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EVIDENCE

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RELEVANCY—CHARACTER TESTIMONY IN CRIMINAL CASES

Character of the Accused—Reputation Testimony

State v. Frentz[1] is a really splendid opinion by Justice Tate. It etches out the major aspects of the law relative to character evidence admissible for the purpose of proving or disproving the guilt of the accused, distinguishing and delineating the rules relative to reputation testimony admissible to prove or disprove the credibility of a witness. The value of the opinion goes much beyond its mere holding, for the court uses the problem presented in *Frentz* as a vehicle for "laying out" the law relative to character and reputation evidence generally.

Defendant had been charged with aggravated crime against nature with a person under the age of seventeen. The defendant, said the supreme court, had introduced testimony putting his character at issue with respect to the trait of homosexuality. To rebut, the state, over objection, elicited testimony from a police officer summarizing the opinion of an unnamed third party as to defendant's reputation as a homosexual. The supreme court very properly held that the police officer's testimony was improper, that it violated the rules relative to the admissibility of character evidence, and that it constituted inadmissible hearsay. The writers fully agree.

Character of the Victim to Show Who Was Aggressor

State v. Boss[2] is a very interesting case relative to the character of the victim.[3] Following *State v. Lee,*[4] the court differentiated between evidence admissible to show that the defendant acted in self-defense and evidence admissible to

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1. 354 So. 2d 1007 (La. 1978).
2. 353 So. 2d 241 (La. 1977).
3. *See also* State v. Bernard, 358 So. 2d 1268 (La. 1978).
4. 331 So. 2d 455 (La. 1976).

show that the victim was the aggressor.[5] Of importance, the court took the position that the admissibility of evidence to show that the victim was the aggressor is not dependent upon the defendant's having known of such evidence at the time of the alleged crime. The court held, however, that since here one is dealing with character of the victim as bearing upon the probability of his having acted in a particular way,[6] evidence of such character is limited to general reputation, and particular acts against third parties are inadmissible.[7] Although the writers agree that in most instances proof of the victim's character to show that he was the first aggressor should be limited to reputation only, cases may well arise where the proffered evidence would have such a high probative value that such a limitation would violate a defendant's constitutional right to make out his defense.[8] For example, Revised Statutes 15:479 should not preclude a defendant's showing that the victim was the first aggressor when he could demonstrate that the defendant had a plan to chastise or liquidate the members of a particular family and that he had in fact that very day carried out the plan as to several members of the class.

Character of Victim—Reputation for Chastity in Sexual Assault Cases

In *State v. Frentz*[9] the court quite properly differentiated between reputation testimony that is relevant and admissible to prove or disprove material elements of the crime charged (hereafter called probability evidence) and reputation testi-

5. *State v. Lee* is discussed in *The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Evidence*, 37 LA. L. REV. 575, 576 (1977), reprinted in G. PUGH, LOUISIANA EVIDENCE LAW 68 (Supp. 1978), and Note, *Character and Prior Conduct of the Victim in Support of a Plea of Self-Defense*, 37 LA. L. REV. 1166 (1977), reprinted in G. PUGH, *supra*, at 62.

6. On the distinction between evidence relevant to prove that a fact is probable and evidence relevant to prove that a witness is credible, see note 10, *infra*.

7. The court in this connection relied upon LA. R.S. 15:479 (1950), which states: "Character, whether good or bad, depends upon the general reputation that a man has among his neighbors, not upon what particular persons think of him."

8. *See* Chambers v. Mississippi, 410 U.S. 284 (1973), discussed in *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Evidence*, 35 LA. L. REV. 525, 544 (1975), reprinted in G. PUGH, *supra* note 5, at 154.

9. 354 So. 2d 1007 (La. 1978).

mony relevant and admissible on the issue of credibility of a witness (hereafter called credibility evidence).[10] *Frentz* recognizes that different rules apply to the admissibility of evidence offered under one or the other theory. Of course, at times evidence may be *relevant* to the ultimate issues in the case, *as well as* to the credibility of a witness, but under applicable rules may be *admissible* under either or both theories, or neither.

Problems in this area are especially challenging when they concern the prior sexual history of the victim in a sexual assault case. To what extent, if at all, should the accused be permitted to inquire into the prior sexual history and reputation of the alleged victim? This very delicate and serious issue has engendered much discussion and legislation, especially recently.[11] In 1975 the Louisiana Legislature adopted a rather confusing provision (Revised Statutes 15:498)[12] concerning the problem.

It is unclear to these writers whether Revised Statutes 15:498, relative to the reputation and prior sexual conduct of alleged victims of sexual assault, addresses itself to credibility of the alleged victim as a witness or to the likelihood or unlikelihood of the charged crimes having occurred. Although the caption of the section speaks in terms of impeachment and the section is placed with the provisions relative to credibility of witnesses,[13] rather than with those governing the admissibility of evidence on probability,[14] the section itself speaks in very broad, embracive terms that might be interpreted to apply to

10. For the distinction between probability and credibility evidence, see and compare Rules 106 and 306 of the American Law Institute's MODEL CODE OF EVIDENCE (1942). *See also* M. LADD AND R. CARLSON, CASES AND MATERIALS ON EVIDENCE 232 (1972).

11. *See, e.g.*, Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1 (1977); Davis, *Character Evidence in Rape Cases*, 1976 N.Z.L.J. 178; Herman, *What's Wrong with Rape Reform Laws?*, CIV. LIB. REV., Dec. 1976/Jan. 1977, at 60; Rudstein, *Rape Shield Laws: Some Constitutional Problems*, 18 WM. & MARY L. REV. 1 (1976); Comment, *Evidence—Impeaching Credibility—Prior Sexual Experience*, 15 DUQ. L. REV. 155 (1976); Comment, *Due Process Challenge to Restrictions on the Substantive Use of Evidence of a Rape Prosecutrix's Prior Sexual Conduct*, 9 U. CAL. D. L. REV. 443 (1976). *See also* State *ex. rel.* Pope v. Superior Ct., 113 Ariz. 22, 545 P.2d 946, discussed in Note, 1976 ARIZ. ST. L. J. 213.

12. 1975 La. Acts, No. 732, *adding* LA. R.S. 15:498.

13. LA. R.S. 15:484-97 (1950); LA. R.S. 15:498 (Supp. 1975).

14. LA. R.S. 15:479-83 (1950).

probability as well as credibility: "Evidence of prior sexual conduct and reputation for chastity of a victim of rape or carnal knowledge shall not be admissible except for incidents arising out of the victim's relationship with the accused."

If the statute is interpreted to be a limitation on defendant's ability to establish that the victim of the alleged rape had consented to sexual intercourse and hence that no rape had in fact occurred, the provision under certain circumstances would be a severe limitation upon defendant's right to make out his defense and might well violate his constitutional right of compulsory process.[15]

On the other hand, if the statute is interpreted as applying solely to impeachment of the alleged victim as a witness, then it would not necessarily preclude the defendant from adducing testimony as to the alleged victim's prior sexual history when the same has a particularized relevance on the issue of probability. It might, however, still be constitutionally suspect under certain circumstances as constituting an undue limitation on the right of the defendant to confront the witnesses against him.[16] If, for example, under the hypothetical posed in footnote fifteen, the alleged victim on the stand denies that she had consented to the sexual intercourse, defendant should not be precluded from inquiring into some, at least, of the facts detailed.

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15. Chambers v. Mississippi, 410 U.S. 284 (1973), discussed in *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Evidence*, 35 LA. L. REV. 525, 544 (1975), reprinted in G. PUGH, *supra* note 5, at 154. As an example of a case in which the problem would be presented, assume that a man and a woman in a bedroom are surprised by the police in a most embarrassing situation. Assume further that the woman, on seeing the police, cries "rape." Assume that defendant's defense is that the woman had consented to sexual intercourse for a stipulated prepaid fee. At an ensuing trial for rape, is the defendant by the 1975 act to be precluded from adducing testimony that the woman was widely reputed in the community to be a prostitute, that the premises involved had been used regularly during the prior months by the "victim" as a house of prostitution, and that several other designated men had had similar relations with the "victim" during the prior week? If so, the goddess of justice would have no need of a blindfold; the statute would suffice.

16. *See* Davis v. Alaska, 415 U.S. 308 (1974), discussed in *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Evidence*, 35 LA. L. REV. 525, 538 (1975), reprinted in G. PUGH, *supra* note 5, at 168, and *The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Evidence*, 37 LA. L. REV. 575, 586 (1977), reprinted in G. PUGH, *supra* note 5, at 165.

As with the privacy of other alleged victims, it is desirable to strike an appropriate balance between the interest of the accused and that of the prosecution and the alleged victim.[17] Through the years prior to the 1975 enactment, Louisiana courts had developed a body of rules for the protection of the privacy of alleged rape victims.[18] They did not, however, go as far as the 1975 act. Although the writers are thoroughly sensitive to societal interest in affording appropriate safeguards to the privacy of victims of sexual assault and are completely sympathetic with the terrible plight of the victims of such heinous crimes, it is submitted that the very broad language of the 1975 act goes too far.

State v. Domangue[19] was the first case decided under the 1975 act. Under the facts set forth in the opinion, there was no suggestion that the alleged victim's prior sexual history had any particularized relevance to the alleged attempted aggravated rape or to the credibility of the victim as a witness. Without discussing the constitutional and other problems that might arise in different contexts, the court upheld the trial court's refusal to permit defendant to "inquire into the victim's past sexual relationships with men other than her common law husband and the defendant."[20] It is anticipated that future cases will present some of the ramifying problems suggested above. The problem is scheduled for exploration in a student piece in a later issue of this Review.

Expert Witness as to Psychological Incapacity

Is it possible in Louisiana for a defendant to adduce expert testimony that defendant's psychological makeup is such that he is incapable of committing the crime charged? The matter has been considered elsewhere in the country and is the subject of conflicting approaches.[21]

17. *See* LA. R.S. 15:482 (Supp. 1952).

18. *See* State v. Jack, 285 So. 2d 204 (La. 1973), and authorities collected therein. *See also* the discussion in *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Evidence*, 35 LA. L. REV. 525, 530 (1975), reprinted in G. PUGH, *supra* note 5, at 73.

19. 350 So. 2d 599 (La. 1977).

20. *Id.* at 601.

21. *See* People v. Jones, 42 Cal. 2d 219, 266 P.2d 38 (1954), and Falknor and

In *State v. Mallett*[22] the defense attempted to adduce testimony "as to whether defendant was psychologically capable of committing the crime of contributing to the delinquency of a juvenile where the juvenile was his son."[23] Although the supreme court upheld the trial court's refusal to permit the defendant to introduce the offered evidence, it did not base its ruling upon the inadmissibility of such testimony generally. Instead it held that the foundation required for expert testimony in Louisiana had not been laid—the witness (a chiropractor and social psychologist) had not stated the facts upon which his opinion was based. The implication appears to be that a qualified expert in the area, after appropriate examination of defendant and after giving the facts upon which he based his opinion, could properly testify to defendant's purported psychological incapacity to commit the crime charged. Whether or not the supreme court will hereafter so hold must await future developments.

RELEVANCY—OTHER CRIMES OR WRONGFUL ACTS COMMITTED BY THE ACCUSED

Intent

It is clear from *State v. Nelson*[24] that for "other crimes" evidence to come in to show "intent," whether the requisite intent was present must be "a real and genuine contested issue at trial."[25] The mere fact that specific intent is a necessary element of the crime charged does not suffice. Such a determination should preferably be made in advance of trial.[26]

Steffen, *Evidence of Character: From the "Crucible of the Community" to the "Couch of the Psychiatrist,"* 102 U. PA. L. REV. 980 (1954). *See also* 2 J. WIGMORE, EVIDENCE § 569 (3d ed. 1940).

22. 357 So. 2d 1105 (La. 1978).

23. *Id.* at 1110.

24. 357 So. 2d 1100 (La. 1978).

25. *Id.* at 1103. *See also* State v. Holstead, 354 So. 2d 493 (La. 1977); State v. Carter, 352 So. 2d 607 (La. 1977).

26. *See* State v. Herman, 358 So. 2d 1282 (La. 1978); State v. Nelson, 357 So. 2d 1100, 1103 n.2 (La. 1978); State v. Carter, 352 So. 2d 607, 614 n.14 (La. 1977).

System

In *State v. Frentz,*[27] a prosecution of defendant for aggravated crime against nature with a person under seventeen years of age,[28] a majority of the court held that it was improper for the state to show other similar acts with other juveniles at the same location, for under the facts presented it was clear that the juvenile involved and the defendant were at defendant's home at the time charged. In so holding, the court quoted with approval from *State v. Ledet:*[29]

> [W]hen there is no contest at all over the participation of the accused in the alleged incident, but the only question is whether any crime at all took place, evidence of extraneous offenses serves only to establish that defendant is capable of and thus likely to have committed the crime in question, and as such the evidence is inadmissible.[30]

"Res Gestae"

When is another crime so much a part of the "res gestae" of the charged crime that the *Prieur*[31] notice need not be given? In *State v. Schwartz*[32] the court made it clear that a very close relationship is required, indicating that the other crime must be so closely connected with the charged crime and so bound up with it that charging the defendant with the instant crime must be realistically deemed to have given him notice of the other offense as well. The test laid down seems very appropriate.[33]

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27. 354 So. 2d 1007 (La. 1978).

28. *See also* State v. Jackson, 352 So. 2d 195 (La. 1978) (prior distribution of drugs).

29. 345 So. 2d 474 (La. 1977). This case is discussed in *The Work of the Louisiana Appellate Courts for the 1976-1977 Term—Evidence,* 38 LA. L. REV. 567, 569 (1978).

30. 345 So. 2d at 479. *State v. Ledet* is quoted with approval in *State v. Frentz,* 354 So. 2d 1007, 1009 (La. 1978).

31. State v. Prieur, 277 So. 2d 126 (La. 1973).

32. 354 So. 2d 1332 (La. 1978).

33. *See The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Evidence,* 35 LA. L. REV. 525, 578, 604 (1975), reprinted in G. PUGH, *supra* note 5, at 99.

Identity

Several recent cases[34] concern the admissibility of "other crimes" evidence to show the identity of the perpetrator of the charged crime. The applicable test is set forth in *State v. Lewis*[35] as follows: "In order to be admissible to prove identity the other crimes must be distinctively similar in system,"[36] or, continued the court, "so peculiarly distinctive that one must logically say that [the two crimes] are the work of the same person."[37] Different factual shadings, however, make such a test difficult to apply.[38]

Drug Addiction as Motive for Armed Robbery

In an excellent opinion authored by Justice Dennis, the court in *State v. Sutfield*[39] held that it was reversible error in an armed robbery case for the state to introduce evidence (track marks) to show that defendant was a heroin addict and hence needed money to support his habit. In so holding, the court applied Professor McCormick's balancing test:

> [T]he problem is not merely one of pigeonholing, but one of balancing, on the one side, the actual need for the other crimes evidence in the light of the issues and the other evidence available to the prosecution, the convincingness of the evidence that the other crimes were committed and that the accused was the actor, and the strength or weakness of the other crimes evidence in supporting the issue, and on the other, the degree to which the jury will proba-

34. State v. Lewis, 358 So. 2d 1285 (La. 1978); State v. Mitchell, 356 So. 2d 974 (La. 1978); State v. Jackson, 352 So. 2d 195 (La. 1977).

35. 358 So. 2d 1285, 1287 (La. 1978).

36. For the quoted proposition the court cited the following cases: State v. Jackson, 352 So. 2d 195 (La. 1977); State v. Slayton, 338 So. 2d 694 (La. 1976); State v. Waddles, 336 So. 2d 810 (La. 1976); State v. Hicks, 301 So. 2d 357 (La. 1974).

37. State v. Lewis, 358 So. 2d at 1287, *quoting* State v. Lee, 340 So. 2d 1339, 1345 (La. 1976) (Dennis, J., concurring).

38. *See e.g.*, State v. Mitchell, 356 So. 2d 974 (La. 1978), where, over vigorous protests, the majority held that the required test had been met.

39. 354 So. 2d 1334 (La. 1978).

> bly be roused by the evidence to overmastering hostility. (Footnotes omitted.) McCormick, § 190, p. 453.[40]

The court said that "[w]ithout additional evidence indicating a motive to commit the particular crime involving the particular victim, heroin addiction should not be admitted to prove motive."[41] In so holding, the court adopted a view contrary to that reflected in the 1973 case of *State v. St. Amand.*[42] The *St. Amand* case, however, was not discussed. In light of *Sutfield,* it is interesting to speculate as to whether in a prosecution for armed robbery for morphine at a drugstore, the court will hold inadmissible the fact of defendant's morphine addiction. A more particularized motive would be present, but not for the burglary of that *particular* drugstore.

Unresponsive Answers by Police Officers

In *State v. Schwartz*[43] the court indicated in a footnote that a majority may now be ready to hold the prosecution responsible for unresponsive answers by police officers implicating the defendant in unrelated inadmissible other crimes. Justice Dennis, speaking for the court, stated with grave concern that the officer "whose testimony gratuitously implicated the defendant in other crimes, has given similar 'unresponsive answers' in other cases which have been reviewed by this court."[44] He then went on to observe: "The recurrence of such testimony by experienced and knowledgeable witnesses . . . establishes too clear a pattern for this court to continue to excuse the highly prejudicial unresponsive remarks as being inadvertent, unplanned or unexpected by prosecuting attor-

40. *Id.* at 1337 n.1. *See also* State v. Burnette, 353 So. 2d 989 (La. 1978); State v. Moore, 278 So. 2d 781 (La. 1973); State v. Prieur, 277 So. 2d 126 (La. 1973).

41. 354 So. 2d at 1337.

42. 274 So. 2d 179 (La. 1973). This case is discussed in Comment, *Other Crimes Evidence in Louisiana—I. To Show Knowledge, Intent, System, Etc. in the Case in Chief,* 33 LA. L. REV. 614 (1973), reprinted in G. PUGH, *supra* note 5, at 30 n.67. *See also* Comment, *Other Crimes Evidence in Louisiana—II. To Attack the Credibility of the Defendant on Cross-Examination,* 33 LA. L. REV. 630 (1973), reprinted in G. PUGH, *supra* note 5, at 111 n.67.

43. 354 So. 2d 1332 (La. 1978).

44. *Id.* at 1333 n.2. *State v. Schwartz* is discussed in *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Evidence,* 36 LA. L. REV. 656, 657 (1976).

neys."[45] It is to be hoped that police academies and district attorneys will effectively caution police officer witnesses to avoid mentioning inadmissible other crimes.

Joinder and Severance of Offenses for Trial

In 1975 the Louisiana Legislature authorized broad joinder of offenses.[46] In several of the cases decided in the past year[47] the court grappled with the problem of reconciling the new statute with the earlier *Prieur* line of cases. In the most important of these cases, *State v. Carter*,[48] Justice Calogero, speaking for four members of the court in a very well-reasoned opinion, succinctly concluded that

> when crimes, which have been joined simply because they are the same or similar character offenses, are indeed legitimate "other crimes" under *Prieur* and its progeny (the offenses are sufficiently similar, the evidence is relevant to a real issue in each case, and the prejudicial effect of the evidence does not outweigh its probative value), a decision not to sever the crimes will normally be proper. Conversely, we hold that when offenses, which have been joined solely because they are same or similar character offenses, are not legitimate "other crimes" under *Prieur* and its progeny, they should normally be severed upon pretrial motion of the accused or the state.[49]

EXAMINATION AND CROSS-EXAMINATION OF WITNESSES

"Opening the Door" to Cross-examination as to Prior Arrests

When a defendant on direct examination has the audacity

45. 354 So. 2d at 1333 n.2.

46. LA. CODE CRIM. P. arts. 493-95.1, *as amended by* 1975 La. Acts, No. 528. For an excellent discussion of joinder and severance problems, see Comment, *Joinder of Offenses: Louisiana's New Approach in Historical Perspective*, 37 LA. L. REV. 203 (1976).

47. *See* State v. Lewis, 358 So. 2d 1285 (La. 1978); State v. Cramer, 358 So. 2d 1277 (La. 1978); State v. Nelson, 357 So. 2d 1100 (La. 1978); State v. Mitchell, 356 So. 2d 974 (La. 1978); State v. Holstead, 354 So. 2d 493 (La. 1977); State v. Proctor, 354 So. 2d 488 (La. 1977); State v. Carter, 352 So. 2d 607 (La. 1977).

48. 352 So. 2d 607 (La. 1977).

49. *Id.* at 614.

to assert "that he had never 'been in any kind of trouble with the law' in his life,"[50] does he thereby "open the door" to cross-examination as to whether he has been previously arrested?[51] Over the dissenting opinion of Justice Dennis, a majority of the court appears to have held in the affirmative in *State v. Betancourt.*[52]

The court apparently concluded that by making such a sweeping assertion on the stand the defendant had precluded himself from complaining on appeal that the trial court had permitted the prosecution to meet such defense testimony.[53] Whether this is, in fact, the position of the Louisiana Supreme Court, however, is not clear, for with respect to a remarkably similar line of questioning in *State v. Anderson,*[54] the court relied upon other grounds for upholding the trial court's refusal to grant a mistrial when a question about prior arrests was asked the defendant on cross-examination.

Even if it is ultimately decided that a defendant, by such testimony on direct, "opens the door" to cross-questioning as to prior arrests, the writers believe that the prosecution could not properly introduce extrinsic evidence to disprove the truthfulness of defendant's answer. When, prior to the 1952 amendment to Revised Statutes 15:495, the prosecution was permitted to attack a witness's credibility via cross-examination as to prior arrests, the prosecution was "bound by the answer" and could not disprove it by extrinsic evidence.[55]

Scope of Cross-examination—When is the Accused a "Witness"?

Revised Statutes 15:462[56] provides that when an accused becomes a witness at the trial, he thereby subjects himself to cross-examination on the entire case.[57] If, instead of taking the

50. State v. Betancourt, 351 So. 2d 1187 (La. 1977).

51. *See* LA. R.S. 15:495 (Supp. 1952).

52. 351 So. 2d 1187 (La. 1977).

53. For an excellent discussion of "opening the door," see C. MCCORMICK, EVIDENCE § 57, at 131 (Cleary ed. 1972).

54. 358 So. 2d 276 (La. 1978). This case is discussed in text at note 69, *infra.*

55. *See* State v. Vastine, 172 La. 137, 133 So. 389 (1931).

56. LA. R.S. 15:462 (1950).

57. *But see* the approach taken in State v. Lovett, 345 So. 2d 1139 (La. 1977),

stand to make assertive statements relative to the alleged crime, defendant seeks merely to demonstrate that he does not possess a physical attribute associated with the perpetrator of the alleged crime, does he become a "witness" within the meaning of Revised Statutes 15:462? In *State v. Tillett*[58] a prosecution witness had testified that the alleged robber had a Spanish accent. The court held that reversible error was committed when the trial court refused to permit the defendant to try to demonstrate that he did not have such an accent. In so holding, the court relied on cases declaring that an accused's privilege against self-incrimination is not infringed by forcing him to perform non-testimonial acts.

Cross-examination by Accused as to Prosecution Witness's Prior Acts of Misconduct

There is a certain tension between recognizing a defendant's right of confrontation and protecting a state's witness's legitimate interest in privacy. Louisiana has gone far to protect a *defendant* from prosecutorial cross-questioning about extraneous acts of misconduct where the purpose of such questioning is a general attack upon the veracity of the defendant as a witness.[59] Is the defendant to be similarly limited when he seeks to cross-examine state's witnesses? The question underlay *State v. Anderson*[60] and divided the court.[61] Under the circumstances there presented, the majority held that defendant had no right to cross-examine the victim of an alleged robbery-kidnapping about prior homosexual acts with persons other than the defendant.[62] Contrary to the victim's version of the

discussed in *The Work of the Louisiana Appellate Courts for the 1976-1977 Term—Evidence*, 38 LA. L. REV. 567, 587 (1978). The *Lovett* case was disapproved by the legislature in Act 746 of 1978, amending Code of Criminal Procedure article 703(B).

58. 351 So. 2d 1153 (La. 1977).

59. *See* State v. Prieur, 277 So. 2d 134 (La. 1973), discussed in *The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Evidence*, 34 LA. L. REV. 443, 453 (1974), reprinted in G. PUGH, *supra* note 5, at 169.

60. 358 So. 2d 276 (La. 1978).

61. *See also* State v. Marshall, 359 So. 2d 78 (La. 1978).

62. *See also* in this connection LA. R.S. 15:498 (Supp. 1975), the recently enacted statute regarding an analogous problem, questioning an alleged rape victim about prior sexual conduct with persons other than the accused.

alleged incident, defendant contended that the matter had arisen out of the victim's efforts to secure a homosexual relationship with the defendant. Two justices dissented, taking the position that defendant's right of confrontation had been violated. Whether or not the majority or dissenting position was correct under the facts presented, it seems clear that because of the confrontation clauses,[63] defendant's right of cross-examination of a state's witness and right to adduce extrinsic evidence to attack the credibility of a state's witness may at times be broader than the prosecution's right to cross-examine and attack the credibility of a defense witness. Statutes creating testimonial privileges and restricting attacks upon credibility of a witness are necessarily limited pro tanto by the confrontation clauses of the state and federal constitutions.[64]

Prejudicial Effect of Unanswered Question—Questioning Defendant About Prior Arrests

Revised Statutes 15:495 was amended in 1952[65] expressly to prohibit the admissibility of evidence of prior arrests to impeach a witness. The purpose of the amendment, says *State v. Carite*,[66] was

> to clothe the accused with a mantle of protection against any evidence of prior arrests for the reason that the infer-

63. *See* the discussion in *The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Evidence*, 34 LA. L. REV. 443, 448 (1974), reprinted in G. PUGH, *supra* note 5, at 155, and *The Work of the Louisiana Appellate Courts for the 1970-1971 Term—Evidence*, 32 LA. L. REV. 344, 345 (1972), reprinted in G. PUGH, *supra* note 5, at 91.

64. *See* Davis v. Alaska, 415 U.S. 308 (1974), and the discussion in *The Work of the Louisiana Appellate Courts for the 1976-1977 Term—Evidence*, 38 LA. L. REV. 567, 580 (1977).

65. LA. R.S. 15:495 (Supp. 1952) provides:

> Evidence of conviction of crime, but not of arrest, indictment or prosecution, is admissible for the purpose of impeaching the credibility of the witness, but before evidence of such former conviction can be adduced from any other source than the witness whose credibility is to be impeached, he must have been questioned on cross-examination as to such conviction, and have failed distinctly to admit the same; and no witness, whether he be defendant or not, can be asked on cross-examination whether or not he has ever been indicted or arrested, and can only be questioned as to conviction, and as provided herein.

66. 244 La. 928, 155 So. 2d 21 (1963).

> ence and innuendo flowing therefrom are prejudicial. If the jury is told that the accused was arrested for possession of narcotics once, the implication is that the accused would do it again. It furthermore destroys the accused's credibility in the minds of the jury. Any other result would fail to comprehend the realities of the case and the prejudice to the accused ensuing from such a statement which the legislature in adopting the codal article clearly recognized.[67]

Is reversible error committed when a defendant who has taken the stand on his own behalf is asked on cross-examination whether he has ever been arrested? The writers feel that the implications from the question are so prejudicial and that the law is so very clear on the point, that in a jury trial, and perhaps even in a nonjury trial, the mere asking of the question should necessitate a reversal. Forcing defense counsel to object to such a question definitely signals to the trier of fact that defendant is trying to hide one or more arrests, and we are all too prone to equate an arrest or indictment with guilt.[68]

The problem is a serious one and has been before the court in various forms many times. Understandably the court is hesitant to require a new trial, especially so when guilt may be clear. On the other hand, how else is the legislative purpose to be achieved?

The matter was again before the court in *State v. Anderson*,[69] a nonjury trial. Relying on *State v. Hatch*,[70] the court differentiated between questions which are themselves assertive and those which are "purely interrogatory" in character. Finding that the question involved was a "pure question" and noting that "moreover" it was a judge rather than a jury

67. *Id.* at 933-34, 155 So. 2d at 23.

68. *See* State v. Gaspard, 301 So. 2d 344 (La. 1974). *See also The Work of the Louisiana Appellate Courts for the 1965-1966 Term—Evidence*, 27 LA. L. REV. 551, 552 (1967), reprinted in G. PUGH, *supra* note 5, at 129; *The Work of the Louisiana Appellate Courts for the 1961-1962 Term—Evidence*, 23 LA. L. REV. 406, 409 (1963), reprinted in G. PUGH, *supra* note 5, at 100; and Note, *Prejudicial Effect of Unanswered Question*, 19 LA. L. REV. 881 (1959), reprinted in G. PUGH, *supra* note 5, at 95.

69. 358 So. 2d 276 (La. 1978).

70. 305 So. 2d 497 (La. 1974).

trial, the court found that the trial court had not erred when, after sustaining defense counsel's objection, it denied his motion for a mistrial. The defendant in *Anderson* was certainly not in an exceptionally meritorious position, for on direct examination he had apparently testified that he had not been in any trouble since 1966 (when he had been released from Angola) and may well have thus "opened the door" to the question asked on cross-examination. Further, the fact that the trial in question was a bench trial rather than a jury trial certainly mitigates the prejudice.[71] Nevertheless, the writers submit that if the salutary purposes of Revised Statutes 15:495 are to be achieved, perhaps the only effective way is for the supreme court to insist upon a mistrial when a prosecutor on cross-examination asks a witness whether he has ever been arrested.[72] As persons trained in the law, prosecutors should be held to obey the simple rule that has been embodied in 15:495 for the last twenty-six years. It may well be that requiring a new trial may be the only way to achieve the legislative purpose.

Questioning Defendant About Whether Police Witness Lying

The court forcefully reiterated in *State v. Duke*[73] that it deems it improper for the prosecution to ask a defendant on cross-examination whether a police officer testifying contrary to defendant was lying. The court noted that it had so stated on several prior occasions and indicated considerable impatience with prosecutorial persistence in such questioning. It said that although in the past it had not held such improper questioning reversible error, the continuance of such questioning might "require us to re-examine our holdings to this effect."[74]

71. *See* Levin and Cohen, *The Exclusionary Rule in Nonjury Criminal Cases*, 119 U. PA. L. REV. 905 (1971). *See also* authorities collected in *The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Evidence*, 37 LA. L. REV. 575, 575 n.2 (1977), reprinted in G. PUGH, *supra* note 5, at 1.

72. For an analogous problem, see the discussion of volunteered remarks by a police officer about a defendant's other crimes in *State v. Schwartz*, 354 So. 2d 1332, 1333 n.2 (La. 1978), discussed in text at note 43, *supra*.

73. 358 So. 2d 293 (La. 1978).

74. *Id.* at 295.

ATTACKING CREDIBILITY

Credibility-Reputation Testimony

Recently, in *State v. Walker,*[75] the supreme court appropriately held that with respect to reputation testimony on the question of probability,[76] defendant's character witness, although apparently unable to testify to defendant's community-wide reputation, could nonetheless properly testify to defendant's reputation among long-standing co-workers at his place of employment. In so holding, the court gave a liberal interpretation to Revised Statutes 15:479.[77] The writers feel that a similar liberal interpretation should be given to analogous language in Revised Statutes 15:490[78] and 491[79] relative to reputation testimony admissible on the issue of credibility of a witness.

A doubt is raised by the recent case of *State v. Trosclair*[80] which concerned a credibility attack on a state's witness, an effort by defendant to show that the witness bore a bad reputation among bar owners. Without discussing *Walker,* the court found the attack to have been improper. The testimony involved seemed to be of very dubious utility, and the writers agree that it should have been rejected. The reputation of the witness in that small, limited segment of the community was of insufficient value to warrant its admissibility. The writers hope, however, that *Trosclair* will not be regarded as a rejection of the approach taken in *Walker*—that, instead, it will be viewed merely as a rejection of the questionable evidence involved in *Trosclair.*

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75. 334 So. 2d 205 (La. 1976). This case is discussed in *The Work of the Louisiana Appellate Courts for the 1976-1977 Term—Evidence,* 38 LA. L. REV. 567, 571 (1978).

76. With respect to the distinction between evidence of credibility and evidence of probability, see notes 6 and 10, *supra.*

77. LA. R.S. 15:479 (1950) provides: "Character, whether good or bad, depends upon the general reputation that a man has among his neighbors, not upon what particular persons think of him."

78. LA. R.S. 15:490 (1950) provides: "The credibility of a witness may be attacked generally by showing that his general reputation for truth or for moral character is bad, or it may be attacked only in so far as his credibility in the case on trial is concerned."

79. LA. R.S. (1950) 15:491 provides: "When the general credibility is attacked, the inquiry must be limited to general reputation, and can not go into particular acts, vices or courses of conduct."

80. 350 So. 2d 1164 (La. 1977).

Reputation Testimony—Significance of Absence of Discussion

Louisiana courts have long held that "the fact that the reputation of an accused has never been discussed in the community in which he lives is admissible as evidence of good character."[81] Further, "[t]he court has held[82] that under certain circumstances the jury should be instructed as to the favorable inference that can be drawn from non-discussion."[83]

When a character witness who purports to be familiar with defendant's reputation is called by defendant, may he testify that the defendant's reputation is good even though he has never heard it discussed? For example, would a longtime friend and colleague of General Washington have been permitted to testify that Washington's reputation as to honesty was good, even though he had never heard it in any way talked about. A majority of the jurisdictions hold that he could.[84]

The matter has been the subject of varying and conflicting pronouncements by the Louisiana courts through the years.[85] In 1956, in *State v. Howard,*[86] the court, without citing the 1936 case of *State v. Pace*[87] and relying upon earlier contrary authority, held that a character witness's concession that he had not heard the defendant's character discussed precluded his testifying as to his reputation. In 1977, relying on *State v. Howard* and the 1915 decision in *State v. Warren,*[88] the court in *State v. George*[89] held that the fact that the character witness has never heard the reputation discussed precludes his expressing his opinion as to what the reputation is. The following year, in

81. State v. George, 346 So. 2d 694, 701 (La. 1977). *See also* State v. Daniels, 262 La. 475, 263 So. 2d 859 (1972); State v. Pace, 183 La. 838, 165 So. 6 (1936); State v. Ciaccio, 163 La. 563, 112 So. 486 (1927).

82. State v. Emory, 151 La. 152, 91 So. 659 (1922). *See also* State v. Leming, 217 La. 257, 46 So. 2d 262 (1950), and State v. Todd, 173 La. 23, 136 So. 76 (1931).

83. *The Work of the Louisiana Appellate Courts for the 1955-1956 Term—Evidence,* 17 LA. L. REV. 421, 424 (1957), reprinted in G. PUGH, *supra* note 5, at 24, 27.

84. *See* the discussion in G. PUGH, LOUISIANA EVIDENCE LAW 24 (1974), and authorities cited therein.

85. *Id.*

86. 230 La. 327, 88 So. 2d 387 (1956).

87. 183 La. 838, 165 So. 6 (1936).

88. 138 La. 361, 70 So. 326 (1915).

89. 346 So. 2d 694 (La. 1977).

State v. Frentz,[90] the court in footnote, without citing the *George* decision, took a position contrary to *George*. The *Frentz* case declares the *Howard* approach "erroneous" and approves the position taken in *Pace*. It is hoped that *Howard* will not hereafter be resuscitated and that the *Frentz* position will prevail.

Prior Conviction—Pendency of Appeal

Does the fact that an appeal is pending relative to a witness's prior conviction of crime preclude use of that information for impeachment purposes? Noting that the question was one of first impression in Louisiana, a unanimous supreme court in *State v. Rhodes*[91] held that the pendency of the appeal does not preclude use for impeachment, but that the trier of fact may be informed of the appeal's pendency. In so holding, the court relied upon the majority position elsewhere in the country[92] and the position taken in the Federal Rules of Evidence.[93]

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90. 354 So. 2d 1007, 1011 n.2 (La. 1978).

91. 351 So. 2d 103 (La. 1977).

92. In this connection the court cited and relied on the following authorities: C. MCCORMICK, *supra* note 53, § 43, at 87 (2d ed. 1972); Annot., 16 A.L.R.3d 726 (1967). The court cited and quoted from *United States v. Soles*, 482 F.2d 105, 108 (1973), for a succinct summary of the reasons for the majority view:

> [T]he defendant has at least some means of qualifying the effect of the use of such a conviction since he can explain that it is under appeal . . . whereas an absolute rule of exclusion would totally deprive the Government of the use of the impeaching material despite the extremely high proportion of affirmances on criminal appeals. Furthermore, courts have stressed the greater probative value of relatively recent convictions . . .; yet these are the very ones most likely to be under appeal. When . . . the appeal presents a constitutional issue, the process can lead all the way to the Supreme Court of the United States, and an absolute rule of exclusion would render such a conviction unavailable for impeachment for several years. In addition, a rule mandating exclusion of convictions still on appeal might well encourage frivolous appeals and dilatory tactics by defendants seeking to avoid the use of prior convictions for impeachment in pending criminal actions. Similarly, prosecutors intending to use recent prior convictions for impeachment might seek to delay trial until an appeal of the earlier judgment had been decided.

351 So. 2d at 104.

93. FED. R. EVID. 609(e).

SUPPORTING CREDIBILITY

Reference to Fact Witness Took, and Presumably Passed, Lie Detector Test

In a well-reasoned opinion in *State v. Davis*[94] the court, through Chief Justice Sanders, held that defendant's conviction for armed robbery must be reversed because of improper reference to a lie detector test. The trial court, over objection, had permitted the state, in support of the credibility of its star witness, to bring out that the witness, following the alleged armed robbery, had taken a lie detector test at the request of her employer and had been continued as an employee. In this connection, the court stated:

> [W]e are forced to conclude that not only was error committed but that the error committed substantially prejudiced the defendant and was, therefore, reversible. LSA—C. Cr.P. art. 921. In the present case, by eliciting impermissible testimony to the effect that the witness had taken a lie detector test and establishing that she had been retained in her employment, the State created the impression that the witness took the test; told the truth; and, therefore, was testifying truthfully at the trial.[95]

If it is accepted in Louisiana that, absent stipulation, the results of lie detector tests are inadmissible,[96] then references to such tests from which the results are naturally inferred should normally be excluded as well.

EXCLUSION OF WITNESSES

Violation of Sequestration Order

State v. Jones,[97] a very significant decision authored by Justice Dennis, represents a sharp break with past cases relative to exclusion of defense witnesses for violation of a seques-

94. 351 So. 2d 771 (La. 1977).

95. *Id.* at 774.

96. *See* State v. Refuge, 264 La. 135, 270 So. 2d 842 (1972), discussed in *The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Evidence,* 34 LA. L. REV. 443, 448 (1974), reprinted in G. PUGH, *supra* note 5, at 126.

97. 354 So. 2d 530 (La. 1978).

tration order.[98] Relying on a long line of federal cases, the court held that because of defendant's state[99] and federal[100] rights to compulsory process and to present a defense, a trial court may not properly exclude defendant's witness from testifying because of violation of a sequestration order absent "the consent, connivance, procurement or knowledge of the defendant or his counsel."[101]

The writers fully agree with the court's analysis of the federal constitutional problem, but for reasons set forth in an earlier article,[102] would go further and argue that Louisiana's statutory provisions[103] authorize contempt as the only coercive remedy.[104]

A very interesting civil case concerning the sanction for violation of a sequestration order is *Hopkins v. Department of Highways,*[105] a decision authored by Judge Domengeaux for the Third Circuit Court of Appeal. *Hopkins* held that although the trial court in its discretion could, because of violation of a sequestration order, properly exclude testimony of expert witnesses, it had abused its discretion in not permitting defendant to be given the opportunity to have different experts familiarize themselves with the facts underlying plaintiffs' claims and testify in rebuttal with respect to same.

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98. For a discussion of the position earlier taken by the court, see *The Work of the Louisiana Appellate Courts for the 1976-1977 Term—Evidence,* 38 LA. L. REV. 567, 594 (1978).

99. LA. CONST. art. I, § 16.

100. U.S. CONST. amend. VI.

101. State v. Jones, 354 So. 2d 530, 532 (La. 1978). The required test was arguably found to have been met in the later case of *State v. Western,* 355 So. 2d 1314 (La. 1978). *See* the concurrence of Justice Dennis, 355 So. 2d at 1322 (Dennis, J., concurring).

102. *The Work of the Louisiana Appellate Courts for the 1976-1977 Term—Evidence,* 38 LA. L. REV. 567, 594 (La. 1978).

103. LA. CODE CRIM. P. art. 21, 22 and 764.

104. Of course, as recognized in *Hopkins v. Department of Highways,* 350 So. 2d 1271 (La. App. 3d Cir. 1977), the fact of violation of a sequestration order could be brought out on cross-examination to attack the credibility of the witness. To preserve a *defendant's* right of confrontation, perhaps the exclusion of state's witnesses would be a needed remedy under certain circumstances.

105. 350 So. 2d 1271 (La. App. 3d Cir. 1977).

OPINION

Expert Opinion—Qualification Required to Estimate Vehicular Speed from Use of "Template"

State v. Self[106] was a negligent homicide prosecution arising out of a motor vehicle accident in which a state policeman had been killed. Reflecting an expressed "distrust of vehicular speed determination evidence in criminal cases,"[107] a majority of the supreme court held that the trial court committed reversible error in permitting a state police officer to qualify and testify "as an expert in the field of determining the speed of motor vehicles involved in collisions" when "the witness admitted that he was not an expert at estimating the speed of vehicles from collision damage, and he conceded that he did not understand the derivation of the speed calculation formulae upon which the template is based."[108] Following *State v. Rogers*[109] the court held it improper to permit a prosecution witness to give an opinion of vehicular speed based upon the use of a template when he did not understand the theory underlying its use. In a very well-written opinion, Justice Dennis fully demonstrated the complexity of the factors involved in estimating vehicular speed from skidmarks, etc. A jury, of course, would have great difficulty in evaluating the accuracy of such an expert's conclusion, and the supreme court apparently wants to be very sure that before such testimony is introduced, the purported expert is in fact thoroughly competent. The court appears particularly interested in protecting a defendant in a criminal case against the possibility of error.

PRIVILEGE

Attorney-Client Privilege—Availability in Succession Proceedings

In *Succession of Norton*[110] the court recognized that the

106. 353 So. 2d 1282 (La. 1977).
107. *Id.* at 1284.
108. *Id.* at 1283.
109. 324 So. 2d 358 (La. 1976).
110. 351 So. 2d 107 (La. 1977).

attorney-client privilege provided by Civil Code article 2283[111] generally survives the death of the client. It held, however, that where in a succession proceeding the executor of the beneficiaries named in the will seeks access to a testator's attorney-client records for the purpose of upholding his will, descendants not named in the will should not be permitted to assert the attorney-client privilege to block access to the records. The writers fully agree. A privilege created to protect a person's communications with his attorney should not be available to prevent access to records sought by his executor for the purpose of supporting the legality of his testamentary declarations.

Privilege Against Self-incrimination—Who May Assert

The privilege against self-incrimination is normally personal to the witness, and it is for him to decide whether to assert or waive it. A problem arises where the witness is a minor.

In *State v. Lawson*[112] the trial court, to protect a teenage minor, an alleged co-participant in the crime who had been called by the defendant as a witness, appointed counsel to advise her as to her privilege against self-incrimination. Following a conference with the attorney, rather than the witness's claiming the privilege, the attorney claimed it on behalf of the witness. Apparently to insure that defendant's right of compulsory process had not been violated, a divided court remanded the case to the trial court to determine whether the witness would have invoked the privilege herself, thus emphasizing the personal nature of the privilege against self-incrimination.

Privilege Against Self-incrimination—Grant of "Use" Immunity

Article 439.1 of the Code of Criminal Procedure, adopted by the Louisiana Legislature in 1972,[113] provides that under certain preconditions, despite a witness's claimer of the privilege against self-incrimination, he may, via the grant of "use"

111. LA. CIV. CODE art. 2283.
112. 359 So. 2d 964 (La. 1978).
113. LA. CODE CRIM. P. art. 439.1, *added by* 1972 La. Acts, No. 410, § 1.

immunity, be required to answer a question posed to him. *In re Parker*[114] concerned the state's invocation of the statute to force the brother of the defendant in a murder case to answer questions relative to the alleged murder weapon. The state contended that the weapon had been stolen by the witness and given to the defendant shortly before the homicide and claimed that the witness had earlier so stated to the police. Despite promised immunity as to the theft of the pistol, the witness refused to answer, claiming that his answer might implicate him in the murder. The state understandably was unwilling to grant the witness full immunity as to any answer he might give relative to the weapon, for it feared that the witness might, under a grant of immunity, admit to having committed the murder himself and thus raise a doubt as to the defendant's guilt. Noting that the witness had stated that he would recant his earlier statement given to the police and that his current position was that he possessed the pistol in question before and after the date of the murder, the Louisiana Supreme Court held that the tendered immunity was insufficient to negate the witness's privilege. Speaking for a unanimous court, Justice Summers, in a well-reasoned opinion, stated that the privilege against self-incrimination is to be liberally construed: "[t]o sustain the privilege, it need only be evident from the implication of the question, in the setting in which it is asked, that a responsive answer would disclose facts which could be used against the witness in a future prosecution for crime."[115] Finding that there was a "rational connection" between the witness's possible answer to the district attorney's question and the witness's implication in the alleged murder, the proffered immunity was insufficient to protect the witness's privilege against self-incrimination. The writers fully agree.

It is interesting to speculate whether under the defendant's right of compulsory process[116] and in light of the statute authorizing the *prosecution* to compel testimony via "use" immunity,

114. 357 So. 2d 508 (La. 1978).

115. *Id.* at 513.

116. *See* Davis v. Alaska, 415 U.S. 308 (1974). *See also* State v. Jones, 354 So. 2d 530 (La. 1978); State v. Kellogg, 350 So. 2d 656 (La. 1977); State v. Conerly, 342 So. 2d 671 (La. 1977); State v. Bolton, 337 So. 2d 446 (La. 1976).

a *defendant* in such circumstances might have successfully demanded that such a witness be forced to answer like questions under a grant of "use" immunity. No jurisdiction has appeared to go so far, but there is speculation among writers concerning the possibility.[117]

Inference from Claimer of Privilege

When the prosecution in a criminal case knows that a defendant will assert a valid privilege as to all of a witness's relevant testimony, may it nonetheless properly call the witness to the stand and force the defendant to claim his privilege in the presence of the jury?[118] Although it does not so hold, an implication can fairly be drawn from *State v. Bennett*[119] that such conduct on the part of the prosecution would be improper. Knowing that the defendant would assert the confidential connubial communication privilege with respect to certain testimony by his wife, the prosecution nonetheless called the wife to the stand. *Under the particular circumstances* of the case, the court found that the conduct of the prosecution had not been improper. Importantly, the court reasoned that the district judge had not committed error in finding that the testimony given by the witness spouse—testimony not subject to the confidential connubial privilege—was relevant and admissible. The court *did not* state that the prosecution under different circumstances would be entitled to have the jury observe a defendant claim the confidential connubial privilege. Instead, it implied that if a witness spouse has no relevant admissible

117. *See* Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 167 (1974); Comment, *A Re-Examination of Defense Witness Immunity: A New Use For Kastigar*, 10 HARV. J. LEGIS. 74, 79 (1972). *See also* United States v. Alessio, 528 F.2d 1079 (9th Cir. 1976); Earl v. United States, 361 F.2d 531 (D.C. Cir. 1966).

118. For discussion on forcing a witness to assert his privilege before the jury and inferences to be drawn from assertion of privilege, see *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Evidence*, 37 LA. L. REV. 575, 598 (1977), reprinted in G. PUGH, *supra* note 5, at 237; *The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Evidence*, 35 LA. L. REV. 525, 542 (1975), reprinted in G. PUGH, *supra* note 5, at 214; and Note, *The Use of a Witness's Privilege for the Benefit of a Defendant*, 37 LA. L. REV. 1244 (1977). *See also* FED. R. EVID. 513 as originally adopted by the Unites States Supreme Court, but later rejected by Congress, and the accompanying comments, at 56 F.R.D. 183, 260 (1972).

119. 357 So. 2d 1136 (La. 1978).

testimony to offer aside from that covered by the confidential connubial privilege, forcing the defendant to assert his privilege in the presence of the jury is improper.

The court went further and clearly stated that the district attorney's comment in closing argument relative to the defendant's assertion of his confidential connubial privilege was improper; however, under the circumstances, including the trial judge's admonition to disregard the prosecutorial comment, it did not necessitate reversal. Two justices dissented on this point, taking the position that the improper prosecutorial comment was so prejudicial that it constituted reversible error.

The *Bennett* decision is important not only as to the confidential connubial communication privilege, but in other areas as well. Presumably the court will hold that no adverse inference is properly to be drawn from a criminal defendant's assertion of a valid privilege. The continued authority of *State v. McMullan*[120] (concerning the propriety of the prosecution's calling a witness who, it has been informed, will claim a privilege and forcing the witness to assert his privilege before the jury) appears in serious doubt.[121]

NEW EXCLUSIONARY RULE FOR LOUISIANA?

Statements Made During Period of Detention Where Right to Counsel Not Accorded

What is the remedy for violation of the statutory provision requiring that within a maximum of seventy-two hours an arrested person shall be brought before a judge for appointment of counsel, etc.?[122] The statute provides that if this provision is not complied with the defendant shall be "released forthwith." But what remedy does a defendant have if he is neither brought before the judge within the prescribed time nor released forthwith? Justice Tate in a concurring opinion to a writ denial

120. 223 La. 629, 66 So. 2d 574 (1953), discussed in Note, *Evidence—The Husband-Wife Testimony Privilege*, 14 LA. L. REV. 427 (1954), reprinted in G. PUGH, LOUISIANA EVIDENCE LAW 173 (1974).

121. *See* discussion in *The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Evidence*, 37 LA. L. REV. 575, 598 (1977), reprinted in G. PUGH, *supra* note 5, at 237.

122. LA. CODE CRIM. P. art. 230.1, *as amended by* 1977 La. Acts, No. 395, § 1.

in *State v. Daigle*[123] suggested persuasively that statements secured from a defendant during such period should be inadmissible against him. Such an exclusionary rule would be very similar to the *McNabb-Mallory* rule adopted many years ago by the United States Supreme Court.[124]

HEARSAY

Definition

In *State v. Martin*[125] the court recognized that Louisiana statutes provide no authoritative definition of "hearsay" and that to determine what is or is not hearsay is not always an easy matter.[126] The court then adopted the definition suggested by Professor McCormick: "Hearsay evidence is testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter. C. McCormick, Evidence, § 246 (Cleary ed. 1972)."[127]

Hearsay v. Non-Hearsay—Police Radio Broadcasts

May the prosecution in a criminal case, over a hearsay objection, properly adduce evidence by a police officer as to the detailed description of the reported perpetrator of the crime that he had received over the police radio prior to the arrest? Further, may the prosecution properly adduce evidence that the arresting officer had arrested defendant because defendant fit the description that the police officer had received over the police radio? A majority of the court in *State v. Mitchell*[128] (a

123. 353 So. 2d 287 (La. 1977).

124. *See* C. MCCORMICK, *supra* note 53, § 155, at 337, which, *inter alia*, discusses the impact and constitutionality of 18 U.S.C. § 3501(c) (1968), which purports to limit the impact of the rule.

125. 356 So. 2d 1370 (La. 1978).

126. *See* Comment, *Hearsay and Non-Hearsay as Reflected in Louisiana Criminal Cases*, 14 LA. L. REV. 611 (1954), reprinted in G. PUGH, LOUISIANA EVIDENCE LAW 412 (1974). *See also* State v. Ford, 336 So. 2d 817 (La. 1976), discussed in *The Work of the Louisiana Appellate Courts for the 1976-1977 Term—Evidence*, 38 LA. L. REV. 567, 582 (1978).

127. 356 So. 2d at 1373-74.

128. 356 So. 2d 974 (La. 1978).

rape case) indicated that in both instances the prosecution may, reasoning that the evidence is non-hearsay—that it is admissible as fact of utterance rather than utterance of fact. With deference, the writers submit that such evidence should be classified as inadmissible hearsay; the fact that the arresting officer heard a description of the reported perpetrator of the crime on the radio does not remove it from the realm of hearsay. It must be conceded, however, that there are cases indicating the contrary result.[129]

There is no general exception for complaints received by police officers. Thus, generally a police officer as a witness on the stand may not, over a hearsay objection, properly relate a complaint he had received from the alleged victim that a person fitting a certain designated description committed the robbery.[130] Likewise, a second officer who was told of such description by the first officer could not as a witness relate it on the stand. For the same reason, the fact that the second officer might have received the report from the first officer by radio is of no moment. The fact of such description would, of course, explain why the arresting officer arrested the defendant. But at a trial on the merits, as opposed to a motion to suppress, the officer's conduct in making the arrest is normally immaterial. If as a result of cross-examination or otherwise the propriety of the officer's conduct became an issue in the case, then *the fact* that he had received such information might become relevant non-hearsay. In general, however, in the state's case in chief the *reason* for the officer's arresting the defendant and the officer's state of mind is immaterial.

Prior Statement by Witness on Stand

In an excellent discussion of the problem, Justice Dennis in *State v. Martin*[131] adhered to the traditional position that

129. *See* the discussion in *The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Evidence*, 37 LA. L. REV. 575, 606 (1977), reprinted in G. PUGH, *supra* note 5, at 530. *See also* State v. Tucker, 354 So. 2d 521 (La. 1978).

130. *See* State v. Ford, 336 So. 2d 817 (La. 1976), discussed in *The Work of the Louisiana Appellate Courts for the 1976-1977 Term—Evidence*, 38 LA. L. REV. 567, 582 (1978).

131. 356 So. 2d 1370 (La. 1978).

testimony by a witness on the stand as to his own out-of-court statement offered to prove the truth of the statement is nonetheless hearsay and must fit within an exception to the hearsay rule to be admissible.[132] After a careful analysis of Louisiana and other authorities, the court concluded: "often an erroneous ruling admitting an unsworn out-of-court assertion by a testifying witness will not present grounds for reversal, but the hearsay character of a proffered out-of-court assertion is not altered by the fact that the statement was made by a person who appears in court as a witness."[133]

Confessions—Foundation for Voluntariness—Impact of Intoxication

What is the impact of inebriation on the free and voluntary requirement for admissibility of a confession? Traditionally, the law has been unsympathetic to the plight of the accused whose tongue at the time of the confession was loosened by self-induced inebriation.[134]

In *State v. Rankin*[135] the court continued to set forth an exacting requirement for exclusion of a confession because of intoxication, stating:

> Where the free and voluntary nature of a confession is challenged on the ground that he was intoxicated at the time of interrogation, the confession will be rendered inadmissible only when the intoxication is of such a degree as

132. *See* 3A J. WIGMORE, EVIDENCE § 1018 (Chadbourne rev. 1977) (collecting recent cases both approving and disfavoring the traditional view). *See also* State v. Ford, 336 So. 2d 817 (La. 1976), discussed in *The Work of the Louisiana Appellate Courts for the 1976-1977 Term—Evidence,* 38 LA. L. REV. 567, 582 (1978), and the materials therein collected.

133. 356 So. 2d at 1374. In so holding, the court expressly disapproved sporadic intimations to the contrary in the following earlier cases: State v. Monroe, 345 So. 2d 1185 (La. 1977); State v. Launey, 335 So. 2d 435 (La. 1976); State v. Hayes, 306 So. 2d 705 (La. 1975); State v. Jacobs, 281 So. 2d 713 (La. 1973); Southern Scrap Material Co. Ltd. v. Commercial Scrap Materials Corp., 239 La. 958, 120 So. 2d 491 (1960).

134. *See* State v. Manuel, 253 La. 195, 217 So. 2d 369 (1969), and State v. Alexander, 215 La. 245, 40 So. 2d 232 (1949). For the law in other jurisdictions, see Annot., 69 A.L.R.2d 361 (1960).

135. 357 So. 2d 803 (La. 1978).

> to negate defendant's comprehension and to render him unconscious of the consequences of what he is saying.[136]

Significantly, however, the court went on to hold that the confession in question was inadmissible, finding that the prosecution had failed to sustain its burden of showing that the confession involved had been freely and voluntarily made.

A police officer called by defendant had testified that at the time of defendant's arrest and prior to the making of the confession, defendant had appeared "intoxicated and disoriented, confused and irrational."[137] The state had itself called no witnesses to show that the confession was free and voluntary; it had introduced the confession on cross-examination of the police officer called by defendant. Quite properly, the court held that the state had failed to sustain its burden of proof on the voluntariness issue.

The court went on to state: "The evidence is clear that defendant was not capable of understanding his *Miranda* rights and making a free and voluntary confession due to his intoxicated condition."[138] Rarely have courts found, as in *Rankin,* that the inebriation of the confessor precluded the admissibility of the confession. Further, the last quoted language seems more sympathetic to the inebriated confessor than that of the test traditionally formulated.

Confessions—Coercion by Private Persons

In *State v. Nelson*[139] the court in dictum took the position that an involuntary confession is inadmissible whether the action precipitating the involuntary confession was by police officers or private individuals. Although the case arose in the shoplifter context,[140] the language of the opinion goes much further, indicating that any evidence obtained as a result of an

136. *Id.* at 804. Justice Dennis, in his concurring opinion, objected to such a formulation and said that he preferred the approach taken on the voluntariness issue in *State v. Glover,* 343 So. 2d 118 (La. 1977).

137. 357 So. 2d at 804.

138. *Id.* at 805.

139. 354 So. 2d 540 (La. 1978).

140. *See* LA. CODE CRIM. P. art. 215.

unreasonable search and seizure, by whomever made, is inadmissible in Louisiana.[141]

Confession of Codefendant Which Implicates Defendant—Limiting Instruction

Serious questions relative to a defendant's right of confrontation and his right to a fair trial are presented when a defendant and a codefendant are jointly tried and the confession of the codefendant implicating both himself and the defendant is offered in evidence against the codefendant. Is a defendant sufficiently protected by an instruction that the jury is to use the confession only against the codefendant? The majority in *Bruton v. United States*[142] held that when a codefendant does not take the stand and a confession by the codefendant implicating both defendant and codefendant has been introduced against the codefendant, an instruction to the jury that the codefendant's confession is to be used solely against the codefendant is insufficient protection for the defendant.[143] In this connection the court stated: "Plainly, the introduction of [the codefendant's] confession added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination, since [the codefendant] did not take the stand. Petitioner thus was denied his constitutional right of confrontation."[144] Is the same rule to be applied when codefendant in fact takes the stand and tells substantially the same story as the defendant? In *Nelson v. O'Neil*[145] the confessing codefendant took the stand, told the same story as defendant, denied having made the confession implicating both himself and defendant, and stated that the facts contained in the alleged confession were untrue. A divided court held that under the circumstances, defendant's right of confrontation was not violated. The court stated that "where a codefendant takes the stand in his own defense, denies making an alleged out-of-court

141. *See* LA. CONST. art. I, § 5.
142. 391 U.S. 123 (1968).
143. *See also* Roberts v. Russell, 392 U.S. 293 (1968).
144. 391 U.S. at 127-28, *as quoted in* Nelson v. O'Neil, 402 U.S. 622, 628 (1971).
145. 402 U.S. 622 (1971).

statement implicating the defendant, and proceeds to testify *favorably* to the defendant concerning the underlying facts, the defendant has been denied no rights protected by the Sixth and Fourteenth Amendments."[146] Justices Brennan, Douglas and Marshall argued persuasively in dissent that the concern underlying the decision in *Bruton* should likewise control in *Nelson.* They contended that the reason underlying the *Bruton* holding was the "substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining [Bruton's] guilt"[147] and that a similar danger had been present in the trial in *Nelson.* In a separate dissenting opinion, Justice Marshall urged the need for new rules in joint trials and enthusiastically supported the American Bar Association Standards in this connection—proposals that would force the prosecution in such cases as *Bruton* and *Nelson* to grant a severance, delete reference to defendant in codefendant's confession, or not introduce the confession.[148]

A fascinating version of the problem was presented to the Louisiana Supreme Court in *State v. Harvey.*[149] As in *Nelson v. O'Neil,* the codefendant whose confession the state wished to introduce in *Harvey* took the stand and repudiated the confession; however, instead of affirming the story told by defendant, he told yet a different story, claiming that he knew nothing whatsoever about the alleged homicide for which they were both on trial. Defendant argued on appeal that the trial court's instruction to limit use of the codefendant's confession to codefendant only was insufficient protection of defendant's state and federal rights of confrontation. Rejecting defendant's arguments, the court distinguished *Bruton* and took the position that since codefendant had taken the stand, defendant's rights of confrontation had not been violated.

With deference, the writers urge that the law in this area be reexamined by the court. The writers agree that the *Harvey*

146. *Id.* at 629-30 (emphasis added).

147. *Id.* at 633 (Brennan, J., dissenting), *quoting* Bruton v. United States, 391 U.S. 123, 126 (1968).

148. ABA STANDARDS, Joinder and Severance § 2.3(a) (1968).

149. 358 So. 2d 1224 (1978).

case is not necessarily controlled by *Bruton,* for unlike *Bruton,* the codefendant in *Harvey* took the stand. But of course the fact that *Bruton* does not require exclusion of the statement does not necessitate its admissibility in Louisiana.

Analytically, the first question to be resolved is the admissibility in the state's case in chief of the codefendant's confession implicating not only himself but defendant as well. The confession of the codefendant is, as to the defendant, inadmissible hearsay, and in Louisiana this is true even though the codefendant thereafter takes the stand in his own behalf.[150] The writers believe that the fear expressed in *Bruton*—that the jury may not follow the limiting instruction—is well grounded and that the danger is not significantly reduced by the fact that the codefendant later takes the stand, at least where the codefendant on the stand denies having made the alleged confession. If codefendant does in fact take the stand and reiterates that part of his earlier confession implicating the defendant, then it may be that the earlier admissibility of codefendant's confession would become harmless error, but such a circumstance would be unusual indeed.

Except insofar as the codefendant's testimony in *Harvey* contradicted testimony by an alleged conspirator that the conspirator, together with defendant and codefendant, had planned the armed robbery which culminated in the death of the victim, the codefendant's testimony on the stand did not support defendant's version of the incident, and thus it is submitted that the *Harvey* case is significantly unlike *Nelson.* But whether or not the United States Supreme Court would thus distinguish *Nelson* and hold that defendant's federal right of confrontation was violated by the admission of codefendant's jointly incriminating confession, it is submitted that Louisiana's confrontation clause,[151] its rule against the admissibility of hearsay,[152] and its rule that generally a witness's out-of-court

150. See text at note 159, *infra. See also* State v. Ford, 336 So. 2d 817 (La. 1976), discussed in *The Work of the Louisiana Appellate Courts for the 1976-1977 Term—Evidence,* 38 LA. L. REV. 567, 583 (1978).

151. LA. CONST. art. I, § 16.

152. LA. R.S. 15:434 (1950).

statement is not to be given substantive effect[153] all militate in favor of our adopting the position set forth in the American Bar Association Standards.

Res Gestae—Prerequisite for Admissibility

A divided court held in *State v. Millet*[154] that in order to introduce testimony of an out-of-court statement by a third party as part of the res gestae, the state must show by evidence *aliunde* the proffered statement that the charged crime in fact took place. Otherwise, as the court indicated, there would be a "boot strap operation." The writers fully agree.

Public Records—Proof of Identity

A recurring problem in multiple offender hearings has been establishing the fact of prior convictions. The first *Curtis* case[155] held that coincidence of name as to defendant and the person previously convicted is insufficient to establish identity, and the *French* case[156] held that in habitual offender proceedings identity must be established beyond a reasonable doubt. Although various ways of proving identity are possible,[157] one of the most enticing is via identity of fingerprints of the person previously convicted and of the defendant in an habitual offender proceeding. But because of the hearsay rule and the rule requiring proper authentication of documents, establishing such identity has given considerable trouble.[158]

153. *See* State v. Ray, 259 La. 105, 249 So. 2d 540 (1971), discussed in *The Work of the Louisiana Appellate Courts for the 1971-1972 Term—Evidence*, 33 LA. L. REV. 306, 311 (1973), reprinted in G. PUGH, *supra* note 5, at 104.

154. 356 So. 2d 1380 (La. 1978).

155. State v. Curtis, 319 So. 2d 434 (La. 1975), discussed in *The Work of the Louisiana Appellate Courts for the 1976-1977 Term—Evidence*, 38 LA. L. REV. 567, 567-68 (1978).

156. City of Monroe v. French, 345 So. 2d 23 (La. 1977), discussed in *The Work of the Louisiana Appellate Courts for the 1976-1977 Term—Evidence*, 38 LA. L. REV. 567, 568 (1978).

157. *See* State v. Curtis, 338 So. 2d 662 (La. 1976), discussed in *The Work of the Louisiana Appellate Courts for the 1976-1977 Term—Evidence*, 38 LA. L. REV. 567, 567-68 (1978).

158. *See* State v. Martin, 356 So. 2d 1370 (La. 1978); State v. Hamilton, 356 So. 2d 1360 (La. 1978); State v. Adams, 355 So. 2d 917 (La. 1978); State v. Demouchet, 353 So. 2d 1025 (La. 1978); State v. Barrow, 352 So. 2d 635 (La. 1978).

One of the most important of the recent cases is *State v. Martin,*[159] holding inadmissible "a fingerprint card from a neighboring sheriff's office" which was "stamped 'a true copy of the original on file in this office' and signed by an individual identifying himself as 'Deputy Sheriff, Jefferson Parish.'"[160] As to authentication of the document, the court said that normally the custodian of official records and the person issuing acceptable certificates of authenticity must be identical, but because of Louisiana's Code of Criminal Procedure article 331 to the effect that a deputy sheriff possesses all the powers of a sheriff, a deputy sheriff may properly issue acceptable certified copies of records in the sheriff's office. As the court properly pointed out, however, such a certification by the deputy sheriff meets the authentication objection only and does not answer the underlying hearsay objection, and the court then went on to hold that because of the hearsay objection, the proffered records should have been excluded. The court said that Louisiana has not adopted a hearsay exception admitting public records generally, but instead has enacted statutes creating hearsay exceptions as to specific records,[161] and that "an overbroad exception admitting into evidence all statements on file with all public officers would have potential conflict with a defendant's right to confrontation and allow introduction of information derived from untrustworthy sources and through unreliable methods."[162] The writers agree.

Presumably in response to *Martin* and other recent decisions, the 1978 legislature enacted a statute[163] providing that when a person is convicted of a felony, the trial judge "shall

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For a case dealing with the analogous problem of proof of prior conviction of simple robbery when defendant is charged under LA. R.S. 14:95.1 (Supp. 1975) with carrying a concealed weapon by a person who has been convicted of simple robbery, see *State v. Tillman,* 356 So. 2d 1376 (La. 1978), decided the same day as *State v. Martin.*

159. 356 So. 2d 1370 (La. 1978).

160. *Id.* at 1374.

161. *See* Hawthorne, *Business Records in Louisiana as an Exception to the Hearsay Rule,* 21 LA. L. REV. 449 (1961), reprinted in G. PUGH, *supra* note 5, at 542; Zwick, *Hearsay Evidence and the Federal Rules: Article VIII—II. Exceptions to the Hearsay Rule: Expanding the Limits of Admissibility,* 36 LA. L. REV. 159, 169 (1975), reprinted in G. PUGH, *supra* note 5, at 505, 513.

162. 356 So. 2d at 1375.

163. 1978 La. Acts, No. 302, *amending* LA. CODE CRIM. P. art. 871.

cause to be affixed to the bill of indictment or information the fingerprints of the defendant against whom such judgment is rendered"[164] and shall certify that the fingerprints are those of the defendant.[165] The statute is narrowly drawn and, reasonably interpreted, presumably requires that the fingerprints be taken in open court in the presence of the judge. It is felt that thus interpreted it would overcome confrontation objections. If so, copies of such original documents properly certified by the legal custodian should be equally admissible as the original.[166] It is believed that the 1978 act should go far to relieve the problem encountered by the prosecution in establishing identity in habitual offender proceedings.

PRESERVING RIGHTS FOR APPEAL

Burden of Showing Requirements for Hearsay Exceptions Met

When a litigant offers hearsay evidence and the opponent interposes a hearsay objection, does the proponent or opponent have the burden of showing that the offered evidence meets or does not meet the requirements for a designated hearsay exception? Generally it is felt that the burden is on the proponent, and certainly it would be the safer practice for a cautious proponent to attempt to shoulder it. Somewhat surprisingly, in *State v. Williams*[167] the court stated that the trial court had committed error in sustaining the state's objection to the admissibility of certain hospital records, despite the absence of any showing that defendant offeror had relied upon the hospital records exception to the hearsay rule[168] or called the trial court's attention to the exception and despite the absence of a showing that the statutory requirements of certification by an appropriate official had been complied with. Additionally, there had apparently been no offer of proof[169] of the hospital

164. *Id.*

165. *See also* LA. R.S. 15:529.1(F) (Supp. 1958 & 1978) relative to certification of inmate records by penitentiary wardens, etc.

166. *See* LA. R.S. 15:457 (1950).

167. 346 So. 2d 181 (La. 1977).

168. LA. R.S. 13:3714 (Supp. 1966 & 1977).

169. *See* State v. George, 312 So. 2d 860 (La. 1975), discussed in *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Evidence*, 36 LA. L. REV. 651,

records in question, and the supreme court hence did not have the offered records before it. The supreme court held, however, under the particular circumstances presented in the case, that defendant had not been prejudiced by the trial court's error.

Contemporaneous Objection Rule—Effect of Failure to Interpose Objection When Objectionable Evidence First Adduced

If a litigant fails to interpose an objection to testimony as to particular subject matter, is he thereby precluded from later objecting to similar evidence as to the same subject matter? *State v. Lee*[170] and *State v. Millet*[171] both answer in the negative and the writers fully agree.

The contemporaneous objection rule[172] embodied in article 841 of the Code of Criminal Procedure[173] generally serves a very valuable function, forcing an aggrieved litigant to put his opponent on notice with respect to his purported violation of evidentiary rules and giving the trial judge the opportunity to cure the claimed impropriety. However, as Justice Calogero said, speaking for a majority of the court in *State v. Lee*:[174]

> Article 841 is not an inflexible rule imposed on criminal litigants without rationale or justification. . . . [T]he fact that a prosecutor has made a prejudicial reference to a previous trial without objection does not mean that he can then exploit defense counsel's inattention or mistake by repeated prejudicial comments in the same vein. Our rules are not intended to be available for manipulation by the defense *or* by the state.[175]

A litigant's failure to assert an available objection should not

678 (1976), reprinted in G. PUGH, *supra* note 5, at 584.

170. 346 So. 2d 682 (La. 1977).

171. 356 So. 2d 1380 (La. 1978).

172. *See The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Evidence*, 35 LA. L. REV. 525, 549 (1975), reprinted in G. PUGH, *supra* note 5, at 588.

173. LA. CODE CRIM. P. art. 841.

174. 346 So. 2d 682 (La. 1977).

175. *Id.* at 684-85 (emphasis by the court).

be interpreted to mean that the non-objecting party permanently waives objection to the objectionable subject matter, as the court correctly concluded. The fact that no protest is made when an opponent opens a forbidden door[176] should not give the opponent the right to use such door throughout the trial.

176. See text at note 1, *supra*.