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I. INTRODUCTION

Generally, a lower court or a trial court has two main functions: it finds facts, and it issues laws.[1] When a trial judge sits without a jury, he performs both functions. When a trial judge sits with the jury—that peculiar institution of Anglo-American jurisprudence—he performs only one of these functions. He issues the law, but the jury finds the facts. The reasons for this divergence of function are more historical than rational. Nevertheless, the jury, because it brings to the fact-finding process the collective experience of twelve individuals drawn from the whole spectrum of society,[2] may be better able to resolve questions of credibility and enunciate community standards of conduct than a single judge from the upper stratum of society.[3] In theory, the jury is restricted to finding the facts which are relevant to the law given to them in the judge's instructions and to applying this law to these facts to reach a generalized verdict. In practice, however, its role expands. Indeed, the

† Oliphant, *A Return to Stare Decisis*, 6 AM. SCH. REV. 229 (1927):
> There is a constant factor in the cases which is susceptible of sound and satisfying study. The predictable element in it all is what the courts have done in response to stimuli of the facts of the concrete cases before them. Note not the judge's opinions, but which way they decide cases, will be the dominant subject matter of any truly scientific study of law.

Id. at 230.

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1. Of course, in one sense, the two processes are inseparable. One cannot find relevant facts unless one has some idea of the requirements of the law which makes them relevant, whereas one cannot issue statements of law without having some idea of the facts which call into play the particular rules of law one is to issue. *See* Richardson v. Gregory, 281 F.2d 626 (D.C. Cir. 1960).

2. There is real doubt as to whether a jury can be said to represent a spectrum of society when many groups of people by practice and statute are prevented from sitting on a jury. *See* G. WILLIAMS, THE PROOF OF GUILT 271-72 (3d ed. 1963).

3. Broeder, *The Functions of the Jury: Facts or Fiction?*, 21 U. CHI. L. REV. 386, 388 (1954) [hereinafter cited as Broeder]; Curtis, *The Trial Judge and the Jury*, 5 VAND. L. REV. 150, 154 (1952). Another justification for the jury system is a political one; there is some possibility that a jury may protect the democratic nature of a society by acting as a check on the attempts by a government to repress dissent. Erskine's successful defense of the Whigs in jury trials prevented the government of Pitt the Younger from repressing all dissent in England in the 1790's. R. TREVELEYAN, LORD GREY AND THE REFORM BILL, 83-88 (1952). Possibly, the experience of serving on a jury may be a significant civic experience.

real significance of the jury may come from its occasional intrusion into the law-issuing process to mitigate the severity of the law.[4]

> The jury protects the Court. It's a question how long any system of courts could last in a free country if judges found the verdicts. It doesn't matter how wise and experienced the judges may be. Resentment would build up every time the findings didn't go with current notions of prejudices. Pretty soon, half the community would want to lynch the judge. There's no focal point with a jury; the jury is the public itself. That's why a jury can say when a judge couldn't, "I don't care what the law is, that isn't right and I won't do it." It's the great prerogative of free men. They have to have a way of saying that and making it stand. They may be wrong, they may refuse to do things they ought to do; but freedom just to be wise and good isn't any freedom. We pay a price for lay participation in the law; but it's a necessary expense.[5]

Although on some occasions the jury's ability to go beyond the law may supply the oil which keeps the judicial system in operation, its propensity to do so has led to the invention of a number of legal tests and devices designed to limit and control its power.[6] The rules of evidence regulate the information given to the jury.[7] Rules affecting the conduct of parties, attorneys, judges, jurors, and press regulate the atmosphere in which the jury receives such information.[8] The "sufficiency of the evidence" test controls the cases and issues which are submitted to a jury.[9] Finally, the motion for a new trial provides a method of overturning a jury verdict which is against the weight of the evidence.[10] These jury control devices place a limit on the jury "lawlessness."[11]

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4. Stern, *Review of Findings of Administrators, Judges, and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 81 (1944).

5. J. COZZENS, THE JUST AND THE UNJUST 427-28 (1942); *see* Curtis, *The Trial Judge and the Jury*, 5 VAND. L. REV. 150, 155-56 (1952). *See also* H. KALVEN & H. ZEISEL, THE AMERICAN JURY 193-344, 381-410 (1966) [hereinafter cited as KALVEN & ZEISEL], for a discussion of jury "legislation" in America.

6. James, *Sufficiency of the Evidence and Jury-Control Devices Available Before Verdict*, 47 VA. L. REV. 218 (1961). Although developed for the purpose of controlling the jury in theory, at least, these controls are equally applicable to non-jury trials as well as jury trials; in practice, however, they are applied strictly only in jury trials. *See* J. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 60 (1954).

7. J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW 509 (1898); *see* Morgan, *The Jury and the Exclusionary Rules of Evidence*, 4 U. CHI. L. REV. 247 (1936). The rules of evidence also serve a secondary purpose of conserving time by limiting the introduction of irrelevant material.

8. Note, *The Nature and Consequences of Forensic Misconduct in the Prosecution of a Criminal Case*, 54 COLUM. L. REV. 946 (1954).

9. *See James, Sufficiency of the Evidence and Jury Control Devices Available Before Verdict*, 47 VA. L. REV. 218 (1961).

10. F. JAMES, CIVIL PROCEDURE 312-14 (1965) [hereinafter cited as JAMES]. To some ex-

In our federal judicial system, the main reviewing bodies are the circuit courts of appeals.[12] These courts are entrusted with the review of both the law-issuing and the fact-finding process conducted at the trial level. Theoretically, the circuit courts do not distinguish between the significance of their review of the law-issuing process and their review of the fact-finding process. In actuality, they are far more concerned with the supervision of the law-issuing process than the fact-finding process. There are perhaps two reasons for this development. First, it is more interesting intellectually to concern oneself with the development of sweeping abstract principles than it is to concern oneself with the finding of some rather mundane facts. Second, it is easier for the circuit courts to supervise the issuance of legal rules than the finding of facts. They are given the power to review the end product of the law-issuing process whether the end product takes the form of a trial judge's conclusions of law or his instructions to the jury. Similarly, in non-jury civil cases they are given the power to review the end product of the fact-finding process when this end product is embodied in the findings of fact set forth by the trial court.[13] The case is far different, however, in a jury civil case or in a criminal case. In these cases the circuit courts have no power to review the jury's verdict, which is the end product of the fact-finding process. Such direct review is viewed as inconsistent with the nature and the purpose of the jury.[14] The best the circuit courts can manage is indirect review through their supervision of the trial judges' administration of jury control devices. It is no wonder then that the circuit courts have tended to regard their

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tent, the selection individuals for juries has an effect on the fact-finding process; jury selection as a jury control device, however, is beyond the scope of this article. *See* Note, *The Case for Black Juries*, 79 YALE L.J. 531 (1970). For voir dire controls, *see* Fritz v. Boland & Cornelius, 287 F.2d 84 (2d Cir. 1961). Also, the motion for a new trial is a jury control device not considered in this article.

11. Broeder, *supra* note 3, at 396-97.

12. The circuit courts handle appeals from various specialized courts and administrative agencies as well as appeals from the district courts. In 1966 & 1967, 2,639 of the 15,086 cases handled by the circuit courts involved administrative appeals. *See* Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to Function of Review and the Natural Law*, 82 HARV. L. REV. 542 (1969).

13. FED. R. CIV. P. 52 (a), requires the appellate courts to accept such findings "unless clearly erroneous." United States v. Aluminum Co. of America, 148 F.2d 416, 433 (2d Cir. 1945).

14. As used in this article, "direct review" refers to a system of review pursuant to which the reviewer examines the conclusions of the fact finder and approves or disapproves of them on the merits; "indirect review" refers to a system where the reviewer examines not the conclusions of the fact finder but only the process by which he arrived at such conclusion. It is quite clear that the circuit courts have the power of direct review in non-jury civil cases. It is not clear whether they have such a power in terms of non-jury criminal cases.

task of supervising the fact-finding process in jury cases with some disdain. Nevertheless, the fact-finding process is as important, if not more important, than the law-issuing process. Indeed, a dictator could easily say: "I don't care who makes the laws, as long as I find the facts." For this reason, the role of the circuit courts in the fact-finding process is a significant one.

It should be noted, however, that the role of the circuit courts in supervising the fact-finding process at the trial level or, indeed, in performing any other function, has seldom attracted the attention of legal scholars.[15] As perhaps the most significant and least publicized branch of our federal judicial system, the eleven United States circuit courts of appeals deserve more systematic consideration.[16] The purpose of this article is to remedy this situation in part by a thorough examination of their supervision of the fact-finding process at the trial level.[17]

15. In the period 1958-1961, for example, the Index to Legal Periodicals lists but one article dealing with the circuit courts but one hundred and eight dealing with the Supreme Court. For two excellent contributions to our understanding of the circuit courts, *see* Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542 (1969); Note, *The Second Circuit: Federal Judicial Administration in Microcosm*, 63 COLUM. L. REV. 874 (1963).

16. *See* Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. CHI. L. REV. 211 (1957), for an elaboration of a similar need in respect to state appellate courts.

17. For the purpose of this article, the author has examined all cases decided by the Second Circuit in the period September 1960–August 1964 (vols. 282-336), and by the District of Columbia Circuit in the period October 1957–September 1961 (vols. 249-90). These two courts were selected for this study partly because they are probably the two most distinguished circuit courts in the country and partly because their differing attitudes towards the criminal law results in a different treatment of their task of supervising the fact-finding process. *See* Loeb, *Judicial Blocs and Judicial Values in Civil Liberties Cases Decided by the Supreme Court and the United States Court of Appeals for the District of Columbia Circuit*, 14 AM. L. REV. 146, 148 (1965). *See also* Karlen, *The United States Court of Appeals for the Second Circuit*, 17 REC. OF N.Y.C. B. ASS'N 500 (1962); tables V and VI, Appendix *infra*. The two periods in question were selected because the personnel on both courts during the respective periods was relatively constant. Present on the Second Circuit in September 1960 were Lumbard, Clark, Waterman, Moore, Friendly, Smith (Judges) and L. Hand, Swan, Chase, Medina, and Hincks (Senior Judges); at the end only Clark (Judge), L. Hand (Senior Judge) and Hincks (Senior Judge) had departed to be replaced by Kaufman, Hayes and Marshall (Judges). Present on the District of Columbia Circuit in the beginning were Edgerton, Prettyman, Miller, Brazelon, Fahy, Washington, Danaher, Bastian and Burger; there were no changes in court personnel during this study. The method of research used in this article involved two steps. First, the briefs of both parties were read for alleged errors in the admission or exclusion of evidence, application of the sufficiency of the evidence test, and misconduct on the part of a judge or attorney. In any case, where such errors were alleged, the circuit court opinon was read to determine the circuit court's treatment of the alleged errors. Finally, the circuit court's view of the verdict was examined. If the opinion did not indicate the court's view of the verdict, the record was checked to get the author's "objective" evaluation of the result of the fact-finding process (credit for the origination of this approach should be given to A. Sizisty, Esq., Yale Law School 1967). This study was restricted to jury and non-jury civil and criminal cases appealed to the circuits in question; it does not encompass certain other appeals which involve similar problems. Examples of such appeals include: United States v. Lieber, 336 F.2d 190 (2d Cir. 1964) (28 U.S.C. § 1651 (1970) hearing-significance of demeanor evidence); Hollander v. Hollander, 318 F.2d 818 (2d Cir.

This examination of the Second Circuit and the District of Columbia Circuit has led to the conclusion that there exists a great difference between the theory and the practice of appellate supervision of the fact-finding process. In theory, the circuit courts utilize the same set of control devices to supervise the fact-finding process whether it is conducted by a judge or a jury. In theory, the circuit courts examine the application for these control devices in a vacuum, without examining the results produced by them except to the extent the devices themselves necessitate such an examination. In practice, however, things turn out differently.

The circuit courts tend to neglect and ignore the indirect control devices in civil cases tried by judges since they can control the fact-finding in non-jury civil trials by direct review. Likewise, they tend to manipulate the jury control devices in cases tried by juries so that these devices are used not as a means of regulating the process itself, but as a means of controlling the end product of the process. This is achieved by a refusal of circuit courts to invoke these controls in cases in which they find themselves in agreement with the jury verdict, and by the willingness of the circuit courts to invoke these controls in cases in which they find themselves in disagreement with the jury verdict. What follows then is an examination of how the courts in fact apply the jury control devices to regulate the results of the fact-finding process.

II. The Non-Jury Trial

A. *Rules of Evidence*[18]

The rules of evidence are designed to limit the trier of fact to

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1963) (contempt hearing-significance of demeanor evidence); S.O.S. Sheet Metal Co. v. Hackensack Plumbing Supply Co., 297 F.2d 32 (2d Cir. 1961) (motion to transfer proceedings-hearsay problem); Yin-Shing Woo v. United States, 288 F.2d 434 (2d Cir. 1961) (naturalizaton case-mixed question of law and fact and problem of appropriate standard for review). Occasionally, cases of this nature are referred to in this article to illustrate a certain problem.

It should be noted that the parenthetical remarks following the citations in the footnote's do not necessarily mean that the information in the parenthetical remark can be found in the decision which is cited. This information was obtained from briefs, records, and unreported distrtct court opinions. It is included to indicate the courts' or the author's "objective" evaluation of the case.

18. Under Fed. R. Civ. P. 26, the federal courts in criminal cases follow common law rules of evidence except as otherwise provided by the federal rules themselves or by an act of Congress. This power may also be subject to constitutional limitations. *See* California v. Green, 399 U.S. 149 (1969). Under Fed. R. Civ. P. 43(a), the federal courts in civil

material which is relevant and trustworthy.[19] The approach followed by circuit courts with respect to allegedly erroneous evidentiary rulings made in the course of a non-jury trial is perhaps best illustrated by the opinion of the Second Circuit in *United States v. Martinez*.[20] There, the trial judge in a non-jury narcotics case had questioned the defendant's attorney as to defendant's prior criminal record. The attorney did not admit that defendant possessed such a record but by referring to the defendant's refusal to take the stand suggested that defendant feared that his presence on the witness stand would result in the revelation of his record.[21]

The Second Circuit, confronted on appeal with the claim that the trial judge had thus erroneously received evidence of prior crimes of defendant, found two grounds for affirmation. First, the court sophistically held that defendant's criminal record had not been admitted into evidence.[22] Second, it ruled that the evidence, even if admitted, had not prejudiced the defendant since the judge seemed to have excluded it before reaching a verdict.[23] The court said, ". . . when a case is tried without a jury, the error of admitting incompetent evidence will be regarded as harmless if it is rejected or excluded by the judge before the decision is made."[24]

Although laconic in this case as to *how* a circuit court was to determine whether or not a trial judge had excluded from consideration evidence which he had erroneously admitted, the Second Circuit indicated its resolution of this problem in *United States v. Mitchell*.[25] There, the trial judge, trying a narcotics case without a jury, had questioned the defendant about details of his prior criminal record which

cases will admit any evidence admissable under the state evidentiary rules unless federal statutes or federal equity practice applies. For a discussion of this rule, *see* Hope v. Hearst Consol. Publications Inc., 294 F.2d 681 (2d Cir. 1961).

19. Certain exclusionary rules such as FED. R. CIV. P. 41(e), are not evidentiary rules in the sense that they prohibit the production of certain evidence for constitutional reasons and not because such evidence is irrelevant or untrustworthy.

20. 333 F.2d 80 (2d Cir. 1964).

21. Ordinarily, evidence relating to defendant's criminal record is inadmissible. Once a defendant takes the stand, the prosecution may proffer his criminal record for the purpose of impeachment. J. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 157(10) (1954). Consequently, the defendant who has an imposing record seldom testifies on his own behalf for fear that the advantage gained by his testimony would be outweighed by the disadvantage stemming from the revelation of his criminal record. *See* discussion of the rationale of this rule in Swann v. United States, 195 F.2d 689, 690-91 (4th Cir. 1952). Defendant is, of course, entitled to an instruction limiting the use of such evidence for impeachment purposes. *See* Smith v. United States, 283 F.2d 607 (2d Cir. 1960).

22. 333 F.2d at 82.

23. *Id.*

24. *Id.*

25. 297 F.2d 407 (2d Cir. 1962).

had been properly admitted into evidence. The Second Circuit rebuked the trial judge's display of curiosity, saying:

> Though we do not approve of the introduction into evidence of this irrelevant information, we again point out that this was a one day trial before a judge sitting without a jury and we are constrained to believe that the judge was not prejudiced against this narcotics suspect by the detailed knowledge . . . .[26]

This case illutrates the time-honored presumption[27] that a trial judge does not utilize erroneously admitted evidence in rendering his verdict. As a general proposition, this presumption seems highly dubious.[28] Applied to the particular circumstances of this case it seems exceedingly improbable. Kalven and Zeisel[29] have noted that one major cause of judge-jury disagreement (judge would have convicted when jury acquitted) is the judge's possession of information about the defendant's previous criminal record.[30]

Unfortunately, evidence of prior crimes is not the only kind of suasive evidence which, if erroneously received, is still presumed to have been excluded by the trial judge in reaching his final decision. Hearsay evidence is also covered by this presumption. In *Mitchell*, a government agent had testified, without objection from defense counsel, that an informer had identified the defendant by name as a narcotics pusher. On appeal, defendant's new counsel urged that this testimony was hearsay. The Second Circuit dismissed the appeal on the grounds that the error was not of sufficient scope to justify invocation of the "plain error" rule,[31] thus once again indicating its conviction that the

26. *Id.* at 408.

27. J. McCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 60 (2d ed. 1972) [hereinafter cited as McCORMICK].

28. "A judge has not such control over his mental faculties that he can definitely determine whether or not inadmissible evidence he has heard will affect his mind . . . ." Kovacs v. Szentes, 130 Conn. 229, 33 A.2d 124, 125 (1943). *See* Maguire & Epstein, *Rules of Evidence in Preliminary Controversies as to Admissibility*, 36 YALE L.J. 1101, 1115 (1927).

29. *See* note 221 *infra*.

30. Another case illustrating the Second Circuit's approach to evidence of prior crimes in non-jury trials is United States v. Cimino, 321 F.2d 509 (2d Cir. 1963), *cert. denied*, 375 U.S. 974 (1964). Here, defendant's counsel had requested the trial judge to order the government to turn over to the defense certain statements which allegedly fell within the provisions of the Jencks Act, 18 U.S.C. § 3500 (1970). In order to rule on the defense motion, the trial judge commenced to read the documents in question. While reading these materials, he learned of the defendant's prior record. The Second Circuit held that his action did not violate the rule against the admission of evidence regarding prior crimes, partly because it felt to rule otherwise would be to create a horrible imbroglio in any case involving Jencks Act statements, and partly because it believed that the trial judge was not prejudiced by the material which he had uncovered.

31. 297 F.2d 407 (2d Cir. 1962). FED. R. CRIM. P. 52b, provides, "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the atten-

trial judge would not have been influenced by the introduction of erroneous evidence.

The employment of this presumption is almost an automatic response by the circuit court to any allegation that a trial court sitting without a jury admitted erroneous evidence.[32] Although the theoretical justification for ignoring evidentiary rulings in such cases is not sound, the pragmatic justification is, however, obvious: since the circuit courts are free to review directly the findings of fact by the trial judge, they feel it is inane to subject the trial judge's fact-finding process to the same indirect controls as the jury fact-finding process. Of course, the presumption obviously cannot apply when the trial judge erroneously excludes evidence. The circuit courts do reverse in such cases, a fact which leads trial judges to admit all evidence not clearly incompetent but to base their findings only on the clearly admissible testimony.[33] Not surprisingly, during the period covered by this survey the only reversals of non-jury cases on evidentiary grounds occurred in two cases where the trial court erroneously excluded evidence,[34] and in a case where the trial judge ignored the evidence presented to him by both sides and based his decision on information he discovered in the course of his researches in the New York Public Library.[35]

B. *The Atmosphere Regulations*

The rules regulating the conduct of the attorneys and the judge during the trials are the particular product of the jury system. It is not

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tion of the court." *Id.* By decision, courts will recognize plain error in civil cases. Troupe v. Chicago, Duluth & Georgian Bay Transit Co., 234 F.2d 253, 260 (2d Cir. 1956).

32. United States v. Kane, 322 F.2d 787 (2d Cir. 1963) (hearsay); United States v. Cimino, 321 F.2d 509 (2d Cir. 1963) (prior crimes); United States v. Fredia, 319 F.2d 853 (2d Cir. 1963) (confessions of both defendants); *see* Unitied States v. Greco, 298 F.2d 247 (2d Cir. 1962) (prior crimes). For use of this presumption in other circuits, *see* McCormick, *supra* note 27, § 60. Sometimes the circuit court simply ignores the problem. *See* Oblatore v. United States, 289 F.2d 400 (2d Cir. 1961) (authentication problem ignored). Such an approach is particularly questionable when the case is reversed on other grounds since the problems may reoccur again. *See* Roebling v. Anderson, 257 F.2d 615 (D.C. Cir. 1958) (possibly irrelevant evidence). *See also* Kane v. Branch Motor Export Co., 290 F.2d 503 (2d Cir. 1961) (non-probative evitdence). For an exception, *see* United States v. Consolidated Laundries Corp., 291 F.2d 563, 572 (2d Cir. 1961).

33. McCormick, *supra* note 27, § 60.

34. Asheville Mica Co. v. Commodity Credit Corp., 335 F.2d 768 (2d Cir. 1964); Kirtley v. Abrams, 299 F.2d 341 (2d Cir. 1962).

35. United States v. Alvary, 302 F.2d 790 (2d Cir. 1962). The reason for such judicial strictness is obvious; unless the information which the trial takes judicial notice of is in fact common knowledge or a matter of public record, the appellate court will no longer be able to tell from the record whether the judge's findings of fact are or are not "clearly erroneous." Thus, the one control device which the circuit courts do enforce in non-jury trials is the doctrine of judicial notice. *See* Morgan, *Judicial Notice*, 57 Harv.

surprising that in the period covered by this survey no non-jury cases were found in which an appellant had even alleged a violation of the atmosphere regulations.

C. *Sufficiency of Evidence*

The "sufficiency of the evidence" test is designed to regulate the cases and issues which are submitted to a jury by excluding from the province of the jury any issue or case in which the evidence presented by a party would, even if believed, be insufficient to support the verdict requested by the party.[36] Under the "sufficiency of evidence" test, only the quantity of the evidence is examined; the evaluation of its quality is left to the purview of the trier of fact.

In a non-jury civil case, a defendant may invoke a special version of the "sufficiency of the evidence" test by a motion to dismiss at the close of the plaintiff's evidence.[37] Trial judges in general prefer to deny such a motion, hear all the evidence in the case, and then render findings of fact upon such evidence.[38] Indeed, in all the cases examined in the course of this survey, only two cases were found in which the trial judge granted a motion to dismiss.[39] On appeal, defendants do not raise the sufficiency of the evidence question, preferring to attack the trial judge's findings under the "clearly erroneous" test. This abandonment of the sufficiency of the evidence argument is probably due to the recognition that the "clearly erroneous" standard duplicates the special "sufficiency of the evidence" standard.

In a non-jury criminal case, the defendant may raise the issue of sufficiency of the evidence by a motion for judgment of acquittal at

L. REV. 269 (1944). Thus, in Lady Nelson, Ltd. v. Creole Petroleum Corp., 286 F.2d 684 (2d Cir. 1961), the court discussed at some length the problems involved in judicial notice of foreign law.

36. The "sufficiency of the evidence" test poses the question of whether the evidence on the record, viewed in the light most favorable to the party opposing the motion alleging insufficient evidence, would enable reasonable men to find for such side. *See* James, *Sufficiency of the Evidence and Other Jury-Control Devices Available Before Verdict*, 47 VA. L. REV. 218 (1961).

37. FED. R. CIV. P. 41(b). The motion to dismiss in a non-jury trial permits the trial judge to examine the quality as well as the quantity of the plaintiff's evidence. Consequently, a trial judge may grant a motion to dismiss in a non-jury trial although he could not have properly granted a motion for directed verdict had the case been tried before a jury. Apparently, this motion is not available to the plaintiff in a non-jury case although he may employ its equivalent in a jury case. FED. R. CIV. P. 50.

38. *See* Shorter v. Adler, 258 F.2d 163 (D.C. Cir. 1958), where trial judge went so far as to ask defendant to withdraw motion to dismiss and then proceeded to make findings of fact favorable to defendant based on his disbelief on the plaintiff's witnesses.

39. Bevelheimer v. Slick Airways, Inc., 303 F.2d 69 (2d Cir. 1962); Roebling v. Anderson, 257 F.2d 615 (D.C. Cir. 1958).

the close of the prosecution's case or at the close of all the evidence.[40] Failure to make such a motion does not waive a claim of error based on the sufficiency of the evidence since the general plea of "not guilty" in a non-jury trial is considered to constitute such a motion in view of the trial judge's obligation to enter judgment of acquittal on its own motion when appropriate.[41] The "sufficiency of the evidence" standard, rather than the "clearly erroneous" standard, is invoked on appeal by the criminal defendant since the appellate court in a non-jury criminal case has no power of direct review.[42]

Since the circuit courts do not have the power of direct review in non-jury criminal cases, on occasion they manipulate the "sufficiency of the evidence" test to give them such power. Thus, the District of Columbia Circuit in *Farrar v. United States*[43] threw out the conviction of a defendant in a rape case because the testimony of the prosecutrix, a prostitute, that she had never seen the knife defendant allegedly held against her during the incident was inherently incredible (that is, the District of Columbia Circuit did not believe it and discredited her entire testimony).

III. Jury Trials

A. *Rules of Evidence*

1. *The "Ostrich" Method*

Allegations of evidentiary error are often ignored by the circuit courts.[44] The "ostrich" approach of the courts serves two basic functions. Generally, it is used by the circuit courts as a time-saving device —as a means of avoiding discussion of allegations which are patently absurd (in eleven of the cases in which the circuit courts employed this

40. Fed. R. Crim. P. 29. *See* note 109 *infra*.
41. Hall v. United States, 286 F.2d 676, 677 (5th Cir. 1960).
42. *Contra*, United States v. Cimino, 321 F.2d 509, 514 (2d Cir. 1963) (Waterman, J.). "The standard of appellate review is not, of course, the same as that to be applied by a trial judge. D'Ercole's conviction must be affirmed unless it was 'clearly erroneous.'"
43. 275 F.2d 868 (D.C. Cir. 1959) (Miller J., dissenting), petition for rehearing en banc denied. *Id.* at 875 (Miller, Danaher, Bastian & Burger, JJ., dissenting).
44. Slavenburg Corp. v. Boston Insurance Co., 332 F.2d 990 (2d Cir. 1964) (excluded evidence hearsay); United States v. Dardi, 330 F.2d 316 (2d Cir. 1964) (real evidence, relevancy of some testimony); Kennedy v. Long Island R.R., 319 F.2d 366 (2d Cir. 1963) (relevancy of evidence); United States v. Tufaro, 316 F.2d 240 (2d Cir. 1963) (excluded evidence irrelevant); United States v. McCue, 301 F.2d 452 (2d Cir. 1962) (evidence obviously irrelevant); Randall v. Evening Star Newspaper Co., 289 F.2d 880 (D.C. Cir. 1961) (evidence not probative); Lambert Constr. Co. v. Socony Mobil Oil Co., 288 F.2d 30 (2d Cir. 1961) (hearsay); Brown v. Coates, 253 F.2d 36 (D.C. Cir. 1958) (evidence not probative); Curtis Features Syndicate v. Time, Inc., 251 F.2d 389 (D.C. Cir. 1958) (no objection made at trial to violation of best evidence rule).

device, the errors complained of were in the opinion of the author groundless). Even used in this fashion, however, the device is of dubious merit. Certainly, the use of the device saves the court time,[45] but then so would a refusal to write an opinion. Surely, an appellant is entitled in the interests of justice to a more reasoned disposition of his claim. The "ostrich" approach has, however, a second function which is far more dangerous than the first. The "ostrich" approach may be used to ignore clearly erroneous rulings when the circuit court concludes that the jury's verdict was clearly correct.[46]

The "ostrich" approach occurs in cases reversed on other than evidentiary grounds.[47] Time saved by the use of this approach in these cases may prove highly illusory since the evidentiary problems so ignored may well reoccur on retrial and even result in a second appeal. Nevertheless, only one jury case was found in the course of this survey in which the appellate court, reversing a case on non-evidentiary grounds, discussed allegations of evidentiary error made by the appellant.[48] Indeed, the circuit courts seem to stretch to employ the "ostrich" device in some cases by choosing to reverse on non-evidentiary grounds even though evidentiary grounds for reversal are present. For example, in *United States v. Shackney*,[49] the Second Circuit used a strained construction of the criminal statute in question to justify reversal on sufficiency grounds of a case replete with evidentiary error.

2. *The Discretion Doctrine*

In *Fitzgerald v. United States Lines Co.*,[50] plaintiff alleged that he had been injured while loading cargo on a ship because his employer had established unsafe procedures for loading such cargo. To support his claims, he sought to introduce testimony that another employee

45. One could question how much time the circuit courts save by refusing to discuss allegations of error which could be adequately handled by a sentence or two in the course of an opinion.

46. Such a result may sometimes be unintentional since the failure to subject a questioned ruling to the hard test of written justification may sometimes result in approval of a ruling which would otherwise be reversed. However, this fact serves only to illustrate another danger of the "ostrich" approach even when it is used for only its first purpose.

47. For examples of the courts' usual approach, *see* Delima v. Trinadad Corp., 302 F.2d 585 (2d Cir. 1962) (authentication problem, hearsay); United States v. Paroutain, 299 F.2d 486 (2d Cir. 1962) (hearsay, authentication); United States v. Christmann, 298 F.2d 651 (2d Cir. 1962) (allusion to lie detector test); Salem v. United States Lines Co., 293 F.2d 121 (2d Cir. 1961); Sellers v. United States, 271 F.2d 475 (D.C. Cir. 1959) (relevancy problem, impeachment by prior crimes); Miller v. Pennsylvania R.R., 272 F.2d 545 (D.C. Cir. 1959) (expert testimony); Hanna v. Fletcher, 261 F.2d 75 (D.C. Cir. 1958).

48. Mandel v. Pennsylvania R.R., 291 F.2d 433 (2d Cir. 1961).

49. 333 F.2d 475 (2d Cir. 1964).

50. 306 F.2d 461 (2d Cir. 1962) (jury verdict for defendant clearly justified).

had protested to one of the supervisors about the allegedly dangerous procedures some time before his accident. The trial judge refused to admit either his testimony or the testimony of his fellow worker. The Second Circuit affirmed the trial judge's ruling by ruling that the trial judge did not abuse his discretion in excluding the evidence; it did admit, however, that ". . . a more liberal concept of relevancy would have conformed better with modern trends in the law of evidence."[51] In *United States v. Licavoli*,[52] the defendant, accused of contempt of Congress by virtue of his failure to respond to a subpoena issued by the McClellan committee, attempted to defend his conduct on the grounds that his counsel had advised him not to obey the subpoena. Ostensibly to show that counsel should have known better than to give this advice, but actually to show that counsel frequently so advised clients being investigated by Congress, the prosecutor asked the defendant's counsel if he had ever similarly advised other clients in this situation. The trial court, over objection, made the counsel answer this question. The District of Columbia Circuit affirmed the trial court's action as a matter of discretion even though the court sub silentio admitted that the question was improper when it held that advice of counsel, even if given in good faith, was not a defense.

In both of these cases, the circuit courts invoked the "abuse of discretion" doctrine. This doctrine recognizes the fact that certain matters, including rulings on the relevancy of evidence, cannot be regulated by a hard and fast rule and consequently must be left to the discretion of the trial court, whose decision should not lightly be overturned by the circuit court. This "abuse of discretion" rule gives the circuit courts a most useful device to review the jury's verdict in certain cases. In the two cases discussed above, and in other cases uncovered in the course of this survey,[53] the circuit courts ignored clear

51. *Id.* at 465 (it should be noted that action was brought by plaintiff's estate).

52. 294 F.2d 207 (D.C. Cir. 1961). The court indicates in its opinion that it was quite clear defendant intended to avoid questions which gave rise to contempt of Congress indictment.

53. For other examples of erroneous rulings upheld by circuit courts under the "discretion" doctrine, *see* United States v. Crisafi, 304 F.2d 803 (2d Cir. 1962) (refusal to admit evidence to explain away prior crime used for impeachment purposes) (Second Circuit finds ample evidence to support convictions); United States v. Baumgarten, 300 F.2d 807 (2d Cir. 1962) (Argentine lawyer who failed Argentine Bar and had no special knowledge of Argentine custom law permitted to testify as expert thereon) (appellate court indicating evidence shows defendant acted with "evil" intent in scheme to use mail which resulted in charge for mail fraud); United States v. Ross, 267 F.2d 618 (D.C. Cir. 1959) (Fahy, J., dissenting) (refusal to admit evidence that assault charges were dropped although evidence that assault charges were made admitted) (guilt clear).

abuses of discretion on the part of the trial court because they agreed with the jury's verdict. The reluctance of the circuit courts to reverse for abuse of discretion may be seen by the fact that in the panel covered by the survey, the Second Circuit reversed only three cases and the District of Columbia Circuit none on such grounds.[54]

3. *Waived Error*

Courts normally will refuse to consider on appeal issues not raised at the trial.[55] By rule in criminal cases and by decision in civil cases, however, they will relax this rule in order to reach errors causing substantial injustice. As a matter of abstract justice, there is much to be said in favor of the "waived error" doctrine. Certainly, the general "waived error" rule is necessary to prevent the complete overloading of the federal judicial system which would follow if litigants were able to hedge against adverse jury verdicts by carefully nursing along errors for presentation on appeal. Similarly, a relaxation of such a doctrine is necessary in some cases to avoid penalizing a litigant for the incompetence, negligence, or mere carelessness of an attorney who fails to make timely objection[56] to the introduction of improper but highly damaging evidence. That the circuit courts are reluctant to reverse a decision where the evidentiary error complained of was not objected to below is indicated by the fact that during the period covered by this survey only one case was found in the Second Circuit where the court reversed because of an evidentiary error not subject to objection at trial.[57]

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54. United States v. 18.46 Acres of Land, 312 F.2d 287 (2d Cir. 1963) (failure to admit evidence of comparative sales and evidence of tax stamps to show for what plaintiff actually sold property) (evidence excluded would have changed jury verdict); Harrington v. Sharff, 305 F.2d 333 (2d Cir. 1962) (Clark, J., dissenting) (abuse of discretion to correct misstatement of fact by counsel in summation through admission of hearsay evidence for the purpose of rebuttal) (Moore believed the verdict to be wrong and Waterman considered it a close case); United States v. Turoff, 291 F.2d 864 (2d Cir. 1961) (abuse of discretion to admit House Un-American Activities Committee transcript showing defendant a Communist when only part of transcript relevant) (evidence indicates defendant clearly guilty).

55. *Cf.* Troupe v. Chicago, Duluth & Georgian Bay Transit Co., 234 F.2d 253 (2d Cir. 1956).

56. The objection should be made as soon as the improper evidence is introduced or proper evidence is used in an improper fashion. United States v. Turoff, 291 F.2d 864, 868 (2d Cir. 1961).

57. *See* United States v. Rinaldi, 301 F.2d 576 (2d Cir. 1962). The circuit courts are much more willing to invoke the "plain error" rule in the case of error affecting the instructions. *See* Ferrara v. Sheraton McAlpin Corp., 311 F.2d 294 (2d Cir. 1962); Mullen v. United States, 263 F.2d 275 (D.C. Cir. 1958), where the "plain error" rule was invoked to

4. *Harmless Error*

Both federal statute and procedural rule provide that "harmless error," that is, error which does not affect "the substantial rights of the parties," should not be a ground for reversal.[58] The basis for the "harmless error" rule is the recognition that many evidentiary rules are so technical in nature that their violation is almost always non-prejudicial, while other rules of more substantial nature can still, on a given occasion, be broken without prejudicial effect. There is no little difficulty, however, in defining what "harmless error" is. The view followed in most circuits, including the District of Columbia Circuit[59] is one propounded by Justice Rutledge in *Kotteakos v. United States*:[60]

> [The question is] what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own.
>
> This must take account of what the error meant to them, not singled out and standing alone.
>
> If, when all is said and done, the conviction is sure that the error did not influence the jury, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. But if one cannot say, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.[61]

The Second Circuit uses a different test for harmless error. It reads the "sufficiency of the evidence" test into the "harmless error" test to make harmless error depend on whether or not (disregarding the questionable evidence) there was sufficient evidence to support the verdict of the jury.[62]

Although employing different tests for harmless error, both the

reverse for error regarding instruction but not invoked where testimony had been admitted in violation of the priest-penitent privilege.

58. *See* 28 U.S.C. § 2111 (1970); FED. R. CRIM. P. 52(a); FED. R. CIV. P. 61.

59. United States v. Sanchez, 293 F.2d 260, 267 (8th Cir. 1961); Rosa v. City of Chester, 278 F.2d 876, 882 (3d Cir. 1960); Starr v. Unted States, 264 F.2d 377 (D.C. Cir. 1958).

60. 328 U.S. 750 (1946).

61. *Id.* at 764-65.

62. United States v. Antonelli Fireworks Co., 155 F.2d 631 (2d Cir. 1946).

Second Circuit and the District of Columbia Circuit consider harmless error per se any evidentiary ruling made in connection with a multi-count trial resulting in concurrent sentences for each count when there is no valid allegation of error in respect to the conviction on one count.[63] Similarly, the Second Circuit holds as harmless per se an evidentiary error made in respect to the issue of damages when the jury has found against the plaintiff on the liability issue.[64] Likewise, the Second Circuit, in an action where plaintiff failed to make out a prima facie case, held as harmless error allegedly erroneous rulings which did not impede the plaintiff's efforts to make out such a case.[65] Presumably, the District of Columbia Circuit would have reached the same result in these cases under its own test for harmless error.

The use of different tests, however, leads to different results in some cases. In *United States v. Vardine*,[66] the prosecution had used the net worth method to prove that defendants had been cheating on their income taxes in 1953 and 1954. The Second Circuit reversed conviction on the first count on the grounds that the figures the Government placed in evidence to show a gap between actual and reported income were based on an erroneous interpretation of the Internal Revenue Code's provisions concerning actual income and that the apparent gap could have been accounted for completely by an error in the Government's figures.[67] The Second Circuit refused to reverse on the second count:

> Although the jury might have been relying on the apparent 1953 bulge, which we have found to be at least partially erroneous, as proof of willfulness in 1954, the other proof of defendant's intent was sufficient to preclude reversal as to 1954. The fact that defendant consistently failed to report his dividend income and cashed Star's checks without recording them on the books or reporting them on his return coupled with the consistent net worth bulges for the four years preceding the prosecution years

63. United States v. Soblen, 301 F.2d 236 (2d Cir. 1962); Martin v. United States, 271 F.2d 499 (D.C. Cir. 1959); Langford v. United States, 268 F.2d 896 (D.C. Cir. 1959). An exception is made by the District of Columbia Circuit in the case when the evidence erroneously admitted on one count may influence verdict on other counts. *See* text, section III(4) *supra*.

64. Cisneros v. Cities Serv. Oil Co., 334 F.2d 232 (2d Cir. 1964); Fitzgerald v. United States Lines Co., 306 F.2d 461 (2d Cir. 1962); Nielsen v. Kurz & Co., 295 F.2d 692 (2d Cir. 1961).

65. Herman Schwabe, Inc. v. United Shoe Mach. Corp., 297 F.2d 906 (2d Cir. 1962).

66. 305 F.2d 60 (2d Cir. 1962) (according to the Second Circuit, evidence of guilt was adequate).

67. *Id.* at 66.

> make the $1,999 error in 1953 insignificant in proving willfulness as to 1954.[68]

The District of Columbia Circuit, employing its "harmless evidence" test, presumably would have reversed. For example, in *Taylor v. United States*,[69] the District of Columbia Circuit ruled, "We shall reverse the conviction of appellant Taylor on the conspiracy count because of the erroneous admission of this prejudicial evidence of the undercover agent. And since it is quite probable that this evidence was also considered by the jury in connection with the related count two, charging Taylor with the operation of a lottery, we shall also reverse the conviction of Taylor on that count," even though there was sufficient evidence against Taylor on that count to sustain a conviction.[70]

Perhaps the major significance of the "harmless error" rule is that it furnishes an appellate court, examining a claim that the fact-finding process was defective, with a legitimate reason for examining the result of that process and making its determination of the validity of the process after consideration of such a result. The circuit courts are not slow to manipulate the "harmless error" rule to reverse jury verdicts of which they disapprove even though no prejudicial error exists.

In *Edmonds v. United States*,[71] where the trial judge permitted both a policeman and defendant's doctor to testify that defendant had confessed his participation in the crime to them, the District of Columbia Circuit ruled that the trial court erred in permitting the doctor to testify because of the privilege rule.[72] It refused to consider this error harmless even though the testimony of the doctor was cumulative to that of a policeman. In *Fenwick v. United States*,[73] where the trial judge had permitted the prosecutor to impeach the defendant with a conviction which was being appealed, the District of Columbia Circuit held that the trial court had erred; it refused to hold this error harmless even though the conviction had since been finalized.[74] In *United States v. Turoff*,[75] the Second Circuit reversed the contempt

68. *Id.*
69. 260 F.2d 737 (D.C. Cir. 1958) (fairly close case when questionable evidence not considered). *See* Dancy v. United States, 276 F.2d 521 (D.C. Cir. 1960).
70. 260 F.2d at 738.
71. 260 F.2d 474 (D.C. Cir. 1958) (Miller, Bastian & Danaher, JJ., dissenting) (evidence fairly clear that defendant was emotionally disturbed).
72. *Id.* at 478.
73. 252 F.2d 124 (D.C. Cir. 1958) (Bastian, J., dissenting). The majority viewed government case as weak since it was "developed through two alleged accomplices who had grounds for hostility." *Id.* at 125.
74. *Id.* at 126.
75. 291 F.2d 864 (2d Cir. 1961).

of Congress conviction of a war veteran, who had refused to inform the House Un-American Activities Committee of the names and addresses of his Communist friends, on the ground that the trial court had erroneously admitted into evidence the transcript of the defendant's entire testimony before the Committee. In so doing, the Second Circuit did not consider the possibility that this error was "harmless" since there was sufficient other evidence for the jury to find the defendant guilty. Of course, the circuit courts manipulate the "harmless error" rule in the other direction also; on occasion they hold plainly prejudicial errors to be harmless.[76]

5. *Cured Error*

Another device used by circuit courts confronted with allegations of error in evidentiary rules is the "cured error" doctrine. Briefly stated, this doctrine permits the circuit courts to consider as "cured" any error by a trial judge which the latter recognizes and corrects. No problem occurs when the error "cured" is an error involving the exclusion of properly admissible evidence since a trial judge can rectify such an error by simply reversing his stance and letting the evidence come in. The problem occurs in terms of evidence improperly admitted. Frequently, the trial judge can remedy his error of admitting evidence which should not have been admitted by striking such evidence from the record and issuing a "curative" instruction to the jury, ordering them to ignore the evidence in question. In such a case, the circuit courts generally will hold that the instruction in question "cured" the

76. Lewis v. Chapman, 265 F.2d 345 (D.C. Cir. 1959) (admission of inapplicable statute to show standard of care in a negligence case) (plaintiff probably guilty of contributory negligence which was reflected by small jury verdict); Capitol Products v. Romer, 252 F.2d 843 (D.C. Cir. 1958) (admission of evidence in negligence case of change by defendant in procedures alleged to be responsible for plaintiff's injury) (defendant obviously negligent). One further tendency in the circuit courts' use of the "harmless error" rule should be noted. Often, the courts do not discuss the alleged errors but simply issue a blanket ruling holding that it finds "no error affecting substantial rights." The District of Columbia Circuit is a particular employer of this combination of the "harmless error" rule and the "ostrich" approach. Phillips v. Kitt, 290 F.2d 377 (D.C. Cir. 1961) (relevancy); Key v. United States, 284 F.2d 295 (D.C. Cir. 1960) (trial judge refused to let defendant in murder case substantiate self-defense claim by introducing evidence concerning character of defendant); Weinheimer v. United States, 283 F.2d 510 (D.C. Cir. 1960) (trial judge's ruling violated the best evidence rule); Duckworth v. Helms, 268 F.2d 584 (D.C. Cir. 1959) (hearsay); Love v. United States, 259 F.2d 950 (D.C. Cir. 1958); Kornegay v. United States, 258 F.2d 418 (D.C. Cir. 1958) (admissions); Evans v. United States, 257 F.2d 655 (D.C. Cir. 1958); Chase v. United States, 256 F.2d 891 (1958) (hearsay). The Second Circuit also uses such a device on occasion. *See* Horton v. Moore-McCormack Lines, Inc., 326 F.2d 104 (2d Cir. 1964) (questionable admission of doctor's report under business records exception to the hearsay rule); Polara v. Trans World Airlines, Inc., 284 F.2d 34 (2d Cir. 1960) (questionable exclusion of police report which might have come in under business records exception to hearsay rule). This approach is open to the same criticisms as the "ostrich" method.

original error by erasing this material from the mind of the jury.[77] On occasion, however, it seems doubtful that the instruction has the curative effect intended. It seems probable that a jury will obey a curative instruction which tells them to ignore evidence which they themselves would consider to be of doubtful value because of its lack of relevance or inherent untrustworthiness. When the evidence in question would seem both relevant and trustworthy, however, it seems unlikely that a curative instruction will have much effect. Indeed, it is possible that a curative instruction in some circumstances may even have a detrimental effect by drawing the attention of the jury to a matter which otherwise might have gone unnoticed or might have been deemed to be less significant by the jurors.[78] Consequently, the circuit courts may, in appropriate circumstances, rule that the curative instruction was not sufficiently curative to erase the original error and thus reverse the verdict of the trial court.[79] Thus, the power of the circuit court to relax the "cured error" doctrine, like its power to relax the "waived error" doctrine, enables the circuit courts to review the jury's verdict and by a manipulation of this doctrine reverse or affirm as the court feels justified. In *Turroff*, for example, the Second Circuit refused to consider as sufficiently curative the trial court's instruction to the jury not to consider the fact that the House Un-American Activities Committee transcript, which had been erroneously admitted into evidence, indicated the defendant was a Communist. On the other hand, in *Davis v. United States*,[80] the District of Columbia Circuit followed the common practice in conspiracy cases of holding that a trial judge's instruction to disregard certain statements made by one

77. *E.g.*, James v. United States, 269 F.2d 245 (D.C. Cir. 1959) (instruction cured error which occurred when witness testified he identified defendant from mug shot) (defendant clearly guilty).

78. *See* Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744 (1959), noting effect of curative instruction in civil case where evidence that defendant is insured is inadvertently admitted and then striken from the record. *E.g.*, Brief for Appellant at 2-3, James v. United States, 269 F.2d 245 (D.C. Cir. 1959).

79. *See* United States v. Rinaldi, 301 F.2d 576 (2d Cir. 1962) (prior crimes); Taylor v. United States, 260 F.2d 737 (D.C. Cir. 1958) (declaration of alleged co-conspirator when no conspiracy proved may have been used in terms of substantial count even though jury instructed not to use it).

80. 274 F.2d 585 (D.C. Cir. 1959). Under the admissions exception to the hearsay rule, statement of a conspirator in furtherance of a conspiracy may be used against co-conspirators. However, participation by the alleged co-conspirator must be proved by other independent evidence before such statement can be used against him. The trial judge often permits the prosecutor to vary the proof and present the statement before proving participation.

member of a conspiracy about the activities of the others had the effect of erasing this matter from the minds of the jury.[81]

6. *Rule Making*

Inherent in the nature of jury control devices is the power of the courts, particularly the appellate courts, to change the devices on a generalized basis as they see fit. The rules of evidence are the most complex of the devices as well as the easiest for the courts to change. So it is not surprising that in the period covered by this survey, both circuits were quite active in changing, in one degree or another, the rules of evidence. Such changes, as long as they were on a generalized basis, are not the subject of this study.[82] When, however, such changes were made on an ad hoc basis (constituting a train ticket good for one ride only) or when such changes involved what seemed to be a studied ignorance of the impact of the rules in a given case, it seemed obvious that the circuit courts were using their rule-making power to manipulate the results produced by the trial process.

In *Case v. New York Central Railroad Co.*,[83] the Second Circuit engaged in such a manipulation of the hearsay rule. Here a railroad official, attempting to rebut the unfavorable presumption which would

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81. *Id.* at 588. If the prosecutor fails to prove participation, the trial court instructs the jury to ignore the hearsay statement. *See* McCORMACK, *supra* note 27. For another case where the circuit court was probably over optimistic about the effect of the curative statement, *see* United States v. Sahadi, 292 F.2d 565 (2d Cir. 1961). When defendant is responsible for introduction of the evidence, the courts do not question the curative effect of the instruction. *See* United States v. Vita, 294 F.2d 524 (2d Cir. 1961).

82. Of course, it should be noted that changing the rules on a generalized basis is in one sense manipulative of the results produced by a trial process since the results produced by such a process are affected by the rules of evidence which often favor one party as opposed to another.

The liberal District of Columbia Circuit has tended to favor defendants in criminal cases and plaintiffs in civil cases by its changes in the rules of evidence. In Gordon v. United States, 383 F.2d 936 (D.C. Cir. 1967), the District of Columbia Circuit finally limited the introduction of evidence of prior crimes for impeachment purposes to crimes involving the element of falsehood—as if the fact that someone convicted of murder would be as likely to tell the truth on a witness stand as an individual without a criminal record. Similarly, the District of Columbia Circuit has liberalized the admissions exception of the hearsay rule in respect to post-accident admissions made by a defendant's agent. Koninklijke Luchtvaart Maatschappij N.V. KLM v. Tuller, 292 F.2d 775 (1961).

Some rule changes reflect the desire on the part of the circuit courts not to favor one side or another but rather to streamline the fact-finding process by dispensing with rules which the court views as being without value. For instance, in the Second Circuit, it appears an accepted practice to accept photostatic copies of documents without the requirement of authentication. *See* Brief For Appellant at 16, DeLima v. Trinidad Corp., 302 F.2d 585 (2d Cir. 1962); McCORMACK, *supra* note 27, §§ 185-94.

83. 329 F.2d 936 (2d Cir. 1964) (evidence clearly in favor of defendant who prevailed in jury verdict).

ordinarily be drawn from the railroad's failure to produce its employees who were at the scene of the accident, was permitted by the trial judge to testify he had asked not only the missing witness but also some five other employees near the scene whether they had seen the accident in question and received a negative response from each. The Second Circuit, over a strong dissent from Judge Hays, ruled that this testimony was admissible despite the fact that it was offered to prove the truth of the matter asserted.[84] Another example of apparent misapplication of the evidentiary rules occurred in *Dancy v. United States*,[85] where the District of Columbia Circuit ruled that an instruction limiting the use of hearsay about defendant's involvement in narcotics for the purpose of refuting defendant's entrapment defense was not sufficiently clear. On that basis the court reversed the defendant's conviction on a multi-count indictment.[86]

Certain decisions do not seem readily categorizable as exemplifying the impact of a new generalized rule or the impact of manipulation. In *United States v. De Sisto*,[87] the Second Circuit made a formal exception to the general rule that prior inconsistent statements may be used for impeachment purposes but not as substantive evidence. The court ruled that the prior inconsistent statement of a government witness made at an earlier trial, regarding the identification of the defendant, was admissible as substantive evidence at the second trial on the ground that it was sufficiently trustworthy since it had been made under oath and subjected to the test of cross examination.[88] On the surface, the *De Sisto* decision clearly constitutes a case where the court has made a generalized change in the rules of evidence for valid substantive reasons and without any intent to manipulate the rules to justify affirmance in these cases. It is interesting to note, however, that the

84. *Id.* at 938.
85. 276 F.2d 521 (D.C. Cir. 1960).
86. *Id.*
87. 329 F.2d 929 (2d Cir. 1964) (appellate court considered guilt clear).
88. *Id.* at 934. A number of eminent writers have urged the abolition of the rule that prior inconsistent statements cannot be used as substantive evidence. United States v. Block, 88 F.2d 618 (2d Cir.), *cert. denied*, 321 U.S. 690 (1931); DiCarlo v. United States, 6 F.2d 364 (2d Cir.), *cert. denied*, 268 U.S. 706 (1924); *see* 3 J. WIGMORE, EVIDENCE § 1018 n.2 (3d ed. 1940); Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 192 (1948). The Supreme Court, in California v. Green, 396 U.S. 1001 (1970), has ruled that a California statute permitting use of prior inconsistent statements as substantive evidence in some circumstances did not violate the sixth or fourteenth amendment. There are constitutional problems which would arise if the prior impeaching statement were one which would not be admissible because of constitutional exclusionary rules. *See* United States v. Curry, 358 F.2d 904 (2d Cir. 1965). The abolition of this rule would also pose certain difficult problems in trial preparation. *See* Weinstein, *The Probative Force of Hearsay*, 46 IOWA L. REV. 331, 336 (1961).

change was necessary to secure conviction of the defendant. Without the change the conviction would have to have been reversed because, as the Second Circuit admitted,[89] the trial judge's instruction on the limiting effect of the prior inconsistent statement had been both late and inadequate and because the prior inconsistent statement had to be considered substantive evidence for the conviction to be sustained under the "sufficiency of the evidence" test.

Even more difficult to categorize than the *De Sisto* case are *United States v. Kennedy*,[90] *United States v. Annunziato*,[91] and *United States v. Isadore Press Co.*[92] Viewed in one light, these cases are textbook cases[93] which permit the introduction of evidence under the state of mind exception when its only relevance was not to show a state of mind but only to prove the truth of the matter asserted extra-judicially. In *Kennedy* for example, the Second Circuit upheld the trial judge, who had permitted a victim of an extortion racket to testify that other truck drivers had told him that the defendants had threatened them also, on the theory that this evidence showed the states of mind of the victims. This it certainly did; unfortunately the state of mind of the victims were not really relevant to the case. The fact that the defendants had made such threats was relevant; the problem was that the testimony was not admissible to prove the making of such threats. Viewed in another light, however, these cases may represent only special manipulations of the state of mind exception to uphold the convictions of individuals whom the circuit courts deemed to be guilty. It is interesting to note that in *United States v. Murray*[94] the defendant was not able to obtain the benefit of the *Kennedy* rule. One could raise the same question about the District of Columbia Circuit's restrictive interpretation of the rule against impeachment of one's own witness. In *Belton v. United States*,[95] the prosecutor knew that the one witness to the murder (a witness he was obligated to call), had changed part of his story but did not know which part. When the witness changed his

89. 329 F.2d at 932.
90. 291 F.2d 457 (2d Cir. 1961). "The evidence fairly 'shrieks the guilt of the parties.' " *Id.* at 458.
91. 293 F.2d 373 (2d Cir. 1961) (defendant clearly guilty).
92. 336 F.2d 1003 (2d Cir. 1964). The court said it was "not even one of the 'close' cases arising under the Mail Fraud Statute." *Id.* at 1009.
93. *See* J. McGUIRE, J. WEINSTEIN, J. CHADBURN & J. MANSFIELD, EVIDENCE (5th ed. 1965).
94. 297 F.2d 812 (2d Cir. 1962) (ample basis for the jury's rejection of defendant's explanation of unreported income).
95. 259 F.2d 811 (D.C. Cir. 1958) (en banc with Miller, Bastian & Danaher, JJ., dissenting).

story on the stand to support defendant's claim of self-defense, the prosecutor attempted (by impeachment) to bring out the original story, which showed an unprovoked attack by defendant. The District of Columbia Circuit chose to ignore the general rule that the prosecutor's testimony may impeach any witness he is obligated to call.[96] The court ruled that attempts by the prosecution to impeach this witness warranted reversal.[97] One could also question the District of Columbia Circuit's decision in *Evans v. United States*.[98] Defendant in this case claimed that she had stabbed the victim in her efforts to prevent him from sexually assaulting her. The trial court excluded evidence that the deceased became quarrelsome when under the influence of alcohol (as it seems he was on the night of his death) and that deceased suffered from emotional problems and occasionally became deeply depressed. The District of Columbia Circuit then adopted the rule that evidence about a decedent's character for turbulence and violence should be admitted in a homicide case where the defendant claims self-defense, even though the defendant had no knowledge of the same.[99] It then ruled that the evidence about the decedent's character should have been admitted in view of defendant's claim of self-defense,[100] even though the evidence showed only a tendency of the deceased to be quarrelsome while drinking and not a tendency for him to become sexually aggressive and therefore did not have any bearing on defendant's claim that she killed decedent because of his attempted sexual assault.

B. *Sufficiency of the Evidence*

1. *The Test—Civil Cases*

In a jury civil case, the "sufficiency of the evidence" test is brought into play by a motion for a directed verdict which may be made at the close of the opposing party's case, at the close of all the evidence, or after the jury verdict is returned.[101] Such motion is made as a matter

96. Meeks v. United States, 179 F.2d 319 (9th Cir. 1950); DiCarlo v. United States, 6 F.2d 364 (2d Cir. 1925).

97. The District of Columbia Circuit had to engage in legal gymnastics to hear the case since no appeal had been properly filed. 259 F.2d at 814-17.

98. 277 F.2d 354 (D.C. Cir. 1959).

99. *Id.* at 354-55. *See* McCORMICK, *supra* note 27, § 160.

100. 277 F.2d at 355.

101. FED. R. CIV. P. 50. The "sufficiency of the evidence" test is also brought into play at earlier stages of a civil proceeding by motions for judgment on the pleadings and motions for summary judgment. FED. R. CIV. P. 12 & 56. A plaintiff is entitled to a directed verdict when all the evidence, viewed in the light most favorable to the defen-

of course by the defendant at the close of the plaintiff's case if there seems to be any possible defect in the prima facie case. Normally, such a motion is groundless and may be denied out of hand. When the trial judge concludes that the motion may be justified, he is placed between the devil and the deep blue sea. If he grants the motion at this time, he will save the time and expense of conducting the rest of the trial. On the other hand, he knows that appellate courts look upon the granting of such a motion, particularly when it is made at the close of the plaintiff's case, with disfavor.[102] If he does deny the motion, he can in effect delay decision of the matter since he can count on its being renewed at the close of all the evidence.[103] If he grants the motion at that time, he insures himself a more favorable attitude by the circuit court, which is more inclined to uphold direction of a verdict in a case where it can review all the evidence and assure itself that the plaintiff has no valid claim, than when it can review only the plaintiff's case.[104] If the trial judge does not wish to grant the motion at the close of all the evidence, he can reserve judgment on it specifically or he can again

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dant, would not enable reasonable men to find for other than the plaintiff. The author found only one case in which plaintiff appealed on the basis that such a motion was improperly denied. *See* Comer v. Pennsylvania R.R., 323 F.2d 863 (2d Cir. 1963).

102. Trial judges in the District of Columbia Circuit who granted motions for directed verdict at the close of the plaintiff's case had the following record:

Reversals:	White v. Louis Creative Hairdresser, Inc., 273 F.2d 832 (1959)
	Rotan v. Greenbaum, 273 F.2d 830 (1959)
	McManus v. Rogers, 273 F.2d 104 (1959)
	Kelly v. Safeway Stores, Inc., 267 F.2d 683 (1959)
	Capanelli v. Grane, 266 F.2d 445 (1959)
	Ekberg v. Gifford, 262 F.2d 231 (1958)
	Young v. Fishback, 262 F.2d 469 (1958)
	Hanna v. Fletcher, 261 F.2d 75 (1958)
Affirmances:	Randall v. The Evening Star Newspaper Co., 289 F.2d 880 (1961)
	Quick v. Thurston, 290 F.2d 360 (1961)
	Taylor v. Crane Rental Co., 254 F.2d 350 (1958)

The trial judges in the Second Circuit do not direct verdicts frequently.

Only four cases were discovered in the course of this study in which a district judge in the Second Circuit directed a verdict at any point in the trial. Three were reversed: Mazzi v. Greenlee Tool Co., 320 F.2d 821 (2d Cir. 1963); Massa v. Venezuelan Navigacion Co., 298 F.2d 239 (2d Cir. 1962); Scholle v. Cuban Venezuelan Oil Voting Trust, 285 F.2d 318 (2d Cir. 1960).

103. Trial judges are seldom reversed for refusing to grant a motion based on the "sufficiency of the evidence" test. For the only cases covered in this survey in which such reversal occurred, *see* Pierce Ford Sales, Inc. v. Ford Motor Co., 299 F.2d 425 (2d Cir.), *cert. denied*, 371 U.S. 829 (1962); Ryan v. Saint Johnsbury & L.R.R., 290 F.2d 350 (2d Cir. 1961).

104. In three of four cases in which trial judge granted a judgment notwithstanding the verdict, the District of Columbia Circuit upheld the action in contrast with its record in terms of directed verdict granted at close of plaintiff's case. *See* Kelly v. Great Atl. & Pac. Tea Co., 284 F.2d 610 (D.C. Cir. 1960); Skinner v. Koontz, 284 F.2d 207 (D.C. Cir. 1960) (judgment notwithstanding the verdict upheld); Spann v. Richmond, F. & P.R.R., 273 F.2d 827 (D.C. Cir. 1959) (judgment notwithstanding the verdict reversed); Williams v. Greenblatt, 272 F.2d 564 (D.C. Cir. 1959) (judgment notwithstanding the verdict upheld).

delay by denying it out of hand, confident that it will be renewed following the return of an adverse jury verdict.[105] By doing this, the trial judge accomplishes two things. First, he may eliminate the necessity for ruling on the motion since the jury may take him off the hook.[106] Second, by obtaining a jury verdict, he obviates the necessity for a new trial in the event he grants the motion of a judgment notwithstanding the verdict and is reversed.[107] Of course, his delay does increase the time and expense of the trial.

2. *The Test—Criminal Cases*

In a jury criminal case, the "sufficiency of the evidence" test is raised by a motion for a judgment of acquittal, which may be made at the close of the government's case, at the close of the evidence, or after the jury verdict.[108] Such motion is made as a matter of course in most criminal cases. It requires the trial judge to examine the evidence presented by the prosecution to determine whether the evidence is sufficient to justify sending the case to the jury.[109] In the District of Columbia Circuit, and in most circuits, the courts use the test devised

105. FED. R. CIV. P. 50(a). If the trial judge reserves decision, the party making the motion must renew the same following the return of the verdict to empower trial judge to grant such motion. *See* Johnson v. New York, N.H. & H.R.R., 344 U.S. 48 (1962). The *Johnson* rule effectively negates the trial judge's power to reserve decision.

106. *See* Kelly v. Great Atl. & Pac. Tea Co., 284 F.2d 610, 611 (D.C. Cir. 1960) (Burger, J., dissenting).

107. Spann v. Richmond, F. & P.R.R., 273 F.2d 827 (D.C. Cir. 1969). The motion for judgment notwithstanding the verdict was invented for just this purpose. *See* James, *supra* note 10, at 331.

108. FED. R. CRIM. P. 29. Of course, the prosecution is not entitled to a motion for a directed verdict of conviction because of the sixth amendment. *See* Sparf v. United States, 156 U.S. 51 (1895).

109. As in a civil case, the timing of such a motion may be significant. When the motion is made at the close of the government's case, the trial judge is required to consider only the evidence presented by the government whereas the motion made at the close of all the evidence requires the trial judge to examine all the evidence. This means that the defendant in some circumstances may repair a deficiency in the prosecution's case. Once such deficiency is repaired, it can never again be attacked because the defendant, by putting on evidence, waives his objection to the sufficiency of the plaintiff's case. *See* United States v. Goldstein, 168 F.2d 666, 668, 671 (2d Cir. 1948). Of course, defendant can renew his attack on sufficiency of the evidence by making a motion for judgment of acquittal at the close of all the evidence or after the jury verdict, but such attack must take the government's case as the defendant has repaired it. The defendant's decision as to put on evidence or not in such a situation is a hard one. *See* Comment, *The Motion for Acquittal: A Neglected Safeguard*, 70 YALE L.J. 1151 (1961). The District of Columbia Circuit has relaxed the harshness of this rule by dropping the waiver requirement and examining the sufficiency of the evidence solely in terms of the government's case. *See* Cephus v. United States, 324 F.2d 893 (D.C. Cir. 1963). The Second Circuit and the other circuit courts hold to the old rule. *See* United States v. Rosengarten, 357 F.2d 263, 286 (2d Cir. 1966); 2 C. WRIGHT, FEDERAL PRACTICE & PROCEDURE § 464 (1969) [hereinafter cited as WRIGHT]. The sufficiency of the evidence in criminal cases is a matter of federal law. *See* United States v. Monica, 295 F.2d 400 (2d Cir. 1961).

in *Curley v. United States*.[110] This test requires the trial judge, in passing on a motion for judgment of acquittal, to ". . . determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilty beyond reasonable doubt, the motion must be granted. If he concludes that either of the two results is fairly possible, he must let the jury decide the matter."[111] The Second Circuit employs another test for sufficiency of the evidence. The Second Circuit test makes the test for sufficiency of the evidence in criminal prosecutions the same as it is in civil cases: ". . . in all criminal prosecutions the prosecution makes out a sufficient case to go to the jury if the evidence would have been enough in a civil action, the only difference between the two being that in the end the evidence must satisfy the jury beyond any reasonable doubt."[112] Although at least one critic has claimed the Second Circuit test is based upon the proposition that the defendant is presumed guilty until proven innocent,[113] a less hysterical view would indicate that the differences between the two tests are more verbalistic than real.[114]

In all events, under either test, the trial judge usually denies the motion for judgment of acquittal out of hand. When he feels that the motion is justified, however, he is placed in something of a dilemma. If he grants the motion, he saves the time and expense of completing the trial (although defendants in criminal cases, unlike defendants in civil cases, do not take much time in presenting their side of the case). Since his decision to grant judgment of acquittal is not reviewable, he need not concern himself about being reversed.[115] The very fact that

110. 160 F.2d 229 (D.C. Cir. 1947).
111. *Id.* at 232-33.
112. United States v. Dudley, 260 F.2d 439, 440 (2d Cir. 1958), *quoting* United States v. Costello, 221 F.2d 668, 671 (2d Cir. 1955).
113. Goldstein, *The State and the Accused: The Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1159-62 (1960).
114. The extent to which the two tests differ has been called "a largely semantic dispute apparently intriguing to sciolists." United States v. Leitner, 312 F.2d 107, 108 n.1 (2d Cir. 1963).
115. The fifth amendment has been construed as to prohibit appeal by the government from judgment of acquittal. *See* Kepner v. United States, 195 U.S. 100 (1904) (Holmes, J., dissenting) (many others have agreed with his position). *See* Mayers & Yarborough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1 (1960).

the Government cannot obtain review of a judgment of acquittal, however, makes the conscientious trial judge reluctant to grant such a motion.[116] He may deny the motion in the hope that he may be taken off the hook by the jury, but otherwise he has nothing to gain by delay.

3. *Appellate Review*

The circuit courts treat the "sufficiency of the evidence" test with far more respect than the rules of evidence. Of course, the circuit courts do adopt the "ostrich" approach in some criminal cases due to the tendency of appellant's lawyers to use the "sufficiency of the evidence" claim as a catch-all device.[117] The courts in jury criminal cases will invoke the waiver doctrine when the defendant has failed to move for judgment of acquittal at the trial.[118] The circuit courts also use the "harmless error" rule to avoid discussion of the sufficiency of the evidence in multi-count cases where there is no valid allegation of error in respect to the conviction on one count.[119]

In general, however, opinions in cases involving the "sufficiency of the evidence" test discuss the evidence in great detail. One reason for such treatment is, of course, the practical difficulty of employing this test without such discussion. A second reason is the circuit courts' conviction that error in the application of this test is, unlike error in application of evidentiary rules, prejudicial per se. A final reason for such careful employment of this test is the fact that it comes closer than any other device to giving the circuit courts the power of direct review.

The District of Columbia Circuit, however, appears unsatisfied with the power given it by the "sufficiency of the evidence" test. It in-

116. WRIGHT, *supra* note 109, at 461.

117. The District of Columbia Circuit, which is the main culprit in this respect, produced no fewer than sixteen "ostrich" opinions out of 72 cases, which avoided, by means of a general finding of no error or no substantial error, discussing allegations of insufficiency of the evidence.

118. *See* Lee v. United States, 251 F.2d 915 (D.C. Cir. 1958); Johnson v. United States, 251 F.2d 888 (D.C. Cir. 1958). The circuit courts do not consider the entrance of a plea of not guilty in a jury trial the equivalent of a motion for judgment of acquittal as they do in a non-jury trial. The rationale in difference in treatment is difficult to understand. WRIGHT, *supra* note 109, at 266. However, it would seem that a real case of insufficient evidence would have to be noticed by the court under FED. R. CRIM. P. 52(b). *See* United States v. Viale, 312 F.2d 595 (2d Cir. 1963); WRIGHT, *supra* note 109, at 469. The waiver doctrine is also applied in civil cases when no motion for a directed verdict is made. *See* Nielson v. Kurz Co., 295 F.2d 692 (2d Cir. 1961).

119. *See* United States v. Benjamin, 328 F.2d 854 (2d Cir. 1964); United States v. Cardillo, 316 F.2d 606 (2d Cir. 1963).

sists, in criminal cases at least, in not just examining the quantity of the evidence but also in evaluating its quality by resolving questions of credibility. In *Dorsey v. United States*,[120] defendant had been convicted of assaulting, raping, and robbing a woman whom he had picked up on a Washington street. The District of Columbia Circuit held without discussion that there was sufficient evidence to support convictions for assault and robbery but not for rape despite the fact that all three charges sprung from the same incident and were based solely on the testimony of the prosecutrix. The reversal for the rape conviction reflected the District of Columbia Circuit's disbelief in her story—presumably on the perhaps questionable theory that prostitutes are not raped.[121]

Similarly, in *Wilson v. United States*,[122] the District of Columbia Circuit threw out the conviction of the defendant in an indecent liberties case on the ground that the uncorroborated testimony of the child-prosecutrix was insufficient to sustain a conviction.[123] The "prostitute testimony" and "uncorroborated testimony" corollaries to the "sufficiency of the evidence test" gave the Circuit the opportunity to review directly the jury's resolution of credibility—power which is not granted to it under the "sufficiency of the evidence" test.

C. *Atmospheric Regulations*

Perhaps the most significant, though infrequently employed jury control devices are a series of rules, some with constitutional implications, which control the atmosphere in which the trial is conducted and regulate the activities of attorneys, prosecutors and judges. These rules are designed to protect the jury from the influence of the other participants at the trial. They insure that the jury conducts its deliberations in a calm atmosphere, free from popular prejudices, and that it decides the case on the basis of the evidence in the record and not on the basis of extraneous material which often would have

120. 281 F.2d 71 (D.C. Cir. 1960).

121. Juries are normally more reluctant than trial judges to convict in such cases, partly because they do not believe the complainants, but mainly because they feel that the complainant was responsible for the situation. *See* KALVEN & ZEISEL, *supra* note 5, at 249-54.

122. 271 F.2d 492 (D.C. Cir. 1959).

123. Both juries and trial judges are often loath to convict in such situations because of the likelihood that complainant's testimony is not true. *See* KALVEN & ZEISEL, *supra* note 5, at 170.

been inadmissible had either party sought to introduce it into evidence.[124]

Like the evidentiary rules, the rules regulating the conduct of attorneys (especially prosecutors) and judges are manipulated to enable the circuit courts to review the end result of the fact-finding process as well as the mechanics of the process. Unlike the evidentiary rules, however, the atmospheric regulations are generally manipulated in one way only. Their application may be distorted to ignore abuses, to uphold the verdict of the lower court, but never to invent abuses to reverse the verdict of the lower court.[125] The reason for this lies in the fact that the United States attorneys and district judges are kith and kin of the circuit judges, many of whom have served in one or both

124. The purpose of the jury control is to permit the jury to decide those issues in a case which are deemed suitable for a jury's deliberation under the law; to decide such issues based solely on evidence which the law considers relevant and trustworthy; and to decide the issues in an atmosphere which is conducive to calm and deliberate decision making. One could say with little exaggeration that the purpose of newspaper coverage of criminal trials is to permit the public to decide whatever issues in a case it pleases based on whatever information the press cares to give it in an emotional and unjudicial fashion. Naturally, this leads to a confrontation. To avoid polluting the jury, prospective jurors are questioned about their knowledge of the case from the news media; those affected by such knowledge are excused. *See* Rideau v. Louisiana, 373 U.S. 723 (1963), where the Supreme Court ruled in effect that pretrial publicity could prejudice jurors who had no direct contact with it. During the case, the jury is instructed to ignore any portion of the news media which dealt with the case; in highly publicized cases, the jurors are often sequestered for the duration of the trial. As long as the jurors do not come into contact with such articles, they cannot be prejudiced by them although it may still be the better part of valor for a trial judge to refrain from discussing the case with the press. *See* United States v. Fancher, 319 F.2d 604 (2d Cir. 1963). Moreover, contact with non-prejudicial publicity is also considered harmless. *See* United States v. Vita, 294 F.2d 524 (2d Cir. 1961). Despite these precautions, however, sometimes jurors come into contact with prejudicial news media accounts which relate to the case. The normal method used by the trial judge in such a situation is to issue a cautionary instruction to cure the error which occurs. Sometimes the cautionary instruction is considered "curative" when the newspaper item is not particularly prejudicial. *See* United States v. Kahaner, 317 F.2d 459 (2d Cir. 1963); Shepard v. United States, 281 F.2d 603 (D.C. Cir. 1960). When the material in question is excessively prejudicial, courts have ruled that the curative instruction is insufficient. *See* United States v. Vita, 294 F.2d 524 (2d Cir. 1961); Coppedge, v. United States, 272 F.2d 504 (D.C. Cir. 1959).

125. Not surprisingly, the District of Columbia Circuit is sometimes an exception to this rule. *Eg.*, Berton v. United States, 259 F.2d 811 (D.C. Cir. 1958) (reversed also on evidentiary grounds), where the District of Columbia Circuit sitting en banc held that prosecutorial claim that flight of defendant in a murder case and his disappearance for five years prevented the government from producing most of the witnesses to the event was unwarranted. Judges Bastian and Miller dissented on this point. *Eg.*, Polisnik v. United States, 259 F.2d 951 (D.C. Cir. 1958), where the District of Columbia Circuit invoked the "plain error" rule to reverse for an unintentional statement on the part of the trial judge in summarizing psychiatric evidence even though the judge issued the normal cautionary instruction to the jury. *Eg.*, Frank v. United States, 262 F.2d 695 (D.C. Cir. 1958), where evidence clearly indicated defendant had failed to register as an agent for a foreign country (the Dominican Republic) but where Judges Edgerton and Danaher concluded that prosecutor's references to defendant's involvement in the famous *Murphy* case and evidence of the same, although relevant, were unnecessary and prejudicial. Judge Prettyman dissented.

of these capacities before elevation to the bench. Indeed, certain manipulation of the atmospheric regulations regarding judicial conduct seems less traceable to the circuit courts' desire to uphold a verdict it agrees with than to its desire not to criticize the conduct of the district judge.

1. *Conduct of Attorneys*

Traditionally, the private attorney has been given a great deal of leeway in his conduct during the trial. Trial courts are generally reluctant to infringe upon the attorney's traditional, though not unlimited, privilege in this area.[126] Appellate courts are most unwilling to reverse cases on the groud that misconduct of an attorney necessitated a new trial. Indeed, in the course of this survey, not one case was found where there was a reversal for misconduct of an attorney.[127] Perhaps the lenient attitude of the courts to an overly emotional argument by attorneys is generally justified, particularly since juries listen to their arguments with some skepticism. Nevertheless, on occasion, such leniency is carried too far. In *Camina v. Carolina Freight Carriers*,[128] the defendant's attorney claimed in his summation that plaintiff, his attorney, and his medical witnesses had all engaged in a conspiracy to obstruct justice and falsify testimony. The Second Circuit refused to reverse for what it admitted to be misconduct on the ground that the plaintiff's counsel had also been emotional in his summation. The circuit courts are equally lenient in regard to mistatements of fact. Insignificant mistatements of fact or law in the course of summation are probably cured by issuance of the usual instruction that statements of counsel are not evidence and are not to be considered as such, and that the judge rather than counsel is the source of the law. More significant mistatements may be corrected by specific instruction.[129] Such is not always the case with some statements which contain inadmissible evidence.

126. *See* ABA CANONS OF PROFESSIONAL ETHICS No. 15, which provides, "It is improper for a lawyer to assert his personal belief in his client's innocence or in the justice of his cause."

127. In Hong Sai Chee v. Long Island R.R., 328 F.2d 711 (2d Cir. 1964), the Second Circuit held harmless error an effort by defense attorney to appeal to religious prejudice on the grounds that plaintiff had not made out a prima facie case; otherwise, the court stated reversal would have been ordered. In actuality, the circuit courts are not often confronted with claims of misconduct on the part of ordinary attorneys. The absence of claims probably reflects the feeling by most attorneys that extravagant arguments by their opponents do not furnish a strong basis for appeal.

128. 297 F.2d 530 (2d Cir. 1962).

129. Dindo v. Grand Union Co., 331 F.2d 138 (2d Cir. 1964).

In *Rofrano v. Duffy*,[130] plaintiff's attorney, in both his opening and in his closing, mentioned matters which were inadmissible into evidence because of the hearsay rule. Despite the fact that questions to the judge (which resulted in the issuance of a curative instruction) indicated that the jury was considering the remarks of the plaintiff's attorney as evidence, the Second Circuit, invoking the waiver doctrine and the "cured error" doctrine, refused to reverse. The District of Columbia Circuit employed the same fictions in affirming *District of Columbia v. Elliott*,[131] although plaintiff's attorney in his summation had twice referred to matters which the trial court had refused to admit into evidence.

In *Pauling v. News Syndicate Co.*,[132] the plaintiff, a prominent nuclear scientist and a man of generally extreme liberal views, had filed suit for libel against a newspaper which had alleged in effect that he was pro-Communist. During the course of the trial, attorney for the defendant referred to one of plaintiff's counsel, a member of the Yale Law School Faculty, as "Tommie the Commie." Under the circumstances of that case and the prevailing political attitude of the day, this completely irrelevant allegation probably prejudiced the jury. Nevertheless, the Second Circuit refused to reverse.

2. *Conduct of the Prosecutor*

The problem of prosecutorial misconduct assumes several dimensions not present in the case of misconduct by an ordinary attorney. First, the prosecutor is an officer of the state. Therefore, his misconduct reflects not just on himself but on the state. Second, this misconduct is more likely to prejudice the rights of the opposing party than misconduct on the part of a private attorney.[133] Consequently, the courts cannot justifiably give the prosecutor the same freedom given to the ordinary attorney.

Probably the area in which the courts give the prosecutor the most allowance is in the field of the argument to the jury. This is illustrated in *United States v. Lefkowitz*.[134] Here, discrediting defendant's character witness, the prosecutor informed the jury:

> There is another side to Mr. Lefkowitz's character, another side

130. 291 F.2d 848 (2d Cir. 1961) (evidence clearly in favor of plaintiff as jury found).
131. 262 F.2d 218 (D.C. Cir. 1958) (jury verdict for plaintiff seems justifiable).
132. 335 F.2d 659 (2d Cir. 1964) (evidence favors defendant as jury found).
133. NAT'L COMM. ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1931).
134. 284 F.2d 310 (2d Cir. 1960) (evidence fairly close).

> that Mr. Heller does not know; another side that lives on the periphery of the law; another side that is a parasite which lives on the unjust earnings of others while maintaining the dignified cloak of a civilized human being in society. . . .[135]

The Second Circuit, while characterizing this comment as "needlessly colorful,"[136] did not seem overly concerned about the matter. However, the Second Circuit does recognize that even in argument, the prosecutor must observe certain bounds: "It is the prosecutor's obligation to avoid arguments . . . which are immaterial and which may serve only to prejudice the defendant. It is his duty above all else to be fair and objective and keep his argument within the issues of the case."[137]

Despite these strictures, the courts are most reluctant to reverse for abuse of argument and use the same devices to avoid such reversal as those used for evidentiary errors. In *United States v. Passero*,[138] a narcotics case, the prosecutor informed the jury: "If you don't believe the agents, you may just as well clear the book on the prosecution of narcotics." The Second Circuit ruled: "Any possibly harmful effect of this comment, which was made in response to a sharp attack upon the agents' credibility, was cured by the judge who termed the remark 'inaccurate and improper' and instructed the jury to completely ignore and disregard it."[139]

The courts are particularly apt to invoke the "harmless error" rule when confronted with a claim that the prosecutor went too far in argument. In determining whether his remarks were harmless error, the Second Circuit applies its special rule and will affirm a verdict in spite of such misconduct if ". . . the jury had adequate affirmative testimony to support its verdict. . . ."[140] Surprisingly enough, the District of Columbia Circuit, which employed the normal "harmless error" test in dealing with allegations of evidentiary errors, neverthe-

135. *Id.* at 314.
136. *Id.* For other examples of permissible oratory, *see* United States v. Passero, 290 F.2d 238, 245 (2d Cir. 1961) (defendant obviously guilty), where prosecutor argued that defendant in narcotics case had consorted with other narcotics pushers:

> In response to the defense argument that the government was improperly relying on guilt by association, the prosecutor argued that 'when you walk like a duck, talk like a duck, and you look like a duck, you are a duck.' Although the image may not have been particularly apt, the remarks were in no way improper and indeed focused the jury's attention upon the evidence that tended to show Passero's guilt.

137. United States v. Bugros, 304 F.2d 177, 179 (2d Cir. 1962).
138. 290 F.2d 238 (2d Cir. 1961).
139. *Id.* at 245-46.
140. United States v. Dardi, 330 F.2d 316, 334 (2d Cir. 1964).

less seems to employ a version of the Second Circuit test in dealing with allegations of prosecutorial misconduct. The District of Columbia Circuit has said: "It is generally held that whether improper misconduct of Government counsel constitutes prejudicial error depends in good part on the relative strength of the Government's evidence of guilt."[141]

In *United States v. Whiting*,[142] the defendants were accused of a mail fraud scheme which involved bribery of Latin American officials. In summation the prosecution alluded to such bribery and said that if that's the way Americans do business in Latin American countries, it was little wonder that there was anti-American rioting in the streets down there. The Second Circuit invoked the "harmless error" doctrine to rule, "While we are not to be understood as sanctioning such latitudinous remarks, we do not believe that they were sufficiently prejudicial to require reversal."[143] Similarly, in *United States v. Guidarelli*,[144] the Second Circuit said: "While we believe the prosecutor did overstep the bounds in summation—calling defendant a leech and accusing him of ruining a young law student-relative's career by having the boy hold cash for him—we do not feel that these comments were sufficiently prejudicial to warrant reversal."[145]

The courts are particularly fond of invoking the "waived error" doctrine when confronted with claims of extravagant prosecutorial argument. They justify their use of the device not only on the ground of expediency, but also on the ground that failure of defense counsel to make objection at trial indicates his judgment that the conduct of which he now complains was not prejudicial.[146] The circuit courts seem quite unwilling to invoke the "plain error" rule to reach waived misconduct.[147] In *Accardo v. United States*,[148] the District of Columbia Circuit refused to invoke the "plain error" rule despite the fact that

141. Jones v. United States, 338 F.2d 553, 554 n.3 (D.C. Cir. 1963).
142. 308 F.2d 537 (2d Cir. 1962) (evidence ample to support the judgment).
143. *Id.* at 542.
144. 318 F.2d 523 (2d Cir. 1963) (guilt very clear).
145. *Id.* at 525.
146. *See* United States v. Farley, 292 F.2d 789 (2d Cir. 1961). "We do not think any reversible error was committed in this isolated reference. The defense counsel made no objection, and did not think the matter of sufficient moment to justify a request for a charge on the subject." *Id.* at 793.
147. *See* United States v. Agueci, 310 F.2d 817 (2d Cir. 1962); United States v. Mont, 306 F.2d 412 (2d Cir. 1962); United States v. Frascone, 299 F.2d 824 (2d Cir. 1962); United States v. Farley, 292 F.2d 789 (2d Cir. 1961); Cecil v. United States, 254 F.2d 773 (D.C. Cir. 1958); Cook v. United States, 251 F.2d 381 (D.C. Cir. 1957). For an exception, *see* United States v. Persico, 305 F.2d 534 (2d Cir. 1962).
148. 249 F.2d 519 (D.C. Cir. 1957) (Bazelon, J., dissenting) (no doubt of guilt).

the prosecutor, in urging the jury to believe the word of the prosecution witness (though his testimony was uncorroborated and, indeed, contradicted by defendant), declared: ". . . if you take that position [of believing defendant] you are issuing a license to the robbers and criminals in this jurisdiction to take over the capital of the nation . . . . If so why you just issue a license, as I stated before, to increase crime in this jurisdiction."[149] Often, the courts simply ignore claims of improper argument.[150]

Unfortunately, the courts are not inclined to look with any more of a jaundiced eye at more serious kinds of prosecutorial misconduct—prosecutorial misstatements of fact and law, and prosecutorial references to matters inadmissible into evidence.[151] Of course, if the misconduct is minor, the courts should invoke the "harmless error" rule. However, if the misconduct is significant, it would seem that reversal would be merited. In *United States v. Dardi,* [152] the Second Circuit invoked the "harmless error" rule when the prosecutor informed the jury of the supposed content of testimony of unavailable witnesses.

In cases involving prosecutorial misconduct of this nature, the courts tend to rely heavily on the "cured error" doctrine. Sometimes, the circuit courts are justified in holding that the normal instruction given by the judge to the effect that the statements of counsel are not evidence may be sufficient to cure any misstatements made by the prosecutor. Occasionally, a more specific instruction may also be sufficient. The problem occurs, however, when such instructions would not seem to be sufficient. This is a problem, however, which does not seem to be readily recognized by the courts. In *United States v. Klein,*[153] the prosecutor, in his summation, misstated a crucial item of evidence. The trial judge, instead of correcting him, repeated the same statement twice. Nevertheless, the Second Circuit held that the trial judge's general charge to the jury (which included customary instructions not to take either judge's or prosecutor's comments as evidence) cured

149. *Id.* at 521-22.

150. *See* United States v. Cording, 290 F.2d 392 (2d Cir. 1961); Chaifetz v. United States, 288 F.2d 133 (D.C. Cir. 1960); Silverman v. United States, 275 F.2d 173 (D.C. Cir. 1960); United States v. Hunt, 258 F.2d 161 (D.C. Cir. 1958).

151. 6 J. WIGMORE, EVIDENCE § 1807 (3d ed. 1940); Levin & Levy, *Persuading the Jury with Facts Not in Evidence—the Fiction-Science Spectrum,* 105 U. PA. L. REV. 139 (1956); *see* Note, *Forensic Misconduct,* 54 COLUM. L. REV. 946 (1954).

152. 330 F.2d 316 (2d Cir. 1964) (jury had adequate affirmative testimony to support its verdict).

153. 306 F.2d 13 (2d Cir. 1962) (ample evidence to sustain Klein's participation in the crime).

the error in question.[154] In *Kornegay v. United States*,[155] a prosecution for a federal gambling law violation, the prosecutor informed the jury that the defendant was the "backer" of a particular numbers operation.[156] The District of Columbia Circuit held that the trial judge's instruction to disregard this remark had the effect of erasing the impression made on the jury.

It is interesting to note that in the period covered by this study, the circuit courts reversed only five cases for prosecutorial misconduct.[157]

3. *Judicial Misconduct*

Perhaps even more significant than misconduct on the part of the attorneys in a civil case or the prosecutor in a criminal case, is misconduct on the part of the trial judge. Misconduct on the part of one who is theoretically impartial is more likely to be resented than the misconduct of one who is an adversary. Judicial misconduct is more likely to cause substantial injustice to the parties than any other kind of misconduct. The jury is far more likely to be swayed by the judge, to whom it looks for impartial guidance, than by the parties, who it recognizes have a definite bias. The conduct of a trial judge, like the conduct of Caesar's wife, must be above suspicion; and the reviewing court must be as zealous of the honor of the trial court as it is of its own.

Unfortunately, judicial misconduct is far more difficult to detect than prosecutorial misconduct because it seldom takes the direct form of extravagant and emotional argument or the shape of inadmissible evidence. Generally, it consists of a course of conduct which conveys the impression of bias for one side or another.[158] Often, no single incident may be significant.[159] Moreover, the conduct which is preju-

154. *Id.* at 15.
155. 258 F.2d 418 (D.C. Cir. 1958) (guilt clear).
156. Record at 498, *id.*
157. *See* United States v. Curtiss, 330 F.2d 278 (2d Cir. 1964) (reversed also for lack of counsel); United States v. Persico, 305 F.2d 534 (2d Cir. 1962) (reversed also for judicial misconduct); United States v. Bugros, 304 F.2d 177 (2d Cir. 1962); Frank v. United States, 262 F.2d 695 (D.C. Cir. 1958); Belton v. United States, 259 F.2d 811 (D.C. Cir. 1958) (reversed in part on evidence, part for prosecutorial misconduct).
158. Sometimes the misconduct of the judge may lead to the introduction of inadmissible evidence. *See* Brief for Appellant at 6, McNamara v. Dionne, 298 F.2d 352 (2d Cir. 1962) (Clark, J., dissenting), where Judge Gibson in a negligence case permitted defendant's lawyer to enter a special appearance in the case although the defendant was represented by counsel furnished by his insurer, and where trial judge permitted defendant's lawyer to argue about charge insofar as it related to insurance in front of the jury (clear case on liability but amount of damages questionable).
159. *See* United States v. DeSisto, 289 F.2d 833 (2d Cir. 1961).

dicial often differs only in degree from that which is non-prejudicial. Frequently, the conduct complained of is but a slightly exaggerated version of the normal conduct of certain trial judges who have in time lost their psychological fitness for the bench. Well aware that certain judges are frequent offenders in this regard, the circuit courts are all too often willing to tolerate almost incredible conduct on the part of a judge which would not be tolerated in any one else. Attorneys would be jailed for conduct which trial judges are permitted to engage in, not only without rebuke from circuit courts but even without notice. Although the printed record is often inadequate to convey the atmosphere of a trial, a number of cases encountered in this survey seemed to exhibit examples of judicial misconduct which are shocking in nature.

The circuit courts, however, are not easily shocked. In *United States v. Williams*,[160] for example, Judge Bicks struggled with counsel for one of the defendants throughout the trial, constantly harassing him and hampering his cross-examination of witnesses. While some of the difficulty was probably due to the counsel's fault, some of it seemed to be a result of Judge Bicks' evident desire to teach the attorney a lesson. Indeed, Judge Bicks' attitude even spread over to the attorney for the second defendant. On asking the counsel if he had ample opportunity to cross examine, the counsel replied, "I don't know, Judge. I'll have to sleep on it and think it over." Judge Bicks then commented, "You'd better start sleeping now, while the jury and the witnesses are here."[161] Judge Bicks was so significantly cognizant of the extent to which the trial had become a personal quarrel between the defense counsel and himself that he felt obliged to issue cautionary instructions to the jury telling them not to be influenced by his rebuke of defense counsel.[162] The Second Circuit, affirming this case in open court without opinion, completely ignored the problem caused by Judge Bicks' misconduct. In *United States v. Gross*,[163] Judge Bicks interrupted the prosecutor's examination of the main defense witness to predict to the jury that, "Give the United States Attorney an opportunity and I daresay there must be a prior contradictory statement which he [the witness] is now going to be confronted with."[164] At this

160. 282 F.2d 899 (2d Cir. 1960) (guilt clear from the record).
161. Record at 338, *id.*
162. Brief for Appellee at 48, *id.*
163. 286 F.2d 59 (2d Cir. 1961) (evidence of guilt clear).
164. *Id.* Joint Appendix, at 1439.

point, defendant's counsel moved for a mistrial. The trial judge denied his motion but told the jury to disregard his comment. "If my surmise was a wrong one, the jury has been instructed adequately."[165] The Second Circuit again ignored this misconduct on the part of Judge Bicks in its affirmation of the conviction in this case.[166] In *United States v. Ramis*,[167] the Second Circuit refused to examine as unworthy of "discussion" a complaint of misconduct arising from the fact that Judge Cooper had interrupted the summation of defense counsel three times in an attempt to get him to abide by a supposed agreement to speak only half an hour, and the allegation that Judge Cooper had made various prejudicial facial expressions while giving the charge.[168]

Sometimes the "ostrich" approach is employed when the circuit courts reverse on other grounds. Thus, the Second Circuit did not discuss the misconduct of Judge Zavatts in *United States v. Paroutian*,[169] which it reversed for failure to suppress illegally seized evidence, even though the trial judge had prejudicially referred to the defendant as "this operator, co-conspirator," "this big operator," and "this big shot."[170]

The Second Circuit is particularly adept at employing its test for harmless error to rule that the complained-of conduct on the part of the trial judge was not prejudicial.[171] Occasionally, the Second Circuit

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165. *Id.*

166. This action by the Second Circuit is particularly incomprehensible because Judge Bicks had a long history of judicial misconduct. The Second Circuit had rebuked him for his actions in United States v. Curcio, 279 F.2d 681 (2d Cir. 1960), and in Wendy v. McLean Trucking Co., 279 F.2d 958 (2d Cir. 1960). It was obvious that to charge Judge Bicks' method of trying cases would require reversals of his actions and not mere rebukes, or worse yet, a hear, say and see no evil attitude.

167. 315 F.2d 437 (2d Cir. 1963) (evidence of guilt clear).

168. Admittedly, it is somewhat difficult for an appellate court to examine this claim of error. *See* McElroy, *Some Observations Concerning the Discretion Reposed in the Trial Judge by ALI's Code of Evidence*, MODEL CODE OF EVIDENCE 250 (1942).

169. 299 F.2d 486 (2d Cir. 1962).

170. Record at 1936-37, *id.*

171. It expostulated this test in United States v. Kennedy, 291 F.2d 457 (2d Cir. 1961), where it said:

> The serious question . . . is whether reversal is required because of the remarks by the judge. . . . If the incidents were to be considered alone, as they appear when assembled in some seventy typewritten pages to appendix to appellants' briefs we should deem it our duty to reverse, as our colleagues in the First Circuit have recently done . . . . Moreover, this was not a case where there was a strong factual issue . . . defendants had not testified and the only issue of fact was whether the jury would believe prosecution witnesses whose testimony had not been challenged in any effective way. Under the circumstances, we do not believe reversal to be required.

Id. at 459-60.

is justified in so doing.[172] As mentioned before, *Pauling v. News Syndicate Co.*,[173] however, is not one of those instances. This case involved an action for libel brought by Dr. Linus Pauling. Judge Dawson permitted defendant's attorney to refer to one of plaintiff attorneys as "Tommie the Commie." After plaintiff had testified, "The editors of a great newspaper have a special obligation to stick to the truth," Judge Dawson broke in to say, "But you don't think you do." Judge Dawson also informed the jury that plaintiff was "foolish to have views on the Constitution."[174] Confronted with a clear cut case of judicial misconduct, the Second Circuit declared:

> We have given careful consideration to the claim of unfairness on the part of the trial judge. It is difficult for an appellate court to appraise the significance of remarks that may look quite different in a cold record than when made in the give and take of a trial. Although some comments would better have been foregone, the record is far from manifesting such unfairness as to warrant our ordering a new trial after a balanced charge and an afternoon's deliberation by the jury.[175]

The Second Circuit equalled its obtuse performance in this case with its decision in *United States v. Frascone*.[176] There, Judge Noonan, behaved improperly throughout the entire course of the trial. In the day and a half consumed by the prosecution's case, he intervened 133 times to ask the witnesses further questions to strengthen the prosecution's case. At the same time, he constantly interfered with defense counsel's cross-examination of these witnesses by interrupting defense counsel some thirty times. At one point, when defense counsel was asking a government agent how he had met a certain informer, Judge Noonan intervened to say, "Mr Burns, I assume that Mr. McDonnell did not meet Mr. Bove as a fellow student at Oxford University."[177] When defense counsel was questioning the agent about the number of payments he had made to this informer, Judge Noonan

172. United States v. Fanchers, 319 F.2d 604 (2d Cir. 1963) (comments made out of presence of jury to newspaper reporters. Jurors do not read newspaper reports); United States v. Tomaiolo, 317 F.2d F.2d 324 (2d Cir. 1963) (comments made to jury after verdict is returned); Riggs v. Lilibridge, 316 F.2d 60 (2d Cir. 1963) (limited questioning of witness by trial judge); United States v. Campisi, 292 F.2d 811 (2d Cir. 1961) (trial judge strict with both sides in regards to expedition of trial).

173. 335 F.2d 659 (2d Cir. 1964). *See* text, section III(c)(1) *supra*.

174. Record at 303, 280, 296-97, 335 F.2d 659 (2d Cir. 1964).

175. 335 F.2d at 671.

176. 299 F.2d 824 (2d Cir. 1962). Second Circuit made reference to "impressive evidence" against defendant. *Id.* at 828.

177. Brief for Appellant at 17-24, *id.*

again intervened to state (incorrectly) that his testimony on direct examination had been "that he doesn't recall any."[178] When defense counsel asked another witness how long a given conversation had lasted, Judge Noonan again intervened to say, "Well, I think the conversation lasted no more than thirty seconds. Do you?"[179] At another time when defense counsel was making a point that persons delivering narcotics resembled grocery boys, Judge Noonan remarked, apropos of nothing, "Well, I delivered groceries when I was in grammar school and are you putting me in a similar category."[180] The Second Circuit's response to this display of judicial misconduct was quite simple. "Although one or two of his comments would have been better unsaid, the record does not reveal that the judge's remarks obstructed defense in its effort to present evidence."[181]

Another device used by the Second Circuit to avoid reversals for judicial misconduct is the "waiver" doctrine. In *Blue v. Pennsylvania Railroad*,[182] an accident case in which plaintiff had injured her finger, Judge Ritter engaged in the following colloquies with defense counsel:

> The Court: Did she lose her finger in this accident?
> Mr. Gitlin: She cut her finger.
> The court: It looks to me as if she got a finger off.
>
> Q. Did you lose your finger?
> A. No. I mashed that.
>
> The Court: I see. She had it folded over. That has been bent all during the trial. The way it was bent, I thought it was cut off, yesterday. She has trouble with her little finger, bad trouble.
>
> Mr. Gitlin: Your Honor, we have taken testimony of the two doctors, who are not subject to subpoena by this court.
> The Court: We are not going to listen to all that. What do you need all that for?
> Mr. Gitlin: May I read parts of it?
> The Court: Yes. I do not see why we cannot have some stipulations about some of these things. The woman was hurt. There isn't any question about that. She was hurt bad. Is there any question in your mind about what happened to this woman?
>
> Mr. Kenny: May counsel approach the bench, your Honor?
> The Court: Yes. Is there any question at all in your mind about what happened to this woman?

178. *Id.*
179. *Id.*
180. *Id.*
181. 299 F.2d at 829. *See* United States v. Birnbaum, 337 F.2d 490, 498 (2d Cir. 1964).
182. 301 F.2d 450 (2d Cir. 1962).

Mr. Kenny: Yes, there is, your Honor.
The Court: I don't know why.[183]

Unfortunately, the defense counsel did not make any objection during several of these colloquies. The Second Circuit, invoking the "waiver" doctrine, the "harmless error" rule, and the "cured error" rule, affirmed the decision. In general, however, the Second Circuit has been willing to relax the rigor of the "waiver" doctrine in criminal cases by the invocation of the "plain error" rule.[184]

A final device used by the Second Circuit to avoid reversals for judicial misconduct is the "cured error" doctrine. Under some circumstances, where the trial judge's demonstration of bias has not been significant, an instruction on his part to disregard any such demonstration may be sufficient to erase the matter from the minds of the jury.[185] If, however, his bias has been blatant, a curative instruction would seem to be unavailing.[186] The Second Circuit is normally justified in invoking this doctrine in cases in which the trial judge in the course of summing up the evidence has made a minor mistake and corrects it by a general instruction to the jury not to take his summary as evidence but only as his recollection of the evidence.[187] If, however, the mistake is a significant one, or if the trial judge goes too far in resolving jury questions in the summary, it would seem that the curative instruction would be inadaquate. Nevertheless, in *United States v. Klein*,[188] when the trial judge mistook a crucial item of evidence in his summation, the Second Circuit ruled that the normal instruction regarding summation was sufficient to erase the impact of the judge's remark from the minds of the jury.[189] It is interesting to note that in the period covered by the survey, the Second Circuit reversed only two cases solely for judicial misconduct.[190]

183. Record at 38-39, 199, *id.*
184. *See* United States v. Salazar, 293 F.2d 442 (2d Cir. 1961).
185. *See* United States v. Haskell, 327 F.2d 281 (2d Cir. 1964); United States v. Woodner, 317 F.2d 649 (2d Cir. 1963).
186. *See* United States v. DeSisto, 289 F.2d 833, 835 (2d Cir. 1961) (defendant's guilt clear and Second Circuit affirmed results of retrial, 329 F.2d 929 (1964)).
187. United States v. Haynes, 291 F.2d 166 (2d Cir. 1961).
188. 306 F.2d 13 (2d Cir. 1962).
189. *Id.* at 15.
190. United States v. Salazar, 293 F.2d 442 (2d Cir. 1961) (evidence of guilt clear); United States v. DeSisto, 289 F.2d 833 (2d Cir. 1961). In two other cases, the Second Circuit reversed both for judicial misconduct and for other errors. *See* United States v. Persico, 305 F.2d 534 (2d Cir. 1962); Rheaume v. Patterson, 289 F.2d 611 (2d Cir. 1961) (weak case for plaintiff-appellee). In at least nine other cases the Second Circuit noted misconduct on the part of the trial court, rebuked it, but refused to reverse. *See* United States v. Birnbaum, 337 F.2d 490 (2d Cir. 1964); Pauling v. News Syndicate Co., 335 F.2d 659 (1964); United States v. Haskell, 327 F.2d 281 (2d Cir. 1964); United States v.

In contrast to the Second Circuit, the District of Columbia Circuit seems to have no problem with the kind of judicial misconduct seemingly common in the Second Circuit. However, the District of Columbia Circuit is willing to use the "harmless error" test to justify judicial misconduct. In *United States v. Lyles*,[191] defendant, accused of murder, invoked the insanity defense. At the end of the trial, the trial judge instructed the jury as to the effects of a verdict of acquittal by reason of insanity. After carefully informing the jury that defendant, if acquitted on this ground, would be confined to a mental hospital from which he would be released when recovered, the trial judge reminded the jury that a psychiatrist had already found the defendant competent to stand trial. The majority of the District of Columbia Circuit, sitting en banc, ignoring the fact that any alert juryman would have instantly noted the import of the judge's remarks, concluded that they constituted harmless error in view of the fact that this remark was but a minor element in a lengthy but otherwise valid charge and summary.[192] In *United States v. Heinke*,[193] the District of Columbia Circuit wrongfully invoked the "cured error" doctrine to affirm a case in which the trial judge had given the jury his opinion on one of the ultimate issues in the case.

IV. Conclusion

The study of the circuit courts' regulation of the fact-finding process by means of the jury control devices tends to substantiate two hypotheses about these devices. First, it seems evident that the circuit courts do not concern themselves with such devices when reviewing the fact-finding process conducted by a trial judge sitting without a jury—except to the extent that the circuit courts employ the "sufficiency of the evidence" test in criminal trials. Second, it seems clear that the circuit courts also manipulate the use of these devices when reviewing the fact-finding process conducted by a jury so as to review not just the process, but the end results of the process. At this point, however, it

Fancher, 319 F.2d 604 (2d Cir. 1963); United States v. Tomaiolo, 317 F.2d 324 (2d Cir. 1963); United States v. Paroutian, 299 F.2d 486 (2d Cir. 1962); United States v. Frascone, 299 F.2d 824 (2d Cir. 1962); United States v. Kennedy, 291 F.2d 457 (2d Cir. 1961); Wendy v. McLean Trucking Co., 279 F.2d 958 (2d Cir. 1960); United States v. Curcio, 279 F.2d 681 (2d Cir. 1960).

191. 254 F.2d 725 (D.C. Cir. 1957) (Edgerton, Bazelon, Fahy & Washington, JJ., dissenting).

192. *Id.* at 730.

193. 294 F.2d 727 (D.C. Cir. 1961) (evidence of guilt clear) (judge gave usual cautionary instructions about his comments and comments of counsel).

would be well to recognize that the above study permits us to make no conclusions regarding the use of these control devices at the trial level because the cases appealed constitute a small proportion of the cases actually tried. Indeed, the cases appealed presumably show a much higher rate of non-application, or mal-application, of the control devices than the vast majority of the cases which are not appealed. Thus, there may be no inconsistency between observing that these control devices are treated cavalierly at the appellate level, and suspecting that this treatment may be a result in part of the circuit courts conviction that they are generally applied quite properly at the trial level (and consequently that any misapplication of them is likely to involve a close question and was probably not prejudicial to the appellant).

This last point can best be understood by an examination of Tables V, VI, VII, VIII and IX.[194] Table V[195] shows seven cases in which the circuit courts misapplied the rules of evidence or the atmospheric regulations to justify reversal of jury verdicts of which they disapproved. In *Polisnik v. United States*[196] and *Edmonds v. United States*,[197] there was substantial evidence to indicate that the defendants were insane and the reversals in these cases probably reflected the District of Columbia Circuit's conclusion that the jury verdicts of guilty were not justified. In *United States v. Belton*,[198] *United States v. Fenwick*,[199] and *United States v. Taylor*[200] the District of Columbia Circuit seemed to feel that the evidence of guilt was weak. In *Belton* it was because the only prosecution witness had repudiated his earlier story and now supported the defendant's claim of self-defense; in *Fenwick* it was because the prosecution witnesses were accomplices with good reason to be antagonistic to the defendant; in *Taylor* it was because with the exception of one statement by a co-defendant, which the jury was instructed not to use against Taylor, there was little convincing evidence against Taylor. In *Evans*, the District of Columbia Circuit seemed to be quite disturbed by the fact that there was no motive for the homicide and seems to have concluded that evidence of the decedent's serious mental problems, while not substantiating

194. *See* Tables V, VI, VII, VIII & IX in Appendix *infra*.
195. *Id.*
196. 259 F.2d 951 (D.C. Cir. 1958).
197. 260 F.2d 474 (D.C. Cir. 1958).
198. 259 F.2d 811 (D.C. Cir. 1958).
199. 252 F.2d 124 (D.C. Cir. 1958).
200. 260 F.2d 737 (D.C. Cir. 1958).

defendant's claim of self-defense (in an attempt to repel rape) might still have convinced the jury that the decedent probably did initiate the dispute. The District of Columbia Circuit's reversal of the multi-count conviction in *Dancy* may reflect its dislike of police undercover narcotics agents and its conviction that the police bother the small-time casual pusher but not the "big man." In all events, the reversals of the cases listed in Table V reflect the circuit courts' reaction to the "error" in the verdict rather than the "error" in the use of the control devices.

Table VI[201] shows the cases in which the circuit courts misapplied[202] the rules of evidence and the rules controlling atmospheric regulations to justify affirmance of jury verdicts with which they agreed. In ten of the twelve civil cases listed, the evidence as examined and commented upon by the circuit court, or in the absence of such examination, as evaluated by the author, seemed to support the verdict. In *Levis v. Chapman*,[203] the author feels that there was strong evidence of contributory negligence but that the small jury verdict made allowance for this. In *McNamara v. Dionne*,[204] the author believes the damages awarded by the jury seemed excessive. In twenty-two of the twenty-three criminal cases listed, the evidence seemed to support the jury's verdict. In *United States v. Lyles*,[205] the sanity question seemed close to the author and may be partly responsible for the dissents by four members of the District of Columbia Circuit.

Table VII[206] lists a number of cases in which the circuit courts properly reversed jury verdicts because certain evidence had been improperly kept from the jury. In *United States v. 18.43 Acres of Land*,[207] a condemnation case, the jury had not been given evidence of prices paid for similar tracts of land nor evidence showing the amount of tax stamps purchased by the plaintiff when he sold the remaining portion of land. In *Abrams v. Gordon*,[208] the plaintiff had been prevented from impeaching defendant's medical witnesses by means of a treatise. In *Howard v. United States*[209] and *United States v.*

201. *See* Table VI in Appendix *infra*.
202. "Misapplied" is not used in the strict sense. The author recognizes that some of the "misapplication" might be justified under the "harmless error" or "abuse of discretion" rules.
203. 265 F.2d 345 (D.C. Cir. 1959).
204. 298 F.2d 352 (2d Cir. 1962).
205. 254 F.2d 725 (D.C. Cir. 1957).
206. *See* Table VII in Appendix *infra*.
207. 312 F.2d 287 (2d Cir. 1963).
208. 276 F.2d 500 (D.C. Cir. 1960).
209. 278 F.2d 872 (D.C. Cir. 1960).

Tomaillo,[210] the defendants had not been permitted to introduce prior inconsistent statements which would have had the effect of impeaching the testimony of the main prosecution witnesses. The admission of evidence that plaintiff was drawing a pension in *Eichel v. New York Central Railroad*[211] would have supported defendant's contention, on the issue of damages, that the plaintiff was malingering when he claimed total disability. In *United States v. New York Trade Zone Operators*,[212] the exclusion of a report of an accident offered by plaintiff's assignee weakened a plaintiff's case which was otherwise based on the self-serving testimony of the plaintiff and the totally ineffectual and confused testimony of his friend. In *Puggioni v. Luckenbach Steamship Co.*,[213] the plaintiff's case was adversely affected by the court's refusal to permit him to impeach one of his witnesses with a prior inconsistent statement. The one characteristic common to all of these cases is the exclusion of evidence which might have led the jury to a different verdict. Table VIII,[214] on the other hand, lists a number of cases in which the circuit courts properly reversed jury verdicts because of errors in the admission of evidence or because of judicial or prosecutorial misconduct. The one characteristic common to all of these cases is that in the view of the circuit courts or in the view of the author the evidence on the part of the prevailing party was very weak. Since the cases listed on these two tables represent fourteen of twenty-one cases properly reversed for evidentiary error or misconduct, it seems quite probable: (1) that the circuit courts are influenced by their view of the verdict in cases in which they have valid grounds for reversal, and (2) that they are generally willing to reverse only if the error complained of involves the admission of prejudicial evidence or misconduct in a case where the evidence for the prevailing side was weak, or if the error complained of involves the exclusion of material evidence in a case where the jury, shown the excluded evidence, might have arrived at a different verdict. The cases listed in these two tables are cerainly not cases in which the circuit courts' application of the rules of evidence and of the atmospheric regulations was made without regard to the evidence. This is not to say, however, that there are no such cases. Indeed, in all of the cases listed on Table IX,[215] the prosecu-

210. 286 F.2d 568 (2d Cir. 1961).
211. 319 F.2d 12 (2d Cir. 1963).
212. 304 F.2d 792 (2d Cir. 1961).
213. 286 F.2d 340 (2d Cir. 1961).
214. *See* Table VIII in Appendix *infra*.
215. *Id.*

tion's case was quite strong and yet the circuit court reversed. And then there is the curious case of *Masuda v. Kawaski Dockyard Co.*,[216] where the Second Circuit patted itself on the back for refusing to reverse a case in which it disapproved of the jury verdict. *Exceptio probat regulam.*

While it is easy to understand how the appellate courts, impatient at the bit of indirect review, and skeptical of the significance of the errors complained of, tend to abandon the enforcement of the control devices in non-jury cases and manipulate their enforcement of them in jury trials, it is not so easy to approve of their modus operandi. Admittedly, the system seems to work relatively well in practice, because the circuit courts are skilled in reviewing the results produced by the jury and partly because many of the jury control devices such as a number of the laws of evidence are unnecessary. Nevertheless, the system as it operates at the present has two great weaknesses.

First, the Second Circuit underestimates the effect of judicial misconduct on the jury and its tendency to degrade the judicial system. Kalven and Zeisel have already shown the great influence possessed by trial judges in their calculations that in clear cut cases judge-jury disagreement may range from 4 per cent to 26 per cent depending on the degree of empathy felt by the jury to the defendant when the trial judge neither summarizes the evidence nor comments on it.[217] In the same type of cases, however, when the trial judge summarizes the evidence or comments upon it, the disagreement rate dropped to 0 per cent to 1 per cent.[218] Moreover, Kalven and Zeisel have noted that when the trial judge by his demeanor or other actions reveals his opinion of the case, "the majority of the jurors are both interested in and skillful in reading his reaction."[219] In view of the impact that misconduct may have on the jury, the appellate courts cannot with any sense of justice continue to tolerate the kind of conduct which certain of its district judges feel free to indulge in. Although the ultimate solution to this problem is the creation of a commission to consider misconduct of judges and force from the bench those who can no longer adorn it with honor, the circuit courts, when confronted with such misconduct on appeal, must be more cognizant of the effect of such misconduct on a jury and also more zealous for the honor of the court.

216. 328 F.2d 662 (2d Cir. 1964).
217. KALVEN & ZEISEL, *supra* note 5, at 427.
218. *Id.* Admittedly, no such correlation was found in close cases.
219. *Id.* at 418.

The second deficiency in the present system is far more fundamental than the first. There is something both illogical and, in the last analysis, fundamentally dishonest about the system which has one rule for the jury, another for the trial judge, and still a third at the appellate level; or which permits the appellate courts by manipulation of the jury control devices to review the results of the fact-finding process even though in theory such review is verboten. Such lack of rationality and constancy in the operation of our judicial system has a debilitating effect on all the participants. In the end the cost of such a performance gap must be blanket distrust for the institution perpetuating it, and, in the end, for society itself.

One method of bridging the performance gap would be for the appellate courts to enforce the employment of the jury control devices without regard to the results produced by the fact-finding process. Indeed, such strict enforcement is clearly mandated, as indicated earlier, in terms of the standards for judicial conduct. Nevertheless, such strict enforcement would have several grave deficiencies.

The first deficiency is a purely practical one. Strict enforcement of the jury control devices, carried to its logical conclusion, would involve the jettisoning of the "harmless error" rule, the "waiver" doctrine, and the "cured error" rule, and would result in the reversal of such a huge number of trials as to tie the federal judicial system in knots. Even if strict enforcement were not carried to its logical extreme, it might place a serious burden on the judicial system.

The second deficiency seems more substantial in nature. Strict enforcement of the rules of evidence in particular would not produce more substantial justice than that which results under the present system. Indeed, strict enforcement might produce *less* substantive justice than is produced under the present system. The reason for this lies in the weaknesses of the rules of evidence themselves.[220] Let us examine the rule against admission of evidence of prior crimes. The rationale for this rule is that evidence of prior crimes may lead the jury to infer that the defendant has a criminal character and thus lead the jury to convict more readily. The factual assumption behind this theory would seem to be accurate.[221] However, the conclusion which is drawn from

220. *Cf.* E. MORGAN, PROBLEMS OF PROOF 169-95 (1956), for a searching examination of the evidence included and excluded by the rules of evidence.

221. KALVEN & ZEISEL, *supra* note 5, at 121-33, indicate that 1 per cent of judge-jury disagreement in which a jury acquits where the judge would have convicted are the result of the judge's knowledge of defendant's record and the jury's ignorance of the same. The reason that more disagreements are not occasioned by such factor is that 74

the theory—that such evidence should not be given to a jury—does not seem to make sense. However, accepting for a moment this conclusion, the "prior crimes" rule still does not stand scrutiny. Under the rule, evidence of prior crimes will be admissible as part of the res gestae, to prove a conspiracy, to prove other crimes by the accused employing the same modus operandi, to show a passion for illicit relations with the victim of a sex crime, to show that the criminal act was not inadvertent, to establish motive, to show malice, to prove identity, to constitute admissions by conduct or to impeach.[222] Although admitted solely for the purposes set forth in the exception, evidence of prior crimes cannot fail to have an effect on the jury's evaluation of defendant's character and its calculation of the likelihood that he committed the crime in question. Thus, the "prior crimes" rule will permit the jury to use evidence of prior crimes for the very purpose which the rule is intended to thwart.

The "prior crimes" rule is not the only evidentiary rule which is inherently contradictory. Another such rule is the rule that statements of co-conspirators are admissible only if made in the course of a conspiracy.[223]

> Strictly, the prosecution should first establish prima facie the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible against all. But the order of proof of so sprawling a charge is difficult for a judge to control. As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed. The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction.[224]

Indeed, the hearsay rule in general is inherently contradictory in the sense that it is intended to keep "hearsay" statements from being used

per cent of defendants with records and 90 per cent of defendants without records take the stand (75 per cent of the time the defendant's criminal record is brought out if he takes the stand; 13 per cent of the time when he does not take the stand it is brought out also). *See id.* at 146-47. Moreover, juries tend to draw unfavorable inferences in cases where defendant does not testify so the prior crimes rules protection of defendant's criminal record is not as effective as it might be. *Id.* at 179-81.

222. J. McCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 157 (1st ed. 1954).

223. Krulewitch v. United States, 336 U.S. 440 (1949).

224. *Id.* at 453 (Jackson, J., concurring).

for the truth of the matter asserted, but by permitting certain statements to come in under the exceptions to the hearsay rule it in effect permits these statements to be used for the truth of the matter asserted, as the appellants in *United States v. Kennedy*[225] found out to their sorrow.

However, it is not the evidentiary rules themselves which seem so illogical and contradictory in the last analysis, as it is the concept of jury control by means of such rules. There is something inherently inconsistent and illogical about making a body of laymen the triers of fact in a given case and then trying to hedge against their decision by censoring the information given to them. One of the most significant conclusions of the Kalven and Zeisel survey on the jury is that the jury does understand the case and it does follow the evidence; in short, that mistrust for the jury is unjustified.[226] If the jury is to be given the responsibility for deciding a case, a responsibility which the jury discharges adequately, it makes no sense to keep from it the kind of information which the average juror receives, evaluates, and acts upon in the course of his daily existence. There seems to be no reason in fact or logic to assume that taking the juror off the street and placing him in a jury box somehow renders him incompetent to deal with the kind of information he had been dealing with the day before. Granted, hearsay is not the best evidence. The juror knows this as well as the judge, however, and will make proper allowance for it. In light of this, it would be foolish to tighten the enforcement of the rules of evidence.

The third objection to the proposal to enforce the jury controls more strictly is psychological and functional in nature. The requirement that circuit courts (or any other individual or group) review the means by which the fact-finding process is conducted, rather than the results of the process itself, is to ask them to go against human nature. The deficiency of the present system is that it places what at times becomes an irresistible temptation in front of the circuit judges. There appears to be no way to remove this temptation. Moreover, one is moved to inquire as to why, ignoring history and tradition for a moment, this temptation should be removed. Common sense suggests that if circuit courts can review the findings of a trial judge, they should be equally able to review the findings of a jury.

It would seem that strict enforcement of the jury control devices is not, except in the case of judicial misconduct, the answer. If one does

225. 291 F.2d 457 (2d Cir. 1961).
226. KALVEN & ZEISEL, *supra* note 5, at 149.

not bridge the performance gap by making reality conform to theory, one can make the theory conform to the reality. What should be done is to abandon the concept of indirect review and to permit circuit courts to review the jury's verdict with the same attitude of respect with which it reviews the trial judge's judgment.[227] At the same time, the

227. F. Lee Bailey, suggested that the misfortunes of Dr. Sheppard, who was convicted by a jury influenced by pretrial publicity in Sheppard v. Maxwell, 384 U.S. 333 (1966), could have been avoided if the appellate courts had the power to review directly the jury's verdict. N.Y. Times, Nov. 15, 1966, at 1.

Of course, it should be noted that direct review as it is presently conducted in non-jury civil cases pursuant to the "clearly erroneous" standard has certain weaknesses. The first of these stems from the occasional refusal of trial judges to make findings of fact pursuant to FED. R. CIV. P. 52(a). For violations of this rule, *see* Nuzzo v. Redieri, 304 F.2d 506 (2d Cir. 1962) (reversed); Eden v. Lauriat, 254 F.2d 339 (D.C. Cir. 1958) (injunction) (remanded for further findings); Van der Heyot v. Rogers, 251 F.2d 17 (D.C. Cir. 1958) (dismissal for failure to prosecute) (remanded for further findings).

Often when the trial judge does make findings of fact, he does not prepare these findings himself but merely copies them from a list submitted by the victorious side. *See* Brief for Appellant at 34-36, Bevelheimer v. Slick Airways, Inc., 303 F.2d 69 (2d Cir. 1962); Wiseman v. Sinclair Refining Co., 290 F.2d 818 (2d Cir. 1961); Appleton Elec. Co. v. Watson, 148 F. Supp. 69, 71 (D.D.C. 1957). The author has been informed that this practice was common in the Second Circuit during the period covered by this study by Ralph Winter, then Clerk for Judge Marshall and now Professor of Law, Yale University. When findings are non-existent or inadequate, the circuit court application of the "clearly erroneous" test is hampered because of its ignorance of what the trial judge "really" found.

Another weakness of the direct review stems from the confusion between findings of fact (which are to be upheld unless "clearly erroneous") and conclusions of law (which are subjected to de novo review), particularly in cases which involve mixed questions of fact and law. *See* O. HOLMES, THE COMMON LAW 120-29 (1861).

In Ruby v. American Airlines, 329 F.2d 11 (2d Cir. 1964), for example, the majority of the Second Circuit treated the trial judge's conclusion that the employer had failed to bargain in good faith as a finding of fact and upheld the trial judge's decision on the grounds that it was not clearly erroneous. Judge Friendly, dissenting, argued that such a conclusion was a conclusion of law open to full review without regard to the lower court's ruling. The existence of a number of mixed questions of fact and law sometimes will induce an appellate court to apply the "clearly erroneous" test to a conclusion of law or to engage in de novo review of a finding of fact. *See* Romero v. Garcia, 286 F.2d 347 (2d Cir. 1961), for a discussion of whether a determination of negligence is a finding of fact or a finding of law. "Many decisions in this Circuit, some in civil actions and others in admiralty, have held that a judge's determination of negligence, as distinguished from the evidentiary facts leading to it, is a conclusion of law freely reviewable on appeal and not a finding of fact entitled to the benefit of the 'unless clearly erroneous' rule. . . . The basis of these decisions is that determination of negligence involves first the formulation and then the application of a standard of conduct to evidentiary facts found to be established. When all this has been done by a judge, a reviewing court has no means of knowing whether he formulated the standard correctly, since he does not charge himself. Thus, there must be free review of his ultimate determination of negligence although not of the facts on which it was based." *Id.* at 355. *Accord*, Trost v. American Hawaiian S.S. Co., 324 F.2d 225 (2d Cir. 1963); *see* United States v. Certain Interests in Property, 302 F.2d 201 (2d Cir. 1962) (contract—question of law or fact); Pacific Tow Boat Co. v. States Marine Corp., 276 F.2d 745, 752 (9th Cir. 1960); Imperial Oil Ltd. v. Drlik, 234 F.2d 4, 10 (6th Cir. 1956).

The circuit courts are reluctant to reverse findings by a trial judge, particularly when these findings are based on his resolutions of credibility. *See* United States v. Aluminum Co. of America, 148 F.2d 416, 433 (2d Cir. 1945), where Judge Hand says that a circuit court:

> . . . will nevertheless reverse it most reluctantly and only when well persuaded. This is true to a considerable degree even when the judge has not seen the witnesses. His duty is to sift the evidence, to put it into logical sequence and to make the proper

rules of evidence should be abolished in favor of a general rule which makes any evidence admissible unless the trial judge specifically ex-

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inferences from it; and in the case of a record of over 40,000 pages like that before us, it is physically impossible for an appellate court to function at all without ascribing some prima facie validity to his conclusions. . . . The reason for this is obvious and has been repeated over and over again; in such cases, the appeal must be decided upon an incomplete record, for the printed word is only a part, and often by no means the most important part, of the sense impressions which we use to make up our minds. Since an appellate court must have some affirmative reason to reverse anything done below, to reverse a finding it must appear from what the record does preserve that the witnesses could not have been speaking the truth, no matter how transparently reliable and honest they could have appeared. Even upon an issue on which there is conflicting direct testimony, appellate courts ought to be chary before going so far; and upon an issue like the witness's own intent, as to which he alone can testify, the finding is indeed "unassailable," except in the most exceptional cases.

Id. at 433 (citations omitted).

Such reluctance is based on the circuit courts' obeisance to demeanor evidence and to FED. R. CIV. P. 52(a), which provides that on appeal, "due regard shall be given to the opportunity for the trial court to judge of the credibility of the witnesses." Nevertheless, the circuit courts often seem to place too high a value on demeanor evidence. *See* Blatt, *He Saw the Witnesses*, 38 AM. JUD. SOC. 86 (1954), for a suggestion that demeanor evidence is over-valued. *See* Levin & Levy, *Persuading the Jury with Facts not in Evidence —the Fiction Science Spectrum*, 105 U. PA. L. REV. 139, 155 n.95 (1956), for the suggestion that appellate courts may have a better view of trial than trial judges because they have a clearer perspective. In Mayer v. Zim Israel Navigation Co., 289 F.2d 562 (2d Cir. 1960), the trial judge refused to accept plaintiffs version of her medical treatment at the hands of defendant's doctor ". . . even though this was uncontradicted and an inference favorable to her might have been drawn from respondent's unexplained failure to produce the testimony of the ship's doctor." *Id.* at 563. The Second Circuit, over the dissent of Judge Clark, affirmed the trial judge's rejection of plaintiff's testimony on the grounds that he could reasonably have found her testimony impeached by her demeanor and, consequently, unworthy of credence. *See* Shortler v. Adler, 258 F.2d 163 (D.C. Cir. 1958), for a contrary rule. In this case, District of Columbia Circuit reversed trial judge for refusing to accept uncontradicted and not inherently incredible testimony of plaintiff's witnesses.

In Salines v. Schwartz, 290 F.2d 777 (2d Cir. 1961), plaintiff stated that he had been driving his vehicle up First Avenue and was going through the intersection under a green light when he was hit by defendant's car. He admitted, however, that he had been trying to make every light on First Avenue on the way uptown. Defendant claimed that the light was green when he crossed First Avenue and struck the plaintiff's automobile. The only other witness to the case, a man who had been driving behind the plaintiff, testified that he had told passengers in his car that plaintiff was heading for trouble the way he was driving. He then testified that plaintiff had run the red light at this intersection. The trial judge nevertheless rejected the testimony of defendant and the impartial witness and accepted testimony of plaintiff. The Second Circuit upheld his decision partly on the grounds that he had opportunity to observe the witnesses. In Sittler v. United States, 316 F.2d 312 (2d Cir. 1963), a naturalization case, the trial judge refused to accept petitioner's avowal of devotion to American principles and his disavowal of any devotion to the principles of German Nationalism and National Socialism which had led him at the age of twenty to enter Germany, become a German citizen, join the Nazi party, and work for the Nazi propaganda agency. The Second Circuit affirmed the trial judge's rejection of plaintiff's testimony and the testimony of twenty character witnesses who appeared on his behalf because of the ". . . opportunity of the district judge to observe the conduct and demeanor of the witnesses, particularly of the petitioner himself." *Id.* at 314.

The reluctance of the circuit courts to employ the "clearly erroneous" test to overturn a trial judge's findings of fact may be best evidenced by the fact that during the period covered by this survey, the Second Circuit overturned the trial judge's decision in five cases on this ground while the District of Columbia Circuit overturned the trial judge's decision in only one case. *See* Damanti v. Inger, 314 F.2d 395 (2d Cir. 1963); Nuzzo v. Rederi, 304 F.2d 506 (2d Cir. 1962); Kalimian v. Liberty Mut. Fire Ins. Co., 300 F.2d 547 (2d

cludes it as excessively prejudicial, too time-consuming, or lacking in probity.

Cir. 1962); James Wood Trading Establishment v. Jaques Coe, 297 F.2d 651 (2d Cir. 1961); Wiseman v. Sinclair Ref. Co., 290 F.2d 818 (2d Cir. 1961); Shortler v. Adler, 258 F.2d 163 (D.C. Cir. 1958).

APPENDIX

TABLE I
UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Civil Cases	Judge Only	Jury
Affirmed	6	23
Reversed on Findings or Sufficiency of the Evidence	1	12
Reversed for Evidentiary Errors	0	1
Reversed for Judicial Misconduct	0	0
Reversed on Instructions or Conclusions of Law	0	2
Total	7	38

TABLE II
UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Criminal Cases	Judge Only	Jury
Affirmed	1	58
Reversed on Findings or Sufficiency of the Evidence	1	7
Reversed for Evidentiary Errors	0	7[a]
Reversed for Prosecutorial Misconduct	0	1
Reversed on Judicial Misconduct	0	1
Reversed on Instructions or Conclusions of Law	0	5
Miscellaneous	0	1
Total	2	80

[a] One case reversed in part for prosecutorial misconduct.

TABLE III
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Civil Cases	Judge Only	Jury
Affirmed	15	43
Reversed on Findings or Sufficiency of the Evidence	5	6[a]
Reversed for Evidentiary Errors	3	6
Reversed for Judicial Misconduct	0	1[b]
Reversed on Instructions or Conclusions of Law	5	4
Total	28	60

[a] One case reversed in part.
[b] Also reversed for error in regards to instructions

TABLE IV

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

	Criminal Cases	
	Judge Only	Jury
Affirmed	16	83
Reversed on Findings or Sufficiency of the Evidence	2[a]	7[b]
Reversed for Evidentiary Errors	0	5
Reversed for Prosecutorial Misconduct	0	3[c]
Reversed for Judicial Misconduct	0	2[d]
Reversed on Instructions or Conclusion of Law	0	3
Miscellaneous	1	3
Total	19	106

[a] Both cases reversed in respect only to certain defendants.

[b] One case also reversed on evidentiary grounds; one defendant in another case also received a new trial on evidentiary grounds, two cases were reversed only in respect to one defendant and a fifth case was reversed only in respect to one count.

[c] One case was also reversed for judicial misconduct and another was also reversed because of inadequate counsel.

[d] One case was also reversed for prosecutorial misconduct.

TABLE V

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Criminal Cases

United States v. Evans, 277 F.2d 354 (1960) (evidence).
United States v. Dancy, 276 F.2d 521 (1960) (evidence).
Polisnik v. United States, 259 F.2d 951 (1958) (judicial conduct).
United States v. Taylor, 260 F.2d 737 (1958) (evidence).
Edmonds v. United States, 260 F.2d 474 (1958) (en banc) (evidence).
United States v. Belton, 259 F.2d 811 (1958) (en banc) (evidence and prosecutorial misconduct).
United States v. Fenwick, 252 F.2d 124 (1958) (evidence).

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Criminal Cases

None

TABLE VI

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Civil Cases

Lewis v. Chapman, 265 F.2d 345 (1959).
D.C. v. Elliot, 262 F.2d 218 (1958).
Phillips v. Madison & Pub. Inv. Corp., 254 F.2d 348 (1958).
Romer v. Capital Products, Inc., 252 F.2d 843 (1958).

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Criminal Cases

United States v. Heinecke, 294 F.2d 727 (1961).
United States v. Licavoli, 294 F.2d 207 (1961).
United States v. James, 269 F.2d 245 (1959).
United States v. Ross, 267 F.2d 618 (1959).
United States v. Kornegay, 258 F.2d 418 (1958).
United States v. Lyles, 254 F.2d 725 (1957) (en banc).
United States v. Accardo, 249 F.2d 519 (1957).

TABLE VI (*Continued*)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Civil Cases

Pauling v. New York News Syndicate, 335 F.2d 659 (1964).
Case v. New York Cent. R.R., 329 F.2d 936 (1964).
United States Lines v. Fitzgerald, 306 F.2d 461 (1962).
Blue v. Pennsylvania R.R., 301 F.2d 450 (1962).
Usiak v. New York Barge Co., 299 F.2d 808 (1962).
McNamara v. Dionne, 298 F.2d 352 (1962).
Camina v. Carolina Carriers, 297 F.2d 530 (1962).
Rofrano v. Duffy, 291 F.2d 848 (1961).

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Criminal Cases

United States v. Isadore Press Co., 336 F.2d 1003 (1964).
United States v. Dardi, 330 F.2d 316 (1964).
United States v. DeSisto, 329 F.2d 929 (1964).
United States v. Guidarelli, 318 F.2d 523 (1963).
United States v. Whiting, 308 F.2d 537 (1962).
United States v. Klein, 306 F.2d 13 (1962).
United States v. Crisafi, 304 F.2d 803 (1962).
United States v. Freeman, 302 F.2d 347 (1962).
United States v. Baumgarten, 300 F.2d 807 (1962).
United States v. Frascone, 299 F.2d 824 (1962).
United States v. Annunziato, 293 F.2d 373 (1961).
United States v. Kennedy, 291 F.2d 457 (1961).
United States v. Passero, 290 F.2d 238 (1961).
United States v. Gross, 286 F.2d 59 (1961).
United States v. Smith, 283 F.2d 760 (1960).
United States v. Williams, 282 F.2d 899 (1960).

TABLE VII

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

United States v. Howard, 278 F.2d 872 (1960) (evidence).
Abrams v. Gordon, 276 F.2d 500 (1960) (evidence).

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Eichel v. New York Cent. R.R., 319 F.2d 12 (1963) (evidence).
United States v. 18.43 Acres of Land, 312 F.2d 287 (1963) (evidence).
United States v. New York Trade Zone Operators, Inc., 304 F.2d 792 (1962) (evidence).
United States v. Tomaiolo, 286 F.2d 568 (1961) (evidence).
Puggioni v. Luckenbach S.S. Co., 286 F.2d 340 (1961) (evidence).

TABLE VIII

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

United States v. Taylor, 260 F.2d 737 (1958) (conspiracy count).

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

United States v. Birnbaum, 337 F.2d 490 (1964) (evidence).
United States v. Beno, 324 F.2d 582 (1963) (judicial misconduct).
United States v. Persico, 305 F.2d 534 (1962) (prosecutorial and judicial misconduct).
Harrington v. Sharff, 305 F.2d 333 (1962) (evidence).
United States v. 158.76 Acres of Land, 298 F.2d 559 (1962).
Rheaume v. Patterson, 289 F.2d 611 (1961).

TABLE IX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

United States v. Frank, 262 F.2d 695 (1958) (prosecutorial misconduct).

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

United States v. Curtiss, 330 F.2d 278 (1964) (prosecutorial misconduct).
United States v. Bugros, 304 F.2d 177 (1962) (prosecutorial misconduct).
United States v. Rinaldi, 301 F.2d 576 (1962) (evidence).
United States v. Salazar, 293 F.2d 442 (1961) (judicial misconduct).
United States v. Turoff, 291 F.2d 864 (1961) (evidence).
United States v. DeSisto, 289 F.2d 833 (1961) (judicial misconduct).