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Illinois Appellate Court, First District

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The “Whys” and “Whynots” of Judicial Comments on Evidence in Jury Trials*

*Justice Allen Hartman***

[T]he jurors are chancellors.

LORD COKE¹

Trial by jury [without judicial commentary] is not trial by jury in any historic sense of the words. It is not the venerated institution which attracted the praise of Blackstone and of our ancestors, but something novel, modern, and much less to be respected.

JAMES B. THAYER²

[T]he common people . . . should have as complete a control . . . in every judgment of a court of judicature [as they have, through the legislature, in other decisions of government.]

JOHN ADAMS³

Our interest in the common law of England is guided by neither pedanticism in the present nor romanticism with the past. Instead, today we continue to be governed in Illinois by a 19th century statute that compels our attention to English common law. This statute⁴ provides:

801. Rule of Decision

The common law of England, so far as the same is applicable and of a general nature, and all statutes or acts of the British parlia-

* Based upon lectures by Justice Allen Hartman to the Loyola University Chicago Law School London Advocacy Seminar in the Middle Temple of the Inns of Court, London, England, on January 4, 1991.

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1. ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 133 (1922).

2. JAMES B. THAYER, PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 188 n.2 (1898).

3. Comment, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 172 (1964) (quoting Diary (Feb. 12, 1771), in 2 THE WORKS OF JOHN ADAMS 253 (1850)).

4. ILL. REV. STAT. ch. 1, para. 801 (1987). This provision was enacted on February 4, 1819, soon after Illinois achieved statehood. However, the common law first came to Illinois through its adoption while Illinois was a county of the Commonwealth of Virginia, following Colonel George Rogers Clark's successful invasion of this part of the Louisiana Territory during the Revolutionary War. Later, the common law was again adopted in 1789 while Illinois was part of the Indiana Territory under the Northwest Ordinance. See *Bulpit v. Matthews*, 34 N.E. 525 (Ill. 1893).

ment made in aid of, and to supply the defects of the common law, prior to the fourth year of James the First, excepting the second section of the sixth chapter of 43d Elizabeth, the eighth chapter of 13th Elizabeth, and ninth chapter of 37th Henry Eighth, and which are of a general nature and not local to that kingdom, shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority.⁵

The period beginning with 4 James I corresponds to March 24, 1606.⁶ The Illinois Supreme Court suggests that date was chosen because it was the "period at which the first territorial government was established in America, and with it the common law of England as it then existed. From that period [onward] we must look to American legislation and the reports of American courts for improvements and modifications in the common law."⁷

The Illinois courts, however, may not have adhered strictly to paragraph 801. One interesting deviation in Illinois and most American state courts from the common law, as it existed prior to 1606, is a procedure still followed by British judges hearing jury cases: commentaries by judges to juries concerning evidence adduced during the course of trials.

While visiting the Old Bailey⁸ in August of 1985, the author observed trial proceedings in an armed robbery case. The proceedings went much the way an American lawyer or judge would expect, but with two notable exceptions. First, there was a high level of civility and deferential conduct maintained between counsel, and between court and counsel during the trial, unlike the courtroom scenarios seen occasionally in American state courts.

The second remarkable exception at this trial came near its end. After both counsel for the crown and for the accused had delivered their final argument to the jury, the court instructed the jury. In doing so, the court initially commented upon the evidence for the benefit of the jury. First, the trial judge summed up all the material evidence that had been received during the course of the trial. She then further analyzed the evidence that had been given by both sides, witness by witness, and raised many questions as to each of them concerning the relevancy of the testimony to the dispositive

5. Although considered antiquated, para. 801 nevertheless continues to be referenced in modern times. *See, e.g.*, *People v. Gersch*, 553 N.E.2d 281, 286 (Ill. 1990). Paragraph 801 recently sparked some controversy concerning its application. *See Torres v. Walsh*, 456 N.E.2d 601, 605, 609 (Ill. 1983).

6. *See ILL. ANN. STAT.* ch. 1, para. 801, historical note (Smith-Hurd 1980).

7. *Penny v. Little*, 4 Ill. (3 Scam.) 301, 305 (1841).

8. Central Criminal Court in London, England.

issues of the case. Finally, she gave the jury the benefit of her views as to the bias, interest, and truthfulness of each witness, and the contradictions in their testimony, as she saw those elements appear during the course of the testimony given. The judge occasionally cautioned the jury that it, in its ultimate role as the fact finder in the case, was at liberty to come to its own conclusions with regard to the weight to be given the evidence.

More recently, in January 1991, the author witnessed a rape and buggery (sodomy) trial in the Old Bailey. At the end of the proceedings, the trial judge substantially followed the same procedure as the aforementioned judge, but with a degree or two less fervency and with a somewhat broader suggestion of the independence of the jury in arriving at its decision. Nevertheless, the two judges' observations were among the best impeachment and bolstering of witnesses' testimony that the author has ever observed. In view of the judges' input, there seemed to be little chance that the juries would find either of those defendants not guilty—and, as expected, they did not.

This commentary to a jury upon the evidence is a procedure not often seen in the American court system as a whole and not seen in the Illinois state courts in modern times, for reasons that will be discussed later. In fact, the analyses by the aforementioned English judges, if articulated in Illinois, would have been deemed prejudicial error and would have required reversal and a new trial.⁹ These distinctions between the English law and the trial procedure in most American jurisdictions, resulting in considerable differences in the degree of control over juries that each country's judges may exercise, are the subjects of this discourse.

The reasons why the English judges were able to share with their juries, in the detail noted, their commentaries on the evidence produced by the parties,¹⁰ and why this cannot be done in most American state courts, including Illinois, are founded in the long and rich history of early English court development. Trial procedure essentially began with the General Eyre, a court staffed by itinerant justices commissioned by the crown to hear various types of cases around the country.¹¹ From this emerged the first vestiges of a

9. See, e.g., *infra* notes 169-73 and accompanying text.

10. It may be useful to note that two forms of judicial comment are considered here as separate and distinct: one simply sums up all the material evidence produced by the parties; the other not only sums up the evidence, but also comments to the jury upon the weight of the evidence and its relevance to the issues in the case.

11. For the history of this court and the various courts which emerged therefrom see 1 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW (1922), and JAMES B.

jury system.¹² Although the proceedings of other early English courts, such as the county court,¹³ the hundred court,¹⁴ and the franchise court¹⁵ of the 11th and 12th centuries are also enormously interesting, closer to the present topic is the history of the petit jury system and the development of that system under the controls exercised by the crown and its judges.

The earliest jury system seems to have been one identified by the first law treatise writer, Ranulf De Glanvill, who was the prime minister and justiciar of Henry II toward the end of the 12th century. Glanvill reported that the mode of judicature during that period in criminal cases was the inquest system, which was first introduced in England by the Normans.¹⁶ Typically, in this system, a royal commission to the sheriff required that he assemble juries, called "assizes,"¹⁷ that were taken from among inhabitants of the neighborhoods where the controversy arose. These assemblies were an exemplification of popular justice, in the nature of a town meeting of knights and other substantial community members acting as judges.¹⁸ This system possessed a strictly Germanic flavor. At that time, there was no rational method of adducing evidence before the court. This jury was expected to arrive at a verdict not from evidence put before it by witnesses, but from its own investigation and knowledge of the parties and the disagreement under consideration. Indeed, the jury's qualification to serve was based substantially upon its knowledge of the controversy at issue.¹⁹

When members of this ancient jury could not agree on the proposed disposition of the case, they would be "kept without meat, drink, fire, or candle, unless by permission of the judge, till they are

THAYER, PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW (1898). The era covered in these treatises extends from the Norman conquest in 1066 through the 19th century.

12. 1 HOLDSWORTH, *supra* note 11, at 145-56.

13. 1 *id.* at 187-93.

14. 1 *id.* at 11-13.

15. 1 *id.* at 87-94.

16. THAYER, *supra* note 11, at 41-54, 61-65.

17. EDWARD COKE, COMMENTARY UPON LITTLETON § 234 (19th ed. 1853). Assize is a middle English word roughly meaning "sitting together," but it later came to denote the things accomplished or enactments passed at a court or assembly. 1 HOLDSWORTH, *supra* note 11, at 275-76; THAYER, *supra* note 11, at 57-58.

18. 1 HOLDSWORTH, *supra* note 11, at 327-28; THAYER, *supra* note 11, at 62-63.

19. 1 HOLDSWORTH, *supra* note 11, at 327-28; THAYER, *supra* note 11, at 62-63, 131-32, 137.

unanimously agreed,"²⁰ or new jury members would be summoned to take their places until they were able to reach a unanimous agreement, a procedure called an *afforced verdict*.²¹ This jury, when considering criminal cases, was also called a grand jury and a jury of presentment.²² This jury was not unlike its modern parallel in that its function was to determine the presence of probable cause, rather than to determine guilt or innocence.²³ Its counterpart in civil cases was called the "grand assize."²⁴

The grand assize in civil cases made its appearance through legislation, probably enacted by the council of Windsor at the end of the 12th century.²⁵ This assize ordinarily dealt with rights and titles to land.²⁶ Other assizes included the possessory assizes and the assize *utrum*, also dealing with land and tenure.²⁷

The composition and functions of these early courts began revealing the bases for the requirement that a case be tried in the locale or venue where it took place. It was more likely that juries with knowledge of the facts could be secured from the situs of the controversy than from elsewhere. The word "venue" is derived from the middle English word "visne," meaning neighborhood and, to this day, plays an important role in locating the place of a trial, even in our country.²⁸

Trials could be commenced upon the presentment of a complaint witness, who might or might not be placed under oath.²⁹ Under ancient usages and rules, the parties would vie for the right to go to proof of the charges or of innocence.³⁰ The forms of proof were many and varied. The judgment rendered by this jury did not determine who ought to prevail on the merits, but only which form

20. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 375 (21st ed. 1857).

21. 1 HOLDSWORTH, *supra* note 11, at 327-28; THAYER, *supra* note 11, at 62-63.

22. 1 HOLDSWORTH, *supra* note 11, at 321.

23. 1 *id.* at 322-23.

24. 1 HOLDSWORTH, *supra* note 11, at 275-76; THAYER, *supra* note 11, at 57-58.

25. 1 HOLDSWORTH, *supra* note 11, at 327.

26. 1 *id.* at 275, 327.

27. 1 *id.* at 327-29. The term "possessory assizes" describes the three possessory assizes of novel disseisin, mort d'ancestor, and darrien presentment. 1 *id.*

28. BLACK'S LAW DICTIONARY 1396 (5th ed. 1979). For example, the Sixth Amendment to our United States Constitution and Article I, § 8 of the Illinois Constitution both require that trials in criminal cases be conducted in the district or county where the offense was committed. U.S. CONST. amend. VI; ILL. CONST. art. I, § 8. Our modern codes of procedure are replete with venue regulations in civil cases, generally requiring trial at the place of the subject transaction or where one or more of the defendants reside. See, e.g., ILL. REV. STAT. ch. 110, para. 2-101 (1989).

29. THAYER, *supra* note 11, at 12.

30. 1 HOLDSWORTH, *supra* note 11, at 301; THAYER, *supra* note 11, at 10.

of trial was to be utilized.³¹ One complaint witness was often enough to start the procedure.³² Parenthetically, such a witness could be challenged to a duel himself.³³ If there was more than one complaint witness, and if a defendant could get such witnesses to disagree among themselves, he might win the case without need for a trial.³⁴ The complaint witnesses were called the *secta*³⁵ and were sometimes confused in historical accounts with the proof witnesses. In actuality, however, the advent of proof witnesses came later.³⁶

In the centuries following the Norman Conquest, the trials as ordered by these juries took various forms, including trials by the one-sided witnesses or *secta*, by oath or compurgation, by ordeal, or by battle.³⁷ It should be noted that the word "trial," in those early times, was not the word used to describe the proceedings. Instead, the words used were "*probatio*," or direct proof, such as that by showing a bodily wound; "*purgatio*," made by oath-taking which was often required to be supported by twelve compurgators, neighbors, or relatives who swore that they believed the oath-taker; "*ordalie*," subjection of a defendant to ordeal by fire or water, expecting divine intervention to demonstrate truth or falsity by virtue of the defendant's survival or demise, in other words, an appeal to heaven; and, "*duellum*," or battle, in which the contending parties fought a duel, either in person or by a substitute, with the winner designated the champion.³⁸

All such modes of early dispute resolution fell into disuse and eventually gave way to the gentler, more civilized trial. This latter procedure was established only through the intervention of royal power.³⁹ Unfortunately, public records of this transition in trial methods are sparse and incomplete. Record keeping was confined largely to entries in the Domesday Book, ordered by William the Conqueror to record social and economic conditions in 1085. Entries essentially noted local customs; descriptions, possession, and tenure of land; taxability of landowners; status of individuals; and disputes and identities of parties to litigation.⁴⁰ The information

31. 1 HOLDSWORTH, *supra* note 11, at 301; THAYER, *supra* note 11, at 10.

32. THAYER, *supra* note 11, at 12.

33. *Id.*

34. 1 HOLDSWORTH, *supra* note 11, at 300-01; THAYER, *supra* note 11, at 12.

35. 1 HOLDSWORTH, *supra* note 11, at 300; THAYER, *supra* note 11, at 10.

36. THAYER, *supra* note 11, at 12.

37. 1 HOLDSWORTH, *supra* note 11, at 300; THAYER, *supra* note 11, at 16.

38. 1 HOLDSWORTH, *supra* note 11, at 299-312; THAYER, *supra* note 11, at 16 n.1.

39. THAYER, *supra* note 11, at 49.

40. *Id.* at 51.

was compiled, in part, from jury verdicts.⁴¹

It appears that the transition from the original Frankish and Norman inquisition system to what became the more English-oriented trial was slow. Trial procedure before the court, commissioned by the crown, was called the inquiry.⁴² The answer to be given by the court was called the recognition.⁴³ A variety of assizes gradually developed, delineated according to the subject matter of the inquiry, and were classified as petit assizes and great assizes. These assizes also were commenced by obtaining royal writs, which directed that inquests be sworn to answer the questions specified by the writs.⁴⁴ Through this system there developed a more rational method of deciding questions of fact identified and referred to by the assizes.⁴⁵ Those questions were then to be decided at trial by a body of men early referred to as a common law jurata, or what we now call a jury.⁴⁶

The utilization of trials by jury, first obtainable only through the royal writ, began to expand in breadth and increase in number with the development of new writs and forms of action that provided the aggrieved parties with potential remedies.⁴⁷ The writs subsequently became available as of right, particularly through article 36 of the Magna Carta.⁴⁸ Chancery clerks began issuing writs in actions on the case and in trespass, and, still later, in other actions of course.⁴⁹ Litigation following this mode burgeoned in the 13th and 14th centuries. By the middle of the 15th century, statutes had to be enacted to relieve certain abuses in the now flourishing varieties of jury trials.⁵⁰

The records of early criminal trials reveal the commissions of the judges, the presentments of the grand juries, the indictments, the defendants' pleas, the placements by defendants for trials "upon the country," and the summons of the juries and their verdicts.⁵¹ Apparently, however, during this period, little notice was taken of either the evidence received or the directions given by the judges to the juries, with which we are concerned. The early juries, as noted

41. 1 HOLDSWORTH, *supra* note 11, at 313.

42. 1 *id.* at 330.

43. THAYER, *supra* note 11, at 55.

44. *Id.* at 58-59.

45. *Id.* at 57-58.

46. 1 HOLDSWORTH, *supra* note 11, at 330-32; THAYER, *supra* note 11, at 65, 146-47.

47. THAYER, *supra* note 11, at 66-67.

48. *Id.* at 68.

49. *Id.* at 66-67.

50. *Id.* at 67-68.

51. *Id.*

previously, were themselves the witnesses and represented the evidence or proof.⁵² Not all accused criminal defendants, however, enjoyed even this rudimentary form of trial. According to the formalism then so popular in the courts, the consent of the accused to a trial by jury and his plea to the charges were both required in order to bring the accused to trial.⁵³ The accused did not always cooperate and sometimes was coerced by torture and starvation until he gave his consent, or died in the process.⁵⁴

When jury trials were fully utilized, such evidence as the jury held by virtue of their private knowledge of the facts, gave them as much right to rely upon these subjective facts as any evidence given in court.⁵⁵ It also was held that although no proof had been presented by either side, the jury might bring in a verdict anyway based largely upon their own personal knowledge.⁵⁶

Later, in the 13th and 14th centuries, another form of jury coercion and control came into play when the heavy burden of attaints was extended to trial by jury. A jury was made subject to the penalties of attaint for rendering false verdicts.⁵⁷ For example, a verdict would be considered false when sworn grand jury members, who found probable cause, later sitting as petit jury members at trial, acquitted the defendant.⁵⁸ The penalties for false verdicts included forfeiture of the jury's goods and profits; loss of their homes, forests, and meadows; and the removal of their wives and children from their domiciles.⁵⁹

This primitive method of jury control continued until 1670 when, in *Bushell's Case*, the jury that acquitted Quakers William Penn and William Mead of the charge of unlawful assembly were themselves absolved and discharged without punishment.⁶⁰ James B. Thayer, a noted scholar on evidence at the common law, attaches importance to *Bushell's Case* due to its stance regarding jury control. Thayer observed that Lord Chief Justice John Vaughan's opinion in *Bushell* emphasized two things: first, that the jury is the judge of the evidence; and second, that because the jury may have acted upon evidence of which the judge had no knowledge, it

52. See *supra* notes 19, 29 and accompanying text.

53. 1 HOLDSWORTH, *supra* note 11, at 326; THAYER, *supra* note 11, at 68-69.

54. 1 HOLDSWORTH, *supra* note 11, at 326; THAYER, *supra* note 11, at 68-69.

55. 3 BLACKSTONE, *supra* note 20, at 374.

56. 3 *id.*

57. 1 HOLDSWORTH, *supra* note 11, at 341; THAYER, *supra* note 11, at 137.

58. See 1 HOLDSWORTH, *supra* note 11, at 343.

59. 3 BLACKSTONE, *supra* note 20, at 404; 1 HOLDSWORTH, *supra* note 11, at 341.

60. THAYER, *supra* note 11, at 166-67.

would be absurd for the judge to punish that jury for deciding a case contrary to the judge's own conclusions.⁶¹ Accordingly, *Bushell's Case* appears to mark the increasing awareness of the judiciary with respect to jury control and its parameters.

Until *Bushell's Case*, however, a jury was sometimes permitted to escape the heavy penalties of attain only by providing proof that existed outside of their personal knowledge.⁶² Still later, when it became known that a juror had any personal knowledge of any matter in issue, the juror was required to be sworn as a witness and to give his evidence in court.⁶³

Similarly, because the crown in the early days had a continuing interest in securing convictions, particularly of those persons indicted for the commission of treason or other serious crimes, the crown demanded and encouraged the presence of the indictors on the petit or trial jury as well.⁶⁴ During the reign of Henry III, "mixed" juries, composed of both witnesses and judges of the effect of testimony, often sat together as *jurata per patriam et per testes*.⁶⁵

By the 14th century, however, the practice of allowing the indictors also to sit upon the trial jury was discouraged.⁶⁶ In addition, the civil petit jury thereafter started to become a separate body for purposes of trial and was drawn from the country at large.⁶⁷ The need for neighbors or hundredors in criminal juries, however, was not formally abolished until the 19th century.⁶⁸ Nevertheless, juries in both civil and criminal cases gradually ceased being witnesses and eventually became what we recognize today as judges of the facts.⁶⁹

With the increasing utilization of independent sources of evidence in old England came two other profound modifications of the medieval jury trial system. Pleading and practice rules developed, and a body of evidentiary rules was created.⁷⁰ These new developments led to the establishment of rules requiring pleadings in order to place the controversy between the parties at issue. Correspondingly, with the identification of the issues came the need for

61. *Id.* at 167-69.

62. *Id.*

63. 1 HOLDSWORTH, *supra* note 11, at 336.

64. 1 *id.* at 346.

65. THOMAS STARKIE, PRACTICAL TREATISE ON THE LAW OF EVIDENCE 8 (10th ed. 1876).

66. 1 HOLDSWORTH, *supra* note 11, at 336-37; THAYER, *supra* note 11, at 93-94.

67. 1 HOLDSWORTH, *supra* note 11, at 336-37; THAYER, *supra* note 11, at 93-94.

68. 1 HOLDSWORTH, *supra* note 11, at 332.

69. 1 *id.* at 334-36.

70. See 3 HOLDSWORTH, *supra* note 11, at 627-58; THAYER, *supra* note 11, at 114-20.

rules administering the proofs, or evidence, to be submitted by the parties in support of their pleading for consideration by the fact finder. Governance over pleadings and rules of evidence also added new elements of control by judges over juries.

The requirement of pleadings in litigation also did much to centralize the system of the common law, whereas other systems of law continued to permit generalization of the issues.⁷¹ The English rules tended to extract with greater precision the questions to be resolved by identifying both points upon which the parties agreed and in what instances proof to support controverted allegations was required.⁷² Concomitantly, this sifting procedure matured into an elaboration of differences between questions of law for the court and questions of fact for the jury.⁷³ The rules continually became more sophisticated, enabling the parties and the court to achieve greater and more varied dispositions of pending litigation.⁷⁴

What started as a system of oral pleading began to give way to written pleadings.⁷⁵ Unfortunately, with the advent of written pleadings came the rigid formalism attending the forms of action that became so notorious after the 15th century.⁷⁶ Oral pleadings were put into writing by prothonotaries, who entered upon a parchment roll the pleas, proceedings, and judgment, which was then filed in the treasury of the court.⁷⁷ Eventually, the pleadings were drafted by the attorneys themselves or by counsel hired solely for that purpose, because they were possessed of special knowledge, experience, and skill in what became a very complicated process.⁷⁸ Pleaders of the causes in court became the latter-day barristers, and those acting as agents of suitors presaged the role of solicitors.

Methods of providing evidence for consideration by juries also had been evolving throughout this era. The need for a judge to know as much about the case before him as the jurors did required the introduction in court of dispositive evidence through witnesses who were totally independent of the decision-making process.⁷⁹

71. 3 HOLDSWORTH, *supra* note 11, at 627-28.

72. 3 *id.*

73. 3 *id.* at 628.

74. *See* 3 *id.* at 627-58.

75. 3 *id.* at 639-40.

76. *See* 3 *id.* at 641-48, 650-51.

77. 3 *id.* at 642-44.

78. 3 *id.* at 639-48.

79. 9 HOLDSWORTH, *supra* note 11, at 127-33.

Having such witnesses available to testify was considerably difficult. Early on, volunteer witnesses were looked upon with suspicion because they often offered false testimony for which they became subject to punishment for maintenance.⁸⁰ Volunteer witnesses later were encouraged to come forward, especially when testifying on behalf of the crown.⁸¹ The practice of bringing in witnesses by compulsion, through the process of subpoena, evolved.⁸² Mixed signals were sometimes given, however, and until the end of the 17th century, independent witnesses often could not be sworn if their testimony favored the defense in a criminal case.⁸³

These earlier, crude methods of jury control by the judiciary eventually gave way to more sophisticated means of achieving the desired results. Governance over pleadings was one way to limit jury questions.⁸⁴ Careful choice of juries by the crown was another way.⁸⁵ Rulings upon the admissibility of evidence were a further judicial exercise of control over juries.⁸⁶ The recognition of presumptions of fact by the court also diminished the totality of jury decisions by eliminating certain questions from consideration.⁸⁷ Objections and exceptions to evidence offered by the parties additionally limited jury assignments.⁸⁸ Special verdicts came into use, limiting the jury's power to make overall decisions in cases,⁸⁹ and verdicts directed by the judges disposed of unwanted jury decisions.⁹⁰ The granting of new trials also became a means of diminishing jury influence in the decision-making process.⁹¹

The questions of the respective duties and responsibilities of judges and juries eventually became a matter of legislative concern in the English realm. For example, in 1641, the Irish parliament propounded a question to the judges of that country, asking "whether the judge or jurors ought to be judge of the matter of fact."⁹² The judges replied, "the jurors [are] the sole judges of matter of fact, yet the judges of the court are judges of the *validity of*

80. 1 HOLDSWORTH, *supra* note 11, at 334-35.

81. 1 *id.* at 335-36.

82. 1 *id.* at 335.

83. 1 *id.* at 335-37.

84. See 3 HOLDSWORTH, *supra* note 11, at 633-34.

85. See 1 HOLDSWORTH, *supra* note 11, at 346.

86. See THAYER, *supra* note 11, at 180-81.

87. *Id.*

88. *Id.*

89. See *id.* at 187-88.

90. See *id.* at 180.

91. 1 HOLDSWORTH, *supra* note 11, at 346-47.

92. 1 PITT TAYLOR, A TREATISE ON THE LAW OF EVIDENCE § 23, n.1 (8th ed. 1887) (citing 2 NALSON'S COLLECTION OF STATE PAPERS 575, 582 (1683)).

the evidence and of the matters of law arising out of the same, wherein the jury ought to be guided by them."⁹³

By the 17th century, the courts' close guidance of juries developed into what is now modern practice in England. After a court received all the evidence produced by both sides and counsel had delivered argument to the jury, it became the practice for the judge to sum up the whole of the evidence to the jury while the parties and counsel were present. The judge typically omitted all superfluous circumstances, identified the principal issue, stated what evidence had been given in support, and made such remarks as the judge thought necessary for the direction of the jury.⁹⁴

What was the perceived need for this then relatively new procedure? The answer, in large part, is found in Burke's report on the Warren Hastings trial:

In the trials below, the Judges decide on the competency of the evidence before it goes to the jury, and . . . with great propriety and wisdom. Juries are taken promiscuously from the mass of the people; they are composed of men who in many instances, in most perhaps, were never concerned in any causes, judicially or otherwise, before the time of their service. They have generally no previous preparation or possible knowledge of the matter to be tried; and they decide in a space of time too short for any nice or critical disposition. These Judges, therefore, of necessity must forestall the evidence where there is a doubt on its competence, and indeed observe much on its credibility, or the most dreadful consequences might follow. The institution of juries, if not thus qualified, could not exist.⁹⁵

Thayer agrees that English judges should comment on the evidence for the jury's benefit. Without such commentary, Thayer argues that "[t]rial by jury, in such a form as that, is not trial by jury in any historic sense of the words. It is not the venerated institution which attracted the praise of Blackstone and of our ancestors, but something novel, modern, and much less to be respected."⁹⁶

Another commentator, Thomas Starkie, has stated that "it must be admitted to be essential that [the jury's] attention should be skillfully directed to the points material for their consideration."⁹⁷

93. 1 *id.*

94. 3 BLACKSTONE, *supra* note 20, at 374.

95. 9 JOHN HENRY WIGMORE, EVIDENCE § 2551 (Chadbourn rev. ed. 1981) (citing 31 PARL. HIST. ENG. 357 (1794) (Report to the House of Commons)).

96. THAYER, *supra* note 11, at 188 n.2.

97. STARKIE, *supra* note 65, at 810.

Otherwise, "the full benefit to be derived from the united discernment of a jury" would be lost.⁹⁸

The struggle over the appropriate responsibilities of juries and judges continued over the centuries. Lord Mansfield observed that the fundamental definition of trial by jury depended upon the universal principle, "*ad quaestionem juris non respondent juratores; ad quaestionem facti non respondent iudices.*"⁹⁹ Freely translated, this meant that whether there is *any* reasonable evidence is a question for the judge; but whether the evidence is satisfactory is a question for the jury. Lord Mansfield went on to say:

The constitution trusts that, under the direction of a judge, [the jurors] will not usurp a jurisdiction which is not in their province. They do not know, and are not presumed to know, the law: they are not sworn to decide the law; they are not required to decide the law. . . . It is the duty of the judge, in all cases of general justice, to tell the jury how to do right, though they have it *in their power* to do wrong, which is a matter entirely between God and their own consciences.¹⁰⁰

The observation has been made, however, that problems persisted when judges exercised their rights to make observations upon the facts and give instructions to the jury on the law of the case.¹⁰¹ In particular, many judges, including those of great ability, did not confine their observations to summing up and commenting on the weight of the evidence, but instead gave "their opinions respecting the matters of fact; and although this mode of proceeding, when adopted, as it sometimes has been, in a supercilious spirit, may arouse the jealous feelings of a jury, and may excite them, in their anxiety to prove their independence, to pronounce an unjust verdict."¹⁰² To avoid such a result, the following advice was given by Lord Bacon to one Judge Hutton, which was, "you should be a light to jurors to open their eyes, but not a guide to lead them by their noses."¹⁰³

As time went on, the practice of judges commenting on the evidence met further resistance because the Stuart judges exceeded

98. *Id.*

99. 1 TAYLOR, *supra* note 92, § 22 n.10 (citing *Regina v. The Dean of Saint Asaph*, 100 Eng. Rep. 657 (K.B. 1784)). An earlier version is set forth in COKE, *supra* note 17, § 234.

100. 1 TAYLOR, *supra* note 92, § 22 n.10 (citing *Regina v. The Dean of Saint Asaph*, 100 Eng. Rep. 657 (K.B. 1784)).

101. 1 TAYLOR, *supra* note 92, § 25.

102. 1 *id.*

103. 1 *id.* § 25 n.1 (quoting VII BAC. WORKS 271 (Montague ed.)).

“the bounds of decency” while attempting to coerce juries.¹⁰⁴ The tide of popular resentment ran strong against the judges.¹⁰⁵ The jury was popularly regarded as a protection against the despotic power of the crown, and writers claimed that even wider powers belonged to the jury, which included being judges not only of the facts but also of the law.¹⁰⁶ Although the judges might advise the jurors as to the law, the jurors retained the right and power to determine for themselves whether the judge’s view of the law was correct.¹⁰⁷ During the treason trial of Colonel John Lilburne in 1649, the defendant reportedly proclaimed to the court: “The jury by law are not only judges of fact but of law also, and you who call yourselves judges of the law are no more but Norman intruders, and indeed and in truth, if the jury please, are no more but cyphers to pronounce their verdict.”¹⁰⁸

Important changes took place after the bloodless English revolution of 1688. The direct power of the crown over judges ceased when the Act of Settlement in 1700¹⁰⁹ provided that judges no longer held office at the pleasure of the crown but, upon good behavior, for life.¹¹⁰ Thereafter, in Britain, the confidence of the people in the judges underwent restoration,¹¹¹ and with it came a corresponding diminution in prevailing approbation of wide jury powers.¹¹² By the time of the American Revolution in 1776, the principle was well established in English law that juries would be limited to answering questions of fact and judges limited to questions of law.¹¹³ British judges again resumed commenting to juries upon the evidence, as before, and as at present.

Why wasn’t this practice carried over to America as part of the general common law assimilation?¹¹⁴ First, it is not entirely clear

104. Austin Wakeman Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 676 (1918).

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 676 (quoting VARAX, TRIAL OF COLONEL LILBURNE 107 (2d ed.)).

109. Scott, *supra* note 104, at 677 (citing 12 & 13 WILL. III ch.2).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. It is maintained that:

What the statute adopted was not just those precedents which happened to have already been announced by English courts at the close of the sixteenth century, but rather a system of law whose outstanding characteristic is its adaptability and capacity for growth. The common law which the statute adopted “is a system of elementary rules and of general judicial declarations of principles,

whether the practice of judicial commentary described by Blackstone as having developed in the 17th century was the established practice at all,¹¹⁵ and if so, whether the practice was established before 1606, when 4 James I existed. Perhaps more important, in America before the American Revolution, British colonial judges continued to serve by appointment of the King.¹¹⁶ Frequently, these colonial judges had little or no legal training and were ordinary laymen.¹¹⁷ As expected, they favored the crown in whatever controversy came before them.¹¹⁸ The jury was perceived by colonists as an important democratic body because it was composed of twelve laymen to decide a case instead of one layman who posed as a judge.¹¹⁹ In 1735, in fact, after a jury refused to submit to the instruction of the court in the trial of John Peter Zenger, the jury system became even more popularly regarded in the colonies, especially in the Jeffersonian period, and later in the Jacksonian period.¹²⁰ More than an element in the administration of justice, the American jury became a political symbol of democracy. Alexis de Tocqueville observed that, politically, the jury trial played an essential role in the development of sovereignty for the people of the United States.¹²¹

which are continually expanding with the progress of society, adapting themselves to the gradual changes of trade, commerce, arts, inventions and the exigencies and usages of the country."

Keenan v. McGuane, 150 N.E.2d 168, 177 (Ill.), *cert. denied*, 358 U.S. 828 (1958) (citation omitted) (quoting Amann v. Faigy, 114 N.E.2d 412, 418 (Ill. 1953)); *see also* Torres v. Walsh, 456 N.E.2d 601, 605 (Ill. 1983).

115. Reliance upon quotations from Blackstone and Sir Matthew Hale as authority for trial judges evaluating the evidence is questioned by one writer who claimed that "under the early common law in England, the judge merely summed up the facts and . . . the expression of opinions were limited to incidental and suppositional remarks, and not positive and vigorous expressions of opinions on the facts. So the common law is no true foundation for the . . . [reported] practice." Ashley Cockrill, *Trial By Jury*, 52 AM. L. REV. 823, 830 (1918).

116. Arthur T. Vanderbilt, *Judges and Jurors: Their Functions, Qualifications, and Selection*, 36 B.U. L. REV. 56 (1956).

117. Scott, *supra* note 104, at 677.

118. Vanderbilt, *supra* note 116, at 56.

119. *See id.* "Juries were popular in America as communal representatives in a day when the battle cry was 'No taxation without representation.'" *Id.*

120. *See* JACK B. WEINSTEIN AND MARGARET A. BERGER, 1 WEINSTEIN'S EVIDENCE ¶ 107[01], at 107-11 to -12 (1990).

121. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 291-97 (Phillips Bradley ed. 1945). Alexis de Tocqueville observed:

It would be a very narrow view to look upon the jury as a mere judicial institution; for however great its influence may be upon the decisions of the courts, it is still greater on the destinies of society at large. The jury is, above all, a political institution, and it must be regarded in this light in order to be duly appreciated.

Interestingly, an early draft of the American Constitution failed to guarantee trial by jury, as now embodied in the Seventh Amendment, which led Alexander Hamilton to remark that friends and adversaries of the proposed constitution "concur at least in the value they set upon the trial by jury."¹²² Hamilton ultimately justified the jury's role in decision-making as neutralizing the risk of corruption in judges.¹²³ John Adams's diary contains the statement that "the common people . . . should have as complete a control . . . in every judgment of a court of judicature" as they have in the other decisions of government.¹²⁴

Natural justice at that time was considered a better source for decision-making than the authority of a black letter maxim.¹²⁵ Since natural law was accessible to the ordinary man, the theory held, each jury must be allowed to decide for itself whether a particular rule or law was consonant with principles of higher law.¹²⁶

The status of the judiciary in America did not improve but worsened after ties with England were severed. There was an antipathy among the colonists for royal predilections.¹²⁷ Further, most colonial judges still had only minimal legal training and were frequently scorned by members of the bar.¹²⁸ In 1796, the North Carolina legislature enacted a law that forbade judges from expressing any opinion to the jury on whether a fact was sufficiently proved because this was considered the true province of the jury.¹²⁹ Other states followed suit.¹³⁰ The main argument advanced was that the judges' comments on the evidence effectively deprived the parties of a trial by jury, contrary to the democratic tradition.¹³¹ This was true, the argument went, even though the judge instructed the jury that it was responsible for resolving all matters of fact and was not bound by the judge's comments.¹³²

Moreover, the American colonists broadly supported the proposition that the jury, particularly in criminal cases, should decide

Id. at 293.

122. THE FEDERALIST NO. 83, at 456 (Alexander Hamilton) (Scott ed. 1894).

123. *Id.* at 458.

124. Comment, *supra* note 3, at 172 (quoting Diary (Feb. 12, 1771), in 2 THE WORKS OF JOHN ADAMS 253 (1850)).

125. ROSCOE POUND, CRIMINAL JUSTICE IN AMERICA 115-16 (1930).

126. *Id.* at 130.

127. See WEINSTEIN, *supra* note 120, ¶ 107[01], at 107-12 to -13.

128. *Id.* at 107-12.

129. *Id.*

130. *Id.*

131. *Id.* at 107-12 to -13.

132. *Id.* at 107-13; see also Kenneth M. Johnson, *The Province of the Judge in Jury Trials*, 12 J. AM. JUD. SOC. 76, 78-80 (1928).

questions of law as well as questions of fact.¹³³ This view continued even after the United States Constitution was adopted. Although there is some dispute as to its intent, even the United States Supreme Court submitted a case to a jury on an agreed set of facts in *Georgia v. Brailsford*.¹³⁴ In that case, Justice John Jay charged the jury with the presumption that, although the courts are the best judges of law, the jury had the "right to take upon . . . [itself] to judge of both, and to determine the law as well as the fact in controversy."¹³⁵ This rule prevailed in a number of state court jurisdictions as well.¹³⁶

The concept of the jury sitting as both judge of the law and of the facts underwent considerable change toward the end of the 19th century as a result of criticism leveled at juries by treatise writers.¹³⁷ These writers urged that judges be given more control over both questions of fact at the trial and announced verdicts because of the judge's expertise in sifting testimony in order to arrive at the truth.¹³⁸ Noted was the flood of complaints about the caliber of people who sat on juries, and influential members of the bar joined in the chorus of jury critics.¹³⁹ One century after *Georgia v. Brailsford*¹⁴⁰ was decided, the Supreme Court revisited the question and made clear that the jury was required to apply the law, as given to them by the judge, to the facts as the jury shall so find.¹⁴¹

Further, by 1898, the United States Supreme Court characterized the term "trial by jury" as referring to a trial by a jury under the common law and the Seventh Amendment of the United States Constitution, which meant, "a jury of twelve men, in the presence and *under the superintendence* of a judge empowered to instruct

133. Mark D. Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 590-91 (1939).

134. 3 U.S. (3 Dall.) 1 (1794) (an Article III, § 2 case, between the State of Georgia and citizens of South Carolina).

135. *Id.* at 4.

136. A fascinating history of the American jury's right to decide questions of law and fact is set forth in Comment, *supra* note 3, at 170.

137. See Campbell, *Some Hints on Defects in the Jury System*, 4 S.U. L. REV. 521 (1878). Campbell noted:

If we persist in applying in the court-room the hustings theory that reading and writing, with all wisdom, come by nature, and that every man whom in our reckless generosity we allow to dispose of our common interests at the ballot-box can be trusted to manage our private interests in the jury-box, we must take the consequences.

Id. at 533.

138. *Id.*

139. See *id.* at 533-34.

140. See *supra* notes 134-35 and accompanying text.

141. *Sparf v. United States*, 156 U.S. 51, 100-03 (1895).

them on the law *and to advise them on the facts*, and . . . to set aside their verdict if in his opinion it is against the law or the evidence."¹⁴²

Nevertheless, by 1928, the constitutions in eight states forbade judges to comment on the evidence.¹⁴³ In sixteen other states, the practice was forbidden by statute.¹⁴⁴ In thirteen additional states, the procedure was prohibited by court decisions.¹⁴⁵ The English common law practice remained effective in only ten states.¹⁴⁶ Subsequently, twenty-seven jurisdictions permitted a judge only to sum up the evidence heard by the jury, but not to evaluate it.¹⁴⁷ In the overwhelming majority of state courts then, trial judges continued to be precluded from commenting to juries on the weight to be given the evidence.¹⁴⁸

In the modern federal system, the judge has retained the power to comment to the jury on the evidence, to call its attention to those parts that the judge thinks are important, and to express the judge's opinions on the facts. This was made clear in *Quercia v. United States*,¹⁴⁹ in which the United States Supreme Court defined the federal judge's right to comment. Paradoxically, the limitations of a trial judge in commenting on the evidence, to the detriment of the privilege, was involved in *Quercia*. There, the judge told the jury:

You may have noticed . . . that the [defendant] wiped his hands during his testimony. It is a rather 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

142. *Capital Traction Co. v. Hof*, 174 U.S. 1, 13-14 (1899) (emphasis added). Of course, even then a judge could not set aside an acquittal of a criminal charge. *Id.*

143. *Johnson*, *supra* note 132, at 77.

144. *Id.*

145. *Id.*

146. *Id.*

147. ARTHUR T. VANDERBILT, *MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION* 226-29 (1949).

148. *Id.* at 229.

149. 289 U.S. 466 (1933). In *Quercia*, the Supreme Court stated:

In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. In charging the jury, the trial judge is not limited to instructions of an abstract sort. It is within his province, whenever he thinks it necessary, to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important; and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination.

Id. at 469 (citation omitted).

man said, except when he agreed with the Government's testimony, was a lie.¹⁵⁰

The conviction was reversed on the ground, among others, that the judge by his comments did not analyze the evidence, but added to it.¹⁵¹

The practice of comment in the federal courts is derived largely from British antecedents in the common law rather than by rule. Neither rule 30 nor rule 51 of the Federal Rules of Civil Procedure explicitly authorizes judges to sum up or comment on the evidence.¹⁵² The power has not been widely used in the United States. In 1966, even in federal and state courts where the English common law practice was permitted, trial judges summarized evidence to the jury in only eighteen percent of the cases and evaluated the evidence in only eight percent of the others.¹⁵³ In the federal courts alone, the district judges summarized evidence in only twenty-seven percent of the cases and otherwise commented in eighteen percent of the cases.¹⁵⁴

The power of the judge to sum up and evaluate the evidence in judicial comments to a jury is not without its detractors.¹⁵⁵ Among the several reasons for challenging this judicial power are the following: (1) the judge may be introducing the judge's own biases that may unduly influence a jury;¹⁵⁶ (2) the judge's view may compete with the views of the parties as adversaries;¹⁵⁷ (3) the jury may give undue importance to the judge's point of view simply because it is the judge's view;¹⁵⁸ (4) the judge may not be sufficiently experienced or trained to give objective advice to the jury;¹⁵⁹ (5) the judge has no better pipeline to the truth than the jury;¹⁶⁰ (6) biases possessed by individual jury members, chosen at random, tend to neutralize each other, whereas the bias of a judge is more difficult

150. *Id.* at 468.

151. *Id.* at 471-72.

152. *See* FED. R. CIV. P. 30, 51.

153. WEINSTEIN, *supra* note 120, ¶ 107[01], at 107-10 n.8 (citing HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 422 (1966)). No more recent studies in this regard appear to have been reported.

154. *Id.*

155. For an extensive collation of authorities arguing for and against judicial commentary, see *id.* ¶ 107[01], at 107-5 to -6.

156. Stephen A. Saltzberg, *The Unnecessarily Expanding Role of the American Trial Judge*, 64 VA. L. REV. 1, 35-36 (1978).

157. *Id.*

158. *Id.* at 38-39.

159. *See id.*

160. *Id.* at 37-38.

to counterbalance, neutralize, or control;¹⁶¹ and (7) the timing of judicial comment is also crucial because, it is claimed, "the impact of the final bits of evidence . . . is pervasive."¹⁶²

Another objection is directed to potential misuse of the power:

The power is too dangerous to be placed in the hand even of the upright and able men who can resist every temptation to do wrong but are not always immune to the great American fault, a dogmatic certainty in our opinions, which make us desire to force them down the throats of others. Until we are ready to discard the wisdom of our fathers and substitute one man's judgments for the jury system we must not extend the power of the trial judges to impress their views of the facts on the jury.¹⁶³

This commentator argues that the judgment of a jury will always be preferable to that of a judge because most Americans, including upstanding judges, are overconfident in their individual opinions.

A final objection is not directed at potential misuse of the power, but questions whether judicial commentary will have any impact at all upon the jury. A committee of trial lawyers questioned the value of judicial comment on the weight of the evidence where the trial judge is nevertheless required to instruct the jury that they are not bound by the judge's observations.¹⁶⁴

Statutory restrictions on the power of Illinois judges to comment on the weight of evidence first appeared with section 37 of the Practice Act, adopted in 1827.¹⁶⁵ The Illinois judges, however, were still permitted to sum up the evidence presented and its relationship to the issues, until the Act of 1847, which chilled all participation by the judge in the consideration of facts by the jury.¹⁶⁶

As late as 1931, the Illinois Supreme Court extensively reviewed the authorities on this subject and concluded that it was beyond the power of an Illinois trial court judge to comment upon the facts or weight of the evidence because it would be an unlawful arrogation of the jury's prerogatives, directly or indirectly, to the judge.¹⁶⁷ Interestingly, a two judge dissent was filed in that case, which

161. *Id.* at 36.

162. *Id.* at 38 (quoting Laurens Walker et al., *Order of Presentation at Trial*, 82 YALE L.J. 216, 222 (1972)).

163. WEINSTEIN, *supra* note 120, ¶ 107[01], at 107-14 (quoting Schumaker, *Comment on Evidence by Trial Judges*, 32 L. NOTES 5 (1928)).

164. *Id.* ¶ 107[01], at 107-13.

165. ILL. REV. LAWS, Practice § 37 (1827).

166. An Act to Amend the Practice Act, 1847 ILL. LAWS 63, § II. These restrictions were analyzed by the Chief Justice of the Illinois Supreme Court in 1916. See James H. Cartwright, *Present But Taking No Part*, 10 ILL. L. REV. 537 (1916).

167. *People v. Kelly*, 179 N.E. 898 (Ill. 1931).

would have found the statutory forbiddance of judicial comment unconstitutional.¹⁶⁸

Our present statute, paragraph 2-1107 of the Code of Civil Procedure¹⁶⁹ reads, in pertinent part: "The court shall give instructions to the jury . . . *only as to the law of the case.*"¹⁷⁰ Among the Illinois pattern jury instructions that may be given in this regard are introductory remarks, conveyed at the judge's discretion before jury selection and trial commencement, including the following:

You are the judges of the facts in this case, and in that connection *you are the judges of the credibility of the witnesses and the weight to be given to their testimony.* It is my duty to inform you of the applicable law. It is also my duty to determine what evidence you may consider. After the jury has heard all the evidence in this case, and the arguments of counsel, and received the written instructions from me as to the law, it will be the duty of the jury to determine the facts in the case from the evidence presented and the Court's instructions.¹⁷¹

Another jury instruction, to be given at the end of the trial, provides in part:

It is your duty to determine the facts, and to determine them from the evidence produced in open court. You are to apply the law to the facts and in this way decide the case. Neither sympathy nor prejudice should influence you. Your verdict must be based on evidence and not upon speculation, guess or conjecture.¹⁷²

Finally, the lengths to which an Illinois trial judge must go in disclaiming to the jury any intent to comment on the evidence is set forth in the following jury instruction: "Neither by these instructions nor by *any ruling or remark* which I have made *do I or have I meant to indicate any opinion as to the facts.*"¹⁷³

Are juries being deprived of essential guidance necessary to achieve just results in Illinois and in the other states that prohibit judicial summing up and comment upon the evidence? Apparently not. The United States Congress has declined to accept a proposed federal rule of evidence,¹⁷⁴ which would have formalized the prac-

168. *Id.* at 904 (De Young and Dunn, JJ., dissenting).

169. ILL. REV. STAT. ch. 110, para. 2-1107 (1989).

170. *Id.* para. 2-1107(a) (emphasis added).

171. ILLINOIS PATTERN JURY INSTRUCTIONS: Civil, at Intro-8 (3d ed. 1988) (emphasis added) [hereinafter IPI Civ. 3d].

172. IPI Civ. 3d, No. 1.01[3] at 1-50.

173. IPI Civ. 3d, No. 1.01[8] at 1-6 (emphasis added).

174. Proposed rule 105 as drafted by the United States Supreme Court. WEINSTEIN, *supra* note 120, ¶ 107[01], at 107-1.

tice now authorized in federal courts and in some state courts,¹⁷⁵ the ostensive reason being that the proposed rule contains "authority not granted to judges in most [s]tate courts."¹⁷⁶ Although Congress did not accept the rule, it did not interfere with the practice, to whatever extent it is now being pursued. As noted earlier, judicial comment is not widely exercised in either federal or state courts even where it is authorized.¹⁷⁷

It may be enlightening to consider observations made by judges who possess the power to comment on evidence to the jury, but who advocate caution in its use. One such judge, the Honorable Charles E. Wyzanski, Jr., made the following remarks upon this subject:

There are some who would say that the trial judge has not fulfilled his moral obligation if he merely states clearly the law regarding negligence, causation, contributory fault and types of recoverable damage. In their opinion it is his duty to analyze the evidence and demonstrate where the evidence seems strong or thin and where it appears reliable or untrustworthy. But most federal judges do not make such analyses. They are not deterred through laziness, a sentimental regard for the afflatus of the Seventh Amendment or even a fear of reversal. They are mindful that the community no longer accepts as completely valid legal principles basing liability upon fault. They perceive a general recognition of the inevitability of numerous accidents in modern life, which has made insurance widely available and widely used. Workmen's compensation acts and other social and economic legislation have revealed a trend that did not exist when the common law doctrines of tort were formulated. And the judges sense a new climate of public opinion which rates security as one of the chief goals of men.¹⁷⁸

Judge Wyzanski also observed that "[t]raditionally juries are the device by which the rigor of the law is modified pending the enactment of new statutes,"¹⁷⁹ and quoted from Lord Coke's maxim that "'the jurors are chancellors.'"¹⁸⁰

Another thoughtful comment was made by a state court judge,

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175. *Id.* ¶ 107[01], at 107-1 through 107-4.
 176. *Id.* ¶ 107[01], at 107-3.
 177. *See supra* notes 143-54 and accompanying text.
 178. Charles E. Wyzanski, Jr., *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1285-86 (1952).
 179. *Id.* at 1286.
 180. *Id.*; cf. Alexander Holtzoff, Remarks at the Judicial Administration Section of the American Bar Association convened at Atlantic City, New Jersey in *The Right of a Judge to Comment on the Evidence in His Charge to the Jury*, 6 F.R.D. 317, 320-26 (1947) (judicial commentary "guides" the jury and "is an instrument for achieving justice").

the Honorable Curtis Bok, whose court system permits comment extending to expression of opinions to the jury with respect to the evidence.¹⁸¹ Judge Bok stated:

[W]e can [express an opinion] in our state, provided we leave it entirely to the jury and tell them they are free to form their own opinion and are not bound by what we say. I say that when I am in favor of this right to comment, I am also very much in favor of the judge's sparing use of it. I think the better the judge the more sparingly it should be used.

To all of us, and particularly in the trial of cases, what we call the truth is a mysterious and elusive thing. I think most judges recognize that and the good judge more so. He is the one who commands the respect of the jury from the beginning and, therefore, every word that he utters has weight with the jurors. As for the bad judge who takes over the trial and tells the lawyers and everyone to sit down and who bullies the witness, I don't think it makes much difference what he says so far as the jury is concerned. We don't have that type of man to any great extent. The average judge is a conscientious person and he will largely stay away from expressing opinion, but where he is moved to do so in the interest of justice but tells the jury that they are free to disregard anything he says it may have a good effect.¹⁸²

Clear differences exist among judges with respect to their schooling, social and economic backgrounds, professional experiential histories, ethnic mores, religious training, and judicial experience.¹⁸³ There are varying complexities in the cases before them; the preparation levels and skills of the attorneys involved in the subject cases; and the nature, quality, and quantity of the evidence adduced.¹⁸⁴ For these reasons, initial and continuing judicial training programs would be in order before such power to influence juries is released to judges. Training would not only familiarize judges with appropriate techniques to employ, but would sensitize judges to their potential biases, give them some conditioning in objectivity, and sharpen their skills in communicating essential infor-

181. See *infra* note 182.

182. Curtis Bok, Remarks at the Judicial Administration Section of the American Bar Association convened at Atlantic City, New Jersey in *The Right of a Judge to Comment on the Evidence in His Charge to the Jury*, 6 F.R.D. 317, 319 (1947). Comments by the trial judge may be so prejudicial, however, that they can "not be cured by ritualistic statements telling the jury that the issues were solely for the jury to decide." *United States v. Assi*, 748 F.2d 62, 68 (2d Cir. 1984).

183. See Allen Hartman, "Judges May Differ": *Another Look at Judicial Decision-Making*, 76 ILL. B.J. 540, 541 (1988).

184. See Charles P. Curtis, *The Trial Judge and the Jury*, 5 VAND. L. REV. 150, 163 (1952).

mation to juries. Should the power to sum up and evaluate the evidence in the judge's commentary to the jury become more widespread, it is suggested that the foregoing steps first be taken to minimize potential abuses.

In the absence of compulsory judicial schooling in most jurisdictions today, the outlook for the establishment of such educational programs is not very bright. For practical reasons, perhaps the best course would be a continuation of the status quo with respect to judicial commentary to juries. Although our English common law heritage suggests that we allow broad judicial commentary on the evidence, our own democratic principles serve to remind us that jury independence may require limited judicial commentary. Presently, the status quo seems to preserve this as well.