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NOTES

JUDICIAL INTERVENTION IN TRIALS

I. INTRODUCTION

The American trial is an adversary proceeding¹ 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 trial³ before an impartial judge.⁴ Fairness requires not only an absence of actual bias

1. *Hickman v. Taylor*, 329 U.S. 495, 516 (1947) (Jackson, J., concurring); see B. BOTEIN & M. GORDON, *THE TRIAL OF THE FUTURE* 27 (1963); J. FRANK, *A MAN'S REACH* 227-59 (B. Kristein ed. 1965).

The traditional adversary proceeding is divided into three segments: opening statements, presentation of evidence, and closing arguments. Generally, the prosecution or plaintiff 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).

2. B. BOTEIN & M. GORDON, *supra* note 1, at 27.

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).

3. *Estes v. Texas*, 381 U.S. 532, 543 (1965); *In re Murchison*, 349 U.S. 133, 136 (1955); *Offutt v. United States*, 348 U.S. 11, 13 (1954); *Betts v. Brady*, 316 U.S. 455 (1942); *Bradley v. Gladden*, 403 F.2d 858, 860 (9th Cir. 1968); *State v. Winchester*, 166 Kan. 512, 518, 203 P.2d 229, 233 (1949); *Payne v. Lee*, 222 Minn. 269, 275, 24 N.W.2d 259, 263-64 (1946); *Garrett v. State*, 187 Miss. 441, 461, 193 So. 452, 458 (1940); *Coyle v. Stopak*, 165 Neb. 594, 610, 86 N.W.2d 758, 770 (1957).

4. *In re Murchison*, 349 U.S. 133, 136 (1955); *United States v. Hill*, 332 F.2d 105, 106 (7th Cir. 1964); *Gomila v. United States*, 146 F.2d 372, 374 (5th Cir. 1944); cf. *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (judge cannot have pecuniary interest in outcome of case); American Bar Association & Association of American Law Schools, *Report of the Joint Conference on Professional Responsibility*, 44 *A.B.A.J.* 1159 (1958); Godman, *Disqualifications for Bias of Judicial and Administrative Officers*, 23 *N.Y.U.L.Q. REV.* 109 (1948). See also U.S. CONST. amend. VI; ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE 1.1 (Approved Draft, 1972) [hereinafter cited as ABA STANDARDS]; Conner, *The Trial Judge, His Facial Expressions, Gestures and General Demeanor—Their Effect on the Administration of Justice*, 6 *AM. CRIM. L.Q.* 175, 176 (1967); Rothblatt, *Prejudicial Conduct of the Trial Judge in Criminal Cases*, 2 *CRIM. L. BULL.* 3 (Sept. 1966).

in the trial of a case, but the absence of even the appearance of bias.⁵ Consequently, the judge must neither usurp the function of counsel⁶ nor appear to align himself with any litigant.⁷ Rather, he must seek the truth impartially⁸ and guide the course of the trial⁹ to assure a fair presentation of the facts to the jury.¹⁰ To fulfill these responsibilities,

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

6. *United States v. DeSisto*, 289 F.2d 833, 834 (2d Cir. 1961); *Commonwealth v. Safis*, 122 Pa. Super. 333, 338, 186 A. 177, 179 (1936).

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 LAW. 7 (1966); see C. WYZANSKI, WHEREAS—A JUDGE'S PREMISES 15-16 (1965).

9. *Hunter v. United States*, 62 F.2d 217, 220 (5th Cir. 1932); see C. WYZANSKI, *supra* note 8, at 15-16; *Sheintag, The Cold Neutrality of an Impartial Judge*, 19 N.Y. ST. B. ASS'N BULL. 227, 229 (1947). See also D. PECK, COMPLEMENT OF COURT AND COUNSEL 9 (1954); *Noonan, The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485, 1487 (1966).

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. 38; FED. R. CRIM. P. 23; W.

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,¹¹ calling and questioning witnesses, analyzing the evidence, and guiding the jury by sharing his opinion even on matters of fact.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.¹³ The right of the trial judge to comment on the evidence has been retained,¹⁴ but the Court

11. *Quercia v. United States*, 289 U.S. 466, 469 (1933); *Wornom v. Hampton Normal & Agric. Inst.*, 144 Va. 533, 538-39, 132 S.E. 344, 346 (1926). See also M. HALE, *HISTORY OF THE COMMON LAW* 291-92 (1779); 3 J. WIGMORE, *EVIDENCE* § 784 (J. Chadbourn rev. ed. 1970) [hereinafter cited as WIGMORE]; Sunderland, *The Inefficiency of the American Jury*, 13 MICH. L. REV. 302, 305-06 (1915) [hereinafter cited as Sunderland].

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).

For general discussions of the Anglo-American jury system, see H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* (1966); Knittel & Seiler, *The Merits of Trial by Jury: Some Aspects of English Jury Trial and Continental Modes of Trial*, 30 CUMB. L.J. 316 (1972); Rosenberg, *The Adversary Proceeding in the Year 2000*, 1 PROSPECTUS 5 (1968).

13. *Quercia v. United States*, 289 U.S. 466, 469 (1933); *Starr v. United States*, 153 U.S. 614 (1894).

14. See, e.g., *Quercia v. United States*, 289 U.S. 466, 469-71 (1933); *United States v. Baxley*, 406 F.2d 397, 398 (4th Cir.), cert. denied, 394 U.S. 1007 (1969); *Kyle v. United States*, 402 F.2d 443, 444-45 (5th Cir. 1968); *Thurmond v. United States*, 377 F.2d 448, 451 (5th Cir. 1967); *Jones v. United States*, 361 F.2d 537, 540 (D.C. Cir. 1966); *Franano v. United States*, 310 F.2d 533, 537-39 (8th Cir. 1962), cert. denied, 373 U.S. 940 (1963); *United States v. Gibas*, 300 F.2d 836, 839 (7th Cir.), cert. denied, 371 U.S. 817 (1962); *Roberts v. United States*, 284 F.2d 209, 211 (D.C. Cir. 1960), cert. denied, 368 U.S. 863 (1961); *Wegman v. United States*, 272 F.2d 31, 34 (8th Cir. 1959). See also FED. R. CIV. P. 51; FED. R. CRIM. P. 30; 8 J. MOORE, *FEDERAL PRACTICE* § 30.09 (2d ed. 1972). See generally Farley, *Instructions to Juries—Their Role in the Judicial Process*, 42 YALE L.J. 194 (1932); Johnson, *Province of the Judge in Jury Trials*, 14 MASS. L.Q. 48 (1928).

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.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.¹⁶ It has thus been suggested that the rule proscribing a judge's commenting on the evidence in state courts¹⁷ was created to prevent the judge from usurping the fact-finding function of the jury¹⁸ and, more generally, to prevent the judge from revealing to the jurors his attitudes on the merits of the case.¹⁹ The rule, though rejected by federal courts and long criticized by commentators, has been retained in most states.²⁰

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

16. ARIZ. CONST. art. 6, § 12 (1910) (now ARIZ. CONST. art. 6, § 27); ARK. CONST. art. 7, § 23; CAL. CONST. art. VI, § 19 (1879) (amended 1934, CAL. CONST. art. VI, § 10, cl. 3); DEL. CONST. art. 4, § 22 (1897) (now DEL. CONST. art. 4, § 19); NEV. CONST. art. 6, § 12; S.C. CONST. art. 5, § 26; TENN. CONST. art. 5, § 5 (1796) (now TENN. CONST. art. 6, § 9); WASH. CONST. art. 4, § 16; *Wood v. Deutchman*, 75 Ind. 148, 151-52 (1881); *Heithecker v. Fitzhugh*, 41 Kan. 50, 20 P. 465 (1889); *Winter v. Supreme Lodge Knights of Pythias*, 96 Mo. App. 1, 16, 69 S.W. 662, 666 (1902) (and cases cited); *Yoder v. Reynolds*, 28 Mont. 183, 196, 72 P. 417, 420 (1903); *Kleutsch v. Security Mut. Life Ins. Co.*, 72 Neb. 75, 100 N.W. 139 (1904); *Kirk v. Territory of Okla.*, 10 Okla. 46, 54-65, 60 P. 797, 800-03 (1900); *Mazer v. Commonwealth*, 142 Va. 649, 128 S.E. 514 (1925); *White v. Sohn*, 63 W. Va. 80, 82, 59 S.E. 890, 891 (1907). *But see* *State v. Cianflone*, 98 Conn. 454, 467-70, 120 A. 347, 353-54 (1923); *Presley Fruit Co. v. St. Louis I.M. & S. Ry.*, 130 Minn. 121, 124, 153 N.W. 115, 116 (1915); *Flanders v. Colby*, 28 N.H. 34, 39 (1853); *Merklinger v. Lambert*, 76 N.J.L. 806, 813, 72 A. 119, 122 (1908); *Hurlburt v. Hurlburt*, 128 N.Y. 420, 425-26, 28 N.E. 651, 652-53 (1891); *Fredericks v. Northern Cent. Ry.*, 157 Pa. 103, 128-29, 27 A. 689, 696-97 (1893); *State v. Lynott*, 5 R.I. 295 (1858); *People v. Lee*, 2 Utah 441, 452-54 (1878); *Seviour's Adm'r v. Rutland R.R.*, 88 Vt. 107, 110, 91 A. 1039, 1040 (1914).

17. WIGMORE § 2484; Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729 (1906), reprinted in 8 BAXLOR 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).

18. See WIGMORE §§ 2549-55a; Hogan, *The Strangled Judge*, 14 J. AM. JUD. Soc'y 116 (1930); McCormick, *Comment on Kolkman v. People*, 16 J. AM. JUD. Soc'y 151 (1933); Sunderland; Wigmore, *A Program for the Trial of the Jury Trial*, 12 J. AM. JUD. Soc'y 166 (1929).

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.

20. ALA. CODE tit. 7, § 270 (1958); GA. CODE ANN. § 81-1104 (1956); ILL. ANN. STAT. ch. 110, § 67 (Smith-Hurd 1968); IOWA CODE ANN. § 780.9 (1950); LA. CODE CIV. PRO. ANN. art. 1792 (West 1960); LA. CODE CRIM. PRO. ANN. art. 806
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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-

(West 1967); ME. REV. STAT. ANN. tit. 14, § 1105 (1965); MASS. GEN. LAWS ANN. ch. 231, § 81 (1956); MISS. CODE ANN. §§ 11-7-155 (civil), 99-17-35 (criminal) (1972); N.C. GEN. STAT. § 1-180 (1969); N.D.R. CIV. P. 51(a) (1960); ORE. REV. STAT. § 17.255.1 (1971). *But see* Ch. 2096, § 1, [1877] Fla. Laws — (repealed 1967); Judicature Act, ch. 18, § 58, [1915] Mich. Acts 122 (repealed 1961); Act of Feb. 12, 1880, ch. 6, § 23, [1880] N.M. Acts 51, *as amended*, N.M. STAT. ANN. § 21-1-1 51(h) (1966) (now allowing comment). *See also* notes 11 *supra*, 22 & 45 *infra*. *See generally* Lukowsky, *The Constitutional Rights of Litigants to Have the State Trial Judge Comment Upon the Evidence*, 55 KY. L.J. 122, 125 (1966).

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.

25. *See* notes 27 & 28 *infra*. *See also* A. ABBOTT, *CIVIL JURY TRIALS* § 125 (5th ed. P. Viesselman 1935); A. ABBOTT, *CRIMINAL TRIAL PRACTICE* § 323 (4th ed. P. Viesselman 1939).

26. *Compare* CAL. CONST. art. 6, § 19 (1879) (repealed 1966) *with* *People v.*

tion of witnesses is allowed for two reasons: to elicit the truth²⁷ and to clarify the facts for the jury.²⁸ Since the trial judge's failure to examine witnesses may result in an injustice,²⁹ the trial judge may be under an affirmative duty to question witnesses in appropriate circumstances.³⁰ The judge may, for example, have "the duty to participate

Corrigan, 48 Cal. 2d 551, 559, 310 P.2d 953, 958 (1957); compare S.C. CONST. art. 5, § 26 (1895) with State v. Chasteen, 288 S.C. 88, 99, 88 S.E.2d 880, 885 (1955); compare ILL. ANN. STAT. ch. 110, § 67 (Smith-Hurd 1968) with People v. Palmer, 27 Ill. 2d 311, 314-15, 189 N.W.2d 265, 267 (1963); compare ALA. CODE tit. 7, § 270 (1958) with Cook v. State, 57 So. 2d 832, 834 (Ala. App. 1952); compare Kleutsch v. Security Mut. Ins. Co., 72 Neb. 75, 100 N.W. 139 (1904), with Coyle v. Stopak, 165 Neb. 594, 610, 86 N.W. 758, 770 (1957).

27. Johnson v. United States, 333 U.S. 46, 54 (1948) (Frankfurter, J., dissenting); United States v. Stone, 431 F.2d 1286, 1291 (5th Cir.), *cert. denied*, 401 U.S. 912 (1970); Young v. Slaney, 255 F.2d 785, 787 (1st Cir. 1958); Smith v. Welch, 189 F.2d 832, 837 (10th Cir. 1951); Simon v. United States, 123 F.2d 80, 83 (4th Cir. 1941); Montrose Contracting Co. v. Westchester County, 94 F.2d 580, 583 (2d Cir.), *cert. denied*, 304 U.S. 561 (1938); Guthrie v. Curlett, 36 F.2d 694, 696 (2d Cir. 1929); People v. Corrigan, 48 Cal. 2d 551, 559, 310 P.2d 953, 958 (1957); State v. Monroe, 4 Conn. Cir. 541, 236 A.2d 471 (1967); People v. Palmer, 27 Ill. 2d 311, 314-15, 189 N.E.2d 265, 267 (1963); Coyle v. Stopak, 165 Neb. 594, 610, 86 N.W.2d 758, 770 (1957); Commonwealth v. Safis, 122 Pa. Super. 333, 338, 186 A. 177, 179 (1936); State v. Chasteen, 228 S.C. 88, 99, 88 S.E.2d 880, 885 (1955).

28. United States v. McCarthy, 473 F.2d 300 (2d Cir. 1972); United States v. Aguiar, 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); Colee v. State, 75 Ind. 511, 514 (1881); Cook v. State, 36 Ala. App. 449, 451-52, 57 So. 2d 832, 833 (1952).

29. Thomas, *Judge's Participation in the Trial of Civil Cases and in Settlement of Cases*, in PROCEEDINGS OF THE NATIONAL CONFERENCE OF STATE TRIAL JUDGES 68, 71 (1961).

30. See, e.g., Johnson v. United States, 333 U.S. 46, 54 (1948) (Frankfurter, J., dissenting) ("He surely has the duty to [call and examine witnesses] before resorting to guess-work in establishing liability . . ."); United States v. Ostendorff, 371 F.2d 729 (4th Cir.), *cert. denied*, 386 U.S. 982 (1967); Griffin v. United States, 164 F.2d 903 (D.C. Cir. 1947), *rev'd on other grounds*, 336 U.S. 704 (1948); Montrose Contracting Co. v. Westchester County, 94 F.2d 580 (2d Cir.), *cert. denied*, 304 U.S. 561 (1938); People v. Lopez, 124 Cal. App. 2d 100, 102, 268 P.2d 171, 172 (1954).

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

31. *United States v. Ostendorff*, 371 F.2d 729, 732 (4th Cir.), *cert. denied*, 386 U.S. 982 (1967). See R. BOWERS, *JUDICIAL DISCRETION OF TRIAL COURTS* §§ 399, 401 (1931). For discussion of the attempts by Judge Sirica of the United States District Court for the District of Columbia to uncover the facts of the Watergate burglary and related illegal campaign activities, see *TIME*, Jan. 7, 1974, at 8.

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 inadvertance, departs from that attitude of disinterestedness which is the foundation of a fair and impartial trial.

People v. Roby, 38 Mich. App. 387, 196 N.W.2d 346 (1972); *State v. Winchester*, 166 Kan. 512, 203 P.2d 229 (1949).

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 case³⁵ and demonstrate a lack of respect for counsel.³⁶ 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.³⁷

Because juries are highly sensitive to trial judges' comments and actions,³⁸ excessive participation by the trial judge may usurp the jury's

210 F.2d 693 (D.C. Cir. 1953), *cert. denied*, 350 U.S. 912 (1955). *See also* Rothblatt, *supra* note 4, at 5. *But see* *United States v. Neff*, 212 F.2d 297, 312-13 (3d Cir. 1954).

35. *In re United States*, 286 F.2d 556, 561 (1st Cir. 1961), *rev'd on other grounds sub nom.* *Fong Foo v. United States*, 369 U.S. 141 (1962); *United States v. Marzano*, 149 F.2d 923, 925 (2d Cir. 1945); *Gomila v. United States*, 146 F.2d 372, 375 (5th Cir. 1944); *Williams v. United States*, 93 F.2d 685, 687 (9th Cir. 1937); *People v. Lopez*, 124 Cal. App. 2d 100, 101, 268 P.2d 171, 172 (1954); *People v. Giacomino*, 347 Ill. 523, 528, 180 N.E. 437, 439 (1932); *Miland v. Meiswinkel*, 82 App. Div. 522, 527-28 (Ill. 1899); *State v. Chasteen*, 228 S.C. 88, 99, 88 S.E.2d 880, 885 (1955).

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

37. *In re United States*, 286 F.2d 556, 561 (1st Cir. 1961), *rev'd on other grounds sub nom.* *Fong Foo v. United States*, 369 U.S. 141 (1962):

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—").

38. *Bollenbach v. United States*, 326 U.S. 607, 612 (1946); *Starr v. United States*, 153 U.S. 614, 626 (1894):

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.³⁹ 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."⁴⁰ To assure maintenance of distinct roles for judge and jury,⁴¹ and to prevent a deprivation of any litigant's right to a fair trial,⁴² 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."⁴³

C. Admonitions to Counsel

Both state and federal trial judges may admonish counsel.⁴⁴ The

39. *Cook v. State*, 36 Ala. App. 449, 451-52, 57 So. 2d 832, 834 (1952). See also cases cited note 91 *infra*.

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.

Crowe v. DiManno, 225 F.2d 652, 655 (1st Cir. 1955).

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. L. Seth*, 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 ("[I]t 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.⁴⁵ It is imperative for two reasons that the trial judge exercise self-restraint when he comments upon or criticizes the conduct of counsel.⁴⁶ First, the trial judge should display professional respect toward counsel, who along with the judge are officers of the court.⁴⁷ 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.⁴⁸ 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 jury⁴⁹ 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.⁵⁰

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).

46. See, e.g., *Bursten v. United States*, 395 F.2d 976, 983 (5th Cir. 1968) (prejudicial remarks by trial judge to defense counsel); *Moody v. United States*, 377 F.2d 175 (5th Cir. 1967) (conviction reversed because trial judge congratulated witness for helping to incriminate defendant); *Peckham v. United States*, 210 F.2d 693 (D.C. Cir. 1953), cert. denied, 350 U.S. 912 (1955). But cf. *Pietzuk v. Kansas City Ry.*, 289 Mo. 135, 158-59, 232 S.W. 987, 989 (1921); *Massey v. Alston*, 173 N.C. 215, 225, 91 S.E. 964, 968-69 (1917) (extent of judge's reprimand is within sound discretion of trial judge).

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,⁵¹ the due process guarantee of a fair trial will be more rigorously enforced in criminal cases,⁵² notwithstanding the recent expansion of due process in the civil context.⁵³ 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,⁵⁴ most appellate courts will allow a trial judge less latitude in criminal cases in which the judge intervenes in the course of the trial.⁵⁵

But see United States v. Ross, 321 F.2d 61 (2d Cir.), *cert. denied*, 375 U.S. 894 (1963); United States v. Frascone, 299 F.2d 824 (2d Cir.), *cert. denied*, 370 U.S. 910 (1962).

51. Gagnon v. Scarpelli, 411 U.S. 778 (1973); Argersinger v. Hamlin, 407 U.S. 25 (1972); Duncan v. Louisiana, 391 U.S. 145 (1968); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956). *Compare id. with* United States v. Kras, 409 U.S. 434 (1973).

The requirements for due process in civil cases have been expanded by the Supreme Court in recent years. *See, e.g.,* Fuentes v. Shevin, 407 U.S. 67 (1972) (pre-judgment replevin); Boddie v. Connecticut, 401 U.S. 371 (1971) (access to courts for indigent divorce litigants); Goldberg v. Kelly, 397 U.S. 254 (1970) (hearing required prior to termination of welfare benefits); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (pre-judgment garnishment of wages).

52. *Cf.* Offutt v. United States, 348 U.S. 11, 17 (1954):

[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*.

53. *Compare* Ortwein v. Schwab, 410 U.S. 656 (1973), and United States v. Kras, 409 U.S. 434 (1973), with Boddie v. Connecticut, 401 U.S. 371 (1971).

54. Crowe v. DiManno, 225 F.2d 652, 655 (1st Cir. 1955); Commonwealth v. Safis, 122 Pa. Super. 333, 338, 186 A. 177, 179 (1936).

55. *See* United States v. Kras, 409 U.S. 434 (1973); Griffin v. Illinois, 351 U.S. 12, 17 (1956); *cf.* Boddie v. Connecticut, 401 U.S. 371, 391 (1971) (Black, J., dissenting):

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.

Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949); Chambers v. Florida, 309 U.S. 227 (1940).

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.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.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.⁵⁸ Not since 1933, in *Quercia v. United States*,⁵⁹ has the Court attempted to delineate the proper role of the trial judge in the federal courts.

In *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.⁶⁰

Quercia was convicted and the Court of Appeals for the First Circuit affirmed.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.⁶²

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,⁶³ as well as limiting the role of the trial judge.⁶⁴

56. See note 66 *infra*.

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.

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).

59. 289 U.S. 466 (1933).

60. *Quercia v. United States*, 62 F.2d 746, 747-48 (1st Cir. 1933).

61. 62 F.2d 746 (1933).

62. 289 U.S. 466 (1933).

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).

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

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

denied, 410 U.S. 970 (1973); *United States v. Dopf*, 434 F.2d 205, 208 (5th Cir. 1970); *United States v. Calabrese*, 421 F.2d 108, 113 (6th Cir.), *cert. denied*, 397 U.S. 1021 (1970); *Crowe v. DiManno*, 225 F.2d 652, 655 (1st Cir. 1955); *United States v. Gollin*, 166 F.2d 123, 127 (3d Cir.), *cert. denied*, 333 U.S. 875 (1948).

65. Compare *United States v. Johnson*, 463 F.2d 216, 217 (9th Cir.), *cert. denied*, 409 U.S. 858 (1972) (conviction affirmed), and *United States v. Nowak*, 448 F.2d 134, 140 (7th Cir. 1971), *cert. denied*, 404 U.S. 1039 (1972) (same), with *United States v. Grunberger*, 431 F.2d 1062, 1067 (2d Cir. 1970) (conviction reversed), and *United States v. Brandt*, 196 F.2d 653, 655 (2d Cir. 1952) (same).

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.

70. *Darby v. United States*, 283 F.2d 896 (10th Cir. 1960); *Griffin v. United States*, 164 F.2d 903, 905 (D.C. Cir. 1947), *remanded*, 336 U.S. 704 (1949); *Risley v. Lenwell*, 129 Cal. App. 2d 608, 634, 277 P.2d 897, 909 (1954); *State v. Cianflone*, 98 Conn. 454, 469, 120 A. 347, 353 (1923); *People v. Palmer*, 27 Ill. 2d 311, 314-15, 189 N.E.2d 265, 267-68 (1963); *People v. Richardson*, 17 Ill. 2d 253, 260, 161 N.E.2d 268, 272 (1959); *People v. Giacomino*, 347 Ill. 523, 528, 180 N.E. 437, 439 (1932); *Commonwealth v. Gockley*, 411 Pa. 437, 455, 192 A.2d 693, 702 (1963); *State v. Chasteen*, 228 S.C. 88, 99, 88 S.E.2d 880, 885 (1955); *cf. United States v.*

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.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."⁷² If, then, the evidence overwhelmingly supports one party's case, intervention is not likely to be held prejudicial.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,⁷⁴ and that they are the sole finders of fact.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."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."⁷⁷ The Supreme Court has recognized that in some contexts a jury either "will not or cannot" follow instructions.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).

71. *United States v. Kaufman*, 393 F.2d 172, 178 (7th Cir.), *cert. denied*, 393 U.S. 1098 (1968).

72. *United States v. Glasser*, 315 U.S. 60, 83 (1942).

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).

75. *United States v. Cassell*, 440 F.2d 569, 571-72 (7th Cir. 1971); *United States v. Calabrese*, 421 F.2d 108, 113 (6th Cir.), *cert. denied*, 397 U.S. 1021 (1970); *Bush v. United States*, 267 F.2d 483, 486 (9th Cir. 1959). *See also* *United States v. Frascone*, 299 F.2d 824, 829 (2d Cir.), *cert. denied*, 370 U.S. 910 (1962).

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).

78. *See, e.g.*, *Bruton v. United States*, 391 U.S. 123, 135 (1968) (jury instructions not substitute for right of cross-examination); *Jackson v. Denno*, 378 U.S. 368 (1964) (jury determination of voluntariness and truthfulness of confession); *Opper v. United States*, 348 U.S. 84 (1954) (inadmissibility of one defendant's confession to prove guilt of co-defendant); *Krulewitch v. United States*, 336 U.S. 440 (1949) (same). For a general discussion of the ability of a jury to follow instructions, *see* *Skidmore v. Baltimore & O.R.R.*, 167 F.2d 54 (2d Cir. 1948).

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.⁷⁹ When the trial judge's actions have been extreme—for example, a trial judge's statement that defendant's counsel intentionally misled the jury⁸⁰—the instructions to disregard the judge's statement have properly been held to have no curative effect.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."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.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.⁸⁴ Failure to object is more likely to be held to prevent reversal in state courts than in federal courts. The Federal Rules of

79. *Compare* United States v. Boatner, 478 F.2d 737 (2d Cir.), cert. denied, 414 U.S. 848 (1973) (facts not in dispute), with United States v. Grunberger, 431 F.2d 1062, 1069 (2d Cir. 1970) (facts in dispute).

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).

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).

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).

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).

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 Procedure⁸⁵ 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.⁸⁶ In the states, local procedure may prevent recognition of any error unless a timely objection has been made.⁸⁷ The recent Supreme Court decision in *Webb v. Texas*,⁸⁸ 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.⁸⁹ 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.⁹⁰

In evaluating the propriety of a trial judge's interventions, some courts have focused on whether the intervention was excessive or persistent.⁹¹ 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).

86. See, e.g., *Taylor v. National Trailer Convoy, Inc.*, 433 F.2d 569, 571 (10th Cir. 1970); *Blier v. United States Lines Co.*, 286 F.2d 920, 922 (2d Cir.), cert. denied, 368 U.S. 836 (1961); *E.I. DuPont De Nemours & Co. v. Cudd*, 176 F.2d 855, 857 (10th Cir. 1949); cf. *Hormel v. Helvering*, 312 U.S. 552, 555-56 (1941).

87. See, e.g., *Hart v. Farris*, 218 Cal. 69, 72, 21 P.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, Sua Sponte Consideration in Appellate Review*, 27 FORDHAM L. REV. 477 (1958).

88. 409 U.S. 95 (1972), rev'g 480 S.W.2d 398 (Tex. Crim. App. 1971).

89. *Id.* at 97.

90. 409 U.S. 95 (1972).

91. *Jackson v. United States*, 329 F.2d 893, 894 (D.C. Cir. 1964); *United States v. Fry*, 304 F.2d 296, 298-99 (7th Cir. 1962); *United States v. DeSisto*, 289 F.2d 833, 834 (2d Cir. 1961); *United States v. Brandt*, 196 F.2d 653, 656 (2d Cir. 1952); *People v. Adler*, 274 App. Div. 820, 80 N.Y.S.2d 210 (1948).

questioning,⁹² particularly in a criminal trial in which the judge has directed his questioning mainly to the defendant or the defendant's witnesses.⁹³ Similarly, the cumulative effect of a trial judge's disparaging remarks to counsel, although individually harmless, may require reversal.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 intervention balanced? The second consideration is the extent of intervention: 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 admonitions 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 recently heard more appeals challenging trial judges' interventions than the other circuit courts.⁹⁶ An examination of four recent appeals to

92. *United States v. DeSisto*, 289 F.2d 833, 834 (2d Cir. 1961).

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. Cassagnol*, 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. 1972), *cert. denied*, 410 U.S. 970 (1973).

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. DeFillo*, 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*⁹⁷ appellant challenged the trial judge's extensive questioning of the Government's principal witness during cross-examination. The court affirmed the conviction,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.⁹⁹ In short, the trial judge's interventions did not convey an "impression of partisanship" to the jury.¹⁰⁰

In *United States v. Boatner*¹⁰¹ appellant had been convicted¹⁰² following a trial characterized by unmistakable hostility between the judge and defense counsel.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.¹⁰⁴ Moreover, the

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 359 (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.

101. 478 F.2d 737 (2d Cir.), *cert. denied*, 414 U.S. 848 (1973).

102. The conviction was pursuant to 18 U.S.C. § 472 (1970) (possession of counterfeit currency).

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.¹⁰⁵

In contrast to *Pellegrino* and *Boatner*, the evidence in *United States v. Nazzaro*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 conviction¹⁰⁷ because the trial judge's questioning tended to buttress the credibility of prosecution witnesses and discredit the testimony of defense witnesses.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.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.¹¹⁰

In *United States v. Fernandez*¹¹¹ defendant was convicted of armed

tioning by the trial judge because the witness was evasive, no objection was made at the time, and cautionary instructions were issued to the jury.

For an example of a "curative" instruction which was cited with favor, see *United States v. Aaron*, 190 F.2d 144, 146-47 (2d Cir. 1951):

If, during the course of the trial, I made any statements that may have indicated to you that I have an opinion as to the ultimate facts in this case, you are to disregard them. They are not binding on you, because, as I have stated, you are the exclusive judges of the facts and the credibility of the witnesses.

On one occasion I did make a comment with respect to the testimony of the witness Louis Rosen. You are to disregard that comment made by me because, as I indicated to you, you members of the jury are the exclusive judges of the facts and are the sole judges of the credibility of the witnesses who have appeared before you and, in the last analysis, the responsibility is yours to decide those facts and to render your verdict accordingly.

During the trial I have addressed questions to some of the witnesses and have made statements to counsel. Such questions as were asked by me were for the purpose of eliciting facts to aid you in your deliberations. If any of you have formed any impression that I accentuated certain facts elicited, you must put that completely out of your minds. All facts were elicited for the purpose only of aiding you in your deliberations and were not intended to be, nor are they any expression by me on the facts or the credibility of any of the witnesses.

105. 478 F.2d at 742.

106. 472 F.2d 302 (2d Cir. 1973).

107. Defendant was convicted under Act of July 18, 1956, ch. 629, tit. I, § 106, 70 Stat. 570, as amended, 18 U.S.C. § 545 (1970) (smuggling).

108. 472 F.2d at 307-08.

109. *Id.* at 308-09.

110. *Id.* at 312.

111. 480 F.2d 726 (2d Cir. 1973).

robbery,¹¹² 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.¹¹³ 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.¹¹⁴ 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.¹¹⁵

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."¹¹⁶ Excessive intervention dimin-

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-*
https://openscholarship.wustl.edu/law_lawreview/vol1973/iss4/4

ishes the effectiveness of the adversary system and may deprive a litigant of his right to an impartially administered trial. Nonintervention, however, may also infringe principles of fairness in those instances in which the adversary proceedings manifestly fail to test the truthfulness 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.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?"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 adversary framework must recognize that some diminution of the adversary 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.¹¹⁹

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

In response to the need for such guidelines, two operationally practical 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.¹²¹ One objection to this suggestion is that the value of the trial judge's clarifying

liminary Matters and Trial Proceedings, 47 CALIF. L. REV. 703, 718-19 (1959).

117. 1 WIGMORE § 21; Pound, *supra* note 17; cf. Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U.L.Q. 279.

118. Pound, *supra* note 17, at 739, 8 BAYLOR L. REV. at 15.

119. J. FRANK, COURTS ON TRIAL 102 (Antheneum ed. 1969); see *id.* at 80-107.

120. See *United States v. Boatner*, 478 F.2d 737 (2d Cir.), *cert. denied*, 414 U.S. 848 (1973) (citing cases). See also Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 757 (1957).

121. Louisell, *supra* note 116, at 719; Thomas, *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.

122. Hudson, *Controlling the Trial and Supervising the Courtroom*, in PROCEEDINGS OF THE NATIONAL CONFERENCE OF TRIAL JUDGES 25, 27-28 (1967); Thomas, *supra* note 29, at 71.

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).