Volume 3 | Issue 1 Article 5

1957

Prejudicial Error: Admissions and Exclusions of Evidence in the Federal Courts

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PREJUDICIAL ERROR: ADMISSIONS AND EXCLUSIONS OF EVIDENCE IN THE FEDERAL COURTS

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Introduction.

THE FOREMAN ROSE to announce the jury's decision. All parties concerned however were certain that conviction would be the verdict. The special prosecutor had been masterful throughout the entire proceeding. What initially appeared to be a close case had been made one-sided by his eloquence, expertness in the rules of evidence, and courtroom tactics. Perhaps the prosecutor's most dramatic and triumphant moment during the three week trial occurred in the midst of the defense's cross-examination of a key government witness. With what appeared to be the unrelenting courage of his convictions, government counsel strenuously objected to a line of questioning intended to impeach the witness. He convincingly argued that the questions were irrelevant, repetitious, and beyond the scope of direct examination. Persuaded by these forensics, the trial judge sustained the objection. The words "guilty as charged" were no sooner out of the foreman's mouth than a host congratulated the heroic prosecutor, the servant of law and order. Some six months later the court of appeals reversed the conviction and ordered a new trial,[1] holding the aforementioned restriction of cross-examination to have been prejudicial error.

It is the goal of this Article to answer effectively the following question: What did the appellate court mean when it said the trial judge had committed *prejudicial error?*[2]

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The writer expresses his sincere gratitude for the unstinting assistance rendered by Milas C. Bradford, Jr., and Lewis G. Pollock of the Texas and Massachusetts Bars, respectively, and to Edeltraut Hirsch of Munich, Germany.

1. Federal appellate tribunals are afforded great latitude in rectifying errors or irregularities arising in the trial court. 28 U.S.C. § 2106 (1952). Where evidence in the record independent of the prejudicial error is sufficient to sustain the result below, the case will ordinarily be remanded for a new trial. Labiosa v. Government of the Canal Zone, 198 F.2d 282, 285 (5th Cir. 1952). The new trial so ordered may be limited to the issue or issues affected by the error. *Accord,* Thompson v. Camp, 167 F.2d 733 (6th Cir. 1948), *cert. denied,* 335 U.S. 824 (Oct. 11, 1948).

2. The analysis is limited to the federal court cases wherein one or more evidentiary errors of admission or exclusion occurred in the trial court. Though similar con-

The question's significance can not be overemphasized. The trial judge is forever concerned with it during trial in attempting to minimize possible prejudice arising from his own questionable rulings [3] and in deciding upon motions for mistrial. Ordinarily all trial counsel do, or should, seek to obviate errors prejudicial to their opponents, while attorneys confident of success attempt to minimize the prejudice resulting from such errors once they have occurred. Pessimistic counsel, in the hope of obtaining reversal on review, have been known to strive to induce errors prejudicial to themselves and to preserve or create prejudice from errors already committed. And appellate judges and counsel must be aware of the concept in dealing with both brief and argument.[4]

There was a time when many legal authorities thought that litigants were entitled to an errorless hearing in the trial court.[5] Orthodox application of such a principle must have entailed incessant effort by counsel to inject into the record error in some way adverse to their clients in order to insure a subsequent retrial, if the need should arise. This predilection to provoke error has not escaped unscathed; of lawyers so inclined, the following has been said:

> "To them it is a fencing contest between counsel, where the real issue of fact, to-wit, the guilt or innocence of defendant is lost in the heat of the duel between opposing counsel. The sole effort is to inject error into the trial." [6]

The harm resulting from this misdirection was undoubtedly compounded. Trial judges, in attempting to compensate for the justice-defeating gyrations of counsel, must have been tediously super-cautious in deliberation prior to ruling. Endless hearings, frequent rehearings and resultant high cost of judicial administration could not have been avoided.

It would be ideal for each losing litigant to have had a perfect hearing; but the demands of the modern court calendar render any requirement of this sort impossible. The rule of necessity today is

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siderations may be applicable, miscellaneous questions of evidence (e.g., judicial notice, presumptions and burden of proof) and other problems to which the concept of prejudicial error may apply (e.g., jury instructions and misconduct by counsel or judge) are not treated.

3. Where the trial judge is confronted with a close evidentiary question having two or more alternative solutions, his ruling may well be affected by the estimated degree of prejudice likely to arise from either alternative.

4. An excessive number of appellate briefs containing arguments concerning alleged evidentiary errors fail to discuss whether the errors were prejudicial.

5. 1 WIGMORE, EVIDENCE § 21 (3d ed. 1940).

6. United States v. Johnson, 123 F.2d 111, 141 (7th Cir. 1941) (dissenting opinion), *rev'd*, 319 U.S. 503 (1943).

that a party "is entitled to a fair trail but not a perfect one." [7] Either by statute or by judicial decision almost every jurisdiction has adopted the policy of sustaining a judgment despite one or more errors in the trial court, if the errors were but technical in nature. This so-called *doctrine of prejudicial error* represents a sound practice, leading to a reduction in the number of appeals and curtailment of the necessity for fencing among counsel and trial judge, as well as allowing both counsel and judge better to concentrate on the substantive matters at issue.[8]

The current doctrine of prejudicial error is thus a manifestation of a sound judicial administration. It has been articulated in many ways, but the following federal legislation is fairly representative: [9]

> "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." [10]
>
> "Harmless Error and Plain Error.
>
> (a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> (b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." [11]
>
> "Harmless Error.
>
> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." [12]

7. Lutwak v. United States, 344 U.S. 604, 619 (1953).

8. The easing of tension thereby afforded the trial judge may occasionally encourage him to be somewhat heedless in his rulings, feeling secure that he is insulated from reversal. To prevent fruition of such practice, especially where precedent-making rulings are involved, it might be prudent for appellate courts occasionally to treat an error as reversible, regardless of the absence of prejudicial error in the usual sense. See Krulewitch v. United States, 336 U.S. 440, 457 (1949) (concurring opinion).

9. See Kotteakos v. United States, 328 U.S. 750, 757-763 (1946), for an interesting discussion of pertinent legislative history.

10. 28 U.S.C. § 2111 (1952).

11. FED. R. CRIM. P. 52. This rule merely restated pre-existing law. Bihn v. United States, 328 U.S. 633, 683 n.3 (1946).

12. FED. R. CIV. P. 61. Though criminal rule 52 and this rule are evidently directed toward federal district courts, they are followed by federal appellate courts as well. Illinois Terminal R.R. v. Friedman, 208 F.2d 675, 680 (8th Cir. 1953).

Though these rules are characteristically vague, their thrust is that reversal should result only where justice would not be served were the judgment below allowed to stand. But even Socrates found the concept of justice unwieldy. Federal courts have continually attempted to refine these statutory statements into more practical, specific terms. The resultant paraphrasing has been immensely varied; but looming high as a common denominator is the principle that prejudicial error varies with the error's effect upon the decision [13] reached by the trier of fact.[14]

How does the appellate court determine whether an error affected the decision of the trier of fact? In attempting to answer this question, it must be recognized that the appellate tribunal's inquiry is ordinarily restricted to the contents of the record on appeal.[15] Satisfactorily including in the record matter relating to improperly excluded evidence may often prove most difficult. Sometimes the excluded matter's nature is obvious from the record; [16] other cases may require an offer of proof [17] or the excluded document or a summary of the excluded testimony as an appellate exhibit.[18] The reviewing court's examination may not be so circumscribed if the appellant was deprived of an opportunity to have the matter included in the record or if the appellee obstructed inclusion.[19] And also, where the trial or preparation of the record was conducted by the appellant without aid of counsel, the method of review may be liberalized.[20]

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13. The decision deemed to have been affected may be the findings or merely the amount of the verdict or sentence. United States v. Dressler, 112 F.2d 972, 979-980 (7th Cir. 1940).

14. Fiswick v. United States, 329 U.S. 211, 218 (1946). Language to the contrary occasionally appears in appellate opinions. In discussing the meaning of prejudicial error, the Ninth Circuit once stated:

> "We must emphasize that, contrary to exhortations of appellee, we do not test 'manifest injustice' by whether or not *we* are convinced of appellants' guilt. The test is rather whether the now contested evidence, in the light of all the facts of the case before the court, so improperly prejudiced appellants in the eyes of the jury as to deny them a fair trial and thus require us to reverse, even though, *we* might feel that if the contested evidence was deleted, the jury would still have returned a finding of guilt." Smith v. United States, 173 F.2d 181, 186 (9th Cir. 1949).

15. 28 U.S.C. § 2111 (1952), O'Neal v. Cowles Magazines, Inc., 225 F.2d 43,45 (D.C. Cir. 1955). For the form and content of records on appeal, see the appropriate federal rules. FED. R. CIV. P. 75 and 76 and FED. R. CRIM. P. 39(b).

16. Downie v. Powers, 193 F.2d 760, 768 (10th Cir. 1951).

17. Cavanaugh v. Fireman's Fund Ins. Co., 197 F.2d 853, 855 (8th Cir. 1952). It would appear that trial counsel may make such offer as a matter of right. FED. R. CIV. P. 43(c), Downie v. Powers, *supra* note 16.

18. United States v. De Normand, 149 F.2d 622, 625 (2d Cir. 1945), *cert. denied*, 326 U.S. 756 (Oct. 15, 1945), *cert. denied*, 330 U.S. 822 (1947), *denial of motions for new trial and to vacate part of sentence aff'd sub nom.* Oddo v. United States, 171 F.2d 854 (2d Cir. 1949), *cert. denied*, 337 U.S. 943 (June 20, 1949).

19. Edwards v. United States, 312 U.S. 473, 477-78, 481-82 (1941).

20. United States v. Helwig, 152 F.2d 456 (3d Cir. 1945) (alleged exclusion by deprivation of opportunity to summon witnesses), *vacated per curiam and remanded for perfection of the record*, 328 U.S. 820 (1946), *rev'd*, 159 F.2d 616 (3d Cir. 1947).

Basic to an appellate court's analysis of a trial record is the assumption that the trier of fact did not perform its duties arbitrarily.[21] So regarding the trier of fact, the appellate tribunal searches the record for threads of evidence from which it can infer whether the result was affected by the error under consideration. Enlightening conditions may and do recur from case to case. A discussion of these recurring situations or prejudice factors will ensue; but it is well to note that merely because a factor in one case was held determinative, it need not be similarly held conclusive of whether the result was affected in another case. As Mr. Justice Rutledge put it,

> "In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of stare decisis by what has been done in similar situations." [22]

Prejudice factors relating to errors of admission [23] differ somewhat from those pertaining to errors of exclusion,[24] although there are some factors applicable to both.

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21. Goins v. United States, 99 F.2d 147, 151 (4th Cir. 1938), *cert. granted,* 306 U.S. 623 (1939), *cert. dismissed,* 306 U.S. 622 (Apr. 17, 1939).

22. Kotteakos v. United States, 328 U.S. 750, 762 (1946).

23. The phrase, errors of admission, is here used in its broadest sense. The admission of testimony which is irrelevant, immaterial, incompetent or merely responsive to an improper question, is an erroneous admission. The improper restriction of a cross-examiner's efforts to impeach the testimony of a witness may derivatively render the testimony of the witness on direct an error of admission. Gordon v. United States, 344 U.S. 414, 421-22 (1953). Another example of a derivative error of admission is the improper exclusion by the trial court of evidence that may have rendered other admitted evidence inadmissible, as in United States v. Carignan, 342 U.S. 36, 38 (1951), where evidence of a confession's involuntariness was improperly excluded. The examination of derivative error cases to see whether the result was affected, logically involves a two step analysis. In Little v. United States, 93 F.2d 401, 406-07 (8th Cir. 1937), *cert. denied,* 303 U.S. 644 (1938), the appellate court considered separately whether the improper restriction of cross-examination affected the weight given the witness's testimony on direct and whether the latter testimony affected the ultimate result, the jury's verdict.

24. The phrase, errors of exclusion, likewise is all-encompassing, including improper restraint upon questioning of witnesses, erroneous instructions that the jury ignore certain evidence, and incorrect granting of motions to strike evidence from the record. There are also derivative errors of exclusion, as when a witness's testimony is discredited by improperly admitted evidence, which thereby has an excluding effect on the former. An erroneous denial of a motion to produce evidence has also been treated as an error of exclusion. Gordon v. United States, 344 U.S. 414, *supra* note 23 (*semble*).

The Eighth Circuit recently held that a trial court's sustaining of an "objection" to evidence after admission was not even an exclusion, since the evidence was not thereby "stricken from the record or otherwise withdrawn from the jury's consideration." Kelly v. Cordle, 217 F.2d 757, 763 (8th Cir. 1954). The decision, taking the position that not even an exclusion had occurred, strains the prejudicial error doctrine's very spirit of disregarding technical defects; it is far from clear that every jury member considers evidence in the face of a sustained objection, albeit occurring after the evidence was received.

I.

PREJUDICE FACTORS PERTAINING TO ERRORS OF ADMISSION.

A few of these factors are fairly apparent. If the trier of fact expressed particular interest in the evidence, its decision may well have been affected thereby.[25] If the evidence was never examined by the trier of fact, rarely could it be considered to have influenced the outcome below.[26] And where it had probative value only because it tended to support a result contrary to the one actually reached, there is little likelihood that such evidence was prejudicial. In *Skiskowski v. United States*[27] a federal agent testified that he had confronted the criminal defendant with a statement by an alleged co-conspirator. Though the defendant had purportedly nodded while listening to the statement, after having heard it *in toto* he unequivocally denied its truth. There having been no adoptive admission, the testimony was clearly hearsay and improperly admitted. The court held that, because it included the defendant's denial, the line of testimony could not have acted on the verdict and was thus non-prejudicial.

A decision as to whether the evidence pertained to *matters in dispute* often disposes of the prejudice question. In *Sivert v. Pennsylvania R.R.*[28] the court, in holding that there had been no prejudice, relied on the fact that the evidence related to a subject not in dispute.[29] But where the pertinent matter is in dispute, its magnitude of materiality becomes crucial in determining if the error influenced the result. A finding of negligible materiality of the question to which the erroneously admitted evidence related was dispositive of the prejudice question in *Salerno v. United States.*[30] The converse may also be true: in a recent Third Circuit personal injury case, improperly admitted testimony concerning the most material issue, who was at fault, was held therefore to have been prejudicial.[31] Though the ultimate fact to which the evidence appertains may be legally immaterial, it may take on materiality in the eyes of the trier of fact. In the *Byler* case, [32] a

25. Fiswick v. United States, 329 U.S. 211, 220 (1946) (clarifying instruction requested by jury).

26. Little v. United States, 93 F.2d 401, 407 (8th Cir. 1937), *cert. denied,* 303 U.S. 644 (1938).

27. 158 F.2d 177, 180-82 (D.C. Cir. 1946), *cert. denied,* 330 U.S. 822 (1947).

28. 197 F.2d 371, 377 (7th Cir. 1952).

29. A concession by counsel in opening statement rendered a question not subject to dispute for purposes of prejudice in Dunlap v. United States, 70 F.2d 35, 38 (7th Cir. 1934), *cert. denied,* 292 U.S. 653 (June 4, 1934). See also MODEL CODE OF EVIDENCE rule 4 (1942).

30. 61 F.2d 419, 421 (8th Cir. 1932).

31. Gordon v. Robinson, 210 F.2d 192, 194 (3d Cir. 1954).

32. Byler v. Wabash R.R, 196 F.2d 9, 11-12 (8th Cir. 1952), *cert. denied,* 344 U.S. 826 (Oct. 13, 1952).

personal injury suit under the Safety Appliance Act, [33] defense counsel in opening argument dwelled on the importance of plaintiff's assumption of the risk and contributory negligence, though neither constituted a defense. Because any resulting misapprehension by the jury was never rectified during the trial, admission of evidence indicating assumption of the risk was held to have been prejudicial error.

Another common factor is the *degree of persuasiveness* possessed by the evidence. That the evidence has little or no relevance to issues in dispute usually indicates that its admission did not sway the trier of fact.[34] Or, if the evidence is of negligible persuasiveness because of its patent incredibility or the testifying witness's unreliability, prejudice is similarly unlikely.[35] On the other hand, where the evidence is highly relevant or its source most dependable, prejudice is more probable.

Regardless of its immateriality and minimal probative value, *highly inflammatory evidence* is frequently considered to have influenced the determination. *United States v. Sprengel* [36] is illustrative. Defendants, who had operated one of the notorious Baker heirs organizations,[37] were charged with and convicted of conspiring to use and using the mails to defraud. The zealous prosecutor offered evidence that the operators of rival Baker heirs associations had been convicted of fraud. This was held to have constituted prejudicial error even though Judge Biggs wrote for the majority, "In our opinion there can be no question of the guilt of the appellants." [38] Evidence of past misconduct is similarly treated,[39] and this practice is not limited to criminal cases.[40] A more common example of prejudicial, inflammatory evidence in civil suits is evidence that the defendant in a tort suit is insured.[41] Where highly inflammatory evidence is improperly ad-

33. 35 STAT. 65 (1939), 45 U.S.C. § 51 (1952).

34. Stephan v. United States, 133 F.2d 87, 97 (6th Cir. 1943), *cert. denied,* 318 U.S. 781 (Apr. 5, 1943), *appeal application denied,* 319 U.S. 423 (June 1, 1943).

35. Krulewitch v. United States, 336 U.S. 440, 459 (1949) (dissenting opinion).

36. 103 F.2d 876, 881 (3d Cir. 1939).

37. One Jacob Baker or Becker allegedly had received considerable land in what is now downtown Philadelphia in return for his services during the Revolutionary War. Since Baker's estate evidently never had been settled, so the story goes, a number of organizations arose with the putative purpose of finding the deserving heirs, representing them in processing their claims, and ultimately obtaining a portion of the fictitious estate for them. Naturally each newly discovered heir supported the respective organization financially.

38. 103 F.2d at 879.

39. Sang Soon Sur v. United States, 167 F.2d 431 (9th Cir. 1948). The opinion suggested an additional, but quite uncontrollable, factor when it stated, "Such an error must have resulted in prejudice to the appellant, more so perhaps, because of his nationality and alien status." *Id.* at 432.

40. Cohen v. Checker Taxi Co., 217 F.2d 449, 452 (7th Cir. 1954).

41. Brown v. Walter, 62 F.2d 798 (2d Cir. 1933). *Accord,* Gilbert v. Gulf Oil Corp., 175 F.2d 705, 710 (4th Cir. 1949). But prejudice is not invariable; in Lobel v.

mitted, it is usually considered to be prejudicial, unless other evidence is so overwhelming that the trier of fact would certainly have reached the same result notwithstanding the error.[42] Consistent reversals in such cases have their salutary effect in discouraging counsel from succumbing to the ever-present temptation of presenting obviously inadmissible evidence of this variety.

One of the most recurrent prejudice factor problems is whether *other evidence in the record neutralizes* the prejudicial quality of the improperly admitted evidence. Where other evidence in the record serves to nullify any inference from the erroneously admitted evidence adverse to the appellant, there can be no prejudice.[43] In *United States v. Hefler*[44] a policeman-witness improperly testified to seizing property from the defendant in the belief that it was "the proceeds of other larcenies"; however, any prejudice was held removed when the defense counsel on cross-examination elicited from the same witness an answer that the property was later discovered to have been legally acquired by the defendant. If the neutralizing evidence, however, is of a noticeably lesser degree of persuasiveness than that improperly admitted, the prejudice may not be considered cured. For example, where evidence of prior misconduct is improperly admitted, the criminal defendant's own testimony as to his own good character will not nullify the prejudice resulting therefrom.[45] Another example of the neutralizing effect of other evidence is found when there is admissible evidence in the record to the same effect as that erroneously received in evidence;[46] there can be no prejudice when the wrongfully admitted evidence is but comu-

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American Airlines, Inc., 192 F.2d 217, 221 (2d Cir. 1951), *cert. denied,* 342 U.S. 945 (1952), the effect of such evidence was viewed as inconsequential in light of the manifest financial ability of the defendant of record.

42. Templeton v. United States, 151 F.2d 706, 707-08 (6th Cir. 1945). Here the prosecution elicited from several of the witnesses that the defendant and a number of his witnesses were related to Hawk Carter, "the notorious bootlegger of Sumner County."

43. Illinois Terminal R.R. v. Friedman, 208 F.2d 675, 679 (8th Cir. 1953).

44. 159 F.2d 831, 834 (2d Cir. 1947), *cert. denied,* 331 U.S. 811 (Apr. 28, 1947).

45. United States v. Modern Reed & Rattan Co., 159 F.2d 656 (2d Cir. 1947), *cert. denied,* 331 U.S. 831 (June 2, 1947). A subsidiary point was raised in the case concerning whether admitted evidence of prior misconduct remained error once the defendant subsequently put his own character in issue. The court answered in the affirmative, convinced that the very error had forced the accused to put his character in issue as rebuttal evidence.

46. An extreme view was taken in Beach v. United States, 149 F.2d 837 (D.C. Cir. 1945), *cert. denied,* 326 U.S. 745 (Oct. 8, 1945), where other evidence to the same effect, though technically inadmissible, had been admitted without objection; the latter was held to have neutralized the prejudice.

Judicial notice concerning the same matter to which the improper evidence relates may similarly neutralize any prejudice. Freeman-Sweet Co. v. Luminous Unit Co., 264 Fed. 107, 109 (7th Cir. 1919) (improper admission of uncertified record of which the court could have taken judicial notice), *cert. denied,* 253 U.S. 486 (1920).

lative.[47] *United States v. Fried* [48] involved a witness who improperly testified to a conclusion. On cross-examination he explained the factual basis for his opinion, thereby removing any prejudice. In *Masterson v. Pennsylvania R.R.*,[49] a personal injury suit, two written medical diagnoses were incorrectly admitted. Direct testimony to the same effect by a well-qualified doctor was held to have removed the prejudice. And wherever the appellant himself testifies to the same effect in the trial court, prejudice is generally considered absent.[50] Note that if the other evidence has little or no probative value or depends substantially upon the erroneously admitted evidence for corroboration, prejudice may remain nonetheless. In *Dowdy v. United States* [51] co-conspirator Martin testified against the defendant. Subsequently, witness Trexler, a special investigator, was allowed to testify as to statements incriminating the defendant but made by Martin after being arrested and therefore definitely after the conspiracy had terminated. The prejudicial effect of admitting this hearsay evidence was held not ameliorated by Martin's direct testimony to the same effect, since the latter's probative value depended to a large extent upon Martin's corroborating, prior consistent statements about which Trexler had testified.

Perhaps the most frequently articulated prejudice factor consideration is whether, in a jury trial, the trial judge cured the prejudicial effect of the erroneously admitted evidence by an *appropriate instruction,* during the trial or as part of his charge to the jury, either to ignore the evidence or to consider it only for proper purposes. Generally if the trial judge has so instructed, prejudice is held to have been eradicated.[52] In devising these instructions, the trial judge must be cautious concerning both timing and content. A remark to the jury immediately after admission of the evidence may be enough, but, if given later in the trial, it may be ineffective; [53] thus, the sooner the instruction is given, the more likely will the prejudice be cured.[54] Though timely, the instruction may not be curative, if it does not

47. That other evidence to the same effect is or was available, though the record does not indicate that it was received in evidence or improperly excluded, does not cure the prejudice. Watson v. United States, 224 F.2d 910 (5th Cir. 1955). *But see,* Yoffe v. United States, 153 F.2d 570, 574 (1st Cir. 1946).

48. 149 F.2d 1011, 1013 (2d Cir. 1945), *cert. denied,* 326 U.S. 756 (Oct. 22, 1945).

49. 182 F.2d 793, 797-98 (3d Cir. 1950).

50. Kreinbring v. United States, 216 F.2d 671, 673 (8th Cir. 1954).

51. 46 F.2d 417, 425-27 (4th Cir. 1931).

52. Mora v. United States, 190 F.2d 749, 752 (5th Cir. 1951).

53. Jarabo v. United States, 158 F.2d 509, 515 (1st Cir. 1946).

54. United States v. Zeoli, 170 F.2d 358, 360 (3d Cir. 1948).

explicitly apply to the objectionable evidence.[55] An instruction that is equivocal or does not clearly direct the jury either to totally ignore the evidence or restrict their reliance on it to the proper limits is equally impotent.[56] Occasionally the content or repetition of an instruction may itself create prejudice by causing the jury to overemphasize the evidence's significance.[57] Sometimes the improper evidence is so momentous that regardless of the care taken by the trial judge, its prejudicial effect can not be purged. In the *Holt* case [58] admission of a statement by an alleged co-conspirator thoroughly implicating the defendant was held prejudicial despite the trial court's instructional efforts.[59] However, where the appellant fails to object to the instruction, its inadequacies may well be ignored.[60] Requiring the appellant to register his dissatisfaction with an insufficient instruction seems reasonable, since the trial judge is thereby notified either to rectify the instruction or, where no instruction could be satisfactory, to declare a mistrial and thus avoid the costs of continuing the trial and prosecuting the appeal.

II.

PREJUDICE FACTORS PERTAINING TO ERRORS OF EXCLUSION.

As those relating to errors of admission, some factors are patently clear. Where the evidence would not have supported a result contrary to that reached in the trial court, its exclusion can hardly be prejudicial.[61] And if the record indicates that the trier of fact heard or saw the excluded evidence, in an offer of proof or otherwise, and was apparently not particularly impressed therewith, the outcome was probably unaffected by the error.[62]

55. Pasquel v. Owen, 186 F.2d 263, 272 (8th Cir. 1950) (*semble*).

56. Stueber v. Admiral Corp., 171 F.2d 777, 780 (7th Cir. 1949), *cert. denied*, 336 U.S. 961 (Apr. 25, 1949). In Collenger v. United States, 50 F.2d 345, 349 (7th Cir. 1931), *cert. denied*, 284 U.S. 654 (Oct. 26, 1931), an instruction allowing the jury to determine the admissibility of the evidence, where the subject of admissibility was within the exclusive realm of the trial judge, was held not to have removed the prejudice.

57. Rice v. United States, 149 F.2d 601, 604 (10th Cir. 1945) (jury impressed by trial judge's repeated instructions to ignore certain evidence).

58. Holt v. United States, 94 F.2d 90, 94 (10th Cir. 1937).

59. The well-meaning prosecutor who offers a confession or other very strong evidence prior to laying a foundation for admissibility may, in the event that he does not later succeed in establishing the foundation, find himself in the unenviable position of having injected incurably prejudicial error into the record.

60. Blodgett v. United States, 161 F.2d 47, 51-52 (8th Cir. 1947). See also FED. R. CIV. P. 51 and FED. R. CRIM. P. 30.

61. Chapman v. United States, 194 F.2d 974, 978 (5th Cir. 1952), *cert. denied*, 344 U.S. 821 (Oct. 13, 1952).

62. United States v. Compania Cubana De Aviacion, 224 F.2d 811, 822 (5th Cir. 1955).

An exclusion of evidence relating to a question directly in issue is more likely to have affected the decision;[63] the contrary is true where the matter has little materiality.[64] Frequently the significance of excluded evidence is exaggerated by words or actions of counsel or judge. Opposing counsel's dwelling upon the importance of the evidentiary void resulting from an exclusion is one method. Another was illustrated in *Meeks v. United States,*[65] where the trial judge repeatedly resisted defendant's efforts to show that a key prosecution witness was on probation arising from a conviction for forgery; moreover, the same judge found counsel in contempt for persistently trying to elicit such testimony.[66]

The degree of persuasiveness possessed by the excluded evidence is another important factor. Excluding evidence having only negligible relevance is seldom considered to be reversible error;[67] where the excluded testimony would be otherwise unpersuasive, the same may be said. Thus, in *Lindberg Engineering Co. v. Ajax Engineering Corp.*[68] the exclusion of testimony by a witness who could have been easily and convincingly impeached was held not to have been prejudicial error. But where the evidence is of obvious persuasiveness, particularly on a material and disputed issue, prejudice is more likely.[69]

Finally, where there is other evidence in the record neutralizing any prejudicial effect resulting from the exclusion, reversible error is of course not present. If there is ample evidence that would have overcome any contrary inference raised by the excluded evidence, prejudice could not have resulted.[70] There can rarely be prejudice if the excluded matter is itself later received into evidence,[71] or is but cumu-

63. Modern Woodmen of America v. Watkins, 132 F.2d 352, 354-55 (5th Cir. 1942) (exclusion of statements by deceased indicating an intent to commit suicide, where defendant insurer had raised the suicide issue in suit on life insurance policy).

64. Bateman v. United States, 212 F.2d 61, 69 (9th Cir. 1954) (improper impeachment of witness whose testimony pertained only to preliminary matters). See also MODEL CODE OF EVIDENCE rule 4 (1942).

65. 163 F.2d 598 (9th Cir. 1947).

66. "It is obvious that the average man in a jury well could conclude that the government's witness was a person highly respected by a court which, sua sponte, interrupted and refused to allow an inquiry as to the witness' bias, then refused to admit the proof of his prior conviction of a crime, followed by the shaming of appellant's attorney before the jury for an entirely proper endeavor to protect his client." Meeks v. United States, *supra* note 65 at 601.

67. Curley v. United States, 160 F.2d 229, 238-39 (D.C. Cir. 1947), *cert. denied,* 331 U.S. 837 (June 2, 1947).

68. 199 F.2d 807, 811 (7th Cir. 1952).

69. In the *Meeks* case, the appellate court so considered impeaching evidence that the witness was on probation. 163 F.2d at 599-600.

70. Lindberg Engineering Co. v. Ajax Engineering Corp., 199 F.2d at 811.

71. Deschenes v. United States, 224 F.2d 688, 692 (10th Cir. 1955). The same is true if the appellant later had been given an opportunity to have the excluded matter received in evidence but did not avail himself of that opportunity. Walsh v. Bekins Van Lines Co., 217 F.2d 388, 390 (8th Cir. 1954).

lative to other evidence in the record.[72] But where the record indicates that the excluded evidence would have been more persuasive than or would have lent needed corroboration to evidence already in the record, appellate courts are reluctant to state that the result was unaffected by the error.[73]

III.

PREJUDICE FACTORS COMMON TO ERRORS OF ADMISSION AND EXCLUSION.

A number of these miscellaneous factors do not require extended discussion. Though a single evidentiary error may not be prejudicial by itself, an appellate court may nevertheless consider it together with other errors, evidentiary or otherwise, and determine that their combined effect is prejudicial.[74] There may be a temptation to find prejudice where a large number of errors occur in a given case, but appellate tribunals are generally aware that the question of whether the result was affected is not necessarily dependent on the number of errors committed.[75] The severity of the decision being reviewed is undoubtedly another factor,[76] as is the prospective duration and expense of retrial.[77] Concessions by trial or appellate counsel concerning the adverse effect of the erroneous ruling may also be considered.[78] Thus, trial counsel's declaration that certain improperly admitted evidence was of very limited prejudice influenced the Seventh Circuit in *Cherney v. Holmes.*[79]

The *locus of responsibility* for the error is very often a factor, though its rationale is exclusively equitable.[80] Normally an error is

72 See Wolcher v. United States, 200 F.2d 493, 499 (9th Cir. 1952).

73. Gordon v. United States, 344 U.S. 414, 420-22 (1953) (prejudicially erroneous exclusion of document though testimony describing contents of document was received in evidence). *But see,* Associated Petroleum Carriers, Inc. v. Beall, 217 F.2d 607 (5th Cir. 1954).

74. Wolcher v. United States, 200 F.2d 493, 499 (9th Cir. 1952).

75. Wheeler v. United States, 165 F.2d 225 (D.C. Cir. 1947), *cert. denied,* 333 U.S. 829 (1948).

76. United States v. Certain Parcels of Land, 149 F.2d 81, 82 n.7 (5th Cir. 1945).

77. In United States v. Trenton Potteries Co., 273 U.S. 392, 404 (1927), Mr. Justice Stone for the Supreme Court stated the following:

"The trial lasted four and one-half weeks. A great mass of evidence was taken and a wide range of inquiry covered. In such a case a new trial is not lightly to be ordered on grounds of technical errors in ruling on the admissibility of evidence which do not affect matters of substance."

78. Confessions of error by government appellate counsel usually lead to reversal. United States v. Kaplan, 156 F.2d 922, 923 (2d Cir. 1946). This is especially true where the establishment of precedent is not involved. Casey v. United States, 343 U.S. 808 (1952).

79. 185 F.2d 718, 722 (7th Cir. 1950).

80. This factor is to be distinguished from those which provide inferences as to whether the result was affected.

caused by the appellee's trial counsel or the trial judge or both. Where the former was the cause, due consideration is given if the error was inadvertent[81] or otherwise not in bad faith.[82] If, however, the error resulted from behavior of the appellant or his counsel, usually reversal will not follow, apparently because an estoppel-like principle is applied.[83] And where the appellant elicited evidence to the same effect as that offered in evidence by the appellee, though both items may have been inadmissible, prejudice is held not to be present.[84] This laying the blame on the appellant has sometimes been carried to extremes. In the *Skiskowski* case[85] the reviewing court surmised that retention of certain inadmissible evidence in the record was integral to appellant's trial tactics; therefore, the error was in some manner attributed to the design of the appellant and was held not to have been prejudicial.[86]

When the error demonstrably could not have affected the result, there is no prejudice. For example, if the trier of fact resolved the issue to which the error related in favor of the appellant or based its determination on other grounds, there is no prejudice.[87] Moreover, if the result reached was compelled by grounds other than the one to which the error related, appellate courts will not reverse, notwithstanding the basis of decision by the trier of fact.[88] In a civil suit where judgment was entered for the defendant, evidentiary errors relating solely to the question of damages were not prejudicial.[89]

In *criminal cases involving multiple counts,* there is no prejudice where the error could not have affected the sentence, as where the count to which the error pertained was not one on which the defendant

81. Smith v. Boggia, 200 F.2d 604 (2d Cir. 1952).

82. Gulf, Mobile & Ohio R.R. v. Williamson, 191 F.2d 887, 894-95 (8th Cir. 1951).

83. F. W. Woolworth Co. v. Contemporary Arts, Inc., 344 U.S. 228, 231 (1952) (evidence excluded on appellant's own objection); United States v. Potash, 118 F.2d 54, 57 (2d Cir. 1941) (appellant's own inadmissible testimony), *cert. denied,* 313 U.S. 584 (May 26, 1941). The same principle was applied in a related context in Utley v. United States, 115 F.2d 117 (9th Cir. 1940), *cert. denied,* 311 U.S. 719 (1941), where, after an improper examination by appellee's trial counsel, the trial judge offered to declare a mistrial. Because the appellant rejected this offer, the appellate court would not hear the appellant ask for a new trial based on this same error.

84. Smith v. United States, 173 F.2d 181, 185-86 (9th Cir. 1949).

85. 158 F.2d at 182.

86. Generally appellate courts should be wary of speculating as to a trial counsel's tactics. Little v. United States, 93 F.2d 401, 407 (8th Cir. 1937), *cert. denied,* 303 U.S. 644 (1938).

87. Pennok Oil Co. v. Roxana Petroleum Co., 289 Fed. 416, 420 (8th Cir. 1923) (findings revealed judgment was based on other grounds). The basis of the findings may be indicated in a jury's special verdict or answer to interrogatories or in a trial court's findings or opinion. See FED. R. CIV. P. 49 and 52 and FED. R. CRIM. P. 23(c).

88. *Accord,* Kanatser v. Chrysler Corp., 199 F.2d 610, 616 (10th Cir. 1952), *cert. denied,* 344 U.S. 921 (1953).

89. Ersler v. T. F. Schneider Corp., 188 F.2d 1022 (D.C. Cir. 1951).

was convicted,[90] was never submitted to the jury,[91] or was not one for which the defendant received sentence.[92] Similarly, there is no prejudice where, though the defendant was convicted and ostensibly sentenced on the pertinent count, the over-all sentence would have remained the same even if acquittal on the tainted count had been the result. Illustrative is where the sentence on the count involved is to be served concurrently with the sentence on a sustainable count, providing the former does not exceed the latter in duration.[93] Another is where a general sentence has been entered on two or more counts, at least one of which is sustainable, and the general sentence does not exceed the amount lawful for the sustainable counts.[94] It seems far from clear, however, in the case of a general sentence, that conviction on any given count had no effect on the sentence.[95] Moreover, where an error would have been prejudicial if the case involved a single count indictment, few would claim that the same error would not have had a prejudicial carry-over effect on the findings of guilty on other counts in any multi-count indictment case. Attempting to prove a defendant's guilt on one count by improper means is in effect improperly presenting evidence of a defendant's prior misconduct and should be similarly treated when prejudice is being considered.[96]

Probably the most controversial prejudice factor is whether, in the estimation of the appellate tribunal, the *result below was correct.* It is elemental that there can be no prejudice where, if the improper evidence had been excluded or the erroneously excluded evidence had been admitted, the record would nevertheless have been insufficient to sustain a contrary result.[97] Equally clear is that there must have been prejudice where the result below would not have been sustainable if the error had not occurred.[98] The difficulty arises where the trier of fact reasonably could have reached the same or a contrary result, even if the error had not occurred. Where, absent the error, the appellate

90. United States v. Schenck, 126 F.2d 702, 709 (2d Cir. 1942), *cert. denied,* 316 U.S. 705 (June 8, 1942).

91. Jones v. United States, 72 F.2d 873 (7th Cir. 1934).

92. *Accord,* Garber v. United States, 145 F.2d 966, 968 (6th Cir. 1944).

93. Jeffers v. United States, 151 F.2d 587, 589 (5th Cir. 1945).

94. Estep v. United States, 223 F.2d 19, 21 (5th Cir. 1955).

95. The often articulated reasoning is that the trial court is presumed to have awarded sentence on the good counts only. Pinkerton v. United States, 328 U.S. 640, 641 n.1 (1946). The more logical presumption is that the trial court assessed a portion of the sentence for each count of which the defendant was convicted.

96. See note 39 *supra.*

97. United States v. Borden, 347 U.S. 514, 516 (1954).

98. Kotteakos v. United States, 328 U.S. 750, 763-64 (1946) (insufficient evidence without erroneously admitted evidence); Wetherbee v. Safety Casualty Co., 219 F.2d 274, 275 (5th Cir. 1955) (sufficient evidence to render directed verdict improper, if improperly excluded evidence had been admitted).

court considers the record to contain but an unconvincing case in support of the result, prejudice is likely to be concluded.[99] But where the record if errorless nevertheless would have presented a very strong case in support of the result,[100] or a very weak case in support of a contrary result,[101] prejudice is unlikely.

This factor has occasionally been subjected to considerable criticism. In *United States v. Rubenstein*[102] the defendant was charged with conspiracy to bring fraudulently into the country a female alien, essentially by promoting a mock marriage between her and an American citizen. Documents and testimony indicating that the defendant, a lawyer, had subsequently procured a collusive divorce for his "client" by devising false affidavits and suborning perjured testimony in support thereof were improperly received in evidence. In concluding that there had been no prejudice, the majority remarked, "The crime was proved beyond the faintest peradventure of doubt; it was a deliberate fraud upon the immigration authorities, without excuse or palliation."[103] Directing his attention to this sentence, Judge Frank's dissent contains the argument that it was both unsound and unconstitutional for the majority to refuse reversal merely because of the belief that the result below was correct.[104] The unsoundness, according to Judge Frank, arises from the obvious fallibility of calculating a defendant's guilt only from the printed page, rather than from demeanor evidence presented in the trial court as well.[105] The unconstitutionality, it is argued, results from the possibility that an appellate court may uphold a conviction, believing it to be correct, though the jury might have acquitted if the error had not occurred; the end result would then be contrary to the jury's hypothetical decision and thus there would occur a denial of the constitutional guarantee of trial by jury.

Judge Frank's dissent is defensible if the majority espoused the view that he ascribes to them. It is submitted, however, that appellate courts consider their appraisal of the correctness of the decision below

99. Fiswick v. United States, 329 U.S. 211, 220 (1946).

100. In finding no prejudice, the Supreme Court recently stated: "In view of the fact that this record fairly shrieks the guilt of the parties, we cannot conceive how this one admission could have possibly influenced this jury to reach an improper verdict." Lutwak v. United States, 344 U.S. 604, 619 (1953).

The record need not "shriek" for this analysis to be apropos; a clear and convincing case in support of the result is likewise a usual basis for determining no prejudice. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 235 (1940).

101. Miller v. Potomac Electric Power Co., 192 F.2d 614 (D.C. Cir. 1951).

102. 151 F.2d 915 (2d Cir. 1945), *cert. denied,* 326 U.S. 766 (Nov. 13, 1945).

103. 151 F.2d at 919.

104. 151 F.2d at 919-25.

105. No matter what the method of analysis for prejudicial error, demeanor evidence's unavailability to the appellate court is an unavoidable imperfection.

not as dispositive of the prejudice question but only as one of the factors upon which they base their conclusion.[106] True, the appellate judge may sometimes determine that, had he been the trier of fact and the error had not occurred, the same result would have been reached, and, hence that the decision was correct. Unfortunately, the appellate judge is never sufficiently acquainted with the triers of fact to determine intelligently how they personally were influenced by the error. The appellate judge is thus compelled to presume that the triers of fact, being persons like himself, would similarly have viewed the decision reached, and to decide that their decision was unaffected by the error. The Supreme Court has commented that the appellate judge's assuming the guise of the trier of fact is unavoidable in appellate review.[107] Naturally if other factors in the record imply that the actual triers of fact might well have reacted differently, these factors take precedence.[108] When the record so indicates, the appellate tribunal will ordinarily, albeit reluctantly, order a reversal.[109]

IV.

BURDEN OF PROOF ON APPEAL.

Formerly the appellee had the burden of demonstrating the absence of prejudice once the appellate court was satisfied that error had occurred.[110] The current view is that the appellant has the burden of showing both error and prejudice.[111] Cases do arise where prejudice is difficult to demonstrate; under such circumstances a few appellate courts purport to cast the burden of disproving prejudice upon the appellee.[112]

106. Meeks v. United States, 163 F.2d at 602. But in Mann v. Funk, 141 F.2d 260 (3d Cir. 1944), the court seemed to consider the correctness of the result as determinative that no prejudice occurred. There, medical testimony relating to damages was improperly admitted but held non-prejudicial, solely because the amount of the verdict was not considered excessive or, in other words, was considered to be within the correct range of recovery.

107. Kotteakos v. United States, 328 U.S. 750, 763 (1946).

108. The Ninth Circuit has indicated that, though it is not conclusive of the prejudice question, the appellate tribunal's appraisal of the correctness of the decision below is a very strong factor. Simons v. United States, 119 F.2d 539, 559 (9th Cir. 1941), *cert. denied,* 314 U.S. 616 (Oct. 13, 1941). My personal observation is that the longer the record the more significant is the appellate tribunal's examination of the correctness of the decision below.

109. In reversing a conviction, the Third Circuit once related that "there can be no question of the guilt of the appellants." United States v. Sprengel, 103 F.2d at 879.

110. Berger v. United States, 295 U.S. 78, 82 (1935); Sang Soon Sur v. United States, 167 F.2d 431 (9th Cir. 1948). Unlike now, it was then to the appellant's advantage for the record not to indicate the nature of improperly excluded matter. *Contra*, United States v. Andolschek, 142 F.2d 503, 506 (2d Cir. 1944).

111. Sang Soon Sur v. United States, *supra* note 110.

112. United States v. Dressler, 112 F.2d 972, 978 (7th Cir. 1940). The Seventh Circuit however seemed to revert completely to the old view in Worcester v. Pure Torpedo Co., 127 F.2d 945, 947 (7th Cir. 1942), where it stated, "[I]t is well settled that a reversal will be directed unless it appears, beyond doubt, that the error complained of did not and could not have prejudiced the rights of the party."

Of what must the appellant persuade the appellate court to obtain a reversal? In attempting to answer this question, it becomes evident that judicial opinions vary greatly among appellate courts. Some require only that the appellate tribunal be convinced that the error "may" have affected the result.[113] Others indicate that prejudice is present only when the error was, in relation to the decision below, a "determining factor" [114] or had more than a "very slight effect"; [115] and some opinions dwell on the necessity of showing that the error had "substantial influence." [116] Though these verbal differences seem to be formal rather than substantive, one can not escape the suspicion that in a given case the outcome of appellate review could well differ depending on the verbal formula used. Regardless of whether these differences in approach are more apparent than real, it is clear that the appellant has a heavier-than-usual burden of proof under the following two circumstances: when suitable objection to the error was not made in the trial court [117] and, with respect to errors of admission, when the trial judge sat as the trier of fact.[118]

A.

Suitable Objection Not Made at Trial.

"An objection to testimony not made in the trial court cannot be urged for the first time on appeal," [119] unless there was no opportunity to make any objection.[120] This rule definitely applies to the review

113. Krulewitch v. United States, 336 U.S. 440, 445 (1949).

114. Sang Soon Sur v. United States, 167 F.2d 431, 432 (9th Cir. 1948).

115. *Accord,* Kotteakos v. United States, 328 U.S. 750, 764 (1946).

116. Fiswick v. United States, 329 U.S. 211, 218 (1946). See also MODEL CODE OF EVIDENCE rules 6 and 7 (1942). Occasionally an opinion will contain language that an error is prejudicial if it "probably induced a different" result than would otherwise have been reached. United States v. Compania Cubana De Aviacion, 224 F.2d 811, 822 (5th Cir. 1955).

117. Raising the error in the trial court is to be differentiated from properly raising it on appeal. Failure to comply with the appellate tribunal's court rules or otherwise failing adequately to raise the error on appeal may preclude review, but the appellate court may disregard such defects. Zimmerman v. Emmons, 225 F.2d 97, 99 (9th Cir. 1955).

118. There seems to be no significant differences in the burden of proof relating to civil and criminal cases as such. 28 U.S.C. § 2111 (1952). See also MODEL CODE OF EVIDENCE rules 6 and 7 (1942). Language in Kotteakos v. United States, 328 U.S. 750, 762-63 (1946), however, does suggest a smaller quantum required in criminal cases involving deprivations of life or liberty.

119. Kreinbring v. United States, 216 F.2d 671, 673 (8th Cir. 1954). See also MODEL CODE OF EVIDENCE rules 6 and 7 (1942).

120. FED. R. CRIM. P. 51 and FED. R. CIV. P. 46. Appellant's failure to object was disregarded in Williams v. United States, 93 F.2d 685, 690-91 (9th Cir. 1937), where the trial judge's examination of a witness gave rise to the error; the appellate court opined that the inevitable friction between the trial judge and counsel, had an objection been made, was tantamount to a denial of an opportunity to object.

of civil cases;[121] but it is not necessarily as controlling in criminal cases.[122] With respect to the latter, the requirement is apparently relaxed where a particularly severe sentence is involved[123] or where the error was "plain."[124]

To obtain a reversal in the balance of criminal cases wherein objection was not properly made, the appellant must muster a larger quantum of proof that the error affected the result, than is otherwise required to show prejudice.[125] Inflicting this heavier burden upon the appellant is eminently just and practical. Trial counsel are encouraged to notify the trial court of errors, thereby permitting the latter an opportunity to remedy the same; at the same time, the rule is not so harsh as to deny the appellant justice in particularly clear cases of prejudice.[126] It is difficult to measure the additional proof thereby required, and this greater burden has been variously described. One court strives to determine if the error "so improperly prejudiced appellants in the eyes of the jury as to deny them a fair trial,"[127] while another inquires whether the errors "seriously affect the fairness, integrity, or public reputation of judicial proceedings";[128] and a third seeks to determine if the error's "natural and probable influence upon the jury was prejudicial."[129]

For counsel successfully to avoid this greater burden, he must bring the error to the attention of the trial court properly both in time and in form. Timeliness requires that the objection be made at the earliest opportunity arising after the error is committed and could reasonably be ascertained.[130] Trial counsel, once having made a timely

121. Knight v. Loveman, Joseph & Loeb, Inc., 217 F.2d 717 (5th Cir. 1954). *But cf.* Mondshine v. Short, 196 F.2d 606 (5th Cir. 1952) (failure to object to instructional error).

122. Smith v. United States, 173 F.2d 181, 184 (9th Cir. 1949).

123. Stephan v. United States, 133 F.2d 87, 89-90 (6th Cir. 1943) (death sentence), *cert. denied,* 318 U.S. 781 (Apr. 5, 1943), *appeal application denied,* 319 U.S. 423 (June 1, 1943).

124. FED. R. CRIM. P. 52, United States v. Jones, 204 F.2d 745, 749 (7th Cir. 1953), *cert. denied,* 346 U.S. 854 (Oct. 19, 1953).

125. Robertson v. United States, 171 F.2d 345 (D.C. Cir. 1948) (reversal though trial court could have cured prejudice). In cases wherein the appellant fails to object to an erroneous ruling, or to an inadequate curative instruction, the appellate court is confronted with two policy considerations: to discourage the withholding of objection in the trial court and to reverse where the result was likely to have been affected by the error. Requiring a greater burden of proof in such cases seems to satisfy both policies. But some opinions seem to indicate that the former policy is foremost in importance and that appellate courts will affirm regardless of the amount of prejudice involved. Yoffe v. United States, 153 F.2d 570, 574 (1st Cir. 1946).

126. Barnes v. United States, 215 F.2d 91 (9th Cir. 1954).

127. Smith v. United States, 173 F.2d 181 (9th Cir. 1949).

128. Blodgett v. United States, 161 F.2d 47, 52 (8th Cir. 1947).

129. Robertson v. United States, 171 F.2d 345, 346 (D.C. Cir. 1948).

130. Marx v. United States, 86 F.2d 245, 251 (8th Cir. 1936). Respecting evidence obtained through an improper search or seizure, the motion to suppress should ordinarily be made before trial. FED. R. CRIM. P. 41(e).

objection, will not be required to reiterate his objection to the same error [131] or later identical errors.[132] In addition to timeliness, the objection must adequately apprise the trial court of the ruling which is allegedly in error [133] and the specific basis for objecting,[134] and the theory of objection must have been legally correct.[135]

B.

Judge Sat as Trier of Fact.

With respect to the review of errors of admission, language of the following sort is not uncommon in appellate opinions: "Since no jury was present, the reception of incompetent evidence would not be prejudicial. . . ." [136] Although such unqualified statements are commonplace where the decision below is affirmed without much ado, longer and more detailed opinions are more moderate in approach. In *Harper v. United States* [137] the Eighth Circuit stated, "Where an action at law is tried before a court, error in receiving evidence over objection is *ordinarily* regarded as harmless and not grounds for reversal." (emphasis added.) To show prejudice in cases tried before a judge, the appellant must affirmatively establish first that the trial court considered the inadmissible evidence in reaching his decision.[138] Once having done so, he must shoulder the standard burden of showing that the evidence, so considered, affected the result.[139] The additional prerequisite seems justifiable.[140] In a jury trial it may be presumed

131. Collenger v. United States, 50 F.2d 345, 349 (7th Cir. 1931). But if the evidentiary error becomes apparent only after the objection has been made, the objection is premature and must be repeated. In Skiskowski v. United States, 158 F.2d at 182, the court held untimely counsel's objection to testimony which, at the time, appeared to be admissible as an adoptive admission, though subsequent testimony showed it to have been inadmissible hearsay.

132. Dowdy v. United States, 46 F.2d 417, 426 (4th Cir. 1931).

133. United States v. Rubenstein, 151 F.2d at 918 (objection directed to large body of evidence of which the erroneously admitted items were only a part).

134. Een v. Consolidated Freightways, 220 F.2d 82, 87-88 (8th Cir. 1955) ("incompetent, irrelevant, immaterial, calling for speculation, guess and conjecture" held too general).

135. Knight v. Loveman, Joseph & Loeb, Inc., 217 F.2d 717 (5th Cir. 1954) (valid ground for objection not raised until appeal).

136. Daniel v.. United States, 127 F.2d 1 (8th Cir. 1942), *cert. denied,* 317 U.S. 641 (Oct. 12, 1942).

137. 143 F.2d 795, 803 (8th Cir. 1944).

138. Safety Motors, Inc. v. Elk Horn Bank and Trust Co., 217 F.2d 517, 522 (8th Cir. 1954).

139. United States v. Compania Cubana De Aviacion, 224 F.2d 811, 821 (5th Cir. 1955).

140. Of course, if the record without the inadmissible evidence does not support the finding below, appellant need not show that the evidence influenced the judge. Grandin Grain & Seed Co. v. United States, 170 F.2d 425, 427 (8th Cir. 1948).

that the lay triers of fact consider all of the evidence of record, admissible and inadmissible alike, in reaching their verdict, since that is normally their duty; but where the trier of fact is a legally trained judge, a contrary presumption may well be valid.[141] There are a number of ways by which the appellant can rebut this presumption. The trial judge may have indicated his reliance upon the evidence during the trial or in an oral opinion.[142] The judge's findings [143] and written opinion, if any, are other sources for the appellant.

V.

REVERSIBLE ERROR REGARDLESS OF WHETHER THE RESULT WAS AFFECTED.

Especially in criminal cases, some evidentiary errors seem to result in reversal without any determination whether the result was thereby affected. The major exemption from the doctrine of prejudicial error in its usual application lies in the field of *constitutional rights in their evidentiary manifestation.*[144] Reversal apparently follows regardless of the error's consequences, where [145] evidence obtained through an improper search or seizure is admitted,[146] where the record contains evidence obtained through "brutal conduct" by police officials,[147] or where a coerced confession is admitted into evidence.[148] Reversal similarly results where the evidentiary error is a transgression

141. Fotie v. United States, 137 F.2d 831, 839 (8th Cir. 1943).

142. Fotie v. United States, *supra* note 141.

143. FED. R. CIV. P. 52(a) and FED. R. CRIM. P. 23(c). Where "special findings" are required by the pertinent rule, they should be in sufficient detail to allow the appellate court to determine which evidence influenced the trial court. Irish v. United States, 225 F.2d 3, 7-8 (9th Cir. 1955).

144. Kotteakos v. United States, 328 U.S. 750, 764-65 (1946).

145. Violations of the hearsay rule as such have never been exempted from the usual prejudicial error doctrine, though they frequently seem to involve infringements of the sixth amendment right of confrontation. Fotie v. United States, 137 F.2d 831, 839-40 (8th Cir. 1943).

146. McDonald v. United States, 335 U.S. 451 (1948). The McDonald case illustrates quite well the different analysis appropriate to the violation of a constitutional right. Once the court had determined that there had been error, reversal as to co-defendant McDonald, whose right had been violated, followed summarily; as to co-defendant Washington whose right against unreasonable searches and seizures had not been violated, the court found prejudicial error only because, absent the improperly admitted evidence, there was insufficient evidence to support his conviction. *Id.* at 456.

147. Rochin v. California, 342 U.S. 165 (1952) (morphine capsules obtained by forcing emetic into defendant's stomach). The court did state that the capsules were the chief prosecution evidence, but the balance of the opinion indicated that reversal would have followed were such not the case. *Id.* at 166 and 172-74.

148. Brown v. Allen, 344 U.S. 443, 475 (1953). Courts have a tendency to rely on more than one string to their bow; and, for this reason, holdings clearly premised on the *reversal per se doctrine* are rare indeed. An opinion initially may reverse because a coerced confession was admitted in evidence and later point out that the confession undoubtedly affected the result. Stroble v. California, 343 U.S. 181, 190 (1952).

of certain *statute-founded fundamental rights,*[149] such as the introduction of evidence obtained contrary to the Federal Communications Act [150] or in violation of the protections afforded those who are compelled to testify before a congressional committee.[151] Though one would expect the receiving of a confession obtained during illegal detention contrary to the *McNabb* rule [152] to be so treated also, it appears that such an error does not require reversal per se.[153]

The beneficial effect of a summary reversal once error has been determined in these fundamental rights cases is unmistakable. The practice simplifies and expedites the review of criminal cases, for evidence obtained at the expense of constitutional or other basic guarantees is almost invariably prejudicial. But of primary importance, one can think of few better methods of discouraging subsequent infringements of cherished rights; [154] further, affirming despite such constitutional violations might well be interpreted as a sanctioning of reprehensible evidence-gathering methods.[155]

A Supreme Court decision in the October, 1952 Term has been construed by some as implicitly defeating the policy underlying this *reversal per se doctrine.*[156] In the *Stein* case an allegedly coerced confession was received in evidence, and the trial court later instructed the jury to consider the confession only if believed to have been voluntary.[157] The United States Supreme Court determined the confession not to have been coerced, thereby negating any error even if it had been unqualifiedly received in evidence.[158] By way of dicta, the opinion stated that no error, and hence no reversal, would have resulted if the jury determined the confession to have been coerced, evidently assuming that the jury would have complied with the trial court's instruction to ignore the confession.[159] The fallacy of the majority's reasoning lies in the

149. Kotteakos v. United States, 328 U.S. 750, 764-65 (1946).

150. 48 STAT. 1103 (1934), 47 U.S.C. § 605 (1952), Weiss v. United States, 308 U.S. 321, 331 (1939). *But see,* Nardone v. United States, 302 U.S. 379, 380 (1937).

151. 18 U.S.C. § 3486 (1952), Adams v. Maryland, 347 U.S. 179 (1954).

152. FED. R. CRIM. P. 5(a), McNabb v. United States, 318 U.S. 332 (1943).

153. Upshaw v. United States, 335 U.S. 410, 411 (1948).

154. Stein v. New York 346 U.S. 156, 201-203 (1953) (dissenting opinion). If the tainted evidence is not introduced at the trial, the doctrine of summary reversal as well as much of its necessity, is inapplicable. Roscoe v. United States, 148 F.2d 333 (6th Cir. 1945), *cert. denied,* 325 U.S. 890 (June 18, 1945).

155. Rochin v. California, 342 U.S. 165, 173-74 (1952).

156. Stein v. New York, 346 U.S. 156, 197-208 (1953) (dissenting opinions).

157. *Id.* at 170.

158. *Id.* at 188.

159. *Id.* at 192.

ill-founded premise that all jury-members can or will comply with the trial judge's instruction once having seen the confession. That some or most of the jurors would obediently discard the confession, while a few would not, is little consolation to a convicted defendant. By approving the practice of admitting a confession and allowing the jury to later determine its voluntariness, the *Stein* case may be permitting the prosecutor to profit somewhat from obtaining a coerced confession.

Certain qualifications to the reversal per se doctrine are reported occasionally. Where the criminal defendant has made a judicial confession [160] or where another confession having considerable reliability is properly admitted,[161] no reversal will follow. Rule 52(b) [162] permits review of evidentiary errors involving fundamental rights, though no objection was registered in the trial court; however, some authorities indicate that where the appellant was remiss in failing to object, he must shoulder the normal burden of proving that the result was thereby affected,[163] unless the deprivation of the fundamental right was so patent as to reduce the very trial to a mockery.[164]

CONCLUSION.

Trial counsel with enthusiasm to help their respective clients often fail to appreciate the significance of error that has been injected into their records. Throughout a trial they should be guided by certain habits of thought, of which appellate counsel should also be cognizant in making argument on review.

Some errors seem to require summary reversal; these infringements of fundamental rights should be avoided at all costs. The balance, constituting the greater number by far, afford trial counsel a certain margin of safety. Once an error of the latter variety has occured and been detected, each counsel must make a value judgment. The offended party, after having *made his record,*[165] must determine whether to preserve or minimize the prejudice resulting. Essentially the problem is one of trial tactics. He should preserve, but never pro-

160. Butler v. United States, 138 F.2d 977, 980 (7th Cir. 1943).

161. Wheeler v. United States, 165 F.2d 225, 230-31 (D.C. Cir. 1947), *cert. denied,* 333 U.S. 829 (1948). *But see,* Stroble v. California, 343 U.S. 181, 190 (1952).

162. FED. R. CRIM. P. 52.

163. Schowers v. United States, 215 F.2d 764, 766 (D.C. Cir. 1954) (absence of objection to trial judge's failure to instruct concerning voluntariness of confession).

164. Brown v. Mississippi, 297 U.S. 278, 286-87 (1936).

165. i.e. properly registered an objection and, if an erroneous exclusion, insured that the record indicates the nature of the excluded matter.

mote, the prejudice if prospects of a successful outcome are poor or do not, in his opinion, depend on the matter to which the error relates. Opposing counsel must make a similar decision.

After counsel has determined the most advantageous course of action, he should attend to and utilize the appropriate prejudice factors. Thus, the analysis contained in these pages is intended to be a guide for trial counsel, as well as a study of an appellate review process.