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with the longshoreman problem have gone out of business. Also, in the years between 1945 and 1954, insurance rates in the industry rose 600 per cent.[85] These are but two indications that the shipping industry is not the horn of plenty that is envisioned by the courts. If America is to effectively compete with the rising shipping industries in other parts of the world, policy decisions should now favor the shipowners. *Sieracki* today stands on such a slim footing that it, and all that followed are better overruled, for in light of a decision like *Gutierrez* the case has grown to unreasonable proportions. It is submitted that the shipowner's liabilities should not be so unique, *and positive steps should be taken* to secure the prosperity of a valuable enterprise.

Joseph A. Barone

POWER TO COMMENT ON THE ISSUE OF GUILT: TRIAL BY JURY OR TRIAL BY JUDGE

I.

INTRODUCTION

Whether a judge should have the power to comment on the evidence in his charge to the jury has been a constant source of disagreement among American legal authorities. Those favoring judicial comment trace the practice to the English courts, from which our system of trial by jury was adapted.[1] Some opinions assert that the constitutional right to a trial by jury requires that the judge be empowered to comment on the evidence, since this was an integral part of common law.[2] Because of its foundation, this view has been known as the common law or orthodox rule. However, many of the states began to severely limit or entirely eradicate the power of judicial comment by court decision, statute, or constitutional provision.[3] Moreover, this power was frequently the subject of proposed federal legislation by a Congress seeking to restrict the role of federal judges.[4] At the present time, only the federal courts

85. See Shields & Byrne, *supra* note 83, at 1148–50.

1. See Sunderland, *The Inefficiency of the American Jury*, 13 MICH. L. REV. 302, 305 (1915). See also Wright, *Instructions to Jury: Summary Without Comment*, 1954 WASH. U.L.Q. 177.

2. See Patton v. United States, 281 U.S. 276, 288, 289, 50 S.Ct. 253, 254, 255 (1930); Capital Traction Co. v. Hof, 174 U.S. 1, 13–16, 19 S.Ct. 580, 585 (1899). *But see* People v. Kelly, 347 Ill. 221, 179 N.E. 898 (1931).

3. For a thorough discussion of this process, see Johnson, *Province of the Judge in Jury Trials*, 12 J. AM. JUD. SOC'Y 76, 77 (1928). See also Note, 30 MICH. L. REV. 1303, 1307 & n.11 (1931).

4. See 23 A.B.A.J. 521 (1937).

and approximately one-fourth of the states[5] follow the common law rule, and even in these jurisdictions the power is limited in varying degrees despite some eminent authorities who oppose any restriction.[6] This comment will examine the common law rule, both in its early history and as it exists today, in an effort to ascertain when, and if, an expression by the trial judge in his charge to the jury as to his belief in the guilt of a defendant in a criminal case falls within the permissible area of judicial comment.

II.

JUDICIAL COMMENT ON THE EVIDENCE IN GENERAL

Before discussing any specific aspect of the power to "comment on the evidence," the phrase itself must be analyzed. It does not concern the judge's power to review and summarize the evidence in his charge.[7] There is little dispute that the judge should at least be permitted, if not obliged, to perform this function. But rather, commenting on the evidence entails commenting on the weight of the evidence, which in turn includes expressing an opinion thereon. This is further classified into expressions of opinion on the credibility of a particular witness, and as to how some particular factual issue should be resolved,[8] including the ultimate issue in a case.[9] The controversy over the power focuses mainly on the latter category, to which this discussion is limited.

The opponents of the common law rule vigorously object that any expression of opinion by the trial judge on a factual issue invades the province of the jury, and will be unduly influential in the jury's determination.[10] This is especially true when the judge expresses his opinion on the ultimate issue, and not merely on the general weight of the evidence or on a specific factual issue.[11] However, the proponents of the rule point out that where the judge has been given the power to express an opinion on the facts, it has been carefully exercised, and furthermore any attempt to deny the jury the benefit of the court's opinion will reduce the role of the judge to that of a mere umpire.[12] Somewhere between these diverse lines of argument lies the real value of judicial comment, wherein the judge

5. The states allowing some degree of judicial comment today are California, Connecticut, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New Mexico, New York, Pennsylvania, Rhode Island, Utah, and Vermont. For a classification of all the states according to liberality in allowing the general power of judicial comment, see Wright, *Instructions to Jury Without Comment*, 1954 WASH. U.L.Q. 177.

6. Dean Wigmore maintains that the "tendency [to restrict the exercise of the power] is lamentable." 9 WIGMORE, EVIDENCE § 2551 (3d ed. 1940).

7. See Otis, *Comment to the Jury by the Trial Judge*, 21 ORE. L. REV. 1, 3 (1941).

8. The narrow meaning of comment on the evidence is limited to expressing an opinion on factual issues. *Id.* at 8.

9. See Weissberger, *The Right of the Trial Judge in Federal Courts To Comment on the Evidence*, 5 BROOKLYN L. REV. 272, 276 (1936).

10. See Otis, *supra* note 7, at 4.

11. See Fryer v. United States, 11 F.2d 707 (7th Cir. 1926), where the court distinguished an opinion on an ultimate issue determinative of guilt and an opinion on guilt itself.

12. See Otis, *supra* note 7, at 9.

may give the jury the benefit of his knowledge and experience, without unduly influencing their verdict by direction or coercion.[13] Accordingly, several limitations on the power arose, within which the judge could express his opinion as to the facts. Any expression of opinion must be non-argumentative, dispassionate and couched in judicial language.[14] Being thus limited in the tone of his charge, the judge is prohibited from persuading or coercing the jury by his expression of opinion. Secondly, the ultimate determination of any fact issue must be clearly left to the jury.[15]

The above limitations have also been applied in criminal cases. The United States Supreme Court announced at an early date that the power to express an opinion on the facts encompassed an opinion as to the judge's personal belief in the guilt of the accused, and this is not reviewable on appeal if matters of fact are ultimately left to the jury.[16] But it can be argued that the judge should be prohibited entirely from comment on the criminal guilt of a defendant, since he is prohibited from directing a verdict of guilty.[17] But by indicating his belief that the defendant is guilty, the judge has in effect told the jury that he is of the opinion that the prosecution has proved its case beyond a reasonable doubt, and it is difficult to see how the jury can lightly regard this statement.[18] If the jury is unduly influenced, or the court has substituted its opinion for that of the jury, a verdict of guilty has in effect been directed.[19] This factor has influenced many courts in jurisdictions following the orthodox rule to severely limit the situations in which comment on the guilt of the accused is permissible.

III.

THE FEDERAL COURTS

A. *Before 1933*

Many Supreme Court decisions gave effect to the common law rule, but the majority of these involved civil cases.[20] In the few criminal cases

13. See Walker, *Judicial Comment on the Evidence in Jury Trials*, 15 A.B.A.J. 647 (1929).

14. Starr v. United States, 153 U.S. 614, 14 S.Ct. 919 (1894). However, when it is apparent that doubt exists in the minds of the jury, the judge is subject to the further limitation that he may not express an opinion after his main charge. Thus where the judge urged the jury that they should have no difficulty in reaching a verdict when they had returned for additional instructions, this was coercion on the part of the judge. Boyett v. United States, 48 F.2d 482 (5th Cir. 1931). This is especially true when the jury is in apparent deadlock. Garst v. United States, 180 Fed. 339 (4th Cir. 1910).

15. See Walker, *supra* note 13, at 647.

16. Starr v. United States, 153 U.S. 614, 14 S.Ct. 919 (1894).

17. The court may not direct a verdict of guilty even when the facts are undisputed. United States v. Taylor, 11 Fed. 470 (C.C.D. Kan. 1882).

18. The jury gives great weight to the judge's lightest word. Hicks v. United States, 150 U.S. 442, 452, 14 S.Ct. 144, 147 (1893).

19. What the judge may not do directly he may not do by indirection. Peterson v. United States, 213 Fed. 920 (9th Cir. 1914). See also Horning v. District of Columbia, 254 U.S. 135, 41 S.Ct. 53 (1920) (dissenting opinion of Mr. Justice Brandeis).

20. Rucker v. Wheeler, 127 U.S. 85, 8 S.Ct. 1142 (1888); United States v. Philadelphia & R. R.R., 123 U.S. 113, 8 S.Ct. 77 (1887); St. Louis I.M. & S. Ry. v. Vickers, 122 U.S. 360, 7 S.Ct. 1216 (1887); Vicksburg & M. R.R. v. Putnam, 118 U.S. 545, 7 S.Ct. 1 (1886).

in which the rule was mentioned, the Court was not dealing with a direct expression in the charge of belief in the defendant's guilt.[21] In the lower federal courts, however, the rule had been applied to sustain instructions where such an expression of opinion was directly involved, and was subjected only to the limitations generally imposed on the common law power. In *Dillon v. United States*,[22] the district judge ventured his opinion that the defendant was guilty of the crime charged.[23] This was upheld in the circuit court under the "well-established rule" which permitted such expression of opinion provided the jury is "given unequivocally to understand that it is not bound by the expressed opinion of the judge."[24]

The *Dillon* case typifies the trend in the federal courts during the first quarter of the century to include the power to express an opinion on the guilt of the defendant within the general power to comment on the evidence. Nonetheless, in two cases the courts expressed disapproval of this trend, but felt the expression of opinion was not reversible error. In *Endleman v. United States*,[25] the trial judge in the Ninth Circuit had included in his charge to the jury the statement "I do not see any way that these defendants can be acquitted."[26] After criticizing this language, the circuit court felt compelled to allow the charge under the authority of prior Supreme Court decisions, since "no rule of law was incorrectly stated," and the fact questions were ultimately left to the determination of the jury.[27] In *Breese v. United States*,[28] the Fourth Circuit Court made this statement:

> While this court does not approve of certain expressions in the charge, wherein the trial judge stated that, in his opinion, the defendant could not escape conviction; that viewing the evidence as the court did, the defendant was guilty, and it was the duty of the jury to say so, — yet qualified . . . by the caution . . . that the jury was not . . . governed by the opinion of the court, we cannot say that such expressions constitute reversible error.[29]

In 1920, the Supreme Court dealt squarely with the permissibility of an expression of opinion on the issue of guilt in *Horning v. District of Columbia*,[30] and upheld, by a slim majority, a strong expression of belief

21. See Allis v. United States, 155 U.S. 117, 15 S.Ct. 36 (1894) (court propounded questions indicating belief in defendant's guilt); Starr v. United States, 153 U.S. 614, 14 S.Ct. 919 (1894) (judge overly dramatic in stating evidence); Simmons v. United States, 142 U.S. 148, 12 S.Ct. 171 (1891) (expression made in declining jury's request to be discharged).

22. 279 Fed. 639 (2d Cir. 1921).

23. *Id.* at 642.

24. *Id.* at 643.

25. 86 Fed. 456 (9th Cir. 1898).

26. *Id.* at 462.

27. *Ibid.*

28. 106 Fed. 680 (4th Cir. 1901), *rev'd on other grounds*, 108 Fed. 804 (4th Cir. 1901).

29. *Id.* at 686.

30. 254 U.S. 135, 41 S.Ct. 53 (1920).

in defendant's guilt by the lower court judge.[31] Refuting the objection that the lower court had directed a verdict of guilty,[32] Mr. Justice Holmes reasoned that since all the facts were admitted, the function of the jury was "little more than formal," and the strong expression of opinion on the defendant's guilt by the judge was warranted.[33] Therefore, when the facts were uncontroverted, even the strongest expressions as to guilt were allowable.[34] Conversely, the tendency was to limit such cases in which expression of belief in the guilt of the accused was permissible within the scope of the *Horning* decision.[35] The decisions after that case still noted disapproval of the rule, but recognized that where there were no disputed facts, the danger of invading the province of the jury was "purely formal."[36]

B. *After 1933*

In 1933, in *United States v. Murdock*,[37] the Supreme Court was again faced with a clear expression of opinion by the judge that the defendant was guilty. The charge to the jury had included the statement that the "Court feels . . . the government . . . has proved that this defendant is guilty . . . beyond a reasonable doubt."[38] The circuit court reversed, admitting the power of the court to express an opinion as to the guilt of the accused, but maintaining that this power be severely limited.[39] The Supreme Court affirmed, limiting the power to express an opinion on the guilt issue to "exceptional cases."[40] The power was thus to be held greatly in check.[41]

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31. The lower court judge had said: "I will say that a failure to bring in a verdict in this case can arise only from a willful and flagrant disregard of the evidence and the law as I have given it to you and a violation of your obligation as jurors . . . I cannot tell you in so many words to find the defendant guilty, but what I say amounts to that." *Id.* at 140, 41 S.Ct. at 54–55.

32. The dissenting opinion by Mr. Justice Brandeis contains a strong assertion that the charge had amounted to a direction to find the defendant guilty. *Id.* at 139, 140, 41 S.Ct. at 54, 55.

33. *Id.* at 138, 41 S.Ct. at 54.

34. See United States v. Notto, 61 F.2d 781 (2d Cir. 1932); Fryer v. United States, 11 F.2d 707 (7th Cir. 1926); Carney v. United States, 295 Fed. 606 (9th Cir. 1924); Robinson v. United States, 290 Fed. 755 (2d Cir. 1923); United States v. Siden, 293 Fed. 422 (D.C. Minn. 1923).

35. See Carney v. United States, 295 Fed. 606 (9th Cir. 1924); Robinson v. United States, 290 Fed. 755 (2d Cir. 1923); United States v. Siden, 293 Fed. 422 (D.C. Minn. 1923).

36. See United States v. Notto, 61 F.2d 781 (2d Cir. 1932); Fryer v. United States, 11 F.2d 707 (7th Cir. 1926).

37. 290 U.S. 389, 54 S.Ct. 223 (1933).

38. *Id.* at 393, 54 S.Ct. at 225.

39. "[T]he trial court has an important duty to perform in assisting the jury to arrive at a true verdict . . . [but] there is . . . considerable danger of the court's substituting its opinion for that of the jury. . . . It would seem the better practice to comment upon the character of the evidence and, if and when an opinion is expressed, to limit it to a basic fact or an issue involved, upon which the guilt of accused is in part dependent. By so doing, the jury is left to perform its constitutional duty of determining the guilt or innocence of the accused, and at the same time, the court fully meets its very important duty of assisting the jury in reaching an intelligent verdict." Murdock v. United States, 62 F.2d 926, 927 (1932).

40. United States v. Murdock, 290 U.S. 389, 394, 54 S.Ct. 223, 225 (1933).

41. United States v. Brown, 79 F.2d 321 (2d Cir. 1935).

In *Hartzell v. United States*,[42] where the judge had stated his opinion that the government had established facts which should convince men of the defendant's guilt beyond a reasonable doubt, the court reiterated the proposition that where the facts are undisputed the power to express opinion remains.[43] But, where the facts are in dispute, cases have consistently held that the *Murdock* decision has prohibited comment.[44] This is fully expressed in *Meltzer v. United States*[45] which interpreted the limitations on the power after the *Murdock* and *Horning* decisions to be threefold: (1) the judge may advise and persuade, but may not command or coerce; (2) discretion to be exercised by the judge is limited by the standards of his high office, and (3) exceptional circumstances existing in the case, which condition could not be present where the facts are in dispute.[46] The facts are "in dispute" where the defendant introduces no evidence[47] or where he testifies to even the most implausible story.[48]

Although the *Murdock* case had seemingly allowed comment in the "undisputed fact" area, the trend has been to further the *Horning* rationale. The Second Circuit has been most restrictive, but other circuits have also followed in that direction.[49] The 1958 case of *United States v. Woods*[50] emphasizes this trend by again questioning the "well-established rule," as quoted in the *Dillon* case. The trial judge had expressed the opinion that the defendant was guilty as charged. In reversing, the court distinguished between expressing an opinion as to the credibility of a witness and an opinion on guilt: the latter is far more prejudicial since in doing so the judge says that not only are all the commonwealth witnesses telling the truth, but also that their testimony constitutes evidence of guilt beyond a reasonable doubt.[51]

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42. 72 F.2d 569 (8th Cir. 1934).

43. *Id.* at 586. See also Bennett v. United States, 252 F.2d 97 (10th Cir. 1958). But in a concurring opinion in another case it was thought that any comment on guilt is a violation of the sixth amendment. United States v. Meltzer, 100 F.2d 739, 748 (7th Cir. 1938).

44. See United States v. Woods, 252 F.2d 334 (2d Cir. 1958); Davis v. United States, 227 F.2d 568 (10th Cir. 1955); United States v. Meltzer, 100 F.2d 739 (7th Cir. 1938). The clearest example of this proposition can be found in Billeci v. United States, in which the trial judge had quoted verbatim the instruction involved in *Horning*, but was held to have urged his view on the jury since an expression of opinion on the guilt issue where the facts are in dispute invades the constitutional line between judge and jury. Billeci v. United States, 184 F.2d 394 (D.C. Cir. 1950).

45. 100 F.2d 739 (7th Cir. 1938). This case, although dealing with an expression of opinion concerning credibility of witnesses, contains an enlightening discussion of the scope and purpose of judicial comment. It also lists in exhaustive detail all the circuit court decisions before *United States v. Murdock* which held squarely that the judge may comment on the guilt of the accused. *Id.* at 743 n.1.

46. *Id.* at 746.

47. Billeci v. United States, 184 F.2d 394 (D.C. Cir. 1950).

48. McBride v. United States, 314 F.2d 75, 77 (10th Cir. 1963); Davis v. United States, 227 F.2d 568 (10th Cir. 1955).

49. McBride v. United States, 314 F.2d 75 (10th Cir. 1963); Sadler v. United States, 303 F.2d 664, 666 (10th Cir. 1962) (indicates that if judge had made an expression as to guilt, he would be reversed); United States v. Link, 202 F.2d 592 (3d Cir. 1953).

50. 252 F.2d 334 (2d Cir. 1958).

51. *Id.* at 336.

Although the federal courts unquestionably still follow the general orthodox common law power to comment, there have been many sentiments expressed in the circuit court decisions that an expression of opinion on the guilt issue is not within the power. The Supreme Court has not gone this far. But in *Murdock* they have strictly limited the rule and have left interpretation of the "exceptional circumstances" rule to the lower courts. Because of the great risk of undue influence by the judge in this area, most of these courts have interpreted *Murdock* so narrowly as to make any permissible expression on guilt a distinct rarity.

IV.

STATE COURTS

Less than ten states adhere to the orthodox rule as it exists in the federal courts while other jurisdictions allow judicial comment to some extent. For purposes of analysis, the states will be divided into two main classifications: those that do and those that do not purport to follow the orthodox rule as it existed at common law. The former category is further subdivided according to liberality in allowing expression of opinion on the issue of guilt, and the latter jurisdictions will be summarily examined to determine if such expression is permitted.

A. *Orthodox Rule Jurisdictions*

1. *Most Liberal*

(a) *Pennsylvania.* This jurisdiction clearly allows the court to express an opinion as to the guilt of the defendant if there are reasonable grounds for such a statement, and the court clearly leaves the jury free to decide the issue regardless of this opinion.[52] In addition, any opinion must be fair and temperate to avoid coercion of the jury.[53] This rule has prevailed and has been consistently upheld in both the superior and supreme court of the state.[54]

It appears, however, that the rule evolved from early cases in which the court was not dealing with an opinion directed solely at the guilt issue, but was concerned with an expression of opinion as to the degree of guilt,[55]

52. LAUB, PENNSYLVANIA TRIAL GUIDE § 201 (1959).

53. Commonwealth v. Raymond, 412 Pa. 194, 194 A.2d 150 (1963); Commonwealth v. Cisneros, 381 Pa. 447, 113 A.2d 293 (1955); Commonwealth v. Simmons, 361 Pa. 391, 65 A.2d 353 (1949); Commonwealth v. Karmendi, 325 Pa. 63, 68, 188 Atl. 752, 754, 755 (1937); Commonwealth v. Watson, 117 Pa. Super. 594, 178 Atl. 408 (1935).

54. Recent applications of the rule can be found in Commonwealth v. Raymond, 412 Pa. 194, 194 A.2d 150 (1963); Commonwealth v. Cisneros, 381 Pa. 447, 113 A.2d 293 (1955); Commonwealth v. Lomax, 196 Pa. Super. 5, 173 A.2d 710 (1961). In the *Cisneros* and *Raymond* cases, the charge to the jury had included the judge's statement that a verdict of not guilty would be a miscarriage of justice, and this was held to be allowable within the orthodox rule.

55. Commonwealth v. Lance, 381 Pa. 293, 113 A.2d 290 (1955); Commonwealth v. Simmons, 361 Pa. 391, 65 A.2d 353 (1949); Commonwealth v. Weston, 297 Pa. 382,

and the fixing of a penalty.[56] These cases are not convincing authority that an opinion on the issue of guilt is within the orthodox rule. Also, when faced with a direct judicial expression of guilt, the courts have shown an indication to treat such opinion as an opinion on the weight of the evidence alone.[57] In *Johnson v. Commonwealth*[58] and *Johnston v. Commonwealth*,[59] the rule that the judge may express his opinion as to the guilt of the defendant was applied in upholding strong expressions by the court that the evidence clearly warranted the conviction of the defendant. However, the opinions ventured by the judges in both cases were directed to the weight of the evidence[60] — a practice clearly within the orthodox rule[61] — and only by innuendo indicated a belief in the defendant's guilt.

Only in dissenting opinions and in dicta has the orthodox rule been attacked. In *Commonwealth v. Gross*,[62] Justice Keller believed that the judge's charge, to the effect that the jury should have no trouble in finding defendant guilty, exceeded the common law power; a judge should have no right to tell the jury what its verdict ought to be, since such an opinion goes to the whole case, both fact and law.[63] The modern opponent of the rule is Justice Musmanno, who dissented in both *Commonwealth v. Cisneros*[64] and *Commonwealth v. Raymond*.[65] In the *Cisneros* case he stated: "so long as we have trial by jury it is the jury which decides guilt or innocence not the judge. If the evidence was so overwhelmingly in favor of the prosecution, why was it necessary to bludgeon the jury into a verdict of guilty? Could he not assume that the jury itself would see what apparently he [the judge] saw so vividly?"[66] It is true that these dissents object mainly that the expressions of opinion involved were not fair and temperate, and thus admit the basic premise that the judge has

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387, 147 Atl. 79, 81 (1929); Commonwealth v. Myma, 278 Pa. 505, 123 Atl. 486 (1924); Commonwealth v. Lawrence, 282 Pa. 128, 135, 127 Atl. 465, 467 (1925); Commonwealth v. McClain, 110 Pa. 263, 1 Atl. 45 (1885).

56. Commonwealth v. Edwards, 318 Pa. 1, 178 Atl. 20 (1935); Commonwealth v. Nafus, 303 Pa. 418, 420, 154 Atl. 485, 486 (1931).

57. Commonwealth v. Scott, 38 Pa. Super. 303 (1909). The charge to the jury was as follows:

> . . . it is the opinion of the court that this defendant did not exercise such care and caution as he ought to have done in the premises, and that he, therefore, is guilty of neglect of duty. 38 Pa. Super. at 304.

The appellate court dealt with this as an expression on the weight of the evidence.

58. 115 Pa. 369, 9 Atl. 78 (1887).

59. 85 Pa. 54 (1877).

60. In the *Johnson* case, the charge contained the statement that "the evidence of the Commonwealth . . . seems to point to this defendant as the murderer . . ." 115 Pa. at 396, 9 Atl. at 82, and the Supreme Court pointed out that this statement was clearly warranted *by the evidence*. In the *Johnston* case, the court construed a similar charge as a statement that if the jury believed the evidence, it seemed that they should convict. 85 Pa. at 65. The theory behind both decisions was that since the evidence against the defendant was overwhelming and uncontradicted, no harm was done to the defendant as long as the ultimate determination of his guilt was left to the jury.

61. Commonwealth v. Orr, 138 Pa. 276, 20 Atl. 866 (1890). See generally SADLER, CRIMINAL PROCEDURE IN PENNSYLVANIA § 572 (2d ed. 1937).

62. 89 Pa. Super. 387 (1926).

63. *Id.* at 391 (dissenting opinion).

64. 381 Pa. 447, 113 A.2d 293 (1955).

65. 412 Pa. 194, 194 A.2d 150 (1963).

66. 381 Pa. 447, 458, 113 A.2d 293, 299 (1955) (dissenting opinion).

the right to advance his opinion on the guilt issue. However, the probability that this opinion will be given undue weight by the jury is clearly recognized. Because of the lack of precedent dealing directly with judicial opinion of guilt, the dissenting view might influence the court to eventually deny this power to the judge.[67]

(b) *New Jersey.* This state gives the judge power to express an opinion freely on the evidence, and the inferences he would draw from it.[68] The only limitation is that issues of fact must ultimately be left to the jury. Few cases have dealt squarely with the question of whether this power includes an opinion on the guilt issue, but an affirmative answer would seem inevitable since the judge has the right to use language which indicates the impression made upon his mind by the evidence.[69] In *State v. Giampetro,*[70] the rule allowing judicial comment was cited to support an instruction that the evidence led to the conclusion that the defendant had committed the crime charged; although this statement was strictly concerned with the weight to be afforded the evidence, it closely approached a belief of guilt.

The trend to include the guilt issue within the area of permissible expression of opinion has been supported by a long line of decisions.[71] By way of contrast, the courts seem more reluctant to allow comment on the ultimate issue in civil cases. In *Morie v. New Jersey Mfg. Co.*[72] the court stated that an expression of opinion on the ultimate issue constitutes an unfair interference with the jury verdict, because of the great influence of the judge's opinion.[73] The criminal cases have given no indication that they will go this far.[74]

(c) *California.* California originally was very restrictive in allowing the judge power to comment, and incorporated this restrictive attitude into its constitution.[75] However, in 1934 the constitution was amended to allow greater freedom of comment, and the state is now one of the jurisdictions according considerable leeway to the judge.[76] The cases decided under the 1934 constitutional amendment indicate that an expression of belief in

67. See brief for petitioner in Commonwealth v. Wright, argued before the Supreme Court of Pennsylvania, April 29, 1964.

68. See State v. Corrado, 113 N.J.L. 53, 172 Atl. 571 (1934); State v. Dragone, 99 N.J.L. 144, 122 Atl. 878 (1923); State v. Randall, 95 N.J.L. 452, 113 Atl. 231 (1921); State v. Harrington, 87 N.J.L. 713, 94 Atl. 623 (1915); State v. Overton, 85 N.J.L. 287, 88 Atl. 689 (1913); State v. Pulley, 82 N.J.L. 579, 82 Atl. 857 (1912); State v. Hummer, 73 N.J.L. 714, 65 Atl. 249 (1906).

69. State v. Dragone, 99 N.J.L. 144, 122 Atl. 878 (1923).

70. 107 N.J.L. 120, 150 Atl. 367 (1930).

71. *Supra,* note 68.

72. 48 N.J. Super. 70, 137 A.2d 41 (1957). In this case the ultimate issue was whether an explosion had occurred within the meaning of an insurance policy, and the trial judge had said "I personally think there was an explosion." The appellate court held that this exceeded the bounds of fair comment.

73. *Id.* at 82, 137 A.2d at 48.

74. The New Jersey Superior Court has gone this far when dealing with the question of the judge indicating a belief in defendant's guilt while partaking in an examination of witnesses. State v. Riley, 49 N.J. Super. 570, 140 A.2d 543 (1958).

75. CAL. CONST. art. VI, § 17 (1879).

76. CAL. CONST. art. VI, § 19 (1954). See People v. Busby, 40 Cal. App. 2d 193, 104 P.2d 531 (1940).

guilt is permissible when the common law limitations on the power are observed.[77] These limitations are designed to safeguard the right of the jury to decide issues of fact and protect the rights of the defendant. Therefore, any comment must be temperately and fairly made, and involve the exercise of judicial caution to avoid advocacy.[78] Thus an expression of belief in guilt has been held coercive where the judge offered his opinion not in his charge, but only when it appeared the jury might be deadlocked.[79] Generally, however, opinions on the guilt issue have been freely allowed, since "guilt must always depend on evidence, and the judge may comment on the evidence."[80]

(d) *Connecticut.* Since 1918, the power of a judge to comment on the evidence has been governed by statutory provisions, granting the judge the privilege to submit fact questions to the jury "with such observations on the evidence for their information as it may think proper."[81] The purpose of the statute was to restore trial by jury to its common law form.[82] This section applied to criminal as well as civil cases.[83] Although the only limitations on the judge under this section are that the judge may not direct, advise, or attempt to control the verdict of the jury,[84] it has been argued that the better course is for the judge to refrain from expressing himself on the issue of guilt.[85] But the statutory provision and the decisions interpreting it seem clearly broad enough to cover an expression of opinion of guilty, and no case has been found denying the existence of that power.

2. *Restrictive*[86]

(a) *New York.* The power to express a view on the guilt of the accused was generally upheld in older New York cases,[87] subject only to the standard limitations imposed by common law. In *People v. Fisher*[88] the court stated that only where the evidence of bias is marked, and the balance of proof is only slightly in favor of guilt would such an expression

77. See People v. Friend, 50 Cal. 2d 570, 327 P.2d 97 (1958); People v. Huff, 134 Cal. App. 2d 182, 285 P.2d 17 (1955); People v. Eudy, 12 Cal. 2d 41, 82 P.2d 359 (1938); People v. Patubo, 9 Cal. 2d 537, 71 P.2d 270 (1937); People v. Ottey, 5 Cal. 2d 714, 56 P.2d 193 (1936).

78. *Ibid.*

79. People v. Crowley, 101 Cal. App. 2d 71, 224 P.2d 748 (1950); People v. Walker, 93 Cal. App. 2d 818, 209 P.2d 834 (1949).

80. People v. Friend, 50 Cal. 2d 570, 578, 327 P.2d 97, 104 (1958) (dissenting opinion of Justice Schauer).

81. CONN. GEN. STAT. ANN. tit. 52, § 216 (1949).

82. State v. Gannon, 75 Conn. 206, 52 Atl. 727 (1902). For a concise discussion of this statute see Johnson, *Province of the Judge in Jury Trials*, 12 J. AM. JUD. Soc'y 76, 78 (1928).

83. State v. Cianflone, 98 Conn. 454, 120 Atl. 347 (1923).

84. State v. Pinagglia, 99 Conn. 242, 121 Atl. 473 (1923) (judge can't direct, advise or attempt to control verdict); State v. Cabaudo, 83 Conn. 160, 76 Atl. 42 (1910) (judge can't advise jury how to decide case); State v. Marx, 98 Conn. 18, 60 Atl. 690 (1905) (greater care to avoid advising should be used in serious criminal cases).

85. Coy v. Town of Milford, 126 Conn. 484, 12 A.2d 641 (1940).

86. These jurisdictions adhere to the orthodox rule, but have greatly limited the situations in which a judge may express his belief in the guilt of the defendant.

87. See generally Note 9, N.Y.U. INTRA. L. REV. 201, 205 (1954); Note, 2 BROOKLYN L. REV. 273 (1933).

88. 136 App. Div. 57, 120 N.Y. Supp. 659 (1909).

constitute reversible error. However, the trend shifted. In *People v. Kohn*,[89] the appellate court held the trial court's instruction to be error where the judge indicated that the "inference of guilt was irrestible."[90] This amounted to an invasion of the province of the jury which "leaving it up to them" could not cure. Also in *People v. Carlsonakas*,[91] although not reversing the jury verdict, the appellate court made the statement that the judge must state the law, but is not permitted directly or indirectly to express an opinion to the jury. This view followed what had been said to be the general rule: in New York the judge should not have thrown his personal conviction into the scales by which defendant's guilt is to be weighed, and the jury should feel free to determine the questions submitted, without indication on the part of the court as to its conviction of the guilt or innocence of the accused.[92] Whenever an expression of belief in defendant's guilt is directly involved, the courts seem willing to accept this "general rule" allowing the judge to comment on the evidence, but without expressing an opinion on the guilt issue.[93] Thus the judge may marshal the evidence so as to indicate his belief, but may not expressly give his opinion.

(b) *Michigan.* The power to comment on a factual issue was restricted by statute in Michigan in 1915.[94] In 1929, however, the judge was given power to comment on the testimony, and the earlier statute was repealed.[95] Despite these statutory provisions, case law has produced its own limitations on the power. Before 1929 the cases appear confused as to whether a judge could express an opinion that a defendant was guilty. Those that argued that the judge could express his opinion as to the guilt or innocence of the accused felt that such power was a corollary to the accepted rule that the judge may under proper circumstances, whenever he thinks it will assist the jury in arriving at a just conclusion, express his opinion on any question of fact he submits to the jury; at least this is true when no factual dispute is raised.[96] Another line of cases maintained that the trial judge is excluded from intimating to the jury his views as to how they should decide a fact issue.[97] After the 1929 statute, however, strict limitations were imposed. The court in *People v. Padgett*[98] removed from the scope of the 1929 statute any expression of what the judge thinks the

89. 251 N.Y. 375, 167 N.E. 505 (1929).
90. *Id.* at 370, 167 N.E. at 506.
91. 241 App. Div. 232, 272 N.Y. Supp. 35 (1934).
92. People v. Kilroe, 201 App. Div. 549, 194 N.Y. Supp. 506 (1922).
93. See People v. Spitzer, 295 N.Y. 5 (1944) (per curiam); People v. De Martine, 205 App. Div. 80, 199 N.Y. Supp. 426 (1923). See generally 9 WIGMORE, EVIDENCE § 2551 (3d ed. 1940). The rule was mentioned in other cases where the court construed the charge as not indicating an expression of opinion on guilt. People v. Becker, 215 N.Y. 126, 109 N.E. 127 (1915); Henze v. People, 82 N.Y. 611 (1880).
94. Mich. Pub. Acts 1915, No. 314, § 27.1038.
95. MICH. STAT. ANN. § 28.1052 (1954).
96. People v. Murphy, 239 Mich. 60, 214 N.W. 165 (1927); People v. Heikkala, 226 Mich. 332, 197 N.W. 366 (1924) (dictum).
97. People v. Lintz, 244 Mich. 603, 222 N.W. 201 (1928); People v. Durham, 170 Mich. 598, 136 N.W. 431 (1912).
98. People v. Padgett, 306 Mich. 545, 11 N.W.2d 235 (1943).

jury verdict should be. The case has been interpreted as bringing the scope of expression of opinion on the guilt issue within the limits of the federal rule, as dictated by the *Murdock* decision.[99] This is evidenced by recent decisions reversing the instruction on the grounds that it exceeded the bounds of fair comment.[100]

B. *Jurisdictions Allowing Limited Judicial Comment*

Few jurisdictions which do not adhere strictly to the orthodox rule indicate that an expression of opinion on the ultimate issue of guilt is allowable. However, New Mexico and Vermont constitute exceptions. In the leading case of *State v. Ochoa*,[101] the New Mexico Supreme Court held that the 1934 trial court rule allowing comment encompassed a fair expression of opinion. Although this case dealt with the credibility of witnesses it clearly announces the intention to test any expression of opinion by the limits imposed by the federal courts. This same rule prevails in Vermont, where the expression will be permitted as long as the judge leaves final determination to the jury.[102]

The strongest indication that no opinion on the ultimate issue is permissible is found in Utah, where it has been held that the constitutional right to trial by jury is invaded if the judge indicates that any of the facts which constitute the crime charged are established.[103] This rule has been applied to prohibit as unfair comment any opinion on the facts, and would thus be a bar to an opinion on the guilt issue.[104]

Rhode Island also adopts a strict view, allowing the judge to state the evidence bearing on the issues and to refer to the evidence, if he does so fairly.[105] However, the judge is prohibited from expressing his own view as to the facts[106] or his impression as to the weight of the testimony.[107] The rule is most clearly stated in a civil case, *Pompei v. Casetta*,[108] where the Supreme Court stated that the trial judge may only mention the evidence to explain the law, and should not give opinions on the evidence; if he does give such an opinion, he should not do it in his charge to the jury. Under this reasoning, in a criminal case, it would seem no expression of belief in defendant's guilt would be permissible. In *State v. Harris*,[109]

99. See also People v. Lintz, 244 Mich. 603, 222 N.W. 201 (1928).

100. People v. Oates, 369 Mich. 214, 119 N.W.2d 530 (1963); People v. Barmore, 368 Mich. 26, 117 N.W.2d 186 (1962).

101. 41 N.M. 589, 72 P.2d 609 (1937).

102. State v. Malnati, 109 Vt. 429, 199 Atl. 249 (1938).

103. State v. Estrada, 227 P.2d 247 (Utah, 1951); State v. Green, 78 Utah 580, 6 P.2d 177 (1931).

104. See State v. Lawrence, 120 Utah 323, 234 P.2d 600 (1951); State v. Peterson, 110 Utah 413, 174 P.2d 843 (1946); State v. Crank, 105 Utah 332, 142 P.2d 178 (1943). The dissenting opinion of Justice Wolfe in *State v. Lawrence* contains a seemingly unheeded plea to follow the orthodox rule and allow the judge to advise the jury in an impartial way in a proper case. 120 Utah at 326, 234 P.2d at 604, 606.

105. State v. Gallogly, 47 R.I. 483, 134 Atl. 20, 21 (1926).

106. State v. Fish, 49 R.I. 397, 143 Atl. 604, 607 (1928).

107. State v. Gallogly, 47 R.I. 483, 134 Atl. 20 (1926).

108. 63 R.I. 74, 7 A.2d 198 (1939). See also McCreadie v. Billtcliffe, 80 R.I. 232, 95 A.2d 458, 459 (1953); State v. Smith, 70 R.I. 500, 41 A.2d 153, 160 (1945).

109. 89 R.I. 202, 152 A.2d 106, 110–11 (1959).

the judge's charge was to the effect that the defendant had killed his own mother, and although the issue was ultimately left to the jury, the appellate court felt that it was improper for the judge to suggest to the jury "a definite resolution of this contested issue of fact."

Statutes have played an important role in two other states. In Massachusetts an expression on guilt is clearly not allowed, despite the repeal of their restrictive statute.[110] Dean Wigmore makes reference to Massachusetts as an example of a state which has adopted a compromise rule which allows the judge to rehearse and state the testimony, but not charge the jury by expressing an opinion on the main issue.[111] For this contention he cites *Hohman v. Hemmen*,[112] a civil case, and though some feel that this case reinstated the common law power, there is no indication that prior law allowed an expression of guilt. In Maine the restrictive statute has had little effect, as the courts continued to construe the statute as allowing the common law power.[113] But the direct wording of the statute seems clearly to prohibit an expression of opinion on the issue of guilt, though no case has gone this far.

V.

CONCLUSION

The power to express an opinion on the guilt issue has been distinguished from other aspects of the common law power to comment on the evidence.[114] It is in effect a statement that the prosecution has proved its case beyond a reasonable doubt. Because of the danger that any opinion bearing such import might be given undue weight by the jury, the Supreme Court has specifically limited the situation in which such comment is permissible to cases in which no factual dispute is presented.[115] But, some states, notably Pennsylvania, California, Connecticut, and New Jersey, have ignored the policy of the *Murdock* decision and allowed comment on the guilt issue as long as such comment is "fair and temperate."[116] Limiting permissible comment within the confines of *Murdock* is the better course, and is more in keeping with the historically accepted conceptual function of the jury.

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110. MASS. GEN. LAWS ch. 231, § 81 (1956).
111. 9 WIGMORE, EVIDENCE § 2551 (3d ed. 1940).
112. 280 Mass. 526, 182 N.E. 850 (1932).
113. See, *e.g.*, State v. Jones, 137 Me. 137, 16 A.2d 103 (1940); State v. Means, 95 Me. 359, 50 Atl. 30 (1901).
114. United States v. Woods, 252 F.2d 334 (2d Cir. 1958) (distinguished from expressing an opinion on credibility); Fryer v. United States, 11 F.2d 707 (7th Cir. 1926) (distinguished from expressing opinion on ultimate issue).
115. See United States v. Murdock, 290 U.S. 389, 54 S.Ct. 223 (1933).
116. See *e.g.*, Commonwealth v. Raymond, 412 Pa. 194, 194 A.2d 150 (1963). Clearly, since the facts were in dispute, this was not an "exceptional" case as contemplated by the federal courts; Pennsylvania has thus retained the orthodox rule to its fullest extent in this area and attained a liberality far beyond that accorded federal judges.