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The Authority of a California Judge to Comment on a Criminal Defendant's Guilt: Common Law in a State of Flux

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COMMENT

THE AUTHORITY OF A CALIFORNIA JUDGE TO COMMENT ON A CRIMINAL DEFENDANT'S GUILT: COMMON LAW IN A STATE OF FLUX

INTRODUCTION

In an era of increased concern for the rights of the criminal defendant, legal safeguards have been bolstered at every stage of the criminal process, commencing with the defendant's initial confrontation with police authority and continuing through the trial stage and the correctional process. As thorough as this legal reform has been, a particularly crucial aspect of criminal procedure has eluded wide-spread attention. This problem typically arises with the charge delivered by the trial judge to the jury, when the judge chooses to make some personal observations concerning the case which has been presented. When these observations take the form of opinions on the defendant's guilt, the goal of a fair adjudication of issues of criminal liability may well be frustrated.

The California constitution[1] and the California Penal Code[2] contain open-ended provisions granting to the court the power to comment on the evidence and testimony that have been presented at trial. The parameters of permissible comment by a trial judge concerning the ultimate issue of a defendant's guilt will be explored in the material to follow. California law on this subject will be summarized and criticized. The dangers of unrestricted comment on guilt from the bench to the jury will be considered, and the necessity for restraints on such comment will be emphasized. The English common law provides the necessary concep-

1. CAL. CONST. art. VI, § 10 (West 1972) reads in part: "The court may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause."

2. CAL. PEN. CODE § 1127 (West 1954) reads in part:

> In charging the jury the court may instruct the jury regarding the law applicable to the facts of the case, and may make such comment on the evidence and the testimony and the credibility of any witness as in its opinion is necessary for the proper determination of the case and in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court. The court shall inform the jury in all cases that the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of the witnesses.

tual tools for understanding the disorderly formulation of rules and guidelines which attempt to delineate appropriate judicial comment concerning a defendant's guilt.

COMMENTS ON GUILT: THE ENGLISH COMMON LAW POSITION

The English court system, during its developmental period in the eleventh through the fifteenth centuries, lacked definitive rules of evidence and procedure.[3] The trial judge freely modified and created rules of evidence as he deemed proper to facilitate the fact-finding process. What was even then recognized as hearsay was commonly admitted.[4] The judge could call witnesses to support the positions of one party to the detriment of the other.[5] He could question the defendant from the bench, and could fine and imprison members of the jury for returning a verdict with which the judge disagreed.[6] Surprisingly, this latitude of judicial power did not extend to the pre-verdict independence of the jury, which was formalistically protected. A judge faced with a jury verdict of which he strongly disapproved was able in post-verdict proceedings to imprison individual jurors, but this potent weapon had no place prior to a verdict, where judicial deference to the judgment of the jury in matters of fact promoted the development of an independent jury. Medieval English judicial behavior displayed a consistent tendency of the judge to play the role of the umpire of a game.[7] Extensive responsibility was vested in the jury to make difficult findings of fact with a minimum of judicial assistance. In criminal cases, the judge was careful not to play the role of the inquisitor.[8]

By the sixteenth century it was the accepted practice of the trial judge, when charging the jury, to sum up or "repeat" to the jury the evidence which had been presented at trial.[9] Although such summation did not necessarily pose any challenge to the fact-finding independence of the jury, when this "repeating" function was set in the context of the judge's extensive powers to determine relevancy and admissibility of evidence, it provided a forum for expression of the judge's opinion about the strength of the case presented against the defendant. The charge of the judge in the

3. 2 F. POLLOCK & MAITLAND, THE HISTORY OF ENGLISH COMMON LAW 655 (2d ed. 1898) [hereinafter cited as POLLOCK & MAITLAND].

4. *Id.* at 636. *See also* 1 J. STEPHEN, A HISTORY OF THE COMMON LAW IN ENGLAND 439-40 (1883) [hereinafter cited as STEPHEN].

5. POLLOCK & MAITLAND 671.

6. *Id.* at 670-71.

7. *Id.* at 671.

8. STEPHEN, *supra* note 4, at 326.

9. *Compare* this practice *with* a modern counterpart in text accompanying note 60 *infra.*

then-celebrated case of *Oates* provides an extreme example of an expression of judicial opinion in the guise of a summation of evidence:

> And sure I am if you think these witnesses swear true, as I cannot see any colour of objection, there does not remain the least doubt but that Oates is the blackest and most perjured villian that ever appeared upon the face of the earth.[10]

More typically, judicial comment on the facts served a valuable advisory function, since the summing-up process placed before the jury in understandable language the fact-finding tasks it was about to undertake. Acting within common law powers, the English trial judge became the mentor of the jury, a learned counselor who freely directed its attention to pertinent factual aspects of the case. Gradually the power of the judge to repeat the facts to the jury was transformed by opinionated judges into a power to comment on the facts of the case.[11]

The United States Supreme Court readily acknowledged the integration of this English view into American jurisprudence. Mr. Justice Gray, writing in *Vicksburg & Meridian Railroad Co. v. Putnam*,[12] gave a concise summary of what may be called the English position:

> In the courts of the United States, as in those of England, from which our practice was derived, the judge, in submitting a case to the jury, may, at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts . . . .[13]

These broad powers of comment granted to the judge by the English rule were commonly interpreted by American courts to permit the trial judge to express the opinion that the defendant was guilty of one or more of the offenses charged.[14] Such expression could take the form of a comment that the prosecution had sustained its burden of proof,[15] that the defendant's defenses were meritless,[16] or that the conduct of the defendant conformed to all

10. 10 St. Tr. 1079, 1226 (1685).
11. M. HALE, HISTORY OF THE COMMON LAW 291 (1672).
12. 118 U.S. 545 (1886).
13. *Id.* at 553.
14. *See* People v. Rupp, 41 Cal. 2d 371, 260 P.2d 1 (1953); People v. Daugherty, 40 Cal. 2d 876, 256 P.2d 911 (1953); People v. Patubo, 9 Cal. 2d 537, 71 P.2d 270 (1937); People v. Moore, Crim. No. 24776 (Cal. Ct. App., 2d Dist., July 25, 1974); People v. Thompson, 252 Cal. App. 2d 76, 60 Cal. Rptr. 203 (1967), *cert. denied*, 392 U.S. 930 (1968). *See also* People v. Warren, 16 Cal. 2d 103, 104 P.2d 1024 (1940); People v. Ottey, 5 Cal. 2d 714, 56 P.2d 193 (1936).
15. People v. Brock, 66 Cal. 2d 645, 426 P.2d 889, 58 Cal. Rptr. 321 (1967).
16. *See* People v. Slater, 60 Cal. App. 2d 358, 140 P.2d 846 (1943). *But*

the elements of a crime.[17] Similarly, the charge to the jury could take on a general tenor, due to its content and manner of delivery, that conveyed the judge's opinion of the defendant's guilt.[18]

HISTORICAL CYCLES AND THE JUDICIAL ROLE

Legal historians have observed a tendency for the role of the judge to fluctuate between that of the passive judge, the presiding officer exemplifying neutrality, and that of the active judge, aggressively commenting on evidence and freely advising the jury.[19] The English position favors an active role for the trial judge.[20] This approach had less than national acceptance throughout the United States.

Beginning in North Carolina in 1795 and spreading across the South and West, a body of legal opinion adopted a position contrary to the English rule,[21] imposing restrictions on permissible judicial comment to the jury. Roscoe Pound and other observers of legal history have attributed this shift to a desire to prevent a recurrence of the political oppression experienced by colonial Americans in the hands of judges owing allegiance to the King.[22] It was believed that a strong and independent jury system could guarantee against repressive courts. The rise of Jacksonian democracy in the early nineteenth century, with its philosophical distaste for an elite leadership not answerable to the public, accelerated this trend toward limiting judicial power.[23] In the nineteenth century attempts were made in a majority of states to prevent trial judges from commenting on evidence.[24] The California constitution of 1849 included a provision precluding a judge from commenting on matters of fact, but allowing a statement of the testimony and declaration of the law from the bench.[25] With a split

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see People v. Flores, 17 Cal. App. 3d 579, 95 Cal. Rptr. 138 (1971); People v. Graham, 156 Cal. App. 2d 525, 319 P.2d 677 (1958).

17. People v. Shannon, 260 Cal. App. 2d 320, 67 Cal. Rptr. 207 (1968).

18. *See* People v. Marrone, 210 Cal. App. 2d 299, 26 Cal. Rptr. 721 (1962); People v. Robinson, 73 Cal. App. 2d 233, 166 P.2d 17 (1946). *But see* People v. Hooper, 92 Cal. App. 2d 524, 207 P.2d 117 (1949).

19. POLLOCK & MAITLAND, *supra* note 3, at 670.

20. 3 W. BLACKSTONE, COMMENTARIES, *375 (1791 ed.). *See* note 33 and accompanying text *infra* for a discussion of the integration of this position into California law.

21. A. HOLTZOFF (chairman), INSTRUCTIONS TO JURORS, REPORT OF A COMMITTEE OF THE SECTION OF JUDICIAL ADMINISTRATION OF THE AMERICAN BAR ASSOCIATION, 10 F.R.D. 409 (1951) [hereinafter cited as 1951 REPORT].

22. R. POUND, THE SPIRIT OF THE COMMON LAW 122-23 (1921).

23. Comment, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170 (1964).

24. *Id.*

25. CAL. CONST. art. VI, § 17 (1849) provided: "Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the

of authority developing between proponents of the common law unrestricted power to comment and statutes or judicial decisions prohibiting judicial comment on facts and credibility, the stage was set for a Supreme Court review of the possible constitutional dimensions of a trial judge's comment on a criminal defendant's guilt.

UNITED STATES V. MURDOCK[26]

Defendant Murdock was convicted for wilful failure to answer questions posed by Internal Revenue agents concerning the computation of his tax liability. During the charge to the jury, the judge exercised broad powers of comment, stating that the government had sustained its burden of proving the guilt of the defendant beyond a reasonable doubt, while cautioning the jury that it might choose to disregard the court's view. Defendant Murdock requested but was refused an instruction that if the defendant's refusal to answer questions posed by Internal Revenue agents was based upon his good faith belief that he need not answer, it would not constitute a *wilful* refusal. Such wilfuless was an element of the crime charged.[27] The defendant had argued during his trial that his fifth amendment right against self-incrimination formed the basis of his good faith belief that he need not answer.[28]

Given this set of facts, the Court set up sketchy guidelines for determining those cases in which a federal trial judge could inform the jury that he believed the defendant to be guilty.

> Although the power of the judge to express an opinion as to the guilt of the defendant exists, it should be exercised cautiously and only in exceptional cases.[29]

The Court did not choose to limit the meaning of "exceptional cases" by means of an exclusive definition, but it did explain that in the case before it the comments of the trial judge were inappropriate because they had the effect of foreclosing from the consideration of the jury a fundamental defense of the defendant, namely that his refusal to answer was not wilful. It follows from

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law." This provision later appeared unaltered in CAL. CONST. art. VI, § 19 (1879).

26. 290 U.S. 389 (1933).

27. Defendant was charged with violation of the Act of Feb. 26, 1926, ch. 27, § 1114, 44 Stat. 116. It provided for prosecution for purposeful evasion of federal income taxes.

28. *See* United States v. Murdock, 284 U.S. 141 (1931). *Murdock* was decided by the Court on two separate occasions; the first decision dealt with a fifth amendment self-incrimination issue, holding that the defendant could not invoke fifth amendment protections. The second occasion is the one emphasized in this section of this Comment.

29. 290 U.S. 389, 394 (1933).

this reasoning that included in the class of "exceptional cases" are those in which no questions of fact are left for the jury to decide before finding the defendant guilty of the charged offense.[30]

The Court artfully avoided basing its decision on constitutional guarantees.[31] Subsequently, the decision has been interpreted as being based on the Court's power to supervise procedural matters in federal courts.[32] Thus *Murdock*, lacking constitutional dimensions, does not govern the scope of judicial comment in state cases. Any application to the states must be by the force of its reasoning rather than by force of law, and the failure of the Court to define "exceptional cases" further dilutes its force.

CALIFORNIA ADOPTS THE COMMON LAW POSITION

On November 6, 1934, article VI, section 19, an amendment to the California constitution, became effective.[33] This amendment extended to the trial judge the authority to comment on the evidence, on the testimony, and on the credibility of any witness, including the defendant. This constitutional provision incorporated what may be described as a curative requirement, mandating disclosure to the jurors that they remain the exclusive determiners of questions of fact and of the credibility of witnesses. Section 19 has been read by many California courts as authority for the proposition that so long as a judge informs the jury of its independence and freedom to disregard opinions about fact and credibility issued from the bench, the authority of the jury and the right of the defendant to a jury trial have been protected.[34]

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30. *See* TRIAL JUDGE'S REMARKS AS TO GUILT, 7 A.L.R. FED. 377, 381 (1971) for a discussion of federal courts' interpretation of the meaning of "exceptional cases." *Compare* Horning v. District of Columbia, 254 U.S. 135 (1920), *with* McBride v. United States, 314 F.2d 75 (10th Cir. 1963); Sadler v. United States, 303 F.2d 664 (10th Cir. 1962); Davis v. United States, 227 F.2d 568 (10th Cir. 1955).

31. 290 U.S. 389, 397-98 (1933).

32. Gonsoir v. Craven, 449 F.2d 20, 22 (9th Cir. 1971).

33. CAL. CONST. art. VI, 19 (repealed 1966) provided:

> The court may instruct the jury regarding the law applicable to the facts of the case, and may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case. The court shall inform the jury in all cases that the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of witnesses.

For a discussion of the history of this amendment see People v. Friend, 50 Cal. 2d 570, 576, 327 P.2d 97, 100 (1958) in which the court described the intention of the amendment as best reflected by the ballot argument in its favor, which read in part:

> This measure enables the trial judge to comment to the jury on the facts of the case; to give the jurors his analysis of the evidence *and to express his opinion on the merits of the case.* . . . (emphasis added).

For a compelling defense of broad judicial powers of comment see 1951 REPORT, *supra* note 21.

34. *See* note 45 *infra.*

In 1958, in the leading case of *People v. Friend*,[35] the California Supreme Court read section 19 in the context of the common law powers California judges had been exercising since the enactment of the amendment. The court observed that a judge may express opinions as to the guilt or innocence[36] of a criminal defendant so long as the province of the jury as the exclusive trier of issues of fact and credibility, as defined by section 19, is not invaded.[37] The *Friend* court, in deference to established judicial practice, held that comments on the defendant's guilt could be made pursuant to section 19. It reasoned that the purpose of the constitutional amendment was to allow the judge to assist jurors in the analysis of difficult and possibly conflicting aspects of evidence, and that comments pertaining to punishment and guilt were often necessary to make such assistance meaningful.[38]

The *Friend* decision placed faith in the proposition embodied in section 19 that a jury informed of its exclusive powers to decide issues of fact and credibility will exercise those powers. The protection of the independence of the jury, however, often amounted in practice to nothing more than a colorless recitation by the judge of the powers of the jury, followed by extensive judicial comment approaching the realm of open advocacy.[39] The *Friend* court sought to strike an acceptable balance between the mandate of the voters that judges should assist jurors in determination of a given case, and the statutory duty of the jury to remain the exclusive determiner of issues of fact and witness credibility. To advance this end the judge was allowed to express the opinion that the defendant was guilty. This holding indicates a fundamental lack of sensitivity by the *Friend* court towards such recurring factors as unduly impressionable jurors and particularly convincing trial judges.[40]

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35. 50 Cal. 2d 570, 327 P.2d 97 (1958).

36. While the subject of commentary on the innocence of the defendant is beyond the scope of this Comment, the theoretical similarities with comments on guilt render many arguments interchangeable.

37. The court explained that the phrase "so long as the province of the jury is not invaded" is understood to mean that the judge:

> [M]ay not withdraw material evidence from the jury's consideration or distort the testimony, and his comments should be temperately and fairly made, rather than . . . amounting to partisan advocacy. The jury . . . must remain as the exclusive arbiter of questions of fact. . . .

50 Cal. 2d 570, 577-78, 327 P.2d 97, 101 (1958).

38. *Id.* at 576-77, 327 P.2d at 100-01.

39. *See* People v. Graham, 156 Cal. App. 2d 525, 319 P.2d 525 (1958); People v. Hooper, 92 Cal. App. 2d 524, 207 P.2d 117 (1949); People v. Robinson, 73 Cal. App. 2d 233, 166 P.2d 17 (1946). *See generally* Note, *Trial Judge's Right to Comment on Evidence Pertaining to Punishment in Capital Offense Cases*, 32 S. CAL. L. REV. 311 (1959).

40. *See* Quercia v. United States, 289 U.S. 466 (1933); Braley v. Gladden, 403 F.2d 858 (9th Cir. 1968); People v. Smith, 267 Cal. App. 2d 155, 162, 72

Another disturbing element of the *Friend* decision is its interpretation of section 19 as permitting the trial judge to sum up only evidence unfavorable to the defendant's case while ignoring favorable evidence. Such a presentation of the facts can have a far more persuasive and prejudicial effect upon jurors than would a straightforward statement of opinion, since its status as an expression of opinion is not made explicit.[41]

THE FANTASY OF THE CURATIVE INCANTATION

Case law is replete with commentary attesting to the usually influential position that the trial judge occupies in the eyes of the jury.[42] When a trial judge exercises his common law or statutory authority to comment on the facts of the case, the possibility becomes particularly acute that the jury will abdicate its decision-making role, and, without making preliminary findings of fact, agree with the judge's opinion concerning guilt. When a judge's comments have this effect, the province of the jury has been invaded and the defendant's right to trial by jury has been severely compromised.[43] In order to reconcile the common law power of the trial judge to comment on the facts and evidence with this likely prejudicial consequence, two basic types of curative reminders to the jury have been developed. The first type consists of an instruction to the jurors that they are the exclusive judges of questions of fact, and are free to disregard any opinions expressed by the trial judge on questions of fact. A typical cautionary instruction of this type was given by the trial judge in *United States v. Murdock*.[44] The law recognizes such instructions as cap-

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Cal. Rptr. 696, 703 (1968). Justice Jochems, dissenting in State v. Wheat, 131 Kan. 562, 566, 292 P. 793, 797 (1930) explained:

> The trial judge occupies a high position. He presides over the trial. The jury has great respect for him. They can be easily influenced by the slightest suggestion coming from the court, whether it be a nod of the head, a smile, a frown, or a spoken word. It is therefore imperative that the trial judge shall conduct himself with the utmost caution in order that the unusual power he possesses shall not be abused.

See also ABA CANONS OF JUDICIAL ETHICS, No. 5.

41. *See* text accompanying note 52 *infra*.

42. *See* note 40 *supra*.

43. Sixth amendment arguments, asserting a denial of the right to jury trial resulting from comment on guilt, have had little success; *see* Gonsoir v. Craven, 449 F.2d 20, 21 (9th Cir. 1971) where the court refused to reach this issue. *See also* Davis v. Craven, 485 F.2d 1138, 1140 (9th Cir. 1971) where the court expresses a reluctance to "constitutionalize" any rule governing the scope of permissible judicial comment. This presumably includes a reluctance to recognize any sixth amendment claim.

44. 290 U.S. 389, 393. The instruction in *Murdock* reads in part:

> So far as the facts are concerned in this case, gentlemen of the jury, I want to instruct you that whatever the court may say as to the facts, it is only the court's view. You are at liberty to entirely disregard it. The court feels from the evidence in this case . . . that this defendant is guilty in a manner and form as charged beyond a reasonable doubt.

able of curing the most flagrant remarks by the judge, including imputations of guilt to the defendant.[45] In California, California Jury Instructions Criminal serve as the most common means by which juries are informed that they are the exclusive judges of fact, empowered to disregard comments from the bench on evidence, testimony, credibility, and guilt.[46]

A second type of curative requirement is not embodied in a specific warning to the jury, but takes the form of a condition imposed on the trial judge. Should the judge decide to present his opinion on the guilt of the accused, he must combine this with a discussion of relevant evidence that led him to the formulation of this opinion. Such a requirement is rooted in English common law,[47] and can be implied directly from California written law. Those statutes which have been interpreted to allow judicial comment on guilt are worded so as to allow judicial comment on *evidence.*[48] The California Supreme Court indicated that the power to comment on guilt was conceptually dependent on the power to comment on evidence.[49] California cases have recognized the necessity for disclosure of factual support for judicial comment concerning guilt as a means of demonstrating the evidentiary basis for a judge's opinion.[50] The requirement of such a disclosure

45. The California Supreme Court acknowledged the efficacy of the section 19 curative requirement for the first time in People v. Ottey, 5 Cal. 2d 714, 56 P.2d 193 (1936).

46. CALJIC Instruction No. 17.32 provides:

> I have not intended by anything I have said or done, or by any questions that I may have asked, to intimate or suggest how you should decide any questions of fact submitted to you.
>
> If anything I have done or said has seemed to so indicate, you will disregard it and form your own opinion.
>
> At this time, however, and for the purpose of assisting you in deciding this case, I am permitted by the Constitution of California to comment on the evidence and the testimony and credibility of any witness.
>
> My comments are intended to be advisory only and are not binding on you as you are the exclusive judges of the questions of fact submitted to you and of the credibility of the witnesses.
>
> You should disregard any or all of the comments if they do not agree with your views of the evidence and the credibility of the witnesses.

47. 3 W. BLACKSTONE, COMMENTARIES, *375 (1791 ed.) relates:

> When the evidence is gone through on both sides, the judge, in the presence of the parties, the counsel, and all others, sums up the whole to the jury; omitting all superfluous circumstances, observing wherein the main question and principal issue lies, *stating what evidence has been given to support it,* with such remarks as he thinks necessary for their direction, and giving them his opinion in matters of law arising upon the evidence. (emphasis added).

See text accompanying note 11 *supra.*

48. *See* notes 1 and 2 *supra.*

49. People v. Ottey, 5 Cal. 2d 714, 56 P.2d 193 (1936).

50. *See* People v. Brock, 66 Cal. 2d 645, 651-52, 426 P.2d 889, 893, 58 Cal. Rptr. 321, 325 (1967); People v. Smith, 267 Cal. App. 2d 155, 163, 72 Cal. Rptr. 696, 702 (1968).

theoretically tends to preclude the issuance of unfounded and unjustifiable opinions from the bench, limiting the expression of opinions to those supported by evidence in the record. Unfortunately this requirement places only a weak constraint on the trial judge. If a judge wishes to issue an opinion to the jury that the defendant has been shown to be guilty, it is only the rarest of trial records that is not replete with morsels of evidence to support such an opinion. In such a context, the requirement for a disclosure of a factual basis for opinions from the bench serves more as a technique for reinforcing and adding persuasive power to a judge's opinions than it serves as a bar against arbitrary and capricious expressions of belief.

The requirement that an evidentiary basis accompany an expression of opinion by the trial judge similarly fails to provide meaningful safeguards at the appellate level. Given the adversary system, competent counsel are likely to have supplied briefs which delineate evidence supporting a trial judge's opinions. The appellate judge can selectively point to the evidence emphasized in the briefs and conclude that an evidentiary basis for opinions did exist, yet at the same time fail to address the issue of the prejudicial impact of a trial judge's opinions on a particular set of jurors.

Both of the curative devices which have been discussed are designed to preserve the independence of the jury. In many instances they tend to have precisely the opposite effect. The mere existence of a curative incantation fosters the conviction that unjustified or excessive judicial comment can be purged of its prejudicial potential, or "cured", by a simple direction to the jury to look at the facts and decide for itself. Such a formalistic conception of the charge to the jury ignores the compelling force of the trial judge's opinions on the jury.

The concept that an instruction can "cure" any prejudicial effect of judicial comment on guilt presupposes initially that the "curative incantation" will convince jurors to adhere to instructions and temper any tendency towards uncritical faith in judicial opinion. Given a curative instruction potent enough to be adopted by the jury as a mandate for jury independence, it has the potential for exerting two contradictory influences on the jury.[51] The incantation may in fact be adhered to by some jurors as an effective direction to make an independent determination of culpability. Alternatively, such an instruction may be construed by jurors as evidence of the sincerity and compelling force of the judge's

51. *Cf.* People v. Smith, 267 Cal. App. 2d 155, 159, 72 Cal. Rptr. 696, 699 n.1 (1968) where the court quotes the trial judge: "[N]or, in the alternative, can you say, 'He's trying to get us to decide the case this way; we will teach him a lesson and decide it the other way.' "

opinion, since in spite of the legal recognition of the potential prejudicial effect of such an opinion, the judge has decided nevertheless to exercise his power of comment. This is a prime example of how potency is infused into an opinion by phrasing it in legal terminology and presenting it in a legal context.

Similarly, the requirement that a judge support his expression of opinion with a display of supporting evidence does not necessarily subordinate this opinion to a set of objective facts in evidence which can be employed by the jury to reach independent conclusions. Sir James F. Stephen, Justice, King's Bench, described the process of summing up the facts by the judge as necessarily intertwined with the expression of an opinion:

> . . . I further think that he ought not conceal his opinion from the jury, nor do I see how it is possible for him to do so if he arranges the evidence in the order in which it strikes his mind. The mere effort to see what is essential to a story, in what order the important events happened, and in what relation they stand to each other must of necessity point to a conclusion.[52]

The ritual of respect attached to the trial judge further complicates the task of convincing the juror that an opinion issuing from the bench is to be considered advisory rather than conclusionary. The judge dons a black robe. He decides questions of law. People stand in respect as he ascends the bench. He is a specialist in the administration of justice. Is it any wonder that, with such symbols of authority attached to his office, his opinions are regarded with extraordinary import by the jury?

CALIFORNIA LAW TODAY: A DRIFT AWAY FROM UNRESTRICTED COMMENTARY POWER

In the case of *People v. Brock*[53] the California Supreme Court took the opportunity to review the scope of judicial comment on guilt sanctioned by the California constitution. The trial judge in *Brock* had instructed the jury in a manner consistent with the English common law.[54] The judge cautioned the jury in explicit terms that his comments were not to be interpreted as an

52. STEPHEN, *supra* note 4 at 455.

53. 66 Cal. 2d 645, 426 P.2d 889, 58 Cal. Rptr. 321 (1967).

54. *Id.* at 649, 426 P.2d at 891, 58 Cal. Rptr. at 323. The instruction read in part:

> It is the opinion of this Court, based on the evidence, that the guilt of the defendant Sam Brock as to both offenses charged, has been established beyond a reasonable doubt. I would caution you, however, that it is your right and duty to exercise the same independence of judgment in weighing my comment on the evidence as you are entitled to exercise in weighing the testimony of the witnesses and the arguments of counsel. (Italics of Cal. Sup. Ct. omitted).

attempt to compel a verdict, and that the jurors remained the exclusive judges of questions of fact.[55] The *Brock* court held that, in spite of the trial judge's admonitions to the jury mandating independence of thought, the comments, taken as a whole, amounted to a directed verdict.[56] The trial judge conveyed the impression that his comments were to be given equal weight with the testimony in the case.[57]

The court attempted to reconcile its disapproval of the *Brock* comment with other California cases approving similar remarks by trial judges by emphasizing the fact that in this case the judge made a "general comment on guilt without discussion of the evidence."[58] Such a comment did nothing to aid the jury in applying the law to the evidence in the case, and had the prejudicial effect of encouraging the jury to avoid preliminary fact-findings. Hence, the comment frustrated the purpose of the constitutional provision, which was to *aid* jury determination of the ultimate issue of guilt.[59]

One of the effects of the *Brock* decision was to read into Article VI of the California constitution[60] a requirement that any comment on the guilt of the defendant be supported by an explanation of the evidentiary basis for this inference of guilt. At first blush this appears to be little more than a reaffirmation of the position taken in *People v. Friend*,[61] but the *Brock* court added an important precondition to such comment, that where there exists a "conflict in the evidence" no judicial comment on guilt should be made.[62] The court declined, however, to state categorically that a clear judicial expression of opinion that the defendant was guilty, when evidence probative of guilt was in conflict, would be per se improper, warranting reversal.[63] While evidencing a distaste for any tendency of a trial judge to pick and choose among conflicting facts to support opinion expressed to the jury,[64] the court adopted a circuitous and largely ineffective scheme for discouraging such comment. This scheme involves an initial determination of whether a comment on guilt was prejudicial, followed by an examination of the record to determine whether evidence of guilt was overwhelming. Only in those cases lacking such over-

55. *Id.* at 649, 426 P.2d at 891, 58 Cal. Rptr. at 323.

56. *Id.* *Compare* this proposition *with* United Bhd. of Carpenters v. United States, 330 U.S. 395, 408 (1946) quoted in text accompanying note 75 *infra.*

57. *Id.* at 652, 426 P.2d at 893, 58 Cal. Rptr. at 325.

58. *Id.* at 651, 426 P.2d at 893, 58 Cal. Rptr. at 325.

59. *Id.*

60. CAL. CONST. art. VI, § 10 (West 1972).

61. 50 Cal. 2d 570, 327 P.2d 97 (1958).

62. People v. Brock, 66 Cal. 2d 645, 652-53, 426 P.2d 889, 893-94, 58 Cal. Rptr. 321, 325-36 (1967).

63. *Id.* at 655, 426 P.2d at 895, 58 Cal. Rptr. at 327.

64. *Id.* at 651, 426 P.2d at 892, 58 Cal. Rptr. at 324.

whelming evidence does prejudicial comment on guilt warrant reversal of the case.[65] In announcing this test, the court cited the California constitutional section which defines the doctrine of harmless error.[66] The critieria set up in *Brock*, however, yielded a test more specific and more readily reviewable by an appellate court than that required in a search for harmful error.

Indicia of Permissible Comment on Guilt

Guided by the principle that the trial judge is authorized to make comments as necessary for the proper adjudication of the case, the *Brock* court discussed standards for appropriate comment, nonconformity to any of which raises the inference that a judge's expression of opinion was prejudicial. Comment on guilt will be deemed prejudicial if it fails to conform to any of three guidelines: 1) the comment must be supported by a recitation of a relevant evidentiary basis;[67] 2) the jury must be cautioned to exercise independence of thought, the judge making it clear that comments from the bench are advisory only and not evidence;[68] and 3) the comment must not be made if there are disputed issues of fact which must be resolved by the jury to arrive at a verdict of guilty.[69]

If a comment transgresses any of these guidelines, the court will then examine the record to determine if there exists overwhelming evidence of guilt.[70] While at the trial level the mandate of *Brock* is for a restriction of comment should issues of fact remain to be decided by the jury on the issue of guilt, the appellate review procedure endorsed by *Brock* vitiates this mandate. Rather than having the appellate court search for disputed issues of fact and calculate whether judicial comment in essence directed findings on these issues, the court adopted an "overwhelming evidence of guilt test"[71] which has been treated by California courts as a generalized harmless error review.[72] Such appellate review procedures convey the realistic message to trial judges that preju-

65. *Id.* at 655, 426 P.2d at 895, 58 Cal. Rptr. at 327.

66. *Id.* The court cited article VI, section 13 of the California constitution, which reads in part:

> No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury . . . unless, after an examination of the entire case, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

67. People v. Brock, 66 Cal. 2d 645, 654-55, 426 P.2d 889, 898, 58 Cal. Rptr. 321, 327 (1967).

68. *Id.* at 652, 426 P.2d at 893, 58 Cal. Rptr. at 325.

69. *Id.* at 654, 426 P.2d at 895, 58 Cal. Rptr. at 327.

70. *Id.*

71. *Id.*

72. *See* People v. Thompson, 252 Cal. App. 2d 76, 93, 60 Cal. Rptr. 203, 214 (1967), *cert. denied*, 392 U.S. 930 (1968).

dicial comment to the jury about the guilt of the defendant, approaching the realm of advocacy and lacking even the minimal safeguards of well-worded curative incantations, is permissible so long as there is overwhelming evidence of guilt on the record. As long as this overwhelming evidence is present, prejudicial comment will not warrant reversal, even when there remain findings of fact on the issue of guilt to be made by the jury![73]

Direction of Verdicts and the Brock Anomaly

The *Brock* court, in support of the proposition that a judge's comment cannot legitimately control the verdict, cited the Supreme Court case of *United Brotherhood of Carpenters and Joiners v. United States.*[74] The language of this case is illuminating. "For a judge may not direct a verdict of guilty no matter how conclusive the evidence."[75]

Brock held that the instructions given by the trial court amounted to a directed verdict.[76] Yet, by supplying California appellate courts with the "overwhelming evidence of guilt" test, the courts have been able to find instructions essentially identical to the one in *Brock not reversible error.*[77] In order for the appellate courts in these cases to decide that a comment on the defendant's guilt was not reversible error, it was necessary to review the conclusiveness of the evidence. This conclusiveness is precisely the factor that the United States Supreme Court has held that a trial judge may not consider in making directive comment.[78] *Brock* has approved a policy that will in one case label a given judicial comment as prejudicial and improperly directive of a verdict, necessitating reversal, while the same comment in another case will be prejudicial yet permissible, despite the admitted fact that the prejudicial expression of opinion

> . . . [M]ay lead the jurors to abdicate their awesome responsibility in favor of accepting the judge's comment without determining the questions submitted to them under the instructions.[79]

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73. *Id.*

74. 330 U.S. 395 (1946).

75. *Id.* at 408. For an example of an instruction about a degree-divided offense (such as murder, which may be of the first or second degree), that was held to amount to a directed verdict, necessitating reversal, see People v. Shavers, 269 Cal. App. 2d 886, 75 Cal. Rptr. 334 (1969).

76. 66 Cal. 2d 645, 649, 426 P.2d 889, 891, 58 Cal. Rptr. 321, 323 (1967).

77. *See* Davis v. Craven, 485 F.2d 1138 (1973); People v. Davis, 260 Cal. App. 2d 211, 67 Cal. Rptr. 35, *cert. denied,* 393 U.S. 830 (1968); People v. Thompson, 252 Cal. App. 2d 76, 60 Cal. Rptr. 203 (1967), *cert. denied,* 392 U.S. 930 (1968). For a paradigm comment of this type, *see* note 54 *supra.*

78. *See* text accompanying note 75 *supra.*

79. People v. Brock, 66 Cal. 2d 645, 651-52, 426 P.2d 889, 893, 58 Cal. Rptr. 321, 325 (1967).

A LOOK TOWARDS THE FUTURE: A PROHIBITION OF COMMENTS ON GUILT

California law has evolved to the point where a court may find the comments of a judge concerning the guilt of a defendant to be unnecessary "for the proper determination of the cause"[80]—hence beyond the province of proper judicial comment as delineated by the California constitution—yet nevertheless hold that such comments do not warrant reversal of a particular case. Only the development of a consistent judicial preference for reversal of cases in which the trial judge comments on guilt, or a change in constitutional provisions to disallow such comments, can alleviate the necessity for a case-by-case determination of whether judicial comment interfered with the fact-finding process of the jury. In such a case-by-case review the right of the criminal defendant to an impartial determination by the jury of the ultimate issue of that defendant's guilt may be lost in a maze of speculation by the courts of appeal about the effect that a trial judge's unnecessary comments may have had on a jury that has long been dismissed.

While the value of vigorous appeal of cases in which the trial judge did comment on guilt should not be underestimated as a means for discouraging such comment,[81] the fact remains that the California constitution does grant to the trial judge a latitude of commentary that encourages abuse.[82] While the California Supreme Court in *Brock* clarified just what sorts of comments were prejudicial, the court made it equally clear that in many cases these prejudicial comments would not warrant reversal.[83] Given this state of affairs, a comprehensive remedial measure is needed to guarantee to the criminal defendant a trial in which the judge maintains impartiality as to guilt in deference to the independence of the jury.

In August, 1972, the House of Delegates of the American Bar Association approved a draft of standards concerning the function of the trial judge. Section 5.6(a) reads as follows:

> The trial judge should not express or otherwise indicate to the jury his personal opinion whether the defendant is guilty or express an opinion that certain testimony is worthy or unworthy of belief.[84]

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80. CAL. CONST. art. VI, § 10 (West 1972).

81. For those contemplating appeal based on prejudicial judicial comment, it should be noted that it is *not* necessary to raise objection to such commentary during the trial. *See* People v. Terry, 2 Cal. 3d 362, 398, 466 P.2d 961, 984, 85 Cal. Rptr. 409, 432 (1971), *cert. dismissed*, 406 U.S. 912 (1972). *See* the interpretation of *Terry* in People v. Flores, 17 Cal. App. 3d 579, 588, 95 Cal. Rptr. 138, 144 (1971).

82. *See* CAL. CONST. art. VI, § 10 (West 1972).

83. 66 Cal. 2d 645, 655, 426 P.2d 889, 895, 58 Cal. Rptr. 321, 327 (1967).

84. AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUS-

This writer urges the consideration of an amendment to the California constitution which would prohibit issuing from the bench the opinion that the defendant is guilty. The forceful language of the American Bar Association proposal provides an ideal standard to integrate into California law. Its absolute prohibition of comments on guilt would put an end to tacit acceptance of a practice regarded by California courts as prejudicial.[85] With such an amendment in force, courts of appeal no longer would need to speculate about the efficacy of "curative" instructions,[86] and the shift in California law from the English common law position of extensive judicial commentary powers to a position more in line with the protection of the right of the criminal defendant to a trial by jury would be complete.

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TICE, STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE, Approved Draft, 1972, at 68-70. *See* § 5.6(a) and following commentary for a discussion of the debate that led to the adoption of this standard.

85. *See* text accompanying note 65 *supra.*

86. *See* text accompanying note 42 *supra.*