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Valparaiso University

CROSS-EXAMINATION OF A WITNESS TO THE GOOD CHARACTER OF A CRIMINAL DEFENDANT IN INDIANA

INTRODUCTION

As a general rule the defendant in a criminal prosecution is allowed to introduce evidence of his good character.[1] Once a witness has given evidence concerning the defendant's good character, the prosecution may cross-examine that witness.[2] The law in Indiana is in many respects ill-defined with regard to what is permissible in the cross-examination of a witness who has attested to the good character of the accused. This note will clarify the law in that area. Before discussing the cross-examination of character witnesses, however, it is important to understand what is meant by "character evidence" and the manner in which such testimony may be used.

A person's character consists of his actual moral or physical disposition, or the sum of his traits.[3] Evidence of the defendant's character is relevant because it tends to show whether the accused is the kind of individual who would be likely to have committed the crime with which he is charged.[4] Nonetheless, it is a widely accepted rule that the state may not initially introduce testimony as to the defendant's bad character.[5] Such evidence, it is reasoned, may act to unduly prejudice the jury against the accused.[6] On the other hand,

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1. C. MCCORMICK, EVIDENCE § 191 (2d ed. 1972) [hereinafter cited as MCCORMICK]; I J. WIGMORE, EVIDENCE § 52 (3d ed. 1940) [hereinafter cited as WIGMORE].

2. MCCORMICK, *supra* note 1, at § 191; WIGMORE, *supra* note 1, at § 58.

3. *Id.* at § 52.

Wigmore goes on to say that while some courts have used the term character to refer to both actual disposition and reputation, this is incorrect. Character is, when considered for purposes of relevancy, "the actual moral or physical disposition or sum of traits." Reputation, the community opinion of a person's character, is a means of evidencing character. *Id.*

This note uses the words character and reputation in the manner described in WIGMORE. A witness who is described as a "character witness" will be a person who has been called by the defendant to attest to the good reputation for character of the accused.

4. MCCORMICK, *supra* note 1, at § 188; WIGMORE, *supra* note 1, at § 55.

5. MCCORMICK, *supra* note 1, at § 190; WIGMORE, *surpa* note 1, at § 57.

6. Evidence of the defendant's bad character is relevant, but cannot be initially introduced because it may unjustly prejudice the jury against the defendant and may lead to his condemnation because of his reputation for character and not because he committed the crime with which he is charged. *See* WIGMORE, *supra* note 1, at § 57. Indiana is in accord. Stewart v. State, 184 Ind. 367, 111 N.E. 307 (1915).

there is no danger of prejudice in the admission of testimony to the effect that the defendant is a person of good character.[7] Therefore, the good character of the accused is always admissible.[8]

There are three acknowledged methods by which the defendant may prove his good character. These are testimony as to the good reputation of the accused in the community, testimony of the witness's opinion of the defendant based on personal knowledge, and evidence of the specific past acts of the accused.[9] Of the three, the defendant is limited to the introduction of testimony concerning his good reputation in the community.[10] Reputation evidence is believed to avoid the distracting collateral issues which often accompany testimony as to particular past instances of conduct of the accused.[11] The advantage of reputation evidence over opinion evidence in proving the defendant's good character is not so clear,[12] but opinion

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7. MCCORMICK, *supra* note 1, at § 191; WIGMORE, *supra* note 1, at § 56.

8. According to WIGMORE, up to the beginning of the nineteenth century the defendant could offer his good character only in capital cases and only in doubtful cases. Since that time, however, the rule has been that the defendant's good character is always admissible in a criminal case. *See* WIGMORE, *supra* note 1, at § 56.

An Indiana case, Kistler v. State, 54 Ind. 400, 406 (1876), specifically recognizes that at one time evidence of the accused's good character could only be considered in doubtful cases. In following what was in 1876 the "weight of modern authority," the court held that "proof of good character constitutes an ingredient to be considered by the jury in all criminal cases without reference to the apparently conclusive or inconclusive character of the other evidence."

Indiana cases do not specifically metion the ancient rule that the defendant may introduce evidence of his good character only in capital cases, but the Indiana courts have consistently allowed the introduction of character evidence by the accused in trials for offenses of a lesser nature. Keener v. State, 89 Ind. App. 629, 167 N.E. 549 (1929) (prosecution for operating an automobile while intoxicated); Baehmer v. State, 25 Ind. App. 597, 58 N.E. 742 (1900) (prosecution for unlawful sale of intoxicating liquor on Sunday); Shears v. State, 147 Ind. 51, 46 N.E. 331 (1899) (prosecution for larceny); Randall v. State, 132 Ind. 539, 32 N.E. 305 (1892) (prosecution for petit larceny); Kistler v. State, 54 Ind. 400 (1876) (prosecution for blackmail).

9. MCCORMICK, *supra* note 1, at § 186.

10. MCCORMICK, *supra* note 1, at § 191; VII WIGMORE, *supra* note 1, at § 1983. Indiana is in accord. "On direct and redirect examination, one's general reputation only, as to his general moral character, can be given." Griffith v. State, 140 Ind. 163, 166, 39 N.E. 440, 441 (1895). *See also* Engleman v. State, 2 Ind. 91 (1850).

11. MCCORMICK, *supra* note 1, at § 191.

12. WIGMORE states that the original practice in England allowed character witnesses for the accused to testify concerning their own estimate of the defendant's character based on personal intimacy. However, in Jones Trial, 31 How. St. Tr. 310 (1809), Lord Ellenborough carelessly commented, "It is reputation; it is not what a person knows." This remark was picked up by the court in Regina v. Rowtan, 10 Cox. Cr. 25 (1865), resulting in the subsequent rule that testimony as to the accused's character

evidence is almost universally disallowed for this purpose.[13]

When the defendant calls a witness to attest to the good character of the accused the prosecution may rebut by cross-exmination and by presenting extrinsic evidence of the accused's reputation for bad character.[14] The scope of this note is confined to the cross-examination of the defendant's character witness in a criminal case in the State of Indiana.[15] Its purpose is to clarify Indiana law in this area. The note analyzes Indiana cases which have dealt with the cross-examination of witnesses who have attested to the good reputation of the accused, and compares the results of these cases with the law of other jurisdictions.

Issues involving the cross-examination of a defendant's character witnesses fall into three classes when studied in the light of Indiana law. First, the courts of Indiana follow traditional and widely accepted rules with regard to many aspects of such cross-examination. Second, some questions which arise concerning the cross-examination of character witnesses for the accused have not been specifically decided by the Indiana courts. It is therefore necessary to consider both Indiana cases which have dealt with analogous questions and the decisions of other jurisdictions in order to determine the direction which Indiana would most likely take in these areas.

The third class includes two issues upon which Indiana follows

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founded exclusively on the witness's personal knowledge, is excluded. VII WIGMORE, *supra* note 1, at § 1981.

As in England, early American practice does not seem to have known this rule of exclusion. However, so far as cases have dealt with it, reputation is made the exclusive mode of proof in most states. VII WIGMORE, *supra* note 1, at § 1983.

13. *See* note 12 *supra*.

14. MCCORMICK, *supra* note 1, at § 191; I WIGMORE, *supra* note 1, at § 58.

Indiana is in accord as to cross-examination. McFord v. State, 90 Ind. 320 (1883). Stalcup v. State, 146 Ind. 270, 45 N.E. 334 (1896), recognizes the right of the state to rebut by introducing extrinsic evidence, although the question is not specifically ruled on.

15. This note deals only with character evidence in criminal cases. Cross-examination of witnesses as to the reputation for character of another witness, or of a dead person, such as the deceased in a murder case, are not within its scope. Also, the issue of the right to cross-examine the accused himself regarding past acts relating to his character or credibility has been excluded. The note is not concerned with the duty of the trial judge to instruct the jury as to the weight and effect to be given to testimony elicited by the cross-examination of the defendant's character witnesses.

This note recognizes that federal cases cited may be affected by the Federal Rules of Evidence which became effective July 1, 1975. However, the purpose of the note is to discuss the law in Indiana. Therefore, no attempt will be made to analyze the Federal Rules.

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minority rules. Specifically, it would seem permissible for the prosecutor, in cross-examining witnesses who have attested to the good reputation of the accused to pose hypothetical questions assuming the defendant to be guilty of some prior misconduct when there is no evidence thereof. In addition, the Indiana courts apparently allow the state to cross-examine character witnesses as to their personal knowledge of particular instances of past misconduct by the defendant. For reasons that will be explained in this note, the holdings of the Indiana cases as to both of these issues are undesirable.

As has been stated, once a witness has attested to the defendant's reputation for good character, the prosecution may cross-examine the witness.[16] This cross-examination is used primarily to refute the good reputation which the defendant has attempted to claim.[17] Thus the accused can be prevented from creating a false impression by introducing a parade of partisan witnesses.[18] Cross-examination of the defendant's witness is limited. A discussion of the manner in which Indiana and other jurisdictions have dealt with questions arising in this area follows.

RUMORS OR REPORTS OF SPECIFIC PAST ACTS OF MISCONDUCT ADMISSIBLE

The majority of jurisdictions allow cross-examination of a defendant's character witnesses as to both the general reputation of the accused[19] and rumors or reports of the defendant's particular past misdeeds.[20] Indiana is among these states.[21] Inquiry into specific

16. *See* note 2 *supra*.

17. I WIGMORE, *supra* note 1, at § 58.

18. In the words of the court in Regina v. Rowtan, 10 Cox. Cr. 25 (1865), "If the prisoner, having a bad character, misleads the court, . . . the false impression should be removed."

19. State v. Hedrick, 534 S.W.2d 578 (Mo. 1976). *See also* MCCORMICK, *supra* note 1, at § 191.

While no Indiana criminal case deals directly with cross-examination of a defendant's character witness as to his knowledge of the accused's general reputation, it seems logical that this would be permitted. There is less chance of prejudice resulting from such general questioning than from inquiry concerning rumored specific past misdeeds of the defendant, which is clearly permitted. Moreover, in a civil case the Indiana Supreme Court allowed cross-examination of such a witness as to his knowledge of the general reputation of the accused. Hutts v. Hutts, 62 Ind. 240 (1878).

20. Michelson v. United States, 335 U.S. 469 (1948); Jones v. State, 120 Ala. 303, 25 So. 204 (1899); Driggers v. State, 36 Ala. App. 637, 61 So. 2d 862 (1952); People v. Bentley, 131 Cal. App. 2d 687, 281 P.2d 1 (1955); Brindisi v. People, 76 Colo. 244, 230 P. 797 (1924); State v. Jerome, 33 Conn. 265 (1866); Carnley v. State, 143 Fla. 756, 197 So. 441 (1940); Bryant v. State, 236 Ga. 495, 224 S.E.2d 369 (1976); State v. Brown, 53 Idaho 576, 26 P.2d 131 (1933); State v. Barly, 192 Kan. 144, 386 P.2d 221 (1963); Brazles v. Commonwealth, 267 S.W.2d 73 (Ky. 1954); State v. Powell, 213 La. 811, 35 So. 2d 741

instances of the accused's past misconduct is not permitted for the purpose of proving that the acts which are rumored or reported were actually performed by the defendant,[22] but only to test the credibility of the witness and the extent of his actual knowledge of the defendant's reputation.[23] Thus, a witness to the good reputation of a defendant on trial for burglary may not be asked whether he has heard that the defendant was previously convicted of robbery for the purpose of proving that the defendant has stolen in the past. But the question may be posed to show that if the witness has heard the rumor, his evaluation of the accused's reputation is suspect.

A minority of states hold that the prosector may not inquire into reports or rumors of past misdeeds of the accused on cross-

(1948); Allison v. State, 203 Md. 1, 98 A.2d 273 (1933); People v. Rosa, 268 Mich. 462, 256 N.W. 483 (1934); Magee v. State, 200 Miss. 861, 27 So. 2d 858 (1934); State v. Curry, 372 S.W.2d 1 (Mo. 1963); State v. Popa, 56 Mont. 587, 185 P. 1114 (1919); State v. Boyle, 49 Nev. 386, 248 P. 48 (1926); State v. Steenson, 35 N.J. Super. 103, 113 A.2d 203 (1955); State v. Hawkins, 25 N.M. 514, 184 P. 977 (1919); People v. Fay, 270 App. Div. 261, 59 N.Y.S.2d 127, *aff'd*, 296 N.Y. 510, 68 N.E.2d 453, *aff'd*, 332 U.S. 261 (1945); State v. Polkamus, 62 Ohio L. Abs. 113, 106 N.E.2d 646 (1951); Taylor v. State, 96 Okla. Crim. 1, 247 P.2d 749 (1952); State v. Linn, 179 Or. 499, 173 P.2d 305 (1946); Commonwealth v. Maslie, 155 Pa. Super. 419, 38 A.2d 403 (1944); State v. Lyles, 210 S.C. 87, 41 S.E.2d 625 (1947); State v. Husman, 66 S.D. 530, 287 N.W. 30 (1939); Walker v. State, 197 Tenn. 452, 273 S.W.2d 707 (1954); Smith v. State, 411 S.W.2d 548 (Tex. Crim. 1967); People v. Hite, 8 Utah 461, 33 P. 254 (1893); Kanter v. Commonwealth, 171 Va. 524, 199 S.E. 477 (1938) (rule recognized by court); State v. Anderson, 46 Wash. 2d 864, 285 P.2d 879 (1955).

21. Shears v. State, 147 Ind. 51, 46 N.E. 331 (1899); McDonel v. State, 90 Ind. 320 (1883). *See also* note 19 *supra*.

22. WIGMORE lists three dangers inherent in permitting testimony as to specific past misdeeds of the defendant: 1) an overstrong tendency to believe the defendant is guilty merely because he is a likely person to commit such a crime, 2) a tendency to condemn, not because he is guilty but because he has escaped punishment for the other offense, and 3) the injustice of attacking one necessarily unprepared to demonstrate that the attacking evidence is fabricated. 1 WIGMORE, *supra* note 1, at § 194.

23. Anderson v. State, 44 Ala. App. 388, 210 So. 2d 436 (1968); Carnley v. State, 143 Fla. 756, 197 So. 441 (1940); State v. Hinton, 206 Kan. 500, 479 P.2d 910 (1971); Carter v. State 84 Nev. 592, 446 P.2d 165 (1968); Garza v. State, 129 Tex. Crim. 443, 88 S.W.2d 113 (1935).

Indiana is in agreement. As stated by the Supreme Court of Indiana in Randall v. State, 132 Ind. 539, 541, 32 N.E. 305, 306 (1892):

> A cross-examination of a witness under such circumstances is in the nature of a trial of the witness. The facts thus developed had no bearing on the question of the guilt or innocence of the accused, save as they may have tended to shake or sustain the credibility of the witness or to weaken or strengthen his estimate of the character of the accused.

See also Jordan v. State, 232 Ind. 265, 110 N.E.2d 558 (1953); Woods v. State, 233 Ind. 320, 119 N.E.2d 558 (1954) (dictum).

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examination of his character witnesses.[24] Their rationale for excluding this evidence is that it has the effect of prejudicing the jury against the defendant.[25] It is argued that when a question is posed as to reports or rumors of the accused's past misconduct, the jurors tend to assume the fact of such misconduct.[26] Therefore, these jurisdictions allow character witnesses to be cross-examined only as to their knowledge of the accused's general reputation. While this serves to mitigate the admitted danger of prejudice, it makes the cross-examiner's task of effectively testing the credibility and knowledge of the witness very difficult. The majority approach is superior in this regard.

The cross-examination of a defendant's character witness as to rumors or reports of the past misdeeds of the accused is a very effective method of determining the credibility of the witness. When a witness testifies to the good reputation of the defendant, the reputation must be indicative of the "general and unqualified concensus of opinion in the community."[27] If rumors of flagrant misconduct are known to the witness, such knowledge is inconsistent with the witness' broad assertion of the defendant's reputation for good character.[28] Moreover, if it is shown that such rumors have been circulated but are unknown to the witness, the extent of the witness' knowledge of the reputation of the accused becomes suspect.

An example demonstrating the effectiveness of cross-examination of the defendant's character witness regarding reports or rumors concerning past acts of the accused's misconduct is found in *Long v. State*,[29] a case which dealt with cattle rustling. The accused called a witness who attested to the good reputation of the defendant. On cross-examination the witness admitted to having heard that the accused had a case pending against him in another county for "stealing cattle." One may reasonably infer that upon hearing this testimony the jurors doubted the witness had an idea of what a good reputation was.

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24. State v. Williams, 111 Ariz. 511, 533 P.2d 1146 (1975); People v. Redmond, 50 Ill. 2d 313, 278 N.E.2d 766 (1972); State v. Hunt, 287 N.C. 360, 215 S.E.2d 40 (1975).

25. People v. Page, 365 Ill. 524, 6 N.E. 845 (1937).

26. When counsel in cross-examination asks a witness if he has not heard that defendant has been guilty of some specific and particularly atrocious crime, even though the witness may answer in the negative, the average juror is extremely apt to assume from the mere fact the question has been asked that rumors at least to that effect are afloat, and even perhaps that those rumors are true.

Viliberghi v. State, 45 Ariz. 275, 278, 43 P.2d 210, 212 (1935).

27. III A WIGMORE, *supra* note 1, at § 988 (Cladbourne rev. 1970).

28. I WIGMORE, *supra* note 1, at § 197.

29. Long v. State, 61 Okla. Crim. 274, 67 P.2d 980 (1937).

The possibility of prejudice to the defendant is also apparent in the above example. There is an admitted danger that the jury might convict the defendant merely because they feel that he is a bad man. However, the danger of prejudice can be mitigated by the general requirement that the trial judge instruct the jury that evidence of former misconduct of the accused may be considered only for the purpose of discrediting the witness and testing his knowledge.[30] Instructions cannot erase from the minds of the jurors all biases which may have been created by the testimony. Nonetheless, conscientious jurors will attempt to conform to the judge's instructions, limiting the prejudicial effect created by the evidence.

Before rumors of his past misconduct can be inquired into, the defendant must have claimed good character through the introduction of testimony by witnesses as to his good reputation. If the accused fears adverse testimony resulting from the cross-examination of his character witnesses, he has the option of not calling them to begin with.[31]

For the reasons that have been discussed, the value of evidence obtained by the cross-examination of character witnesses as to specific past instances of misconduct by the accused outweighs the danger of prejudice. On the balance it would seem the better view is that this kind of evidence should be admissible.

In any event the law in Indiana at this time is clearly that witnesses who have attested to the defendant's good reputation may be cross-examined with regard to rumors or reports of the defendant's past misconduct.[32] Restrictions upon the admissibility of testimony concerning such rumors or reports will be discussed below.

Source of Rumors or Reports

In determining what is permissible in the cross-examination of the defendant's character witnesses it is necessary to point out limitations concerning the source of rumors or reports of past misdeeds. Specifically to be considered are, 1) the place of the reputation attested to, 2) the number of people from whom the witness has heard a rumor or report, and 3) reports which were not heard by word-of-mouth, but which were read in the newspapers or in other published materials.

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30. Baehmer v. State, 25 Ind. App. 597, 58 N.E. 741 (1900).
31. *See* notes 5 through 8 *supra*.
32. *See* note 21 *supra*.

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1.) Place of Reputation

Traditionally, testimony concerning the reputation of the accused for character has been limited to that reputation which prevails in the community in which the accused lives.[33] Some jurisdictions interpret this requirement broadly and admit evidence of the defendant's reputation in any probative "community."[34] Probative communities might include localities where the accused does not reside but in which he is well known, such as his professional circle or place of work.[35] Thus, in a Florida case character evidence was admitted concerning the reputation of the defendant in the area where he worked as a hotel employee.[36]

In Indiana testimony as to the reputation of the accused is still limited to that reputation by which the accused is known in the area in which he makes his home.[37] However, evidence may be allowed regarding the defendant's reputation in a neighborhood in which he formerly lived.[38] It would also seem that a character witness may be questioned as to reports or rumors of past misdeeds which the accused perpetrated at some place other than the defendant's home neighborhood, so long as the rumors or reports were heard in that home neighborhood.[39]

2.) Number of Persons from Whom the Report Must Have Been Heard

There appears to be no requirement in Indiana concerning the number of people from whom the witness must have heard reports of past acts of the accused for the reports to be admissible. In only two cases has this issue been considered. Both were decided by Ten-

33. V WIGMORE, *supra* note 1, at § 1615.

34. Hamilton v. State, 129 Fla. 219, 176 So. 89 (1937); State v. Jackson, 373 S.W.2d 4 (Mo. 1963); Jordan v. State, 163 Tex. Crim. 287, 290 S.W.2d 666 (1956).

In light of modern living conditions which often cause a person to be better known in his place of employment or recreation than in the locality of his residence, this may well be the better view. Indeed, MCCORMICK takes this position. MCCORMICK, *supra* note 1, at § 191.

35. *Id.*

36. Hamilton v. State, 129 Fla. 219, 176 So. 89 (1937).

37. Randall v. State, 132 Ind. 539, 32 N.E. 305 (1905); McDonel v. State, 90 Ind. 320 (1883); Rawles v. State, 56 Ind. 492 (1863); Beauchamp v. State, 6 Blackf. 299 (1844).

38. Bryant v. State, 205 Ind. 372, 186 N.E. 322 (1933).

39. Randall v. State, 132 Ind. 539, 32 N.E. 305 (1892).

Testimony was admitted concerning a witness who had attested to the defendant's good character having heard that the accused had been arrested in another county on a charge of malicious trespass.

nessee courts. The earlier of the two[40] held that "the witness must have heard a sufficient number of persons speak . . . that he believes that he knows what the majority would say if called on to speak."[41] The latter case found that the number of persons from whom the witness heard reports is immaterial.[42]

Indiana, along with the great majority of jurisdictions, has not ruled directly on this question. From the language of the Indiana decisions it may be inferred that so long as the defendant's character witness has actually heard a rumor or report of a former misdeed perpetrated by the accused, his testimony as to that rumor or report is admissible on cross-examination.[43] There would seem to be no minimum requirement regarding the number of rumors or reports heard or the number of persons from whom a rumor or report was heard before cross-examination thereto is admissible.

3.) Newspaper Articles and Other Published Reports

Another issue with which Indiana has not specifically dealt is whether a witness who has attested to the defendant's good character may be cross-examined as to his knowledge of newspaper articles or other published reports of the accused's past misdeeds. In other jurisdictions at least one court has excluded this kind of evidence on the ground that what is printed in the media is not indicative of reputation.[44]

The traditional approach allows the witness to be cross-examined concerning such printed reports,[45] and this appears to be the preferable view. As the court said in *United States v. Blane*,[46] "Newspaper accounts may be as much a part of a community's thinking regarding the reputation of an individual as rumors and suspicions that circulate orally among his neighbors and associates."

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40. Poole v. State, 2 Baxt. 288 (Tenn. 1872).

41. *Id.* at 294.

42. Tucker v. State, 149 Tenn. 98, 257 S.W. 850 (1923).

43. "One of the witnesses testifying to the good character of appellant . . . was asked . . . if he had ever heard the people talking about appellant . . . stealing chickens . . . ." Shears v. State, 147 Ind. 51, 53, 46 N.E. 331, 332 (1899).

"The [character] witness was then cross-examined at considerable length, and, among other things, testified to having heard of the arrest of the accused . . . ." Randall v. State, 132 Ind. 539, 541, 32 N.E. 305, 306 (1892).

44. Commonwealth v. Colandro, 231 Pa. 343, 80 A. 571 (1911).

45. United States v. Blane, 375 F.2d 249 (6th Cir. 1967); People v. Stevens, 5 Cal. 2d 92, 53 P.2d 133 (1935); People v. Kuss, 32 N.Y.2d 436, 299 N.E.2d 249, 345 N.Y.S.2d 1002, *cert. denied*, 415 U.S. 913 (1973).

46. United States v. Blane, 357 F.2d 249, 251 (6th Cir. 1967).

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The reasoning in *Blane* seems logical. It is true that the act reported in the press may have been committed at a place other than the defendant's neighborhood. However, cross-examination as to reports of such geographically remote misconduct is permissible as long as the report is read in the community in which the accused lives.[47] Likewise, testimony regarding media reports of the defendant's past acts ought not be excluded because the reports were printed or broadcast at a place distant from the home of the accused. The rule is that the reputation which may be attested to is that prevailing in the community in which the defendant resides.[48] As the *Blane* court pointed out, media reports read or heard in this area are bound to indicate the reputation of the accused. They should therefore be admissible on cross-examination to refute the good reputation to which the accused's witness has attested.

Extent and Scope of Cross-Examination

Trial judges in Indiana[49] and throughout the United States[50] are vested with broad discretion in regard to permitting a prosecutor to cross-examine character witnesses as to rumors or reports of particular past misdeeds of the defendant. While the scope of such cross-examination is largely dependent upon the judge's discretion,[51] certain general rules have evolved limiting what the state may ask the defendant's character witnesses. Abuse of discretion by the trial court is a ground for reversal.[52]

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47. *See* note 39 *supra*.

48. *See* notes 33 through 37 *supra*.

49. Baehner v. State, 25 Ind. App. 597, 58 N.E. 741 (1900) (recognized).

50. Michelson v. United States, 335 U.S. 469 (1948) (recognized); Romez v. State, 225 Ala. 24, 141 So. 907 (1932); People v. Burwell, 44 Cal. 2d 16, 279 P.2d 744, *cert. denied*, 349 U.S. 936 (1955); People v. Futamata, 140 Colo. 233, 343 P.2d 1058 (1959); State v. Carroll, 188 S.W.2d 22 (Mo. 1945) (recognized); State v. Steenson, 35 N.J. Super. 103, 113 A.2d 203 (1955) (recognized); Taylor v. State, 96 Okla. Crim. 1, 247 P.2d 749 (1952); State v. Linn, 179 Or. 499, 173 P.2d 305 (1946); State v. Lyles, 210 S.C. 87, 41 S.E.2d 624 (1947).

51. United States v. Silverman, 430 F.2d 106 (2d Cir. 1970); Ellis v. State, 39 Ala. App. 325, 100 So. 2d 725, *cert. denied*, 100 So. 2d 732 (1964); State v. Hild, 240 Iowa 119, 39 N.W.2d 139 (1949); State v. Wilson, 248 S.W.2d 857 (Mo. 1952); State v. Newte, 188 Neb. 412, 197 N.W.2d 403 (1972); State v. Williams, 16 N.J. Super. 372, 84 A.2d 756 (1951) (recognized); People v. Clemente, 285 App. Div. 258, 136 N.Y.S.2d 779 (1954); Taylor v. State, 96 Okla. Crim. 1, 247 P.2d 749 (1952); State v. Shull, 131 Or. 224, 282 P.2d 237 (1929); Zirkle v. Commonwealth, 189 Va. 862, 55 S.E.2d 24 (1949) (recognized).

Accord, Randall v. State, 132 Ind. 539, 32 N.E. 305 (1892).

52. United States v. Polack, 442 F.2d 446, *cert. denied*, 403 U.S. 931 (1971) (recognized); Jeel v. State, 53 Okla. Crim. 200, 11 P.2d 197 (1932).

Indiana recognized this rule in Wachstetter v. State, 99 Ind. 290 (1884).

1.) Details of Defendant's Past Misdeeds Generally Not Admissible

The courts of other states have tended to disallow the introduction of evidence describing the details of incidents of the accused's past misconduct during the cross-examination of the defendant's character witnesses.[53] Hopefully, this would be the position taken by the Indiana courts. The only reason the prosecution is allowed to question the character witnesses as to rumors or reports of the accused's misconduct is to test his credibility and his knowledge of the defendant's reputation. Evidence to the effect that the witness had heard that the asccused had committed some reprehensible act should be enough in itself to shake the credibility of the witness.

Assume that in a rape case a witness who has attested to the good reputation of the defendant for "peace and quietude" admitted on cross-examination that he had heard reports of the accused having been convicted of rape at an earlier date. This testimony would surely cause the jury to doubt the value of the witness's estimate of the defendant's reputation. Additional questions regarding particularly gruesome or disgusting details of the previous crime would therefore not be needed to discredit the witness, and could greatly prejudice the jurors against the defendant. Testimony as to the particulars surrounding the accused's past misdeeds may raise confusing side issues which do not pertain in any way to the case at bar. Because such evidence is unnecessary and fraught with danger, it should be excluded.

2.) Nature of Misdeeds: Character Trait Involved

A traditional rule in Indiana and in many other juridications has been that evidence introduced for the purpose of illustrating the good character of the accused must relate to the nature of the charge against him.[54] The purpose of this rule is to confine the jury's

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Although *Wachstetter* deals with the cross-examination of witnesses who attested to the good character of the defendant's character witness, it is logical that the reasoning would also apply to cross-examination of the accused's character witness.

53. State v. Carroll, 138 S.W.2d 22 (Mo. 1945); Magee v. State, 198 Miss. 642, 22 So. 2d 245 (1945); State v. Williams, 16 N.J. Super. 372, 84 A.2d 756 (1951) (recognized); Schroeder v. State, 142 Tex. Crim. 443, 154 S.W.2d 480 (1941).

54. "The rule is that the character a defendant is permitted to introduce in evidence is the character involved in the charge." Baehner v. State, 25 Ind. App. 597, 599, 58 N.E. 741, 742 (1900). The rule was applied in early English cases such as Captain Kidd's Trial, 14 How. St. Tr. 146 (1701); and Dover's Trial, 6 How. St. Tr. 539 (1663). It is still in effect in modern decisions. State v. Blake, 157 Conn. 99, 249 A.2d 232 (1968); Hallenger v. State, 14 Md. App. 43, 286 A.2d 213 (1974).

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attention to the basic issue of guilt or innocence and avoid possible excursions into collateral matters.[55]

It follows that in order to avoid prejudice,[56] rumors or reports of specific instances of misconduct about which the defendant's character witnesses are cross-examined the evidence must involve the character trait which the accused "put in issue" on direct, i.e., the trait relevant to the commission of the crime for which he is being tried.[57] Thus, in a Kentucky case in which a witness had attested to the good reputation of the accused for "peace and quietude," it was held to be reversible error to admit testimony on cross-examination regarding the defendant's reputation for having engaged in the illegal traffic of intoxicating liquors.[58]

Past Indiana cases indicate an alignment with the majority rule. That is to say the specific past acts about which the accused's character witnesses may be questioned must relate to the trait involved in the crime with which he is charged.[59] However, language used in *McDonel v. State*[60] indicates that if the defendant was inadvertently allowed to introduce testimony as to his good reputation for a character trait not involved in the commission of the crime for which he is being tried, the state would likely be allowed to cross-examine the character witness about rumors or reports of past misdeeds involving the character trait attested to. Accoring to the *McDonel* court "when a witness testifies that such reputation is good with respect to some quality or disposition, it is competent to show by its cross-examination that he has heard reports at variance with the reputation he has given the party for the purpose of impeaching the witness' credibility."[61]

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55. State v. Steenson, 35 N.J. Super. 103, 107, 113 A.2d 203, 205 (1955).

56. People v. Tucker, 164 Cal. App. 2d 624, 331 P.2d 160 (1958).

57. Aaron v. United States, 397 F.2d 584 (5th Cir. 1968); Scott v. State, 34 Ala. App. 18, 37 So. 2d 670, *cert. denied*, 251 Ala. 440, 37 So. 2d 674 (1948) (recognized); State v. Ferro, 108 Ariz. 268, 496 P.2d 129 (1972); People v. Tucker, 164 Cal. App. 2d 624, 331 P.2d 160 (1958); State v. Bryant, 242 Iowa 382, 44 N.W.2d 690 (1950); Smith v. Commonwealth, 206 Ky. 728, 268 S.W. 328 (1925); Magee v. State, 198 Miss. 642, 22 So. 2d 245 (1945) (recognized); State v. Wilson, 34 S.W.2d 98 (Mo. 1930) (recognized); State v. Steenson, 35 N.J. Super. 103, 112 A.2d 203 (1955); Commonwealth v. Hurt, 163 Pa. Super. 232, 60 A.2d 828 (1948); State v. Lyles, 210 S.C. 87, 41 S.E.2d 625 (1947); Kennedy v. State, 150 Tex. Crim. 215, 200 S.W.2d 400 (1947) (recognized).

58. Albertson v. Commonwealth, 312 Ky. 68, 226 S.W.2d 523 (1950).

59. This rule is recognized by the court in McDonel v. State, 90 Ind. 320 (1883). *See also* note 36 *supra*.

60. McDonel v. State, 90 Ind. 329, 325 (1883).

61. *Id.*

3.) Former Convictions, Prosecutions, Arrests

Under the rule that allows cross-examination of character witnesses concerning rumors or reports of the defendant's particular past misdeeds, inquiry as to reports of prior arrest,[62] prosecutions,[63] and convictions[64] of the accused is generally permissible. Logically the previous criminal proceeding must relate to the character trait now in issue. *Shears v. State*,[65] illustrates that this is the rule in Indiana. In *Shears*, a witness who had attested to the good reputation of the accused was allowed to testify on cross-examination that he had heard that the defendant had previously been arrested and convicted for malicious trespass.

A recent case which is indicative of Indiana's positon on this matter is *Jordan v. State*.[66] The *Jordan* court held that it was proper to question a character witness with regard to a supposed arrest and conviction of the accused for assault and battery.[67] While the question in *Jordan* was posed in hypothetical form and the answer

62. Michelson v. United States, 335 U.S. 469 (1948); Johnson v. State, 34 Ala. App. 623, 43 So. 2d 424, *cert. denied*, 253 Ala. 194, 43 So. 2d 431 (1949); People v. Logan, 41 Cal. 2d 279, 260 P.2d 20 (1953); De Jarnette v. State, ___ Del. ___, 338 A.2d 117 (1975); Bryant v. State, 236 Ga. 495, 224 S.E.2d 369 (1976); State v. McDonald, 57 Kan. 537, 46 P. 966 (1896); Hendron v. Commonwealth, 487 S.W.2d 275 (Ky. 1972); State v. Banks, ___ La. ___, 307 So. 2d 594 (1975); Comi v. State, 202 Md. 472, 97 A.2d 129, *cert. denied*, 346 U.S. 898 (1953); State v. Carroll, 188 S.W.2d 22 (Mo. 1945); State v. Steenson, 35 N.J. Super. 103, 113 A.2d 203 (1955) (recognized); State v. Polkamus, 62 Ohio L. Abs. 113, 106 N.E.2d 646 (1951); Serggo v. State, 509 P.2d 1374 (Okla. Crim. 1973); Commonwealth v. Masline, 155 Pa. Super. 419, 38 A.2d 403 (1944); Love v. State, ___ Tex. Crim. ___, 533 S.W.2d 6 (1976).

63. Lawrence v. United States, 56 F.2d 555 (7th Cir.), *cert. denied*, 286 U.S. 565 (1932); Driggers v. State, 36 Ala. App. 637, 61 So. 2d 865 (1952); Ellison v. Commonwealth, 272 Ky. 364, 114 S.W.2d 130 (1937); Avery v. State, 15 Md. App. 520, 292 A.2d 728 (1972); Moore v. State, 142 Tex. Crim. 99, 151 S.W.2d 595 (1941).

64. United States v. Rudolph, 403 F.2d 805 (6th Cir. 1968); Flournoy v. State, 34 Ala. App. 23, 37 So. 2d 218 (1948), *cert. denied*, 251 Ala. 285, 37 So. 2d 323; Brindisi v. People, 76 Colo. 244, 230 P. 797 (1924); State v. Brown, 53 Idaho 476, 26 P.2d 131 (1933) (recognized); State v. Kirtdall, 206 Kan. 208, 478 P.2d 188 (1970); Brazles v. Commonwealth, 267 S.W.2d (Ky. 1954); Taylor v. State, 28 Md. App. 560, 346 A.2d 718 (1975); People v. Basemore, 36 Mich. App. 256, 193 N.W.2d 335 (1971); State v. McCoy, 458 S.W.2d 356 (Mo. 1970); People v. Clemente, 285 App. Div. 258, 136 N.Y.S.2d 779 (1954); State v. Danser, 116 N.J.L. 487, 184 A. 800 (1936); Ellis v. State, 54 Okla. Crim. 295, 19 P.2d 972 (1933); State v. Franhofer, 134 Or. 378, 293 P. 921 (1930); Commonwealth v. Amos, 445 Pa. 927, 284 A.2d 748 (1971); Hines v. State, 515 S.W.2d 670 (Tex. Crim. 1974).

65. Shears v. State, 147 Ind. 51, 46 N.E. 331 (1899).

66. Jordan v. State, 232 Ind. 265, 110 N.E.2d 751 (1953).

67. "Let us assume that the defendant was arrested and convicted in 1945 for assault and battery, would that change your opinion as to his reputation for peace and quietude?" Jordan v. State, 232 Ind. 265, 266, 110 N.E.2d 751, 752 (1953).

did not depend upon whether the witness had heard rumors or reports, the indication is that the court would follow *Shears* in permitting cross-examination of character witnesses concerning rumors or reports of prior arrests, prosecutions, and convictions.

A related issue is whether testimony of former commission of similar misdeeds is admissible. The defendant may have perpetrated an act of misconduct in the past which was the same as, or similar to, the crime for which he is presently on trial. This past misdeed certainly involves the same character trait as the crime with which he is charged. Rumors or reports of the prior misconduct will therefore be admissible on cross-examination of the defendant's character witness.[68]

A prior Indiana case provides a good example.[69] The defendant was charged with larceny. The court allowed the prosecutor to cross-examine a witness who had attested to the reputation of the accused for "honesty and integrity" in regard to whether he had heard that on previous occasions the defendant had stolen chickens and robbed a spring house.

4.) Time of Other Misdeeds or Reports Thereof

The admissibility of testimony involving a character witness' knowledge of rumors or reports of the defendant's past misdeeds may be affected by issues involving time. Specifically, cross-examination as to a rumored or reported act may be excluded if a) the act was committed at a date very remote in time from the perpetration of the crime charged, b) the act occurred after the misdeed for which the defendant is being tried, or c) the rumor or report was heard after the commission of the crime charged. A discussion of the rationale of these general rules along with a statement of Indiana's position with regard to them follows.

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68. Spallito v. United States, 39 F.2d 782 (8th Cir. 1930); Sanders v. State, 243 Ala. 691, 11 So. 2d 740 (1943); People v. Perry, 144 Cal. 748, 78 P. 284 (1904); Carnley v. State, 143 Fla. 756, 197 So. 441 (1940); Rucker v. State, 135 Ga. 391, 69 S.E. 541 (1910); State v. Arnold, 12 Iowa 479 (1861); State v. McDonald, 57 Kan. 537, 46 P. 966 (1896); Wright v. Commonwealth, 267 Ky. 441, 102 S.W.2d 376 (1937); State v. Green, 127 La. 830, 54 So. 45 (1911); Comi v. State, 202 Md. 472, 97 A.2d 129, *cert. denied*, 346 U.S. 898 (1953); Smith v. State, 112 Miss. 802, 73 So. 793 (1916), *overruled on other grounds* in Ladnier v. State, 155 Miss. 348, 124 So. 432 (1929); State v. Carson, 239 S.W.2d 532 (Mo. App. 1951); State v. Boyle, 49 Nev. 386, 248 P. 48 (1926); People v. Laudiero, 192 N.Y. 304, 85 N.E. 132 (1908); Taylor v. State, 96 Okla. Crim. 1, 247 P.2d 749 (1952); State v. Linn, 179 Or. 499, 173 P.2d 305 (1946); Commonwealth v. Zimmerman, 143 Pa. Super. 331, 17 A.2d 714 (1941); Farland v. State, 149 Tex. Crim. 516, 196 S.W.2d 829 (1946); State v. Robinson, 24 Wash. 2d 909, 167 P.2d 986 (1946).

69. Shears v. State, 147 Ind. 51, 46 N.E. 331 (1897).

a.) Remoteness

In *State v. Willard*,[70] the Missouri Supreme Court held that the trial court had erred in permitting cross-examination of a character witness regarding a crime allegedly committed by the defendant fourteen or fifteen years before the date of the trial. The court reasoned that witnesses who have attested to the good character of the accused should not be cross-examined about past misdeeds of the defendant so remote in time as to furnish, by their very remoteness, strong inference of the defendant's reformation. Other courts have also held that the questioning of the defendant's character witnesses with regard to misdeeds perpetrated by the accused in the distant past is not permissible.[71] However, in many cases the trial court has been found to have properly exercised its discretion in admitting cross-examination as to rumored instances of misconduct which took place as many as twenty-seven years prior to the commission of the crime which the defendant was charged.[72]

The Indiana courts have not directly ruled on this point. In the analogous area of impeachment of witnesses by the introduction of evidence concerning the witnesses' reputation for character, Indiana courts have consistently held that such reputation evidence must relate to the time at which the witness sought to be impeached is examined.[73] It may therefore be inferred that past misdeeds of the defendant which occurred at a very remote date should not be admissible.[74]

It is difficult to determine just how long ago an act must have occurred to render it inadmissible. It is clear from two Indiana cases that the misdeed would have to have been accomplished at a date relatively remote in time from the commission of the crime charged.

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70. State v. Willard, 192 S.W. 437 (Mo. 1917).

71. Amos v. State, 209 Ark. 55, 189 S.W.2d 611 (1945); Nichols v. State, 312 Ky. 171, 226 S.W.2d 796 (1950); State v. Carroll, 188 S.W.2d 22 (Mo. 1945); Stinson v. State, 120 Tex. Crim. 456, 49 S.W.2d 468 (1932) (recognized); Jenkins v. State, 146 Tex. Crim. 364, 175 S.W.2d 83 (1943) (recognized).

72. Michelson v. United States, 335 U.S. 469 (1948).

73. Pennsylvania R. Co. v. Ribkee, 92 Ind. App. 611, 174 N.E. 427 (1930); Klintz v. State, 71 Ind. App. 225, 124 N.E. 739 (1919); Rawles v. State, 56 Ind. 433 (1877); City of Aurora v. Cobb, 21 Ind. 492 (1863); Roger v. Lewis, 19 Ind. 405 (1862).

74. However, it should be noted that in impeaching a character witness by introduction of evidence of the witness's conviction of a crime, the question of whether the evidence can be excluded as too remote is apparently within the discretion of the trial court. Way v. State, 224 Ind. 280, 66 N.E.2d 608 (1946); Denny v. State, 190 Ind. 76, 129 N.E. 308 (1921).

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In *Jordan v. State*,[75] a witness who had attested to the defendant's good character was properly cross-examined as to an alleged arrest and conviction of the accused which apparently took place seven or eight years prior to the commission of the crime for which the defendant was on trial.[76] In the more recent case of *Lineback v. State*,[77] the court allowed the prosecutor to ask a character witness about the defendant's having been declared an "incorrigible juvenile" at a date eight years prior to the perpetration of the crime charged.

b.) Exclusion of Reports of Acts Committed After the Crime Charged

A further limitation involving the time element placed upon the introduction of character evidence is the general rule forbidding the defendant's use of testimony concerning his reputation at a time after the commission of the crime for which he is on trial.[78] The decision in *In Re Darrow* demonstrates Indiana's adherence to the rule.[79]

Darrow involved a disbarment proceeding. The attorney/defendant called a witness who testified on direct examination as to the accused's reputation for good moral character, his character for honesty and his professional character. It was held that this testimony was properly excluded because it extended to a time beyond the occurrence of the incident for which the disbarment proceeding was initiated. The rule as stated in *Darrow* and as followed in subsequent Indiana cases is:

> [W]hen a party to a criminal or other case is entitled to prove his good character, it is limited to the trait of character involved in the crime charged. But such evidence must be limited to proof of such person's

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75. Jordan v. State, 232 Ind. 265, 110 N.E.2d 752 (1953).

76. The matter inquired into allegedly occurred in 1945. The Supreme Court of Indiana heard the case in 1953. Jordan v. State, 232 Ind. 265, 110 N.E.2d 752 (1953).

77. Lineback v. State, 260 Ind. 503, 301 N.E.2d 636, *aff'd on rehearing*, 260 Ind. 503, 301 N.E.2d 636 (1973), *cert. denied*, 415 U.S. 929 (1974).

78. It should be noted that WIGMORE reasons that since a defendant's reputation for character will probably have suffered as a result of his being charged with a criminal act, it would not be harmful to allow him to introduce evidence of his good reputation *post litem motam*. The danger lies in allowing the prosecution to introduce testimony as to the defendant's bad reputation at a time after the perpetration of the crime charged. WIGMORE concedes that the general rule excludes evidence concerning either the good or the bad reputation of the accused *post litem motam*. V WIGMORE, *supra* note 1, at § 1618 (Chadbourn rev. 1974).

79. In Re Darrow, 175 Ind. 44, 92 N.E. 369 (1910).

character as to such trait as it existed before the alleged offense or "ante litum moturn."[80]

Other jurisdictions hold that the defendant's character witness may attest only to the reputation of the defendant prior to the perpetration of the crime whether the testimony is the result of direct or cross-examination. Thus, the witness may not be asked about rumors or reports of particular misdeeds of the accused which occurred after the act for which he is on trial.[81] The rationale is that the reputation for character with which the court is concerned is the reputation of the defendant at the time the offence he is charged with was committed. Since the reputation of the accused is bound to suffer as a result of his being placed on trial, testimony concerning rumors or reports of misconduct which occurred after the offense with which the defendant is charged would be prejudicial. Such evidence would be likely to distort the jury's picture of the defendant's reputation.[82]

Indiana does not allow the accused to introduce evidence of his good reputation for character as it existed at a time after the commission of the crime for which he is being tried.[83] In light of this rule, if the prosecution were permitted to inquire as to misdeeds of the defendant reported to have been perpetrated after the act with which the accused is charged, the state would be given an unfair advantage. It is undoubtedly desirable to disallow this unjust advantage and guard against the danger of undue prejudice as discussed above. Therefore, it may be reasonably inferred that Indiana courts would not permit cross-examination of character witnesses concerning misdeeds done by the defendant after the commission of the crime with which he is charged.

The same reasoning can be applied to the question of whether rumors or reports of the defendant's misconduct which were heard by a character witness subsequent to the commission of the crime

80. Keener v. State, 89 Ind. App. 629, 167 N.E. 549 (1929); Wolf v. State, 89 Ind. App. 463, 166 N.E. 883 (1929).

81. Anderson v. State, 44 Ala. App. 388, 210 So. 2d 436 (1968); State v. Powell, 172 Iowa 208, 154 N.W. 488 (1915); State v. Rever, 203 La. 330, 14 So. 2d 14 (1943); People v. Hill, 258 Mich. 79, 241 N.W. 873 (1932); White v. State, ___ Miss. ___, 290 So. 2d 616 (1974); State v. Carson, 239 S.W.2d 532 (Mo. App. 1951); State v. Steenson, 35 N.J. Super. 103, 113 A.2d 203 (1955); Henderson v. State, 59 Okla. Crim. 86, 56 P.2d 915 (1936); Commonwealth v. Beck, 122 Pa. Super. 123, 184 A. 761 (1936) (recognized); Tucker v. State, 149 Tenn. 98, 257 S.W. 850 (1924); Wharton v. State, 156 Tex. Crim. 326, 248 S.W.2d 739 (1952).

82. State v. Rowell, 172 Iowa 208, 154 N.W. 488 (1915).

83. *See* notes 78 through 80 *supra*.

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charged are the subject of proper cross-examination. Such rumors are not relevant to the reputation of the defendant at the time the crime was perpetrated. Moreover, the reputation of the accused will probably be less desirable as the result of his having been charged with a criminal act. Therefore, testimony as to rumors or reports heard after the perpetration of the crime charged should not be permitted.[84] Hopefully, Indiana courts would agree.

5.) Hypothetical Questions

The issue of whether hypothetical questions (assuming the accused to be guilty of some prior misconduct when there is no evidence thereof) may be posed to the defendant's character witnesses upon cross-examination did not arise in Indiana until 1953. While in some states such questions are not permitted,[85] it would seem that they are admissible in Indiana.

In *Jordan v. State*,[86] the accused, who was charged with murder, called a witness who attested to the defendant's good character. On cross-examination the prosecutor was permitted to ask this witness three hypothetical questions over the objections of defense counsel. The first of these questions asked "let us assume if it should be a fact, that the defendant has been arrested and convicted several times for other crimes, would the fact change your opinion?"[87] The other two questions, while requiring different assumptions, were posed in the same form.[88] Nothing in the

84. Cases following this rule: Hallman v. State, 35 Ala. App. 534, 50 So. 2d 6 (1951); People v. Lagie, 321 Mich. 303, 32 N.W.2d 458 (1948); State v. Carroll, 188 S.W.2d 22 (Mo. 1945); State v. Steenson, 35 N.J. Super. 103, 113 A.2d 203 (1955) (recognized); State v. Holly, 155 N.C. 485, 71 S.E. 450 (1911); Steyh v. State, 58 Okla. Crim. 258, 52 P.2d 121 (1935); Commonwealth v. Becker, 326 Pa. 105, 191 A. 351 (1937); Tucker v. State, 149 Tenn. 98, 257 S.W. 850 (1954); Brown v. State, 120 Tex. Crim. 95, 47 S.W.2d 290 (1932).

85. Pittman v. United States, 42 F.2d 293 (8th Cir. 1930); Mullins v. State, 31 Ala. App. 571, 19 So. 2d 845 (1944); People v. Fowzer, 127 Cal. App. 2d 742, 274 P.2d 471 (1954); State v. Keul, 233 Iowa 852, 241 N.W. 873 (1932); State v. Williams, 16 N.J. Super. 372, 84 A.2d 746 (1951).

86. Jordan v. State, 232 Ind. 265, 110 N.E.2d 751 (1953).

87. 232 Ind. at 268, 110 N.E.2d at 752.

88.

> 2. Let us assume that the defendant was arrested and convicted in 1945 for assault and battery, would that change your opinion as to his reputation for peace and quietude?
>
> 3. Let us assume that the defendant in March, 1950, was arrested and convicted for being drunk in a public place, and in September, 1950, was arrested and convicted of a violation of the Fire Arms Act, would that change your opinion as to his reputation for peace and quietude?

Id.

language of the opinion indicates the actual occurrence of these arrests and convictions. Admission of this testimony was held not to constitute error.

Where evidence as to prior misconduct of the accused has already been presented, it would not seem to be particularly prejudicial to the defendant to allow hypothetical questions assuming that same misconduct. The jury has already heard about the past acts and mere repetition is not likely to greatly alter their opinions. However, the practice of allowing the state to ask the defendant's character witnesses hypothetical questions concerning supposed former misdeeds of the accused, the occurence of which is unsupported by other evidence, seems dubious at best.

It it true that when inquiring about former reprehensible behavior on the part of the accused the prosecutor must in good faith reasonably believe that the misconduct actually happened.[89] But the primary danger of the hypothetical lies not in the possibility that the misdeeds were never perpetrated by the defendant. The problem is with the form of the question. If a witness is asked whether he has heard reports of a certain misdeed of the accused of which he is not in fact aware, he can answer in the negative. But when asked a question such as "Let us assume that in 1967, the defendant was convicted of murder, would that change your opinion as to his reputation for peace and quietude?" the witness is bound to answer that it would.

The whole sequence of question and answer seems cleverly designed to give the jury a bad impression of the defendant's reputation despite the fact that the witness being cross-examined may be aware of nothing unsavory in the past conduct of the accused. Although a hypothetical question will not change the reputation of the defendant in the eyes of the witness, it may well paint a sordid picture for the jury. Therefore, it appears logical to exclude this type of question as unduly prejudicial.

As has been shown, Indiana aligns with the majority in allowing a character witness for the accused to be cross-examined regarding rumors or reports of the defendant's past misdeeds. An exception is the undesirable position on hypothetical questions which was discussed above. It is also important to consider whether the witness may be cross-examined as to his actual knowledge of past criminal acts of the accused.

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89. *See* notes 120 through 124 *infra.*

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WITNESS'S KNOWLEDGE OF THE DEFENDANT'S MISDEEDS AS FACT: "HAVE YOU HEARD?" AS OPPOSED TO "DO YOU KNOW?"

A witness called to attest to the good character of the defendant may not testify as to his firsthand knowledge of the accused's behavior, but only as to the defendant's reputation.[90] On cross-examination the state may attempt to refute this testimony by asking the witness about rumors or reports of specific past acts of misconduct by the accused.[91] The danger of prejudice arising from cross-examination of character witnesses concerning the accused's past misdeeds is widely recognized.[92] Thus, the only reason for which it is allowed is to test the witnesses' credibility and to plumb the true depth of their knowledge of the defendant's reputation for character.[93]

Because of a general desire on the part of courts to limit the danger of biasing the jury against the accused, a character witness may not, in many jurisdictions, be cross-examined as to his personal knowledge of specific past acts of misconduct perpetrated by the defendant.[94] Nor may the prosecutor pose questions to the witness in terms that infer actual knowledge of a past misdeed of the accused.[95] Therefore, it is usually required that when the prosecutor cross-examines a character witness as to rumors or reports of past misconduct on the part of the accused, the question must be posed in the form of "Have you heard?" as opposed to "Do you know?"[96]

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90. *See* note 10 *supra.*

91. *See* notes 19 through 21 *supra.*

92. *See* note 25 *supra.*

93. *See* notes 22 and 23 *supra.*

94. Michelson v. United States, 335 U.S. 469 (1948); Vinsaw v. State, 247 Ala. 22, 22 So. 2d 344 (1945); People v. Grimes, 148 Cal. App. 2d 747, 307 P.2d 932 (1957); State v. Keul, 233 Iowa 852, 5 N.W.2d 849 (1942); Lain v. Commonwealth, 287 Ky. 134, 151 S.W.2d 1055 (1941); Comi v. State, 202 Md. 472, 97 A.2d 128, *cert. denied*, 346 U.S. 898 (1953); Magee v. State, 198 Miss. 642, 22 So. 2d 245 (1945); State v. Carroll, 188 S.W.2d 22 (Mo. 1945) (recognized as a general rule); State v. Steenson, 35 N.J. Super. 103, 113 A.2d 203 (1955); People v. Fay, 270 App. Div. 261, 59 N.Y.S.2d 127, *aff'd*, 296 N.Y. 510, 68 N.E.2d 453, *aff'd*, 332 U.S. 261 (1945); Commonwealth v. Hurt, 163 Pa. Super. 232, 68 A.2d 828 (1948); Adams v. State, 158 Tex. Crim. 306, 255 S.W.2d 512 (1953).

95. Roberson v. United States, 237 F.2d 536 (5th Cir. 1956); Patrick v. State, 39 Ala. App. 240, 97 So. 2d 589 (1957); Spinks v. State, 92 Ga. App. 878, 90 S.E.2d 590 (1955); People v. Hermens, 5 Ill. 2d 277, 125 N.E.2d 500 (1955); State v. Wheelock, 218 Iowa 178, 254 N.W. 313 (1934) (recognized); People v. Hill, 258 Mich. 79, 241 N.W. 873 (1932) (recognized); State v. Gress, 250 Minn. 337, 84 N.W.2d 616 (1957); Magee v. State, 198 Miss. 642, 22 So. 2d 245 (1945); Commonwealth v. Hurt, 163 Pa. Super. 232, 60 A.2d 828 (1948); Pitcock v. State, 168 Tex. Crim. 204, 324 S.W.2d 855 (1959).

96. Kasper v. United States, 225 F.2d 275 (9th Cir. 1955); Jarrell v. State, 35 Ala. App. 256, 50 So. 2d 767, *rev'd on other grounds*, 255 Ala. 128, 50 So. 2d 774, *aff'd*,

The exceptions to this rule involve those past acts of the defendant which are of a public nature. These may include arrests, indictments and convictions. It seems that where this kind of misconduct is involved the defendant's character witness may be cross-examined as to his personal knowledge of the deed.[97] The reason is that the charges are public, have been reported in the community, and have affected the reputation of the accused. Therefore, the witness need not have heard them from another source.[98]

From the opinion of the court in *Jordon v. State*,[99] one may reasonably conclude that Indiana allows cross-examination of the defendant's character witnesses concerning their actual knowledge of past public indictments, arrests and convictions of the defendant. However, Indiana is not so clearly in accord with the broader rule that witnesses who have attested to the good character of the accused may not be cross-examined with regard to their personal knowledge of other past misdeeds of the defendant.

This was not always true. Historically, cross-examination of character witnesses as to their personal knowledge of instances of the defendant's prior misconduct was not permitted in Indiana. In *Redman v. State*,[100] an 1820 case, the admission of evidence concerning the accused's confinement in jail on a matter not involving the case at bar was held to constitute error.

While it is unclear from the opinion whether or not this evidence came in on cross-examination, the *Redman* case was cited in a later decision, *Engleman v. State*,[101] where the court found reversible error for the following reason: "On the trial the defendant called witnesses to his general good character. The state was permitted, on cross-examination, over the objection of the defendant, to prove particular acts of his bad conduct. This was wrong."[102]

255 Ala. 209, 50 So. 2d 776 (1949); People v. Neal, 85 Cal. App. 2d 765, 194 P.2d 57 (1948); State v. Wheelock, 218 Iowa 178, 254 N.W. 313 (1934); Laine v. Commonwealth, 287 Ky. 134, 151 S.W.2d 1055 (1941); Comi v. State, 202 Md. 472, 97 A.2d 129, *cert. denied*, 346 U.S. 898 (1953); Magee v. State, 198 Miss. 642, 22 So. 2d 248 (1945); State v. Carroll, 188 S.W.2d 22 (Mo. 1945) (recognized as a general rule); State v. Steenson, 35 N.J. Super. 103, 113 A.2d 203 (1955); Commonwealth v. Hurt, 163 Pa. Super. 232, 60 A.2d 828 (1948); Herriago v. State, 158 Tex. Crim. 362, 255 S.W.2d 516 (1953).

97. MCCORMICK, *supra* note 1, at § 191.

98. *Id.*

99. 232 Ind. at 268, 110 N.E.2d at 752 (Hypothetical questions were asked which required the witness to assume actual knowledge of past arrests and convictions of the defendant.).

100. Redman v. State, 1 Blackf. 96 (1820).

101. Engleman v. State, 2 Ind. 91 (1850).

102. 2 Ind. at 97.

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Throughout the remainder of the nineteenth century, only the "Have you heard?" form of question was allowed in cross-examining character witnesses as to past misdeeds of the accused.[103]

The turn of the century saw the beginning of a very gradual erosion in Indiana of the rule that character witnesses may not be cross-examined with regard to their personal knowledge of specific instances of the accused's past misconduct. The first element to disappear was the requirement of the "Have you heard?" form of question.

This occurred in the case of *Baehner v. State*,[104] which involved a tavern owner who was charged with the unlawful sale of liquor on Sunday. The prosecution was permitted to cross-examine a witness who had attested to the good reputation of the accused "as respects keeping a saloon" by asking whether the witness "had seen a slot machine in his [defendant's] room?"[105] Other witnesses were questioned as to whether they "knew" of a slot machine in the accused's saloon.[106]

Although the questions were asked in a form which indicates actual knowledge on the part of the witnesses, the appellate court held that admitting the testimony did not constitute abuse of discretion. In the opinion, the court used the following language:

> There was no reversible error in permitting these questions to be asked. They were competent upon the question of the witness's credibility, and appellant [defendant] was entitled, had he asked it, to an instruction that such evidence should be considered by the jury only as affecting the credibility of the character witness.[107]

Thus, the law in Indiana after *Baehner* was that while the "Have you heard?" form of question was not necessarily required on cross-examination of the defendant's character witness, past misdeeds of the defendant could be inquired about only for the purpose of discrediting the witness. Such testimony was not allowed for the purpose of proving the occurrence of the acts of misconduct about which the witness was cross-examined.

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103. Shears v. State, 147 Ind. 51, 46 N.E. 331 (1899); Randall v. State, 132 Ind. 539, 32 N.E. 395 (1892); McDonel v. State, 90 Ind. 320 (1883).

104. Baehner v. State, 25 Ind. App. 597, 58 N.E. 741 (1900).

105. 25 Ind. App. at 599, 58 N.E. at 742.

106. *Id.*

107. *Id.*

The effect of the rule was further weakened in *Jordon v. State*,[108] a 1953 Indiana case. In *Jordan* the supreme court stated that when a defendant tenders his good character in evidence, he invites disclosure of specific instances of his misconduct to detract from the testimony of his character witness "although the answers elicited may incidentally impute to him other guilt."[109] This language indicates that it is acceptable for the jury to hear testimony as to the actual occurrence of past misdeeds of the defendant which may "impute to him other guilt," so long as the testimony is introduced only for the purpose of testing the credibility of the defendant's character witness. However, this limitation was done away with in 1973 when the Indiana Supreme Court took the position that a witness who has attested to the good character of accused may be cross-examined as to his personal knowledge of former misdeeds perpetrated by the accused.

The trial court in *Lineback v. State*[110] permitted the prosecutor to pose the following question to the defendant's character witness: "Did you know that on the 23rd day of March, 1963, he [defendant] was found to be an incorrigible juvenile?"[111] Upon appeal, and again upon rehearing the supreme court found that the testimony was properly admitted.

The form in which the question was asked indicates personal knowledge on the part of the witness as to the occurrence of the event inquired about. Moreover, the incident of the defendant's having been declared an incorrigible juvenile does not fall within the exception which permits cross-examination of the defendant's character witnesses with regard to their personal knowledge of such past public misdeeds of the accused as arrests, indictments and convictions.[112] A character witness may be questioned as to his actual knowledge of this type of act only because it is a matter of public record and is therefore assumed to have affected the defendant's reputation in his home community.[113] This logic does not apply to the juvenile record of an accused. As the Indiana Supreme Court stated in the *Lineback* rehearing, "juvenile matters are secret and the results thereof are not open to public scrutiny as a general proposi-

108. 232 Ind. 265, 110 N.E.2d 751 (1953).

109. 232 Ind. at 269, 110 N.E.2d at 753.

110. 260 Ind. 503, 296 N.E.2d 788, *aff'd on rehearing*, 260 Ind. 503, 301 N.E.2d 636 (1973), *cert. denied*, 415 U.S. 929 (1974).

111. 260 Ind. at 508, 301 N.E.2d at 637.

112. *See* notes 97 through 99 *supra*.

113. *See* note 98 *supra*.

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tion . . . ."[114] Therefore, the defendant's being declared an "incorrigible juvenile" should not have been considered a public act.

Assuming this to be true, a probable legitimate interpretation of *Lineback* would be that there is no longer any requirement in Indiana for the use of the "Have you heard?" form in cross-examining the defendant's character witnesses. Furthermore, such witnesses' actual knowledge of instances of past misconduct appears to be within the scope of proper cross-examination. In the words of the *Lineback* court, when an accused introduces evidence of his reputation for good character, he "opens his entire life to scrutiny. . . ."[115]

There are, however, distinct disadvantages in permitting witnesses who have attested to the good character of the defendant to be cross-examined as to their knowledge of the accused's past misdeeds. It has been established that on direct examination of character witnesses the defendant may elicit only testimony as to his good reputation for character.[116] Appropriately, the only reason for which the state is allowed to cross-examine the defendant's character witnesses concerning specific past misdeeds is to test the witnesses' credibility and their knowledge of the reputation of the accused.[117] This purpose is not well served by the rule applied in *Lineback*.

Testimony as to the witness' specific knowledge of the defendant's past misconduct is not as illustrative of the witness' knowledge of the reputation of the accused as is testimony to the effect that the witness has heard rumors or reports of that misconduct. Actual knowledge of the act may lie with the witness alone and have no bearing on general reputation in the community. Rumors or reports of the misdeed have at least a limited circulation. It is by way of rumors or reports of the defendant's behavior that his reputation in the community is established. By the same token, the character witness' having heard rumors or reports of past acts of misconduct by the defendant is more indicative of the credibility of his testimony as to reputation than is his personal knowledge of the defendant's former misdeeds. A witness who has heard nothing but good in the community concerning the defendant's behavior can truthfully testify that the defendant's reputation is good, despite the witness' personal knowledge of the defendant's misconduct. On the other hand, it would seem very inconsistent for a witness to testify

114. 269 Ind. at 508, 301 N.E.2d at 637.
115. *Id.*
116. *See* note 10 *supra*.
117. *See* notes 22 and 23 *supra*.

on direct examination that the accused has a good reputation in the community and then to admit on cross-examination that he has heard rumors to the effect that the accused had at one time engaged in a reprehensible act.

Evidence of a character witness' actual knowledge of the defendant's past misdeeds therefore has comparatively little value. Nonetheless, it can be highly prejudicial to the accused for two primary reasons. First, since the defendant may not generally introduce evidence of the fact of any specific good deeds on his part,[118] he has no effective means of countering testimony as to his specific misconduct. Second, when a witness testifies that he has heard that the accused formerly engaged in some deplorable act, it is not certain that such conduct actually occurred. But if the witness is allowed to state that he knows that the defendant perpetrated some past misconduct, the fact of the deed is proven. Logically, the jury will more likely be biased against a person that they know was involved in previous misconduct than someone who is rumored to have formerly committed a misdeed.

In considering whether a character witness should be cross-examined concerning rumors or reports of particular past acts of the accused many courts have reasoned that the value of the testimony outweighs the danger of prejudice.[119] However, cross-examination as to a witness' actual knowledge of the defendant's past misdeeds has less probative value than that concerning rumors or reports, and it is more apt to bias the jurors. One must conclude that the danger of permitting testimony regarding specific knowledge of the accused's prior misconduct overshadows any small benefit to be gained by admitting such evidence. Therefore, it is the conlusion of this note that the rule of the majority of jurisdictions, which disallows cross-examination of the defendant's character witnesses as to their knowledge of specific instances of the defendant's misconduct, is the superior view.

GOOD FAITH OF THE CROSS-EXAMINER

It has generally been held that questions posed by the state in the cross-examination of a character witness must be asked in good

118. I WIGMORE, *supra* note 1, at § 195. *Accord,* Griffith v. State, 140 Ind. 163, 39 N.E. 440 (1895).

119. *See* cases collected in III A WIGMORE, *supra* note 1, at § 988 (Chadbourne rev. 1970).

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faith.[120] This good faith requirement is usually taken to mean that the prosecutor must have some reasonable basis for believing that the misdeeds about which he asks have actually occurred or are rumored to have occurred.[121]

The purpose behind requiring good faith questioning of character witnesses is to restrict the potential for abuse of cross-examination by unscrupulous attorneys.[122] There is a temptation to question the witness about past misdeeds which exist only in the fertile mind of the prosecutor. In the words of Justice Jackson, the prosecution should not be allowed to "ask a groundless question to waft an unwarranted inuendo into the jury box."[123]

Some courts and writers have urged that ensuring good faith in the cross-examination of the defendant's character witnesses should not be left entirely to the discretion of the trial court. They would require a prior showing by the prosecutor of the basis for his belief in the truth of the matter about which he proposes to cross-examine the witness.[124] Such showing would be made out of the presence of the jury.

120. United States v. Cummings, 468 F.2d 274 (1972); People v. Wrigley, 69 Cal. 2d 149, 443 P.2d 580, 70 Cal. Rptr. 1163 (1968); State v. Carter, 222 Iowa 474, 269 N.W. 445 (1936) (recognized); State v. Pierce, 208 Kan. 19, 490 P.2d 584 (1971); Girkey v. Commonwealth, 240 Ky. 389, 42 S.W.2d 516 (1931); State v. Carroll, 188 S.W.2d 22 (Mo. 1945); State v. Steenson, 35 N.J. Super. 103, 113 A.2d 203 (1955); People v. Alamo, 23 N.Y.2d 630, 246 N.E.2d 496, 298 N.Y.S.2d 681 (1969); Miller v. State, 418 P.2d 220 (Okla. Crim. 1966); State v. Bateliam, 94 Or. 524, 186 P. 5 (1919); State v. Lyles, 210 S.C. 87, 41 S.E.2d 625 (1947); Villariel v. State, 163 Tex. Crim. 654, 295 S.W.2d 222 (1956); Kanter v. Commonwealth, 171 Va. 524, 199 S.E. 477 (1938).

121. Michelson v. United States, 335 U.S. 469 (1948); People v. Gambrano, 33 Cal. App. 2d 200, 91 P.2d 221 (1939); State v. Rounds, 216 Iowa 131, 248 N.W. 500 (recognized); Taylor v. Commonwealth, 269 Ky. 656, 108 S.W.2d 645 (1937); State v. Hastings, 477 S.W.2d 108 (Mo. 1972); State v. Steenson, 35 N.J. Super. 103, 113 A.2d 203 (1955) (recognized); People v. Alamo 23 N.Y.2d 630, 246 N.E.2d 496, 298 N.Y.S.2d 681 (1969) (recognized); Lowrey v. State, 87 Okla. Crim. 313, 197 P.2d 637 (1948); State v. Lyles, 210 S.C. 87, 41 S.E.2d 625 (1947); Hart v. State, 447 S.W.2d 944 (Tex. Crim. 1969); Kanter v. State, 171 Va. 524, 199 S.E. 477 (1938) (recognized); State v. Cyr, 40 Wash. 2d 840, 246 P.2d 480 (recognized). In the Indiana civil case of Oliver v. Pate, 43 Ind. 132 (1873), the Supreme Court of Indiana found that no error had been committed by the trial court in rejecting a question asked on cross-examination of a character witness for one of the parties because it involved an alleged past misdeed of the party of which "[t]here was not even a charge that he was guilty, or that anybody in his neighborhood ever charged, suspected or believed he was." Because of the obvious danger of abuse in cross-examination of defendant's character witnesses, it is felt that Indiana would extend this idea to require good faith in criminal cases.

122. Michelson v. United States, 335 U.S. 469 (1948).

123. 335 U.S. 481.

124. 335 U.S. 469; United States v. West, 460 F.2d 374 (5th Cir. 1968); Gross v. United States, 394 F.2d 216 (8th Cir. 1968); People v. Rutamata, 140 Colo. 233, 343 P.2d

Indiana has not yet adopted this procedure, although it is clearly desirable. Under this system questions posed to character witnesses concerning past misdeeds of the defendant would be systematically screened by the trial court before they could be heard by the jury. Such a procedure could be relatively effective in weeding out questions as to non-existent rumors or reports of past misdeeds. Inquiries of this nature are undesirable because they have no probative value and their only effect can be to unfairly prejudice the jury.

CONCLUSION

Indiana is in accord with the majority of states in allowing cross-examination of character witnesses as to rumors or reports of past misdeeds of the accused. Certain limitations are placed upon such cross-examination, however. With regard to the source of the rumors or reports, it is clear that while some jurisdictions allow testimony concerning the defendant's reputation in any "probative community," Indiana follows the traditional rule and requires that the accused's reputation be that which prevails in his community of residence. There is no indication that Indiana courts require that rumors or reports about which a character witness is cross-examined be heard from a minimum number of persons. Moreover, the courts of Indiana could logically be expected to allow evidence of media reports, so long as they are read or heard in the community in which the defendant lives.

The extent and scope of cross-examination of witnesses who have attested to the good reputation of the accused is largely within the discretion of the trial court. However, certain general rules have been established in this area. For example, the argument could be made that testimony regarding specific details of rumored past misdeeds of the accused is without significant probative value and is highly prejudicial. Thus, some jurisdictions exclude this kind of evidence. Hopefully, Indiana will follow suit.

Indiana aligns with the majority of jurisdictions in limiting the scope of cross-examination of character witnesses to rumored or reported misdeeds involving the same character trait as the crime with which the defendant is charged. Under this rule inquiry into

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1058 (1959); State v. Hinton, 206 Kan. 500, 479 P.2d 910 (1971); People v. Dorikas, 354 Mich. 303, 92 N.W.2d 305 (1958); State v. Steenson, 35 N.J. Super. 103, 113 A.2d 203 (1955); Miller v. State, 418 P.2d 220 (Okla. Crim. 1966). *See also* MCCORMICK, *supra* note 1, at § 191.

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rumors or reports of the accused's prior commission of similar acts of misconduct is permissible, as is the questioning of character witnesses concerning reported past arrests, prosecutions, or convictions of the defendant.

In considering limitations imposed by the time element on the cross-examination of character witnesses, it it concluded that the courts of Indiana would probably disallow testimony as to past misdeeds of the accused which are very remote in time from the commission of the crime for which the defendant is on trial. The length of time which would render misconduct too remote is not established, but it is clear that cross-examination regarding former acts which occurred eight years before the perpetration of the crime charged has been allowed in this state. Also, it may be reasonably inferred that Indiana does not permit the questioning of character witnesses concerning either reports of misdeeds of the accused which were committed after the crime for which he is being tried or rumors or reports heard by the witness subsequent to the commission of the crime charged.

Hypothetical questions assuming the accused to be guilty of some prior misconduct when there is no evidence thereof are within the scope of proper cross-examination of character witnesses in Indiana. However, some states do not allow this kind of question. The preferable view is that hypotheticals of this nature should be excluded as unduly prejudicial.

While a majority of jurisdictions permit the prosecution to cross-examine character witnesses regarding rumors or reports of the defendant's past misdeeds, most states do not allow inquiry as to a witness' actual knowledge of specific instances of former misconduct of the accused. An exception is usually made in the case of past public acts such as indictments, arrests, and convictions. Indiana was initially in accord. However, a gradual process of erosion culminating in *Lineback v. State*,[125] has destroyed the rule that character witnesses may not be cross-examined concerning their actual knowledge of the defendant's past misdeeds in Indiana.

This note concludes that evidence elicited on cross-examination as to a witness's personal knowledge of former misconduct of the accused is not only of very low probative value, but is highly prejudicial to the defendant. It should therefore be excluded.

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125. Lineback v. State, 260 Ind. 503, 296 N.E.2d 788, *aff'd on rehearing*, 260 Ind. 503, 301 N.E.2d 636 (1973), *cert. denied*, 415 U.S. 929 (1974).

Questions posed to a character witness on cross-examination must be asked in good faith. It is proposed that a hearing held out of the presence of the jury could be a relatively effective method of eliminating groundless questions as to former misdeeds of the defendant. The prosecutor would be required to show that he has a reasonable basis for believing that misconduct about which he desires to cross-examine a character witness did in fact occur. This procedure has been advocated by a few courts and writers, but has not been adopted in Indiana.

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