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OTHER CRIMES EVIDENCE: RELEVANCE REEXAMINED

"It is a fundamental guarantee of American jurisprudence that a person charged with a criminal offense may safely assume that he will be tried only for the stated offense, and will not be required to meet evidence of other, unrelated criminal acts."[1] Despite this seemingly clear-cut proposition, a common device used by the prosecution in criminal cases is the introduction of the accused's past, concurrent, or subsequent crimes or wrongs to prove his guilt of the crime charged.[2] The rules regarding the admissibility of evidence of other crimes have been stated in various forms.[3] Generally, the law recognizes the propriety of drawing inferences from happenings other than the one at issue. The validity of the inference drawn, and thus the admissibility of the evidence, often turns on the degree of similarity between the acts sought to be proved and those other acts sought to be introduced.[4]

People v. McDonald[5] states the Illinois rule on the admission of other crimes evidence. Generally, evidence of extra-indictment offenses is not admissible against the defendant except when it tends to prove a fact in issue. "[E]vidence which goes to show motive, intent, identity, absence of mistake or *modus operandi* is admissible. . . . [I]t has been broadly held that

1. R. DONIGAN, THE EVIDENCE HANDBOOK § 9-14 (4th ed. 1980). See also Slough & Knightly, *Other Vices, Other Crimes*, 41 IOWA L. REV. 325 (1956), for an excellent discussion of the use of other crimes evidence in criminal prosecutions.

2. 1 C. TORCIA, WHARTON'S CRIMINAL EVIDENCE §§ 151, 163 (13th ed. 1972).

3. *E.g.*, FED. R. EVID. 404(b). See *Rule 404(b) Other Crimes Evidence: The Need for A Two-Step Analysis*, 71 NW. U.L. REV. 635 (1977) for a discussion of the meaning and application of Rule 404(b). *See also* 1 S. GARD, ILLINOIS EVIDENCE MANUAL Rule 4:10 (2d ed. 1979).

Julius Stone has recognized what he terms the "original" and the "spurious" rules for the admission of other crimes evidence. The former excludes this evidence (denoted as "similar fact" evidence) when relevant only to prove a disposition toward criminal conduct, while the latter excludes all such evidence except that which falls within certain exceptions. Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988, 989 (1938). In his article, Stone traces the origins of the different forms of the common-law rule from England to the American legal system. *Id.* at 991.

4. E. CLEARY & M. GRAHAM, HANDBOOK OF ILLINOIS EVIDENCE § 401.14 (3d ed. 1979).

5. 62 Ill. 2d 448, 343 N.E.2d 489 (1975). *See infra* notes 38-44 and accompanying text.

evidence of other offenses is admissible if relevant for any purpose other than to show propensity to commit a crime."[6] An understanding of the concept of relevance is the key to analyzing this rule and its application. This article will examine the application of this evidentiary rule in Illinois criminal cases, and in addition, by analyzing the relevance of and the attendant dangers associated with the introduction and admission of other crimes evidence, will discuss the appropriate scope of the use of such evidence.

RELEVANCE OF OTHER CRIMES EVIDENCE

Evidence introduced at trial must be relevant to be admissible.[7] Evidence is relevant when it tends to show that a fact in controversy did or did not exist.[8] Relevance is often discussed in terms of probabilities: whether the offered evidence tends to make a proposition at issue appear more or less probable.[9]

Even if evidence is relevant, it is not automatically admitted and placed before a jury. A court has the power, indeed the obligation, to exclude relevant evidence if the probative value of such evidence does not outweigh the dangers of prejudice, confusion of issues, or waste of time.[10] The exclusion of otherwise relevant evidence is necessary at times to insure the efficiency of the truth-seeking process. Balancing the desire for truth against the concern for fairness is within the sound discretion of the trial judge. No clear standard for this balancing process has been articulated, but relevant evidence is usually not excluded unless trial efficiency concerns or prejudice substantially outweigh its probative value.[11]

Generally, courts are liberal in admitting evidence with some degree of relevance to matters in issue. Direct and circumstantial evidence are not distinguished in this context. Either type of evidence is admissible if it is relevant.[12] One type of circumstantial evidence, other crimes or acts of the defend-

6. 62 Ill. 2d at 455, 343 N.E.2d at 492-93.

7. *See* CLEARY & GRAHAM, *supra* note 4, at § 402.1; FED. R. EVID. 402.

8. 1 C. TORCIA, *supra* note 2, at § 151.

9. *Id.* See also FED. R. EVID. 401, which defines relevant evidence as that which has "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." FED. R. EVID. 401.

10. CLEARY & GRAHAM, *supra* note 4, at § 402.1; 1 C. TORCIA, *supra* note 2, at § 164; FED. R. EVID. 403.

11. CLEARY & GRAHAM, *supra* note 4, at § 403.1. Some possible trial concerns include avoiding needless cumulation of evidence or the introduction of irrelevant evidence, and lessening the potential for wasting time and confusing issues.

12. 1 C. TORCIA, *supra* note 2, at § 155.

ant, is often sought to be admitted in criminal cases. It may be argued that evidence of the accused's other crimes or acts, done either before or after the offense on trial, is relevant to establish some element of the crime charged.[13] For example, the fact that A committed a certain act in the past may demonstrate an *opportunity* or *ability* to commit a present crime, and may be some evidence of the probability that A did or did not commit that present crime.[14]

It is a basic principle of scientific analysis that when one repeats a set of circumstances a number of times and obtains a similar result in each trial, further repetitions will produce the same result. It then might be argued that an individual who participates in a course of conduct in the past may be expected to continue that course of conduct into the future. This very general proposition, however, is not absolute. Concluding that a result occurred because similar results occurred in the past is dangerous when interjected into legal reasoning because human behavior is not as predictable as other scientific phenomena.

This potential danger gives rise to the major argument against admitting evidence of other crimes: the evidence does not tend to make a fact in issue more probable than not, and it is therefore not relevant. An accused's conviction ought to be based on evidence which demonstrates his guilt of the presently charged offense, and not on evidence of his involvement in other offenses unrelated to the crime charged.[15] The inherent danger associated with other crimes evidence is that a jury will infer that an accused with a criminal history is a "bad man" and that it may be disposed, therefore, to convict the accused on the basis of his past criminal conduct. Such a conviction would be based on irrelevant evidence.

A common-law tradition has evolved which prohibits the prosecution from introducing evidence of a defendant's bad character as substantive evidence of his guilt.[16] Evidence of

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13. DONIGAN, *supra* note 1, at § 9-15.

14. 1 C. TORCIA, *supra* note 2, at § 157.

15. *Id.* at § 240. *See also* E. MORGAN, BASIC PROBLEMS OF STATE AND FEDERAL EVIDENCE 191 (J. Weinstein 5th ed. 1976).

> It is reasonably clear that the probative value of evidence that a person committed a single crime as tending to prove his disposition to commit crimes generally is very slight. And although evidence of his commission of a specified crime may have appreciable value in proving a repetition of the offense, it seems equally clear that if other evidence of disposition in such a case is to be excluded, this circumstantial evidence of disposition should receive similar treatment.

Id.

16. Michelson v. United States, 335 U.S. 469, 475 (1948). *See* FED. R. EVID. 404(a) (codifies the common-law rule). *See also* CLEARY & GRAHAM, *supra* note 4, at § 404.3; S. GARD, JONES ON EVIDENCE, CIVIL AND CRIMINAL

other crimes is, if admitted, akin to a demonstration of the defendant's bad character. Evidence of other crimes may lead to the inference that the defendant has a propensity to commit crimes and, therefore, the introduction of such evidence for this purpose is not proper.[17]

In Illinois, exceptions which allow for the admission of other crimes evidence and for its publication to the jury riddle the rule excluding it.[18] Evidence which falls under one of the exceptions is deemed relevant to prove an issue in the case. Otherwise relevant evidence may be excluded, however, especially where unfair prejudice to the accused outweighs the probative value of the evidence.[19] Prejudice may be defined in two ways. It may mean simply an "increased probability of an unfavorable verdict."[20] When used in this manner any evidence which tends to prove a defendant guilty as charged is prejudicial;[21] an eyewitness account of the crime is highly prejudicial to the defendant because it increases the likelihood that he will be convicted. Although prejudicial in this sense, the evidence is extremely relevant and must not be excluded. "Prejudice," however, may also refer to an "increased probability of a verdict contrary to fact."[22] It is with this type of prejudice that the exclusion of other crimes evidence is concerned.[23] To avoid the insinuation of this

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§ 4:15 (6th ed. 1972) [hereinafter cited as JONES]; C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 190 (2d ed. 1972). Character evidence may be submitted by the prosecution after a defendant has put his own character in issue.

17. People v. Lehman, 5 Ill. 2d 337, 342, 125 N.E.2d 506, 509 (1955); People v. Butler, 63 Ill. App. 3d 132, 139, 379 N.E.2d 703, 708 (1978). *See also* JONES, *supra* note 16, at § 4:18.

18. These exceptions include instances in which the other crimes evidence is relevant to prove motive, intent, identity, *modus operandi*, common scheme, design, or plan, or absence of mistake.

19. 1 S. GARD, *supra* note 3, at Rule 4:09; 2 J. WIGMORE, EVIDENCE § 305 (Chadbourn rev. 1979).

> If the point to prove which the evidence is competent can just as well be proven by other evidence, or if it is of but slight weight or importance upon that point, the trial judge might well be justified in excluding it entirely, because of its prejudicial and dangerous character as to other points.

MCCORMICK, *supra* note 16, at § 190 (quoting Adkins v. Brett, 184 Cal. 252, 259, 193 P. 251, 254 (1920)).

20. Comment, *Developments in Evidence of Other Crimes*, 7 U. MICH. J.L. REF. 535, 543 (1974).

21. People v. Stadtman, 59 Ill. 2d 229, 231, 319 N.E.2d 813, 814 (1974).

22. Comment, *Development in Evidence of Other Crimes*, 7 U. MICH. J.L. REF. 535, 545 (1974).

23. CLEARY & GRAHAM, *supra* note 4, at § 403. It is thought that evidence of other crimes is excluded not because it has no probative value, but because it may have too much—such evidence is apt to be given too much weight by a jury, resulting in a conviction based on bad character rather than on specific guilt of the offense charged. People v. Lehman, 5 Ill. 2d 337,

type of prejudice into a case, the trial judge must balance various factors surrounding the offered evidence in determining its admissibility. Factors to be considered include the importance of the evidence to the issues involved in the case, the availability of other evidence on those issues, whether the issue on which the evidence is offered is disputed, the potential effectiveness of limiting or cautionary instructions, and the degree of likely prejudice.[24] When the trial judge, in the exercise of sound discretion, determines that, when balanced, the value of the other crimes evidence prevails over the possibility of prejudice to the defendant, the jury may properly hear the evidence. If probative value does not prevail, the evidence must be excluded to lessen the danger of a verdict contrary to fact.

The determination of relevancy thus encompasses a two-step approach. First, the inquiry focuses on whether the offered evidence will make a fact *at issue* more likely than not to have occurred. Second, the trial court must determine whether the evidence, otherwise relevant and admissible, threatens to divert the attention of the jury from the fact at issue to an improper consideration of the character of the accused, thus obscuring any real probative value the evidence might have. The trial judge should admit such evidence only when, in his discretion, he finds the situation appropriate.[25] As in any situation where

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342, 125 N.E.2d 506, 509 (1955). It is also argued that the defendant's other crimes constitute collateral issues which may confuse a jury and divert its attention from the real issues in the case. "A litigant's right to a trial by an unbiased jury is violated where the jury in fact based its decision on extraneous matters. . . . Collateral-crimes evidence is likely to violate this right." People v. Lindgren, 79 Ill. 2d 129, 143, 402 N.E.2d 238, 245 (1980).

See also 1 S. GARD, *supra* note 3, at Rule 4:10; JONES, *supra* note 16, at § 4:18; 1 J. WIGMORE, EVIDENCE § 194 (3d ed. 1940). Consider: "[W]hen the trial court is convinced that its effect would be to generate heat instead of diffusing light, or . . . where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it. . .," evidence of other crimes should not be admitted. State v. Goebel, 36 Wash. 2d 367, 378, 218 P.2d 300, 306 (1950).

24. *See* People v. Foster, 76 Ill. 2d 365, 392 N.E.2d 6 (1979). *See also* CLEARY & GRAHAM, *supra* note 4, at §§ 403, 404.5.

25. In the interest of fairness to the accused in criminal trials, it has been suggested that where a judge finds the issue of admissibility to be a close one, with the balance favoring neither side very convincingly, he should not admit the evidence.

> [The] lee-way of discretion lies rather in the opposite direction, empowering the judge to exclude the other crimes evidence, even when it has substantial independent relevancy, when in his judgment its probative value for this purpose is outweighed by the danger that it will stir such passion in the jury as to sweep them beyond a rational consideration of guilt or innocence of the crime on trial. Discretion implies not only leeway but responsibility.

MCCORMICK, *supra* note 16, at § 157 (citation omitted). *See also* People v. Butler, 31 Ill. App. 3d 78, 80-81, 334 N.E.2d 448, 450-51 (1975).

discretion plays a major role, the danger of abuse is great unless extreme caution regarding the admission of this evidence is exercised.

THE USE OF OTHER CRIMES EVIDENCE IN ILLINOIS

The leading Illinois case[26] which defines the circumstances under which other crimes evidence is admissible is *People v. McDonald*.[27] Before *McDonald*, Illinois courts had allowed the use of other crimes evidence, but inconsistencies in the application of the rules for admission existed. Some cases treated the rule as generally excluding other crimes evidence, but recognized a limited number of purposes for which such evidence would be received.[28] The exceptions were limited to situations in which such evidence was relevant to place the defendant in time and place proximity to the charged offense, to aid in establishing the identity of the perpetrator, or to prove design, motive, or knowledge.[29] It was acknowledged, however, that admissibility depended on whether the other crimes evidence was so closely connected to the main issues in the instant case that it tended to prove the defendant guilty.[30] This statement, although somewhat ambiguous, may be construed as an acknowledgement of the requirement that the offered evidence be relevant to the issues at hand.

Other decisions revealed a much broader view, however, and framed the rule as one of allowing admission of other crimes evidence, unless offered for an improper purpose.[31] This approach allowed the admission of relevant evidence of other crimes for any purpose other than to demonstrate an accused's propensity to commit crimes.[32] For example, such evidence was

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26. *See supra* text accompanying notes 5-6.

27. 62 Ill. 2d 448, 343 N.E.2d 489 (1975).

28. *See* People v. Wilson, 46 Ill. 2d 376, 380, 263 N.E.2d 856, 859 (1970) (evidence of prior sale admissible to show knowledge of possession of narcotics); People v. Tranowski, 20 Ill. 2d 11, 16, 169 N.E.2d 347, 349 (five robberies within one hour and several blocks admissible), *cert. denied sub nom.*, Tranowski v. Illinois, 364 U.S. 923 (1960), *cert. denied*, 368 U.S. 978 (1962). *But see* People v. Spencer, 7 Ill. App. 3d 1017, 1021, 288 N.E.2d 612, 615 (1972) (evidence of bus robbery within four blocks and 17 hours of charged robbery inadmissible).

29. People v. Wilson, 46 Ill. 2d 376, 380, 263 N.E.2d 856, 859 (1970).

30. People v. Tranowski, 20 Ill. 2d 11, 16, 169 N.E.2d 347, 349, *cert. denied sub nom.*, Tranowski v. Illinois, 364 U.S. 923 (1960), *cert. denied*, 368 U.S. 978 (1962).

31. *See supra* text accompanying notes 15-17.

32. People v. Dewey, 42 Ill. 2d 148, 157, 246 N.E.2d 232, 236 (1969) (where murder defendant claimed that death was accidental, evidence of defendant's offers of rides to four others admissible to show purpose); People v. Cole, 29 Ill. 2d 501, 503-05, 194 N.E.2d 269, 271 (1963) (evidence of defendant's

admissible to corroborate other evidence already presented or to make a witness' testimony more credible.[33]

The various interpretations of the other crimes evidence rule and the differences in emphasis on the aspects of the rule under consideration led to inconsistencies in Illinois decisions. One court would focus on the exclusionary aspects of the rule in an effort to minimize prejudice,[34] while another would attempt to fit the evidence, in a mechanical fashion, into one of the recognized exceptions to the rule.[35] Early cases also reflected differences in the amount of detail of the other crimes or acts which would be admitted. Testimony showing similar facts might be admitted if no reference to another completed crime, as such, were made.[36] In another instance, the court permitted the recounting of a complete, distinct substantive offense to demonstrate peculiar and distinctive features common to both crimes in order to establish the defendant's common scheme.[37]

In *McDonald*, the Illinois Supreme Court attempted to reconcile these differing views by pronouncing the rule in a new

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prior drug sales to witness admissible to rebut claim of innocence and to explain witness' account of the event and ease in the transaction); People v. Kovacivich, 10 Ill. App. 3d 797, 799-800, 295 N.E.2d 33, 35-36 (1973) (testimony of defendant's accomplice concerning other burglaries admissible to show method).

33. *See, e.g.*, People v. Palmer, 47 Ill. 2d 289, 296, 265 N.E.2d 627, 631 (1970) (evidence that witness observed defendant committing other crimes admissible to make in-court identification more credible), *cert. denied sub nom.*, Palmer v. Illinois, 402 U.S. 931 (1971); People v. Hall, 38 Ill. 2d 308, 315, 231 N.E.2d 416, 420-21 (1967) (armed robbery; evidence of kidnapping on same night admissible to corroborate defendant's confession, and because the two crimes were one continuous transaction); People v. Walls, 33 Ill. 2d 394, 398, 211 N.E.2d 699, 701 (1965) (evidence of auto theft subsequent to charged rape admissible to corroborate victim's story; aided identification).

34. *See, e.g.*, People v. Gleason, 36 Ill. App. 2d 15, 17, 183 N.E.2d 523, 524 (1962) (evidence in theft case of identical theft three weeks earlier in the same department of the same store held inadmissible as concerning a distinct substantive offense).

35. *See, e.g.*, People v. Scott, 100 Ill. App. 2d 473, 478-79, 241 N.E.2d 579, 583 (1968) (evidence of a series of burglaries in the same neighborhood excluded when no exception deemed applicable). It is interesting to note that *Scott* and *Gleason* were decided within the same appellate district.

36. *See, e.g.*, People v. Butler, 58 Ill. 2d 45, 49, 317 N.E.2d 35, 37 (1974) (officer permitted to testify to arresting the defendant without revealing nature of crime); People v. Butler, 31 Ill. App. 3d 78, 80, 334 N.E.2d 448, 450 (1975) (when used to show identity, other crimes evidence should be confined to details showing opportunity for identification and not the details of other crime); People v. Aughinbaugh, 131 Ill. App. 2d 581, 584, 266 N.E.2d 530, 532 (1970) (witness allowed to testify to having seen defendant with a gun on the day of the crime charged; not permitted to say that defendant was robbing another store).

37. People v. Lehman, 5 Ill. 2d 337, 125 N.E.2d 506 (1955) (evidence of a second telephone truck robbery admitted in trial for telephone truck robbery which had occurred two weeks before).

form.[38] The rule that emerged was a hybrid which embraced both exclusionary and inclusionary approaches and combined the best and worst features of the previously promulgated rules. The practical application of this rule depends a great deal on subtle distinctions.[39] The court's goal of clarity in this area may have been frustrated by later misapplications of the rule, in which apparent misunderstanding of the purposes underlying the exclusion of other crimes evidence may be observed.

McDonald involved a burglary. The victim was awakened by a man sitting on her bed trying to choke her. The perpetrator had gained entrance to the victim's apartment by standing on an overturned wastebasket and removing a window screen.[40] The prosecution was permitted to introduce the testimony of another woman who related the details of a similar crime. This crime occurred four days after the crime in question, and the defendant had been tried and convicted of the subsequent crime.[41] The court found that the time of commission, the manner of entrance and attack, and the dress of the defendant were similar enough in the two cases to permit the prosecution to introduce evidence of the other crime to show a similar method or *modus operandi*.[42]

The court found that, in general, evidence of extra-indictment offenses committed by the accused is not admissible. The court then noted exceptions to this general rule, and held that evidence which tends to prove a fact in issue—identity, in this case—is admissible, although it may reveal the accused's participation in other offenses. The court further held that evidence which "goes to show motive, intent, identity, absence of mistake or *modus operandi*" is admissible.[43] Perhaps to emphasize that this list of exceptions was not exhaustive, the court reiterated the prior broad view which held that other crimes evidence is admissible, if relevant, for any purpose other than to show the accused's propensity to commit crimes.[44]

After *McDonald*, confusion continued. Over one hundred cases decided since *McDonald* have purported to apply the rule for the admission of other crimes evidence, but glaring inconsis-

38. People v. McDonald, 62 Ill. 2d 448, 455, 343 N.E.2d 489, 492-93 (1975).

39. *See* Stone, *supra* note 3, at 1007.

40. 62 Ill. 2d 448, 450-51, 343 N.E.2d 489, 490 (1975).

41. *Id.* at 452, 343 N.E.2d at 491.

42. *Id.* at 455, 343 N.E.2d at 493.

43. *Id.*, 343 N.E.2d at 492.

44. *Id.*, 343 N.E.2d at 493. *See also* People v. Dewey, 42 Ill. 2d 148, 157, 246 N.E.2d 232, 237 (1969); People v. Cole, 29 Ill. 2d 501, 503, 194 N.E.2d 269, 271 (1963).

tencies persist.[45] One explanation is that the ultimate admissibility of other crimes evidence rests on a preliminary, and discretionary, determination by the trial judge. The judge must consider the facts and circumstances surrounding each case, the actual need for such evidence in light of other available evidence, and the danger of unwarranted prejudice;[46] as the facts differ, so must the results. A precise rule is unattainable because the promotion of fairness and justice requires flexibility to deal adequately with differing factual situations. A rule which would deny other crimes evidence to the prosecution in all cases would severely hamper efforts to convict the guilty. Conversely, a rule which too broadly allows other crimes evidence may result in a multitude of convictions of the currently innocent, based on an unfortunate past history tending to show bad character. Some compromise must be found.

Cases decided after *McDonald*, along with commentators on the law of evidence, continue to try to devise a neat list of exceptional circumstances in which other crimes evidence will be received.[47] The most common of these exceptions allow the prosecutor to use other crimes evidence to show an accused's state of mind (intent or knowledge), the identity of the perpetrator, a common scheme or design, or the accused's *modus operandi*. While a specific state of mind is often an element of the charged offense to be proved by the prosecution, the other exceptions are not ordinarily elements of the crime.[48] The pur-

45. *See generally* 2 J. WIGMORE, *supra* note 19, at § 302. No attempt will be made here to examine all of the Illinois cases in which the problem has arisen. Reconciliation of the various decisions is not possible and would be a frustrating endeavor. What is sought is an examination of some pertinent cases to illustrate continuing uncertainty in the area. Those cases which have tried to clarify the rule further or which have offered guidelines for its application will also be set forth.

46. *See, e.g.*, People v. Olivas, 41 Ill. App. 3d 146, 151, 354 N.E.2d 424, 429 (1976); People v. Butler, 31 Ill. App. 3d 78, 80, 334 N.E.2d 448, 450 (1975). *See also* CLEARY & GRAHAM, *supra* note 4, at §§ 402.1, 404.5; 1 S. GARD, *supra* note 3, at Rule 4:09; MCCORMICK, *supra* note 16, at § 190; 1 C. TORCIA, *supra* note 2, at § 151.

47. *See, e.g.*, Cleary & Graham, *supra* note 4, at § 404.5 (motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, guilty knowledge, specific intent); 1 S. GARD, *supra* note 3, at Rule 4:09 (state of mind, motive, intent, habit, pattern or plan) & Rule 4:10 (identity, absence of mistake, motive or intent, presence at scene of crime, common scheme or design).

48. *See generally* 2 J. WIGMORE, *supra* note 19, at § 300. Wigmore attempts to differentiate between knowledge or intent (which may be inferred from knowledge) and design, which he defines as a preceding mental state which may be used to show probable commission. *Id. See also* Stone, *supra* note 3, at 1026 n.190.

poses for which other crimes evidence is admissible are not distinct categories of exception and tend to overlap.[49]

Probably the most legitimate use of other crimes evidence is where the identity of the perpetrator is at issue. Evidence of an independent crime is admissible to aid in identifying the defendant as the one who committed the crime in question.[50] An example of this is a case in which a prior rape and robbery victim was allowed to testify at the trial of a subsequent rape which had occurred less than one hour later, four blocks away. The witness was permitted to relate the details of the attack so that the state could establish that both attacks were done by the same person. This victim's identification of the defendant bolstered the complaining witness' identification.[51] Other cases in which other crimes evidence was used to aid in identification include those in which the accused committed either a prior or subsequent similar offense against the same victim.[52] There remains some uncertainty, however, as to whether all of the details of the other offense should be admissible, or whether the

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49. Although listed as a separate exception, a showing of *modus operandi* may be considered a step from which the identity of the accused as the perpetrator of the crime may be inferred. The similarities between and the distinctive features of the various acts may be such that the methods are closely associated with the defendant. *See* DONIGAN, *supra* note 1, at § 9-21; 1 C. TORCIA, *supra* note 2, at § 243. *See also* People v. Watson, 98 Ill. App. 3d 296, 298, 424 N.E.2d 329, 331 (1981) (*modus operandi* is nothing more than circumstantial evidence of identity); People v. Sievers, 56 Ill. App. 3d 880, 883, 372 N.E.2d 705, 707 (1978) (other rapes admitted to show design and identity).

Courts also tend to view similarities between other crimes and the present crime as evidencing *modus operandi* and a common scheme. *See, e.g.*, People v. Gonzales, 60 Ill. App. 3d 980, 377 N.E.2d 91 (1978) (similarities of attacks make other crimes evidence relevant to show common scheme and *modus operandi*); People v. Middleton, 38 Ill. App. 3d 984, 350 N.E.2d 223 (1976) (peculiar and distinctive features show *modus operandi* and constitute common scheme).

Text writers also indicate that a showing of common design may be helpful to show absence of mistake, to negate innocent intent, or to infer knowledge. *See* DONIGAN, *supra* note 1, at § 9-18; 2 J. WIGMORE, *supra* note 19, at § 304. Some writers attempt to separate each of the recognized exceptions into discreet, exclusive categories. Wigmore claims that other crimes evidence has been used to show a plan even in cases where the act in question has not yet been established. He would require more than a mere showing of similarity between acts to demonstrate a design. 2 J. WIGMORE, *supra* note 19, at § 304. In contrast, when intent is the object to be proved, the act is assumed to be done and a showing of similar gross features may be sufficient for this purpose. *Id.*

50. *See, e.g.*, People v. Cruz, 38 Ill. App. 3d 21, 30, 347 N.E.2d 227, 234 (1976). *See also* 1 C. TORCIA, *supra* note 2, at § 243.

51. People v. Oliver, 50 Ill. App. 3d 665, 675, 365 N.E.2d 618, 626 (1977).

52. *See, e.g.*, People v. Harris, 91 Ill. App. 3d 112, 414 N.E.2d 755 (1981) (evidence of subsequent robbery of same place three months later admissible to show identity); *In re* Hatfield, 72 Ill. App. 3d 249, 390 N.E.2d 453 (1979) (prior robberies of same victim admissible).

evidence should be limited to only those details which show the opportunity for identification.[53]

Another significant exception to the general rule of exclusion is the admission of evidence which tends to prove intent or another mental state which is an element of the crime charged. Wigmore suggests that the theory of using other crimes evidence to prove intent is that it illustrates a recurrence of similar results which tend to negative an innocent mental state.[54] To use other crimes evidence in this way, the other crimes must be so closely related in time or circumstances to the charged crime that they constitute a continuous transaction.[55] Illinois courts have commonly admitted other crimes evidence to show intent or mental state in drug-related cases. Evidence of a previous drug sale to an undercover policeman was admitted as tending to show the defendant's intent in a later transaction where he claimed to be an innocent bystander.[56] In another case, evidence of a defendant's statements on another occasion, regarding his ability to procure drugs at specified prices, was deemed relevant to show a present state of mind in the charged offense.[57] Evidence of other crimes, used to show a particular mental state, is also relevant and admissible in other types of cases; evidence of a burglary and the theft of a knife was relevant to support the defendant's intent to attempt murder.[58] Also, evidence of a previous conviction for attempted rape was deemed probative of the defendant's mental state, and was admitted to show that a rape victim did not consent, as the defendant had claimed.[59]

Cases in which other crimes evidence was admitted to show a particular *modus operandi* or to show a common scheme are

53. *See, e.g.*, People v. Harris, 91 Ill. App. 3d 112, 116, 414 N.E.2d 755, 759 (1981) (Van Deusen, J., specially concurring); *In re* Hatfield, 72 Ill. App. 3d 249, 259, 390 N.E.2d 453, 460 (1979) (acknowledging that perhaps the evidence should be limited to the fact that the victim had seen the defendant before).

54. 2 J. WIGMORE, *supra* note 19, at § 302. This concept is seen as a logical process which negates innocent intent by multiplying instances of the same result until it is perceived that innocence cannot account for all of them: "[A]n unusual and abnormal element might perhaps be present in one instance, but . . . the oftener similar instances occur with similar results, the less likely is the abnormal element to be the true explanation of them." *Id.*

55. *See* DONIGAN, *supra* note 1, at § 9-17; 1 C. TORCIA, *supra* note 2, at §§ 168, 245.

56. People v. Jaffe, 64 Ill. App. 3d 831, 381 N.E.2d 1018 (1978).

57. People v. Hill, 56 Ill. App. 3d 510, 371 N.E.2d 1257 (1978). The dissent viewed the evidence as establishing nothing other than a propensity on the defendant's part to commit crime. *Id.* at 515-16, 371 N.E.2d at 1261 (Craven, J., dissenting).

58. People v. Brooks, 50 Ill. App. 3d 4, 364 N.E.2d 994 (1977).

59. People v. Lighthart, 62 Ill. App. 3d 720, 379 N.E.2d 403 (1978).

also varied in terms of factual situations and the standards of admissibility which the trial judges apply. When courts hold other crimes evidence admissible to show *modus operandi*, they usually compare the details of each offense and then state the significant similarities which justify admission.[60] Conversely, if the court holds the evidence inadmissible, the usual rationale is a lack of similarity in details.[61]

One court required that, to establish a *modus operandi*, the other crimes evidence had to show a clear connection to the offense charged so that the inference of the perpetrator's identity flowed logically; common factors alone were not sufficient to support such an inference.[62] Another standard for a distinguishable *modus operandi* requires that the charged offense and the other offense must exhibit "peculiar and distinctive features" so as to "earmark the crimes as the handiwork of the accused."[63] The Illinois Supreme Court has recently held that a "striking similarity" between the crimes must be established.[64] The danger in these variations is that trial courts faced with other crimes evidence might pick and choose the standard they wish to apply in order to reach the desired result in a given case.

Some courts have recognized the potential for misapplication of the other crimes evidence rule and warn against a mechanical application. Courts have stated that a declaration that a case falls within an exception to the rule should not be an

60. *See, e.g.*, People v. Watson, 98 Ill. App. 3d 296, 424 N.E.2d 329 (1981) (similarity of rapist's conduct admitted to show *modus operandi* and to establish identity); People v. Johnson, 97 Ill. App. 3d 1055, 423 N.E.2d 1206 (1981) (evidence of another rape within eight days and four blocks sufficiently similar to show common scheme or design), *cert. denied sub nom.*, Johnson v. Illinois, 455 U.S. 952 (1982); People v. DiGiacomo, 71 Ill. App. 3d 56, 388 N.E.2d 1281 (1979) (evidence of similar rape on night of charged rape showed identical *modus operandi* and was admissible); People v. Moore, 61 Ill. App. 3d 694, 378 N.E.2d 516 (1978) (similar rape and robbery several days prior to charged offense admissible); People v. Marine, 48 Ill. App. 3d 271, 362 N.E.2d 454 (1977) (similar manner of entry in other burglary was relevant to establish *modus operandi*).

61. *See, e.g.*, People v. Triplett, 99 Ill. App. 3d 1077, 1083, 425 N.E.2d 1236, 1241 (1981) (similarities common to robberies in general; inadmissible); People v. Cook, 53 Ill. App. 3d 997, 998, 369 N.E.2d 246, 247 (1977) (admission of other rape for which defendant was convicted held effective to inflame jury and not relevant to show *modus operandi*; vague similarities common to many rapes).

62. People v. Butler, 63 Ill. App. 3d 132, 140, 379 N.E.2d 703, 708 (1978) (similarities of location and victims not sufficient to infer identity).

63. People v. Therriault, 42 Ill. App. 3d 876, 886, 356 N.E.2d 999, 1007 (1976) (similarities in two rapes within one month and five blocks showed common *modus operandi*).

64. People v. Tate, 87 Ill. 2d 134, 141, 429 N.E.2d 470, 475 (1981).

automatic determination in favor of admissibility.[65] "Other-crimes evidence cannot be admitted if the grounds for establishing its relevance are speculative."[66] Evidence of other crimes must have substantial relevance to prove an issue in the case.[67] The goal of proving time and place proximity, without more, is an insufficient justification for admitting this evidence.[68]

McCormick recognized the problem which arises when courts mechanically apply the rule and the exceptions:

> There is danger that if judges, trial and appellate, content themselves with merely determining whether the particular evidence of other crimes does or does not fit in one of the approved classes, they may lose sight of the underlying policy of protecting the accused against unfair prejudice. The policy may evaporate through the interstices of the classification.[69]

At least one Illinois court has also seen the dangers inherent in this mechanical approach. In *People v. Triplett*,[70] the court pointed out that other crimes evidence may fall into several categories, or none at all, and the problem is one of balancing and not "pigeon-holing". The court felt that the standards of relevance should be applied strictly to insure fairness.[71]

At the other extreme, some courts take advantage of the approach which allows other crimes evidence to be admitted for any relevant purpose other than to show a propensity to commit crimes. Evidence of the accused's other crimes has been admitted to explain the relative ease with which a government agent was able to purchase drugs from the accused,[72] to contradict an

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65. *See, e.g.*, People v. Pelate, 49 Ill. App. 3d 11, 363 N.E.2d 860 (1977) (judge must consider actual need for the evidence); People v. Olivas, 41 Ill. App. 3d 146, 151, 354 N.E.2d 424, 429 (1976) (fact that evidence falls into exception does not guarantee admissibility; court must balance probative value against prejudicial effect).

66. People v. Lindgren, 79 Ill. 2d 129, 140, 402 N.E.2d 238, 244 (1980) (distinct crime committed for different reason at different place and time not sufficiently relevant).

67. People v. Johnson, 81 Ill. App. 3d 359, 360, 401 N.E.2d 288, 289 (1980) (evidence sufficient to establish identity without other crimes evidence).

68. *See, e.g.*, People v. Lindgren, 79 Ill. 2d 129, 139, 402 N.E.2d 238, 243 (1980); People v. Carlson, 98 Ill. App. 3d 873, 876, 424 N.E.2d 968, 971 (1981) (inquiry into defendant's activities at a specific place does not establish witness' knowledge of defendant's presence); People v. Watson, 55 Ill. App. 3d 564, 568, 371 N.E.2d 113, 116 (1977) (evidence fits into no exception; that defendant was in the same place two months later lacks probative value). *See generally* CLEARY & GRAHAM, *supra* note 4, at § 404.5.

69. MCCORMICK, *supra* note 16, at § 190.

70. 99 Ill. App. 3d 1077, 425 N.E.2d 1236 (1981).

71. *Id.* at 1082-83, 425 N.E.2d at 1240.

72. People v. Borawski, 61 Ill. App. 3d 774, 378 N.E.2d 255 (1978) (narcotics).

alibi defense by placing the defendants at a different location,[73] to show a lack of consent on the part of a rape victim,[74] and to show that the defendant was engaged in a vendetta against the victim.[75] Other crimes evidence has also been used to explain a cashier's reason for detaining the defendant at a bank,[76] to show the circumstances of the defendant's arrest and that the weapon used there was stolen during the commission of the charged offense,[77] and to establish the authority of an officer to make an arrest.[78]

In some cases, the prosecution attempts to justify using other crimes evidence by claiming that this evidence tends to enhance the credibility of state witnesses and to corroborate other evidence in the case.[79] Some courts, however, have been reluctant to accept this view, and have held that this evidence may not be used for the independent purpose of enhancing the credibility of state witnesses.[80] This proposition seems to recognize that the accumulation of inflammatory evidence of other crimes poses a great danger of overpersuasion of the jury and of prejudice to the accused.[81]

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73. People v. Bolton, 35 Ill. App. 3d 965, 343 N.E.2d 190 (1976) (robbery and shooting one day later used as evidence in murder trial).

74. People v. Dorn, 46 Ill. App. 3d 820, 361 N.E.2d 353 (1977) (evidence showed concurrent robbery of rape victim).

75. People v. Godsey, 57 Ill. App. 3d 364, 373 N.E.2d 95 (series of arsons all aimed at one victim), *rev'd on other grounds*, 74 Ill. 2d 64, 383 N.E.2d 988 (1978).

76. People v. Hatcher, 45 Ill. App. 3d 374, 359 N.E.2d 1157 (1977) (defendant arrested at bank twenty days after robbery while trying to cash victim's checks).

77. People v. Diaz, 78 Ill. App. 3d 277, 397 N.E.2d 148 (1979) (admission was error, as all details of subsequent, unrelated attempted armed robbery were not relevant).

78. People v. Hoppock, 98 Ill. App. 3d 58, 423 N.E.2d 1351 (1981) (evidence leading up to charge of resisting arrest admissible).

79. *See, e.g.*, People v. Romero, 66 Ill. 2d 325, 329, 362 N.E.2d 288, 289 (1977) (events subsequent to charged burglary not relevant); People v. Sutton, 45 Ill. App. 3d 739, 741, 359 N.E.2d 1132, 1133 (1977) (accomplice testimony more credible with evidence of other crimes committed by the accomplice and the defendant).

80. *See, e.g.*, People v. Romero, 66 Ill. 2d 325, 362 N.E.2d 288 (1977); People v. Mangiaracina, 98 Ill. App. 3d 606, 609, 424 N.E.2d 860, 863 (1981) (other incidents involving victim and defendant not relevant to show defendant's intent); People v. Turner, 78 Ill. App. 3d 82, 94-95, 396 N.E.2d 1139, 1148 (1979) (evidence of prior burglaries of victim and subsequent kidnapping of witness improperly admitted in murder case).

81. *See, e.g.*, People v. Olson, 96 Ill. App. 3d 193, 198-99, 420 N.E.2d 1161, 1165 (1981) (admission of evidence of burglary conviction and parole in trial for attempted murder and armed violence demonstrated trial court's insensitivity to need for balancing and overpersuaded jury); People v. Funches, 59 Ill. App. 3d 71, 73, 375 N.E.2d 135, 137 (1978) (introduction of evidence of seven other thefts at trial for one theft was "prosecutorial overkill").

Even though both the inclusionary and exclusionary forms of the other crimes evidence rule prohibit the admission of such evidence for the purpose of showing a propensity to commit crimes, there is one area, cases involving sex offenses,[82] in which courts are inclined to admit this evidence apparently for just that purpose. Theoretically, prior acts may show a relationship between the parties and may show that the act in question was more likely than not to have occurred.[83] In this area, a general disposition toward committing sex crimes is viewed as relevant to prove the sex crime at issue. This particular distinction is devoid of logical explanation. Why is proof of a propensity to commit sex-related crimes acceptable in view of the general restriction against evidence of "bad character"? The dangers of prejudice, and of a conviction not grounded in the facts of the case at bar, appear even greater in light of the inflammatory nature of sex-related offenses. Nevertheless the practice continues, and the trend appears to be toward expanding, rather than restricting, the use of other crimes evidence in sex offense prosecutions.

Proof of Other Crimes: The Effect of Acquittal

In many instances, evidence of an accused's other crimes is relevant to prove elements of the crime at issue. It is therefore necessary to establish some standard of proof regarding the accused's commission of the *other* offense: what amount of proof is necessary before the judge can determine that the other crimes evidence is admissible in the case on trial? This question is especially significant whenever the evidence involves an offense for which the defendant has been acquitted. Most authorities recognize that proof of the commission of the other crime need not be beyond a reasonable doubt, and it has been suggested that each item of evidence need only meet the test of relevancy.[84] The burden imposed on the government depends

82. *See* Donigan, *supra* note 1, at § 9-22; McCormick, *supra* note 16, at § 190; Morgan, *supra* note 15, at 192; 1 C. Torcia, *supra* note 2, at § 250. *See also* Slough & Knightly, *supra* note 1, at 333.

83. Cleary & Graham, *supra* note 4, at § 404.5.

84. *See, e.g.*, People v. Fletcher, 59 Ill. App. 3d 310, 375 N.E.2d 1333 (1978) (kidnapping, murder); People v. Parker, 35 Ill. App. 3d 870, 343 N.E.2d 52 (1976) (burglary); People v. Everett, 14 Ill. App. 3d 421, 302 N.E.2d 723 (1973) (forgery); People v. Clark, 104 Ill. App. 2d 12, 244 N.E.2d 842 (1969) (forgery). *See also* 1 S. Gard, *supra* note 3, at Rule 4:10; 1 C. Torcia, *supra* note 2, at § 263; 2 J. Wigmore, *supra* note 19, at § 307. *But see* People v. McRae, 47 Ill. App. 3d 302, 311, 361 N.E.2d 685, 691 (1977) ("proof beyond a reasonable doubt of all elements of the other crimes is not indispensible as a prerequisite to the competency of the evidence as tending to establish motive").

on the esteem accorded the rights involved[85]—here, the right of an accused to be free from having to defend against crimes with which he is not presently charged.[86] No one standard of admissibility of other crimes evidence has emerged from the Illinois decisions and the stated burdens vary widely.

Some courts appear satisfied when a "great deal" of evidence connects the defendant to the other crimes.[87] Others would require, as a prerequisite to admission, that it be shown that the other crime took place and that the defendant participated therein.[88] The absence of a clear standard for the admission of other crimes evidence raises substantial concerns for fairness and greatly increases the possibility of prejudicial evidence reaching a jury. This threat expands when the evidence sought to be introduced involves offenses for which there has been a previous acquittal. Some courts outside of Illinois have concluded that such evidence should be completely excluded due to the fact that an acquittal greatly reduces the weight that can properly be given to the other crimes evidence.[89] Illinois courts disagree as to whether an acquittal of another offense bars admission of evidence of that offense in a subsequent trial,[90] and some have held that a prior acquittal does not affect the admissibility of other crimes evidence.[91]

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85. *See* MORGAN, *supra* note 15, at 21-22.

86. *See* People v. Sanders, 59 Ill. App. 3d 650, 375 N.E.2d 921 (1978) (evidence of unrelated and uncharged burglary and theft not relevant to rape charge).

87. *See, e.g.*, People v. Fletcher, 59 Ill. App. 3d 310, 320, 375 N.E.2d 1333, 1339 (1978). *See also* Annot., 3 A.L.R. 784, 785 (1919); MCCORMICK, *supra* note 16, at § 190.

88. *See, e.g.*, People v. Walters, 69 Ill. App. 3d 906, 917, 387 N.E.2d 1230, 1238 (1979) (murder and attempted armed robbery); People v. Miller, 55 Ill. App. 3d 421, 426, 370 N.E.2d 1155, 1159 (1977) (mere suspicion of other arson insufficient). *See also* CLEARY & GRAHAM, *supra* note 4, at § 404.5.

It has also been suggested that unless a jury would have been authorized to find the defendant guilty of the other offense had it been tried, evidence of the other offense should never be admitted. *See* Annot., 3 A.L.R. 784, 785 (1919).

89. *See* 2 J. WIGMORE, *supra* note 19, at § 306 n.4; Annot., 86 A.L.R. 2d 1132, 1146 (1962) (acquittal supports inadmissibility because of showing propensity or bad character).

90. *See generally* Annot., 86 A.L.R.2d 1132 (1962), which states that the numerical weight of authority is that acquittal does not render the other crimes evidence inadmissible, although most courts will allow the defendant to prove the acquittal. *Id.* at 1135. It has been suggested, however, that the defendant's "acquittal of an offense should relieve him from having to answer again, at the price of conviction for that offense or another, evidence which amounts to a charge of a crime of which he has been acquitted." *Id.* at 1136 (quoting State v. Little, 87 Ariz. 295, 350 P.2d 756 (1960)).

91. *See, e.g.*, People v. Osborne, 53 Ill. App. 3d 312, 323, 368 N.E.2d 608, 617 (1977) (prior acquittal does not require estoppel or res judicata), *cert. de-*

Several Illinois decisions have stressed the policy of fairness and the responsibility for balancing probative value against prejudicial effect when considering evidence of an offense for which there has been an acquittal, suggesting that an acquittal of a prior crime renders admission of evidence of that crime much less desirable.[92] It may be preferable to admit only those facts which bear directly on the issues at hand, and not to reveal the actual commission of another crime.[93] The prosecutor may show that the defendant was observed doing specified acts which constitute the crime of burglary, but without actually naming the other crime as burglary. This distinction is necessary, especially where there has been an acquittal, because the unfavorable impression that other crimes evidence leaves with a jury can never be completely erased.[94] Despite this notion, however, complete evidence of other crimes has been held admissible, even where an acquittal has been obtained.[95]

This attitude concerning the admission of other crimes for which there has been an acquittal flies in the face of all consideration of reason or fairness. It may even constitute a step toward dealing a fatal blow to one of the oldest and most basic presumptions in criminal law—that one is presumed innocent until proven guilty. The use of this evidence may also raise significant double jeopardy concerns. An acquittal does not necessarily determine facts, any more than does a conviction, but it is from the totality of the circumstances that a conclusion is drawn. A conviction, however, is recognized as conclusive proof that the defendant was guilty of the crime in question, as evidenced by the imposition of punishment. Anything less than a conviction ought to signify, logically, that the defendant was *not* proven guilty beyond a reasonable doubt.

It may be said that an acquittal does not necessarily prove innocence; even though acquitted, a defendant might have been guilty of the crime. He may have escaped conviction because of any number of factors other than his innocence. But, neither is acquittal proof of guilt. Litigation must come to an end at some

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nied sub nom., Osborne v. Illinois, 439 U.S. 837 (1978); People v. Bricker, 48 Ill. App. 3d 452, 455, 363 N.E.2d 190, 192 (1977) (no estoppel).

92. *See* People v. Ulrich, 30 Ill. 2d 94, 101, 195 N.E.2d 180, 183-84 (1963) (fairness requires the present charge to stand or fall on its own facts); People v. Butler, 31 Ill. App. 3d 78, 81 n.2, 334 N.E.2d 448, 451 n.2 (1975) (acquittal must bear on judge's determination of whether the evidence is convincing that the defendant committed the other crime).

93. People v. Pendleton, 52 Ill. App. 3d 241, 249, 367 N.E.2d 196, 202 (1977) (tailor evidence strictly where defendant acquitted of other crime), *cert. denied sub nom.*, Illinois v. Pendleton, 435 U.S. 956 (1978).

94. *See* Annot., 86 A.L.R. 2d 1132, 1136, 1146 (1962).

95. People v. Everett, 14 Ill. App. 3d 421, 426-27, 302 N.E.2d 723, 728 (1973).

point. An acquittal ought to relieve a person from having to defend against the same allegations of criminal conduct ever again.[96] If the admissibility of other crimes evidence must turn on its relevance to present issues, as well as on some proof of the defendant's connection to the other crime,[97] admission of evidence of prior offenses implies that, because charges were brought, the defendant was guilty, even though acquitted. Extreme caution must be exercised where offered evidence relates to an acquitted offense so as to avoid such a prejudicial implication. A prior acquittal may indeed be conclusive proof of a defendant's innocence, and he should not be required to meet the evidence of the other crime once again on a different battlefield.[98]

Limiting Instructions to Minimize Prejudice

It is certain that evidence of other crimes by the accused will be admitted in criminal cases. If this evidence is admitted for limited purposes, and not for the broad purpose of proving criminal propensity, it is incumbent on the trial judge to instruct the jury properly on this limited use.[99] This is consistent with the theory that the use of limiting instructions is effective in minimizing any possible prejudice accompanying the other crimes evidence.[100]

One example of such a limiting instruction is the Illinois Pattern Jury Instruction 3.14. The instruction reads:

> 3.14 Proof of Other Crimes—Intent, etc.
>
> Evidence has been received that the defendant has been involved in [offenses] [an offense] other than that charged in the indictment [information]. This evidence has been received solely on the issue of the defendant's [identification—presence—intent—mo-

96. Indeed, the double jeopardy clause of the fifth amendment, applicable to the states through the fourteenth amendment, Benton v. Maryland, 395 U.S. 784 (1969), would seem to guarantee this relief to a criminal defendant. *See* U.S. Const amend. V.

97. *See supra* text accompanying notes 87-88.

98. Consider this convoluted reasoning:

> [A]n acquittal . . . for uttering a forged check, would not necessarily negative the fact that the check was forged, if in fact it was forged; . . . All these facts may have been found to be true, and yet the party may have been acquitted. . . . The verdict of acquittal may have resulted from the fact that the jury could not, upon the evidence before them, find *all* the facts, which must exist and be proved, in order to constitute the crime. . . .

Bell v. State, 57 Md. 108, 116-17 (1881). It is possible that although the check in *Bell* may have been forged, as the court states, it is by no means clear that the defendant must forever be expected to answer for having done the forgery.

99. *See* 1 C. Torcia, *supra* note 2, at §§ 161, 264.

100. *See, e.g.*, People v. Cole, 29 Ill. 2d 501, 505, 194 N.E.2d 269, 272 (1963).

tive—design—knowledge]. This evidence is to be considered by you only for the limited purpose for which it was received.[101]

Two problems are readily apparent with the use of such an instruction at the close of a trial. First, once a jury is permitted to hear evidence which is highly inflammatory and which may actually have been introduced for the purpose of creating prejudice in favor of the prosecution, the damage is done.[102] No amount of instruction to disregard such evidence, or to consider it for a limited purpose, can guarantee that its prejudicial effect will be eliminated from the minds of the jurors.[103]

Second, the possible prejudice that may have been created at the time of admission may be reinforced if the judge, by giving such an instruction prior to deliberations, reminds the jury that such information was received. A juror may not have given much weight to the evidence of other offenses when he first learned of it. He may, however, be inclined to remember it and to give it even more weight, all out of proportion to its probative value, if such evidence is the subject of a specific charge from the judge.

A better approach would involve an instruction to the jury prior to the admission of the evidence which addresses the issue of limited purpose. In this way, the jury could be informed of the reasons for hearing such evidence just prior to its admission and could then judge the weight to be given it at that time. This approach is preferable to hearing, long after the fact, a limiting instruction which might go unnoticed among other instructions, or, conversely, which might be singled out and accorded significance beyond its worth.

CONCLUSION

Other crimes evidence is here to stay. Regardless of whether a court uses an inclusionary or exclusionary approach, this evidence will, arguably, be relevant to prove widely varying issues in scores of criminal cases. It is obvious that, in Illinois, the restrictions on the use of other crimes evidence are as varied as the factual situations in which the evidence is introduced. The admissibility of other crimes evidence must be limited. There exists a tremendous potential for verdicts which result not from facts proving an accused's guilt, but rather from the inference that the accused is an evil person who ought to be

101. I.P.I. 2d 3.14 Criminal (1981).

102. People v. Gregory, 22 Ill. 2d 601, 605, 177 N.E.2d 120, 123 (1961) (murder).

103. People v. Brown, 3 Ill. App. 3d 1022, 1025, 279 N.E.2d 765, 767 (1972) (murder).

punished. As the Illinois Supreme Court has said, it is "elementary that a defendant, no matter how reprehensible his crime or how black his history of misdeeds, is entitled to have his guilt or innocence determined solely with reference to the crime with which he is charged."[104] It must be recognized, therefore, that the admission of other crimes evidence must be carefully scrutinized, if not greatly curtailed, in order to render such a proposition meaningful.

A recommended procedure for the admission of other crimes evidence involves several steps. First, the trial judge, outside the presence of the jury, would hear a summation of the prospective testimony prior to a witness taking the stand. The judge would then instruct the prosecution concerning what facts may and may not be elicited before the jury.[105] This would prevent accumulation of inflammatory evidence when the need for the evidence does not really exist and would also protect against the jury knowing of the defendant's involvement in a distinct, unrelated offense, the nature of which may be irrelevant to the case at hand.

Second, the judge must determine that the evidence is relevant, probative, and absolutely necessary in light of the circumstances, and should not apply mechanically a list of exceptions to see if the evidence fits into one of them. Third, the judge might be required to set forth the reasons for his determination as further protection against arbitrary action. Finally, the judge would instruct the jury, before he allows it to hear the evidence, of the limited purpose for which it is admitted. If all of these steps are taken, the interests of justice and fairness will be better served.

If the evidence offered is of other crimes for which the defendant has been acquitted, special protections and closer scrutiny are required to guard against undue prejudice. The best approach would be to exclude such evidence completely to avoid an inference of guilt in the other crime or in the one at bar, without an adequate basis in fact. Where such evidence is deemed substantially probative, minimally prejudicial, and absolutely necessary, the evidence admitted should be strictly tailored. Only that amount of detail for which there has been clear proof, and which is actually—not just arguably—relevant to current issues may be admitted. Above all, any uncertainty should be decided in the defendant's favor and against admis-

104. People v. Gregory, 22 Ill. 2d 601, 603, 177 N.E.2d 120, 122 (1961).

105. People v. Pendleton, 52 Ill. App. 3d 241, 250, 367 N.E.2d 196, 203 (1977).

sion. Other crimes evidence should never be admitted if any doubt as to its value exists.

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