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CRIMINAL LAW

PROSECUTORIAL CROSS-EXAMINATION: LIMITATIONS UPON THE SWORD OF JUSTICE

JEREMY MARGOLIS*

INTRODUCTION

Cross-examination has been labeled as the most efficient engine ever devised for the discovery of truth,1 and defense lawyers traditionally refer to it as "the bulwark of liberty." 2 The prosecutor, however, uses cross-examination to fulfill more than just an obligation to a particular client; he is charged not merely with the task of convicting a person accused of a crime, but rather with the broader responsibility of seeking justice.3 The prosecutor, therefore, may consider cross-examination to be the sword of justice.

The prosecutor exercises his right of cross-examination4 in an effort to strengthen his own case5 as well as to weaken the case of the defense.6 This is accomplished by discrediting the testimony of the witness on the stand, using the testimony to discredit or minimize the testimony of other witnesses, using that testimony to corroborate the favorable testimony of prosecution witnesses, or using it to contribute independently to the prosecution’s own case.7

The purpose of this article is to examine the permissible methods by which these trial tactics can be accomplished. To do so, attention has been given to the general areas of allowable inquiry as well as to the specific form required of individual questions.8 The words “proper,” “allowable,” “acceptable,” and their opposites have been used to refer to the general judicial opinion of the matter under discussion. Not all techniques or particular questions labeled as “improper” automatically require the reversal of a conviction, but the conscious entry into a frowned upon area may bring a prosecutor into conflict with the high professional standards to which he should aspire.

I THE LIMITATIONS OF SCOPE

The general background of a witness is almost always an area of legitimate inquiry. Questions may be asked pertaining to residence,9 marital status10 and employment.11 One may ask about a witness’ previous whereabouts12 or general knowledge of matters pertaining to the crime in question.13 These general questions are governed by


1 See Sears v. State, 282 N.E.2d 807 (Ind. 1972) (any doubt as to the legitimacy of a question should be resolved in favor of the examiner). The holding of this case is tempered by numerous examples cited infra.


the rules of allowable scope only when the answers become prejudicial to the defendant.14 Such general questions, as well as all others on cross-examination, may be asked in leading form.16

Other than a few preliminary questions, the scope or breadth of permissible cross-examination depends upon the rules of the jurisdiction. The crucial question here is: must the examiner be confined in his questioning to those matters which were testified to on direct examination?

The traditional or "English" rule of cross-examination allows the examiner to question the witness about any subject which is relevant to the case in chief. The cross-examiner is not limited to those subjects which have been opened by the direct examiner. This "wide open" rule is followed in only a minority of jurisdictions in the United States.18 It generally applies, subject to the limitations of the fifth amendment, to defendants as well as to non-party witnesses.17 The "wide open"

14 See People v. Hough, 102 Ill. App. 2d 287, 243 N.E.2d 520 (1968) (questions about employment record tending to show instability were proper); Bolin v. Commonwealth, 407 S.W.2d 431 (Ky. 1966), cert. denied, 386 U.S. 946 (1967) (questions concerning parasitic relationship with mother, inability to hold job for any length of time were found to be proper. This decision is probably wrong.); Commonwealth v. Girleath, 407 Ariz. 318, 487 P.2d 385 (1971), cert. denied, 406 U.S. 921 (1971) (all matters within knowledge of witnesses having relevancy to the issues at trial. Proper to inquire as to reason for marital disputes with murder victim wife); State v. Taylor, 9 Ariz. App. 290, 451 P.2d 648 (1969) (anything bearing on credibility that sheds light on the case is permitted); State v. Richardson, 258 La. 62, 254 So. 2d 357 (1971); State v. Williams, 250 La. 64, 193 So. 2d 787 (1967); Rush v. State, 254 Miss. 641, 182 So. 2d 214 (1966) (cross-examination should not be interfered with except because of "irrelevancy, trespass beyond admissible ground, or extremes of continual, aimless repetition"); State v. Penley, 277 N.C. 704, 178 S.E.2d 490 (1971) (questions must only be material according to the judge); State v. Huskins, 209 N.C. 727, 184 S.E. 480 (1936); State v. McGee, 55 S.C. 247, 33 S.E. 353 (1889) (any question pertinent to the case).

15 See Thomas v. State, 249 So. 2d 510 (Fla. 1971) (could ask accused about his knowledge of a prosecution witness); State v. Warren, 271 So. 2d 527 (La. 1973); State v. Jones, 263 La. 1012, 270 So. 2d 489 (1972) (defendant subject to cross-examination on entire case); State v. Giles, 253 La. 533, 218 So. 2d 585 (1969). But see State v. West, 249 Mo. 221, 161 S.W.2d 966 (1942) (statute limits cross-examination of defendant has received significant impetus through the recently proposed Federal Rules of Evidence. Those rules have adopted the practice of allowing cross-examination on any matter relevant to the case (including credibility). One can reasonably expect that the federal example will lead to greater acceptance of the "wide open" rule.19

The vast majority of the states presently subscribe to the view that cross-examination must be limited to those matters testified to on direct examination.20 Subject to fifth amendment limitations, the guidelines which govern the prosecutor's inquiry generally apply to defendants as well as to non-party witnesses. Cross-examination may be based upon matters "covered on,"21 "gone into on,"22 "touched on,"23 responsive or relevant to,24
connected with25 and within the fair purview of the direct examination.26 Cross-examination, however, is not limited to a mere categorical review of the direct examination.27

In addition to a large body of supporting case-law,28 this limited rule of cross-examination has been formally codified in certain jurisdictions.29 A major argument for this limited rule is that it promotes the orderly presentation of the case.30 Quite interestingly, however, a reason given by the drafters for the adoption of the new "wide" federal rule is that it would save the time spent bickering over objections regarding scope.31

Under the majority view, the asking of questions outside the scope of the direct is often enough in itself to require reversal.32 Whether a reversal is required will depend upon the merits of each individual case33 and may hinge upon the existence of prejudice to the accused's substantive rights.34 Other errors in the course of a trial may be compounded by questioning outside the scope of the direct.35 The permissible scope of inquiry may be greatly broadened, however, by sweeping denials of guilt by the defendant on direct examination.36

Jurisdictions which follow the limited rule in cross-examination generally allow one exception. Cross-examination to impeach need not be limited to the scope of the direct,37 since it would be a rare occasion indeed when a direct examiner would raise the issue of his own witness' veracity,38 memory,39 or bias.40 The defendant himself is generally subject to this exception.41 The limited scope rule

24 Id.
25 See, e.g., People v. Pearson, 2 Ill. App. 3rd 861, 277 N.E.2d 544 (1972) (cross of defendant as to failure to call witnesses when they were equally accessible to the state was compounderd since outside the scope of the direct).
26 See, e.g., People v. Eisenberg, 266 Cal. App. 2d 605, 72 Cal. Rptr. 390 (1968); State v. Lamborn, 452 S.W.2d 216 (Mo. 1970) (sweeping denial of guilt rendered proper the question, "Did you take little Mary Elizabeth's head and slam it up against the wall?")
28 See United States v. Dillon, 436 F.2d 1093 (5th Cir. 1971) (can cross to test truthfulness); Lewis v. United States, 373 F.2d 576 (9th Cir.), cert. denied, 389 U.S. 880 (1967) (can cross to test truthfulness); State v. Manning, 162 Conn. 112, 291 A.2d 750 (1971) (can cross to explore credibility); DeLilly v. State, 11 Md. App. 676, 276 A.2d 417 (1971) (questions tending to test accuracy, veracity, character, or credibility are proper); Chism v. Cowan, 425 S.W.2d 942 (Mo. 1967) (any question is permitted which tends to test accuracy, veracity, or credibility, however irrelevant or however it may disgrace him as long as the witness isn't exposed to a criminal charge).
30 See Wills v. Russell, 100 U.S. 621, 625-26 (1879); McCormick §27.
31 PROPOSED FED. R. EVID. 611, Advisory Committee's Notes. The limited rule came under severe criticism by the ABA's Committee for the Improvement of the Law of Evidence (1937-38) which wrote, "The rule limiting cross-examination to the precise subject of the direct examination is probably the most frequent rule (except the Opinion rule) leading in trial practice today to refined and technical quibbles which obstruct the progress of the trial, confuse the jury, and give rise to appeal on technical grounds only. Some of the instances in which Supreme Courts have ordered new trials for the mere transgression of this rule about the order of evidence have been astounding. We recommend that the rule allowing questions upon any part of the issue known to the witness ... be adopted . . . ."
32 See Dixon v. United States, 303 F.2d 226 (D.C. Cir. 1962) (defendant's wife testified to time he left house, was crossed as to whether she gave her money when he returned); Wilson v. United States, 4 F.2d 888 (8th Cir. 1925); State v. McClinton, 418 S.W.2d 55 (Mo. 1967); People v. Rahming, 26 N.Y.2d 411, 259 N.E.2d 727 (1970) (error to widen cross to lay foundation for rebuttal); Rodriguez v. State, 442 S.W.2d 376 (Tex. 1969) (defendant questioned regarding the truthfulness of a co-indictee's testimony at a separate trial); State v. Belwood, 27 Utah 214, 494 P.2d 519 (1972) (cross far exceeded scope).
33 See, e.g., State v. McClinton, 418 S.W.2d 55 (Mo. 1967).
is not relaxed in pre-trial proceedings, but greater flexibility is allowed after conviction, such as in sentencing hearings.

The discretion of the trial judge plays a major role throughout the various phases of cross-examination, but nowhere is it as dominant as in the determination of proper scope. This discretionary power is left undisturbed except when flagrantly or grossly abused, and when the defendant has been

See Shull v. Commonwealth, 475 S.W.2d 469 (Ky. 1971) (defendant in suppression hearing could be crossed only within the scope of the direct; the testimony could not be admitted at trial); People v. Lacy, 25 App. Div. 2d 788, 270 N.Y.S.2d 1014 (1966) (defendant could not be crossed on the merits in a confession suppression hearing). See also People v. Morrison, 31 Mich. App. 301, 187 N.W.2d 434 (1971).

See People v. Butler, 55 Cal. Rptr. 511, 421 P.2d 703 (1967) (can cross-examine defendant about life history and activities, criminal and otherwise); People v. Advins, 41 Ill. 2d 297, 242 N.E.2d 258 (1968) (defendant could be crossed as to details of other crimes to which he had pled guilty).


See Enriquez v. United States, 293 F.2d 788 (9th Cir. 1961) (prosecution should not have unlimited rights); United States v. Kretske, 220 F.2d 785 (7th

As previously noted, cross examination in a jurisdiction following the rule of limited scope is not confined to a mere categorical review of those matters gone into on direct examination. Numerous tests have been formulated by the courts to express the relationship that proper cross-examination must bear to the direct. Many of these appear to require identity of transaction or close proximity in time and space. More liberal is the view that cross-examination may cover all reasonable and logical inferences of the direct. Typically, cross-examination is permitted if it tends to clarify the

Control by judge—The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation of the evidence effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

See cases cited note 27 supra; State v. Jensen, 189 N.W.2d 919 (Iowa 1971); State v. Huffer, 424 S.W.2d 776 (Mo. 1968).

But there is some case law which holds that if the cross-examiner goes beyond the bounds of the direct and draws out a new fact, the witness becomes the examiner's own and impeachment on that new fact is not permitted. See Pollard v. State, 201 Ind. 180, 166 N.E. 654 (1929); State v. Spurr, 100 W.Va. 121, 121 S.E. 81 (1925). An extension of the direct will not require reversal, however, unless damaging to the defendant's case. See State v. Kelley, 161 N.W.2d 123 (Iowa 1968). This combination of rules appears to put the prosecutor in a most disadvantaged position. If he draws a favorable fact he is reversed, yet a negative fact may stand unchallenged.


See People v. Doebbe, 1 Cal. App. 3d 931, 81 Cal. Rptr. 391 (1969) (defendant implied on direct that he didn't sell narcotics to an undercover man by saying he had none to sell, but he never actually denied the sale. Cross as to marijuana delivery was proper).

See United States v. Crawford, 438 F.2d 441 (8th Cir. 1971); State v. Sweazee, 460 S.W.2d 614 (Mo. 1970) (defendant testified he had been drinking, could cross as to amount was proper); State v. Baca, 80 N.M. 488, 458 F.2d 92 (1969) (crossed on prior
qualify,\textsuperscript{54} elaborate,\textsuperscript{55} explain,\textsuperscript{56} modify\textsuperscript{57} or discredit\textsuperscript{58} the testimony offered on direct examination of criminal charges which were mentioned on direct); State v. Anaya, 79 N.M. 43, 439 P.2d 561 (1968) (questioning as to penitentiary sentence was proper); Rapp v. State, 418 P.2d 357 (Okla. 1966); Crumsey v. State, 460 S.W.2d 858 (Tenn. 1970) (defendant testified as to prior guilty pleas, cross to clarify was proper).

\textsuperscript{54}See Leeper v. United States, 446 F.2d 281 (10th Cir. 1971), cert. denied, 404 U.S. 1021 (1972) (cross proper which embraces any matter germane to direct, qualifies or destroys it, or tends to elucidate, modify, explain, contradict or rebut testimony given in chief). See also People v. Eisenberg, 266 Cal. App. 2d 006, 72 Cal. Rptr. 390 (1968).

\textsuperscript{55}See Isaac v. United States, 431 F.2d 11 (9th Cir. 1970) (defendant testified to a guilty plea, could cross as to nature of charge); United States v. D’Antonio, 362 F.2d 151 (7th Cir. 1966), cert. denied, 385 U.S. 900 (1966) (government agent called as a defense witness to testify that the search of defendant’s trailer yielded no ink, bond paper, or a printing press; could properly cross as to what was found; metal punch, welding rods, miscellaneous auto keys, walkie talkies and a police radio); People v. Watson, 46 Cal.2d 818, 299 P.2d 243 (1956), cert. denied, 355 U.S. 846 (1957) (defendant mentioned schooling, could cross as to attendance; defendant testified to his height 6’6”, it was collateral but not requiring reversal to question if he attempted to stretch his height to 6’8” to gain an army discharge); State v. Rodriguez, 93 Idaho 286, 460 P.2d 711 (1969) (defendant testified to prior trouble, could question what kind of trouble); State v. Baca, 80 N.M. 458, 458 P.2d 92 (1969) (questioning as to cross crime committed by defendant); State v. Anaya, 79 N.M. 43, 439 P.2d 561 (1968); Griffith v. State, 430 S.W.2d 197 (Tex. 1968) (could fill out fragmentary information regarding prior convictions); State v. Solomon, 5 Wash. App. 412, 487 P.2d 643 (1971) (cross as to whereabouts on night in question after denial of presence at crime scene).

\textsuperscript{56}See People v. Conrad, 81 Ill. App. 2d 34, 225 N.E.2d 713 (1967), aff’d, 41 Ill. 2d 13, 241 N.E.2d 423 (1968) (proper cross regarding defendant’s actions while inebriated and unable to control self; proper for a medical witness in order to explain his direct testimony); Blair v. Commonwealth, 458 S.W.2d 761 (Ky. 1970) (can cross as to prior conviction brought out without explanation on direct); Lewis v. State, 458 P.2d 309 (Okla. 1969); State v. Etheridge, 74 Wash. 2d 102, 443 P.2d 536 (1968) (could cross as to use of stolen credit cards referred to on direct).

\textsuperscript{57}See People v. Conrad, 81 Ill. App. 2d 34, 225 N.E.2d 713 (1967), aff’d, 41 Ill. 2d 13, 241 N.E.2d 423 (1968) (proper cross regarding defendant’s actions while inebriated and unable to control self; proper for a medical witness in order to explain his direct testimony); Blair v. Commonwealth, 458 S.W.2d 761 (Ky. 1970) (can cross as to prior conviction brought out without explanation on direct); Lewis v. State, 458 P.2d 309 (Okla. 1969); State v. Etheridge, 74 Wash. 2d 102, 443 P.2d 536 (1968) (could cross as to use of stolen credit cards referred to on direct).

\textsuperscript{58}See United States v. Crawford, 438 F.2d 441 (8th Cir. 1971); State v. Miranda, 3 Ariz. App. 550, 416 P.2d 444 (1966) (could cross as to why defendant was a passenger in his own vehicle); Sherwood v. State, 271 So. 2d 21 (Fla. 1972) (direct testimony about honorable discharge from army, could cross as to misconduct while in service); People v. Hough, 102 Ill. App. 2d 287, 243 N.E.2d 520 (1968); State v. Baca, 30 N.M. 488, 458 P.2d 92 (1969); State v. Anaya, 79 N.M. 43, 439 P.2d 561 (1968); State v. Garcia, 78 N.M. 136, 429 P.2d 334 (1967) (could cross to determine completeness of father’s information); also proper are questions which tend to elicit additional relevant details regarding matters explored on direct.\textsuperscript{60} Within limits, a witness may be asked the whereabouts of persons mentioned in direct testimony,\textsuperscript{60} and often the examiner may even probe into the witness' personal associations.\textsuperscript{61}

When discussing the permissible scope of cross-examination courts frequently use the phrase “the door has been opened.” This rather imprecise legal shorthand refers to the privilege of the cross-examiner to tender questions on subjects “opened” in direct testimony.\textsuperscript{62} These subjects often relate to alibis,\textsuperscript{63} theories of defense,\textsuperscript{64} items of evidence,\textsuperscript{65} Lewis v. State, 458 P.2d 309 (Okla. 1969); State v. Bauman, 77 Wash. 2d 938, 468 P.2d 684 (1970) (can counter testimony of good conduct with questions as to bad conduct; can counter claim that defendant was a peaceful man with questions regarding fighting).

\textsuperscript{60}See United States v. Lobac, 416 F.2d 756 (7th Cir. 1969), reh. denied, 397 U.S. 1003 (1970) (why checks in question were not produced earlier; what relationship did they have to defendant’s law practices; tax evasion charge); Kemnitz v. United States, 369 F.2d 389 (7th Cir. 1966); Moore v. United States, 217 F. Supp. 289 (E.D. Pa. 1963), aff’d, 332 F.2d 372 (3d Cir. 1964) (other relevant and material facts on same issue); State v. Jesser, 95 Idaho 43, 501 P.2d 727 (1972) (location, identification of participants involved in, and movements of grain transfers); State v. Huffer, 424 S.W.2d 716 (Mo. 1968) (statements made to police officer made relevant by defendant’s denial on direct that he kicked the officer); Bailey v. State, 479 S.W.2d 329 (Tenn. 1972).

\textsuperscript{61}See United States v. Free, 437 F.2d 631 (D.C. Cir. 1970) (brief foray is permitted, but no searching inquiry since the individual played a minor role in the case); Stevens v. United States, 319 F.2d 733 (D.C. Cir. 1963) (could cross about failure to produce the “Johnny Williams” who supposedly lent the defendant a stolen car). See also Sears v. State, 282 N.E.2d 807 (Ind. 1972).

\textsuperscript{62}See Leeper v. United States, 446 F.2d 281 (10th Cir. 1971), cert. denied, 404 U.S. 1021 (1972) (questions about companionship with co-conspirators); Gafford v. State, 440 P.2d 405 (Alas. 1968), cert. denied, 393 U.S. 1120 (1969) (did defendant go to funeral of decedent); State v. Kelley, 161 N.W.2d 827 (Iowa 1968) (questions of defendant regarding membership in a gang, could ask for a list of names of associates since none was of such infamous character that it would prejudice him by association).


\textsuperscript{64}See United States v. Teague, 445 F.2d 114 (7th Cir. 1971) (government agent, called as a defense witness, asked if a lineup was held. Could cross him as to whether a lineup was held).
personal histories and the defendant's actions.

Often questions which have been asked on direct examination are repeated verbatim by the cross-examiner. Although the "opened door" test is quite a liberal one, the connection with the direct examination must still be more than tenuous.

When that connection is established, however, even questioning which is highly damaging to the accused will be permitted.

It is widely held that when a person (including a defendant) assumes the witness stand, his credibility is automatically put in issue, and cross-examination to attack that credibility is warranted. Other cases reach the same conclusion by stating that by taking the stand the witness puts his character for truthfulness in issue and he may be cross-examined on it. One must be careful to not open door to cross as to how many lineups he has been in before). Iles v. Commonwealth, 476 S.W.2d 170 (Ky. 1972) (defendant's statement on direct that he lived in Indianapolis for seven years did not open door to extensive cross regarding time spent living in penal institutions); State v. Crown, 119 Wash. 450, 205 P.2d 830 (1922) (declared acquaintance with prosecuting witness does not open door to questions regarding intimacy with her); State v. Lampsire, 74 Wash. 2d 888, 447 F.2d 727 (1968) (mention of prospective witness' phone bill does not open door to cross on defendant's unpaid bill).

See United States v. Teague, 445 F.2d 114 (7th Cir. 1971); Monroe v. United States, 320 F.2d 277 (5th Cir. 1963), aff'd, 435 F.2d 160 (5th Cir. 1970) (crossed as to false name and ownership of a bag of heroin); United States ex rel. Walker v. Follette, 311 F. Supp. 490 (S.D.N.Y. 1970), aff'd, 443 F.2d 167 (2d Cir. 1971) (a defendant hoping to open a sensitive subject to take the sting out of it cannot expect the same protection from the court that he would get if the prosecution had opened the area of inquiry. Here the defendant brought out and was crossed on prior convictions).


People v. Matola, 259 Cal. App. 2d 658, 66 Cal. Rptr. 610 (1968) (testimony regarding pre-arrest activities does not open door to post-arrest events); State v. Taylor, 198 Kan. 290, 424 P.2d 612 (1967) (defendant's criticism of lineups is not tantamount to holding himself as an expert on lineups and does not open door to cross as to why he didn't); Kiraly v. State, 212 So. 2d 311 (Fla. 1968), reh. denied, 221 So. 2d 747 (Fla. 1969) (reference on direct to illegal confession opened door to cross on it); State v. Jackson, 195 N.W.2d 687 (Iowa 1972) (a glove found in the assault victim's room and one found on defendant's person were in evidence and discussed on direct, could inquire if they were his); Gilbrell v. State, 412 S.W.2d 1975 (1970) (could cross as to prior juvenile court charge); People v. United States, 360 F.2d 1972 (10th Cir.), cert. denied, 385 U.S. 959 (1966) (could cross as to homosexual conduct); United States v. Laverick, 348 F.2d 385 U.S. 964 (1966) (could cross as to business activity); United States v. Fiorillo, 376 F.2d 180 (2d Cir. 1967) (could cross as to defendant being ejected from the garbage business after testifying about his good character); McCowan v. United States, 376 F.2d 122 (9th Cir.), cert. denied, 389 U.S. 839 (1967) (education opened, crossed as to years at law school; intimacy with government witness opened by testimony that defendant was investigating her on official police business); Maxfield v. United States, 360 F.2d 97 (10th Cir.), reh. denied, 385 U.S. 954 (1966) (could cross as to business activities); United States v. Laverick, 348 F.2d 708 (3d Cir.), cert. denied, 382 U.S. 940 (1965) (could cross as to finances, savings account, investments); People v. Dotson, 46 Cal. 2d 891, 299 P.2d 875 (1956) (defendant mentioned he was a marine, could cross about dishonorable discharge); People v. Goodsin, 261 Cal. App. 2d 723, 68 Cal. Rptr. 247 (1968) (could cross as to prior use of narcotics); People v. Yonder, 44 Ill. 2d 376, 256 N.E.2d 321 (1969), cert. denied, 397 U.S. 975 (1970) (could cross as to sources of income); State v. Broten, 176 Wash. 2d 176, 296 P.2d 176 (1957), cert. denied, 330 U.S. 800 (1947) (defendant's credibility in issue even if stand taken to demonstrate lack of voluntariness of a prior statement); People v. Koontz, 24 Mich. App. 336, 180 N.W.2d 202 (1970) (defendant's credibility in issue, could be crossed on prior convictions); People v. Brown, 23 Mich. App. 625, 179 N.W.2d 235 (1970) (defendant's credibility in issue, could be crossed on prior criminal record); Jones v. State, 453 P.2d 393 (Okla. 1969) (defendant taking stand puts veracity in issue, impeached on bad checks passed); Commonwealth v. Scali, 432 Pa. 571, 248 A.2d 295 (1968), vacated and remanded for resentencing (1968) (defendant's credibility in issue even if stand taken to demonstrate lack of voluntariness of a prior statement); People v. Matola, 259 Cal. App. 2d 686, 66 Cal. Rptr. 610 (1968) (testimony regarding pre-arrest activities does not open door to post-arrest events); State v. Taylor, 198 Kan. 290, 424 P.2d 612 (1967) (defendant's criticism of lineups is not tantamount to holding himself as an expert on lineups and does not open door to cross as to how many lineups he has been in before). Iles v. Commonwealth, 476 S.W.2d 170 (Ky. 1972) (defendant's statement on direct that he lived in Indianapolis for seven years did not open door to extensive cross regarding time spent living in penal institutions); State v. Crown, 119 Wash. 450, 205 P.2d 830 (1922) (declared acquaintance with prosecuting witness does not open door to questions regarding intimacy with her); State v. Lampsire, 74 Wash. 2d 888, 447 F.2d 727 (1968) (mention of prospective witness' phone bill does not open door to cross on defendant's unpaid bill).
distinguish, however, between character for truthfulness (similar to credibility) and general character evidence (which may include such diverse traits as loyalty, responsibility and good citizenship). This latter type of character evidence is generally initiated by specific testimony.

Subject to the limitations of the fifth amendment, the scope of the cross-examination of a defendant is normally no different from that of any other witness. The accused's credibility, for example, may be subjected to the close scrutiny of the prosecutor's questions. The cross-examination of a defendant is governed, of course, by the discretion of the trial judge, who traditionally permits a searching inquiry within the bounds of fairness. Statutory limitations in some jurisdictions, however, severely circumscribe the prosecutor's field.

The accused does not subject himself to cross-examination on other issues in the case when he takes the stand on preliminary matters such as in a suppression hearing or to show his state of mind when asserting an insanity defense. This does not

cert. denied, 379 U.S. 818 (1964); United States v. Palumbo, 317 F.2d 607 (2d Cir. 1963); United States v. Fratello, 44 F.R.D. 444 (S.D.N.Y. 1968); Burton v. State, 207 So. 2d 465 (Fla. 1968); State v. Schroeder, 201 W. Va. 184, 453 S.W.2d 295 (1969); State v. Vigo, 352 S.W.2d 127 (Mo. 1965); State v. Domino, 234 La. 950, 102 So. 2d 227 (1958); Robinson v. State, 12 Md. App. 322, 278 A.2d 664 (1971); State v. Dalton, 433 S.W.2d 562 (Mo. 1968); State v. Shipman, 354 Mo. 265, 189 S.W.2d 273 (Mo. 1945); State v. Rhodes, 10 N.C.App. 154, 177 S.E.2d 754 (1970); State v. McGuinn, 6 N.C.App. 554, 170 S.E.2d 616 (1969); State v. Lindsey, 81 N.M. 173, 464 P.2d 903 (1969), cert. denied, 398 U.S. 904 (1970); State v. Porter, 14 Ohio St. 2d 10, 235 N.E.2d 520 (1968); Gable v. State, 424 F.2d 433 (Okla. 1970); Harris v. State, 466 S.W.2d 761 (Tex. 1971); Coleman v. State, 442 S.W.2d 338 (Tex. 1969); Black v. State, 440 S.W.2d 668 (Tex. 1969) (defendant could be impeached, discredited, attacked, sustained, bolstered up, made to give evidence against himself, and crossed as to new matters with the exception of a prior conviction on the same charge or the failure to testify at an earlier hearing);State v. Robideau, 70 Wash. 2d 994, 425 P.2d 880 (1967) (material and germane fact which shows untrustworthiness); Porter v. State, 440 F.2d 249 (Wyo. 1970).


State v. Johnson, 261 Iowa 661, 155 N.W. 2d 512 (1968); Sensabaugh v. State, 426 S.W.2d 224 (Tex. 1968). See IOWA CODE ANN., ch. 781, §13 (1950) which provides:

When the defendant testifies in his own behalf, he shall be subject to cross examination as an ordinary witness, but the state shall be strictly confined therein to the matters testified to in the examination in chief.

PROPOSED FED. R. EVID. 1041(b). This is designed to encourage the participation of the accused in preliminary matters. It is necessitated by the scope of the

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| App. 264, 254 A.2d 715 | (defendant, crossed on prior convictions); Minor v. State, 6 Md. App. 250 A.2d 113 | 1969 | (defendant); Robinson v. State, 4 Md. App. 515, 243 A.2d 879 | (1968) | (witness); Ervin v. State, 4 Md. App. 42, 241 A.2d 142 | (1968) | (defendant puts character in issue when he takes stand for limited purpose); Robinson v. State, 3 Md. App. 666, 240 A.2d 638 | (1968) | (defendant takes stand for limited purpose); Boone v. State, 2 Md. App. 89, 233 A.2d 476 | (1967) | (defendant); People v. Bitter, 27 Mich. App. 404, 183 N.W.2d 595 | (1970) | (defendant, crossed on prior conviction); State's taking stand 57| (1969)| (defendant); People v. Bitter, 27 Mich. App. 404, 183 N.W.2d 595 | (1970) | (defendant), See also Proposed Fed. R. Evid. 608(a). In order to determine the credibility of a witness, CAL. EVID. CODE §780 (West 1966) provides that the following may be considered (a) His demeanor while testifying and the manner in which he testifies. (b) The character of his testimony. (c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies. (d) The extent of his opportunity to perceive any matter about which he testifies. (e) His character for honesty or veracity or their opposites. (f) The existence or nonexistence of a bias, interest, or other motive. (g) A statement previously made by him that is consistent with his testimony at the hearing. (h) A statement made by him that is inconsistent with any part of his testimony at the hearing. (i) The existence or nonexistence of any fact testified to by him. (j) His attitude toward the action in which he testifies or toward the giving of testimony. (k) His admission of untruthfulness. But see Commonwealth v. Barron, 438 Pa. 259, 264 A.2d 647, appeal dismissed, 439 Pa. 614, 266 A.2d 476 | (1970) | (defendant's taking stand and mention of his parole does not put character in issue). See State v. Wyman, 270 A.2d 460 | (Me. 1970); Braxton v. State, 11 Md. App. 435, 274 A.2d 647 | (1971). See IOWA CODE ANN., ch. 781, §13 (1950) which provides: The accused does not subject himself to cross-examination on other issues in the case when he takes the stand on preliminary matters such as in a suppression hearing or to show his state of mind when asserting an insanity defense. This does not...
not mean that he may artificially limit the scope of the cross-examination regarding the substantive issues of the case. As a general rule, for example, a defendant who testifies to part of a conversation or transaction can be examined by the prosecutor as to the rest of it.

Cross-examination which tests the overall reliability of a witness' direct testimony without being inherently prejudicial, is clearly within the scope of the direct examination. There are a number of specific areas of inquiry, however, whose connection with the direct must be demonstrated with greater specificity in order to remain permissible. For example, cross-examination regarding particular actions of the defendant which were gone into on direct is proper.

Examination of this nature is frequently used to establish the element of intent. Questions which delve into the ultimate issue of guilt itself, i.e., "Did you take little Mary Elizabeth's head and slam it up against the wall?", are often proper, but the limits of scope will be quite strictly construed.

Direct examination which establishes a particular theory of defense opens the door for the prosecutor to cross-examine and undermine that theory. Common examples are the defenses of insanity (Miss. 1968) (similar checks passed elsewhere); State v. Spenser, 486 S.W.2d 433 (Mo. 1972) (defendant's use of identification taken from robbery victim); Jenkins v. State, 484 S.W.2d 900 (Tex. 1972) (defendant threatened prosecution witness). But see United States v. Masters, 450 F.2d 866 (9th Cir. 1971), cert. denied, 405 U.S. 1044 (1972) (questions regarding use of marijuana improper since only bore a minute relationship to the smuggling charge); United States v. Thomas, 345 F.2d 431 (7th Cir. 1965) (questions regarding methods of narcotics dealers and sale objected to).

See United States v. Higuchi, 437 F.2d 835 (9th Cir. 1971) (use of aliases); Witt v. United States, 414 F.2d 604 (9th Cir. 1969); Candalaria v. People, 493 P.2d 355 (Colo. 1972) (frequency purchases of cough medicine from robbed drug store, robbery proceeds included cough medicine); State v. Hale, 206 Kan. 521, 479 P.2d 902 (1971) (arson plan to hide evidence); State v. Walker, 6 N.C.App. 740, 171 S.E.2d 91 (1969) (statement made to police regarding need for money to get a pregnant girl out of trouble).

See State v. Lamborn, 452 S.W.2d 216 (Mo. 1970) (defendant makes a state v. the state's own evidence).


See United States v. Kroll, 402 F.2d 221 (3d Cir.), cert. denied, 393 U.S. 1043 (1969) (question—would you submit to induction now—was irrelevant since the issue was whether defendant knowingly failed to report in the past?); State v. Jensen, 189 N.W.2d 919 (Iowa 1971) (defendant can only be asked the ultimate question if it was asked on direct).

See United States v. Harding, 432 F.2d 1218 (9th Cir. 1970) (defendant claimed someone else put the smuggled aliens in his car trunk, could cross as to his knowledge of alien smuggling rumors); Lewis v. United States, 373 F.2d 576 (9th Cir.), cert. denied, 389 U.S. 880 (1967) (explanation of money found on his person when arrested); Jones v. United States, 296 F.2d 398
sanity and self defense. Depending on the court and the scope of the direct examination, the prosecutor may be able to establish particular elements of the crime, or even build his theory of the case on cross-examination.

(D.C. Cir. 1961), rev'd on other grounds, 327 F.2d 867 (1963) (defendant claimed lack of recollection of chain of events leading up to the shooting, crossed as to other rational acts performed, i.e., request to see a lawyer); Branch v. United States, 171 F.2d 337 (D.C. Cir. 1948) (defense of perjury); People v. Harris, 7 Cal. App. 3d 922, 87 Cal. Rptr. 46 (1970) (claimed shooting accidental); People v. Wilson, 254 Cal. App. 2d 489, 62 Cal. Rptr. 240 (1967); People v. Jones, 6 Ill. App. 3d 669, 286 N.E.2d 87 (1972) (defense witness who had been arrested and released was cross-examined); People v. Sisti, 267 N.Y. 717, 175 N.E. 740 (1931) (questions concerning firearms handling to show intent).

Quite clearly falling within the scope of proper cross-examination are those questions which are directed towards the refutation of specific statements made on direct. A claim that the defendant never owned a firearm can be attacked with questions regarding a weapons charge lodged against him, and the assertion that the accused works every day can be contradicted with conflicting employment records. Similarly, denials of actual guilt, particular acts associations, or of the truth of alleged facts will open the door to cross-examining the government's case which was outside the scope of the direct was reversible error.

See United States v. Williams, 455 F.2d 361 (9th Cir. 1972) (proper if government assured it would support that theory with evidence); Bennett v. People, 168 Colo. 360, 451 P.2d 443 (1969) (attempt to show illegal source of funds in defendant's possession); State v. Mathis, 47 N.J. 455, 221 A.2d 526 (1966), (cross to show increased money in defendant's possession after the crime is proper); Commonwealth v. Koch, 446 Pa. 469, 288 A.2d 791 (1972) (questions concerning firearms handling to show intent).


See, e.g., Davis v. State, 216 So. 2d 87 (Fla. 1968).


See, e.g., United States v. Washington, 463 F.2d 904 (D.C. Cir. 1972) (denied narcotics sale, could question source of $735 on his person); United States v. Chase, 372 F.2d 453 (4th Cir.), cert. denied, 387 U.S. 907 (1967) (denied knowingly running numbers, asked if he knew a man named Jones, a known numbers racketeer); Drinkard v. State, 48 Ala. App. 224, 287 So. 2d 357 (1972) (attempt to refute claim that defendant did not know the murder rifle was in his car by repeatedly asking if defendant shot the rifle at a car a year before the fatal shooting was irrelevant and highly prejudicial); State v. Frese, 256 Iowa 289, 127 N.W.2d 83 (1964) (refuting claim that rape victim consented with guilty verdicts of co-defendants was collateral and improper).


See Robinson v. Commonwealth, 474 S.W.2d 107 (Ky. 1971) (denied association with co-defendant, crossed as to imprisonment together); Terry v. Commonwealth, 471 S.W.2d 730 (Ky. 1971) (improper to cross all witness as to her associates in jail since not connected with offense).

See State v. Martinez, 102 Ariz. 178, 427 P.2d 129 (1967) (crossed on questions regarding ownership of
examination in those subjects. The characterizations of an individual on the witness stand as a peace-loving, gentle person or a devoted family man invites cross-examination, as does his portrayal of the facts of the case so that they appear inconsistent with guilt.

Weapons: Carlson v. State, 84 Nev. 534, 445 P.2d 157 (1968) (denied sexual attractions for children, crossed on attempt to kidnap; Harris v. State, 435 S.W.2d 502 (Tex. 1968) (defendant claimed he did not know how his fingerprints got on a cash box, could ask, "Must have somebody took and put them up there?"); 2nd Cir. 1968), cert. denied, 386 U.S. 969 (1967) (peaceful social worker, could cross as to ownership of two rifles); French v. State, 415 S.W.2d 203 (Tex. 1967) (peaceful alcoholic, could cross as to use of false leg to kick and assault people, but approaching impropriety). See also Cudjo v. State, 498 P.2d 1101 (Okla. 1971) (witness who had been assaulted by the defendant testified to his peacefulness).


Other representations inviting cross-examination are United States v. DeSapio, 435 F.2d 272 (2d Cir. 1970), cert. denied, 402 U.S. 956 (1972) (defendant represented himself as legitimate insurance employee, financial sources could be crossed); Muxted v. United States, 405 F.2d 173 (9th Cir. 1969) (defendant portrayed as anti-marijuana crusader, crossed as to a marijuana charge lodged against him as being the real reason for his work as an informer); McCune v. People, 499 P.2d 1184 (Colo. 1972) (wearing of an army uniform on the stand, invited cross as to attempts to gain a discharge); Yager v. Commonwealth, 407 S.W.2d 413 (1966), (claimed to be intelligent and worthy of belief, could cross to show his desire to embarrass public officials and gain notoriety, i.e., he had stimulated fourteen official prison investigations through the filing of civil suits).

See United States v. Kenny, 462 F.2d 1205 (3d Cir. 1972) (cross on tax returns to show gambling earnings); Melendez-Rodríguez v. United States, 441 F.2d 1109 (9th Cir. 1971) (defendant’s assertion that he would not jeopardize his pending immigration status by smuggling aliens was countered by questions showing a prior insensitivity to that status); Romero v. People, 170 Colo. 234, 460 P.2d 784 (1969) (claimed he and his murdered wife had reconciled differences and were preparing to purchase a mobile home, cross to show improbability of that claim with questions showing bad debts and poor credit rating); People v. Scott, 82 Ill. App. 2d 109, 227 N.E.2d 72 (1967) (defendant claimed it was unbelievable that anyone could be raped in an elevator, properly crossed as to his prior conviction for a rape in an elevator); State v. Edwards, 435 S.W.2d 1 (Mo. 1968) (assertion that a confession was induced by police officers telling defendant that his wife would have nothing further to do with him if he did not confess was rebutted with questions showing divorce suit and support and alimony motions had been filed); State v. Miller, 258 S.C. 572, 190 S.E.2d 23 (1972) (defendant asserted he pled guilty every time he was properly charged and therefore was innocent of instant charge, crossed as to the penalty for armed robbery to show his reluctance to plead guilty because of the sentence he would receive, not because of innocence).


As previously stated, the witness’ credibility almost always is in issue. Since cross-examination regarding previous criminal convictions is a major method of impeaching credibility, in that sense at least, questions regarding prior criminal activity are within the scope of the direct examination. When inquiry delving into past illegal conduct is warranted by affirmative testimony on the witness stand, however, the extent of that questioning is governed by the guidelines previously discussed in this section. That inquiry is frequently occasioned by the seemingly inexplicable denial on direct examination of prior criminal involvement for which there is a readily accessible record. For whatever the reason, defendants and defense witnesses routinely and falsely deny arrests, convictions and the commission of criminal acts in general. A frequent claim is “I haven’t been in
any trouble since..."

110 When the prosecutor is able to refute these erroneous representations with questions based upon a record of prior criminal involvement, significant damage may be done to the defendant's case.

When reference is made on direct examination to prior criminal activity, the door is often opened to relevant and legitimate inquiry into that area on cross-examination.111 This inquiry, however, is not as broad as it is permitted when the witness (including the defendant) makes false representations or denials,112 and, therefore, often results in prejudicial questioning.113 If the jurisdiction's limitations of scope are followed, however, the prosecutor may explore the general area of the criminal behavior114 as well as some details of a particular offense.115

196 (1968) (“I don't carry a knife.” Improper to cross on concealed weapons arrest (without charge).

The denial must be in clear contradiction of the record. United States v. Vigo, 435 F.2d 1347 (5th Cir. 1970), cert. denied, 403 U.S. 908 (1971) (defendant testified that she did not know anyone who was convicted of heroin charges who dealt with her co-defendant). Cross-examination regarding her husband's heroin addiction to and money spent on narcotics).

searching prejudicial cross concerning use of, type of,

Hines,

convictions, specific acts and sentences); People v. Petty, 3 Ill. App. 3d 951, 279 N.E.2d

To terminate the discussion of the scope of cross-examination, a brief mention should be made of re-cross and further cross. Re-cross follows re-direct examination and is limited to the explanation of new matters brought out on re-direct.116 It is of course subject to the judge's discretion.117 Further cross is an extension of the original cross-examination. Subject to court discretion, a witness may be recalled and his examination continued.118 For example, a defendant might be re-called regarding an alibi defense which was testified to by a witness who followed the defendant's original examination.119

II FIFTH AMENDMENT LIMITATIONS

It is axiomatic that an accused who testifies on his own behalf is subject to cross-examination, and to some extent, therefore, waives his fifth amendment right against self-incrimination.120 (This is


For example, a defendant might be re-called regarding an alibi defense which was testified to by a witness who followed the defendant's original examination.119


See Mccormack §32; La. Rev. Stat., ch. 15, §281 (1967). But see State v. Warren, 271 So. 2d 527 (La. 1973) (although recross is limited to scope of re-direct, no abuse in some leeway); State v. Giles, 253 La. 533, 184 So. 2d 585 (1966) (defendant subject to re-cross on entire case).


See, e.g., Parkman v. State, 53 Wis. 2d 458, 192 N.W.2d 838 (1972).

See the discussion of this area in Carlson, supra note 76. Smith v. United States, 338 F.2d 683 (3d Cir. 1966); Bolling v. United States, 18 F.2d 863 (4th Cir. 1927); Zilka v. Beto, 334 F. Supp. 560 (N.D. Tex. 1971); United States ex rel. Smith v. United States, 338 F.2d 683 (3d Cir. 1966).

The waiver of the privilege is not suspended when the
not true for an ordinary witness who does not cast aside the protection of the fifth amendment by the act of taking the witness stand.) What is quite unclear, however, is the breadth of that waiver. In this regard one must distinguish between the "scope of the direct" and the "waiver of the Fifth," for as Dean McCormick has explained,

Clearly the two matters are not identical, and fundamentally different factors are involved in each. The scope of cross-examination is essentially a matter of control over the order of production of evidence; the primary policy being served is the orderly conduct of the trial. The waiver of the privilege, however, involves the extent to which an accused must forfeit the protection of the privilege to place his own version of the facts before the trier of fact.\(^{121}\)

This dicotomy is most acute in jurisdictions favoring the "wide open" rule of cross-examination. The Proposed Federal Rules of Evidence for example, which provide for the "wide open" rule, make clear that they do not attempt to control the extent of an accused's waiver.\(^{122}\) In the absence of clear constitutional guidelines provided by Supreme Court litigation, the various jurisdictions use their formulations of permissible scope as a standard or gauge by which the fifth amendment waiver can be judged.

The fifth amendment has been deemed waived consistent with the scope of the direct examination accused temporarily leaves the witness stand. \(^{See}\) State v. Coty, 229 A.2d 205 (Me. 1967). The defendant is not subject to cross-examination by having made unworn statements. \(^{See}\) Smith v. State, 124 Ga. App. 510, 184 S.E.2d 225 (1971); Wright v. State, 113 Ga. App. 436, 148 S.E.2d 333 (1966); Schoffelt v. State, 107 Ga. App. 217, 129 S.E.2d 572 (1963). \(^{But see}\) Redfield v. United States, 315 F.2d 76 (9th Cir. 1963) (defendant acting as own counsel, made continued unworn statements in spite of fifth amendment warning by the judge, who eventually asked a few questions while the defendant was examining a witness).

A defendant may be subjected to cross if he performs a demonstration of some sort before the jury. \(^{See}\) Machin v. State, 213 So. 2d 499 (Dist. Ct. App. Fla.), \(^{cert. denied}\), 221 So. 2d 747 (1968) (running to demonstrate lack of a limp which the guilty party was supposed to have). At least one court has ruled that if the defendant is unrepresented by counsel, an instruction about the waiver of the fifth amendment or taking the stand does not serve as a waiver. \(^{See}\) People v. Glaser, 238 Cal. App. 2d 819, 48 Cal. Rptr. 427, \(^{cert. denied}\), 385 U.S. 890 (1966).

\(^{121}\) \(^{See}\) McCormick §132.

\(^{122}\) \(^{See}\) Proposed Fed. R. Evid. 611(b). by some courts,\(^{123}\) sometimes with language advising caution by the prosecutor.\(^{124}\) Other courts have taken the position that the waiver is quite broad\(^{125}\) and may include "whatever has legitimate bearing upon the question of guilt,"\(^{126}\) or "all matters pertaining to the prosecution."\(^{127}\) Most frequently, however, courts construe the waiver as including all matters relevant to,\(^{128}\) related to,\(^{129}\) or within the extent of the direct examination.\(^{130}\) The waiver may be significantly extended, therefore by a general denial of guilt.\(^{131}\)

There is scant case law on the question of whether a waiver necessarily must extend to all counts of a multi-count indictment, but the few


\(^{124}\) \(^{See}\) People v. Schader, 71 Cal. 2d 761, 457 P.2d 841, 80 Cal. Rptr. (1969) (prosecutor must make his own case without assistance from defendant's silence or compelled testimony).

\(^{125}\) \(^{See}\) United States v. Doremus, 414 F.2d 252 (6th Cir. 1969) (all inquiries pertinent to the issue on trial); State v. Zappia, 8 Ariz. App. 549, 448 P.2d 119 (1968), \(^{cert. denied}\), 396 U.S. 861 (1969); Sanders v. State, 260 So. 2d 466 (Miss. 1972) (any relevant issue); May v. State, 211 So. 2d 845 (Miss. 1968) (anything relevant to the case, once a cloak of immunity is cast off, it cannot be presumed at will). \(^{See also}\) Ex Parte Soderland, 128 N.W.2d 605 which provides that questions regarding prior conduct of the defendant may be asked if they are probative of the truth and not remote.

\(^{126}\) \(^{See}\), e.g., Commonwealth v. Smith, 163 Mass. 411, 40 N.E. 189 (1895).

\(^{127}\) \(^{See}\), e.g., Lumpkins v. Commonwealth, 425 S.W.2d 355 (Ky. 1968).

\(^{128}\) \(^{See}\) Brown v. United States, 356 U.S. 148, \(^{rel. denied}\), 356 U.S. 948 (1958); United States v. Dana, 457 F.2d 205 (7th Cir. 1972); Nash v. United States, 463 F.2d 1047 (8th Cir. 1972); United States v. Lyon, 397 F.2d 505 (7th Cir.), \(^{cert. denied}\), 393 U.S. 864 (1968); United States v. ex rel. Irwin v. Pate, 357 F.2d 911 (7th Cir. 1966); Carpenter v. United States, 264 F.2d 565 (4th Cir.), \(^{cert. denied}\), 360 U.S. 936 (1959); Howard v. Sigler, 325 F. Supp. 272 (D. Neb. 1971), \(^{rev'd on other grounds}\), 454 F.2d 115 (8th Cir. 1972); State v. Dobkins, 277 N.C. 484, 178 S.E.2d 449 (1971).

\(^{129}\) \(^{See}\) McCautha v. California, 402 U.S. 183 (1971) (defendant must take into account the matters which may be brought out on cross); Sandy v. United States, 386 F.2d 516 (5th Cir. 1967), \(^{cert. denied}\), 390 U.S. 1004 (1968).

\(^{130}\) \(^{See}\) Melendez-Rodriquez v. United States, 441 F.2d 1109 (9th Cir. 1971). \(^{See also}\) DeRose v. United States, 315 F.2d 482 (9th Cir.), \(^{cert. denied}\), 375 U.S. 846 (1963) (testified about pretrial statements, could be crossed on them); People v. Kadison, 243 Cal. App. 2d 162, 52 Cal. Rptr. 117 (1966) (cannot limit testimony and cross to favorable facts).

\(^{131}\) \(^{See}\) People v. Eaton, 275 Cal. App. 2d 584, 80 Cal. Rptr. 192 (1969); People v. Ing, 65 Cal. 2d 603, 422 P.2d 590, 55 Cal. Rptr. 902 (1967).
cases on point indicate that the answer is in the affirmative.122 This holding has been severely criticized by commentators in light of the fact that if the counts were severed, the defendant would have the option of testifying at each particular trial.123

It is well settled that a prosecutor may not cross-examine the accused regarding his silence at the time of the arrest or his request for the assistance of counsel.124 Nevertheless, there are avenues of inquiry in this area which can be explored under the proper circumstances. The courts have defined a legal “twilight zone” where the accused’s right to silence merges with an obligation to give the police the explanation that he offers to the jury at trial.125 The theory here, is that if the defendant tells the court that he found burglary proceeds on the ground and was arrested while on his way to deliver them to the police, it is reasonable to ask why he didn’t say that to the arresting officers.126 Although there is authority to the contrary,127 most courts hold that when a defendant presents a detailed exculpatory explanation128 or alibi129 at trial, it is a proper test of the story’s credibility to question if that story had ever been offered previously. Occasionally, the door will be opened to this inquiry by the defendant on direct examination broaching the subject of his prior silence.130 Questions of an

45, 97 Cal. Rptr. 413 (1970) (harmless error to ask about verbal reaction to arrest due to overwhelming evidence and failure to move to strike); Hines v. People, 497 P.2d 1258 (Colo. 1972); Cowan v. Commonwealth, 407 S.W.2d 695 (Ky. 1966) (asked why he did not turn himself in if it was self defense); State v. Elmore, 467 S.W.2d 915 (Mo. 1971) (self defense claim, no duty to assert it while in jail); State v. Griffin, 120 N.J. Super. 13, 293 A.2d 217 (1972) (self defense claim, the court distinguished between questions on pre-Miranda and post-Miranda silence and finds that only the latter is improper); State v. Lopez, 503 P.2d 1180 (N.M. 1972). Claimed he thought he was helping a neighbor move and was not aware he was participating in a burglary until he was arrested.

122 See People v. Perez, 65 Cal. 2d 615, 422 P.2d 597, 55 Cal. Rpr. 909 (1967), writ dissmitted, 395 U.S. 208 (1969) (defendant denied two counts of a four count indictment, the court finding that he was subject to inculpation on them all); see also United States v. Baker, 262 F. Supp. 657 (D.C. 1966). Questions on “other rights” were approved in 401 F.2d 958 (D.C. Cir. 1968) (court postponed severance motion for a later determination of the prejudice to defendant). But see State v. Grody, 153 Conn. 26, 211 A.2d 674 (1965) (by taking stand at trial defendant did not waive the privilege insofar as habitual criminality portion of the indictment was concerned).

123 See McCormick §132.

124 See Fagundes v. United States, 340 F.2d 673 (1st Cir. 1965) (questions regarding silence and request for an attorney); People v. Williams, 26 Mich. App. 218, 182 N.W.2d 347 (1970); State v. Hovey, 80 N.M. 373, 456 P.2d 206 (1966) (no error since guilt not inferred from the question which was unrelated to details of the crime); People v. Finney, 39 N.Y.2d 749, 332 N.Y.S.2d 83 (1972); State v. Young, 27 Ohio St. 2d 310, 272 N.E.2d 353 (1971), vac. for resentencing, 408 U.S. 940 (1972).


126 See Sims v. Saltton, 333 F. Supp. 246 (W.D. Va. 1971) (questions about defendant’s failure to tell police he heard the fatal shotgun blast); Kelley v. State, 478 S.W.2d 73 (Tenn. 1972) (questions also were proper regarding failure to allow a vehicle search).

127 See United States v. Brinson, 411 F.2d 1057 (6th Cir. 1969); Sharpe v. United States, 410 F.2d 969 (5th Cir. 1969); Fowle v. United States, 410 F.2d 48 (9th Cir. 1969) (distinguished from a situation where the defendant fully denies ever making any statement to the police); United States ex rel. Young v. Follette, 308 F. Supp. 670 (S.D.N.Y. 1970) (harmless error in light of the evidence); State v. Greer, 17 Ariz. App. 162, 496 P.2d 152 (1972); People v. Knight, 20 Cal. App. 3d 45, 97 Cal. Rptr. 413 (1970) (harmless error to ask about verbal reaction to arrest due to overwhelming evidence and failure to move to strike); Hines v. People, 497 P.2d 1258 (Colo. 1972); Cowan v. Commonwealth, 407 S.W.2d 695 (Ky. 1966) (asked why he did not turn himself in if it was self defense); State v. Elmore, 467 S.W.2d 915 (Mo. 1971) (self defense claim, no duty to assert it while in jail); State v. Griffin, 120 N.J. Super. 13, 293 A.2d 217 (1972) (self defense claim, the court distinguished between questions on pre-Miranda and post-Miranda silence and finds that only the latter is improper); State v. Lopez, 503 P.2d 1180 (N.M. 1972). Claimed he thought he was helping a neighbor move and was not aware he was participating in a burglary until he was arrested.


If the defendant makes exculpatory statements at the time of his arrest, he may be questioned as to omissions or inconsistencies. See United States v. Cordova, 421 F.2d 471 (9th Cir.), cert. denied, 398 U.S. 941 (1970).


alibi witness regarding his prior silence do not raise the fifth amendment issue (unless of course the answer would expose him to a criminal prosecution). 142

It is violative of the fifth amendment and therefore improper to question a defendant regarding his silence at an earlier trial, 143 at the trial of a co-defendant, 144 in a preliminary hearing, 145 or before a grand jury. 146 Similarly, inquiry into an earlier guilty plea to the instant charge is not allowed. 147

Questions which may expose the defendant to additional criminal charges may be asked if the subject matter falls within the initial fifth amendment waiver. 148 If the defendant does legitimately invoke the fifth amendment during the course of cross-examination, the prosecutor should be careful not to draw improper, adverse inferences from the assertion of the privilege. 149

Davidson, 457 S.W.2d 674 (Mo. 1970) (claim that he was not allowed to tell his story to the police and refused to sign a statement afterwards).


142 State v. Miller, 485 S.W.2d 435 (Mo. 1972) (homosexual behavior).

143 Stewart v. United States, 366 U.S. 1 (1961) (defendant took the stand for the first time in his third trial and bolstered his insanity defense by babbling. The prosecutor caused reversal with the question “Willie, you were tried on two other occasions. This is the first time you have gone on the stand, isn’t it Willie?”).


145 See, e.g., People v. Jordan, 7 Mich. App. 28, 151 N.W.2d 242 (1967) (this is the classic example of the one question too many).


149 See Johnson v. United States, 318 U.S. 189 (1943) (privilege applicable); Utah Code Ann. §§78-24-9 (1953) (“... he need not give an answer which will have a tendency to subject him to punishment for a felony ...”). The privilege is not available to a defendant who fears incriminating a co-defendant, State v. Jesser, 95 Idaho 43, 501 P.2d 727 (1972); nor to a defendant who seeks to avoid examination regarding prior felony convictions, Stubbs v. State, 243 A.2d 57 (Me. 1968).

150 See Birns v. Perini, 426 F.2d 1288 (6th Cir. 1970), III CHARACTER WITNESSES

As mentioned previously, 150 a defendant (or a witness) on direct examination may authorize inquiry into limited areas of his character by representing himself in a particular light. 151 For example, he may testify to his reputation for peace and quiet and be cross-examined to refute that assertion. 152 Questions which explore the defendant’s specific character for truth and veracity are governed by the rules of scope or by legislation. 153 If it has not been put in issue, however, the prosecutor should cautiously avoid the vilification of an accused’s general character, for the courts will no longer entertain a quest for “the villain of the piece.” 154

In addition to offering evidence of his good character while on the witness stand himself, a defendant may choose to call upon a character witness to testify to his noteworthy reputation in the community. Although the presentation of a character witness may lead to particularly devastating cross-examination, this type of witness is called to the stand with great regularity. It has been said that character evidence alone may raise a reasonable doubt of guilt, 155 and apparently this feeling is cest. denied, 402 U.S. 950 (1971) (nor was there a deliberate attempt to force the invocation of the privilege). 156

151 See notes 103-04 supra.

152 See Proposed Fed. R. Evid. 404(a)(1) (evidence of a pertinent trait of the accused’s character can be used to rebut his assertion that his character is inconsistent with guilt); KAN. STAT. ANN. §60-447 (1964) (character evidence tending to prove conduct may be admitted only after introduced by the defendant).


154 See Proposed Fed. R. Evid. 608(b) which provides: “The credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness.” The comment following the rule recognizes cross-examination of this nature as being recognized by the bulk of judicial authority. Similarly, CAL. EVID. CODE §806 (West 1966) provides: “Evidence of traits of his character other than honesty or veracity, or their opposites, is inadmissible to attack or support the credibility of a witness.” See also KAN. STAT. ANN. §60-422(c) (1964) which provides “evidence of traits of his (the witness’) character other than honesty or veracity or their opposites shall be inadmissible.”


156 See, e.g., Edgington v. United States, 164 U.S. 361 (1896).
shared by many experienced members of the criminal bar.\textsuperscript{164}

When a witness is called to testify that the accused has a reputation for peacefulness, honesty, or other qualities of character which are inconsistent with the conduct that is charged, the witness may be broadly cross-examined\textsuperscript{165} in order to discredit his reliability.\textsuperscript{168} This cross-examination provides a vehicle by which negative information concerning the defendant’s background, which would not otherwise be admissible, may be laid before the trier of fact.\textsuperscript{169}

The cross-examination of a character witness delves into his familiarity with the defendant’s reputation\textsuperscript{169} and may focus either on his sources of information, or the frequency with which he discussed the issue.\textsuperscript{161} It also may disparage the standard.\textsuperscript{165}

\textsuperscript{164}In the 1973 bribery trial of seventh circuit Judge (and former Governor of the State of Illinois) Otto Kerner, Paul Connelly, a veteran trial lawyer, called to the witness stand approximately eighteen character witnesses including General William F. Westmoreland and Roy Wilkins.\textsuperscript{169}

\textsuperscript{165}See United States v. Strangna, 453 F.2d 422 (8th Cir. 1972) (wide latitude); United States v. Goss, 339 F.2d 102 (6th Cir. 1964), reh. denied, 382 U.S. 922 (1965) (broad latitude); Lane v. Warden, Maryland Penitentiary, 320 F.2d 179 (4th Cir. 1963) (wide latitude).


\textsuperscript{169}See State v. Newte, 188 Neb. 412, 197 N.W.2d 403 (1972) (any prejudice vitiating by defendant’s own admission on direct examination). See also Valdez v. State, 472 S.W.2d 754 (Tex. 1971); State v. Briscoe, 78 Wash. 2d 338, 474 P.2d 267 (1970) (but the jurisdiction is moving towards the accepted form; here asked, do you know or have you heard).


\textsuperscript{161}In Gandy v. United States, 386 F.2d 516 (5th Cir.), cert. denied, 390 U.S. 1004 (1968), the court wrote: Prosecutors, however, would be well advised to carefully acquaint themselves with the opinion in Michelson, clearly a masterpiece in the field, and particularly that language (A)the form of the inquiry, ‘Have you heard?’ has general approval, and ‘Do you know?’ is not allowed. See also Wilcox v. United States, 387 F.2d 60 (5th Cir. 1967), cert. denied, 405 U.S. 917 (1972); Bryan v. United States, 373 F.2d 403 (5th Cir. 1967) (parentry improper).
character witness regarding traits or behavior of the defendant which are irrelevant to the areas opened in direct examination, he may inquire if the witness has heard of certain illegal acts committed by the accused such as assaults or even sexual crimes. Similarly, the prosecutor may inquire if the witness has heard negative rumors about the defendant which may have circulated throughout the community.


134 See Gains v. State, 481 S.W.2d 835 (Tex. 1972) (traffic offenses or offense peculiar to military law); Pace v. State, 398 S.W.2d 123 (Tex. 1965) (traffic offenses or minor offenses peculiar to the military, minor AWOL likened to a wife fussing when her husband comes in late).

of these occurrences, provided the witness was acquainted with the accused at that time.\textsuperscript{177}

It would appear that when dealing with a matter of record such as an arrest or a conviction, the cross-examiner should be permitted to use the "Do you know?" form of the question.\textsuperscript{178} The \textit{Michelson} guideline, however, has had such widespread influence, that most of the reported cases reflect the use of the "Have you heard?" form even when dealing with factual realities such as these.\textsuperscript{179}

\textsuperscript{177} See \textit{Michelson} v. United States, 335 U.S. 469 (1948) (an arrest so remote that the rumors may have died, may be excluded within the court's discretion, but here two witnesses knew the defendant at the time; therefore a twenty-seven year old arrest was properly used on cross); United States v. Booz, 451 F.2d 719 (3d Cir. 1971) (thirteen year old non-marital affair, after arrest was not returned until, after another arrest had taken place, the second arrest was properly brought out); Anderson v. State, 44 Ala. App. 388, 210 So. 2d 436 (1968) (questions of later crimes answered in negative, prejudice removed); State v. Butler, 6 Ohio App. 2d 193, 217 N.E.2d 237 (1966), \textit{rev'd on other grounds}, 11 Ohio St. 2d 23, 227 N.E.2d 627 (1967) (error since post incident character is irrelevant). It may also be improper to cross-examine regarding incidents occurring after the defendant left the community of the witness. See Awkard v. United States, 352 F.2d 641 (D.C. Cir. 1965). \textit{But see United States} v. Pingleton, 438 F.2d 722 (7th Cir. 1971) (could question if reputation affected by incident); United States v. Null, 415 F.2d 1178 (4th Cir. 1969) (instant charge inquiry permitted); United States v. Wolfsen, 405 F.2d 779 (2d Cir. 1969) \textit{aff'd}, 413 F.2d 804 (1969) (proper to question on present indictment and consent decree enjoining further similar conduct); Shimon v. United States, 352 F.2d 441 (D.C. Cir. 1965) (error to question on similar indictment was not reversible); Comi v. State, 202 Md. 472, 97 A.2d 129, \textit{cert. den'ed}, 346 U.S. 988 (1953); Avery v. State, 15 Md. App. 500, 229 A.2d 728 (1972); \textit{compare} Donaldson, 76 Wash. 2d 513, 458 F.2d 21 (1969) ("do you know?" form approved). The "do you know?" form with regard to matters of record has been specifically ruled against by a few courts. See \textit{Potts} v. State, 502 P.2d 1287 (Okla. 1972); Webber v. State, 472 S.W.2d 136 (Tex. 1971).


Arrests: Zaragoza-Almeida v. United States, 427 F.2d 1148 (9th Cir. 1970) (arrested and deported); People v. Hurd, 5 Cal. App. 3d 865, 85 Cal. Rptr. 718 (1970) (additional, this case holds that a character witness can be questioned on an arrest for which a pardon has been granted); Jones v. State, 484 S.W.2d 745 (Tex. 1972); Cooper v. State, 395 S.W.2d 702 (Tex. 1971); Sanders v. State, 433 S.W.2d 162 (Tex. 1969).


\textsuperscript{179} See United States v. Pope, 409 F.2d 371 (7th Cir. 1969) ("would your appraisal of the reputation of Mr. Pope be different if you knew that for the past six years he'd been carrying on an illicit relationship with another woman?"); Robinson v. State, 47 Ala. App. 689, 260 So. 2d 419 (1972) (witness said he felt reputation for truth and veracity was still good in spite of a mixture of arrests and convictions for theft, firearms violations, desertion and non-support, and assault and battery); People v. Himman, 253 Cal. App. 2d 896, 61 Cal. Rptr. 609 (1967), \textit{cert. den'ed}, 391 U.S. 923 (1968) (if you had heard things, would it have your impression changed?);\textit{Barriques} v. State, 122 Ga. App. 757, 178 S.E.2d 744 (1970) (proper in this jurisdiction to ask what would opinion be if the present arrest had been known); Kinnett v. Commonwealth, 408 S.W.2d 417 (Ky. 1966), \textit{cert. den'ed}, 387 U.S. 924 (1967) (would this effect your evaluation of the defendant's reputation?); Comi v. State, 202 Md. 472, 97 A.2d 129, \textit{cert. den'ed}, 346 U.S. 988 (1953) (would knowledge of prior arrests and charges change your mind?); State v. Hastings, 477 S.W.2d 108 (Mo. 1972); State v. McCody, 458 S.W.2d 356 (Mo. 1970) (would their opinion be the same in light of arrests or convictions for burglary, theft, robbery and carrying concealed weapons).\textit{But see State} v. Kidwell, 199 Kan.
ness may therefore be put in the position of either withdrawing his earlier testimony or clearly demonstrating to the jury that he attributes little importance to the unattractive behavior that has been discussed, in which case the weight of his opinion is therefore reduced. 181

The cross-examination of character witnesses obviously entails the possibility of significant prejudice to the defendant’s case. The prosecutor, therefore, must cautiously avoid unduly emphasizing the negative material with which he is dealing, 182 for the courts are quick to remind him that this mode of cross-examination is meant to attack the witness and not the accused. 183 Additionally, he is held to a very strict standard of good faith. 184 The questions he propounds to the witness must be founded either in fact or upon reasonable belief. Random inquiries are not tolerated by the courts. 185 To avoid this possibility, the courts have increasingly begun to undertake judicial examinations of the proposed questions before they are aired before the jury. 186 In this way, unsubstantiated charges and inherently prejudicial material can be screened and kept from the ears of the jurors.

IV. EXPERT WITNESSES

The permissible limits of prosecutorial cross-examination are quite broad when dealing with an expert witness. 187 As one court has said,


186 See United States v. West, 460 F.2d 374 (5th Cir. 1972) (prefered procedure is to have in camera proceeding); United States v. Machado, 457 F.2d 1372 (9th Cir. 1972) (improper not to have demonstrated the basis of a petty theft charge); United States v. Jordan, 454 F.2d 323 (7th Cir. 1971). Gross v. United States, 394 F.2d 216 (6th Cir. 1968); United States v. Dilbone, 393 F.2d 642 (2d Cir. 1968) (hearing is an added precaution); People v. Eli, 56 Cal. Rptr. 916, 424 P.2d 356, cert. denied, 389 U.S. 888 (1967); State v. Hinton, 206 Kan. 500, 479 P.2d 910 (1971). The court in State v. Steensen, 113 A.2d 203, 206 (N.J. 1955) laid out the following guidelines for the preliminary inquiry into the questions to be asked of a character witness. The court advised that the judge satisfy himself:

1. That there is no question as to the fact of the subject matter of the rumor, that is, of the previous arrests, conviction, or other pertinent misconduct of the defendant;

2. That a reasonable likelihood exists that the previous arrest, conviction, or other pertinent misconduct would have been bruited about the neighborhood or commission of the offense on trial;

3. That neither the event or conduct nor the rumor concerning it occurred at a time too remote from the present offense;

4. That the earlier event or misconduct and the rumor concerned the specific trait involved in the offense for which the accused is on trial; and

5. That the examination will be conducted in the proper form, that is: ‘Have you heard,’ etc. not ‘Do you know,’ etc.

The court added that “if the conclusion is reached to allow the interrogation, the jury should be informed of its exact purpose either at the conclusion thereof or in the charge,” 113 A.2d at 206.

187 See People v. Nye, 78 Cal. Rptr. 467, 455 P.2d 395 (1969) (“the nature and scope of the cross-examination allowed in the case of an expert witness is entirely different from that allowed in the case of an ordinary witness.”); Scott v. People, 166 Colo. 452, 444 F.2d 385 (1968); State v. Konaklis, 100 R.I. 298, 214 A.2d 893 (1965) (wider latitude than with ordinary witness if relevant); Zebrowski v. State, 50 Wis. 2d 715, 185 N.W.2d 545 (1971) (greater latitude than with an ordinary witness, within court discretion); State v. He-
Once an expert offers his opinion, however, he exposes himself to the kind of inquiry which ordinarily would have no place in the cross-examination of a factual witness. The expert invites investigation into the extent of his knowledge, the reasons for his opinion including facts and other matters upon which it is based and which he took into consideration; and he may be subjected to the most rigid cross-examination concerning his qualifications, and his opinion and its sources.188

Experts are properly cross-examined regarding their educational background and professional qualifications,189 their experience,190 as well as the possible existence of a special interest in the outcome of the case. Inquiries into financial remuneration191 as well as bias towards a particular defendant192 or type of case192 are properly made.

A major portion of an expert’s cross-examination is directed towards questioning the grounds for his opinion. In this regard, the prosecutor may inquire as to the facts that were relied upon to reach the witness’ ultimate conclusion.194 The expert may be asked if he ever reached a different conclusion.195 If relevant facts have been omitted by the expert, the prosecutor may ask if his opinion would have differed if those facts had been relied upon as well.196 Alternate theories or conclusions can be offered and comment upon them requested.197 Admissions or other statements of the defendant are also proper subjects of inquiry if they have been relied upon by the expert or may otherwise be relevant to his opinions.198

The prosecutor may call into question the completeness of the investigation performed by the expert witness.199 For example, a defense psychiatrist may be asked how many times he interviewed interest in her); State v. Tusner, 81 N.M. 450, 468 P.2d 421, cert. denied, 81 N.M. 505, 469 P.2d 151 (1970).

188 See McCormick §35.
190 See United States v. Julian, 450 F.2d 575 (10th Cir. 1971) (proper to ask would a defendant who desired incarceration refuse to identify himself to the F.B.I. when apprehended?); Zebrowski v. State, 50 Wis. 2d 713, 185 N.W.2d 543 (1971); State v. Hebard, 50 Wis. 2d 408, 184 N.W.2d 156 (1971) (proper to cross if defendant would have killed five persons had a police officer been present?). But see State v. Cucinelli, 261 La. 769, 261 So. 2d 217 (1972) (improper to ask, would it be safe to return a person like that to society? Harmless error because unanswered).
191 See Carr v. State, 43 Ala. App. 642, 198 So. 2d 791 (1967) (could cross a medical witness as to whether defendant’s calling the sheriff and saying he would surrender to the sheriff but not to a city policeman indicates that he knew he had done something wrong); People v. Nye, 78 Cal. Rptr. 467, 453 P.2d 38 (1969) (defendant’s testimony at first trial used on cross of expert to show conflict and possible lying); People v. Whitmore, 251 Cal. App. 2d 359, 59 Cal. Rptr. 411 (1967); Tarrants v. State, 236 So. 2d 360 (Miss. 1970), cert. denied, 401 U.S. 920 (1971) (could examine all aspects of defendant’s life); State v. Turner, 81 N.M. 571, 469 P.2d 720 (1970) (if considered by expert, proper to ask about defendant’s admission of two assaults, a rape and two burglaries). But see Hurt v. State, 480 S.W.2d 747 (Tex. 1972) (questions regarding thirteen prior criminal acts constituted reversible error; psychiatrist could not be crossed like a character witness).
192 Inquiry as to a defendant’s statements is improper pursuant to ALAS. STAT. §12.45.100 (1972) which provides:

No statement made by the accused in the course of an examination into his sanity or mental capacity . . . may be admitted into evidence against the accused on the issue of guilt in a criminal proceeding.

the defendant, whether he performed psychological tests, and whether he bases his opinion mainly on the reports of others. Additionally, the psychiatrist may be asked questions going to the heart of the insanity defense, i.e., is the defendant faking? Where an expert witness has first hand information, as where a forensic pathologist has examined a body to determine the cause of death, or where a psychiatrist has personally examined the defendant, specific questions may be asked about his opinions. Where, however, the expert is lacking first hand information but his opinion is nevertheless desired or even if he has first hand information but is being asked to speculate about the possibility of certain facts changing his testimony, the prosecutor may tender hypothetical questions. In this regard, the courts exercise a broad discretionary power. Some courts will permit the asking of hypothetical questions which are based on facts not in evidence, and the offer of a prosecutor to prove up any fact which the expert testifies would change his opinion may increase the likelihood of acceptance.

Virtually all courts, to some extent, allow the use of treatises in the cross-examination of expert witnesses. The majority view is that an expert may be cross-examined with a treatise if he has relied upon that particular work in reaching his opinion, if he recognizes it as authoritative in the field, or if the work itself has been admitted into evidence. The very liberal minority view permits this examination if the examiner merely is able to establish the authenticity of the work by evidence or judicial notice.

The hearsay objection that is offered in connection with learned treatise examination, is also raised with regard to cross-examination using reports of other experts or hospital records. These objections are untenable if the expert has himself relied on these sources to reach his conclusions. The final point should be made that an expert witness appointed by the court is subject to normal cross-examination by both the prosecution and the defense.

V CROSS-EXAMINATION OF COURT WITNESSES AND CROSS-EXAMINATION BY THE COURT ITSELF

It can be categorically asserted that witnesses may be called to stand by the court itself. It is equally clear that court witnesses are subject to cross-examination by counsel for both sides. This modification of the confrontation principle is supported.
ported by both case law and legislation. The courts will generally apply the same guidelines of scope and propriety with regard to a court's witness as they would with an adverse witness.

Judges occasionally take an active role in the examination of witnesses. This is more frequent, however, in the federal courts than in state courts. The examination is generally directed towards the clarification of confusing or unresponsive testimony, but may at times be a piercing inquiry. A judge who plays too aggressive a role in the course of the trial, however, may precipitate the reversal of a guilty verdict, for as Justice Learned Hand has said,

Prosecution and judgment are too quite separate functions in the administration of justice; they must not merge.

VI CROSS-EXAMINING ONE'S OWN WITNESS

At common law, the party who called a witness was forbidden from impeaching that witness. This rule was based upon the principle that the calling party vouched for the credibility of his witness, and therefore should not attack that credibility. Recently, however, this theory has come under severe criticism because witnesses may not chosen by the application of strict screening standards. For this reason, there has been a recent move away from the common law position. Some legislation, including the Proposed Federal Rules of Evidence, now provides that either party may impeach any witness on the stand. Similarly, a small body of case law supports the modern position. Although the impeachment may be on the grounds of bias, interest, or character, it typically is in the form of an attack based upon a prior inconsistent statement.

The Proposed Federal Rules of Evidence may be expected to give significant impetus to the movement towards more liberal impeachment. In the meantime, the majority view is that one's own witness may be impeached only if the calling party has been surprised and his case damaged. The

210 See Estrella-Ortega v. United States, 423 F.2d 509 (9th Cir. 1970); Smith v. United States, 331 F.2d 265 (8th Cir. 1964), aff'd, 431 F.2d 1 (8th Cir. 1970); Brady v. State, 190 So. 2d 607 (La. 1966); Montesi v. State, 220 Tenn. 354, 417 So. 2d 554 (1967).

211 See Proposed Fed. R. Evid. 614 (a): "The judge may on his own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called." The Federal Rules of Evidence specifically provide for the court appointment of expert witnesses, with rights of cross-examination included, of course.

212 See United States v. Wilson, 447 F.2d 1 (9th Cir. 1971), cert. denied, 404 U.S. 1053 (1972); Sutton v. State, 239 So.2d 664 (Fla. 1970); People v. Marino, 44 Ill. 2d 562, N.E.2d 770 (1970). But see People v. Kimbrough, 131 Ill. App. 2d 36, 266 N.E.2d 431 (1970), where the court held that cross-examination must be limited to direct issues, and that collateral matters cannot be raised.

213 See McCormick §8; United States v. Sorce, 308 F.2d 299 (4th Cir. 1962), cert. denied, 377 U.S. 957 (1964) (When a defendant or other witness gives unresponsive, evasive, or contradictory answers, the judge is not obliged to remain inert. It may become his duty to intervene.) A typical example of permissible judicial inquiry is Whalen v. United States, 367 F.2d 468 (5th Cir. 1966), where the defendant was questioned as to what number of prior felony convictions were on his record.

214 Consider, for example, the active role that was played by D.C. District Court Judge John J. Sirica in the trial of the Watergate Seven.


216 See United States v. Manzano, 149 F.2d 923 (2nd Cir. 1945).

217 See the general discussion, McCormick §38, and Proposed Fed. R. Evid. §607, advisory Committee's Note.

218 See Proposed Fed. R. Evid. 607. See also CAL. EVID. CODE 785 (West 1966); ILL. REV. STAT. ch. 110, §60 (1971); KAN. STAT. ANN. §60-420 (1964). The liberal hearsay provisions of the proposed federal rules have given rise to §806, which reads in part: "If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination." Proposed Fed. R. Evid. 806.


221 See e.g., Troubleshooting v. United States, 372 F.2d 912 (D.C. Cir. 1967); Coleman v. United States, 371 F.2d 343 (D.C. Cir. 1966), cert. denied, 386 U.S. 945 (1967). But see the interesting rule in Cain v. State, 113 Ga. App. 477, 148 S.E.2d 508 (1966), where the court held that the party cannot impeach its witness with a prior inconsistent statement unless it was made to the impeaching party or to a law enforcement officer and turned over to the prosecutor.

222 See United States v. Watson, 450 F.2d 290 (8th Cir. 1971), cert. denied, 405 U.S. 993 (1972); Bushaw v. United States, 353 F.2d 477 (9th Cir. 1965), cert. denied,
surprise must constitute more than a minor change in the recited facts.\textsuperscript{223} Also, surprise may not be claimed if the prosecutor has had as little as fifteen minutes warning that the witness would not testify as originally expected.\textsuperscript{224} The damage must be real and substantial, rather than just the failure to give evidence helpful to the prosecution’s case. For example, innocuous statements or claims of “I don’t know” or “I don’t remember” do not constitute sufficient damage.\textsuperscript{225} These limitations are based on 384 U.S. 921 (1966); State v. Potts, 205 Kan. 47, 468 P.2d 78 (1970); State v. Grey, 257 La. 1070, 245 So.2d 175 (1971); State v. Hamilton, 249 La. 392, 187 So.2d 405 (1966); Green v. State, 243 Md. 154, 220 A.2d 544 (1966); State v. Harvey, 253 S.C. 328, 170 S.E.2d 657 (1969); Norwood v. State, 486 S.W.2d 776 (Tex. 1972). See also United States v. Cunningham, 446 F.2d 194 (2d Cir. 1971); cert. denied, 404 U.S. 950 (1971); Bartley v. United States, 319 F.2d 717 (D.C. Cir. 1963); Baldwin v. State, 5 Md. App. 22, 245 A.2d 98 (1968); Sanders v. State, 1 Md. App. 630, 232 A.2d 555 (1967); State v. Wright, 11 Ohio App. 2d 31, 227 N.E.2d 650 (1967); Commonwealth v. Wilson, 431 Pa. 21, 244 A.2d 734 (1968); Cheri v. State, 472 S.W.2d 273 (Tex. 1971). But see Beavers v. State, 392 F.2d 89 (Alaska 1967); State v. Quattrocchi, 103 R.I. 115, 233 A.2d 99 (1967). See also Gaskins v. State, 10 Md. App. 666, 272 A.2d 413 (1971), cert. denied, 404 U.S. 1040 (1972); See also Smith v. State, 479 S.W.2d 311 (Tex. 1972); United States v. Johnson, 427 F.2d 957 (5th Cir. 1970); Commonwealth v. Brabham 433 Pa. 491, 252 A.2d 378 (1969). The judge may allow the prosecutor to examine the witness outside the presence of the jury to demonstrate surprise. (State v. Robertson, 102 R.I. 623, 232 A.2d 781 (1967), cert. denied, 390 U.S. 1036 (1968).)

\textsuperscript{223} See United States v. Dobbs, 446 F.2d 1262 (5th Cir. 1971).


\textsuperscript{225} See United States v. Stubin, 446 F.2d 457 (3d Cir. 1971) (witness was hostile, recalcitrant, and unwilling); United States v. Mitchell, 408 F.2d 996 (4th Cir. 1969), cert. denied, 396 U.S. 930 (1969) (witness was uncooperative); United States v. Duff, 332 F.2d 702 (6th Cir. 1964) (witness was recalcitrant); State v. Collins, 204 Kan. 55, 460 P.2d 573 (1969) (witness was recalcitrant); State v. Kietze, 85 S.D. 502, 186 N.W.2d 551 (1971) (witness refused to answer questions and gave evasive replies).


\textsuperscript{227} See, e.g., United States v. Washabaugh, 442 F.2d
though under the modern view, prior inconsistent statements under certain circumstances may be an exception to the hearsay rule and admissible as substantive evidence, requiring that the jury be given a limiting instruction. Prior inconsistent statements may have been given to the prosecutor himself, to the police, or to probation or parole officers to a psychiatrist.


224 The bulk of the case law holds that prior inconsistent statements may be used for impeachment only, and not as substantive evidence. See United States v. LaRose, 459 F.2d 361 (6th Cir. 1972); Benson v. United States, 402 F.2d 576 (9th Cir. 1968); Jones v. United States, 385 F. 2d 296 (D. C. Cir. 1967); United States ex rel. Smith v. Reineck, 354 F.2d 418 (2d Cir. 1965); People v. Luna, 37 Ill. 2d 199, 226 N. E. 2d 586 (1967); People v. Sivizzero, 84 Ill. App. 2d 251; 228 N. E. 2d 604 (1967); Stutzman v. State, 250 Ind. 467, 235 N. E. 2d 186 (1968); State v. Nobles, 14 N. C. App. 340, 188 S. E. 2d 600 (1972).


228 See, e.g., United States v. Mayersohn, 413 F.2d 641 (2d Cir. 1969), aff'd, 452 F.2d 521 (1971) (probation report compiled before defendant withdrew his guilty plea); People v. Alesi, 67 Cal. 2d 855, 434 P. 2d 360, 64 Cal. Rptr. 104 (1967) (statements given in rehabilitation center on advice of counsel). But see People v. Harrington, 2 Cal. 3d 991, 471 F.2d 901, 85 Cal. Rptr. 161 (1970) (where admission to probation officer with no advice of counsel were not sufficiently reliable for impeachment purposes).

229 Inconsistent testimony may have been offered to a grand jury, at a coroner's inquest, in a previous trial, in depositions, or in affidavits or in the preliminary proceedings of the instant trial. This list by no means exhausts the sources of prior inconsistent statements.

As with most other areas of cross-examination, the trial judge exercises a broad discretionary power over impeachment based upon prior inconsistent statements. That discretion must be invoked to determine whether there is a sufficient discrepancy between the present testimony and the prior statement to warrant the impeachment of the witness. While it does not require a Solomon to recognize the discrepancies in the testimony of a witness who in court says that A killed B, but when in the grand jury room said that C killed B, less obvious inconsistencies defy categorization and interpretation.
vite judicial discretion. Generally speaking, if the witness omits a material fact which he should not reasonably have done, or if he alters a material fact in his testimony, he is subject to confrontation with his prior statement. A stricter standard may be applied by some courts when the person to be impeached is the defendant. Whether or not a lay witness may be impeached by a prior inconsistent opinion, will also depend upon the view of the jurisdiction, but commentators have suggested that the answer should be in the affirmative.

The foundation requirements for prior inconsistent statement impeachment stem from an 1820 English opinion, Queen Caroline's Case. A portion of that opinion reads,

If it be intended to bring the credit of a witness into question by proof of anything he may have said or declared touching the cause, the witness is first asked, upon cross-examination, whether or not he has said or declared that which is intended to be proved.

That requirement of asking the witness if he made the statement has been carried down through the years and expanded. Currently, the majority view requires that the witness be told the date, time, place, substance of, and person to whom the statement was made. His memory having been refreshed, the witness must then be given the opportunity to explain away or deny the statement. A witness who claims that he does not know or cannot remember if he made the statement does not thereby escape impeachment. Having properly laid the required foundation, the prosecutor may introduce the prior statement into evidence at his next opportunity to offer evidence.

The rigid requirements of a proper foundation have been relaxed in the Proposed Federal Rules of Evidence, through the abolition of the rule of creation. See, e.g., Oliver v. State, 239 So. 2d 637 (Fla. Ct. App. 1970); Stafford v. State, 481 S.W.2d 831 (Tex. 1965).


McCORMICK §34. But the prosecutor can't force the issue. A prosecutor who pushes the witness to obtain a contradiction may cause a reversal. See, e.g., People v. Taylor, 104 Cal. Rptr. 350, 501 P.2d 918 (1972), where the witness denied possessing narcotics which had been found in an illegal search fell prey to the prosecutor who continually and improperly raised the issue. Proper impeachment would have required that the witness/defendant make the denial on his own. Accord People v. Schwartz, 30 App. Div. 2d 385, 292 N.Y.S.2d 518 (1968).


See McCORMICK §35.


Id. at 313.

See McCORMICK §37. See also United States v. Harris, 441 F.2d 1333 (10th Cir. 1971); Gill v. Turner, 445 F.2d 54 (7th Cir. 1971); Troublesfield v. United States, 372 F.2d 912 (D.C. Cir. 1967) Thomas v. United States, 363 F.2d 159 (9th Cir. 1966); Edwards v. State, 279 Ala. 371, 185 So. 2d 513 (1967); Thigpen v. State, 49 Ala. App. 233, 270 So. 2d 666 (1971) 209 So. 2d 896 (1968); State v. Miller, 16 Ariz. App. 92, 491 P.2d 481 (1971); People v. Brown, 6 Ill. App. 3d 500, 285 N.E.2d 515 (1972); People v. Rodgers, 46 Mich. App. 211, 193 N.W.2d 412 (1971); Hooks v. State, 197 So. 2d 236 (Miss. 1967); Bullock v. State, 53 Wis. 2d 809, 193 N.W.2d 889 (1972). No foundation needs to be laid if the subject matter of the statement is material to the pending inquiry. See State v. Mack. 282 N.C. 334, 193 S.E.2d 71 (1972). There are cases which hold that it is improper to lay the foundation for impeachment and not follow it up with proof of the inconsistent statement. See, e.g., United States v. Bohle, 445 F.2d 54 (7th Cir. 1971); People v. Williams, 105 Ill. App. 2d 25, 245 N.E.2d 17 (1959). It is improper to ask each question of a lengthy prior statement. See, e.g., People v. Newport, 2 Ill. App. 3d 324, 276 N.E.2d 782 (1971) (for one witness, 98 for another), but see State v. Walker, 148 Mont. 216, 419 P.2d 500 (1966), where each question and answer was properly called to witness' attention.

See PROPOSED FED. R. EVID. 613 (a): Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require....

Accord, KAN. STAT. ANN. 60-422 (b) (1964). See also United States v. Cirillo, 468 F.2d 1233 (2d Cir. 1972); United States v. Hayutin, 398 F.2d 944 (2d Cir. 1968); Commonwealth v. Dennison, 441 Pa. 334, 272 A.2d 180 (1971). The prosecutor need produce the person to whom the prior statement was made; United States v. Caruso, 465 F.2d 1369 (2d Cir. 1972); Pedersen v. State, 420 P.2d 327 (Alas. 1966); nor does the fact that the defendant wasn't present when a witness made a prior statement preclude its use, State v. Covington, 432 S.W.2d 267 (Mo. 1968). See also the interesting rule in Cain v. State, 113 Ga. App. 477, 148 S.E.2d 505 (1966).


See McCORMICK §37, PROPOSED FED. R. EVID. 613 (b).
Queen Caroline's Case. Under the proposed rules, therefore, the statement need not be shown to the witness, but it must be shown to opposing counsel upon his request. This is to avoid the allegation that a nonexistent statement has been fabricated.

The prosecutor is held to a good faith standard, and, therefore, asking a witness if he has made prior inconsistent statements when there is no reason to believe that he did so has been criticized as improper. Prosecutors have also encountered criticism when they have attempted to play for the witness (and thus, for the jury) a prior statement recorded on tape. This has led to a number of reversed convictions. The safer procedure with regard to taped statements (except in those jurisdictions which allow prior inconsistent statements as substantive evidence) is to play the tape for the witness using individual earphones, or to make certain that the jury is given a cautionary instruction limiting the tape to impeachment use only.

The requirement fostered by Queen Caroline's Case that a prior inconsistent statement must be shown to the witness to refresh his memory, has been traditionally applied with at least as much rigor to written statements as it has to oral statements. Just as the Queen's authority has begun to slip with regard to oral statements, a few jurisdictions no longer require that a written statement be shown to the witness in order to impeach him.

In Walder v. United States, a defendant who made the broad sweeping claims that he never in his life possessed, handled, sold or given away narcotics, was impeached by reference to narcotics convictions no longer require that a written statement be shown to the witness in order to impeach him.

The defendant went beyond a mere denial of complicity in the crimes of which he was charged and made the broad sweeping claim that he had never dealt in or possessed any narcotics.... He must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally seized by it, and therefore not available for its case in chief. Beyond that, however, there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility.


See also, e.g., Beavers v. State, 492 P.2d 88 (Alaska 1971); Commonwealth v. Wilson, 431 Pa. 21, 244 A.2d 734 (1968), cert. denied, 393 U.S. 1102 (1969). See also Pallota v. United States, 404 F.2d 1035 (1st Cir. 1968) (newspaper article); State v. Carleton, 82 N.M. 537, 484 P.2d 757 (1971) (uncertified, unauthenticated notes). However, the use of a letter written by the defendant to his wife was improper and violative of the marital privilege. See McCravey v. State, 455 S.W.2d 174 (Tenn. 1970).
the court expanded the *Walder* principle to apply to statements which are inadmissible as substantive evidence because of deficiencies in the *Miranda* requirements. In *Harris*, a defendant charged with the sale of heroin to an undercover policeman took the witness stand and admitted selling a substance, but he claimed it was baking powder. He then was impeached with contradictory statements he made to the police following his arrest. These statements were inadmissible in the case in chief due to the lack of a showing in the record that the accused was given his *Miranda* warnings. The Supreme Court held, however, that they were usable for impeachment purposes because,

Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury... Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process. Had inconsistent statements been made by the accused to some third person, it could hardly be contended that the conflict could not be laid before the jury by way of cross-examination and impeachment.

The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. We hold, therefore, that petitioner's credibility was appropriately impeached by use of his earlier conflicting statements.266

The court in *Harris* required, of course, that the statements used for impeachment be trustworthy in that they must be free from coercion,266 which may necessitate a hearing on the voluntariness question prior to impeachment.267 The court also said that there was no distinction in principle between statements relating to collateral issues and statements which bear directly on guilt or innocence.268 Statements, therefore, which go to the central issue being litigated, but are inadmissible due to technical *Miranda* violations, are usable for impeachment.269

As already discussed, the *Walder* case allowed impeachment by the use of illegally seized evidence. With that principle established and broadened by *Harris* to include evidence which may be probative of guilt, the prosecutor now has significant latitude with regard to impeachment by means of otherwise inadmissible tangible evidence as well as statements.270

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265 400 U.S. at 225.
VIII IMPEACHMENT BY CONVICTION OF CRIME

At common law, a person who had been previously convicted of treason, a felony, or a misdemeanor involving dishonesty was rendered incompetent to testify as a witness in any judicial proceeding.270 While the belief that a criminal record reduces the trustworthiness of a person’s testimony has remained ingrained in the law, the policy of holding such a person incompetent to testify has been rejected by both statutes and decisions.272 At the present time, therefore, the vast majority of jurisdictions allow the prosecutor to cross-examine defendants and defense witnesses regarding prior criminal records for the purpose of impeaching their credibility.272 Exceptions to this practice include Kansas and Pennsylvania, where inquiry into the criminal record of the accused is allowed only after he has put his character in issue.274


Every attorney with even limited experience in criminal practice, knows that impeachment of an accused in a criminal case is not, in fact, the real purpose of the examination. It simply pictures the misconduct and vilifying of the accused and prejudices the jury by injecting.


Impeachment by prior conviction may also take place in the penalty stage of a trial. See Stratman v. State, 436 S.W.2d 144 (Tex. 1968); Mays v. State, 428 S.W.2d 525 (Tex. 1968). But see Brunfield v. State, 445 S.W.2d 732 (Tex. 1969).


Impeachment by prior criminal conviction is for the purpose of attacking the credibility of a witness or defendant on the stand. It is improper, therefore, to question a defense witness under the guise of impeachment, about the prior record of a defendant who has not taken the stand himself.276

Prior crimes which are similar or identical to those presently charged may serve the dual purpose of impeachment and proof of motive, intent and lack of mistake.278 The prosecutor must be careful, however, since impeachment by similar crimes tends to show that the accused has a propensity to engage in illegal behavior. This latter purpose is clearly improper.277

While there is an abundance of case law which upholds impeachment by “felonies”279 or by prior conviction, the application of the prior conviction rule becomes problematic when the prior conviction relevant to impeachment is a conviction for a misdemeanor.280 See, e.g., United States v. Comi, 336 F.2d 856 (4th Cir. 1965), cert. denied, 379 U.S. 992 (1965) (defendant’s mother asked about his involvement in a conspiracy and his tax evasion); People v. Mays, 48 Ill. 2d 164, 269 N.E.2d 281 (1971) (defendant’s mother crossed as to his time in jail); State v. Rowell, 77 N.M. 124, 419 P.2d 966 (1966) (defendant’s mother asked about his forgery conviction). But see Mays v. State, 428 S.W.2d 325 (Tex. 1968) (defendant’s mother questioned in penalty phase about the meaning of “conviction” after she testified that her son had never been convicted of a felony).


various jurisdictions have evolved specific guidelines. For example, impeachment may
be limited to convictions of “infamous” crimes, or to “felonies and misdemeanors involving moral turpitude.” The quality of “moral turpitude” might be required of felons as well. Although


the dictionary definition of “moral turpitude” is “an act of baseness, vileness, or depravity . . . .”; 284 the courts have applied the term to offenses ranging from fraud and prostitution to illegal entry. 284 There is general agreement, at least, that drunkenness is outside the ambit of the definition. 285

Another common categorization is “felonies and misdemeanors in the “crimen falsi” category. 286

Cir. 1969) (such cross-examination should be limited to acts or conduct which reflects upon integrity or truthfulness, or pertains to personaliturpitude such as would indicate moral depravity or degeneracy); Ins v. Huard, 125 Vt. 189, 212 A.2d 640 (1965) (question if witness had ever been convicted of a felony was too broad since it included crimes not involving moral turpitude). See also United States v. Griffin, 378 F.2d 445 (6th Cir. 1967); Paul v. State, 251 So. 2d 246 (Ala. 1971), reh. denied, 265 So. 2d 185 (Ala. 1972); Caldwell v. State, 282 Ala. 713, 213 So. 2d 919 (1968); McGovern v. State, 44 Ala. App. 197, 205 So. 2d 247 (1967); Baker v. State, 43 Ala. App. 550, 195 So. 2d 815 (1966), vacated, 396 U.S. 198 (1969); Norman v. State, 121 Ga. App. 753, 175 S.E.2d 119 (1970), cert. denied, 401 U.S. 956 (1971); Campbell v. State, 405 S.W.2d 506 (Tenn. 1966); McKenzie v. State, 462 S.W.2d 243 (Tenn. 1971); Courney v. State, 424 S.W.2d 440 (Tex. 1968). 286 See BLACK’S LAW DICTIONARY 1160 (1968).


crimes of violence such as assault are indicative of diminished credibility.

Some jurisdictions have expanded widespread impeachment by prior conviction by allowing that impeachment to be based upon “any crime.” Other courts have established the more limited rule that misdemeanor convictions may not be so employed. Whatever policy has been adopted by a particular jurisdiction, convictions in the federal courts or in the courts of other states which fall within that jurisdiction’s guidelines, are usable for impeachment. Prior convictions for crimes which are identical to or similar to the charges in the ongoing case also may generally be used.

In spite of conflicting policies and varying procedures, as a general matter, impeachment may be accomplished with prior convictions for burglary, larceny, forgery, auto theft and narcotics offenses. Most courts will also allow impeachment based upon crimes of violence such as assault and battery; however, crimes involving the use of force such as robbery, assault, and other crimes of violence such as assault are indicative of a propensity to engage in unlawful behavior see note infra.

The use of prior similar convictions was one of the factors weighed when determining whether to allow impeachment in the Luck line of cases at notes 346-49 infra. For the consequences of the possibility that the jury will take the accused’s prior record to be indicative of a propensity to engage in unlawful behavior see note 273 supra.


as murder, assault and rape. Municipal ordinance violations, traffic violations and petty offenses such as vagrancy typically cannot be used for impeachment. The majority view is that juvenile offenses are not properly usable for impeachment, but some courts relax that prohibition in light of the seriousness of the offense, especially if the offenses have been adjudicated in a regular criminal court. Minor military offenses such as a few hours A.W.O.L. are not suitable for impeachment, but offenses such as burglary or larceny which would be useable if prosecuted in a civilian court, will not be disallowed because they arose under military jurisdiction.

A conviction that is so remote that it has lost any real relationship to a witness or defendant's present credibility, may not be used to impeach. The standards by which remoteness is judged are quite flexible, but with its adoption in the Proposed Federal Rules of Evidence, the ten year limit...
will probably gain acceptance as a general rule of thumb.\textsuperscript{83} When determining remoteness, the courts look to the intervening conduct of the witness.\textsuperscript{84} Therefore, a 1929 conviction for armed robbery which would otherwise have been termed remote, was usable for impeachment when it was followed by convictions for breaking and entering in 1937, receiving stolen property in 1945, breaking and entering in 1946, and armed robbery in 1956.\textsuperscript{85} Additionally, the courts look to the date that the punishment was terminated rather than to the date of the conviction for the actual offense.\textsuperscript{86}

To be used for impeachment, a judgment must be final; that is to say, the sentence must have been imposed by the judge.\textsuperscript{237} Impeachment with a conviction that was not final at the time, but is final when a defendant claims error based upon that impeachment, may well be harmless error.\textsuperscript{318}

The pendency of an appeal does not render a conviction inappropriate for use in impeachment,\textsuperscript{239} but a reversal of the verdict most certainly does.\textsuperscript{240} A pardon will normally not prevent the conviction's use,\textsuperscript{241} but the Proposed Federal Rules of Evidence provide that if the pardon is based on rehabilitation, and the witness has not been convicted of a subsequent crime, or if the pardon is based upon innocence, the conviction is no longer usable for impeachment.\textsuperscript{242} The imposition of probation as a sentence will not preclude the conviction held not too remote see United States v. Simpson, 445 F.2d 735 (D.C. Cir. 1970) (robbery—7 years); Weaver v. United States, 408 F.2d 1269 (D.C. Cir.), cert. denied, 395 U.S. 927 (1969) (robbery—5 years); Gurlerski v. United States, 405 F.2d 253 (5th Cir. 1968), aff'd, 434 F.2d 612 (5th Cir. 1970) (Dyer Act—18 years); United States v. Aulet, 339 F.2d 934 (7th Cir. 1964), cert. denied, 380 U.S. 974 (1965) (conspiracy to overthrow United States Government—15 years); State v. Phillips, 102 Ariz. 377, 430 P.2d 139 (1967) (Mann Act—10 years); People v. Mose, 19 Cal. App. 2d 389, 97 Cal. Rptr. 128 (1951), aff'd, 24 Cal. App. 3d 384, 100 Cal. Rptr. 907 (1972) (robbery—8 years); People v. Neam, 485 S.W.2d 131 Ill. 119, 175, 268 N.E.2d 227 (1971) (robbery—20 years); People v. Bradley, 131 Ill. App. 2d 91, 266 N.E.2d 469 (1970) (robbery—9 years); People v. Gilmore, 111 Ill. App. 2d 100, 254 N.E.2d 590 (1969), cert. denied, 400 U.S. 845 (1970) (robbery—13 years); Bogre v. Commonwealth, 467 S.W.2d 767 (Ky. 1971) (tax conviction—18 years); State v. Scott, 459 S.W.2d 321 (Mo. 1970) (unspecified—7 years); Pejman v. State, 480 S.W.2d 652 (Tex. 1972) (armed robbery—approximate 6 years; burglary—approximately 8 years); Mitchell v. State, 436 S.W.2d 539 (Tex. 1969) (murder—parole ended 9 years prior); State v. Robinson, 75 Wash. 2d 230, 450 P.2d 180 (1969) (unspecified—16 years).

\textsuperscript{83} See Proposed Fed. R. Evd. 609(b): Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the release of the witness from confinement imposed for his most recent conviction, or the expiration of the period of his parole, probation, or sentence granted or imposed with respect to his most recent conviction, whichever is imposed with respect to his most recent conviction, whichever is the later date.

\textsuperscript{237} See Proposed Fed. R. Evd. 609(c) (a pardon restores lost civil rights but does not affect credibility);


\textsuperscript{242} See Proposed Fed. R. Evd. 609(c) (a pardon restores lost civil rights but does not affect credibility); Cal. Evtd. Code §788 (West 1966).
tion's use, nor will the fact that the verdict was reached after a guilty plea, but there is conflict over whether a judgment based upon a plea of nolo contendere may impeach. It has been held that a minor charge which is settled by a forfeiture of bond is not suitable for this purpose. A constitutionally infirm prior conviction such as a conviction in which the accused was unrepresented by counsel also may not be used to impeach.


223 See United States v. Bray, 454 F.2d 178, 181 (5th Cir. 1971), where the court stated: The problem is not whether he denied or admitted committing the offense for which he was convicted, but whether he committed the offense at all... a guilty plea is often as much a result of an accused's realistic assessment of his chances to be acquitted should he go to trial as it is a result of any altruistic motive to come clean.

224 See also State v. Marquez, 160 Conn. 47, 273 A.2d 689 (1970); A guilty plea before a magistrate not within his jurisdiction cannot be used. See People v. Burd, 18 N.Y.2d 447, 223 N.E.2d 24 (N.Y. 1966). Rule 410 of the proposed federal rules provides that a guilty plea or an offer to plead guilty which is later withdrawn may not be used to impeach. PROPOSED R. EVID. 410. See also State v. Tate, 2 Wash. App. 241, 469 P.2d 999 (1970).

225 See McCormick §43 for cases holding that a plea of nolo contendere can impeach. See also State of Oklahoma ex rel. Neubitt v. Allied Materials Corporation, 312 F. Supp. 130 (W.D. Okla. 1968). The proposed federal rules provide that a plea of nolo contendere, which is later withdrawn may not be used to impeach. PROPOSED R. EVID. 410. See also Reynolds v. People, 172 Colo. 137, 471 P.2d 417 (1970).


228 The fiat against impeachment with a legal involvement not ending in a conviction precludes the use of arrests, charges or indictments, to
impeach. Similarly, a charge which was not pressed is not useable for this purpose. A minority view allows a witness or defendant to be asked if he is actually guilty of a crime that may not have resulted in a conviction. This practice is based upon a distinction which is drawn between the personal knowledge of the witness and the charges or accusations of others. There are also cases which hold that the unlawful occupation of a witness may be shown to attack his credibility.

The prosecutor may usually inquire as to the name and location of a conviction as well as its nature,  and the punishment imposed. Some courts, however, limit the examiner to the mere fact of a conviction and no further questions may be asked. Others allow the examiner to establish the name of the crime only. Even the more liberal majority view does not permit broad forays into the details of the crime. The latitude given the witness to explain the prior conviction may be broader than the examiner's ability to explore its details, but this has been termed a "harmless charity."


See People v. Frank, 31 Mich. App. 378, 188 N.W.2d 95 (1971) (no error since ample proper impeachment discredited the accused).


See People v. Frank, 31 Mich. App. 378, 188 N.W.2d 95 (1971) (no error since ample proper impeachment discredited the accused).
Others allow for cross-examination but hold that after a witness denies a conviction the questioning on that subject should be terminated and the impeachment continued with the introduction of the record, while some advocate very thorough or "sifting" cross-examination. Typically, a witness or defendant may invite inquiry by opening the door to his prior convictions on direct examination.

The prosecutor is of course held to a good faith standard when impeaching a witness. The failure to have the record of the conviction at his disposal is not necessarily erroneous when good faith is present. Some jurisdictions do not allow any cross-examination at all on prior convictions and instead require introduction of the record to impeach. See also Pizzoferrato v. State, 490 P.2d 466 (Alaska 1971); People v. Harley, 4 Ill. App. 3d 722, 223 N.E.2d 10 (1972); People v. Sanders, 1 Ill. App. 2d 168, 238 N.E.2d 180 (1968); People v. Ring, 89 Ill. App. 2d 161, 232 N.E.2d 23 (1967); People v. Webb, 80 Ill. App. 2d 445, 225 N.E.2d 679 (1967); People v. Walker, 84 Ill. App. 2d 264, 228 N.E.2d 597 (1967); People v. Brown, 89 Ill. App. 2d 231, 231 N.E.2d 262 (1967); People v. Snell, 74 Ill. App. 2d 12, 219 N.E.2d 554 (1965); People v. Arakule, 69 Ill. App. 2d 251, 215 N.E.2d 825 (1965); but see State v. Robinson, 272 N.C. 271, 158 S.E.2d 23 (1967) (prior convictions cannot be proved up with independent evidence).


See, e.g., United States v. Reddington, 433 F.2d 997 (4th Cir. 1970) (when defendant painted himself on direct examination as disapproving of narcotics, he opened himself up to impeachment on narcotics convictions); United States v. Leach, 429 F.2d 953 (5th Cir. 1970), cert. denied, 402 U.S. 986 (1971) (when felony conviction was admitted on direct, prosecutor could ask how many convictions); United States v. Windes, 413 F.2d 1407 (9th Cir.), cert. denied, 396 U.S. 933 (1969) (when defense witness admitted three convictions on direct, prosecutor could cross as to six); Suggs v. United States, 407 F.2d 1272 (D.C. Cir. 1969) (when drunkenness was offered to show lack of intent, it could be used to impeach); Burrows v. United States, 292 F.2d 434 (10th Cir. 1961) (when defendant testified he went to California to join the marines he could be crossed on his parole violation which made him ineligible); United States v. Taylor, 312 F.2d 159 (7th Cir. 1963) (witness' denial that he lent his apartment to a narcotics dealer opened the door to cross-examination on his narcotics addiction); State v. Poole, 500 P.2d 726 (Ore. 1972) (when defendant tried to minimize a prior guilty plea by stating that he was told that it was the only way he could get out of jail, it was proper to show that the charge was reduced to petty larceny from burglary). See also People v. McClaine, 312 Ill. App. 2d 669, 270 N.E.2d 176 (1971); People v. Somerville, 88 Ill. App. 2d 134, 231 N.E.2d 701 (1967), aff'd, 48 Ill. 2d 346, 270 N.E.2d 16 (1971); Shackley v. Commonwealth, 415 S.W.2d 873 (Ky. 1967); People v. Bearden, 29 Mich. App. 416, 185 N.W.2d 438 (1971); Leroy v. State, 503 P.2d 249 (1972); Bradley v. State, 414 S.W.2d 673 (Tex. 1967).

Wisconsin courts hold that if a defendant admits his prior conviction on direct examination, cross-examination is thereby precluded. See Nicholas v. State, 49 Wis. 2d 683, 183 N.W.2d 11 (1971); State v. Hancock, 48 Wis. 2d 687, 180 N.W.2d 517 (1970). When the defendant admits his prior conviction on cross-examination, it has been held that further inquiry is then fore-
There is no standard form for the questions that are asked of a witness undergoing impeachment.\textsuperscript{248} Usually, the defense attorney must preserve his objection to the form or nature of the question for purposes of appeal.\textsuperscript{249} Also, where the witness is the defendant, it is the responsibility of the defense to offer an instruction limiting the conviction to impeachment use only.\textsuperscript{250}

In 1965 the Circuit Court for the District of Columbia held in Luck v. United States\textsuperscript{331} that it was not bound to allow the impeachment of a defendant based upon his prior criminal convictions. The court decided instead that the decision whether to allow impeachment was a discretionary one based upon the weighing of the probative value of the convictions against their possible prejudicial effect. Luck and its progeny\textsuperscript{332} looked to the number of convictions, S.W.2d 163 (1971).


The prosecutor is not bound by the answer of the witness. See Minn. Code Ann. § 595.07 (1966); Mo. Stat. § 491.050 (1952); Wash. Code Ann. § 10.52.030 (1962).

See also Laughlin v. United States, 385 F.2d 287 (D.C. Cir. 1967), cert. denied, 390 U.S. 1003 (1969) (“Are you the same Allan U. Forte who, in March of 1942, under the name of A. U. Forte in North Carolina was convicted of abortion?” was proper); State v. Warren, 4 N.C. App. 441, 166 S.E.2d 858 (1969) (“What have you been convicted of?” was proper). See also Shorter v. State, 257 So. 2d 236 (Miss. 1972); Merx v. State, 455 S.W.2d 658 (Tex. 1970).


43 See United States v. Thomas, 452 F.2d 1373 (D.C. Cir. 1971) and nature of the prior convictions as well as their similarity to the instant charge. They also considered the importance of the case to the defendant’s testimony and credibility. While this exercise of discretion was followed by a number of courts,\textsuperscript{333} it was specifically rejected by others.\textsuperscript{334} Finally Congress stepped in to clarify in what was rapidly becoming an uncharted and unpredictable area by rewriting the section of the District of Columbia Code pertaining to impeachment so that it conformed with the Proposed Federal Rules of Evidence.\textsuperscript{335} That section now provides that prior convictions falling within the purview of the code (discussed previously) “shall” be admitted by cross-examination or by evidence.


IX Impeachment by Misconduct Not Resulting in Conviction

Nowhere is there so little uniformity of practice among the various jurisdictions as there is in the area of impeachment by misconduct not resulting in a conviction. While some courts refuse to allow this type of impeachment\(^\text{356}\) (but often find that it amounts to only harmless error),\(^\text{357}\) others permit the prosecutor to question both defendants\(^\text{358}\) and defense witnesses\(^\text{359}\) in this manner. Courts may distinguish between the two, however, in light of the greater possibility of prejudice when examining

\(^{356}\) See United States v. Davenport, 449 F.2d 696 (5th Cir. 1971) (error to cross-examine the defendant about an insurance law suit tending to show fraudulent intent); Courtney v. United States, 390 F.2d 520 (9th Cir., reh. denied 393 U.S. 922 (1969) (failure to file income tax returns could not be used); State v. Goldsmith, 104 Ariz. 226, 450 P.2d 684 (1969) (improper to cross-examine concerning unnatural acts); People v. Sawyer, 256 Cal. App. 2d 66, 63 Cal. Rptr. 749 (1967) (improper to ask about possessing a pistol); Pankey v. Commonwealth, 485 S.W. 2d 513 (Ky. 1972) (improper to allude to possibility of defendant being a professional robber); State v. Wyman, 270 A. 2d 460 (Me. 1970) (improper to ask about marital infidelity); Wood v. State, 257 So. 2d 193 (Miss. 1972) (improper to ask about number of marriages and discipline problems with son); People v. Johnson, 27 N.Y.2d 119, 261 N.E.2d 644 (1970), cert. denied, 401 U.S. 966 (1970) (impeachment not made in good faith); Thrash v. State, 482 S.W.2d 513 (Tex. 1972) (proper to refuse to allow the defense to show that a government witness was a homosexual); State v. Beyor, 129 Vt. 472, 282 A.2d 819 (1971) (improper to ask about domestic relations, an illicit affair, delinquency in support payments and financial difficulties); State v. Lashipire, 74 Wash. 2d 888, 447 P.2d 727 (1968), aff'd, 422 P.2d 819 (1967).


the accused.\(^\text{360}\) In any event, the examiner's questions must be based upon good faith.\(^\text{361}\)

Acts of misconduct useable for impeachment may be limited to those which are relevant to credibility.\(^\text{362}\) This is similar to the "probative of truthfulness or untruthfulness" requirement of the Proposed Federal Rules of Evidence.\(^\text{363}\) A broader approach is taken by courts which allow impeachment based upon any vicious or immoral act tending to relate to credibility.\(^\text{364}\)

Professor McCormick suggests that courts may look to five factors when determining whether or not to allow impeachment by acts of misconduct. Those factors are:

1) whether the testimony of the witness under the attack is crucial or unimportant,
2) the relevancy of the act of misconduct to truthfulness . . . ,
3) the nearness or remoteness of the misconduct to the time of trial,
4) whether the matter inquired into is such as to lead to time-consuming and distracting explanations on cross-examination or re-examination,
5) whether there is undue humiliation of the witness and undue prejudice.\(^\text{365}\)

Bad acts which tend to show bias, however, are generally admissible.\(^\text{366}\) (Impeachment to show bias is discussed in Section X.)


\(^{361}\) The presence of a good faith belief that the misconduct has a reasonable basis in fact may allow the act to be used for impeachment. See People v. Brown, 26 N.Y.2d 88, 257 N.E.2d 16 (1970); State v. Mack, 193 S.E.2d 71 (N.C. 1972). But see People v. Nuccio, 43 Ill. 2d 375, 253 N.E.2d 353 (1969).


\(^{363}\) Proposed Fed. R. Evid. 608(b). The note accompanying the rule advises that the fifth amendment is not waived just by the act of taking the witness stand.


\(^{365}\) McCORMICK § 42.

Impeachment attempts which are founded in conduct that has at best, a remote bearing upon credibility, are frequently held to be improper. The most common of these is the attempt to discredit a defendant or defense witness through inquiry into an extra-marital affair or the birth of illegitimate children. Forays into patterns of conduct such as homosexuality, drinking and fighting, or into an individual’s personal associations also occur with regularity.

There is a clear division of authority over whether narcotics addiction is a proper subject of cross-examination. Those courts favoring a broad range of inquiry in this regard cite the inherent unreliability of narcotics addicts as support for this position. Other courts hold that the use of narcotics may be a subject of cross-examination only when there is reason to believe that the person being examined was under the influence of drugs at the time of the events in question.

Acts of misconduct are proper subjects of inquiry when they tend to show the state of mind, motive or intent of the accused. Of course they may not be used to demonstrate that the defendant has a propensity to engage in criminal conduct. Frequently, prior acts not otherwise admissible may be made so when put in issue on direct examination.

X Impeachment on Grounds of Bias, Interest, Hostility and Capacity

The prosecutor has traditionally been allowed very broad latitude when cross-examining a witness to demonstrate bias, interest, hostility or lack of competence. All of these qualities are viewed as having a bearing on the credibility of the witness’ testimony.

Bias in favor of the defendant may be explored through inquiry into the witness’ family ties.


See, e.g., Suhl v. United States, 390 F.2d 547 (9th Cir.), cert. denied, 391 U.S. 964 (1968) (fraudulent intent in mail fraud put in issue on direct); State v. Nevarey, 108 Ariz. 414, 459 P.2d 709 (1972) (details of a resisted arrest opened on re-direct); People v. Tarry, 85 Cal. Rptr. 409, 466 P.2d 961 (1970) (sexual relationship put in issue); Whittaker v. State, 421 S.W.2d 905 (Tex. 1967) (testimony that defendant could drink twelve beers before getting drunk opened his prior driving record); State v. Bassett, 4 Wash. App. 491, 481 P.2d 939 (1971) (after defendant’s wife testified that their sex life was normal, it was proper to cross with her prior statement that the defendant forced her at gunpoint to stand nude under a street lamp). But see State v. Storms, 244 Ore. 357, 418 P.2d 261 (1966) (state could not damage defendant’s reputation after he had thoroughly blackened it on direct).


friendship or romantic involvement with the accused. In spite of the very real possibility of prejudice, a homosexual relationship between the defendant and the witness is a customary and proper subject of cross-examination. Employment and financial ties as well as the existence of a partnership in crime may also be developed by the examiner.

The prosecutor may show through cross-examination that testimony which is favorable to the accused may have been influenced by the witness' fear for his physical safety. Hostility to the police or to a government witness may also be exposed as a motive for the witness' testimony. Cross-examination may test the memory and perceptual ability of a witness' senses, but courts are apt to disallow courtroom experiments. The mental health of a witness may also be inquired into insofar as it relates to the credibility of the witness.


See, e.g., United States v. Williams, 446 F.2d 1115 (5th Cir. 1971) (witness extensively examined about his feeling towards the coast guard in a trial for assaulting coast guard officers); United States v. Littlepage, 435 F.2d 498 (5th Cir. 1970), cert. denied, 402 U.S. 913, reh. denied, 402 U.S. 1013 (1971) (hostility to the government shown by a pending indictment for the same charge as in the instant case); McKay v. State, 489 P.2d 145 (Alaska 1971) (witness asked if he was presently under charge arising from the work of the same undercover agent who was responsible for the instant case); State v. Goff, 195 N.W.2d 521 (S.D. 1972) (witness questioned if her children were taken away by court proceedings in which the state's attorney had some involvement).


XI CROSS-EXAMINATION BY USE OF PHYSICAL EVIDENCE

Within the limitations of reasonableness and propriety, cross-examination may include more than just a series of questions and answers devoid of movement or physical activity. The most common source of physical interaction is the use of documents which have been introduced as evidence or have been used to refresh the witness' recollection on direct examination. These may be shown to the witness and questions based upon them may

(proper to ask a witness if he was ever in a mental institution); State v. Miskell, 161 N.W.2d 732 (Iowa 1968) (proper to ask whether witness declared incompetent); Commonwealth v. Carroll, 276 N.E.2d 705 (Mass. 1971) (proper to inquire about mental infirmities and idiocrasies as well as a medical discharge from the army); State v. Vigliano, 47 N.J. 587, 221 A.2d 353 (1966) (error to refuse to allow the defendant to examine a government witness as to his commitment for psychiatric observation); Sturdevant v. State, 49 Wis. 2d 142, 181 N.W.2d 523 (1970) (proper to examine regarding intelligence and physical or mental condition when relevant to credibility). But see State v. Crow, 486 S.W.2d 248 (Mo. 1972) (not error to refuse to allow defense to examine a state witness regarding his treatment for mental illness, and his masquerading as an Edwardian English fop and an Arabian sultan).


Documentary evidence not used on direct examination may be employed on cross. See Daugherty v. State, 225 Ga. 274, 168 S.E.2d 155 (1969) (documents not offered into evidence can be used to remind the witness of her marriage date); People v. White, 38 Mich. App. 651, 197 N.W.2d 121 (1972) (blurring an allibi witness by inferring that a piece of paper was a contrary statement that he made to police was improper because the prosecutor refused to show the paper to defense counsel); State v. Kuske, 109 N.J. Super. 575, 264 A.2d 227 (1970) (inflammatory letters and a telegram written by the defendant to the complaining witness in a sodomy prosecution could be used to impeach his denial that the acts took place).


be tendered. Similarly, photographs may be shown to the witness and his responses elicited.

A most interesting area of the art of cross-examination is the involvement of the witness (usually the defendant) in demonstrations while on the witness stand. While a witness cannot be required to do embarrassing or humiliating things before the jury, within the bounds of relevance, he may be required to perform certain acts. Typically, he might be compelled to demonstrate to the jury the truth of a claim he has made on direct examination, such as that a weapon fired accidentally. Most commonly, a defendant may be required to briefly don a certain garment found at the crime scene such as a hat or a jacket to demonstrate proper fit and hence the likelihood of ownership. Defendants are also often called upon to produce handwriting exemplars on cross-examination when that is an issue in the case.

See Comdon v. State, 498 P.2d 276 (Alaska 1972) (photographs of bruised wife shown to defendant); Commonwealth v. Izzo, 357 Mass. 39, 267 N.E.2d 631 (1971) (photograph of defendant wearing a beard, a German helmet and a swastika-laden motorcycle jacket was shown to defense witnesses); State v. Rhinehart, 70 Wash. 2d 649, 424 P.2d 905, cert. denied, 389 U.S. 832 (1971) (defendant cross-examined using pictures of nude males ostensibly found in his apartment).

See Doremus v. United States, 414 F.2d 253 (6th Cir. 1969). It has been held to be within the court's discretion to refuse to compel a government witness to display his arms to the jury after he claimed he no longer used narcotics. See United States v. Lawler, 413 F.2d 622 (7th Cir. 1969), cert. denied, 396 U.S. 1046 (1970). See also People v. Brocato, 17 Mich. App. 277, 169 N.W.2d 483 (1969), in which the defendant was required to strip to the waist to demonstrate the amount of hair he had on his body as a means of identification.

See State v. Patterson, 200 Kan. 176, 434 P.2d 808 (1967). (Defendant was asked to demonstrate how a cocked weapon with the cylinder open accidentally discharged and killed his wife); Stevens v. Commonwealth, 462 S.W.2d 182 (Ky. 1970) (defendant's wife was required to show how a shotgun barrel struck a car door during the shooting in question). See also State v. Thorne, 39 Utah 208, 117 P. 58 (1911).


See Doremus v. United States, 414 F.2d 253 (6th Cir. 1969). It has been held to be within the court's discretion to refuse to compel a government witness to display his arms to the jury after he claimed he no longer used narcotics. See United States v. Lawler, 413 F.2d 622 (7th Cir. 1969), cert. denied, 396 U.S. 1046 (1970). See also People v. Brocato, 17 Mich. App. 277, 169 N.W.2d 483 (1969), in which the defendant was required to strip to the waist to demonstrate the amount of hair he had on his body as a means of identification.
XII General Prosecutorial Misconduct

The responsibility of the prosecutor to engage in cross-examination in a fair and ethical manner involves matters of judgment, taste and judicial discretion which do not readily lend themselves to compartmentalization. The propriety of a particular area or mode of examination is rarely so clearly defined as it was in the classic case of prosecutorial misconduct, Berger v. United States. In Berger, the prosecutor

a) misstated facts,

b) put answers in the mouths of witnesses which they hadn’t uttered,

c) assumed facts unsupported by the evidence,

d) pretended to misunderstand witnesses’ answers and continued to cross-examine them on that basis,

e) suggested that statements had been made to him outside the court, when in fact none had,

f) bullied and argued with witnesses.

The Berger case provides a fairly complete outline of the “foul blows” that a prosecutor must refrain from striking, no matter how odious the deeds of the defendant might have been.

While a good faith limited entry into a questionable area generally does not require the reversal of a verdict, cross-examination which tends to inflame the passions of the jury and thereby divert them from proper consideration of the issues at hand is another matter. Dwelling unnecessarily on a victim’s pleas for mercy or asking a defendant charged with rape if he likes to rape little girls, or why he specializes in little girls, may well be expected to prejudice a jury. Cross-examination which humiliates or degrades the accused is also condemned as improper. For example, to refuse to call a defendant “Mr.” or to call attention by


forty-four separate references to the fact that an armed robbery defendant is a prostitute is reversible error. The form of the question may be cause for appellate castigation if it is argumentative, accusatory, or if it is calculated to intimidate the witness.

See also Pendergrast v. United States, 417 F.2d 776 (D.C. Cir.), cert. denied, 395 U.S. 926 (1969), where reversal was not warranted because prosecutor referred to the defendant as “Mr. defendant.”

See State v. Holm, 93 Idaho 904, 478 P.2d 254 (1970). Guidelines in this area have been propounded although precision in definition is, of course, lacking. See A.B.A. STANDARDS RELATING TO THE PROSECUTION FUNCTION 5.7(a):

[The examination of all witnesses should be conducted fairly, objectively and with due regard for the dignity and legitimate privacy of the witness, and without seeking to intimidate or humiliate the witness unnecessarily. Proper cross-examination can be conducted without violating rules of decorum.

See also Burton v. State, 267 So. 2d 503 (Ala. 1972) (improper to ask defendant’s wife how many times she had been raped); Wells v. State, 46 Ala. App. 342, 241 So. 2d 901 (1970) (error to cross-dress with amorous letters written by a woman twenty years his senior who had undergone psychotherapy); People v. Jones, 273 N.E.2d 423 (Ill. 1971) (error to ask defendant “Did it make you feel big to kill a man, Mrs. Jones?”); People v. Smothers, 2 Ill. App. 3d 513, 276 N.E.2d 427 (1971) (proper to ask a question regarding the mature side of the defendant’s face); Commonwealth v. Lytes, 209 Pa. Super. 456, 228 A.2d 922 (1967) (improper to ask defendant if he was in the presence of four lesbians putting on a “queer show”); Craft v. State, 271 So. 2d 735 (Miss. 1973) (improper to ask questions which embarrass or humiliate).

In State v. Days, 281 N.C. 592, 189 S.E.2d 481 (1972), the court stated that although a witness cannot be badgered or humiliated with insulting or impertinent questions, he can be asked degrading questions which tend to disparage him. No definition of those terms were provided.

See, e.g., Hawkins v. United States, 417 F.2d 1271 (5th Cir. 1969), cert. denied, 397 U.S. 914 (1970) (argumentative to ask “why is it that you elected to plead not guilty?”); State v. Taylor, 198 Kan. 290, 424 P.2d 612 (1967) (argumentative to ask defendant if he had ever done a dishonest thing, ever lied, or ever broke into places); Barlow v. State, 231 So. 2d 829 (Miss. 1970) (argumentative to ask: “You made enough money there that you could have been honest? Wouldn’t you agree with me that justice of the peace making that kind of money at the expense of the taxpayer ought to be honest?”). See also Hooks v. State, 197 So. 2d 238 (Miss. 1967) (not error to state, “are you going to sit there and face these people while under oath? Face your lord now and tell the truth...you see, it breaks out all over your face, come on, I’m waiting for your answer.”).

See, e.g., State v. Hyleck, 286 Minn. 126, 175 N.W.2d 163 (1970); Sensabaugh v. State, 426 S.W.2d 224 (Tex. 1968).

See, e.g., United States v. Reed, 446 F.2d 1226 (8th Cir. 1971), aff’d, 461 F.2d 1106 (8th Cir. 1972); People v. Pena, 383 Mich. 402, 175 N.W.2d 767 (1970).

Probably the most frequent instances of prosecutorial misconduct occur when questions either insinuate or actually state propositions which are unsupportable by evidence in the case. These practices have been widely criticized. Also not allowable are questions delving into a defendant’s financial condition if it tends to show that his economic limitations presented a motive for criminal conduct, and questions which attempt to at-
tack a witness’ credibility based upon his religious affiliation.\(^49\) Quite obviously, questions which include racial slurs or attempts to curry favor with any racially prejudiced members of the jury are prohibited.\(^40\)

A permissible line of inquiry which is often undertaken is one composed of questions regarding the persons to whom the witness has spoken about the case.\(^41\) Witnesses may also be questioned about their understanding of perjury if it is not calculated to prejudice the jury against a particular witness.\(^42\) Finally, rephrased or repetitious questions are permitted within the judge’s discretion, but they should not tend to prejudice the jury.\(^43\)

**XIII THE COLLATERAL IMPEACHMENT RULE**

Any complete discussion of cross-examination must make reference to the collateral impeachment rule. This rule provides that in order to avoid needless time-consuming inquiries into “collateral” matters, the cross-examiner is bound by the witness’ answer and extrinsic evidence may not be offered to contradict the witness.\(^44\)

Matters are not considered collateral if they are related to the central substantive issues of the case,\(^45\) or if they are subject to being proved up with extrinsic evidence in the case-in-chief.\(^46\) Bias, interest, prejudice and conviction of a crime fall within the latter test, and are therefore not subject to the prohibition against collateral impeachment.\(^47\) Misconduct, however, is termed a collateral issue and the prosecutor is, therefore, bound by his answer when impeaching a witness on that basis.\(^48\)

**CONCLUSION**

As has been noted throughout this article, many entries into an area of “improper” cross-examination result in harmless error. Juries are instructed to disregard,\(^49\) questions are answered in the nega-

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In State v. Scott, 192 S.E.2d 669 (S.C. 1972), the court held that while a negative answer precludes refutation with extrinsic evidence, further cross-examination may be warranted. It is improper to overemphasize collateral matters. See People v. Wilson, 40 Mich. App. 290, 198 N.W.2d 424 (1972); Davis v. State, 413 P.2d 920 (Okla. 1966).


\(^46\) See Mccormick §§36, 47. See also United States v. Lambert, 463 F.2d 552 (7th Cir. 1972); State v. Scott, 192 S.E.2d 669 (S.C. 1972).


\(^48\) See also Dillon v. United States, 391 F.2d 433 (10th Cir. 1968), aff’d, 392 F.2d 1030 (10th Cir. 1970); Edelwinter v. State, 244 Ark. 1096, 428 S.W.2d 271 (1968).

\(^49\) See Mccormick §§40, 42; Wigmore §97; United States v. Keefer, 464 F.2d 1385 (7th Cir. 1972).

tive or not at all, and defense attorneys fail to object and thereby do not preserve the record for appeal. The presence of overwhelming evidence of guilt regularly prevents the reversal of a verdict that may be tainted with improper cross-examination.

The individual prosecutor must consider these realities along with the guidelines previously discussed. He must view it all in light of his responsibilities to the public as well as the accused, and he must then determine how he shall wield the sword of justice.

(1971). In White v. State, 444 S.W.2d 921, 922 (Tex. 1969), the court stated the applicable rule:

[An error in asking an improper question or in admitting improper testimony can generally be cured or rendered harmless by a withdrawal of such testimony and an instruction to disregard the same except in extreme cases where it appears that the question is clearly calculated to inflame the minds of the jury and is of such character as to suggest the impossibility of withdrawing the impression produced on their minds.]


