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When, If Ever, Does Evidentiary Error Constitute Reversible Error

Margaret A. Berger

WHEN, IF EVER, DOES EVIDENTIARY ERROR CONSTITUTE REVERSIBLE ERROR?

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I. INTRODUCTION

When asked by the organizers of this Symposium to think about whether evidence rules matter, I elected to translate the topic into one considerably narrower: when, if ever, do evidence rules matter once the trial is over and the case is on appeal? Since I was also promised that I need not write a conventional law review article replete with state-of-the-art footnotes, I confess at the outset that my conclusions rest on a fairly narrow universe of 1990 appellate opinions, as well as some recent scholarly commentary and personal experience. I hope that others will find some of these remarks of sufficient interest to pursue the topic further. All of my observations relate to the federal courts and the Federal Rules of Evidence.

For purposes of this Essay I will concentrate primarily on those cases in which evidence rules seemingly matter the most on appeal—cases in which the reviewing court has specified that it is reversing because of an evidentiary error at trial.[1] Cases in which the court concluded that the error also amounted to a constitutional violation have been omitted because courts use a somewhat different standard in determining reversible error in these cases.[2]

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1. This list does not include habeas corpus applications from state court determinations in which the court discussed a Federal Rule in the process of finding an evidentiary error necessitating a granting of the writ. It also does not include cases in which the appellate court reversed a grant of summary judgment on the ground that the district court had erroneously concluded that evidence would not be available at trial. *See, e.g.*, *In re* Paoli R.R. Yard PCB Litig., 916 F.2d 829, 860 (3d Cir. 1990) (district court erroneously applied rules on expert testimony in concluding that plaintiff would not be able to prove causation because expert testimony was inadmissible), *cert. denied*, 111 S. Ct. 1584 (1991); DeLuca v. Merrell Dow Pharmaceuticals, Inc., 911 F.2d 941, 957 (3d Cir. 1990) (same). This list also excludes cases in which the appellate court remanded because it needed additional information to determine whether reversible error had occurred.

2. In the case of constitutional error, the courts use a higher standard—the error must be harmless beyond a reasonable doubt—and the burden is on the prosecution to show that error did not result, rather than on the appellant to demonstrate that the error affected his or her substantial rights. *See* Chapman v. California, 386 U.S. 18, 24 (1967); Kotteakos v. United States, 328 U.S. 750, 765 (1946). Recent Supreme Court opinions have, however, eroded some

Although more than twenty thousand cases a year were tried in the federal courts in the twenty-four month period between July 1, 1988 and June 30, 1990,[3] I could find only thirty cases decided in 1990 in which a court of appeals stated in an officially reported opinion that its reversal was due to an evidentiary error at trial.[4] Furthermore, this number,

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of the distinction between constitutional and non-constitutional error. *Chapman* appeared to require courts to reverse, even if overwhelming evidence had been presented, if the erroneously admitted or excluded evidence might have affected the verdict. Now, however, constitutional error is nevertheless harmless as long as the reviewing court is persuaded that "the record developed at trial establishes guilt beyond a reasonable doubt." Rose v. Clark, 478 U.S. 570, 579 (1986); *see also* Arizona v. Fulminante, 111 S. Ct. 1246, 1264 (1991) ("[Evidence] may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt."). In both constitutional and non-constitutional error cases, therefore, the focus may be more on whether the evidence against appellant is overwhelming rather than on the nature of the error. *See* JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 103[08] (1986 & Supp. 1991).

3. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANN. REP. OF THE DIRECTOR APP. I, at 43 (1989) (20,102 trials completed between July 1, 1988 and June 30, 1989); ADMINISTRATIVE OFFICE OF THE U.S. CTS., ANN. REP. OF THE DIRECTOR 161 (1990) [hereinafter 1990 ANN. REP.] (20,433 trials completed between July 1, 1989 and June 30, 1990). It is impossible to tell from these statistics how many of the verdicts in these trials were appealed and decided in 1990. A total of 39,734 appeals were filed in all circuits in the twelve-month period ending June 30, 1989, and a total of 40,898 appeals were filed in all circuits in the twelve-month period ending June 30, 1990. *See* 1990 ANN. REP., *supra*, at 105. One cannot tell from these statistics how many appeals followed trials, but included in the second period's totals are 2263 prisoner petitions, 1087 bankruptcies and 2578 administrative appeals which clearly did not entail appeals after a trial in the district court.

4. D.C. Circuit: United States v. Miller, 904 F.2d 65, 67-68 (D.C. Cir. 1990); Ealy v. Richardson-Merrell, Inc., 897 F.2d 1159, 1160 (D.C. Cir.), *cert. denied*, 111 S. Ct. 370 (1990). Second Circuit: United States v. Long, 917 F.2d 691, 704-05 (2d Cir. 1990); United States v. Colombo, 909 F.2d 711, 715 (2d Cir. 1990); United States v. Biaggi, 909 F.2d 662, 692 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1102 (1991). Third Circuit: Habecker v. Copperloy Corp., 893 F.2d 49, 53 (3d Cir. 1990). Fourth Circuit: United States v. Bolick, 917 F.2d 135, 140 (4th Cir. 1990); United States v. Simpson, 910 F.2d 154, 158 (4th Cir. 1990). Fifth Circuit: Dartez v. Owens-Illinois, Inc., 910 F.2d 1291, 1294 (5th Cir. 1990); Edmonds v. Illinois Cent. Gulf R.R., 910 F.2d 1284, 1288 (5th Cir. 1990); Davidson Oil Country Supply Co. v. Klockner, Inc., 908 F.2d 1238, 1249 (5th Cir. 1990). Sixth Circuit: Laney v. Celotex Corp., 901 F.2d 1319, 1321 (6th Cir. 1990). Seventh Circuit: Taylor v. National R.R. Passenger Corp., 920 F.2d 1372, 1377 (7th Cir. 1990); United States v. Wright, 901 F.2d 68, 70 (7th Cir. 1990). Eighth Circuit: Williams v. Wal-Mart Stores, Inc., 922 F.2d 1357, 1364 (8th Cir. 1990); Gulbranson v. Duluth, Missabe & Iron Range Ry., 921 F.2d 139, 143 (8th Cir. 1990); Fox v. Dannenberg, 906 F.2d 1253, 1260-61 (8th Cir. 1990); Hawkins v. Hennepin Technical Ctr., 900 F.2d 153, 156-57 (8th Cir.), *cert. denied*, 111 S. Ct. 150 (1990); United States v. Fawbush, 900 F.2d 150, 152 (8th Cir. 1990). Ninth Circuit: Dean v. Trans World Airlines, Inc., 924 F.2d 805, 811-12 (9th Cir. 1991); United States v. Gomez-Gallardo, 915 F.2d 553, 557 (9th Cir. 1990); Hudspeth v. Commissioner, 914 F.2d 1207, 1215 (9th Cir. 1990); United States v. Simtob, 901 F.2d 799, 804 (9th Cir. 1990); United States v. Tafollo-Cardenas, 897 F.2d 976, 981 (9th Cir. 1990). Tenth Circuit: United States v. Sullivan, 919 F.2d 1403, 1416 (10th Cir. 1990); Dugan v. EMS Helicopters, Inc., 915 F.2d 1428, 1435 (10th Cir. 1990); Graham *ex rel.* Graham v. Wyeth Labs., 906 F.2d 1399, 1419 (10th Cir.), *cert. denied*, 111 S. Ct. 511 (1990).

small as it is, is somewhat misleading. Examination of the cases indicates (1) that some of the alleged errors are not really evidentiary errors, and (2) that in a number of cases an element other than evidentiary error may have accounted for the appellate court's response despite the court's stated reliance on an erroneous evidentiary ruling. These thirty cases suggest that an evidentiary error alone is not very likely to induce the reviewing court to term the error "reversible" on the ground that the error affected a substantial right of a party.[5]

II. STATISTICAL SUMMARY OF 1990 CASES SPECIFICALLY REVERSED FOR EVIDENTIARY ERROR

Before turning to a more detailed analysis of the factors that are present in the thirty cases in addition to evidentiary error, a few general statistics are in order. Of the thirty reversals on the basis of evidentiary error, seventeen occurred in civil cases[6] and thirteen in criminal cases.[7]

Eleventh Circuit: United States v. Eason, 920 F.2d 731, 737-38 (11th Cir. 1990); Montgomery v. Aetna Casualty & Sur. Co., 898 F.2d 1537, 1541 (11th Cir. 1990); FDIC v. Marina, 892 F.2d 1522, 1528 (11th Cir. 1990).

5. When an appellant raises an evidentiary error, Federal Rule of Evidence 103 requires the reviewing court to consider (1) whether an erroneous ruling in admitting or excluding evidence was made below, (2) whether this error was appropriately brought to the trial court's attention, either by objection or offer of proof, and (3) whether a substantial right of a party was affected. FED. R. EVID. 103. If the court finds that no evidentiary error occurred below, it will not reverse on an evidentiary ground. If the court finds that no substantial right of a party was affected even though error occurred, it will likewise not reverse and will term the error "harmless." *See, e.g.*, Kotteakos v. United States, 328 U.S. 750, 764-65. If error occurred below and affected a substantial right, the court must decide further whether the error was appropriately raised below. If it was, the court may reverse, finding "prejudicial" or "reversible" error. *See, e.g.*, WEINSTEIN & BERGER, *supra* note 2, ¶¶ 103[06]-[07]. If the error was not brought to the trial court's attention, the court may still reverse, but only if it also determines that "plain error" occurred excusing the failure to make a proper record. *See id.* ¶ 103[07]. "Substantial rights" are nowhere defined in the Federal Rules of Evidence, or other governing authority. *See* 28 U.S.C. § 2111 (1988) ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."); *see also* FED. R. CIV. P. 61 ("[Court] must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."); FED. R. CRIM. P. 52(a) ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

6. *Dean*, 924 F.2d 805; *Williams*, 922 F.2d 1357; *Gulbranson*, 921 F.2d 139; *Taylor*, 920 F.2d 1372; *Dugan*, 915 F.2d 1428; *Hudspeth*, 914 F.2d 1207; *Dartez*, 910 F.2d 1291; *Edmonds*, 910 F.2d 1284; *Davidson Oil Country Supply Co.*, 908 F.2d 1238; *Graham*, 906 F.2d 1399; *Fox*, 906 F.2d 1253; *Laney*, 901 F.2d 1319; *Hawkins*, 900 F.2d 153; *Montgomery*, 898 F.2d 1537; *Ealy*, 897 F.2d 1159; *Habecker*, 893 F.2d 49; *Marina*, 892 F.2d 1522.

7. *Eason*, 920 F.2d 731; *Sullivan*, 919 F.2d 1403; *Long*, 917 F.2d 691; *Bolick*, 917 F.2d 135; *Gomez-Gallardo*, 915 F.2d 553; *Simpson*, 910 F.2d 154; *Colombo*, 909 F.2d 711; *Biaggi*, 909 F.2d 662; *Miller*, 904 F.2d 65; *Simtob*, 901 F.2d 799; *Wright*, 901 F.2d 68; *Fawbush*, 900 F.2d 150; *Tafollo-Cardenas*, 897 F.2d 976.

This ratio of criminal cases to civil cases, which is remarkably consistent with the ratio between criminal and civil trials,[8] dispels the notion, at least for 1990, that a considerably higher percentage of reversals will occur in criminal cases because a court will be more likely to find that a party's substantial rights have been affected.[9]

Taking at face value the appellate court's stated reason for reversing, the errors are almost evenly divided between errors in admitting evidence (sixteen)[10] and errors in excluding evidence (fourteen).[11] The courts were, however, much more likely to find reversible error in a criminal case because of the erroneous admission of evidence, and in a civil case because of the erroneous exclusion of evidence. In nine of the twelve criminal cases, error consisted of admitting evidence erroneously,[12] and in eleven of the seventeen civil cases error was attributed to the erroneous exclusion of evidence.[13]

The thirty opinions can also be classified with regard to the nature of the mistake the trial judge made in applying an evidentiary rule. The Federal Rules of Evidence in general have moved away from mechanical, per se solutions in favor of directives to judges to exercise their discretion

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8. 43.3% of the reversals occurred in criminal cases. In the twelve month period between July 1, 1989 and June 30, 1990, criminal cases accounted for 43.7% of all trials. 1990 ANN. REP., *supra* note 3, at 161 (8931 of 20,433 trials were criminal cases).

9. Certainly, the *Kotteakos* opinion suggested that findings of reversible error might be expected more frequently in criminal cases. Kotteakos v. United States, 328 U.S. 750, 762-63 (1946). In discussing how the reviewing court should interpret the harmless error statute, the Court wrote:

> Necessarily the character of the proceeding, what is at stake upon its outcome, and the relation of the error asserted to casting the balance for decision on the case as a whole, are material factors in judgment. The statute in terms makes no distinction between civil and criminal cases. But this does not mean that the same criteria shall always be applied regardless of this difference.

Id.

10. *Gulbranson*, 921 F.2d 139; *Taylor*, 920 F.2d 1372; *Eason*, 920 F.2d 731; *Long*, 917 F.2d 691; *Bolick*, 917 F.2d 135; *Dugan*, 915 F.2d 1428; *Gomez-Gallardo*, 915 F.2d 553; *Dartez*, 910 F.2d 1291; *Edmonds*, 910 F.2d 1284; *Simpson*, 910 F.2d 154; *Colombo*, 909 F.2d 711; *Wright*, 901 F.2d 68; *Fawbush*, 900 F.2d 150; *Montgomery*, 898 F.2d 1537; *Ealy*, 897 F.2d 1159; *Tafollo-Cardenas*, 897 F.2d 976.

11. *Dean*, 924 F.2d 805; *Williams*, 922 F.2d 1357; *Sullivan*, 919 F.2d 1403; *Hudspeth*, 914 F.2d 1207; *Biaggi*, 909 F.2d 662; *Davidson Oil Country Supply Co.*, 908 F.2d 1238; *Graham*, 906 F.2d 1399; *Fox*, 906 F.2d 1253; *Miller*, 904 F.2d 65; *Laney*, 901 F.2d 1319; *Simtob*, 901 F.2d 799; *Hawkins*, 900 F.2d 153; *Habecker*, 893 F.2d 49; *Marina*, 892 F.2d 1522.

12. *Eason*, 920 F.2d at 737-38; *Long*, 917 F.2d at 704-05; *Bolick*, 917 F.2d at 140; *Gomez-Gallardo*, 915 F.2d at 557; *Simpson*, 910 F.2d at 158; *Colombo*, 909 F.2d at 715; *Wright*, 901 F.2d at 70; *Fawbush*, 900 F.2d at 152; *Tafollo-Cardenas*, 897 F.2d at 981.

13. *Dean*, 924 F.2d at 811-12; *Williams*, 922 F.2d at 1364; *Hudspeth*, 914 F.2d at 1215; *Davidson Oil Country Supply Co.*, 908 F.2d at 1249; *Graham*, 906 F.2d at 1419; *Fox*, 906 F.2d at 1260-61; *Laney*, 901 F.2d at 1321; *Hawkins*, 900 F.2d at 156-57; *Habecker*, 893 F.2d at 53; *Marina*, 892 F.2d at 1528.

in making the particular determinations specified by the rule in question.[14] Most of the Federal Rules set forth general principles or "standards" rather than inflexible "rules" of law.[15] Nevertheless, some of the Federal Rules, such as the great majority of the class hearsay exceptions, still employ a per se "rules" approach; hearsay offered pursuant to one of these exceptions is admissible only if certain specified conditions are satisfied.[16] Other Federal Rules operate as "standards." They require the court to exercise its judgment in order to determine whether the rule will apply. The residual hearsay exception, for instance, directs the court to find whether "equivalent circumstantial guarantees of trustworthiness" exist.[17] Some of the Federal Rules utilize a mixed approach of rule and standard. Rule 608(b), for example, contains per se limitations, such as the exclusion of extrinsic evidence and the requirement that the evidence be relevant to "truthfulness," intertwined with a directive to the court to exercise discretion.[18]

Appellate courts often speak of reviewing the trial court's discretion regardless of whether they are dealing with a rule or a standard or a mixture of the two. If we disregard the courts' terminology and look instead at the nature of the particular provision the court is construing, we see that in twelve of the 1990 reversals the trial court had erred in applying a per se provision,[19] and in twelve other cases it had inappropri-

14. *See* David P. Leonard, *Power and Responsibility in Evidence Law*, 63 S. CAL. L. REV. 937 (1990) (suggesting it is more likely that truth will be found if judges use their own wisdom and sensitivity); Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 IOWA L. REV. 413 (1989) (suggesting that trial court should have discretion to admit all relevant evidence).

15. For a discussion of the distinction between "rules" and "standards," see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1688 (1976). The author states:

> The first dimension of rules is that of formal realizability .... The extreme of formal realizability is a directive to an official that requires him to respond to the presence together of each of a list of easily distinguishable factual aspects of a situation by intervening in a determinate way ....
>
> ....
>
> ... The application of a standard requires the judge both to discover the facts of a particular situation and to assess them in terms of the purposes or social values embodied in the standard.

Id. at 1687-88; *see also* H.L.A. HART, THE CONCEPT OF LAW 121-32 (1961) (distinguishing between "plain" cases that clearly fit within general rule and problematic cases which require interpretation of rule).

16. *See, e.g.*, FED. R. EVID. 803(1)-(5).

17. *See, e.g.*, FED. R. EVID. 803(24); FED. R. EVID. 804(b)(5).

18. David P. Leonard, *Appellate Review of Evidentiary Rulings*, 70 N.C. L. REV. (forthcoming 1992) (manuscript at 13-18, on file with author) (reviewing opinions construing Rule 608).

19. Included in this footnote are cases in which the court made an evidentiary determination that does not rest directly on a Federal Rule of Evidence. Dean v. Trans World Airlines,

ately exercised its discretion.[20] In one case the court found numerous

Inc., 924 F.2d 805, 811 (9th Cir. 1991) (holding error not to have admitted misdemeanor conviction for failure to file complete tax return because it involves dishonesty within meaning of Rule 609(a)(2)); Gulbranson v. Duluth, Missabe & Iron Range Ry., 921 F.2d 139, 142 (8th Cir. 1990) (holding error in violation of Rule 801(d)(2)(D) to have admitted minutes of safety committee where proffering party had failed to establish that statements related to matter within scope of agent's employment); Taylor v. National R.R. Passenger Corp., 920 F.2d 1372, 1375 (7th Cir. 1990) (holding error to permit impeachment of witness by contradiction as to collateral or irrelevant matter elicited on cross-examination); United States v. Eason, 920 F.2d 731, 735 (11th Cir. 1990) (holding error to have allowed conviction of someone other than witness himself to be admitted to impeach witness); United States v. Sullivan, 919 F.2d 1403, 1416 (10th Cir. 1990) (holding error due to prosecution's repeated use of evidence that had never been shown to satisfy Rule 404(b)); United States v. Bolick, 917 F.2d 135, 140 (4th Cir. 1990) (holding error to admit prior consistent statements before any of declarants had taken stand); Dugan v. EMS Helicopters, Inc., 915 F.2d 1428, 1432 (10th Cir. 1990) (holding error not to have admitted plaintiff's complaint in other proceeding as admission pursuant to Rule 801(d)(2), and for impeachment, as it contained allegations inconsistent with plaintiff's position in present case); United States v. Gomez-Gallardo, 915 F.2d 553, 556-57 (9th Cir. 1990) (holding error to have permitted testimony by witness called for sole purpose of impeaching him with otherwise inadmissible evidence); Dartez v. Owens-Illinois, Inc., 910 F.2d 1291, 1294 (5th Cir. 1990) (holding error to have admitted excerpts from post-trial briefs in different case as admissions of party opponent pursuant to Rule 801(d)(2) even though circuit had previously held that briefs cannot be so characterized); United States v. Miller, 904 F.2d 65, 68 (D.C. Cir. 1990) (holding testimony before grand jury by witness who claimed Fifth Amendment privilege at trial satisfied former testimony exception in Rule 804(b)(1) and should have been admitted against government); United States v. Tafollo-Cardenas, 897 F.2d 976, 979-80 (9th Cir. 1990) (holding witness's prior inconsistent statements to DEA agents should have been excluded as satisfying neither Rule 801(d)(1)(A) nor Rule 804(b)(3)); FDIC v. Marina, 892 F.2d 1522, 1526-27 (11th Cir. 1990) (holding error to exclude as hearsay statement which was not being offered for its truth but to show parties' beliefs).

20. Williams v. Wal-Mart Stores, Inc., 922 F.2d 1357, 1361 (8th Cir. 1990) (holding error to have precluded plaintiff from asking treating physician whether in his expert opinion plaintiff had experienced trauma in lower back); Hudspeth v. Commissioner, 914 F.2d 1207, 1214 (9th Cir. 1990) (holding tax court should have admitted evidence relating to valuation of timber made in settlement of another case as relevant to Commissioner's bias and therefore admissible under bias exception to Rule 408); Edmonds v. Illinois Cent. Gulf R.R., 910 F.2d 1284, 1287 (5th Cir. 1990) (holding error to permit psychologist to testify that stress worsened plaintiff's coronary artery disease); United States v. Simpson, 910 F.2d 154, 158 (4th Cir. 1990) (weapons charge; holding error to have admitted evidence that defendant met drug courier profile); United States v. Colombo, 909 F.2d 711, 713 (2d Cir. 1990) (conspiracy to commit robberies; holding error to have admitted evidence that one of robbery victims had been raped and sodomized); United States v. Biaggi, 909 F.2d 662, 691 (2d Cir. 1990) (holding error to have excluded evidence that defendant had rejected government's offer of immunity as proof of "consciousness of innocence"), *cert. denied*, 111 S. Ct. 1102 (1991); Fox v. Dannenberg, 906 F.2d 1253, 1257 (8th Cir. 1990) (holding error to have excluded opinion of two engineers with considerable training and experience with regard to accident reconstruction as to who was driving car); United States v. Simtob, 901 F.2d 799, 804 (9th Cir. 1990) (holding error for court to have refused to listen to tape recording after close of evidence; tape was relevant to perjury by main prosecution witness and could have been used for impeachment and cross-examination); United States v. Wright, 901 F.2d 68, 70 (7th Cir. 1990) (narcotics prosecution; holding error to admit wiretapped conversation made six months after charged sales in which defendant boasted of being drug dealer); Hawkins v. Hennepin Technical Ctr., 900 F.2d 153,

errors of both types.[21]

In the remaining five cases, although the courts attributed the reversals to mistaken evidentiary rulings, a closer look reveals that the faulty conclusions below depended more on the trial court's misapprehension about the applicable substantive law than on errors relating to evidentiary principles.

III. FACTORS IN EVIDENTIARY ERROR REVERSALS

A. Substantive Law Errors

Rule 401 states that " '[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[22] This definition requires the trial court to undertake two different explorations. First, it must discover which propositions of fact are of consequence or material. The conclusions reached will be dictated not by the rules of evidence but by the applicable substantive law. Second, the trial court must engage in an analysis to ascertain whether the proffered item of evidence alters the probability of the identified consequential or material facts. This examination, in which the court considers and evaluates evidentiary hypotheses in order to determine whether the proffered evidence could affect the trier's evaluation of the probability of a consequential fact, is central to the law of evidence.

When an appellate court reverses because a trial judge has excluded an entire line of proof due to a misconception of the governing law, there is no need to assess the validity of the trial judge's evidentiary hypothesis. The trial court's error does not consist of failing to understand how a proffered item of evidence makes a matter properly provable in the case

156 (8th Cir.) (action claiming gender discrimination and unlawful retaliatory discharge after complaint of sexual harassment; holding error to have excluded details about alleged harassment even though harassment was not charged because atmosphere of condoned sexual harassment in workplace increased likelihood of retaliation after complaint), *cert. denied*, 111 S. Ct. 150 (1990); United States v. Fawbush, 900 F.2d 150, 152 (8th Cir. 1990) (prosecution for aggravated sexual assault; holding error to have admitted testimony by defendant's daughters that he had sexually abused them as children and had impregnated one of them nine years prior to trial); Habecker v. Copperloy Corp., 893 F.2d 49, 52-53 (3d Cir. 1990) (holding error to have excluded plaintiff's expert on causation because he lacked engineering degree in light of expert's extensive background in health and safety sciences).

21. United States v. Long, 917 F.2d 691, 697-701 (2d Cir. 1990) (prosecution for RICO violation; holding possible error to have admitted tape recordings of co-conspirators' conversations under 18 U.S.C. § 2518(8)(1)'s sealing requirements and holding error to have admitted expert testimony on organized crime).

22. FED. R. EVID. 401.

more or less probable. Instead, the court has made a mistake about the applicable substantive law. Although a court has discretion to exclude evidence pursuant to Rule 403[23] when the probative value of the proffered evidence is substantially outweighed by the factors specified in the rule, the trial court will seriously misestimate probative value if it fails to understand the issue to which the proof is directed. Consequently, its wide discretion under Rule 403, or other rules, is unlikely to cure an error of exclusion based on a misperception of the material issues in controversy.[24] Although the appellate court may state that the court abused its discretion under Rule 403 in excluding the evidence, the source of the error is the mistake about the governing substantive law.

In *Laney v. Celotex Corp.*,[25] for instance, an action seeking damages for injuries sustained from alleged asbestos exposure, the trial court refused to allow the defendant to introduce evidence that plaintiff had been exposed to asbestos manufactured by others than the lone defendant. The trial court concluded that the evidence would be confusing and misleading under Rule 403 because "Defendant could not disprove Plaintiff's case by showing that there were other causes unless Defendant had testimony that they were the sole cause."[26] The appellate court found that the trial judge had misconstrued the governing state law which held defendant liable only if his negligence was a *substantial* factor in producing the injury, an analysis that "cannot be made in a vacuum."[27] The exclusion of evidence relating to the fiber content of the other products to which plaintiff had been exposed prevented the jury from being able to ascertain which, if any, were the substantial factors. Thus, although the appellate court stated that it was reversing for an abuse of discretion in applying Rule 403, the reversal was, in fact, really attributable to the trial court's misunderstanding of state substantive law.[28] In addition to *Laney*, four other reversals appear to hinge in large measure on misconcep-

23. Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

24. *See* Montgomery v. Aetna Casualty & Sur. Co., 898 F.2d 1537, 1541 (11th Cir. 1990) (discretion to admit expert testimony does not mean that court did not err when it allowed expert to testify about issue that court rather than jury was required to decide).

25. 901 F.2d 1319, 1320 (6th Cir. 1990).

26. *Id.*

27. *Id.* at 1321.

28. The court also expressed doubt, but did not decide, whether the trial court had erred with regard to an evidentiary analysis of relevancy when it allowed certain letters to be introduced as relevant to defendant's knowledge. *Id.* at 1321 & n.1.

tions about the governing law.[29]

The opinions in the remaining twenty-five cases in which the reversal was attributed to evidentiary error reveal a number of recurring patterns which perhaps explain why these few appeals succeeded when the appellate courts affirmed more than two hundred other cases in which appellant objected to an evidentiary ruling below.[30]

B. Prosecutorial Abuse

In nine of the cases, or almost one-third of all reversals and close to seventy percent of the thirteen reversals in the criminal cases, the appellate court devoted a portion of its opinion to details and complaints about prosecutorial behavior which it explicitly deplored.[31] The conduct

29. For example, in Davidson Oil Country Supply Co. v. Klockner, Inc., 908 F.2d 1238 (5th Cir. 1990), the plaintiff sued for a breach of warranty. The trial court refused to allow any evidence of other failures with regard to the particular well tubing offered by the plaintiff to show a latent defect in the tubing. *Id.* at 1243. The defendant argued that case law declaring such evidence relevant to the question of merchantability was inapplicable in its case because it was the seller rather than the manufacturer of the product. *Id.* at 1245. Quoting from the Texas Uniform Commercial Code (UCC), the court concluded that this distinction was irrelevant since the defendant had made the warranty as the seller. *Id.* at 1245 n.18.

Similarly, in Graham v. Wyeth Labs., 906 F.2d 1399 (10th Cir.), *cert. denied*, 111 S. Ct. 511 (1990), an action against the manufacturer of the diptheria/tetanus/pertussis (DTP) vaccine, the trial court excluded the plaintiff's experts on the ground that they possessed no expertise with regard to whether the vaccine could cause the type of damage suffered by the child. *Id.* at 1408. The defendant was proffering experts to testify regarding an intervening cause, that is, that a pre-vaccination stroke had caused the child's injuries. *Id.* at 1409. The court held that the trial judge could not employ its discretion with regard to expert testimony "to restrict viable and relevant theories offered by a party." *Id*

In Montgomery v. Aetna Casualty & Sur. Co., 898 F.2d 1537 (11th Cir. 1990), the court held that under Florida law, the judge, rather than the jury, should have decided whether the insurer's duty to defend encompassed suit against the Internal Revenue Service. *Id.* at 1540-41 & nn.8-9. Consequently, it was error to permit the plaintiff's expert to give an opinion as to whether the insurer had an obligation to hire tax counsel. *Id.* at 1541. The court ordered judgment *non obstante veredicto* in favor of the insurer after construing the contract. *Id.*

Finally, in Ealy v. Richardson-Merrell, Inc., 897 F.2d 1159 (D.C. Cir.), *cert. denied.*, 111 S. Ct. 370 (1990), the court held that it was error to have admitted expert testimony as to whether Bendectin caused the child's birth defects. *Id.* at 1164. In a previous case, Richardson v. Richardson-Merrell, Inc., 857 F.2d 823 (D.C. Cir. 1988), *cert. denied*, 493 U.S. 882 (1989), the court had held that as a matter of law, based on present epidemiological findings, Bendectin was not a human teratogen. *Id.* at 827.

30. A Westlaw search that sought all cases in which the appellate court affirmed and the opinion contained a headnote discussing a federal rule of evidence as well as the terms "harmless error" or "abuse of discretion" produced 244 entries.

31. United States v. Eason, 920 F.2d 731, 735-36, 737 n.9, 738 n.11 (11th Cir. 1990); United States v. Sullivan, 919 F.2d 1403, 1412-16 & 424-28 (10th Cir. 1990); United States v. Bolick, 917 F.2d 135, 140-42 (4th Cir. 1990); United States v. Gomez-Gallardo, 915 F.2d 553, 556 (9th Cir. 1990); United States v. Simpson, 910 F.2d 154, 156-58 (4th Cir. 1990); United States v. Colombo, 909 F.2d 711, 714-15 (2d Cir. 1990); United States v. Miller, 904 F.2d 65,

complained of included mischaracterizations or disregard of the applicable law in oral argument or briefs,[32] the deliberate flouting of the trial judge's evidentiary rulings,[33] inappropriate argument to the jury that compounded the evidentiary error[34] and manipulation of the evidentiary rules to produce the illusion that there was considerably more evidence against the defendant than actually existed.[35] In some of the cases, more

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67-68 (D.C. Cir. 1990); United States v. Simtob, 901 F.2d 799, 802, 804-06 (9th Cir. 1990); United States v. Wright, 901 F.2d 68, 70 (7th Cir. 1990).

32. *Eason*, 920 F.2d at 735 (government deliberately introduced offending evidence citing case law inappropriately); *Miller*, 904 F.2d at 67 (prosecutor's brief mischaracterized his statements at trial); *Wright*, 901 F.2d at 70 (at oral argument, in disregard of Rule 404 and Seventh Circuit case directly on point, government attorney argued that government "believes that evidence of other crimes should be admissible if relevant, and it is relevant if the other crime is of the same general character (e.g., trafficking in cocaine) as the crime with which the defendant is charged"). For a discussion of the court's comment in *Miller*, see *infra* note 36 and accompanying text; for a discussion of *Eason*, see *infra* notes 37-39 and accompanying text.

33. In the *Colombo* case, for example, after a mistrial, the prosecutor acknowledged that introduction of evidence at retrial that the robbery victim was raped and sodomized might warrant reversal and that consequently he would not go into any details at the second trial. 909 F.2d at 714-15. He indicated that he would ask only if the victim had been "sexually assaulted." *Id.* at 714. Nevertheless, at the second trial, the prosecutor "repeatedly harped" "on the rape and sodomy of a robbery victim—despite his acknowledgment of the risk and assurance that he would not introduce such proof." *Id.* at 714-15; *see also Sullivan*, 919 F.2d at 1412-17 (prosecution elicited evidence of uncharged crimes despite prior warnings by judge about use of Rule 404(b) evidence and despite sustained objections to testimony).

34. In *Sullivan* the prosecutor insinuated in closing that the trial judge had found the evidence sufficient or else the charges would have been dismissed. 919 F.2d at 1425-26. Furthermore, the prosecutor read from a purported transcript of an inaudible tape, although the transcript had never been found to be accurate or admitted into evidence. *Id.* at 1425. There was also a *Brady* claim with regard to handwritten notes that the government had destroyed. *Id.* at 1426. On remand, the trial court was directed to hold an evidentiary hearing with regard to this claim. *Id.* at 1427-28; *see also Simtob*, 901 F.2d at 805-06 (prosecutorial vouching for chief prosecution witness; evidentiary error consisted of court's refusal to reopen trial to review tape relevant to witness's credibility).

35. In *Bolick* the government's first witness testified that each of the government's three witnesses to the drug transaction had told him the defendant was guilty. 917 F.2d at 137. Although the statements ultimately might have been admissible as prior consistent statements after the witnesses had testified and been impeached, the court found reversible error in the prosecutor's trial tactic which doubled the number of times the jury heard that the defendant did it, especially since the statements came from the mouth of a law enforcement official. *Id.* at 140-43.

In *Gomez-Gallardo* the government called its witness, knowing in advance what he would say, solely for the purpose of impeaching him and then asked the jury to consider him a liar. 915 F.2d at 556. The court stated: "[T]he government's actions directly undermined the judicial process . . . . The adversarial system breaks down when the defendant is prevented from defining and presenting his own case and the prosecution proves guilt by creating and then destroying its own creation." *Id.*

In *Simpson* the government "grossly exaggerated" the probative value of a drug courier profile where there was no evidence linking the defendant—charged with unlawful possession of a firearm and attempting to board a plane with a concealed weapon—to the drug trade. 910

than one type of prosecutorial misconduct occurred. The appellate characterizations of the United States Attorney's conduct ranged from some fairly mild sarcasm[36] to considerable outrage. In *United States v. Eason*,[37] for example, the court was so offended at the prosecutor's deliberate introduction of the witness's father's prior conviction and its rationalization of the error[38] that it felt "obliged again to remind the United States Attorney's office in this district as well as other federal prosecutors of the duties of a United States Attorney in a criminal prosecution."[39] In all of these cases the court was clearly annoyed with the prosecution. How great a role this displeasure played in leading to a reversal of course cannot be ascertained. Yet the reviewing court's willingness to make disapproving comments about the prosecutor's behavior is perhaps some indication that these cases have been singled out for reversal not merely because of the evidentiary mistake but in hopes of reforming the prosecution's attitude.

C. Behavior of Counsel in Civil Cases

Although counsel's obligation in a civil case differs from that of a government attorney, irritation at counsel's behavior may perhaps play a role in civil cases as well. In a number of the opinions, the appellate court noted ways in which appellee's counsel misrepresented the way in

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F.2d at 157. The government suggested that the defendant was an armed drug courier on the way to the source city. *Id.* at 158.

Finally, in *Wright* the police waited six months after allegedly observing sales of a few bags of crack with which the defendant was charged before putting a telephone tap on his phone. 901 F.2d at 70. At trial the prosecution played a recorded conversation in which the defendant boasted of being a wholesale dealer. *Id.* at 69. The tape's only relevance was to prove that the defendant may have been guilty of some similar crimes. *Id.* at 70.

36. *Miller*, 904 F.2d at 67. The court stated: "The government, somewhat disingenuously in its brief to this court, claims the prosecutor 'conceded' before the district judge that Matarazzo had *not* waived his privilege. (Since the government was attempting to prevent Matarazzo's testimony at trial, that is an interesting use of the word 'conceded.')" *Id.* The opinion further notes the prosecutor's "contemptuous" objection, calling "absurd" defense counsel's request for the admission of grand jury testimony of an unavailable witness pursuant to Rule 804(b)(1). *Id.* at 67-68. The court found that the prosecutor's response and the trial court's prompt denial of the request excused defense counsel's failure to refer specifically to Rule 804(b)(1). *Id.* at 67.

37. 920 F.2d 731 (11th Cir. 1990).

38. The court was also clearly annoyed with the United States Attorney's legal argument in support of its position. It termed the government's reliance on a particular case as "disingenuous," *id.* at 735 n.4, and then added, "[i]ncredibly, the government also cites . . . . ," *id.* at 735 n.6.

39. *Id.* at 735. The court then quoted from a prior circuit opinion about the prosecutor's "heavy obligation to the accused." *Id.* at 736 (quoting Dunn v. United States, 307 F.2d 883, 885 (5th Cir. 1962)).

which evidence had been used.[40] Acknowledgement of the error, followed by a harmless error argument, might perhaps have proved more effective.

D. Behavior of the Trial Court

Appellate courts clearly are far more reticent in discussing the conduct of the trial court than the actions of the prosecutor, but every now and then a revealing comment emerges. In some instances, one can read between the lines a suggestion that the judge was not sufficiently even-handed. Reviewing courts seem particularly concerned about impartiality with regard to expert testimony.

In *Williams v. Wal-Mart Stores*,[41] for example, the court found plain error in the trial judge's refusal to permit plaintiff's experts to state their opinions on medical causation. The details in the majority's opinion[42] about how these rulings were made suggest the reversing judges' concern that the district judge was not sufficiently dispassionate and conveyed his assessment of the case to the jury.[43]

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40. *See* Gulbranson v. Duluth, Missabe & Iron Range Ry., 921 F.2d 139, 142-43 (8th Cir. 1990) (plaintiff argued on appeal that statements had been offered for non-hearsay purpose of showing knowledge on part of defendant rather than for truth of matter asserted, but on closing argument plaintiff's attorney not only used statements for truth but suggested that they warranted "more credibility than the live testimony of the witnesses"); Dartez v. Owens-Illinois, Inc., 910 F.2d 1291, 1292-93 (5th Cir. 1990) (noting that plaintiffs were "[u]ndaunted by Hardy" (the controlling case) and then argued in their brief that "highly unusual circumstances" that *Hardy* indicated might justify exception applied but did not specify any unusual circumstances); *see also* Taylor v. National R.R. Passenger Corp., 920 F.2d 1372, 1377 (7th Cir. 1990) (noting that appellee in its brief mischaracterized evidence as impeachment evidence in violation of principles in prior opinion of court; evidence of prior back injury inadmissible both substantively and for impeachment used to suggest that plaintiff had preexisting injury and "this tenuous evidence was used to bootstrap argument that [plaintiff] lied on his employment application").

41. 922 F.2d 1357 (8th Cir. 1990).

42. The dissenting judge agreed that the trial judge had erroneously excluded evidence on medical causation but was unwilling to find plain error "on a barren record" or to overlook plaintiff's lawyer's failure to make an offer of proof as to what the experts would have testified. *Id.* at 1365 (Fagg, J., dissenting). The dissenting judge found no miscarriage of justice in the district court's rulings. *Id.* at 1364-65 (Fagg, J., dissenting).

43. The opinion states:

> The district court's repeated refusal to allow appellant to ask his expert witnesses their opinion regarding the cause of appellant's injuries and then its refusal to allow appellant to rephrase the question . . . denied appellant a fair opportunity to litigate his case. Moreover, while the district court denied appellant the opportunity to elicit from his own medical experts their opinion on the cause of his injuries, it did allow Wal-Mart on cross-examination to question the doctors about the likely cause of appellant's injuries.
>
> The district court responded harshly to appellant's questioning of his expert witnesses. Indeed, the record indicates that the district court warned appellant's counsel

In other cases as well, the appellate court seems to be suggesting that one party was somehow favored to the detriment of the other.[44] Particular concern is expressed when the trial judge excludes evidence on a particular issue but admits a similar type of evidence offered by the opponent on the same issue.[45]

There are also cases in which the evidentiary error seems to confirm that matters were not proceeding appropriately at trial, and that the trial judge did not have matters sufficiently well in hand. In *United States v. Long*,[46] for instance, the trial judge made a number of evidentiary errors. The judge allowed questions of character witnesses that required them to

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that he would be held in contempt if he brought up again the issue of whether a medical expert can give his or her opinion on the cause of the injuries treated . . . .

Appellant may not have been a credible plaintiff. However, that was for the jury, not the district court, to decide.

Id. at 1362. The opinion also quotes twice, in text and footnote, what the trial judge told the jury when he erroneously ruled that the plaintiff's expert would not be allowed to explain the basis of his opinion and the substance of it:

This man is not entitled, in my opinion, to pass on what he was told as the basis for it. He's supposed to tell you what he found and so on. We're not—he's not—we're not testing the credibility of the plaintiff with respect to that. A lot of things that the people [sic] tell doctors isn't true. You know that and he'll tell you that too.

Id. at 1363 & n.5.

44. *See, e.g.*, Habecker v. Copperloy Corp., 893 F.2d 49 (3d Cir. 1990). In *Habecker*, in finding that the lower court erred in excluding one of the plaintiffs' experts, the court acknowledged that the testimony may have been cumulative but noted that the "defendants collectively offered the testimony of *three* witnesses on the issue." *Id.* at 53. Furthermore, the court responded to the plaintiffs' complaints that the district court had continually admitted evidence about industry standards, government regulations, and other "state of the art" matters by stating that "[t]he district court has recognized the problem, and we are confident that it will carefully limit the admissibility of such evidence on retrial." *Id.*; *see also* Fox v. Dannenberg, 906 F.2d 1253, 1257-58 (8th Cir. 1990). *Fox* involved a wrongful death action in which the issue of who was driving the car was crucial. The appellate court held that the trial court erred in excluding the plaintiff's expert on the identity of the driver while allowing the defense expert to testify that it was impossible to determine who was driving based on the facts and circumstances of the accident. *Id.* at 1257. The court explained: "We consider the district court's admission of [defendant's] expert's testimony that it is impossible to conclude who was driving the car to be error only in light of the district court's contemporaneous ruling excluding [plaintiff's] experts' testimony as to who was driving." *Id.* at 1258. The court found additional reversible error in the instruction the trial judge gave the jury, authorizing them to infer that the same driver who had been driving at the beginning of the trip some four hours previously was still driving at the time of the accident, and in the judge's refusal to instruct as to res ipsa loquitur. *Id.* at 1258-60.

45. United States v. Biaggi, 909 F.2d 662, 690-93 (2d Cir. 1990) (excluding evidence bearing on defendant's consciousness of innocence but permitting evidence of consciousness of guilt consisting primarily of wife's action in buying gold with $3.5 million she took out of joint account shortly after cooperating witnesses pleaded guilty; noting that admission of this evidence "exacerbated" unfairness of exclusion of defendant's evidence), *cert. denied*, 111 S. Ct 1102 (1991). See *supra* note 44 for a discussion of *Fox*, 906 F.2d 1253, a case with similar evidentiary exclusions.

46. 917 F.2d 691 (2d Cir. 1990).

assume the guilt of the defendants.[47] Furthermore, the trial judge permitted an FBI special agent to testify at length as an expert about organized crime even though the nexus with organized crime was extremely tangential,[48] and gave an erroneous instruction to the jury suggesting that defendant's wife was willing to testify against him when in fact she was seeking to avoid criminal charges against herself.[49] The appellate court acknowledged that "[w]hether any of these errors would, absent the others, have been harmless is irrelevant in light of the cumulative prejudice caused."[50] In addition to these evidentiary errors, however, the court also erred in the jury instruction it gave regarding RICO,[51] and failed to conduct an evidentiary hearing with regard to the chain of custody and integrity of electronic surveillance tapes.[52] Multiple errors in addition to mistaken evidentiary rulings occurred in other cases as well.[53]

E. Undiscussed Factors

In all of the cases discussed above evidentiary rules clearly matter in the sense that they provide the court with a handle for reversing. However, whether the evidentiary rulings would have caused a reversal had counsel or the court acted differently cannot be ascertained. Furthermore, evidentiary rules may be a convenient scapegoat in cases in which the reversing court never mentions anything other than an erroneous evi-

47. *Id.* at 703-04. The questioning was error in light of the Second Circuit's previous decision in United States v. Oshatz, 912 F.2d 534 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1595 (1991), in which the court found error though it was termed harmless when questioning assumed the guilt of the defendants.

48. *Long*, 917 F.2d at 701-03.

49. *Id.* at 698-99.

50. *Id.* at 705.

51. *Id.* at 696-98 (RICO is acronym for Racketeering Influenced Corrupt Organizations Act).

52. The appellate court did not explicitly find error with regard to the tapes but it instructed the district court to hold an evidentiary hearing in the event of a retrial. *Id.* at 699-700.

53. United States v. Sullivan, 919 F.2d 1403 (10th Cir. 1990), is another case in which evidentiary error is but one of the problems. In addition to the erroneous references to evidence of other crimes, and prosecutorial misbehavior, *see supra* note 34 and accompanying text, the trial judge failed to give a warranted instruction on entrapment. *Sullivan*, 919 F.2d at 1418. Similarly, in United States v. Simtob, 901 F.2d 799 (9th Cir. 1990), the court was concerned about the trial judge's failure to review a tape offered to impeach the prime prosecution witness, *see supra* note 34, even in response to post-trial motions for retrial. Furthermore, although the court concluded that the government was not involved, the court was clearly disturbed that the informant in the case had approached the prime prosecution witness before he was due to testify and threatened that his sentence would be increased if he deviated from his testimony. *Simtob*, 901 F.2d at 803. The informant had also destroyed some notes though the court found that this did not deprive defendant of a fair trial. *Id.* at 809. There was prosecutorial misbehavior in this case as well. *Id.* at 805-06.

dentiary ruling below. Were one to look at the record, one might discern questionable conduct by the court or counsel about which the appellate court chooses to remain silent.[54] When the court remains mute, it is, of course, impossible to discern how frequently courtroom misconduct occurs. Furthermore, silence coupled with the harmless error rule may mean that cases are affirmed despite prosecutorial or judicial misconduct.[55]

IV. CONCLUSION

An analysis of the thirty officially reported reversals on the ground of evidentiary error in 1990 leaves the impression that evidentiary rules frequently matter relatively little in the case before the federal appellate court—that most reversals occur when counsel, particularly prosecutors, or the court are acting unfairly. Of course, if the appellate court explains an evidentiary rule, this may have some future effect regardless of whether the court reverses or finds harmless error. Presumably conscientious counsel and trial judges pay attention to appellate reasoning even though an affirmance on harmless error grounds means that the interpretation is merely dictum. The appellate court may be serving notice of a future intention to enforce an evidentiary rule.[56]

But is this enough? Are the policies underlying the rules of evidence

54. A number of years ago I decided to write a note on an opinion I did not understand, in which the Second Circuit had reversed a conviction for the erroneous receipt of other crimes evidence. The reason I did not understand the opinion was that I knew that exactly the same kind of evidence had been admitted in a series of related cases in both the southern and eastern districts of New York. I accordingly decided to look at the record on appeal. When I asked for it at the courthouse the clerk first told me that it had not yet been returned by the court, but then found it on a cart awaiting shelving. When I opened the record I found torn pieces of yellow pad marking some of the pages. The material on those pages related to the other crimes evidence on which the court had reversed, and outbursts by the trial judge directed at defense counsel. The conduct of the trial judge was not mentioned in the opinion. More recently, I also encountered some discontinuities between the appellate court's argument and the record below. The odd circumstance that the defendants were being tried in the southern district of New York was never mentioned, although the retrial was held in another district. Also, nowhere discussed in the opinion was the enormous pressure put upon defense counsel in this multi-defendant case in having to make all objections at trial in writing. I wonder to what extent others have encountered this phenomenon in which evidentiary error is used as a vehicle for reversal although other nondisclosed factors may perhaps more adequately explain the result. I also wonder how this matter could be researched.

55. *See* Vilija Bilaisis, Note, *Harmless Error: Abettor of Courtroom Misconduct*, 74 J. CRIM. L. & CRIMINOLOGY 457, 475 (1983) (concluding that "harmless error standards . . . are eroding the integrity of the criminal justice system by encouraging violations of longstanding trial rules").

56. See *supra* notes 46-52 and accompanying text for a discussion of the *Long* and *Oshatz* decisions.

adequately served at the appellate level by hortatory opinions and a few reversals a year when something goes seriously wrong at trial? Some recent evidence scholarship demonstrates the appellate courts' unwillingness to find error of any kind even when the trial court has committed error with regard to rules that set forth per se conditions.[57] When an appellate court glosses over errors in applying rules as to which there is no discretion by endorsing the result as a ruling within the trial court's discretion, the evidentiary mistake obviously does not contribute to a reversal, and does not elicit an opinion that will affect the application of the rule. Is this unwillingness to concede error at all, coupled with the enormous volume of harmless error opinions, sending the message that evidence rules matter very little? Further research needs to be done to see the extent to which evidentiary rules are being ignored at trial. One possible lesson of the Clarence Thomas hearings, to which evidentiary rules did not apply at all, is that untempered admissibility is not the ideal for which to strive. Built into many of the rules over the centuries, and codified in the Federal Rules, are notions of fairness. If the appellate courts do not remain vigilant in enforcing and expounding some of these rules, we will lose some of the protections that rules of evidence are designed to provide.

57. *See, e.g.*, Leonard, *supra* note 18 (discussing Rule 608 provisions); Eleanor Swift, *Has the Hearsay Rule Been Abolished De Facto by Judicial Decision?*, 76 MINN. L. REV. (forthcoming 1992) (discussing how courts have ruled on hearsay exceptions); *see also* Victor J. Gold, *Do the Federal Rules of Evidence Matter?*, 25 LOY. L.A. L. REV. 909 (1992) (discussing tendency of appellate courts to overlook trial courts' failure to consider prejudicial effect of conviction evidence despite clear rule).