The Limiting Instruction--Its Effectiveness and Effect

Minn. L. Rev. Editorial Board

Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Part of the Law Commons

Recommended Citation
https://scholarship.law.umn.edu/mlr/2866

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.
The Limiting Instruction—Its Effectiveness and Effect

She generally gave herself very good advice (though she very seldom followed it), and [s]ometimes she scolded herself so severely as to bring tears into her eyes; and once she remembered trying to box her own ears for having cheated herself in a game of croquet she was playing against herself, for this curious child was fond of pretending to be two people. "But it's no use now," thought poor Alice, "to pretend to be two people! Why, there's hardly enough of me left to make one respectable person!"*

As the common law jury evolved from an investigational institution into its present role as an impartial decision maker,¹ problems developed regarding the evidence which the jury was allowed to consider. Because certain evidence is deemed competent for one purpose and not for another, or competent against one defendant and not another, limiting instructions are used to protect both parties to the litigation.² When the judge instructs the jury to consider the evidence only for its legally competent purpose, the objecting party is theoretically protected from the specific prejudice which would otherwise require exclusion of the evidence.³

Several recent developments have raised grave questions concerning the willingness of the courts to rely upon limiting


1. Historically, jurors relied upon knowledge gathered in their active participation in the fact finding process. See McCormick, Evidence § 223, at 455 (1954) [hereinafter cited as McCormick]; 5 Wigmore, Evidence § 1364 (3d ed. 1940) [hereinafter cited as Wigmore]. Today, however, they must rely almost exclusively upon evidence presented by the adversaries. See Turner v. Louisiana, 379 U.S. 466 (1965). See generally Thayer, Preliminary Treatise on Evidence at the Common Law (1898); 1 Wigmore § 4(b).


3. This practice probably arose out of necessity. The only feasible alternative to unlimited use or total exclusion of the evidence is a procedure whereby only the competent element of evidence could be considered by a jury. See Shephard v. United States, 62 F.2d 683 (10th Cir. 1933); 1 Wigmore at 300. Although many courts have recognized that the limiting instruction is a "naive assumption," the fear remained that it was part of a system resting at homeostasis and the slightest interference with this balance would be more detrimental than beneficial. See Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring); Michelson v. United States, 335 U.S. 469, 486 (1948); Ackland v. United States, 352 F.2d 641, 646 n.13 (D.C. Cir. 1965).
instructions. This Note will consider whether the jury actually follows the court’s admonitions. It will then focus on the questions arising in three specific areas: the use of the limiting instruction in joint trials to limit the jury’s consideration of hearsay evidence; the use of limiting instructions to limit the jury’s consideration of “other crimes” evidence; and the general use of limiting instructions where no alternatives are available to protect defendants.4

I. THE INEFFECTIVENESS OF THE LIMITING INSTRUCTION

The greatest obstacle to an understanding of the operation of the jury is the traditional secrecy enveloping the jury’s decision reaching process.5 Logically, the most efficient method of testing the jury’s ability to disregard evidence for a particular purpose or against a particular defendant, would be to record their deliberations. However, this procedure is clearly prohibited, at least in the federal courts.6 The result is the absence of first hand empirical evidence upon which to base any conclusion as to the ability of the jury to follow instructions limiting the use of evidence. There have been several attempts to study the jury by the use of questionnaires and experimental juries. Although any conclusion based on information so gathered may be subject to statistical insufficiencies, the results of several studies provide valuable insight into the jury’s use of limiting instructions.7

The University of Chicago Jury Project utilized experimental juries, intensive jury interviews, and interpretation and analysis

---

4. This Note will concentrate on the criminal trial only, although limiting instructions are also used to prevent prejudice in civil cases. For the role of the limiting instruction in a civil case, see Tipton v. Socony Mobil Oil, Inc., 375 U.S. 34 (1963).
6. Id. at 281. Although the consent of all necessary persons was obtained, one study met with stern opposition and was subsequently prohibited by Congress. 18 U.S.C. § 1508 (1964).
   It should be noted that this study was widely supported by many legal scholars. Auerbach, Garrison, Hurst & Mermin, op. cit. supra note 5. In addition, the legislation pertains only to federal juries, leaving the door open for this type of research in state courts. It would seem that the knowledge gained from a well supervised study of jury deliberations would profit the law much more than it would undermine the jury function. This is especially true since, if the instructions are ineffective defendants are subject to undue prejudice.
of statistical data to test several hypotheses in an attempt to uncover many of the mysteries of the jury system.\textsuperscript{8} One hypothesis dealt with the ability of the juror to follow curative instructions.\textsuperscript{9} In a personal injury action to recover damages from an automobile accident, the following variables were presented to an experimental jury: (1) Defendant disclosed that he had no liability insurance and no objection was made by plaintiff: the average verdict for the plaintiff was $33,000; (2) Defendant disclosed his liability insurance and there was no objection: the average verdict totaled $37,000; (3) Defendant disclosed that he had insurance and an objection was taken by the plaintiff. The judge then instructed the jury to disregard the evidence. The average verdict was $46,000.\textsuperscript{10}

The conclusion drawn from an analysis of recorded deliberations and subsequent interviews of jurors was that an instruction to disregard, instead of preventing the jurors from considering the insurance, sensitized the jury to that evidence.\textsuperscript{11} However, it was also concluded that the instruction to disregard did serve to prevent the jurors from talking about insurance during the deliberation.\textsuperscript{12} This, however, is little consolation to the defendant when the instruction is ineffective in limiting the verdict.

A similar study, yet smaller and less sophisticated, consisted of a questionnaire examination of jurors subsequent to their participation in actual civil litigation.\textsuperscript{13} One question to be answered was whether “the jury ignored instructions by the judge to disregard statement[s] previously made.”\textsuperscript{14} The most significant fact adduced was that, of eighteen persons interviewed, only one remembered the judge’s instruction sufficiently to attempt to follow it.\textsuperscript{15} The authors concluded that their study demonstrated the “wisdom of trial lawyers who fight hard to get a particular piece of evidence before the jury, even though they know the judge is going to strike it out.”\textsuperscript{16}

\textsuperscript{8} Ibid.
\textsuperscript{9} Id. at 753.
\textsuperscript{10} Id. at 754.
\textsuperscript{11} Ibid.
\textsuperscript{12} Ibid. Compare Hunter, \textit{Law in the Jury Room}, 2 Ohio St. L.J. 1, 15 (1936), in which this same phenomenon was noted. Yet there the result was deemed to be due to the unfamiliarity of the jurors with automobile insurance, a situation which would be very rare today.
\textsuperscript{13} Hoffman & Brodley, \textit{Jurors on Trial}, 17 Mo. L. Rev. 235 (1952).
\textsuperscript{14} Id. at 243.
\textsuperscript{15} Id. at 245.
\textsuperscript{16} Ibid.
Actually the above studies dealt with what might be called curative rather than limiting instructions. The curative instruction functions as an alternative to the granting of a new trial whenever inadmissible evidence is heard by the jury. It is presumed that, as a result of the judge’s admonition, the jury will completely disregard the incompetent evidence. The limiting instruction functions somewhat differently in that the jury hears and considers evidence, but is charged to limit consideration of it to its competent use. The function required of the jury in implementing the limiting instruction is probably more difficult. Rather than entirely disregarding the evidence, the juror must ultimately consider it but only for a limited purpose. Consequently, the above studies, by casting doubt on the ability of the jury to follow curative instructions, seriously question the jury’s ability to implement the limiting instruction.

Although the available empirical evidence deserves consideration in reaching any conclusion concerning the validity of the limiting instruction, such information should be considered mainly as complementary to the experience of many learned jurists and scholars who entertain no doubt that limiting instructions are useless. Their conclusion is based upon the premise that it is impossible for the juror to so order his mind as to enable him to fractionate evidence into competent and incompetent segments, using only the former in his decision-making process.

Although few dispute this position, most argument to the contrary emphasizes that limiting instructions are one of the expressions of trust that American jurisprudence places in the jury system. Thus, in Delli Paoli v. United States, Justice Burton, speaking for the majority, concluded the following with respect to the limiting instruction:

'It is a basic premise of our jury system that the court states the law to the jury and that the jury applies that law to the facts.'
as the jury finds them. Unless we proceed on the basis that the jury will follow the court's instructions . . . the jury system makes little sense.\textsuperscript{20}

However, it would seem that this fear is misplaced and may even work contrary to the interest of reinforcing the security of the jury system. The limiting instruction has been characterized as a judicial "placebo"\textsuperscript{21} which "undermines a moral relationship between the courts, the jurors, and the public; [and] like any other judicial deception, it damages the decent judicial administration of justice."\textsuperscript{22} Accordingly, there is no reason why taking from the jury a function which it cannot perform would interfere with the many functions which society and the law consider best left with the jury.\textsuperscript{23} On the contrary, any step away from the rigid presumptions and prophylactic fictions which have haunted the criminal and civil courts in the past centuries should be hailed as a legal victory.

The strongest argument in support of the limiting instruction recognizes it as an empty ritual but suggests that there are mitigating policies which support its use. Judge Learned Hand took this position in \textit{Nash v. United States}\textsuperscript{24} when he recognized that, although the limiting instruction would not prevent the jury from considering the prejudicial evidence,\textsuperscript{25} by permitting the avoidance of the exclusionary rules of evidence it "probably furthers rather than impedes the search for truth."\textsuperscript{26}

Both of the arguments supporting the use of limiting instructions seem to beg the question, for the issue to be decided is whether the jury is able to perform this very important function of limiting its consideration of evidence. The security of the jury system as an institution and the competency of the evidence

\textsuperscript{20} Id. at 242.
\textsuperscript{21} In a criticism of the majority decision in \textit{Delli Paoli}, Judge Frank stressed the reference by Judge Hand to the limiting instruction as a "placebo." He took the medical definition, "a medicinal lie," and compared it to its legal equivalent, "a judicial lie." \textit{United States v. Grunewald}, 233 F.2d 556, 574 (2d Cir. 1956).
\textsuperscript{22} \textit{United States v. Grunewald}, supra note 21, at 574. It has been said that the use of limiting instructions fosters an inconsistent attitude toward juries for "treating them at times as a group of low-grade morons and at other times as men endowed with a superhuman ability to control their emotions and intellects." \textit{Morgan, Some Problems of Proof Under the Anglo-American System of Litigation} 105 (1956).
\textsuperscript{24} 54 F.2d 1006 (2d Cir. 1932).
\textsuperscript{25} He referred to the limiting instruction as a "mental gymnastic which is beyond, not only their [the jury's] powers, but anybody's [sic] else." \textit{Id.} at 1007.
\textsuperscript{26} \textit{Ibid.}
are tangential issues to be independently evaluated upon the finding that limiting instructions are of no value.

II. THE JOINT TRIAL—ADMISSION OF HEARSAY EVIDENCE

In the joint criminal trial, the limiting instruction is commonly relied upon to support the admission into evidence of confessions and other implicating statements of a codefendant.\(^{27}\) This evidence is hearsay since it is an out of court statement admitted to prove the truth of the confession;\(^{28}\) therefore, it is admissible only against the party making the statement.\(^{29}\)

Recent decisions of federal and state courts have cast serious doubt upon the fairness of this procedure. Indeed, reliance upon limiting instructions to cure the hearsay element of a codefendant's confessions and admissions may constitute a violation of the accused's sixth amendment right of confrontation by depriving him of the right to cross-examine the witnesses against him.

A. RESTRICTIONS UPON THE USE OF THE LIMITING INSTRUCTION

At common law,\(^{30}\) and under most statutory codes of procedure,\(^{31}\) it is within the discretion of the trial court to determine whether defendants jointly charged with the commission of a crime will be tried together or separately.\(^{32}\) Although there are several grounds upon which a defendant might move for a severance,\(^{33}\) the most common, and the only ground discussed in this paper, is where a codefendant has made a confession, admission, or other extrajudicial statement which implicates the party moving for the severance.\(^{34}\)

Since the witnesses and evidence against each defendant will generally be the same, efficient judicial administration is


\(^{28}\) Mccormick at 460.

\(^{29}\) It is considered to be an admission against interest by the declarant. See 5 WIGMORE §§ 1463-65; Morgan, Declarations Against Interest, 5 VAND. L. REV. 451 (1952).


\(^{31}\) Annot., 54 A.L.R.2d 830, 867 (1957).

\(^{32}\) Id. at 832.

\(^{33}\) Ibid.

\(^{34}\) The same analysis will apply in any situation where evidence is admissible against one defendant and not another.
promoted by the joint trial.\textsuperscript{35} However, the possible increase in the administrative burden is clearly insufficient to justify reliance on ineffective limiting instructions to prevent prejudice. The Supreme Court has in several instances recognized that considerations of administrative convenience must be subordinated to a defendant's constitutional right to a fair trial.\textsuperscript{36} Therefore, if it is recognized that the limiting instruction does not perform its expected function, the administrative considerations calling for joinder of criminal defendants would seem insufficient justification for endangering the defendant's right to a fair trial.

A recurrent area in which the jury's capacity to follow limiting instructions is questioned is the joint prosecution for conspiracy. Extrajudicial incriminatory statements of one conspirator, not within the coconspirator exception to the hearsay rule,\textsuperscript{37} are generally admitted against the declarant, subject to an instruction limiting their use to the declarant. In \textit{Delli Paoli v. United States}, the Supreme Court re-examined and reaffirmed the general propriety of this practice.\textsuperscript{38} The Court noted its many prior decisions which, although recognizing the heavy burden placed on jurors by the limiting instruction, nevertheless upheld its use.\textsuperscript{39} However, the Court further recognized that not every instruction is effective, the applicable test being "whether the instructions were sufficiently clear and whether it was reasonably possible for the jury to follow them."\textsuperscript{40} The trial court in \textit{Delli Paoli} had delineated in its instructions the reasons why the jury should consider the confession only against

\textsuperscript{35} See People v. Aranda, 63 Cal. 2d 518, 407 P.2d 265 (1965).
\textsuperscript{36} Kotteakos v. United States, 328 U.S. 750, 773 (1946); Schaffer v. United States, 362 U.S. 511, 522-23 (1960) (dissenting opinion).
\textsuperscript{37} Generally the coconspiracy exception to the hearsay rule applies to acts or declarations by one coconspirator committed in furtherance of the conspiracy and during its pendency, providing that a foundation for its admission is laid by independent proof of the conspiracy. See 72 HARV. L. REV. 920, 984-85 (1959). See generally Levie, \textit{Hearsay and Conspiracy, A Reexamination of the Co-Conspirators' Exception to the Hearsay Rule}, 52 MICH. L. REV. 1159 (1954). However, out of court confessions, since they occur either after the conspiracy has ended or after the confessor's withdrawal, do not fall within this exception. See 72 HARV. L. REV. 920, 989-90 (1959).
\textsuperscript{38} 352 U.S. 232 (1957); see 24 U. CHI. L. REV. 710 (1957).
\textsuperscript{39} In a footnote the court stated:
For long-standing recognition that possible prejudice against other defendants may be overcome by clear instructions limiting the jury's consideration of a post-conspiracy declaration solely to the determination of the guilt of the declarant, see also ... 352 U.S. at 239 n.8 (1957).
\textsuperscript{40} Id. at 239.
its maker. The Supreme Court noted that "nothing could have been more clear"\textsuperscript{41} than these instructions. In addition, the Court felt that, since the incriminating confession was admitted only after all the government's evidence had been presented, it was reasonably possible for the jury to follow the instructions.\textsuperscript{42}

However, the limited language of \textit{Delli Paoli}, as well as subsequent decisions, have cast doubt on the vitality of the decision as broadly supporting the use of the limiting instruction. The Court engaged in a careful factual analysis to demonstrate why the jury was able to limit its consideration of the implicating confession.\textsuperscript{43} By negative implication, when some or all of these factors are not present, the Court might well find that the prejudice was not eliminated. Justice Frankfurter dissented,\textsuperscript{44} stating his disbelief in the efficacy of the limiting instruction:

> The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition . . . fails of its purpose as a legal protection to defendants against whom such a declaration should not tell.\textsuperscript{45}

Even more suggestive of the demise of the limiting instruction is the recent Supreme Court decision in \textit{Jackson v. Denno}.\textsuperscript{46} In a five to four decision, New York's procedure for determining the voluntariness of confessions was struck down as a violation of due process. In holding that a jury could not separate the issue of voluntariness from that of truth,\textsuperscript{47} the Court seemed to

\textsuperscript{41} Id. at 240-41 n.6.

\textsuperscript{42} Other factors considered important by the Court were the simple nature of the crime, the fact that the separate interests of the parties were emphasized throughout the trial, and that the confession was merely corroborative of other evidence already established by the government. \textit{Id.} at 241-42. See also United States v. Bozza, 365 F.2d 206 (2d Cir. 1966).

\textsuperscript{43} Most of the Court's analysis seemed to be aimed at demonstrating that there was no confusion among the jurors and therefore no tendency to convict by association, a problem faced by the Court in \textit{Krulewitch v. United States}, 336 U.S. 440 (1949).

\textsuperscript{44} Justices Black, Douglas, and Brennan joined with Justice Frankfurter in dissenting.

\textsuperscript{45} \textit{352 U.S.} at 247 (1957).

\textsuperscript{46} \textit{378 U.S.} 368 (1964).

\textsuperscript{47} Under the New York procedure the jury heard the confession, determined its voluntariness, and judged its truth or falsity. If the jury found the confession involuntary, it was instructed to disregard it. The Court felt no juror could do this. \textit{378 U.S.} at 388. In a footnote the Court quoted the following passage:

> [T]he rule of exclusion ought not to be emasculated by admitting the evidence and giving to the jury an instruction which, as every judge and lawyer knows, cannot be obeyed.

\textit{Id.} at 382-83. See \textit{Morgan, Some Problems of Proof Under the Anglo-American System of Litigation} 104-05 (1956).
feel that a juror could probably understand that an involuntary confession could well be unreliable; however, he could not be expected to comprehend the underlying motivation requiring the complete exclusion of such evidence—the belief that important human values are sacrificed when the government, in the course of securing a conviction, wrings a confession out of the accused against his will. Thus the limiting instruction alone could not prevent the jury from considering the impermissible evidence.

Although the precise functions required of the juror in Jackson are not that required of the juror in Delli Paoli, the essential mental process required—the limited use of probative evidence—is equivalent. Moreover, it has been suggested that the task to be performed in limiting consideration of hearsay evidence in a joint trial might be even more difficult. In People v. Aranda, Chief Justice Traynor of the California Supreme Court stated:

Under the New York procedure . . . the jury was only required to disregard a confession it found to be involuntary. . . . In joint trials, however, when the admissible confession of one defendant inculpates another defendant, the confession is never deleted from the case and the jury is expected to perform the overwhelming task of considering it in determining the guilt or innocence of the declarant and then ignoring it in determining the guilt or innocence of any codefendants of the declarant. If Justice Traynor is correct, the Supreme Court may no longer be willing to recognize the propriety of limiting instructions to prevent prejudicial evidence from reaching the jury.

Several other federal and state courts have doubted the efficacy of the limiting instruction enough to prohibit reliance upon it in joint trials. The Fifth Circuit has several times expressed its dissatisfaction with limiting instructions. In Barton v. United States, defendants were charged with violating the

50. Id. at 529, 407 P.2d at 271-72.
52. In Schaffer v. United States, 221 F.2d 17 (5th Cir. 1955), the court reversed defendant's conviction for intentionally and unlawfully receiving stolen government property. The trial court denied a motion for severance under Rule 14 of the Federal Rules of Criminal Procedure. This was held to be an abuse of discretion in that under the circumstances the limiting instruction was ineffective to protect the moving defendant from the incriminating confession of the codefendant. However, the court, as in Delli Paoli, was primarily concerned with the facts of the particular case and did not lay down a blanket rule.
53. 263 F.2d 894 (5th Cir. 1959).
Mann Act. Prior to trial, one defendant moved for severance, presenting to the lower court the implicating confession given by his codefendant. The court denied the motion, and at trial the statement was read to the jury, with instructions to consider it only against the codefendant. On appeal, the court reversed, holding that it was an abuse of the trial court's discretion under Rule 14 of the Federal Rules of Criminal Procedure not to grant the severance. In acknowledging the ineffectiveness of the instruction the court stated that:

The sole reliance for Mitchell's protection was the [trial] court's instruction to the jury . . . . [W]e doubt whether it was at all possible to carry out that instruction. To do so certainly would require twelve minds more perfectly disciplined than those of the average human jurors.

Although the court refrained from enunciating a broad rule, its language with respect to the ineffectiveness of the limiting instruction would strongly suggest an attitude requiring severance or an effective editing of the statement for any other alternative would require reliance on the instruction to prevent misuse of the hearsay evidence.

The most recent federal court to consider this question found the limiting instruction insufficient to safeguard the defendant's right not to have the jury exposed to prejudicial hearsay evidence. In United States v. Bozza, six defendants were convicted of various crimes related to the burglary of United States post offices. At trial the confession of codefendant Jones was admitted over timely motions for severance. Limiting instructions were given and the names of the objecting defendants omitted. The court of appeals reversed the convictions of all defendants except Jones, holding that the trial court abused its discretion in not requiring the government to choose between severance and exclusion of the confession. The court clearly rested its decision on the inadequacy of the limiting instruction, noting that:

It is impossible realistically to suppose that when the twelve good men and women had Jones' confession in the privacy of the jury room, not one yielded to the nigh irresistible temptation to fill in the blanks . . . and ask himself . . . to what extent

54. The relevant part of the instruction read as follows: "If two men are engaged in a transaction and one of them makes a confession, it is admissible against him, and not against the other fellow." Id. at 897.
55. Id. at 898.
56. See text accompanying note 69 infra.
57. 365 F.2d 206 (2d Cir. 1966).
58. Id. at 218.
Jones' statement supported Kuhle's testimony. However, it was not willing to end all such reliance on the limiting instruction and while acknowledging the "logic of Jackson v. Denno," the court stated:

[W]e do not mean to cast general doubt on the value of instructions to disregard or limit evidence... we hold only that there is a point where credulity as to the efficacy of such instructions with respect to a confession implicating co-defendants is overstretched, and this point was reached here.

Thus, the Second Circuit adopted a position similar to Barton but distinguishable in that, when excision cannot effectively cure prejudice, the court will examine the circumstances of each case to determine whether the jury could follow the judge's limiting instruction. Under Barton, it is arguable that, once it is shown that excision is ineffective, there must be a severance, the circumstances of each case notwithstanding.

A somewhat weaker position was taken by the District of Columbia Circuit in Kramer v. United States, where it was held that "when deletion of the hearsay... is feasible... an instruction by the court that the jury disregard the reference is not an adequate substitution for deletion." However, the court would not go so far as to require severance where deletion was impossible and thereby did not completely repudiate the validity of the limiting instruction.

59. Id. at 215.
60. Id. at 217.
61. Ibid.
62. The court, in an extensive discussion, applied the criteria set down by the Supreme Court in Delli Paoli to determine whether, "under the circumstances," the instructions could be implemented.
63. The Barton court displayed no trust whatsoever in the limiting instruction and thus any reliance on it would be inconsistent with its position. See text accompanying note 55 supra.
64. 317 F.2d 114, 117 (D.C. Cir. 1963); see Oliver v. United States, 335 F.2d 724 (D.C. Cir. 1964). See also Greenwell v. United States, 336 F.2d 962 (D.C. Cir. 1964).
65. 317 F.2d at 117.
66. In a similar case, Oliver v. United States, 335 F.2d 724 (D.C. Cir. 1964), four defendants were charged with rape. One of the codefendants confessed, implicating the other three, and his statement was admitted into evidence with limiting instructions to use it only against the confessor. Despite substantial independent evidence of guilt, the court of appeals reversed the convictions of all defendants except the confessor. The court felt it "could not be 'sure'... that the hearsay references [in the confession]... did not sway the jury." Furthermore, "unlike the confession in Delli Paoli v. U.S.,... there was no 'impracticality of such deletion.'" 335 F.2d at 728. See the concurring opinion of Wright, J., where he notes the uselessness of the limiting instruction. 335 F.2d at 731. See also Greenwell v. United States, 336 F.2d 962 (D.C.
The most logical position was that taken by Judge Frank in his dissenting opinion to Delli Paoli. Reasoning that limiting instructions were fully ineffective, he suggested the following rule:

Where several defendants are on trial . . . if the government seeks to put in evidence an out-of-court statement by one defendant which is hearsay as to the others . . . then
(a) Unless all references to the other defendants can be effectively deleted . . . and unless those references are deleted,
(b) the trial judge must
   (1) refuse to admit the statement or
   (2) sever the trial of those other defendants.

This standard reflects the logical consequence of the conclusion that limiting instructions are ineffective, and by requiring “effective” deletion, leaves a modicum of discretion in the trial court to determine the feasibility of a method other than severance.

Several state courts also have rejected the limiting instruction as a device to protect the codefendant in a joint trial, where the defendants were charged with bank robbery. One defendant confessed implicating appellant Greenwell. At trial, his name was deleted from the confession and the phrase, “named person” inserted as a substitute. However, with only the two men on trial and both at the same time, it was held that this was not an effective way of keeping the incriminating information from the jury. This reasoning may demonstrate the willingness of this court to adopt the Fifth Circuit procedure of requiring a severance any time the prejudicial evidence cannot be effectively eliminated by excision or substitution. Several circuits have refused to recognize the inability of limiting instructions to protect codefendants. See Glass v. United States, 351 F.2d 678 (10th Cir. 1965); United States v. Gardner, 347 F.2d 405 (7th Cir. 1965).

67. 229 F.2d 319, 322 (2d Cir. 1956).
68. Id. at 324.
69. 229 F.2d at 324. (Emphasis added.)
70. See Greenwell v. United States, 336 F.2d 962 (D.C. Cir. 1964), where the court discusses the effectiveness of editing.
71. See People v. Buckminster, 274 Ill. 495, 113 N.E. 713 (1916); State v. Rosen, 151 Ohio St. 339, 86 N.E.2d 24 (1949). See also State v. Castelli, 92 Conn. 58, 101 Atl. 476 (1917). New York has adopted a position similar to the D.C. Circuit in requiring deletion whenever possible. People v. Vitagliano, 15 N.Y.2d 360, 206 N.E.2d 864 (1965). Kentucky has adopted a somewhat different rule, requiring “some additional factor” of prejudice before a severance would be granted. One such factor was if “one defendant’s admission directly implicates the other.” Underwood v. Commonwealth, 390 S.W.2d 635 (Ky. 1965).

Several states, however, have recently reaffirmed their confidence in the limiting instruction to prevent prejudice in joint trials. See State v. Goodyear, 404 P.2d 397 (Ariz. 1965); State v. Egerton, 141 S.E.2d 515 (N.C. 1965).
California\textsuperscript{72} and New Jersey\textsuperscript{73} having recently adopted Judge Frank's suggestion.

The most recent development affecting the prosecution of joint trials was the Supreme Court's adoption of an amendment to Rule 14 of the Federal Rules of Criminal Procedure. The rule provides for vesting the trial court with discretion in the granting or denial of severance.\textsuperscript{74} The amendment added that:

In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection \textit{in camera} any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.\textsuperscript{75}

This amendment does not require excision or severance as an alternative to reliance upon limiting instructions. However, it certainly reflects a distrust of using the limiting instruction to prevent prejudice.\textsuperscript{76} By having access to prejudicial state-

\textsuperscript{72} People v. Aranda, 63 Cal. 2d 518, 407 P.2d 265 (1965).

\textsuperscript{73} State v. Young, 46 N.J. 152, 215 A.2d 352 (1965). This most recent state court decision abolishing reliance on limiting instructions stated:

Not only is there a grave question as to the efficacy of this type of instruction in guiding the jury's deliberations, but, wherever there is a potentiality for prejudice in a criminal trial, our courts should take all reasonable measures to protect those defendants whose rights are endangered.

\textit{Id.} at 157, 215 A.2d at 355.

The court went on to prospectively adopt the rule suggested by Judge Frank, and adopted in \textit{Aranda}, requiring severance if other methods of protecting the defendant fail. See text accompanying note 69 supra.

\textsuperscript{74} If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

\textsc{Fed. R. Crim. P. 14}.

\textsuperscript{75} The amendment, added at the end of Rule 14, supra note 74, was passed Feb. 26, 1966 and became effective July 1, 1966.


It could be argued that the Supreme Court's recent amendment of Rule 14, by leaving the trial court with discretion as to severance, impliedly recognized the constitutionality of Rule 14 insofar as it would permit limiting instructions to be relied upon to cure prejudice from hearsay evidence. This argument would seem to be directly contrary to what the Court intended by adopting this amendment. By providing the trial court with an effective tool to require submission of questionable evidence, the Court might well have been requiring an effective editing of these hearsay statements prior to their admission. This would greatly reduce the number of cases in which the only alternative to limiting instructions is severance, and would mitigate the threat of imposing an administrative burden on the courts.
LIMITING INSTRUCTION

ments, the trial court can predetermine the possible prejudice to the defendant at a time when severance or excision is a far more practical alternative.\(^7\)

By its decision in *Jackson v. Denno*, and approval of the amendment to Rule 14, the Supreme Court may have signaled the demise of the rule in *Delli Paoli*. Accordingly, in the future, the Court may examine more closely the discretion exercised by federal courts in relying upon limiting instructions. However, the recognition by the Supreme Court that limiting instructions are ineffective may also have repercussions in the state courts because of the foreseeable constitutional implications.

B. CONSTITUTIONALITY OF THE LIMITING INSTRUCTION

In *Pointer v. Texas*,\(^8\) the Supreme Court acknowledged the constitutional right under the sixth amendment, as applied to the states through the fourteenth, of a defendant to cross-examine his accusers. If limiting instructions are ineffective in preventing hearsay evidence from being considered by the jury, the accused is deprived of his right of cross-examination and consequently of his constitutional rights under the sixth amendment.

Although there is no explicit provision in the Constitution guaranteeing the accused the right to cross-examination, the sixth amendment provides that “In all criminal prosecutions, the

\(^{77}\) Ibid.

\(^{78}\) 390 U.S. 400 (1965). In *Pointer*, the accused was not represented by counsel and did not attempt to cross-examine the witnesses against him at the preliminary hearing. Since the victim was unavailable for the trial, the transcript of the hearing which contained his testimony was introduced into evidence. Defendant challenged this evidence on the ground that it was an infringement of his sixth amendment right of cross-examination. The Supreme Court held that “[T]he right of . . . cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country’s constitutional goal. . . .” *Id.* at 405. And, furthermore, that “the Sixth Amendment’s right of an accused to confront the witnesses against him is . . . a fundamental right and is made obligatory on the States by the Fourteenth Amendment.” *Id.* at 403.

Prior to *Pointer*, it had been held that there was not a federally guaranteed right of cross-examination. See *Stein v. New York*, 346 U.S. 156 (1953). However, the *Stein* Court probably was wrong, for in *Pointer* the Supreme Court stated: “Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of . . . due process of law.” 380 U.S. at 405. Two cases support this position. *Turner v. Louisiana*, 379 U.S. 466 (1966); *In re Oliver*, 333 U.S. 257 (1948).
accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."\(^9\) The history of this amendment is silent as to its precise meaning; however, the courts have agreed that it guarantees the defendant the right to confront and cross-examine the witnesses against him.\(^8\) Because the hearsay rule and the right to confrontation contain as a common denominator the right of cross-examination,\(^8\) the constitutional requirements of the confrontation clause have generally been couched in terms of the hearsay rule and the exceptions thereto. Thus, the courts have generally held that the right to confrontation is not violated by hearsay evidence which is admissible under one of the exceptions to the hearsay rule.\(^8\) Professor Wigmore, in noting this relationship, concluded that ""The rule sanctioned by the Constitution is the Hearsay rule as to cross-examination, with all the exceptions that may legitimately be found, developed, or created therein."

Relying upon similar reasoning, the Court also struck down a practice used of entering into evidence the confession of a co-defendant. In *Douglas v. Alabama*\(^8\) the prosecutor, under the guise of cross-examination of a hostile witness, was allowed to present to the jury the confession of a convicted accomplice. Petitioner was unable to cross-examine the accomplice because of his refusal to testify and,\(^8\) since the prosecutor was not a

\(^9\) U.S. Const. amend. VI.  
\(^8\) The main objection to hearsay evidence lies in the inability of the defendant to cross-examine the witnesses against him. McCormick at 458; 5 Wigmore § 1362; Morgan, *The Jury and the Exclusionary Rules of Evidence*, 4 U. Chi. L. Rev. 247 (1937). Other infirmities include the inability of the jury to observe the demeanor of the declarant, Mattox v. United States, 156 U.S. 237, 242 (1894); People v. Sligh, 48 Mich. 54 (1882); McCormick at 458; 5 Wigmore § 1395, the fact that the declarant is not under oath, and the possibility that the evidence was not repeated in substance as it was related to the witness. McCormick at 458.  
\(^8\) 5 Wigmore § 1397. Authority exists holding that the right to confrontation is a common law right, the purpose of the sixth amendment being to preserve but not to expand it. Sallinger v. United States, 273 U.S. 542 (1926). See also Mattox v. United States, 156 U.S. 237, 243 (1894). Compare the language of Justice Cardozo in Snyder v. Massachusetts, 291 U.S. 97, 107 (1934), where he concluded that "the exceptions to the hearsay rule are not even static, but may be enlarged from time to time if there is no material departure from the reason of the general rule."  
\(^8\) 380 U.S. 415 (1965).  
\(^8\) The accomplice refused to testify on the ground that his case
witness, he could not be cross-examined. The Court concluded that "petitioner's inability to cross-examine [the accomplice] as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause." 6

In a joint trial, implicating statements of a codefendant are admitted, not under any of the exceptions to the hearsay rule, 7

was on appeal and the fifth amendment still applied. However, this contention was not answered by the Court. 380 U.S. 415, 420 (1965).

86. Id. at 419.

The Supreme Court's concern with the importance of cross-examination is emphasized in Pointer by its extensive discussion of this right and its citation to Wigmore, where that writer stressed the need for cross-examination in the following terms:

It [cross-examination] is beyond any doubt the greatest legal engine ever invented for the discovery of truth. . . . [T]here has probably never been a moment's doubt upon this point in the mind of a lawyer of experience.

5 WIGMORE § 1367.

87. Pointer and Douglas may have created a situation wherein almost every exception to the hearsay rule, because it deprives the accused of his opportunity to cross-examine, is subject to a federal standard requiring the right to cross-examine except where the Constitution dispenses with it. See Note, Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials, 113 U. PA. L. Rev. 741 (1965).

Exceptions to the hearsay rule were created to allow use of evidence which is unusually trustworthy and necessary. 5 WIGMORE §§ 1420-22. However, in applying these criteria, the several factors underlying the need for cross-examination also should be weighed: the need to test the witness's honesty, memory, perception, and ability to communicate. In weighing the above considerations, the judge in a criminal case must distinguish between the countervailing policies at work in criminal as opposed to civil litigation. See Fillman, Inadmissible Hearsay as Evidence To Impeach a Witness Other Than the Declarant, 57 NW. U. L. Rev. 499, 503 (1962). The modern trend is toward the admission of more probative evidence, despite its hearsay qualities. UNIFORM RULE OF EVIDENCE 7. However, this liberality must stop at the border of the criminal trial where the consequences transcend financial loss. A system of law geared to protecting the innocent must restrict rather than expand the admission of doubtful evidence. Some hearsay evidence will and should be admitted, the problem being to devise a standard that will protect the defendant from undue prejudice and, yet, admit much needed probative evidence. The courts would not and probably should not dispose of trustworthy and necessity as criteria in creating a constitutional standard. However, in view of the critical nature of a criminal trial, it would seem that many of the historical judgments of the common law courts weighing these two factors should not be accepted at face value. Note, Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials, 113 U. PA. L. Rev. 741, 748 (1965). Philosophical underpinnings and experiences of people change without a simultaneous change in the law. For example, the basis for the dying declaration exception—trustworthiness—may no longer be sound because the theological basis of this rule may no longer be valid. See id. at 749. Yet the admissibility of statements against interest is probably not af-
but under the assumption that the hearsay element will be
cured by the limiting instruction. However, considering the
Supreme Court's decision in Jackson, and the other movements
away from such reliance, it seems that this assumption has been
or expressly will be rejected by the Supreme Court. The result
is that reliance upon limiting instructions will be equivalent to
the naked admission of hearsay evidence and a consequential
deprivation of the accused's right to cross-examination.88

The proper solution to this problem is that suggested by
Judge Frank,89 that where incriminating statements are to be
introduced into a joint trial, either a severance must be granted,
the confession must not be used, or the hearsay objection must
be cured by an effective editing of the evidence. Unlike Bozza,
under no circumstances should it be assumed that twelve jurors
could otherwise properly examine this kind of evidence. This is
especially so when it is recognized that the right to cross-exam-
ine one's accusers is fundamental and when feasible alterna-
tives are available which would eliminate all prejudice with little
or no burden to the state. Indeed, more judicial time may be

88. See Barton v. United States, where the court stated:
    Unless that admonition [the limiting instruction] was effective
    . . . Mitchell has been deprived of his constitutional right to be
    confronted with the witnesses against him, for he has been af-
    forded no opportunity to cross-examine Barton as to the truth-
    fulness of his many accusatory statements.
263 F.2d 894, 898 (5th Cir. 1959).
89. See text accompanying note 69 supra.
saved by severance, for it would make unnecessary the many appeals alleging error in discretion and requiring the various appellate courts to apply the nebulous criteria established by the Court in Delli Paoli.90

III. LIMITING INSTRUCTIONS—OTHER CRIMES’ EVIDENCE

As with the joint trial, the admissibility of evidence of a defendant’s previous crimes under a limiting instruction provides only a transparent shield against prejudice. Since the highly prejudicial effect of such evidence is recognized, it is admissible only for limited purposes. Generally, evidence of prior convictions may not be admitted solely to prove that the accused has a criminal disposition or is of bad character,91 for such evidence unduly prejudices the jury against the accused. This prejudice stems from two sources. The first is the tendency of jurors to brand the accused as an incorrigible who, even if not guilty of the particular crime with which he is charged, should be punished for the other crimes which he has committed.92 Second is the logical tendency to infer that because the accused has committed other crimes, he probably committed the one with which he is charged. In Michelson v. United States,93 the Supreme Court noted that such evidence must be excluded because of the

90. See note 42 supra. One other approach could be taken in arguing the unconstitutionality of the joint trial where limiting instructions are relied upon to prevent prejudice. In United States v. Stein, 140 F. Supp. 761, 765 (S.D.N.Y. 1956), the district court concluded that “an application for a severance is, in effect, an invocation of the right to a trial by an impartial jury guaranteed by the Sixth Amendment.” Several courts have held that an impartial jury “is one which is of impartial frame of mind at the beginning of trial, is influenced only by legal and competent evidence during trial, and bases its verdict upon evidence connecting the defendant with the crime charged . . . .” See note 118 infra. Since both the sixth and fourteenth amendments pose objections to uncross-examined evidence, such incriminating statements are constitutionally incompetent. Therefore, it could be argued that admission of hearsay statements violates the sixth amendment guarantee to an impartial jury.

91. See Michelson v. United States, 335 U.S. 469 (1948); Drew v. United States, 331 F.2d 85, 89 (D.C. Cir. 1964); McCormick § 157; 1 Underhill, Criminal Evidence §§ 205-12 (5th ed. 1956); 1 Wigmore §§ 192-94. See generally Lacy, Admissibility of Evidence of Crimes Not Charged in the Indictment, 31 Ore. L. Rev. 267 (1952); Slough & Knightly, Other Vices, Other Crimes, 41 Iowa L. Rev. 325 (1956); Stone, The Rule of Exclusion of Similar Fact Evidence: England, 46 Harv. L. Rev. 954 (1933).

92. See 1 Wigmore § 57 at 455; Note, Other Crimes Evidence at Trial: Of Balancing and Other Matters, 70 Yale L.J. 763 (1961).

93. 335 U.S. 469 (1948).
effect it has on jurors "to so overpersuade them as to . . . deny . . . [the accused] a fair opportunity to defend against a particular charge."94

However, evidence of other crimes committed by the accused is admissible for some purposes. The prosecution may introduce evidence of other crimes only if it is substantially relevant for some purpose other than to prove that the accused is a man of criminal character.95 Thus, evidence of prior convictions is admissible to prove that the accused has committed crimes using a similar method of operation.96 The closer the identity of the methods used, especially if the devices used are unique and distinctive, the more probative the evidence is and the more likely its probative value outweighs its prejudicial effect. Similarly, in proving that the accused acted intentionally or with guilty knowledge, evidence of past crimes is admissible.97

Here again the problem arises as to the proper utilization of this evidence so that the defendant is not unduly prejudiced but the state is able to use the evidence for its competent purpose. The resolution of this conflict has been to rely upon the limiting instruction to prevent the jury from using other crimes' evidence for a prohibited purpose.98 The probability that these instructions are heeded is very small.

A recent law review disclosed the results of tests confirming the widely held view that the jury is unwilling to ignore this evidence or limit its use to certain issues.99 Consequently, other

94. Id. at 476. Michelson dealt with the procedure by which other crimes' evidence may be introduced to the jury by way of cross-examination of defendant's character witnesses.

95. We do not overlook or minimize the consideration that "the jury almost surely cannot comprehend the judge's limiting instruction," [see United States v. Michelson, 165 F.2d 732, 735 (2d Cir. 1948) where the court of appeals suggests this problem] . . . However, limiting instructions on this subject are no more difficult to comprehend or apply than those upon various other subjects . . .


97. See Martin v. United States, 127 F.2d 865 (D.C. Cir. 1942); Whiteman v. State, 119 Ohio St. 285, 164 N.E. 51 (1928); McCORMICK § 157; 1 UNDERHILL, CRIMINAL EVIDENCE § 205 (5th ed. 1956); 1 WIGMORE § 194.

98. McCORMICK § 157 at 328.

99. See generally McKusick, Techniques In Proof of Other Crimes To Show Guilty Knowledge and Intent, 24 IOWA L. REV. 471 (1939).
LIMITING INSTRUCTION

Crimes' evidence must either be totally excluded, or admitted with the understanding that the jury probably will not be able to circumscribe its use of the evidence.

In several important areas, however, alternatives are available whereby reliance upon limiting instructions can be abandoned and the other crimes' evidence still used for its full probative value. Many states have habitual criminal statutes providing increased penalties for repeating felons.\(^1\) Two basic procedures have developed to implement these statutes: the common law method, and the Connecticut procedure.

Under the common law method the entire indictment, including the allegations of the previous crimes,\(^2\) is read to the jury, and during the state's case documentary evidence is introduced to substantiate the previous crimes. Although the defendant is entitled to a limiting instruction, the evidence of past crimes is before the jury when it determines guilt or innocence. The Connecticut method,\(^3\) on the other hand, avoids the needless prejudice of the common law method by postponing the introduction of prior crimes' evidence until a full trial is held upon the primary question of guilt.\(^4\) Only if the accused is convicted of the particular crime will the jury be permitted to hear such evidence.\(^5\)

While many states follow the common law method, other states have judicially or legislatively changed their procedures in view of its patent unfairness.\(^6\)

---


103. Ibid.; see Lane v. Warden, Maryland Penitentiary, 320 F.2d 179, 183 (4th Cir. 1963); Harrison v. State, 394 S.W.2d 713, 714 (Tenn. 1965); 33 N.Y.U.L. Rev. 210, 216 (1958).


The Oklahoma Supreme Court in Harris v. State, 369 P.2d 187 (Okla. Crim. 1962), acted in a unique manner. The court had previously up-
In *Harrison v. State*, the Supreme Court of Tennessee reversed defendant's conviction of armed robbery and of being a habitual criminal on the ground that "it is prejudicial error to allow . . . evidence of [defendant's] previous convictions . . . to be placed before the jury prior to their determination of defendant's guilt or innocence of [the charge of armed robbery] . . . ."107 The court reasoned that limiting instructions were incapable of preventing prejudice:

> There are limits to the human mind. We think to say to any jury, there is evidence here the defendant . . . has been guilty of several prior crimes but you are not to consider this in determining his guilt or innocence of the present crime, is at best to severely test the ability of the mind to remove all prejudice therefrom.108

In *Lane v. Warden*, the Fourth Circuit, on a habeas corpus petition, reversed defendant's conviction on the ground that it was impossible for the jury to separate the evidence as to guilt and enhancement of punishment. The court did not directly deal with the issue of whether limiting instructions were effective. However, the court had little faith in their effectiveness, for the trial court did so instruct the jury and had the instructions been effective there would have been no prejudicial error. The more probable explanation is an implicit recognition by the court that these instructions are entirely worthless.

In a related area, however, the Third Circuit was not hesitant to dispute the effectiveness of limiting instructions. In *United States v. Banmiller*, the court of appeals considered the constitutionality of a statutory procedure known as the "Parker Rule," whereby evidence of defendant's past criminal convictions is admitted during trial to enable the jury to determine the penalty upon a finding of guilt. The trial court admonished the jury to consider the prior crimes evidence only as an aid to sentencing. The court of appeals, however, commented that:

> [W]e cannot believe that . . . the "Parker Rule" would permit the jurors to put the knowledge of Scoleri's . . . convictions . . .

held this procedure suggesting that the legislature should change it. In *Harris*, the court reconsidered the practice and changed it to conform with the Connecticut procedure, explaining that the failure of the legislature to act did not reflect its hostility toward this practice but only an inability to grasp the meaning of the problem.

106. 394 S.W.2d 713 (Tenn. 1965).
107. *Id.* at 717.
108. *Ibid*.
109. 320 F.2d 179 (4th Cir. 1963).
110. 310 F.2d 720 (3rd Cir. 1962).
LIMITING INSTRUCTION

out of their minds while considering his guilt or innocence. Certainly such a feat of psychological wizardry verges on the impossible even for berobed judges. It is not reasonable to suppose that it could have been accomplished by twelve laymen brought together as a jury.\textsuperscript{111}

All jurisdictions recognize that other crimes' evidence is extremely prejudicial and only when its probative need is great, and limiting instructions are used, is it admitted.\textsuperscript{112} However, if limiting instructions are not effective, little protection is given to the defendant. Again, the courts have considered the availability of alternative procedures whereby the evidence may be presented without affecting the jury's determination of guilt or innocence.

The sixth amendment provides that "the accused shall enjoy the right to . . . trial, by an impartial jury . . . ."\textsuperscript{113} Furthermore, the fourteenth amendment guarantees to the criminal defendant a fair trial by indifferent jurors, the failure to accord same violating even the minimal standards of due process.\textsuperscript{114} The terms "impartial jury" and "fair and impartial trial" are used somewhat interchangeably\textsuperscript{115} and necessarily overlap, since a fair and impartial trial is impossible without an impartial jury.

The constitutional problems raised by this interrelationship are (1) Whether the impartial jury requirement of the sixth amendment prohibits the use of evidence of prior crimes to enhance punishment prior to the jury's determination of guilt or innocence, and if so, (2) whether this provision is of such a fundamental nature that it would be made obligatory on the states through the fourteenth amendment; if either (1) or (2) is answered in the negative, (3) whether the due process clause of the fourteenth amendment prohibits this practice because the prejudice to the defendant creates an unfair trial.

The sixth amendment contains no definite criteria for determining what constitutes an impartial jury. Consequently, the

\textsuperscript{111} Id. at 725.

\textsuperscript{112} See McCormick § 157 at 328-33; Note, 70 Yale L.J. 763, 777 (1961).

\textsuperscript{113} U.S. Const. amend. VI. The Constitution does not demand that the state provide criminal defendants with trial by jury. However, when a jury is provided, it must be fair and impartial. Irvin v. Dowd, 366 U.S. 717 (1961); Fay v. New York, 332 U.S. 261 (1947).

\textsuperscript{114} See In re Oliver, 333 U.S. 257 (1948); Tumey v. Ohio, 273 U.S. 510 (1927).

\textsuperscript{115} See Baker v. Hudspeth, 129 F.2d 779 (10th Cir.), cert. denied, 317 U.S. 681 (1942): "The denial of a fair and impartial trial, as guaranteed by the Sixth Amendment . . . ." Id. at 781. Here, the court assumed that a partial jury creates an unfair trial.
Supreme Court, in *United States v. Wood,*116 defined this term in its broadest sense:

Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude . . . the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.117

Several state courts have been more specific in their application of this clause holding that an impartial jury "is one which is of impartial frame of mind at the beginning of trial, is influenced only by legal and competent evidence produced during trial, and bases its verdict upon evidence connecting the defendant with the commission of the crime charged . . . ."118 This definition has never been accepted by the Supreme Court, and moreover, the Court has never interpreted the sixth amendment to apply to evidentiary practices which might prejudicially influence jurors. However, the Court has left a great deal of room for interpretation of this amendment. It would seem that the Constitution requires that a juror remain in such a mental state that no matter what a man has done in the past, there would be a fair opportunity to prove his innocence of the crime with which he is presently charged. This is very difficult when jurors are informed of prior convictions, and it certainly would not be stretching the meaning of the term "impartial" to preclude the introduction of other crimes’ evidence prior to a finding of guilt or innocence.119

Assuming that the Court would find the introduction of other crimes’ evidence violative of the sixth amendment, there would be little to prevent it from making this provision obliga-

119. The effect of this evidence is obviously to create a partial jury, yet whether this would be held within the sixth amendment requirement is difficult to predict. Although the Supreme Court has never had occasion to consider the constitutional objection of other crimes’ evidence under the sixth amendment, it has recently granted certiorari and heard argument in several cases posing these issues. See *Reed v. Beto,* 343 F.2d 723 (5th Cir. 1965), cert. granted, 382 U.S. 1025 (1966) (No. 288 Misc., 1965 Term; renumbered No. 76, 1966 Term); *Spencer v. Texas,* 389 S.W.2d 304 (Tex. Ct. Crim. App. 1965), cert. granted, 382 U.S. 1022 (1966) (No. 273 Misc., 1965 Term; renumbered No. 68, 1966 Term); *Bell v. Texas,* 387 S.W.2d 411 (Tex. Ct. Crim. App. 1965), cert. granted, 382 U.S. 1023 (1966) (No. 128 Misc., 1965 Term; renumbered No. 69, 1966 Term).
tory on the states. In *Gideon v. Wainright*\(^{120}\) and *Pointer v. Texas*,\(^{121}\) the sixth amendment right to counsel and right to confrontation were incorporated into the fourteenth amendment as rights "fundamental and essential to a fair trial . . ."\(^{122}\) Undoubtedly if the Court could be persuaded to adopt the argument that the introduction of other crimes’ evidence prior to guilt was violative of the impartial jury requirement of the sixth amendment, it would apply it to the states.

Much of the above analysis is also applicable to the fourteenth amendment’s due process clause requiring “fair and impartial trial.” If the Court would be unwilling to recognize the applicability of the sixth amendment, the minimal standards of the due process clause also pose a challenge to this evidence.\(^{123}\)

The distinction has been pointed out above between the many ways in which other crimes’ evidence is used, in that in certain circumstances an alternative method is available whereby prejudice easily can be avoided. There is little doubt that this factor has been important in many constitutional determinations of due process.\(^{124}\) It would seem that the due process argument would be more appealing to the Supreme Court since it is intuitively unfair to subject a defendant to unnecessary prejudice in view of a procedure which would accommodate both parties without undue prejudice to either.

In *Lane v. Warden*, the court of appeals held that the Maryland habitual criminal procedure was unconstitutional because it “destroyed the impartiality of the jury and denied . . . [the defendant] due process of law.”\(^{125}\) The court concluded that:

> [O]f special significance in this case, [is] the revelation of Lane’s prior convictions to the jury prior to a finding of guilt on the current charges was entirely unnecessary. Alternative procedures . . . were well known . . . .\(^{126}\)

Again, in *Banmiller*, the Third Circuit displayed its distrust of the jury’s ability to follow the limiting instruction holding that “[the defendant] was overreached by the procedure followed at

\(^{120}\) 372 U.S. 335 (1963).
\(^{121}\) 380 U.S. 400 (1965).
\(^{122}\) Pointer v. Texas, 380 U.S. 400, 403 (1965).
\(^{123}\) Cases now before the Court argue due process.
\(^{124}\) Cf. *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951). Here the Court noted that “reasonable and adequate alternatives are available” to accomplish the city’s motive in inspecting distant milk sources.
\(^{125}\) *Lane v. Warden*, Maryland Penitentiary, 320 F.2d 179, 187 (4th Cir. 1963).
\(^{126}\) *Id.* at 186.
his trial” which was “so fundamentally unjust” as to deprive him of due process under the fourteenth amendment.\textsuperscript{127} Although the court did not specifically advert to the availability of alternative procedures, it must have had this in mind since the practice of having the jury determine the penalty does not in any way conflict with the Constitution. Therefore, it must be concluded that the presentation to the jury of other crimes’ evidence before the determination of guilt or innocence created the constitutional objection, and that presumably, if limiting instructions had been effective or if such evidence had been given to the jury after this determination, there would have been no constitutional problem.

IV. MULTIPLE ADMISSIBILITY—LIMITING INSTRUCTIONS WHERE NO ALTERNATIVE PROCEDURE IS AVAILABLE

Throughout this Note, attention has been directed primarily to the effect of a recognition that limiting instructions are valueless in two areas where feasible alternatives are available. In joint trials, excision and severance provide methods by which prejudice can be cured with little or no administrative or tactical burden upon the state. In trials requiring a consideration of prior offenses to enhance the punishment or to aid the jury in sentencing, a separate hearing could be used subsequent to the determination of guilt. The constitutional problems raised in those situations resulted from the prejudice to the accused because of the ineffectiveness of the limiting instruction and the fact that the prejudice could be easily eliminated. The remainder of this Note will deal with the result of a finding that limiting instructions are ineffective in areas of multiple admissibility where no alternative procedure is available.

Where the same evidence, relevant to more than one issue but not competent with respect to all, is presented to the jury, a greater need arises to rely upon limiting instructions. The only other choices are the naked admission of the evidence or its total exclusion, neither of which is desirable.\textsuperscript{128} There seem to be two feasible approaches to this problem. First, a re-evaluation of the limiting instruction, and second, a re-evaluation of the

\textsuperscript{127} 310 F.2d 720, 725 (3rd Cir. 1962). Subsequent cases are awaiting determination by the Supreme Court on this issue. See note 119 supra.

\textsuperscript{128} As suggested by the Chicago jury project, no instruction at all might be better. See 24 U. Chi. L. Rev. 710, 713 (1957).
LIMITING INSTRUCTION
evidence with emphasis on the ineffectiveness of the limiting instruction.

It must be recognized that a jury is in many cases totally unable to comprehend and follow the exclusionary rules reflected in limiting instructions. However, since experience is the cornerstone of the rules of evidence, it is possible that in certain situations jurors can sufficiently understand the need for a limited consideration of evidence to enable them to discriminate. The inability of the juror to follow a limiting instruction stems from two factors: (1) the failure of most courts to adequately and comprehensively explain the underlying need for the limitation on the evidence, and (2) the inherent psychological inability of the jury to disregard evidence.

Courts generally are too technical and superficial in their instructions to the jury. Thus, the suggested jury instruction in the federal courts for the admissibility of incriminating statements reads: "an admission or incriminatory statements made outside of court by one defendant may not be considered as evidence against another defendant not present when the statement was made." The ineffectiveness of such an instruction to a jury is obvious; it gives them no reason to do what they intuitively would not do—limit their consideration of probative evidence.

As discussed above, the Supreme Court in Delli Paoli felt that the instruction given by the trial court was sufficient to enable the jurors to limit their consideration of the incriminatory confession to the defendant who made it. The trial court attempted to explain to the jury the reason it should limit consideration of this evidence:

An admission by defendant after his arrest . . . may be considered as evidence by the jury against him . . . because it is, as the law describes it, an admission against interest which a person ordinarily would not make. However, if such defendant . . . implicates other defendants in such an admission it is not evidence against those defendants because as to them it is nothing more than hearsay evidence.

The first part of the instruction might well tell a jury why the evidence is admissible against the declarant, for experience teaches that people do not generally, when encountered by the

129. THAYER, PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW, 263 (1896).
131. See note 29 supra.
police, admit things contrary to their best interest. However, the crucial part of the instruction, explaining to the jury why it must refrain from using the evidence against the other defendants, speaks only in terms of "hearsay evidence," not explaining why the law has historically been distrustful of this evidence. Thus, although the alternative of excision or severance would have been much preferable, it would seem that a more explicit and illuminating instruction might have given the jury a relatively better chance of performing the function required of it.

Given an instruction which would simply and comprehensively relay to the jury the common sense reasons for the distrust of hearsay evidence, the jury may be able to limit its consideration of the evidence or, at least, give it less weight.

In many instances hearsay is admitted not to establish the truth of the statement offered but as proof of some other issue. In United States v. Kennedy, defendant was charged with obstructing interstate commerce by extorting payments from interstate truck drivers. One of the elements of the case which had to be proved was that the payments were made under duress. Evidence was admitted consisting of testimony by the victimized truck drivers that they had been warned by other drivers that nonpayment of the required fee would lead to beatings. Since the men actually beaten did not testify, this evidence was hearsay as to the truth of the beatings, but was admitted in this case with an instruction limiting its use to prove the state of mind of the victim and not the actual occurrence of the beatings.

The jurors probably would not be able to completely disregard the suggestion that other beatings had taken place, although arguably this would be an easier function for the jury to perform than disregarding incriminating testimony in joint trials. Yet, the jury might well believe that the victim had heard of these beatings and thus was coerced to make the payments to the defendants without considering whether the beatings had actually taken place. Therefore, since the only alternative is exclusion of this much needed evidence, the law could trust a well-explained instruction in such an instance.

In contrast to Kennedy are the cases in which it would be psychologically impossible for a juror to be instructed sufficiently to enable him to limit consideration of the prejudicial evidence. This would seem to be the case when the judge instructs a jury to limit its use of other crimes' evidence.

133. See note 41 supra.
134. 291 F.2d 457 (2d Cir. 1961).
difficulty in explaining to a jury that it should consider this
evidence only for a limited purpose is apparent.

The most plausible conclusion regarding the effectiveness of
limiting instructions is that in some instances the jury may
limit the weight given the prohibited element of the evidence.
However, in a criminal trial the consequences are too great to
attempt to resolve doubts as to the utility of the instruction
when the alternatives of severance or excision are available.

In cases where the only alternative is absolute exclusion,
discretion should remain in the trial court to closely examine
the protective value of the limiting instruction in the particular
case. This should be one of the factors weighed in balancing
the probative need for the evidence against its prejudicial effect.
This discretion would be reviewed by appellate courts, and
presumably rules would evolve applicable to different situations of
multiple admissibility, all of which would be subject to the con-
stitutional safeguards of the sixth and fourteenth amendments.

V. CONCLUSION

The specific problems raised by this Note represent a sample
of the possible questions resulting from a conclusion that limit-
ing instructions are ineffective in curing prejudice from incompe-
tent evidence. In recognizing that these instructions are not
effective, the narrow issue left to consider is whether the par-
ticular evidence involved is admissible absent a limiting instruc-
tion. It is suggested that, since for many years this question has
been precluded from examination by the belief that these in-
structions performed their supposed function, the role of the law
is now one of reappraisal. In most instances such a re-examina-
tion must be made in light of the constitutional requirements
of the sixth and fourteenth amendments.

Very likely Pointer and Jackson have created a new law of
joint trial procedure, focusing on the cross-examination require-
ment of the sixth amendment. In addition, Banmiller and Lane,
in conjunction with Jackson, would seem to create a constitu-
tional rule, under the fourteenth amendment, requiring separate
hearings when possible in cases involving the admission of other
crimes' evidence. In both of these areas, a constitutional stand-
ard is needed to prevent the unnecessary prejudice to criminal
defendants in the face of available procedures which could easily
eliminate this prejudice with no significant burden on the law
enforcement process.
The most troublesome questions arise where no alternative procedures are available so that probative evidence must be totally excluded if limiting instructions do not work. Probably, full exclusion of the evidence, guarded in the past by limiting instructions, is not called for. A re-evaluation of the evidence must, however, be made in which the possible effectiveness of the limiting instruction, the probative value of the evidence, and its need would be the criteria in applying exclusionary practices.

Whatever result the courts reach with respect to the multiple admissibility of evidence, it must be considered a step forward when a profession so dedicated to the truth strives to strike another deception from its midst.