Have You Heard? Cross-Examination Of A Criminal Defendant's Good Character Witness: A Proposal For Reform

I. INTRODUCTION

Prosecutor:	Now Father Jones, you have testified that this defendant, accused of sodomy and incest, is of good moral character. Have you heard that he was arrested for forcible rape of one Sally Smith in November, 1965, in Downey, California?
Witness:	No, I hadn't heard that.
Prosecutor:	Have you heard he was arrested for child beating in 1968 and for a Mann Act violation?
Witness:	No.
Prosecutor:	Well, then, have you heard that he was arrested for Grand Theft, Auto, in January of 1946 in Hermosa Beach, California; and for armed robbery in Louisiana?[1]

These specific acts would not be admissible as prior acts under California Evidence Code section 1101(b), because they are not relevant to any disputed issue at trial.[2] Nor would these questions constitute permissible impeachment of the witness, as they are not felony convictions and the defendant is not on the stand.[3] However, these questions are permissible, because the witness's testimony

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[1]Hypothetical based on People v. Hurd, 5 Cal. App. 3d 865, 85 Cal. Rptr. 718 (4th Dist. 1970).
[2]CAL. EVID. CODE § 1101(b) (West 1968).
[3]CAL. EVID. CODE § 788 (West 1968). *See* Comment, *Impeaching and Rehabilitating a Witness by Character Evidence; Reputation, Opinion, Specific Acts and Prior Convictions*, this volume [hereinafter cited as *Character Impeachment*].

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placed the defendant's character in issue[4] as circumstantial evidence of the defendant's innocence.

The prosecutor is foreclosed from initiating any inquiry into the defendant's character.[5] But once the defendant chooses to raise the character issue by putting a good character witness on the stand, the prosecutor is permitted to test the foundation of the character witness's testimony. The prosecutor is allowed to put before the jury any prior act ever committed by the defendant inconsistent with a character trait testified to by the witness.[6] In the example, because the witness testified to the defendant's good moral character, the prosecutor is allowed to ask the witness on cross-examination about specific occasions where the defendant demonstrated bad moral character. The ostensible purpose of the questions is to assist the jury in evaluating the character witness's testimony.

Since the United States Supreme Court's decision in *Michelson v. United States* in 1948, the cross-examination of character witnesses in this manner has been widely accepted.[7] The theory is that with appropriate safeguards,[8] the jury will use this cross-examination solely to evaluate the credibility of the witness's testimony, and that the defendant will therefore not suffer undue prejudice. This assumption has been challenged by decisions concerning character in issue subsequent to *Michelson*. It has been rejected in analogous areas of law, such as impeachment by prior felonies and evidence of prior acts under California Evidence Code section 1101(b).[9] It is the thesis of this article that the present safeguards on specific acts cross-examination fail to prevent undue prejudice, and that the practice

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[4]The phrase "character in issue" is misleading courtroom parlance since character is almost never an ultimate issue determining guilt or innocence. It is merely circumstantial evidence bearing on the probability of the accused's behavior. E. CLEARY ET AL., MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 191 at 454-55 (2d ed. 1972) [hereinafter cited as MCCORMICK (2d ed.)]. This article will nevertheless use the phrase "character in issue" to clearly differentiate this use of character from the use of character for impeachment purposes.

[5]FED. R. EVID. 404(a) (the Federal Rules of Evidence contained in 28 U.S.C. FED. R. EVID. 101 *et seq.* (1975)); CAL. EVID. CODE § 1101(a) (West 1968).

[6]Authorities cited note 33 *infra.*

[7]335 U.S. 469 (1948). *Michelson* is considered the leading case in the law of character in issue. Justice Jackson for the Court, and Justice Rutledge in dissent, marshalled and evaluated the rules of character evidence. The actual holding, however, is very narrow and only concerns the scope of cross-examination. MCCORMICK (2d ed.), *supra* note 4, at 457 n.77.

California allowed specific acts cross-examination before the *Michelson* case. *See* People v. Fair, 43 Cal. 137 (1872). *Michelson* has been cited extensively and used as a point of reference in subsequent California cases. *See, e.g.*, People v. Eli, 66 Cal. 2d 63, 424 P.2d 356, 56 Cal. Rptr. 916, *cert. denied*, 389 U.S. 888 (1967); People v. Calderalla, 163 Cal. App. 2d 32, 329 P.2d 137 (1st Dist. 1958).

[8]Discussed in text accompanying note 69 *infra.*

[9]Discussed in text accompanying notes 73-102 *infra.*

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should be reformed.

This article will first examine the process by which a criminal defendant's character is placed in issue. It will analyze and suggest modifications of the rules for cross-examining character witnesses. The article will focus mainly on cross-examination of a witness testifying to the defendant's reputation, the usual means of proving character. Finally, it will discuss cross-examination of an opinion witness. Opinion evidence to prove character has only recently been permitted in California and federal courts, and rules of cross-examination have not yet been developed.

II. BACKGROUND

The process of placing character in issue can be divided into three stages. The first stage is the absolute prohibition on the prosecutor from initiating any inquiry into the defendant's character.[10] This rule is consistent with a fundamental tenet of Anglo-American jurisprudence: that a person must be found guilty of a specific crime and not of being a "bad person" or of committing past bad acts which show a criminal disposition.[11] Although evidence of character may be relevant, it is excluded as unduly prejudicial.[12]

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[10]CAL. EVID. CODE § 1101(a) (West 1968) provides, with certain exceptions, that:

> . . . evidence of a person's character or trait of his character . . . is inadmissible when offered to prove his conduct on a specific occasion.

FED. R. EVID. 404 states, in pertinent part:

> Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion except: (1) Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same.

[11]

> Our criminal law theory rejects the concept of "good men" and "bad men." The primary article of faith in our criminal law is that before a man can be stigmatized as a criminal he must be charged with, and proved guilty of committing, a specific criminal act. His general pre-disposition toward crime or bad reputation cannot be used against him at his trial.

United States v. Fox, 473 F.2d 131, 134 (D.C. Cir. 1972) (Wright, J.). *See also* Michelson v. United States, 335 U.S. at 475-76; *Id.* at 489 (Rutledge, J., dissenting); W. LAFAVE & A. SCOTT, CRIMINAL LAW §§ 2, 24, 25 (1972); R. PERKINS, CRIMINAL LAW 546 (1969); 1 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 57 (3d ed. 1940) [hereinafter cited as WIGMORE (3d ed.)]. California cases discuss the importance of not convicting for bad character in the context of California Evidence Code section 1101(b), which allows evidence of prior acts in some circumstances. *See* cases cited notes 81 & 82 *infra.*

[12]Michelson v. United States, 335 U.S. 469; MCCORMICK (2d ed.), *supra* note 4, § 190; 1 WIGMORE (3d ed.) *supra* note 11, § 57. The rule forbids initiation by the prosecution at all stages of the trial: the case-in-chief, People v. Fair, 43 Cal. 137 (1872); cross-examination of the defendant, People v. Alverson, 60 Cal. 2d 803, 388 P.2d 711, 36 Cal. Rptr. 479 (1964); cross-examination of the defendant's witnesses, People v. Tucker, 164 Cal. App. 2d 624, 331 P.2d 160

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This prohibition should not be confused with two situations in which the prosecutor may introduce specific acts tending to show character. First, when the defendant takes the stand as a witness, the prosecutor may impeach the defendant's character for truth and veracity, as he can that of any other witness, by showing prior felony convictions.[13] Second, the prosecutor may also introduce the defendant's specific acts to prove a disputed fact other than the defendant's disposition, such as identity, plan or intent.[14] When this evidence bears an insufficient connection to the charged crime, courts will exclude it as a prejudicial showing of criminal character.[15] For example, evidence that the defendant was brandishing a gun ten minutes before an armed robbery may be relevant in proving a criminal plan. Evidence that the defendant was brandishing a gun a week before the armed robbery may show only a criminal disposition.

The second stage in character in issue is the defendant's option to place his character in issue.[16] The defendant may introduce evidence of character traits inconsistent with those associated with the crime.[17] This option stems from the common law policy allowing a

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(4th Dist. 1958); rebuttal testimony, People v. McKelvey, 85 Cal. App. 769, 260 P. 397 (2d Dist. 1927). One co-defendant is also prohibited from initiating evidence of another co-defendant's character, People v. Terry, 2 Cal. 3d 362, 400, 466 P.2d 961, 985, 85 Cal. Rptr. 409, 433 (1970), *cert. denied*, 406 U.S. 912 (1972).

[13] McCORMICK, *supra* note 4, at 455 n.66; 3A J. WIGMORE, A TREATISE ON ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 925 (Chadbourn rev. 1972) [hereinafter cited as 3A WIGMORE]; *Character Impeachment*, *supra* note 3.

[14] CAL. EVID. CODE § 1101(b) (West 1968) states:

> Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident) *other* than his disposition to commit such acts. (emphasis added)

FED. R. EVID. 405(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[15] Cases cited notes 81 & 82 *infra*.

[16] In California, all evidence of character as circumstantial evidence of conduct is prohibited by CAL. EVID. CODE § 1101(a) (West 1968), set out in note 10 *supra*, subject to certain exceptions. These exceptions are stated in CAL. EVID. CODE § 1102(a) (West 1968), which allows such evidence in a criminal action if it is:

> (a) offered by the defendant to prove his conduct in conformity with such character or trait of character, (b) offered by the prosecution to rebut evidence adduced by the defendant under subdivision (a).

FED. R. EVID. 404, set out in part at note 10 *supra*, also generally prohibits character evidence, subject to this exception.

[17] B. WITKIN, CALIFORNIA EVIDENCE § 329 (2d ed. 1966). Some crimes lend themselves easily to trait analysis. Peace and quiet are traits contrary to any

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defendant to use any relevant evidence to prove his innocence.[18] General observation and experience make it improbable that a person who has uniformly pursued an honest and upright life would depart from that standard and perform criminal acts.[19] The defendant's good character is circumstantial evidence and may be sufficient to raise a reasonable doubt as to his guilt.[20] In at least one case, the California Supreme Court found that it was prejudicial error not to allow the defendant's character witness to testify.[21] However, the right to have character testimony is probably not constitutionally mandated.[22]

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crime involving an element of violence, such as murder, manslaughter, assault with a deadly weapon, battery or forcible rape. Honesty is relevant to perjury or to any crime involving misappropriation, such as larceny, embezzlement or false pretenses or forgery. Morality, chastity and virtue are inconsistent with a sexual crime. Some crimes demonstrate more than one trait. Robbery requires both violence and dishonesty. A defendant, however, does not have to present character testimony for all traits demonstrated by a crime. People v. Hernandez, 47 Cal. App. 2d 132, 117 P.2d 394 (2d Dist. 1941). Some crimes are difficult to associate with an inconsistent good trait. For example, "ethical medical practice" has been held inconsistent with abortion, People v. Kramer, 259 Cal. App. 2d 452, 66 Cal. Rptr. 638 (4th Dist. 1968). "Integrity" has been held inconsistent with the sale of narcotics, People v. Sweeny, 55 Cal. 2d 27, 357 P.2d 1049, 9 Cal. Rptr. 793 (1960). Where the court has been unable to define a trait, the prosecutor may ask the witness if the defendant is the sort of person who would have the "traits involved" in this crime. People v. Gin Shue, 58 Cal. App. 2d 625, 137 P.2d 742 (1st Dist. 1943). Using the trait of "law abiding" is disadvantageous to the defendant. *See* text accompanying note 56 *infra.*

[18] Michelson v. United States, 335 U.S. at 476; *accord, id.* at 491 (Rutledge, J., dissenting).

[19] *Id.* at 476; People v. Jones, 42 Cal. 2d 219, 266 P.2d 38 (1954); 1 WIGMORE (3d ed.), *supra* note 11, § 55.

[20] People v. Bell, 49 Cal. 485, 489 (1875); B. WITKIN, CALIFORNIA EVIDENCE §§ 329-32 (2d ed. 1966); CAL. JURY INSTRUCTIONS CRIMINAL 2.40 (West 3d ed. 1970) [hereinafter cited as CALJIC]. The Ninth Circuit's rule for jury instructions is slightly different. It does not allow the court to single out character for special consideration, fearing that it would be an invitation to consider character to the exclusion of other evidence. Smith v. United States, 305 F.2d 197 (9th Cir.), *cert. denied*, 371 U.S. 890 (1962). There is a split of authority in the other circuits. *See* 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE [hereinafter cited as WEINSTEIN] ¶ 404 (1975).

Failure to put character into issue does not raise an inference of bad character. People v. Rusling, 268 Cal. App. 2d 930, 74 Cal. Rptr. 418 (4th Dist. 1969). Conversely, the presumption of innocence does not mean that the defendant's character is presumed good. People v. Lee, 1 Cal. App. 169, 81 P. 969 (2d Dist. 1905); 2 WIGMORE, *supra* note 11, § 290.

[21] People v. Jones, 42 Cal. 2d 219, 266 P.2d 38 (1954). Character evidence has particular value in cases based on circumstantial evidence. People v. Anglopoulos, 30 Cal. App. 2d 538, 86 P.2d 873 (3d Dist. 1939). It also assists in cases involving lewd and lascivious behavior, where the defendant's character and denial along with the impeachment of the child's testimony is often the only defense, People v. Anthony, 185 Cal. 152, 196 P.47 (1921), and in other cases where there is only one eye witness, United States v. Fox, 473 F.2d 131, 135 n.10 (D.C. Cir. 1972). WEINSTEIN, *supra* note 20, at 404-31, suggests that character evidence is necessary in a mistaken identity situation when the defendant has no alibi witness other than himself.

[22] The Court in Michelson v. United States, 335 U.S. 469, exercising its super-

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Reputation evidence is the usual means of proving good character in both California and federal courts.[23] A person's reputation is that which is generally thought and said of him in his community.[24] A reputation witness may only testify to the defendant's reputation regarding the relevant character trait, and may not give specific details of the defendant's behavior.[25]

Both the California Evidence Code and the newly enacted Federal Rules of Evidence changed prior law by permitting opinion testimony to prove character.[26] This change recognizes the reliability of testimony given by persons with firsthand, intimate knowledge of the defendant.[27] Courts have not yet decided whether expert opinion, such as that of a psychiatrist, is encompassed by the statutory changes allowing opinion testimony.[28]

Neither side is permitted to use a defendant's specific acts to prove character as circumstantial evidence of guilt or innocence.[29] Specific acts are a more probative means of proving character than opinion and reputation testimony, since specific acts are actual demonstrations of the defendant's disposition, rather than a mere description. There is a strong tendency to believe that a person who has acted in a certain manner in the past will act that way again.[30] This prohibition

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visory power over lower federal courts, relied entirely on common law concepts. In Spencer v. Texas, 385 U.S. 554 (1967), the Court noted that nowhere did the majority or minority in *Michelson* discuss character in issue as a matter of constitutional law. (In fact, Justice Rutledge's dissent said the practice was violative of due process. Michelson v. United States, 335 U.S. at 495 (Rutledge, J., dissenting)). *But see* Washington v. Texas, 388 U.S. 14 (1967) (right to witness an ingredient of a fair trial).

[23] 5 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1608 (Chadbourn rev. 1974) [hereinafter cited as 5 WIGMORE].

[24] CAL. EVID. CODE § 1102, Law Rev. Comm'n. Comment (West 1968); 1 WIGMORE (3d ed.), *supra* note 11, § 55.

[25] *See Character Impeachment*, *supra* note 3, for discussion of reputation testimony, and techniques for introduction of reputation and opinion testimony.

[26] FED. R. EVID. 405(a); CAL. EVID. CODE § 1102 (West 1968).

[27] FED. R. EVID. 405, Advisory Comm. Notes; CAL. EVID. CODE § 1102, Law Rev. Comm'n. Comment (West 1968). The prohibition had long been criticized by Wigmore. 7 WIGMORE (3d ed.) *supra* note 11, § 1986. *See also* MCCORMICK (2d ed.), *supra* note 4, § 191.

[28] The federal rules seem to contemplate expert opinion. FED. R. EVID. 405, Advisory Comm. Note. However, this type of testimony has been severely criticized. WEINSTEIN, *supra* note 20, ¶ 405[03]. Falknor & Steffens, *Evidence of Character: From the Crucible of the Community to the Couch of the Psychiatrist*, 102 U. PA. L. REV. 980 (1954). The California Evidence Code probably does not require expert psychiatric opinions, since the description of opinion evidence in the commission comments as based upon personal intimacy, CAL. EVID. CODE § 1102, Law Rev. Comm'n. Comments (West 1968), is not consistent with the nature of psychiatric testimony. *See* Falknor & Steffens, *supra*.

[29] FED. R. EVID. 405; CAL. EVID. CODE § 1102, Law Rev. Comm'n. Comment (West 1968).

[30] Michelson v. United States, 335 U.S. at 476; FED. R. EVID. 405, Advisory Comm. Notes. In California, courts discuss the extreme prejudice of specific

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on the use of specific acts is a corollary of the general rule against convicting a person for bad character.[31]

III. RULES OF CROSS-EXAMINING A REPUTATION CHARACTER WITNESS

A. FORM AND PURPOSE

When the defendant puts character in issue by presenting reputation testimony, stage three of the rules comes into play: the prosecutor may respond by presenting rebuttal witnesses,[32] or by attacking the testimony of the reputation witness on cross-examination. On cross-examination a prosecutor may challenge a character witness's testimony by asking whether the witness has heard of specific acts committed by the defendant which are inconsistent with the wit-

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prior acts in the context of California Evidence Code section 1101(b). *See* cases cited notes 81 & 82 *supra. See also* McCORMICK (2d ed.), *supra* note 4, § 190; 1 WIGMORE (3d ed.), *supra* note 11, § 194. Wigmore also argued that such evidence may confuse the issues and unfairly surprise the parties.

As Chief Justice Warren pointed out, although conviction by bad character stemming from specific acts has not specifically been held to violate due process, evidence of prior crimes introduced to show disposition undoubtedly would be unconstitutional. Spencer v. Texas, 385 U.S. 554, 573-74 (1967) (Warren, C.J., concurring in part and dissenting in part), and the cases there cited.

[31] The prohibition also applies to the defendant. CAL. EVID. CODE § 1102, Law Rev. Comm'n. Comment (West 1968). *See* People v. Murphy, 146 Cal. 502, 80 P. 709 (1905); People v. Rocha, 3 Cal. 3d 893, 479 P.2d 372, 92 Cal. Rptr. 172 (1971); People v. Cordray, 209 Cal. App. 2d 425, 26 Cal. Rptr. 42 (2d Dist. 1962). This position is criticized in 1 WIGMORE (3d ed.), *supra* note 11, § 195. Recently, People v. Wagner, 13 Cal. 3d 612, 532 P.2d 105, 119 Cal. Rptr. 457 (1975), appears to have allowed specific acts introduced by the defendant, although the decision did not address this issue. Wagner also disallowed specific acts cross-examination of a defendant introducing his own character.

Some California cases have treated the defendant's assertion of never having participated in an act of the type charged as putting character into issue. The prosecutor was then allowed to rebut by proving specific acts with extrinsic evidence. *See, e.g.*, People v. Westek, 31 Cal. 2d 469, 190 P.2d 9 (1948); People v. Mahle, 273 Cal. App. 2d 309, 78 Cal. Rptr. 360 (1st Dist. 1969); People v. Hughes, 123 Cal. App. 2d 767, 267 P.2d 376 (1st Dist. 1954). This practice is especially questionable where the statement rebutted is drawn out on cross-examination by the prosecutor. People v. Goff, 100 Cal. App. 2d 166, 233 P.2d 27 (4th Dist. 1950). A review of the cases shows that the courts were probably treating the defendant's denial as contesting a factual issue, such as intent or knowledge, and allowing rebuttal under the principle codified in California Evidence Code section 1101(b). The courts, however, labeled the process as rebutting good character. Good character testimony cannot be rebutted with extrinsic evidence. Michelson v. United States, 335 U.S. at 482. Courts must clearly differentiate between character in issue and evidence admissible under California Evidence Code section 1101(b) so that extrinsic evidence is not admitted as a rebuttal of good character testimony.

[32] On rebuttal, the prosecutor may call witnesses either to give their opinion of defendant's character or to testify as to his reputation. Rebuttal witnesses may not testify to specific acts. CAL. EVID. CODE § 1102, Law Rev. Comm'n. Comments (West 1968); People v. Crews, 110 Cal. App. 2d 218, 242 P.2d 64

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ness's testimony.[33]

The cross-examination of a reputation witness is calculated to test the witness's knowledge of what is being said about the defendant in the community. The purpose is not to ascertain what the witness personally knows about the defendant. Thus, the cross-examination must be in the form,."Have you heard . . .?"[34] This form is designed to prevent the jury from believing that the event has actually occurred.[35] Any form which implies that the basis of the question is true,

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(1st Dist. 1952); *see* MCCORMICK (2d ed.), *supra* note 4, § 191. Because this article is concerned with the prejudice of specific acts, rebuttal witnesses will not be discussed. Rebuttal witnesses can only rebut those traits put into evidence by defendant's character witnesses. CAL. EVID. CODE § 1102 (West 1968). The form of rebuttal (opinion or reputation) does not depend upon the form in which defendant presented his evidence. People v. Ogg, 258 Cal. App. 2d 841, 66 Cal. Rptr. 289 (3d Dist. 1968).

An issue not yet raised in California is whether the defendant may cross-examine the prosecution rebuttal witness as to specific instances of good conduct, for the purpose of testing the witness's foundation in the same way defendant's witness is cross-examined. The entire basis of the character in issue rules is a balancing of equities between defendant and the government equally. Michelson v. United States, 335 U.S. at 486. Fairness to the defendant should dictate giving the defendant the same opportunity to cross-examine prosecution rebuttal witnesses.

[33] Michelson v. United States, 335 U.S. 469; United States v. Machado, 457 F.2d 1372 (9th Cir.), *cert. denied*, 409 U.S. 860 (1972); People v. Eli, 60 Cal. 2d 63, 424 P.2d 356, 56 Cal. Rptr. 916, *cert. denied*, 389 U.S. 888 (1967); People v. Marsh, 58 Cal. 2d 732, 376 P.2d 300, 26 Cal. Rptr. 300 (1962); People v. Fair, 43 Cal. 137 (1872); B. WITKIN, CALIFORNIA EVIDENCE § 1214 (2d ed. 1966); Annot., 47 A.L.R. 2d 1258, 1264 (1956).

[34] Cases cited note 33 *supra*. There is no mention in the California Evidence Code of "have you heard" cross-examination. It is allowed by the general provision permitting cross-examination, CAL. EVID. CODE § 761 (West 1968), which codified existing law.

[35] B. WITKIN, CALIFORNIA EVIDENCE § 1214 (2d ed. 1966). The event in the "have you heard" question can be a felony, *e.g.*, "Have you heard that the defendant has been convicted of murder?" People v. Ah Lee Doon, 97 Cal. 171, 31 P. 933 (1893); misdemeanor, People v. Stennett, 51 Cal. App. 370, 197 P. 372 (3d Dist. 1921); an arrest, People v. Hurd, 5 Cal. App. 3d 865, 85 Cal. Rptr. 718 (4th Dist. 1970); a prison record or parole record, People v. Sambrano, 33 Cal. App. 2d 200, 91 P.2d 221 (3d Dist. 1939); a juvenile act, People v. Eli, 60 Cal. 2d 63, 424 P.2d 356, 56 Cal. Rptr. 916, *cert. denied*, 389 U.S. 888 (1967); a criminal act never brought to the attention of the police, People v. Burke, 18 Cal. App. 72, 122 P. 435 (3d Dist. 1912); acts not of a criminal nature but inconsistent with the good trait, People v. Wrigley, 69 Cal. 2d 149, 443 P.2d 580, 70 Cal. Rptr. 116 (1968); People v. McKenna, 11 Cal. 2d 327, 79 P. 1065 (1938); an official investigation, People v. Fowzer, 127 Cal. App. 2d 742, 274 P.2d 471 (2d Dist. 1954); or an acquittal, Michelson v. United States, 335 U.S. at 482.

Policy reasons may exist for excluding acts committed by the defendant as a juvenile. California attempts to prevent mistakes of youth from haunting an adult's life. *See, e.g.*, CAL. WELF. AND INST. CODE § 827 (West 1960) (records of juvenile proceedings not made public). However, it has also been argued that a person cannot hide behind the shield of youth forever. *See* Davis v. Alaska, 415 U.S. 308 (1974). Where the court exercises proper discretionary controls under California Evidence Code section 352, acts committed as a juvenile may be a proper event for a "have you heard" question. Comment, *Character Evidence and the Juvenile Record*, 20 CLEV. STATE L. REV. 86 (1971).

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such as "Do you know," is error.[36] The defendant is entitled to an instruction *sua sponte* that the questions are to be disregarded except for purposes of evaluating the witness.[37]

The underlying rationale of "have you heard" cross-examination is to give the prosecutor the opportunity to refute the defendant's claim of good character. The purpose is not to allow the prosecution to prove bad character once the defendant has opened the issue.[38] The prosecutor is allowed only to impeach the reputation witness's testimony, not to impeach the prior conduct of the defendant.[39] Proof of the defendant's bad character would be contrary to the fundamental principle that a person cannot be convicted for being a "bad" person. It would also violate federal and state statutes prohibiting proof of a criminal disposition.[40]

Since the rationale of "have you heard" cross-examination is to refute the defendant's claim of good character, the prosecutor's questions should not go beyond neutralizing the defendant's character witnesses. At the beginning of a trial, the defendant's character can be viewed as a non-issue.[41] After the defendant places his character in issue, it becomes a potential plus factor in creating a reasonable doubt. The most the prosecutor should be allowed to do consistent with the principle of conviction for a specific crime is rebut the defendant's character down to a zero factor. The prosecutor should not be allowed to take character to a minus. This would prove actual bad character, from which a general predisposition for the crime could be inferred. Taking the defendant's character to a minus factor may be viewed as causing the defendant undue prejudice. *Michelson v. United States* does not suggest that a defendant may be shown to be a "bad" person by the prosecution in exchange for introducing his

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[36] People v. Marsh, 58 Cal. 2d 732, 376 P.2d 300, 26 Cal. Rptr. 300 (1962); People v. McDaniel, 59 Cal. App. 2d 672, 140 P.2d 88 (2d Dist. 1943). Annot., 47 A.L.R. 2d 1258, 1327 (1956) lists several California cases that seem to approve "do you know." Some of these cases failed to discuss the issue at all. In any event, Marsh overruled the practice.

[37] People v. Grimes, 148 Cal. App. 2d 747, 307 P.2d 932 (1st Dist. 1957); People v. Bentley, 131 Cal. App. 2d 687, 281 P.2d 1 (2d Dist. 1955); CALJIC, *supra* note 20, § 2.42.

[38] 1 WIGMORE, *supra* note 11, § 58; Udall, *Character Proof in the Law of Evidence — A Summary*, 18 U. CIN. L. REV. 283, 301 (1949). *See* United States v. Duke, 492 F.2d 693, 697 (5th Cir. 1974); United States v. Fox, 473 F.2d 131, 135 (D.C. Cir. 1972) (Wright, J.); DeJarnette v. State, Del. Supr., 338 A.2d 117, 118 (1975); Taylor v. State, 28 Md. App. 560, 346 A.2d 718 (1975).

[39] United States v. Fox, 473 F.2d 131, 136 (D.C. Cir. 1972) (Wright, J); Shimon v. United States, 352 F.2d 449, 454 (D.C. Cir. 1965) (Burger, J.).

[40] Both FED. R. EVID. 404(a) and CAL. EVID. CODE §§ 1101(a), 1102 (West 1968) are in accord. The defendant may introduce good character to prove his innocence. But the prosecution is explicitly limited to rebutting the defendant's evidence. The word "rebut" is defined in BLACK'S LAW DICTIONARY 1432 (4th ed. 1968) as "to defeat or take away the effect of something," *i.e.*, not affirmatively proving the opposite.

[41] Authorities cited note 20 *supra*.

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good character testimony.[42] Rather, the defendant's proof is subjected to tests of credibility to prevent him from imposing a false character by parading partisans.[43]

Testing the witness's credibility involves three considerations: foundation, fabrication and standards. If the witness has not heard reports of what is being said about the defendant, the jury may find that the witness has inadequate knowledge of the defendant's character, and may discount his testimony. Conversely, where the witness has heard of specific acts inconsistent with his testimony, the jury may find the asserted reputation to be a fabrication. Finally, if the witness has heard of inconsistent acts and still considers the defendant's reputation good, the jury may find the witness's standards for good character to be too low.[44]

B. RULES FOR PROPER "HAVE YOU HEARD" QUESTIONS

The *Michelson* Court recognized the danger that a prosecutor's cross-examination could be a random or groundless question designed to prejudice the defendant.[45] Four rules have been developed to ensure that "have you heard" questions are used only to reveal weaknesses in the witness's testimony: 1) that the event be actual and notorious; 2) that the event be proximate enough in time to affect reputation; 3) that the event demonstrate a trait inconsistent with the good character testimony; and 4) that the prosecutor accept a witness's "no" answer without further inquiry. The trial judge has considerable discretion in determining whether a question satisfies these requirements.[46]

These rules guarantee only that a "have you heard" question will

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[42] Some broad language in Michelson v. United States, 335 U.S. at 479, seems to suggest that the prosecutor's cross-examination may affirmatively prove bad character. However, the only purpose the court gives for the "have you heard" question is to prevent the defendant from profiting from a false character.

[43] *Id.* Not allowing the prosecutor to prove bad character after the defendant attempts to show good character may appear to be a double standard. However, it is the only rule that synthesizes the competing interests involved. The defendant must be allowed the use of all relevant evidence. The prosecutor must be able to respond to it. But the defendant cannot be convicted for his bad character.

[44] Foundation and fabrication are suggested in 3A WIGMORE, *supra* note 13, § 988, *approved in* People v. Marsh, 58 Cal. 2d 732, 376 P.2d 300, 26 Cal. Rptr. 300 (1962) (citing same section in an earlier edition). Standards is suggested by the *Michelson* dissent, 335 U.S. at 492 (Rutledge, J., dissenting); and MCCORMICK (2d ed.), *supra* note 4, § 191, at 457 n.74.

[45] Michelson v. United States, 335 U.S. at 481.

[46] "Wide discretion is accompanied by heavy responsibility on trial courts to protect the practice from any misuse." *Id.* at 480-81; *accord*, United States v. Machado, 457 F.2d 1372 (9th Cir.), *cert. denied*, 409 U.S. 860 (1972); People v. Eli, 66 Cal. 2d 63, 424 P.2d 356, 56 Cal. Rptr. 916, *cert. denied*, 389 U.S. 888 (1967).

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meet the threshold relevance standard required of all admissible evidence. The rules do not purport to measure the probative value of the question. Nor do they attempt to balance the probative value against the possibility of undue prejudice.[47] In California, this balancing process can be applied to all evidence, including "have you heard" questions, under California Evidence Code section 352.[48] This section gives a trial judge discretion to prohibit unduly prejudicial questions. Although individual trial judges may exercise their discretion in "have you heard" cross-examination, appellate cases in California appear to automatically allow all "have you heard" questions once the four rules are satisfied.[49] Many of these cases have allowed questions that seem prejudicial, without any discussion of exercising judicial discretion.[50] Thus, the four rules appear to create a category of questions automatically proper if phrased "have you heard."

The first rule is that the prosecutor's question refer only to events that are actual and notorious. The trial court must first ascertain out of the presence of the jury that the prosecutor has a good faith belief

> that the target of the question was an actual event, which would probably result in some comment among acquaintances, if not injury to the defendant's reputation.[51]

The second rule requires that the event be proximate enough in time to affect reputation. Since the purpose of character evidence is to show circumstantially that defendant did not commit the crime

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[47] Undue or potential prejudice as used here is defined in People v. Schader, 71 Cal. 2d 761, 774, 457 P.2d 841, 849, 80 Cal. Rptr. 1, 9 (1969), as the likelihood "that a jury will be led astray and convict an innocent man because of his bad record." Probative value refers to the materiality, relevance and necessity of the evidence. *Id.*

[48] CAL. EVID. CODE § 352 (West 1968) states:

> The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

[49] One California case could possibly be interpreted as finding error based on the undue prejudice of an otherwise proper question. People v. Anthony, 185 Cal. 152, 196 P. 47 (1921) (cross-examination as to prior sexual misconduct in a lewd and lascivious behavior case). However, no California appellate decision has ever explicitly required a trial judge to consider the potential prejudice of the question. The rule seems to allow automatic admission if the question is phrased "have you heard" and meets the rules for a proper question. *See* People v. Wrigley, 69 Cal. 2d 149, 443 P.2d 580, 70 Cal. Rptr. 116 (1968); People v. Eli, 66 Cal. 2d 63, 242 P.2d 356, 56 Cal. Rptr. 916, *cert. denied,* 389 U.S. 888 (1967); People v. Thomas, 58 Cal. 2d 121, 373 P.2d 97, 23 Cal. Rptr. 161 (1962); People v. Malloy, 199 Cal. App. 2d 219, 18 Cal. Rptr. 554 (1st Dist. 1962); People v. Gin Shue, 58 Cal. App. 2d 625, 137 P.2d 742 (1st Dist. 1943).

[50] *See* part V of this article *infra.*

[51] Michelson v. United States, 335 U.S. at 481; People v. Eli, 66 Cal. 2d 63, 79, 424 P.2d 356, 367, 56 Cal. Rptr. 916, 926, *cert. denied,* 389 U.S. 888 (1967).

California cases before Eli were confused on how to show good faith. Defen-

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charged, the inquiry is usually limited to events at or prior to the time of the crime.[52] The trial judge has discretion to exclude events that have happened far in the past if it is unlikely that the witness has heard of them, or if they might have been forgotten.[53]

The third rule is that the question must concern a trait inconsistent with the character witness's testimony.[54] Where a defendant in a robbery case put character in issue with a witness testifying to the defendant's honesty, it was held error to cross-examine the witness about defendant's previous arrest for assault. The character

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dants would object that the prosecutor failed to show the event happened. However, proof that the event happened was held error. *See, e.g.*, People v. Darby, 114 Cal. App. 2d 412, 250 P.2d 743 (2d Dist.). *appeal dismissed*, 345 U.S. 937 (1952); People v. Gin Shue, 58 Cal. App. 2d 625, 137 P.2d 742 (1st Dist. 1943); People v. Steele, 100 Cal. App. 639, 280 P. 999 (1st Dist. 1927). Some courts avoided the issue by assuming the prosecutor's good faith as a public official. People v. Thomas, 58 Cal. 2d 121, 373 P.2d 97, 23 Cal. Rptr. 161 (1962), *appeal dismissed*, 371 U.S. 231 (1963).

What constitutes a prosecutor's good faith belief that the event is actual and notorious is within the discretion of the trial judge. People v. Kramer, 259 Cal. App. 2d 452, 66 Cal. Rptr. 638 (4th Dist. 1968). Documentary reports for events such as arrests or convictions are adequate, People v. Hurd, 5 Cal. App. 3d 880, 85 Cal. Rptr. 718 (4th Dist. 1970), as is a prosecutor's statement that he has confirmed the event by talking to persons with personal knowledge. People v. Kramer, 259 Cal. App. 2d 452, 66 Cal. Rptr. 638 (4th Dist. 1968). Testimony in court by the defendant himself is adequate. People v. Rice, 90 Cal. App. 590, 266 P. 295 (2d Dist. 1928). Testimony by a police officer in court before the jury as to defendant's statements of an event is adequate. People v. Logan, 41 Cal. 2d 279, 260 P.2d 20 (1953).

Bad faith has been found where the prosecutor asks groundless questions to get information before the jury, persists in asking inadmissible questions, or uses the form "do you know." People v. Neal, 85 Cal. App. 2d 765, 194 P.2d 57 (2d Dist. 1948). Bad faith exists where a prosecutor wilfully misrepresents a particular event, but failure by the prosecutor to call rebuttal witnesses is not bad faith. People v. Johnson, 178 Cal. App. 2d 360, 3 Cal. Rptr. 28 (1st Dist. 1960). Nor is there bad faith where the prosecutor has previously ascertained out of court that the witness has not heard the event, so long as the witness was not under oath at the time. People v. Perry, 144 Cal. 748, 78 P. 284 (1904).

[52] 5 WIGMORE, *supra* note 23, § 1617; Annot., 87 A.L.R.2d 968 (1963). Events taking place subsequent to the crime but prior to the trial may also be relevant to reputation. 5 WIGMORE, *supra* note 23, § 1618. This issue has not been dealt with in California or in most other states. Annot., 47 A.L.R.2d 1258, 1303 (1956). It cannot be decided by analogy to impeachment since impeachment is concerned with truth and veracity at trial. In impeachment, any event can be relevant to credibility at the time of trial. A recent federal decision recognized the general rule in a case involving character in issue, but held that a court has discretion to admit events subsequent to the crime. United States v. Lewis, 482 F.2d 632 (D.C. Cir. 1973). *See also*, People v. Lee, 48 Cal. App. 3d 516, 122 Cal. Rptr. 43 (3d Dist. 1975) holding that when the defendant introduces evidence of his character at the present time, the prosecutor may ask if the witness has heard that the defendant has committed the acts for which he is on trial.

[53] People v. Burwell, 44 Cal. 2d 16, 279 P.2d 744, *cert. denied*, 349 U.S. 936 (1955). *But see* Michelson v. United States, 335 U.S. at 484, where an arrest twenty years earlier was allowed since two of the witnesses dated their relationship to the defendant to that time.

[54] Michelson v. United States, 335 U.S. at 483-84; B. WITKIN, CALIFORNIA EVIDENCE § 1213 (2d ed. 1966).

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trait for assault (lack of peacefulness) was not inconsistent with the trait testified to (honesty), even though it was related to the crime charged.[55]

In this regard, a defendant should not introduce the character trait of being law abiding. This trait would be relevant in any criminal trial, since having a "law abiding" disposition would be contrary to the tendency to commit a crime. But its use by the defendant would allow the prosecution to ask the witness about any prior criminal act because of its inconsistency with a law abiding disposition.[56]

The final rule is that the prosecutor must accept a "no" answer from the witness. The prosecutor may not pursue the inquiry with further details, or prove that the event in the question actually oc-

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[55] People v. Hernandez, 47 Cal. App. 2d 132, 117 P.2d 394 (2d Dist. 1941). A question is also improper if no trait is shown at all. People v. Seiber, 201 Cal. 341, 257 P.64 (1927), *overruled on other grounds*, People v. Marsh, 58 Cal. 2d 732, 376 P.2d 300, 26 Cal. Rptr. 473 (1962) (asking if witness had heard that defendant's wife feared death from defendant improper since the question demonstrates no direct act by defendant that reveals a trait). *Cf.* People v. Singh, 11 Cal. App. 2d 244, 53 P.2d 403 (3d Dist. 1936). The trial court has discretion in determining the trait revealed by the specific act. People v. Burwell, 44 Cal. 2d 16, 279 P.2d 744, *cert. denied*, 349 U.S. 936 (1955).

The traits used to cross-examine a witness putting character in issue should be distinguished from the traits used to cross-examine a witness rehabilitating defendant's credibility as a witness. A good character witness presented to rehabilitate the credibility of the defendant as a witness will testify only to defendant's honesty and veracity. Cross-examination of the rehabilitation witness is thus limited to these two traits. *See, e.g.*, People v. Roberson, 167 Cal. App. 2d 429, 334 P.2d 666 (1st Dist. 1959) (improper to cross-examine a good character witness about defendant's drug-related traits where witness only testified to honesty and veracity to rehabilitate defendant's credibility, even though the crime charged was drug-related). *See also* People v. Tucker, 164 Cal. App. 2d 624, 331 P.2d 160 (4th Dist. 1958). Where the crime involves only honesty and veracity, the distinction between cross-examination on a character in issue theory or on an impeachment theory is unimportant, since in either case the cross-examination only concerns honesty and veracity. However, if the cross-examination is on a character in issue theory, then the event may be limited to those acts occurring prior to the offense. *See* note 52 *supra*.

[56] *See* People v. Hinman, 253 Cal. App. 2d 896, 61 Cal. Rptr. 609 (2d Dist. 1967), *cert. denied*, 391 U.S. 923 (1968). A defendant on trial for solicitation for murder put his reputation as a law abiding man in issue. The court held that the prosecutor could cross-examine the witness about convictions for failure to comply with fire hazard laws, a battery and contempt, even though not necessarily inconsistent with murder. *See* Michelson v. United States, 335 U.S. at 483 (any criminal activity is inconsistent with law abiding).

A court should satisfy itself that the defendant purposely elicited the trait of law abiding before allowing the prosecutor to use events inconsistent with law abiding but not with the crime charged. A misuse possibly occurred in People v. Houser, 85 Cal. App. 2d 686, 193 P.2d 937 (4th Dist. 1948), where witnesses testified to truth, honesty, integrity and morality. On cross-examination, the prosecutor suggested law abiding and the witness agreed. The prosecutor then inquired about reports that included public intoxication, probation, and driving a car without the owner's consent. These events were inconsistent with law abiding, but not with the original traits put into evidence. *See also* People v. Buchanan, 119 Cal. App. 523, 6 P.2d 538 (2d Dist. 1932).

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curred.[57]

There is conflicting authority in California as to whether the prosecutor, after receiving a "no" answer to a "have you heard" question, may pose a hypothetical question which assumes the fact that the witness denies having heard about.[58] For example, the defendant is charged with lewd conduct. A good character witness testifies that the defendant's reputation for chastity, morality and virtue is excellent. On cross-examination, the prosecutor asks the witness, "Have you heard that the defendant and a woman were ejected from their apartment because the defendant was bringing men there for prostitution?" After the witness answers "no," the prosecutor then asks, "If you heard such a report, would you still think that he had such a good reputation?"[59] The second question is an example of a follow-up hypothetical. Such hypothetical questions have been found improper as calling for an opinion on hypothetical facts rather than testing the witness.[60] Hypothetical follow-up questions may also violate the rule requiring acceptance of the witness's "no" answer.[61] Such questions probably have prejudicial impact by implying that the hypothetical facts are true.[62]

Some decisions,[63] however, have approved the hypothetical follow-up question on the basis of the California Supreme Court's decision in *People v. McKenna.*[64] In *McKenna*, the hypothetical was not a follow-up question. Instead, the prosecutor combined the

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[57]People v. Grimes, 148 Cal. App. 2d 747, 749, 307 P.2d 932, 933 (1st Dist. 1957); People v. Beltran, 94 Cal. App. 2d 197, 210 P.2d 238 (2d Dist. 1949); People v. Gin Shue, 58 Cal. App. 2d 625, 137 P.2d 742 (1st Dist. 1943). This rule could be viewed as merely procedural. However, the prosecutor is prevented from bringing out further information after the character witness has said "no." After a "no" answer, the value of the follow-up questions becomes minimal. Thus, the rule can also be viewed as limiting questions to those relevant to testing the witness's foundation.

[58]Most jurisdictions hold such questions improper. Annot., 47 A.L.R.2d 1258, 1309 (1956).

[59]People v. Boone, 126 Cal. App. 2d 746, 273 P.2d 350 (1st Dist. 1954) (hypothetical question approved).

[60]People v. Buchel, 141 Cal. App. 2d 91, 296 P.2d 113 (3d Dist. 1956); People v. Beltran, 94 Cal. App. 2d 197, 210 P.238 (2d Dist. 1949); People v. Neal, 85 Cal. App. 2d 765, 194 P.2d 57 (2d Dist. 1948); B. WITKIN, CALIFORNIA EVIDENCE § 1215 (2d ed. 1966).

[61]People v. Fowzer, 127 Cal. App. 2d 742, 274 P.2d 471 (2d Dist. 1954).

[62]*Id.;* People v. Neal, 85 Cal. App. 2d 765, 194 P.2d 57 (2d Dist. 1948). In addition, when the witness is asked the hypothetical, he is often surprised to hear of these specific acts. The witness's momentary indecision may weaken the value of the testimony in the jury's minds. *See, e.g.*, the cross-examination in People v. Eli, 66 Cal. 2d 63, 78, 424 P.2d 356, 366, 56 Cal. Rptr. 916, 926, *cert. denied*, 389 U.S. 888 (1967).

[63]People v. Hinman, 253 Cal. App. 2d 896, 61 Cal. Rptr. 609 (2d Dist. 1967), *cert. denied*, 391 U.S. 923 (1968); People v. Malloy, 199 Cal. App. 2d 219, 18 Cal. Rptr. 545 (1st Dist. 1962); People v. Boone, 126 Cal. App. 2d 746, 273 P.2d 350 (1st Dist. 1954).

[64]11 Cal. 2d 327, 79 P.2d 1065 (1938).

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hypothetical with a proper cross-examination question by asking, "If you were told that the defendant broke an agreement, what would your opinion be of defendant's reputation for truth and honesty?"[65] A follow-up hypothetical, by comparison, would involve two questions: "Have you heard that defendant broke an agreement," and if the witness answered "no," "What would your opinion be if you thought that?"

It is doubtful that the single *McKenna* question is adequate authority for the follow-up hypothetical. First, *McKenna* did not treat the question as a hypothetical one. In one cryptic passage, the court approved the question as if it were the standard "have you heard" type.[66] Second, there is an earlier California Supreme Court decision more directly on point. In *People v. Weber*, the defendant attempted to cross-examine a rehabilitation character witness with a follow-up hypothetical question after the witness answered "no."[67] The court ruled that the question was properly disallowed because it was hypothetical and speculative, and attempted to admit excluded matter. The form of the follow-up hypothetical is clearly more similar to the two part question disapproved in *Weber* than the single question approved in *McKenna.*[68]

In summary, the purpose of the prosecutor's cross-examination is to prevent a defendant from benefitting from a false character. But the prosecutor should not be allowed to go beyond rebuttal to prove that the defendant has a criminal disposition. The phrase "have you heard" and the four rules assist in protecting the defendant from a groundless attack on his reputation. These requirements, however, operate as mechanical rules. Once a question satisfies the rules, it is automatically allowed. Although California Evidence Code section

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[65]People v. McKenna, 73 P.2d 673, 678 (2d Dist. 1937), *vacated*, 11 Cal. 2d 327, 79 P.2d 1065 (1938). In People v. Boone, 126 Cal. App. 2d 219, 273 P.2d 350 (1st Dist. 1954), the court reasoned that the follow-up question required the witness to give an opinion of the defendant's character on the basis of hypothetical information. Since the approved *McKenna* question also required hypothetical information, the court concluded that a follow-up hypothetical was appropriate.

[66]*Compare* McKenna, 11 Cal. 2d 327, 335-36, 79 P.2d 1065, 1069 (1938), *with* cases stating the California rule at note 33 *supra*. The questions in *McKenna, see* text at note 65 *supra*, were not the standard "have you heard" questions.

[67]149 Cal. 325, 343, 86 P. 671, 678 (1906). After the rehabilitation witness answered "no" to an impeaching question concerning the witness whose credibility was being attacked, the defense asked, "If any of these matters had been brought to your mind, would it change your opinion?"

[68]Justice McComb wrote the lower court *McKenna* opinion approving a combined follow-up. 73 P.2d 673 (2d Dist. 1937), *vacated*, 11 Cal. 2d 327, 79 P.2d 1065 (1938). Ten years later he concurred without comment in People v. Neal, 85 Cal. App. 2d 765, 194 P.2d 57 (2d Dist. 1948), which expressly disapproved a hypothetical follow-up. Neal, *supra*; People v. Buchel, 141 Cal. App. 2d 91, 296 P.2d 113 (3d Dist. 1956); and People v. Beltran, 94 Cal. App. 2d 197, 210 P. 238 (2d Dist. 1949), all fail to mention *McKenna* in relation to the follow-up hypothetical question they disapproved.

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352 permits a trial court to exclude prejudicial matter, appellate courts have not required that discretion be exercised in this area.

IV. CRITICISM OF SPECIFIC ACTS CROSS-EXAMINATION OF A REPUTATION WITNESS

A. THE MYTH OF "HAVE YOU HEARD"

The primary concern in the area of character in issue is that the jury not use the "have you heard" questions prejudicially to take the defendant's character to a negative factor. The *Michelson* Court reasoned that a question phrased "have you heard" enables the jury to evaluate the reputation witness's testimony, but hides from the jury the fact that the prejudicial event actually occurred.[69] Furthermore, under the *Michelson* rationale, additional prejudice is cured by jury instructions, the rules for a proper question and the defendant's option not to raise the issue.[70] The dissent in *Michelson* argued for a prohibition of specific acts cross-examination, contending that despite the "have you heard" form, the jury would infer that these events are true, causing the defendant undue prejudice.[71]

Although California has accepted the majority's position in *Michelson*,[72] California cases in analogous areas seem to accept the dissent's view that despite safeguards, specific acts are likely to be used by the jury for prejudicial purposes. California cases explicitly recognize that juries cannot be expected to use specific acts only in the manner instructed by the trial judge and to otherwise disregard these acts.

For example, impeachment of a witness by use of a felony conviction is analogous to character in issue. A prior felony conviction is admissible to impeach the credibility of a witness.[73] Similarly, "have you heard" questions are admitted for the sole purpose of impeaching a character witness. The jury is specifically instructed to disregard the felony conviction for all purposes other than impeach-

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[69] Michelson v. United States, 335 U.S. 482. *See also* authorities cited at notes 33 & 35 *supra*.

[70] *Id.* at 482, 484-85.

[71] *Id.* at 488, 495 (Rutledge, J., dissenting):

> In my opinion the only answers to these [have you heard] questions are not that the prosecution was "testing the witness's standards of opinion of reputation," but that it was telling the jury what it could not prove directly and what the petitioner had no chance to deny, namely that he had been so arrested and thereby either insinuating that he had been convicted of the crime or leaving to the jury to guess that this had been the outcome. The question was typical abuse arising from allowing this type of inquiry. It should have been excluded. There is no way to tell how much prejudice it produced.

[72] *See* note 7 *supra*.

[73] CAL. EVID. CODE §788 (West 1968); *see Character Impeachment, supra* note 3.

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ment,[74] just as a jury is told to disregard a "have you heard" question except to weigh testimony. In *People v. Beagle*,[75] the California Supreme Court, recognizing the possible jury misuse of a defendant-witness's prior felony convictions, instructed trial courts to use their discretion and consider the potential prejudice of the evidence in judging its admissibility.

The present law on character in issue is analogous to pre-*Beagle* law on felony conviction impeachment. Pre-*Beagle*, all prior felonies were automatically admissible. California Evidence Code section 788 allowing prior felony impeachment was considered a mandatory statute that precluded exercise of judicial discretion under California Evidence Code section 352.[76] In character in issue, all questions which meet the threshold relevance standard are likewise automatically admissible. Even though a trial court is not prohibited from using its discretion to exclude prejudicial questions, failure to exercise discretion has never been found to be error in California.[77] *Beagle*, recognizing the prejudice of specific acts, changed the law of impeachment to require the exercise of judicial discretion. But no similar discretionary control is required for specific acts brought before the jury under "have you heard."

The potential prejudice of specific acts is also recognized in California Evidence Code section 1101(b). This section admits prior acts of the defendant for the purpose of proving a disputed fact at trial other than disposition, such as identity, plan or intent.[78] Similarly, "have you heard" questions are admissible to test the reputation witness, which is also a purpose other than proving disposition. The jury is instructed to consider the evidence admissible under section 1101(b) only as it relates to the crime charged.[79] Similarly, the jury is instructed to disregard a "have you heard" question except to weigh the witness's testimony. Before any specific act is admissible under section 1101(b), it must be scrutinized to ensure that it is related to the crime charged.[80] Any doubt is resolved in the defendant's favor. Furthermore, the court will weigh the potential prejudice and probative value of the evidence.[81] The purpose of these

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[74] CALJIC, *supra* note 20, § 2.23.
[75] 6 Cal. 3d 441, 492 P.2d 1, 99 Cal. Rptr. 313 (1972); *accord*, People v. Rist, 16 Cal. 3d 211, 545 P.2d 833, 127 Cal. Rptr. 457 (1976); People v. Antick, 15 Cal. 3d 79, 537 P.2d 43, 123 Cal. Rptr. 475 (1975).
[76] *Character Impeachment*, *supra* note 3.
[77] *See* note 49 *supra*.
[78] The statute is set out in note 14 *supra*.
[79] CALJIC, *supra* note 20, § 2.50.
[80] The precise test used to scrutinize the evidence of the prior act will depend upon the purpose of the evidence and the crime involved. *See* B. WITKIN, CALIFORNIA EVIDENCE § § 340-72 (2d ed. 1966).
[81] People v. Schader, 71 Cal. 2d 761, 457 P.2d 841, 80 Cal. Rptr. 1 (1969); People v. McCaughin, 49 Cal. 2d 409, 317 P.2d 974 (1957). *See also* B. WITKIN, CALIFORNIA EVIDENCE § 340-41 (2d ed. Supp. 1974).

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safeguards is to prevent the jury from convicting the defendant for being anti-social or immoral or on the basis of prior acts demonstrating a criminal disposition.[82] Specific acts under "have you heard" cross-examination are also recognized as having potential prejudice. Yet, "have you heard" questions are allowed automatically without an exercise of judicial discretion.[83]

These two analogies are not diminished by the fact that felony convictions or prior acts can be proved substantively with extrinsic evidence, while "have you heard" questions cannot be. There is potential prejudice in the "have you heard" question regardless of the fact that the event in the question is not proved with extrinsic evidence.[84] Thus, in all three areas, the prior acts are recognized as having potential prejudice. In all three, the jury is cautioned to use the information for a purpose other than criminal disposition. Yet only in character in issue is the question allowed without the court undertaking a balancing to ensure that the defendant is not unduly prejudiced.

Several authorities argue that juries consider "have you heard" specific acts for substantive purposes. McCormick pointed out that the mere asking of the question by a district attorney, a respected public official, and its approval by the judge, may cause the jury to use the event substantively.[85] Wigmore also opposed specific acts cross-examination on these grounds.[86] At least two California decisions agree.[87] In addition, some California cases have recognized the

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[82] People v. Sam, 71 Cal. 2d 194, 454 P.2d 700, 77 Cal. Rptr. 804 (1969); People v. Haston, 69 Cal. 2d 233, 444 P.2d 91, 70 Cal. Rptr. 419 (1968).

[83] The courts are also more frequently excluding evidence that juries are likely to misuse in civil cases. *See, e.g.*, Hrnjak v. Graymar, Inc., 4 Cal. 3d 725, 484 P.2d 599, 94 Cal. Rptr. 623 (1971) (exclusion of evidence of collateral payments to prove malingering); Grudt v. City of Los Angeles, 2 Cal. 3d 575, 468 P.2d 825, 86 Cal. Rptr. 465 (1970) (trial court must use its discretionary powers to exclude evidence of bias of witness where the prejudicial effect outweighs the probative value). *See also* B. WITKIN, CALIFORNIA EVIDENCE § § 373-87 (2d ed. 1966).

[84] The courts have recognized that there is some prejudicial impact in the "have you heard" question by the fact that a limiting instruction is given *sua sponte*. *See* note 37 *supra*. The majority in *Michelson* clearly stated that these questions had some prejudicial effect, but maintained that there were adequate safeguards. 335 U.S. at 484-85.

[85] MCCORMICK (2d ed.), *supra* note 4, § 191.

[86] 3A WIGMORE, *supra* note 13, § 988.

[87] *See* People v. Anthony, 185 Cal. 152, 158-59, 196 P. 47, 50 (1921):

> It would be impossible for the jury to believe, as it is for us to conceive that the district attorney would ask questions of this character witness without any information whatever upon which to predicate the question . . . The human mind is not so constructed that a thing of that kind can either be forgotten or overlooked by a jury.

See also People v. Bentley, 131 Cal. App. 2d 687, 691, 281 P.2d 1, 3 (2d Dist. 1955):

> [A]nyone who theorizes that such questions have no pernicious

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jury's probable misuse of "have you heard" by allowing a defendant to testify on rebuttal that the event referred to is not true. According to these courts, an untrained lay person would be likely to use the subject matter of the question prejudicially.[88]

In recognition of the potential prejudice caused by "have you heard" cross-examination, some federal courts[89] and state courts,[90] apply the same discretionary rules to "have you heard" as California applies to the admission of prior felony convictions for impeachment. The District of Columbia Court of Appeals interpreted *Michelson* as having

> stressed the need for the exercise of judicial discretion. . . . Yet the rules as formulated in this jurisdiction might appear to suggest that judge's role is a mechanical one: if the defendant puts on a character witness, the prosecutor may ask if the witness has heard of defendant's prior arrests or convictions, without a further exercise of judicial discretion. The supposed automatic operation of the rule is suggested by the metaphorical statement in *Michelson* that the defendant "has opened the door." But the Supreme Court has made it clear that even though the defendant has opened the door, the trial judge is to decide what passes through.[91]

> effect upon the lay minds of the jury with regard to other offenses is indeed naive.

[88] People v. Bentley, 131 Cal. App. 2d 687, 691, 281 P.2d 1, 3 (2d Dist. 1955); People v. Houser, 85 Cal. App. 2d 686, 193 P.2d 937 (4th Dist. 1948). These cases demonstrate how anomalous the area can become. The courts felt obligated to allow the prosecutor to rebut the defendant's rebuttal, although theoretically the "have you heard" events were not supposed to be proved substantively. The "have you heard" practice has been criticized for not allowing defendant to rebut, a criticism that assumes the jury believes the event in question is true. 3A WIGMORE, *supra* note 13, § 988; *accord*, Michelson v. United States, 335 U.S. at 493 (Rutledge, J., dissenting).

Empirical information on jury behavior is lacking. The most important study to date is H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966). *See* Spencer v. Texas, 385 U.S. 554, 565 n.8, 575 (1967).

[89] United States v. Duke, 492 F.2d 693 (5th Cir. 1974); United States v. Lewis, 482 F.2d 632 (D.C. Cir. 1973); United States v. Fox, 473 F.2d 131 (D.C. Cir. 1972). Many other federal courts stress the trial court's discretion, but fail to make clear whether a balancing process is involved. *See, e.g.*, Michelson v. United States, 335 U.S. at 480; Mullins v. United States, 487 F.2d 581 (8th Cir. 1973); United States v. Machado, 457 F.2d 1372 (9th Cir. 1972); United States v. Pingleton, 458 F.2d 722 (7th Cir. 1972); United States v. Polack, 442 F.2d 446 (3d Cir.), *cert. denied*, 403 U.S. 931 (1971); United States v. Silverman, 430 F.2d 106 (2d Cir.), *cert. denied*, 402 U.S. 953 (1970); United States v. Blane, 375 F.2d 249 (6th Cir.), *cert. denied*, 389 U.S. 825 (1967). WEINSTEIN, *supra* note 20, at 405-26 to 27 maintains that a discretionary balancing test is now mandated by FED. R. EVID. 403, which states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

[90] Taylor v. State, 28 Md. App. 560, 346 A.2d 718 (1975); State v. Hale, 21 Ohio App. 2d 207, 50 Ohio Op. 2d 340, 256 N.E.2d 239 (1969).

[91] Awkard v. United States, 352 F.2d 641, 644 (D.C. Cir. 1965).

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In *Shimon v. United States*,[92] Judge (now Chief Justice) Burger affirmed the principle of discretionary controls. In that case, Burger cited as a standard his opinion on the felony conviction issue in *Luck v. United States*,[93] which served as a basis for the California Supreme Court's decision in *People v. Beagle.*[94]

United States Supreme Court cases subsequent to *Michelson* have also undermined the belief that jury instructions are adequate protection. Justice Jackson, writing for the majority in *Michelson*, reasoned that instructions were safeguards as effective as those used in two other areas: evidence of a conspiracy and admissions of a co-defendant.[95] Yet that same term, Jackson wrote that in a conspiracy case,

> [A]s a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others. . . . The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction.[96]

The second example cited by Jackson of potential prejudice being cured by jury instructions, admissions of a co-defendant, was overruled in *Bruton v. United States.*[97]

Due process of law may also be violated by "have you heard" questions when discretionary controls are not utilized to prevent undue prejudice. In *Spencer v. Texas*,[98] prior specific acts were admitted for sentencing purposes, with limiting instructions to the jury to disregard the acts on the issue of guilt. The Court upheld the practice, recognizing that admission of a defendant's specific acts was a complicated issue that required the balancing of many considera-

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[92] 352 F.2d 449 (D.C. Cir. 1965).

[93] 348 F.2d 763 (D.C. Cir. 1965). *See also* Gordon v. United States, 383 F.2d 936, 940-41 (D.C. Cir. 1967).

[94] 6 Cal. 3d 441, 452, 492 P.2d 1, 7, 99 Cal. Rptr. 313, 319 (1972).

[95] Michelson v. United States, 335 U.S. at 485.

[96] Krulewitch v. United States, 336 U.S. 440, 453 (1948) (Jackson, J., concurring).

[97] 391 U.S. 123 (1967); *accord*, People v. Aranda, 63 Cal. 2d 518, 407 P.2d 265, 47 Cal. Rptr. 353 (1965). In *Aranda*, the California Supreme Court cited many authorities to the effect that such an instruction requires the jury to perform mental gymnastics beyond their capabilities and to use superhuman powers to control their emotions and intellect. *See also* Jackson v. Denno, 378 U.S. 368 (1964) (instructions to the jury to disregard an involuntary confession inadequate to prevent prejudice).

In Awkard v. United States, 352 F.2d 641, 646 n.13 (D.C. Cir. 1965) the court noted the inadequacy of jury instructions to cure prejudice caused by "have you heard" questions. Jury instructions are probably not inadequate as a matter of constitutional law in the "have you heard" area since both Bruton and Jackson protected specific constitutional rights: the right to confrontation and the privilege against self-incrimination. The right to present good character testimony is probably not constitutionally protected. *See* note 22 *supra.*

[98] 385 U.S. 554 (1967).

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tions and should be left to the states. The Court emphasized, however, that the trial judge had discretionary power to exclude prior acts if the prejudice outweighed the probative value.[99]

In *Chambers v. Mississippi*, the Court held that a mechanically applied hearsay rule which barred testimony favorable to the defendant was a violation of due process.[100] *Spencer* and *Chambers* read together suggest that the Court will not hold unconstitutional state evidence rules which allow for a trial court's discretion, but that automatic rules in certain limited circumstances may violate due process. In other words, the exercise of discretion by a trial court on matters unduly prejudicial to a defendant may be constitutionally mandated.

A response to the criticisms of "have you heard" cross-examination is the argument made by Justice Jackson in *Michelson:* that if the defendant feels unduly prejudiced by the practice, he has the option of not placing character in issue.[101] If the defendant's only complaint is that the prosecutor's questions are taking the defendant's character from a plus factor to zero, then Justice Jackson is undoubtedly correct.

But if the broad cross-examination oversteps mere rebuttal into affirmative proof of bad character this argument is not sound. It is equivalent to arguing that the proper way to ensure that a right is not wrongfully infringed is to not exercise it initially. Since a defendant does have at least a common law right to character evidence,[102] the proper solution is to correct the practice.

In summary, an underlying principle of Anglo-American jurisprudence is that a person must be convicted of a specific crime and not for a criminal disposition. Specific bad acts of the defendant have a strong tendency to prove a criminal disposition. When specific acts are used by the prosecutor to rebut character testimony, the law must inquire whether the prosecutor is going beyond rebuttal into proving bad character. There is little doubt that the jury uses these specific acts substantively. Some additional safeguards are necessary to prevent the prosecutor from using "have you heard" questions to take the defendant's character below zero.

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[99] *Id.* at 561-62.

[100] 410 U.S. 284 (1973). *Cf.* Henry v. Mississippi, 379 U.S. 443 (1965) (state may not avoid federal review by classifying as procedural a state evidence rule that specifies when a federal search and seizure objection may be raised, unless there is a valid waiver by the defendant).

[101] Michelson v. United States, 335 U.S. at 485.

[102] *Id.* at 476. The right is codified in FED. R. EVID 404(a)(1); CAL. EVID. CODE §1102(a) (West 1968). This is not a situation where the defendant is simply exchanging one right (character testimony) for another right (the right to keep the entire subject closed). Not being convicted for bad character is an absolute prohibition, not an exchangeable right.

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V. REFORM PROPOSALS FOR "HAVE YOU HEARD" CROSS-EXAMINATION

A. PER SE RULE OF EXCLUSION

Either of two approaches would eliminate prejudice suffered by the defendant as a result of "have you heard" cross-examination. The most sweeping reform of the practice would be a per se prohibition of "have you heard" cross-examination. A less drastic reform would require a discretionary balancing process similar to that set forth in *People v. Beagle* for felony convictions impeachment.

At least one jurisdiction, Arizona, has adopted a per se prohibition of "have you heard" questions.[103] Under this approach, the prosecutor's cross-examination of a reputation witness is limited to questions about sources from which the witness gained knowledge of good character. If the prosecutor believes that the defendant has acted inconsistently with the testimony of good character, he may inquire if the witness has heard other comments from the sources of the witness's information. In his question, the prosecutor may not name the act allegedly committed. The Arizona court rejected the majority view because it believed that jurors are apt to assume from the specifics of the question that the event actually occurred, especially if the same question is asked of several witnesses. Furthermore, the court reasoned that this rule is as effective as the majority rule in evaluating the accuracy and candor of the witness.[104]

B. DISCRETIONARY APPROACH

The disadvantage of a per se rule of exclusion is that excluded material may have sufficient probative value to overcome the danger of undue prejudice. Not all specific acts referred to on cross-examination will reduce the defendant's character below zero creating undue prejudice. The use of some specific acts on cross-examination may be necessary to give the prosecutor the oppor-

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[103] Viliborghi v. State, 45 Ariz. 275, 43 P.2d 210 (1935). Arguably, this is also the position of Illinois and North Carolina. *See* McCormick (2d ed.), *supra* note 3, at 456, n.73; Annot., 47 A.L.R. 2d 1270-72 (1956).

[104] A narrower version of Arizona's per se prohibition would limit specific acts cross-examination to felony convictions, analogous to the rules of impeachment by prior felonies. Cal. Evid. Code § 788 (West 1968). New Jersey has adopted a rule limiting events in "have you heard" questions to any conviction. N.J. Evidence Rule 47; State v. LaPorte, 62 N.J. 312, 301 A.2d 146 (1973).

The common law rule was that any prior specific act tending to discredit testimony was admissible for impeachment. Because of distraction, confusion, abuse, surprise and prejudice, this rule has been altered to allow only felony convictions. McCormick (2d ed.), *supra* note 4, § § 42, 43. The same reasoning could apply to "have you heard." Even though all specific acts may be relevant, a felony conviction is perhaps the best indicator of bad character. *Cf.* rule at note 54 *supra*, requiring that the event in the "have you heard" question be inconsistent with the crime charged, even though any event may be relevant to testing the witness.

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tunity to rebut the defendant's good character testimony. Justice Frankfurter, in *Michelson*, was sympathetic to the dissent's fear of conviction based on bad character. He concurred with the majority, however, because of his lack of faith in crystalized rules that would limit the discretionary powers of a judge.[105]

A discretionary approach would require application of the trial courts discretion under California Evidence Code section 352 to the events referred to in "have you heard" questions. This exercise of discretion would be in addition to the four rules already required. Although it is impossible to judge exactly where the cross-examination goes beyond mere rebuttal, trial judges have experience at applying balancing tests under this section aimed at preventing undue prejudice. This approach has been used by some federal[106] and state courts.[107] It is directly analogous to the discretionary process used in admitting felony convictions for impeachment or prior acts under California Evidence Code section 1101(b).

1. MEASURING THE POTENTIAL PREJUDICE

The discretionary approach involves measuring and weighing two considerations: the potential prejudice of a question and the probative value of the witness's answer. In measuring the potential prejudice, the standards formulated in *People v. Beagle* for weighing the prejudice of prior felonies could be applied to the events referred to in "have you heard" questions.[108]

Courts using this approach should first consider the number of events being asked about.[109] Additional events become increasingly prejudicial on the issue of guilt. Yet, there is presently no attempt to curb the number of cumulative events where each was independently

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This should not be confused with a proposal at note 108 *supra*, to apply the same discretion currently used to judge the admissibility of prior felonies to all events used in "have you heard" questions.

[105] 335 U.S. at 487 (concurring opinion).

[106] Authorities cited note 89 *supra*.

[107] Cases cited note 90 *supra*.

[108] People v. Beagle, 6 Cal. 3d 441, 453, 492 P.2d 1, 8, 99 Cal. Rptr. 313, 320 (1972). This should not be confused with a proposal to limit events to prior felonies at note 104 *supra*. This only suggests that the same balancing criteria applied presently to prior felonies be applied to all "have you heard" events.

Beagle formulated five factors to be weighed before using a prior conviction: how recent was the conviction, how relevant was the character trait revealed, the number of prior convictions, the similarity of the conviction to the crime charged, and the importance in a given case of hearing the defendant's testimony. The first two criteria already have an analogy in the character in issue requirements of timeliness, *supra* note 52, and inconsistent traits, *supra* note 54. *See also Character Impeachment*, *supra* note 3.

[109] This is analogous to the requirement in *Beagle* of considering the number of felony convictions allowed. 6 Cal. 3d 441, 453, 492 P.2d 1, 8, 99 Cal. Rptr. 313, 320 (1972).

admissible under the four "have you heard" rules.[110] At some point, the value of the cross-examination is overcome by the prejudice of the string of bad acts.

A second factor is the similarity of the event asked about to the crime with which defendant is charged.[111] When the act in the question is the same as or similar to the crime charged, there is a greater possibility that the defendant will be convicted for his criminal disposition. Yet, the mechanical operation of the rules of character in issue have routinely allowed the prosecutor to use similar acts, thereby informing the jury of past violations.[112] Although the "have you heard" event must involve the same trait as that associated with the crime charged,[113] at some point the prejudicial effect may overcome the probative value of the question.

A third factor is the importance of the character testimony in the particular case.[114] Courts have recognized that certain cases, such as those involving circumstantial evidence or sex offenses, are more likely to require character evidence than others.[115] A court may be justified in limiting the "have you heard" cross-examination in these cases so that the defendant would not be deterred from using character evidence.[116]

A final consideration should be the amount of detail the prosecutor can use. Justice Rutledge in his *Michelson* dissent suggested that the excessive detail in a "have you heard" question would likely result in the jury using these events substantively.[117] This reasoning is supported by a California District Court of Appeal case which held it

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[110] People v. Stevens, 5 Cal. 2d 92, 53 P.2d 133 (1935); People v. Hurd, 5 Cal. App. 3d 865, 85 Cal. Rptr. 718 (4th Dist. 1970); People v. Cooley, 211 Cal. App. 2d 173, 27 Cal. Rptr. 543 (5th Dist. 1962); People v. Malloy, 199 Cal. App. 2d 219, 18 Cal. Rptr. 545 (1st Dist. 1962); People v. Beltran, 94 Cal. App. 2d 197, 210 P.2d 238 (2d Dist. 1949).

[111] United States v. Duke, 492 F.2d 693, 697 (5th Cir. 1974); Shimon v. United States, 352 F.2d 449, 452-54 (D.C. Cir. 1965). This is analogous to considering in *Beagle* how similar the prior felony is to the present charge. 6 Cal. 3d 441, 453, 492 P.2d 1, 8, 99 Cal. Rptr. 313, 320 (1972); *accord*, People v. Rist, 16 Cal. 3d 441, 545 P.2d 833, 127 Cal. Rptr. 457 (1976).

[112] In perjury cases, the prosecution is allowed to cross-examine as to specific acts of perjury. People v. McKenna, 11 Cal. 2d 327, 79 P.2d 1065 (1938). In lewd and lascivious behavior cases, which are invariably inflammatory, there is practically no limitation to the number of prejudicial sex acts brought before the jury. *See* People v. Malloy, 199 Cal. App. 2d 219, 18 Cal. Rptr. 545 (1st Dist. 1962); People v. Green, 153 Cal. App. 2d 473, 314 P.2d 828 (4th Dist. 1957).

[113] B. WITKIN, CALIFORNIA EVIDENCE § 1213 (2d ed. 1966).

[114] This is analogous to the final *Beagle* criterion. 6 Cal. 3d 441, 453, 492 P.2d 1, 8, 99 Cal. Rptr. 313, 320 (1972). However, character evidence might not be given the same weight as the defendant's own testimony.

[115] *See* note 21 *supra*.

[116] *See* United States v. Fox, 473 F.2d 131, 135 (D.C. Cir. 1972) (improper questions that deterred character testimony in a case involving one eyewitness held prejudicial).

[117] 335 U.S. at 494-95 (Rutledge, J., dissenting) (objecting to the precise dates and crimes being used in questions).

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error to give additional details in successive questions where the witness said he had not heard of the event.[118]

2. MEASURING THE PROBATIVE VALUE

The probative value of the "have you heard" question must also be considered as part of the balancing process. When an event is admissible as a prior act under section 1101(b), the court must clearly perceive its connection to the crime charged.[119] The analogy for character in issue is that the "have you heard" event should clearly be related to the defendant's reputation.

If the event is one the community is not likely to hear about, there is little probative value in asking a reputation witness the question. Only two factors are presently considered on this point: the event must have achieved some level of public notoriety,[120] and the witness must have sufficient contact with the community where the event is known.[121] The courts should also consider three additional factors.

First, a court should weigh the likelihood that the event would naturally become community knowledge. Where the defendant or other participants would not be expected to disseminate the information, and the prosecutor discovers the event only through investigation, there is little likelihood that the event is known in the community.[122] For example, a defendant school board member is charged with conflict of interest in a public contract. The prosecutor asks the defendant's character witness if he has heard that the defendant stayed at a hotel in Yosemite as a guest of the principal stockholder of a corporation that had contracted with the defen-

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[118] People v. Grimes, 148 Cal. App. 2d 747, 749, 307 P.2d 932, 933 (1st Dist. 1957). The rules for questioning about prior acts, under California Evidence Code section 1101(b), also require omitting irrelevant details. People v. Perkins, 7 Cal. App. 3d 593, 86 Cal. Rptr. 585 (1st Dist. 1970); B. WITKIN, CALIFORNIA EVIDENCE § 318A (2d ed. Supp. 1974).

This suggests an additional tool a court may use to limit prejudice. A court may require the prosecutor to give only the generic name of the crime referred to, as suggested by Rutledge's dissent in Michelson, 335 U.S. at 494-95. Rather than ask, for example, "Have you heard that defendant had broken into a tire recapping company on three occasions and stolen money," *see* People v. Eli, 66 Cal. 2d 63, 77, 424 P.2d 356, 366, 56 Cal. Rptr. 916, 926, *cert. denied*, 389 U.S. 888 (1967), the prosecutor must ask, "Have you heard a rumor that defendant was involved in stealing?" or "Have you heard of defendant being arrested?" An argument that additional detail may jar the witness's memory on cross-examination was rejected in *Grimes*, *supra*, where the details were spread over four questions. This would not be an abolition of specific acts cross-examination as in Arizona; the prosecutor could still suggest the general nature of a misdeed to a witness.

[119] Authorities cited note 81 *supra*.

[120] Authorities cited note 51 *supra*.

[121] People v. Kramer, 259 Cal. App. 2d 452, 66 Cal. Rptr. 638 (4th Dist. 1968).

[122] United States v. Duke, 492 F.2d 693, 694 (5th Cir. 1974).

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dant's school board.[123] The potential prejudice stems from the similarity to the crime charged and the excessive details. The probative value is minimal, since even if the community was aware that the defendant took a vacation, the fact that the host was a principal stockholder is not the sort of information that would naturally tend to become community knowledge.

Second, a court should examine whether the nature of the witness's contacts in the community makes it likely that the witness will in fact have heard of the defendant's specific acts. For example, in *People v. Kramer*, a defendant physician charged with performing illegal abortions had professionals in the community testify to his reputation for ethical medical conduct.[124] On cross-examination, they were asked if they had heard rumors among certain groups (students, nurses, Mexican-Americans and frequenters of bars) that the defendant was the one to see for an abortion. The court ruled that the witnesses had sufficient contact with these groups so that the prosecutor could anticipate an affirmative answer. The court failed to consider how likely it was that in the course of their relationship with members of these groups, these particular character witnesses would discuss abortions. Where the subject matter is not likely to be transmitted in the scope of social interchange, the court should accord the question less probative value.[125]

Finally, where the event referred to took place geographically distant from the character witness's residence, the court should consider whether there is a reasonable likelihood that the information would travel to the witness's community. If there was no local publicity about the misdeed, or if the defendant was not in contact with

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[123] People v. Darby, 114 Cal. App. 2d 412, 250 P.2d 743 (2d Dist. 1952), *appeal dismissed*, 345 U.S. 937 (1952). *See also* People v. Wrigley, 69 Cal. 2d 149, 443 P.2d 580, 70 Cal. Rptr. 116 (1968). The defendant was charged with lewd behavior. The questions on cross-examination concerned an illicit relationship between the defendant and a woman. The prosecutor's sole source of information for these questions was the young prosecutrix. There was no showing of general community knowledge, and the event was not the type that the participants would have communicated. The lack of probative value should have been considered, but the decision allowed the question without addressing this issue. Where the event is against the defendant's penal interest, there is even a greater need to examine the extent of community knowledge.

[124] 259 Cal. App. 2d 452, 66 Cal. Rptr. 638 (4th Dist. 1968). The professionals included a doctor, dentist, president of a medical school, lawyer, pharmacist and minister.

[125] Kramer, *id.*, raised an additional consideration. The prosecutor demonstrated a good faith belief only that rumors were in fact circulating, not that the defendant actually committed abortions. The court allowed this question, notwithstanding that it arguably violated the rule requiring a good faith belief that the rumor have a factual basis. Michelson v. United States, 335 U.S. at 480. However, the Court in *Michelson* also pointed out that evidence of mere rumors was valuable, whether or not well-founded, "for it is not the man that he is, but the name that he has that is put into issue." *Id.* at 479. Even if unsubstantial rumor has probative value, it should probably be given less weight than an actual event.

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friends or relatives who were likely to transmit the information, then the probative value of these events is decreased. For example, where the facts show only that crimes were attempted in Las Vegas and Louisiana, and the character witness is from Southern California, the court should consider if questions about the crimes have any value in testing the witness's foundation.[126]

3. *PROCEDURE FOR ADMINISTERING DISCRETIONARY RULES*

In impeachment by prior felony convictions, the trial court weighs the possibility of undue prejudice against the probative value of the prosecutor's questions after the prosecutor's case in chief but before the defendant testifies.[127] A similar procedure could be used for character in issue. The trial court could rule on the admissibility of the potential questions before the character witness takes the stand and out of the presence of the jury.[128]

VI. CROSS-EXAMINATION OF A CHARACTER OPINION WITNESS

The law concerning cross-examination of character witnesses deals mainly with reputation witnesses. Until recently, reputation had been the only method of proving character. Both the California Evidence Code and the Federal Rules of Evidence have broken with prior judicial decisions by permitting a witness to state his *opinion* of the defendant's character.[129] However, there have been no cases defining the scope of permissible cross-examination of an opinion witness. At the present time, the only rules regulating cross-examination of a character witness are those applicable to cross-examining a non-character lay opinion witness.[130]

Opinion testimony is based upon the personal knowledge of the witness.[131] Therefore, cross-examination of a character opinion witness would necessitate examining what the witness personally knows about the defendant. The form of the question may be "Do you

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[126] People v. Hurd, 5 Cal. App. 3d 865, 85 Cal. Rptr. 718 (4th Dist. 1970).

[127] People v. Delgado, 32 Cal. App. 3d 242, 108 Cal. Rptr. 399 (4th Dist. 1973), *disapproved on other grounds*, People v. Rist, 16 Cal. 3d 211, 545 P.2d 833, 127 Cal. Rptr. 457 (1976).

[128] *See* United States v. Lewis, 482 F.2d 632 (D.C. Cir. 1973); United States v. Fox, 473 F.2d 131 (D.C. Cir. 1972).

[129] FED. R. EVID. 405(a); CAL. EVID. CODE § 1102 (West 1968).

[130] FED. R. EVID. 405, Advisory Comm. Notes; B. WITKIN, CALIFORNIA EVIDENCE § 1212 (2d ed. 1965). In People v. Hurd, 5 Cal. App. 3d 865, 86 Cal. Rptr. 718 (4th Dist. 1970), "have you heard" was held appropriate for an opinion witness. The court did not discuss the full scope of cross-examining an opinion character witness.

[131] Comment, *The Opinion Rule in California and Federal Courts: A Liberal Approach*, this volume [hereinafter cited as *Opinion Testimony*].

know . . .?"[132] A "yes" answer from the opinion witness to a "do you know" question would be direct proof that the event has actually occurred.

This cross-examination technique raises three difficulties. First, such use of specific acts is directly contrary to the rule prohibiting proof of character in this manner.[133] Second, even if witness answers a "do you know" question with a "no," the mere asking of the question carries with it the same dangers of jury misuse present in a "have you heard" question. Third, procedural confusion may result from having a different set of rules for cross-examining a character opinion witness than that used for a reputation witness.

All three difficulties can be overcome by cross-examining a character opinion witness with the same techniques suggested in this article for cross-examination of a reputation witness.[134] This would entail use of the "have you heard" form, the four rules for a proper question, and the exercise of judicial discretion.

This solution prevents proof of character by specific acts because the question will not be in the "do you know" form. Secondly, the exercise of judicial discretion to exclude prejudicial questions will lessen the possibility of undue prejudice stemming from the question itself. Finally, there will not be two different sets of rules for character witness cross-examination.[135]

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[132] McCORMICK (2d ed.), *supra* note 4, at 457 n.74, FED. R. EVID. 405, Advisory Comm. Notes. The federal advisory commission, after noting that an opinion witness would be cross-examined on his specific knowledge, commented that the "have you heard" form made slight if any practical difference from the "do you know" form. This may be an additional indication that "have you heard" questions do not prevent the jury from learning that the "have you heard" event has occurred.

[133] Authorities cited note 29 *supra.*

[134] *Contra,* FED. R. EVID. 405, Advisory Comm. Notes. There is a theoretical justification for not allowing a character opinion witness to be cross-examined about specific acts, even though a normal lay opinion witness could be. Lay opinions are short-hand renditions of facts, rationally based on the perception of the witness. *Opinion Testimony, supra* note 131. But an opinion as to character is not necessarily based on facts ultimately capable of a precise determination. Because character is an amorphous concept, it may not be possible to state as a fact that a defendant is a particular kind of person. *See* 1 WIGMORE (3d ed.), *supra* note 11, § 55. Opinion, like reputation, is considered a means of inferring disposition, rather than direct proof. *See id.* at § 52; 5 WIGMORE, *supra* note 23, § 1608; 7 WIGMORE, *supra* note 11, § 1986. Opinion is merely a more efficient indicator than reputation, which is a collection of individual opinions, and which has been labeled "opinion in disguise." FED. R. EVID. 405, Advisory Comm. Notes.

Character lay opinion differs from normal lay opinion in another manner. A character lay opinion witness may not state on direct examination specific facts leading to his opinion on direct examination because of the rule against specific acts. A normal lay opinion witness may state the specific facts underlying his opinion. *Opinion Testimony, supra* note 131.

[135] "Have you heard" cross-examination accomplishes the same goal as "do you know" cross-examination. In cross-examining the lay opinion witness, the prosecutor attempts to expose to the jury either that the witness has had insufficient

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CONCLUSION

There are five principles governing the rules of character in issue. First, a defendant cannot be convicted for bad character. Second, specific acts are the most prejudicial kind of character evidence. Third, character may be relevant to a defendant's innocence. Fourth, a defendant has a right to use all relevant evidence. Finally, the prosecution has the right to rebut good character. However, because of the first principle, the prosecutor should not be allowed to go beyond rebutting the character testimony to prove that defendant has a criminal disposition.

Up to the point of specific acts cross-examination, the rules are harmonious. The defendant uses opinion or reputation evidence to paint a broad, non-specific portrait of character. The prosecutor can rebut with his own witnesses. The prosecutor can also cross-examine as to the witness's general foundation such as how long he has known the defendant. It is only when the prosecutor recites specific acts before the jury that the rules become prejudicial to the defendant. There is a danger that the jury will use these specific acts in their deliberations. Hiding the specific act behind the phrase "have you heard" gives little protection. Nor are jury instructions or the rules for a proper question sufficient to guard against undue prejudice. The appropriate solution is to require the same discretionary controls used to scrutinize specific acts elsewhere, such as felony convictions impeachment or prior acts to show identity, plan or intent. When the witness testifies by personal opinion, the rules for cross-examination should be the same as for a reputation witness.

The *Michelson* majority itself cricitized the rules of character in issue as "archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counter privilege to the other."[136] Yet the Court refused to alter these rules for fear of disrupting the entire practice.[137] Application of discretionary controls, however, has been applied by some courts without disruption. These controls help alleviate the undue prejudice caused by specific acts which was feared by the *Michelson* dissent.

Lester Rosen

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contacts with the defendant to form an opinion, or that the witness knows of inconsistent acts, but is fabricating or has low standards. These are also the prosecutor's goals with a reputation witness. "Have you heard" can accomplish the same for either form of testimony, and therefore a different set of rules for each is not required.

[136] Michelson v. United States, 335 U.S. at 486.

[137] *Id.*

HeinOnline -- 9 U.C.D. L. Rev. 393 1976

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