

June 1984

Evidence: The 1982-83 Term - Towards a More Progressive and Flexible Approach to the Federal Rules of Evidence

Jeffrey Cole

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>



Part of the [Law Commons](#)

Recommended Citation

Jeffrey Cole, *Evidence: The 1982-83 Term - Towards a More Progressive and Flexible Approach to the Federal Rules of Evidence*, 60 Chi.-Kent L. Rev. 587 (1984).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol60/iss3/6>

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact jwenger@kentlaw.iit.edu, ebarney@kentlaw.iit.edu.

EVIDENCE: THE 1982-83 TERM—TOWARDS A MORE PROGRESSIVE AND FLEXIBLE APPROACH TO THE FEDERAL RULES OF EVIDENCE

JEFFREY COLE*

I. INTRODUCTION

In reviewing the Seventh Circuit's decisions on evidentiary questions during the 1982-83 Term, two dominant themes emerge. The first is the court's repeated insistence, in deed as well as word, that great deference must be accorded exercises of the extraordinarily broad discretion possessed by district courts in supervising the conduct of trials.¹ The court has emphasized that while this discretion is not without limits, there is substantial room for the exercise of judgment and diversity of opinion. The question is not whether a reviewing court would have come to the same conclusion had it been the trial judge; it is whether the decision of the district court is outside the boundaries of reasonableness, ineffable though those boundaries may seem to be.²

The second theme is the court's refusal to treat the rules of evidence "as a mere collection of wooden rules in a game,"³ or to view the

* B.S. 1965; J.D. 1968. Mr. Cole is in the private practice of law in Chicago and is an Adjunct Professor of Law at IIT Chicago-Kent College of Law where he teaches a course in Trial Advocacy. He previously served as Chief of the Appellate Division and Assistant Chief of the Criminal Division in the Office of the United States Attorney for the Northern District of Illinois. He has lectured on various litigation topics and is the author of: *Evidence: Developments In Character Evidence, Cross Examination Rules, and Prior Consistent Statements*, 56 CHI.-KENT L. REV. 279 (1980); *MAKING THE DECISION TO SUE*, (Chamber of Commerce of the United States 1979); *The Exclusionary Rule in Probation and Parole Revocation: Some Observations on Deterrence and the 'Imperative of Judicial Integrity'*, 52 CHI.-KENT L. REV. 21 (1975); *Defense Counsel and the First Amendment: 'A Time to Keep Silence and a Time to Speak'*, 6 ST. MARY'S L. J. 347 (1974); *Impeachment With Unconstitutionally Obtained Evidence: Coming to Grips with the Perjurious Defendant*, 62 NW. J. OF CR. L. AND CRIM. 1 (1971); *Impeaching With Unconstitutionally Obtained Evidence: Some Reflections on the Palatable Fruit of the Poisonous Tree*, 18 DEPAUL L. REV. 25 (1968); *Comment, Additur—Procedural Boon or Constitutional Calamity*, 17 DE PAUL L. REV. 175 (1967); *Note, Vicarious Liability—Abrogation of The Both Ways Rule*, 16 DEPAUL L. REV. 478 (1967).

1. *See, e.g.*, *United States v. Serlin*, 707 F.2d 953, 957 (7th Cir. 1983); *United States v. Hamann*, 688 F.2d 507, 512 (7th Cir. 1982); *United States v. Bouye*, 688 F.2d 471, 476 (7th Cir. 1982); *United States v. Bruscano*, 687 F.2d 938, 941 (7th Cir. 1982) (en banc), *cert. denied*, 103 S. Ct. 1235 (1983). *See also* *United States v. Baskes*, 649 F.2d 471, 481 (7th Cir. 1980), *cert. denied*, 450 U.S. 1000 (1981).

2. *See* *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 857-58 (1982); *United States v. Bouye*, 688 F.2d 471, 476 (7th Cir. 1982). *Cf.*, *NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 236 (1947).

3. *United States v. Mitchell*, 322 U.S. 65, 66 (1944).

trial process as a sporting event in which the most adroit player prevails. In varying contexts, the Seventh Circuit has stressed that in overseeing trials, the district courts are not engaged in some arid scholastic exercise, but in the very real and serious business of seeking to fairly resolve disputes between anxious and contentious litigants. Thus, time and again, the court has rejected inflexible constructions of the Rules of Evidence as inconsistent with the mandate of Rule 102 that the rules "shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."

In what follows, I shall discuss those cases which are likely to have an impact on future decisions or which present issues that recur with some frequency in cases tried in the district courts. Since "[c]rowded dockets make it impossible for judges, however able, to probe every case to its foundations",⁴ some of the court's opinions are not as comprehensive as one might wish. Others, surprisingly few in number given the court's substantial output, seem wrongly decided. In the main, however, the opinions are basically solid, marked more by good sense and sound instincts than by what Judge Friendly has called "the overarduous performance of bead-games, for the applause of the law reviews."⁵

II. ADMISSIBILITY OF EVIDENCE OF OTHER CRIMES, WRONGS OR ACTS UNDER RULES 403 AND 404

A.

In June, 1896, the wealthy and notorious Baroness de Valley was found strangled in her apartment in Paris. In due course, Messrs. Kiesgen, Ferrand, Lagueny and Truel were called to the dock to stand trial for the grisly murder. In addition to proof of their actual commission of the crime, extensive evidence was presented to the jury reflecting on literally every facet of the character of the accuseds. Thus the jury was informed that one of the defendants was an habitué of the saloons and women of the Latin Quarter. Another was, as a young man, a member of a gang of bicycle thieves and later, an agent for houses of ill fame. A third, as the jury was told, was the son of an unfortunate woman who seemed to have done some "questionable errands" for the victim and had died insane two years before the trial. A fourth lived as a street

4. B. CARDOZO, *THE GROWTH OF THE LAW* 5 (1924).

5. H.J. FRIENDLY, *On Entering The Path Of The Law*, in *BENCHMARKS* 31 (1960).

peddler, hawking dogs or newspapers and sleeping in public refuges. In the fullness of time, he became quite adept at arranging assignations for young girls. Not surprisingly, the jury convicted all of the defendants.⁶

On the Continent, this class of evidence “is given great consideration, and is freely used.”⁷ Its “indubitable relevancy”⁸ is based on “the teaching of human experience”⁹ that a “bad” man is more likely to commit crimes than a “good” one. While it is clear that this class of evidence was also resorted to without limitation in early English practice,¹⁰ for nearly three centuries, a very different rule has prevailed in Britain.

Between 1670 and 1680, the courts of England came to realize the dangers posed by the indiscriminate use of character evidence. Out of that new awareness was born a principle of the law of evidence now deemed fundamental: the prosecution cannot, in its case-in-chief, introduce evidence of a defendant’s evil or unsavory character to demonstrate that he acted in conformity with that character.

This policy of exclusion, which obtained in America from the very beginning of the Republic, has received unquestioned judicial sanction, “more emphatic with time and experience. It represents a revolution in the theory of criminal trials, and is one of the peculiar features, of vast moment, which distinguishes the Anglo-American from the Continental system of Evidence.”¹¹

The principle of exclusion is not one of logic, but of deeply felt intuitions of policy. “The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.”¹²

6. 1 J. WIGMORE, EVIDENCE, § 193 at 644-45 (3d ed. 1940).

7. *Id.* at 646. *Accord* *Michelson v. United States*, 335 U.S. 469, 480 n.17 (1948).

8. 1 WIGMORE, *supra* note 6, §193 at 646.

9. *Id.* at 644 *quoting* *State v. Lapage*, 57 N.H. 275, 299 (1876).

10. *Id.* at 646.

11. *Id.*, §194 at 647.

12. *Michelson v. United States*, 335 U.S. 469, 476 (1948). No less eminent authorities than Dean Wigmore and Mr. Justice Cardozo have said that “[t]he natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying condemnation, irrespective of the accused’s guilt of the present charge.” 1 WIGMORE, *supra* note 6, §193 at 646; *People v. Zackowitz*, 254 N.Y. 192, 198, 172 N.E. 466, 468 (1930). See also 2 J. WEINSTEIN, M. BURGER, WEINSTEIN’S EVIDENCE ¶ 404[04] at 404-26 (1982).

The rule prohibiting evidence of character to prove propensity is a conspicuous illustration of one of Mr. Justice Holmes’ most famous insights:

This policy of exclusion has never been without exceptions. It has long been recognized that if, entirely apart from the matter of propensity, the evidence has independent relevance, such as tending to prove, *inter alia*, motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident, it *may* be admissible.¹³ It must then be determined by the court that the evidence's probative significance is not 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.¹⁴

These common law principles have been codified in Rules 404 and 403 of the Federal Rules of Evidence.¹⁵ In numerous opinions, the Seventh Circuit has articulated criteria which must be satisfied for evi-

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. O.W. HOLMES, *THE COMMON LAW* 5 (Howe Ed. 1963).

13. *See* Nye & Nissen v. United States, 336 U.S. 613, 618 (1949); United States v. Michelson, 335 U.S. 469, 475 n.8 (1948); Moore v. United States, 150 U.S. 57, 61 (1893); 2 WEINSTEIN'S EVIDENCE, *supra* note 12, ¶ 404[18] at 404-99. The use of character evidence arises in two significantly different ways. First, character itself may be an element of a crime, claim or defense, and thus under the pleadings is a material operative fact which must be proved if the party is to prevail under the substantive law. Under these circumstances, character is in issue, and character evidence does not fall within the general prohibition. In this situation, the evidence is not being offered to prove that the person acted in conformity with his character on a particular occasion, but rather is introduced because character is an operative element of a claim or defense. *See* 2 WEINSTEIN'S EVIDENCE, *supra* note 12, ¶ 404[02] at 404-16.

The second way in which character evidence may be used is circumstantially to suggest that the person acted on the occasion in question consistent with his character. As the text above explains, the circumstantial use of evidence by the government in its case-in-chief to prove probability of guilt is rejected both by the common law and Rule 404 of the Federal Rules of Evidence. To the general prohibition against this use of character evidence are several important exceptions. It is the use of character evidence to prove intent, motive and so on that is pertinent to the present discussion.

14. *See, e.g.*, United States v. Ostrowsky, 501 F.2d 318, 321 (7th Cir. 1974); United States v. Hines, 470 F.2d 225, 228 (3d Cir. 1972), *cert. denied*, 410 U.S. 968 (1973).

15. Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally.—Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(b) Other crimes, wrongs, or acts.—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.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

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.

dence of other crimes, wrongs, or acts to be admissible under Rule 404(b). While the cases vacillate somewhat on at least one of the criteria, they do enunciate certain basic tests: evidence of the other crime must be similar and close in time to the offense charged in the indictment;¹⁶ it must be clear and convincing;¹⁷ it must be related to an issue¹⁸ which is disputed by the defendant;¹⁹ and the probative value must not be outweighed by the danger of unfair prejudice.²⁰

16. The cases are not harmonious. *See* United States v. Dothard, 666 F.2d 498, 504 (11th Cir. 1982) (4 years too remote); United States v. Jimenez, 613 F.2d 1373, 1376 (5th Cir. 1980) (1 year too remote); United States v. Berkwitz, 619 F.2d 649, 655 (7th Cir. 1980) (5 years not too remote); United States v. McGovern, 82 CR 387 (N.D. Ill.) (McMillen, J.) (9 years not too remote).

17. *See* United States v. Moschiano, 695 F.2d 236, 245 n.14 (7th Cir. 1982), *cert. denied*, 104 S. Ct. 110 (1983); United States v. Dolliole, 597 F.2d 102, 106-07 (7th Cir.), *cert. denied*, 442 U.S. 946 (1979); United States v. Feinberg, 535 F.2d 1004, 1009 (7th Cir.), *cert. denied*, 429 U.S. 929 (1976). *Contra* United States v. Beechum, 582 F.2d 898, 910 (5th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 920 (1979); United States v. Leonard, 524 F.2d 1076, 1090, 1091 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976). *See also* 2 WEINSTEIN'S EVIDENCE, *supra* note 12, ¶ 404[10] at 404-56. This test is satisfied by direct testimony of a witness with firsthand knowledge. *See* United States v. Moschiano, 695 F.2d at 245 n.14; United States v. O'Brien, 618 F.2d 1234, 1239 (7th Cir.), *cert. denied*, 449 U.S. 858 (1980). Whether anything less will suffice is an open question in this Circuit. *Compare* United States v. Maestas, 554 F.2d 834, 838 (8th Cir.), *cert. denied*, 431 U.S. 972 (1977) (circumstantial evidence sufficient).

18. Some opinions have said that the other acts must have "substantial relevance" to an issue other than general criminal character. *See* United States v. Verkuilen, 690 F.2d 648, 656 (7th Cir. 1982) (emphasis added). The difference between relevance and substantial relevance, if any, has yet to be explained.

19. United States v. Feinberg, 535 F.2d 1004, 1009 (7th Cir.), *cert. denied*, 429 U.S. 929 (1976). It is in relation to this requirement that the decisions are least consistent. In United States v. Price, 617 F.2d 455 (7th Cir. 1979), the defendant argued that since he denied receiving any payoffs, the issue of intent was undisputed, and it was error to have admitted evidence of other payoffs. While the court pointed out that the issue had been raised by portions of the defense's opening statement and cross-examination, its holding was clear: since the government was required to prove intent, other crime evidence was admissible even if the defense did not treat it as a real issue. *Id.* at 459-60. In United States v. Miroff, 606 F.2d 777, 780 (7th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980); United States v. Grzywacz, 603 F.2d 682 (7th Cir. 1979), *cert. denied*, 446 U.S. 935 (1980); United States v. Weidman, 572 F.2d 1199 (7th Cir.), *cert. denied*, 439 U.S. 821 (1978); and United States v. Zeidman, 540 F.2d 314 (7th Cir. 1976) other crime evidence was allowed even though the defendant had not put the issue of intent in question. *Cf.* United States v. DeJohn, 638 F.2d 1048, 1052 n.4 (7th Cir. 1981). In United States v. Berkwitz, 619 F.2d 649, 654, 655 (7th Cir. 1980), the *Feinberg* formula was repeated, although the issue of intent was disputed in the defendant's opening statement. *See generally*, 2 WEINSTEIN'S EVIDENCE, *supra* note 12, at ¶ 404[09]. *Price* and *Berkwitz* demonstrate that where the opening statement or the cross-examination raises questions about intent, the matter is then in dispute. *See also* United States v. Green, 643 F.2d 587, 595 (9th Cir. 1981); United States v. Hall, 653 F.2d 1002 (5th Cir. 1981).

20. *See* United States v. Moschiano, 695 F.2d 236, 243 (7th Cir. 1982), *cert. denied*, 104 S. Ct. 110 (1983); United States v. Dolliole, 597 F.2d 102, 106 (7th Cir.), *cert. denied*, 442 U.S. 946 (1979); United States v. Fairchild, 526 F.2d 185 (7th Cir. 1975), *cert. denied*, 425 U.S. 942 (1976). This balancing test is a function not of Rule 404(b), but of Rule 403. From time to time, the Seventh Circuit has suggested that use of the other crime evidence is not admissible unless it is "necessary". *See, e.g.*, United States v. DeJohn, 638 F.2d 1048, 1052 n.4 (7th Cir. 1981); United States v. Dolliole, 597 F.2d at 106. This is not a "test" easily administered. *See* 2 WEINSTEIN'S EVIDENCE, *supra* note 12, ¶¶ 404[09], 404[18]. *See generally* Symposium: *Rule 404(b) Other Crime*

Despite more than a century of judicial discussion and consideration, no part of the law of evidence is more consistently litigated than that having to do with the admissibility of evidence of other crimes, wrongs, or acts.²¹ In the 1982-83 Term, several cases came before the court presenting controversies under Rules 403 and 404. The appellants in these cases were not sympathetically received by the court. In most instances, the issues were uncomplicated and the court's affirmance predictable.²²

Other cases, however, presented substantial and important questions. Of these, the most significant was *United States v. Moschiano*.²³ There, the defendant admitted his involvement in certain heroin transactions, but claimed he was entrapped. To rebut this defense, the government sought to prove the defendant's predisposition, i.e., his prior willingness to commit the crimes with which he was charged. This it did through the testimony of an undercover DEA agent, who described how one month *after* the return of the indictment, Moschiano illicitly offered to purchase \$50,000 worth of Preludin tablets for resale to truck drivers. The jury rejected the claim of entrapment and convicted Moschiano and his co-defendants.

On appeal, the argument was advanced that evidence of crimes *subsequent* to those charged in an indictment is irrelevant to prove predisposition and is inadmissible, *per se*, under Rule 404(b).²⁴ In rejecting this argument, the court began with the "well established" principle that evidence of a defendant's criminal acts *prior* to those charged in the indictment to rebut an entrapment defense by proving predisposition is admissible under Rule 404(b).²⁵

Evidence: The Need For A Two-Step Analysis, 71 NW. U.L. REV. 635 (1977); Annot., *Admissibility, Under Rule 404(b) of the Federal Rules of Evidence, Of Evidence Of Other Crimes, Wrongs, Or Acts Similar To Offense Charged To Show Preparation Or Plan*, 47 A.L.R. FED. 781 (1980); Annot., *Admissibility, Under Rule 404(b) of Federal Rules of Evidence, Of Evidence of Other Crimes, Wrongs, Or Acts not Similar To Offense Charged*, 41 A.L.R. FED. 497 (1979); Annot., *Admissibility In Federal Criminal Conspiracy Prosecution of Evidence of Defendant's Similar Prior Criminal Act*, 20 A.L.R. FED. 125 (1974).

21. See Crowley, *Modernizing and Liberalizing the Law Of Evidence*, 57 CHI. KENT L. REV. 191 (1981). There continues to be criticism of the basic rule itself. See Uviller, *Evidence of Character To Prove Conduct: Illusion, Illogic, and Injustice In the Courtroom*, 130 U. PA. L. REV. 845 (1982).

22. See, e.g., *United States v. Hamann*, 688 F.2d 507, 513 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 1255 (1983) (Rule 403 not violated by using letters from defendant's prison file as basis for handwriting comparison); *United States v. Green*, 680 F.2d 520, 523 (7th Cir.), *cert. denied*, 103 S. Ct. 1255 (1983) (Rule 403 not violated by hearsay statement of victim of murder, "that little nigger is still bothering me", offered to prove victim's mental state).

23. 695 F.2d 236 (7th Cir. 1982), *cert. denied*, 104 S. Ct. 110 (1983).

24. *Id.* at 243-44.

25. *Id.* at 243. While perhaps correct, the applicability of Rule 404 in entrapment cases is not quite as "well established" as the court suggested. Prior to the Federal Rules, other crime evi-

While conceding, perhaps unnecessarily, that subsequent criminal acts are less probative on the issue of predisposition than prior ones, the court emphatically declared—although it did not pause to prove—that the commission of similar crimes *following* the indicted offense does have a tendency to make it more probable that the defendant was predisposed to commit the offense charged. Consequently, the court refused to adopt a *per se* rule of inadmissibility.²⁶ As a matter both of principle and precedent, the court's conclusion is eminently sound.

The springs of conduct are, as the Supreme Court has observed, subtle and varied;²⁷ “[h]uman nature, like human life, has complexities and diversities too many and too intricate to be compressed within a formula.”²⁸ In dealing with questions of predisposition, juries are required to make judgments involving the “complexities and diversities” of human behavior and motivation in all their myriad aspects. Thus, whether a particular person is predisposed to commit a particular crime at a particular moment in time plainly cannot be determined in the abstract by resort to any general, fixed rule.²⁹

That there are hazards in any attempt to prove the state of a per-

dence was always admissible in entrapment cases, subject of course to the court's discretionary control. *See* Annot., 61 A.L.R. 3d 293 (1975). Following the adoption of the Rules, however, little consideration was given to their applicability in cases involving entrapment. The Seventh Circuit appears to be one of the few courts of appeals to have concluded that Rule 404 governs admissibility of other crime evidence in such cases. While courts today routinely admit 404(b) type evidence in entrapment cases, they do so, as Judge Weinstein has noted, without analysis of how this evidence fits into the framework of the Federal Rules of Evidence:

The Advisory Committee Note is silent on whether it viewed entrapment as a defense in which one of the elements is the predisposition of the accused, thereby making the accused's character an issue in the case. The courts, since the enactment of the Federal Rules, have continued to admit evidence of the defendant's character when entrapment is raised, as they did under previous law, for the most part without analyzing how this use of character evidence fits in under Rule 404. *See* discussion at ¶ 404[04], *infra*. It has been suggested that “the best method of reconciling the entrapment rule with Rule 404 is to consider it a rule of substantive law beyond the reach of the Evidence Rules.

2 WEINSTEIN'S EVIDENCE, *supra* note 12, ¶ 404[03] at 404-20.

While *Moschiano* does not explain the basis for its conclusions, the court's opinion in *United States v. Murzyn*, 631 F.2d 525 (7th Cir. 1980), *cert. denied*, 450 U.S. 923 (1981), on which it relied, does contain a comprehensive and careful analysis of the intertwining of Rules 403, 404 and 405 and the use of other crime evidence in entrapment cases. *Murzyn* also teaches that the extent to which such evidence may be used is a function of the extent and nature of the testimony it is designed to rebut. *Compare* *Michelson v. United States*, 335 U.S. 469, 484 (1948) (“The cross-examination [of a defendant's character witnesses] may take in as much ground as the testimony it is designed to verify.”).

26. 695 F.2d at 244.

27. *Harrison v. United States*, 392 U.S. 219 (1968).

28. B. CARDOZO, *LAW AND LITERATURE* 92 (1931). *See also* *Mirizio v. Mirizio*, 248 N.Y. 175, 175 (1928) (Cardozo, J.) (“We have refused to compress within a formula the extenuating possibilities of behavior in all its myriad diversities.”).

29. Especially inadequate is a formula which is bottomed solely on a chronological relationship between two events (i.e., whether the “other” crime was committed before or after the offense charged).

son's mind at a given moment in time is quite true. However, save at too great a cost, we cannot avoid these risks by resort to a rigid rule of exclusion which is contradicted by human experience, "of all teachers the most dependable."³⁰ "[T]he undoubtedly grave problem of providing adequate safeguards against convictions of the innocent must be solved in some way other than that of refusing to allow reasonable inferences to be made."³¹

Every day, in courts across the Nation, juries "pass upon knowledge, belief, and intent—the state of men's minds—having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred."³² Thus, the question is not whether the "other crime" occurred before rather than after that with which the defendant has been charged. The inquiry is whether, as a matter of ordinary human experience, predisposition can reasonably be said to be evidenced by subsequent criminal acts. The command that "[r]ealities must dominate judgment"³³ is perhaps more urgent here than in other areas of the law.

Common experience leads irresistibly to the firm conclusion that following the termination of a government-created crime,³⁴ the truly entrapped defendant—that is, one who lacked the predisposition to commit the crime—generally will not engage in additional criminal activities. Consequently, evidence of criminal activity subsequent to the alleged entrapment does have, at the very least, some tendency to demonstrate predisposition.³⁵

30. *Funk v. United States*, 290 U.S. 371, 381 (1933).

31. *United States v. Allen*, 159 F.2d 594, 598 (2d Cir. 1946) (Frank, J.), *cert. denied*, 330 U.S. 838 (1947). *See also* *United States v. Davis*, 437 F.2d 928, 933 (7th Cir. 1971) (Stevens, J.) ("The importance of minimizing . . . prejudice does not outweigh the necessity for preserving otherwise fair and accepted procedures."); *United States v. Franzese*, 392 F.2d 954, 960 (2d Cir. 1968) (Friendly, J.), *vacated on other grounds*, 394 U.S. 310 (1969)("[w]hile rehabilitation of this sort [*i.e.*, reference to witnesses' fear of defendants] may well have a spill-over effect, the process is essential to development of the truth and reliance must be placed on trial judges to prevent unfair tactics by the prosecution.").

32. *American Communications Association v. Douds*, 339 U.S. 382, 411 (1950). *See also* *Michelson v. United States*, 335 U.S. 469, 487 (Frankfurter, J., concurring) ("I believe it to be unprofitable, on balance, for appellate courts to formulate rigid rules for the exclusion of evidence in courts of law that outside them would not be regarded as clearly irrelevant in the determination of issues.").

33. *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 360 (1933). *See also* *Di Santo v. Pennsylvania*, 273 U.S. 34, 43 (1927) ("[T]he logic of words should yield to the logic of realities.").

34. By definition, the defense of entrapment rests on the notion that the government is the architect of the crime. *See* *United States v. Russell*, 411 U.S. 423 (1973); *United States v. Burkley*, 591 F.2d 903, 910-11 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 966 (1979).

35. As such, the evidence is relevant. Rule 401 of the Federal Rules of Evidence defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Under the Federal Rules of Evidence, the threshold for admissibility is

The argument can, of course, be made that subsequent criminal activity may be the product of a capacity or predisposition for crime first awakened by the government's entrapment, and that as a consequence, subsequent criminal activity does not necessarily prove prior predisposition. In some cases, this argument may be true. In others, it will not be. Yet, it is this uncertainty of human behavior which makes inappropriate a rigid rule of inadmissibility—a rule which, by depriving the jury in appropriate cases of relevant evidence, would skew the fact finding process.

The argument for a *per se* rule of exclusion is, as *Moschiano* held, lacking in judicial support. In a very long line of cases, the federal courts and those of the several states have held repeatedly that post-offense conduct is admissible on the issues of intent and motive as well as on the question of predisposition.³⁶ This is not to suggest that evidence of post-offense criminality, regardless of its nature, should always be admissible. Arguments which favor universal admissibility are as dangerous and analytically unsound as those which favor universal inadmissibility.

For the court in *Moschiano*, the principle of compromise between these polar positions is to be found in Rules 403 and 404. Thus, evidence of subsequent acts is admissible if it meets the tests for the admissibility of other crime evidence discussed earlier, and its "probative value is [not] *substantially* outweighed by the danger of *unfair* prejudice."³⁷ Finding those tests satisfied, the court of appeals affirmed the convictions in *Moschiano*.³⁸

The question of the admissibility of subsequent acts was also addressed in *United States v. Serlin*,³⁹ which involved a conviction for

quite low. *United States v. Murzyn*, 631 F.2d 525, 529 (7th Cir. 1980), *cert. denied*, 450 U.S. 923 (1981).

36. *See, e.g.*, *United States v. Jones*, 486 F.2d 1081, 1084 (5th Cir. 1973); *United States v. Pfingst*, 477 F.2d 177, 194 (2d Cir.), *cert. denied*, 412 U.S. 941 (1973); *United States v. Nathan*, 476 F.2d 456, 459-60 (2d Cir. 1973); *United States v. Gaus*, 471 F.2d 495, 501 (7th Cir.), *cert. denied*, 412 U.S. 938 (1973); *United States v. O'Connor*, 433 F.2d 752, 754-55 (1st Cir. 1970), *cert. denied*, 401 U.S. 911 (1971); *United States v. Marine*, 413 F.2d 214 (7th Cir. 1969), *cert. denied*, 396 U.S. 1001 (1970). *Cf.* *United States v. Compton*, 355 F.2d 872, 874 (6th Cir. 1966). *See also* Annot., 92 A.L.R. 3d 545 (1979).

37. Fed. R. Evid. 403 (emphasis added).

38. 695 F.2d at 245. The court rejected the claim that since one crime involved prelude, while the other involved heroin, the crimes were dissimilar. The court noted that both transactions reflected the defendant's involvement in large scale distribution of narcotics. It is the type of activity involved not the nature of the drug that was pivotal. The court also summarily dismissed the arguments that: (i) the 3 months between the crime charged and the subsequent crime stripped the latter of any evidentiary value; and (ii) that the government's need for the subsequent act evidence was so slight as to warrant its exclusion. 695 F.2d at 245.

39. 707 F.2d 953 (7th Cir. 1983).

failure to file income tax returns. At trial, the district court allowed the government to introduce evidence that the defendant had also failed to file a tax return in 1978, the year *following* those which were the subject of the indictment.

In affirming the conviction, the court reiterated the familiar principle that proof of other wrongs or crimes, while not admissible to show that the defendant is a "congenital evildoer and therefore guilty of the crime charged," is admissible pursuant to Rule 404(b) to show motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.⁴⁰ The court held that the defendant's failure to have filed his 1978 return was "indicative of a conscious plan to evade taxes and hence proves that the earlier failures were also the product of a willful design."⁴¹

The panel found that Rule 403 had not been violated by the other crimes evidence and that the probative value was not outweighed by the danger of unfair prejudice. The court then turned to the "novel claim" that the evidence of willfulness was so overwhelming that admission of the defendant's 1978 non-filing amounted to prosecutorial overkill which was violative of the due process clause.⁴²

While conceding that the "availability of other evidence of a defendant's guilt *may* be relevant under Rule 403 in determining whether to admit *questionable* evidence,"⁴³ the court emphatically rejected any notion that the due process clause delimited or defined the quantum of otherwise admissible evidence the prosecution could introduce in a criminal case. "Evidence of guilt, while it undoubtedly works to the detriment of the accused, is not *unfairly* prejudicial."⁴⁴

B.

Rule 404(a)(1) is an exception to the general prohibition against the circumstantial use of character evidence to prove probability of guilt. The rule allows a defendant to offer evidence of his good character⁴⁵ to demonstrate that it was unlikely that the defendant committed the crime charged.⁴⁶ Once the defendant has introduced evidence of

40. 707 F.2d at 959.

41. *Id.* at 959.

42. *Id.* at 959-60. The court expressed some difficulty in understanding this argument.

43. *Id.* at 959 (emphasis added).

44. *Id.* at 960 (emphasis added).

45. FED. R. EVID. 405, which prescribes the allowable methods for proof of character, envisions the use of reputation or opinion evidence.

46. *See* *Michelson v. United States*, 335 U.S. 469, 476 (1948).

good character, the government may introduce contradictory character evidence.

Interesting questions under Rule 404(a)(1) were before the court during the 1982-83 Term in *United States v. Gaertner*.⁴⁷ There, the defendant admitted that he had cocaine in his automobile, but denied that he intended to deliver it to Brian Maas, a government agent. It was the defendant's contention that he was holding the cocaine as collateral for a loan he had made to one Haman, a government informant. The district court ruled, *in limine*, that the defendant's two prior convictions for possession of marijuana would not be admissible for impeachment if he chose to testify since, in his view, the danger of unfair prejudice outweighed the probative significance.

Having obtained this favorable ruling, the defendant testified in his case-in-chief about his alleged loan transaction with Haman. He claimed that he had told Haman if the loan was not repaid in 24 hours, he would flush the drugs down the toilet since he was not "into the cocaine thing, *the . . . drug thing*." He returned to and amplified on this theme when he later testified that he "certainly didn't need to be in a situation where [he] was related to *any* drug transactions no matter how off-handed or left handed it was and [he] didn't need the exposure. *I . . . wasn't into that*."⁴⁸

At the close of the direct examination, the court concluded that the effect of the defendant's sweeping testimony was to put in issue his character for "clean-living".⁴⁹ Accordingly, the district court reversed itself and permitted cross-examination regarding the prior marijuana convictions pursuant to Rule 404(a)(1).⁵⁰ A conviction followed.

On appeal, the defendant contended that the cross-examination was impermissible under Rule 404(a)(1) since the prior drug convictions were not "evidence of a pertinent trait of his character." The court of appeals held the evidence to have been properly admitted and affirmed the conviction. While the result is undeniably correct, the underlying rationale is somewhat opaque.⁵¹

47. 705 F.2d 210 (7th Cir. 1983).

48. 705 F.2d at 215 (emphasis added).

49. 705 F.2d at 215-16.

50. The rule allows character evidence to be used by the government to rebut "[e]vidence of a pertinent trait of his character offered by an accused. . . ." In *United States v. West*, 670 F.2d 675, 682 (7th Cir.), *cert. denied*, 457 U.S. 1124 (1982), the court noted that neither Rule 404(a)(1) nor any of the cases interpreting it defined the term "character trait". Relying on Professor McCormick, the court suggested that it refers to elements of one's disposition such as honesty, temperance, or peacefulness.

51. Upon a first reading the opinion seems to hold that by testifying as he did, the defendant put his character in issue within the meaning of the rule. A more careful reading fails to confirm

The opinion begins with an *in haec verba* quotation of Rule 404(a)(1). Then, although they are separate concepts, distinct from the principles of Rule 404(a)(1), the court immediately recited the general rules that when a defendant testifies, he can be impeached like any other witness and that felony convictions are available for impeachment.⁵² Thereafter, follows this statement:

When Gaertner testified that he was not into the "drug thing", he obviously put his character in issue by attempting to portray himself as a "clean liver" in the eyes of the jury. Once the defendant denied he was involved in the "drug thing", he raised the issue and opened the door on the question of his prior or present drug involvement, and thus we agree with the trial court and hold that the evidence of Gaertner's prior drug experiences, including his drug (marijuana) convictions was admissible to impeach his testimony and his credibility as a witness.⁵³

There can be no quarrel with the court's conclusion that once the defendant falsely sought to suggest to the jury that he was "a clean liver" and had no prior involvement in drug trafficking, it was permissible to introduce the prior convictions. As the court noted, two distinct purposes were served by this evidence. First, under the principles of general character impeachment, the jury had the right to consider prior felonies as bearing on the defendant's overall credibility as a witness.⁵⁴

Second, the evidence served to contradict the specific testimony relating to prior lack of involvement in drugs. This holding is consistent with the decisions of the Supreme Court and those of the Seventh Circuit that, in order to prevent open affronts to and distortions of the fact finding process, a witness who voluntarily injects into the trial the question of his prior lack of criminal involvement (or some other important matter), opens the door to a cross-examination which might otherwise not have been permissible.⁵⁵

this initial impression and leaves the scope, content, and applicability of 404(a)(1) anything but clear.

52. Rule 404(a)(3) provides, *inter alia*, that a witness may be impeached with character evidence as provided in Rule 609. That rule, in turn, allows impeachment by felony convictions or misdemeanors involving *crimen falsi*. The court in *Gaertner* made no mention either of Rule 609 or Rule 404(a)(3).

53. 705 F.2d at 216 (emphasis added).

54. See 2 WEINSTEIN'S EVIDENCE, *supra* note 12, ¶ 404[05] at 404-38 ("Although many courts speak of the defendant as putting his character 'in issue' when he introduces good character evidence, the terminology is misleading; the issue is not whether defendant is 'good' but whether he committed a given act, and the evidence is being used circumstantially to show that a person of such character is unlikely to have committed such an act.")

55. The classic case is *Walder v. United States*, 347 U.S. 62 (1954), where the court allowed unconstitutionally obtained evidence to be used to impeach a defendant who falsely testified he had never possessed narcotics. See also *United States v. Bolin*, 514 F.2d 554 (7th Cir. 1975) (doctrine of curative admissibility); *United States v. Johnson*, 506 F.2d 305 (7th Cir. 1974) (doctrine of

The more difficult questions, unanswered by the opinion,⁵⁶ are whether a defendant's sweeping assertions of clean living can effectively inject character evidence into the case within the meaning of Rule 404(a)(1); whether evidence of prior narcotics dealing can only be used for impeachment rather than as rebuttal character evidence within the meaning of 404(a)(1), even though it contravenes Rule 405's prohibition against proof of character save by reputation or opinion evidence.⁵⁷

It remains for future cases to clarify *Gaertner* and explicate the applicability of Rule 404(a)(1) in comparable cases. What is clear beyond any doubt, however, is that defense counsel must take special precautions to insure that testimony does not become so sweeping as to open the door to otherwise inadmissible evidence.

C.

The cases decided during the 1982-83 Term teach anew that determinations under Rules 403 and 404 cannot be made mechanistically; they are not a kind of catechism, the mere invocation of which will solve necessarily diverse evidentiary problems. Realizing that it "is hardly in a position to reevaluate, based on a cold record, the helpfulness of certain testimony or the subtle balancing of factors contained in Rule 403",⁵⁸ the court has continued to champion the view that the "highly judgmental" character of Rule 403 mandates that "[a reviewing

curative admissibility); *United States v. Jansen*, 475 F.2d 312, 316 (7th Cir.), *cert. denied*, 414 U.S. 826 (1973) (defendant's claim that he was never convicted of any crime opened door for government to show misdemeanor conviction); *Esquire Restaurant, Inc. v. Commonwealth Inc. Co. of N.Y.*, 393 F.2d 111, 117 (7th Cir. 1968). *Accord* *People v. Westek*, 31 Cal. 2d 469, 190 P.2d 9, 13, 18 (1948); *Molton v. People*, 118 Colo. 147, 193 P.2d 271, 272 (1948); *State v. Barnett*, 156 Kan. 746, 137 P.2d 133 (1943). *See also* *Cole, Impeachment With Unconstitutionally Obtained Evidence: Coming To Grips With The Perjurious Defendant*, 62 NW. J. OF CR. L. AND CRIM. 1 (1971). *Compare* *United States v. Johnston*, 690 F.2d 638, 646 (7th Cir. 1982) (*en banc*); *United States v. Cavale*, 688 F.2d 1098, 1112 (7th Cir.), *cert. denied*, 103 S. Ct. 380 (1982) (cross-examination opened door to government's use of damaging evidence even though question was withdrawn); *United States v. Allain*, 671 F.2d 248, 252 (7th Cir. 1982) (cross-examination of witness' involvement in marijuana dealings opened door for government to show that defendant purchased marijuana from them with counterfeit currency).

56. At one point, the court said that by his testimony, *Gaertner* obviously put his character in issue. However, it later stressed the prior convictions were used solely to impeach credibility and seemed to suggest that absent this limited use of the evidence, a different result might have obtained. 705 F.2d at 217.

57. The admission of the evidence in *Gaertner* for impeachment purposes obviously differs theoretically from use under 404(a)(1). In the former situation, the jury is cautioned that the evidence can only be considered insofar as it might bear on the defendant's credibility. Rebuttal character evidence is not subject to any such cautionary instructions. While *Walder v. United States*, 347 U.S. 62 (1954) does not specifically address the question, it seems to suggest that the evidence is admissible merely to impeach credibility. *See id.* at 65.

58. *Bohannon v. Pegelow*, 652 F.2d 729, 732 (7th Cir. 1981).

court] not restrike the balance" itself.⁵⁹

This theme was the cynosure of the court's *en banc* decision in *United States v. Bruscano*.⁶⁰ Speaking for seven of the eight members of the court, Judge Posner held that whether exposure to prejudicial publicity had an effect on the jury's verdict is to be determined by the district court employing the reasonable possibility standard. However, the proper standard of appellate review is vastly different, it is whether the district court's determination constitutes an abuse of discretion:

The trial judge will always be in a better position than the appellate judges to assess the probable reactions of jurors in a case over which he has presided. He has had the opportunity to observe the jurors' demeanor and gauge their attentiveness, as the appellate judges have not. He can also judge, as we cannot, whether the atmosphere of the trial—the congeries of intangibles that no stenographic transcript can convey [⁶¹—might have made the jury receptive to being prejudiced by the documents in question, or, for that matter, might have inoculated it against such prejudice. As we cannot put ourselves in the district judge's shoes in these matters we ought to accept his judgment unless we have a very strong conviction of error.⁶²

While not decided under the Rules, the underlying rationale of *Bruscano* applies equally to review of discretionary decisions under Rule 403. For those who find in *Bruscano* a dilution, if not an outright abdication, of the appellate function, it is well to remember that appellate judges, no less than other men and women, are "normally vain, they have ambitions, party leanings, a decent human share of prejudice, passion and blindness . . . [and vary in their intellectual endowments], imagination, and training."⁶³ Thus, as Mr. Justice Cardozo

59. *United States v. McPartlin*, 595 F.2d 1321, 1345 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979). However, district courts are not free to do as they please, as is vividly illustrated by the Second Circuit's interesting reversal of one of Judge Weinstein's decisions. *See United States v. Jamil*, 707 F.2d 638 (2d Cir. 1983).

60. 687 F.2d 938 (7th Cir. 1982) (*en banc*), *cert. denied*, 103 S. Ct. 1205 (1983).

61. In his informative book, *THE ART OF ADVOCACY* 39-40 (1954), Mr. Lloyd Paul Strycher has said this of "atmosphere":

Atmosphere, that nothing, that vague and intangible something, that everything, is a vital element in the trial, and within limits the advocate may stimulate it, for whether he would or no, there is a general feeling that permeates the courtroom, the judge, and above all the jury—a kind of indoor climate of opinion. If favorable, it can help, sometimes more than any evidence. But if it turns hostile, the strongest proofs may not prevail.

62. 678 F.2d at 941. *See also* *Ashcraft v. Tennessee*, 322 U.S. 143, 171 (1944) (Jackson, J., dissenting) ("[A] few minutes' observation of the parties in the courtroom is more informing than reams of cold record."); *Haley v. Ohio*, 332 U.S. 596, 625 (1948) (Burton, J., dissenting) ("In this living record, there are many guideposts to the truth which are not in the printed record. Without seeing them ourselves, we will do well to give heed to those who have seen them.")

63. K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 130 (1960).

has said in another context, "substitute [an appellate court's discretion] for [that of a district judge] and you shift the center of authority but add no quota of inspired wisdom."⁶⁴

In the last analysis, fairness in the administration of the Federal Rules of Evidence can only be achieved if federal district judges are truly possessed of competence, good sense, fairness and courage. If the United States District Courts are not manned by judges with such qualities, no rules, however detailed, and no appellate review, however stringent, can do very much to make up for the lack of them.⁶⁵

III. THE CONTEMPORANEOUS OBJECTION RULE

Long before the enactment of the Federal Rules of Evidence in 1975, "Baron Parke's doctrine of presumed prejudice from the commission of error"⁶⁶ had fallen into desuetude, and it had become accepted that a litigant was entitled to a fair trial, not a perfect one.⁶⁷ By the early part of this Century, either as a result of legislation or judicial decision, erroneous rulings by a trial judge had ceased to be basis for reversal unless they affected a substantial right.⁶⁸

In addition, the common law required, as a precondition to appellate review, that the claimed error have been called to the court's attention by timely and specific objection made at trial. This enduring common law principle, which was always a part of the fabric of federal trial practice, ultimately was codified in Rule 51 of the Federal Rules of Criminal Procedure and Rule 46 of the Federal Rules of Civil Procedure.⁶⁹ Under these Rules, the requirement of a timely and specific

64. B. CARDOZO, *THE GROWTH OF THE LAW* 133 (1924). In fact, this may even detract from the validity of the decision.

65. *Michelson v. United States*, 335 U.S. 469, 488 (1948) (Frankfurter, J., concurring).

66. 10 J. MOORE, H. BENDIX, *MOORE'S FEDERAL PRACTICE*, ¶ 1103.11 (2d ed. 1982). The doctrine of presumed prejudice from the commission of error was laid down by Baron Parke speaking for the Court of Exchequer in *Crease v. Barrett*, 1 CM & R 919, 932-33 (1827).

67. See *Lutwak v. United States*, 344 U.S. 604, 619 (1953); *Perkins v. Endicott Johnson Corp.*, 128 F.2d 208, 211-12 (2d Cir. 1942); *In re Barnett*, 124 F.2d 1005, 1011 (2d Cir. 1942).

68. While the doctrine of presumed prejudice was at one time quite generally accepted in this Country, by the early part of this century, American courts and legislatures, both federal and state, had gone far toward a complete repudiation of the doctrine and in its place crafted a doctrine of harmless error. 7 J. MOORE, J. LUCAS, *MOORE'S FEDERAL PRACTICE* ¶ 61.02 at 61-3 (2d ed. 1982); 8B J. MOORE, M. WAXNER, M. EISENSTEIN, *MOORE'S FEDERAL PRACTICE* ¶ 52.01 (2d ed. 1982) [hereinafter cited as 8B MOORE'S], *FED. R. CRIM. P.* 61. For a fascinating history of the evolution of the harmless error rule in criminal cases and the strident conflict it evoked among certain distinguished members of the Second Circuit, see M. SCHICK, *LEARNED HAND'S COURT* 268-76, 299-300 (The John Hopkins' Press 1970).

69. Compare *FED. R. CRIM. P.* 30 and *FED. R. CIV. P.* 51, which preclude a party from raising challenges to jury instructions in the absence of a timely and specific objection. See *United States v. Verkuilen*, 690 F.2d 648, 652 (7th Cir. 1982); *Exxon Corp. v. Exxene Corp.*, 696 F.2d 544, 548 (7th Cir. 1982).

objection was applicable to any trial error regardless of its nature.⁷⁰ Rule 103(a)(1) of the Federal Rules of Evidence has further codified the contemporaneous objection rule insofar as it pertains to erroneous admission of evidence.⁷¹

Compliance with the contemporaneous objection rule is not dictated by abstract notions of formalism. Rather, its "eminently practical" purpose⁷² is to expedite finality and economy in litigation by forcing parties to make appropriate objections at the time the error occurs or risk being foreclosed from raising the error on appeal. Indeed, failure to adhere to the contemporaneous objection requirement will generally result in a bar to review by a court of appeals of the claimed error.⁷³

Calling error to the attention of the trial court gives it an opportunity for correction which may obviate the need for further proceedings.⁷⁴ In this way, unnecessary burdens on an adversary system that is already under strain are avoided, and the rights of other litigants "who are entitled to prompt adjudication of their claims,"⁷⁵ are not abridged.

During the 1982-83 Term, the Seventh Circuit expressed its intolerance of attempts to hedge the risk of an adverse verdict by failing to object, thereby allowing, if not inviting, the trial judge to commit error. In *United States v. Knop*,⁷⁶ the defendant was charged with having made false statements to two different federally insured banks. The government's evidence that the banks were insured at the time of the submission of the false statements was far from satisfactory.

Interjected between questions relating to identification of the defendant and certain documents which he had submitted to the banks, came the question: "[I]s your bank insured by the Federal Deposit

70. See 8B MOORE'S, *supra* note 66, at 51-6.

71. FED. R. EVID. 103(a)(1) provides that:

(a) *Effect of erroneous ruling.* Error may not be predicated upon a ruling which admits or excludes evidence unless a *substantial right* of the party is affected, and

(1) *Objection.* In case the ruling is one admitting evidence, a *timely objection* or motion to strike appears of record, stating the *specific ground of objection*, if the specific ground was not apparent from the context. . . . (Emphasis added).

72. *Local 901 v. Compton*, 291 F.2d 793, 796-97 (1st Cir. 1961) ("The rule [requiring timely and specific objection] is both elementary and for obvious reasons eminently practical.").

73. See, e.g., *United States v. Collins*, 690 F.2d 670, 674 (8th Cir. 1982); *United States v. Wilson*, 690 F.2d 1267, 1275 (9th Cir. 1982), *cert. denied*, 104 S.Ct. 205 (1983); *United States v. Weed*, 689 F.2d 752, 756 (7th Cir. 1982); *United States v. Baskes*, 649 F.2d 471, 480 n.8 (7th Cir. 1980), *cert. denied*, 450 U.S. 1000 (1981).

74. 1 WEINSTEIN'S EVIDENCE, *supra* note 12, ¶103[02] at 103-11; 8B MOORE'S, *supra* note 66, at 51-4. *Accord* *United States v. Weed*, 689 F.2d 752, 756 (7th Cir. 1982); *Crusan v. Ackerman*, 342 F.2d 611, 613 (7th Cir. 1965).

75. *Maneikis v. Jordan*, 678 F.2d 720, 722 (7th Cir.) *cert. denied*, 103 S. Ct. 346 (1982).

76. 701 F.2d 670 (7th Cir. 1983).

Insurance Corporation?"⁷⁷ The prosecutor never explicitly asked whether the bank *was insured at the time of the crime*. In the court of appeals, it was argued that since there was no evidence that the banks were insured at the time of the false submissions, reversal was mandatory.

Speaking for a divided panel, Judge Pell recognized that taken "woodenly and literally" the testimony might seem to refer only to the time of trial and thus would be irrelevant. However, in the context of the overall trial, it could plausibly have been taken by the jury as referring to the time of the commission of the offenses. This conclusion was buttressed by the fact that appellant's counsel neither objected to the introduction of the testimony on relevancy grounds nor challenged the proof of the bank's federally insured status, even though such an objection easily would have cured the very error urged on appeal.

Relying on *Wainwright v. Sykes*,⁷⁸ the majority demonstrated that the roots of the contemporaneous objection rule are deeply embedded in compelling considerations of finality in the judicial process.⁷⁹ And they delivered a pointed warning to those who would refrain from making objections so that they might "have another go at it"⁸⁰ in the court of appeals:

We hesitate to suggest that counsel for the defendant deliberately engaged in a 'sandbagging' process. Yet we cannot ignore what a unique opportunity this situation presents. Counsel aware of the lack of pinpointing of the time to the offense could easily have objected to the question as being irrelevant because of its reference to the insurance status as of the time of the testimony. Counsel would also have been aware had he done so that the objection would have been sustained and the Government could easily have brought in the requisite proof. *By saying nothing about the matter at any time at the trial level his client could easily have a built-in claim for reversal if the jury should reject his defense on the substantive merits.*⁸¹

77. *Id.* at 672 (emphasis added).

78. 433 U.S. 72, 89-90 (1977).

79. 701 F.2d at 673.

80. *Ferguson v. Moore-McCormack Lines*, 352 U.S. 521, 542 (1957) (Frankfurter, J., dissenting).

81. 701 F.2d at 673 (emphasis added). See also 8B MOORE'S, *supra* note 66, at 51-6. One of the more forceful pre-rules' statement of the principle is found in *United States v. 5 Cases*, 179 F.2d 519 (2d Cir. 1950), *cert. denied*, 339 U.S. 963 (1951). There, the government called one Memmoli as a witness. To each question asked, he claimed his fifth amendment privilege. No objection was made to the lengthy series of lethal questions. On appeal, it was alleged that the questions were so prejudicial that reversal was warranted in spite of there having been no objections raised at trial. A unanimous panel, consisting of Learned Hand and Judges Frank and Swan, unhesitatingly rejected the argument:

After [Memmoli] had claimed the privilege, in response to the third question put to him, it was apparent that he would continue to claim it. Nevertheless, counsel for the Gov-

The majority refused to sanction this sort of gamesmanship and affirmed the conviction.

The applicability of these basic principles in civil cases is evidenced by *Wesley-Jessen Division of Schering Corp. v. Bausch & Lomb, Inc.*⁸² There, Judge Getzendanner asked experts from both sides to recommend literature to assist her in evaluating certain evidence which had been received during an injunction hearing. Without a whisper of protest from the plaintiff, Bausch & Lomb's expert recommended and delivered two texts. The plaintiff submitted nothing.

Nonetheless, on appeal, the plaintiff contended that the court violated Rule 201 of the Federal Rules of Evidence by, in effect, taking judicial notice of non-adjudicate facts which comprised the contents of the books provided by Bausch & Lomb. The panel found Rule 201 inapplicable since the district court did not use the books as a substitute for evidence, but only as background information to help her interpret the evidence which had been presented at the hearing. While this holding could have sufficed to end the matter, the panel took pains to underscore its unwillingness to allow the victim of alleged prejudice to take advantage of a situation which, by his silence, he has helped to create.

The panel emphasized that Judge Getzendanner had, in an unbiased, open and even-handed manner solicited from both parties in open court recommendations for reference materials. Although Wesley-Jessen was thus keenly aware of which reference works would be considered, neither its expert nor its counsel made any objection until after Judge Getzendanner had made her decision. Hence, it was "too late now for Wesley-Jessen to complain about the judge's use of the books."⁸³

ernment propounded a series of increasingly pointed questions as to each of which the privilege could be, and was, claimed. Had this been done over the claimant's protest, it might have been error serious enough to require reversal. As to that, we need not say; for here, the claimant allowed the questions to go on without a whisper of objection and then moved for a mistrial. *The victim of alleged prejudice cannot be allowed to nurse it along to the point of reversibility and then take advantage of a situation which by his silence he helped to create.*

United States v. 5 Cases, 179 F.2d at 523 (emphasis supplied). See also United States v. Allain, 671 F.2d 248, 252 (7th Cir. 1982); United States v. Murzyn, 631 F.2d 525, 531 (7th Cir. 1980) cert. denied, 450 U.S. 923 (1981); United States v. Kanovsky, 618 F.2d 229, 231 (2d Cir. 1980); United States v. Hedgeman, 564 F.2d 763, 768 (7th Cir. 1977); Morrow v. United States, 101 F.2d 654, 658 (7th Cir. 1939).

82. 698 F.2d 862 (7th Cir. 1982).

83. 698 F.2d at 865. See also 1 WIGMORE, *supra* note 6, §18 at 322; Skogen v. Dow Chemical Co., 375 F.2d 692, 703 (8th Cir. 1967):

[He] preferred to let the action of the trial court stand . . . yet retain this incident as his "ace in the hole". After receiving an unfavorable verdict, he now attempts to revive this

In an era of ever-spiraling dockets,⁸⁴ any procedural rule which fairly husband's judicial resources is bound to be attractive to an adversary system which, of necessity, is seeking ways to promote efficiency and judicial economy. As the Supreme Court has said "[t]he contemporaneous-objection rule surely falls within this classification."⁸⁵ *Knop* and *Wessley-Jessen* are but recent examples of the increasing frequency with which the federal courts of appeals are harkening to the inherent wisdom of Learned Hand's dictum that "justice is not a game"⁸⁶ and are refusing to sanction or condone tactical violations of the contemporaneous objection rule.⁸⁷ Viewed from this perspective, Rule 103 and the common law rule requiring prompt and precise objection in the face of claimed error cannot be blithely ignored.⁸⁸

IV. THE HEARSAY RULE

It is common ground that out of court statements constitute hearsay "only when offered in evidence to prove the truth of the matter asserted."⁸⁹ Despite the ease with which the definition is stated, proper application of the rule occasionally proves elusive. Of the cases dealing with the hearsay rule during the 1982-83 Term, *United States v.*

alleged error. [Yet] it is the most fundamental rule of appellate procedure that a party may not sit idly by and allow the trial court to commit error, wait for a verdict, and complain of the error only if the verdict is unfavorable.

Compare *United States v. Passero*, 290 F.2d 238, 244 (2d Cir. 1961) (Lumbard, C.J., Magruder and Friendly, J.J.).

84. In 1982 there were 206,193 filings in the United States District Courts. *See* *United States v. Mendoza*, 104 S. Ct. 568 (1984).

85. *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977). *Compare* *Federated Department Stores Inc. v. Moitie*, 452 U.S. 394, 401 (1981); *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 578, 579 (1974) (doctrines of *res judicata* and collateral estoppel properly bottomed on considerations of judicial economy).

86. *United States v. Paglia*, 190 F.2d 445, 447 (2d Cir. 1951). *See also* H.J. FRIENDLY, *On Entering The Path Of The Law*, in *BENCHMARKS*, 30 (1960).

87. *See* *United States v. Allain*, 671 F.2d 248, 252 (7th Cir. 1982).

88. While uttered in a very different context, Mr. Justice Cardozo's penetrating observations in *R.H. Stearns Co. v. United States*, 291 U.S. 54, 61-62 (1934), perhaps best enunciate the ethical basis upon which cases such as *Knop* and *Bausch & Lomb* ultimately rest:

He who prevents a thing from being done may not avail himself of the non-performance which he has himself occasioned, for the law says to him in effect 'this is your own act, and therefore you are not damnified.' . . . Sometimes the resulting disability has been characterized as an estoppel, sometimes as a waiver. The label counts for little. Enough for present purposes that the disability has its roots in a principle more nearly ultimate than either waiver or estoppel, the principle that no one shall be permitted to found any claim upon his own iniquity or take advantage of his own wrong.

89. *Anderson v. United States*, 417 U.S. 211, 219 (1974) (emphasis added). *See also* *FED. R. EVID.* 801(c); *United States v. Kanovsky*, 618 F.2d 229, 231 (2d Cir. 1980); *United States v. Aleman*, 609 F.2d 298, 308 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); *Kerr v. City of Chicago*, 424 F.2d 1134 (7th Cir.), *cert. denied*, 400 U.S. 833 (1970); *United States v. Pasha*, 332 F.2d 193, 196-97 (7th Cir. 1964), *cert. denied*, 379 U.S. 839 (1965); 5 J. WIGMORE, *EVIDENCE* § 1361 (Chadbourn Rev. 1976); *MCCORMICK, EVIDENCE* § 246 (Cleary Ed. 1972).

Green,⁹⁰ was the most uncomplicated. Yet, as will be seen, it was not without its subtleties.

In *Green*, the defendant was charged with having kidnapped Rhonda Gillihan in Missouri and forcing her to accompany him to Illinois, where he killed her. At trial, the evidence showed that on May 24, 1980, during a party at the home of Emmett Ware, the defendant made a sexually suggestive remark to Ms. Gillihan. She left Ware's apartment and went to a second party at which the defendant made further remarks. At about 2:30 a.m., she left the second party to return to Ware's apartment. The defendant followed her. Upon her arrival at Ware's apartment, she said "that little nigger is still bothering me."⁹¹

The court of appeals held that this statement "indicated that she was nervous and upset and that she was transported by Green without her consent."⁹² Since these were "essential issues" at trial, the evidence was relevant. The court held that although the evidence was hearsay, it was admissible under Rule 803(3) of the Federal Rules of Evidence, which makes admissible, as an exception to the hearsay rule, a statement of the declarant's then existing state of mind, emotion, sensation or physical condition.⁹³

The court's conclusion that the evidence was admissible is obviously correct. What is somewhat problematic is its conclusion that the evidence was hearsay requiring invocation of an exception to the hearsay rule. In strict theory, it would have been more sound to have concluded that the evidence was not hearsay at all.

Verbal utterances are often used non-assertively as indicating *circumstantially* a particular mental state. For example, if the state of mind of a testatrix's sister, whether affectionate or hateful, was in issue, the utterance of the sister that "She is too ugly to die yet", indicates indirectly the sister's condition of feeling and is, of course, not used as testimonial evidence of the facts asserted.⁹⁴

It is important to distinguish this *circumstantial* use of utterances to prove a condition of mind from declarations *directly* asserting the existence of that mental state (i.e., "I hate my sister."). In the former instance, the hearsay rule is inapplicable; in the latter, the rule applies with full vigor, and the exception must be invoked as a precondition to

90. 680 F.2d 520 (7th Cir.), *cert. denied*, 103 S. Ct. 493 (1982).

91. *Id.* at 521.

92. *Id.* at 523.

93. *Id.* See 4 WEINSTEIN'S EVIDENCE, *supra* note 12, ¶ 803(3)[02] at 803-94.

94. 6 J. WIGMORE, EVIDENCE §1715 at 99 (Chadbourn Rev. 1976).

admissibility.⁹⁵

Although the question is a close one, proper application of these principles strongly suggests that the statement in *Green*—"that little nigger is still bothering me"—is not hearsay, for it was not used to prove the truth of the matter asserted. Rather, it was employed, as the Seventh Circuit noted, as evidence "*indicat[ing]* that [the declarant] was nervous and upset."⁹⁶ However, as Wigmore has stressed, "[a]ll such indirect uses of verbal utterances must be distinguished from direct assertions of the state of mind . . . to which alone the hearsay rule applies, and for which alone it is necessary to invoke the [presently existing mental state] exception."⁹⁷

Far more troublesome is *United States v. Gaertner*.⁹⁸ In *Gaertner*, the defendant was charged with possession with the intent to distribute cocaine to one Maas, an undercover agent. While admitting that he had the cocaine in his car, the defendant contended he was not going to give it to Maas. To support this thesis, the defendant sought to introduce, on his direct examination, a conversation between himself and one Haman, a government informant, in which it allegedly was agreed that the defendant was to hold the cocaine as collateral for a loan to Haman. The district court's refusal to allow the conversation into evidence on the ground that it was hearsay was sustained by the Seventh Circuit.

The panel properly recognized that where evidence is received not to prove the truth of the matters asserted, but to form the basis from which flowed a defendant's perceptions or beliefs—in short, his state of mind—there is no violation of the hearsay rule. Nonetheless, the panel concluded that the evidence of the "loan/collateral" agreement was hearsay since it "necessarily" was offered to prove the truth of the matter asserted:

i.e. that the "loan/collateral" agreement did in fact exist. Logical reasoning leads to the conclusion that before the jury could believe that the alleged loan/collateral transaction took place they would necessarily have to have found credible the truthfulness of Haman's alleged statements."⁹⁹

With all deference, this conclusion cannot withstand analysis.

95. See 6 WIGMORE, *supra* note 94, § 1715 at 99, § 1730 at 148.

96. *Green*, 680 F.2d at 523 (emphasis added). See generally 4 WEINSTEIN'S EVIDENCE, *supra* note 12, ¶ 803(3)[02] at 803-94.

97. 6 WIGMORE *supra* note 94, § 1715 at 99. Compare 4 WEINSTEIN'S EVIDENCE, *supra* note 12, ¶ 803(3)[02] at 803-94.

98. 705 F.2d 210 (7th Cir. 1983).

99. 705 F.2d at 214 (emphasis added).

Whether the loan agreement "did in fact exist" is dependent upon whether Haman and Gaertner in fact agreed. While the agreement is evidenced by utterances, it does not follow that the hearsay rule is implicated. As Wigmore has conclusively shown, proof of the existence of a "contract" does not involve the hearsay rule at all, for the utterances are verbal acts.¹⁰⁰

Equally flawed is the conclusion that the jury necessarily had to "have found credible the *truthfulness* of Haman's alleged statements" before "believing the alleged loan/collateral transaction took place. . . ." It was of no moment whether Haman, the declarant, actually intended to abide by his promise to return for his cocaine and repay the money allegedly lent. The only question was whether the statements were made and thereafter generated some belief or conduct in the defendant:

Whenever an utterance is offered to evidence the *state of mind* which ensued in *another person* in consequence of the utterance, it is obvious that no assertive or testimonial use is sought to be made of it, and the utterance is therefore admissible, so far as the hearsay rule is concerned.¹⁰¹

In short, it was the credibility of the defendant—not that of the declarant—which was pivotal to the jury's determination. Since the defendant was on the stand, under oath and subject to cross-examination, none of the triune vices underlying the hearsay rule were present.¹⁰²

The "truthfulness" of the declarant's statements is no more at issue in *Gaertner* than is the "truthfulness" of the declarant who makes threats to another,¹⁰³ or the declarant who tells a policeman that a third person is engaging in unlawful conduct,¹⁰⁴ or the declarant who makes calls to the defendant's telephone desiring to place bets,¹⁰⁵ or the prosecutor who tells a defendant before the grand jury that he is being less than candid,¹⁰⁶ or the declarant/informer whose statements are said to constitute entrapment.¹⁰⁷ The question in all of these cases is whether the statements were made, and that depends on the credibility of the witness, not the declarant.¹⁰⁸

100. See 6 WIGMORE, *supra* note 94, § 1770.

101. *Id.* §1789 at 314.

102. *California v. Green*, 399 U.S. 149, 158 (1970).

103. See *United States v. Herrera*, 600 F.2d 502 (5th Cir. 1979); *United States v. Demopoulos*, 506 F.2d 1171 (7th Cir. 1974), *cert. denied*, 420 U.S. 991 (1975).

104. *Kerr v. Mohan*, 424 F.2d 1134 (7th Cir.), *cert. denied*, 400 U.S. 833 (1970).

105. *United States v. Pasha*, 332 F.2d 193 (7th Cir. 1964), *cert. denied*, 319 U.S. 839 (1965); *Billeci v. United States*, 184 F.2d 394 (D.C. Cir. 1950).

106. See *United States v. Kanovsky*, 618 F.2d 229, 231 (2d Cir. 1980).

107. *Crispo v. United States*, 443 F.2d 13 (9th Cir. 1971).

108. See 4 WEINSTEIN'S EVIDENCE, *supra* note 12, ¶ 801(a)[02]. See also *United States v.*

Finally, the evidence was also receivable under the principle that utterances are admissible as non-hearsay when they accompany conduct to which it is desired to attach some legal effect. One of the salient examples given by Wigmore involves the handing over or receiving of money. The act itself may have a varied significance, and thus words accompanying the receipt or delivery are admissible without offending the hearsay rule:

The application of the verbal act doctrine is illustrated in a great variety of instances. Some of these, presenting special complications, may be taken up separately. In this place may be noticed sundry classes of cases not usually complicated by other questions.

(1) The act of *handing over* or of *receiving money* may have a varied legal significance, and words accompanying the receipt or delivery may therefore serve to make definite the effect of the act:

* * *

Declarations accompanying a *delivery of money may therefore be admissible, in order to determine whether a loan or a payment was made, whether one debt or another was paid, whether it was accepted in full or in part payment, or whether any other significance is to be attributed to the act. Declarations by either party are receivable, except so far as a declaration by one could not legally affect the significance of the act done by the other.*¹⁰⁹

The third in the trilogy of cases is *United States v. Chappell*.¹¹⁰ *Chappell* presented questions under Rule 803(6) which is an exception to the hearsay rule for records of regularly conducted business activity. Chappell was charged with having defrauded the investors of the General Oil Company by making misrepresentations concerning the use of invested funds. At trial, the books of the company were offered over the defendant's objection that they were hearsay.

To satisfy the requirement of 803(6), the government offered the testimony of two former employees of General Oil, both of whom stated that Anthony Ricci was the bookkeeper for the company. In addition, an agent of the SEC testified that the defendant had told him that Ricci was maintaining the books of General Oil. The agent also testified that he was a licensed certified public accountant, that he examined the books and records obtained from Ricci, and that they appeared to be records made in the ordinary course of business.

He further testified that he corroborated the information contained

Anderson, 417 U.S. 211, 220 n.8 (1974) ("Of course, evidence is not hearsay when it is used only to prove that a prior statement was made and not to prove the truth of the statement.").

109. 6 WIGMORE, *supra* note 94, § 1777 at 274-76 (footnotes omitted) (emphasis partly in original and partly supplied).

110. 698 F.2d 308 (7th Cir.), *cert. denied*, 103 S. Ct. 2095 (1983).

in the books and records with checks, bank statements and other records and found that all the entries appeared accurate. Finally, and according to the court most importantly, the government offered portions of Ricci's testimony given to the SEC in May, 1977. In that testimony, Ricci stated that he was the accountant for General Oil and that he maintained the books and records. He also identified each of the exhibits and described how he posted entries and prepared schedules.

The court held that this testimony was "clearly admissible" as an admission by a party-opponent through his agent concerning a matter within the scope of the agency and made during the existence of the relationship.¹¹¹ Based on this, the court held the evidence qualified for admissibility under Rule 803(6).

V. PRIVILEGES AND RULE 501

As originally conceived, Article V of the Federal Rules of Evidence contained thirteen separate rules relating to privileges. However, in place of Proposed Rules 501 through 513, Congress passed a single rule, Rule 501, which provides, *inter alia*, that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."¹¹²

In enacting this single-rule Article, Congress specifically rejected the Advisory Committee's attempt to enumerate the recognized non-constitutional privileges and to define their scope. Congress also rejected the Committee's attempt to create a uniform federal law of privilege, mandating instead that in cases where state law governs substantively, state privilege law also shall apply.¹¹³

111. Ricci's testimony, as a party admission, does not fall into a hearsay exception but rather is defined as not hearsay under Rule 801(d)(2)(D). The exclusion of party admissions from the definition of hearsay, unlike most hearsay exceptions, is not grounded on a probability of trustworthiness but rather on the idea that a party cannot object to his failure to cross-examine himself. See *supra* note 12, 4 WEINSTEIN'S EVIDENCE ¶ 801(d)(2)[01]. The fact that Ricci was no longer on the General Oil payroll at the time that he gave testimony to the SEC was not dispositive since he was acting as General Oil's bookkeeper. Only twelve days prior to Ricci's testimony, Chappell himself told the SEC that Ricci was still acting as General Oil's accountant and that the books and records were in Ricci's possession. The court held that Ricci's testimony was properly admitted as an admission by a party-opponent and that it laid the foundation for the admission of the General Oil books and records.

112. Rule 501 also requires application of state law of privilege on substantive questions as to which state law supplies the rule of decision.

113. In rejecting the Committee's recommendations, Congress was motivated by a concern that the proposed rules intruded upon legitimate state interests in having state substantive law applied. More broadly, Congress was motivated by a concern that the proposed rules would have tended to "freeze" standards in an area of law which Congress felt was best left to grow and

During the 1982-83 Term, the Seventh Circuit considered two cases under the attorney-client privilege and one which sought recognition of a psychotherapist-patient privilege. In all three cases, the appellants' arguments were rejected. Two of the cases are unremarkable. One, however, *United States v. Weger*,¹¹⁴ if it means what it seems to say, poses greater dangers to the attorney-client privilege than any case in recent memory. We begin with the cases dealing with the attorney-client privilege.

A. *The Attorney-Client Privilege*

The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients, thereby promoting broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client. In order for these ends to be realized, it is imperative that the confidential communications be free from the consequences or the apprehension of disclosure.¹¹⁵

Despite the well defined scope of the privilege,¹¹⁶ the courts of appeals continue to be confronted with claims that the privilege has been violated. In *United States v. Lawless*,¹¹⁷ the IRS sought enforcement of a subpoena calling for the production of documents used by Lawless in the preparation of an estate tax return. The district court held that a letter from one of the executors to Lawless containing detailed financial information and a handwritten note on an envelope were privileged, even though Lawless had made no attempt to demonstrate that the doc-

develop on a case basis and in the light of changing circumstances. See *Emerging Problems Under The Federal Rules Of Evidence* 92 (American Bar Association 1983).

114. 709 F.2d 1151 (7th Cir. 1983).

115. See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

116. The general contours of the privilege are easily stated: A client may assert the privilege with respect to confidential communications made to his attorney for the purpose of enabling the attorney to render legal advice or services to him. He who claims the privilege has the burden of proof of proving all its essential features. Communications made to or intended to be disclosed to a third party are not privileged. The communication must relate to an attorney's status as a legal advisor, and communications relating or responding to requests for business, scientific, economic or accounting advice are not privileged. Communications made in furtherance of a crime or fraud are outside the privilege, as are those made in the context of joint representation. See generally *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); 8 J. WIGMORE, *EVIDENCE* ¶¶ 2291-92, 2312 (McNaughton Rev. 1961); MCCORMICK, *EVIDENCE* § 87 (Cleary Ed. 1972). Proposed Rule 503(b) would merely have restated, rather than modified, the common law privilege. See 56 F.R.D. 183, 236 (1973).

117. 709 F.2d 485 (7th Cir. 1983).

uments were transmitted to him with the expectation that their contents would remain confidential rather than with the expectation they would be used in the preparation of the return.¹¹⁸

The court of appeals began with the fundamental principle that the party claiming the privilege has the burden of establishing all of its essential elements.¹¹⁹ Satisfaction of that burden requires a document by document or question by question assessment; "a blanket claim of privilege is unacceptable."¹²⁰ The court stressed that "[t]he scope of the privilege should be 'strictly confined within the narrowest possible limits.'"¹²¹ Finally, there was the reiteration of the principle that where information is transmitted to an attorney with the intent or expectation that it will be revealed to a third party, such information is not confidential and thus not privileged.¹²²

These basic principles, the court held, required reversal of Judge Morgan's order. As the court noted, where the client expects that there will be revelation to a third party, the privilege is inapplicable; actual disclosure is not necessary. The second basis for reversal stemmed from the fact that in preparing the tax return, Lawless was not acting in his capacity as a legal adviser, but rather was performing an "accounting service." Therefore, the communications by definition were not privileged.¹²³

In *United States v. Weger*,¹²⁴ the defendant, in 1980, had submitted a title opinion to a federally insured bank, ostensibly prepared by her attorney, Mr. Yanacheck. In fact, the document had been forged

118. Moreover, Judge Morgan stated that based on his knowledge of Lawless' work habits he was certain that the information contained in the two documents had, in fact, been used to prepare the estate tax return which was under criminal investigation by the IRS.

119. 709 F.2d at 487. *Accord* *United States v. Weger*, 709 F.2d 1151 (7th Cir. 1983); *In Re Walsh*, 623 F.2d 489, 493 (7th Cir.), *cert. denied*, 449 U.S. 994 (1980); *FTC v. Shaffner*, 626 F.2d 323 (7th Cir. 1980); *United States v. Tratner*, 511 F.2d 248, 251-52 (7th Cir. 1975).

120. *Lawless*, 709 F.2d at 487. *Accord* *Radiant Burners Inc. v. American Gas Association*, 320 F.2d 314, 324 (7th Cir.) (en banc), *cert. denied*, 375 U.S. 929 (1963). *Compare* *Upjohn Co. v. United States*, 449 U.S. 383, 396 (1981) ("the recognition of a privilege based on a confidential relationship . . . should be determined on a case-by-case basis").

121. *Lawless*, 709 F.2d at 487 (emphasis added). *Accord* *United States v. Pipkins*, 528 F.2d 559, 563 (5th Cir.), *cert. denied*, 426 U.S. 952 (1976). *In Re Transocean Tender Offer Security Litigation*, 78 F.R.D. 692, 697 (N.D. Ill. 1978).

122. *Lawless*, 709 F.2d at 487.

123. *Id.* at 487. The privilege only protects communications and disclosures made to obtain informed legal advice. *See* *Fisher v. United States*, 425 U.S. 391 (1976); *In Re Walsh*, 623 F.2d 489 (7th Cir. 1980), *cert. denied*, 449 U.S. 994 (1980). The court held that even if Lawless had been rendering legal advice in addition to his tax preparation services, the privilege was inapplicable since no evidence was introduced to establish that the two disputed documents were given to Lawless for any purpose other than use in preparation of the return. 709 F.2d at 487. *Accord* *United States v. Brown*, 478 F.2d 1038 (7th Cir. 1973); *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961).

124. 709 F.2d 1151 (7th Cir. 1983).

by the defendant on paper stolen from Mr. Yanacheck's office. Based on the forged title opinion, the bank granted the defendant a loan which she failed to repay.

An investigation was begun. To insure that there would be no suspicion that he or his firm had been involved in the forgery, Mr. Yanacheck turned over to federal authorities a letter written to him in 1978 by the defendant at a time when he was counsel for her and her family. The letter pertained to a civil suit in which the defendant had been involved and contained a type face which was almost identical to that on the forged opinion letter.¹²⁵ Ms. Weger was indicted.

At trial, the 1978 letter was used as the basis for expert testimony that the style of type on the forged 1980 opinion letter and that on the 1978 letter sent by the defendant to Mr. Yanacheck were uniquely similar. The expert thus concluded that the forged document "had most likely been typed on the defendant's typewriter." The district court rejected the claim that the 1978 letter was inadmissible under the attorney-client privilege, and the court of appeals affirmed.

The court held that the privilege was designed to protect the substance of confidential communications, not their form. Thus, since the contents of the 1978 letter were not used against the defendant there was no violation of the privilege. The court also held that the Canons of Ethics allowed Mr. Yanacheck to turn the letter over to authorities in order to insure that he and his firm would not falsely be thought to have been involved in the crime.¹²⁶ These aspects of the court's holding are unexceptional and no doubt correct.

However, not content to let the matter rest here, the panel found it appropriate to decide "whether the defendant waived her right to assert the attorney-client privilege [as to the 1978 letter] when she forged her attorney's signature [*in 1980*] to a purported title opinion on the law firm's letter-head stationery."¹²⁷ In answering this question affirmatively, the court said:

It should be noted that the attorney-client privilege was not created to shield clients from charges for fraudulent conduct, *and a client who abuses the attorney-client relationship waives the attorney-client privilege.*¹²⁸

While the immediate holding of *Weger* is plain enough, it is diffi-

125. 709 F.2d at 1153.

126. *Id.* at 1156-57. DR 4-101(d)(4) of the Illinois Code of Professional Responsibility permits an attorney to reveal confidences or secrets necessary to defend himself against an accusation of wrongful conduct.

127. 709 F.2d at 1156-57.

128. 709 F.2d at 1156 (emphasis added) (*quoting* Clark v. United States, 289 U.S. 1, 15 (1933)).

cult to fix with any degree of precision either its limitations or the doctrinal basis on which it rests. The most troublesome aspect of the opinion lies in its seeming holding that an "abuse" of the attorney-client relationship results in a retroactive waiver of the privilege. If the opinion is in fact meant to articulate such a principle, it is open to very serious question, for nothing in *Clark* or the history of the privilege begins to support it.

The proper scope to be afforded the attorney-client privilege has long been a matter of debate. However, from the beginning there has been virtual unanimity of opinion that no privilege attaches to communications intended to help the client in achieving illicit ends. It is not that the privilege in such circumstances is waived; it is rather that the privilege does not exist at all. As Wigmore has emphasized, "the difficulty has been to define the boundaries of this limitation. It has not always been kept in mind that the privilege, in its very fundamentals presupposes . . . the furnishing of legal advice to a culpable client, as well as to the worthy one, *i.e.*, to a client who, if the law were duly enforced, would lose in the litigation."¹²⁹

However, all the reasons which justify the holding of confidences of the guilty as well as the innocent "cease to operate at a certain point," namely where the client seeks advice not with reference to *prior* misconduct, but to accomplish *future* wrongdoing. "*From that point onwards*, no protection is called for. . . ."¹³⁰ This is precisely what Mr. Justice Cardozo said in *Clark v. United States*—and this is all he said:

There is a privilege protecting communications between attorney and client. The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told.¹³¹

The panel's attempt to distill a doctrine of retroactive waiver from an epigram eviscerated from an opinion which did not pretend to deal with the concept of *waiver*—let alone retroactive waiver, is palpably wrong. The panel's methodology cannot be squared with the Supreme Court's oft-repeated warning that the meaning of judicial opinions is not to be derived from a hyper-literal parsing of and preoccupation

129. 8 WIGMORE, *supra* note 116, § 2298 at 572 (McNaughton Rev. 1961).

130. *Id.*, § 2298 at 573 (emphasis added).

131. 289 U.S. at 15. *Clark* was not even an attorney-client privilege case. The issue was whether a juror who had lied on *voir-dire* could be held in criminal contempt. The defendant argued that jury deliberations were immune from scrutiny. "Searching for an analogy", the Court looked to the fraud exception to the attorney-client privilege. There then followed the quotation cited above.

with words, surgically excised from the broader context of an opinion.¹³² What Mr. Justice Cardozo said in *Snyder v. Massachusetts*¹³³ applies with singular force here:

A fertile source of perversion in constitutional theory is the tyranny of labels. Out of the vague precepts of the Fourteenth Amendment a court frames a rule which is general in form, though it has been wrought under the pressure of particular situations. *Forthwith another situation is placed under the rule because it is fitted to the words, though related faintly, if at all, to the reasons that brought the rule into existence.*¹³⁴

Broadly read, *Weger* raises perplexing questions, as the following paradigm demonstrates: X has an attorney-client relationship with Y over a number of years. In 1978, X, in various confidential written communications admits to Y *past* criminal wrongdoing involving fraudulent use of stolen American Express credit cards. In 1980, X asks Y if and how he can, in the *future*, engage in a scheme involving counterfeit VISA cards and avoid detection under the mail fraud statute. Y refuses to assist X who nonetheless engages in his planned illegal activities. X is indicted for mail fraud. At the trial, Y is ordered to testify about his conversation in 1980 with X relating to the future wrongdoing *and* to produce the 1978 letters in which X has admitted *past* wrongdoing.¹³⁵

Under traditional principles, the 1980 conversation would not be privileged and would have to be revealed. *Weger*, however, would also seem to require production of the 1978 communications since the privi-

132. See, e.g., *United States v. Apfelbaum*, 445 U.S. 115, 119-20 (1980); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979) ("[T]he language of an opinion is not always to be parsed as though we were dealing with the language of a statute."); *Accord CBS v. FCC*, 453 U.S. 367, 385 (1981). Judge Pell's decision in *The Northern Trust Co. v. Garman*, 643 F.2d 1252, 1256 (7th Cir. 1980), *cert. denied*, 450 U.S. 910 (1981) illustrates the inappropriateness and futility of attempts to rely on isolated words in an opinion as a basis for decision of later cases.

133. 291 U.S. 97 (1934).

134. 291 U.S. at 114 (emphasis added). See also *Hawks v. Hammill*, 288 U.S. 52, 57 (1933) (words have "a color and a content that will vary with the setting."); *Towne v. Eisner*, 245 U.S. 418, 425 (1918) (Holmes, J.) ("A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."); *Shapiro v. United States*, 335 U.S. 1, 56 (1948) (Frankfurter, J., dissenting) ("[i]t is part of wisdom, particularly for judges, not to be victimized by words."); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821) (Marshall, C.J.) ("[i]t is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used."); *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) (L. Hand, J.) ("Words are not pebbles in alien juxtaposition; they have only a communal existence; and . . . all in their aggregate take their purport from the setting in which they are used. . . ."); Holmes, *Law In Science And Science In Law*, 12 HARV. L. REV. 443, 460 (1899) ("We must think things not words, or at least we must constantly translate our words into the facts for which they stand, if we are to keep to the real and the true.").

135. The latter evidence would be sought by the government under Rule 404(b) to show intent.

lege was "abused" and is therefore "waived retroactively." It is outside the purview of this Article to determine either the wisdom or the doctrinal soundness of such a rule, although both are dubious. The point is to suggest that there is nothing either in *Clark* or the *Weger* opinion itself which supports *Weger's* apparent conclusion.¹³⁶

To perform their proper function, judicial opinions must do more than merely announce a conclusion which is justified not by the force of their reasoning but by the power of their author's commission. As Justice Stone said:

I can hardly see the use of writing judicial opinions, unless they are to embody methods of analysis and of exposition which will serve the profession as a guide to the decision of future cases. If they are not better than an excursion ticket, good for this day and trip only, they do not serve even as protective coloration of the writer of the opinions and would much better be left unsaid.¹³⁷

Measured against this standard, *Weger* does not fare too well.

B. *The Psychotherapist-Patient Privilege*

While a physician-patient privilege is not generally recognized under federal common law,¹³⁸ it enjoys substantial recognition by a majority of the states.¹³⁹ Therefore, the privilege often must be applied by federal courts exercising diversity jurisdiction.¹⁴⁰

The Advisory Committee's proposed rules would have recognized no physician-patient privilege and would, indeed, have precluded its assertion even in diversity actions. Proposed Rule 504 would, however, have recognized a discrete aspect of that privilege, namely a psychotherapist-patient privilege. Although the question is far from clear, it has been suggested that "it appears that perhaps under the influence of state law and Proposed Rule 504, the federal courts are increasingly

136. The Illinois Code of Professional Responsibility would not itself authorize production. DR4-101(d)(4) gives permission to a lawyer to reveal confidences to protect himself *if* he is so inclined. It does not authorize the government to obtain by subpoena those confidences which the attorney may not choose voluntarily to surrender.

137. Letter from Justice Stone to Felix Frankfurter *quoted in* A. MASON, *THE SUPREME COURT FROM TAFT TO WARREN* 105-06 (1958).

138. *See* *United States v. Mancuso*, 444 F.2d 691, 695 (5th Cir. 1971); *In Re Verplank*, 329 F. Supp. 433, 438 (C.D. Cal. 1971); *Ramer v. United States*, 411 F.2d 30, 39 (9th Cir.), *cert. denied*, 396 U.S. 965 (1969); *United States v. Kansas City Lutheran Home & Hospital Association*, 297 F. Supp. 239, 244 (W.D. Mo. 1969); *United States v. Westinghouse Elec. Corp.*, 483 F. Supp. 1265, 1268 (W.D. Pa. 1980); *In Re Grand Jury Subpoena*, 460 F. Supp. 150, 151 (W.D. Mo. 1978); *Contra In Re Subpoena of Jorge S. Zuriga*, 714 F.2d 632 (6th Cir. 1983).

139. *See* *Louisell and Sinclair, Foreward: Reflections On The Law Of Privileged Communications—The Psychotherapist-Patient Privilege*, 59 CALIF. L. REV. 30, 32 n.11 (1971).

140. The scope of the privilege is discussed at length in *Emerging Problems Under the Federal Rules of Evidence* 102 (American Bar Association 1983).

sympathetic to the assertion of such a privilege, though not perhaps going so far as to absorb Proposed Rule 504 into the federal common law."¹⁴¹

During the 1982-83 Term, the Seventh Circuit avoided the question of whether a psychotherapist-patient privilege should be recognized under Rule 501. In *In Re Pebsworth*,¹⁴² the court reviewed an order requiring compliance with a grand jury subpoena for an insurance carrier's records relating to insurance reimbursements. Blue Cross and a Dr. Anita had objected to the subpoena on the ground that it violated the psychotherapist-patient privilege established by the Illinois Mental Health and Development Disabilities Confidentiality Act,¹⁴³ the common law, and the Federal Constitution. The district court held that any privilege which might have existed was "waived through the patients' explicit authorization of disclosure of such records to medical insurance carriers, and their consequent expectation that the confidential character of the records would necessarily be compromised pursuant to the reimbursement process."¹⁴⁴

In affirming the district court's compliance order, the court of appeals declined to consider whether a psychotherapist privilege existed under Rule 501. Rather, the court affirmed the district court's order on the basis that the patient's authorization of disclosure to the insurance carrier constituted a waiver of any privilege that might arguably have existed.

At the threshold, the court made clear that "the contours and exceptions of . . . privileges [under Rule 501] are clearly a matter of federal common law; state-created principles of privilege do not control."¹⁴⁵ Thus, the fact that the Illinois Mental Health Act prohibited the redisclosure by insurance carriers of the kind of information sought by the grand jury was of no moment. The court held that any privilege that might have attached to billing and administrative records which were sought by the grand jury had been intentionally and knowingly waived when the patients assented to the publicizing aspect of the reimbursement and claims procedure.

However, the availability of the privilege under other circumstances was not foreclosed. Indeed, the court cautioned that its deci-

141. Emerging Problems Under the Federal Rules of Evidence 104 (American Bar Association 1983). Based upon the three cases cited, this conclusion is perhaps a bit overstated.

142. 705 F.2d 261 (7th Cir. 1983).

143. ILL. REV. STAT. ch. 91 1/2, ¶¶ 801-17 (1981).

144. *Pebsworth*, 705 F.2d at 262.

145. *Id.*

sion might well be different if the subpoena sought involved, detailed, psychological profiles or substantive accounts of therapy sessions.¹⁴⁶ Thus, whether a psychotherapist-patient privilege exists under Rule 501 is still an open one in this circuit.

VI. OPINION EVIDENCE AND RULES 701, 702, AND 703

Although not decided under the Federal Rules of Evidence, *United States ex rel. DiGiacomo v. Franzen*,¹⁴⁷ involving as it does a question over which there has been not a little disagreement, is, at least potentially, one of the more important cases decided by the Seventh Circuit in the 1982-83 Term. The facts are these: during the defendant's state court rape trial, the victim told how she was forced to drive the defendant to a cornfield where the rape occurred. Her identification of the defendant was unequivocal.

Thereafter, the supervising criminologist at the Illinois Bureau of Identification testified that a comparison between samples of the defendant's hair and those found in the victim's car revealed them to be microscopically similar and that the chances of the hair in the car being other than the defendant's were one in 4,500.¹⁴⁸

During their deliberations, the jury asked the court whether it had been conclusively established by the sampling of hair specimens that the defendant was in the victim's car. Shortly after the trial judge declined to answer the question, the jury returned a verdict of guilty.

Following the exhaustion of his state court remedies, the defendant sought *habeas* relief in the district court. While conceding the admissibility of the testimony regarding the scientific comparison of the hair samples, the defendant contended that admission of the testimony of mathematical probabilities misled the jury into believing that the state had conclusively established that he was in the car.¹⁴⁹ The district court rejected these arguments, and in a relatively brief *per curiam* opinion, the Seventh Circuit affirmed.

At the threshold, the court frankly conceded "that the interjection into the criminal trial process of sophisticated theories of mathematical probability raises a number of serious concerns."¹⁵⁰ No less candid

146. *Id.* at 263.

147. 680 F.2d 515 (7th Cir. 1982) (*per curiam*).

148. This testimony was based on a recently published study the witness had read. *Id.* at 516.

149. *Id.* at 517.

150. *Id.* at 518 (footnote omitted). The court took notice of the debate in the law journals about the use of evidence of statistical probability. *See id.* at 518 n.3. In light of the court's acknowledgement of the serious nature of the question presented, which was *res integra* in this

was its acknowledgement of those decisions which had refused to sanction the admissibility of such evidence.¹⁵¹ While the Seventh Circuit "share[d] in the concern of these courts that the admission of evidence as to mathematical probability . . . may mislead and confuse the jury", it nonetheless refused to find, "on the facts before [it]", that its admission constituted a denial of due process.¹⁵²

Since "[t]he Constitution does not, and, indeed, cannot guarantee that only completely reliable evidence will be placed before the jury", the admission of the statistical evidence—even if somewhat unreliable—did not, the court reasoned, constitute a *per se* violation of the due process clause.¹⁵³ So long as a defendant was afforded the opportunity to challenge whatever evidence was admitted, due process is satisfied.

The court noted that the petitioner's counsel had made no attempt to cross-examine the state's expert, to challenge the validity of her conclusions, to call his own expert, or to correct any impressions which might have been misleading. In fact, the court emphasized, "[e]ven now, [the petitioner] does not claim that Dillon was wrong in her conclusion. . . ." ¹⁵⁴

In determining how far, if at all, *DiGiacomo* sanctions the use of evidence of statistical probabilities in federal trials, it must not be overlooked that *DiGiacomo* was a *habeas corpus* case. Consequently, the sole question was whether the alleged error in the admission of the evidence was of constitutional dimensions.¹⁵⁵ In a federal case, admissibility will depend on the various non-constitutional factors enunciated

Circuit, the court's determination on the briefs alone is somewhat surprising. What is more unusual, was defense counsel's silent acquiescence in this determination. *Id.* at 515.

151. *Id.* at 518. See also *Miller v. State*, 240 Ark. 340, 399 S.W.2d 268 (1966); *State v. Sneed*, 76 N.M. 349, 414 P.2d 858 (1966).

152. 680 F.2d at 518-19. The court bottomed this conclusion on the absence in the prosecutor's closing argument of (i) any claim that the statistical evidence conclusively proved that the defendant was in the victim's car, and (ii) the absence of any attempt to blur the issue of whether the source of the hair was the petitioner with the issue of whether he committed the crime—even though, as the court recognized, in the case before it, these two questions "were one and the same." *Id.* at 518-19.

153. *Id.* at 519.

154. *Id.* at 519. There is to be sure a surface allure in this kind of argument, for if the challenged evidence is in fact true and the defendant guilty, arguments against its admissibility tend to be viewed as much ado about nothing. Yet, there are obvious dangers in such a result-oriented approach. If carried too far, the burden of proof is subtly shifted from the government to the defendant. No longer is it the government which must prove the reliability of its evidence at trial, it is the defendant who, on appeal, must prove its unreliability to gain a reversal. This approach, which is appearing more and more in the cases, see, e.g., *United States v. Winograd*, 656 F.2d 279, 282 (7th Cir. 1981), is not limited to questions of evidentiary admissibility. As one perceptive student commentator has shown, this "guilty anyhow" attitude is found even where errors of constitutional magnitude are alleged. See Note, *Effective Assistance of Counsel in Illinois: "The Guiding Hand of Counsel?"*, 59 CHI.-KENT L. REV. 901, 914 (1983).

155. *DiGiacomo*, 680 F.2d at 519. See also *Wainwright v. Goode*, 104 S. Ct. 378, 382 (1983)

ated in the Federal Rules of Evidence—factors which are at once substantially less rigorous and far more easily violated than is the due process clause of the fourteenth amendment.

Before evidence of mathematical probabilities can be received in a federal case, several basic Rules will have to be satisfied. First, Rule 702 will require that the “expert” be qualified to give an opinion on statistical probability. If, as in *DiGiacomo*, the testimony is based on extrinsic data, Rule 703 will require that the data be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject. And finally, but perhaps most importantly, the evidence will have to pass muster under Rule 403.

Whether the evidence in *DiGiacomo* could have been received in a federal trial is open to very serious question. In the court’s *per curiam* opinion, there appears to be some concern about the reliability of the evidence, although there is, to be sure, a suggestion that the evidence has some probity.¹⁵⁶ While the court did not, of course, address the question of jury confusion within the context of Rule 403, there are indications that evidence of mathematical probability could well be excluded by a judge in the proper exercise of the very considerable discretion accorded under Rule 403. For, as the court conceded, statistical evidence “may mislead and confuse the jury.”

Nor was the court required to address the question of whether the state’s expert would have been qualified as an expert under Rule 702 to testify on mathematical probabilities. Obviously, the mere reading of a single published study would not be enough. And merely reciting to the jury the results of a study, as was done in *DiGiacomo* and *United States v. Massey*,¹⁵⁷ would not satisfy Rule 703. More importantly, this sort of testimony would raise serious problems under the federal hearsay rule.

The adoption of the Federal Rules of Evidence has expanded the scope of expert testimony. For example, Rule 703 expressly permits experts to base their testimony on evidence that would be inadmissible

(“It is axiomatic that federal courts may intervene in the state judicial process only to correct wrongs of a constitutional dimension.”).

156. The court’s statement that the Constitution does not guarantee that only completely reliable evidence will be placed before the jury, could be read as an implicit recognition that the particular evidence received at trial was not wholly reliable. However, shortly thereafter, the court noted that to have limited the expert’s opinion to an assertion that the hairs were similar “would have robbed the state of the full probative value of its evidence.” 680 F.2d at 519.

157. 549 F.2d 676 (8th Cir. 1979). In *Massey*, the court held that the study was lacking in foundational authority since the witness “did not know the nature and extent of the studies conducted from which the statistics were gathered.” *Id.* at 680.

so long as it is of a type reasonably relied on by experts in the particular field in forming opinions or inferences upon the subject.¹⁵⁸ While a court must make such a finding to satisfy the requirement of the Rule, in criminal cases the inquiry must go further:

In criminal cases, a court's inquiry under Rule 703 must go beyond finding that hearsay relied on by an expert meets these standards. An expert's testimony that was based entirely on hearsay reports, while it might satisfy Rule 703, would nevertheless violate a defendant's constitutional right to confront adverse witnesses. The Government could not, for example, simply produce a witness who did nothing but summarize out-of-court statements made by others. A criminal defendant is guaranteed the right to an effective cross-examination.¹⁵⁹

None of the hesitancy of the *DiGiacomo* opinion was evident in *United States v. Green*.¹⁶⁰ There, the defendant was charged with the kidnapping and murder of a young woman. A forensic serologist testified that genetic markers consistent with the defendant's blood type were found in the victim's car and on her sheet. In addition, "he testified as to the frequency of occurrence of those markers in the population, which was comparatively rare."¹⁶¹

On appeal, the defendant argued that the testimony regarding the frequency of occurrence of the genetic markers was not reliable. Citing neither case authority nor any of the Federal Rules, the court rejected the argument:

The government furnished Green with all of its reports and test results, including an article written by the expert on the frequency of occurrence of genetic markers in the population, so that he was aware that this type of testimony might be introduced, and we find that it was properly admitted. Green also contends that the testimony was not reliable because the expert relied on a biological statistician to determine an appropriate sample size in studying frequency of occurrence since this was outside of his own area of expertise. However, we find that the expert was not relying on someone else's work, but that he only used it as recommendations in connection with his own statistical studies. Therefore, we find the expert's testimony was reliable.¹⁶²

In sum, neither *DiGiacomo* nor *Green* silences the various concerns that many have voiced regarding the use of evidence of mathe-

158. See *United States v. Lawson*, 653 F.2d 299, 302 (7th Cir. 1981), *cert. denied*, 454 U.S. 1150 (1982).

159. *United States v. Lawson*, 653 F.2d at 302.

160. 680 F.2d 520 (7th Cir.), *cert. denied*, 459 U.S. 1072 (1982). The trial was to the court, the defendant having waived a jury.

161. *Id.* at 522.

162. 680 F.2d at 523.

mathematical probabilities. It remains for future cases to give the kind of critical analysis that was not necessary in *DiGiacomo* and was not undertaken in *Green*.¹⁶³

Finally, there is *United States v. Bastanipour*,¹⁶⁴ which illustrates the breadth of Rule 703. There, a government chemist testified that the substance in certain caviar tins was heroin. The opinion was based on laboratory tests he personally performed and on information obtained by way of computer. On cross-examination, it was revealed that the expert did not recall the literature spectra upon which he based his analysis and that he had lost or destroyed the "standard" spectra which he had compared against the literature spectra. The expert also acknowledged that he knew nothing about the program which caused the computer to bring forth the information it produced.

The court of appeals rejected the defendant's claim that the failure of the witness to retain the laboratory standards and test results and the failure of the government to disclose technical information concerning the patented computer programs of standard commercial laboratory instruments prevented his counsel from conducting a meaningful cross-examination of the expert.

Holding that the trial court was within its discretion in admitting the government's expert testimony under Rules 703 and 705, the court distinguished cases holding that a computer program relating to test data must be made available to the defense prior to trial so that it could prepare to conduct an effective cross-examination of the expert witness. In the court's view, those cases involved the admission of evidence of computer printouts or direct testimony of results rather than opinion testimony of an expert who had used what he characterized as recognized instrumental techniques involving the use of a computer.¹⁶⁵

Lastly, the court rejected the dissenting opinion in *Perma Research and Development v. Singer Co.*,¹⁶⁶ in which Judge Van Graafeiland held that where a computer is programmed to produce information for purposes of litigation, a court should not permit a witness to state the results without having the program available at trial, and the party should make the availability known in advance of trial. The Seventh Circuit found more persuasive Mr. Justice Clark's opinion in which it

163. Evidence of statistical probabilities is to be distinguished from the use of extrapolation evidence. See *Illinois Physicians' Union v. Miller*, 675 F.2d 151 (7th Cir. 1982); *State of Georgia v. Califano*, 446 F. Supp. 404 (N.D. Ga. 1977).

164. 697 F.2d 170 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 1790 (1983).

165. 697 F.2d at 177.

166. 542 F.2d 111, 125 (2d Cir.), *cert. denied*, 429 U.S. 987 (1976).

was concluded that the trial judge had not abused his discretion in allowing the experts to testify even though "it might have been better practice" to deliver the data and theorems in advance of trial.¹⁶⁷

As in *United States ex rel. DiGiacomo v. Franzen*,¹⁶⁸ the court in *Bastanipour* stressed the failure of defense counsel to advance meaningful evidence to contradict the expert testimony:

It is difficult to believe that, in the words of *Dioguardi*, 428 F.2d at 1038, there is 'an appreciable risk that prejudice resulted.' Not only did defense counsel reject the proffer of a sample for testing. The facts demonstrate that considerable effort was spent to conceal the white powdery substance under the false bottoms of the caviar tins. It is difficult, if not wholly unrealistic, to imagine that such energies would have been exerted if the matter in question were not extremely valuable contraband. Under defendant's elaborate switching hypothesis, which involved the intricate substitution of deceptively similar wrapped tins and handwritten labels, any other possibility would be even more remote.¹⁶⁹

VII. SPOILIATION AND THE DRAWING OF NEGATIVE INFERENCES BY THE TRIER OF FACT

A.

The Federal Rules of Evidence have not entirely supplanted common law principles which still govern in the absence of an applicable rule.¹⁷⁰ One of the most enduring of the common law principles is the doctrine of spoliation. In essence, the doctrine provides that when a litigant, in bad faith, has destroyed, fabricated, or suppressed evidence, the trier of fact may draw an inference that the spoliator believes his case is weak or unfounded.¹⁷¹

The principle has best been described by Dean Wigmore:

It has always been understood—the inference, indeed, is one of the simplest in human experience—that a party's *falsehood* or *other fraud* in the preparation and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, and all similar conduct is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the *fact* itself of the cause's lack of truth

167. 542 F.2d at 115.

168. 680 F.2d 515 (7th Cir. 1982). See *supra* note 147, and accompanying text.

169. *Bastanipour*, 697 F.2d at 177.

170. See *United States v. Bolin*, 514 F.2d 554, 558 (7th Cir. 1975).

171. The doctrine was often employed in early admiralty cases. See, e.g., *The Pizarro*, 15 U.S. (2 Wheat.) 227 (1817); *The Fortuna*, 16 U.S. (3 Wheat.) 236 (1818); *The Cheshire*, 70 U.S. (3 Wall.) 231 (1865); *The Circassian*, 69 U.S. (2 Wall.) 135 (1864); *The Andromeda*, 69 U.S. (2 Wall.) 481 (1864).

and merit. The inference thus does not necessarily apply to any specific fact in the cause, but operates, indefinitely though strongly, against the whole mass of alleged facts constituting his cause.¹⁷²

During the 1982-83 Term, the Seventh Circuit had before it several cases involving this principle. The first was *S.C. Johnson & Son Inc. v. Louisville & Nashville RR Co.*,¹⁷³ in which the plaintiff brought an action against a carrier for damage to a shipment of Johnson products. In an attempt to determine the extent of the damage, one Manske, a technical specialist in Johnson's quality control department, performed tests on representative samplings of the damaged products. As he performed the tests, Manske took notes regarding the condition of the various products. These notes were used to prepare an internal memorandum regarding the extent of the damage. After the preparation of the memorandum, Manske destroyed the notes since, as he claimed at trial, the notes "were illegible to anyone but himself and because all of the necessary information was contained in the memorandum."¹⁷⁴

The district court concluded that Johnson had failed to prove its damages with requisite certainty and entered judgment for the defendant. In reaching this conclusion, Judge Grady relied, in part, on the negative inferences he drew from Manske's destruction of his notes. While the Seventh Circuit affirmed the ultimate conclusion that the plaintiff's proof of damages was inadequate, it disagreed with the district court's application of the doctrine of spoliation.¹⁷⁵

As the court of appeals noted, application of the doctrine involves a two step process. First, the evidence must, of course, have been destroyed. Second, and more importantly, the court must conclude that the evidence was destroyed in bad faith. The crucial element is not the

172. 2 J. WIGMORE, EVIDENCE § 278 at 133 (Chadbourn Rev. 1979) (emphasis in original). See also Maguire & Vincent, *Admissions Implied From Spoliation or Related Conduct*, 45 YALE L.J. 226 (1935).

173. 695 F.2d 253 (7th Cir. 1982).

174. *Id.* at 256.

175. *Id.* at 259. In explaining the doctrine, the majority stated that bad faith destruction of documents allows the trier of fact to "infer from this state of mind that the contents of the evidence would be unfavorable to that party if introduced in court." *Id.* at 258 (emphasis added). The court did not draw the distinction enunciated by Wigmore relating to the extent of the negative inference. Wigmore distinguishes between conduct giving rise to negative inferences: On the one hand is conduct indicating a consciousness of the weakness of the case in general, including bribery, destruction of evidence, and the like; on the other, is conduct indicating a consciousness of the weakness of a specific element in the cause, including failure to produce a particular witness or a document and the like. 2 WIGMORE, *supra* note 172, § 278 at 133. The failure to note this distinction was probably inadvertent and in any event was of no consequence since, in the case before the court, a negative inference relating to the contents of the document necessarily compelled a negative inference as to the entire damage aspect of the case.

destruction of the evidence, *simpliciter*, but the reasons for its destruction.¹⁷⁶ Before the trier of fact is justified in drawing negative inferences from the destruction of evidence, it must be shown that there was some reason to suppose that non-production would be used against the non-producing party.¹⁷⁷

The court went on to hold that the facts surrounding Manske's destruction of his notes did not support an inference of bad faith.¹⁷⁸ The court cautioned that had Judge Grady found Manske to have been an incredible witness, based on his demeanor, it would respect that finding.¹⁷⁹ That not being the case, the court proceeded on the assumption that Manske testified truthfully.

The court's emphasis on the almost inviolable nature of a district court's credibility determinations based on demeanor should not be overlooked. It has long been recognized that the trier of fact can consider the manner in which a witness testifies as well as his conduct and demeanor on the witness stand in resolving conflicting evidence.¹⁸⁰ Moreover,

the demeanor of a witness . . . may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies.¹⁸¹

176. *See* *The Olinde Rodrigues*, 174 U.S. 510, 528-29 (1899).

177. 695 F.2d at 258-59.

178. *Id.* *See also* *United States v. Bastanipour*, 697 F.2d 170, 174 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 1790 (1983) (DEA agents' good faith destruction of notes not violative of Jencks Act even though violated DEA's retention policy).

179. *Id.* at 259. The power of a court to determine that a witness' testimony is inherently incredible is not open to question. *See, e.g.*, *The Northern Trust Co. v. Garman*, 643 F.2d 1252, 1260 (7th Cir. 1981), *cert. denied*, 450 U.S. 910 (1981); *United States v. Shoupe*, 548 F.2d 636 (6th Cir. 1977); *Geigy Chemical Corp. v. Allen*, 224 F.2d 110, 114 n.5 (5th Cir. 1955) ("If there be any one thing in the administration of law upon which the decisions, the texts, and the general opinion of the bench and bar are in agreement, it is that evidence which is inherently unbelievable or incredible is in effect no evidence. . . . Courts are not required to believe that which . . . they judicially know to be incredible."). *Accord* *Quock Ting v. United States*, 140 U.S. 417, 420 (1891); *Indiana Metal Products v. NLRB*, 442 F.2d 46, 51-52 (7th Cir. 1971); *Peters v. Fitzpatrick*, 310 F.2d 704, 707 (7th Cir. 1962).

180. *See* *Sartor v. Arkansas National Gas Corp.*, 321 U.S. 620, 628 (1944); *United States v. Warwick*, 695 F.2d 1063, 1067 (7th Cir. 1982); *Ballou v. United States*, 370 F.2d 659, 664 (6th Cir. 1966), *cert. denied*, 388 U.S. 911 (1967); *United States v. American Tel. & Tel. Co.*, 83 F.R.D. 323, 339-40 (D.D.C. 1979); *Oscar Gruss & Son v. Lumbermens Mutual Casualty Co.*, 41 F.R.D. 279, 282 (S.D.N.Y. 1966). *See also* *Schulenberg v. Signatrol, Inc.*, 37 Ill. 2d 352, 226 N.E.2d 624, 626 (1967).

181. *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). *Accord* *United States v. Barham*, 466 F.2d 1138, 1140-41 (9th Cir. 1972), *cert. denied*, 410 U.S. 926 (1973); *United States v. Tropiano*, 418 F.2d 1069, 1075 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970); *In re Bebar*, 315 F. Supp. 841, 844 (E.D.N.Y. 1970). This does not mean, however, that mere disbelief alone can serve

By their very nature, credibility determinations based on demeanor are not generally susceptible of or subjected to appellate scrutiny and are given enormous deference, for as Justice Jackson has incisively observed, "a few minutes' observation in the courtroom is more informing than reams of cold record."¹⁸² Thus in fashioning findings of fact pursuant to Rule 52 of the Federal Rules of Civil Procedure, lawyers involved in bench trials or injunction hearings should not overlook the importance of demeanor "evidence". Properly drafted Findings will go far toward insuring that the victory obtained in the district court will not be overturned on appeal.

B.

Since at least *Wilson v. United States*,¹⁸³ it has been settled that false statements by a defendant in explanation of his conduct are admissible against him as tending circumstantially to indicate his guilt. While there is no Federal Rule of Evidence which explicitly treats false exculpatory statements, it is clear that they are a species of relevant circumstantial evidence under Rule 401 and thus are admissible pursuant to Rule 402.¹⁸⁴ The more difficult question is the extent to which this and similar sorts of evidence can be used as affirmative or substantive proof.

The court briefly addressed this problem in *United States v. Green*.¹⁸⁵ There, the defendant admitted to the police two days after

in lieu of affirmative proof. See *United States v. Green*, 680 F.2d 520, 523-24 (7th Cir. 1983); *Pariso v. Towse*, 45 F.2d 962, 964 (2d Cir. 1930).

182. *Ashcraft v. Tennessee*, 322 U.S. 143, 171 (1943) (Jackson, J., dissenting). Cf., *United States v. Bruscano*, 687 F.2d 938, 941 (7th Cir. 1982) (en banc). Where, however, factual conclusions are made on the basis of documentary evidence, the same deference to a court's findings is neither required nor shown. See *United States v. General Motors Corp.*, 384 U.S. 127, 141-42 n.16 (1966); *John R. Thompson Co. v. United States*, 477 F.2d 164, 167 (7th Cir. 1973) ("Since the evidence in this case is all either documentary or in the form of physical exhibits we are in as good a position as the trial court to examine it . . ."); *Deep Welding, Inc. v. Sciaky Bros., Inc.*, 417 F.2d 1227, 1229 (7th Cir. 1969), cert. denied, 397 U.S. 1037 (1970).

183. 162 U.S. 613 (1896). Professors Maguire and McCormick treat such statements and other attempts to manufacture or suppress evidence as implied admissions. Wigmore classifies this as a species of circumstantial evidence indicating consciousness of guilt. 2 WIGMORE EVIDENCE § 278 (3d ed. 1940). See also Maguire and Vincent, *supra* note 172. See, e.g., *United States v. Johnson*, 513 F.2d 819, 824 (2d Cir. 1975); *United States v. Lacey*, 459 F.2d 86 (2d Cir. 1972); *Virgin Islands v. Lovell*, 378 F.2d 799 (3rd Cir. 1967); *Young v. United States*, 358 F.2d 429 (9th Cir. 1966); *United States v. McCorney*, 329 F.2d 467 (2d Cir. 1964); *Corey v. United States*, 305 F.2d 232, 239 (9th Cir. 1962), cert. denied, 371 U.S. 956 (1963); *Rizzo v. United States*, 304 F.2d 810, 830 (8th Cir.), cert. denied, 371 U.S. 890 (1961). See also *United States v. Karigiannis*, 430 F.2d 148, 151 (7th Cir.), cert. denied, 400 U.S. 904 (1970); *United States v. Riso*, 405 F.2d 134, 138 (7th Cir. 1968), cert. denied, 394 U.S. 959 (1969).

184. See 1 WEINSTEIN'S EVIDENCE, *supra* note 12, ¶ 401[10] at 401-57.

185. 680 F.2d 520 (7th Cir. 1983).

the murder of a young girl, that shortly before her death, he had spoken with her. He claimed that he had apologized to her for a sexually suggestive remark and that in response, she had stabbed him in the forearm with a knife.¹⁸⁶ In addition, he claimed that later in the evening, he had gone with friends to East St. Louis and later returned home.

Two weeks later, the police informed Green that his story about his friends, Saffold and Wright, and the trip to East St. Louis did not stand up, whereupon Green recanted and said that Rhonda had stabbed him at the El Cid Complex and that afterwards, he had gone home and stayed there. Some days later, Green agreed to give a blood test but failed to appear at the appointed place and time. Three days later, he was indicted but was not apprehended until almost a year later in New Orleans. Following his arrest, he gave a third version of the events.¹⁸⁷

The case against the defendant was entirely circumstantial,¹⁸⁸ consisting in part, of the various false exculpatory statements made to the police. Based on all the evidence, the district court found the defendant guilty.

On appeal, the defendant contended that his statements were inadmissible—although the opinion of the court of appeals never explains exactly why. In fact, the court blurs the difference between admissibility of the statements and the extent to which a conviction may be bottomed on them. A reading of the entire portion of that aspect of the decision reveals that what really was at issue was *not* the admissibility of the false exculpatory statements, but rather the extent, if any, to which they have independent substantive effect.

While the opinion treats these questions in summary fashion,¹⁸⁹ at least this much is clear: A conviction based solely on statements of an accused cannot stand, there must be independent evidence that a crime has been committed.¹⁹⁰ While mere disbelief of the defendant's statements cannot alone support a conviction, such disbelief is not

186. *Id.* at 521-22. The knife wounds in the defendant's arm were made with a weapon similar to that which inflicted the fatal wounds on the victim.

187. *Id.*

188. The fact that evidence is wholly or partly circumstantial does not impose a greater or more onerous burden on a party in a federal case since as the Supreme Court has held, circumstantial evidence stands on no different footing and is entitled to no less weight than direct evidence. *See Holland v. United States*, 348 U.S. 121 (1954).

189. *Green*, 680 F.2d at 523-24. The whole discussion of this issue is contained in a single paragraph.

190. *Id.* at 524. This is the familiar *corpus delicti* rule.

irrelevant.¹⁹¹

The court of appeals held that the defendant's inconsistent statements "were an attempt to throw suspicion on others and tended to show his own guilt."¹⁹² In addition, the detailed knowledge of the events of the crime contained in these statements tended to show the defendant's own guilt since had he not perpetrated the crime he could not have had such detailed information. The conviction was affirmed since the totality of the evidence demonstrated beyond a reasonable doubt the defendant's guilt.

VIII. CONCLUSION

The approach of the Seventh Circuit during the 1982-83 Term was marked by flexibility in applying the Federal Rules of Evidence. That flexibility not only makes good sense, but also is consonant with the command of Rule 102 which mandates a construction of the rules that secures fairness in administration, elimination of unnecessary expense and delay and the promotion of the interstitial development evidentiary principles in order that the truth be ascertained and proceedings justly determined. In short, the decisions of the 1982-83 Term, while abjuring "*over-emphasis* on the *technique* of legal rules in detail,"¹⁹³ were "rightly merits-minded."¹⁹⁴

191. See *United States v. Johnson*, 513 F.2d 819, 824 (2d Cir. 1975) (false exculpatory statements have "independent probative force").

192. 680 F.2d at 524.

193. 1 WIGMORE, *supra* note 6, § 8a at 244-45.

194. 1 WEINSTEIN'S EVIDENCE, *supra* note 12, ¶ 102[01] at 102-7.