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PROSECUTORIAL CROSS-EXAMINATION: LIMITATIONS UPON THE SWORD OF JUSTICE

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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-examination[4] in an effort to strengthen his own case[5] 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 status[10] and employment.[11] One may ask about a witness' previous whereabouts[12] or general knowledge of matters pertaining to the crime in question.[13] These general questions are governed by

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[1] *See* WIGMORE, EVIDENCE §1367 (Chadbourn rev. 1940) [hereinafter cited as WIGMORE].

[2] STRYKER, THE ART OF ADVOCACY (1954).

[3] *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 7; ABA STANDARDS RELATING TO THE PROSECUTION FUNCTION 1.1(c); State v. Wyman, 270 A.2d 460, 463 (Me. 1970) ("While they may strike hard blows, they must refrain from improper and illegitimate tactics solely calculated to produce a conviction. It is just as much their duty to see that the accused has a fair trial, as it is to bring about a just conviction of the guilty.").

[4] *See* Barber v. Page, 390 U.S. 719 (1968); Pointer v. Texas, 380 U.S. 400 (1965); Brown v. United States, 234 F.2d 140 (6th Cir. 1956), *reh. denied*, 356 U.S. 948 (1958) (the right of cross-examination belongs to the state as well as to the accused); State v. Reeh, 434 S.W.2d 416 (Tex. 1968).

[5] *See* State v. Redford, 27 Utah 2d 379, 496 P.2d 884 (1972); DUCANN, THE ART OF THE ADVOCATE (1964).

[6] *See* DUCANN, *supra* note 5; Sears v. State, 282 N.E.2d 807 (Ind. 1972).

[7] TUCKER, EXAMINATION, CROSS-EXAMINATION AND IMPEACHMENT, THE PROSECUTOR'S DESKBOOK (N.D.A.A. 1971); BYRNE, EXAMINATION OF WITNESSES, THE PROSECUTOR'S DESKBOOK (N.D.A.A. 1971).

[8] *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*.

[9] Commonwealth v. Arsenault, 280 N.E.2d 129 (Mass. 1972).

[10] Commonwealth v. Libby, 266 N.E.2d 641 (Mass. 1971) (tended to show adultery); Porter v. State, 440 P.2d 249 (Wyo. 1968) (questions of marriage and child custody).

[11] People v. Suriwka, 2 Ill. App. 3d 384, 276 N.E.2d 490 (1971); People v. Hough, 102 Ill. App. 2d 287, 243 N.E.2d 520 (1968); Bolin v. Commonwealth, 407 S.W.2d 431 (Ky. 1966), *cert. denied*, 386 U.S. 946 (1967).

[12] State v. Brooks, 107 Ariz. 320, 487 P.2d 387 (1971) (proper to ask defendant's whereabouts at the time of his arrest).

[13] Butler v. State, 285 Ala. 387, 232 So. 2d 631 (1970); State v. Harrington, 178 N.W.2d 314 (Iowa 1970).

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.[15]

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.[16] It generally applies, subject to the limitations of the fifth amendment, to defendants as well as to non-party witnesses.[17] The "wide open" rule 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).[18] 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]

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[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. Arsenault, 280 N.E.2d 129 (Mass. 1972) (residence was prison). *See also* Prince v. State, 461 S.W.2d 413 (Tex. 1970) (proper to cross-examine defendant regarding his attitude towards police, white people and his legal rights).

[15] *See* Butler v. State, 285 Ala. 387, 232 So. 2d 631 (1970); PROPOSED FED. R. EVID. 611.

[16] *See* Riddle v. Dorough, 279 Ala. 527, 187 So. 2d 568 (1966) (all matters within the issues of the case); Brown v. State, 45 Ala. App. 391, 231 So. 2d 167 (1970); State v. Gilreath, 107 Ariz. 318, 487 P.2d 385 (1971), *cert. denied*, 406 U.S. 921 (1972) (all matters within knowledge of witness 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, 245 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 (1899) (any question pertinent to the case).

[17] *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 defendants and their wives to the scope of the direct, all others can be crossed on the entire case).

[18] PROPOSED FED. R. EVID. 611(b) provides "A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interests of justice, the judge may limit cross-examination with respect to matters not testified to on direct examination." The comment following the rule states that it does not purport to resolve the constitutional questions raised by a defendant's fifth amendment waiver.

The proposed federal rule represents an about-face from the rule proposed in 1969 which limited cross examination to the scope of the direct.

Other jurisdictions providing by statute for the wide open rule are Missouri *supra* note 17, and LA. REV. STAT., ch. 15, §280 (1967).

[19] Commentators have long advocated the "wide open" rule due to the desire to provide for maximal discovery of the truth. WIGMORE §§1887–88; MCCORMICK, LAW OF EVIDENCE (2d ed. Cleary, 1971) §27 [hereinafter cited as MCCORMICK].

[20] *See* Sawyer v. United States, 202 U.S. 150 (1906); Philadelphia & Trenton R.R. v. Stimpson, 39 U.S. 448 (1840) (one of the earliest cases standing for the limited rule); United States v. Prionas, 438 F.2d 1049 (8th Cir.), *cert. denied*, 402 U.S. 977 (1971); Lewis v. United States, 373 F.2d 576 (9th Cir.), *cert. denied*, 389 U.S. 880 (1967); People v. Lynn, 16 Cal. App. 3d 259, 94 Cal. Rptr. 16 (1971); State v. Stevens, 93 Idaho 48, 454 P.2d 945 (1969); People v. Clark, 96 Ill. App. 2d 247, 238 N.E.2d 220 (1968); People v. Sisti, 87 Ill. App. 2d 107, 230 N.E.2d 500 (1967); State v. Harrington, 178 N.W.2d 314 (Iowa 1970); State v. Broten, 176 N.W.2d 827 (Iowa 1970); State v. Allnut, 261 Iowa 897, 156 N.W.2d 266 (1966); Jenkins v. State, 14 Md. App. 1, 285 A.2d 667 (1971); State v. Dalton, 433 S.W.2d 562 (Mo. 1968); State v. McClinton, 418 S.W.2d 55 (Mo. 1967); People v. Rahming, 26 N.Y.2d 411, 259 N.E.2d 727 (1970).

[21] *See* Storie v. State, 254 Ind. 301, 258 N.E.2d 849 (1970).

[22] *See* State v. Coyne, 452 S.W.2d 227 (Mo. 1970) (defendant on direct said he made an untrue statement to police, proper to cross on it).

[23] *See* State v. Bagley, 339 Mo. 215, 96 S.W.2d 331 (1936).

[24] *See* State v. Mirschl, 208 Kan. 111, 490 P.2d 917 (1971); State v. Roth, 200 Kan. 677, 438 P.2d 58 (1968).

connected with[25] 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 case[33] 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

[25] *See* Philadelphia & Trenton R.R. v. Stimpson, 39 U.S. 448 (1840).

[26] *See* State v. Dalton, 433 S.W.2d 562 (Mo. 1968).

[27] *See* People v. Eisenberg, 266 Cal. App. 2d 606, 72 Cal. Rptr. 390 (1968); State v. Dalton, 433 S.W.2d 562 (Mo. 1968); State v. Bagley, 339 Mo. 215, 96 S.W.2d 331 (1936).

[28] *See, e.g.*, cases cited note 20 *supra*.

[29] PROPOSED FED. R. EVID. 611(b) (1969) (the drafters of this rule, however, did an about-face within three years for the rule finally proposed by the Supreme Court embraced the "wide open" rule), note 18 *supra*; CAL. EVID. CODE §773 (West 1966).

[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 he 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).

[34] *Id.*

[35] *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 compounded since outside the scope of the direct).

[36] *See, e.g.*, People v. Eisenberg, 266 Cal. App. 2d 606, 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?").

[37] *See* United States v. Roselle, 432 F.2d 879 (9th Cir. 1970), *reh. denied*, 402 U.S. 924 (1971) (error was deminimus); State v. Stevens, 93 Idaho 48, 454 P.2d 945 (1969); Kennamer v. State, 59 Okla. Crim. 146, 57 P.2d 646 (1936).

[38] *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).

[39] *See* United States v. Hoffman, 415 F.2d 14 (7th Cir.), *cert. denied*, 396 U.S. 958 (1969); Lewis v. United States, 373 F.2d 576 (9th Cir.), *cert. denied*, 389 U.S. 880 (1967); DeLilly v. State, 11 Md. App. 676, 276 A.2d 417 (1971).

[40] *See* Wills v. Russell, 100 U.S. 621 (1879); Lewis v. United States, 373 F.2d 576 (9th Cir.), *cert. denied*, 389 U.S. 880 (1967).

[41] *See* United States v. Augello, 452 F.2d 1135 (2d Cir. 1971), *cert. denied*, 406 U.S. 922 (1972) (defendant can be impeached like any other witness); United States v. Bland, 432 F.2d 96 (5th Cir. 1970), *cert. denied*, 401 U.S. 912 (1971) (defendant can be impeached like any other witness); United States v. Justice, 431 F.2d 30 (5th Cir. 1970) (defendant can be impeached like any other witness); United States v. Franklin, 429 F.2d 274 (8th Cir. 1970), *cert. denied*, 400 U.S. 967 (1970) (defendant can be crossed as to his narcotic addiction because of the inherent unreliability of addicts).

is not relaxed in pre-trial proceedings,[42] but greater flexibility is allowed after conviction, such as in sentencing hearings.[43]

The discretion of the trial judge plays a major role throughout the various phases of cross-examination,[44] but nowhere is it as dominant as in the determination of proper scope.[45] This discretionary power is left undisturbed except when flagrantly or grossly abused,[46] and when the defendant has been unduly prejudiced.[47] The trial judge has the discretionary power to limit to scope of "wide open" cross-examination as well as to expand the scope of limited cross.[48]

As previously noted,[49] 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.[50] 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.[51] More liberal is the view that cross-examination may cover all reasonable and logical inferences of the direct.[52] Typically, cross-examination is permitted if it tends to clarify,[53]

[42] *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. Morrin, 31 Mich. App. 301, 187 N.W.2d 434 (1971).

[43] *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. Adkins, 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).

[44] *See, e.g.*, United States v. Cobb, 449 F.2d 1145 (D.C. Cir. 1971) (within court's discretion to withhold rulings in advance of direct); United States v. Huff, 442 F.2d 885 (D.C. Cir. 1971) (impeachment of defendant and defense witness within court discretion); United States v. Pledger, 409 F.2d 1335 (5th Cir. 1969); Howard v. United States, 389 F.2d 287 (D.C. Cir. 1967) (wide discretion regarding reliability). *See also* United States v. Thomas, 345 F.2d 431 (7th Cir. 1965); Rizzo v. United States, 295 F.2d 638 (8th Cir. 1961); People v. Sommerville, 88 Ill. App. 2d 212, 232 N.E.2d 115 (1967), *cert. denied*, 393 U.S. 823 (1968); State v. Broten, 176 N.W.2d 827 (Iowa 1970); Cornwall v. State, 6 Md. App. 178, 251 A.2d 5 (1969); State v. Daye, 281 N.C. 592, 189 S.E.2d 481 (1972). *But see* People v. Lynn, 16 Cal. App. 3d 259, 94 Cal. Rptr. 16 (1971) (no discretion as to waiver of fifth amendment).

[45] *See* United States v. Henon, 457 F.2d 798 (9th Cir. 1972); United States v. White, 451 F.2d 351 (8th Cir. 1971), *cert. denied*, 406 U.S. 923 (1972); United States v. Talk, 418 F.2d 53 (10th Cir. 1969); Goings v. United States, 377 F.2d 753 (8th Cir. 1967), *cert. denied*, 393 U.S. 883 (1968); Harris v. United States, 371 F.2d 365 (9th Cir. 1967); United States v. Bowe, 360 F.2d 1 (2d Cir. 1966); Chapman v. United States, 346 F.2d 383 (9th Cir.), *cert. denied*, 382 U.S. 909 (1965); United States v. Ruehrup, 333 F.2d 641, (7th Cir.), *cert. denied*, 379 U.S. 903 (1964); United States v. Greenberg, 268 F.2d 120 (2d Cir. 1959); Bell v. United States, 185 F.2d 302 (4th Cir. 1950), *cert. denied*, 340 U.S. 930 (1951); Madden v. United States, 20 F.2d 289 (9th Cir.), *cert. denied*, 275 U.S. 554 (1927); *In re* Hogan, 309 F. Supp. 945 (D. Del 1970); People v. Smythe, 270 N.E.2d 431 (Ill. 1971); People v. Duncan, 127 Ill. App. 2d 305, 262 N.E.2d 274 (1970); People v. Clark, 96 Ill. App. 2d 247, 238 N.E.2d 220 (1968); State v. Harrington, 178 N.W.2d 314 (Iowa 1970); Alexander v. Commonwealth, 463 S.W.2d 334 (Ky. 1971); Commonwealth v. Hicks, 356 Mass. 442, 252 N.E.2d 880 (1969); Commonwealth v. Nunes, 351 Mass. 401, 221 N.E.2d 752 (1966).

[46] *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 Cir.), *rev'd*, 350 U.S. 807 (1955) (error only if discretion is abused); People v. Swingle, 28 App. Div. 2d 1063, 284 N.Y.S.2d 133 (1967) (discretion not disturbed unless injustice present or plain abuse).

[47] *See* United States v. Pledger, 409 F.2d 1335 (5th Cir. 1969) (reverse if probative value outweighed by prejudice).

[48] *See* PROPOSED FED. R. EVID. 611(b), *supra* note 18 ("In the interests of justice, the judge may limit cross-examination with respect to matters not testified to on direct examination." This is to avoid confusion and protraction of the case). *See also* PROPOSED FED. R. EVID. 611(a):

> 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 effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

[49] *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).

[50] 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, 130 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.

[51] *See* MCCORMICK §21; State v. Jesser, 95 Idaho 43, 501 P.2d 727 (1972).

[52] *See* People v. Doebke, 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).

[53] *See* United States v. Crawford, 438 F.2d 441 (8th Cir. 1971); State v. Sweazea, 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 P.2d 92 (1969) (crossed on prior

qualify,[54] elaborate,[55] explain,[56] modify[57] or discredit[58] the testimony offered on direct examination. Also proper are questions which tend to elicit additional relevant details regarding matters explored on direct.[59] Within limits, a witness may be asked the whereabouts of persons mentioned in direct testimony,[60] and often the examiner may even probe into the witness' personal associations.[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.[62] These subjects often relate to alibis,[63] theories of defense,[64] items of evidence,[65]

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).

[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 606, 72 Cal. Rptr. 390 (1968).

[55] *See* Issac 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. 488, 458 P.2d 92 (1969) (questioning additional criminal conduct); 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).

[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 to cross 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).

[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); Rapp v. State, 418 P.2d 357 (Okla. 1966); State v. Baca, 80 N.M. 488, 458 P.2d 92 (1969); State v. Anaya, 79 N.M. 43, 439 P.2d 561 (1968).

[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, 80 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); 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).

[59] *See* United States v. Lacob, 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 practice—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 776 (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 829 (Tenn. 1972).

[60] *See* United States v. Free, 437 F.2d 631 (D.C. Cir. 1970) (a 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).

[61] *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 123 (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).

[62] *See* Powers v. United States, 223 U.S. 303 (1912); Jenkins v. State, 14 Md. App. 1, 285 A.2d 667 (1971); State v. Dvisen, 403 S.W.2d 574 (Mo. 1966); State v. Lee, 255 S.C. 309, 178 S.E.2d 652 (1971) (could cross on collateral matters opened on direct).

[63] *See* State v. Taylor, 99 Ariz. 85, 407 P.2d 59 (1965), *cert. denied*, 384 U.S. 979 (1966) (alibi witness opens door to questions regarding his whereabouts).

[64] *See* State v. Broten, 176 N.W.2d 827 (Iowa 1970) (fist fighting ability of manslaughter defendant).

[65] *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 a reason for no lineup, *i.e.*, no doubt as to defendant's identity); United States v. Prionas, 438 F.2d 1049

personal histories[66] and the defendant's actions.[67] Often questions which have been asked on direct examination are repeated verbatim by the cross-examiner.[68] Although the "opened door" test is quite a liberal one, the connection with the direct examination must still be more than tenuous.[69] When that connection is established, however, even questioning which is highly damaging to the accused will be permitted.[70]

It is widely held that when a person (including a defendant) assumes the witness stand, his credibility is automatically put in issue,[71] 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.[72] One must be careful to

(8th Cir.), *reh. denied*, 402 U.S. 977 (1971) (exhibits bearing a certain name, could ask if defendant ever used that name); Williams v. State, 238 So. 2d 137 (Fla.), *cert. denied*, 241 So. 2d 397 (Fla. 1970) (defendant states he offered to take a polygraph, could 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); Gilbreath v. State, 412 S.W.2d 60 (Tex. 1967) (similarity between signature on defendant's confession and a questioned bill of sale).

[66] *See* United States v. Hykel, 461 F.2d 721 (3d Cir. 1972) (arrest); Sinclair v. Turner, 447 F.2d 1158 (10th Cir. 1971), *cert. denied*, 405 U.S. 1048 (1972) (could cross as to homosexual conduct); 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 also 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. 964 (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 N.W.2d 827 (Iowa 1970) (could cross as to Golden Gloves activity of manslaughter defendant); State v. Fahy, 201 Kan. 366, 440 P.2d 566 (1968) (could cross as to prior juvenile court charge continuously referred to on direct); Pyeath v. State, 462 S.W.2d 952 (Tex. 1971) (could cross as to charges pending against a defense witness).

[67] *See* United States v. Robinson, 327 F.2d 959 (7th Cir.), *cert. denied*, 377 U.S. 1003 (1964) (amount of drinking on day in question); DeRose v. United States, 315 F.2d 482 (9th Cir.), *cert. denied*, 375 U.S. 846 (1963) (conversation with a narcotics agent); Madden v. United States, 20 F.2d 289 (9th Cir.), *cert. denied*, 275 U.S. 554 (1927).

[68] *See* Crain v. Commonwealth, 484 S.W.2d 839 (Ky. 1972) (question regarded prior felony); Pooler v. State, 462 S.W.2d 256 (Tenn. 1970) (regarded defendant's relationship with another person arrested).

[69] *See* 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 him 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. Crowder, 119 Wash. 450, 205 P.2d 850 (1922) (declared acquaintance with prosecuting witness does not open door to questions regarding intimacy with her); State v. Lampshire, 74 Wash. 2d 888, 447 P.2d 727 (1968) (mention of prosecuting witness' phone bill does not open door to cross on defendant's unpaid bill).

[70] *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).

[71] United States v. Hykel, 461 F.2d 721 (3d Cir. 1972) (cross of defendant's credibility subject to court discretion); Harris v. United States, 371 F.2d 365 (9th Cir. 1967) (wide scope to cross on credibility—financial stake); Fagundes v. United States, 340 F.2d 673 (1st Cir. 1965) (defendant's credibility opened); Sorrells v. State, 44 Ala. App. 481, 213 So. 2d 687 (1968) (defendant's credibility opened); Braxton v. State, 11 Md. App. 435, 274 A.2d 647 (1971); Boone v. State, 2 Md. App. 80, 233 A.2d 476 (1967) (defendant's credibility in issue even if stand taken solely 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. Scoleri, 432 Pa. 571, 248 A.2d 295 (1968), *vacated and remanded for resentencing*, 408 U.S. 934 (1972) (defendant's credibility in issue, could be crossed like any other witness); Commonwealth v. Connolly, 217 Pa. Super. 201, 269 A.2d 390 (1970) (can impeach defendant's credibility with prior felony or misdemeanor *crimen falsi* convictions). *See also* PROPOSED FED. R. EVID. 607; CAL. EVID. CODE §785 (West 1966).

[72] *See* United States v. Skidmore, 123 F.2d 604 (7th Cir. 1941), cert. denied, 315 U.S. 800, *reh. denied*, 315 U.S. 828 (1942) (defendant); Fowler v. State, 7 Md.

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).[73] This latter type of character evidence is generally initiated by specific testimony.[74]

Subject to the limitations of the fifth amendment,[75] the scope of the cross-examination of a defendant is normally no different from that of any other witness.[76] The accused's credibility, for example, may be subjected to the close scrutiny of the prosecutor's questions.[77] The cross-examination of a defendant is governed, of course, by the discretion of the trial judge,[78] who traditionally permits a searching inquiry within the bounds of fairness.[79] Statutory limitations in some jurisdictions, however, severely circumscribe the prosecutor's field.[80]

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.[81] This does

App. 264, 254 A.2d 715 (1969) (defendant, crossed on prior convictions); Minor v. State, 6 Md. App. 82, 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. 80, 233 A.2d 476 (1967) (defendant); People v. Britter, 27 Mich. App. 404, 183 N.W.2d 595 (1970) (defendant, crossed on prior convictions); State v. Sinclair, 57 N.J. 56, 269 A.2d 161 (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 710, *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).

[73] *See* State v. Wyman, 270 A.2d 460 (Me. 1970); Braxton v. State, 11 Md. App. 435, 274 A.2d 647 (1971).

[74] *See* Hattaway v. United States, 416 F.2d 1178 (5th Cir. 1969) (testimony that defendant was raised in a good Christian home and was concerned about her children put general character in issue); Sorrells v. State, 44 Ala. App. 481, 213 So. 2d 687 (1968) (defendant only puts character in issue with affirmative evidence or testimony). *See also* State v. Hartsell, 272 N.C. 710, 158 S.E.2d 785 (1968); State v. Hudson, 1 Wash. App. 813, 463 P.2d 786 (1970).

[75] *See* Tucker v. United States, 5 F.2d 818 (8th Cir. 1925).

[76] *See generally* the excellent discussion in Carlson, *Cross Examination of the Accused*, 52 CORNELL L.Q. 705 (1967). *See also* United States v. Davenport, 449 F.2d 696 (5th Cir. 1971); United States v. Vigo, 413 F.2d 691 (5th Cir. 1969); Cline v. United States, 395 F.2d 138 (8th Cir. 1968); United States v. Jackson, 344 F.2d 922 (6th Cir.), *cert. denied*, 382 U.S. 880 (1965); Hug v. United States, 329 F.2d 475 (6th Cir.), *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 Kan. 811, 443 P.2d 284 (1968); State v. Domino, 234 La. 950, 102 So. 2d 227 (1958); Raimondi 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 P.2d 433 (Okla. 1967); 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 P.2d 249 (Wyo. 1968).

[77] *See* United States v. Pennix, 313 F.2d 524 (4th Cir. 1963); Hobbs v. State, 243 Ark. 881, 422 S.W.2d 849 (1968); Wright v. State, 243 Ark. 221, 419 S.W.2d 320 (1967); People v. Tinsley, 128 Ill. App. 2d 440, 262 N.E.2d 4 (1970); People v. April, 97 Ill. App. 2d 1, 239 N.E.2d 285 (1968); State v. McClain, 404 S.W.2d 186 (Mo. 1966), *cert. denied*, 385 U.S. 1016 (1967); State v. McElroy, 22 Ohio App. 2d 103, 258 N.E.2d 460 (1970).

[78] *See* Speers v. United States, 387 F.2d 698 (10th Cir. 1967), *cert. denied*, 391 U.S. 956 (1968); People v. Burris, 49 Ill. 2d 98, 273 N.E.2d 605 (1971); Storie v. State, 254 Ind. 301, 258 N.E.2d 849 (1970); Shuemak v. State, 254 Ind. 117, 258 N.E.2d 158 (1970).

[79] *See* People v. Russel, 27 Mich. App. 654, 183 N.W.2d 845 (1970); State v. Ross, 275 N.C. 550, 169 S.E.2d 875 (1969), *cert. denied*, 397 U.S. 1050 (1970).

[80] 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.

[81] 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

not mean that he may artificially limit the scope of the cross-examination regarding the substantive issues of the case.[82] 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.[83]

Cross-examination which tests the overall reliability of a witness' direct testimony without being inherently prejudicial,[84] is clearly within the scope of the direct examination.[85] 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.[86] Examination of this nature is frequently used to establish the element of intent.[87] 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?",[88] are often proper,[89] but the limits of scope will be quite strictly construed.[90]

Direct examination which establishes a particular theory of defense opens the door for the prosecutor to cross-examine and undermine that theory.[91] Common examples are the defenses of in-

"wide open" federal rule. United States v. Grimes, 421 F.2d 1119 (D.C. Cir. 1969), *cert. denied*, 398 U.S. 932 (1970) (insanity defense, defendant took stand only to show state of mind, prosecutor could not inquire if he committed the crime); Shull v. Commonwealth, 475 S.W.2d 469 (Ky. 1971) (suppression hearing); People v. MacIntosh, 14 Mich. App. 755, 165 N.W.2d 895 (1968) (defendant took stand to establish existence of a speech defect, no reason to impeach credibility); People v. Lacy, 25 App. Div. 2d 788, 270 N.Y.S.2d 1014 (1966) (cross on merits not allowed in suppression hearing).

[82] *See* United States v. Weber, 437 F.2d 327 (3d Cir. 1970), *cert. denied*, 402 U.S. 932 (1971) (defendant cannot limit cross to only those facts which are favorable); United States v. Doremus, 414 F.2d 252 (6th Cir. 1969) (defendant cannot limit himself to favorable issues); People v. Zerillo, 36 Cal. 2d 222, 214 P.2d 31 (Dist. Ct. App.), *aff'd*, 223 P.2d 223 (1950); People v. Lynn, 16 Cal. App. 3d 259, 94 Cal. Rptr. 16 (1971); State v. Richardson, 258 La. 62, 245 So. 2d 357 (1971) (defendant replied, "I'll answer that partially;" could ask, "you don't want to answer it fully?"); People v. Johnson, 27 N.Y.2d 119, 261 N.E.2d 644, 313 N.Y.S.2d 728, *cert. denied*, 401 U.S. 966 (1971) (defendant cannot limit cross with omissions in his direct testimony).

[83] *See, e.g.*, Tafero v. State, 223 So. 2d 564 (Dist. Ct. App. Fla. 1969).

[84] *See, e.g.*, United States v. Huff, 442 F.2d 885 (D.C. Cir. 1971) (likelihood of prejudice if defense witness is asked if she testified at a preliminary hearing in order to imply that her story was a recent fabrication).

[85] *See* Bush v. United States, 375 F.2d 602 (D.C. Cir. 1967); People v. Fields, 271 Cal. App. 2d 500, 76 Cal. Rptr. 358 (1969) (why does alibi witness remember that particular day so distinctly?); Salisbury v. State, 222 Ga. 549, 150 S.E.2d 819 (1966), (did alibi witness tell her story to any law enforcement officers?); People v. Jordan, 38 Ill. 2d 83, 230 N.E.2d 161 (1967) (reliability of measurements made at the crime scene); State v. Mooring, 445 S.W.2d 303 (Mo. 1969).

[86] *See* McBride v. United States, 409 F.2d 1046 (10th Cir. 1969), *aff'd*, 446 F.2d 229 (1971) (defense witness); United States v. Mousley, 201 F. Supp. 510 (E.D. Pa. 1962), *cert. denied*, 372 U.S. 966 (1963) (defendant's failure to turn records over to I.R.S.); Alexander v. Commonwealth, 463 S.W.2d 334 (Ky. 1971) (receipt, transport and sale of stolen goods); State v. Fulford, 290 Minn. 236, 187 N.W.2d 270 (1971) (knife threats made to deceased); Pierce v. State, 213 So. 2d 769 (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 dilution and sale objected to).

[87] *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) (frequent 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).

[88] *See* State v. Lamborn, 452 S.W.2d 216 (Mo. 1970) (defendant makes a sweeping denial of guilt on direct).

[89] *See* Hobbs v. State, 243 Ark. 881, 442 S.W.2d 849 (1968) (did defendant rob the filling station on the night in question?); People v. McClellan, 71 Cal. 2d 793, 457 P.2d 871, 80 Cal. Rptr. 31 (1969) (was defendant just coming from robbing a liquor store?); State v. Ragona, 232 Iowa 700, 5 N.W.2d 907 (1942); State v. Hale, 206 Kan. 521, 479 P.2d 902 (1971) (possession of stolen shotgun); State v. Penley, 277 N.C. 704, 178 S.E.2d 490 (1971) (who planned the escape?); Levasseur v. State, 464 S.W.2d 315 (Tenn. 1970) (did defendant's wife aid and abet?).

Questions regarding collateral criminal conduct may also be permitted. State v. Manning, 134 N.W.2d 91 (N.D. 1965); State v. Howard, 486 P.2d 130 (Ore. 1971) (did defendant suborn perjury?); State v. Conley, 3 Wash. App. 579, 476 P.2d 544 (1970) (possession of stolen credit cards). *But see* State v. Jensen, 189 N.W.2d 919 (Iowa 1971). Accusations of crime may fall within the scope of proper cross. *See also* Coleman v. United States, 295 F.2d 555 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 842 (1962) (counter accusations by co-defendants).

[90] *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).

[91] *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[92] and self defense.[93] Depending on the court and the scope of the direct examination, the prosecutor may be able to establish particular elements of the crime,[94] or even build his theory of the case on cross-examination.[95]

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.[96] A claim that the defendant never owned a firearm can be attacked with questions regarding a weapons charge lodged against him,[97] and the assertion that the accused works every day can be contradicted with conflicting employment records.[98] Similarly, denials of actual guilt,[99] particular acts,[100] associations,[101] or of the truth of alleged facts[102] will open the door to cross-

(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 persecution); 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 crossed as to his valid reason for release, an alibi); McCranney v. Commonwealth, 449 S.W.2d 914 (Ky. 1970) (can request elaboration and detail of defense theory); State v. Keegan, 296 A.2d 483 (Me. 1972) (claim of arrest without justification at wife's insistence, prior assault charge examined); Commonwealth v. Howard, 356 Mass. 452, 253 N.E.2d 345 (1969) (claimed entrapment, asked if he ever went to the police); State v. Phillips, 480 S.W.2d 836 (Mo. 1972) (claimed too drunk to form intent, could cross as to ability to drive a truck from the scene); State v. Harvey, 449 S.W.2d 649 (Mo. 1970) (claimed alibi); State v. Adams, 26 Utah 377, 489 P.2d 1191 (1971) (attempt to show unjustified police harassment, proper to cross on prior fights and shooting upon the Moose Lodge).

A conviction may be reversed, however, if the questioning is prejudicial and not relevant to the defense asserted. People v. Hicks, 133 Ill. App. 2d 424, 273 N.E.2d 450 (1971) (defense of justifiable force, question—are you a peaceful man, have you ever been drunk, have you ever been high or loaded, have you ever shot the M-1 carbine, have you ever threatened anyone with it?); People v. Sisti, 87 Ill. App. 2d 107, 230 N.E.2d 500 (1967) (no supporting evidence of prosecutor's assertions).

[92] *See* Hawes v. State, 48 Ala. App. 565, 266 So. 2d 652 (1972) (could behavior have been caused by drinking); People v. Murray, 247 Cal. App. 2d 730, 56 Cal. Rptr. 21 (1967) (religious beliefs bearing on insanity); Chaffin v. State, 227 Ga. 327, 180 S.E.2d 741 (1971) (asked defendant's previous lawyer why the insanity defense was not used in the first trial); 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. Johnson, 69 Wash. 2d 264, 418 P.2d 238 (1966) (passive nature tied to insanity defense, could cross as to conviction for threatening wife's life).

[93] *See* State v. Mayo, 487 S.W.2d 539 (Mo. 1972) (proper to cross on prior encounters with deceased, *i.e.*, did defendant stab him in the abdomen on a prior occasion); Commonwealth v. James, 433 Pa. 508, 253 A.2d 97 (1969) (proper to question prior encounters, *i.e.*, did defendant stab deceased three weeks prior to his death?); Mosby v. State, 482 S.W.2d 256 (Tex. 1972) (proper to ask if defendant knew victim was seven months pregnant).

[94] *See* Eberbart v. State, 121 Ga. App. 663, 175 S.E.2d 73 (1970) (hypothetical questions embodying facts sought to be proved are proper); People v. Lloyd, 5 Mich. App. 717, 147 N.W.2d 740 (1967) (questions concerning possession of a gun in an armed robbery prosecution). *But see* Tucker v. United States, 5 F.2d 818 (8th Cir. 1925) (attempt to establish an independent element in the government's case which was outside the scope of the direct was reversible error).

[95] *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 529 (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).

[96] *See* Daugherty v. State, 225 Ga. 274, 168 S.E.2d 155 (1969) (dates); People v. Parisie, 5 Ill. App. 3d 1009, 287 N.E.2d 310 (1972) (reasons for employment termination); Commonwealth v. Ventola, 351 Mass. 703, 221 N.E.2d 395 (1966) (employment); People v. Williams, 26 Mich. App. 218, 182 N.W.2d 347 (1970). *But see* Hunter v. State, 48 Ala. App. 232, 263 So. 2d 690 (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).

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

[98] United States v. Rosebar, 463 F.2d 1255 (D.C. Cir. 1972).

[99] *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, 43 Ala. App. 294, 189 So. 2d 583 (1966); People v. Miller, 245 Cal. App. 2d 112, 53 Cal. Rptr. 729 (1966), *cert. denied*, 392 U.S. 616 (1968) (denied murder).

[100] *See* People v. Duncan, 127 Ill. App. 2d 305, 262 N.E.2d 274 (1970) (defendant denied placing cartons in a Hertz truck, asked if he rented one); Terry v. Commonwealth, 471 S.W.2d 730, (Ky. 1971) (defendant claimed he never met the robbery victim); Smith v. State, 223 So. 2d 657 (Miss. 1969), *cert. denied*, 397 U.S. 1030 (1970) (KKK activities); State v. Donaldson, 76 Wash. 2d 513, 458 P.2d 21 (1969) (collateral acts of sexual misconduct).

[101] *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 alibi witness as to her associates in jail since not connected with offense).

[102] *See* State v. Martinez, 102 Ariz. 178, 427 P.2d 129 (1967) (crossed on questions regarding ownership of

examination on those subjects. The characterizations of an individual on the witness stand as a peaceloving, gentle person,[103] or a devoted family man[104] invites cross-examination, as does his portrayal of the facts of the case so that they appear inconsistent with guilt.[105]

As previously stated, the witness' credibility almost always is in issue.[106] 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,[107] convictions[108] and the commission of criminal acts in general.[109] A frequent claim is "I haven't been in

weapons); Carlson v. State, 84 Nev. 534, 445 P.2d 157 (1968) (denied sexual attractions for children, crossed on attempt to kiss a child); 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?").

[103] *See* United States v. Bowe, 360 F.2d 1 (2d Cir. 1966), *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).

[104] *See* United States v. Talk, 418 F.2d 53 (10th Cir. 1969) (claimed happily married, could ask if he assaulted wife); People v. Miller, 245 Cal. App. 2d 112, 53 Cal. Rptr. 720 (1966), *cert. dismissed*, 392 U.S. 616 (1968); People v. Longstreet, 2 Ill. App. 3d 556, 276 N.E.2d 825 (1971) (claimed supported family, shown to be on welfare); State v. Hansen, 22 Utah 2d 63, 448 P.2d 720 (1968), *cert. denied*, 394 U.S. 992 (1969); Ramer v. State, 40 Wis. 2d 79, 161 N.W.2d 209 (1968), *cert. denied*, 394 U.S. 989 (1969) (family man spending much time at home, proper to cross on time in a penitentiary).

Other representations inviting cross-examination are United States v. DeSapio, 435 F.2d 272 (2d Cir. 1970), *cert. denied*, 402 U.S. 998 (1972) (defendant represented himself as legitimate insurance employee, financial sources could be crossed); Maxted 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).

[105] *See* United States v. Kenny, 462 F.2d 1205 (3d Cir. 1972) (cross on tax returns to show gambling earnings); Melendez-Rodriquez 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).

[106] *See* notes 71–72 *supra*.

[107] *See* State v. Lopez, 107 Ariz. 214, 484 P.2d 1045 (1971) (crossed on arrest and deportation proceedings); Dixon v. Commonwealth, 487 S.W.2d 928 (Ky. 1972) (misdemeanor indecent exposure conviction used to impeach denial of arrest on morals charge); Witherspoon v. State, 486 S.W.2d 953 (Tex. 1972) (testified never in jail more than one day, crossed on three-and-one-half year imprisonment for AWOL).

[108] *See* Newman v. United States, 331 F.2d 968 (8th Cir. 1964), *cert. denied*, 379 U.S. 975 (1965); People v. Bey, 42 Ill. 2d 139, 246 N.E.2d 287 (1969). *See also* State v. Miles, 492 P.2d 497 (Ore. 1972) (claimed no traffic convictions within last three years, crossed on driving while intoxicated, driving without a license, driving with a suspended license).

[109] *See* United States v. Glasser, 443 F.2d 994 (2d Cir.), *cert. denied*, 404 U.S. 854 (1971) (denied throwing acid on a plate glass window, had done exactly that in a union dispute); People v. Doerr, 266 Cal. App. 2d 36, 71 Cal. Rptr. 889 (1968) (use of marijuana denied); Berlin v. State, 12 Md. App. 48, 277 A.2d 468 (1971) (claimed never sold drugs illegally before, had sold to a policeman); Commonwealth v. French, 357 Mass. 356, 259 N.E.2d 195 (1970), *vac. for resentencing*, 408 U.S. 936 (1972) (denied loansharking); Commonwealth v. Bastone, 211 Pa. Super. 509, 239 A.2d 863 (1968) ("I never robbed anyone in my life," crossed on four convictions); Hamilton v. State, 480 S.W.2d 685 (Tex. 1972) ("I never been inside a burglary before. I didn't know nothing about how to rob or nothing." Properly crossed as to other robberies where he was identified as a participant); Guillory v. State, 400 S.W.2d 751 (Tex. 1966) (claim that defendant never tried to take anyone's life, crossed on incident not resulting in a conviction where he struck a person with an iron pipe). *But see* People v. Jackson, 95 Ill. App. 2d 193, 238 N.E.2d

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 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 behavior[114] as well as some details of a particular offense.[115]

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 redirect 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

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 conviction and friendship with her co-defendant was improper because there was no evidence that he dealt with the co-defendant); McKee v. State, 488 P.2d 1039 (Alas. 1971) (claim that defendant never stabbed or raped anyone was not contradicted by a threatened assault); People v. Matlock, 11 Cal. App. 3d 453, 89 Cal. Rptr. 862 (1970) ("I don't enjoy beating on one at no time" was not a denial of prior assaults. Cross on them was therefore error).

[110] *See* State v. Lopez, 107 Ariz. 214, 484 P.2d 1045 (1971); State v. Elbert, 471 S.W.2d 170 (Mo. 1971) (crossed on gambling and disturbing the peace); Heartfield v. State, 470 S.W.2d 895 (Tex. 1971); Barnett v. State, 445 S.W.2d 205 (Tex. 1969) (aggravated assault and shoplifting).

[111] *See, e.g.*, People v. Otkins, 114 Ill. App. 2d 439, 252 N.E.2d 906 (1969).

[112] *See, e.g.*, People v. Parish, 6 Ill. App. 3d 587, 285 N.E.2d 606 (1972); People v. Hines, 87 Ill. App. 2d 283, 232 N.E.2d 111 (1967).

[113] *See* Rogers v. United States, 411 F.2d 228 (10th Cir. 1969) (defendant mentioned jail stay, improper to cross about various jails and compare them); People v. Parish, 6 Ill. App. 3d 587, 285 N.E.2d 606 (1972) (defendant's brother testified that defendant was afraid of the police. Improper to extensively cross regarding convictions, specific acts and sentences); People v. Hines, 87 Ill. App. 2d 283, 232 N.E.2d 111 (1967) (admission of narcotics conviction did not open door to searching prejudicial cross concerning use of, type of, addiction to and money spent on narcotics).

[114] *See* Patterson v. United States, 413 F.2d 1001 (5th Cir. 1969) (probation); United States v. Sisk, 390 F.2d 652 (4th Cir. 1968) (bank robbery); United States v. Countryman, 311 F.2d 189 (2d Cir. 1962) (use of narcotics); United States v. Coleman, 340 F. Supp. 451 (E.D. Pa. 1972) (prior record and knowledge of unrelated crimes); Howard v. State, 491 P.2d 154 (Alas. 1971) (gambling and co-habitating with a woman not his wife); People v. Petty, 3 Ill. App. 3d 951, 279 N.E.2d 509 (1972) (number of arrests); People v. Johnson, 2 Ill. App. 3d 53, 276 N.E.2d 107 (1971) (nature of crime); Baker v. State, 249 Ind. 117, 231 N.E.2d 21 (1967) (crimes); State v. Scroggins, 199 Kan. 108, 427 P.2d 603 (1967) (forgery); State v. Rush, 248 Ore. 568, 436 P.2d 266 (1968) (jail term); Commonwealth v. Smith, 432 Pa. 517, 248 A.2d 24 (1968) (prior arrests).

[115] *See* Martin v. United States, 404 F.2d 640 (D.C. Cir. 1968); People v. Owens, 41 Ill. 2d 465, 244 N.E.2d 188 (1969) (asked about use of narcotics, what constitutes an outfit); People v. Robinson, 386 Mich. 551, 194 N.W.2d 709 (1972) (testified he dealt in illicit guns, asked if he carried concealed weapons); State v. Baca, 81 N.M. 686, 472 P.2d 651 (1970) (asked about specific thefts); State v. McDaniel, 272 N.C. 556, 158 S.E.2d 874, *rev'd* 392 U.S. 665, *aff'd*, 274 N.C. 574, 164 S.E.2d 469 (1968) (asked about type of weapon used in prior assault); Commonwealth v. Flagg, 212 Pa. Super. 344, 242 A.2d 921 (1968) (asked about specific juvenile offenses); Harmon v. Commonwealth, 212 Va. 442, 185 S.E.2d 48 (1971) (asked about what degree was the murder charge).

[116] *See* McCormick §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 redirect, no abuse in some leeway); State v. Giles, 253 La. 533, 218 So. 2d 585 (1969) (defendant subject to re-cross on entire case).

[117] *See* People v. Daniels, 16 Cal. App. 3d 36, 93 Cal. Rptr. 628 (1971); State v. Harder, 3 N.C. App. 426, 165 S.E.2d 43 (1969).

[118] *See* Williams v. State, 45 Ala. App. 138, 227 So. 2d 135 (1969) (defendant foundation laid for his impeachment); People v. Barboza, 212 Cal. App. 2d 920, 28 Cal. Rptr. 805 (1963) (defendant); State v. West, 17 N.C. App. 5, 193 S.E.2d 381 (defendant).

[119] *See, e.g.*, Parkam v. State, 53 Wis. 2d 458, 192 N.W.2d 838 (1972).

[120] See the discussion of this area in Carlson, *supra* note 76. Smith v. United States, 358 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, 358 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 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

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 unsworn 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); Shoffeitt 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 unsworn 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. 880 (1966).

[121] *See* McCormick §132.

[122] *See* Proposed Fed. R. Evid. 611(b).

[123] *See* Fitzpatrick v. United States, 178 U.S. 304 (1900); Harrold v. Territory of Oklahoma, 169 F. 47 (8th Cir. 1909); People v. Ing, 65 Cal. 2d 603, 422 P.2d 590, 55 Cal. Rptr. 902 (1967); Commonwealth v. Camm, 443 Pa. 253, 277 A.2d 325 (1971), *cert. denied*, 405 U.S. 1046 (1972).

[124] *See* People v. Schader, 71 Cal. 2d 761, 457 P.2d 841, 80 Cal. Rptr. 1 (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 resumed at will). *See also* Proposed Fed. R. Evid. 608(b) 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 535 (Ky. 1968).

[128] *See* Brown v. United States, 356 U.S. 148, *reh. denied*, 356 U.S. 948 (1958); United States v. Dana, 457 F.2d 205 (7th Cir. 1972); Nash v. United States, 405 F.2d 1047 (8th Cir. 1969); United States v. Lyon, 397 F.2d 505 (7th Cir.), *cert. denied*, 393 U.S. 846 (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. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

[129] *See* McGautha 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. 114 (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.[132] 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.[133]

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.[134] 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.[135] 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.[136] Although there is authority to the contrary,[137] most courts hold that when a defendant presents a detailed exculpatory explanation[138] or alibi[139] 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.[140] Questions of an

[132] *See* People v. Perez, 65 Cal. 2d 615, 422 P.2d 597, 55 Cal. Rptr. 909 (1967), *writ dismissed*, 395 U.S. 208 (1969) (defendant denied two counts of a four count indictment, the court finding that he was subject to inquiry on them all); *see also* United States v. Baker, 262 F. Supp. 657 (D.C. 1966), *rev'd on other grounds*, 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).

[133] *See* McCormick §132.

[134] *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).

[135] *See* Johnson v. People, 172 Colo. 406, 473 P.2d 974 (1970) (no direct reference to refusal to speak to police); Reilly v. State, 212 So. 2d 796 (Fla. 1968) (questions related to impeachment of story rather than to his silence).

[136] *See* Sims v. Salyton, 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).

[137] *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).

[138] *See* United States v. Driscoll, 449 F.2d 894 (1st Cir.), *cert. denied*, 405 U.S. 920 (1972); United States v. Ramirez, 441 F.2d 950 (5th Cir.), *reh. denied*, 404 U.S. 987 (1971) (claim of duress by police officer); United States v. Pledger, 409 F.2d 1335 (5th Cir. 1969) (claim that he thought a federal agent he assaulted was a hijacker); People v. Thompson, 25 Cal. App. 3d 132, 101 Cal. Rptr. 683 (1972) (arguably an attempt to test credibility of story); People v. Davidson, 1 Cal. App. 3d 292, 81 Cal. Rptr. 529 (1969) (claim that a "third man" committed the crime); People v. Queen, 8 Ill. App. 3d 858, 290 N.E.2d 631 (1972); State v. Crowe, 207 Kan. 473, 486 P.2d 503 (1971); State v. Wade, 206 Kan. 347, 479 P.2d 811 (1971); People v. Bobo, 41 Mich. App. 362, 200 N.W.2d 335 (1972) (claimed saw two men running near crime scene, this cross differs from making an evidentiary point of the refusal to make a statement); People v. Calhoun, 33 Mich. App. 141, 189 N.W.2d 743 (1971) (defendant blamed robbery on an apparently imaginary character named Billy); People v. Russel, 27 Mich. App. 654, 183 N.W.2d 845 (1970) (defense to murder was that he was making a citizen's arrest on a reckless driver); State v. Burt, 107 N.J. Super. 390, 258 A.2d 711 (1969), *cert. denied*, 404 U.S. 1047 (1972) (self defense and accidental shooting, distinguishes between comment on silence and failure to present a reasonable explanation); Taylor v. State, 188 S.E.2d 850 (S.C. 1972).

It is proper to question on the defendant's course of action following the arrival of the police. *See* Ester v. United States, 253 A.2d 537 (D.C. 1969). 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).

[139] *See* United States v. White, 378 F.2d 908 (4th Cir.), *cert. denied*, 389 U.S. 984 (1967); People v. Farley, 267 Cal. App. 2d 214, 72 Cal. Rptr. 855 (1968); State v. Jackson, 201 Kan. 795, 443 P.2d 279 (1968), *cert. denied*, 394 U.S. 908 (1969); State v. Robideau, 70 Wash. 2d 994, 425 P.2d 880 (1967).

[140] Tafero v. State, 223 So. 2d 564 (Dist. Ct. App. Fla. 1969); People v. Garcia, 3 Ill. App. 3d 695, 279 N.E.2d 506 (1972) (reference to his willingness to be extradicted communicated to a public defender); People v. Shugar, 29 Mich. App. 139, 185 N.W.2d 178 (1970); State v.

alibi witness regarding his prior silence do not raise the fifth amendment issue[141] (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]

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 villification 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

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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).

[141] People v. McCorry, 51 Ill. 2d 343, 282 N.E.2d 425 (1972); People v. McMath, 104 Ill. App. 2d 302, 244 N.E.2d 330 (1968), *cert. denied*, 400 U.S. 846 (1970); Holtzclaw v. State, 451 S.W.2d 505 (Tex. 1970).

[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?").

[144] *See* Messier v. State, 428 P.2d 338 (Okla. 1967); Dean v. Commonwealth, 209 Va. 666, 166 S.E.2d 228 (1969). *But see* Raffel v. United States, 271 U.S. 494 (1926); Funderbunk v. State, 12 Md. App. 481, 280 A.2d 4 (1971).

[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).

[146] *See* Grunewald v. United States, 353 U.S. 391 (1957); United States v. Williams, 464 F.2d 927 (8th Cir. 1972); State v. Boscia, 93 N.J. Super. 586, 226 A.2d 643 (1967); People v. Leo, 23 N.Y.2d 556, 245 N.E.2d 705, *cert. denied*, 395 U.S. 962 (1969).

[147] *See, e.g.*, Commonwealth v. Henderson, 217 Pa. Super. 329, 272 A.2d 267 (1970).

[148] *See* People v. Harris, 18 Cal. App. 3d 1, 95 Cal. Rptr. 468 (1971) (forgery); State v. Hemphill, 460 S.W.2d 648 (Mo. 1970) (concealed weapons charges); State v. Anderson, 27 Utah 276, 495 P.2d 804 (1972). *But 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).

[149] *See* Birns v. Perini, 426 F.2d 1288 (6th Cir. 1970), *cert. denied*, 402 U.S. 950 (1971) (nor was there a deliberate attempt to force the invocation of the privilege).

[150] *See* notes 103–04 *supra*.

[151] *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).

[152] *See, e.g.*, Kinnett v. Commonwealth, 408 S.W.2d 417 (Ky. 1966), *cert. denied*, 387 U.S. 924 (1967).

[153] *See* Proposed Fed. R. Evid. 608(a) 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 §786 (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 that "evidence of traits of his (the witness') character other than honesty or veracity or their opposites shall be inadmissible."

[154] McCormick §41. *See also* State v. Briscoe, 78 Wash. 2d 338, 474 P.2d 267 (1970). *But see* McGowen v. State, 221 Tenn. 442, 427 S.W.2d 555 (1968) (proper attack on a defendant's character to question his homosexual activities). As with other areas of cross-examination, the courts exercise a broad power of discretion. United States v. Battaglia, 394 F.2d 304 (7th Cir. 1968), *cert. denied*, 401 U.S. 924 (1971).

[155] *See, e.g.*, Edgington v. United States, 164 U.S. 361 (1896).

shared by many experienced members of the criminal bar.[156]

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[157] in order to discredit his reliability.[158] 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.[159]

The cross-examination of a character witness delves into his familiarity with the defendant's reputation[160] and may focus either on his sources of information, or the frequency with which he discussed the issue.[161] It also may disparage the standards he applied to reach his character assessment. The primary method of examination is to question the witness' knowledge of the various components of the defendant's reputation. The particular form that these questions must take has been fashioned quite precisely by the courts.

The leading case in the area is *Michelson* v. *United States*,[162] which represents the majority view that questions which inquire as to the witness' knowledge of negative aspects of the defendant's life history must be asked with the prefix "Have you heard . . . ?" [163] A few jurisdictions allow the questions to be asked in the older "Do you know . . . ?" form.[164] While the use of the latter, which is generally considered improper form, will not always require reversal,[165] the appellate courts have severely rebuked prosecutors who have deviated from the *Michelson* standard.[166]

Although the prosecutor may not question a

[156] 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 P. Westmoreland and Roy Wilkins.

[157] *See* United States v. Straughan, 453 F.2d 422 (8th Cir. 1972) (wide latitude); United States v. Gosser, 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).

[158] *See* Michelson v. United States, 335 U.S. 469 (1948); United States v. Kenny, 462 F.2d 1205 (3d Cir. 1972); United States v. Benson, 369 F.2d 569 (6th Cir. 1966), *cert. denied*, 391 U.S. 903 (1968); State v. Elliot, 25 Ohio St. 2d 249, 267 N.E.2d 806 (1971), *vacated for resentencing*, 408 U.S. 939 (1972); Commonwealth v. Little, 295 A.2d 287 (Pa. 1972); Brown v. State, 477 S.W.2d 617 (Tex. 1972). *See generally* Caplan, *Defendants' Character Testimony in the Criminal Case* (N.D.A.A. 1971).

[159] *See, e.g.*, People v. Swingle, 28 App. Div. 2d 1063, 284 N.Y.S.2d 133 (1967). This type of searching inquiry will be grounds for reversal if the witness being examined has not actually testified as a character witness. *See also* State v. Fierro, 108 Ariz. 268, 496 P.2d 129 (1972) (parole officer asked if he made the statement that he always thought the defendant was a rapist); Hurt v. State, 480 S.W.2d 747 (Tex. 1972) (psychiatrist asked about thirteen acts of criminal conduct).

[160] *See* United States v. Polack, 442 F.2d 446 (3d Cir.), *cert. denied*, 403 U.S. 931 (1971); Commonwealth v. Little, 295 A.2d 287 (Pa. 1972); Smotherman v. State, 455 S.W.2d 285 (Tex. 1970) (limited contact with the defendant in recent years). *See also* Strickland v. State, 269 So. 2d 340 (Miss. 1972) (proper to ask a character witness if he was familiar with the instant case, since no details were explored). One may ask the witness' personal opinion of the accused's character. *See* United States v. Benton, 457 F.2d 1174 (2d Cir. 1972). *But see* State v. Thompson, 472 S.W.2d 351 (Mo. 1971) (improper to ask character witness if he and his father were the only ones who thought the accused had a good reputation, but no reversal).

[161] *See* United States v. Lewin, 467 F.2d 1132 (7th Cir. 1972) (opportunity to acquire information, number of people spoken to, and how long the reports have prevailed); United States v. Williams, 436 F.2d 287 (D.C. Cir. 1970); Harrison v. State, 120 Ga. App. 812, 172 S.E.2d 328 (1970) (statements of particular individuals).

[162] 335 U.S. 469 (1948).

[163] *See* United States v. Machado, 457 F.2d 1372 (9th Cir. 1972); State v. Pierce, 208 Kan. 19, 490 P.2d 584 (1971); State v. Hinton, 206 Kan. 500, 479 P.2d 910 (1971); Brown v. State, 477 S.W.2d 617 (Tex. 1972); Johnson v. State, 459 S.W.2d 637 (Tex. 1970); Whitaker v. State, 421 S.W.2d 905 (Tex. 1967); Smith v. State, 411 S.W.2d 548 (Tex. 1967).

[164] *See* State v. Newte, 188 Neb. 412, 197 N.W.2d 403 (1972) (any prejudice vitiated 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).

[165] *See* Veith v. State, 267 So. 2d 480 (Ala. 1972) (not grounds for reversal); Robinson v. State, 44 Ala. App. 205, 205 So. 2d 524 (1967) (improper but not reversible); Comi v. State, 202 Md. 472, 97 A.2d 129 (1953), *cert. denied*, 346 U.S. 898 (1953) (questions objectionable in form only); People v. Stedman, 41 Mich. App. 393, 200 N.W.2d 370 (1972) (not automatically reversible error). *But see* Palmer v. State, 47 Ala. App. 235, 252 So. 2d 657 (1971) (reversible to ask the witness, a police officer, if he ever arrested the accused). An alternate form such as, "Has there been any report made to you?" may be proper. *See* Campbell v. State, 480 S.W.2d 391 (Tex. 1972).

[166] 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 (T)he 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) (parently improper).

character witness regarding traits or behavior of the defendant which are irrelevant to the areas opened in direct examination,[167] he may inquire if the witness has heard of certain illegal acts committed by the accused[168] such as assaults[169] or even sexual crimes.[170] Similarly, the prosecutor may inquire if the witness has heard negative rumors about the defendant which may have circulated throughout the community.[171]

The character witness may be questioned regarding his knowledge that the person upon whose reputation he has reported has been accused,[172] arrested[173] or convicted of a crime.[174] While there is some authority which supports the view that minor offenses such as traffic violations[175] should not be mentioned, juvenile offenses appear to be proper subjects of inquiry in a few jurisdictions.[176] There is no limitation concerning the remoteness of any

[167] *See* PROPOSED FED. R. EVID. 405(a) United; States v. Grey, 422 F.2d 1043 (6th Cir. 1970), *cert. denied*, 400 U.S. 967 (1970). *See also* United States v. Wooden, 420 F.2d 251 (D.C. Cir. 1969) (twenty drunkeness arrests); Aaron v. United States, 397 F.2d 584 (5th Cir. 1968) (illicit love affair); Gross v. United States, 394 F.2d 216 (8th Cir. 1968), *cert. denied*, 397 U.S. 1013 (1970); United States v. Beno, 324 F.2d 582 (2d Cir. 1963), *cert. denied*, 379 U.S. 880 (1964) (if defense witness offers irrelevant evidence his testimony should be stricken rather than allow prosecutor to introduce irrelevant prejudicial information); Hamilton v. State, 43 Ala. App. 192, 186 So. 2d 108 (1966), *cert. denied*, 279 Ala. 687, 186 So. 2d 114 (1966) (did defendant "cat" around); People v. Redmond, 50 Ill. 2d 313, 278 N.E.2d 766 (1970); Brown v. State, 477 S.W.2d 617 (Tex. 1972). *But see* State v. McCody, 458 S.W.2d 356 (Mo. 1970) (questions need not refute only those specific traits testified to).

[168] *See* PROPOSED FED. R. EVID. 405(a) provides that "On cross-examination, inquiry is allowable into relevant specific instances of conduct." *See also* United States v. Pingleton, 458 F.2d 722 (7th Cir. 1972) (stole a gum machine); Gross v. United States, 394 F.2d 216 (8th Cir. 1968), *cert. denied*, 397 U.S. 1013 (1970); Green v. State, 45 Ala. App. 549, 233 So. 2d 243 (1970) (reputation for carrying a long knife); Anderson v. State, 44 Ala. App. 388, 210 So. 2d 436 (1968); Banks v. State, 133 Ga. App. 661, 149 S.E.2d 415 (1966) (but reversible to ask inaccurate hypothetical question and not allow an explanation by the witness); People v. Stedman, 41 Mich. App. 393, 200 N.W.2d 370 (1972); Carter v. State, 84 Nev. 592, 446 P.2d 165 (1968); State v. Elliot, 25 Ohio St.2d 249, 267 N.E.2d 806 (1971), *vacated for resentencing*, 408 U.S. 939 (1972). *But see* United States v. Rudolph, 403 F.2d 805 (6th Cir. 1968) (prejudicial to cross on an unrelated crime, a murder plot, no relevance to guilt or innocence of crime charged); People v. Hunt, 132 Ill. App. 2d 314, 270 N.E.2d 243 (1971) (prejudicial to ask if witnesses knew defendant carried a blackjack); People v. Meyers, 94 Ill. App. 2d 340, 236 N.E.2d 786 (1968) (improper to ask about specific acts, but no error since already brought out by accused on direct). *See also* the rule in State v. Smith, 5 N.C. App. 635, 169 S.E.2d 4 (1969) (cannot ask about specific bad acts unless admitted by the defendant on direct).

[169] *See, e.g.*, Smith v. State, 411 S.W.2d 548 (Tex. 1967).

[170] *See* People v. Wrigley, 70 Cal. Rptr. 116, 443 P.2d 580 (1968) (adultery leading to a marriage breakup); Hart v. State, 447 S.W.2d 944 (Tex. 1969) (sodomy); State v. Wilson, 1 Wash. App. 1001, 465 P.2d 413 (1970) (two acts, indecent liberties with a child).

[171] *See* Michelson v. United States, 335 U.S. 469 (1948); United States v. Longfellow, 406 F.2d 415 (4th Cir.), *cert. denied*, 394 U.S. 998 (1969); Aaron v. United States, 397 F.2d 584 (5th Cir. 1968); United States v. Blane, 375 F.2d 249 (6th Cir.), *reh. denied*, 389 U.S. 998 (1967) (newspaper stories); United States v. Gosser, 339 F.2d 102 (6th Cir. 1964), *reh. denied*, 382 U.S. 922 (1965) (rumored associations with a known gambler); United States v. Beno, 324 F.2d 582 (2d Cir. 1963), *cert. denied*, 379 U.S. 880 (1964); People v. Harris, 7 Cal. App. 3d 922, 87 Cal. Rptr. 46 (1970); People v. Kramer, 259 Cal. App. 2d 452, 66 Cal. Rptr. 638 (1968) (defendant rumored to perform abortions); Steigler v. State, 277 A.2d 662 (Del. 1971), *vacated for resentencing*, 408 U.S. 939 (1972) (rumors of adultery and embezzlement); Miller v. State, 418 P.2d 220 (Okla. 1966); State v. Nuckols, 152 W.Va. 736, 166 S.E.2d 3 (1968).

[172] *See, e.g.*, State v. Wilson, 93 Idaho 194, 457 P.2d 433 (1969).

[173] *See* Michelson v. United States, 335 U.S. 469 (1948); United States v. Dalton, 465 F.2d 32 (5th Cir 1972); United States v. Hykel, 461 F.2d 721 (3d Cir. 1972); United States v. Wells, 437 F.2d 1144 (6th Cir. 1971) (state and federal arrests and indictments); United States v. Williams, 436 F.2d 287 (D.C. Cir. 1970); Hendron v. Commonwealth, 487 S.W.2d 175 (Ky. 1972) (three arrests); State v. Daniels, 262 La. 475, 263 So.2d 859 (1972) (driving while intoxicated and attempted rape); State v. Newte, 188 Neb. 412, 197 N.W.2d 403 (1972); Commonwealth v. Little, 295 A.2d 287 (Pa. 1972) (aggravated robbery, prostitution, solicitation to commit sodomy); Blanco v. State, 471 S.W.2d 70 (Tex. 1971) (six arrests). *But see* People v. Hannon, 381 Ill. 206, 44 N.E.2d 923 (1942) (error to question regarding arrests not connected with instant charge).

[174] *See* United States v. Rudolph, 403 F.2d 805 (6th Cir. 1968); State v. Kirtdoll, 206 Kan. 208, 478 P.2d 188 (1970); People v. Basemore, 36 Mich. App. 256, 193 N.W.2d 335 (1971) (military larceny conviction); Pitman v. State, 487 P.2d 716 (Okla. 1971) (driving while intoxicated conviction; divorce on adultery grounds); Correll v. State, 475 S.W.2d 209 (Tenn. 1971); Garner v. State, 469 S.W.2d 542 (Tenn. 1971); McGowen v. State, 221 Tenn. 442, 427 S.W.2d 555 (1968) (forfeit of city appearance bond for soliciting males); Blanco v. State, 471 S.W.2d 70 (Tex. 1971) (fine for concealed pistol, felony by carrying a gun into a bar where a shooting took place); State v. Wilson, 1 Wash. App. 1001, 465 P.2d 413 (1970) (sexual involvement with a child reduced to lewd and disorderly charges).

[175] *See* Gaines 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).

[176] *See* Lee v. State, 486 S.W.2d 664 (Tex. 1971); Bartley v. State, 457 S.W.2d 297 (Tex. 1970); Hart v. State, 447 S.W.2d 944 (Tex. 1969); State v. Briscoe, 78 Wash. 2d 338, 474 P.2d 267 (1970) (assault, larceny, shoplifting).

of these occurrences, provided the witness was acquainted with the accused at that time.[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.[178] The *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.[179]

If a character witness has answered that he has not heard the negative rumors which may have circulated, or the reports of criminal arrests or convictions, the jury may conclude that the witness is not sufficiently qualified to testify about the accused's reputation. If the witness has admitted knowledge of these things, but still was willing to speak favorably of the defendant's reputation, the jury is then free to consider what sort of standards the witness has applied. This is brought into focus for the jurors by the very effective technique (in those jurisdictions which permit it) of asking the witness at the end of his examination, now that he has heard these things is his opinion still the same, or in the alternative, if he had considered these matters before, what would his opinion have been.[180] The wit-

[177] *See* 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 courts martial conviction within judge's discretion); United States v. Silverman, 430 F.2d 106 (2d Cir. 1970), *reh. denied*, 403 U.S. 924 (1971) (fourteen year old assault arrest, twenty-nine year old forgery arrest); People v. Hurd, 5 Cal. App. 3d 865, 85 Cal. Rptr. 718 (1970) (seven arrests dating back to 1945); State v. Hastings, 477 S.W.2d 108 (Mo. 1972) (twenty-five year old conviction, witness knew defendant all his life); State v. Whittle, 52 N.J. 407, 245 A.2d 367 (1968) (1944 counterfeiting conviction, two witnesses knew defendant at the time); Lewis v. State, 486 S.W.2d 104 (Tex. 1971).

There is the general limitation, however, that a character witness cannot be examined about conduct of the accused which occurred after the instant charge. *See* United States v. Jordan, 454 F.2d 323 (7th Cir. 1971) (reversible error); United States v. Lacob, 416 F.2d 756 (7th Cir. 1969), *reh. denied*, 397 U.S. 1003 (1970) (grand theft indictment following instant indictment, improper but not reversible); United States v. Ripso, 338 F. Supp. 662 (E.D. Pa. 1972) (with the exception in this case that since the indictment 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), *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). *But see* United States v. Pingleton, 458 F.2d 722 (7th Cir. 1972) (could question if reputation affected by instant charge); United States v. Null, 415 F.2d 1178 (4th Cir. 1969) (instant charge inquiry permitted); United States v. Wolfson, 405 F.2d 779 (2d Cir. 1968) *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 449 (D.C. Cir. 1965) (error to question on similar conduct to instant charge).

[178] McCormick §191; Comi v. State, 202 Md. 472, 97 A.2d 129, *cert. denied*, 346 U.S. 898 (1953); Avery v. State, 15 Md. App. 520, 292 A.2d 728 (1972); State v. Donaldson, 76 Wash. 2d 513, 458 P.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* Potts v. State, 502 P.2d 1287 (Okla. 1972); Webber v. State, 472 S.W.2d 136 (Tex. 1971).

[179] Acts: United States v. Stringi, 378 F.2d 896 (3d Cir.), *cert. denied*, 389 U.S. 846 (1967); Balwin v. State, 282 Ala. 653, 213 So. 2d 819 (1968); Bond v. State, 44 Ala. App. 65, 202 So. 2d 173 (1967); People v. Ogg, 258 Cal. App. 2d 841, 66 Cal. Rptr. 289 (1968); People v. Alamo, 23 N.Y.2d 630, 246 N.E.2d 496, *cert. denied*, 396 U.S. 879 (1969); Jones v. State, 479 S.W.2d 307 (Tex. 1972).

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) (additionally, 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, 470 S.W.2d 702 (Tex. 1971); Sanders v. State, 453 S.W.2d 162 (Tex. 1970).

Convictions: Coleman v. United States, 420 F.2d 616 (D.C. Cir. 1969); People v. Hinman, 253 Cal. App. 2d 896, 61 Cal. Rptr. 609 (1967), *cert. denied*, 391 U.S. 923 (1968); Hamilton v. State, 197 So. 2d 469 (Miss. 1967); Morton v. State, 460 S.W.2d 917 (Tex. 1970); King v. State, 414 S.W.2d 935 (Tex. 1967). *See also* United States v. Gosser, 339 F.2d 102 (6th Cir. 1964), *reh. denied*, 382 U.S. 922 (1965) (guilty plea to robbery charge).

[180] *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. Hinman, 253 Cal. App. 2d 896, 61 Cal. Rptr. 609 (1967), *cert. denied*, 391 U.S. 923 (1968) (if you had heard this, would it change your opinion); Garrison 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), *cert. denied*, 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, *cert. denied*, 346 U.S. 898 (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). *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, . . .

1752, 434 P.2d 316 (1967), *aff'd*, 204 Kan. 200, 460 P.2d 614 (1969) (witness asked if she considered the defendant's "crime" but did not specify what crime was being referred to, prosecutor refused to clarify, prejudicial error); People v. Eli, 56 Cal. Rptr. 916, 424 P.2d 356, *cert. denied*, 389 U.S. 888 (1967).

[181] *See* United States v. Beno, 324 F.2d 582 (2d Cir. 1963), *cert. denied*, 379 U.S. 880 (1964).

[182] *See* People v. Harris, 270 Cal. App. 2d 863, 76 Cal. Rptr. 130 (1969) (prejudicial to cross extensively as to defendant's prior acts of violence); Bird v. State, 481 P.2d 773 (Okla. 1971) (continuous cross regarding defendant's father's alleged arson was prejudicial); Billingsley v. State, 473 S.W.2d 501 (Tex. 1971) (error when examining a character witness to read portions of a letter written by defendant dealing with drugs and being high).

[183] *See* United States v. Wooden, 420 F.2d 251 (D.C. Cir. 1969) ("care must be taken to exclude questions which merely tend to traduce and besmirch the defendant, while having no substantial impact on the credibility of the witness"); Shimon v. United States, 352 F.2d 449 (D.C. Cir. 1965); Raimondi v. State, 12 Md. App. 322, 278 A.2d 664 (1971); State v. Beyor, 129 Vt. 472, 282 A.2d 819 (1971) (improper to use character witness cross-examination techniques when the only character testimony was the witness's last statement that the defendant was a good boy); State v. Donaldson, 76 Wash. 2d 513, 458 P.2d 21 (1969). The court need not give a preliminary ruling as to the allowable scope, however, since it is unknown what subjects the witness will broach. United States v. Evanchik, 413 F.2d 950 (2d Cir. 1969).

[184] *See* United States v. Salazar-Gaeta, 447 F.2d 468 (9th Cir. 1971); Gross v. United States, 394 F.2d 216 (8th Cir. 1968); United States v. Beno, 324 F.2d 582 (2d Cir. 1963), *cert. denied*, 379 U.S. 880 (1964); People v. Kramer, 259 Cal. App. 2d 452, 66 Cal. Rptr. 638 (1968) (good faith present when questions based on reports from students, pharmacists, narcotics officer and a "reliable source"; State v. Hinton, 206 Kan. 500, 479 P.2d 910 (1971); State v. Hastings, 477 S.W.2d 108 (Mo. 1972); Carter v. State, 84 Nev. 592, 446 P.2d 165 (1968); State v. Elliot, 25 Ohio St. 2d 249, 267 N.E.2d 806 (1971), *vacated for resentencing*, 408 U.S. 939 (1972) (reversible error if questions propounded in bad faith); Kizer v. State, 468 P.2d 156 (Okla. 1970); Miller v. State, 418 P.2d 220 (Okla. 1966); Brown v. State, 477 S.W.2d 617 (Tex. 1972).

[185] *See, e.g.* People v. Eli, 56 Cal. Rptr. 916, 424 P.2d 356, *cert. denied*, 389 U.S. 888 (1967); Raimondi v. State, 12 Md. App. 322, 278 A.2d 664 (1971).

[186] *See* United States v. West, 460 F.2d 374 (5th Cir. 1972) (preferred 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 (8th Cir. 1968); United States v. Dilbrizzi, 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. 432, 444 P.2d 388 (1968); State v. Konzukonis, 100 R.I. 298, 214 A.2d 893 (1965) (wider latitude than 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 remuneration[191] as well as bias towards a particular defendant[192] or type of case[193] 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

bard, 50 Wis. 2d 408, 184 N.W.2d 156 (1971) (leeway in cross of an expert).

[188] People v. Jones, 225 Cal. App. 2d 598, 37 Cal. Rptr. 454 (1964).

[189] *See* CALIF. EVID. CODE §721(a)(1) (West 1966); Simpson v. State, 32 Wis. 2d 195, 145 N.W.2d 206 (1966), *cert. denied*, 386 U.S. 969 (1967). *See generally* Trimble, *Cross-examination of the Defense Psychiatrist: A Suggested Outline* (N.D.A.A. 1971); Leahy, *Examining, Cross-examining, and Impeaching Expert Witnesses* (N.D.A.A. 1971); Flannery, *Meeting the Insanity Defense*, 51 J. CRIM. L.C. & P.S. 309 (1960).

[190] *See, e.g.*, State v. Vennard, 159 Conn. 385, 270 A.2d 837 (1970), *cert. denied*, 400 U.S. 1011 (1971) (psychiatrist asked if she ever examined a person accused of a crime before).

[191] *See* CALIF. EVID. CODE §722(b) (West 1966). Paragraph (a) provides that the fact that an expert has been appointed by the court may be revealed before the jury.

[192] *See, e.g.*, United States v. Abrams, 427 F.2d 86 (2d Cir.), *cert. denied*, 400 U.S. 832 (1970); United States v. Hoffman, 415 F.2d 14 (7th Cir. 1969).

[193] *See* United States v. Abrams, 427 F.2d 86 (2d Cir.), *cert. denied*, 400 U.S. 832 (1970) (did he previously testify as a defense witness in two similar cases. This was an attorney testifying as an expert on immigration matters); United States v. Hoffman, 415 F.2d 14 (7th Cir. 1969) (attorney called as an insurance expert could be asked if thirteen of the companies he represented had gone bankrupt).

[194] *See* PROPOSED FED. R. EVID. 705 which provides. "The expert may in any event be required to disclose the underlying facts on data on cross-examination."; CALIF. EVID. CODE §721(a)(3) West 1966; United States v. Retolaza, 398 F.2d 235 (4th Cir. 1968), *cert. denied*, 393 U.S. 1032 (1969); People v. Nye, 78 Cal. Rptr. 467, 455 P.2d 395 (1969) (photos of victim as related to doctor's opinion that defendant had no sexual interest in her); State v. Tusner, 81 N.M. 450, 468 P.2d 421, *cert. denied*, 81 N.M. 506, 469 P.2d 151 (1970).

[195] *See* MCCORMICK §35.

[196] *See* People v. Jones, 225 Cal. App. 598, 37 Cal. Rptr. 454 (1964); People v. Woody, 3 Mich. App. 729, 143 N.W.2d 619 (1966), *aff'd*, 380 Mich. 332, 157 N.W.2d 201 (1968) (prosecutor raised stints in boys training school, escape, burglary, murder, assaults and penitentiary time, could ask if these altered his opinion); MCCORMICK §14.

[197] *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 715, 185 N.W.2d 545 (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. Cuchinelli, 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).

[198] *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, 455 P.2d 395 (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).

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.

[199] *See* People v. Jones, 225 Cal. App. 2d 598, 37 Cal. Rptr. 454 (1964) (history of sexual offenses); Simpson v. State, 32 Wis. 2d 195, 145 N.W.2d 206 (1966), *cert. denied*, 386 U.S. 965 (1967).

the defendant, whether he performed psychological tests, and whether he bases his opinion mainly on the reports of others.[200] Additionally, the psychiatrist may be asked questions going to the heart of the insanity defense, *i.e.*, is the defendant faking?[201]

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.[202] Some courts will permit the asking of hypothetical questions which are based on facts not in evidence,[203] 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.[204]

Virtually all courts, to some extent, allow the use of treatises in the cross-examination of expert witnesses.[205] 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.[206] 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.[207]

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.[208] 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.[209] It is equally clear that court witnesses are subject to cross-examination by counsel for both sides. This modification of the confrontation principle is sup-

[200] *See, e.g.*, United States v. Harper, 450 F.2d 1032 (5th Cir. 1971); Brown v. State, 45 Ala. App. 391, 231 So. 2d 167 (1970) (question—did you ask him whether or not he had been convicted of a penitentiary offense?).

[201] *See* People v. Bandhauer, 83 Cal. Rptr. 184, 463 P.2d 408 (1970) (proper to ask doctor if he knew that defendant had seen numerous other "knowledgeable" prisoners and therefore simply that his symptoms might be faked); Bateman v. State, 10 Md. App. 630, 272 A.2d 64 (1971) ("Doctor, if I tell you this case was originally set for trial in February and the insanity plea was not filed until after the case was originally set for trial, would that indicate perhaps this insanity is a newly made up idea?" Here it was proper to demonstrate that the accused had no history of mental disease and made no effort to seek treatment until the case was set for trial. Additionally, the defendant's amnesia symptom was incongruous with normal medical standards).

[202] *See* United States v. Kiliyan, 456 F.2d 555 (8th Cir. 1972); Tarrants v. State, 236 So. 2d 360 (Miss. 1970), *cert. denied*, 401 U.S. 920 (1971) (seven page hypothetical question permitted).

[203] *See* Carr v. State, 43 Ala. App. 642, 198 So. 2d 791 (1967); Zerega v. State, 260 So. 2d 1 (Fla. 1971); Zebrowski v. State, 50 Wis. 2d 715, 185 N.W.2d 545 (1971). *Contra*, Sallee v. Ashlock, 438 S.W.2d 538 (Ky. 1969).

[204] *See, e.g.*, People v. Jones, 225 Cal. App. 2d 598, 37 Cal. Rptr. 454 (1964).

[205] *See* McCormick §321.

[206] *See* Brown v. United States, 419 F.2d 337 (8th Cir. 1969) (works recognized by witness as authoritative); Calif. Evid. Code §72(b) (West 1966):

> If a witness testifying as an expert testifies in the form of an opinion, he may not be cross-examined in regard to the content or tenor of any scientific, technical, or professional test, treatise, journal, or similar publication unless: (1) The witness referred to, considered, or relied upon such publication in arriving at or forming his opinion; or (2) such publication has been admitted in evidence.

[207] *See, e.g.*, Darling v. Charleston Community Memorial Hospital, 33 Ill. 2d 326, N.E. 2d 253 (1965). For a discussion of *Darling* see Note, *Use of Authoritative Treatises on Cross-examination*, 15 De Paul L. Rev. 492 (1966); 41 Notre Dame Lawyer 607 (1966); 17 Syracuse L. Rev. 566 (1966); 29 U. Cin. L. Rev. 255 (1966); 1966 U. Ill. L. F. 225: 69 W. Va. L. Rev. *See also* 38 Tenn. L. Rev. 449 (1971).

[208] *See* United States v. Harper, 450 F.2d 1032 (5th Cir. 1971); Jarrett v. State, 500 P.2d 1027 (Wyo. 1972). It also is proper to use the reports of the prosecution expert. *See* State v. Risden, 106 N.J. 226, 264 A. 2d 214 (1970). If the witness' report is used to impeach him, it is error not to introduce the entire report. *See* People v. Plummer, 37 Mich. App. 657, 195 N.W.2d 328 (1972).

[209] *See* McCormick §8; Prop, Fed. R. Evid. 614 (a), 706. *See also* United States v. Wilson, 447 F.2d 1 (9th Cir. 1971), *cert. denied*, 404 U.S. 1053 (1972) (the court properly called a witness at the prosecutor's request, so that he could be cross-examined as to intimidation attempts by the defendant). But it is improper to call a court witness so the prosecutor can extensively cross-examine him on the basis of prior statements under the guise of impeachment. People v. McKee, 39 Ill. 2d 265, 235 N.E.2d 625 (1968); People v. Dandridge, 120 Ill. App. 209, 256, N.E.2d 76 (1970).

ported by both case law[210] and legislation.[211] 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.[212]

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,[213] but may at times be a piercing inquiry.[214] A judge who plays too aggressive a role in the course of the trial, however, may precipitate the reversal of a guilty verdict,[215] for as Justice Learned Hand has said,

> Prosecution and judgment are too quite separate functions in the administration of justice; they must not merge.[216]

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.[217] 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.[218] Similarly, a small body of case law supports the modern position.[219] Although the impeachment may be on the grounds of bias, interest, or character,[220] it typically is in the form of an attack based upon a prior inconsistent statement.[221]

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.[222] 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); Momtesi 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.

[215] *See* United States v. Wyatt, 442 F.2d 858 (D.C. Cir. 1971) (reversal where extensive questioning opened new areas); United States v. Cassiagnol, 420 F.2d 868 (4th Cir. 1970), *cert. denied*, 397 U.S. 1044 (1970) (reversal caused by exhaustive, chiding, hostile examination of the defendant); Jackson v. United States, 329 F.2d 893 (D.C. Cir. 1964), *aff'd*, 351 F.2d 821 (D.C. Cir. 1965) (where extensive, prejudicial examination of witnesses required reversal).

[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.

[219] *See* State v. Micheal, 103 Ariz. 46, 436 P.2d 595 (1968), *aff'd*, 107 Ariz. 126, 483 P.2d 541 (1971); People v. Freeman, 20 Cal. App. 3d 488, 97 Cal. Rptr. 717 (1971); State v. Gardner, 2 Ore. App. 265, 467 P.2d 125 (1970); People v. Chacon, 73 Cal. Rptr. 10, 447 P.2d 106 (1968); State v. Scott, 502 P.2d 753 (Kan. 1972); State v. Armstrong, 207 Kan. 681, 486 P.2d 1322 (1971); State v. Harden, 206 Kan. 365, 480 P.2d 53 (1971); State v. Franklin, 206 Kan. 527, 479 P. 2d 848 (1971); Barger v. State, 2 Md. App. 565, 235 A.2d 752 (1967); State v. Fronning, 186 Neb. 463, 183 N.W. 2d 920 (1971); State v. Williams, 12 N.C. App. 161, 182 S.E.2d 592 (1971), *cert. denied*, 279 N.C. 514, 183 S.E.2d 691 (1971).

[220] *See* McCormick §38; State v. Harden, 206 Kan. 365, 480 P.2d 53 (1971); State v. Franklin, 206 Kan. 527, 479 P.2d 848 (1971); Barger v. State, 2 Md. App. 565, 235 A.2d 752 (1967).

[221] *See e.g.*, Troublefield 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.[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.[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.[225] These limitations are based on the theory that the only reason for the impeachment of one's own witness is to remove the adverse effects of his unexpected testimony.[226]

While courts frequently use the term "hostile witness" to refer to a witness who has given surprising and damaging testimony to the party who called him,[227] the term also refers to a witness who may be evasive, unwilling, or recalcitrant.[228] In those situations, judges in some jurisdictions, by the exercise of their discretion, may allow the calling party to cross-examine the witness.[229]

VII Impeachment by Prior Inconsistent Statements

When the person on the witness stand, whether he is a defense witness, a prosecution witness, a court witness, or the defendant himself, testifies to facts which are inconsistent with assertions he has made at an earlier time, that person's credibility may be impeached through cross-examination based upon his prior inconsistent statements.[230] Al-

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 178 (1971); State v. Hamilton, 249 La. 392, 187 So.2d 417 (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); Cherl v. State, 472 S.W.2d 273 (Tex. 1971). *But see* Beavers v. State, 492 P.2d 88 (Alaska 1971); State v. Quattrochi, 103 R.I. 115, 235 A.2d 99 (1967).

[223] *See* 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).

[224] *See* Jackson v. State, 124 Ga. App. 488, 184 S.E.2d 185 (1971). *See also* Doss v. United States, 431 F.2d 601 (9th Cir. 1970); United States v. Miles, 413 F.2d 34 (3d Cir. 1969); Ewing v. United States, 386 F.2d 10 (9th Cir. 1967), *cert. denied*, 390 U.S. 991 (1968); Hooks v. United States, 375 F.2d 212 (5th Cir. 1967); Bushaw v. United States, 353 F.2d 477 (9th Cir. 1965); *cert. denied*, 384 U.S. 921 (1966); Weaver v. State, 446 P.2d 64 (Okla. 1968); Zanders v. State, 480 S.W.2d 708 (Tex. 1972); State v. Green, 71 Wash. 2d 372, 428 P.2d 540 (1967). *But see* Gaitan v. People, 167 Colo. 395, 447 P.2d 1001 (1968), here prosecutor avoided questioning the witness in an in camera proceeding to prevent foreknowledge because he was afraid she would change her testimony. He was still allowed to claim surprise at trial but the court evidenced some disapproval.

[225] *See* United States v. Dunmore, 446 F.2d 1214 (8th Cir. 1971), *cert. denied*, 404 U.S. 1041 (1972); United States v. Insana, 423 F.2d 1165 (2d Cir. 1970), *cert. denied*, 400 U.S. 841 (1970); United States v. Miles, 413 F.2d 34 (3d Cir. 1969); United States v. Duff, 332 F.2d 702 (6th Cir. 1964); Gibbs v. State, 193 So.2d 460 (Fla. 1967); Russell v. Commonwealth, 403 S.W.2d 694 (Ky. Ct. App. 1966); Commonwealth v. Knudsen, 443 Pa. 412, 278 A.2d 881 (1971), *cert. denied*, 409 U.S. 866 (1972); Zanders v. State, 480 S.W.2d 708 (Tex. 1972). In United States v. Mingola, 424 F.2d 710 (2d Cir. 1970), impeachment was allowed when a witness who previously had said that he stole checks for the defendant, testified in court that they never had conversations about dealings in stolen checks. *But see* United States v. Washabaugh, 442 F.2d 1127 (9th Cir. 1971), where a witness who claimed lack of memory could be impeached.

[226] *See* United States v. Dobbs, 448 F.2d 1262 (5th Cir. 1971).

[227] *See* United States v. Dobbs, 448 F.2d 1262 (5th Cir. 1971); United States v. De Bose, 410 F.2d 1273 (6th Cir. 1969), *cert denied*, 410 U.S. 920 (1971); Crowder v. United States, 294 F. Supp. 291 (E.D. Mich. 1967), *aff'd*, 406 F.2d 727 (6th Cir. 1969); Hudson v. State, 267 So. 2d 494 (Ala. 1972); State v. Hamilton, 249 La. 392, 187 So.2d 417 (1966).

[228] *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).

[229] *See, e.g.*, United States v. Stubin, 446 F.2d 457 (3d Cir. 1971); United States v. Holsey, 414 F.2d 458 (10th Cir. 1969), *aff'd*, 437 F.2d 250 (10th Cir. 1970); United States v. Mitchell, 408 F.2d 996 (4th Cir.), *cert. denied*, 396 U.S. 930 (1969); Lerma v. United States, 387 F.2d 187 (8th Cir.), *cert. denied*, 391 U.S. 907 (1968); Goings v. United States, 377 F.2d 753 (8th Cir. 1967). *cert. denied*, 393 U.S. 883 (1968); United States v. Duff, 332 F.2d 702 (6th Cir. 1964); Caldwell v. State, 243 So.2d 422 (Fla. 1971); State v. Collins, 204 Kan. 55, 460 P.2d 573 (1969); Brown v. Commonwealth, 440 S.W.2d 520 (Ky. 1969); State v. Fournier, 267 A.2d 638 (Me. 1970); Commonwealth v. Douglas, 354 Mass. 212, 236 N.E.2d 865 (1968), *cert. denied*, 394 U.S. 960 (1969); People v. Seligman, 35 App. Div. 2d 591, 313 N.Y.S.2d 593 (1970); State v. Minneken, 27 Ohio St.2d 155, 271 N.E.2d 821 (1971). The prosecution is not bound by the answer of a hostile witness. *See* People v. Woodfork, 29 Mich. App. 633, 185 N.W.2d 826 (1971). *See also* Rotolo v. United States, 404 F.2d 316 (5th Cir. 1968), where a 15 year old government witness in a prosecution for transport of a minor for prostitution was properly asked leading questions because of her upset and nervous condition.

[230] *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,[231] that matter is outside the scope of this article. For present purposes, prior inconsistent statements will be discussed not as a method of proving that a particular fact or statement is true but rather as a method of showing that the witness who materially changes his story is generally unworthy of belief (The majority view limits this type of examination for the latter purpose[232] and requires that the jury be given a limiting instruction.[233]).

Prior inconsistent statements may have been given to the prosecutor himself,[234] to the police,[235] to probation or parole officers[236] or to a psychiatrist.[237] Inconsistent testimony may have been offered to a grand jury,[238] at a coroner's inquest,[239] in a previous trial,[240] in depositions,[241] or affidavits[242] or in the preliminary proceedings of the instant trial.[243] This list by no means exhausts the sources of prior inconsistent statements.[244]

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 in-

1127 (9th Cir. 1971); United States v. Pisente, 453 F.2d 412 (9th Cir. 1971); United States v. Hicks, 420 F.2d 814 (5th Cir. 1970); United States *ex. rel.* Lewis v. Yeager, 285 F.Supp. 780 (D.N.J. 1968), *cert. denied*, 402 U.S. 961 (1971); Bond v. State, 120 Ga. App. 555, 171 S.E.2d 634 (1969); Stutzman v. State, 250 Ind. 467, 235 N.E.2d 186 (1968); People v. Miles, 23 N.Y.2d 527, 245 N.E.2d 688 (1968); Kennedy v. State, 443 P.2d 127 (Okla. 1968); Sierra v. State, 476 S.W.2d (Tex. 1971); Thumann v. State, 466 S.W.2d 285 (Tex. 1971); Dove v. State, 402 S.W.2d 913 (Tex. 1966).

[231] *See* PROPOSED FED. R. EVID. 801; CAL. EVID. CODE 1235 (West 1966).

[232] 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. Reinckie, 354 F.2d 418 (2d Cir. 1965); People v. Luna, 37 Ill.2d 299, 226 N.E.2d 586 (1967); People v. Svizzero, 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).

[233] *See* Colbert v. State, 124 Ga. App. 283, 183 S.E.2d 476 (1971); Minor v. State, 6 Md. App. 82, 250 A.2d 113 (1969).

[234] *See, e.g.*, Williams v. Florida, 399 U.S. 78 (1970); United States v. Caruso, 465 F.2d 1369 (2d Cir. 1972); United States v. Lopez, 355 F.2d 250 (2d Cir. 1966), *cert. denied*, 384 U.S. 1013 (1966); State v. Lancaster, 25 Ohio St. 2d 83, 267 N.E.2d 291 (1971).

[235] *See, e.g.*, Moore v. Beto, 320 F. Supp. 469 (S.D. Tex. 1970); Realmuto v. Wallack, 254 F. Supp. 1006 (S.D. N.Y. 1966); Minor v. State, 6 Md. App. 82, 250 A.2d 113 (1969); State v. Baca, 80 N.M. 488, 458 P.2d 92 (1969); Carter v. State, 414 S.W.2d 663 (Tex. 1967).

[236] *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 856, 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 P.2d 961, 88 Cal Rptr. 161 (1970) (where admission to probation officer without advice of counsel were not sufficiently reliable for impeachment purposes).

[237] *See, e.g.*, People v. Acosta, 18 Cal. App. 3d 895, 96 Cal. Rptr. 234 (1971). *But see* note 198 *supra*.

[238] *See, e.g.*, United States v. Guglielmini, 425 F.2d 439 (2d Cir. 1970); Collaher v. United States, 419 F.2d 520 (9th Cir. 1969), *cert. denied*, 396 U.S. 960 (1969); United States v. Budzanoski, 331 F. Supp. 1201 (W.D. Pa. 1973), *aff'd*, 462 F.2d 443 (3d Cir. 1972). *But see* State v. Terrebonne, 256 La. 385, 236 So. 2d 773 (1970) (grand jury secrecy cannot be violated for impeachment purposes).

[239] United States *ex rel.* Musil v. Pate, 427 F.2d 930 (7th Cir. 1970), *cert. denied*, 401 U.S. 914 (1971); People v. Byers, 50 Ill. 2d 210, 278 N.E.2d 65 (1972); State v. Jacques 296 A.2d 246 (Vt. 1972).

[240] *See, e.g.*, People v. Peckham, 249 Cal. App. 2d 941, 57 Cal. Rptr. 922 (1967); Jett v. Commonwealth, 436 S.W.2d 788 (Ky. 1969); State v. Atkinson, 485 P.2d 1117 (Ore. Ct. App. 1971); Stafford v. State, 481 S.W.2d 831 (Tex. 1972); State v. Kramer, 72 Wash. 2d 904, 435 P.2d 970 (1967). *Contra*, Commonwealth v. Rasom, 446 Pa. 457, 288 A.2d 762 (1972).

[241] *See, e.g.*, Keener v. State, 456 S.W.2d 912 (Tex. 1970); Griffin v. State, 455 S.W.2d 298 (Tex. 1970).

[242] *See, e.g.*, United States v. Cantome, 426 F.2d 902 (2d Cir.), *cert. denied* 400 U.S. 827 (1970); Smith v. United States, 312 F.2d 867 (D.C. Cir. 1962), *aff'd*, 332 F.2d 720 (D.C. Cir. 1964); Moore v. Beto, 320 F. Supp. 469 (S.D. Tex. 1970).

[243] *See, e.g.*, Woody v. United States, 379 F.2d 130 (D.C. Cir.), *cert. denied*, 389 U.S. 961 (1967); Humphrey v. United States, 236 A.2d 438 (D.C. Cir. 1967); Commonwealth v. Ravenell, 448 Pa. 162, 292 A.2d 365 (1972).

[244] For example, a newspaper article may be the source of a prior inconsistent statement. *See* United States v. Bohle, 445 F.2d 54 (7th Cir. 1971) (defense counsel was able to cross-examine a witness based upon a newspaper interview wherein the witness claimed that the defendant appeared to be high on LSD); Pallota v. United States, 404 F.2d 1035 (1st Cir. 1968), *rev'd on other grounds*, 443 F.2d 594 (1st Cir. 1970) (counsel could impeach a witness where the witness had given a different newspaper account). A statement not adopted by the witness may not be used to impeach. *See* Lawrence v. United States, 357 F.2d 434 (10th Cir. 1966).

vite judicial discretion.[245] Generally speaking, if the witness omits a material fact which he should not reasonably have done,[246] or if he alters a material fact in his testimony, he is subject to confrontation with his prior statement.[247] A stricter standard may be applied by some courts when the person to be impeached is the defendant.[248] 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.[249]

The foundation requirements for prior inconsistent statement impeachment stem from an 1820 English opinion, *Queen Caroline's Case*.[250] 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.[251]

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.[252] His memory having been refreshed, the witness must then be given the opportunity to explain away or deny the statement.[253] A witness who claims that he does not know or cannot remember if he made the statement does not thereby escape impeachment.[254] Having properly laid the required foundation, the prosecutor may introduce the prior statement into evidence at his next opportunity to offer evidence.[255]

The rigid requirements of a proper foundation have been relaxed in the Proposed Federal Rules of Evidence, through the abolition of the rule of

[245] *See, e.g.*, Oliver v. State, 239 So. 2d 637 (Fla. Ct. App. 1970); Stafford v. State, 481 S.W.2d 831 (Tex. 1972).

[246] *See* State v. Mack, 282 N.C. 334, 193 S.E.2d 71 (1972). In State v. Brewton, 247 Ore. 241, 422 P.2d 581 (1967), *cert. denied*, 387 U.S. 943 (1967), the court specifically rejected the voluntary-involuntary distinction as being irrelevant. *See also* State v. Paul, 83 N.M. 619, 495 P.2d 797 (1972).

[247] 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).

[248] United States *ex. rel.* Dixon v. Cavell, 284 F. Supp. 535 (E.D. Pa. 1968) (a defendant must deny more than elements of the crime); Commonwealth v. Burkett, 211 Pa. Super. 299, 235 A.2d 161 (1967), *aff'd*, 215 Pa. Super. 733, 256 A.2d 138 (1969) (more pinpointed inconsistency needed than the mere denial of elements of the crime).

[249] *See* McCormick §35.

[250] *See* 2 Brod. & Bing 284, 129 Eng. Rep. 976 (1820).

[251] *Id.* at 313.

[252] *See* McCormick §37. *See also* United States v. Harris, 441 F.2d 1333 (10th Cir. 1971); Gill v. Turner, 443 F.2d 1064 (10th Cir. 1971); United States v. Bohle, 445 F.2d 54 (7th Cir. 1971); Troublefield 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 (1971); 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, 36 Mich. App. 211, 193 N.W.2d 412 (1971); Hooks v. State, 197 So. 2d 238 (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 (1969). It is improper to ask each question of a lengthy prior statement. *See, e.g.*, People v. Bacon, 2 Ill. App. 3d 324, 276 N.E.2d 782 (1971) (77 for one witness, 98 for another), *But see* State v. Walker, 148 Mont. 216, 419 P.2d 300 (1966), where each question and answer was properly called to witness' attention.

[253] *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).

[254] "Don't remember" allows impeachment. *See* United States v. Washabaugh, 442 F.2d 1127 (9th Cir. 1971); People v. Luna, 69 Ill. App. 291, 216 N.E.2d 473 (1967); People v. Dozier, 22 Mich. App. 528, 177 N.W.2d 694 (1970); State v. Miles, 73 Wash. 2d 67, 436 P.2d 198 (1968). *Contra* People v. Sam, 454 P.2d 700, 77 Cal. Rptr. 804 (1969). People v. Forgash, 38 Mich. App. 474, 196 N.W.2d 873 (1972).

[255] *See* McCormick §37, Proposed Fed. R. Evid. 613 (b).

Queen Caroline's Case.[256] 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.[257] 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.[258] 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,[259] 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.[260] 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.[261]

In *Walder v. United States*,[262] 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 which were unlawfully seized from him on a prior occasion. The pending charges were unrelated to this prior seizure and therefore the illegally seized evidence did not tend to prove guilt; it only tended to show the defendant's unreliability. The Supreme Court, finding that this impeachment was proper, wrote,

> 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.[263]

In the landmark case of *Harris v. New York*,[264]

[256] *See* PROPOSED FED. R. EVID. 613 (a).

[257] *See* People v. Woodell, 2 Ill. App. 3d 257, 274 N.E.2d 105 (1971).

[258] *See* State v. Gonya, 107 R.I. 594, 268 A.2d 729 (1970) (error although tapes garbled, no transcript made available); Weaver v. State, 446 P.2d 69 (Okla. 1968) (no cautionary instruction). *But see* People v. Wheeler, 23 Cal. App. 3d 290, 100 Cal. Rptr. 198 (1971) (jurisdiction allows use as substantive evidence).

[259] This was done United States v. McKeever, 271 F.2d 669 (2d Cir. 1959).

[260] *See, e.g.*, Beavers v. State, 492 P.2d 88 (Alaska 1971); Commonwealth v. Wilson. 431 Pa. 21, 244 A.2d 734 (1969), *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).

[261] *See* PROPOSED FED. R. EVID. 613 (a); KAN. STAT. ANN. §60-422(a)(1964). *See also* Commonwealth v. Williams, 443 Pa. 85, 277 A.2d 781 (1971).

[262] 347 U.S. 62 (1954).

[263] *Id.* at 65.

[264] 400 U.S. 222 (1971). The decision received some criticism. *See* Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Majority*, 80 YALE L.J. 1198 (1971); Note, 1971 WASH. L.Q. 441 (1971). Prior to the Harris decision, courts were divided over the issue. *Contra* Bosley v. United States, 426 F.2d 1257 (D.C. Cir. 1970); Proctor v. United States, 404 F.2d 819 (D.C. Cir. 1968); United States v. Fox, 403 F.2d 97 (2d Cir. 1968); Groshart v. United States, 392 F.2d 172 (9th Cir. 1968); United States *ex rel.* Hill v. Pinto, 394 F.2d 470 (3d Cir. 1967); Wheeler v. United States, 382 F.2d 988 (10th Cir. 1967); Rolland v. Michigan, 320 F. Supp. 1195 (E.D. Mich. 1970), *vacated*, 439 F.2d 1203 (6th Cir. 1971); Velarde v. People, 171 Colo. 261, 466 P.2d 919 (1970); People v. Goree, 30 Mich. App. 490, 186 N.W.2d 872 (1971); People v. Marsh, 14 Mich. App. 518, 165 N.W.2d 853 (1968), *rev'd on other grounds*, 383 Mich. 495, 175 N.W.2d 780 (1970); State v. Brewton, 247 Ore. 241, 422 P.2d 581, *cert. denied*, 387 U.S. 943 (1967) Commonwealth v. Padgett, 428 Pa. 229, 237 A.2d 209 (1968); State v. Catrett, 276 N.C. 86, 171 S.E.2d 398 (1970); Caldwell v. Commonwealth, 209 Va. 412, 164 S.E.2d 699 (1968). See notes 42 N.Y.U.L. REV. 772 (1967); 36 U. CINC. L. REV. 738 (1967). *See also* People v. McGrath, 31 Mich. App. 351, 187 N.W.2d 904 (1971); Spann v. State, 448 S.W.2d 178 (Tex. 1969). *Accord* United States v. Curry, 358 F.2d 904 (2d Cir. 1965), *reh. denied*, 387 U.S. 949 (1967); Bailey v. United States, 328 F.2d 542 (D.C. Cir. 1964), *cert. denied*, 377 U.S. 972 (1964); People v. Durazo, 353 Cal. App. 2d 555, 61 Cal. Rptr. 391 (1967); People v. Boodie, 26 N.Y.2d 779, 257 N.E.2d 657 (1970); People v. Kulis, 18 N.Y.2d 318, 221 N.E.2d 541 (1966); State v. Butler, 19 Ohio St. 2d 55, 249 N.E.2d 818 (1969); Mullins v. State, 425 S.W.2d 354 (Tex. 1968); State v. Burgess, 71 Wash. 2d 617, 430 P.2d 185 (1967). Of course a signed confession in proper form can be used to impeach. *See* People v. Williams, 98 Ill. App. 2d 136, 240 N.E.2d 144 (1968).

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 useable 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.[265]

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]

[265] 400 U.S. at 225.

[266] This principle, of course, is almost without exception. *See, e.g.*, United States v. McQueen, 458 F.2d 1049 (3d Cir. 1972); Smith v. United States, 312 F.2d 867 (D.C. Cir. 1962), *aff'd*, 332 F.2d 720 (D.C. Cir. 1964); Fernandez v. Delgado, 257 F. Supp. 673 (D. Puerto Rico 1966); People v. Canard, 257 Cal. App. 2d 444, 65 Cal. Rptr. 15 (1967), *cert. denied*, 393 U.S. 912 (1968); State v. Vollhardt, 157 Conn. 25, 244 A.2d 601 (1968); People v. Lefler, 38 Ill. 2d 216, 230 N.E.2d 827 (1967); Commonwealth v. Klaciak, 350 Mass. 679, 216 N.E.2d 417 (1966); State v. Kassow. 28 Ohio St. 141, 277 N.E.2d 435 (1971), *vacated for resentencing*, 408 U.S. 939 (1972); State v. Swanson, 9 Ohio App. 2d 60, 222 N.E.2d 844 (1967); Riddell v. Rhay, 79 Wash. 2d 248, 484 P.2d 907 (1971), *cert. denied*, 404 U.S. 974 (1971); Gaertmer v. State, 35 Wis. 2d 159, 150 N.W.2d 370 (1967). *But see* People v. Sovientini, 34 App. Div. 2d 832, 312 N.Y.S.2d 530 (1970).

[267] *See* Ruffin v. United States, 293 A.2d 477 (D.C. Cir. 1972); State v. Slobodian, 120 N.J. Super. 68, 293 A.2d 399 (1972), *cert. denied*, 409 U.S. 909 (1972); People v. Torres, 32 App. Div. 2d 791, 302 N.Y.S.2d 396 (1969); State v. Dunlap, 16 N.C. App. 176, 191 S.E.2d 385 (1972). *But see* Rooks v. State, 250 Ark. 561, 466 S.W.2d 478 (1971).

[268] *See* McCormick §43.

[269] The *Harris* principle may be applied to *Escobedo* and *McNabb-Mallory* situations as well. *See* Tate v. United States, 283 F.2d 377 (D.C. Cir. 1970) (*McNabb-Mallory* problem); Padgett v. Russell, 332 F. Supp. 41 (E.D. Pa. 1971) (*Escobedo* violation). In State v. Grant, 77 Wash. 2d 47, 459 P.2d 639 (1969), the court held that a defense witness who was denied counsel could be impeached with his statements.

The influence of the *Harris* decision has already been felt in a number of cases. *See* People v. McIntyre, 467 F.2d 274 (8th Cir. 1972); United States v. Cransom, 453 F.2d 123 (4th Cir. 1971), *cert. denied*, 406 U.S. 909 (1972); State v. Altman, 107 Ariz. 93, 482 P.2d 460 (1971); Rooks v. State, 250 Ark. 561, 466 S.W.2d 478 (1971); Retherford v. State, 270 So. 2d 353 (Fla. 1972); Estep v. State, 14 Md. App. 53, 286 A.2d 187 (1972); State v. Slobodian, 120 N.J. Super. 68, 293 A.2d 399 (1972), *cert. denied*, 409 U.S. 909 (1972); State v. Bryant, 280 N.C. 551, 187 S.E.2d 111 (1972); State v. Iverson, 187 N.W.2d 1 (N. D. 1971); Commonwealth v. Williams, 443 Pa. 85, 277 A.2d 781 (1971); Small v. State, 466 S.W.2d 281 (Tex. 1971).

[270] *See* United States v. Blackwood, 456 F.2d 526 (2d Cir. 1972); Brooks v. United States, 449 F.2d 1296 (9th Cir. 1971); Compton v. United States, 334 F.2d 212 (4th Cir. 1964); United States *ex rel.* Debrow v. Zelken, 324 F. Supp. 383 (S.D.N.Y. 1971); United States v. Schipani, 315 F. Supp. 253 (E.D.N.Y. 1970), *cert. denied*, 401 U.S. 983 (1971); Lassof v. Grey, 207 F. Supp. 843 (W.D. Ky. 1962); Trowbridge v. State, 502 P.2d 495 (Okla. 1972). In *Commonwealth v. Wright*, 415 Pa. 55, 202 A.2d 79 (1964, *rev'd* 444 Pa. 588, 282 A.2d 266 (1971), the Pennsylvania supreme court stated the conditions which it felt must be present in order to impeach with illegally seized evidence. These are: (1) the defendant must elect to take the stand; (2) the testimony which conflicts must be more than a denial of the elements of the crime; (c) the inadmissible evidence can be received only to the extent that it does not admit the acts which are the essential elements of the crime charged. *See also* Commonwealth v. Reginelli,

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.[271] 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.[273] 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]

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.[275]

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.[276] 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" [278] or by prior

208 Pa. Super. 344, 222 A.2d 605 (1966), *cert. denied*, 387 U.S. 945 (1967). *But see* United States v. Birrell, 276 F. Supp. 798 (S.D.N.Y. 1967), where the court held that impeachment with evidence tainted by failure to give *Miranda* warnings was improper.

[271] *See* MCCORMICK §43.

[272] *See* PROPOSED Fed. R. EVID.; MICH. STAT. ANN. §27A. 2158 (1962); MINN. STAT. ANN. §595.07 (1964); MISS. CODE ANN. ch. 8, §1692 (1972); MO. STAT. ANN. §491.050 (1952); WASH. CODE ANN. tit. 10 §1.052.030 (1961). *See also* Brooks v. United States, 309 F.2d 580 (10th Cir. 1962), *cert. denied*, 383 U.S. 916 (1966); State v. Bitting, 162 Conn. 1, 291 A.2d 240 (1971); State v. Shipp, 184 N.W.2d 679 (Iowa 1971); Commonwealth v. Holloway, 212 Pa. Super. 250, 242 A.2d 683 (1971). An alternative motivation for impeachment by prior conviction is discussed by Justice Keeton in his dissenting opinion in State v. Owen, 253 P.2d 203, 224 (Idaho 1953):

> 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 villaining of the accused and prejudices the jury by injecting.

[273] *See* MINN. STAT. ANN. §595.07 (1966); MO. STAT. ANN. §491.050 (1952); WASH. CODE ANN. §10.52.030 (1962). *See also* Spencer v. Texas, 385 U.S. 554 (1967); Parish v. State, 477 P.2d 1005 (Alaska 1970); People v. Knightom, 250 Cal. App. 2d 221, 58 Cal. Rptr. 700 (1967); State v. Dunn, 91 Idaho 870, 434 P.2d 88 (1967); State v. Anderson, 159 N.W.2d 809 (Iowa 1968); State v. Everett, 157 N.W.2d 144 (Iowa 1968); People v. Cook, 24 Mich. App. 401, 180 N.W.2d 354 (1970); State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971); State v. Weaver, 3 N.C. App. 439, 165 S.E.2d 15 (1969).

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 325 (Tex. 1968). *But see* Brunfield v. State, 445 S.W.2d 732 (Tex. 1969).

[274] *See* KAN. STAT. ANN. §60-421 (1964); PA. STAT. ANN., tit. 19, ch. 9, §19-711 (1964). *See also* State v. DeLespine, 201 Kan. 348, 440 P.2d 572 (1968); State v. Cantrell, 201 Kan. 182, 440 P.2d 580 (1968); Commonwealth v. Barron, 438 Pa. 259, 264 A.2d 710, *appeal dismissed*, 439 Pa. 614, 266 A.2d 476 (1970); Commonwealth v. Bastome, 211 Pa. Super. 509, 239 A.2d 863 (1968).

[275] *See, e.g.*, United States v. Comi, 336 F.2d 856 (4th Cir. 1964), *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).

[276] *See* PROPOSED FED. R. EVID. 404(b). *See also* United States v. Fisher, 377 F.2d 285 (6th Cir. 1967), *reh. denied*, 389 U.S. 998 (1967); Ivery v. State, 219 So. 2d 120 (Fla. 1969); State v. Smith, 262 La. 39, 262 So. 2d 362 (1972); State v. Lee, 485 P.2d 660 (Ore. 1971).

[277] *See* PROPOSED FED. R. EVID. 404(b). *See also* Tapia v. Rodriquez, 446 F.2d 410 (10th Cir. 1971); People v. Washington, 32 App. Div. 2d 605, 299 N.Y.S. 2d 927 (1969); People v. Johnson, 31 App. Div. 2d 842, 298 N.Y.S.2d 366 (1969); People v. Childers, 28 App. Div. 2d 725, 281 N.Y.S.2d 706 (1967); State v. Fletcher, 279 N.C. 85, 181 S.E.2d 405 (1971); State v. Thomas, 17 N.C. App. 8, 193 S.E.2d 450 (1972).

[278] *See, e.g.*, United States v. Badgood, 453 F.2d 988 (5th Cir. 1972); United States v. White, 463 F.2d 18 (9th Cir. 1972); United States v. Michaelson, 453 F.2d 1248 (9th Cir. 1972); United States v. Cook, 450 F.2d 339 (5th Cir. 1971), *cert. denied*, 406 U.S. 925 (1972); United States v. Kiraly, 445 F.2d 291 (6th Cir.) *cert. denied*, 404 U.S. 915 (1971); United States v. Gibson, 444 F.2d 275 (5th Cir. 1971); United States v. Harper, 443 F.2d 911 (9th Cir.), *cert. denied*, 404 U.S. 966 (1971); United States v. Dandridge, 437 F.2d 1324 (7th Cir.), *cert. denied*, 403 U.S. 934 (1971); United States v. Mancuso, 423 F.2d 23 (5th Cir.), *cert. denied*, 400 U.S. 839 (1970); United States v. Scarpellino, 431 F.2d 475 (8th Cir. 1970); Johnson v. United States, 424 F.2d 537 (9th Cir. 1970); United States v. Greenberg, 419 F.2d 808 (3d Cir. 1969); Nutter v. United States, 412 F.2d 178 (9th Cir. 1969), *cert. denied*, 397 U.S 927 (1970); Burg v. United States, 406 F.2d 235 (9th Cir. 1969); United States v. Freeman, 412 F.2d 1181 (10th

"convictions",[279] various jurisdictions have evolved specific guidelines. For example, impeachment may be limited to convictions of "infamous" crimes,[280] or to "felonies and misdemeanors involving moral turpitude." [281] The quality of "moral turpitude" might be required of felonies as well.[282] Although

Cir. 1969); Montgomery v. United States, 403 F.2d 605 (8th Cir. 1968), *cert. denied*, 396 U.S. 859 (1969); United States v. Berriel, 371 F.2d 587 (6th Cir. 1967), *cert. denied*, 390 U.S. 907 (1968); Whitfield v. United States, 376 F.2d 5 (8th Cir. 1967), *cert. denied*, 389 U.S. 883 (1967); Singleton v. United States, 381 F.2d 1 (9th Cir.), *cert. denied*, 389 U.S. 1024 (1967); United States v. Wade, 364 F.2d 931 (6th Cir. 1968); Helberg v. United States, 365 F.2d 314 (9th Cir. 1966), *cert. denied*, 385 U.S. 1010 (1967); Taylor v. Slayton, 341 F. Supp. 489 (W.D. Va. 1972); Cofflin v. Cox, 317 F. Supp. 86 (W.D. Va. 1970); Stevens v. Nelson, 302 F. Supp. 968 (N.D. Cal. 1968), *cert. denied*, 396 U.S. 1020 (1970); Dotsun v. Boles, 271 F. Supp. 24 (N.D. W. Va. 1967); State v. Bowen, 104 Ariz. 138, 449 P.2d 603, *cert. denied*, 396 U.S. 912 (1969); State v. Foggy, 101 Ariz. 459, 420 P.2d 934 (1966), *aff'd*, 107 Ariz. 307, 486 P.2d 789 (1971); State v. Bernal, 13 Ariz. App. 177, 475 P.2d 6 (1970); State v. Chance, 4 Ariz. App. 38, 417 P.2d (1966), *cert. denied*, 386 U.S. 966 (1967); Swan v. State, 245 Ark. 154, 431 S.W.2d 475 (1968); People v. Bowen, 22 Cal. App. 3d 267, 99 Cal. Rptr. 498 (1971); People v. House, 12 Cal. App. 3d 756, 90 Cal. Rptr. 831 (1970); People v. Long, 6 Cal. App. 3d 741, 86 Cal. Rptr. 227 (1970); People v. Harris, 272 Cal. App. 2d 506, 77 Cal. Rptr. 406 (1969); People v. Aulisi, 264 Cal. App. 2d 149, 70 Cal. Rptr. 220 (1968); People v. Kelley 261 Cal. App. 2d 708, 68 Cal. Rptr, 337 (1968); People v. Arzola, 258 Cal. App. 2d 124, 65 Cal. Rptr. 372 (1968); People v. Johnson, 253 Cal. App. 2d 396, 61 Cal. Rptr. 225 (1967); People v. Hays, 250 Cal. App. 2d 373, 58 Cal. Rptr. 293 (1967); People v. Roberts, 55 Cal. Rptr. 412, 421 P.2d 420 (1966), *stay denied*, 386 U.S. 1001 (1967); People v. Molera, 242 Cal. App. 2d 736, 51 Cal. Rptr. 781 (1966); People v. DeGeorgio, 185 Cal. App. 2d 413, 8 Cal. Rptr. 295 (1960); Lacey v. People, 166 Colo. 152, 442 P.2d 402 (1968); Miller v. State, 224 A.2d 592 (Del. 1966); Hinton v. Florida, 201 So. 2d 484 (Fla. 1967); State v. Dunn, 91 Idaho 870, 434 P.2d 88 (1967); People v. Wright, 72 Ill. App. 2d 117, 218 N.E.2d 799 (1966); State v. Hackett, 200 N.W.2d 493 (Iowa 1972); State v. Anderson, 159 N.W.2d 809 (Iowa 1969); State v. Everett, 157 N.W.2d 144 (Iowa 1968); State v. Allnut, 261 Iowa 897, 156 N.W.2d 266, *aff'd*, 158 N.W.2d 715 (Iowa 1968); Jenkins v. Commonwealth, 477 S.W.2d 795 (Ky. 1972); Hood v. Commonwealth, 448 S.W.2d 388 (Ky. 1968); Commonwealth v. Nunes, 351 Mass. 401, 221 N.E.2d 752 (1966); State v. Hackney, 420 S.W.2d 257 (Mo. 1967); State v. Kirby, 185 Neb. 240, 175 N.W.2d 87 (1970); State v. Jones, 183 Neb. 133, 158 N.W.2d 278 (1968); Franklin v. State, 437 S.W.2d 260 (Tenn. 1968); Vaughn v. State, 456 S.W.2d 141 (Tex. 1970); Phillips v. State, 450 S.W.2d 650 (Tex. 1970); Munoz v. State, 435 S.W.2d 500 (Tex. 1968); Smith v. State, 414 S.W.2d 659 (Tex. 1967); State v. Sibley, 411 S.W.2d 187 (1967); State v. Simmons, 28 Utah 2d 301, 501 P.2d 1206 (1972).

A felony charge which is reduced to a misdemeanor prior to adjudication cannot be used to impeach. *See* United States v. Thompson, 443 F.2d 336 (5th Cir. 1971) (fondling reduced to contributing to the delinquency of a minor); People v. Wright, 38 Mich. App. 427, 196 N.W.2d 839 (1972) (larceny reduced to disorderly conduct); People v. Rahar, 37 Mich. App. 577, 194 N.W.2d 77 (1972) (possession of drugs reduced to being in an illegal establishment); People v. Farrar, 36 Mich. App. 294, 193 N.W.2d 363 (1971) (attempted murder reduced to aggravated assault); State v. Weaver, 3 N.C. App. 439, 165 S.E.2d 15 (1969) (felonious assault retried as simple assault).

[279] *See, e.g.*, United States v. Chapman, 455 F.2d 746 (5th Cir. 1972); United States v. Bray, 445 F.2d 178 (5th Cir. 1971), *cert. denied*, 404 U.S. 1002 (1972); United States v. Mills, 440 F.2d 647 (6th Cir.), *cert. denied*, 404 U.S. 837 (1971); Bandelow v. United States, 418 F.2d 42 (5th Cir. 1969), *cert. denied*, 400 U.S. 967 (1970); Harris v. United States, 384 F.2d 363 (5th Cir. 1967); Reese v. United States, 353 F.2d 732 (5th Cir. 1965); United States v. Comi, 336 F.2d 856 (4th Cir. 1964), *cert. denied*, 379 U.S. 992 (1965); Stewart v. State, 240 Ark. 701, 402 S.W.2d 116 (1966); People v. Medina, 26 Cal. App. 3d 809, 103 Cal. Rptr. 337 (1972); People v. Jones, 8 Cal. App. 3d 710, 87 Cal. Rptr. 625 (1970); State v. Fredericks, 154 Conn. 68, 221 A.2d 585 (1966); Harris v. State, 208 So. 2d 108 (Fla. 1968); Reid v. State, 285 N.E.2d 279 (Ind. 1972); Hensley v. State, 268 N.E.2d 90 (Ind. 1971); Fisher v. State, 247 Ind. 529, 219 N.E.2d 818 (1966); Mason v. State, 242 Md. 707, 218 A.2d 682 (1966); Commonwealth v. Connolly, 356 Mass. 617, 255 N.E.2d 191 (1970); People v. Pollard, 39 Mich. App. 291, 197 N.W.2d 546 (1972); People v. Payne, 37 Mich. App. 442, 194 N.W.2d 906 (1971); State v. Johnson, 291 Minn. 407, 192 N.W.2d 87 (1971); State v. Emerson, 286 Minn. 246, 175 N.W.2d 503 (1970); Ferrell v. State, 267 So. 2d 813 (Miss. 1972); Murray v. State, 266 So. 2d 139 (Miss. 1972); Emily v. State, 191 So. 2d 925 (Miss. 1966); State v. Cote, 108 N.H. 290, 235 A.2d 111 (1967), *cert. denied*, 390 U.S. 1025 (1968); State v. Mustachio, 109 N.J. Super. 257, 263 A.2d 139 (1970), *aff'd*, 57 N.J. 265, 271 A.2d 582 (1970); State v. Christie, 91 N.J. Super. 420, 221 A.2d 20 (1966); State v. Lee, 404 S.W.2d 740 (Mo. 1966); State v. Lea, 193 S.E.2d 383 (N.C. 1972); State v. Wright, 192 S.E.2d 818 (N.C. 1972); State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971); State v. Gaiten, 277 N.C. 236, 176 S.E.2d 778 (1970); State v. Sherman, 4 N.C. App. 386, 166 S.E.2d 836 (1969); State v. Weaver, 3 N.C. App. 439, 165 S.E.2d 15 (1969); Benefield v. State, 480 P.2d 626 (Okla. 1971); Torbett v. State, 449 P.2d 725 (Okla. 1969); State v. Rush, 248 Ore. 568, 436 P.2d 266 (1968); Bellah v. State, 415 S.W.2d 418 (Tex. 1967).

[280] *See, e.g.*, People v. Jackson, 270 N.E.2d 498 (Ill. Ct. App. 1971); People v. Culver, 96 Ill. App. 2d 314, 238 N.E.2d 161 (1968); People v. Osborne, 78 Ill. App. 2d 132, 223 N.E.2d 243 (1966); People v. Smith, 74 Ill. App. 2d 458, 221 N.E.2d 68 (1966); Neam v. State, 14 Md. App. 180, 286 A.2d 540 (1972).

[281] *See, e.g.*, United States v. White, 446 F.2d 1280 (3d Cir. 1971); United States v. Saitta, 443 F.2d 830 (5th Cir.), *cert. denied*, 404 U.S. 938 (1971); United States v. Sanders, 412 F.2d 854 (3d Cir. 1969); United States v. Romero, 388 F.2d 783 (3d Cir. 1968); Hudson v. United States, 387 F.2d 331 (5th Cir. 1967), *cert. denied*, 402 U.S. 965 (1971); Leary v. United States, 383 F.2d 851 (5th Cir. 1967), *remanded*, 431 F.2d 85 (5th Cir. 1970); Pickney v. United States, 380 F.2d 882 (5th Cir. 1967), *cert. denied*, 390 U.S. 908 (1968); United States v. Jackson, 344 F.2d 922 (6th Cir.), *cert. denied*, 382 U.S. 880 (1965); State v. Toppi, 275 A.2d 805 (Me. 1971); Commonwealth v. Flagg, 212 Pa. Super. 344, 242 A.2d 921 (1968); Holgin v. State, 480 S.W.2d 405 (Tex. 1972); Wood v. State, 478 S.W.2d 513 (Tex. 1972); Smith v. Commonwealth, 212 Va. 675, 187 S.E.2d 191 (1972); Land v. Commonwealth, 211 Va. 223, 176 S.E.2d 586 (1970).

[282] *See* Butler v. United States, 408 F.2d 1103 (10th

the dictionary definition of "moral turpitude" is "an act of baseness, vileness, or depravity . . . .",[283] 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] "Crimen falsi" refers to crimes which involve the element of falsehood and deceit such as forgery and perjury.[287] A similar, but broader guideline is the one adopted by the Proposed Federal Rules of Evidence which allows impeachment with felonies and misdemeanors involving dishonesty or false statement.[288] Some courts, however, require that all crimes used to impeach, even felonies, must involve the element of dishonesty.[289] There is, of course, no uniform view as to what crimes involve dishonesty and hence credibility, but there is a general consensus of opinion that burglary, larceny and forgery would be included in any definition.[290] There is much disagreement, however, whether

Cir. 1969) (such cross-examination should be limited to acts or conduct which reflects upon integrity or truthfulness, or pertains to personal turpitude such as would indicate moral depravity or degeneracy); *In re* 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 (1968); Norman v. State, 121 Ga. App. 753, 175 S.E.2d 119 (1970), *cert. denied*, 401 U.S. 956 (1971); Cambell v. State, 469 S.W.2d 506 (Tenn. 1971); McKenzie v. State, 462 S.W.2d 243 (Tenn. 1970); Courtney v. State, 424 S.W.2d 440 (Tex. 1968).

[283] *See* BLACK'S LAW DICTIONARY 1160 (1968).

[284] *See* Surret v. United States, 421 F.2d 403 (5th Cir. 1970) (defrauding the government of money); United States v. Zubkoff, 416 F.2d 141 (2d Cir. 1969), *cert. denied*, 396 U.S. 1038 (1970) (illegal entry, petty larceny); United States v. Lloyd, 400 F.2d 414 (6th Cir. 1968) (shoplifting); United States v. Bell, 351 F.2d 868 (6th Cir. 1965), *cert. denied*, 383 U.S. 947 (1966) (impersonating a police officer with intent to defraud); Mayberry v. State, 206 So. 2d 585 (Ala. 1968) (larceny, cutting with intent to kill, shooting with intent to kill); Taylor v. State, 470 S.W.2d 663 (Tex. 1971) (procuring, keeping a bawdy house, being a common prostitute, or being the inmate of a house of ill-fame); Johnson v. State, 453 S.W.2d 828 (Tex. 1970) (prostitution, soliciting a male, vagrancy for prostitution); Dunlap v. State, 440 S.W.2d 672 (Tex. 1969) (sex offenses). *See also* State v. Ohlson, 83 S.D. 260, 158 N.W.2d 526 (1968), where the court found that it was improper to ask a witness if he had been convicted of a crime of moral turpitude, since the witness could not possibly have a clear definition of just what that means.

[285] *See* Parker v. State, 280 Ala. 685, 198 So. 2d 261, *rev'd on other grounds*, 281 Ala. 181, 200 So. 2d 481 (1967); Hoover v. State, 449 S.W.2d 60 (Tex. 1969). Courts have held that certain other crimes do not involve moral turpitude. *See* United States v. Smith, 420 F.2d 428 (5th Cir. 1970) (possessing alcoholic beverages in a dry county); Thomas v. State, 47 Ala. App. 28, 249 So. 2d 644 (1971) (marriage of minor without parental consent); McGovern v. State, 44 Ala. App. 197, 205 So. 2d 247 (1967) (resisting arrest, assault, liquor law violations); McKenzie v. State, 462 S.W.2d 243 (Tenn. 1970) (causing children under 18 to leave school); Thomas v. State, 482 S.W.2d 218 (Tex. 1972) (carrying weapons); Valdez v. State, 450 S.W.2d 664 (Tex. 1970) (aggravated assault unless committed on a female); Stephens v. State, 417 S.W.2d 286 (Tex. 1967) (driving while intoxicated and driving with a suspended license).

[286] *See* United States v. Evans, 398 F.2d 159 (3d Cir. 1968) (disorderly person does not amount to *crimen falsi*); Commonwealth v. Butler, 213 Pa. Super. 388, 247 A.2d 794 (1968) (firearm violations do not amount to *crimen falsi*). *See also* Commonwealth v. Maroney, 423 Pa. 589, 225 A.2d 236 (1967); Commonwealth v. Feiling, 214 Pa. Super. 207, 252 A.2d 200 (1969); Commonwealth v. Riddick, 212 Pa. Super. 390, 243 A.2d 174 (1968).

[287] *See* BLACK'S LAW DICTIONARY 446 (1968).

[288] *See* PROPOSED FED. R. EVID. 609. *See also* Ciravolo v. United States, 384 F.2d 54 (1st Cir. 1967).

[289] *See, e.g.*, State v. Gunzelman, 502 P.2d 705 (Kan. 1972); Harris v. Commonwealth, 469 S.W.2d 68 (Ky. 1971); Cotton v. Commonwealth, 454 S.W.2d 698 (Ky. 1970); Johnson v. State, 4 Md. App. 648, 244 A.2d 632 (1968); Robinson v. State, Md. App. 666, 240 A.2d 638 (1968); People v. Fair, 35 App. Div. 2d 519, 312 N.Y.S.2d 353 (1970); Taylor v. State, 188 S.E.2d 850 (S.C. 1972). *Contra* People v. Cantrell, 27 Mich. App. 210, 183 N.W.2d 401 (1970); State v. Hungerford, 54 Wis. 2d 744, 196 N.W.2d 647 (1972); State v. Driscoll, 53 Wis. 2d 699, 193 N.W.2d 851 (1972).

[290] *See* Bowles v. United States, 439 F.2d 536 (D.C. Cir. 1970), *cert. denied*, 401 U.S. 995 (1971) (petty larceny and housebreaking); United States v. White, 427 F.2d 634 (D.C. Cir. 1970) (housebreaking); United States v. DiLorenzo, 429 F.2d 216 (2d Cir. 1970), *cert. denied*, 402 U.S. 950 (1971) (larceny and forgery); United States v. Costa, 425 F.2d 950 (2d Cir. 1969), *cert. denied*, 398 U.S. 938 (1970) (counterfeiting); Ciravolo v. United States, 394 F.2d 54 (1st Cir. 1967) (assault); People v. Carter, 7 Cal. App. 3d 332, 88 Cal. Rptr. 546 (1970) (assault); People v. Petty, 3 Ill. App. 3d 951, 279 N.E.2d 509 (1972) (forgery); Cotton v. Commonwealth, 454 S.W.2d 698 (Ky. 1970) (perjury, forgery, fraudulent alterations, misappropriation of funds, false personation, fraudulent concealment and all felonies involving theft); Cook v. State, 8 Md. App. 243, 259 A.2d 326 (1969) (assault); Commonwealth v. Amos, 445 Pa. 297, 284 A.2d 748 (1971) (burglary); Commonwealth v. Holloway, 212 Pa. Super. 250, 242 A.2d 918 (1968) (all felonies and misdemeanors). Courts have held that specific crimes do not involve dishonesty and credibility. *See* United States v. Carr, 418 F.2d 1184 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 1030 (1970) (joyriding); Smith v. State, 194 So. 2d 310 (Fla. 1966) (conviction of a relative); Peaper v. State, 14 Md. App. 201, 286 A.2d 176 (1972) (bastardy charges); Taylor v. State, 188 S.E.2d 850 (S.C. 1972) (unlawful weapons violation, parole revocation, escape, manslaughter, juvenile "trouble"); Barren v. State, 55 Wis. 2d 460, 198 N.W.2d 345 (1972) (drinking).

crimes of violence such as assault are indicative of diminished credibility.[291]

Some jurisdictions have encouraged widespread impeachment by prior conviction by allowing that impeachment to be based upon "any crime."[292] Other courts have established the more limited rule that misdemeanor convictions may not be so employed.[293] 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 useable for impeachment.[294] Prior convictions for crimes which are identical to or similar to the charges in the ongoing case also may generally be used.[295]

In spite of conflicting policies and varying procedures, as a general matter, impeachment may be accomplished with prior convictions for robbery,[296] burglary,[297] larceny,[298] forgery,[299] auto theft[300] and narcotics offenses.[301] Most courts will also allow impeachment based upon crimes of violence such

[291] For crimes having no relation to credibility, see Jones v. United States, 402 F.2d 639 (D.C. Cir. 1968) (assault); Gordon v. United States, 383 F.2d 936 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968) (crimes of violence); Brown v. United States, 370 F.2d 242 (D.C. Cir. 1966) (assault); State v. Gunzelman, 502 P.2d 705 (Kan. 1972) (assault and battery); Wilson v. Commonwealth, 403 S.W.2d 705 (Ky. 1966) (murder); Taylor v. State, 188 S.E.2d 850 (S.C. 1972) (manslaughter). For crimes which do relate to credibility, *see* People v. Carter, 7 Cal. App. 3d 332, 88 Cal. Rptr. 546 (1970) (assault); Hill v. State, 502 P.2d 1280 (Okla. 1972) (fighting).

[292] *See* MISS. CODE ANN., ch. 8, §§1692–3 (1956); *Okla. Stat. Ann.* tit. 12, ch. 9 §12-381 (1960). *See also* People v. Payne, 27 Mich. App. 133, 183 N.W.2d 371 (1970); State v. West, 285 Minn. 188, 173 N.W.2d 468 (1969); Barlow v. State, 233 So. 2d 829 (Miss. 1970); Mangrum v. State, 232 So. 2d 703 (Miss. 1970); State v. Hawthorne, 49 N.J. 130, 228 A.2d 682 (1966).

[293] *See* United States v. Vasquez, 460 F.2d 202 (9th Cir. 1972); State v. Johnson, 106 Ariz. 539, 479 P.2d 424 (1971); People v. Russel, 22 Cal. App. 3d 330, 99 Cal. Rptr. 277 (1971); People v. Covert, 249 Cal. App. 2d 81, 57 Cal. Rptr. 220 (1967); Hawkins v. People, 161 Colo. 556, 423 P.2d 581 (1967); Dixon v. Commonwealth, 487 S.W.2d 928 (Ky. 1972); Iles v. Commonwealth, 476 S.W.2d 170 (Ky. 1972); State v. Rowe, 57 N.J. 293, 271 A.2d 897 (1970); Anderson v. State, 85 Nev. 415, 456 P.2d 445 (1969); Colle v. State, 85 Nev. 289, 454 P.2d 21 (1969); Ochoa v. State, 481 S.W.2d 847 (Tex. 1972). *Contra*, Gray v. State, 485 S.W.2d 537 (Ark. 1972); State v. Lipscomb, 289 Minn. 511, 183 N.W.2d 790 (1971); State v. Bond, 285 Minn. 291, 173 N.W.2d 347 (1969); Jones v. State, 241 So. 2d 829 (Miss. 1970); State v. Lafferty, 415 S.W.2d 792 (Mo. 1967); State v. Hunt, 49 N.J. 114, 228 A.2d 673 (1967); State v. Williams, 76 N.M. 578, 417 P.2d 556 (1969); State v. McNair, 272 N.C. 130, 157 S.E.2d 660 (1967); State v. Moe, 151 N.W.2d 310 (N.D. 1967); Ruhm v. State, 496 P.2d 809 (Okla. 1972); State v. Johnson, 1 Wash. App. 553, 463 P.2d 205 (1969); City of Mercer Island v. Walker, 76 Wash. 2d. 607, 458 P.2d 274 (1969); State v. Woods, 184 S.E.2d 130 (W. Va. 1971); Massen v. State, 41 Wis. 2d 245, 163 N.W.2d 616, *cert. denied*, 395 U.S. 939 (1969).

[294] *See* MCCORMICK § 43. *See also* United States v. Boyette, 299 F.2d 92 (4th Cir.), *cert. denied*, 369 U.S. 844 (1962); State v. Sample, 107 Ariz. 407, 489 P.2d 44 (1971); State v. Wells, 10 Ariz. App. 89, 456 P.2d 409 (1969); People v. Asher, 273 Cal. App. 2d 876, 78 Cal. Rptr. 885 (1969); People v. Trent, 85 Ill. App. 2d 157, 228 N.E.2d 535 (1967).

[295] *See, e.g.*, United States v. Tubbs, 461 F.2d 43 (7th Cir. 1972); Inklebarger v. State, 481 S.W.2d 750 (Ark. 1972); Williford v. State, 479 S.W. 2d 244 (Ark. 1972); Wethington v. State, 3 Md. App. 237, 238 A.2d 581 (1968), *aff'd*, 7 Md. App. 79, 253 A.2d 523 (1969); State v. Walter, 289 Minn. 309, 184 N.W.2d 426 (1971); State v. Rodea, 132 N.J.L. 199, 39 A.2d 484 (1944); State v. Cook, 280 N.C. 642, 187 S.E.2d 104 (1972); Lang v. State, 457, S.W.2d 882 (Tenn. 1970); Johnson v. State, 456 S.W.2d 864 (Tenn. 1970); Menjares v. State, 456 S.W.2d 946 (Tex. 1970); State v. Gandee, 73 Wash. 2d 978, 439 P.2d 400 (1968). *Contra*, United States v. Smith, 256 A.2d 901 (D.C. Cir. 1969); People v. Eldridge, 17 Mich. App. 306, 169 N.W.2d 497 (1969). 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*.

[296] *See* Thomas v. Commonwealth, 487 S.W.2d 954 (Ky. 1972); People v. Lewis, 31 Mich. App. 433, 188 N.W.2d 107 (1971); State v. Brakes, 1 Wash. App. 987, 465 P.2d 683 (1970).

[297] *See* United States v. Bishop, 457 F.2d 260 (7th Cir. 1972); People v. Walker, 272 Cal. App. 2d 252, 76 Cal. Rptr. 924 (1969); People v. Perrin, 247 Cal. App. 2d 838, 55 Cal. Rptr. 847 (1967); Swann v. State, 7 Md. App. 309, 255 A.2d 457 (1969); State v. Haith, 7 N.C. App. 552, 172 S.E.2d 912 (1970); Sharp v. State, 421 S.W.2d 663 (Tex. 1967); State v. Brakes, 1 Wash. App. 987, 465 P.2d 683 (1970).

[298] *See* Bowie v. State, 494 P.2d 800 (Alas. 1972); Robinson v. State, 4 Md. App. 515, 243 A.2d 879 (1968); People v. White, 30 Mich. App. 97, 186 N.W.2d 27 (1971); State v. Brakes, 1 Wash. App. 987, 465 P.2d 683 (1970).

[299] *See* United States v. Griffin, 378 F.2d 445 (6th Cir. 1967); Bowie v. State, 494 P.2d 800 (Alas. 1972); People v. Petty, 3 Ill. App. 3d 951, 279 N.E.2d 509 (1972); Holgin v. State, 480 S.W.2d 405 (Tex. 1972).

[300] *See* Mottram v. Murch, 458 F.2d 626 (1st Cir. 1972), where the error committed involved four of the jurors at the second trial who knew of defendant's record and his invoking the fifth amendment at the first trial. *See also* Tucker v. United States, 409 F.2d 1291 (5th Cir. 1969), *cert. denied*, 403 U.S. 933 (1971); Iles v. Commonwealth, 476 S.W.2d 170 (Ky. 1972); State v. Harless, 28 Utah 2d 128, 459 P.2d 210 (1969).

[301] *See* United States v. Escobedo, 430 F.2d 14 (7th Cir. 1970), *cert. denied*, 402 U.S. 951 (1971); United States v. McIntosh, 426 F.2d 1231 (D.C. Cir. 1970); Durant v. United States, 292 A.2d 157 (D.C. Cir. 1972); Cobb v. United States, 252 A.2d 516 (D.C. Cir. 1969); People v. Von Latta, 258 Cal. App. 2d 329, 65 Cal. Rptr. 651 (1968); People v. Dempsey, 40 Mich. App. 400, 199 N.W.2d 231 (1972); Smith v. State, 6 Md. App. 581, 252 A.2d 277 (1969).

as murder,[302] assault[303] and rape.[304] Municipal ordinance violations,[305] traffic violations[306] and petty offenses such as vagrancy[307] typically cannot be used for impeachment. The majority view is that juvenile offenses are not properly useable for impeachment,[308] 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.[309] Minor military offenses such as a few hours A.W.O.L. are not suitable for impeachment,[310] 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.[311]

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,[312] but with its adoption in the Proposed Federal Rules of Evidence, the ten year limit

[302] *See, e.g.*, Norman v. State, 121 Ga. App. 753, 175 S.E.2d 119 (1970), *cert. denied*, 401 U.S. 956 (1971).

[303] *See* Commonwealth v. Boudreau, 285 N.E.2d 915 (Mass. 1972); State v. King, 196 N.W.2d 595 (Minn. 1972); Crawford v. State, 512 S.W.2d 58 (Tex. 1967).

[304] *See* United States v. Huff, 442 F.2d 1145 (D.C. Cir. 1971); People v. Eldridge, 17 Mich. App. 306, 169 N.W.2d 497 (1969).

[305] *See, e.g.*, Rainey v. State, 266 So. 2d 335 (Ala. 1972); Caldwell v. State, 282 Ala. 713, 213 So. 2d 919 (1968); Parker v. State, 280 Ala. 685, 198 So. 2d 261 (1967), *rev'd on other grounds*, 281 Ala. 181, 200 So. 2d 481 (1967); State v. Bond, 285 Minn. 291, 173 N.W.2d 347 (1969); Kansas City v. Roberts, 411 S.W.2d 847 (Mo. 1967); Hampshire v. City of Tulsa, 503 P.2d 577 (Okla. 1972); Torbett v. State, 449 P.2d 725 (Okla. 1969); State v. Gustafson, 248 Ore. 1, 432 P.2d 323 (1967); Barren v. State, 55 Wis. 2d 460, 198 N.W.2d 345 (1972). *But see* Scott v. State, 445 P.2d 39 (Alaska 1968), *cert. denied*, 393 U.S. 1082 (1969); State v. Biswell, 83 N.M. 65, 488 P.2d 115 (1971).

[306] *See, e.g.*, United States v. Perea, 413 F.2d 65 (10th Cir. 1969), *cert. denied*, 397 U.S. 945 (1970); State v. Roth, 200 Kan. 677, 438 P.2d 58 (1968); Woodell v. State, 2 Md. App. 433, 234 A.2d 890 (1967); Jones v. State, 268 So. 2d 348 (Miss. 1972); State v. Waller, 80 N.M. 380, 456 P.2d 213 (1969). *But see* People v. White, 30 Mich. App. 97, 186 N.W.2d 27 (1971); People v. Vanderah, 11 Mich. App. 722, 162 N.W.2d 150 (1968); State v. Haith, 7 N.C. App. 552, 172 S.E.2d 912 (1970).

[307] *See* Pickney v. United States, 363 F.2d 696 (D.C. Cir. 1966); Hawkins v. People, 161 Colo. 556, 423 P.2d 581 (1967); Mahaffey v. State, 471 S.W.2d 801 (Tex. 1971), *cert. denied*, 405 U.S. 1018 (1972). *But see* Evans v. State, 401 S.W.2d 602 (Tex. 1966).

Other crimes have been successfully employed in impeachment. *See* Walker v. United States, 363 F.2d 681 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 922 (1967) (weapons violations); State v. Blackwell, 276 N.C. 714, 174 S.E.2d 534, *cert. denied*, 400 U.S. 946 (1970) (fighting with parent and non-support); State v. Stallings, 4 N.C. App. 184, 166 S.E.2d 464 (1969) (cross burning).

[308] *See* Cotton v. United States, 355 F.2d 480 (10th Cir. 1966); Brown v. United States, 338 F.2d 543 (D.C. Cir. 1964); Hammac v. State, 44 Ala. App. 459, 212 So. 2d 849 (1968); Stewart v. State, 221 So. 2d 155 (Fla. 1969); Shropshire v. State, 279 N.E.2d 225, (Ind. 1972); Noel v. State, 247 Ind. 426, 215 N.E.2d 539, *cert. denied*, 385 U.S. 934 (1966); Cook v. State, 8 Md. App. 243, 259 A.2d 326 (1969); Westfall v. State, 243 Md. 413, 221 A.2d 646 (1966); People v. Warren, 23 Mich. App. 20, 178 N.W.2d 127 (1970); People v. Luther, 20 Mich. App. 42, 173 N.W.2d 797 (1969); State v. Laws, 50 N.J. 159, 233 A.2d 633 (1967), *cert. denied*, 393 U.S. 971 (1968); State v. Broxton, 49 N.J. 373, 230 A.2d 489 (1967); Raper v. State, 501 P.2d 847 (Okla. 1972); State v. Gustafson, 248 Ore. 1, 432 P.2d 323 (1967); Aous v. State, 484 S.W.2d 534 (Tex. 1972); Guillory v. State, 400 S.W.2d 751 (Tex. 1966); State v. Mathews, 6 Wash. App. 201, 492 P.2d 1076 (1971); Deja v. State, 43 Wis. 2d 488, 168 N.W.2d 856 (1969).

[309] *See, e.g.*, PROPOSED FED. R. EVID. 609 (d):

> The judge may, however, allow evidence of a juvenile adjudication of a witness other than the accused, if conviction of the offense would be admissible to attack the credibility of an adult and the judge is satisfied that admission is necessary for a fair determination of the issue of guilt or innocence;

See also State v. Alexander, 279 N.C. 527, 184 S.E.2d 274 (1971) (can impeach if the crime could have been tried in adult court); State v. Miller, 281 N.C. 70, 187 S.E.2d 729 (1972) (can cross if it would be a crime if committed by an adult). There is caselaw which holds that juvenile convictions can be used to impeach. *See* Bellew v. State, 246 Ark. 1191, 441 S.W.2d 453 (1969) (stint in a boy's school); People v. Franklin, 74 Ill. App. 2d 392, 220 N.E.2d 872 (1966); People v. Davies, 34 Mich. App. 19, 190 N.W.2d 694 (1971) (can cross a prosecution witness but not a defendant); People v. Vidal, 26 N.Y.2d 249, 257 N.E.2d 886 (1970); People v. Geller, 27 App. Div. 2d 843, 278 N.Y.S.2d 41 (1967) (can impeach on a vicious or immoral act committed while a juvenile); State v. Jeffries, 3 N.C. App. 218, 164 S.E.2d 398 (1968); *See* Commonwealth v. Katchmer, 220 Pa. Super. 231, 281 A.2d 747 (1971).

[310] *See* United States v. Shumate, 429 F.2d 777 (D.C. Cir. 1970); Commonwealth v. Spare, 353 Mass. 263, 230 N.E.2d 798 (1967) (AWOL); Woodall v. State, 2 Md. App. 433, 235 A.2d 890 (1965); Huber v. State, 2 Md. App. 245, 234 A.2d 264 (1967) (AWOL).

[311] *See* United States v. Booz, 325 F. Supp. 1280 (E.D. Pa.), *rev'd*, 451 F.2d 719 (3rd Cir. 1971) (larceny, receiving stolen goods); People v. Helm, 40 Ill. 2d 39, 237 N.E.2d 433 (1968) (courts martial convictions of infamous crimes); Huber v. State, 2 Md. App. 245, 234 A.2d 264 (1967) (military offenses involving moral turpitude such as assault on a German national); People v. Lee, 35 App. Div. 2d 542, 313 N.Y.S.2d 139 (1970) (grand larceny and subsequent dishonorable discharge); Ewing v. State, 174 Neb. 90, 116 N.W.2d 7 (1962) (desertion, but the court takes note of the split in authority).

[312] For convictions held too remote see United States v. Puco, 453 F.2d 539, (2d Cir. 1971) (narcotics—21 years); United States v. McCord, 420 F.2d 255 (D.C. Cir. 1966) (housebreaking—14 years); United States v. Steinback, 402 F.2d 353 (7th Cir. 1968), *cert. denied*, 393 U.S. 1082 (1969) (narcotics—25 years) Spaulding v. State, 481 P.2d 389 (Alas. 1971) (unspecified charges —35 and 37 years); State v. Ross, 107 Ariz. 240, 485 P.2d 810 (1971) (manslaughter—19 years); People v. Ray, 3 Ill. App. 3d 517, 278 N.E.2d 170 (1972) (armed robbery—27 years).

will probably gain acceptance as a general rule of thumb.[313] When determining remoteness, the courts look to the intervening conduct of the witness.[314] Therefore, a 1929 conviction for armed robbery which would otherwise have been termed remote, was useable 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.[315] Additionally, the courts look to the date that the punishment was terminated rather than to the date of the conviction for the actual offense.[316]

To be used for impeachment, a judgment must be final; that is to say, the sentence must have been imposed by the judge.[317] 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.[318]

The pendency of an appeal does not render a conviction inappropriate for use in impeachment,[319] but a reversal of the verdict most certainly does.[320] A pardon will normally not prevent the conviction's use,[321] 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 useable for impeachment.[322] The imposition of probation as a sentence will not preclude the convic-

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For convictions 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); Gurleski 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—18 years); State v. Phillips, 102 Ariz. 377, 430 P.2d 139 (1967) (Mann Act—10 years); People v. Moses, 19 Cal. App. 3d 389, 97 Cal. Rptr. 128 (1971), *aff'd*, 24 Cal. App. 3d 384, 100 Cal. Rptr. 907 (1972) (robbery—8 years); People v. Aristotle, 131 Ill. App. 2d 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, 118 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); Pejian 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. 1968) (murder—parole ended 9 years prior); State v. Robinson, 75 Wash. 2d 230, 450 P.2d 180 (1969) (unspecified—16 years).

[313] *See* PROPOSED FED. R. EVID. 609(b):

> Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the data 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.

See also People v. Bradley, 3 Ill. App. 3d 101, 278 N.E.2d 243 (1971); Penix v. State, 487 S.W.2d 86 (Tex. 1972); Courtenay v. State, 424 S.W.2d 440 (Tex. 1968).

[314] *See, e.g.*, Stevens v. United States, 370 F.2d 485 (D.C. Cir. 1966); Crisp v. State, 470 S.W.2d 58 (Tex. 1971); Beard v. State, 456 S.W.2d 82 (Tex. 1970).

[315] United States v. Palumbo, 401 F.2d 270 (2d Cir. 1968), *cert. denied*, 394 U.S. 947 (1969).

[316] *See* Gass v. United States, 416 F.2d 767 (D.C. Cir. 1969); Holt v. State, 487 S.W.2d 725 (Tex. 1972); Dorsey v. State, 485 S.W.2d 569 (Tex. 1972); Rawlins v. State, 466 S.W.2d 308 (Tex. 1971); Williams v. State, 449 S.W.2d 264 (Tex. 1970); King v. State, 425 S.W.2d 356 (Tex. 1968).

[317] *See* TEX. STAT. ANN. tit. 38, § 29 (1966). *See also* United States v. Semensohn, 421 F.2d 1206 (2d Cir. 1970); Revuelta v. State, 86 Nev. 205, 467 P.2d 105 (1970); State v. Frey, 459 S.W.2d 359 (Mo. 1970).

[318] *See, e.g.*, State v. Wells, 10 Ariz. App. 89, 456 P.2d 409 (1969) (no sentence imposed since defendant fled the jurisdiction, may still impeach); Fairman v. State, 429 P.2d 63 (Nev. 1967) (harmless error); State v. Bandy, 15 N.C. App. 188, 189 S.E.2d 773 (1972) (guilty verdict of jury without sentence is proper to impeach); State v. Bouthiller, 476 P.2d 209 (Ore. 1970) (error cured when conviction becomes final).

[319] *See* PROPOSED FED. R. EVID. 609(e). *See also* United States v. Allen, 457 F.2d 1361 (9th Cir. 1972); United States v. Hauff, 395 F.2d 555 (7th Cir. 1968); United States v. Hoffa, 367 F.2d 698 (7th Cir. 1966), *aff'd*, 436 F.2d 1243 (7th Cir. 1970); People v. Souvens, 276 Cal. App. 2d 439, 81 Cal. Rptr. 86 (1969); People v. Thompson, 48 Ill. 2d 41, 268 N.E.2d 369 (1971); People v. Ledferd, 94 Ill. App. 2d 74, 236 N.E.2d 19 (1968); People v. Scott, 89 Ill. App. 2d 413, 232, N.E.2d 478 (1967); People v. Barney, 89 Ill. App. 2d 180, 232 N.E.2d 481 (1967); People v. Spears, 83 Ill. App. 2d 18, 226 N.E.2d 67 (1967); People v. Eldridge, 17 Mich. App. 306, 169 N.W.2d 497 (1969); McCoy v. State, 466 S.W.2d 540 (Tenn. 1971). *Contra* Neam v. State, 14 Md. App. 180, 286 A.2d 540 (1972); Bailey v. State, 263 Md. 424, 283 A.2d 360 (1971); Cleveland v. State, 12 Md. App. 712, 280 A.2d 520 (1971); State v. Blevins, 425 S.W.2d 155 (Mo. 1968); Salazar v. State, 432 S.W.2d 957 (Tex. 1968).

[320] *See* Howard v. Craven, 306 F. Supp. 730 (C.D. Cal. 1968); Cunningham v. State, 239 So. 2d 21 (Fla. 1971); People v. Shook, 35 Ill. 2d 597, 221 N.E.2d 290 (1966); People v. Crable, 33 Mich. App. 254, 189 N.W.2d 740 (1971); Cohron v. State, 413 S.W.2d 112 (Tex. 1967); Smith v. State, 409 S.W.2d 409 (Tex. 1966), *cert. denied*, 389 U.S. 822 (1967). *Contra*, Suggs v. State, 6 Md. App. 231, 250 A.2d 670 (1969); Nicholson v. State, 254 So. 2d 881 (Miss. 1971); People v. Miller, 62 Misc. 2d 705, 309 N.Y.S.2d 465 (1970).

[321] *See* MCCORMICK § 43. *See also* United States v. Denton, 306 F.2d 336 (6th Cir.), *cert. denied*, 371 U.S. 923 (1962); Spears v. State, 83 Ill. App. 2d 18, 226 N.E.2d 67 (1967). *Contra*, United States v. McCarthy, 445 F.2d 587 (7th Cir.), *rev'd on other grounds*, 394 U.S. 459 (1971).

[322] *See* PROPOSED FED. R. EVID., 609(c) (a pardon restores lost civil rights but does not affect credibility); CAL. EVID. CODE §788 (West 1966).

tion's use,[323] nor will the fact that the verdict was reached after a guilty plea,[324] but there is conflict over whether a judgment based upon a plea of nolo contendere may impeach.[325] It has been held that a minor charge which is settled by a forfeiture of bond is not suitable for this purpose.[326] A constitutionally infirm prior conviction such as a conviction in which the accused was unrepresented by counsel also may not be used to impeach.[327]

The fiat against impeachment with a legal involvement not ending in a conviction[328] precludes the use of arrests,[329] charges or indictments,[330] to

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[323] *See* People v. Hampton, 5 Ill. App. 3d 220, 282 N.E.2d 469 (1972); People v. Spears, 83 Ill. App. 2d 18, 226 N.E.2d 67 (1967); Valdez v. State, 462 S.W.2d 24 (Tex. 1970); Smith v. State, 455 S.W.2d 282 (Tex. 1970), *aff'd*, 465 S.W.2d 163 (Tex. 1971); State v. Knott, 6 Wash. App. 436, 493 P.2d 1027 (1972). *Contra*, State v. Frey, 459 S.W.2d 359 (Mo. 1970); Goad v. State, 464 S.W.2d 129 (Tex. 1971).

[324] *See* United States v. Bray, 445 F.2d 178, 181 (5th Cir. 1971), where the court stated:

> The probative fact 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.

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 (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 FED. R. EVID. 410. *See also* State v. Tate, 2 Wash. App. 241, 469 P.2d 999 (1970).

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

[326] *See* Smith v. State, 453 P.2d 307 (Okla. 1969); State v. Willis, 4 Wash. App. 184, 480 P.2d 221 (1971).

[327] This is an extension of the impropriety of the use of a constitutionally infirm conviction for enhancement enunciated in Burgett v. State, 389 U.S. 109 (1967). The leading case is Loper v. Beto, 405 U.S. 473 (1972) (the use of a prior invalid conviction to impeach the defendant denies him due process). *See also* United States v. Tucker, 404 U.S. 443 (1972) (*Gideon* violation); Gilday v. Scafati, 428 F.2d 1027 (1st Cir.), *cert. denied*, 400 U.S. 926 (1970); People v. Coffey, 60 Cal. Rptr. 457, 430 P.2d 15 (1967); White v. State 11 Md. App. 423, 274 A.2d 671 (1971); Johnson v. State, 9 Md. App. 436, 265 A.2d 281 (1970). *See generally* Note, *The Evidentiary use of Constitutionally Defective Prior Convictions*, 68 COLUMBIA L. REV. 1168 (1968); Note, *Uncounseled Prior Convictions*, 8 HOUSTON L. REV. 774 (1971). For cases holding that the improper impeachment constituted harmless error *see* Subilosky v. Moore, 443 F.2d 334 (1st Cir.), *cert. denied*, 404 U.S. 958 (1971); United States v. Harold, 425 F.2d 721 (5th Cir.), *cert. denied*, 400 U.S. 906 (1970); Bates v. Nelson, 333 F. Supp. 896 (N.D. Cal. 1971) (overwhelming evidence of guilt); People v. Mulqueen, 9 Cal. App. 2d 532, 88 Cal. Rptr. 235 (1970) (a compelling showing can render the error harmless); People v. Patterson, 270 Cal. App. 2d 268, 75 Cal. Rptr. 485 (1969).

A defendant who has stipulated to the admission of a prior conviction may waive the right to raise the claim that it was constitutionally infirm. *See* Martin v. State, 463 S.W.2d 449 (Tex. 1971) (penalty stage); Shorter v. United States, 412 F.2d 428 (9th Cir.), *cert. denied*, 396 U.S. 970 (1969) (conviction admitted on direct examination).

The burden rests with the state to show that the impeaching conviction was not without counsel. *See* Johnson v. State, 9 Md. App. 436, 265 A.2d 281 (1970); Tucker v. State, 499 P.2d 458 (Okla. 1972); Chester v. State, 485 P.2d 1065 (Okla. 1971). *But see*, People v. Hagen, 6 Cal. App. 3d 35, 85 Cal. Rptr. 556 (1970); Evans v. State, 401 S.W.2d 602 (Tex. 1966). The burden was put on the defendant to prove indigency in Gill v. State, 479 S.W.2d 289 (Tex. 1972).

May the violation of a statute which is later declared unconstitutional be used for impeachment? An affirmative answer was given in United States v. White, 463 F.2d 18 (9th Cir. 1972), where an abortion conviction was useable although the statute was subsequently repealed. *See also* Holgin v. State, 480 S.W.2d 405 (Tex. 1972) (a prostitution conviction could impeach although the vagrancy portion of the statute was struck down as unconstitutional).

[328] *See* United States v. Roustio. 455 F.2d 366 (7th Cir. 1972); United States v. Sposato, 446 F.2d 779 (2d Cir. 1971); United States v. Potts, 420 F.2d 964 (4th Cir.), *cert. denied*, 398 U.S. 941 (1970); Lee v. United States, 368 F.2d 834 (D.C. Cir. 1966); United States v. Yarbrough, 352 F.2d 491 (6th Cir. 1965); Davidson v. Boles, 266 F. Supp. 645 (N.D. W. Va. 1967), *cert. denied*, 391 U.S. 970 (1968); People v. Peabody, 37 Mich. App. 87, 194 N.W.2d 532 (1971); People, v. Ryan, 36 Mich. App. 129, 193 N.W. 2d 212 (1971); People v. Luther, 33 Mich. App. 551, 190 N.W. 2d 345 (1971); People v. Montevecchio, 32 Mich. App. 163, 188 N.W.2d 186 (1971); People v. Wasson, 31 Mich. App. 638, 188 N.W.2d 55 (1971); State v. Stimpson, 279 N.C. 716, 185 S.E.2d 168 (1971); Commonwealth v. Allen, 220 Pa. Super 403, 389 A.2d 476 (1972).

[329] *See* State v. Tosatto, 107 Ariz. 231, 485 P.2d 556 (1971), *cert. denied*, 404 U.S. 957 (1971) (vulgar language arrest, harmless error); Corbin v. State, 259 So. 2d 543 (Fla. 1972) (weapons arrets, harmless error); People v. Vincent, 38 Mich. App. 116, 195 N.W.2d 792 (1972) (indecent exposure arrest, reversible error); People v. McKinley, 39 App. Div. 2d 749, 332 N.T.S.2d 154 (1972). *See also* United States v. King, 378 F.2d 359 (6th Cir. 1967), *cert. denied*, 396 U.S. 974 (1969); Maguire v. United States, 358 F.2d 442 (10th Cir.), *cert. denied*, 385 U.S. 870 (1966) (not reversed since question was unanswered); People v. Sanders, 96 Ill. App. 2d 166, 238 N.E.2d 180 (1968); People v. Harges, 87 Ill. App. 2d 376, 231 N.E.2d 650 (1967); People v. James, 36 Mich. App. 550, 194 N.W.2d 57 (1971); People v. James, 35 Mich. App. 627, 192 N.W.2d 517 (1971); State v. Ware, 449 S.W.2d 624 (Mo. 1970); People v. Vernum, 28 App. Div. 2d 946, 281 N.Y.S.2d 672 (1967); Bolin v. State, 472 S.W.2d 232 (Tenn. 1971); State v. Cathey, 32 Wis. 2d 79, 145 N.W.2d 100 (1966). *But see* Mah v. United States, 348 F.2d 881 (10th Cir. 1965) (could cross defendant on prior arrests as a preliminary to bringing out the convictions which resulted from them): State v. Roddy, 270 So.2d 508 (La. 1972) (defendant could be crossed on prior arrests out of the presence of the jury to explore his familiarity

impeach. Similarly, a charge which was nolle prossed is not useable for this purpose.[331] A minority view allows a witness or defendant to be asked if he actually is 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.[332] There are also cases which hold that the unlawful occupation of a witness may be shown to attack his credibility.[333]

The prosecutor may usually inquire as to the name and location of a conviction[334] as well as its general nature,[335] and the punishment imposed.[336] Some courts, however, limit the examiner to the mere fact of a conviction and no further questions may be asked.[337] Others allow the examiner to establish the name of the crime only.[338] Even the more liberal majority view does not permit broad forays into the details of the crime.[339] The latitude given the witness to explain the prior conviction may be broader than the examiner's ability to explore its details,[340] but this has been termed a "harmless charity." [341]

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with arrest procedures in order to determine the voluntariness of his confession).

A few courts have held that impeachment by arrest is proper. *See* People v. Hoffman, 1 Mich. App. 557, 137 N.W.2d 304 (1965); People v. Shivers, 21 N.Y.2d 118, 233 N.E.2d 836 (1967).

[330] *See* Miller v. State, 261 So. 2d 447 (Ala.), *cert. denied*, 288 Ala. 746, 261 So. 2d 451 (1972); People v. Brown, 76 Ill. App. 2d 362, 222 N.E.2d 227 (1966); *aff'd*, 51 Ill. 2d 271, 281 N.E.2d 682 (1972); McLaughlin v. State, 3 Md. App. 515, 240 A.2d 298 (1968); People v. Eddington, 387 Mich. 551, 198 N.W.2d 297 (1972); Johns v. State, 255 So. 2d 322 (Miss. 1971); Barlow v. State, 233 So. 2d 829 (Miss. 1970); State v. Long, 14 N.C. App. 508, 188 S.E.2d 690 (1972); People v. Harvey, 34 App. Div. 2d 857, 310 N.Y.S.2d 913 (1970); State v. Crawford, 17 Ohio App. 2d 141, 244 N.E.2d 774 (1969). Questions regarding time spent in jail suffer from the same infirmity as do those regarding the actual arrest. *See* State v. Williams, 107 Ariz. 262, 485 P.2d 832 (1971); State v. Johnson, 106 Ariz. 539, 479 P.2d 424 (1971).

For cases holding that impeachment by charge or indictment is permissible *see* People v. Miniear, 8 Mich. App. 591, 155 N.W.2d 222 (1968); Stamps v. State, 83 Nev. 232, 428 P.2d 188 (1967); State v. Pillars, 280 N.C. 341, 185 S.E.2d 881 (1972).

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

[332] *See* Inklebarger v. State, 481 S.W.2d 750 (Ark. 1972) (indecent exposure); Polk v. State, 478 S.W.2d 738 (Ark. 1972) (auto theft); Sims v. State, 477 S.W.2d 825 (Ark. 1972) (larceny, prostitution); Harrington v. State, 473 S.W.2d 911 (Ark. 1971) (interstate transportation of a stolen auto); Black v. State, 250 Ark. 604, 466 S.W.2d 463 (1971) (rape); Hughes v. State, 249 Ark. 805, 461 S.W.2d 940 (1971) (theft); State v. Shanklin, 193 S.E.2d 341 (N.C. 1972) (breaking and entering); State v. Gainey, 280 N.C. 366, 185 S.E.2d 874 (1972) (fighting). *Contra*, Hayes v. United States, 407 F.2d 189 (5th Cir.), *cert. denied*, 395 U.S. 972 (1969) (prison escape); Tooley v. State, 448 S.W.2d 683 (Tenn. 1969), *aff'd*, 477 S.W.2d 250 (Tenn. 1971) (rape).

[333] *See* People v. Gibson, 272 N.E.2d 274 (Ill. 1971); Green v. State, 451 S.W.2d 893 (Tex. 1970).

[334] *See* Beaudine v. United States, 368 F.2d 417 (5th Cir. 1966), *reh. denied*, 418 F.2d 500 (5th Cir. 1969); State v. Mendoza, 107 Ariz. 51, 481 P.2d 844 (1971); People v. Boehm, 270 Cal. App. 2d 13, 75 Cal. Rptr. 590 (1969); People v. Dugas, 242 Cal. App. 2d 244, 51 Cal. Rptr. 478 (1966); Padillow v. State, 501 P.2d 837 (Okla. 1972); Brown v. State, 496 P.2d 395 (Okla. 1972).

The number of prior convictions may be inquired into. *See* State v. Houston, 261 Iowa 1369, 158 N.W.2d 158 (1968); Plunkett v. State, 84 N.M. 145, 437 P.2d 92 (1968); Pamanet v. State, 49 Wis. 2d 501, 182 N.W.2d 459 (1971).

[335] *See, e.g.*, People v. Wynn, 44 Cal. App. 2d 723, 112 P.2d 979 (1941); Mays v. People, 493 P.2d 4 (Colo. 1972); People v. Sevastos, 117 Ill. App. 2d 104, 252 N.E.2d 745 (1969); State v. Gravening, 289 Minn. 501, 182 N.W.2d 704 (1970). *Contra*, Sebastian v. Commonwealth, 436 S.W.2d 66 (Ky. 1966).

[336] *See* United States v. Ramsey, 315 F.2d 199 (2d Cir.), *cert. denied*, 375 U.S. 883 (1963); Gafford v. State, 440 P.2d 405 (Alaska 1968), *cert. denied*, 393 U.S. 1120 (1969); Robinson v. State, 4 Md. App. 515, 243 A.2d 142 (1968); People v. Thomas, 36 Mich. App. 23, 193 N.W.2d 189 (1971); State v. Bass, 280 N.C. 435, 186 S.E.2d 384 (1972); Brown v. State, 496 P.2d 395 (Okla. 1972); Simmons v. State, 456 S.W.2d 66 (Tex. 1970); State v. Beard, 74 Wash. 2d 335, 444 P.2d 651 (1968). *Contra*, People v. White, 26 Mich. App. 35, 181 N.W.2d 803 (1970); Murray v. State, 266 So. 2d 139 (Miss. 1972); State v. Slay, 406 S.W.2d 575 (Mo. 1966); State v. McNair, 272 N.C. 130, 157 S.E.2d 660 (1967).

[337] *See* State v. Shephard, 94 Idaho 227, 486 P.2d 82 (1971); Cowan v. Commonwealth, 407 S.W.2d 695 (Ky. 1966); Harmon v. Commonwealth, 212 Va. 442, 185 S.E.2d 48 (1971); State v. Cathey, 32 Wis. 2d 79, 145 N.W.2d 100 (1966).

[338] *See, e.g.*, State v. Coca, 80 N.M. 95, 451 P.2d 999 (1969); State v. Hungerford, 54 Wis. 2d 744, 196 N.W.2d 647 (1972).

[339] *See* United States v. Dow, 457 F.2d 246 (7th Cir. 1972) (improper to ask about violence when the crime was committed); United States v. Rispo, 338 F. Supp. 662 (E.D. Pa. 1972) (improper to ask as to types of goods stolen and the name of the victim). *See also* United States v. Mitchell, 427 F.2d 644 (3d Cir. 1970); Beaudine v. United States, 368 F.2d 417 (5th Cir. 1966), *reh. denied*, 418 F.2d 500 (5th Cir. 1969); United States v. Smith, 353 F.2d 166 (4th Cir. 1965); Gafford v. State, 440 P.2d 405 (Alaska 1968), *cert. denied*, 393 U.S. 1120 (1969); People v. Knighton, 250 Cal. App. 2d 221, 58 Cal. Rptr. 700 (1967); Johnson v. Commonwealth, 445 S.W.2d 704 (Ky. 1969); Huber v. State, 2 Md. App. 245, 234 A.2d 264 (1967); State v. West, 285 Minn. 188, 173 N.W.2d 468 (1969); Benedetti v. State, 249 So. 2d 671 (Miss. 1971); Mangrum v. State, 232 So. 2d 703 (Miss. 1970); State v. Scott, 459 S.W.2d 321 (Mo. 1970); Brown v. State, 496 P.2d 395 (Okla. 1972); State v. White, 53 Wis. 2d 549, 193 N.W.2d 36 (1972). *Contra*, People v. Von Latta, 258 Cal. App. 2d 329, 65 Cal. Rptr. 651 (1968).

[340] *See, e.g.*, United States v. Bray, 445 F.2d 178 (5th Cir. 1971), *cert. denied*, 404 U.S. 1002 (1972), where the court held that a witness cannot be cut off from explaining or extenuating the conviction or denying his guilt. *See also* United States v. Crisafi, 304 F.2d 803 (2d

The prosecutor is of course held to a good faith standard when impeaching a witness.[342] The failure to have the record of the conviction at his disposal is not necessarily erroneous when good faith is present.[343] Some jurisdictions do not allow any cross-examination at all on prior convictions and instead require introduction of the record to impeach.[344] 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,[345] while some advocate very thorough or "sifting" cross-examination.[346] Typically, a witness or defendant may invite inquiry by opening the door to his prior convictions on direct examination.[347]

Cir. 1962); Wittenberg v. United States, 304 F. Supp. 744 (D. Minn. 1969); State v. Sanders, 276 N.C. 598, 174 S.E.2d 487 (1970), *remanded for resentencing*, 279 N.C. 389, 183 S.E. 2d 107 (1971).

[341] *See* WIGMORE § 1117.

[342] *See, e.g.*, People v. Foster, 271 Cal. App. 2d 763, 76 Cal. Rptr. 775 (1969); People v. Korn, 40 App. Div. 561, 334 N.Y.S.2d 115 (1972); State v. Hill, 192 S.E.2d 610 (N.C. 1972). In People v. DeArkland, 262 Cal. App. 2d 802, 69 Cal. Rptr. 144 (1968), the court held that reference to an attempted armed robbery as an armed robbery was a good faith mistake. Where bad faith was present *see* People v. Comnor, 243 Cal. App. 2d 38, 52 Cal. Rptr. 172 (1966) (bad faith found because no proof of conviction was found); People v. McKinley, 39 App. Div. 2d 749, 332 N.Y.S.2d 154 (1972) (bad faith found where prosecutor failed to substantiate record, and failed to allow defense counsel to look at arrest sheet he was using); People v. Nasti, 37 App. Div. 2d 980, 327 N.Y.S.2d 534 (1971) (bad faith presumed because the prosecutor refused to delay impeachment until the information could be verified); People v. Sanza, 37 App. Div. 2d 632, 323 N.Y.S.2d 632 (1971) (bad faith presumed when two charges used to impeach had been dismissed and a third was a juvenile offense).

[343] *See* United States v. Carter, 454 F.2d 525 (9th Cir. 1972); United States v. Booz, 325 F. Supp. 1280 (E.D. Pa. 1971); *rev'd*, 451 F.2d 719 (3d Cir. 1971); People v. Hall, 5 Cal. App. 3d 116, 85 Cal. Rptr. 188 (1970); People v. Hays, 250 Cal. App. 2d 373, 58 Cal. Rptr. 293 (1967); Warren v. State, 270 So. 2d 8 (Fla. 1972); People v. Brown, 34 Mich. App. 45, 190 N.W.2d 701 (1971); People v. Cybulski, 11 Mich. App. 244, 160 N.W.2d 764 (1968); State v. Charlton, 465 S.W.2d 502 (Mo. 1971); State v. Paul, 80 N.M. 521, 458 P.2d 596 (1969), *cert. denied*, 397 U.S. 1044 (1970); State v. Garcia, 80 N.M. 247, 453 P.2d 767 (1969); Scott v. State, 471 P.2d 470 (Okla. 1970).

The failure to produce a record of conviction has been held improper. *See* State v. Van Winkle, 106 Ariz. 481, 478 P.2d 105 (1970); People v. Bryson, 257 Cal. App. 2d 201, 64 Cal. Rptr. 706 (1967); People v. Perez, 23 Cal. Rptr. 569, 373 P.2d 617 (1962); Dixon v. Commonwealth, 487 S.W.2d 928 (Ky. 1972); Wodell v. State, 2 Md. App. 433, 234 A.2d 890 (1967); State v. Toppi, 275 A.2d 805 (Me. 1971); Johns v. State, 255 So. 2d 322 (Miss. 1971); Boley v. State, 85 Nev. 466, 456 P.2d 447 (1969); State v. Miner, 128 Vt. 55, 258 A.2d 815 (1969).

The use of "rap-sheets" in cross-examination have been upheld. *See* People v. Perez, 37 Mich. App. 414, 195 N.W.2d 414 (1971); Bailey v. State, 479 S.W.2d 829 (Tenn. 1972). *See also* Shaddox v. State, 243 Ark. 55, 418 S.W.2d 780 (1967), *aff'd*, 244 Ark. 747, 427 S.W.2d 198 (1968). The use of "rap-sheets" has been held to be improper. *See* People v. Council, 36 Mich. App. 682, 194 N.W.2d 34 (1971); Colle v. State, 85 Nev. 289, 454 P.2d 21 (1969); State v. Williams, 76 N.M. 578, 417 P.2d 62 (1966), *aff'd*, 80 N.M. 63, 451 P.2d 556 (1969).

[344] *See* United States *ex rel.* Schartner v. Pizzo 336, F. Supp. 1192 (M.D. Pa. 1972); People v. Harris, 38 Ill. 2d 552, 232 N.E.2d 721 (1967); People v. Harter, 4 Ill. App. 3d 772, 282 N.E.2d 10 (1972); People v. Sanders, 96 Ill. App. 2d 166, 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 (1966); People v. Arbuckle, 69 Ill. App. 2d 251, 215 N.E.2d 825 (1966); *But see* State v. Robinson, 272 N.C. 271, 158 S.E.2d 23 (1967) (prior convictions cannot be proved up with independent evidence).

[345] *See* Graham v. State, 13 Md. App. 171, 282 A.2d 162 (1971); People v. Luoni, 40 Mich. App. 457, 198 N.W.2d 887 (1972).

[346] *See* Dorroh v. State, 229 Miss. 315, 90 So. 2d 653 (1956); State v. Redfern, 12 N.C. App. 230, 185 S.E.2d 6 (1971), *cert. denied*, 186 S.E.2d 177 (1972).

[347] *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 conviction); United States v. Leach, 429 F.2d 956, (8th 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, 371 F.2d 434 (10th Cir. 1967) (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, 132 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); Shockley 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.[348] Usually, the defense attorney must preserve his objection to the form or nature of the question for purposes of appeal.[349] 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.[350]

In 1965 the Circuit Court for the District of Columbia held in *Luck v. United States*[351] 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[352] looked to the number and nature of the prior convictions as well as their similarity to the instant charge. They also considered the importance to the case of the defendant's testimony and credibility. While this exercise of discretion was followed by a number of courts,[353] it was specifically rejected by others.[354] 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.[355] 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.

closed. *See* Cowan v. Commonwealth, 407 S.W.2d 695 (Ky. 1966). *But see* Barbosa v. Craven, 431 F.2d 698 (9th Cir. 1970); State v. Bowen, 104 Ariz. 138, 449 P.2d 603, *cert. denied*, 396 U.S. 912 (1969); State v. Garten, 277 N.C. 236, 176 S.E.2d 778 (1970).

Partial answers given on direct examination can be explored to completion by the cross-examiner. *See* People v. Kildow, 19 Mich. App. 194, 172 N.W.2d 492 (1969); People v. Baker, 7 Mich. App. 7, 151 N.W.2d 217 (1967).

Questions may be repeated to a reluctant defendant or witness. *See* Swan v. State, 245 Ark. 154, 431 S.W.2d 475 (1968); Ferril v. State, 267 So. 2d 813 (Miss. 1972); State v. Weaver, 3 N.C. App. 439, 165 S.E.2d 15 (1969); State v. Johnson, 69 Wash. 2d 264, 418 P.2d 238 (1966).

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). *But see* Stout v. State, 244 Ark. 676, 426 S.W.2d 800 (1968), *aff'd*, 247 Ark. 948, 448 S.W.2d 636 (1970); State v. Garten, 277 N.C. 236, 176 S.E.2d 778 (1970).

[348] *See* Laughlin v. United States, 385 F.2d 287 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968) ("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, 450 S.W.2d 658 (Tex. 1970).

[349] *See* Green v. United States, 397 F.2d 643 (D.C. Cir. 1968); Lewis v. United States, 381 F.2d 894 (D.C. Cir. 1967); Tyson v. State, 46 Ala. App. 398, 243 So. 2d 382, *cert. denied*, 286 Ala. 741, 243 So. 2d 384 (1970); People v. Jones, 47 Ill. 2d 135, 265 N.E.2d 125 (1970); State v. Kelley, 262 La. 143, 262 So. 2d 501 (1972); Frazier v. State, 7 Md. App. 165, 253 A.2d 919 (1969); Gill v. State, 149 S.W.2d 289 (Tex. 1972).

[350] *See* United States v. De La Mottee, 434 F.2d 289 (2d Cir. 1970), *cert. denied*, 401 U.S. 921 (1971); Harris v. United States, 384 F.2d 363 (5th Cir. 1967); State v. Alexander, 16 N.C. App. 95, 191 S.E.2d 395 (1972); State v. Goodsen, 273 N.C. 128, 159 S.E.2d 310 (1968); Smith v. State, 455 S.W.2d 282 (Tex. 1970), *aff'd*, 465 S.W.2d 163 (1971).

[351] 348 F.2d 763 (D.C. Cir. 1965). *See generally* McGowan, *Impeachment of Criminal Defendants by Prior Convictions*, 1970 LAW AND THE SOCIAL ORDER 1 (1970).

[352] *See* United States v. Thomas, 452 F.2d 1373 (D.C. Cir. 1971); United States v. Isaacs, 449 F.2d 1040 (D.C. Cir. 1971); United States v. Baber, 447 F.2d 1267 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 957 (1971); Davis v. United States, 433 F.2d 1222 (D.C. Cir. 1970); United States v. Bailey, 426 F.2d 1236 (D.C. Cir. 1970); United States v. McIntosh, 426 F.2d 1231 (D.C. Cir. 1970); United States v. Coleman, 420 F.2d 1313 (D.C. Cir. 1969); Davis v. United States, 409 F.2d 453 (D.C. Cir. 1969); Stith v. United States, 256 A.2d 403 (D.C. Cir. 1969); Moss v. United States, 250 A.2d 567 (D.C. Cir. 1969); Smith v. United States, 406 F.2d 667 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 963 (1969); Jones v. United States, 404 F.2d 212 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 907 (1969); Williams v. United States, 394 F.2d 957 (D.C. Cir. 1968); Barber v. United States, 392 F.2d 517 (D.C. Cir. 1968); Bullock v. United States, 243 A.2d 677 (D.C. Cir. 1968); Brooke v. United States, 385 F.2d 279 (D.C. Cir. 1967); Gordon v. United States, 383 F.2d 936 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968); Burroughs v. United States, 236 A.2d 319 (D.C. Cir. 1967); Jackson v. United States, 232 A.2d 576 (D.C. Cir. 1967); Blackney v. United States, 225 A.2d 654 (D.C. Cir. 1967); Brown v. United States, 370 F.2d 242 (D.C. Cir. 1966); Trinkle v. United States, 369 F.2d 95 (D.C. Cir. 1966); Hood v. United States, 365 F.2d 949 (D.C. Cir. 1966).

[353] *See* United States v. Hildreth, 387 F.2d 328 (4th Cir. 1967); Spaulding v. State, 481 P.2d 389 (Alaska 1971); People v. Montgomery, 49 Ill. 2d 510, 268 N.E.2d 695 (1971); State v. Sibold, 83 N.M. 678, 496 P.2d 738 (1972). In People v. Beagle, 99 Cal. Rptr. 313, 492 P.2d 1 (1972), the California court held that the wording of the California evidence code conferred *Luck* discretion upon the trial judge. *See* CAL. EVID. CODE § 788 (West 1966).

[354] *See, e.g.*, United States v. Gornick, 448 F.2d 566 (7th Cir. 1971); United States v. Cacchillo, 416 F.2d 231 (2d Cir. 1969); Shorter v. United States, 412 F.2d 428 (9th Cir. 1969), *cert. denied*, 396 U.S. 970 (1969); Dickerson v. State, 46 Ala. App. 183, 239 So. 2d 235 (1970); Commonwealth v. West, 258 N.E.2d 22 (Mass. 1970); People v. Cantrell, 27 Mich. App. 210, 183 N.W.2d 401 (1970); State v. Busby, 486 S.W.2d 501 (Mo. 1972); People v. Pritchett, 69 Misc. 2d 67, 329 N.Y.S.2d 147 (1972); State v. Adams, 50 N.J. 1, 231 A.2d 605 (1967); Howard v. State, 480 S.W.2d 191 (Tex. 1972). *But see* United States v. Allison, 414 F.2d 407 (9th Cir.), *cert. denied*, 396 U.S. 968 (1969).

[355] D.C. CODE § 14-305 (1970). For the effect of this statute, see White v. United States, 283 A.2d 21 (D.C. Cir. 1971); Taylor v. United States, 280 A.2d 79 (D.C. Cir. 1971).

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[356] (but often find that it amounts to only harmless error),[357] others permit the prosecutor to question both defendants[358] and defense witnesses[359] in this manner. Courts may distinguish between the two, however, in light of the greater possibility of prejudice when examining the accused.[360] In any event, the examiner's questions must be based upon good faith.[361]

Acts of misconduct useable for impeachment may be limited to those which are relevant to credibility.[362] This is similar to the "probative of truthfulness or untruthfulness" requirement of the Proposed Federal Rules of Evidence.[363] A broader approach is taken by courts which allow impeachment based upon any vicious or immoral act tending to relate to credibility.[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.[365]

Bad acts which tend to show bias, however, are generally admissible.[366] (Impeachment to show bias is discussed in Section X.)

[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 (1968) (failure to file income tax returns could not be used); State v. Goldsmith, 104 Ariz. 226, 450 P.2d 684 (1969) (improper to cross 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 (1971) (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. Lampshire, 74 Wash. 2d 888, 447 P.2d 727 (1968) (improper to ask about overdue phone bill). *See also* Craft v. United States, 403 F.2d 360 (9th Cir. 1968), *aff'd*, 421 F.2d 693 (1970); State v. Nevarey, 108 Ariz. 414, 499 P.2d 709 (1972); State v. Cadena, 9 Ariz. App. 369, 452 P.2d 534 (1969); People v. McCarthy, 88 Cal. App. 2d 883, 200 P.2d 69 (1948); People v. Garcia, 90 Ill. App. 2d 396, 232 N.E.2d 810 (1967); State v. Taylor, 198 Kan. 290, 424 P.2d 612 (1967); Garcia v. State, 454 S.W.2d 400 (Tex. 1970); Renesto v. State, 452 S.W.2d 498 (Tex. 1970).

[357] *See* United States v. De Sapio, 456 F.2d 644 (2d Cir. 1972), *cert. denied*, 406 U.S. 933 (1972); Claridy v. State, 270 So. 2d 685 (Ala. 1972); Jessup v. State, 43 Ala. App. 517, 194 So. 2d 570 (1966); State v. Skinner, 4 Ariz. App. 584, 422 P.2d 415 (1967); People v. Pierce, 11 Cal. App. 3d 313, 89 Cal. Rptr. 751 (1970); People v. Jones, 7 Cal. App. 3d 48, 86 Cal. Rptr. 717 (1970); People v. Nieto, 268 Cal. App. 2d 231, 73 Cal. Rptr. 844 (1969); Mitchell v. State, 455 S.W.2d 266 (Tex. 1966).

[358] *See* Hug v. United States, 329 F.2d 475 (6th Cir.), *cert. denied*, 379 U.S. 818 (1964); Wright v. State, 243 Ark. 221, 419 S.W.2d 320 (1967); State v. Stout, 83 N. M. 624, 495 P.2d 802 (1972); Stewart v. State, 484 S.W.2d 77 (Tenn. 1972); Wood v. State, 486 S.W.2d 771 (Tex. 1972).

[359] *See, e.g.*, United States v. Farries, 459 F.2d 1057 (3d Cir. 1972); State v. McFerran, 80 N.M. 622, 459 P.2d 148 (1969); State v. Lassiter, 193 S.E.2d 265 (N.C. 1972).

[360] *See* Heath v. State, 249 Ark. 217, 459 S.W.2d 420 (1970), *cert. denied*, 404 U.S. 910 (1971); State v. Hyleck, 286 Minn. 126, 175 N.W.2d 163 (1970).

[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).

[362] *See, e.g.*, Lyda v. United States, 321 F.2d 788 (9th Cir. 1963); Touhy v. United States, 88 F. 930 (8th Cir. 1937); People v. Bernette, 45 Ill. 2d 227, 258 N.E.2d 793 (1970), *remanded for resentencing*, 403 U.S. 947 (1971). The presence of moral turpitude may give rise to bad act impeachment. *See* Wilson v. State, 452 S.W.2d 355 (Tex. 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.

[364] *See* People v. Brown, 26 N.Y.2d 88, 257 N.E.2d 16 (1970) (knife fighting); People v. Schwartzman, 24 N.Y.2d 241, 247 N.E.2d 642, *cert. denied*, 396 U.S. 846 (1969) (passing worthless checks); People v. Alamo, 23 N.Y.2d 630, 246 N.E.2d 496, *cert. denied*, 396 U.S. 879 (1969) (robberies); People v. Canty, 31 App. Div. 2d 976, 299 N.Y.S.2d 524 (1969) (adultery).

[365] McCormick § 42.

[366] *See, e.g.*, McCracken v. State, 439 P.2d 448 (Alaska 1968); State v. Cadena, 9 Ariz. App. 369, 452

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.[367] Forays into patterns of conduct such as homosexuality, drinking and fighting, or into an individual's personal associations also occur with regularity.[368]

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.[369] 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.[370]

Acts of misconduct are proper subjects of inquiry when they tend to show the state of mind, motive or intent of the accused.[371] Of course they may not be used to demonstrate that the defendant has a propensity to engage in criminal conduct.[372] Frequently, prior acts not otherwise admissible may be made so when put in issue on direct examination.[373]

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.[374] 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,[375]

P.2d 534 (1969). In Smith v. State, 431 P.2d 507, (Alaska 1967), the court noted:

> When the main objective to be served by cross-examination is legitimate and permissible as it is here, then the fact that particular wrongful acts are also suggested or established would be merely incidental and should not prevent the primary and legitimate objective of impeachment by showing bias from being accomplished.

[367] *See, e.g.*, United States v. Marchesani, 457 F.2d 1291 (6th Cir. 1972) (unmarried cohabitation); Moore v. United States, 394 F.2d 818 (5th Cir. 1968), *cert. denied*, 393 U.S. 1030 (1969) (illegitimate children); People v. Simons, 202 N.W.2d 575 (Mich. 1972) (illicit affair); State v. Spencer, 472 S.W.2d 404 (Mo. 1971) (illegitimate children).

[368] *See, e.g.*, Commonwealth v. Ransom, 266 N.E.2d 304 (Mass. 1971) (fighting); People v. Simons, 202 N.W.2d 575 (Mich. 1972) (fighting); Lay v. State, 248 So. 2d 794 (Miss. 1971) (drinking); State v. Taylor, 473 S.W.2d 385 (Mo. 1971) (associations); Thrash v. State, 482 S.W.2d 213 (Tex. 1972) (homosexuality); Booty v. State, 456 S.W.2d 64 (Tex. 1970) (homosexuality).

[369] *See* People v. Perez, 239 Cal. App. 2d 1, 48 Cal. Rptr. 596 (1965); People v. Smothers, 53 Ill. 2d 95, 290 N.E.2d 201 (1972); People v. Talaga, 37 Mich. App. 100, 194 N.W.2d 462 (1971). *Contra* Fields v. State, 487 P.2d 831 (Alaska 1971); People v. Smith, 38 Ill. 2d 237, 231 N.E.2d 185 (1967).

[370] *See, e.g.*, Doe v. State, 487 P.2d 47 (Alaska 1971); State v. Ballesteros, 100 Ariz. 262, 413 P.2d 739 (1966); People v. Ortega, 2 Cal. App. 3d 890, 83 Cal. Rptr. 260 (1969); State v. Goodin, 492 P.2d 287 (Ore. 1971).

[371] *See* United States v. Kaufman, 453 F.2d 306 (2d Cir. 1971) (false income tax returns); United States v. Munchak, 443 F.2d 531 (2d Cir. 1971) (prior similar acts); United States v. Hall, 342 F.2d 849 (4th Cir. 1965), *cert. denied*, 382 U.S. 812 (1965) (receipt of bribes); People v. Garcia, 90 Ill. App. 2d 396, 232 N.E.2d 810 (1967) (prior fights); People v. Talaga, 37 Mich. App. 100, 194 N.W.2d 462 (1971) (heroin addiction); Coleman v. State, 442 S.W.2d 338 (Tex. 1969) (gambling and wife beating).

[372] *See* Commonwealth v. Ransom, 266 N.E.2d 304 (Mass. 1971); People v. Simons, 202 N.W.2d 575 (Mich. 1972). *See also* note 272 *supra*.

[373] *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, 499 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); Whitaker 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).

[374] *See* Mich. Stat. Ann. §27A.2158 (1962); *See also* United States v. Strong, 452 F.2d 1024 (5th Cir. 1971); United States v. Fontana, 231 F.2d 807 (3d Cir. 1956); Williams v. State, 44 Ala. App. 503, 214 So. 2d 712 (1968); Maples v. State, 44 Ala. App. 491, 214 So. 2d 700 (1968); State v. DeNunzio, 5 Conn. Cir. 608, 259 A.2d 768 (1969); Taylor v. State, 249 Ind. 238, 231 N.E.2d 507, (1967); Jenckins v. State, 14 Md. App. 1, 285 A.2d 667 (1967); Commonwealth v. Redmond, 258 N.E.2d 287 (Mass. 1970); Lloyd v. State, 85 Nev. 576, 460 P.2d 111 (1969), *cert. denied*, 398 U.S. 932 (1970); Rodgers v. State, 486 S.W.2d 794 (Tex. 1972). It has been held that a foundation must be laid before impeachment showing bias can take place. *See* People v. Peyton, 72 Ill. App. 2d 240, 218 N.E.2d 518 (1966); Taylor v. State, 249 Ind. 238, 231 N.E.2d 507 (1967). It has also been held that a witness must be afforded an opportunity to explain a prior statement which is indicative of bias. *See* United States v. Hayutin, 398 F.2d 944 (2d Cir. 1968).

[375] *See, e.g.*, Adams v. State, 280 Ala. 678, 198 So. 2d 255 (1967) ("Do you love your father?"); Jenckins v. State, 14 Md. App. 1, 285 A.2d 667 (1971) (inquiry of defendant's wife regarding an affair the deceased was having with her daughter). *See also* Williams v. State, 44 Ala. App. 503, 214 So. 2d 712 (1968); People v.

friendship[376] or romantic involvement with the accused.[377] 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.[378] Employment[379] and financial ties[380] as well as the existence of a partnership in crime[381] 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.[382] Hostility to the police[383] or to a government witness[384] may also be exposed as a motive for the witness' testimony.

Cross-examination may test the memory[385] and perceptual ability of a witness' senses, but courts are apt to disallow courtroom experiments.[386] The mental health of a witness may also be inquired into insofar as it relates to the credibility of the witness.[387]

Jones, 7 Cal. App. 3d 48, 86 Cal. Rptr. 717 (1970); Ward v. State, 474 S.W.2d 471, (Tex. 1971); MICH. STAT. ANN. §27A.2158 (1962); MO. ANN. STAT. §546.260 (1953).

[376] *See, e.g.*, People v. Faulkner, 36 Mich. App. 101, 193 N.W.2d 178 (1971) (witness questioned about relationship with a group called the Black Messengers); People v. Casper, 25 Mich. App. 1, 180 N.W.2d 906 (1970) (witness questioned as to drinking and card playing with defendant); State v. Franklin, 185 Neb. 62, 173 N.W.2d 780 (1971) (witness questioned about association with defendant in jail); State v. Guerrero, 501 P.2d 998 (Ore. 1972) (witness questioned about friendship in penitentiary). *But see* Jessup v. State, 43 Ala. App. 517, 194 So. 2d 570 (1966); Commonwealth v. White, 447 Pa. 331, 290 A.2d 246 (1972).

[377] *See, e.g.*, United States v. Johnson, 246 F.2d 1112 (7th Cir.), *cert. denied*, 400 U.S. 842 (1970) (fiancee); People v. Jones, 7 Cal. App. 3d 48, 86 Cal. Rptr. 751 (1970) (girlfriend); People v. Ogg, 258 Cal. App. 2d 841, 66 Cal. Rptr. 289 (1968) (person with whom defendant had extramarital relationship); People v. Escobedo, 250 Cal. App. 2d 417, 58 Cal. Rptr. 426 (1967) (person with whom defendant had extramarital relationship); People v. Ellison, 121 Ill. App. 2d 149, 257 N.E.2d 199 (1970) (witness questioned as to extramarital relationship with defendant); People v. Somerville, 88 Ill. App. 2d 212, 232 N.E.2d 115 (1967), *cert. denied*, 393 U.S. 823 (1968) (extramarital relationship); State v. Metcalf, 203 Kan. 63, 452 P.2d 842 (1969) (witness questioned about illicit relationship with defendant); People v. Payne, 13 Mich. App. 116, 163 N.W.2d 650 (1968) (witness asked if defendant lived at her home); Lloyd v. State, 85 Nev. 576, 460 P.2d 111 (1969) (witness asked if she spent the night with defendant and previously testified for him); State v. Berger, 148 N.W.2d 331 (N.D. 1966) (witness asked if she dated, drank with, was supported by, stayed overnight with and falsely registered in motel with defendant). *But see* People v. Laurry, 5 Ill. App. 3d 713, 283 N.E.2d 895 (1972) (improper to ask a defense witness about her marital status and the paternity of her child, although an illicit sexual relationship with the defendant was implied).

[378] *See, e.g.*, Tinker v. United States, 417 F.2d 542 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 864 (1969); United States v. Nuccio, 373 F.2d 168 (2d Cir. 1967), *cert. denied*, 392 U.S. 930 (1968); Thompkins v. United States, 236 A.2d 443 (D.C. Cir. 1967); People v. Peters, 23 Cal. App. 2d 522, 101 Cal. Rptr. 403 (1972); Commonwealth v. Cheatham, 429 Pa. 198, 239 A.2d 293 (1968).

[379] *See* State v. DiNunzio, 5 Conn. Cir. 608, 259 A.2d 768 (1969); Commonwealth v. Gardner, 350 Mass. 664, 216 N.E.2d 558 (1966).

[380] *See* United States v. Kerr, 464 F.2d 1367 (6th Cir. 1972); Battles v. State, 44 Ala. App. 635, 218 So. 2d 695 (1968); McCracken v. State, 439 P.2d 448 (Alaska 1968); Smith v. State, 431 P.2d 507 (Alaska 1967); State v. Metcalf, 203 Kan. 63, 452 P.2d 842 (1969); Garcia v. State, 454 S.W.2d 400 (Tex. 1970).

[381] *See* McCracken v. State, 439 P.2d 448 (Alaska 1968); Smith v. State, 431 P.2d 507 (Alaska 1967); Bosnick v. State, 248 Ark. 1289, 455 S.W.2d 688 (1970); Herzig v. State, 213 So. 2d 900 (Fla. 1968); Commonwealth v. Arsenault, 280 N.E.2d 129 (Mass. 1972); State v. Good, 492 P.2d 287 (Ore. 1971).

[382] *See, e.g.*, United States v. Briggs, 457 F.2d 908 (2d Cir. 1972) (witness asked if the defendant threatened him); People v. Hathcock, 8 Cal. App. 3d 509, 504 P.2d 476, 105 Cal. Rptr. 540 (1973) (fear of retaliation by defendant's brother); State v. Chambers, 270 So. 2d 514 (La. 1972) (witness asked what would happen to him when he returned to prison if he implicated the defendant); State v. DiRenzo, 53 N.J. 360, 251 A.2d 99 (1969) (witness feared defendant).

[383] *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. 915, *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 charges 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).

[384] *See, e.g.*, United States v. Dardi, 330 F.2d 316 (2d Cir.), *cert. denied*, 379 U.S. 845 (1964). The defense has a very broad range of permissible inquiry when examining a government witness who may be biased. *See* United States v. Kartman, 417 F.2d 893 (9th Cir. 1969). Wide latitude is also allowed when cross-examining a co-conspirator who testifies for the state. *See* State v. Zwillman, 112 N.J. Super. 6, 270 A.2d 284 (1970), *cert. denied*, 57 N.J. 604, 274 A.2d 56 (1971).

[385] *See* United States v. Allegretti, 340 F.2d 254 (7th Cir. 1964), *cert. denied*, 381 U.S. 911, *reh. denied*, 381 U.S. 956 (1965); Rush v. State, 254 Miss. 641, 182 So. 2d 214 (1966); Wright v. State, 466 P.2d 1014 (Wyo. 1970).

[386] *See* Bryant v. State, 4 Md. App. 572, 244 A.2d 446 (1968); Wood v. State, 257 So. 2d 193 (Miss. 1972); State v. Pevear, 110 N.H. 445, 270 A.2d 598 (1970).

[387] *See* People v. Fort, 273 N.E.2d 439 (Ill. Ct. App. 1971) (proper to question a thirteen year old boy to determine his competency and ability to tell the truth); People v. Chupich, 270 N.E.2d 106 (Ill. Ct. App. 1971)

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.[388] 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.[389] These may be shown to the witness and questions based upon them may be tendered. Similarly, photographs may be shown to the witness and his responses elicited.[390]

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,[391] 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.[392] Most commonly, a defendant may be required to briefly don a certain garment found at the crime scene such as a hat[393] or a jacket[394] 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.[395]

(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 about whether witness declared incompentent); Commonwealth v. Carroll, 276 N.E.2d 705 (Mass. 1971) (proper to inquire about mental infirmities and idiosyncracies as well as a medical discharge from the army); State v. Vigliano, 47 N.J. 504, 221 A.2d 733 (1966) (error to refuse to allow the defense 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).

[388] *See* Harris v. State, 120 Ga. App. 359, 170 S.E.2d 743 (1969). The actions of a prosecutor who placed the murder weapon in his belt the way the defendant had carried it, and went about his cross-examination has been upheld. *See* Crawford v. State, 264 So. 2d 554, *cert. denied*, 264 So. 2d 559 (Ala. 1972).

[389] See Proposed Fed. R. Evid. 612. *See also* Marcus v. United States, 422 F.2d 752 (5th Cir. 1970); United States v. Gober, 337 F. Supp. 252 (W.D. Okla. 1971); State v. Oswald, 197 Kan. 251, 417 P.2d 261 (1966); State v. Grunau, 273 Minn. 315, 141 N.W.2d 815 (1966); State v. Scott, 31 Ohio St. 2d 1, 285 N.E.2d 344 (1972); Fox v. State, 441 S.W.2d 491 (Tenn. 1968). The propriety of refreshing a witness' recollection while on cross-examination is within the judge's discretion. *See* United States v. Baratta, 397 F.2d 215 (2d Cir. 1968), *cert. denied*, 393 U.S. 939, *reh. denied*, 393 U.S. 1045 (1969).

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) (bluffing an alibi 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 denials that the acts took place).

It is proper to offer documents into evidence on cross-examination. *See* Stiles v. People, 159 Colo. 499, 414 P.2d 468 (1966); People v. Smith, 15 Mich. App. 173, 166 N.W.2d 504 (1968).

[390] *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 906, *cert. denied*, 389 U.S. 832 (1971) (defendant cross-examined using pictures of nude males ostensibly found in his apartment).

[391] *See* Doremus v. United States, 414 F.2d 252 (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.

[392] *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).

[393] *See, e.g.*, State v. Taylor, 99 Ariz. 85, 407 P.2d 59 (1965), *cert. denied*, 384 U.S. 979 (1966); State v. Dean, 400 S.W.2d 413 (Mo. 1966).

[394] *See* Howard v. Sigler, 325 F.Supp. 272 (D. Neb. 1971), *rev'd on other grounds*, 454 F.2d 115 (8th Cir. 1972); Mason v. State, 8 Md. App. 579, 261 A.2d 197 (1970); State v. Howard, 184 Neb. 461, 168 N.W.2d 370 (1969). *But see* State v. Thorne, 39 Utah 208, 117 P. 58 (1911), where the court held that dressing the defendant up in a hat, overalls, covering his face with a handkerchief and having him hold a gun could have no purpose other than to disturb and arouse the jury.

[395] *See* United States v. Doremus, 414 F.2d 252 (6th Cir. 1969); State v. Vroman, 188 N.W.2d 746 (S.D. 1972); Long v. State, 48 S.W.2d 632 (Tex. 1931). It has also been held that a defendant may be cross-

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.[396] 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*.[397] In *Berger*, the prosecutor

a) misstated facts,
b) put answers in the mouths of witnesses which they hadn't uttered,
c) assumed facts unsupportable 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,[398] 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,[399] or asking a defendant charged with rape if he likes to rape little girls, or why he specializes in little girls,[400] 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." [401] or to call attention by

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examined on his refusal to provide handwriting exemplars. *See* People v. Stokley, 266 Cal. App. 2d 930, 72 Cal. Rptr. 513 (1968), *cert. denied*, 395 U.S. 914 (1969). The production of other evidence on cross-examination may be required. *See* Ziegler v. United States, 174 F.2d 439 (9th Cir.), *cert. denied*, 338 U.S. 822 (1949) (cancelled checks).

[396] *See* Roller v. State, 268 So. 2d 541 (Fla. 1972), where the court held that the prosecutor cannot exceed fairness or propriety, or resort to methods to produce a wrongful conviction. A prosecutor should not inject his personal opinions into a case. *See* People v. Brocato, 17 Mich. App. 277, 169 N.W.2d 483 (1969). It is improper to infringe upon a witness' privileges, such as the attorney-client privilege, or the husband-wife privilege. *See* Watson v. State, 190 So. 2d 161 (Fla. 1966); People v. Bussell, 28 Mich. App. 522, 184 N.W.2d 502 (1970); People v. Brocato, 177 Mich. App. 277, 169 N.W.2d 483 (1969). It is also improper to cross-examine a witness with an aim toward forcing him to take the fifth amendment and thus prejudice the defendant. *See* United States v. Glasser, 443 F.2d 994 (2d Cir.), *cert. denied*, 404 U.S. 854 (1971).

It is generally improper to cross-examine regarding the failure to produce witnesses who were equally accessible to the prosecutor. *See* People v. Pearson, 2 Ill. App. 3d 861, 277 N.E.2d 544 (1972). *But see* United States v. Chapman, 435 F.2d 1245 (5th Cir.), *cert. denied*, 402 U.S. 912 (1971). If the witness is not equally accessible, comment is permitted. *See* Stallings v. State, 476 S.W.2d 679 (Tex. 1972).

There are few cases which discuss whether or not a witness may be asked to speculate on why witnesses who have contradicted him would lie. *See* Sizemore v. State, 499 P.2d 486 (Okla. 1972) (improper to ask why witnesses would falsely accuse the defendant of theft); Gunn v. State, 487 S.W.2d 666 (Tenn. 1972) (proper to ask the defendant if a man of the gospel for forty years would lie). It has been held that a prosecutor may ask a defendant if he cared to reconsider his testimony in light of the other evidence. *See* Carpenter v. United States, 264 F.2d 565 (4th Cir.), *cert. denied*, 360 U.S. 936 (1959).

A mere lack of effective purpose does not amount to misconduct. *See* People v. Messer, 276 Cal. App. 2d 300, 80 Cal. Rptr. 811 (1969).

What standards are to be applied to the examination of a witness whom the prosecutor believes to be telling the truth? Consider the A.B.A. Standards Relating to the Prosecution Function 5.7 (b):

> The prosecutor's belief that the witness is telling the truth does not necessarily preclude appropriate cross-examination in all circumstances but may affect the method and scope of cross-examination. He should not misuse the power of cross-examination or impeachment to discredit or undermine a witness if he knows the witness is testifying truthfully.

[397] 295 U.S. 78 (1935). *See also* Mason v. State, 8 Md. App. 579, 26 A.2d 197 (1970).

[398] *See* People v. Moran, 83 Cal. Rptr. 411, 463 P.2d 763 (1970) (prosecutor referred to marijuana as LSD); People v. Helfend, 1 Cal. App. 3d 873, 82 Cal. Rptr. 295 (1969), *cert. denied*, 398 U.S. 967 (1970) (prosecutor said "after you killed Max Levin" instead of saying "after Max Levin was killed"); Zilmbi v. State, 39 Wis. 2d 607, 159 N.W.2d 669 (1968) (unintentional misstatement of fact).

[399] *See* People v. Montgomery, 51 Ill. 2d 198, 282 N.E.2d 138 (1972).

[400] *See* People v. Dennis, 25 App. Div. 813, 270 N.Y.S.2d 119 (1966). *See also* United States v. Greene, 400 F.2d 847 (6th Cir. 1968); Petition of Wright, 282 F. Supp 999 (W.D. Ark. 1968); Richmond v. State, 124 Ga. App. 650, 185 S.E.2d 560 (1971); Stevenson v. State, 497 P.2d 1114 (Okla. 1972).

The effect of minor prejudicial conduct is usually minimized by courts. *See* United States v. American Radiator and Stand Son Corp., 433 F.2d 174 (3d Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); People v. Havigrove, 18 Cal. App. 3d 606, 96 Cal. Rptr. 142 (1971); State v. Bausman, 162 Conn. 308, 294 A.2d 312 (1972); State v. Williams, 17 N.C. App. 31, 193 S.E.2d 478 (1972); State v. Syddall, 21 Utah 2d 276, 444 P.2d 753 (1968).

[401] *See* Armstead v. United States, 347 F.2d 806 (D.C.

forty-four separate references to the fact that an armed robbery defendant is a prostitute[402] is reversible error. The form of the question may be cause for appellate castigation if it is argumentative,[403] accusatory,[404] or if it is calculated to intimidate the witness.[405]

Probably the most frequent instances of prosecutorial misconduct occur when questions either insinuate[406] or actually state propositions which are unsupportable by evidence in the case.[407] 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,[408] and questions which attempt to at-

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Cir. 1965). *See also* Pendergrast v. United States, 416 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."

[402] *See* State v. Holm, 93 Idaho 904, 478 P.2d 284 (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):

> [T]he 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 defendant with amorous letters written by a woman twenty years his senior who had undergone psycho-therapy); 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 436, 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. Daye, 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.

[403] *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, 233 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"). *But see* 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.").

[404] *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).

[405] *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).

[406] *See* United States v. Puco, 436 F.2d 761 (2d Cir. 1971) (prosecutor held a piece of paper implying that it was a prior inconsistent statement); State v. Stevens, 93 Idaho 48, 454 P.2d 945 (1969) (no proof followed a question of the defendant asking him whether he asked a girl to lie for him); People v. Saunders, 132 Ill. App. 2d 701, 270 N.E.2d 217 (1971) (inference of prior inconsistent statement not substantiated); People v. Somerville, 71 Ill. App. 2d 381, 219 N.E.2d 116 (1966) (insinuation that defendant had confessed his guilt); State v. Carey, 165 N.W.2d 27 (Iowa 1969) (prosecutor insinuated that the defendant was responsible for the failure of a prosecution witness to appear); Stevens v. State, 263 So. 2d 755 (Miss. 1972) (prosecutor insinuated that the defendant was a burglar by asking him where he had worked and then asking if those places had been burglarized); Davis v. State, 413 P.2d 920 (Okla. 1966) (inference that defendant obtained illegally money in a bank account).

[407] *See* A.B.A. STANDARD RELATING TO THE PROSECUTION FUNCTION:

> It is improfessional conduct to ask a question which implies the existence of a factual predicate which the examiner knows he cannot support by evidence.

See also State v. Enriquez, 102 Ariz. 402, 430 P.2d 422 (1967) (defendant was questioned about wearing a mask which implied he was a robber, but the prosecutor never offered to prove it); People v. Perez, 253 Cal. App. 3d 288, 61 Cal. App. 2d 785 (1967) (improper to ask defendant if he was preparing to take a fix when he was arrested); Marsh v. State, 202 So. 2d 222 (Fla. 1967) (defendant asked about unproved prior admissions); People v. Pollard, 33 Mich. App. 114, 189 N.W.2d 855 (1971) (questions which assume unproven facts are objectionable). The error is often a harmless one. *See* Plumley v. State, 4 Md. App. 671, 245 A.2d 111 (1968), *cert. denied*, 395 U.S. 960 (1969) (witness, a sheriff, was asked if he kept an assassination fund); State v. Thompson, 472 S.W.2d 351 (Mo. 1971) (defendant asked if his attorney told him to play dumb); Commonwealth v. Hill, 223 Pa. Super. 42, 296 A.2d 860 (1972) (defendant gave a negative reply to a question about a non-existent prior inconsistent statement); State v. Hamric, 151 W.Va. 1, 151 S.E.2d 252 (1966) (jury told to disregard questions of the defendant dealing with conversations he had with the deceased); Gaertner v. State, 35 Wis. 2d 159, 150 N.W.2d 370 (1967) (prosecutor implied that the defendant had confessed).

[408] *See* Davis v. United States, 433 F.2d 1222 (D.C. Cir. 1970); United States v. Mullings, 364 F.2d 173 (2d Cir. 1966); State v. Mathis, 47 N.J. 455, 221 A.2d 529 (1966), *rev'd.* 403 U.S. 946 (1970), *reh. denied*, 404 U.S. 876 (1971); State v. Beyor, 129 Vt. 472, 282 A.2d 819 (1971). Under certain circumstances, financial condition is properly brought out. *See* United States v.

tack a witness' credibility based upon his religious affiliation.[409] Quite obviously, questions which include racial slurs or attempts to curry favor with any racially prejudiced members of the jury are prohibited.[410]

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.[411] Witnesses may also be questioned about their understanding of perjury if it is not calculated to prejudice the jury against a particular witness.[412] Finally, rephrased or repetitious questions are permitted within the judge's discretion, but they should not tend to prejudice the jury.[413]

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.[414]

Matters are not considered collateral if they are related to the central substantive issues of the case,[415] or if they are subject to being proved up with extrinsic evidence in the case-in-chief.[416] Bias, interest, prejudice and conviction of a crime fall within the latter test, and are therefore not subject to the prohibition against collateral impeachment.[417] Misconduct, however, is termed a collateral issue and the prosecutor is, therefore, bound by his answer when impeaching a witness on that basis.[418]

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,[419] questions are answered in the nega-

Graydon, 429 F.2d 120 (4th Cir. 1970); United States v. Polansky, 418 F.2d 444 (2d Cir. 1969); People v. Higgins, 28 Cal. App. 3d 771, 104 Cal. Rptr. 925 (1972).

[409] *See* Proposed Fed. R. Evid. 610:

> Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced.

See also People v. Williams, 39 Mich. App. 458, 197 N.W.2d 858 (1972); McCormick §48; Cal. Evid. Code §789 (West 1966). All references to religion, however, are not necessarily improper. See United States v. Rucker, 435 F.2d (8th Cir. 1971) (defense witness asked what other laws besides selective service could not be obeyed by a Jehovah's Witness); People v. Nicolaus, 423 P.2d 787, 56 Cal. Rptr. 635 (1967) (proper to ask a witness if he believed in God after he took the oath); People v. Falkner, 36 Mich. App. 101, 193 N.W.2d 179 (1971) (not improper to ask "Have you heard of the Black Muslims?").

[410] *See, e.g.*, United States v. Seiffert, 463 F.2d 1089 (5th Cir. 1972) (prosecutor asked a defense witness if the defendant said that if a bank board member could not get a loan, only Mexicans would serve on the board); United States v. Grey, 422 F.2d 1043 (6th Cir.), *cert. denied*, 400 U.S. 967 (1970) (a character witness was asked if he knew the defendant, a Negro, was running around with a White go-go dancer).

[411] *See* McCormick §29. *See also* People v. Terezak, 96 Ill. App. 2d 373, 238 N.E.2d 626 (1968); State v. Williams, 263 La. 757, 269 So. 2d 232 (1972); People v. Payne, 13 Mich. App. 116, 163 N.W.2d 650 (1968). Similarly, witnesses may be asked if they have testified in court previously, but if there is no reason to doubt the witness' veracity, the question may be improper. *See* Clark v. State, 246 Ark. 1151, 442 S.W.2d 225 (1969); State v. Elli, 267 Minn. 185, 125 N.W.2d 738 (1964).

[412] *See* United States v. Ross, 452 F.2d 656 (7th Cir. 1971); Turner v. State, 289 Ala. 97, 265 So. 2d 883, *aff'd*, 265 So. 2d 885 (Ala. 1972).

[413] *See* State v. Jones, 270 So. 2d 489 (La. 1972); Shows v. State, 267 So. 2d 811 (Miss. 1972); Coleman v. State, 442 S.W.2d 338 (Tex. 1969).

[414] *See* McCormick §§36, 47. *See also* United States v. Browning, 439 F.2d 813 (1st Cir. 1971); Tinker v. United States, 417 F.2d 542 (D.C. Cir.), *cert. denied*, 396 U.S. 804 (1969); State v. Long, 280 N.C. 633, 187 S.E.2d 47 (1972); Noon v. State, 475 P.2d 410 (Okla. 1970); Commonwealth v. Fisher, 447 Pa. 405, 290 A.2d 262 (1972); State v. Jackson, 126 Vt. 250, 227 A.2d 280 (1967), *aff'd*, 127 Vt. 237, 246 A.2d 829 (1968).

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).

[415] *See* McCormick §§36, 47. *See also* United States v. Quinn, 454 F.2d 29 (5th Cir.), *cert. denied*, 407 U.S. 911 (1972); United States v. Budzanoski, 331 F. Supp. 1201 (W.D. Pa. 1971), *aff'd*, 462 F.2d 443 (3d Cir. 1972); People v. Schwartzman, 24 N.Y.2d 241, 247 N.E.2d 642 (1969); State v. Long, 280 N.C. 633, 187 N.E.2d 47 (1972).

[416] *See* McCormick §§36, 47. *See also* United States v. Lambert, 463 F.2d 552 (7th Cir. 1972); State v. Long, 280 N.C. 633, 187 S.E.2d 47 (1972); State v. Scott, 192 S.E.2d 669 (S.C. 1972).

[417] *See* McCormick §§36, 40, 47; United States v. Schennault, 429 F.2d 852 (7th Cir. 1970); People v. Pierce, 269 Cal. App. 2d 193, 75 Cal. Rptr. 257 (1969), *aff'd*, 11 Cal. App. 3d 313, 89 Cal. Rptr. 751 (1970). *See also* Dillon v. United States, 391 F.2d 433 (10th Cir. 1968), *aff'd*, 432 F.2d 1030 (10th Cir. 1970); Ederington v. State, 244 Ark. 1096, 428 S.W.2d 271 (1968).

[418] *See* McCormick §§40, 42; Wigmore §977; United States v. Keefer, 464 F.2d 1385 (7th Cir. 1972).

[419] *See, e.g.*, United States v. Rifkin, 451 F.2d 1149 (2d Cir. 1971); United States v. Balistrieri, 403 F.2d 472 (7th Cir. 1968), *cert. denied*, 402 U.S. 953 (1971); United States v. Justice, 431 F.2d 30 (5th Cir. 1970); Alexander v. Commonwealth, 463 S.W.2d 334 (Ky. 1971); State v. Smith, 478 P.2d 417 (Ore. 1970); Stover v. Commonwealth, 211 Va. 789, 189 S.E.2d 504

tive[420] or not at all,[421] and defense attorneys fail to object and thereby do not preserve the record for appeal.[422] 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:

> [A]n 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.

[420] *See* Vernon v. State, 12 Md. App. 157, 277 A.2d 635 (1971); State v. Ross, 275 N.C. 550, 169 S.E.2d 875 (1969), *cert. denied*, 397 U.S. 1050 (1970).

[421] *See* United States v. Baum, 435 F.2d 1197 (7th Cir. 1970), *cert. denied*, 402 U.S. 907 (1971); Daily v. State, 250 Ark. 965, 468 S.W.2d 238 (1971); State v. Smith, 478 P.2d 417 (Ore. 1970).

[422] *See* Mikus v. United States, 443 F.2d 719 (2d Cir. 1970); United States v. Goff, 430 F.2d 396 (7th Cir. 1970); People v. Harris, 7 Cal. App. 3d 922, 807 Cal. Rptr. 46 (1970); Thumann v. State, 466 S.W.2d 738 (Tex. 1971). Reversals have been avoided for numerous other reasons. *See* Devine v. United States, 403 F.2d 93 (10th Cir. 1968), *cert. denied*, 394 U.S. 1003 (1969) (only conduct which influences the verdict requires reversal); United States v. Williams, 401 F.2d 901 (9th Cir. 1968) (improper question was helpful to the defendant); Rapue v. State, 171 Colo. 324, 466 P.2d 925 (1970) (no reversal because cross-examination went a trifle too far); McGhee v. State, 460 S.W.2d 875 (Tenn. 1970) (matter already brought out); State v. Todd, 78 Wash. 2d 362, 474 P.2d 542 (1970) (improper questioning brought before the jury matters already aired). The asking of only one improper question will generally not require reversal. *See* Smith v. State, 241 Ark. 748, 410 S.W.2d 126 (1967); Walker v. People, 489 P.2d 584 (Colo. 1971); People v. Bergin, 16 Mich. App. 443, 168 N.W.2d 459 (1969); State v. Ward, 9 N.C. App. 684, 177 S.E.2d 317 (1970), *cert. denied*, 277 N.C. 459, 178 S.E.2d 226 (1971); Smith v. State, 457 S.W.2d 58 (Tex. 1970). *See also* United States v. Balistrieri, 403 F.2d 472 (7th Cir. 1968), *cert. denied*, 402 U.S. 953 (1971).