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SCOPE OF CROSS-EXAMINATION
AND THE PROPOSED FEDERAL RULES

Ronald L. Carlson*

INTRODUCTION

IN ANALYZING THE PROPOSED FEDERAL RULES OF EVIDENCE, the drafting work of the Advisory Committee should not be overlooked. This is easy to do when any particular rule is isolated and criticized. For the most part, the total rules package prepared by the Advisory Committee represents a commendable effort to provide a needed set of uniform rules for federal trials. The ideas contained in the new rules are almost invariably well researched. When oversights or omissions in treatment do appear, however, it is well to raise these points for discussion. Congress is reviewing the Proposed Federal Rules, and the final legislative draft can be strengthened by prudent Congressional adjustments.

One area of concern is the appropriate scope of cross-examination. The tradition in federal courts and in most state courts has been to limit the scope of cross-examination to matters testified to on direct, plus matters bearing on the credibility of the witness. The Advisory Committee sought to change this. Under their proposed approach, "wide open" cross-examination of witnesses would have become the norm in federal trials. More recently in the draft of the rules prepared by the House of Representatives Subcommittee on Criminal Justice, the traditional rule of narrow cross-examination has been reinstated. This Article asks which of the competing approaches is preferable, and asks particularly in criminal cases whether the Advisory Committee’s "wide open" approach is even constitutional. Posing the key question directly, when an accused person takes the stand in a federal criminal trial, may the range of the questioning by the prosecutor extend beyond the scope of the direct in cross-examining the defendant?

HISTORICAL BACKGROUND

1. The Varying Forms of Rule 611(b): Adaptations Made from Time to Time by the Federal Rules Advisory Committee.

Any discussion must begin with a look at the rule in question, and in this case at the separate prior rule drafts. In the original 1969 draft of the

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1The Proposed Rules of Evidence for the United States District Courts and Magistrates (hereafter referred to as Proposed Federal Rules) were drafted by the Advisory Committee on Rules of Evidence of the Judicial Conference of the United States.

2The rules have been approved by the United States Supreme Court and are pending before Congress. They become effective upon approval by Congress, with whatever amendments Congress may make. On some matters wherein sharp disagreement marked the committee's deliberations, the Advisory Committee chairman implicitly extended an invitation to Congress to finally resolve the question. See note 6 infra and accompanying text.


4H.R. 5463, 93d Cong., 1st Sess., as amended by the Subcommittee on Criminal Justice, House Committee on the Judiciary.
Proposed Federal Rules, the traditional American view of narrow cross-examination was retained by the Advisory Committee. The drafting committee’s 1969 proposal provided as follows: “Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The judge may in the exercise of discretion permit inquiry into additional matters as if on direct examination.” Then in the 1971 draft the Advisory Committee switched to the “wide open” view, and this ultimately became the committee’s final approach. In the form presented to the Supreme Court and Congress, Proposed Rule 611(b) provided as follows:

*Scope of cross-examination.* A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interests of justice, the judge may limit cross-examination with respect to matters not testified to on direct examination.

The last sentence of the Advisory Committee’s 1971 rule would have allowed narrow cross-examination in limited circumstances. Those were situations where the result otherwise would have been confusion, complication, or protraction of the case. Such circumstances depended upon individual developments in a particular case, and the narrow cross-examination clause did not apply as a matter of rule to any discrete category of witnesses. More specifically, the Advisory Committee’s rule clearly did not indicate that limited cross-examination was the required approach when an accused person testified in a criminal case, nor did the Advisory Committee’s Note convey this information. The message which came through from the Advisory Committee’s 1971 draft was that “wide open” cross-examination should be the norm for witnesses in all federal trials, save in exceptional circumstances (just as the 1969 draft would have dictated narrow cross as the general norm, with discretion in the court to allow “wide open” cross).

The recent Congressional hearings reveal the narrow one-vote margin by which the drafting committee changed to the “wide open” view. In the following exchange, Chairman Albert Jenner of the Federal Rules Advisory Committee initially indicated that on a few close questions, including one controversy involving a particular application of the attorney-client privilege, the drafting committee “removed that from the draft and left it open for the Congress.”

House Judiciary Committee member H. P. Smith (N.Y.) wanted to know if there were other similar areas:

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5The Advisory Committee noted in 1969 that such a rule “promotes orderly presentation of the case.” Advisory Committee’s Note, Fed. R. Evid. 611(b) (Prelim. Draft 1969). It was this 1969 Rule language which the House subcommittee picked up and reinstated in its print draft. See note 4 *infra* and note 48 *infra* and accompanying text. In the 1971 and later Advisory Committee drafts “wide open” cross was instituted, with narrow cross available in limited situations as indicated in Advisory Committee’s Note, Fed. R. Evid. 611(b), 56 F.R.D. 183, 275 (1972):

The provision of the second sentence, that the judge may in the interests of justice limit inquiry into new matters on cross-examination, is designed for those situations in which the result otherwise would be confusion, complication, or protraction of the case, not as a matter of rule but as demonstrable in the actual development of the particular case.

Mr. SMITH. I assume there are other areas in which the committee originally had a consensus which perhaps has been withdrawn at this time where you may now think it is proper for the Congress to make a decision.

Are there some other areas besides this attorney-client area?

Mr. JENNER. The committee went up the mountain and down the mountain on the question of the scope of cross-examination. The rule in the Federal court today is and has been that the scope of cross-examination is limited to the scope of the direct examination . . . .

Now, there is an area in which the Congress and you may very well [sic]—it is a close question. Litigators are of the view that the scope of cross should be limited to the direct. The scholars in their great wisdom feel that it should be wide open as it is now.

Mr. CLEARY. I think we could probably align the judges on our side, Mr. Chairman.

Mr. JENNER. Align those judges who had not been litigators before they assumed the bench.

Mr. HUNGATE. They will have to qualify as scholars then, won't they?

Mr. SMITH. On your final option was it still a one vote decision?

Mr. JENNER. Yes, it was, one vote.

Judge MARLS. It was one vote in the Advisory Committee. It was by one vote in the Standing Committee. We approved the draft that the majority of that committee had presented.

Mr. JENNER. Yes. We did not debate that in the Standing Committee, but that is an example.

The Advisory Committee debate reflects an ongoing concern among evidence experts and in the courts over which rule should prevail. Accordingly, it is appropriate to turn to court decisions which provide the historical background.

2. Court Decisions.

There are two major views on scope of cross-examination. The American (or federal) rule limits cross-examination of the witness to matters stated in the direct examination. Another view, termed the Massachusetts (or English) rule by many writers, allows cross-examination on all relevant phases of the case. Several jurisdictions follow this broad interrogation rule and require a witness to answer cross-examination questions which inquire into matters foreign to the witness' testimony in chief.

The competing rules have received independent evaluation and rest upon different theories. The Massachusetts rule was brought from England. In both civil and criminal cases this rule is based on the philosophy that when a witness testifies, he should present all the facts unrestricted by technical rules of evidence. Court and counsel are relieved of the duty of determining when questions are within the proper scope of cross-examination and when they are without. This ease of application was a major factor in winning Wigmore's support for the rule.8

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8 Much of the historical analysis contained in this section of the Article is drawn from Carlson, Cross-Examination of the Accused, 52 Cornell L. Q. 705 (1967). See also Ladd and Carlson, Cases and Materials on Evidence 130-146 (1972).

86 Wigmore, Evidence § 1888, at 544-45 (3d ed. 1940). Wigmore was critical of the federal rule and objected to its application as the American rule, despite its operation in the vast majority of American jurisdictions.
An argument often advanced on behalf of the more limited American rule is that it makes for orderliness of trial. A party may not develop a major portion of his case out of normal order through the vehicle of cross-examination. It has also been suggested that there is an element of basic fairness in preventing the cross-examiner from using a witness called by the opposition to establish his own case through the device of leading questions. The Supreme Court’s past solicitude for the limited rule is evidenced by its rejection of a proposed provision for the Federal Rules of Civil Procedure which would have permitted cross-examination on every material matter in the case regardless of the scope of direct examination.

The limited American rule gained early impetus from an 1840 decision wherein the Supreme Court indicated “that a party has no right to cross-examine any witness except as to facts and circumstances connected with the matter stated in his direct examination.” The rule spread rapidly and

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9As noted, the Federal Rules Advisory Committee in the 1969 Rules draft indicated that there was merit to the “orderly presentation of the case” argument supporting the American rule. See note 5 supra.

10The United States Supreme Court made this early comment supporting the limited rule in Wills v. Russell, 100 U.S. 621, 625-26 (1879): Authorities of the highest character show that the established rule of practice in the Federal courts and in most other jurisdictions in this country is that a party has no right to cross-examine a witness, without leave of the court, as to any facts and circumstances not connected with matters stated in his direct examination, subject only to two necessary exceptions. He may ask questions to show bias or prejudice in the witness, or to lay the foundation to admit evidence of prior contradictory statements. . . .

11It has been twice so ruled by this court, and is undoubtedly a valuable rule of practice, and one well calculated to promote regularity and logical order in jury trials. . . .

12The Court struck down the concluding sentence from the Civil Procedure Advisory Committee’s 1937 draft of Rule 43(b) which read: “Except as stated in the last preceding sentence, any witness called by a party and examined as to any matter material to any issue may be cross-examined by the adverse party upon all matters material to every issue of the action.” In proposing amendments to the Rules in 1946 the Advisory Committee did not recommend any amendment to Rule 43. The Committee commented that the rule was working better than the commentators had expected. 5 Moore, Federal Practice ¶ 43.01[7] (2d ed. 1971).

13The rejection of the wide open rule by the Supreme Court was discussed in Bell v. United States, 185 F.2d 302, 310-11 (6th Cir. 1950):

This rule [limited cross-examination] has been the subject of some attack; and an attempt was made by the Advisory Committee when formulating the Rules of Civil Procedure in 1936 and 1937 to change the rule to allow cross examination upon all the material and pertinent issues of the action. The Supreme Court in rejecting these proposals and in adopting Rule 43(b) of the Federal Rules of Civil Procedure, . . . as it now stands, indicate that “the historic limitation upon the scope of cross examination to the subject matter of the direct examination is still to be enforced in the federal courts.” See also Special Committee on Evidence, Judicial Conference of the United States, “Preliminary Study of the Feasibility of Developing Uniform Rules of Evidence for the Federal Courts,” 30 F.R.D. 79, 97-98 (1961).


15McCormick’s findings indicate that the American rule prevails in about four-fifths of the states. McCormick, Evidence § 21 (1972). For the state of the law in various jurisdictions see 2 Wharton, Criminal Evidence § 446 (1972); 6 Wigmore § 1890. It is interesting to note that in Missouri, where the wide open practice prevails in civil cases, the accused in criminal matters is shielded from cross-examination except upon matters referred to in the examination in chief. See Mo. Ann. Stat. §§ 491.070, 546.260 (1952).

Wigmore sought to group all jurisdictions into three categories, including in addition to the two cross-examination rules already discussed the so-called “Michigan rule.” This would permit broad cross-examination of the witness as to everything save the cross-examiner’s affirmative case. 6 Wigmore § 1889. Morgan, however, notes that what Wigmore called the Michigan rule does not exist in Michigan. Morgan, Basic Problems of Evidence, 66 (1963); see Comment, Cross-Examination: Permissible Scope in Michigan, 36 U. Det. L.J. 162 (1958). See also Annots., Right to Cross Examine Witness in Respect of Facts Not Included in His Direct Examination, 108 A.L.R. 167 (1937); Cross-Examination of Witness Called To Testify on Particular Point or Under Order of Court, 95 Am. Jur. Witnesses 629 (1948); 98 C.J.S. Witnesses § 378 (b) (1957).

Although attempts at classification of jurisdictions have been criticized because of the various approaches employed in the several states using the American rule, such classifications continue. See Maguire, Weinstein, Chadbourne & Mansfield, Cases on Evidence 411 (6th ed. 1973); Note, The Limiting Effect of Direct Examination Upon the Scope of Cross Examination, 37 Colum. L. Rev. 1373 (1937).
was applied fully in federal criminal cases. Significantly, certain decisions treating the rule in criminal prosecutions suggested that its application was not merely appropriate trial procedure, but had a basis in the constitution.14

After the adoption of the Fifth Amendment to the Constitution of the United States in 1789, the federal courts proceeded to make its written protections meaningful. Early decisions had no occasion to consider whether the limited cross-examination rule was required by the fifth amendment in criminal cases. The question of the extent of a testifying defendant's waiver of his constitutional privilege did not confront the courts in this context for some time. When this question was ultimately reached, a body of federal authority developed attributing constitutional dignity to the limited rule.

_Tucker v. United States_15 is an example from this line of precedent. In _Tucker_, the defendant and others were charged with using the mails to promote fraud. The indictment alleged that they mailed newspapers containing advertisements instrumental to a fraudulent scheme at a United States Post Office. It was essential for the government to prove that a fraudulent scheme existed and that in the execution thereof the defendant caused the advertisements to be inserted in the paper. At trial the defendant's direct testimony went wholly to refuting the existence of any fraudulent scheme; he at no time went into the issue concerning the insertion of ads in the newspaper. On cross-examination he was asked if he inserted the advertisements as charged. Over objection that such question was outside the scope of the direct examination and therefore compelled the defendant to be a witness against himself, the trial court required the defendant to answer. After citing pertinent decisions of the Supreme Court, the court of appeals reversed in terse language:

The questions asked the witness Dudley Tucker on cross-examination were clearly outside the scope of his direct testimony. They had reference to the second element of the offenses charged, while his direct examination was limited to a refutation of the first element. The questions on cross-examination did not in any way test the truth of the direct examination; they did not seek to explain or modify the same; they were asked for the sole purpose of proving an independent element in the government's case. In eliciting the answers to the questions propounded to Dudley Tucker with reference to the insertion of the advertisements, the government made

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14It should be noted that the question of the scope of cross-examination and that of the scope of waiver of the privilege are separate and distinct. See Morgan, note 13 supra, at 179-80. Although both may serve to limit cross-examination, the former operates by virtue of statutory or decisional authority, whereas the latter expresses a constitutional concept. The interaction of the two principles occurs when the accused takes the witness stand. If the scope of waiver is limited, i.e., if the privilege is waived only as to matters testified to on direct examination, the rule of limited cross-examination may operate as an ancillary procedural device to implement such a concept of waiver and prevent cross-examination offensive to the constitutional privilege. Of course, a jurisdiction can apply a broad waiver rule and deem the privilege destroyed as to every matter relevant to the merits, yet employ the limited cross-examination rule as a procedural device. But the converse does not appear equally true. A jurisdiction applying a narrow waiver rule may be prohibited by privilege considerations from applying a rule of wide-open cross-examination of the accused since such interrogations, exceeding the boundaries of the waiver, delve into matters respecting which the privilege has not been waived. See Note, 5 U. Chi. L. Rev. 116 (1937). Applying the wide-open cross-examination rule in this situation and requiring the defendant to respond may compel him to speak in derogation of his privilege of silence.

Intimations that a limited cross-examination rule may be required by the fifth amendment do not elevate the currently-operating federal cross-examination rule as such to the level of a constitutional standard. What is implied is that the operative rule governing the scope of cross-examination must not be inconsistent with the applicable waiver rule.
Dudley Tucker its witness, and compelled him over seasonable and proper objection to be a witness against himself, in violation of the Fifth Amendment to the Constitution. There is no higher nor more important duty resting upon the courts than to see that the citizen is fully afforded the rights and immunities guaranteed to him by the Constitution.16

As the court observed during its discussion, the facts surrounding the historical origin of the privilege against self-incrimination shed little light on this problem. The history of the privilege extends into the early years of the common law to a time when an accused could not testify on his own behalf. The first American statute according the defendant capacity to give evidence was not enacted until 1864.17 In 1878 Congress, by statute, provided that a person charged with a federal offense could be a competent witness at his trial.18 Following this grant of capacity to testify, it became relevant to explore the protective boundaries of a defendant’s privilege at trial. The Tucker court reasoned that the federal exclusion of compulsory self-incrimination prohibited forced disclosure on issues foreign to the defendant’s direct testimony:

If there is good reason why a defendant should not be compelled to be a witness against himself, there ought to be equally good reason why, if he has testified voluntarily upon one issue, he should not be compelled to testify against his will concerning matters wholly unrelated to that issue, which would not be within the scope of proper cross-examination if he were an ordinary witness.19

The above decision relied in part on the prior case of Harrold v. Territory of Oklahoma,20 which construed the defendant’s privilege in this way:

He may not “be compelled in any criminal case to be a witness against himself.” When he testifies as a witness he waives this privilege of silence and subjects himself to cross-examination and impeachment to the same extent as any other witness would subject himself thereto in the same situation, but no farther. He may be cross-examined upon the subjects of his direct examination, but not upon other subjects. . An accused person who testifies to the single fact that a bill of sale or a deed was signed by the grantor does not thereby waive his privilege to refuse to testify upon every other material issue in his case. He waives his privilege of silence upon the subjects relative to which he testifies, but upon no other.21

This approach applies the philosophy that a defendant who has not used his testimony to advantage himself on a particular issue may not be cross-examined on that issue. The defendant has not produced favorable self-testimony on a point, then unfairly tried to block any probing of that point. Rather, he has maintained his silence. Although he may have testified as to some matters, nonetheless his silence is unbroken on a distinct issue in the

15 F.2d 818 (8th Cir. 1925).
16Id. at 824.
17See Note, Griffin v. California, 70 Dick. L. Rev. 98, 100 (1965).
19Tucker v. United States, 5 F.2d 818, 822 (8th Cir. 1925). It appears that cross-examination only on matters relevant to the direct operates to limit interrogation of the accused much more than cross-examination on all matters relevant to the case. Wigmore expressed preference for broad interrogation, and for the view that voluntary taking of the witness stand by an accused constitutes a waiver of the privilege against self-incrimination as to all relevant matters. 8 Wigmore § 2276(2), at 459-62. The American view limits the waiver to matters testified about on direct examination. Wigmore urges that courts operating in American view jurisdictions to produce a waiver identical in scope to the broad waiver rule by using the theory that the subject of the direct examination of an accused is the whole fact of guilt or innocence. Id. at 467. The Tucker case appears to reject such an application.
20169 Fed. 47 (8th Cir. 1909).
21Id. at 51.
case just as much as if he had never taken the stand. In these circumstances, it is error to permit the prosecutor to probe the sealed area through cross-examination questions.

Other federal cases supporting this general approach may be added to the above.22 A 1966 court of appeals decision asserts that the extent of the accused's waiver of the privilege at trial is determined by his direct testimony. This case, United States ex rel. Irwin v. Pate,23 notes that if a defendant takes the stand in a criminal case, he waives the privilege against self-incrimination to the extent of his direct examination. In support of its ruling the court cited two United States Supreme Court decisions, Fitzpatrick v. United States24 and Brown v. United States.25 These cases will be discussed next.

Of the Supreme Court cases, Fitzpatrick v. United States26 is one of the most significant. The defendant, convicted of murder in the federal District Court for Alaska, argued that his privilege against self-incrimination had been violated by the trial court's failure to restrict the cross-examination when he testified.27 After reviewing the record, the Supreme Court, holding that the cross-examination of the accused did not exceed the direct, affirmed the conviction. In so doing it set forth the constitutional guidelines governing a defendant's waiver of the federal privilege at trial:

Where an accused party waives his constitutional privilege of silence, takes the stand in his own behalf and makes his own statement, it is clear that the prosecution has a right to cross-examine him upon such statement with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the alleged crime. While no inference of guilt can be drawn from his refusal to avail himself of the privilege of testifying, he has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon these facts...If the prosecution should go farther and compel the defendant, on cross-examination, to write his own name or that of another person, when he had not testified in reference thereto in his direct examination, the case of State v. Lurch, 12 Oregon 99, is authority for saying that this...
would be error. It would be a clear case of the defendant being compelled to furnish original evidence against himself. State v. Saunders, 14 Oregon 300, is also authority for the proposition that he cannot be compelled to answer as to any facts not relevant to his direct examination.28

In Fitzpatrick the defendant’s waiver apparently was complete as to matters stated in the direct examination, and cross-examination could fully explore the details of matters previously covered. But the waiver was also limited by the direct examination. Requiring an accused to respond to cross-examination questions covering matters wholly outside the examination in chief, albeit material to the case, would improperly compel him to be a witness against himself.29

In 1958, several years after Fitzpatrick, the Supreme Court again had occasion to discuss the problem in the important case of Brown v. United States.30 In Brown the defendant took the stand in a denaturalization proceeding and on cross-examination by the Government refused to answer questions respecting communist associations. Analyzing the constitutional privilege in this setting, Justice Frankfurter adverted to Fitzpatrick v. United States and pointed out that a defendant has no right to set forth all the facts in his favor without laying himself open to cross-examination on those facts.31 The opinion contains relevant comments which seem to indicate that waiver of the fifth amendment privilege extends to matters opened up by the party on direct examination, but perhaps only that far. In this connection, Justice Frankfurter’s summary of the law applicable to criminal defendants who testify in their own behalf is instructive:

Our problem is illumined by the situation of a defendant in a criminal case. If he takes the stand and testifies in his own defense, his credibility may be impeached and his testimony assailed like that of any other witness, and the breadth of his waiver is determined by the scope of relevant cross-examination. “[H]e has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts.” Fitzpatrick v. United States, 178 U.S. 304, 315; and see Reagan v. United States, 157 U.S. 301 304-305. The reasoning of these cases applies to a witness in any proceeding who voluntarily takes the stand and offers testimony in his own behalf. It is reasoning that controls the result in the case before us.32

28Id. at 315-316. (Emphasis added.)
29This is the construction placed upon Fitzpatrick by the Tucker and Harrold cases. See text accompanying notes 15-21 supra.
30Justice Brown in the Fitzpatrick opinion approved the Oregon rule, which held that freedom from compulsory self-incrimination was violated when cross-examination of the accused was extended beyond the facts to which he had originally testified. As stated in State v. Lurch, 12 Ore. 99, 103 (1885), statutes allowing the accused to be a witness do not compel him to a witness against himself:

[I]t would be a great violation of good faith to permit the State to take advantage of his situation and change the trial into an inquisition. The cross-examination in such cases must be strictly confined to the facts testified to by the accused. The law throws around him in such case an immunity which ought to be sacredly maintained.

Ibid.
31356 U.S. 148 (1958). In the years intervening between Fitzpatrick and Brown, although still citing Fitzpatrick, the Supreme Court wavered from its clear language. See e.g., Johnson v. United States, 318 U.S. 189 (1943) (dictum implying broad waiver).
33Id. at 154-55.
The above passage indicates that the reasoning of the Fitzpatrick decision is controlling. But in addition to the reliance on Fitzpatrick, another feature of the Brown opinion is striking. The decision emphasized that the witness himself, if he is a party, determines the area of disclosure and therefore of inquiry. It would appear that a party can only control the area of disclosure so referred to when the cross-examination is confined to the direct examination. Wide open cross-examination of the accused may range well beyond the scope of the direct, and beyond the party’s control.

Commentators have summarized Brown as espousing a constitutional rule of limited waiver. It is interesting to note, moreover, that Brown was cited by the Seventh Circuit as imposing constitutional limitations on cross-examination in criminal prosecutions.

Such decisions and others of similar import prompted one commentator to conclude:

The constitutional privilege against self-incrimination and the statute of 1878 permitting the defendant to testify have been construed as requiring a restrictive cross-examination.

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33Id. at 155. It is noted that courts applying a narrow theory of waiver nonetheless permit impeachment as an incident of the direct examination. See note 10 supra. This possibility appears to give pause to dissenting Justice Black, who scrutinizes the majority statement that it is the defendant, as a witness, who determines the area of disclosure and therefore of inquiry.

I do not believe this assumption is correct. While it is true that a party can determine the area of his own disclosures on direct examination, the scope of permissible cross-examination is not restricted to the matters raised on direct but may include other and quite different matters if they will aid the court or jury to appraise the credibility of the witness and the probative value of his testimony. *Id.* at 159 (dissenting opinion).

Justice Brennan also dissented, and commented that a rule decreeing waiver of privilege by merely taking the stand developed as a historical corollary of the fact that the accused could not be called as a witness. The Brennan dissent does not explore the scope of waiver, but should this dissent be construed as indicating complete waiver by an accused on all material matters regardless of the scope of direct examination, such construction would appear to miss the distinct point made by the majority. *See* Morgan, The Privilege Against Self-Incrimination, 34 Minn. L. Rev. 1, 42-43 (1949). A careful annotation of the problem contained in the Brown case appears in 72 A.L.R.2d 818, 833, 841 (1960).

34E.g., Note, 37 Texas L. Rev. 343, 344 (1959). *See also* The Supreme Court, 1957 Term, 72 Harv. L. Rev. 77, 177 (1958), wherein the Brown case is summarized as holding that a defendant who voluntarily takes the stand waives the privilege against self-incrimination to the extent of cross-examination on matters raised by his own testimony on direct.

The doctrine of limited waiver is recognized elsewhere in the law of evidence. Most of the authorities agree that if the accused takes the stand for the purpose of testifying on a preliminary question, such as the voluntariness of a confession, this is not to be taken as a complete waiver. Many cases limit the waiver to the particular issue, because it is felt that to do otherwise would penalize the defendant for testifying. Simmons v. United States, 390 U.S. 377 (1968). *See also* McCormick, Evidence § 131 (1972), Maguire, Evidence of Guilt § 2.082(2) (1959); Model Code of Evidence rule 108, comment (1942). The discussion contained in the body of this article deals with testimony on the merits, as opposed to testimony on preliminary matters.

In addition, it is noted that testimony in one proceeding, or one stage of a proceeding, which testimony incorporates the fullest disclosure, does not waive the privilege in a later proceeding or stage. Maguire, *supra,* § 2.082(1).

35United States ex rel. Irwin v. Pate, 357 F.2d 911, 915-16 (7th Cir. 1966). In reviewing a criminal conviction, the court carefully noted that the cross-examination of the defendant who testified was related to his direct testimony. The court went on to state:

In a criminal case, if a defendant voluntarily takes the stand to testify in his own behalf, his testimony may be impeached and he may be cross-examined. The extent of the waiver of the privilege against self-incrimination is determined by what the defendant’s testimony make relevant for cross-examination. *Id.* at 915.

*See note 22 supra.*

In Brooks v. Tennessee, 406 U.S. 605 (1972), the Supreme Court demonstrated marked hostility to rules interfering with the free exercise of testimonial rights by accused persons. A Tennessee statute provided that if a defendant elected to take the stand he was required to testify before other witnesses for the defense. The Court nullified this statute on two grounds, (1) that it was an impermissible restriction on the exercise of an accused’s privilege against self-incrimination, and (2) that it violated due process in that the result was to deprive the defendant of the guiding hand of counsel in making the decision whether to take the stand.

In summary, several federal decisions contain distinct indications to the effect that a limited cross-examination of the accused is required by the fifth amendment. Much of the language militates in the direction of extending the waiver of the constitutional privilege to matters opened up on direct examination, but not beyond.

3. The Constitutional Issue.

The constitutional question raised by the cases heretofore reviewed is quite clear: Does a federal prosecutor have a right to cross-examine an accused person on issues foreign to the witness' direct testimony, an arguably allowable procedure under the language of Proposed Federal Rule 611(b) as submitted to Congress. Contrary to the proposed rule, much decisional authority would seem to indicate that the prosecutor does not have such a right. For this reason, if the Advisory Committee's suggested "wide open" approach to cross-examination had prevailed, its application in criminal cases might have been costly. Judges and prosecutors might have been led into error in the very possible event that the constitutional thesis advanced by the previously-detailed cases proved to be the controlling interpretation. The constitutional problem is succinctly summarized in the 1972 edition of McCormick on Evidence:

Regardless of whether the result under the restrictive rule may be desirable, it may be that the scope of cross-examination of the accused in a criminal case is not controlled solely by evidence case law, and statutes or rules governing the matter. The outer limits of cross-examination may well be controlled, at least in the future, by constitutional doctrine concerning the extent to which the accused waives his privilege of self-incrimination by taking the stand and testifying. Some judicial language suggests that under the Fifth Amendment of the United States Constitution the waiver should extend only to questioning concerning matters mentioned upon direct examination. If this position ultimately prevails, state practice would be governed by the constitutional limits of waiver, making "wide-open" cross-examination of criminal defendants, and perhaps even extremely liberal restrictive rules, unconstitutional.

Solutions

Contrary to one view which holds that the Proposed Federal Rules of Evidence do not purport to resolve constitutional evidence questions, in some instances it is virtually imperative that they do so. Indeed, several constitutional principles have been treated in the rules. Consider, for example, this statement on waiver of constitutional privilege in the note to Rule 611(b), a statement authored by the Federal Advisory Committee: "Under Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968), no general waiver occurs when the accused testifies on such preliminary matters as the validity of a search and seizure or the admissibility of a confession. Rule 104(d), supra." By this statement, as well as the inclusion

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3Fed. R. Evid. 611(b) (1973). See note 5 supra and accompanying text.
4See notes 13-36 supra.
5McCormick, Evidence 53-54 (1972).
6See discussion in Carlson, Cross-Examination of the Accused, 52 Cornell L.Q. 705 (1967).
7Hearings, note 6 supra, at 391.
of Rule 104, the Advisory Committee recognized two points: (1) The Supreme Court of the United States has embraced the doctrine of partial waiver of fifth amendment rights; and (2) the new evidence rules must adhere to constitutional requirements.\footnote{\textit{The Committee's Proposed Federal Rule 104(d) provides: "The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case."}}

Prior court decisions suggest that the proper rule for cross-examination of accused persons is a constitutional issue and not merely a question of good trial procedure. If there are constitutional implications, the final form of Federal Rule 611(b) must adequately accommodate constitutional requirements. Strictly applied, every accused person who took the stand under the Advisory Committee's draft was subject to "wide open" cross-examination. Yet, as pointed out in a note to \textit{United States v. Guajardo-Melendez},\footnote{\textit{Hearings, note 6 supra}, at 392. See a similar (although not identical approach) which is employed in Missouri described in note 13 supra.} "prior decisions (in this circuit). . .as well as the writings of the commentators, e.g., Carlson, Cross Examination of the Accused, 52 Cornell L. Q. 705 (1967), seem to embrace the doctrine of a partial waiver of fifth amendment rights." Consideration of potential amendments of Rule 611(b) would appear to be in order.

1. Reserving the Narrow Rule for Criminal Trials.

There is the possibility of preparing a rule which allows broad interrogation for civil cases and ordinary witnesses generally, with provision to invoke the narrow rule for accused persons in criminal cases.\footnote{\textit{F.2d} 35, 38 n.5 (7th Cir. 1968).} This approach to conforming Proposed Federal Rule 611(b) to constitutional necessities would explicitly exempt accused persons from "wide open" cross-examination. Under this approach, a reservation of Fifth Amendment rights could have been added to the Advisory Committee's draft of Rule 611(b) in this manner:

\begin{quote}
Except for accused persons, a witness may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interests of justice, the judge may limit cross-examination with respect to matters not testified to on direct examination.
\end{quote}

A note to the Rule could advert to the point made by certain of the cases previously detailed, to the effect that examination of criminal case defendants must be controlled by the traditional American rule.

2. Across-the-Board Return to the Narrow.

A second proposal for revision of Rule 611(b) would not only cure the constitutional defects noted here, but would return all examination of witnesses to the traditional American rule. Discussing this approach, Solicitor General Erwin Griswold pleaded that Rule 611(b) be changed to limit cross-examination of witnesses generally to matters contained in the direct. General Griswold's remarks are published in a Congressional Statement prepared by the author of this Article, which Statement is printed in the Hearings record of the House committee reviewing the Proposed Federal Rules of Evi-
The author's Statement first explains possibilities for limited revision of Rule 611(b), then explores other proposals for wholesale alteration of the rule:

A second, perhaps cleaner, approach to the problem might be to return to the advisory committee's original across-the-board proposal in this area. In their first draft (1969), they promulgated this proposal for scope of cross-examination:

Rule 6-11. Mode and Order of Interrogation and Presentation.

(b) SCOPE OF CROSS-EXAMINATION. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The judge may in the exercise of discretion permit inquiry into additional matters as if on direct examination. 46

This original approach by the committee would have kept cross-examination of witnesses within the bounds presently adopted in federal courts as well as the vast majority of state courts. Solicitor General Erwin Griswold pleaded for just such a rule in 1972:

"Turning to another problem with respect to proof, Rule 611(b) would permit cross-examination with regard to any issue in the case and credibility. Should not the scope of cross-examination be restricted to what has traditionally been its limitation in the Federal courts and numerous state courts, namely, the subject matter of direct examination and credibility?"

"The Advisory Committee's note to Rule 611(b) indicates that the rule was drafted in the interest of 'economy of time and energy.' However, would not the rule be disruptive of an orderly presentation of a case?" 47

For a collection of other commentators and case authorities supporting the majority "American" or "federal" rule of limited cross-examination (as opposed to the "wide open" view), see Carlson, Cross-Examination of the Accused, 52 Cornell Law Quarterly 705, 706-708 (1967) (pointing out the U.S. Supreme Court's solicitude in court decisions for the limited rule).

After extensive hearings on the Advisory Committee's draft, the House Subcommittee on Criminal Justice made several changes in the Proposed Federal Rules. Among these was a change in Rule 611(b). Under the bill drafted by the House subcommittee, Rule 611(b) follows the more limited view of cross-examination explained in the preceding Statement, using the exact terms of Rule 6-11 as set forth therein. 48

**Conclusion**

On the scope of cross-examination problem, the drafting Advisory Committee originally (in 1969) recommended adoption of the traditional American view of limited cross-examination. In the 1971 draft the committee made a dramatic shift, apparently by a one-vote margin, to the "wide open" view. Again by a narrow, single vote, the reviewing Standing Committee on Rules of Practice and Procedure sustained the "wide open" approach. This switch triggered debate and discussion over whether the narrow or wide open view of cross-examination should control.

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45Carlson Statement, Hearings, note 6 supra, at 392.
48See also, notes 4 and 5 supra and accompanying text. The House subcommittee stated as follows in support of its approach:
At least one problem with the Advisory Committee's "wide open" approach was its apparent failure to accommodate the significant constitutional considerations raised by this author, and adverted to in the recent edition of McCormick's book, On Evidence. It would seem important to provide guidance to federal judges and attorneys as to the proper scope of examination and especially important to do so when an accused person takes the stand upon trial. The Advisory Committee's draft did provide such guidance when the same defendant took the stand in support of a motion to suppress, but did not provide the accused person with protection from "wide open" cross at trial. As indicated in United States v. Guajardo-Melendez, court decisions as well as the writings of the commentators appear to accord accused persons the right to narrow cross-examination in the latter situation.

The House Subcommittee studying the Rules has reinstated the traditional American rule as the controlling principle in federal trials. Applying this as the rule of cross-examination poses less potential for infringing upon the constitutional rights of accused persons than the "wide open" approach. The House subcommittee's draft provision is not inflexible, however. Ordinary witnesses in civil and criminal cases might well be examined with a certain degree of latitude, for the Congressional subcommittee's draft authorizes some judicial discretion "to permit inquiry into [matters] additional" to the direct.

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Subcommittee Note

The Subcommittee amended subdivision (b) to return to the rule which prevails in the Federal courts and State jurisdictions. As amended, the Rule is in the text of the 1969 draft; it limits cross-examination to credibility and to matters testified to on direct examination, unless the judge permits more. This more traditional rule facilitates orderly presentations and progress at trial. Further, in the light of existing discovery procedures, there appears to be no need to abandon the traditional rule.

*See note 42 supra.
*See note 43 supra.