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THE EXCLUSIONARY RULES IN NONJURY CRIMINAL CASES *

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It should occasion no surprise that the vast welter of doctrine which has become our law of evidence is not applied with equal rigor when a judge rather than a jury sits as trier of the fact.[1] At least two major policy considerations support the prevailing practice under which the exclusionary rules are applied with far less stringency if there is no jury. First, our law of evidence has long been viewed as a product of the jury system,[2] of the need to shelter untrained citizens from the temptation to accept uncritically that which may be unreliable and of

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[1] C. McCORMICK, EVIDENCE § 60 (1954). *See generally* Davis, *Hearsay in Nonjury Cases,* 83 HARV. L. REV. 1362 (1970); Stone, *The Decline of Jury Trial and the Law of Evidence,* 3 RES JUDICATAE 144 (1947); Note, *Improper Evidence in Nonjury Trials: Basis for Reversal?,* 79 HARV. L. REV. 407 (1965); Note, *Exclusionary Rules of Evidence in Non-Jury Proceedings,* 46 ILL. L. REV. 915 (1952); Note, *Incompetent Evidence in Nonjury Trials: Ought We Presume That It Has No Effect?,* 29 IND. L.J. 446 (1954); Comment, *Rules of Evidence in a Trial Where the Jury Is Waived,* 1 IOWA L. BULL. 144 (1915).

[2] Davis, *supra* note 1, at 1365-66 (quoting J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 509 (1898)); C. McCORMICK, EVIDENCE § 60, at 137 (1954) (also quoting J. THAYER, *supra,* 509).

For the view that "not the jury system but rather the adversary system of litigation, coupled with then accepted notions as to the value of an oath," was responsible for the hearsay rule, see Morgan, *Some Observations Concerning a Model Code of Evidence,* 89 U. PA. L. REV. 145, 159 (1940). For Morgan, however, this simply pointed to the need for radical liberalization even where trial was before a jury.

doubtful credibility. Stated differently, the judge, a professional experienced in evaluating evidence, may more readily be relied upon to sift and to weigh critically evidence which we fear to entrust to a jury.[3]

Secondly, there has been, for some decades at least, a basic dissatisfaction with the "lush exuberance of doctrines which bloom in the digests," [4] with the plethora of rules and exceptions which deter the progress of a trial and multiply the risk of reversal at every turn. If substantial segments of evidence law are "overworshipped and overworked" [5] even when a jury sits, certainly they need not be applied unmodified in its absence. "It might have been more expedient," Professor McCormick has suggested, "if these rules had been, at least in the main, discarded in trials before judges." [6]

This has not, however, been the course of the law in most jurisdictions. The point of departure, the prevailing theory at least, applies basically the same governing doctrine in trials before judges as before juries.[7] True, the same strictness in application will not be demanded; the sharp edges of the exclusionary rules will be blunted and their impact softened. Yet, by and large, as a matter of formal doctrine no separate rules permit admission in the nonjury case where the same evidence would be proscribed before a jury.[8]

To limit the inquiry to formal doctrine, however, is to take too narrow a view, for the law has countenanced techniques for avoiding formal doctrine altogether by allowing the trial judge to hear objections to evidence without ruling on them. Even if he should choose to rule, and rules erroneously, he may be saved from reversal because a different set of rules govern appellate review of evidence questions in the nonjury

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[3] State v. Hutchinson, 260 Md. 227, 271 A.2d 641 (1970); Gauthier v. State, 28 Wis. 2d 412, 421, 137 N.W.2d 101, 106 (1965), *cert. denied*, 383 U.S. 916 (1966); State v. Garcia, 97 Ariz. 102, 105, 397 P.2d 214, 216 (1964); People v. Reed, 387 Ill. 606, 611, 122 N.E. 806, 808 (1919) (dictum). *See generally* Note, *Improper Evidence in Nonjury Trials: Basis for Reversal?*, 79 HARV. L. REV. 407 (1965).

[4] McCormick, *Tomorrow's Law of Evidence*, 24 A.B.A.J. 507, 508 (1938).

[5] I J. WIGMORE, EVIDENCE § 8*c*, at 277 (3d ed. 1940) (relating to hearsay).

[6] C. MCCORMICK, EVIDENCE § 60, at 137 (1954).

[7] *Id.* Speaking of the English practice, Professor Stone has observed: "The decline of the jury has not involved the automatic relegation of large parts of the law of evidence to the shelf of obsolescence. The rules are as alive and as rigidly enforced as ever." Stone, *supra* note 1, at 145. *See also* Lacy, *"Civilizing" Nonjury Trials*, 19 VAND. L. REV. 73, 100 (1965) (practice in Israel).

The theory has been criticized without distinguishing civil and criminal trials. *See, e.g.*, Note, *Improper Evidence in Nonjury Trials: Basis for Reversal?*, 79 HARV. L. REV. 407, 414-15 (1965).

[8] *See* Davis, *supra* note 1. Professor Davis argues that a significant omission of the PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES (Preliminary Draft, 1969) [hereinafter cited as PRELIMINARY PROPOSED RULES], in 46 F.R.D. 161 (1969), was the failure to deal directly with the proposition that a different exclusionary structure should arise from the foundation of a judge trial than from a jury trial.

case.[9] The net result is that, insofar as the admissibility of evidence is concerned, the law in operation differs substantially from that in the hornbooks. Adequately to appreciate the law in action, these factors must be carefully considered. In doing so, we turn first to appellate review.

Where evidentiary questions are concerned, reviewing courts invoke new and interesting principles. Presumptions of propriety govern, ascribing to the trial judge—so long as he sits without a jury—the wisdom to have disregarded the inadmissible and to have relied solely on the evidence which he later adjudged competent.[10] At times the presumption may appear a bit tenuous, for the very judge who has been found to have erred in favor of admissibility is presumed to have gained new wisdom, if not a measure of sheer omniscience, by the end of the case when he is obliged to weigh and assess the evidence and is presumed to have disregarded that which he earlier erroneously admitted.[11] The earlier error is thus rendered harmless by power of presumption.[12] However one may view the reasoning or the decision,

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9 *See generally* C. McCormick, Evidence (1954). Indeed, there is some pressure for him to avoid exclusion:

> If he errs, however, in the opposite direction, by excluding evidence which he ought to have received his ruling if substantially harmful to the losing party will of course be subject to reversal.

Id. § 60, at 137.

10 *See, e.g.,* Builders Steel Co. v. Commissioner, 179 F.2d 377, 379 (8th Cir. 1950); Sinclair v. United States, 279 U.S. 749, 767 (1928) (quoting United States v. King, 48 U.S. (7 How.) 833, 854-55 (1849)). *See generally* Note, *Incompetent Evidence in Nonjury Trials: Ought We Presume That It Has No Effect?,* 29 Ind. L.J. 446 (1954).

11 Peterson v. State, 157 Neb. 618, 621-22, 61 N.W.2d 263, 265 (1953); State v. Garcia, 97 Ariz. 102, 105, 397 P.2d 214, 216 (1964) (quoting Peterson v. State, *supra,* with approval). *See also* Note, *Improper Evidence in Nonjury Trials: Basis for Reversal?,* 79 Harv. L. Rev. 407, 409-11 (1965). The presumption is apparently abandoned when the judge himself elicits the inadmissible evidence, People v. Chilikas, 128 Ill. App. 2d 414, 262 N.E.2d 732 (1st Dist. 1970), and actually rebutted when the trial judge indicates that he has considered it. People v. McKee, 39 Ill. 2d 265, 271, 235 N.E.2d 625, 629 (1968). *See also* sources cited note 12 *infra.*

For a realistic appraisal of the limited significance of the "testimony of the trial judge concerning his memory of what considerations were in his mind in reaching judgment a year earlier" where defendant seeks post-conviction relief, see Hurt v. Cupp, 482 P.2d 759, 761 (Ore. App. 1971).

12 *See, e.g.,* Alexander v. United States, 241 F.2d 351, 357 (8th Cir.), *cert. denied,* 354 U.S. 940 (1957); Keil v. Wilson, 47 N.M. 43, 45, 133 P.2d 705, 706 (1942) (appeal dismissed by stipulation while motion for rehearing pending); Hatch v. Calkins, 122 P.2d 126, 129 (Cal. Dist. Ct. App.), *rev'd on other grounds,* 21 Cal. 2d 364, 132 P.2d 210 (1942).

The judge's statement that he disregarded inadmissible evidence can be very influential. *See, e.g.,* Cannon v. Miller, 22 Wash. 2d 227, 238, 155 P.2d 500, 506 (1945); Berlandi v. Commonwealth, 314 Mass. 424, 451-52, 50 N.E.2d 210, 226 (1943); Weibert v. Hanan, 202 N.Y. 328, 331-32, 95 N.E. 688, 689 (1911) (dictum); State v. O'Malley, 115 La. 1095, 1105, 40 So. 470, 473 (1905).

See also note 11 *supra* (discussion of *Hurt v. Cupp*). In State v. Burgess, 483 P.2d 101 (Ore. App. 1971), the *Cupp* case is distinguished and the presumption invoked where an F.B.I. record "was inadvertantly thrust" upon the judge.

Some jurisdictions hold that the hearing of inadmissible evidence by the trial judge generally requires reversal. *See, e.g.,* City of Des Moines v. Rosenberg, 243 Iowa 262, 272, 51 N.W.2d 450, 455 (1952) (dictum); Kovacs v. Szentes, 130 Conn. 229, 232, 33 A.2d 124, 125 (1943).

such holdings do not affect formal evidence law. In theory, the rules of admissibility which should be applied in subsequent cases have not changed. To hold error harmless is, after all, to concede that there was error. In practical terms, however, there is no sanction for failure to follow the applicable "law." The formal rules must ultimately ring hollow.

The courts appear persistent in refusing either to apply formal evidence doctrine or to change it. This very persistence, an almost stubborn adherence to formal rules which are denied substance and reality, suggests the need to re-evaluate the situations in which the problems arise, to examine the exclusionary rules involved, and to inquire whether there are not some which should be applied in the nonjury case and others which should not. The former deserve to be enforced at the appellate level; the latter require change. Candid recognition of their inapplicability would be preferable to the present pattern of fiction and unreality.

We consider next the other device, that of avoiding erroneous rulings by simply not ruling, the technique of avoiding difficult decisions by deciding not to decide. Patently, this is not an available alternative when a jury sits as trier of the fact and the judge must determine what they shall and shall not hear. The problem in the nonjury case, however, is different, for here the judge screens the evidence to determine what he himself shall consider. The alternative of not ruling becomes practicable and has in fact been sanctioned by usage. Admitting hearsay for what it is worth and hearing evidence subject to a later ruling which is never made have become acceptable means of avoiding decisions concerning the evidence.[13] Moreover, this pattern of dealing with the problem by ignoring it has not simply been the practice of some judges or many judges; it has recently been raised to the level of recommended procedure, a desirable means of avoiding error and thus achieving maximum freedom for the judge in the nonjury trial.[14]

Inherent in this procedure, it must be obvious, is the risk of convictions based on improper evidence and immune from meaningful appellate review. Indeed, it renders evidence doctrine irrelevant, for

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[13] *See* Davis, *supra* note 1, at 1362-63. For limitations on this policy, see Kovacs v. Szentes, 130 Conn. 229, 232, 33 A.2d 124, 125 (1943).

[14] This appears to be the clear implication of Davis, *supra* note 1, at 1362-63, relying on and quoting from McCormick, although omitting certain of the latter's qualifications to the statement. C. McCormick, Evidence § 60, at 137-38 (1954). *Compare* The State Trial Judge's Book 93-94 (2d ed. 1969) *with id.* 58-60 (1st ed. 1965). (The later edition omits the sentence, "This fact has led some judges to the wrong view that no discrimination need be exercised, and the evidence can always be admitted 'for what it is worth.'")

there is little point to delineating the finer points of the applicable law if the trial judge is encouraged not to rule even in the face of timely objection by defense counsel. In the criminal trial, particularly, there are significant risks, operating primarily against the defendant, and in such cases we seek, with some effort, to minimize those risks.[15] We espouse a willingness to free many guilty in the effort to avoid convicting even a few innocent. This is a tradition which runs deep, and, however far from the mark we may come in the implementation, the oft-repeated articulation of the values which we hold is in itself significant.[16]

This does not yet argue for applying the full panoply of the rules of exclusion with force and vigor to the nonjury criminal case, but it does argue for the need for critical analysis, and if such analysis bespeaks the drawing of lines or the fixing of guidelines we may, perhaps, avoid the incidence of injustice which unfettered discretion tends to spawn.[17]

It has been wisely observed that "judges, being flesh and blood, are subject to the same emotions and human frailties as affect other members of the species." [18] If all the rules of evidence amounted to no more than prophylactic devices to guard against the lack of experience and supposed lack of sophistication of the average jury in assessing the credibility of evidence and in fixing its probative weight, there might be little need for invoking them in the jury-waived case. We might then free the judge, not by permitting him to hide his rulings or presuming him errorless, but by accommodating doctrine to reality. Presumptively, we should then impose no more onerous restrictions on the judge than on a trial examiner in an administrative hearing.[19]

But the exclusionary rules in criminal cases have, in significant measure, a different focus. Many are designed to minimize the risk of conviction because defendant has been shown a bad man; they deal with the potential for prejudice, with emotional impact, rather than with the risk of intellectual error in tracing a chain of inferences or in recognizing the pitfalls of double hearsay. Other rules, such as that

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[15] *Cf.* Estate of Newman, 205 Wis. 91, 94, 236 N.W. 556, 557 (1931) (discussing risks in civil trials).

[16] Address by Judge Jack B. Weinstein, Annual Advocacy Institute, Nov. 17, 1967, in 44 F.R.D. 375, 381 (*Alternatives to the Present Hearsay Rules*).

[17] J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 15 (1970) (quoting with approval K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY v (1969)).

[18] State v. Hutchinson, 260 Md. 227, 233, 271 A.2d 641, 644 (1970). Having conceded this much, the court concluded that a judge, due to "his legal training, traditional approach to problems, and the very state of the art of his profession," and because "he must early learn to perceive, distinguish and interpret the nuances of the law," is fortified against those frailties earlier considered. *Id.*

[19] *See* Davis, *supra* note 1, *passim* (concerning hearsay).

barring an involuntary confession however reliable it may be, are designed to serve extrinsic policies even at the cost of quality in the trial process, a less rational resolution of an issue of fact. In situations involving such rules it would be wrong to assume a priori that a judge would be immune from prejudice or that he should be subject to no more restrictions in what he may hear than a trial examiner in an administrative hearing.

We propose to consider the problem of rules of evidence in nonjury criminal cases in three selected areas. First, that presented by evidence of a defendant's prior criminal record. These cases present in sharp outline the potential for prejudice. Moreover, in the normal course, there is no reason for the judge to rule the evidence admissible, to "receive the evidence for what it is worth," [20] or to defer decision. For the judge to do any of these should constitute error.

Closely related is the offer of evidence of other crimes. These cases present a similar potential for prejudice. However, they also demand serious concern for an important countervailing consideration, the need to assure at least a minimum level of administrative convenience, to avoid the unmanageable trial or interminable series of trials and retrials which, in the long run, cannot possibly serve the needs of society.

We suggest that the judge be required to rule, to recognize explicitly the impropriety of considering inadmissible evidence of this type in the process of decision. However, we also recognize the need for an added measure of flexibility and suggest that he be afforded greater latitude in the nonjury trial than in the jury trial. Certainly, it would be folly to call for a mistrial where the prosecution has in good faith made an offer of proof concerning evidence of other crimes which the judge promptly rejects.

Secondly, we consider problems of the involuntary confession and related exclusionary rules of constitutional dimension. Here again the prejudice potential is sharp and clear, certainly undiminished and perhaps having even greater force. Problems of administrative convenience are also present, but with the relevant exclusionary rules of constitutional dimension these require fresh analysis and a somewhat different resolution. The importance of the underlying policies together with the risk of prejudice are, in our view, sufficient reason for imposing some measure of added administrative burdens, even to the point of requiring, where feasible, that one judge rule on admissibility of confessions at preliminary hearings and a different judge sit to determine guilt or innocence. And if the safeguards of the process make for more jury

[20] Weinstein, *supra* note 16, at 383.

waivers, where such waivers are permitted, the added administrative cost will have been amply recompensed.

Finally, we turn to cases of hearsay evidence. Here we have the analogy of the administrative experience and the classic case of judicial experience at the task of discrimination in the effort to measure probative weight. The process would, in basic terms, be one of distinguishing credible evidence from that unworthy of belief, not through categorization in terms of artificial exceptions to the hearsay rule, but in terms of the circumstances of the individual case. New procedural safeguards, a broader scope of appellate review on the issue of sufficiency would be necessary, but both the quality of the result and the added efficiency of the process argue for this much-needed liberalization.[21]

We begin with evidence of prior convictions and other crimes.

I. Prior Convictions and Other Crimes

Commonwealth v. Oglesby,[22] recently decided by the Pennsylvania Supreme Court, illustrates in dramatic fashion the risk of informing a trial judge of a defendant's prior record. Moreover, it underscores, at least by implication, the potential for prejudice inherent in anything less than a clear-cut ruling on the part of the trial court should the issue be presented. Defendant had been charged with carrying a concealed deadly weapon. Trial was to the judge who, at the conclusion of the case, sought as further evidence, "any additional investigation on [defendant] at all that would be relevant to the case."[23] None was forthcoming, for the request was explicitly limited to admissible evidence and all sides appear to have conceded that the exclusionary rule should be obeyed. The weapon defendant had in his possession was a straight razor, but he testified that he was a barber going to shave a customer—circumstances which, if believed, were sufficient defense under the substantive law. The judge, with a candor as refreshing as it appears atypical, continued to speculate for the record on defendant's motive for carrying his razor and concluded by announcing, "I'm going to adjudge him guilty. Let me see his record."[24]

Had the record of the case lapsed at this juncture, one might be tempted to speculate concerning the mental processes of the trial judge as he went about resolving the issue of reasonable doubt against defendant barber. The trial judge, however, without going off the record, announced in unambiguous terms precisely what he had done:

[21] *Id.* 381-86.
[22] 438 Pa. 91, 263 A.2d 419 (1970).
[23] *Id.* at 93, 263 A.2d at 420.
[24] *Id.* at 94, 263 A.2d at 420.

"I had a little feeling on this and it turns out he has a record a mile long." And turning to defendant, "If I found that you had no record, that your story was unquestionably true, then I could have reconsidered my judgment and found you not guilty . . . ."[25]

The Pennsylvania Supreme Court reversed. No ruling on evidence had tainted the trial, and the holding goes to the issue of a conditional finding of guilt, of the lower court's application of an erroneous standard of "beyond a reasonable doubt." But the opinion is nonetheless instructive. It suggests, if it does not demonstrate, that judges are vulnerable to the prejudice of a prior record. Moreover, in the ordinary course of a criminal trial there should be no occasion for disclosing the substance of any prior record to the court. If a ruling is necessary, it should, in the normal case, be possible without the court learning any of the details of the record.

Judicial attitudes differ, however, and the cases are divided.[26] Consider *State v. Garcia.*[27] Defendant, charged with illegal possession of marijuana, was in trouble enough. Some thirty years earlier he had been found guilty on a marijuana charge, which was alleged as a prior conviction in the amended complaint upon which he was tried. The trial court, over objection, admitted evidence that a stolen gasoline credit card was in defendant's possession at the time of his arrest, which fact served to connect defendant with a burglary for which he was scheduled to stand trial separately. In addition, again over objection, evidence was introduced that defendant was wanted for burglary elsewhere and that he was in this country illegally. The Arizona Supreme Court had no difficulty finding it was error to admit any of this evidence. Nevertheless, it affirmed the conviction.

The holding is a troublesome one on a number of counts. First is the standard of review. "We cannot say," the opinion reads, "that it clearly appears that the finding would have been different if the evidence of other crimes had not been admitted."[28] At best this is an unhappy standard, imposing undue burdens on a defendant who has concededly been subjected to error below.[29] We return, however, to the more basic problem: the attitude which a reviewing court should take toward the risk of prejudice inherent in evidence of other crimes. It can, of course, be asserted that a judge is disciplined enough not to consider the forbidden evidence or, having considered it, to exclude it from the calculus

[25] *Id.*

[26] *Compare Hurt* and *Hamrick,* discussed at note 30 *infra, with* Hahn v. Comm., 453 S.W.2d 736 (Ky. 1970) *and* cases cited note 27 *infra.*

[27] 97 Ariz. 102, 397 P.2d 214 (1964); *cf.* People v. Guzanich, 13 Mich. App. 634, 164 N.W.2d 749 (1949).

[28] *Id.* at 105, 397 P.2d at 216.

[29] *See* J. TRAYNOR, *supra* note 17, at 35.

of decision when he weighs the proof.[30] This appears highly doubtful, indeed fictional, in the face of erroneous rulings in the course of the trial. Moreover, Wigmore's conclusion concerning prior crimes appears far preferable as a basis for decision:

> The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge. Moreover, the use of alleged particular acts ranging over the entire period of the defendant's life makes it impossible for him to be prepared to refute the charge, any or all of which may be mere fabrications.[31]

As applied to the *Garcia* case, Wigmore's observations assume particular cogency, for a marijuana conviction three decades stale is likely to be read in a very different light given the additional evidence concerning more recent illegal entry and burglaries. Of particular concern is the fact that as yet unsubstantiated charges are also in the case, conceivably to tip the scales against defendant.[32] It is hard to see that he has had a fair trial on the specific crime charged in the indictment.

We need not, however, limit ourselves to speculation concerning the impact on a judge of evidence of other crimes. Empirical data is available. In their classic study, *The American Jury*, Professors Kalven and Zeisel devote a full chapter to disagreements between judge

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> In civil cases, it is the rule in Arizona that improper admissions into evidence will not be considered as error on appeal, where a case is tried to the judge without a jury, because of the presumption that the trial judge disregarded all inadmissible evidence in reaching his decision.

State v. Garcia, 97 Ariz. 102, 104, 397 P.2d 214, 216 (1964). Fortified with no more than this presumption and references to several similar out-of-state holdings in criminal cases, the Arizona Supreme Court had little difficulty formulating a rule extending that presumption into the criminal trial and review process with respect to the present rule of exclusion. *Id.*

Where the judge takes the initiative in seeking out impermissible evidence it is more difficult to sustain the argument that it did not affect the decision, although the argument may nevertheless be made. *See* Hurt v. Cupp, 482 P.2d 759 (Ore. App. 1971). During the course of a trial for sodomy and contributing to the delinquency of a minor, the petition in that case alleged, "while the petitioner's counsel was out of the courtroom the trial judge requested and was given an envelope containing 33 photographs which had not been offered in evidence and which he then proceeded to view. These photographs showed the petitioner, his wife, his stepdaughters and stepson in the nude and in various sexual poses." *Id.* at 760. It further alleged that the judge also saw the presentence report prepared on defendant after conviction in an earlier trial for rape. Post-conviction relief was granted.

In United States v. Hamrick, 293 F.2d 468 (4th Cir. 1961), "the court requested and, over objection, received" defendant's past criminal record. *Id.* at 469. The conviction was reversed.

31 I J. WIGMORE, EVIDENCE § 194, at 646 (3d ed. 1940).

32 *See* H. KALVEN & H. ZEISEL, THE AMERICAN JURY 127-30 (1966) (discussion on arrests).

and jury where additional facts are available to the judge which, generally by application of the exclusionary rules, are kept from the jury.[33] Some are cases in which the judge alone knew defendant personally, or was aware that a guilty plea had been withdrawn or that a blood test had been refused or suppressed.[34] But by far the most significant category to account for the judge's willingness to convict where the jury ultimately acquits is the situation where the judge alone knew of defendant's prior record. Of fifty-four instances of knowledge by the judge alone (occurring in a total of forty-eight prosecutions involving disagreement), twenty-three are of prior criminal records. When instances of "prior arrest for the same offense," "prior acquittal for the same offense," "other charges pending," and "other brushes with the law" are added, the total mounts to thirty-four, well above fifty percent of the total number of instances recorded.[35] No definitive conclusions can be drawn, however, primarily because the data regarding instances where similar additional facts were available to the judge and no disagreement resulted are not available.[36] What is instructive, though, is the authors' analysis and conclusion. They assume that, of course, judges will decide the cases differently because they are privy to such additional, albeit inadmissible, information.[37] Further, the data are cited in support of the exclusionary rules and the policy considerations which lie behind them. "The disagreements that are the subject of this chapter offer an interesting commentary on the merits of the exclusionary rules. Some of these cases represent the price—in 'unjustified' acquittals—which the system is willing to pay for avoiding prejudice in other cases, where the shared information could lead to an unjust conviction." [38] There *is* basis for a contrary result where trial is to the judge who learns of prior convictions of other crimes.

We have focused on the risk of prejudicing the defendant—one which, in our view, is serious enough. In general, the cases point to the desirability of avoiding difficult rulings on "insignificant" questions of evidence. But such countervailing advantages are in this situation tenuous enough, if not totally non-existent, and a trial court should not

[33] *Id.* 105-17 (Ch. 8: *Reasons for Judge-Jury Disagreement—A Summary View*).
[34] *Id.* 131 (table 31).
[35] *Id.*
[36] The data alone might well not suffice unless it also took into account and was controlled for such variables as the strength of the case against the defendant. It would show nothing, for example, if the jury convicted without learning of the defendant's prior record and the judge, too, found the evidence compelling. Nor would an acquittal, in which judge and jury concurred, be particularly significant, when the record was virtually devoid of credible evidence concerning the offense charged in the indictment.
[37] *Id.* 133.
[38] *Id.* The observations of Professor Amsterdam, *infra* note 62, provided the basis for additional concern where a trial judge in a nonjury case learns of defendant's prior criminal record.

be permitted to avoid the issue by accepting the evidence "to be considered if subsequently found admissible." The evil inheres in the information being imparted to the court; absent a clear and unequivocal ruling of exclusion there is certainly no basis for indulging in a presumption of propriety on the part of the trial judge and assuming that he considered only that which should have been considered.

We need not here rehearse the alternative doctrines which, absent the presumption of the lower court's propriety, might still save a judgment of conviction. The varieties of error found to be harmless, and the tests utilized in determining whether or not admitted error is in fact harmless, need not detain us. Suffice it to say that where the pivotal question is one of identity, or of motive, or of another mental state such as knowledge, or where credibility of the defendant is in issue, an appellate court should indeed be sensitive to the risk of harmful prejudice below.

Closer questions can arise, particularly with respect to evidence of other crimes. Such evidence, tending to show defendant has committed criminal acts of which he has never been convicted and for which he is not now on trial, has a prejudice potential which, for our purposes, is no less potent than knowledge of a prior record.[39] Standard doctrine excludes such evidence from jury consideration except in a relatively narrow range of cases where admissibility is predicated on some theory of relevance other than one merely showing defendant to be a "bad man," as in those cases where the other crimes are "so nearly identical in method as to ear-mark them as the handiwork of the accused." [40] Here, too, the judge should not in the normal case be allowed to learn of such added prejudice-laden information. As a simple principle, this should suffice, but the problems, as they arise in the courtroom, are not simple and the problems of administration which emerge are significant.

The difficulty is that there are many theories of relevance under which the prosecution can seek to admit evidence of other crimes and the rules of exclusion are far from precise.[41] Even in a jury case a great deal of testimony focused on proving other offenses may be admitted. For example, in a prosecution of a union official charged with extorting money from a contractor, the court "admitted evidence relating to a

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[39] If anything, the potential harm to the defendant is greater, for there is the risk of surprise and the inability, at trial, adequately to rebut the evidence so presented.

[40] C. McCormick, Evidence § 157, at 328 (1954). The same section discusses the range of the doctrine and its rationale. *Id.*

[41] Admissibility may even depend, in part, on the discretion of the trial judge. *See* United States v. Weber, 437 F.2d 327, 332 n.5a (3d Cir. 1970) (citing United States v. Stirone, 262 F.2d 571, 576-77 (3d Cir. 1958), *rev'd on other grounds*, 361 U.S. 212 (1960)), *cert. denied*, 402 U.S. 932 (1971).

labor extortion committed by [defendant] subsequent to the crimes with which he was charged." [42] This was to show defendant's "determined plan for the levying of tribute." [43] Similarly, the Third Circuit, in a recent decision involving extortion by a labor official, found evidence of alleged crimes with different contractors, relevant and admissible to demonstrate "[defendant's plan] to control pipeline construction in New Jersey for his own pecuniary benefit, his motive, and the history of the transaction." [44] It is hard to argue that the rule of admissibility in the nonjury case should be precisely identical with what will be allowed before a jury. Feats of discrimination are expected of the jurors and it is not unreasonable to allow an added measure of tolerance where it is the judge who will be weighing the evidence.

In addition there is need to consider the realities of the trial situation. It would certainly be improper for the trial judge, sitting without a jury, summarily to exclude other-crime evidence where it is properly offered by the prosecution. But the question of admissibility may be a difficult one, and the judge may find it necessary to learn more of the prosecution's theory and of the nature of the proffered proof in order to rule.[45] At this point a countervailing consideration enters into the equation: the value of efficient and speedy administration, the need for the trial judge to screen as well as to weigh and evaluate.

Appellate law can afford to be less rigorous and more flexible.[46] It may be appropriate then to inquire into the subsequent course of the

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[42] *Id.* at 333 (discussing the trial court's action in United States v. Stirone, 168 F. Supp. 490, 499 (W.D. Pa. 1957)).

[43] United States v. Stirone, 168 F. Supp. 490, 499 (W.D. Pa. 1957), quoted in United States v. Weber, 437 F.2d 327, 333 (3d Cir. 1970).

[44] United States v. Weber, 437 F.2d 327, 333 (3d Cir. 1970) (evidence question relevant where precise issue was failure to sever).

[45] If it is clear that the proffered evidence of other crimes is inadmissible, but the judge, desirous of better informing himself of the character of the defendant, the manner of man before him, invites a further and more detailed offer of proof concerning such other crimes, this would clearly be error and, in appropriate circumstances, reversible error. Nothing in the text is intended to suggest the contrary. *See* text accompanying notes 22-32 *supra* (discussion of Commonwealth v. Oglesby, 438 Pa. 91, 263 A.2d 419 (1970)).

Normally, evidence of prior convictions does not present the close questions of admissibility considered in the text with respect to other crime evidence. If in a given case it did, similar analysis would be appropriate.

[46] Even when the jury must be convinced beyond a reasonable doubt in order to convict, an appellate court need not apply so rigorous a test in determining whether error was harmless. R. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 35 (1970). A fortiori, an appellate court can recognize the need for broader discretion in the trial court's rulings.

Resolution of specific problems can be exceedingly difficult and the results are understandably debated. In United States v. Martinez, 333 F.2d 80 (2d Cir.), *cert. denied*, 379 U.S. 907 (1964), the trial judge had asked concerning prior offenses of the defendant, but did not press the question when defense counsel responded that

trial, and the acceptance or rejection of the tainted testimony by the trial judge at a later point. Suffice it here to suggest that a rule of rigorous exclusion of a defendant's prior criminal record does not preclude a more flexible view of analogous, but distinguishable, testimony concerning other crimes.

II. Coerced Confessions: The Constitutional Dilemma

Coerced confessions are constitutionally prohibited without regard to credibility or reliability. As Mr. Justice White has long since reminded us, if a court, in admitting a confession, has employed "a standard infected by the inclusion of references to probable reliability," [47] the resultant conviction is constitutionally tainted.[48] Such a confession is no more permissible as evidence in a jury-waived case, and if erroneously admitted and followed by conviction, that conviction is similarly tainted.[49] This much may be taken as conceded premise; the difficult problems concern procedures.

From the point of view of a trial judge who wishes to avoid an erroneous ruling on the admissibility of a confession and who is nevertheless hesitant to deprive himself of knowledge of its contents, either of two expedients might appear attractive. The first is not to rule at all, taking the matter under advisement and never announcing a decision;[50] the other is to postpone ruling, hold the evidence inadmissible at the end of the trial, and announce that it will not be considered in the determination of guilt or innocence.[51] The latter course might be particularly appealing where there is other evidence sufficient to convict. In the event of review, there would not even be the need for the appellate court to resort to presumptions of propriety below.

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defendant had elected not to testify and that counsel therefore considered the question inappropriate. The court of appeals affirmed, observing that:

> Even if the Government had offered the record of a prior conviction which was then excluded, it could scarcely be argued that a conviction must nevertheless be reversed; yet the judge would have had more knowledge of the earlier offense than here . . . .

Id. at 82. *See also* State v. Burgess, 483 P.2d 101 (Ore. App. 1971).

[47] Jackson v. Denno, 378 U.S. 368, 376 (1964).

[48]

> It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession . . . ."

Id.; see Rogers v. Richmond, 365 U.S. 534, 540-41 (1961).

[49] *See* United States *ex rel.* Spears v. Rundle, 268 F. Supp. 691 (E.D. Pa. 1967), *aff'd,* 405 F.2d 1037 (3d Cir. 1969) (per curiam); United States *ex rel.* Owens v. Cavell, 254 F. Supp. 154 (M.D. Pa. 1966); *cf.* State v. Hutchinson, 260 Md. 227, 271 A.2d 641 (1970).

[50] *See* United States *ex rel.* Owens v. Cavell, 254 F. Supp. 154 (M.D. Pa. 1966).

[51] *See* State v. Hutchinson, 260 Md. 227, 271 A.2d 641 (1970).

The trial judge has excluded the impermissible and the record is explicit in its statement that the tainted evidence played no role in the decision. As a matter of formal logic the record must be viewed as impeccably correct.

Neither solution commends itself as a norm for the nonjury criminal case. At some point defendant should receive a clear-cut finding on the issues presented by his challenge to the confession. The Supreme Court has spoken in unequivocal terms, albeit in the context of a prosecution in which guilt or innocence was being tried to a jury: "A defendant objecting to the admission of a confession is entitled to a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined." [52] Waiver of jury trial does not and should not imply waiver of a definitive ruling on a question of constitutional dimension.[53] Moreover, no countervailing policy considerations, not even administrative convenience, militate against affording him this right. Failure to accord a defendant this much has been held to render a conviction subject to collateral attack.[54]

For the trial judge to postpone decision presents a somewhat more difficult question, although in our view it represents a practice fraught with unnecessary risk of prejudice and one which, absent significant countervailing considerations, should be disapproved. Is there a risk that the trial judge will dissemble, ruling formally one way but allowing himself to consider "just a little bit," the fact of confession, particularly when he has learned that the confession is sufficiently rich in detail to preclude any doubt concerning its reliability? In the case of some judges, perhaps the answer should be in the affirmative, but for us this is not the central question. A more fundamental inquiry concerns the desirability, and perhaps ultimately the legal propriety, of having one judge rule on both the voluntariness of a confession and the ultimate issue of guilt. This question appears in sharpest focus in cases in which there was a preliminary hearing to determine voluntariness. We turn to those cases.

Perhaps the simplest situation is that of the judge who finds a confession involuntary. It is ruled inadmissible in evidence, but if that very judge becomes the trier of the fact on the issue of guilt, the question arises whether the judge is likely to succeed in clearing his mind of

[52] Jackson v. Denno, 378 U.S. 368, 380 (1964).

[53] *See* United States *ex rel.* Spears v. Rundle, 268 F. Supp 691 (E.D. Pa. 1967), *aff'd,* 405 F.2d 1037 (3d Cir. 1969) (per curiam); United States *ex rel.* Owens v. Cavell, 254 F. Supp. 154 (M.D. Pa. 1966) .

[54] *See* Jackson v. Denno, 378 U.S. 368 (1964); United States *ex rel.* Spears v. Rundle, 268 F. Supp. 691 (E.D. Pa. 1967), *aff'd,* 405 F.2d 1037 (3d Cir. 1969) (per curiam); United States *ex rel.* Owens v. Cavell, 254 F. Supp. 154 (M.D. Pa. 1966).

the tainted evidence. If our analysis of proof of a defendant's prior record is correct, a negative answer is compelled a fortiori.[55] A preliminary hearing does involve a certain amount of administrative inconvenience, but in the normal case assignment of different judges to the hearing and to the trial would not add a significant burden. Certainly, the burden would not, in most courts, be serious enough to prevail over the interest of the defendant in obtaining a trial free of that "admixture of reliability and voluntariness" against which the Supreme Court has warned us.[56]

A subtler question, perhaps, concerns the influence of evidence of guilt on a judge's ability to rule impartially on the issue of voluntariness. Facing the question frontally in *United States ex rel. Spears v. Rundle*,[57] Judge John W. Lord, Jr., extended *Jackson v. Denno*[58] to the situation in which a judge, rather than a jury, sits as trier of the fact. "It is impossible," he finds, for a judge "to objectively and reliably determine that the confession was voluntary after considering his guilt."[59] The holding may be viewed narrowly: the trial court had made no finding whatsoever on the issue of voluntariness;[60] evidence of voluntariness was interlarded with evidence of guilt in a single trial.[61] But the reasoning of the court is broad and its language clear and unambiguous. The task, Judge Lord reemphasizes elsewhere in the opinion, "becomes

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[55] *See* United States *ex rel.* Owens v. Cavell, 254 F. Supp. 154 (M.D. Pa. 1966) (where the issue was presented and discussed, although not decided.):

> Here, where there was no preliminary determination of voluntariness and the trial court heard testimony as to the crime itself and the issue of voluntariness intermixed through the entire trial, it is impossible to say that the issue of voluntariness was determined without being infected by matters pertaining to the petitioner's guilt. . . . [This] Court [questions] whether a judge sitting as fact-finder would be able to pass on guilt or innocence without being influenced by evidence relating to the voluntariness issue.

Id. (latter sentence dictum).

Where the prosecution has indicated in an offer of proof that defendant has a prior record, and that evidence is promptly ruled inadmissible by the judge, the case can be distinguished. There will normally not be that psychological impact requiring a new judge and a new trial.

[56] Jackson v. Denno, 378 U.S. 368, 387 (1964).

[57] 268 F. Supp. 691 (E.D. Pa. 1967), *aff'd,* 405 F.2d 1037 (3d Cir. 1969) (per curiam).

[58] 378 U.S. 368 (1964).

[59] 268 F. Supp. at 696 (dictum).

[60] The judge specifically rejects, in dictum, the proposition that the constitutional defect could have been cured merely by an explicit judicial determination on the record:

> The only method, consistent with *Jackson* . . . which the court could have adopted during Spears' trial was upon learning that he placed the confession in issue, to order a separate hearing to be held by another judge unfamiliar with the case and testimony.

Id.

[61] *Id.* at 695-96.

too great when we require a judge who has heard evidence of guilt, to objectively and coldly assess a distinct issue as to the voluntariness of the confession. Objectivity cannot be guaranteed, and reliability must be questioned." [62] The reach of the rationale clearly extends beyond the requirement of a preliminary hearing; it mandates a different judge.[63]

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[62] 268 F. Supp. at 695 (dictum). *See also* United States *ex rel.* Owens v. Cavell, 254 F. Supp. 154 (M.D. Pa. 1966). In *Owens,* Judge Follmer for the Middle District of Pennsylvania recognized "[t]wo serious problems: (1) Was the trial judge influenced by the testimony as to the crime in deciding on the voluntariness of the confession? (2) Should a judge, who is sitting as trier of fact, determine the voluntariness of a confession as well as guilt or innocence . . . ?" *Id.* at 155. The *Owens* decision is cited in *Spears, supra,* at 695, as presenting the "precise issue."

The comments of Professor Amsterdam concerning background influences on the judge as he resolves the factual disputes are also relevant:

> To a mind-staggering extent—to an extent that conservatives and liberals alike who are not criminal trial lawyers simply cannot conceive—the entire system of criminal justice below the level of the Supreme Court of the United States is solidly massed against the criminal suspect. Only a few appellate judges can throw off the fetters of their middle-class backgrounds—the dimly remembered, friendly face of the school crossing guard, their fear of a crowd of "toughs," their attitudes engendered as lawyers before their elevation to the bench, by years of service as prosecutors or as private lawyers for honest, respectable business clients—and identify with the criminal suspect instead of with the policeman or with the putative victim of the suspect's theft, mugging, rape or murder. Trial judges still more, and magistrates beyond belief, are functionally and psychologically allied with the police, their co-workers in the unending and scarifying work of bringing criminals to book.
>
> These trial judges and magistrates are the human beings that must find the "facts" when cases involving suspects' rights go into court . . . . Their factual findings resolve the inevitable conflict between the testimony of the police and the testimony of the suspect—usually a down-and-outer or a bad type, and often a man with a record. The result is about what one would expect. Even when the cases go to court, a suspect's rights as announced by the Supreme Court are something he has, not something he gets.

Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases,* 54 N.Y.U.L. Rev. 785, 792 (1970).

[63] United States *ex rel.* Spears v. Rundle, 268 F. Supp. 691 (E.D. Pa. 1967), *aff'd,* 405 F.2d 1037 (3d Cir. 1969) (per curiam), has been read this broadly. *See* Lundberg v. Buchkoe, 389 F.2d 154, 156 (6th Cir. 1968) (dictum); Cantrell v. Maxwell, 298 F. Supp. 1061, 1063 (S.D. Ohio 1969).

United States v. Parker, No. 18129 (7th Cir. Aug. 10, 1971), was a prosecution for perjury tried to a jury, but presided over by the judge who presided at the trial in which the perjury allegedly took place. Reversing for errors committed during the trial, the court of appeals noted that the better practice would be for trial to be before a different judge. "We . . . believe," the court observed, "that the prosecutor should not retain any possible advantage resulting from his selection of a particular judge with personal knowledge of critical evidentiary facts." *Id.* at 10. In an extended footnote, the court elaborated on the risk of potential prejudice which, if applicable to a jury trial where the judge is not the trier of the fact, is applicable a fortiori to a jury-waived case. Speaking for the court, Stevens, J., observes:

> Although we do not hold that the refusal to retransfer the case was error under then prevailing practice, we note that the recent recommendations of the American Bar Association Special Committee on Standards of Judicial Conduct may require a significant re-examination of existing procedure. Proposed Canon 2(c) not only states that a judge should disqualify himself if he has "personal knowledge of evidentiary facts" (as in this case, since the judge had witnessed the alleged perjury), but also may require criminal cases which have been remanded for a new trial to be heard by a different judge. The broad language of the proposed canon refers to "any proceeding in which his impartiality might reasonably be questioned" and specifically includes cases in which he "has a fixed belief concerning the merits of the

The Supreme Court of Maryland has taken the contrary position. In the recent case of *State v. Hutchinson*,[64] that court reaffirmed its consistently held view that a trial judge can be relied upon, with confidence, to do precisely what the court in *Spears* considered too difficult. At issue was the admissibility of an inculpatory statement obtained in violation of the *Miranda*[65] guidelines. The risk of prejudice was substantial, for defendant was on trial for the rape and murder of a nine-year-old child and the details of the statement were such as to make it convincing. There had been a preliminary hearing—indeed, numerous evidentiary hearings extending over a period of months—and there was a ruling: the statement was admissible. The trial itself, a jury having been waived, was before a different judge. At this juncture the case would hardly appear one to present problems concerning the finer points of protective procedures to assure lack of prejudice by the trier of the fact. At the trial, however, the circumstances of the interrogation which led to defendant's statement were introduced on the issue of credibility;[66] the trial judge faced the question of voluntariness anew, ultimately holding the statement constitutionally tainted and inadmissible. Defendant was convicted, nevertheless, and the judgment was appealed.

Given these facts, an appellate court might be inclined to uphold the conviction with a decision easily written on narrow grounds. The United States Supreme Court had already indicated that there was no constitutional barrier to a conviction in such a situation if trial had been before a jury,[67] and, although fine lines might have been drawn to distinguish that situation, no feat of jurisprudential prowess was needed to arrive at the conclusion that the rules need not be more rigorous when a judge was assessing the evidence. The Supreme Court of Maryland, however, chose to paint with a broader brush. "At the very core of our judicial system," they quoted with approval, lies the assumption that "judges are men of discernment, learned and experienced in

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matter before him." Having heard evidence which satisfied a jury of a defendant's guilt beyond a reasonable doubt, the judge sitting at the second trial might well have such a fixed belief concerning the merits. Accordingly, he should give serious consideration to the question whether his presiding at a retrial would create at least an appearance of prejudice.

Id. at 5 n.4.

[64] 260 Md. 227, 271 A.2d 641 (1970).

[65] Miranda v. Arizona, 384 U.S. 436 (1966).

[66] Hutchinson v. State, 9 Md. App. 41, 44, 262 A.2d 321, 323-24 (Ct. Spec. App.), *rev'd*, 260 Md. 227, 271 A.2d 641 (1970).

[67] *See* Jackson v. Denno, 378 U.S. 368, 378 n.8 (1964) (indicating no constitutional objection to Massachusetts procedure under which judge rejects confessions he deems involuntary and admits those he believes voluntary, after which jury may disagree with the judge, find an admitted confession involuntary, and ignore it).

the law and capable of evaluating the materiality of evidence." [68] On the one hand, the court finds the risks non-existent or de minimis; on the other, it envisions a threat to the entire institution of nonjury trials and an insurmountable administrative complexity.[69]

The opinion is not convincing. It may have been a reaction to the view of the intermediate appellate court which would have required a new trial before yet another judge,[70] one who had not seen the confession. It may reflect the confidence of that court that even inadmissible prior convictions will not detract from the ability of a judge to discern truth and to adjudicate wisely and fairly.[71] Or the court might have decided, quite simply, not to get involved in the demanding task of drawing lines, in the painstaking process of making distinctions, until a body of doctrine developed. But the drawing of lines is the essence of judging; as the earlier discussion has attempted to demonstrate, confidence in the ability of a trial judge to avoid the prejudicial impact of impermissible knowledge can be a thin reed.

Lines should be drawn. In the first instance it is desirable so to organize the calendar that the judge who has presided over the preliminary hearing will not be assigned to try the case if a jury has been waived. Where a confession or an inculpatory statement has been ruled admissible, it would seem unobjectionable for the same judge to sit as trier of the fact when guilt or innocence is adjudicated. After all, the statement will in any event be introduced into evidence and the circumstances of the making of the statement are admissible on the issue of credibility. When the trial judge, hearing the evidence concerning the circumstances surrounding the challenged interrogation, determines that the statement in question should not have been ruled admissible, we have a more difficult question. This, of course, is *Hutchinson.* A new trial before a third judge is certainly a possibility, and the intermediate appellate court in *Hutchinson* ruled it a necessity. It is difficult to quarrel with this further measure of solicitude for defendant, particularly if we assume that the trial judge may in fact have been influenced by inadmissible, tainted testimony. Yet, there has been an adjudication of admissibility, and the judge whose findings are the subject of review has evidenced a particular sensitivity to the inadmissible evidence. He has identified it and recorded his determination not to consider it in the final adjudication. Countervailing considerations of administrative convenience, not merely in the assignment

[68] State v. Hutchinson, 260 Md. 227, 237, 271 A.2d 641, 646 (1970) (dictum).

[69] *Id.* at 236, 271 A.2d at 646.

[70] Hutchinson v. State, 9 Md. App. 41, 262 A.2d 321 (Ct. Spec. App. 1970).

[71] State v. Hutchinson, 260 Md. 227, 236, 271 A.2d 641, 646 (1970).

of judges, but in avoiding retrials on the merits, enter. Absent unusual circumstances, it is difficult to find a retrial required.

This analysis posits a ruling of admissibility at the preliminary hearing which would survive appellate review. The mere fact that the trial judge disagrees on the facts and concludes that the confession was involuntary does not imply that there was legally cognizable error in the conduct of the preliminary hearing. Questions of credibility lie at the heart of any such determination, and a contrary holding does not vitiate the validity of the initial determination. Indeed, since the first ruling has been in favor of admissibility and the ultimate determination of weight and credibility is for the trier of the fact at the trial, there has been no impropriety. Suppose, however, that the finding of the first judge cannot be sustained as a matter of law. It may be egregiously in error in terms of the evidence of record, or it may have been based on a legally impermissible assumption, such as waiver by the defendant in a situation where the law permits no inference of waiver. A proper ruling at the preliminary hearing would have assured the defendant of a trial before a judge who had not seen the coerced confession or constitutionally tainted inculpatory statement. He should not lose that right because of the error at the preliminary hearing, and retrial before a third judge appears the proper course.

It is quite another matter when the issue of the voluntariness of a proffered statement has not been considered at a preliminary hearing and arises for the first time at the trial itself.[72] Assuming the availability of another judge, it would be highly desirable to have a "preliminary" hearing, out of the presence of the trier of the fact, to determine the admissibility of the challenged statement. To do less, at least in the view of one court, would render a resultant conviction subject to attack.[73] To do this much should, however, be sufficient. A ruling finding the evidence unobjectionable would allow the trial to proceed

[72] Local rules vary in their provisions concerning preliminary hearings to resolve questions of admissibility where the objection is based on constitutional grounds. They may require, permit, or prohibit motions to suppress in advance of trial. Moreover, involuntary confessions and evidence obtained by illegal search and seizure may be subject to different procedural rules. *See* L. Hall, Y. Kamisar, W. La Face & J. Israel, Modern Criminal Procedure 679-84 (1969); 3 C. Wright, Federal Practice and Procedure § 673 (1969) (discussing rationale of trial judge's discretion to entertain motion at the trial).

For a detailed statutory provision with separate treatment of evidence alleged to have been obtained by an unconstitutional search and seizure and "a written confession or written inculpatory statement" claimed to be inadmissible "on any ground," see La. Crim. Pro. Code Ann. art. 703 (West 1967). For a procedural rule covering "any evidence alleged to have been obtained in violation of the defendant's constitutional rights," see Pa. R. Crim. Pro. 323 (1968).

[73] United States *ex rel.* Spears v. Rundle, 268 F. Supp. 691 (E.D. Pa. 1967), *aff'd*, 405 F.2d 1037 (3d Cir. 1969) (per curiam).

with the defendant accorded no less protection than in the analogous cases considered above. If the statement were held inadmissible, the trial could proceed without further consideration of the challenged statement. True, the trial judge would be aware of the existence of such a statement. In theory, at least, if a jury had been sitting, the very existence of a damaging statement would have been kept from them. Yet, the precise content of the statement—the extent of the damage, and the details which tend to create credibility and which so often also create the prejudice—are kept from the trier. There are, after all, countervailing considerations in a world of backlogs and interminable, insufferable delays. And there are risks in inviting and rewarding defense tactics which would necessitate new trials after investment of substantial time and judicial manpower in the trial itself. Even in this situation, where the judge knows there exists an inadmissible inculpatory statement by defendant, a new trial before yet a third judge should not be mandated.

It is of course simplistic to talk of administrative convenience in black and white terms. As a first step in the analysis we have found it useful to speak in terms of another judge being available or unavailable, but it is hardly adequate, in many cases, to stop at this point. Another judge may in fact be available, even in a one-judge judicial district, by assignment of a higher court. Conversely, in a metropolitan court with many judges, assignment of another judge for the hearing on voluntariness may, in fact, force a recess which would seriously inconvenience prosecution witnesses, occasion undesirable delays in the orderly progress of the trial, or force a mistrial if the trial judge has conflicting commitments once the trial had been delayed. These considerations are appropriately considered first at the trial level and subsequently on appeal. The nature of the offense which is the subject of the prosecution, the precise nature of the constitutional infirmity alleged, the extent of trial disruption, and the justification for first raising the objection to the evidence in mid-trial, are all relevant in considering whether in the first instance a different judge should hold the "preliminary" hearing and, separately, whether failure to do so is reversible error.[74]

To do this much is not to relegate constitutional protections to the whim of individual judges or to the accidents of administrative convenience. The United States Supreme Court has most recently, in the context of using unwarned statements to impeach, emphasized the importance of the variables: the nature of the constitutional right

[74] *See* sources cited note 72 *supra* (concerning the availability of a motion to suppress in advance of trial).

violated[75] and the interests of the judicial system in the integrity of its own processes.[76] And here we are considering only the sweep and scope of prophylactic procedures to assure that a judge who has made explicit his intention not to utilize proscribed evidence in the fact-finding process has not, in fact, been improperly tempted to do otherwise.

III. Hearsay Evidence

Much of the controversy concerning reform of the law of evidence has centered on the hearsay rule. The debate, sharp and at times bitter, has persevered for decades and is responsible in large measure for the fact that one major project after another, the Model Code of Evidence,[77] the Uniform Rules,[78] the Preliminary Draft of the Proposed Federal Rules of Evidence,[79] has failed to gain acceptance.[80] The controversy remains unresolved; the final chapter, if indeed there is to be a "final" chapter, is as yet unwritten.[81] But, for all the difference of opinion concerning the path which reform ought to follow, there is substantial agreement on a number of significant propositions which are relevant to our inquiry and which define and sharply delimit the

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[75] *See* Harris v. New York, 401 U.S. 222, 225 (1971).

[76] *See id.* at 225, 226 (dictum).

[77] Model Code of Evidence (1942).

[78] Uniform Rules of Evidence (1953).

[79] Preliminary Proposed Rules, *supra* note 8.

[80] *See, e.g., Report of Committee on Administration of Justice on Model Code of Evidence,* in 19 Cal. St. B.J. 262, 273-76 (1944) (criticism of hearsay provisions of Model Code of Evidence); Chadbourn, *The "Uniform Rules" and the California Law of Evidence,* 2 U.C.L.A.L. Rev. 2, 3-4 (1954) (indicating that hearsay provisions of the Model Code of Evidence were major factors leading to rejection of the Code in California); Maguire, *The Hearsay System: Around and Through the Thicket,* 14 Vand. L. Rev. 741 (1961) (stating that history shows that solution to hearsay problem in Uniform Rules of Evidence was too radical for quick general adoption); New York Trial Lawyers Committee on the Proposed Federal Rules of Evidence, Recommendation and Study Relating to the Advisory Committee's Preliminary Draft of the Proposed Federal Rules of Evidence 69-88 (1970); Report of American College of Trial Lawyers Committee to Study Proposed Rules of Evidence for United States District Courts and Magistrates 54-56 (1970) (criticizing the general construction of the hearsay provisions found in rules 8-03 & 8-04 of preliminary draft).

Compare Preliminary Proposed Rules, *supra* note 8, rules 8-03, 8-04, 46 F.R.D. at 345-87, *with* Proposed Rules of Evidence for the United States Courts and Magistrates rules 803, 804 (Revised Draft, 1971) [hereinafter cited as Revised Proposed Rules], in 51 F.R.D. 315, 419-45 (1971) (indicating a change in the structure of both rules from a general hearsay provision followed by a list of illustrations to a list of specified exceptions followed by a section designed to provide for exercise of limited judicial discretion in treating unanticipated situations).

[81] The Revised Proposed Rules, *supra* note 80, were to undergo further study following an August 1, 1971, deadline for comments by bench and bar. Rule 803(24) and rule 804(b)(6) are intended to allow for further judicial development. *See* Revised Proposed Rules, *supra* note 80, rule 803(24), 51 F.R.D. at 437 (Advisory Committee's Note).

alternatives realistically available in proposing rules to govern the non-jury criminal trial. First is the dissatisfaction, so widespread as to approach unanimity, with the present state of the law. Nevertheless, no one seriously contends for the exclusion of all hearsay. Our courts would be deprived of too much which is too valuable. This, the Advisory Committee on Proposed Federal Rules of Evidence observes, is the path of "clear folly." [82] And, one might add, it would represent a departure from present practice so radical as to create a wrench for bench and bar not likely to be contemplated, let alone tolerated. By the same token, there is no significant support for the opposite alternative, to admit all hearsay. So much that is dross would be included that every serious proposal includes at least minimal safeguards, guidelines for exclusion.[83]

If, then, we are to retain a hearsay rule but provide for exceptions, the nub of the problem must be the nature of the exceptions and their content. It is precisely at this point that the anomaly of the present system obtrudes. The purpose of a hearsay exception is to provide the trier of the fact with trustworthy evidence, absent direct evidence which is more probative. Necessity and reliability, these are the two great principles which are said to govern.[84] The present system, however, operating by category and by class, fails too often in the attempt. The exceptions regularly exclude evidence that has a higher probative force than the evidence they admit.[85] This unhappy result might almost be a fair price to pay for simplicity and efficiency in the trial process. Ease of administration should be a significant factor, but it has been neither achieved nor approached. Instead, complexity compounded

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[82] REVISED PROPOSED RULES, *supra* note 80, 51 F.R.D. at 409 (Advisory Committee's Note).

[83] *See* Weinstein, *supra* note 16, at 375-76.

[84] See V J. WIGMORE, EVIDENCE §§ 1421, 1422, at 204-05 (3d ed. 1940).

[85] Weinstein, *supra* note 16, at 379. The classic characterization of Morgan & Maguire, *Looking Backward and Forward at Evidence,* 50 HARV. L. REV. 909 (1937), remains relevant:

> Within a single exception are found refinements and qualifications inconsistent with the reason upon which the exception itself is built. In short, a picture of the hearsay rule with its exceptions would resemble an old-fashion crazy quilt made of patches cut from a group of paintings by cubists, futurists and surrealists. . . . Fifty years have done comparatively little to make it sensible, and fifty further years of judicial evolution will do little more.

Id. 921. *See also* REVISED PROPOSED RULES, *supra* note 80, 51 F.R.D. at 408-09 (Introductory Note: The Hearsay Problem); Ladd, *The Hearsay We Admit,* 5 OKLA. L. REV. 271, 280 ("Each of the exceptions has its own tailor-made requirements, with varying degrees of rationality in their application."), 286 ("If the question of exceptions were determined from a consideration of the opportunity to perceive, the declarations would be of equal or greater value to those admitted under the present exceptions, assuming the statement came from an honest declarant.") (1952).

See the comments in Falknor, *The Hearsay Rule and Its Exceptions,* 2 U.C.L.A.L. REV. 43 (1954).

appears to be the rule. A "junglelike profusion of hearsay rules and exceptions" [86] has been the legacy of history and the product of development, and it remains today the major premise of reform. The primary focus, at least for jury trials, remains the redefinition of more than a score of categories of evidence which, although hearsay, are to be admitted.[87]

These points bear elaboration if we are to gain a realistic appreciation of the pressures which have developed to relieve the trial judge sitting without a jury of the obligation to apply the full panoply of the law of hearsay in all its pristine rigor. As already noted, the emphasis on category invites the creation of subcategories; the rules spawn sub-rules. Admissions of a party opponent gain entry when he himself is the declarant. But this is not the end to the matter. There are authorized admissions, adoptive admissions and vicarious admissions.[88] Dying declarations are admissible, but only in prosecutions for homicide. Thus, the identical out-of-court statement is admissible when offered by the prosecution if the offense is murder, but not at the instance of the plaintiff who seeks a money recovery.[89] Reform consists of reshaping the categories, moving the lines,[90] and redefining what is and what is not hearsay. Thus, under the proposed Federal Rules of Evidence, declarations of a co-conspirator and those of an agent or servant gain admission not as exceptions, but rather as "Statements Which Are Not Hearsay." [91] Finally, distinctions are drawn in terms of the use to which admissible evidence may be put. It is familiar law that prior inconsistent statements may be offered to "neutralize," or to impeach, but not as substantive evidence of the matter stated.[92] Whatever may be said for preserving these distinctions in the jury trial, with only the judge learning the purport of the challenged testimony as he screens the permissible from the impermissible, keeping the latter from the triers of the fact, though not from himself, by way of preliminary rulings, it hardly seems the way of wisdom to require rigid

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[86] Weinstein, *supra* note 16, at 377; *see* REVISED PROPOSED RULES, *supra* note 80, rules 803, 804, 51 F.R.D. at 419-45. *See also* McCormick, *Hearsay,* 10 RUTGERS L. REV. 620, 630 (1956) (discussing the Uniform Rules of Evidence: "Thirty-one distinct keys to unlock the hearsay door seem too many. . . . The morphology of the exceptions is a wonderful thing.").

[87] *See* REVISED PROPOSED RULES, *supra* note 80, rules 803, 804, 51 F.R.D. at 419-45.

[88] *See* UNIFORM RULES OF EVIDENCE rule 63(8), (9) (1953). *See also* C. McCORMICK, EVIDENCE § 260, at 557 (1954).

[89] C. McCORMICK, EVIDENCE § 260, at 557 (1954).

[90] REVISED PROPOSED RULES, *supra* note 80, 51 F.R.D. at 410-411 (Introductory Note: The Hearsay Problem).

[91] *Id.* rule 801(d)(2)(iv), (v), 51 F.R.D. at 413.

[92] *See id.* rule 801(d)(1), 51 F.R.D. at 415 (Advisory Committee Note).

adherence to doctrine where the judge himself trys the fact.[93] Trial judges have sought, and appellate courts have condoned, a more direct approach to that evidence which, although hearsay, is considered both reliable and trustworthy.

The law has allowed the trial judge freedom from the fetters of the rules, the categories and subcategories. In the main, however, it has not done so by promulgating a different standard for the nonjury case, but by allowing the judge not to rule and by indulging in presumptions when he has ruled erroneously.[94] Reasoned arguments for changing this approach and recognizing the desirability of a different approach in the nonjury case have not been lacking: the ability of the judge, by reason of training and experience, to assess the probative weight of out-of-court declarations and to separate and to disregard the dross is certainly a significant factor.[95] The added flexibility in the ordering of a trial which the absence of a jury permits, thus allowing a litigant to combat unfair surprise, has also been pointed out.[96]

Certainly, not all hearsay need be admitted, even in a nonjury case. Standards, however, are not lacking: "the kind of evidence on which responsible persons are accustomed to rely in serious affairs," [97] has the twin advantages of flexibility and ease of administration. Candid recognition of a rule allowing such hearsay to be admissible in the nonjury criminal case would be a substantial advance. Certainly, it would contribute to simplicity and efficiency in the trial process, obviating the need for the judge constantly to be concerned with the latest version of the exceptions and their technicalities. It would not do so

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[93] Half a century ago a Massachusetts judge, in a rather unusual letter to the editor of the *Harvard Law Review*, commented favorably upon a note which called for liberalization of the hearsay rules before administrative tribunals, and urged an equivalent approach for the judge in the nonjury trial, arguing that the law had already recognized judicial ability "to discern and segregate those matters by which [the jury] might be led astray or biased." 36 HARV. L. REV. 193 (1922). Realistically appraising the probabilities of reform in the normal course, the letter concludes, "Wanted—a Moses to lead the lost legal tribes!" *Id.*

[94] *See* notes 10, 11, & 13, *supra.*

[95] *See* Davis, *An Approach to Rules of Evidence for Nonjury Cases,* 50 A.B.A.J. 723 (1964). At least one reason which Wigmore urges in support of a relaxed rule in administrative hearings is not likely to be cited in support of similar relaxation in a nonjury case. Eager to save administrative tribunals from "the heaviest calamity," he observes:

> A third thing to remember is that the jury-trial system of Evidence-rules cannot be imposed upon administrative tribunals *without imposing the lawyers also upon them;* and this would be the heaviest calamity.

I J. WIGMORE, EVIDENCE § 4*b*, at 36 (3d ed. 1940). *See also* United States v. United Shoe Mach. Corp., 89 F. Supp. 349 (D. Mass. 1950) (Wyzanski, J.); State v. Garcia, 97 Ariz. 102, 397 P.2d 214 (1964).

[96] *See* Weinstein, *supra* note 16, at 380; Weinstein, *Probative Force of Hearsay,* 46 IOWA L. REV. 331, 336 (1961).

[97] Davis, *supra* note 1, at 1363 (quoting L. Hand, J., in NLRB v. Remington Rand, 94 F.2d 862, 873 (2d Cir.), *cert. denied,* 304 U.S. 576 (1938)).

at the expense of reliability and trustworthiness, but rather by means of making these the tests and pursuing directly that which has always been viewed as the ultimate goal.[98]

Adoption of such a proposal, one which has been recommended and which we endorse, would not effect radical change in the nature of criminal prosecutions. True, it would obviate the need for fictive presumptions and buried rulings. It would not, however, obviate the need for compliance with the constitutional[99] requirement that a defendant be afforded his right of confrontation. The limits of the right have yet to be defined with precision,[100] but at the least the prosecution would find it necessary to obtain the presence of witnesses who, with diligence, can be produced.[101] A realistic opportunity for cross-examination would be assured defendants, and the Supreme Court has given ample notice that no redefinition of hearsay doctrine will be permitted to subvert that right.[102] But the Court has made it at least equally clear that the Constitution will not be read so as to import all of the finer distinctions of the hearsay rule under the rubric confrontation.[103] So long as the basic policies of the right of confrontation are adequately served, the states remain free to bring a fresh approach to the hearsay rule.[104] In short, the right of confrontation clearly limits what a court may do,[105] even in the nonjury case, but the constraints are not those of present doctrine nor is the path of change limited to revising and refining the categories which currently obtain.[106] And, of no lesser significance, the right of confrontation operates on behalf

[98] The trenchant criticism of Uniform Rule of Evidence 63(4)(c) by Professor Chadbourn, which proved influential in the drafting of the REVISED PROPOSED RULES, *supra* note 80, 51 F.R.D. at 410-11, is based on the impropriety of having the judge rather than the jury pass on credibility, even if in the form of a ruling on admissibility. In the case of the nonjury trial, this objection would not obtain. Indeed, the force of his argument would lead to approval of the proposal made in the text.

[99] *See* REVISED PROPOSED RULES, *supra* note 80, 51 F.R.D. at 411-12 (Confrontation and Due Process).

[100] *See* Griswold, *The Due Process Revolution and Confrontation*, 119 U. PA. L. REV. 711 (1971).

[101] Barber v. Page, 390 U.S. 719 (1968).

[102] Douglas v. Alabama, 380 U.S. 415 (1965); Pointer v. Texas, 380 U.S. 400 (1965).

[103] Dutton v. Evans, 400 U.S. 74 (1970).

[104] *See* Griswold, *The Due Process Revolution and Confrontation*, 119 U. PA. L. REV. 711 (1971).

[105] For a recent example of the reach of the right of confrontation with respect to hearsay evidence erroneously, albeit inadvertently, placed before the jury, see State v. King, 112 N.J. Super. 138, 270 A.2d 633 (1970), *cert. granted*, 57 N.J. 602, 274 A. 2d 55 (1971).

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> It seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots. But this Court has never equated the two, and we decline to do so now.

Dutton v. Evans, 400 U.S. 74, 86 (1970) (plurality opinion per Stewart, J.) (footnotes omitted).

of the defendant. No similar constraints operate against him, allowing for a flexibility in development already in evidence in more than one jurisdiction.[107]

Adoption of a rule which allows the trial judge to admit hearsay simply because it is "the kind of evidence on which responsible persons are accustomed to rely in serious affairs" [108] could permit founding a conviction entirely on evidence inadmissible both under present rules and under the rules which would then, as now, obtain in jury cases within the same jurisdiction. The right of confrontation would not insure a contrary result, although it might render it less probable and hence infrequent. That right, for example, is consistently considered no bar to the admissibility of dying declarations,[109] and it is difficult to believe that the Supreme Court would introduce a bar simply because the rigors of old definitions had not been maintained with precision. Thus, the possibility of such a conviction must be faced and seriously considered. It need not, however, be viewed as a disadvantage or a reason for rejecting the basic rule. The central problem is one of sufficiency of the evidence to convict. True, the willingness to relax the rules of admissibility should imply an added willingness on the part of appellate courts to consider afresh, and free from artificialities which often obtain under the present system, whether in fact the evidence viewed as a whole is sufficient to convict.[110] The standard remains unaltered: beyond a

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[107] *See, e.g.,* N.J.R. EVID. 63(10) (declarations against interest are admissible in a criminal prosecution when offered by the defendant, but not when offered against him, unless he was the declarant); United States v. Melillo, 275 F. Supp. 314 (E.D.N.Y. 1967) (discussed in Weinstein, *supra* note 16, at 376).

On the desirability of more stringent hearsay rules in criminal cases, see Quick, *Hearsay, Excitement, Necessity and the Uniform Rules: A Reappraisal of Rule 63(4),* 6 WAYNE L. REV. 204, 219 (1960). *See also* Chadbourn, *Bentham and the Hearsay Rule—A Benthamic View of Rule 63(4)(c) of the Uniform Rules of Evidence,* 75 HARV. L. REV. 932, 950-51 (1962); Weinstein, *Probative Force of Hearsay,* 46 IOWA L. REV. 331, 387 (1961).

Approval of such an approach need not go so far as to fall afoul of the concern of the drafters of the Proposed Federal Rules of Evidence that there be one set of rules for civil and criminal cases. REVISED PROPOSED RULES, *supra* note 80, 51 F.R.D. at 410.

[108] Davis, *supra* note 1, at 1368.

[109] *See* Pointer v. Texas, 380 U.S. 400, 407 (1965); Griswold, *supra* note 100, at 725.

[110] Weinstein, *Probative Force of Hearsay,* 46 IOWA L. REV. 331, 340-41, 352 (1961); United States v. Melillo, 275 F. Supp. 314, 318 (E.D.N.Y. 1967) (on motion for directed verdict of acquittal). See also the comment of Professor Brooks:

> The admissibility of evidence and the sufficiency of evidence are two separate problems, and different tests should be used for the admission of evidence and for the determination as to sufficiency when all the evidence is in. . . . The judge can direct a verdict of acquittal, or set aside a conviction, or an appellate court can reverse a conviction, if there is an insufficiency of evidence. . . . "Increased liberality in the admission of evidence should be coupled with a new willingness on the part of the courts to examine the quality of such evidence on the issue of sufficiency to support a conviction." Levin, *Evidence,* 1960 ANN. SURVEY AM. L. 554, 556-57.

REPORT OF THE NEW JERSEY SUPREME COURT COMMITTEE ON EVIDENCE 135 (1963) (Alexander D. Brooks, Reporter).

reasonable doubt, freely translated by one of the greatest of contemporary jurists as a virtual certainty.[111] If the standard has in fact been met, it seems purposeless to inquire whether inapplicable rules governing jury-trial admissibility have also been met. In the normal case, the trial judge, certainly in cases of serious crime, may aid the appellate court by recording the factors which led to his conclusion, giving evidence of the seriousness of his pursuit of the facts and his awareness of the need for careful assessment of the hearsay on which he relied. In an analogous situation, Israel has developed the requirement that the judge give evidence that he has "warned himself" of the need for care.[112] We would not recommend any requirement which could be met by insertion of a talismanic phrase, and, indeed, alternatives which go to the reality of the judge's concern rather than the phrasing of his opinion have been recommended in that jurisdiction.[113] But the result on appellate review need not turn, as it does now, on whether the trial judge has lapsed and allowed himself to demonstrate reliance on technically inadmissible hearsay, or on whether there is in the record a "residuum" of evidence admissible in a jury-tried case. It should turn, rather, on the quality of the evidence as revealed by the entire record, examined by an appellate court which takes seriously the obligation to be increasingly sensitive to problems of sufficiency as the technical rules of admissibility are relaxed.

CONCLUSION

We have considered three different types of problems with respect to admission and exclusion of evidence in the jury-waived case. We seek neither to relax all the rules nor to be more stringent in their application. For us, what emerges from the analysis is the need to treat differently different problems. The potential for prejudice in allowing a trial judge to learn of a defendant's prior criminal record, or of other crimes totally unrelated to the offense charged and not in any real sense properly before the court as it tries the particular case, should be given explicit recognition. Fairness to the defendant in the individual case requires scrupulous adherence by the trial judge to the recognized rules of exclusion and stringency by an appellate court in reviewing what has transpired below.

The involuntary confession presents a problem of constitutional dimension, and the rule requiring its exclusion without regard to re-

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[111] R. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 29, 34 (1970). *See also* United States v. Melillo, 275 F. Supp. 314 (E.D.N.Y. 1967) (extended discussion).

[112] Harnon, *The Need for Corroboration of Accomplice Testimony*, 6 ISRAEL L. REV. 81, 99-100 (1971).

[113] *Id.* 100, 104-05.

liability is based on considerations of policy which, once accepted, apply in the nonjury case as in the jury trial. To give effect to these policies requires, in our view, procedural safeguards such as different judges to determine voluntariness and guilt or innocence. To some, such requirements may appear a further compounding of technicalities at a time when the situation with respect to the administration of the criminal law calls not for the multiplication of obstacles but for simplification. But assuring a defendant that the rules will be rigorously respected even if jury trial is waived may well, in the net, prove a boon rather than a bane by way of increased waivers and resultant economies in judicial administration. More fundamentally, a defendant is entitled to the full and fair implementation of the policies behind these rules of exclusion, no less in the jury-waived case than in the jury trial. We would afford him no less.

Finally, we have discussed the hearsay rule and its exceptions—typical perhaps of various other rules of evidence which could better achieve their purpose by simplification and concern for basic reliability and trustworthiness, at least if the trier of the fact is sensitive to the problems and equipped to deal with them by training and experience, and appellate review is attuned to the need for assuring sufficiency in a realistic sense. Here we would recognize directly what the law has sought by fictive presumptions and other artificial devices approaching the level of subterfuge: flexible rules which seek to achieve a rational resolution of the issues of fact.