Chicago-Kent Law Review

Volume 55 | Issue 1 Article 7

April 1979

Evidence: The Trend towards Admissibility

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EVIDENCE: THE TREND TOWARDS ADMISSIBILITY

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The Court of Appeals for the Seventh Circuit broke no new ground in the field of evidence during its 1977-78 term, nor was it presented with any innovative attempts to expand the range of such rules as Rule 803(24)[1] or Rule 804(b)(5),[2] the hearsay exception catch-alls. One opinion in the antitrust field, *United States v. International Harvester,*[3] represents further acceptance of the *General Dynamics*[4] defense to section 7 Clayton Act[5] cases. In another case, the court struck down a Wisconsin statute[6] which excluded all psychiatric evidence offered to show a defendant's lack of capacity to form an intent in order to rebut a Wisconsin presumption that every person intends the probable consequences of his acts.[7] The most frequently litigated issue during the past year involved the admission of evidence of similar acts in criminal prosecutions.[8]

EVIDENCE OF SIMILAR ACTS AND CHARACTER

One of the most troublesome aspects of the Federal Rules of Evidence is presented by the use of Rule 404(b) in criminal prosecutions. That rule distinguishes between evidence of character and evidence of intent, pattern, or other elements of the crime alleged. It provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[9]

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1. FED. R. EVID. 803(24) (1975).
2. FED. R. EVID. 804(b)(5) (1975).
3. 564 F.2d 769 (7th Cir. 1977).
4. United States v. General Dynamics, 415 U.S. 486 (1974).
5. 15 U.S.C. § 18 (1976).
6. WIS. STAT. § 971.175 (1975).
7. Hughes v. Mathews, 576 F.2d 1250 (7th Cir. 1978). *See* text accompanying notes 70-74 *infra*.
8. *See* text accompanying notes 9-53 *infra*.
9. FED. R. EVID. 404(b) (1975).

This statute means, in effect, that such evidence generally is admissible on any issue other than propensity or disposition to commit the offense charged.[10] Since such evidence is available to prove many of the relevant issues appearing in criminal cases, but unavailable to prove the ultimate conclusion, courts employ "limiting instructions" to apprise juries of the difference between the two uses. An example of the typical limiting instruction used in a Rule 404(b) case is found in *United States v. Miller*.[11] In that case the jury was instructed that the defendant's false loan applications "are not exhibits which are in any way relevant to the guilt or innocence of the offense charged. They are admitted solely limited to the question of intention, knowledge, and credibility. They have no weight in the manner used or the guilt or innocence for the Defendant on the substantial charge."[12]

Whether a jury of laymen is able to make this distinction is open to question.[13] Of course, if a jury is unable to perform accurately the subtle task demanded of it by a Rule 404(b) limiting instruction, the defendant confronted by evidence of other acts may be deprived of a fair trial. The problems inherent in a confusing instruction, which attempts to distinguish between evidence of character and evidence of any other relevant issue, might be lessened by a strict requirement that "other acts" be substantially similar to the offense charged.[14] But the expanded notion of relevance found in Rule 401[15] gives the trial court vast scope, and prejudice must substantially outweigh the probative value of the evidence to warrant exclusion.[16] To insure fair trials, therefore, evidence of other acts must be carefully balanced against the notion of prejudice enunciated in Rule 403.[17]

10. J. WALTZ, THE NEW FEDERAL RULES OF EVIDENCE 34 (1973).

11. 573 F.2d 388 (7th Cir. 1978).

12. *Id.* at 393-94.

13. Note, *The Limiting Instruction—Its Effectiveness & Effect*, 51 MINN. L. REV. 264, 281-88 (1966) [hereinafter cited as The Limiting Instruction].

14. *See* United States v. Grabiec, 563 F.2d 313, 317 (7th Cir. 1977) (Swygert, J., dissenting). *See also* White, *Evidence of Other Crimes, Wrongs, or Acts Under Federal Rule of Evidence 404(b): Some Unanswered Questions*, 21 ATLA L. REP. 117 (1978).

15. FED. R. EVID. 401 (1975).

16. United States v. Cook, 538 F.2d 1000 (3d Cir. 1976).

17. FED. R. EVID. 403 provides, in relevant part:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

See Dolan, *Rule 403, The Prejudice Rule in Evidence*, 49 S. CAL. L. REV. 220 (1976). Rule 403 was used in United States v. Clavey, 565 F.2d 111 (7th Cir. 1977) to exclude relevant evidence helpful to the defendant's case, and the "broad discretion" available to the trial court was relied on by the Seventh Circuit to affirm. 565 F.2d at 115.

In most instances of Rule 404(b) evidence reviewed by the Seventh Circuit during 1977-78, the trial court was not faced with great dissimilarities between the acts offered in evidence and the act for which the defendant was indicted. It is arguable, therefore, that most of these defendants' trials were not genuinely prejudiced by the admission of this evidence.[18] In *Miller*, for instance, the defendant had appealed from a conviction of falsifying loan applications to an F.D.I.C.-insured institution. The defendant had made multiple pledges of his stock in a newly-formed bank in order to obtain loans totalling $78,350 from three other banks. When stock certificates pledged as collateral for a $42,000 loan to the first of the three banks were not delivered after the first loan was made, the defendant obtained reissuance of the shares by signing an affidavit that the shares had been lost in the mail, were otherwise not pledged in other loan transactions, and that the only loan for which the shares had been pledged as collateral was the one to the first bank.

In the course of the trial, the Government introduced two financial statements which had been submitted with loan applications to the other two banks.[19] Both were filled out by the defendant on December 7, 1974, but several answers to questions on one application differed from answers to the same questions on the other form. Sums given for total assets differed by over $117,000. The court rejected the defendant's argument that admission of the two statements was improper because any relevance was outweighed by prejudice.

The court found support for its holding in *United States v. Kaufman*,[20] where the defendant was impeached with a false entry on a tax return. Kaufman, a process server, was charged with falsely making affidavits representing that the intended recipients of process were in military service. Kaufman's defense was that he had not intended to deceive anyone and did not know the statements were false. On cross-examination, the Government introduced the process server's income tax return, which contained a false statement. Judge Anderson's majority opinion for the Second Circuit stated that "evidence that the defendant had signed false legal documents relating to his own personal affairs was relevant to rebut his testimony in which he character-

18. Claims of prejudice arising from characteristics incidental to documentary evidence but which implied "other acts" were rejected in United States v. Richardson, 562 F.2d 476 (7th Cir. 1977), *cert. denied,* 434 U.S. 1072 (1978) (Photographs of one defendant and a photograph of a palm print of his co-defendant carried identification marks from the FBI and a local sheriff's office.).

19. 573 F.2d at 392.

20. 453 F.2d 306 (2d Cir. 1971).

ized himself as . . . beguiled . . . into unknowingly signing false affidavits."[21]

In *Miller*, the Seventh Circuit justified admission of Miller's two loan applications on the ground that:

> here the false statements, which were made to two banks in the course of loan transactions, are more closely related to the present offense of swearing a false affidavit to a bank concerning a loan than were the tax returns in *Kaufman* to the offense of false affidavits concerning the service of process. Moreover, the fact that one of the three potentially false statements was made to the Anthony Wayne Bank may make that statement even more relevant than the other two because it indicates the defendant's way of dealing with the same people and in the same transaction as involved in the affidavit that prompted the indictment.[22]

Whatever the relevance, the trial court in *Miller* nevertheless was faced with the problem of preventing the jury from using evidence of the other false loan applications for any purpose but that contemplated by Rule 404(b). The problems inherent in 404(b) limiting instructions are illustrated by the Seventh Circuit's comments on the trial court's instruction.[23] The court found the instruction to be hopelessly contradictory and suggested that simply using the language of Rule 404(b) would have been preferable.[24] In addition, it found the standard instruction suggested by Devitt & Blackmar almost as confusing. The Devitt & Blackmar instruction states, "The fact that the accused may have committed an offense at some time is not any evidence or proof whatever that, at a later time, the accused *committed* the offense charged in the indictment, even though both offenses are of a like nature."[25]

Nonetheless, even an instruction based on the language of Rule 404(b) offers little protection to the defendant from the inevitable prejudice which results from the admission of evidence of other crimes or wrongful acts. The prejudice has two sources. First is the tendency of jurors to brand the accused as an incorrigible. Second is the tendency to infer that because the accused has committed other crimes, he

21. *Id.* at 311.

22. 573 F.2d at 393. Miller also objected to introduction of the two applications on the basis that the information on neither document was proved false. The court rejected defendant's "no proof of falsity" argument since Rule 404(b) does not require that the statements be proven false in order for them to be admissible to prove intent. In the court's view, "the addition of the words 'or acts' demonstrates an intention to include within the coverage of Rule 404(b) items such as the financial statements here." *Id.* at 392. The court is silent as to how a neutral, or "non-false" document could be relevant to the Government's case.

23. *See* 573 F.2d at 393-94.

24. 573 F.2d at 394.

25. DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS, § 14.14 (3d ed. 1977) (emphasis added).

committed the one with which he is charged.[26] Even in cases where the prosecution introduces evidence of other wrongs greatly different from the crime alleged and a limiting instruction is given, it is unlikely that juries have been appropriately guided.[27]

Evidence of "other wrongs" somewhat more removed in time, if not type, from the crime alleged, was in issue in *United States v. Weidman*.[28] There, the defendant, the president of Walsh Construction Company, knew he would be confronted with evidence of other wrongful acts. Weidman attempted to avoid their introduction by not raising intent as an issue of his case, but denied that he even committed the acts alleged. Nevertheless, he was convicted on fourteen counts of mail fraud and one count of perjury for activity arising out of Walsh's contract with Bethlehem Steel at Burns Harbor, Indiana. The prosecution had introduced evidence of allegedly fraudulent activities by Walsh's personnel on four earlier construction contracts. Weidman objected to the introduction of this evidence as irrelevant. The Seventh Circuit[29] reasoned that, although intent was not part of the defendant's case, it was crucial to the Government's case. Furthermore, the court found that the four prior schemes were virtually identical in detail to the one for which Weidman was indicted.[30] Additionally, the four schemes provided evidence of a pre-existing plan —essential to the prosecution in light of Weidman's utter denial of having committed the act alleged. Thus, the evidence was deemed admissable, and the conviction was affirmed.

26. *See The Limiting Instruction, supra* note 13.

27. 70 YALE L.J. 763, 777 n.89 (1961). It is equally unlikely that the jury in United States v. Alpern, 564 F.2d 755 (7th Cir. 1977) could have performed the mental gymnastics there asked of it. *Alpern* involved a prosecution of several defendants on a charge of conspiring to bomb a tavern. Peters, one of the defendants, argued that he had been unfairly prejudiced because a government witness testified that a second defendant, Baker, had asked for Peters' telephone number, dialed the number and asked a party addressed as "Pete" to come by and pick up some dynamite Baker was holding for the co-conspirator. The trial court instructed the jury not to consider the conversation on the issue of whether Peters was a member of the conspiracy. The court of appeals held that the conversation was so highly probative of Baker's participation that its relevance outweighed prejudice to Peters.

The lack of choices available to the courts of appeals in criminal cases—affirmance or reversal—combined with the need to conserve judicial resources, produces a reluctance to reverse except where prejudice constitutes almost "plain error." Substantial justice could be served by granting courts of appeal statutory authority to grant partial *remittitur* of sentence where prejudice is demonstrable but not at the level of plain error.

28. 572 F.2d 1199 (7th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3221 (U.S. Oct. 3, 1978).

29. Judges Bauer, Sprecher, and Senior District Judge Campbell (sitting by designation).

30. *Contra*, United States v. Benedetto, 571 F.2d 1246 (2d Cir. 1978). In *Benedetto* the Second Circuit held that it was error to admit evidence of similar bribes of a federal meat inspector on trial for accepting a particular bribe when the defendant's intent was not at issue. The conviction, however, was affirmed on other grounds.

United States v. Grabiec[31] probably sets the outer limit for "other acts" evidence in the Seventh Circuit, and demonstrates the potential for prejudice in multiple-defendant cases where the Government seeks to introduce "other act" evidence. The case involved a defendant convicted of conspiracy to extort money under color of official right[32] from employees of Crown Personnel, Inc. Crown Personnel had provided strike-breakers to Honeywell Company during an eight week strike, but had not complied with an Illinois statute requiring written notice of a labor dispute to the job applicants. The striking union filed a complaint charging Crown with violating the Illinois notice statute. Grabiec's co-defendant Wall, a former superintendent of the Division of Private Employment Agencies, held an informal hearing on the complaint in the course of which Crown Personnel admitted its violation. The union demanded revocation of Crown's license. Wall took the matter under advisement pending discussion with defendant Grabiec. At trial, William Organ, the owner of another private employment agency, testified that he had played golf with the defendant Grabiec several days after the first hearing on the union's charges, and that during the game Grabiec had told Organ that something could be done to help Crown for the sum of $1,500 to $2,000. Organ related the demands to Crown's president, who stated that Crown was willing to pay $700. Wall rejected that amount. After further negotiations, a figure of $2,500 was agreed upon, and this money was delivered to Wall by a third party on behalf of Crown. As part of the *quid pro quo*, Crown received a token penalty which was never enforced.

In the course of the prosecution, two other witnesses, who also operated employment agencies, testified over Grabiec's objection, concerning offenses involving Wall. One witness testified that he had paid $200 to Wall's bagman Moran in September 1970 in order to obtain a license; the other testified that he also paid $200 in January 1973 to Moran for acquisition of a license from Wall's office. Moran, testifying under immunity, corroborated both witnesses' testimony. He also testified to two payoffs he himself had made to Wall in connection with obtaining licenses for his own employment agencies, one in 1969 and one in 1972. The defendant argued that the admission of similar occurrence testimony was reversible error since the prior offenses were wholly independent of the offense charged.[33]

31. 563 F.2d 313 (7th Cir. 1977).
32. Defendant Grabiec was a former Director of the Illinois Department of Labor.
33. 563 F.2d at 317.

The court of appeals ruled that two of the license payoffs occurred during the course of the conspiracy alleged by the Government and, therefore, were not independent acts. The 1969 and 1970 transactions also were ruled to be admissible to show a pattern of conduct. The trial court gave essentially the same instruction given in *Miller*,[34] with the additional injunction that evidence against Grabiec's co-defendant Wall could not be considered against Grabiec.

Judge Swygert, in his dissent, strongly objected to the admission of the four criminal acts on the basis of "their flimsy similarity"[35] to the crime alleged. The four transactions, he argued, had nothing to do with Grabiec, only Wall, and only then in connection with applications for licenses—not fraudulent adjudications of complaints. Judge Swygert stated that "[the] only claim to similarity is their extortive nature and an involvement by *one* of the alleged conspirators."[36] He also found that the instruction "limiting" consideration of the previous bribes to Wall "[was] merely a conscience-saving technique [with] little or no pragmatic value."[37] Judge Swygert concluded:

> I entertain the view that all too often, as in this case, the prosecution has been given carte blanche to introduce evidence of prior criminal conduct under the rubric that though such evidence is irrelevant, nonetheless it may be admitted to show intent, motive, design, etc., when upon strict analysis either the prior conduct is not similar to that charged or there is really no issue which makes the evidence relevant. It seems to me that we have tended to forget the salutary justification for the exclusionary part of the rule and that it is in danger of being obliterated by the exceptions.[38]

34. *See* text accompanying note 12 *supra*.
35. 563 F.2d at 320.
36. *Id.*
37. *Id.* at 321.
38. *Id.* (citation omitted). The problem enunciated by Judge Swygert is partially met in the Seventh Circuit by the requirement that "other crimes or acts" be proved by clear and convincing evidence.

The Fifth Circuit has developed a rather cautious rubric to be applied in Rule 404(b) situations, which would avoid Judge Swygert's criticism. This approach is set forth in United States v. Myers, 550 F.2d 1036 (5th Cir. 1977) where the court stated:

> Because the risk of prejudice is so great, we have held that there are two conditions that must be satisfied before evidence of other crimes may be admitted. First, the threshold prerequisites to admission must be met. There [sic] are:
> (1) Proof of other similar crimes must be plain, clear and convincing.
> (2) The other crimes must not be too remote in time from the charged offense.
> (3) The evidence of other crimes must be introduced for a purpose sanctioned by Rule 404(b) of the Federal Rules of Evidence.
> (4) The element of the charged offense that the evidence of other crimes is introduced to prove must be a material issue in the case.
> (5) There must be a substantial need for the probative value of the evidence of the other crimes. (citations omitted)
>
> Moreover, the probative value of the evidence of other crimes must outweigh the prejudice to the defendant that may result from its admission. (citations omitted) This balancing is largely committed to the sound discretion of the district court.

Judge Swygert's wary view of "other act" evidence prevailed in *United States v. Shapiro*,[39] where the court ruled that the trial court had abused its discretion in admitting evidence of other crimes pursuant to Rule 609(b).[40] In that case, the defendant was an eighty-year-old man who had been convicted of bankruptcy, fraud and income tax evasion thirty-eight and twenty-four years prior to his indictment for kiting $687,335 in overdraft checks. In oral argument before the court, the Government conceded that it was concerned that the defendant had a grandfatherly appearance and, thus, might appear blameless to the jury. The court of appeals reversed, stating, "[While] arguing that the evidence [of prior convictions] had bearing on veracity, the Government sought to have the evidence admitted to prejudice the defendant by coloring the jury's idea of the type of person he was."[41] Judge Swygert, writing for the majority, continued, ". . .[I]n view of the similarity between the prior convictions and the charged offense, the risk of unfair prejudice was especially great."[42] Judge Campbell[43] suggested in his dissent that the court's ruling "interferes with the discretionary powers of the district court in ruling on evidentiary matters"[44] and that the ruling "tends to create inflexibility in the application of Rule 609(b)."[45] There was no evidence that the Government had given the requisite notice of intent to utilize superannuated convictions, or that

550 F.2d at 1044-45.

That risk of prejudice was quantified by Kalven and Zeisel, and fully justifies the careful application of Rule 404(b) used by the Fifth Circuit. Kalven and Zeisel demonstrated the severe impact that knowledge of a defendant's prior convictions has on a jury. In cases in which the defendant's prior convictions were known and the prosecution's case was contradictory, the acquittal rate was 38 percent compared with 65 percent in cases where the jury had no knowledge of prior convictions. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 160 (1966).

39. 565 F.2d 479 (7th Cir. 1977). The Seventh Circuit has given broad scope to the "dishonesty or false statements" language of Rule 609(a)(2). United States v. Papia, 560 F.2d 827 (7th Cir. 1972). In *Papia* the defendant was convicted of attempting to collect a debt by extortion after a trial in which he had been impeached with evidence of a misdemeanor conviction for theft of under $100 from a savings and loan. The trial court held that even though fraud or deceit is not an element of the prior offense, the conviction may be introduced if the proponent shows that the underlying facts included a misrepresentation or false statement. 560 F.2d at 846-48.

40. FED. R. EVID. 609(b) (1975) provides:

> Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction, or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

41. 565 F.2d at 481.

42. *Id.*

43. Judge Campbell was sitting by designation.

44. 565 F.2d at 481.

45. *Id.*

the trial court had even attempted to make the findings on the record urged by Judge Bauer in *United States v. Mahone*.[46]

The opposite situation arose in *People ex rel. Rooney v. Housewright*,[47] where evidence of a victim's other acts would have been admissible under Rule 404(2)[48] to demonstrate his reputation for violent acts. However, the defendant was tried in an Illinois court, and Illinois law forbids introduction of evidence of a murder victim's reputation for a violent and dangerous disposition unless the defendant proves that the victim was the aggressor.

Rooney was convicted of the murder of the estranged husband of his girl friend, a Mrs. Sarro. Rooney had driven Mrs. Sarro home after a date. They were confronted about 2:00 a.m. by the husband, "Stormey" Harvill. Harvill stuck his head into Rooney's car and shouted, "I'll kill you, I'll kill you, I'll kill you both." Rooney sent Mrs. Sarro into the house to call the police. As she left the car, she gave him a .45 caliber revolver which she kept in her purse. Rooney got out of the car, gun in hand. Harvill retreated to a corner of the house. Rooney took one shot at him, then fired several more into the air as Harvill ran away. Rooney started to follow Mrs. Sarro into the house, then turned and looked around the corner of the house to find Harvill coming back, crouched near the house wall. Rooney could not see Harvill's hands. When Harvill took several steps toward Rooney, Rooney fired three times. Harvill died at the scene of the shooting.[49]

At trial Rooney attempted to introduce evidence of Harvill's reputation for violence. However, he was not allowed to testify that he knew that Harvill habitually carried a gun, that Harvill had been arrested and had pleaded guilty to carrying a concealed weapon, or that he had been questioned as a suspect in one murder case and charged with murder in yet another. The trial court rejected not only Rooney's testimony but the offer of testimony to the same effect from two local law enforcement officials and a newspaper reporter. The basis for the ruling was the exclusion under Illinois law of evidence of a victim's

46. It is apparently sufficient in the Seventh Circuit for the trial court to hear argument on the nature of the prior conviction, possible prejudice to defendant if it was admitted, and the proper procedure to be followed for its admission under Rule 609, without making an express finding that prejudice is outweighed by relevance. United States v. Mahone, 537 F.2d 922, 928-29 (7th Cir. 1976), *cert. denied*, 429 U.S. 1025 (1977). Nevertheless, such findings are strongly recommended "to avoid the unnecessary raising of the issue." *Id.* at 929. Failure to make express findings on the record when superannuated convictions are offered does constitute prejudicial error in the Second Circuit. United States v. Mahler, 579 F.2d 730 (2d Cir. 1978). *But see,* United States v. Cohen, 544 F.2d 781 (5th Cir.), *cert. denied*, 431 U.S. 914 (1977).

47. 568 F.2d 516 (7th Cir. 1977).

48. FED. R. EVID. 404(2) (1975).

49. 568 F.2d at 518.

reputation for violence unless it can be inferred that the use of unlawful force by the victim was imminent or that the defendant believed that his use of force was necessary to prevent physical harm to himself. In *Rooney*, the Seventh Circuit[50] found the evidence of guilt "overwhelming" and concluded that any error was harmless.[51] Judge Wood, writing for the majority, held that there was an absolute failure of proof on the issue of threat to Rooney, and that, therefore, Rooney was not entitled to introduce evidence of Harvill's violent reputation.[52]

Judge Pell, in a dissenting opinion, stated that Harvill's reputation was highly relevant to the defendant's reasonable belief that he was in imminent danger, and that the plentiful and unbiased evidence of Harvill's violent proclivities was sufficient to convince a reasonable person that Harvill was on the attack just prior to the fatal shots.[53]

ANTITRUST LITIGATION

In *United States v. International Harvester Co.*,[54] the Antitrust Division of the Justice Department brought an action alleging that a stock purchase and manufacturing agreement between co-defendants Steiger Tractor Company and International Harvester violated section 7 of the Clayton Act.[55] The agreement provided that Harvester would acquire thirty-nine percent of Steiger's common stock and the right to place three Harvester directors on Steiger's nine-man board. The agreement also required that Steiger had to assemble four-wheel-drive tractors using certain components supplied by Harvester, that Harvester would purchase certain minimum numbers of such tractors, and that Steiger would make available to Harvester a maximum of forty-eight to fifty-two percent of its annual production.

The Government claimed elimination of actual and potential competition between Harvester and Steiger in the production and sale of high-powered and four-wheel-drive farm tractors.[56] The Government also alleged that another effect of the agreement was a significant increase in concentration of production and sale of such machines. A third alleged effect was possible substantial lessening of competition in

50. Judges Wood and Campbell were sitting by designation.

51. 568 F.2d at 519.

52. The majority also held that admission of evidence that Rooney refused three times to answer questions put to him by the arresting officer was not a violation of Rooney's fifth amendment rights. *Id.* at 522.

53. *Id.* at 529.

54. 564 F.2d 769 (7th Cir. 1977).

55. 15 U.S.C. § 18 (1976).

56. Both sides stipulated that "four wheel drive farm tractors" was the relevant market. 564 F.2d at 772.

production and sale of these machines. Although the court of appeals agreed with the district court that the Government had made out a prima facie case through a statistical showing of concentration, it held that the lower court properly considered evidence of Steiger's "weakness as a competitor."[57] The court of appeals noted that "the evidence can be viewed as a showing that 'the market shares statistics give an inaccurate account of the acquisitions, probable effects on competition.' "[58] The rationale for admitting such evidence is that the government's vast market statistics are insufficient to warrant a directed finding because Steiger's weak financial reserves would not allow it to be as strong a competitor as the bald statistical projections would indicate. The court of appeals observed:

> Even though the defendants do not rely on the failing-company doctrine, which is a valid defense to a Section 7 suit, they have shown that even if Steiger remained in the market, it did not have sufficient resources to compete effectively, and this supports the district court's conclusion that the acquisition of 39 per cent of Steiger's stock by Harvester would not substantially lessen competition.[59]

International Harvester is significant in that the Seventh Circuit has joined the trend away from the strict statistical approach in section 7 cases advanced by Professor Turner[60] and enthusiastically applied by the Warren Court in *United States v. Philadelphia National Bank*.[61]

MARITAL PRIVILEGE

In *Ryan v. Commissioner*,[62] petitioners appealed from a decision of the Tax Court holding them in contempt for refusing to answer seven interrogatories propounded by the Commissioner. Ryan claimed that the Tax Court improperly rejected their claims of fifth amendment privilege and marital privilege.

In September 1969, the Ryans, who evidently were constant litigants with the Commissioner of Internal Revenue, filed a petition in

57. *Id.* at 773 (citing United States v. General Dynamics, 415 U.S. 486, 503 (1974)).

58. *Id.* at 773 (citing United States v. Citizens & Southern National Bank, 422 U.S. 86, 120 (1975)).

59. 564 F.2d at 774 (citation omitted).

60. Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313 (1965).

61. 374 U.S. 321 (1963).

62. 568 F.2d 531 (7th Cir. 1977). *Accord,* United States v. Mendoza, 574 F.2d 1373 (5th Cir. 1978), where an agent's tape recording of a wife's statement that her husband had heroin stashed in Mexico and would smuggle it into the country was admitted against the husband in a prosecution for narcotics smuggling. The Fifth Circuit aligned itself with the Seventh and Second Circuits, stating, "[W]e hold that conversations between husband and wife about crimes in which they are jointly participating when the conversations occur . . . do not fall within the privilege's protection of confidential marital communications." 574 F.2d at 1381.

Tax Court for redetermination of deficiencies of taxes assessed by the Commissioner for the years 1958 through 1962, 1964 and 1965. The Commissioner spent several years attempting to take depositions of Swiss bank officials, during which time the Ryans filed a motion to suppress and enjoin all proceedings, claiming that evidence had been illegally derived from a grand jury investigation of petitioners. On hearing, the Ryans claimed that federal agents had obtained damaging information by abusing the grand jury process and by mounting illegal searches and seizures of their papers. They served subpoenas on several Internal Revenue agents, seeking information about illegal electronic surveillance. The Commissioner moved to quash, and the hearing on this motion was continued until trial. When the new Rules of Practice and Procedure of the United States Tax Court became effective in 1974, the Commissioner served seven interrogatories on the Ryans. At the same time, the United States Attorney for the District of Columbia obtained an order in the United States District Court for the District of Columbia granting the Ryans use immunity in exchange for their testimony. They appealed that order. The appeal was dismissed for lack of jurisdiction on the ground that an immunity order is not a final, appealable order. On remand of their appeal, the Ryans persisted in their refusal to answer the interrogatories, asserting for the first time a marital privilege.

On remand, the Tax Court held the Ryans in contempt for refusal to obey an earlier order to answer the interrogatories, and imposed a fine on the husband. The court reasoned that the Ryans had not established a reasonable apprehension that they would be prosecuted because the proceeding itself was civil, and the statute of limitations had run for the years involved. The Tax Court also rejected the Ryans' claim of marital privilege on the ground that the privilege against adverse spousal testimony is applicable only in criminal proceedings.

The Court of Appeals for the Seventh Circuit rejected the Ryans' argument that the fact that the interrogatories may have been produced by illegal government activities thereby excused the Ryans from answering. Judge Marshall[63] found that the proceeding sought to utilize discovery procedures similar to the Federal Rules of Civil Procedure, which maintain that any matter relevant to the subject matter of the pending case may be the subject of discovery unless it is privileged. Illegal government conduct, according to Judge Marshall, does not fall within either of the two recognized limitations to the scope of discovery

63. Judge Marshall was sitting by designation.

recognized in the rules—privilege and irrelevance.[64]

Furthermore, Tax Court Rule 70(d) provides that no information obtained through discovery shall be considered as evidence until offered and received as evidence. Therefore, answers to the interrogatories could not be used against the Ryans unless they were independently determined to be admissible. The Ryans' motion to suppress could well take the answers out of the scope of admissibility; thus, their objection was at best premature.[65]

The Ryans' fifth amendment argument was rejected on the ground that the grant of immunity by the District Court for the District of Columbia was valid and coextensive with the scope of privilege, and thereby obviated any question. In rejecting the Ryans' claim of marital privilege, Judge Marshall found Rule 504 of the Federal Rules of Evidence[66] controlling.[67] The determination of the existence of the privilege is essentially a case-by-case analysis, balancing the need for truth against the importance of the relationship or policies encouraged by the privilege. The Ryans argued that in their case, the privilege was necessary to avoid forcing one spouse to condemn the other's testimony. As this argument stems from the fear that forcing one spouse to speak against the other would be likely to destroy the marriage, the argument was of little force here, since the Ryans had been married for about forty years and did not even contend that the privilege was necessary to protect their marriage.[68] The court, relying on *United States v. Van Drunnen*,[69] found that the marital privilege should be limited to instances in which the spouse who is neither a victim nor a participant observes evidence of the other spouse's crime.

STATUTORY PRESUMPTIONS

Hughes v. Mathews,[70] an appeal from the grant of a writ of habeas corpus to a state prisoner in Wisconsin, tested the constitutionality of

64. 568 F.2d at 538.

65. *Id.*

66. FED. R. EVID. 504 (1975).

67. 568 F.2d at 543 (citing [1974] U.S. CODE CONG. & AD. NEWS at 7059).

68. *See* United States v. Doughty, 460 F.2d 1360 (7th Cir. 1972), in which the Seventh Circuit refused to extend the marital privilege against adverse spousal testimony when it was unlikely that the privilege was necessary to further its underlying rationale.

69. 501 F.2d 1393, 1396 (7th Cir. 1974). While the *Van Drunnen* court recognized that the underlying reason for the marital privilege against adverse spousal testimony is to preserve the family, it was unable to find that the public interest in family preservation was strong enough to justify assuring a criminal that he can enlist the aid of his spouse in a criminal enterprise without fear that by recruiting an accomplice or co-conspirator he is creating another potential witness. Accordingly, the court concluded that the privilege should be applied only to those cases where the spouse was not a victim or participant.

70. 576 F.2d 1250 (7th Cir. 1978).

Wisconsin criminal procedure and the Wisconsin statute relating to first and second degree murder.[71] Wisconsin had adopted that section of the American Law Institute Model Penal Code dealing with the insanity defense, which states that "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law."[72] However, the Wisconsin legislature refused to pass the corollary section of the Model Penal Code[73] which allowed introduction of evidence regarding mental disability whenever such evidence was relevant to the state of mind of the defense. After the legislative enactment, the Wisconsin Supreme Court, in *Hughes*, refused to admit psychiatric testimony on the issue of intent during the guilt portion of the bifurcated trial.[74] The Seventh Circuit struck down Wisconsin's version of the Model Penal Code on the ground that the statute, in conjunction with decisional law, would presume intent where such an inference could not be rebutted by psychiatric evidence that the defendant lacked specific intent.

The Seventh Circuit cited *Morrissette v. United States*[75] for the proposition that "a conclusive presumption which relieves the state of its duty to prove all elements of the crime beyond a reasonable doubt is, therefore, unconstitutional."[76] The court concluded that, in Wisconsin, psychiatric testimony is relevant evidence on issues regarding a defendant's mental state, including the question of whether the defendant had the capacity to form specific, as opposed to general, intent—the difference, in Wisconsin, between first and second degree murder.[77]

DOCUMENTARY EVIDENCE

United States v. Rose[78] was a frivolous attack on the authenticity of an apparent official record of the defendant's previous conviction. Rose was convicted of unlawful receipt from a convicted felon of a firearm which had moved in interstate commerce. He apparently

71. WIS. STAT. §§ 940.01, .02 (1975).
72. WIS. STAT. § 971.15(1) (1975).
73. MODEL PENAL CODE § 4.02 (Official draft, 1962).
74. A bifurcated trial is mandated by Wisconsin criminal procedure for defendants who plead both not guilty and not guilty by reason of mental disease or defect.
75. 342 U.S. 246 (1952).
76. 576 F.2d at 1254. The defendant in that case, who had broken into his former wife's house and killed his former father-in-law, attempted to introduce testimony at trial that he was a psychopath and that his abnormal condition prevented him from forming the specific intent to kill.
77. *Id.* at 1257.
78. 562 F.2d 409 (7th Cir. 1977).

sought to raise a "genuine claim of authenticity" under Rule 1003 of the Federal Rules of Evidence[79] by asserting that the court improperly admitted his "booking record" from the Orange County, California sheriff's office. The record set out the defendant's fingerprints and recited the state felony charge of which Rose previously had been convicted.[80]

The evidentiary infirmity, according to Rose, was that the photocopy of the original booking slip, substituted for the original at trial, was inadequately identified. The original custodian's successor qualified the document and testified, evidently from hearsay knowledge, that the procedures currently used to prepare booking records were those used by his predecessor.[81] The court's analysis assumed that the booking record was merely a business record admissible under Rule 803(6),[82] rather than an official document controlled by the provisions of Rule 1005.[83] The court reaffirmed its earlier decision in *Peter Ekrich & Sons, Inc. v. Selected Meat Co.*[84] where the court held that "the person who makes the record need not testify."[85] The court noted that Rule 803(6) merely refers to the " 'custodian or other qualified witness,' without any suggestion that the foundation for introduction of a record must be laid by its maker."[86] If the Government had laid a clear foun-

79. FED. R. EVID. 1003 (1975).

80. 562 F.2d at 410.

81. The Government apparently qualified the document pursuant to Rule 901(b)(7) by having the custodian of the document testify to the source of the copy and to the methods used to create it. Rule 901(b)(7) provides:

> Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement or data compilation, in any form, is from the public office where items of this nature are kept.

82. FED. R. EVID. 803(b) (1975) provides:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

83. FED. R. EVID. 1005 (1975) provides:

> The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

"Official record" is construed broadly. In Yaitch v. United States, 283 F.2d 613, 616-17 (9th Cir. 1960), a Selective Service interdepartmental memorandum, part of defendant's file, was held to be an official record.

84. 512 F.2d 1158 (7th Cir. 1975).

85. *Id.* at 1159.

86. *Id.*

dation that the booking record was in fact an official document, the custodian-witness need only have testified that he compared the copy with the original in the sheriff's office and that the copy was correct.[87]

CONCLUSION

The Seventh Circuit's evidentiary decisions during the past year emphasize the trend toward admissibility furthered—if not fostered—by the adoption of the Federal Rules of Evidence. The policy favoring admissibility triumphs in cases involving "other act" evidence where the evidence admitted is obviously prejudicial. This trend, halted momentarily by the decision in *Shapiro*,[88] could profitably be slowed by a requirement that the "other acts" be closely related in kind and time to the acts in issue.

87. FED. R. EVID. 1005. *See* United States v. Rodriguez, 524 F.2d 485 (5th Cir. 1975), *cert. denied*, 424 U.S. 972 (1976), where an agent testified that he made a photostatic copy of the vehicle certificate of title. Although he was not asked directly whether it was a "correct" copy, even the failure to testify to the contrary met the requirements of Rule 1005. *Id.* at 487-88.

88. *See* text accompanying notes 39-46 *supra*.