk about in their summations, if not the plausibility of the defendant’s accident scenario? *Pabst* admitted that the defendant’s “credibility was crucial to the case.”¹⁷⁶

170. *Id.* at 325.

171. *Id.*

172. *See id.* at 325–26.

173. *Id.* at 325 (emphasis omitted).

174. *Id.* at 326.

175. *Id.* (quoting *State v. McClain*, 533 P.2d 1277, 1282 (Kan. 1975)).

176. *Id.* Yet, because it was so crucial, the Supreme Court of Kansas said it was important for the prosecutor not to comment on it. *Id.* It claimed that the arguments about the defendant

Pabst's broad construction of the rule against personal opinion, if taken seriously, would probably mean the end of closing argument as it has long been practiced, a solution akin to curing the disease by killing the patient. A Kansas intermediate appellate judge who has had to apply the *Pabst* rule has written an article arguing that, in practice, the prohibition against commenting on witness credibility is unworkable.¹⁷⁷ At a fundamental level, *Pabst* is inconsistent with the whole idea of a trial: "Credibility is at the heart of any trial. If all of the witnesses agreed upon all of the facts, no factual disputes would be submitted to a judge or jury."¹⁷⁸ Moreover, the rule would prevent defense counsel from attacking the credibility of the government's witnesses, an outcome that would seem to infringe on the defendant's Sixth Amendment rights.¹⁷⁹ In practice, the "trial judge's task of policing *Pabst* violations in closing argument in the absence of objections is not one that can be handled without error."¹⁸⁰ Post-*Pabst*, it was held in *State v. Miller*, a murder case, to be misconduct for the prosecutor to refer to what "the killer" did in a sequence of events leading up to the death in question.¹⁸¹ In a case decided a year later, repeated suggestions that the defendant was "the killer" were held not to be error.¹⁸²

If *Pabst* held the promise of establishing a reasonably clear rule by cordoning off an entire area of the trial from comment, it does not appear that the promise has been fulfilled. Trials in Kansas continue to place the credibility of witness testimony in front of the jury¹⁸³ and lawyers are compelled to address the elephant in the room.¹⁸⁴

lying amounted to "unsworn testimony," adding that "[s]tating facts not in evidence is clearly improper." *Id.* To characterize the prosecutor's remarks as both untoward opinion and factual testimony was a head-scratching turn of logic.

177. Leben, *supra* note 132, at 871.

178. *Id.* at 879.

179. *Id.* at 893–96.

180. *Id.* at 897.

181. *Id.* at 897–98; *see State v. Miller*, 163 P.3d 267, 292–95 (Kan. 2007).

182. Leben, *supra* note 132, at 897–98; *see State v. Scott*, 183 P.3d 801, 823 (Kan. 2008).

183. In *State v. Elnicki*, 105 P.3d 1222, 1233–34 (Kan. 2005), the defendant's version of events at issue during a sexual assault trial, where the defendant gave mutually exclusive versions of events, warranted reversal because the prosecutor referred to the defendant's inconsistent statement as a "fairy tale," "fabrication," and a "tall tale." *Id.* at 133–34. In *State v. Hernandez*, No. 107,288, 2013 WL 4046398, at *1, *4 (Kan. Ct. App. Aug. 9, 2013), the court allowed the following argument despite the ruling in *Pabst*: "[H]e's counting on you not to believe them because after all, they are just children. But you should. And if you do, you will find him guilty." *Id.*

184. Leben, *supra* note 132, at 879.

II. JURY NULLIFICATION IN CLOSING ARGUMENT

This Article turns to another elephant in the room, jury nullification, which will be defined for purposes of this discussion to be a jury verdict that is not based on, and is contrary to, the evidence introduced during the trial and the law as explained to the jury by the trial judge.¹⁸⁵ In criminal cases, a jury nullification argument is usually understood as a defense argument for acquittal in spite of the evidence.¹⁸⁶ Jury nullification often creeps into the trial during closing argument because the prior stages of the trial are confined to matters introduced into evidence and the law explained by the judge.¹⁸⁷

This section will explore, through a few examples, the conundrum prosecutors are faced with when they confront a jury nullification argument by the defense. This conundrum helps to explain the “why” behind some forms of prosecutorial argument that are later deemed error.

A. *The Ambiguous Place of Jury Nullification in Criminal Cases*

Under the Sixth Amendment of the United States Constitution, criminal defendants are entitled to jury trials for felonies, and the judge cannot direct a verdict in favor of the government, even if the evidence is overwhelming on one or all of the counts.¹⁸⁸ As a result, jurors have the unreviewable power to ignore the law and the facts and render a verdict aligned to their sense of justice, or for some other reason.¹⁸⁹ It has long been established that jurors cannot be forced to explain their verdicts, and they cannot be punished for what the court or anyone else believes is even a manifestly erroneous decision.¹⁹⁰ The government has no ability to appeal or obtain a retrial where a verdict was erroneous.¹⁹¹ On the other

185. See, e.g., *United States v. Leach*, 632 F.2d 1337, 1341 n.12 (5th Cir. 1980).

186. See Robert E. Korroch & Michael J. Davidson, *Jury Nullification: A Call for Justice or an Invitation to Anarchy?*, 139 MIL. L. REV. 131, 132 (1993).

187. See Pamela Baschab, *Jury Nullification: The Anti-Atticus*, 65 ALA. LAW. 110, 114 (2004) (describing how defense attorneys attempt to subtly argue for jury nullification in opening or closing statements).

188. See *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993).

189. Korroch & Davidson, *supra* note 186, at 131–32.

190. Todd E. Pettys, *Evidentiary Relevance, Morally Reasonable Verdicts, and Jury Nullification*, 86 IOWA L. REV. 467, 498–99 (2001).

191. See *Arizona v. Rumsey*, 467 U.S. 203, 210 (1984) (holding that a capital sentencing proceeding was deemed a trial and subject to the Double Jeopardy clause, even where acquittal in the sentencing proceeding was based on legal error); *United States v. Wilson*, 420 U.S. 332, 352 (1975) (“A system permitting review of all claimed legal errors would have symmetry to recommend it and would avoid the release of some defendants who have benefited from

hand, juries are, with the exception of a few state courts, told that they have a duty to follow the law as it is given to them, and to apply the facts to that law, based on the evidence admitted at trial.¹⁹² They are not told about their power to nullify, nor are they given instructions to guide them should they decide to entertain nullification.¹⁹³

Thus, as one commentator has said, “[J]ury nullification ultimately exists in the ‘twilight’ between judicial condemnation and permission—judges strongly denounce the practice but are unable to control it.”¹⁹⁴ It has been clear since the 1895 case, *Sparf v. United States*, that judges, not juries, decide questions of law.¹⁹⁵ Thus, the defendant in *Sparf* had no right to an instruction on a lesser-included offense unless the law supported it.¹⁹⁶ Federal courts have been consistent that the defendant has no right to a verdict based on jury nullification,¹⁹⁷ or even the right to pursue such a verdict.¹⁹⁸

To say that the defendant has no right to jury nullification still leaves the possibility that the jury may choose to grant a nullification verdict. It is in this realm that defendants and their lawyers do, rather routinely, seek to inject the possibility of jury nullification into trials. As one experienced Alabama judge has written:

Many defense attorneys argue for nullification during opening or closing statements. Is it permissible for the jury to be made aware of its power to nullify? Most competent defense attorneys will figure a way to get this issue in front of the jury without going so far as to be

instructions or evidentiary rulings that are unduly favorable to them. But we have rejected this position”)

192. *United States v. Desmarais*, 938 F.2d 347, 350 (1st Cir. 1991) (finding that the jury must be instructed to follow the law); *United States v. Boardman*, 419 F.2d 110, 116 (1st Cir. 1969) (asserting that the jury has duty to apply the law and should be instructed to do so); Robert P. Lawry, *The Moral Obligation of the Juror to the Law*, 112 PENN ST. L. REV. 137, 138 n.3 (2007).

193. See Korroch & Davidson, *supra* note 186, at 131–33; see also *United States v. Carr*, 424 F.3d 213, 219 (2d Cir. 2005) (citing *United States v. Edwards*, 101 F.3d 17, 19 (2d Cir. 1996)) (noting that every federal circuit agrees that there is no right for jury to be instructed on nullification).

194. Kimberly Del Frate, Comment, *The Elephant in the Room: Attorney Accountability for Jury Nullification Arguments in Criminal Trials*, 52 CAL. W. L. REV. 163, 172 (2016).

195. *Sparf v. United States*, 156 U.S. 51, 99–101 (1895).

196. See *id.* at 63–64.

197. See, e.g., *Crease v. McKune*, 189 F.3d 1188, 1194 (10th Cir. 1999); *United States v. Horsman*, 114 F.3d 822, 829 (8th Cir. 1997); *United States v. Trujillo*, 714 F.2d 102, 105–06 (11th Cir. 1983).

198. See *United States v. Thompson*, No. 99-41007, 2001 WL 498430, at *16 (5th Cir. Apr. 9, 2001); *Scarpa v. Dubois*, 38 F.3d 1, 11 (1st Cir. 1994).

held in contempt of court. Such arguments as those aimed at evoking sympathy for the client or reviewing the historical role of the jury or even as “send a message” may be subtle enough to escape detection or judicial consequences. A defense attorney who, based on the facts, has no defense will usually take a plea bargain. If that is not possible, he may throw his client’s case on the mercy of the jury.

Then the client’s best or only defense is to urge the jury to nullify. Blatant tactics would evoke possible ethical considerations and may also result in contempt. The defense attorney can still walk a thin line and weave the nullification notion throughout his case. That notion is that even though his client did the deed, it would be an injustice to convict him.¹⁹⁹

Other practitioners and scholars have noted the frequency of appeals to jury nullification in criminal trials.²⁰⁰ In my nearly twenty years as a federal prosecutor in the District of Columbia and Massachusetts, I have noticed that nearly every criminal trial has, to a lesser or greater degree, an element of appeal to jury nullification.

A federal trial court may act in three possible ways. First, the trial judge may actually be sympathetic to a verdict based on jury nullification and wish to open the door fully to that possibility by instructing the jury on factors other than the elements of the charged crime and allowing the jury to consider the possible punishment and decide, whether in light of that punishment, a guilty verdict would be just.²⁰¹ In the last twenty years, at least three federal district judges have proposed doing just that, either in litigation or in scholarly commentary, but federal appellate courts have

199. Baschab, *supra* note 187, at 114.

200. See Douglas E. Litowitz, *Jury Nullification: Setting Reasonable Limits*, 11 CHI. B. ASS’N REC. 16, 16–17 (1997) (noting phenomenon of jury nullification in high profile cases); Rubenstein, *supra* note 14, at 987–88 & n.203 (“Realistic observers have noted that defense attorneys already routinely argue for nullification, though in couched terms.”).

201. See Jonathan Bressler, *Reconstruction and the Transformation of Jury Nullification*, 78 U. CHI. L. REV. 1133, 1140–41 (2011) (describing the effort of a federal district judge to inform the jury of the mandatory minimum sentence faced by the child pornography defendant so that the jury could decide whether to nullify the law—the judge’s effort was thwarted by the United States Court of Appeals for the Second Circuit); Korroch & Davidson, *supra* note 186, at 138 (describing a federal trial resulting in an acquittal in which the trial judge “permitted nullification-related voir dire, a nullification instruction, and nullification argument in a prosecution for operating an illegal gambling business”) (footnote omitted). See generally Del Frate, *supra* note 194, at 180–81; Donald M. Middlebrooks, *Reviving Thomas Jefferson’s Jury: Sparf and Hanson v. United States Reconsidered*, 46 AM. J. LEGAL HIST. 353 (2004) (illustrating a federal district judge’s argument, that juries should not be told that they have a duty to follow the law).

not been kind to this approach.²⁰² As a result, this is apt to be the rare case.

The second possibility is that the trial judge will instruct the jury that it *must* acquit the defendant if the government has not proven its case beyond a reasonable doubt, but that it *should* convict the defendant if the government has met its burden of proof.²⁰³ This instruction opens the door just a crack to a verdict based on jury nullification. In affirming an instruction using a “must/should” formulation, the First Circuit noted the “contrast in directives” and acknowledged that “together with the court’s refusal to instruct in any detail about the doctrine of jury nullification, [it] left pregnant the possibility that the jury could ignore the law if it so chose.”²⁰⁴ In this second scenario, the trial judge may, but is not required to, take measures to block the assertion of a jury nullification defense.²⁰⁵

The third possibility is that the federal trial judge gives a “must/must” instruction, for example, that the jury must acquit if it finds the government has not carried its burden of proof, and it must convict if it finds the government has proven the charged crimes beyond a reasonable doubt.²⁰⁶ This instruction attempts to shut the door, to the extent the trial judge can, to a verdict based on jury nullification. Again, the trial judge is permitted, but is not forced, to prevent jury nullification arguments.²⁰⁷

B. *The Prosecutor Responding to Jury Nullification in Closing Argument*

A federal prosecutor confronts, in closing argument, the potential for jury nullification in every case. The trial judge, in the rare case, may actively promote that possibility.²⁰⁸ Far more likely, the trial judge’s

202. Bressler, *supra* note 201, at 1140–42 (explaining that federal district judges Jack Weinstein and Gerald Lynch were reversed on appeal after they sought to allow jury nullification in separate criminal cases). Federal district judge Donald Middlebrooks has defended jury nullification in a scholarly article. *Id.* See generally Middlebrooks, *supra* note 201.

203. See, e.g., *United States v. Appolon*, 695 F.3d 44, 65 (1st Cir. 2012); *United States v. Sepulveda*, 15 F.3d 1161, 1189–90 (1st Cir. 1993).

204. *Sepulveda*, 15 F.3d at 1190.

205. See *id.*

206. *United States v. Carr*, 424 F.3d 213, 221 (2d Cir. 2005) (agreeing with *United States v. Pierre*, 974 F.2d 1355, 1356–57 (D.C. Cir. 1992) (per curiam), that the trial judge may instruct the jury that it is their duty to convict if they find the government has met its burden of proof).

207. See *Sepulveda*, 15 F.3d at 1190; see also *United States v. Thomas*, 116 F.3d 606, 616–18 (2d Cir. 1997) (suggesting that courts have a duty to prevent jury nullification).

208. Legal scholars have been rather sympathetic to allowing jury nullification to have an explicit part in our criminal legal process. See Bressler, *supra* note 201, at 1139 (“[S]cholars almost unanimously agree that when the Constitution and Sixth Amendment were ratified in the

action will range from subtly acknowledging this possible outcome, by the use of the pregnant negative in a “must/should” instruction, to an admonition not to engage in jury nullification and active steps to prevent it from happening.²⁰⁹

All of the foregoing is meant to show that jury nullification injects an element of ambiguity into closing arguments. At trial, the ethical prosecutor wishes to do no more than obtain a conviction based strictly on the evidence introduced at trial and the jury instructions about to be given by the trial judge. But the chance of jury nullification means that the battle during closing arguments may not be fought strictly on those terms, depending on how the defendant approaches the case.

The defense might encourage acquittal because of how the case was charged, for example, whether the charges seem disproportionate to the defendant’s moral culpability,²¹⁰ or the seemliness of allowing some leniency to cooperating witnesses who have been charged, or the decision not to charge a witness at all.²¹¹ The defense may try to claim the punishment for the crime is unfair,²¹² or seek to emphasize her client’s contributions to society,²¹³ or seek to portray the fact that the defendant is a “sympathetic figure” who had previously suffered childhood abuse.²¹⁴ The realm of argument based on jury nullification is as broad as defense counsel’s inventiveness.

Arguments for jury nullification can lead to responses from prosecutors that can give rise to claims of inappropriate arguments. In the seminal Supreme Court case of *United States v. Young*, discussed earlier in this Article, the defense attorney, after having heard a summary of the evidence by the prosecutor, launched personal attacks at the prosecutor, intimated that the prosecution deliberately withheld exculpatory evidence,

late eighteenth century, the jury was understood to have the right, not merely the power, to decide questions of law—and thus to nullify.”). This may portend a movement among judges and practitioners to accept this practice in the future.

209. See *supra* Section II.A.

210. See, e.g., *United States v. Gonzalez*, 596 F.3d 1228, 1237–38 (10th Cir. 2010) (stating that the defendant maintained he was a lesser player in a conspiracy and acknowledged on appeal that he sought jury nullification because he could not satisfy the elements of a withdrawal defense).

211. See, e.g., *United States v. Muse*, 83 F.3d 672, 676–77 (4th Cir. 1996) (noting that the defense argued that the lack of prosecution of the government’s witnesses who got a “free ride” should be basis for acquittal).

212. See, e.g., *United States v. Roberts*, No. 05-12835, 2007 WL 177734, at *842, *846–47 (11th Cir. Jan. 25, 2007).

213. See, e.g., *United States v. Joseph*, 567 Fed. Appx. 844, 849 (11th Cir. 2014).

214. See, e.g., *United States v. Horsman*, 114 F.3d 822, 829 (8th Cir. 1997).

and directly asserted that the prosecutor in the courtroom did not believe the defendant had intended to defraud anyone, an essential element to the charged crime.²¹⁵ The federal prosecutor, as the *Young* court found, engaged in improper argument to respond to the defense attorney's improper argument.²¹⁶ Writing for the Court, Chief Justice Burger observed that the situation "was but one example of an all too common occurrence in criminal trials—the defense counsel argues improperly, provoking the prosecutor to respond in kind."²¹⁷

Without defending the prosecutor's argument in *Young*, it is fair to say he was faced with implicit arguments for jury nullification; that is, arguments outside the law and evidence. For example, on the claim that the prosecutor had withheld evidence, the exchange of discovery is not relevant to the issues at trial and is regulated outside the hearing of the jury by the judge.²¹⁸ An invitation to acquit because the prosecutor subjectively knew that the defendant lacked the requisite mens rea was outside the evidence because the prosecutor could not have testified at the trial and the jury did not know the prosecutor's internal thought process. For both of these arguments, there was nothing properly in the record with which to respond. On the horns of that dilemma, the prosecutor, according to the Court, crossed the line with unprofessional comments, some directed at defense counsel, which were deemed to be inappropriate statements of personal belief.²¹⁹

In *United States v. Rosa*, the defense attorney began closing argument with vitriolic, if arguably permissible, attacks on the credibility of the government's witnesses, but the attorney then went further and complained about "the United States Government spending your money and mine trying to get some little fish Does it not gripe you that the people who do the dastardly deeds are the ones who get the breaks? The ones who escape punishment?"²²⁰ The propriety and the various reasons for the government deciding to engage in an investigation and prosecution are not relevant to the elements of the alleged offenses and therefore were not before the jury. While "breaks" given to cooperating witnesses are pertinent to assessing credibility of those witnesses, the defense attorney

215. See *United States v. Young*, 470 U.S. 1, 7 (1985).

216. See *id.* at 8–11.

217. *Id.* at 11.

218. See, e.g., D. Mass. R. 116.1-116.10 (2018) (setting out specific procedures for the exchange of discovery overseen by magistrate judge).

219. *Young*, 470 U.S. at 8–9.

220. *United States v. Rosa*, 705 F.2d 1375, 1379 (1st Cir. 1983).

suggested that the jury's "gripe" about prosecutorial decisions be a reason to acquit.²²¹ The defense attorney also accused the government of "using a whale to catch a minnow" and "cho[osing] to exercise all of its resources and come down on the head of a lowly police officer simply because he is a police officer."²²² These were more reasons to decide the case outside the evidence.

Government counsel responded with a brief statement that the government stood by its case and that "I, personally, make no excuses for this case."²²³ The *Rosa* court, without explicitly deciding whether the remarks were improper personal opinions, held that there was no prejudice in light of the prior attack by the defense and declined to reverse the conviction.²²⁴ It is worth considering how, in those circumstances, a prosecutor was hamstrung to respond. The rationale, the internal deliberations on what charges to bring, and whether to enter into a plea agreement and on what terms, would not have been part of the evidence. There may be persuasive reasons, on a moral level, for these prosecutorial or investigative decisions, but they cannot be shared with the jury. Likewise, the portrayal of the defendant as a sympathetic character (i.e., a "lowly police officer" being "crucif[ied]"²²⁵) might, depending on the case, lose some of its luster if the entirety of the defendant's background, including inadmissible bad acts, were given to the jury. Jury nullification efforts like the ones employed in *Rosa* are one-sided arguments.

Other cases illustrate the conundrum of responding to jury nullification arguments during the government's summation. In *United States v. Machor*, the defense claimed that the cooperating witness, the law enforcement agent, and the prosecutor in the courtroom were trying to frame him for a crime he did not commit.²²⁶ How could the prosecutor respond to a claim that he himself was trying to fabricate a case against the defendant unless evidence about the workings of the prosecution team had been introduced at trial? In *United States v. Adams*, the defendant's attorney argued that the government ignored other suspects, but decisions about arresting and prosecuting people other than the defendant are not relevant to whether the defendant committed the alleged offenses, so those

221. *Id.* at 1379.

222. *Id.*

223. *Id.* at 1379–80.

224. *See id.* at 1380.

225. *Id.* at 1379.

226. *United States v. Machor*, 879 F.2d 945, 956 (1st Cir. 1989).

decisions and the reasons for them were not before the jury.²²⁷ In *United States v. Trujillo*, the defense attacked the indictment in closing argument, suggesting nefarious reasons for why certain co-conspirators had not been named in the charging document, which alleged a drug conspiracy.²²⁸ A prosecutor had drafted the indictment, but that drafting process was surely not part of the trial.

In each of these cases, the prosecutor responded to the defense arguments with remarks later challenged on appeal. In *Machor*, the prosecutor stated: “[I]n order to present this case, do you really think we have to fabricate it[?] As [the defendant] told you, that even the prosecutor was here fabricating a case. That’s me.”²²⁹ This was deemed error, but not reversible error.²³⁰ This statement sounded like vouching, but there was no means to rebut the outside-the-record attack on the prosecutor. In *Adams*, the prosecutor responded by saying that the federal agents could have arrested other people but “[t]hey’re not here looking for numbers.”²³¹ On appeal, the First Circuit said this “could be viewed as a form of vouching for the competence and integrity of the police and probably should not have been said,” but it found that the statement was not prejudicial.²³² In *Trujillo*, the prosecutor responded by stating that the judge was responsible for the legal sufficiency of the indictment and that if the judge thought the indictment was not proper, the jury would not have been asked to decide the case.²³³ This rejoinder, an accurate statement about the roles of the judge and jury, was deemed not to be error,²³⁴ but as a matter of advocacy, it probably failed to thwart the real thrust of the defendant’s attack. Questioning who was named in the indictment was probably designed to emphasize the unfairness of charging one defendant when others were not charged. Addressing that would have required argument outside the evidence.

“In our tradition, defense counsel are allowed a good measure of latitude in summing up to the jury”²³⁵ While courts have acknowledged the thrust and parry nature of improper closing arguments by defense counsel and prosecutors, there has been little recognition of the

227. *United States v. Adams*, 305 F.3d 30, 37–38 (1st Cir. 2002).

228. *United States v. Trujillo*, 714 F.2d 102, 104 (11th Cir. 1983).

229. *Machor*, 879 F.2d at 955 (first alteration in original).

230. *Id.* at 955–56.

231. *Adams*, 305 F.3d at 37.

232. *Id.*

233. *Trujillo*, 714 F.2d at 104.

234. *Id.* at 104–05.

235. *Adams*, 305 F.3d at 38.

conundrum that jury nullification arguments create for prosecutors. It is not just a matter of “fighting fire with fire,”²³⁶ as if counsel are simply trading heated personal insults. Rather, there is often, as these examples demonstrate, a deeper purpose behind improper defense argument. It is not just a matter of turning up the heat in the courtroom, but rather an attempt to take the jury outside the facts and the law, and to decide the case based on sympathy for the defendant or disgust for the government. Once the debate ventures outside the evidence introduced during the trial, the ethical prosecutor has few tools in her forensic toolkit.

III. CLOSING ARGUMENT SHOULD MIRROR THE TRIAL

A. *Toward a Better Rule on Vouching and Personal Opinion*

As one scholar has said about the law of closing argument in North Dakota, the cases “do not provide easy reading.”²³⁷ Another commentator has said that “the state and federal courts are perpetually divided as to what constitutes proper closing argument, which is at best ‘wrought with uncertainty.’”²³⁸ The most recent treatment of the subject from the United States Supreme Court, *United States v. Young*, acknowledged the difficulty in drawing a line between acceptable and unacceptable statements, noting “there is often a gray zone.”²³⁹ The discussion of federal cases in Part I of this Article, as well as decisions from Maine and Kansas, illustrate the ongoing difficulty courts and practitioners have had in applying the rule against vouching and personal opinion in closing arguments.

This Article has attempted to explain why this area of the law has been so difficult for courts to articulate. Put simply, the effort in federal courts to allow arguments on key issues, including witness credibility, while separating out statements of personal opinion, has run aground because repeated attempts to identify forbidden words and phrases has rendered a body of case law that is contradictory and elevates form over substance. The experiences of Maine and Kansas, jurisdictions which have tried to set stricter standards by disallowing argument on witness credibility altogether, are not more encouraging.²⁴⁰ If taken seriously,

236. *Id.* at 37.

237. Ahlen, *supra* note 15, at 102.

238. Craig Lee Montz, *Why Lawyers Continue to Cross the Line in Closing Argument: An Examination of Federal and State Cases*, 28 OHIO N.U. L. REV. 67, 69 (2001) (quoting Gary D. Fox, *Objectionable Closing Argument: Causes and Solutions*, 70 FLA. B.J. 43, 47 (1996)).

239. *United States v. Young*, 470 U.S. 1, 7 (1985).

240. *See supra* Sections I.C.5.a–b.

these standards eliminate meaningful argument on the key issues in the trial. If honored in the breach, the strict standards sow more confusion than ever.

The fundamental issue is that courts have failed to give independent meaning to the rule against statements of personal belief. If, for example, a prosecutor's first-person statement refers to matters that were not subject to proof during the trial, it is covered by the rule against arguing outside the evidence, which I have called the prime directive.²⁴¹ If the prosecutor seeks to assure the jury about the credibility of the police witnesses because she knows them well from working with them in many cases, that is impermissible vouching and violative of the prime directive as well. The rule against personal opinions, if it means anything, must apply where those two concerns are not present. Where courts have explained the rule against personal opinions in terms of arguing outside the evidence or vouching, they have left pregnant the question of what the rule against personal opinions means.

Literally speaking, almost everything a prosecutor says during closing argument is a statement of personal belief. Unless a statement of the prosecutor is a statement of fact, it is a statement of opinion, in that it draws an inference or a conclusion. Advocacy is the expression of opinions. Effective advocacy is the expression of opinions, well-supported by facts and logic. All those opinions, for the prosecutor, are personal. The prosecutor has decided to pursue the case, and he must, under attorneys' ethics rules, honestly and subjectively believe that the defendant is guilty beyond a reasonable doubt. By contrast, the defense attorney may subjectively believe his client is, without a doubt, guilty, but he honors his profession by zealously arguing for acquittal based on the evidence at trial. It is glaringly obvious to any juror that the prosecutor subjectively believes in what he is arguing. It insults the intelligence of jurors to think that they would perceive an "it is submitted" statement to be any less of a personal belief than an "I submit" statement. In either case, the government lawyer is doing the submitting, and even converting a statement to the passive voice still leaves the prosecutor in the courtroom as the speaker.

For these reasons, courts are able, with some reason, to identify almost any portion of disputed closing argument by the prosecutor and say it violated the rule against personal opinions. After all, it is hard to say that suggesting that a witness was not telling the truth, or that a defendant committed fraud is not an opinion, inference, or conclusion. And since

241. *See supra* Section I.B.

the prosecutor is the person making the statement, it is personal. Then again, arguing that a drug defendant intended to distribute two kilograms of cocaine found in his car because he had just texted his customer the price for the drugs and had arranged a time to meet the person is also an inference or conclusion, and it is equally personal. But a classic argument like that is never thought to fall within the rule against personal opinions.

So, what is the difference between acceptable and unacceptable personal opinions? If the only difference is that one argument is supported by the evidence (like the example about the cocaine found in the car) and another argument is not, then the prosecutorial sin is violating the prime directive, and the rule against personal opinions has no independent meaning.

Experience has shown that the rule against personal opinion—when it does have independent meaning—functions as a civility code enforced by appellate judges after the fact.²⁴² Because the literal scope of the rule is so vast, it is a convenient mechanism for picking out statements or words that judges would prefer not to hear and calling them out as violating the rule against personal opinion. The countless decisions condemning the words “lie,” “lying,” or “liar” can best be understood as simply a feeling that it is impolite to directly accuse—in person, no less—somebody of lying. These decisions make little or no distinction, as they ought to, between accusing the defendant of “lying” in his courtroom testimony and being a “liar.” The latter characterization could, depending on the context in which the word is used, suggest the defendant has a track record of lying that has not been shared with the jury. The distinctions in phraseology that many courts have found so important, where they acknowledge that the jury could properly receive the same substantive argument from the prosecutor, is simply a preference for a more genteel or more elevated delivery. Substituting “I am telling you that” with “the government submits that” takes the edge off the words that follow. Such substitutions reflect a preference for a formal way of talking over plain speaking. After all, who, in ordinary conversation, would say in reference to an important matter “a conclusion on your part may be drawn,” rather than “I think”?

Of course, some courts permit more plain speaking than others. The United States Court of Appeals for the Eighth Circuit had held that a prosecutor’s use of “colorful pejoratives” like “fraudster” and “Jason Branch is a fraud” was not improper where “the closing was limited to

242. *See supra* Section I.C.

what the government (and ultimately the jury) believed the evidence had proved.”²⁴³ Some federal and state courts have found that the use of the word “lie” is acceptable as a means of arguing the evidence, whereas others find it to be beyond the pale (i.e., per se misconduct).²⁴⁴ In Maine, it was deemed acceptable to say that the defendant was an admitted liar, where he admitted to lying on the stand, but it was improper to say, based on the evidence, that a defendant charged with lying had lied since the defendant himself did not admit that he had lied.²⁴⁵ In that situation, the prosecutor must take care not to contradict the defendant in an adversarial proceeding. In sketching out the rule against personal opinion, the rules seem to be a matter of taste.

It is worth remembering that violations of the rule against personal opinions are analyzed in federal court under the Due Process Clause of the United States Constitution.²⁴⁶ Thus, where prosecutorial statements are found to be improper, it is a Constitutional violation. Where the error results in overturning a conviction, the remark must have “so infected the trial with unfairness as to make the resulting conviction a denial of due process.”²⁴⁷ Where closing argument error is found due to characteristics of phrasing; where general, concluding remarks about the defendant’s guilt are error; where error is found when the prosecutor argues that the defendant lied when the evidence supports that inference;²⁴⁸ it is difficult to believe that these kinds of error are of a fundamental, constitutional magnitude. The lack of harm, if any, from many of the statements that have been found to violate the rule against personal opinions is readily apparent to any reader. A finishing sentence like, “I think when you look at the evidence in this case and use your common sense, there’s only one conclusion you can reach and that is that this defendant Joseph Smith has

243. *United States v. Branch*, 591 F.3d 602, 609–10 (8th Cir. 2009).

244. *See* Claire Gagnon, Note, *A Liar by Any Other Name? Iowa’s Closing Argument Conundrum*, 55 DRAKE L. REV. 471, 490 (2007) (explaining that although Iowa does not allow the prosecutor to argue that the defendant lied, most jurisdictions do); Craig Lee Montz, *Calling the Witness a Liar During Closing Argument: The Florida Supreme Court’s Final Approval*, 75 FLA. B.J. 49, 50 (2001) (explaining that it is permissible in Florida to call a witness a liar if the evidence supports the conclusion); *see also supra* Sections I.C.4–5.

245. *See* *State v. Casella*, 632 A.2d 121, 123 (Me. 1993).

246. *See* *Donnelly v. DeChristoforo*, 416 U.S. 637, 642–43 (1974).

247. *See id.*; *see also Branch*, 591 F.3d at 609 (“[W]hen a prosecutor’s remarks are arguably improper, the defendant must still prove that these remarks made the entire trial fundamentally unfair and the verdict would have changed absent these comments.” (citing *Kellogg v. Skon*, 176 F.3d 447 (8th Cir.1999))); *United States v. Coriarty*, 300 F.3d 244, 255 (2d Cir. 2002) (same).

248. *See supra* Sections I.C.3–5.

been proved guilty beyond a reasonable doubt,”²⁴⁹ does not scream out that the fairness of the trial has, in one blow, been undermined. Rather, it is the prosecutor asking the jury to find the defendant guilty, something that everyone in the courtroom would expect a prosecutor to do. When a court then says that the prosecutorial sin can be expiated by changing “I think” to “the government submits,” the legal analysis has left the constitutional realm.

While some courts have frequently found prosecutorial misconduct in closing argument, it is far less likely for courts to find that the error was so prejudicial that overturning the conviction is necessary.²⁵⁰ Only when the errant remark has “‘so poisoned the well’ that it is likely that the verdict was affected,” will a conviction be vacated.²⁵¹ The touchstones for prejudice from statements of personal opinion are references to matters outside the evidence and vouching.²⁵² This shows that the harm from these kinds of statements stems not from their “personal” nature, but from lack of adherence to the prime directive. If the prosecutor is arguing within the evidence, most courts will find that straying into forbidden formulations does not impact the trial.²⁵³ It is worth asking, then, whether many of these violations ought to be considered constitutional error at all if there is no discernible harmful impact on the trial.²⁵⁴

The legal system would be better off if the current rule against personal opinions were simply abolished. The foregoing analysis has shown that the search to find independent meaning in this rule has been fruitless.²⁵⁵ It functions as a convenient mechanism to enforce the varying norms of decorum which exist around the country, with the range of

249. *United States v. Smith*, 982 F.2d 681, 684 n.2 (1st Cir. 1993) (emphasis omitted).

250. *Cicchini*, *supra* note 61, at 893–95 (noting with frustration how infrequently closing argument errors lead to reversal).

251. *Smith*, 982 F.2d at 682 (quoting *United States v. Mejia-Lozano*, 829 F.2d 268, 274 (1st Cir. 1987)).

252. *See United States v. Wihbey*, 75 F.3d 761, 771–72 (1st Cir. 1996).

253. *See supra* Section I.C.3 (discussing various First Circuit cases in which error was found for expression of personal opinion but no reversible error was found).

254. *United States v. Stover*, 474 F.3d 904, 916 (6th Cir. 2007). One case from the Sixth Circuit drew perhaps the finest of distinctions to find a statement improper, but not prejudicial error: “The difference between what the prosecutor actually said—‘he is a liar’—and what the prosecutor could have permissibly said, that the evidence suggested that Defendant Hinton’s testimony is not credible, is minimal. This statement does not require reversal . . .” *Id.* This phenomenon of finding error where there is no substantive difference between an acceptable and unacceptable statement, but then finding no prejudice, degrades the idea of a violation of constitutional rights.

255. *See supra* Section I.C.

acceptable commentary established by the eye of the beholder.²⁵⁶ Courts and practitioners could stop puzzling over whether remarks are “personal” or not and focus on the true harm that can come from improper summations. The constitutional analysis should concentrate on whether the prosecutor has tried to use facts outside the record to secure a conviction or has attempted to lend the prestige of his office or the office of the police department to the weight of her case. This is the true concern of the rule against personal opinions.

This proposal would place this area of the law on closing arguments on a stronger analytical foundation. With the prime directive at the center of the inquiry, courts and practitioners could analyze whether the prosecutor’s closing has stayed within the bounds of the trial. “In arguing the law to the jury, counsel is confined to principles that will later be incorporated and charged to the jury.”²⁵⁷ Likewise with the facts, attorneys should be confined to the evidence introduced by the parties and deemed admissible during the course of the trial by the trial judge. Closing arguments should mirror the trial.

A practitioner deciding *ex ante* whether to make a particular argument should simply ask whether the matter was part of the trial. If, for example, certain bad acts of the defendant were known to the prosecutor but were excluded by the trial judge as unfairly prejudicial, then those bad acts should not be part of closing argument, even if responsive to the defense attorney’s arguments. Closing argument is not the time to bring in new facts or new theories. Improper vouching can be discerned by this mirroring principle. If the police officer has been allowed to testify about the number of years of his experience, then that may be part of the argument. If the police officer has not testified about the collateral consequences to his career if he lies on the stand, as he probably would not be allowed to do, then that point is out of bounds and cannot be used to bolster the credibility of the police witness.²⁵⁸

At the same time, arguments that comply with this mirroring principle should be permitted. Thus, when a defendant has testified and has offered an implausible, inconsistent, self-serving version of events, it is fair to

256. Because these norms are established through appellate review, often due to alleged errors neither objected to, nor censured by the trial judge, closing arguments are judged by how the words appear on paper. *See supra* Sections I.C.5.a–b (showing the unworkability of strict rules against personal opinion in Maine and Kansas).

257. *United States v. Trujillo*, 714 F.2d 102, 106 (11th Cir. 1983) (citing *United States v. Sawyer*, 443 F.2d 712, 714 n.11 (D.C. Cir. 1971)).

258. *See Pettys*, *supra* note 190, at 517 (explaining that under traditional rules of evidence and procedure “a plain symmetry exists between evidentiary relevance, on the one hand, and jury instructions and closing arguments, on the other”).

argue that the defendant lied, fabricated, or told a tall tale, where that conclusion is supported by references to the evidence. Similarly, arguing that other witnesses have told the truth should be allowed as long as it is in the context of arguing the evidence in the case. A general concluding or introductory statement, such as the “defendant lied to his customers and committed fraud,” should be acceptable where it is a way to headline a discussion about the evidence supporting a defendant’s guilt on fraud charges.

Focusing counsel’s attention on the basic principle of confining oneself to the evidence and the law introduced during the trial is a sounder approach than a list of “guidelines,” which some well-meaning commentators have suggested.²⁵⁹ These varying guidelines tend to be nearly as general and as indeterminate as the maxim of prohibiting statements of personal opinion. Telling an attorney that she may “[u]rge the jury to draw reasonable inferences and conclusions from the evidence” while also repeating the admonition to steer clear of statements of personal belief²⁶⁰ returns the attorney to the same contradictions and inconsistencies which have made the case law not “easy reading.”²⁶¹

The mirroring concept, which is simply a corollary to the prime directive, would be used to police constitutional violations stemming from improper prosecutorial comments during closing argument. That is not to say that courts would be compelled to accept any standard of behavior, so long as the lawyer confined himself to arguing the evidence and stayed within the law articulated by the trial judge. Trial judges have broad discretion in the conduct of trials.²⁶² There are remarks, as one experienced Massachusetts trial judge has written, that fall within the category of “better left unsaid”²⁶³:

Juries are entitled to better than “don’t let the smoke fool you,” “throw the defendant’s testimony out the window, because it’s all baloney;” “this case is about a desperate man, a predator getting his prey into that motel room and leaving her there for dead;” and “take everything the defendant said and throw it in the garbage can.”²⁶⁴

259. See Ahlen, *supra* note 15, at 105–07; Nidiry, *supra* note 6, at 1327–34.

260. Ahlen, *supra* note 15, at 106–07.

261. See *id.* at 102.

262. See *United States v. Young*, 470 U.S. 1, 10 (1985).

263. Agnes, *supra* note 25, at 35.

264. *Id.* (quoting *Commonwealth v. Ormonde*, 770 N.E.2d 36, 39–40 (Mass. App. Ct. 2002)).

Language like that could well be called “crude,” “bombastic,” or “sarcastic,”²⁶⁵ and subject to censure, or the language could be deemed, in the taste of the presiding trial judge, and in the context of a particular trial, acceptable plain speaking. In either event, this mode of expression is not the stuff of a violation of fundamental constitutional rights.²⁶⁶

It should be possible to regulate attorney behavior during closing argument, and even to impose varying, particular, modes of decorum, without making it a matter of constitutional import. This is a proposal, in other words, to delegate the policing of language and tone during closing arguments to the trial court level, and to leave it there. Appellate courts analyzing whether due process has in fact been denied should be looking to the mirroring principle and to violations of the prime directive to decide whether the prosecutor has played by the rules of the trial or has done real harm by violating them. Thus, the system could address the legitimate concern articulated by Justice Burger in *Young*, where he observed that the unseemly back-and-forth between defense counsel and the prosecutor “has no place in the administration of justice.”²⁶⁷ The better remedy to this breakdown in professionalism “would have been for the District Judge to deal with the improper argument of the defense counsel promptly and thus blunt the need for the prosecutor to respond.”²⁶⁸ The real issue in *Young* was not that a fundamentally fair trial was in jeopardy because the prosecutor couched his remarks as “personal impressions” when invited to do so by defense counsel, but that counsel’s verbal jousting gave the trial an unbecoming look.²⁶⁹ This is the sort of sub-constitutional concern that trial judges are well-equipped to deal with in the moment.

Finally, it is important to distinguish between oral advocacy that is sub-optimal, or not effective, and closing arguments that create legal error. As a prosecutor who tries cases, I find many of the challenged closing arguments found in the case reporters cringe-worthy, at least on the cold paper. Repeatedly calling the defendant a liar is not my style and I would not do it even if it were permitted. It just does not seem effective, whereas maintaining one’s dignity and being precise and logical with the facts and the law tends to imbue the prosecutor in the courtroom with more credibility. On the other hand, not all lawyers operate at the same level of

265. *Id.*

266. *Ormonde*, 770 N.E.2d at 39–40 (finding no error in closing argument that was on the “crude side”).

267. *Young*, 470 U.S. at 9.

268. *Id.* at 13.

269. *Id.* at 10 (emphasizing the trial judge’s responsibility to maintain proper decorum in the courtroom).

competence, or at least with the same style. As long as trials continue to have closing arguments,²⁷⁰ the zone of acceptable advocacy must be fairly wide. Lawyers have different vocabularies, different ways of expressing themselves, and different capacities to modulate between ordinary, plain speaking, and more lawyerly speech. Moreover, a closing argument is not a written or memorized speech. At their best, closing arguments are a mix of careful preparation and extemporaneous speaking.²⁷¹ As such, forbidding common verbal formulations, like all first-person statements, is a trap that will be sprung with regularity because even the most cautious advocate can, in a split second, preface a comment on the evidence with “I think” because it is so natural to do so. Refocusing the prosecutor’s charge on staying within the evidence introduced at trial is a way to avoid these needless traps and stumbles.

B. *Policing Jury Nullification Efforts More Effectively*

The mirroring principle proposed in this Article is an effective means to understand and implement the rules relating to arguing within the evidence, vouching, and personal opinions. It is also a useful concept in understanding and policing appeals to jury nullification during closing arguments. As discussed in Part II of this Article, jury nullification occupies an ambiguous place in criminal trials, and this ambiguity presents a conundrum for the prosecutor when faced with an argument based in whole or in part on jury nullification.

While appellate courts have generally adopted a hostile attitude to jury nullification in our legal system, they have not required that a trial judge give an instruction that the jury must convict if it finds the defendant guilty beyond a reasonable doubt, much as the jury is told that it must acquit if it finds that the government had not met its burden of proof.²⁷² It is not clear what the case is for making this a matter of the trial judge’s discretion, for example, allowing the trial judge to simply say that the jury “should” convict if it finds the defendant guilty beyond a reasonable

270. Cf. *Herring v. New York*, 422 U.S. 853, 858 (1975) (“There can be no doubt that closing argument for the defense is a basic element of the adversary factfinding process in a criminal trial.”).

271. See *Donnelly v. DeChristoforo*, 416 U.S. 637, 646–47 (1974) (“[C]losing arguments of counsel, are seldom carefully constructed in toto before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear.”) (emphasis omitted).

272. See, e.g., *United States v. Sepulveda*, 15 F.3d 1161, 1189–90 (1st Cir. 1993); PATTERN CRIMINAL JURY INSTRUCTIONS FOR THE DIST. COURTS OF THE FIRST CIRCUIT § 3.02 (U.S. DIST. COURT ME. 2018), <https://www.med.uscourts.gov/pdf/crjlinks.pdf> (providing that the jury must acquit if the evidence is insufficient; the jury should convict if the government has met its burden).

doubt. This, as the First Circuit has recognized, subtly suggests the possibility of jury nullification,²⁷³ even though juries (except in a handful of states) are not to be instructed explicitly on jury nullification.²⁷⁴ While there are many matters that are necessarily left to the trial judge's discretion, there is no good reason to encourage a non-uniform response to jury nullification, unless, of course, one seeks to promote jury nullification, which some scholars, practitioners, and judges have done.²⁷⁵ Allowing or not allowing jury nullification is a basic proposition that requires a single, unequivocal answer. Appellate courts should require that trial judges give a "must/must" instruction. That is, the jury must acquit if there is reasonable doubt, and it must convict if the government has met its burden of proof. Failing that, they should do a better job of explaining why perpetuating the ambiguity of jury nullification serves a laudable purpose. For the same reasons, appellate courts should require, rather than simply permit, trial judges to block efforts by defense counsel from raising jury nullification arguments.

So long as trial judges retain the discretion to give a "must/must" instruction, they should do so. Similarly, the trial judge should prevent defense counsel from making jury nullification arguments either before or during closing argument. With both of these steps, the trial judge can prevent a mismatch between the scope of the trial and the scope of closing argument. Evidence would be admitted according to lawful notions of relevance, and the prosecutor and defense attorney would argue within the facts introduced at trial. The prosecutor would not be tempted to respond to outside-the-record arguments by defense counsel by going outside the record herself. To those who believe in a criminal justice system without jury nullification—apart from the jury's naked power to engage in it—having both sides arguing within the evidence is the best-case scenario.

The mirroring principle provides an effective response to those who would prefer to open the door a crack to jury nullification (i.e., with a "must/should" instruction and the trial judge taking no steps to block jury nullification arguments) or to those who want to open the door entirely to jury nullification. The mirroring principle says that permitting jury nullification arguments means that the scope of evidence admitted at trial

273. See *Sepulveda*, 15 F.3d at 1189–90.

274. See Korroch & Davidson, *supra* note 186, at 133 (“[T]he prevailing judicial opinion steadfastly has been opposed to permitting the jury to *know* that it has the power to acquit ‘in the teeth of both the law and facts.’”).

275. See Bressler, *supra* note 201, at 1140–41; Del Frate, *supra* note 194, at 180–88; Korroch & Davidson, *supra* note 186, at 138.

should be revisited.²⁷⁶ If, for example, defense counsel seeks an acquittal based on an appeal to sympathy for the defendant, and the trial judge will allow that argument to be made, then the prosecution should be permitted to present information about some of the defendant's unsympathetic characteristics. If the defense is to be allowed to argue that the government's charging decisions unfairly targeted a "little fish," then the government should be permitted to put on evidence and explain why it made the charging decisions it did. This would include showing the societal benefit in deterring such "little fish" from engaging in criminal behavior, or showing that the defendant is not such a "little fish," based on, for example, his criminal record. If the defense wishes to argue that a mandatory minimum sentence would be unjust and that a jury should consider the potential punishment before deciding whether to convict, then the government should be allowed to present the sort of information that a judge considers at a sentencing hearing, such as, again, the defendant's criminal history.

If these scenarios seem unpalatable for proponents of jury nullification, it is only because litigating the righteousness of the government's cause is apt to be a fraught endeavor for the defendant when the jury hears both sides.²⁷⁷ Ordinarily, efforts at jury nullification take place where the defense can create a mismatch between the scope of the trial and the scope of closing argument. It is in this space that the defense attorney advances a jury nullification argument, and the prosecutor has nothing in the record to rebut the argument with. In that case, the government's choices are to leave, for example, a charge that the prosecutor in the courtroom is trying to fabricate a case against the defendant,²⁷⁸ unaddressed, which could be taken by the jury as a tacit admission, or the government could respond in kind by going outside the record, which would be error. This latter scenario would seem to be the worst-case scenario, with the jury hearing argument from both sides unconnected to the evidence they heard during the trial. How is a jury to evaluate an argument when it has not heard the evidence establishing the

276. See Pettys, *supra* note 190, at 517 (explaining that symmetry must exist between evidence and closing arguments under traditional rules of evidence).

277. See *id.* at 518–22 (noting the substantial implications that allowing moral appeals from both sides would have on closing arguments); Rubenstein, *supra* note 14, at 987–99 (permitting jury nullification and defense counsel to argue for it would "radically alter the scope of the modern criminal trial," including substantial changes to the rules of evidence).

278. See *United States v. Machor*, 879 F.2d 945, 956 (1st Cir. 1989).

facts underlying that argument? As the *Young* court said, “two improper arguments—two apparent wrongs—do not make for a right result.”²⁷⁹

Applying the mirroring principle to a bid for jury nullification is a mental exercise that should discourage courts from allowing jury nullification arguments to enter the trial at all and should encourage courts to take active steps to prevent it. When Judge Weinstein suggested that a jury ought to be informed of the mandatory minimum sentence in a child pornography case,²⁸⁰ did he envision putting before the jury all of the matters a judge would consider at sentencing, such as victim impact statements from the children whose pictures were in the defendant’s collection, the defendant’s prior criminal record, the defendant’s upbringing and home life, and his drug history? If not, the jury would be invited to consider punishment in the context of the government’s evidence being confined to the narrow question of whether the defendant committed the alleged child pornography crimes, leaving a very incomplete picture of the matters relevant to punishment.²⁸¹ If evidence would be taken on all of these issues relating to punishment, the trial would grow to enormous proportions—it would be a tale of the defendant’s whole life, plus a whole host of other matters. There would be rival versions of the defendant’s childhood, and no doubt, of the circumstances of his prior criminal cases. The trial would be unmanageable, with the questions of morality and sympathy for the defendant overshadowing the question of whether sufficient proof exists for the alleged offense or offenses. It would be the very picture of lawlessness.

Addressing the ambiguous place of jury nullification in closing arguments requires the attention of the trial judge to this issue during the entirety of the trial, and it requires the prosecutor to object when he or she sees it. More importantly, it requires the judiciary as a whole to decide

279. *United States v. Young*, 470 U.S. 1, 11 (1985).

280. *See United States v. Polouizzi*, 687 F. Supp. 2d 133, 204 (E.D.N.Y. 2010), *vacated on other grounds*, 393 Fed. Appx. 784 (2d Cir. 2010).

281. *See id.* at 199 for the district judge’s reference to the “jury’s historic Sixth Amendment mercy-dispensing powers.” The judge thought said powers could be unleashed in view of “the special circumstances [of] the mandatory minimum sentence unknown to the jury, the need for psychiatric help in view of sexual childhood abuse, the locked door behind which viewing took place, and other factors.” *Id.* at 204. The district judge paints a sympathetic picture of the defendant’s upbringing in Italy and other personal history, matters which are not susceptible of easy proof unless a fact-finder is inclined to simply take the defendant at his word on these historical facts. *See id.* at 138–41. His view of matters outside the normal bounds of relevance is rather myopic, as if the only thing a jury seeking to weigh the moral righteousness of the case, beyond the evidence of the crime alleged, is the defendant’s background. It is as if the children in the thousands of child pornography images, whom the district judge refers to simply as “young girls,” are not in the equation. *See id.* at 138.

the basic proposition of whether it is for or against jury nullification. So long as that question remains unanswered, defendants will be tempted to make arguments outside the evidence and the law, and prosecutors will struggle to respond.

CONCLUSION

There is crying need for the parts of the law of closing argument discussed in this Article to be re-interpreted and simplified. The law should be grounded in functional concerns rather than particular modes of expression. The closing arguments at the end of trials should reflect or mirror the evidence admitted during the trial. Reviewing alleged prosecutorial summation errors by that simple principle would parse out proper and improper argument. Hewing to this mirroring principle would also help stamp out jury nullification from our criminal trials, which would advance the interests of the rule of law.