NOTES AND COMMENTS

OTHER CRIMES EVIDENCE AT TRIAL: OF BALANCING AND OTHER MATTERS

Evidence of the accused's past criminal history—prior convictions at trial, pleas of guilty, acquittals for technical reasons, arrests, and police or private suspicions—have traditionally been viewed with distrust in Anglo-American law.\(^1\) Probably the principal reason for limiting the use of "other crimes" evidence at trial has been the fear that such evidence will prejudice the jury against the accused.\(^2\) The notion of prejudice encompasses two distinct tendencies of jurors. The first is the tendency to convict a man of the crime charged, not because he is guilty of that offense, but because evidence introduced indicates that he had committed another unpunished crime or that he is a "bad man" who should be incarcerated regardless of his present guilt.\(^3\) A conviction for this reason would violate the principle that a man may be punished only for those acts with which he has been charged.\(^4\) The second is the tendency to infer that because the accused committed one crime, he committed the crime charged. In many instances this inference rests on no greater foundation than the belief that commission of one crime indicates a propensity to commit

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On the various kinds of evidence which may be admitted to prove other crimes, see text at notes 40-45 infra.

2. See 1 Underhill, Criminal Evidence § 205 (5th ed. 1956).

Relevant other crimes evidence may also be excluded because it unfairly surprises the accused by requiring him to meet charges not contained in the indictment or pleadings, tends to confuse the jury or distract them from the main issue, or takes up too much time of the court and parties. See United States v. Klein, 131 F. Supp. 807 (S.D.N.Y. 1955). See also 1 Wigmore § 194.

3. See 1 Wigmore § 57, at 456; id. § 194, at 650.


The "bad man" image will be particularly damaging in those few jurisdictions in which
others. Convictions based on this equation are disapproved because of the limited probity of propensity evidence. Whatever statistical data may demonstrate about the likelihood of repeated crimes in a given group of offenders, it says little about the guilt of an individual defendant. Recognizing both these jury tendencies, American courts have generally excluded other crimes evidence which proves no more than “criminal disposition” or “criminal character,” reasoning that the possibility of inflaming jury sentiments outweighs the limited relevance of such evidence.

Yet in some cases other crimes evidence may be rationally probative of guilt. The accused may have committed a prior offense in a manner similar to that used in the crime charged, or he may have committed the type of crime in question several times. The closer the similarity of the other crime to the crime charged, the greater would seem its relevancy to the issue of commission. At a trial for burglary, for example, evidence that an accused had committed four previous burglaries of a type similar to the one in question might be rationally persuasive when connected with other evidence such as proximity to scene of crime and identification by witnesses. This record may also cast doubt on a defense such as mistake or inadvertence.

Probity and prejudice are not, of course, mutually exclusive characteristics. Probative evidence may still be inflammatory. It may also have a persuasive effect far greater than its merits, leading jurors generally to distrust all the evidence offered by the accused.

the jury is also charged with sentencing. See Tappan, Sentencing Under the Model Penal Code, 23 LAW & CONTEMP. PROB. 528, 532 (1958).

5. WIGMORE § 194, at 650 (“the over-strong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts”).

6. See, e.g., Railton v. United States, 127 F.2d 691, 695 (5th Cir. 1942).

7. Considerable work has been done in the field of predicting the likelihood of recidivism of prisoners and juvenile delinquents. See, e.g., OHLIN, SELECTION FOR PAROLE 43-46, 52, 124-30 (1951); Glueck, Status of Glueck Prediction Studies, 47 J. CRIM. L., C. & P.S. 18 (1956).

Criticism of these efforts, however, has been fierce. See WOOTTON, SOCIAL SCIENCE AND SOCIAL PATHOLOGY 182-84 (1959); cf. Goodman, Generalizing the Problem of Prediction, 17 AM. SOC. REV. 609 (1952).

One of the findings of the studies which conflicts with the opinion of most courts and laymen is that most types of sex offenders have a low recidivism rate. See LANGLEY PORTER CLINIC, CALIFORNIA SEXUAL DEVIATION RESEARCH, FINAL REPORT 100 (1954). But cf. ELLIS & BRONCALE, THE PSYCHOLOGY OF SEX OFFENDERS 26, 33-37 (1956).


11. Thus the jury will tend to accept the arguments of the prosecutor and the testimony of prosecution witnesses where it contradicts the version presented by the "bad man"
The trial judge must attempt to strike a balance between the conflicting characteristics of other crimes evidence, ensuring that the jury will consider all evidence relevant to the accused's guilt without being influenced by unduly prejudicial information. Admission of some prejudicial information seems inevitable. Even if the trial judge could control all unauthorized mention of other crimes, the probity of some other crimes evidence might require its admission despite prejudicial content. It is frequently assumed that the trial judge can cure or mitigate the effects of juror contact with inflammatory evidence by appropriate instruction, admonition, and by striking evidence from the record when its introduction is unauthorized. There is one great virtue to the "curative" notion: it greatly simplifies judicial administration by reducing the number of mistrials, new trials, and reversals for prejudice. Recent tests on "credibility" evidence, however, tend to confirm the widely held view that instructions to the jury to ignore prejudicial other crimes evidence, or to limit its use to a certain issue, are ineffective. Prosecutors know this, and treatises on advocacy recognize its importance. Indeed, some defense attorneys would rather have no instruction on such evidence, fearful that a judicial reminder will stir the memory of jurors, and give the evidence still more weight.

Similarly, little control over the jury's use of other crimes evidence can be expected from techniques for looking behind the inscrutable general verdict.

his attorney. See, e.g., Dennison v. State, 17 Ala. App. 674, 677, 88 So. 211, 214 (1921) ("rendered the jury less inclined to listen or give proper weight and consideration to whatever was offered or said in his defense"). See Note, 36 COLUM. L. REV. 931, 935 (1936) ("juries may either omit entirely to estimate the probabilities of a given proposition, or accept it as more highly probable than it is"); cf. Note, 12 TEMPLE L.Q. 496, 496-97 (1938) (jury reliance on and influenced by prosecutor); Note, 54 COLUM. L. REV. 946, 947 (1954) (same).


Alternatively, an erring counsel may avoid mistrial on reversal by voluntarily, quickly, gracefully retracting his remarks. See Note, 36 COLUM. L. REV. 931, 941 & nn.73-74 (1936). Sometimes matter is considered too prejudicial to be cured by the court. See, e.g., Leonard v. United States, 277 F.2d 834 (9th Cir. 1960); Carlile v. State, 129 Fla. 860, 176 So. 862 (1937).

14. The jury study tests are discussed at note 89 infra and accompanying text. See Justice Jackson's oft-quoted remark in Krulewitch v. United States, 336 U.S. 440, 453 (1949): "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." See also Lacy, supra note 1, at 277 ("A pregnant question even though successfully objected to may do about as much harm as a question answered."); McCORMICK § 43 at 93, § 53 at 122-23; 3 WIGMORE § 988.


16. See, e.g., United States v. Tramaglino, 197 F.2d 928, 932 n.2 (2d Cir. 1952).
Interrogatories accompanying a general verdict are available for an “ultimate fact” in issue, such as the accused’s sanity when the charged crime was committed. But the “ultimate fact” definition would not seem to include other crimes mentioned in a case, since these are not elements of the substantive crime, but rather evidence to prove such elements. Similarly, use of special verdicts in other crimes cases would seem to be impracticable, for such verdicts must be framed with particular care to avoid reversal on appeal.

Of course, the possibility of improving these after-the-fact measures is not to be ignored. But their present inability to control the jury’s use of prejudicial matter indicates that the only effective way to prevent undue jury prejudice is to prevent jury contact with such evidence. Thus the crucial safeguard is the trial judge’s decision to admit or exclude the evidence when offered.

**RULES OF ADMISSIBILITY**

*The Prosecutor’s Case-in-Chief*

When other crimes evidence is presented directly to the judge for a ruling on admissibility, he can apply fairly well formulated rules which are designed to strike the balance between prejudice and probity. All jurisdictions observe the requirement that no evidence may be admitted which tends solely to prove that the accused has a “criminal disposition.” The rationale for this absolute prohibition is that such evidence is always more prejudicial than probative. Most states attempt to bar disposition evidence by excluding all other crimes evidence unless relevant to a limited number of facts and propositions. In

17. See, e.g., State v. Tugas, 37 Wash. 2d 236, 222 P.2d 817 (1950); Comment, 60 Colum. L. Rev. 999 & n.6 (1960). Since jury proceedings are secret and the general verdict requires no finding but guilt or innocence, the jury’s deliberative process in almost every criminal trial is effectively unguided. Interrogatories, which may check jury thinking on important issues, are disfavored and rarely used in criminal trials, see, e.g., Gray v. United States, 174 F.2d 919, 922-24 (8th Cir.), cert. denied, 338 U.S. 848 (1949); State v. Greater Huntington Theatre Corp., 133 W. Va. 252, 260-61, 55 S.E.2d 681, 686 (1949), although in some jurisdictions the trial judge has discretion to use them, e.g., State v. Harold, 45 Wash. 2d 505, 509, 275 P.2d 895, 897 (1949). If proper under the “ultimate fact” rubric, see text immediately infra, interrogatories could question the jurors on whether the prosecution had met its required proof burden on any other crime—in Texas, “proof beyond a reasonable doubt,” e.g., Nami v. State, 127 Tex. Cr. R. 403, 77 S.W.2d 528 (1934), in all other jurisdictions, “substantial evidence” or a near equivalent, e.g., People v. Albertson, 23 Cal. 2d 550, 579-80, 145 P.2d 21, 22 (1944)—before such crime could be applied as proof of the crime charged. But some defendants might not want to focus the jury’s attention on the other crime. See note 16 supra and accompanying text.

18. See Green, Judge and Jury 353-54 (1930); Driver, A More Extended Use of the Special Verdict, 9 F.R.D. 495, 499 (1950).

19. The trial judge’s role is that of a “preliminary tester” of the evidence. 1 Wigmore § 29; see Trautman, supra note 1, at 387; McCormick § 53, at 123.

20. See McCormick § 157, at 327 & n.2 (collecting authorities). This ban is an application of the rule that the prosecution may not introduce bad character evidence initially. Ibid.


22. This is the prevailing rule in America. See Note, 3 Vand. L. Rev. 779 (1950); Slough & Knightly, supra note 1, at 327. The leading case is People v. Molineux, 168
other crimes evidence will be admitted only if relevant to prove such things as res gestae, common scheme or plan, unusual and distinctive method, identity, passion for illicit sexual relations with the accuser, motive, specific intent, or purpose to avoid punishment. This list covers most of the recognized exceptions to the "exclusionary" rule. But the purposes for which evidence may be admitted vary from state to state, depending upon local statute or common law. The federal courts and a small but growing number of states do not impose this exclusionary requirement; these jurisdictions have adopted an "inclusionary" rule under which they admit all other crimes evidence relevant to an issue in the trial, except that which tends to prove only criminal disposition. Some courts using the language of "exclusion" admit of so many acceptable uses of other crimes evidence that, in practical fact, the standard applied is as liberal as that articulated by "inclusionary" courts. The "exclusionary" and "inclusionary" systems aim at the same goal—keeping from the jury disposition or character evidence—but the difference in approach may have significant effects at trial.

In many exclusionary jurisdictions, the list of permissible uses for other crimes evidence has become crystallized through codification or stare decisis, and some courts have rigidly adhered to a particular list of categories.


23. Another exception is use for impeachment, but this use involves somewhat different considerations. See text at notes 68-91 infra. A relatively full list is found in McCormick § 157, but he is careful to say it is not complete, and that some evidence may fall between categories or into more than one. Id. at 327-28. Compare the closed formulation in People v. Molineux, 168 N.Y. 264, 291-94, 61 N.E. 286, 293-94 (1901).

24. Recognized exceptions are normally a product of spontaneous judicial thought and research. See Slough & Knightly, supra note 1, at 326.

25. See Morgan, Maguire & Weinstein, Cases on Evidence 380 (1957); e.g., Alford v. State, 223 Ark. 330, 266 S.W.2d 804 (1954); Swann v. United States, 195 F.2d 689 (4th Cir. 1952); People v. Woods, 35 Cal. 2d 504, 218 P.2d 981 (1950); State v. Scott, 111 Utah 9, 21-22, 175 P.2d 1016, 1022 (1947). The distinction between exclusionary and inclusionary approaches is frequently blurred by the reference to recognized exclusionary exceptions as proof that the evidence is relevant.


26. See the comment in State v. Scott, 111 Utah at 20-22, 175 P.2d at 1022.


Courts following this approach may explain the exclusion of evidence relevant to issues outside the accepted list on the ground that evidence thus excluded is by nature more prejudicial than probative. The apparent premise of this explanation seems to be that the prejudicial content of other crimes evidence is more or less uniform, making relevancy the determinative factor in deciding admissibility. The categories are probably looked to as a predetermined index of the kinds of evidence important enough to overcome prejudicial content. This attitude encourages automatic application of the rule, without individual analysis of probity or prejudicial content.

Both underlying assumptions seem erroneous. To the extent that permissible uses are not expanded when new evidentiary relationships are encountered, the list of permissible uses becomes an inaccurate index of relevancy. It is more likely to be a somewhat arbitrary collection of historically accepted rules. Moreover, the very use of general rules in this area is inappropriate. Evidence having some relevance to the issue of intent, for example, may or may not prejudice the jury unduly depending on the nature of the crime. Rigid application of the exclusionary rule in these circumstances is likely to produce two errors. Probative evidence which is not unduly prejudicial may be excluded because it fails to qualify for one of the jurisdiction’s accepted purposes. Similarly, evidence relevant to some accepted purpose may be admitted without regard to its prejudicial content. At the other extreme, adherence to existing categories may cause judges desiring to admit certain “nonconforming” evidence to distort one of those categories. While this practice may

30. See, e.g., the statements in Quarles v. Commonwealth, 245 S.W.2d 947, 948-49 (Ky. 1951).

“[I]t is difficult to determine which is the more extensive, the doctrine or the acknowledged exceptions.” Trogdon v. Commonwealth, 72 Va. (31 Gratt.) 862, 870 (1878).
32. The exceptions used by American courts were taken bodily from the English cases. See Stone II, supra note 1, at 991-93. For a sketch of the process of accretion, see Stone I, supra note 1, at 958-73. After about 1850 the list was crystallized in England. Id. at 965-78.
33. E.g., People v. Molineux, 168 N.Y. 264, 61 N.E. 286 (1901). Evidence tending to prove the accused had poisoned another victim in the same unusual way as in the crime charged was excluded as not within recognized categories of motive, intent, absence of mistake or accident, common scheme or plan, and identity. For criticism of the Molineux decision, see Stone II, supra note 1, at 1023-30. See also Regina v. Hall, 5 N.Z.L.R. (C.A.) 93, 110 (1887).
35. A discussion of this process in relation to the charged crime of rape is found in Lacy, supra note 1, at 272-81. See also Note, 39 J. Crim. L. & Crim. 485 (1948); Note, 10 Mon. L. Rev. 193 (1947); Stone II, supra note 1, at 1031.
introduce flexibility by the back door, attention to the formulae of existing
categories will impede proper analysis of the actual probity and prejudicial
content of the evidence offered. It may also facilitate introduction of prejudicial
evidence by generally broadening the definition of those kinds of evidence
which the rule affirmatively declares admissible.

It seems preferable, therefore, to adopt the inclusionary rule’s flexible at-
titude toward relevancy of other crimes evidence. This alone, however, will
not result in an accurate evaluation of the evidence offered. Concentration on
relevance alone ignores the varying degrees of prejudicial content which may
be involved, and may lead courts following either approach to conclude that
all relevant other crimes evidence is per se admissible. Courts should ex-
plicitly evaluate the prejudicial impact of relevant other crimes evidence.
Some courts have explicitly recognized this obligation by adopting what has
been called a “balancing test.” Under this test evidence found relevant to
some issue at trial is not necessarily admissible. The court first must weigh the
probative worth of this information against its tendency to prejudice the jury.
If the potentiality of bias overbalances the contribution to the rational develop-
ment of the case, the evidence will be barred.

Whichever form of the rule is followed, the “balancing test” becomes the
chief barrier against the use of prejudicial other crimes evidence. The state-
ment of this test gives it an attractive simplicity: “probative worth” is weighed
against “tendency to prejudice.” Difficulties of application may be swept under
the carpet of “discretion” found in all good trial courts. Unfortunately, the
trial judge must be armed with more than discretion and a formula to apply
the test correctly.

Probative worth is a complicated notion. Because other crimes evidence is
generally circumstantial, its use demands an inference from the fact of the
“other crime” to the fact or proposition in issue. Thus, if evidence of a prior
conviction for a crime requiring scienter—for example, knowing possession
of stolen goods—is introduced to show knowledge in a second trial for a like
offense, the judge must examine the reasonableness of the inference which
the prosecution wants drawn from this evidence: that one conviction for this
type of offense makes inadvertent possession of stolen goods less likely. But
the difficulties involved in analyzing this inference are complicated by the
nature of much other crimes evidence. A prior conviction or plea of guilty

should be excluded “where the minute peg of relevancy will be entirely obscured
by the dirty linen hung upon it”).
38. See generally McCormick § 157, at 332-33.
39. See authorities cited note 10 supra.
40. Even here, the certainty is not absolute. See Borchard, Convicting the Inno-
cent (1932).
41. See Piassick v. United States, 253 F.2d 658 (5th Cir. 1958); Commonwealth v.
establishes the commission of the other crime with a high degree of certainty. Often, however, other crimes evidence may include acquittals for technical reasons, arrests which did not lead to trial, police observations not culminating in arrest, and police or private suspicions often not based on direct observation. In such cases, the judge must make a double evaluation of its probative worth, tracing the inference from the testimony to the commission of the other crime, and then to the fact in issue. In some instances, a still longer string of inferences may be required.

Thus far, the scrutiny is that accorded all types of circumstantial evidence. "Probative worth," however, consists of more than logical relevance or persuasiveness. No matter how persuasive of the fact it is supposed to prove, other crimes evidence has no probative worth if the fact is not in issue. Perhaps the clearest case would be other crimes evidence offered to prove a fact not material to proof of the charged crime—for example, specific intent in a manslaughter trial. Because such evidence does not advance the search for truth, it serves no purpose which might justify whatever prejudice it creates, and is excluded for that reason. A similar situation would exist when the accused concedes the issue to be proved—for example, when he admits committing the act in question and bases his defense on some other grounds. Courts have applied this principle to forbid the introduction of evidence on issues which

42. See Alford v. Territory of Hawaii, 205 F.2d 616 (9th Cir. 1953) (statute of limitations).
46. See, e.g., People v. Albertson, 23 Cal. 2d 550, 145 P.2d 7 (1944); Lacy, supra note 1, at 282-83. On the difficulties for both judge and counsel in dealing with a long string of "connecting up" evidence, see McCormick § 58.
48. For an example of this defense, see People v. Knight, 62 Cal. App. 143, 216 Pac. 96 (1923).
seem impossible to dispute, and which are in fact not contested. Gilligan v. State, the leading case, held that other crimes evidence of intent could not be admitted where the act in question, poisoning, was unequivocally intentional. The court noted, however, that the prosecution could use such evidence in rebuttal if the defendant specifically put intent in issue by claiming that the poisoning was accidental, and most authorities agree with this qualification.

Courts refer to this element of probative worth as the "necessity" of the evidence. The cases recognizing the necessity factor seem limited to those in which there is no dispute about the issue to be proved other than that technically raised by a general denial. It might be argued, however, that the principle of necessity should also be applicable to disputed issues when the prosecution's other evidence on the issue is sufficient beyond a reasonable doubt. Here it seems equally true that the only meaningful effect of other crimes evidence would be to prejudice the jury against the accused.

Admittedly, exclusion of evidence in this case would require a premature decision on the factual issue which would interfere with the jury's ability to make a decision. But this is also true of the recognized practice of excluding "intent" evidence in cases involving "unequivocally intentional" crimes. While the defendant's disputation of the issue makes the judge's conclusion less certain, this fact changes only the degree and not the kind of the judicial interference. Perhaps another objection to expanding the necessity test to contested issues is the notion that the defendant "waives" his protection against other crimes evidence by disputing the issue. Whatever the merits of this "opened door" rubric to prevent a defendant from abusing an evidentiary

49. A clear statement of this is found in the English case of Thompson v. The King, [1918] A.C. 221, 232: "The mere theory that a plea of not guilty puts everything material in issue is not enough for this purpose [of substantively 'raising an issue' on which other crimes evidence may be introduced]. The prosecution cannot credit the accused with fancy defenses in order to rebut them at the outset with some damning piece of prejudice."

50. 92 Conn. 526, 103 Atl. 649 (1918).


52. 92 Conn. at 532-33, 103 Atl. at 653.

53. See generally McCormick § 157, at 331.

54. See, e.g., the Gilligan court's statement that the act was "not equivocal, and so the only practical effect which the evidence could have would be to prejudice the accused . . ." 92 Conn. at 536, 103 Atl. at 653. One indication of the certainty required is the qualification that the evidence will be admissible simply if defendant raises the issue.

55. See State v. Gilligan, 92 Conn. at 536, 103 Atl. at 653. Although in Gilligan there was no defense on the issue of intent, see note 54 supra, the court speaks in terms of proof "beyond a reasonable doubt" on the issue, indicating that, even if defendant claimed accident, but the state's direct proof was overwhelming, evidence of other poisonings would be excluded. Cf. A. Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 YALE L.J. 1149-63, 1199 (1960).

56. See People v. Knight, 62 Cal. App. 143, 216 Pac. 96 (1923) (defendant "opened the door" by denying intent).
privilege, it loses this justification when its use is not necessary to protect the state’s case. Applied when defendant has clearly lost the issue, the “open door” notion serves only to punish defendants who contest. Thus, in determining probative worth, the court should evaluate the prosecution’s other admitted and admissible evidence to determine whether the offered other crimes evidence is necessary to prove the issue beyond a reasonable doubt.

This procedure is not without dangers. A court satisfied that other evidence establishes the issue beyond a reasonable doubt will withhold probative other crimes evidence from the jury. If the jury disagrees with the court’s evaluation of the other evidence, finding it alone unpersuasive, this suppression may change the outcome of the trial. There should be a point, however, at which the prosecutor’s need for a safety margin of proof is outweighed by the potentially prejudicial effect of the evidence offered. Two complex variables—the relative certainty of other available proof on the issue and the degree of prejudicial impact of the other crimes evidence—should be considered in arriving at this decision.

The “necessity” test leads to the anomalous result that defendants with the weakest rebuttal evidence on an issue have the strongest shield against other crimes evidence. But this fact should not obscure its pragmatic importance. The number of reported cases discussing use of other crimes evidence gives some indication of the frequency with which such evidence is used. Clearly, prosecutors are aware of the usefulness such evidence has in securing convictions, and the temptations to introduce this evidence in the hope that it will have a prejudicial effect are undoubtedly great. The best check against misuse of this kind of evidence in nonuse. This is particularly true where the other crimes evidence goes only to one issue while the prejudicial effect is likely to affect the outcome of the entire case, which may be in doubt. At the very least,

57. A reasonable doubt test for exclusion is the narrowest statement of the necessity principle; indeed, it is the only standard consistent with this principle. If a lower standard, such as “substantial evidence” were applied, the judge would exclude other crimes evidence in situations where the jury, on the basis of evidence admitted, might acquit. However, the necessity factor should only affect calculation of probative worth when the jury is reasonably certain to find that the issue is established without other crimes data.

58. Arguably, a simpler approach—and one which would retain some penalty to the defendant for raising the issue—would be to require the defendant to concede the issue as a condition of barring the other crimes evidence offered in rebuttal. The impact of such a concession on the jury, however, may go further than erasing the contested issue.

59. Cf. 1 Wigmore § 216. Not only is the defendant with the weakest case protected; the prosecutor who makes the least effort to secure evidence directly related to a material issue has the best chance to get information of prior crimes admitted. This result directly undermines the rationale of the necessity doctrine.

60. Cases involving the trial use of other crimes evidence are as plentiful “as the sands of the sea.” McCormick § 157, at 327 n.2.

61. See Ladd, supra note 1, at 190 (“[T]he bypath of previous convictions for the purpose of testing credibility is something never missed by the prosecuting attorney.”); Lacy, supra note 1, at 286. Note, 54 COLUM. L. REV. 946, 948 (1954).

Compare Howard, Criminal Justice in England 403 (1931).
therefore, the prosecutor should be required to offer all more direct and less volatile data before he relies on other crimes information. The "necessity" rule, if applied to all evidence at the prosecutor's command, will tend to insure this result.

**Prejudice**

The prejudicial impact of other crimes evidence is a function of jury reactions to that evidence. A judge evaluating such evidence should attempt to predict the reactions of the actual jury sitting before him, considering the individual characteristics he has discovered through juror examination and the various local prejudices of which he is aware as a member of the community.

There is no necessary correlation between prejudicial impact and probative worth. Prior sexual offenses and other heinous crimes can be extremely damning, even though their logical relation to the crime charged may be tenuous. The less substantial the probative worth in these cases, the less difficult the task of balancing. Often, however, similarity between the other crime and the crime charged will tend to increase both the jury's bias against the accused and the probative worth of the evidence. Even if the jury is no more disposed to punish the accused for his unpunished past crimes, "overpersuasion" may lead them to conclude that, having committed a crime of the type charged, he is likely to repeat it. When the two competing values are linked, striking a balance will often require that the judge consider other factors relating to the progress of the trial as a whole.

The judge's decision will be most difficult when he concludes that the prejudicial impact of the evidence is so great that the jury is certain to convict, regardless of the evidence. The decisive nature of such "outcome determinative" evidence appears to cause some judges to exclude it regardless of its probative weight. This approach might be supported by the belief that juries should not be permitted to decide criminal cases on an irrational basis. On the other hand, where the highly prejudicial evidence also has great probative worth and plays a crucial role in the prosecutor's case, exclusion of the evidence may destroy his case and result in an unjustified acquittal.

62. Perhaps because commentators have pressed for an exception for evidence showing a passionate relationship or inclination to commit sexual offenses, see Stone II, supra note 1, at 1011-16, there has been increasing acceptance of this purpose. See, e.g., Abbott v. State, 113 Neb. 517, 521, 204 N.W. 74, 75, reversed on other grounds on rehearing, 113 Neb. 524, 206 N.W. 153 (1925) ("sexual depravity"); People v. Gasser, 34 Cal. App. 541, 544, 168 Pac. 157, 158 (1917) ("lewd and lascivious disposition and tendency to commit lewd and lascivious acts"). The relevance of such evidence as an index of propensity has been seriously questioned. See Slough & Knightly, supra note 1, at 332-36. The conflicting authorities on this problem are collected at Trautman, supra note 1, at 406 & nn. 83, 84.

63. See authorities cited note 9 supra.

64. See, e.g., Noor Mohamed v. The King, [1949] A.C. 182.

The problem with "outcome determinative" evidence is that either ruling by the judge is likely to preclude a rational decision by the jury. The judge's decision must always result in either damning prejudice or a deceptive lack of evidence. It is impossible, therefore, to observe the traditional division of function between judge and jury, and a judge ruling on the admissibility of such evidence cannot escape the obligation to decide the case himself. In ruling, the judge should evaluate all the evidence, including the rational inference from the other crimes evidence, to determine whether guilt is proven beyond a reasonable doubt.

If the court is persuaded that all the evidence establishes guilt, it should admit the other crimes evidence. Conversely, if all evidence including that of other crimes is, in the court's view, insufficient to warrant a conviction, the evidence should be barred even though it is itself quite persuasive. A third possible situation should be distinguished. The judge may find that, even without the other crimes evidence, the prosecution's case establishes guilt beyond a reasonable doubt. Within such a finding is the narrower conclusion that the particular fact to be proved by the other crimes evidence has already been established. Thus the "necessity" test becomes relevant, and should take precedence over the inquiry into the larger issue of guilt. The "outcome determinative" inquiry is applicable only when, in addition to its extremely prejudicial content, the other crimes evidence is "necessary" to prove a fact essential to the prosecution's case.

Cross Examination I: Impeachment of the Defendant

Cross examination of the accused affords additional opportunities for the

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66. The traditional rubric is that the jury finds the facts, the judge the law; see Goldstein, supra note 55, at 1155. But since judges began, about a century ago, to pass on the sufficiency of the evidence in criminal cases, they have had the power to direct a verdict of acquittal if the prosecutor failed to prove his case. Goldstein, supra note 55, at 1157-59 & nn.22, 23; see, e.g., Cooper v. United States, 218 F.2d 39 (D.C. Cir. 1954); People v. Asta, 337 Mich. 590, 60 N.W.2d 472 (1953) (motion to dismiss). See generally Note, 55 Colum. L. Rev. 549 (1955); Note, 49 Yale L.J. 733 (1940). A growing number of jurisdictions, however, have reduced the power to direct acquittal by allowing the case to go to the jury if there has been "substantial evidence" of every material allegation. See Goldstein, supra note 55, at 1152-62.

67. Courts are not, however, allowed to direct verdicts of guilty. Sparf v. United States, 156 U.S. 51, 105 (1895); Fleischman v. United States, 174 F.2d 519 (D.C. Cir. 1949). Even the isolated cases allowing such a procedure where there is no contradiction to a clear showing of guilt, see Yates v. State, 31 Ala. App. 362, 17 So. 2d 776, cert. denied, 245 Ala. 490, 17 So. 2d 777 (1944), are contrary to the almost universal rule.

67. It might be, of course, that the judge, if called upon to decide the case, might find the defendant guilty, and yet not feel that the evidence on this issue was so certain that the additional other crimes evidence was "unnecessary." In this case, the hypothesized extremely prejudicial content of the evidence should be weighed against its value to the case. The same test would apply wherever any of the extreme conditions postulated does not exist.
introduction of other crimes evidence. In most jurisdictions, if the accused takes the stand, evidence of past convictions and alleged criminal acts may be introduced immediately to impeach his credibility. Statutes in many jurisdictions governing the impeachment of the credibility of witnesses (including the accused) authorize the introduction of a wide range of criminal convictions on the issue of credibility; in many jurisdictions, moreover, allegations of criminal acts may be introduced for this purpose. As to convictions, some states admit "any felony or misdemeanor involving moral turpitude," others "any crime" or "any felony," while a few admit "infamous crimes," the common law test. Some states leave the decision on relevancy to the trial judge's discretion. Whatever the range of permissible crimes, the standards apply regardless of the content of the accused's testimony. Commentators have severely criticized the breadth of these standards, and the authors of the Uniform Rules of Evidence echo this criticism by strictly limiting the other crimes evidence available for impeachment purposes to convictions for crimes involving dishonesty or false statement. Moreover, under the Uniform Rules, other crimes evidence is only admissible if the accused has "first introduced evidence admissible solely for the purpose of supporting his credibility.

68. See generally Ladd, Credibility Tests—Current Trends, 89 U. Pa. L. Rev. 166 (1941); McCormick §§ 42, 43.
69. See McCormick § 93. Most jurisdictions seem to make no differentiation, for purposes of impeachment, between the accused and other witnesses. This is difficult to reconcile with the far greater danger of prejudice to the accused's chances from evidence of his own past acts. See id. § 43, at 93-94.
70. See Morgan, Maguire & Weinstein, Cases on Evidence 297-98 (1957); McCormick § 42, at 88 & nn.10-15 (listing exceptions).
71. See McCormick § 43, at 89-91 & nn.2-10 (collecting the various formulae).
72. See Ladd, supra note 68, at 177-83; McCormick § 43, at 91.
Admission of a broad range of other crimes evidence for impeachment purposes permits the use of evidence relevant only to an accused's moral character, and thus conflicts with the rationale underlying the general bar on pure disposition evidence. The premise of the broad impeachment rules seems to be that a person's general character can be determined by evidence of past criminal acts and that general character can be a meaningful index of propensity to lie. That some jurisdictions have narrowed the permissible class of offenses to crimes involving "moral turpitude" serves only to underscore this premise.\(^7\) And even the most restrictive jurisdictions, which have adopted a version of the Uniform Rules standard, admit what may be called "specific disposition" evidence. The rationale underlying the limitation of admissible evidence to crimes involving "dishonesty and false statement" is that only these crimes indicate a disposition to perjury.\(^7\) Thus, even in these jurisdictions, the rule reflects a clear distinction between the principles governing the prosecutor's main case, where disposition evidence is absolutely barred, and those controlling the use of evidence for impeachment purposes.\(^7\)

In practice, the possibility of "opening the door" to prejudicial other crimes evidence discourages many defendants from taking the stand.\(^8\) The impeachment doctrine thus effects an anomalous distinction between defendants with and those without a criminal record in the exercise of the right to testify in their own behalf.

Most jurisdictions place some procedural limitations on the use of other crimes evidence to impeach. Courts do not allow an unrestricted exploration by the prosecutor into past convictions or alleged past crimes.\(^8\) The scope and intensity of the prosecutor's inquiry may be regulated at the discretion of the trial judge.\(^8\) Thus, if a prosecutor has badgered the accused or repeatedly asked him the same question about a past act, he may be silenced or told to move to other matters.\(^8\) Similarly, aggravating background circumstances of a conviction usually may not be inquired into; only the type of crime, time and place of conviction, and punishment imposed may be shown by the prosecutor when proving a former conviction.\(^8\) A final safeguard for


\(^8\) See Commonwealth v. Quaranta, 295 Pa. 264, 272, 145 Atl. 89, 92 (1928); Ladd, *supra* note 68, at 177-83; McCormick § 43, at 91.

\(^9\) The distinction is probably an historical outgrowth of the early common law disqualification of witnesses convicted of certain crimes. See McCormick § 43, at 89-90.

\(^10\) See id. at 93-94.

\(^11\) See id. at 92-93.

\(^12\) See id. § 42, § 43 at 92-93; Ladd, *supra* note 68, at 178-82.

\(^13\) See, e.g., State v. Haffa, 246 Iowa 1275, 1285, 71 N.W.2d 35, 41 (1955) (dictum). But the extent of cross examination is at the discretion of the trial court. E.g., People v. Sorge, 301 N.Y. 198, 93 N.E.2d 637 (1950). Although occasionally a trial court may be reversed for allowing a prosecutor to persist, see State v. Hild, 240 Iowa 1119, 1155, 39 N.W.2d 139, 159 (1949), such reversals are rare.

\(^14\) See McCormick § 43, at 92-93.
alleged other crimes, erected as much for convenience as to bar prejudice, is the requirement that the prosecutor must "take the answer" of the accused, and not introduce extrinsic evidence to contradict his answer. This limitation does not apply to denials of a prior conviction, which can be proved without delay and distraction of the jury's attention. A final attempt to minimize prejudice, used in a substantial number of jurisdictions including the federal courts, is to allow the accused, absolutely or in the trial judge's discretion, to make a "brief and general statement" in denial or extenuation of his guilt on the crime for which he was convicted. These standards, however, do not protect against the bedrock of undue bias created by the introduction of other convictions which, while highly prejudicial in themselves, have slight probative value.

One factor which may have led to the permissive use of other crimes evidence in this area is a belief in the jury's ability to segregate the evidence according to its permissible uses. Courts admitting other crimes evidence for credibility purposes instruct juries to limit consideration of this evidence to the issue of credibility. As some courts have recognized, these instructions are frequently if not always fruitless. Recent jury examinations conducted by the University of Chicago indicate that jurors do not segregate evidence introduced for impeachment purposes. These tests disclosed that jurors have an almost universal inability and/or unwillingness either to understand or follow the court's instruction on the use of defendant's prior criminal record for impeachment purposes. The jurors almost universally used defendant's record to conclude that he was a bad man and hence was more likely than not guilty of the crime for which he was then standing trial.

85. See id. § 42, at 89, § 43, at 92.
86. United States v. Boyer, 150 F.2d 595 (D.C. Cir. 1945), is the leading case for allowing such a statement, which Wigmore approves as a "harmless charity," 4 WIGMORE § 1117, at 191, and McCormick as a "reasonable outlet for the instinct of self-defense for one attacked," MCCORMICK § 43, at 93.
89. Letter From Dale W. Broeder, Associate Professor, the University of Nebraska College of Law, who conducted intensive jury interviews, to Yale Law Journal, dated March 14, 1960, on file in Yale Law Library. See also Letter From Harry Kalven, Jr., Professor, the University of Chicago Law School, who also conducted the interviews, dated March 7, 1960, on file in Yale Law Library (Our data "suggest that the jury, like everybody else, has enormous difficulty in understanding what it means to use the evidence on impeachment only and not on guilt."). As Professor Kalven's letter indicates, this material has not yet been published, in part because of the privacy problem about disclosing the identities of jurors interviewed.
The effort of courts and reformers to limit the use of other crimes evidence for impeachment, both by procedural limitations and by confining the category of offense admissible, is tacit recognition of the danger that impeachment evidence will circumvent the purpose of the rules governing admissibility of direct evidence. Whether these limitations cure the abuse, however, is questionable. Perhaps the most illogical protective device is the jury instruction to use the evidence only in weighing credibility. Observers conclude the order is not obeyed, and a moment's reflection about thought processes raises doubts as to whether it can be obeyed. Yet use of the instruction continues, smoothing over the real question of whether uncontrolled use of such evidence ought to be allowed. More radical limitations suffer the same inconsistency. The Uniforms Rules' exclusion of all crimes but crimes of deceit has a superficial plausibility, for it admits into evidence only those crimes from which some direct inference about lying can be drawn. But the difference in probity between crimes of "dishonesty and false statement" and other crimes seems minimal. At best, convictions for forgery, embezzlement, and even perjury, do no more than negative the possible assumption of some jurors that the particular witness could not lie with a straight face. A record of crimes of deceit does not tell any more about the accused's willingness to lie when faced with punishment than does a record containing other kinds of crimes. The possibility that crimes of deceit may be slightly more probative of a general propensity to lie seems irrelevant, for it would appear that, under the pressures of trial and facing a conviction, most guilty defendants will acquire such "propensities" quite readily. Therefore, if other types of crimes are considered inadmissible because their prejudicial effect outweighs their probity, the slight added relevancy of the "lying" crimes does not seem to justify their exception from this general ban.

Of course, all of these restrictions serve a protective function in so far as they reduce the chance that a criminal record will be inadmissible, and limit some of the abuses which might occur when such evidence gains admission. But protection is haphazard, particularly that of the Uniform Rules' limitation as to crime of deceit. Rather than spinning out tenuous distinctions between kinds of other crimes evidence, those concerned with the dangers of prejudice should direct their attention to the basic question whether, on balance, the impeachment value of any other crimes evidence is worth the risk of prejudice it creates.

The balance point may shift, however, when the defendant chooses to introduce evidence of his own credibility or good character.91


91. This distinction is observed by Uniform Rules of Evidence 21 as to credibility. The considerations applicable to rebuttal of character testimony are discussed in the following section.
Cross Examination II: Impeachment of Defense Character Witness

The questions the prosecutor is almost universally permitted to ask defense witnesses who have testified to the accused's good character may also subvert the rules barring disposition evidence. The barrier against initial prosecution use of character evidence does not apply to the accused, who may introduce witnesses who will testify to his good character. This testimony is limited, however, to statements that the accused has a good reputation, or in a few jurisdictions, to the witness’s personal opinion of him; testimony about specific acts evidencing his good character is excluded on the grounds that their introduction would be unduly confusing. In most jurisdictions, the testimony of good character is limited to traits involved in the crime on trial. Once the accused has raised the issue of character, the prosecutor may call witnesses to rebut, by testimony of the defendant's bad reputation. Usually, the prosecutor may also cross examine defense character witnesses by asking questions about rumors as to specific acts of the defendant. Thus the prosecutor may ask the defense witness whether he has heard rumors that defendant was arrested or convicted for other crimes. The rationale given for allowing such questions is that, if answered affirmatively, they might cast serious doubt on the witness's testimony, thus serving a legitimate rebuttal function, and that, if answered negatively, they would show that the witness did not know enough about the accused's reputation to testify. In reality the prosecutor frequently is unconcerned with the witness's answer; his main concern is to get the information of other crimes before the jury.

Since this privilege is denied the prosecution in presenting its case-in-chief, on the grounds that character evidence is not a sufficiently probative index of

92. On impeachment of defense character witnesses, see Ladd, Techniques and Theory of Character Testimony, 24 IOWA L. REV. 498 (1939); McCORMICK §§ 42-44; 3 WIGMORE § 988.
93. See, e.g., Michelson v. United States, 335 U.S. 469, 476 (1948). See generally McCORMICK § 158. Such testimony is introduced to show “that the general estimate of his character is so favorable that the jury may infer that he would not be likely to commit the offense charged.” 335 U.S. at 476. Sometimes this testimony alone raises a reasonable doubt of guilt, and precludes conviction. See Edgington v. United States, 164 U.S. 361 (1896).
95. See McCORMICK § 158, at 334.
96. See Michelson v. United States, 335 U.S. 469, 479 (1948). These witnesses, or any other witnesses at trial, may also be impeached by evidence of their reputation for truthfulness, on their past convictions or alleged other crimes. See McCORMICK §§ 42-44.
99. See 3 WIGMORE § 988: “This method of inquiry or cross-examination is frequently resorted to by counsel for the very purpose of injuring by indirection a character which they are forbidden directly to attack in that way; they rely upon the mere putting of the question (not caring that it is answered negatively) to convey their covert insinuation.”
guilt, it might be argued that it ought similarly to be barred as a weapon for defendant. Nevertheless, the privilege exists. It has been described as a means of reinforcing the presumption of innocence, an advantage given the defendant on the grounds that evidence of good reputation might “tip the scale” in his favor. \(^\text{100}\) It also stems from a policy that first offenders should be treated more leniently, and consequently that the trial procedure should allow an accused to display his clean record. \(^\text{101}\) But the fact remains that the defendant, by submitting character evidence, asserts that his general character is relevant to the issue of guilt and denies the premise of the general rule which bars prosecutors from using such evidence. Thus it would be incongruous to deny the prosecution the opportunity to search for indications of bad character by way of impeachment. Although not sufficiently probative by normal standards, the character evidence sought is being used to rebut defense evidence which, by those same standards, also lacks probity. Despite the prejudicial effects of such cross-examination, it is justified on the ground that otherwise the defendant can profit “by a mere parade of partisans.” \(^\text{102}\) Courts have further stressed the fact that the defendant has the choice whether or not to initiate this line of inquiry. \(^\text{103}\)

This interpretation of defendant’s character evidence privilege suggests that courts should not weigh the probity and prejudice of this other crimes evidence according to the concepts of probity applied to the case-in-chief. It can be argued, therefore, that the three jurisdictions which totally exclude evidence of rumored specific acts, on grounds of undue prejudice, \(^\text{104}\) go too far. This criticism cannot be made, however, against the rule urged by Judge Frank of the Second Circuit \(^\text{105}\)—incorrectly termed the “Illinois Rule”—

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\(^\text{100}\) The leading case is State v. Sterrett, 68 Iowa 76, 78, 25 N.W. 936, 937 (1885) (“the object of introducing evidence with reference to the character of the accused is to establish a fact upon which a presumption of innocence may be based”). For the effect of this advantage, see note 93 supra.

\(^\text{101}\) See 1 \textit{Wigmore} § 55; \textit{McCormick} § 158, at 335; \textit{cf.} Cancemi v. People, 16 N.Y. 501, 506-57 (1858).

\(^\text{102}\) 3 \textit{Wigmore} § 988.

\(^\text{103}\) \textit{Michelson} v. United States, 335 U.S. 469, 479 (1948); State v. Hartung, 239 Iowa 414, 427-28, 30 N.W.2d 491, 498-99 (1948).


\(^\text{105}\) United States v. Michelson, 165 F.2d 732, 735 n.8 (2d Cir. 1948), \textit{aff'd without deciding the issue}, 335 U.S. 469 (1948) (dictum). Judge Frank’s opinion for the court cited 3 \textit{Wigmore} § 988 in support of the proposition that the jury “almost surely cannot comprehend the judge’s limiting instruction,” and asked the Supreme Court—to no avail—to change the controlling rules of evidence in light of the prejudicial impact of the evidence.

\(^\text{106}\) Scrutiny of the Illinois cases on cross examination of defense character witnesses indicates that a dictum in \textit{People} v. Hammon, 381 Ill. 206, 44 N.E.2d 923, 925 (1942),
which would limit the prosecution to questions about crimes which are similar in kind to the crime charged. This limitation seems consonant with the usual restriction of the character witness's testimony to traits involved in the crime charged. Similar offenses seem more probative of the accused's disposition to commit the crime charged.\footnote{107}

One limitation has generally been placed on cross examination by prosecutors: specific acts alluded to must have a basis in fact. To insure this, courts screen the questions prepared by the prosecutor to ascertain whether the acts involved therein actually occurred.\footnote{108} This protection creates an anomaly. To avoid the tendency to obfuscate the main issue by disputes over irrelevant facts, defense evidence is limited to testimony of reputation. Rebuttal is similarly limited to the issue of reputation. Thus the only evidence which the prosecution can introduce to discredit a character witness for the accused is evidence that the defendant's \textit{reputation} was not what the witness claimed it was. Yet courts attempt to control prosecutors, not by requiring proof that rumors of specific criminal acts were current at one time, but rather that the underlying \textit{fact} of arrest is true, or at least that there is substantial evidence of it. The Supreme Court recognized the anomaly of the prerequisite, but approved it "as calculated in practice to hold the inquiry within decent bounds."\footnote{109}

To explain this requirement, it must be recognized that effective cross-examination of good character testimony requires questions concerning specific acts. The fact that defendant is limited to testimony of good reputation does not warrant a similar restriction on the prosecutor's cross examination. Good reputation evidence is, in essence, testimony that no bad acts of the defendant are known. The negative can be stated generally, but a positive statement with sufficient force to rebut must, it seems, contain rumors of specific acts. Most jurisdictions agree, though they allow rumors of specific acts to be introduced only on cross examination.\footnote{110}

But the adverse prejudice created by inferences of specific bad acts is almost certain to outweigh whatever jury prejudice in favor of the defendant is giving dissimilarity of the rumored other crime as an additional ground for excluding the question, is the only basis for the association. Other pertinent Illinois decisions bar any questions about specific acts. See Note, 40 J. Crim. Law & Crim. 58, 60-61 & nn.17-22 (1949).

\footnote{107} See note 9 supra.

\footnote{108} Michelson v. United States, 335 U.S. 469, 481 & n.18 (1948), attributing to Wigmore the suggestion of this procedure. See United States v. Phillips, 217 F.2d 435, 443 (7th Cir. 1955) (no showing defendant was arrested, evidence inadmissible); Wilson v. State, 225 S.W.2d 565, 567 (Tex. Crim. 1950) (motion for rehearing); People v. Young, 25 Cal. App. 2d. 148, 77 P.2d 271 (1938). \textit{But cf.} McCormick \S 158, at 336 n.19 ("actual reversals on this ground [propounding question in bad faith] are exceedingly rare").


\footnote{109} Michelson v. United States, 335 U.S. 469, 481 n.18 (1948).

\footnote{110} See McCormick \S 158, at 337.
induced by a clean record. In a battle of half-true claims and accusations, the defendant will surely be harmed on balance. The rule requiring specific evidence of rumored crimes is designed to foreclose the worst possibilities of abuse. It also tends to insure that the rules regulating character evidence will not operate harshly against the first offender for whom the privilege seems to have been created; the defendant need not fear a reprisal of prejudicial information unless his record is, in fact, tarnished.

OTHER MEANS OF ADMISSION

Forensic Gymnastics

By diligent use of his forensic skills, the prosecutor may place before the jury prejudicial evidence of the accused's past criminal acts which he would be barred from using upon direct application to the judge. Unsupported statements by the prosecutor may carry considerable weight, due to the tendency of jurors to attach great credibility to statements made by a state law enforcement officer. Choice opportunities for such prosecution tactics are the opening statement and closing argument to the jury. The prosecutor may abuse his privilege of opening the proceeding by telling the jury he will prove more numerous and heinous crimes than are charged. If this tactic is objected to, the prosecutor may still avoid a mistrial by apologizing and claiming he thought the other crimes evidence would later be rated admissible. An initial reference to uncharged other crimes in closing is more vulnerable to attack, for the opportunity to plead ignorance of future developments is absent. The general rule regarding summations is that the prosecutor's comments must be confined to the evidence presented at trial. Nevertheless, it is a common excess in summation to attach a stigmatic

111. Cf. id. § 158, at 337 n.26.
114. See, e.g., Leonard v. United States, 277 F.2d 834 (9th Cir. 1960) (opening statement mentions 83 other crimes, with aid of a blackboard chart). In the prosecution of Congressman Adam Clayton Powell for tax evasion, the prosecutor in his opening statement said that he would prove tax frauds "of far greater magnitude" than those alleged in the indictment. N.Y. Times, March 10, 1960, p. 1, col. 7.
115. This tactic was tried in the Leonard case, supra note 114; it failed.
label 117 to the accused, capitalizing on the other crimes evidence in the case,118 or introducing new ones,119 to term the defendant a "bad man" or some equivalent indicating long-standing criminality. Often, this is coupled with an exhortation that the jury should do its duty by ridding society of men of this ilk though a conviction.120 This tactic is in direct conflict with the principle that other crimes evidence may not be introduced to show defendant's character. Allowing it will nullify judicial efforts to limit other crimes evidence to that which is relevant to material issues other than character, for it permits the prosecutor, at a strategic moment in the trial, to turn whatever evidence has been admitted into character evidence.

One court has recently indicated an increased concern with the problem of such flagrant abuses in the prosecutor's statements to the jury by insisting that full transcriptions be made of the opening and closing statements.121 The attitude that these forays are part of the evidence in the case, and as much a cause for reversal as any other evidence improperly introduced, is a step toward a realistic appraisal of the impact of forensics. But many courts still insist that these statements are not part of the evidence, and do not need to be so carefully scrutinized for prejudice as evidence regularly introduced.122

117. Often the label itself may cause reversal. Compare Hill v. State, 144 Tex. Crim. 415, 423, 157 S.W.2d 369, 373 (1941), rev'd on other grounds, 316 U.S. 400 (1942) (in rape case, jury told that "a snake crawls on his own belly but these human vultures crawl on the bellies of our hapless and defenseless women"; conviction upheld), with Commonwealth v. Capalla, 322 Pa. 200, 204, 185 Atl. 203, 205 (1936) (in prosecution for manslaughter, accused called "cold-blooded killer"; conviction reversed); and Volkmor v. United States, 13 F.2d 594, 595 (6th Cir. 1926) (in prosecution for using mails to defraud, defendant called "skunk," "weak-faced weasel," and "a cheap, scaly, slimy crook"; conviction reversed). Courts are much harder on comments using national, religious or racial labels, see Note, 36 Columbia L. Rev. 931, 935 (1936); Davis, supra note 116, at 78-79. But see Quinones v. Commonwealth, 245 S.W.2d 947, 949 (Ky. 1951) (Prosecutor's statement in summation that the defendant "is a mean nigger," although "not a proper argument," not cause for reversal since harmless.).

118. See, e.g., State v. Van Williams, 212 S.C. 110, 46 S.E.2d 665 (1948) (statement that it would be unwise to turn loose a man of the character indicated by past convictions).

119. See, e.g., Az Din v. United States, 232 F.2d 283 (9th Cir. 1956) (accusation of narcotics addiction in prosecution for peddling dope). Here the court upheld the conviction on two grounds: that an instruction from the judge "corrected" the prejudicial appeal of the evidence; and that the prejudicial appeal here was not so strong as in two other cases where convictions were upset.


121. State v. Bogen, 13 N.J. 137, 144, 98 A.2d 295, 298 (1953) (opinion by Judge, later Mr. Justice, Brennan).

The prosecutor may also indulge in forensic misconduct in his presentation of the case-in-chief or on his cross examination of the accused and other defense witnesses. In the event of a false allegation of other crimes on cross examination, the defendant often cannot produce extrinsic proof of his innocence but can only protest in answer; the jury is left to decide the question of truth on nothing more than a verbal thrust and riposte, and can probably be expected to believe the prosecutor's allusions over the denial of the accused or a witness. Similarly, the significance of other crimes evidence properly admitted to the courtroom may be distorted or simply inflated by repeated references to it. Repetition is one of the prosecutor's foremost weapons for influencing jury decisions. Courts almost invariably allow such tactics on the ground that the prosecutor may press the defendant on his answer in the hope that he may change it, and admit commission of the crime suggested. Another tactic is the hit-and-run introduction of inadmissible other crimes evidence, where the prosecutor voluntarily—and not grudgingly or too casually—retracts a prejudicial remark after placing it before the jury. Usually, this conduct will not precipitate a mistrial.

There is considerable adverse comment by appellate courts on the trial excesses of prosecutors. When it is clear that such prejudicial use of other crimes evidence was decisive in the trial, some courts will not allow a conviction to stand. But when there is some question whether the evidence was outcome determinative—either because of the strength of other evidence or the "efficacy" of judicial instructions—the overwhelming number of courts

123. Though truth of allegations cannot be known in individual cases, the kind of tactic which might be used can often be seen. A conviction for abortion was upheld although the prosecutor repeatedly asked the accused—in the face of at least ten denials—if she had committed or was recently involved in certain uncharged abortions which had never been the subject of trial. See excerpts from the trial record, People v. Sorge, 301 N.Y. 198, 93 N.E.2d 637 (1950), printed in Morgan, Maguire & Weinstein, Cases on Evidence 296-98 (1957).


125. See, e.g., People v. Sorge, 301 N.Y. at 200, 93 N.E.2d at 639 ("As long as he acts in good faith, in the hope of inducing the witness to abandon his negative answers, the prosecutor may question further."). The "good faith" standard is difficult to administer, see Lee Won Sing v. United States, 94 App. D.C. 310, 215 F.2d 680 (1954), and has been rejected by at least one court which placed the burden on defendant to show "bad faith," see People v. Fowzer, 127 Cal. App. 2d 742, 749, 274 P.2d 471, 475 (1954).


will do no more than verbally admonish, and will take no action. Despite the known inadequacy of curative measures at the trial level, this reluctance is understandable in light of the inability to measure prejudicial impact and the cost to the state of retrials. Yet appellate reticence may breed ever more frequent abuses. A radical compromise remedy might be suggested. When a prosecutor is discovered overreaching the limits of truth, a stern reprimand from the bench with a statement to the jury that the allegation is false seems an efficacious way to wipe the allegation from the jury's mind. Moreover, the appearance of judicial disfavor may act as a powerful deterrent to the prosecutor concerned with maintaining the jury's respect. What would be the total effect on trial procedure if all other crimes evidence wrongfully introduced were declared false and irresponsible?

Mass Communications Media

News of the accused's criminal past may also reach jurors through newspapers, magazines, radio, and television. Such mass communications media, motivated at least in part by the audience appeal of sensationalism, quite often play up the accused's criminal record and reputation. Frequently the media will expose convictions, arrests, and alleged other crimes not admitted at trial. Zealous reporters may even ferret out and publicize rumored details of the defendant's past life unknown to the prosecutor. The prejudice occasioned by this evidence when it reaches the juror through mass media publicity may be greater than when it is regularly admitted. When contacted outside the courtroom, it may have the aura of forbidden fruit. Furthermore, press accounts of the details of a past crime resulting in conviction may be expansive while in many instances nothing but the kind of crime, the time and place of conviction, and the sentence imposed would be allowed at trial. Finally, the defense is deprived of an opportunity to rebut when the communication to the jury is outside its purview.

129. Sometimes improper comments are excused as inadvertent or as occurring in the ardor of advocacy. See Dunlop v. United States, 165 U.S. 486, 498 (1897); Note, 36 Colum. L. Rev. 931 & n.2 (noting that the cases of abuse reaching the appellate courts are but a very small proportion of all instances of abuse in the courts) 942-43 (1936).


131. See Life Magazine, Feb. 17, 1961, p. 43 (reporting current Illinois murder trial, with mention of evidence that defendant had previously committed a rape with slight resemblance in modus operandi).


133. See text at notes 81-84 supra.
All jurisdictions try to keep jurors from such materials. The most effective shielding device is undoubtedly keeping a jury "locked up" in one location from selection until verdict, shut off from broadcasts and papers, and under the watchful eye of court officers who carefully screen reading material including letters. But this practice, once widespread, has been largely abandoned in favor of freer juror movement during the course of trial. Now, during recesses or delays in a trial, courts almost universally permit jury "separation," and allow the jurors to go their own ways, unsupervised by court officers. Separating the jury in this way of course increases the risk that jurors will get wind of prejudicial publicity about the trial. To minimize this risk, separation is usually accompanied by judicial imprecation to the jurors not to read, listen to, or see any items about the trial. The efficacy of such measures is doubtful.

Courts presented with juror exposure to other crimes data in mass communications media must face the difficult problem of evaluating whether in fact this publicity has prejudiced the jury. An affirmative determination necessitates a mistrial, new trial, or reversal. Reviewing courts have held, therefore, that the mere opportunity for prejudice or corruption will not cause reversal. Moreover, newspaper articles or other publicity limited to unbiased reporting of the incidents of trial which took place in the presence of, or within the hearing of jurors, will not give ground for a claim of prejudice. However, reports involving the criminal record or alleged other offenses of the accused, particularly in those cases where all the evidence was not admitted to the jury in the courtroom, are generally considered prejudicial.

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134. See, e.g., Coppedge v. United States, 272 F.2d 504, 507 (D.C. Cir. 1959) ("Under modern conditions juries are customarily permitted to separate, even over weekends, and, unless there be exceptional circumstances, they should be permitted to do so."). Furthermore, supervision by court officers does not guarantee elimination of prejudicial contact. See Davenport v. Commonwealth, 285 Ky. 628, 148 S.W.2d 1054 (1941); State v. Verde, 66 R.I. 33, 17 A.2d 39 (1940).


136. See, e.g., Holt v. United States, 218 U.S. 245, 251 (1910) (Mr. Justice Holmes' statement that "the probability that jurors, if allowed to separate, will see something of the public prints is . . . obvious"); Lewis, supra note 130 ("jurors may be warned not to read or listen to anything about the case, but no one believes this has much effect").

137. See, e.g., Holt v. United States, 218 U.S. 245, 251 (1910); Shushan v. United States, 117 F.2d 110, 115-16 (5th Cir.), cert. denied, 313 U.S. 574 (1941); McHenry v. United States, 276 Fed. 761 (D.C. Cir. 1921). But cf. Meyer v. Cadwalader, 49 Fed. 32 (C.C.E.D. Pa. 1891). Also, where it is shown that the offending juror does not remember the contents of a prejudicial article, he will apparently be held not influenced by it. See, e.g., United States v. Carruthers, 152 F.2d 512, 519 (7th Cir. 1945), cert. denied, 327 U.S. 787 (1946).

138. See Miller v. Commonwealth, 40 F.2d 820, 822-23 (6th Cir. 1930).

inflammatory is any labeling of the defendant as a bad man, or linking him with known underworld figures.\textsuperscript{140} Where evidence of possible “contamination” is presented, the trial judge may conduct a personal examination of the juror. Prior to the Supreme Court’s 1959 decision in \textit{Marshall v. United States},\textsuperscript{141} if the juror stated that he would not be influenced by the contact, and if the judge accepted his statement and decided that the verdict would not be tinged, a denial of a motion for mistrial would generally be upheld.\textsuperscript{142} The rationale for this affirmance was that the trial judge is in the best position to decide if the juror has in fact been prejudiced, and, therefore, must be given a wide discretion in this determination.\textsuperscript{143} The \textit{Marshall} case appears to impose a more stringent test. \textit{Marshall} involved a prosecution for the unlicensed dispensing of drugs; during the course of trial seven jurors read or skimmed newspaper articles stating that the accused had been convicted previously for forgery and for practicing medicine without a license. Prior to the appearance of the newspaper accounts, the trial judge had barred this evidence from trial as unduly prejudicial. Nonetheless, the court concluded after personal examination of each of the seven jurors that none would be biased, and instructed each juror not to consider facts he had learned about the defendant outside the courtroom. The jury entered a verdict of guilty, and the conviction was affirmed by the Tenth Circuit.\textsuperscript{144} The Supreme Court reversed. While recognizing that great discretion is allowed the trial judge in cases involving possible prejudice through contacts with mass media, the Court held that here the newspaper material was so prejudicial that it made a fair trial impossible.\textsuperscript{145} The Court reasoned that if the information would have been prejudicial if offered at trial, it would be equally prejudicial if it reached the jury through news accounts.\textsuperscript{146} Implicit in the Court’s decision, therefore, is a rejection of the notion that “curative” instructions can cure.\textsuperscript{147} \textit{Marshall} seems to require that both trial

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\bibitem{140} See Franano v. United States, 277 F.2d 511, 515 (8th Cir. 1960); United States v. Montgomery, 42 F.2d 254 (S.D.N.Y. 1930) (newspaper article called the accused a swindler, a jailbird, a disbarred lawyer, and an exconvict).
\bibitem{141} 360 U.S. 310 (1959) (opinion per curiam, Mr. Justice Black dissenting without opinion).
\bibitem{142} See Note, 22 GA. BAR J. 413, 415 (1960).
\bibitem{144} 258 F.2d 94 (10th Cir. 1958).
\bibitem{145} 360 U.S. at 312-13.
\bibitem{146} \textit{Ibid}.
\bibitem{147} See Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Mr. Justice Jackson’s oft-quoted remark: “The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.”). For a deviant and defiant refusal to subscribe to this view, see Ferrari v. United States, 244 F.2d 132, 141 (9th Cir. 1957).
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and appellate courts take a stronger hand in examining jurors for prejudice; it seems to compel lower courts to analyze the prejudicial content of the information separately, and to disregard statements of impartiality when the risk of prejudice is great.\textsuperscript{148}

The Court's rejection of the efficacy of curative measures brings to light the difficulty of controlling the prejudicial impact from inadmissible mass media information. The Supreme Court has held that unless press comment on a trial creates a "clear and present danger" that the accused will be denied a fair trial, no controls may be placed on the media.\textsuperscript{149} Short of returning to locking up juries, the only practical solution seems to be the assumption of responsibility by prosecutors, and by the mass media themselves. Prosecutors in the Apalachin case, realizing that the lower courts were virtually powerless to control jury movement, took upon themselves part of the burden of insuring a trial free of prejudicial press comment. The prosecutors asked the local press to restrict its comments on the trial, and particularly not to print the criminal records of the accused, connect them with the underworld figures or organizations, or castigate them as "bad men," to insure that any possible sentences would not be reversed because of the prejudicial influence of the press on jurors.\textsuperscript{150} The press complied and, at least in this respect, the prosecution was successful.\textsuperscript{151}


\textsuperscript{149} Bridges v. California, 314 U.S. 252 (1941), followed in Pennekamp v. Florida, 328 U.S. 331 (1946); Craig v. Harney, 331 U.S. 367 (1947); Baltimore Radio Show, Inc. v. State, 193 Md. 300, 67 A.2d 497 (1949), cert. denied, 338 U.S. 912 (1950). But see Note, 63 Harv. L. Rev. 840, 850-52 (1950). Great Britain, on the other hand, has legislated and enforced the contempt penalty for reporting which goes beyond the fact of arrest and the bare details of what happens at trial; thus, pre-trial speculation or editorializing is subject to fine and imprisonment. Id. at 848.


\textsuperscript{151} Past efforts at self-imposed journalistic restraint, however, undertaken by such groups as the American Bar Association and the American Society of Newspaper Editors, have been largely unsuccessful. See Note, 63 Harv. L. Rev. at 843-44.