NOTES

JUDICIAL INTERVENTION IN TRIALS

I. INTRODUCTION

The American trial is an adversary proceeding\(^1\) based on the rationale that the opposing parties, motivated by self-interest, will assure a full and thorough presentation of the issues and relevant evidence.\(^2\) The adversary system operates within the framework of constitutional due process, a basic requirement of which is a fair trial\(^3\) before an impartial judge.\(^4\) Fairness requires not only an absence of actual bias

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2. The traditional adversary proceeding is divided into three segments: opening statements, presentation of evidence, and closing arguments. Generally, the prosecutor or defendant has the right to make the first opening statement, present evidence first, and make both the first and the final closing arguments. Walker, Thibaut & Andreoli, Order of Presentation at Trial, 82 YALE L.J. 216 (1972). On the order of presentation generally, see McKelvy, Presentation of the Case in Chief, in SUCCESSFUL JURY TRIALS 187, 192 (J. Appelman ed. 1952). See also United States ex rel. Parsons v. Adams, 336 F. Supp. 340, 343-45 (D. Conn.), aff'd, 456 F.2d 257 (2d Cir. 1971).

3. Entire systems of proof have been devised on the notion that a trial is and necessarily should be a contest over issues formulated by the parties. See Kunert, Some Observations on the Origin and Structure of Evidence Rules Under the Common Law System and the Civil Law System of "Free Proof" in the German Code of Criminal Procedure, 16 BUFFALO L. REV. 122 (1966).


in the trial of a case, but the absence of even the appearance of bias. Consequently, the judge must neither usurp the function of counsel nor appear to align himself with any litigant. Rather, he must seek the truth impartially and guide the course of the trial to assure a fair presentation of the facts to the jury. To fulfill these responsibilities,

5. Gomila v. United States, 146 F.2d 372, 374 (5th Cir. 1944); ABA STANDARDS 6.4.


7. United States v. Fernandez, 480 F.2d 726 (2d Cir. 1973) (conviction reversed because of trial judge's appearance of partiality); Greener v. Green, 460 F.2d 1279 (3d Cir. 1972); Kramer v. United States, 408 F.2d 837 (8th Cir. 1969); United States v. Hill, 332 F.2d 105, 106 (7th Cir. 1964); United States v. Curcio, 279 F.2d 681, 682 (2d Cir.), cert. denied, 364 U.S. 824 (1960); Smith v. Welch, 189 F.2d 832, 837 (10th Cir. 1951); Billeci v. United States, 184 F.2d 394, 403 (D.C. Cir. 1950) ("He [the trial judge] cannot press upon the jury the weight of his influence any more than he can eliminate the jury altogether. . . . [H]e cannot be an advocate; he cannot urge his own view of the guilt or innocence of the accused"); Hunter v. United States, 62 F.2d 217, 220 (5th Cir. 1932) ("It is vastly more important that the attitude of the trial judge should be impartial than that any particular defendant, however guilty he may be, should be convicted"); State v. Bordelon, 141 La. 611, 614, 75 So. 429, 430 (1917); Hall v. Thayer, 105 Mass. 219, 224 (1870); People v. London, 40 Mich. App. 124, 198 N.W.2d 723 (1972); Commonwealth v. Safis, 122 Pa. Super. 333, 338, 186 A. 177, 179 (1936); Hargrove v. Fort Worth Elevator Co., 276 S.W. 426 (Tex. Comm'n App. 1925); cf. Glover, The Attitude of a Judge, 13 TEX. B.J. 13 (1950):

If by his demeanor in a trial, by the tone of his voice, or any other manner he discloses his feeling to a jury, he is not being a fair and impartial judge. If, when a jury retires to consider of its verdict, the jurors have gained no impression as to which way the judge would personally decide the case, if it had been tried before him, then it has been fairly tried; if the jurors have gained an impression of how the court would decide the case, the parties have not had a fair trial.

See also Blunt v. United States, 244 F.2d 355, 365-66 (D.C. Cir. 1957) (robbery prosecution in which trial judge's attitude seemed to favor prosecution); Hunter v. United States, 62 F.2d 217 (5th Cir. 1932) (trial judge's questions could reasonably have led jury to believe that judge did not believe defendant's testimony).

8. Bova v. Bova, 135 S.W.2d 384, 385 (Mo. App. 1940); Gitelson & Gitelson, A Trial Judge's Credo Must Include His Affirmative Duty To Be an Instrumentality of Justice, 7 SANTA CLARA L.J. 7 (1966); see C. WYZANSKI, WHEREAS—A JUDGE'S PREMISES 15-16 (1965).


10. See U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . "); id. amend. VI (impartial jury); id. amend. VII (trial by jury in civil cases). Most states preserve the right to trial by jury in civil as well as criminal cases. See, e.g., GA. CONST. art. VI, § 16; IND. CONST. art. I, § 20; PA. CONST. art. I, § 6. See also FED. R. CIV. P. 58; FED. R. CRIM. P. 23; W. FORSELL, HISTORY OF TRIAL BY JURY (2d ed. 1879).
federal and many state courts have recognized the right of the trial judge to question witnesses, admonish counsel, and comment on the evidence.

This Note will analyze existing case law to ascertain the extent to which a trial judge may properly intervene in the course of a trial, in view of his role in relation to the adversary system, the jury, and the requirement of a fair trial.

II. JUDICIAL INTERVENTION

A. Comments on the Evidence

At common law the trial judge was an active participant in the trial,\(^\text{11}\) calling and questioning witnesses, analyzing the evidence, and guiding the jury by sharing his opinion even on matters of fact.\(^\text{12}\) The Supreme Court, in exercising its supervisory powers over the federal courts, has adopted a role for federal trial judges that is only slightly more restricted than the active role of the common law judge.\(^\text{13}\) The right of the trial judge to comment on the evidence has been retained,\(^\text{14}\) but the Court

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12. See M. HALE, supra note 11, at 291-92; Scott, Trial by Jury and the Reform of Civil Procedure, 31 HARV. L. REV. 669, 680 (1918); Sunderland 305-06. See also Quercia v. United States, 289 U.S. 466, 469 (1933).


has carefully emphasized that the jury is to remain the ultimate fact-finder with any comment by the trial judge not to be interpreted by the jurors as binding upon them.\textsuperscript{15}

In contrast to the federal system, most states early began to circumscribe the role of the trial judge by prohibiting him from informing the jury of his view of the facts.\textsuperscript{16} It has thus been suggested that the rule proscribing a judge's commenting on the evidence in state courts\textsuperscript{17} was created to prevent the judge from usurping the fact-finding function of the jury\textsuperscript{18} and, more generally, to prevent the judge from revealing to the jurors his attitudes on the merits of the case.\textsuperscript{19} The rule, though rejected by federal courts and long criticized by commentators, has been retained in most states.\textsuperscript{20}

\textsuperscript{15} Quercia v. United States, 289 U.S. 466, 472 (1933); Starr v. United States, 153 U.S. 614, 625 (1894).


\textsuperscript{17} Wigmore § 2484; Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, 40 AM. L. REV. 729 (1906), reprinted in 8 BAYLOR L. REV. 1 (1956); see United States v. Williams, 473 F.2d 507 (5th Cir. 1973); Nordmann v. National Hotel Co., 425 F.2d 1103 (5th Cir. 1970).

\textsuperscript{18} See Wigmore §§ 2549-55a; Hogan, The Strangled Judge, 14 J. AM. JUD. SOC'y 116 (1930); McCormick, Comment on Kolkmann v. People, 16 J. AM. JUD. SOC'y 151 (1953); Sunderland; Wigmore, A Program for the Trial of the Jury Trial, 12 J. AM. JUD. SOC'y 166 (1929).

\textsuperscript{19} See Johnson, supra note 14; Sunderland 309; Wright, The Invasion of the Jury, Temperature of the War, 27 TEMPLE L.Q. 137 (1953); Wright, Instructions to the Jury, Summary Without Comment, 1954 WASH. U.L.Q. 177.

Regardless of their views concerning comments on the evidence, federal and state courts recognize that a trial must afford the opportunity to inquire into the truth or falsity of the factual allegations and to ascertain and apply the relevant law to achieve a just result.21 Consequently, a judge has a duty to be more than a mere moderator between the litigants;22 he has an independent duty to investigate the facts.23 However, since this duty may conflict with the requirement established in many state courts that the judge not comment on the evidence, judges in these jurisdictions must guard carefully against creating the appearance of partiality.24

B. The Right to Examine Witnesses

The right of the trial judge to examine witnesses is widely recognized by federal and state courts,25 including courts in many of the states which prohibit judges' comments on the evidence.26 Judicial examina-


21. For a discussion of the judicial system's responsibility to resolve conflicts in a just manner, see B. Botein & M. Gordon, supra note 1; J. Stone, The Province and Function of Law 705-10, 759-62 (1950); Arnold, Trial by Combat and the New Deal, 47 Harv. L. Rev. 913 (1934); Beckham, Preservation of the Adversary System, 78 COMM. L.J. 77 (1973); Thibaut, Walker & Lind, Adversary Presentation and Bias in Legal Decision Making, 86 Harv. L. Rev. 386 (1972).

22. See, e.g., Nordmann v. National Hotel Co., 425 F.2d 1103 (5th Cir. 1970); Heron v. Heron, 393 F.2d 652, 656 (3d Cir. 1968); ABA Advisory Comm. on the Judge's Function, The Judge's Role in Dealing with Trial Disruptions, A.1 (1971):

General Responsibility of the Trial Judge.

In the administration of criminal justice, the trial judge has the responsibility for safeguarding both the rights of the accused and the interests of the public. The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his own initiative, at all appropriate times in an appropriate manner, matters which may significantly affect a just determination of the trial.

23. See cases cited note 27 infra.

24. Gitelson & Gitelson, supra note 8, at 7, 9.


tion of witnesses is allowed for two reasons: to elicit the truth\textsuperscript{27} and to clarify the facts for the jury.\textsuperscript{28} Since the trial judge's failure to examine witnesses may result in an injustice,\textsuperscript{29} the trial judge may be under an affirmative duty to question witnesses in appropriate circumstances.\textsuperscript{30} The judge may, for example, have "the duty to participate


28. United States v. McCarthy, 473 F.2d 300 (2d Cir. 1972); United States v. Aguilar, 472 F.2d 553 (9th Cir. 1972); United States v. Jacquillon, 469 F.2d 380 (5th Cir. 1972); United States v. Watson, 466 F.2d 549 (5th Cir. 1972); United States v. Sutherland, 463 F.2d 641 (5th Cir. 1972); Bryant v. United States, 462 F.2d 433 (8th Cir. 1972); United States v. Esquer, 459 F.2d 431 (7th Cir. 1972); United States v. Cassell, 440 F.2d 569, 571 (7th Cir. 1971); United States v. Tyminski, 418 F.2d 1060, 1062 (2d Cir. 1969), cert. denied, 397 U.S. 1075 (1970); Kramer v. United States, 408 F.2d 837, 841 (8th Cir. 1969); United States v. Godel, 361 F.2d 21 (4th Cir. 1966); Hoffler v. United States, 231 F.2d 661 (4th Cir. 1956); Griffin v. United States, 164 F.2d 903, 905 (D.C. Cir. 1947); Pariser v. City of New York, 146 F.2d 431, 433 (2d Cir. 1945); Fidelity & Deposit Co. v. Bates, 76 F.2d 160 (8th Cir. 1935); Guthrie v. Curlett, 36 F.2d 694, 696 (2d Cir. 1929); People v. Ottey, 5 Cal. 2d 714, 721, 56 P.2d 193, 196 (1936); Hart v. Farris, 218 Cal. 69, 21 P.2d 432 (1933); People v. Lopez, 124 Cal. App. 2d 100, 101, 268 P.2d 171, 172 (1954); People v. Reid, 72 Cal. App. 611, 617-18, 237 P. 824, 827 (1925); Cole v. State, 75 Ind. 511, 514 (1881); Cook v. State, 36 Ala. App. 449, 451-52, 57 So. 2d 832, 833 (1952).


in the examination of witnesses when necessary to bring out matters that have been insufficiently developed by counsel."31

The right, or duty in some instances, of the trial judge to examine witnesses is not, however, without limits. Consistent with the requirement that the judge remain an impartial participant, his examination of witnesses must not give the jury the impression that he is an advocate for one of the parties.32 This restriction is particularly important in criminal proceedings where it is essential that the trial judge not assume, in the eyes of the jury, the role of the prosecutor.33 Furthermore, a trial judge's examination of a witness may be held prejudicial when it casts doubt upon, or reflects the judge's opinion of, a witness' credibility, because it is solely within the province of the jury to determine the credibility of a witness' testimony.34


32. United States v. Stone, 431 F.2d 1286, 1291 (5th Cir.), cert. denied, 401 U.S. 912 (1970) (dictum); United States v. Grunberger, 431 F.2d 1062, 1067 (2d Cir. 1970) (clarifying questions allowed, but questioning "must not be so zealously pursued as to give the impression of partisanship or the impression that he believes one version of the evidence and disbelieves or doubts another"); Jackson v. United States, 329 F.2d 893, 894 (D.C. Cir. 1964); Holmes v. United States, 271 F.2d 635, 639 (4th Cir. 1959) (vigorous questioning by trial judge may give jury the impression of judicial partisanship); Blunt v. United States, 244 F.2d 355, 365 (D.C. Cir. 1957) (constitutional right of trial by jury in criminal trials limits role of judge); Crowe v. MiManno, 225 F.2d 652 (1st Cir. 1955); Blumberg v. United States, 222 F.2d 496, 501 (5th Cir. 1955); Billeci v. United States, 184 F.2d 394, 397 (D.C. Cir. 1950); Gomila v. United States, 146 F.2d 372, 374 (5th Cir. 1944); State v. Monroe, 4 Conn. Cir. 541, 543, 236 A.2d 471, 473 (1967); Holtel v. State, 290 N.E.2d 775 (Ind. App. 1971); Pothast v. Chicago Gr. W.R.R., 110 Iowa 458, 460, 81 N.W. 693, 694 (1900); State v. Haycock, 296 A.2d 489 (Me. 1972); Coyle v. Stopak, 165 Neb. 594, 609-11, 86 N.W.2d 759, 770 (1957). See also ABA STANDARDS, comment 1.3.

33. United States v. Williams, 473 F.2d 507 (5th Cir. 1973); United States v. Jacquillon, 469 F.2d 380 (5th Cir. 1972); Herman v. United States, 289 F.2d 362 (5th Cir. 1961); United States v. Marzano, 149 F.2d 923, 926 (2d Cir. 1945) ("Prosecution and judgment are two quite separate functions in the administration of justice; they must not merge"); Williams v. United States, 93 F.2d 685, 687 (9th Cir. 1937): [T]he harm done is not diminished where the judge, by reason of unrestrained zeal, or through inadvertence, departs from that attitude of disinterestedness which is the foundation of a fair and impartial trial.


34. See, e.g., United States v. Tobin, 426 F.2d 1279 (7th Cir. 1970); United States v. Ornstein, 355 F.2d 222, 224 (6th Cir. 1966); Peckham v. United States,
It is also improper for the trial judge to usurp the examination of witnesses by counsel when they are conducting their cases in an able and lawyer-like manner, because in doing so the judge may interfere with the orderly presentation of the case and demonstrate a lack of respect for counsel. Moreover, the attorney is faced with a dilemma by the judge's action—whether to object to preserve his appeal, or to refrain from objecting to prevent jury prejudice against his client.

Because juries are highly sensitive to trial judges' comments and actions, excessive participation by the trial judge may usurp the jury's


36. See ABA STANDARDS 1.1(c) and official commentary.


Counsel, as in this case, who sees the examination of his witnesses taken over by the judge and led into matters the witnesses were not intended to cover in their testimony and so opened for cross-examination as to those matters by the other side, finds himself in a most difficult and embarrassing situation. In the first place, it is a delicate matter about which counsel think twice to object to any question asked by a judge. In the second place, if counsel objects to a judge's question on the ground that it leads the witness into matters he was not offered to testify about, counsel runs the risk, exemplified in this case, of comment by the judge before the jury implying that he is seeking to cut off legitimate inquiry. On the other hand, if counsel does not object he soon finds his witness floundering and displaying ignorance and, again as in this case, provoking critical comments by the judge either on the witness's intelligence or on counsel's failure to prepare his case.

See Cook v. State, 36 Ala. App. 449, 451, 57 So. 2d 832, 834 (1952) (when defense counsel objected to trial judge's extensive questioning, trial judge replied: "[I]s it your contention that you don't want all the evidence brought out—").


It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling.

United States v. Tobin, 426 F.2d 1279 (7th Cir. 1970); Franano v. United States, 310 F.2d 533, 537 (8th Cir. 1962), cert. denied, 373 U.S. 940 (1963); United States v. Carmel, 267 F.2d 345 (7th Cir. 1959); State v. Philpot, 97 Iowa 365, 369, 66 N.W. 730, 732 (1896). See also ABA STANDARDS 6.4.
function of determining the facts. One commentator has stated that a "remark or indication from the bench will have more effect on the jurors than will testimony by the witnesses who testify under oath." To assure maintenance of distinct roles for judge and jury, and to prevent a deprivation of any litigant's right to a fair trial, some courts have held that it is preferable for a trial judge "to err on the side of abstention from interruption of the case rather than on the side of active participation in it."

C. Admonitions to Counsel

Both state and federal trial judges may admonish counsel. The

40. Conner, supra note 4, at 179. See also United States v. Pellegrino, 470 F.2d 1205 (2d Cir. 1972), cert. denied, 411 U.S. 918 (1973); Moody v. United States, 377 F.2d 175, 179 (5th Cir. 1967); United States v. DeSisto, 289 F.2d 833, 834 (2d Cir. 1961).
41. See United States v. Aaron, 190 F.2d 144, 146 (2d Cir. 1951).
42. United States v. D'Anna, 450 F.2d 1201, 1206 (2d Cir. 1971) ("It is imperative for our judicial system to have judges who are impartial. While it might be proper for a judge to question witnesses to clarify issues, such intervention should not become the rule"); United States v. Barbour, 420 F.2d 1319, 1321 (D.C. Cir. 1969); DiBello v. Rederi A/B Svenska Lloyd v. John W. McGrath Corp., 371 F.2d 559 (2d Cir. 1967); Knapp v. Kinsey, 232 F.2d 458, 466 (6th Cir. 1956):

However, the right of the trial judge to participate in the proceedings and to interrogate witnesses is not an unlimited one. Such participation should be exercised in conformity with the standards governing the judicial office. The judge should exercise self-restraint and preserve an atmosphere of impartiality. When the remarks of the judge during the course of a trial, or his manner of handling the trial, clearly indicate a hostility to one of the parties, or an unwarranted pre-judgment of the merits of the case, or an alignment on the part of the Court with one of the parties for the purpose of furthering or supporting the contentions of such party, the judge indicates, whether consciously or not, a personal bias and prejudice which renders invalid any resulting judgment in favor of the party so favored.
43. Blumberg v. United States, 222 F.2d 496, 501 (5th Cir. 1955). See also Hunter v. United States, 62 F.2d 217, 220 (5th Cir. 1932); ABA STANDARDS, comment 1.1(a).
44. See, e.g., United States v. Ross, 321 F.2d 61 (2d Cir.), cert. denied, 375 U.S. 894 (1963); City of Chicago v. Lewis, 142 Ill. 642, 643, 32 N.E. 428, 428 (1892). See also R. Bowers, supra note 31, at § 282:

The trial judge has the undoubted right, which sometimes rises to the dignity and obligation of a duty, to rebuke or reprimand counsel for transgressing the established and known requirements of proper procedure, not as a punishment of the attorney or the party he represents, but as a preventive of injury to the adverse party.

But see Rothblatt, supra note 4, at 3 ("It is as much error for the judge to disparage defense counsel as it is for the judge to indicate bias against defendant").
cases reveal that this right generally is exercised in response to actions or statements by counsel that may unfairly and adversely affect the rights of the opposing party.\(^\text{46}\) It is imperative for two reasons that the trial judge exercise self-restraint when he comments upon or criticizes the conduct of counsel.\(^\text{47}\) First, the trial judge should display professional respect toward counsel, who along with the judge are officers of the court.\(^\text{48}\) Secondly, the jury is more likely to perceive a lack of judicial impartiality in an admonition to counsel than in the judge’s examination of witnesses.\(^\text{49}\) Most courts, therefore, agree that any comments admonishing counsel, whether for the handling of a client’s case or because of counsel’s courtroom behavior, should not be made in the presence of the jury\(^\text{50}\) since the jury might construe the judge’s comments as opinions on the merits of the litigant’s case, rather than as comments directed solely to the litigant’s counsel.\(^\text{51}\)

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45. See, e.g., United States v. Esquer, 459 F.2d 431, 435-36 (7th Cir. 1972) ("[T]he judge has the power to cure potential error caused by overzealous advocacy on the part of a prosecutor by admonition and instruction to disregard"); Hansen v. Boots, 41 S.D. 96, 168 N.W. 798 (1918) (improper and prejudicial questioning); Shores v. Simanton, 99 Vt. 191, 130 A. 697 (1925) (offer of inadmissible evidence to prejudice jury); cf. United States v. Dellinger, 472 F.2d 340, 386-91 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973) (improper remarks by prosecutor in presence of and directed to jury).


47. See ABA STANDARDS 1.1(c); cf. United States v. Crovedi, 467 F.2d 1032 (7th Cir. 1972); State v. Lemmand, 12 N.C. App. 128, 131, 182 S.E.2d 636, 638 (1971) (new trial granted because court sustained its own objections to nine questions propounded by defense counsel).

48. United States v. Williams, 447 F.2d 894, 902-03 (5th Cir. 1971); Bursten v. United States, 395 F.2d 976, 984 (5th Cir. 1968). See also ABA STANDARDS 1.1(c), 4(a).

49. United States v. Boatner, 478 F.2d 737 (2d Cir.), cert. denied, 414 U.S. 848 (1973); United States v. Nazzaro, 472 F.2d 302 (2d Cir. 1973); Bursten v. United States, 395 F.2d 976, 984 (5th Cir. 1968); Young v. United States, 346 F.2d 793 (D.C. Cir. 1965); United States v. Ross, 321 F.2d 61, 66 n.3 (2d Cir.), cert. denied, 375 U.S. 894 (1963); Lau Lee v. United States, 67 F.2d 156 (9th Cir. 1933).

50. United States v. Coke, 339 F.2d 183, 185 (2d Cir. 1964):

Although the judge’s caustic and disparaging remarks were, for the most part, directed at defense counsel, they undoubtedly gave the jury the impression that the defendant’s case was of little substance and was not worthy of very much attention.
III. Trial Commentary and Appellate Review

The nature of the case—civil or criminal—may determine the extent to which the trial judge should participate in a trial. Since the potential for loss of liberty is greater in criminal than civil cases, the due process guarantee of a fair trial will be more rigorously enforced in criminal cases, notwithstanding the recent expansion of due process in the civil context. Therefore, although some courts have held that the degree of a trial judge’s intervention in a trial should not reflect the civil-criminal dichotomy, most appellate courts will allow a trial judge less latitude in criminal cases in which the judge intervenes in the course of the trial.


[The trial judge’s] behavior precluded that atmosphere of austerity which should especially dominate a criminal trial and which is indispensable for an appropriate sense of responsibility on the part of the court, counsel and jury.

United States v. Boatner, 478 F.2d 737 (2d Cir.), cert. denied, 414 U.S. 848 (1973);

Gomila v. United States, 146 F.2d 372 (5th Cir. 1944); note 3 supra.


Civil lawsuits, however, are not like government prosecutions for crime. Civil courts are set up by government to give people who have quarrels with their neighbors the chance to use a neutral governmental agency to adjust their differences. In such cases the government is not usually involved as a party, and there is no deprivation of life, liberty, or property as punishment for crime. Our Federal Constitution, therefore, does not place such private disputes on the same high level as it places criminal trials and punishment. There is consequently no necessity, no reason, why government should in civil trials be hampered or handicapped by the strict and rigid due process rules the Constitution has provided to protect people charged with crime.

A. General Principles

An appellate court will not necessarily reverse a verdict if the court finds objectionable the manner or extent of a trial judge's intervention in the trial.\textsuperscript{56} Rather, the result of an appellate court's review of a trial judge's actions will depend upon the context in which the judge's conduct occurred.\textsuperscript{57}

The federal judge is hampered by a lack of specific guidelines governing his intervention, which results in part from the fact that the Supreme Court has offered little assistance in this area.\textsuperscript{58} Not since 1933, in \textit{Quercia v. United States},\textsuperscript{59} has the Court attempted to delineate the proper role of the trial judge in the federal courts.

In \textit{Quercia} the defendant had been indicted for a federal narcotics violation. The district court judge issued the following instruction to the jury:

And now I am going to tell you what I think of the defendant's testimony. You may have noticed, Mr. Foreman and gentlemen, that he wiped his hands during his testimony. It is rather a curious thing, but that is almost always an indication of lying. Why it should be so we don't know, but that is the fact. I think that every single word that man said, except when he agreed with the government's testimony, was a lie.\textsuperscript{60} Quercia was convicted and the Court of Appeals for the First Circuit affirmed.\textsuperscript{61} The Supreme Court, in a unanimous decision, reversed the conviction, holding that Quercia had been denied a fair trial because of the highly prejudicial comments of the trial judge.\textsuperscript{62}

\textit{Quercia} is often cited by both courts and commentators as reaffirming the federal trial judge's right to comment on the evidence in his instructions to the jury,\textsuperscript{63} as well as limiting the role of the trial judge.\textsuperscript{64}

\begin{itemize}
\item \textsuperscript{56} See note 66 infra.
\item \textsuperscript{57} United States v. D'Anna, 450 F.2d 1201, 1206 (2d Cir. 1971); People v. Hopkins, 29 Ill. 2d 260, 265, 194 N.E.2d 213, 216 (1963); State v. Winchester, 166 Kan. 512, 517-18, 203 P.2d 229, 233 (1949); Rothblatt, supra note 4, at 3.
\item \textsuperscript{58} See, e.g., United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973); United States v. Pellegrino, 470 F.2d 1205 (2d Cir. 1972), cert. denied, 411 U.S. 918 (1973).
\item \textsuperscript{59} 289 U.S. 466 (1933).
\item \textsuperscript{60} Quercia v. United States, 62 F.2d 746, 747-48 (1st Cir. 1933).
\item \textsuperscript{61} 62 F.2d 746 (1933).
\item \textsuperscript{62} 289 U.S. 466 (1933).
\item \textsuperscript{63} See, e.g., Lowther v. United States, 455 F.2d 657 (10th Cir.), cert. denied, 409 U.S. 857 (1972); 13 B.U.L. Rev. 710 (1933); 22 Geo. L.J. 324 (1934); 18 Minn. L. Rev. 441 (1934).
\item \textsuperscript{64} See, e.g., United States v. Dellinger, 472 F.2d 340, 386 (7th Cir. 1972), cert. https://openscholarship.wustl.edu/law_lawreview/vol1973/iss4/4
\end{itemize}
Quercia has been given these two interpretations because, while the Court reversed Quercia's conviction on the ground of improper intervention by the trial judge, the Court upheld the trial judge's right to comment on the evidence so long as his comments are not prejudicial. Although the two interpretations do not conflict in theory, the application of the interpretations may produce conflicting results. Some courts, for example, have construed Quercia as applicable only to judicial comments on the evidence, while others have construed Quercia as applicable to judicial intervention generally.65

Since a trial judge does have the right to intervene in the trial if the purpose of the intervention is proper66 and if the judge does not usurp the role of the jury or counsel,67 appellate courts are generally reluctant to reverse a verdict because of the alleged misconduct of the trial judge.68 This reluctance to find a trial judge's actions sufficiently prejudicial to require a new trial may rest on any of several grounds. Because the trial judge must be allowed broad discretion,69 an appellate court may reason that a trial judge's interventions in a given instance did not abuse his discretion.70 Or a court


66. See text accompanying notes 22-26, 32-37 supra.

67. See text accompanying notes 38 supra, 86-89 infra.

68. See United States v. Fernandez, 480 F.2d 726 (2d Cir. 1973); Conner, supra note 4, at 176; cf. United States v. Workman, 454 F.2d 1124 (9th Cir.), cert. denied, 409 U.S. 857 (1972); United States v. Nowak, 448 F.2d 134 (7th Cir. 1971), cert. denied, 404 U.S. 1039 (1972); City of South Omaha v. Fennell, 4 Neb. (unoff.) 427, 94 N.W. 632 (1903) (trial judge is in better position than reviewing court to know when circumstances warrant or require interrogation of witnesses from bench).

69. See generally R. Bowers, supra note 31.

may hold that a particular isolated instance of improper intervention by a trial judge, even if prejudicial in itself, did not deprive a litigant of a fair trial.\textsuperscript{71} As the Supreme Court has warned in another context, "We must guard against the magnification on appeal of instances which were of little importance in their setting."\textsuperscript{72} If, then, the evidence overwhelmingly supports one party's case, intervention is not likely to be held prejudicial.\textsuperscript{73}

Appellate court objections to the judge's interventions in the trial may be "cured" by the trial judge's instructions to the jurors that they are not to draw any inferences from his comments,\textsuperscript{74} and that they are the sole finders of fact.\textsuperscript{75} The Ninth Circuit has succinctly stated the underlying reason for refusing to reverse when such instructions were given at trial: "We must assume that the jury followed those instructions."\textsuperscript{76} Some courts, however, have rejected the rationale that a trial judge's instructions to the jury will cure improper interventions, unless the interventions were "only brief and minor departures from judicial impartiality."\textsuperscript{77} The Supreme Court has recognized that in some contexts a jury either "will not or cannot" follow instructions.\textsuperscript{78} Recent

Johnson, 463 F.2d 216, 217 (9th Cir.), cert. denied, 409 U.S. 1028 (1972) (discretion to allow recess in trial); Napolitano v. Compania Sud Americana de Vapores, 421 F.2d 382, 384 (2d Cir. 1970) (discretion to determine proper scope of cross-examination).


73. See note 99 infra.

74. United States v. Pellegrino, 470 F.2d 1205, 1208 (2d Cir. 1972), cert. denied, 411 U.S. 918 (1973) (court's instructions are "a factor that to some extent mitigates any impression created by a trial court's interruptions"); United States v. Cruz, 455 F.2d 184, 185 (2d Cir.), cert. denied, 406 U.S. 918 (1972).


76. Carroll v. United States, 326 F.2d 72, 83 (9th Cir. 1963); cf. note 29 supra.

77. Crowe v. DiManno, 225 F.2d 652, 655 (1st Cir. 1955); see United States v. May, 478 F.2d 238 (5th Cir. 1973); United States v. D'Anna, 450 F.2d 1201, 1206 (2d Cir. 1971).

cases from the Second Circuit suggest, moreover, that instructions to the jury are less likely to have any curative effect when the evidence in the case is conflicting.\textsuperscript{79} When the trial judge’s actions have been extreme—for example, a trial judge’s statement that defendant’s counsel intentionally misled the jury\textsuperscript{80}—the instructions to disregard the judge’s statement have properly been held to have no curative effect.\textsuperscript{81}

An additional consideration is relevant when a trial judge comments on the conduct of counsel. Some courts have held that there was no deprivation of a fair trial when the comments were "invited."\textsuperscript{82} On the other hand, comments to counsel have been held prejudicial even when provoked if they demonstrated a lack of impartiality that may have influenced the jury.\textsuperscript{83}

Appellate courts have also held that a party may waive his objection to the trial judge’s interventions by failing to raise the objection at trial.\textsuperscript{84} Failure to object is more likely to be held to prevent reversal in state courts that in federal courts. The Federal Rules of

\begin{itemize}

\item \textsuperscript{80} United States v. DeSisto, 289 F.2d 833, 834 (2d Cir. 1961); United States v. Brandt, 196 F.2d 653, 656 (2d Cir. 1952) (trial judge asked over 900 questions during trial); Lau Lee v. United States, 67 F.2d 156 (9th Cir. 1933); Hunter v. United States, 62 F.2d 217, 220 (5th Cir. 1932).

\item \textsuperscript{81} United States v. Dopf, 434 F.2d 205, 208 (5th Cir. 1970); Lau Lee v. United States, 67 F.2d 156, 158 (9th Cir. 1933).

\item \textsuperscript{82} United States v. Pellegrino, 470 F.2d 1205 (2d Cir. 1972), cert. denied, 411 U.S. 918 (1973) (comments invited by counsel’s “admittedly ambiguous and repetitious questions”); United States v. Cruz, 455 F.2d 184, 185 (2d Cir.), cert. denied, 406 U.S. 918 (1972) (overly repetitious and extended cross-examination); United States v. Lee, 107 F.2d 522, 529 (7th Cir.), cert. denied, 309 U.S. 659 (1939) (trial judge’s remarks regrettable, but not unwarranted); cf. United States v. McCarthy, 473 F.2d 300 (2d Cir. 1972); United States v. Budzanoski, 462 F.2d 443 (2d Cir. 1972); Burger, Remarks on Trial Advocacy: A Proposition, 7 WASHBURN L.J. 15 (1967).

\item \textsuperscript{83} Peckham v. United States, 210 F.2d 693 (D.C. Cir. 1953), cert. denied, 350 U.S. 915 (1955). But cf. Herman v. United States, 289 F.2d 362 (5th Cir. 1961) (judge reprimanded both counsel).

\item \textsuperscript{84} United States v. Stone, 431 F.2d 1286, 1291 (5th Cir. 1970), cert. denied, 401 U.S. 912 (1971); Bush v. United States, 267 F.2d 483, 488 (9th Cir. 1959): Merely because a statement is made or a question asked by the court or counsel in the heat of a spirited trial which subsequently in the cool of the ivory tower of appellate court chambers seems inappropriate does not make the stating nor the asking prejudicial error.

McDade v. State, 49 Ala. App. 533, 274 So. 2d 89 (1972); Hart v. Farris, 218 Cal. 69, 21 P.2d 432 (1933); Bova v. Bova, 135 S.W.2d 384 (Mo. App. 1940).
Criminal Procedure provide for the recognition of "plain error" whether the error is brought to the attention of the court by the objecting party or on the court's own motion. Although there is no "plain error" rule applicable to civil appeals in the federal courts, the appellate courts have recognized an inherent power to consider errors that prejudicially affect fundamental rights, whether or not the errors are raised at trial. In the states, local procedure may prevent recognition of any error unless a timely objection has been made. The recent Supreme Court decision in Webb v. Texas however, may ease the strictness of such local procedure. In Webb, the state court trial judge singled out the defendant's sole witness for a "lengthy and intimidating warning" not to commit perjury. The defendant did not object until the judge had finished his admonition, by which time the witness had been effectively driven off the stand. In reversing Webb's conviction, the Court held that the defendant had not waived his objection because under the circumstances the defendant was not required to interrupt the judge in the middle of his statement.

In evaluating the propriety of a trial judge's interventions, some courts have focused on whether the intervention was excessive or persistent. Extensive questioning of one party's witnesses is more likely to influence the jury prejudicially than an isolated incident of improper judicial

85. Fed. R. Crim. P. 52(b): Harmless Error and Plain Error:
Plain Error. Plain errors or defects affecting substantial rights may be noticed although they are not brought to the attention of the court. See Surratt v. United States, 269 F.2d 240, 240-41 (D.C. Cir. 1959) (per curiam), applying Fed. R. Crim. P. 52(b); cf. United States v. Cruz, 455 F.2d 184 (2d Cir.), cert. denied, 406 U.S. 918 (1972).


87. See, e.g., Hart v. Farris, 218 Cal. 69, 72, 21 F.2d 432, 434 (1933); Bailey v. State, 6 Md. App. 496, 252 A.2d 85 (1969); Bova v. Bova, 135 S.W.2d 384 (Mo. App. 1940). See also Campbell, Extent to Which Courts of Review Will Consider Questions Not Properly Raised and Preserved, 7 Wis. L. Rev. 91 (1932); Vestal, Sun Sponte Consideration in Appellate Review, 27 Fordham L. Rev. 477 (1958).

89. Id. at 97.
90. 409 U.S. 95 (1972).

questioning,92 particularly in a criminal trial in which the judge has
directed his questioning mainly to the defendant or the defendant's wit-
tnesses.93 Similarly, the cumulative effect of a trial judge's disparaging
remarks to counsel, although individually harmless, may require re-
versal.94 Other courts, while recognizing that excessive intervention should
not be commended, have nevertheless held that the extent of the trial
judge's intervention is irrelevant if the individual interventions are
proper.95

In summary, there are three aspects of a trial judge's intervention
that an appellate court may consider. The first is the propriety of the
interventions: What was the purpose of the intervention? Did the trial
judge usurp the role of the jury or counsel? Was the focus of the inter-
vention balanced? The second consideration is the extent of interven-
tion: Were there isolated instances or continuous interventions? What
was the cumulative effect of the interventions? Finally, appellate courts
may consider the presence of qualifying circumstances: Were admoni-
tions invited by counsel? Were there any "curative" instructions? Was
there a timely objection? Was the evidence supporting the jury's verdict
sufficient to outweigh the effects of the judge's interventions?

B. Application of General Principles: The Second Circuit

The United States Court of Appeals for the Second Circuit has re-
cently heard more appeals challenging trial judges' interventions than
the other circuit courts.96 An examination of four recent appeals to

93. United States v. Fernandez, 480 F.2d 726 (2d Cir. 1973); United States v.
Tobin, 426 F.2d 1279 (7th Cir. 1970); United States v. Cassiagnol, 420 F.2d 868
(4th Cir.), cert. denied, 397 U.S. 1044 (1970); United States v. Hill, 332 F.2d 105
(7th Cir. 1964); Holmes v. United States, 271 F.2d 635 (4th Cir. 1959); Blunt v.
United States, 244 F.2d 355 (D.C. Cir. 1957); Hall v. State, 250 Miss. 253, 165 So. 2d
345 (1964); People v. Herman, 255 App. Div. 314, 7 N.Y.S.2d 560 (1938); Anderson
v. State, 27 Wyo. 345, 196 P. 1047 (1921). But see United States v. Neff, 212 F.2d
297, 312-13 (3d Cir. 1954).
94. See generally United States v. Dellinger, 472 F.2d 340, 385-91 (7th Cir.
95. United States v. Lewis, 338 F.2d 137, 140-41 (6th Cir. 1964) (intervention
proper though trial judge asked 1100 questions of witnesses); United States v. DePillo,
257 F.2d 835, 839 (2d Cir. 1958), cert. denied, 359 U.S. 915 (1959). See also
Goldman v. Fenn, 252 F.2d 47, 48 (1st Cir. 1958).
96. United States v. Kaylor, No. 73-1530 (2d Cir., Oct. 15, 1973); United States
v. Newman, 41 F.2d 222 (2d Cir.), cert. denied, 94 S. Ct. 367 (1973); United
States v. Fernandez, 480 F.2d 726 (2d Cir. 1973); United States v. Boatner, 478 F.2d
737 (2d Cir.), cert. denied, 414 U.S. 848 (1973); United States v. Nazzaro, 472 F.2d
the Second Circuit may, therefore, place in perspective the factors generally considered by appellate courts in varying factual situations.

In United States v. Pellegrino\textsuperscript{97} appellant challenged the trial judge's extensive questioning of the Government's principal witness during cross-examination. The court affirmed the conviction,\textsuperscript{98} citing five reasons why appellant had not been denied a fair trial: the questioning was designed to clarify testimony; the comments were invited; the charge to the jury cautioned against inferring any opinion of the trial judge as to defendant's guilt; the judge's questions "cut both ways;" and the evidence pointed overwhelmingly to defendant's guilt.\textsuperscript{99} In short, the trial judge's interventions did not convey an "impression of partisanship" to the jury.\textsuperscript{100}

In United States v. Boatner\textsuperscript{101} appellant had been convicted\textsuperscript{102} following a trial characterized by unmistakable hostility between the judge and defense counsel.\textsuperscript{103} The conviction was affirmed, however, because the judge's comments, although objectionable, were directed only to defense counsel, not to the credibility or strength of defendant's case, most of the objectionable incidents took place in the absence of the jury, and the judge issued strong curative instructions.\textsuperscript{104} Moreover, the

\footnotesize{302 (2d Cir. 1973); United States v. Pellegrino, 470 F.2d 1205 (2d Cir. 1972), cert. denied, 411 U.S. 918 (1973); United States v. Cruz, 455 F.2d 184 (2d Cir.), cert. denied, 406 U.S. 918 (1972); United States v. D'Anna, 450 F.2d 1201 (2d Cir. 1971); United States v. Grunberger, 431 F.2d 1062 (2d Cir. 1970); see Painter v. Leake, 485 F.2d 427 (4th Cir. 1973); United States v. Hoker, 483 F.2d 339 (5th Cir. 1973).

97. 470 F.2d 1205 (2d Cir. 1972), cert. denied, 411 U.S. 918 (1973).
98. Pellegrino was prosecuted under 18 U.S.C. § 2314 (1970) for interstate transportation of stolen property.
99. 470 F.2d at 1207-08.
100. Id. at 1207.
103. Following the judge's sustaining of a prosecution objection to defense counsel's cross-examination of a witness, defense counsel argued with the judge and the following exchange occurred:

The Court: Stop it.
Mr. Gold [defense counsel]: I am not—
The Court: I will not take any impudence.
Mr. Gold: I am not being impudent.
The Court: Don't do that.
Mr. Gold: I am not doing anything, if it please your honor.
The Court: Excuse the jury.

478 F.2d at 739. In the absence of the jury, defense counsel moved for a mistrial and a bitter exchange between defense counsel and the trial judge ensued. Id.
104. Id. See United States v. Newman, 481 F.2d 222 (2d Cir.), cert. denied, 94 S. Ct. 367 (1973), in which the court affirmed a conviction despite extensive ques-}
Government’s extensive evidence was virtually uncontested by defendant.\textsuperscript{105}

In contrast to \textit{Pellegrino} and \textit{Boatner}, the evidence in \textit{United States v. Nazzaro}\textsuperscript{106} was conflicting. Determination of defendant’s guilt or innocence thus turned upon the jury’s view of the credibility of the witnesses presented by the opposing parties. The court reversed defendant’s conviction\textsuperscript{107} because the trial judge’s questioning tended to buttress the credibility of prosecution witnesses and discredit the testimony of defense witnesses.\textsuperscript{108} Even more damaging to defendant was the trial judge’s constant questioning of defense witnesses, which may have created the impression that the trial judge had assumed the prosecutor’s role.\textsuperscript{109} Reinforcing the appellate court’s conclusion that defendant must receive a new trial was the fact that several objectionable exchanges between the trial judge and defense counsel had occurred in the presence of the jury.\textsuperscript{110}

In \textit{United States v. Fernandez}\textsuperscript{111} defendant was convicted of armed...
robbery, largely on the basis of photographic evidence. The trial judge examined the defense witnesses extensively and made antagonistic remarks to defendant's expert witness who was testifying on the validity of the photographic evidence. Because of these apparently partisan actions by the trial judge, the appeals court reversed the conviction, emphasizing that in light of the conflicting factual evidence the judge's conduct might well have influenced the jury's verdict.

These four cases demonstrate how the interaction of various factors influence appellate review of interventions by trial judges. In each of these cases, the reviewing court considered the three primary aspects of the trial judge's intervention—propriety, extent, and qualifying circumstances. In Pellegrino, for example, the judge's questioning, although extensive, was permissible to clarify the testimony. In addition, curative instructions were issued and the evidence supporting conviction was sufficient to outweigh any damage caused by the extent of the trial judge's interventions. Consequently, the conviction was affirmed. In Nazzaro and Fernandez, however, the judge's actions were improper because they focused on defense witnesses, leaving the impression that the judge had assumed the role of the prosecutor. Moreover, the questioning was extensive and there was an absence of mitigating circumstances. The convictions in these cases were, therefore, reversed.

While Nazzaro, Fernandez, and Pellegrino were correctly decided, the court's action in Boatner is questionable since the court recognized the clearly objectionable character of the trial judge's comments and the atmosphere of hostility that pervaded the trial. Because most exchanges between the judge and defense counsel were not in the presence of the jury, however, the issuance of curative instructions was sufficient to counteract any unfavorable impressions of the defendant received by the jury.

### V. Suggestions and Conclusions

Judicial intervention at trial represents the "ultimate clash between the adversary philosophy on the one hand and the notion of impartial administration of justice on the other." Excessive intervention dimin-

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112. Conviction was pursuant to 18 U.S.C. §§ 2113(a), (d) (1970) (armed bank robbery).
113. 480 F.2d at 742-46.
114. See text accompanying note 95 supra.
115. Cf. note 104 supra.
116. Louisell, 1959 Institute for California Judges—Panel Discussion, Part I: Pre-

ishes the effectiveness of the adversary system and may deprive a liti-
gant of his right to an impartially administered trial. Noninterven-
tion, however, may also infringe principles of fairness in those instances in which the adversary proceedings manifestly fail to test the truth-
fulness of the allegations made.

State appellate court emphasis on non-participation by trial judges has prompted some observers to perceive trials as “games” or “sporting contests” with counsel acting as contestants and judge as referee.\textsuperscript{117} Roscoe Pound, for example, commented that “the inquiry is not, what do substantive law and justice require? Instead, the inquiry is have the rules of the game been carried out strictly?”\textsuperscript{118} Pound’s observation emphasizes the dangers inherent in rigid adherence to the adversary system. To minimize these risks, the dispensation of justice in an adver-
sary framework must recognize that some diminution of the adver-
sary approach to trials is necessary because an advocate’s primary goal is obtaining a favorable result for his client, not aiding the court in discovering the facts.\textsuperscript{119}

As a result of the increased number of appeals, particularly in the federal courts,\textsuperscript{120} involving the propriety and extent of judicial inter-
vention, it has become apparent that approaching the problem of judicial intervention on a case-by-case basis will not facilitate the de-
velopment of standards to govern judicial intervention at trial.

In response to the need for such guidelines, two operationally prac-
tical suggestions have been proposed for instances in which judicial intervention might prejudice the jury against one of the parties. First, with respect to questioning witnesses, it has been recommended that, except in the case of a recalcitrant witness, the judge should delay his questions until counsel have completed their questioning. The trial judge should then confer with counsel, out of the hearing of the jury, on the advisability of his intended line of questioning.\textsuperscript{121} One objection to this suggestion is that the value of the trial judge’s clarifying

\textit{liminary Matters and Trial Proceedings, 47 Calif. L. Rev. 703, 718-19 (1959).}


\textsuperscript{118} Pound, \textit{supra} note 17, at 739, 8 Baylor L. Rev. at 15.

\textsuperscript{119} J. Frank, \textit{Courts on Trial} 102 (Antheneum ed. 1969); see id. at 80-107.

\textsuperscript{120} See United States v. Boatner, 478 F.2d 737 (2d Cir.), cert. denied, 414 U.S. 848 (1973) (citing cases). \textit{See also} Wright, \textit{The Doubtful Omniscience of Appellate Courts}, 41 Minn. L. Rev. 751, 757 (1957).

\textsuperscript{121} Louisell, \textit{supra} note 116, at 719; Thomas, \textit{supra} note 29.
questions would be diminished because the questions would not be presented until the conclusion of counsel's examination. This objection, however, appears specious since under the aforementioned proposal the trial judge need not delay his clarifying questions because there is little possibility that they would prejudice either party. Secondly, with respect to admonishing counsel, it has been proposed that the trial judge call counsel to the bench after the first infraction and issue a warning outside the hearing of the jury. Any further conduct by counsel deemed to be in willful disregard of the admonition might then be handled directly.122

In view of the development of limitations on the trial judge's intervention, it would now be burdensome, even if desirable, to return to the common law tradition of active judicial intervention at trial. The Supreme Court in Quercia held that when a conflict arises between the active role of the trial judge and the principle that the judge must not appear to be an advocate, the latter must control.123 Moreover, the American Bar Association's Code of Judicial Conduct, reflecting the considerable influence of the legal profession, has adopted a more moderate role for the trial judge than the role followed at common law.124 Assuming that some degree of judicial intervention at trial will be maintained, the legal profession, and courts in particular, must attempt to formulate standards to guide judges in determining the necessity for and propriety of intervening at trial.

123. 289 U.S. at 470. See also United States v. Fernandez, 480 F.2d 726 (2d Cir. 1973).
124. Compare ABA CANONS OF JUDICIAL ETHICS No. 15 (expressly allowing intervention by trial judge) with ABA CODE OF JUDICIAL CONDUCT No. 3 (no discussion of trial judge's right to intervene), reprinted in 58 A.B.A.J. 1207 (1972).