1988

Proving the Defendant's Bad Character

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A prosecutor is forbidden to seek a conviction by proving that the defendant has a bad character. The prejudicial impact on the jury of the defendant's criminal or sordid background can be devastating. As the leading authority on evidence observed:

> The deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, is a tendency which cannot fail to operate with any jury, in or out of court.[1]

Empirical studies bear out this statement. The classic study of the American jury shows that when a defendant's criminal record is known and the prosecution's case has weaknesses, the defendant's chances of acquittal are thirty-eight percent, compared to sixty-five percent otherwise.[2] Because of the danger that jurors will assume that the defendant is guilty based on proof that his bad character predisposes him to an act of crime, the courts and legislatures have attempted to circumscribe the use of such evidence.[3] Some prosecutors, however, although well

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1. 1A J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 57 (1983).

2. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 160 (1966).

3. *Compare* Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965) *and* People v. Sorge, 301 N.Y. 198, 93 N.E.2d 637 (1950) *with* United States v. Smith, 551 F.2d 348 (D.C. Cir. 1976) *and* People v. Sandoval, 34 N.Y.2d 371, 314 N.E.2d 413, 357 N.Y.S.2d 849 (1974). *See also* FED. R. EVID. 404, 608, 609; N.Y. CRIM. PROC. LAW § 240.43 (McKinney Supp. 1988).

This is not to say that prosecutors are entirely foreclosed from using evidence of other crimes in order to prove guilt. Such evidence is admissible when relevant to an issue in the case, such as intent, motive, knowledge, opportunity, common scheme, or absence of mistake. *See* FED. R. EVID. 404(b); *see also* United States v. Beechum, 582 F.2d 898 (5th Cir. 1978) (proof of prior offense to show intent), *cert. denied*, 440 U.S. 920 (1979); United States v. Gano, 560 F.2d 990 (10th Cir. 1977) (proof of prior offenses to show motive, preparation, plan, and knowledge); People v. Massey, 196 Cal. App. 2d 230, 16 Cal. Rptr. 402 (1961) (proof of prior offenses to show intent); People v. Schwartzman, 24 N.Y.2d 241, 247 N.E.2d 642, 299 N.Y.S.2d 817 (proof of prior offenses to show intent), *cert. denied*, 396 U.S. 846 (1969). *But see* United States v. Roeniqk, 810 F.2d 809 (8th Cir. 1987) (excessive exploration of details

aware of the insidious effect such prejudicial evidence can have on jurors, violate the rules of evidence, as well as ethical standards, by deliberately introducing inadmissible evidence in order to obtain a conviction, despite the risks involved.[4]

Character Assassination

A prosecutor's opportunities to attack the defendant's credibility through proof of prior criminal acts or other misconduct which did not result in a conviction are limited.[5] Ordinarily, prosecutors are allowed to ask only questions probative of truthfulness, which are based on a good faith belief that prior criminal conduct occurred. This prior criminal conduct cannot be proved by extrinsic evidence.[6] Prosecutors have disobeyed this rule by portraying defendants as dangerous, sinister, and undesirable characters who are likely to have committed the crime charged or some other crime.

A good example of a case involving such a portrayal is *United States v. Shelton*.[7] In *Shelton*, the District of Columbia Circuit Court of Appeals reversed a conviction for assaulting a federal officer on the ground that the prosecutor, through a series of innuendos, painted the defendant as a "seedy and sinister" member of the drug underworld. During cross-examination of the defendant and his witnesses, the prosecutor elicited information that the unemployed defendant was arrested in a known narcotics locale while driving an automobile that was under investigation by federal narcotics agents and carrying $2,600 in cash. The court held that the prosecutor made a conscious effort to portray the defendant as an "undesirable" individual engaged

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of prior narcotics trial in related perjury prosecution); United States v. Beasley, 809 F.2d 1273 (7th Cir. 1987) (proof of other narcotics activities improperly admitted to show criminal "pattern" or criminal intent); United States v. Blankenship, 775 F.2d 735 (6th Cir. 1985) (proof of past and possible future crimes should not have been admitted to counter defendant's claim of entrapment); United States v. Hodges, 770 F.2d 1475 (9th Cir. 1985) (proof of "other crimes" improper under Federal Rule of Evidence 404(b)).

4. *See* STANDARDS FOR CRIMINAL JUSTICE § 3-5.6 (2d ed. 1982) (unprofessional conduct for prosecutor to offer inadmissible evidence or ask legally objectionable questions); *see also* Gershman, *Why Prosecutors Misbehave*, 22 CRIM. L. BULL. 131 (1986).

5. *See* FED. R. EVID. 608(b); *see also* People v. Sorge, 301 N.Y. 198, 93 N.E.2d 637 (1950).

6. *See Sorge*, 93 N.E.2d at 639.

7. 628 F.2d 54 (D.C. Cir. 1980).

in "all sorts of skulduggery" and likely to be guilty of assault.[8] Such innuendos can be more difficult to refute than direct proof and are likely to influence jurors. Convictions obtained when the prosecutor attempts to portray the defendant as heavily involved in narcotics or other nefarious activities are often reversed.[9]

In a similar fashion, prosecutors manipulate racial attitudes in an effort to destroy a defendant's character. In one murder case, the prosecutor asked the defendant: "Now, isn't it true that while you were at the [prison] there in Oregon that you led a race riot?"[10] In another case, a felony murder conviction was reversed because of the prosecutor's "unfounded character assassination" in emphasizing the defendant's unemployment, poverty, and receipt of welfare assistance during cross-examination.[11] Although prior criminal acts not resulting in conviction may be used for impeachment purposes,[12] one prosecutor made a "shambles" of a fair trial by asking the defendant, who was charged with burglary, whether he had committed six prior acts of breaking into homes when, in fact, all of these incidents had been dismissed.[13] When the prior criminal acts are similar to the one that forms the basis of the trial, or involve violent or assaultive behavior, the potential for prejudice is the greatest; therefore, courts are particularly sensitive to such evidence.[14]

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8. *Id.* at 57.

9. *See* United States v. Beasley, 809 F.2d 1273 (7th Cir. 1987) (narcotics); United States v. Hernandez, 750 F.2d 1256 (5th Cir. 1985) (narcotics); United States v. Creamer, 721 F.2d 342 (11th Cir. 1983) (other "dangerous" activities); Ross v. Stahl, 661 F.2d 926 (4th Cir. 1981) (narcotics); United States v. Pintar, 630 F.2d 1270 (8th Cir. 1980) (corruption); People v. Sandy, 115 A.D.2d 27, 499 N.Y.S.2d 75 (1986); People v. Stewart, 92 A.D.2d 226, 459 N.Y.S.2d 853 (1983) (robbery suspect questioned regarding possible use of narcotics); People v. Brown, 70 A.D.2d 1043, 417 N.Y.S.2d 560 (1979) (sexual misconduct); Commonwealth v. Bricker, 506 Pa. 571, 487 A.2d 346 (1985) (murder suspect questioned regarding possible dealings in narcotics); *see also* People v. Brocato, 17 Mich. App. 277, 169 N.W.2d 483 (1969) (general character assassination).

10. United States v. Dow, 457 F.2d 246, 250 (7th Cir. 1972); *see also* McBride v. State, 338 So. 2d 567 (Fla. Dist. Ct. App. 1976) (reference to defendant's racial epithets upon being arrested).

11. People v. Andrews, 88 Mich. App. 115, 276 N.W.2d 867 (1979).

12. *See* FED. R. EVID. 608(b).

13. Watkins v. Foster, 570 F.2d 501 (4th Cir. 1978), *aff'g* 423 F. Supp. 53 (W.D.N.C. 1976).

14. *See* Gordon v. United States, 383 F.2d 936 (D.C. Cir. 1967) (emphasizes safeguards), *cert. denied*, 390 U.S. 1029 (1968); Williams v. Henderson, 451 F. Supp. 328 (E.D.N.Y. 1978); People v. Sandoval, 34 N.Y.2d 371, 314 N.E.2d 413, 357 N.Y.S.2d 849 (1974).

Guilt by Association

Showing that a defendant associates with unsavory characters may not be used to prove guilt.[15] "That one is married to, associated with, or in the company of a criminal does not support the inference that the person is a criminal or shares the criminal's knowledge."[16] The courts strongly disapprove of prosecutorial attempts to link the defendant to other criminals for the explicit purpose of insinuating his guilt; accordingly, several convictions have been reversed.[17] Curative instructions cannot always repair the damage from egregious violations of this rule.[18] Thus, courts have held that evidence of a son,[19] brother,[20] husband,[21] friend,[22] or confederate[23] having been convicted of crimes was irrelevant when deliberately elicited by the prosecutor in an effort to imply the defendant's guilt merely by his association with the miscreant.

In *United States v. Romo*,[24] the Court of Appeals for the Fifth Circuit reversed a conviction of conspiracy to distribute narcotics based on use of this tactic. Although the defendant testified that he had engaged in a few brief and innocent encounters with two acquaintances, during cross-examination the prosecutor asked whether the defendant knew that these persons had been convicted of several drug-related offenses. The prejudicial nature of this tactic has caused the reversal of several convictions, despite the defendant's "opening

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15. United States v. Singleterry, 646 F.2d 1014, 1018 (5th Cir. 1981), *cert. denied*, 459 U.S. 1021 (1982); United States v. Turcotte, 515 F.2d 145, 152 (2d Cir.), *cert. denied sub nom.* Gerry v. United States, 423 U.S. 1032 (1975); United States v. Crawford, 438 F.2d 441 (8th Cir. 1971); United States v. Gosser, 339 F.2d 102, 112 (6th Cir. 1964), *cert. denied*, 382 U.S. 819 (1965); *see also* People v. Forchalle, 88 A.D.2d 645, 450 N.Y.S.2d 220 (1982).

16. United States v. Forrest, 620 F.2d 446, 451 (5th Cir. 1980).

17. *See, e.g.*, United States v. Romo, 669 F.2d 285 (5th Cir. 1982); United States v. Singleterry, 646 F.2d 1014 (5th Cir. 1981), *cert. denied*, 459 U.S. 1021 (1982); United States v. Ochoa, 609 F.2d 198 (5th Cir. 1980); United States v. Labarbera, 581 F.2d 107 (5th Cir. 1978); United States v. Crawford, 438 F.2d 441 (8th Cir. 1971).

18. United States v. Romo, 669 F.2d 285, 289 (5th Cir. 1982).

19. United States v. Labarbera, 581 F.2d 107 (5th Cir. 1978).

20. United States v. Singleterry, 646 F.2d 1014 (5th Cir. 1981), *cert. denied*, 459 U.S. 1021 (1982).

21. United States v. Rodriquez, 573 F.2d 330 (5th Cir. 1978).

22. United States v. Ochoa, 609 F.2d 198 (5th Cir. 1980); United States v. Turcotte, 515 F.2d 145, 152 (2d Cir.), *cert. denied*, 423 U.S. 1032 (1975).

23. United States v. Romo, 669 F.2d 285 (5th Cir. 1982).

24. *Id.*

the door" to such proof on his direct examination.[25] When proof of criminal associations is relevant to an issue in the case and does not cast guilt on the defendant, however, the conviction will not be disturbed.[26]

Improper Use of Prior Convictions

One of the most volatile areas of prosecutorial abuse is the cross-examination of the defendant regarding his prior criminal record. Because "cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested,"[27] the rules of evidence entitle the prosecutor to impeach the defendant by proof of prior convictions.[28] This method of impeachment is predicated on the tenuous and unverified assumption that a person who has disobeyed the law in the past will disregard his oath to testify truthfully.[29] The use of prior convictions to impeach credibility is a dangerous weapon that can easily be abused. Such evidence has an enormous impact on juries.[30] Although trial courts invariably instruct that evidence of prior convictions must be used only to

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25. *See, e.g.*, United States v. Labarbera, 581 F.2d 107 (5th Cir. 1978) (gun law conviction reversed despite fact that defendant and son were observed counting money outside a bar after illegal sale of revolver to federal agent); United States v. Vigo, 435 F.2d 1347 (5th Cir. 1970), *cert. denied*, 403 U.S. 908 (1971) (reversal despite fact that defendant denied knowing anyone who had been convicted of violating narcotics laws).

26. *See* Salemme v. Ristaino, 587 F.2d 81 (1st Cir. 1978).

27. Davis v. Alaska, 415 U.S. 308, 316, 94 S. Ct. 1105, 1110, 39 L. Ed. 2d 347, 353 (1974).

28. FED. R. EVID. 609. Adoption of this Rule by Congress occasioned heavy debate and engendered a large amount of controversy. *See* United States v. Smith, 551 F.2d 348 (D.C. Cir. 1976). Rule 609 assumes that the prior conviction was properly obtained. In *Luce v. United States*, 469 U.S. 38, 105 S. Ct. 460, 83 L. Ed. 2d 443 (1984), the United States Supreme Court ruled that a defendant must take the stand in order to complain on appeal about the failure to exclude a prior conviction. This ruling has been held to apply to prior convictions on evidentiary grounds. However, a defendant need not take the stand in order to complain about prior convictions obtained in violation of constitutional guarantees. *See* Biller v. Lopes, 834 F.2d 41 (2d Cir. 1987) (prior conviction obtained in violation of Fifth Amendment privilege against compelled self-incrimination).

29. United States v. Martinez, 555 F.2d 1273, 1275 (5th Cir. 1977); Gertz v. Fitchburg R.R. Co., 137 Mass. 77, 78 (1884); *see also* C. MCCORMICK, MCCORMICK ON EVIDENCE § 43 (E. Cleary ed. 1972).

30. *See* H. KALVEN & H. ZEISEL, *supra* note 2, at 160; *see also* Loper v. Beto, 405 U.S. 473, 482-83 n.11, 92 S. Ct. 1014, 1018-19 n.11, 31 L. Ed. 2d 374, 381 n.11 (1972).

evaluate the defendant's credibility, persons familiar with criminal trials know that jurors find such instructions confusing. More importantly, however, the jurors are likely to deduce from this evidence that the defendant is a bad man and, in turn, is probably guilty.[31] Therefore, impeachment by prior convictions is permissible only when the prosecutor has a certified record of the conviction or the judge rules that the prosecutor has presented sufficiently reliable proof of the conviction.[32]

Convictions are unqualifiedly allowed as evidence if they relate to acts of dishonesty and falsehood; this is true even when multiple convictions are involved.[33] Otherwise, the trial judge must make a preliminary determination of admissibility by weighing the probative value against the prejudice.[34] References to accusations, arrests, and charges that were dismissed are not permitted.[35] In an effort to insinuate guilt, rather than expose falsehood, prosecutors have deliberately tried to circumvent the narrow, permissible use of prior convictions. Common techniques used to insinuate guilt include introducing prior convictions that bear no relationship to credibility,[36]

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31. *See* United States v. Harding, 525 F.2d 84, 89-90 (7th Cir. 1975) (prosecutor has duty to minimize risk of jury impermissibly using such proof); United States v. Garber, 471 F.2d 212, 215 (5th Cir. 1972) (noting jurors' "mental confusion" from standard limiting instructions on use of prior convictions); *see also* Griswold, *The Long View*, 51 A.B.A. J. 1017, 1021 (1965) ("Is there anyone who doubts what the effect of this evidence in fact is on the jury?").

32. Reed v. United States, 485 A.2d 613 (D.C. App. 1984).

33. *See* FED. R. EVID. 609(a)(2); United States v. Brashier, 548 F.2d 1315 (9th Cir. 1976), *cert. denied*, 429 U.S. 1111 (1977); United States v. McIntosh, 426 F.2d 1231 (D.C. Cir. 1970); Gordon v. United States, 383 F.2d 936, 938 n.2a (D.C. Cir. 1967).

34. FED. R. EVID. 609(a)(1); *see also* United States v. Beasley, 809 F.2d 1273 (7th Cir. 1987); United States v. Hayes, 553 F.2d 824 (2d Cir.), *cert. denied*, 434 U.S. 867 (1977); United States v. Smith, 551 F.2d 348 (D.C. Cir. 1976).

35. Michelson v. United States, 335 U.S. 469, 69 S. Ct. 213, 93 L. Ed. 168 (1948); United States v. Labarbera, 581 F.2d 107 (5th Cir. 1978); Watkins v. Foster, 570 F.2d 501 (4th Cir. 1978), *aff'g* 423 F. Supp. 53 (W.D.N.C. 1976); United States v. Pennix, 313 F.2d 524 (4th Cir. 1963). This prohibition should be distinguished from situations in which the prosecutor seeks to discredit a character witness called by the defendant. In such a case, the prosecutor may refer to prior arrests, indictments, and other specific acts not resulting in conviction. *See Michelson*, 335 U.S. 469; *see also* FED. R. EVID. 404(a)(1). This rule can also be abused. *See* People v. Kennedy, 47 N.Y.2d 196, 391 N.E.2d 288, 417 N.Y.S.2d 452 (1979) (prosecutor committed reversible error by questioning defendant's character witnesses concerning the criminal acts for which defendant was on trial).

36. United States v. Larsen, 596 F.2d 347, 348 (9th Cir. 1979) (using two prior convictions for child molestation in counterfeiting prosecution).

misrepresenting the nature or seriousness of the convictions,[37] and deliberately suggesting that prior guilt can be a basis for inferring present guilt.[38] Thus, prosecutors have been admonished not to "pair" questions about a defendant's previous conviction for an offense similar to the offense for which the defendant is charged with questions that elicit a general denial of the charged crime.[39] For example, one prosecutor's cross-examination of a defendant charged with robbery took the following form:

> Q: And you wouldn't rob that man, right?
> A: I had no reason to rob when I am working.
> Q: You wouldn't do something like that?
> A: No, I wouldn't.
> Q: But in 1968, you were convicted of six counts of robbery and assault with a dangerous weapon, weren't you, on three different people?[40]

Virtually the identical technique was employed in a narcotics prosecution when, after the defendant denied supplying drugs, the prosecutor asked him:

> Q: Is it not true that [the defendant] was convicted on February 1st, 1972, in the Federal District Court at Albuquerque, New Mexico, for possession of cocaine with intent to distribute cocaine?[41]

Moreover, impeachment through the use of prior convictions involving dissimilar crimes is objectionable if a jury would "naturally and necessarily" infer that the defendant is guilty of the charged crime because he committed past crimes.[42] In order to assure the "critical balance between permissible and impermissible uses of prior conviction evidence,"[43] the prosecutor can only inquire into the number of

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37. United States v. Gilliland, 586 F.2d 1384 (10th Cir. 1978) (state convictions that were thirty-four and fourteen years old erroneously admitted); United States v. Pennix, 313 F.2d 524 (4th Cir. 1963) (referring to "thirty prior convictions," most of which were traffic offenses).

38. United States v. Henry, 528 F.2d 661 (D.C. Cir. 1976); United States v. Harding, 525 F.2d 84, 89-90 (7th Cir. 1975).

39. Dorman v. United States, 491 A.2d 455 (D.C. App. 1985) (en banc).

40. United States v. Carter, 482 F.2d 738, 740 (D.C. Cir. 1973).

41. United States v. Henry, 528 F.2d 661, 664 (D.C. Cir. 1976); *see also* People v. Gottlieb, 130 A.D.2d 202, 517 N.Y.S.2d 978 (1987) (pairing prior assault of old woman during cross-examination of defendant charged with assault of old woman).

42. *Dorman*, 491 A.2d 455.

43. United States v. Tumblin, 551 F.2d 1001, 1004 (5th Cir. 1977).

convictions, the nature of the crimes, and when the defendant committed the crimes.[44] The prosecutor must not attempt to elicit excessive details about the convictions because such proof will "weigh too much with the jury and . . . overpersuade them" as to the defendant's guilt.[45] The potential for inflaming the jury is obvious, particularly when the prior convictions are for violent or assaultive crimes, or when the prior facts are similar to the ones for which the defendant is on trial.[46]

For example, after eliciting the existence of prior convictions, one prosecutor asked the defendant the following series of questions:

> Q: You were indicted for robbery in the first degree, . . . were you not?
>
> . . . .
>
> Q: Even today, you were indicted for robbery in the first degree?
>
> . . . .
>
> Q: All the time it's robbery in the first degree?
>
> Q: In the course of grabbing her pocketbook, didn't you hit her across the side of the head and throw her down a flight of stairs?
>
> Q: Isn't it a fact that . . . you pointed this gun at a Police Officer, and you fired it at him attempting to cause his death?[47]

Another prosecutor carefully elicited details of a prior narcotics transaction in an effort to invite "the jury to draw the impermissible inference" of the defendant's guilt.[48] By the same token, a prosecutor's dwelling on the defendant's length of imprisonment for various convictions, the periods of freedom between these incarcerations, and the defendant's unemployment during these periods will not be held to have been committed with an intent to damage the defendant's credibility if the convictions, alone, achieved that purpose.[49] The "obvious significance" of such evidence was to suggest that the

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44. *Id.*; United States v. Mitchell, 427 F.2d 644, 647 (3d Cir. 1970).

45. Michelson v. United States, 335 U.S. 469, 476, 69 S. Ct. 213, 218, 93 L. Ed. 168, 174 (1948).

46. Watkins v. Foster, 570 F.2d 501 (4th Cir. 1978), *aff'g* 423 F. Supp. 53 (W.D.N.C. 1976).

47. Williams v. Henderson, 451 F. Supp. 328, 330-31 (E.D.N.Y.), *aff'd*, 584 F.2d 974 (2d Cir. 1978), *cert. denied*, 441 U.S. 911 (1979); *see also* People v. Artis, 67 A.D.2d 981, 413 N.Y.S.2d 438 (1979).

48. United States v. Harding, 525 F.2d 84, 90 (7th Cir. 1975); *see also* People v. Steward, 92 A.D.2d 226, 231, 459 N.Y.S.2d 853, 856 (1983) ("Rarely has this court seen a case where the prosecutor has allowed himself or herself to be so led astray in the zeal of obtaining a verdict.").

49. United States v. Tumblin, 551 F.2d 1001, 1002-04 (5th Cir. 1977).

defendant was a "man who had spent most of his young life committing crimes and serving time for crimes, rather than being gainfully employed."[50]

Proof of prior convictions may be excluded when the trial judge concludes that the prejudice outweighs its probative value.[51] This ruling is usually made outside the presence of the jury and before the witness testifies.[52] Nevertheless, prosecutors find ways to circumvent these rulings. Thus, after the court excluded any reference to the defendant's parole status, the prosecutor in *State v. Bain*[53] sought to elicit this fact in cross-examining the defendant about the reason why he evaded arrest in the following manner:

> Q: Mr. Bain, have you ever been convicted of a felony?
> A: Yes, I have.
> Q: Did that have anything to do with why you avoided Lieutenant Thurman?
> [objection by opposing counsel sustained by the court]
> . . . .
> Q: Can I ask you: If you're such a law abiding citizen, why you—God damn, didn't stop when you saw sirens or lights behind you?[54]

Similarly, in the rape case of *People v. Cavallero*,[55] the prosecutor violated a pretrial ruling that excluded reference to the defendants' prior rape charges by deliberately eliciting from the complainant the following reason for her reluctance to testify: "The reason I didn't want to testify, was *because I know that they have both been charged before with rape. They have beaten it every time.* I say, why should I have to humiliate myself."[56] The prosecutor acknowledged that his conduct was deliberately violative of the court's order.[57] Such behavior is contemptuous. Surely, when an outstanding protective order is issued, it is a simple task for prosecutors to instruct their witnesses not to discuss the forbidden topics.

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50. *Id.* at 1004.
51. FED. R. EVID. 609(a)(1).
52. *See* United States v. Tham, 665 F.2d 855 (9th Cir. 1981), *cert. denied*, 456 U.S. 944 (1982); People v. Sandoval, 34 N.Y.2d 371, 314 N.E.2d 413, 357 N.Y.S.2d 849 (1974).
53. 176 Mont. 23, 575 P.2d 919 (1978).
54. *Id.* at 921-22.
55. 71 A.D.2d 338, 422 N.Y.S.2d 691 (1979).
56. *Id.* at 693.
57. The court found the prosecutor's conduct so outrageous that it barred retrial under the double jeopardy clause. *Id.* at 695.

Using a prior conviction obtained in violation of the defendant's right to counsel for impeachment is an error of constitutional magnitude.[58] Although courts often find the error harmless,[59] impeaching a defendant by introducing a prior conviction for which the defendant had no counsel has led to reversal.[60] It should be noted, however, that courts usually find the error harmless when the prosecutor impeaches with admissible and valid, as well as invalid, prior convictions.[61]

On direct examination, defense counsel is usually permitted to elicit the defendant's prior convictions in order to neutralize the prosecutor's detrimental use of that information.[62] When the defendant opens the door to a sensitive area, however, "he cannot expect the same measure of protection from cross-examination as when the prosecution initiates the inquiry."[63] Moreover, reference by the defense to matters that the prosecutor would be barred from mentioning can invite an appropriate prosecutorial response.[64] Dubbed the doctrine of "curative admissibility," the rule "operates to prevent an accused from successfully gaining exclusion of inadmissible prosecution evidence and then extracting selected pieces of this evidence for his own advantage, without the [prosecutor] being able to place them in their proper context."[65] The doctrine is, nevertheless, "dangerously prone to overuse."[66]

An example of the application and misuse of this doctrine is found in *Middleton v. United States*.[67] The defendant, facing a robbery charge, took the stand and was questioned by his attorney as follows:

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58. *See* Loper v. Beto, 405 U.S. 473, 92 S. Ct. 1014, 31 L. Ed. 2d 374 (1972); Burgett v. Texas, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967).

59. Zilka v. Estelle, 529 F.2d 388 (5th Cir. 1976); Thomas v. Savage, 513 F.2d 536 (5th Cir. 1975), *cert. denied*, 424 U.S. 924 (1976).

60. *See* Potts v. Estelle, 529 F.2d 450 (5th Cir. 1976).

61. *See* Jones v. Estelle, 622 F.2d 124 (5th Cir.), *cert. denied*, 449 U.S. 966 (1980); Gibson v. United States, 575 F.2d 556 (5th Cir.), *cert. denied*, 439 U.S. 898 (1978).

62. United States v. Boyer, 150 F.2d 595 (D.C. Cir. 1945); Kitt v. United States, 379 A.2d 973 (D.C. 1977).

63. United States *ex rel.* Walker v. Follette, 311 F. Supp. 490, 495 (S.D.N.Y. 1970), *aff'd*, 443 F.2d 167 (2d Cir. 1971); *see also* Brown v. United States, 356 U.S. 148, 157, 78 S. Ct. 622, 628, 2 L. Ed. 2d 589, 598 ("[B]y her direct testimony [the defendant] had opened herself to cross-examination on matters relevantly raised by that testimony."), *reh'g denied*, 356 U.S. 948 (1958).

64. *See* C. MCCORMICK, *supra* note 29, at § 57.

65. United States v. Winston, 447 F.2d 1236, 1240-41 (D.C. Cir. 1971).

66. United States v. McClain, 440 F.2d 241, 244 (D.C. Cir. 1971).

67. 401 A.2d 109 (D.C. 1979).

> [Q]: Why are you on probation?
> [A]: I snatched a lady's pocketbook.
> . . . .
> [Q]: Did you plead guilty or did you go to trial?
> [A]: I plead [sic] guilty.
> [Q]: Why aren't you pleading guilty in this case?
> [A]: Because this isn't my charge, and I don't know nothing about it. This isn't my beef.[68]

On cross-examination, the prosecutor responded to the defendant's irrelevant and improper insinuation with the following question intended to explain the defendant's prior guilty plea:

> [Q]: Isn't it a fact that, Mr. Middleton, that you struck a 58 year old woman in the face and snatched her purse and ran for two blocks? Is that the reason why you plead [sic] guilty to the case, because you were caught red-handed with the purse in your hand? With the woman's purse one block away? Isn't that why you plead [sic] guilty?[69]

Although the court condemned the prosecutor's gratuitous reference to the defendant's having struck his victim in the face as inflammatory and irrelevant, it found that, by improperly referring to the earlier plea, the defendant had opened the door to the prosecutor's eliciting the circumstances of the prior arrest.[70]

Indirect References to Defendant's Criminal Record

If the defendant does not testify or otherwise put his character in issue, the prosecutor is forbidden to introduce evidence of the defendant's criminal record.[71] Nevertheless, prosecutors have employed a variety of techniques to indirectly elicit such proof. Convictions have been overturned, for example, when prosecutors elicited testimony that witnesses identified the defendant's picture from "mugshots"or "mug

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68. *Id.* at 124.
69. *Id.* at 125.
70. *Id.* at 125-26; *see also* MacLaird v. State, 718 P.2d 41 (Wyo. 1986) (prosecutor properly elicited that defendant pleaded guilty in exchange for dropping more serious charges). *But see* United States v. Tham, 665 F.2d 855 (9th Cir. 1981) (defendant opened door to circumstances of prior acquittal, but prosecutor guilty of misconduct in insinuating that acquittal resulted from corruption), *cert. denied*, 456 U.S. 944 (1982).
71. FED. R. EVID. 404; *see* People v. Richardson, 222 N.Y. 103, 118 N.E. 514 (1917) (defendant's character erroneously attacked even though not in issue).

books'' in police files on the ground that such evidence discloses the defendant's criminal record.[72] Furthermore, the introduction of ''mug shots'' is a dangerous practice. When deciding whether to admit these ''mug shots'' into evidence, courts generally examine the following: (1) Whether the photographs are necessary for the prosecution's case; (2) whether the photographs, if shown to the jury, will ''suggest'' that the defendant has a prior criminal record; and (3) whether the manner of introduction draws ''particular attention to the source of implications or the photographs.''[73]

The tactics enumerated above by no means constitute an exhaustive list. Other examples of such prejudicial tactics include: introducing in evidence a police report that lists the defendant's ''B number'' and asking the witness, over repeatedly sustained objections, the meaning of the term ''B number'';[74] proving that the defendant used aliases in an effort to insinuate prior involvement with law enforcement authorities;[75] eliciting testimony from a federal agent to the effect that he executed a search warrant against the defendant in order to search for firearms that were illegal by virtue of their possession by the defendant, a convicted felon;[76] introducing testimony from a pawnshop owner that the defendant was not qualified to repurchase his pawned guns, leaving the unmistakable inference that disqualification resulted from the defendant's prior felonies;[77] repeatedly eliciting testimony that the investigating officers were assigned to the ''major offenders unit'';[78]

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72. *See, e.g.*, State v. Mims, 220 Kan. 726, 556 P.2d 387 (1976) (inadvertent and unsolicited reference to photo array of ''known robbers''); Roberts v. Commonwealth, 350 S.W.2d 626 (Ky. App. 1961); People v. Trowbridge, 305 N.Y. 471, 113 N.E.2d 841 (1953). *But see* United States v. Rixner, 548 F.2d 1224 (5th Cir.) (use of mug shot was harmless error), *cert. denied*, 431 U.S. 932 (1977); State v. Gutierrez, 93 N.M. 232, 599 P.2d 385 (1979) (use of mug shot was harmless error).

73. United States v. Torres-Flores, 827 F.2d 1031, 1037 (5th Cir. 1987); *see* United States v. Fosher, 568 F.2d 207 (1st Cir. 1978); United States v. Harrington, 490 F.2d 487, 494 (2d Cir. 1973).

74. People v. Mullin, 41 N.Y.2d 475, 362 N.E.2d 571, 393 N.Y.S.2d 938 (1977). *But see* State v. Overton, 337 So. 2d 1201 (La. 1976) (reference to defendant's name in ''police file'' did not suggest criminal record).

75. People v. Dowdell, 88 A.D.2d 239, 453 N.Y.S.2d 174 (1982); People v. Evans, 88 A.D.2d 604, 449 N.Y.S.2d 762 (1982) (deliberate reference in order to evade pretrial order of preclusion).

76. People v. McCarver, 87 Mich. App. 12, 273 N.W.2d 570 (1979). *But see* Preston v. State, 615 P.2d 594 (Alaska 1980) (reference to defendant's probation officer unintentional and harmless).

77. Hammond v. State, 139 Ga. App. 820, 229 S.E.2d 685 (1976).

78. State v. Gamez, 144 Ariz. 178, 696 P.2d 1327 (1985).

and asking the defendant, "[T]his isn't the first time you have driven a getaway car, is it?"[79]

Conclusion

"A criminal trial," Justice Frankfurter once said, "should have the atmosphere of the operating room."[80] The reality is otherwise, as many commentators recognize.[81] Courtroom misconduct by prosecutors, particularly conduct which seeks to prove the defendant's bad character, is one of the most common tactics used to prejudice a defendant. Although proof of a defendant's prior criminal, vicious, or immoral conduct may occasionally be relevant, such proof will always be detrimental to the defendant. Constant vigilance by trial judges, along with self-restraint by prosecutors, are essential to ensure a defendant's fair trial and a jury verdict based on proof of guilt, not proof of bad character.

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79. McBride v. State, 338 So. 2d 567, 568 (Fla. Dist. Ct. App. 1976); *see also* People v. Sifford, 76 A.D.2d 937, 429 N.Y.S.2d 270 (1980) (prosecutor rhetorically asked whether defendant was in the business of sticking up grocery stores).

80. Sacher v. United States, 343 U.S. 1, 38, 72 S. Ct. 451, 469, 96 L. Ed. 717, 738 (Frankfurter, J., dissenting), *reh'g denied*, 343 U.S. 931 (1952).

81. *See, e.g.*, Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629 (1972).