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Other Crimes Evidence in Louisiana - II. To Attack The Credibility of the Defendant on Cross-Examination

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relevancy appears to overrule many of the post-1950 decisions. For the first time in Louisiana, it has been expressly recognized that the trial court has the duty to exclude even relevant evidence if its probative value does not justify its prejudicial effect. Secondly, the supreme court recognizes the constitutional problems inherent in the use of other crimes evidence, and adopts comprehensive procedures to protect the defendant from unwarranted character attack.

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OTHER CRIMES EVIDENCE IN LOUISIANA—

II. TO ATTACK THE CREDIBILITY OF THE DEFENDANT ON CROSS-EXAMINATION

In Louisiana, when a defendant in a criminal trial chooses to testify in his own behalf, he may be cross-examined as any other witness.[1] The state may, by certain approved methods, then seek to persuade the jury to disregard his testimony by

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supreme court affirmed a murder conviction in which the state had been allowed to introduce evidence of a rape committed four years prior to the crime in question. In a 5-2 decision (two justices concurring), the majority affirmed the conviction because the defendant was charged with *felony-murder*; thus the prior rape was admissible to prove defendant's intent and system to commit the felony of rape, during which the death occurred. The two concurring opinions expressly adhered to *Prieur* and appeared to severely limit the majority's holding. The two dissenting justices stated that the evidence was cumulative, irrelevant, and highly prejudicial and thus should have been excluded under the holding of *Prieur*. The facts of the case and a fair reading of the concurring and dissenting opinions lead the writer to believe that the *Frezal* holding will be limited to its facts and that the dominant judicial attitude, and thus the viable authority in future cases, is expressed in *Prieur* and *Moore*. *See also*, State v. Jordan, 276 So.2d 277 (La. 1973).

1. LA. R.S. 15:462 (1950) provides: "When a person accused, or a husband or wife becomes a witness, such witness shall be subject to all the rules that apply to other witnesses, and may be cross-examined upon the whole case." *See* United States v. Bland, 432 F.2d 96 (5th Cir. 1970); State v. Cripps, 259 La. 403, 250 So.2d 382 (1971); State v. Guillory, 201 La. 52, 9 So.2d 450 (1942); State v. Dreher, 166 La. 924, 118 So. 85, *cert. denied*, 278 U.S. 641 (1928); State v. Toliver, 163 La. 1000, 113 So. 222 (1927); State v. Waldron, 128 La. 559, 54 So. 1009 (1911); State v. Guy, 106 La. 8, 30 So. 268 (1901); State v. Murphy, 45 La. Ann. 958, 13 So. 229 (1893). For a discussion of the general rule elsewhere, see 3A J. WIGMORE, EVIDENCE § 980 (Chadbourne rev. 1970) [hereinafter cited as WIGMORE]; and C. MCCORMICK, EVIDENCE § 132, at 278-79 (2d ed. 1972) [hereinafter cited as MCCORMICK]: "[W]hen an accused testifies he becomes liable to cross-examination under whatever rules would be applicable to any other witness, and by testifying he waives his privilege to that extent. Not only may he be questioned concerning all facts relevant to the matters he has testified to on direct examination but he is also subject to a searching cross-examination for impeachment purposes."

attacking his credibility.[2] One method by which this attack may be accomplished is to elicit discrediting testimony from the witness himself on cross-examination. When a defendant is cross-examined as to his prior convictions or other acts of misconduct, the chances of prejudice are greater than when the ordinary witness is subject to the same inquiry. Thus, the extent to which discrediting past acts may be the subject of cross-examination becomes more significant when the defendant is a witness.[3]

The purpose of this Comment is to determine to what extent prior convictions and other acts of misconduct of the defendant are proper subjects of cross-examination as reflecting upon his credibility. This discussion will not consider the use of prior acts, even those sought on cross-examination, in order to prove the state's case in chief, *i.e.*, the probability of defendant's having committed the crime charged.[4]

Prior Convictions

Jurisdictions other than Louisiana

In most states, a witness may be impeached by cross-examination as to his prior convictions.[5] In those jurisdictions there are

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In *Malloy v. Hogan*, 378 U.S. 1 (1964), the Supreme Court applied the fifth amendment privilege against self-incrimination to the states through the fourteenth amendment. The federal courts follow the "narrow rule" of cross-examination, limiting waiver to the extent covered on direct and respecting defendant's credibility. Some states, including Louisiana, follow the "broad rule" of cross-examination, allowing inquiry on the whole case. Since the right waived is one guaranteed by the United States Constitution, it has been suggested that the states are now obliged to use the "narrow rule" as used in the federal courts. *See* Tucker v. United States, 5 F.2d 818 (8th Cir. 1925); MCCORMICK § 132, at 270-80; *The Work of the Louisiana Appellate Courts for the 1968-1969 Term—Evidence*, 30 LA. L. REV. 321, 328 (1969). Rule 608(b) of the *Proposed Federal Rules of Evidence* would provide that "[t]he giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility."

2. LA. R.S. 15:486 (1950): "Each side has the right to impeach the testimony and the credibility of every witness sworn on behalf of the other side." For a summary of the approved methods of impeachment, see MCCORMICK §§ 33-50.

3. *See* text accompanying notes 28-40 *infra*.

4. LA. R.S. 15:445-46 (1950). These statutes concern the use of other acts to show knowledge, intent, system, etc. in the state's case in chief, and are the subject of the accompanying article to this Comment. *See* Comment, 33 LA. L. REV. 614 (1973).

5. *See generally* 4B. JONES, EVIDENCE § 26:20 (Gard 6th ed. 1972); MCCORMICK § 43; 2C. TORCIA, WHARTON'S CRIMINAL EVIDENCE §§ 475-77, 481

multitudinous rules governing the use of this evidence.[6] However, there exists wide diversity as to the nature of the crimes that may be used to attack credibility in this manner.[7] At least two jurisdictions[8] have adopted the approach taken in the *Uniform Rules of Evidence*, providing that if the conviction does not involve "dishonesty or false statement," it is inadmissible to impair a witness' credibility; and, where the witness is the

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(13th ed. 1972); WIGMORE §§ 980, 987; Cohen, *Impeachment of a Defendant by Prior Convictions*, 6 CRIM. L. BULL. 26 (1970); Comment, 36 MO. L. REV. 472 (1971); Note, 71 W. VA. L. REV. 160 (1969).

6. Included among those rules are: generally, courts have refused to consider adjudications in juvenile cases as convictions which would be admissible in evidence for impeachment purposes, People v. Witt, 159 Cal. App. 2d 492, 324 P.2d 79 (1958); People v. Warren, 23 Mich. App. 20, 178 N.W.2d 127 (1970); Banas v. State, 34 Wis. 2d 468, 149 N.W.2d 571, *cert. denied*, 389 U.S. 962 (1967). Neither a pardon, Rush v. State, 253 Ala. 537, 45 So.2d 761 (1950), *Annot.*, 30 A.L.R.2d 893 (1953), nor the pendency of an appeal, People v. Bey, 42 Ill. 2d 139, 246 N.E.2d 287 (1969), have prevented the use of convictions. A conviction too remote in time may not be used in some states, State v. Loftis, 89 Ariz. 403, 363 P.2d 585 (1961), but in other jurisdictions, very remote convictions have been allowed, People v. Somerville, 88 Ill. App. 2d 134, 231 N.E.2d 701 (1967), *cert. denied*, 393 U.S. 823 (1968), or the admissibility of remote convictions has been left to the discretion of the trial judge, Lanier v. State, 43 Ala. App. 38, 170 So.2d 167 (1965). To be used in this context, the proceeding must have gone to judgment with a verdict of guilty and a sentence by the court, Austin v. State, 451 S.W.2d 491 (Tex. Crim. App. 1970). A mere verdict of guilty, Commonwealth v. Finkelstein, 191 Pa. Super. 328, 156 A.2d 888 (1959), or a plea of guilty, is not sufficient, Curtis v. State, 224 Ga. 870, 165 S.E.2d 150 (1968). *See* Note, 28 WASH. & LEE L. REV. 490 (1971).

In most jurisdictions not only the fact of convictions, but also the name, Cousins v. State, 230 Md. 2, 185 A.2d 488 (1962), the nature of the crime, People v. Childers, 20 Mich. App. 639, 174 N.W.2d 565 (1969), and the time and place of conviction, Hadley v. State, 25 Ariz. 23, 212 P. 458 (1923), may be admitted. But it is not permissible to show the details of the crime, People v. Howard, 166 Cal. App. 2d 638, 334 P.2d 105 (1959). Further, the conviction can only be proved by asking the witness himself, or by showing the record of conviction, People v. Finks, 343 Mich. 304, 72 N.W.2d 250 (1955).

7. Among those crimes permitted are: (1) common law infamous crimes: People v. Alvis, 342 Ill. 460, 174 N.E. 527 (1930); People v. Hudson, 270 N.E.2d 84 (Ill. App. 1971); ILL. REV. STAT. ch. 38, § 124-1 (1967); (2) felonies only: State v. Mangrum, 98 Ariz. 279, 403 P.2d 925 (1965); People v. McClellan, 71 Cal. 2d 793, 457 P.2d 871, 80 Cal. Rptr. 31 (1969); (3) felonies and serious misdemeanors: State v. Jemmess, 143 Me. 380, 62 A.2d 867 (1948); (4) crimes involving moral turpitude: McGee v. State, 206 Tenn. 230, 332 S.W.2d 507 (1960); Johnson v. State, 453 S.W.2d 828 (Tex. Crim. App. 1970); (5) crimes involving dishonesty and false statements: Cotton v. Commonwealth, 454 S.W.2d 698 (Ky. App. 1970), *noted in* 59 KY. L.J. 514 (1971); (6) any crime: Johnson v. State, 236 Ark. 917, 370 S.W.2d 610 (1963); (7) trial court discretion: Spaulding v. State, 481 P.2d 389 (Alaska 1971); State v. Marquez, 160 Conn. 47, 273 A.2d 689 (1970); State v. Coca, 80 N.M. 95, 451 P.2d 999 (1969).

8. Kansas, KAN. STAT. ANN. § 60-421 (1964); Virgin Islands, V.I. CODE ANN. tit. 5, § 835 (1964).

accused, no evidence of his prior conviction is admissible unless he has introduced evidence to support his credibility.[9]

It appears clear, however, pursuant to the recent United States Supreme Court decision of *Loper v. Beto*,[10] that any prior conviction must be constitutionally valid before it can be used to impeach a defendant's credibility. Further, at least one state jurisdiction has declared unconstitutional the use of prior convictions against a defendant to impeach.[11]

In the federal courts of appeal, the admissibility of prior convictions[12] to impeach also has depended upon the nature of the crime;[13] and, generally, the rules used in the federal courts have been similar to those governing the state courts.[14] How-

9. UNIFORM RULE OF EVIDENCE 21 (1953). To the same effect is MODEL CODE OF EVIDENCE rule 106 (1942).

10. 405 U.S. 473 (1972).

11. State v. Santiago, 492 P.2d 657 (Hawaii 1971), *noted in* 25 VAND. L. REV. 918 (1972). The Hawaii supreme court declared that the admission of evidence of prior convictions to impeach the credibility of the defendant denied him his fourteenth amendment right to due process. The court found that the rule unnecessarily prejudiced defendants with prior convictions and that it unreasonably burdened the defendant's right to testify in his own defense.

12. *See generally* C. WRIGHT, FEDERAL PRACTICE & PROCEDURE § 416 (1969); Orfield, *Impeachment of Witnesses in Federal Criminal Cases*, 11 U. KAN. L. REV. 447, 464-70 (1963). For a summary of the recent cases in the federal courts of appeals, see Note, *The United States Courts of Appeals: 1971-72 Term, Criminal Law & Procedure—Evidence*, 61 GEORGETOWN L.J. 409, 419-22 (1972).

13. Support can be found in the federal cases for the use of each of the following crimes: (1) any crime: United States v. Cohen, 177 F.2d 523 (2d Cir. 1949); Campbell v. United States, 176 F.2d 45 (D.C. Cir. 1949); (2) felonies but not misdemeanors: Johnson v. United States, 424 F.2d 537 (9th Cir. 1970); (3) crimes involving moral turpitude: United States v. Griffin, 378 F.2d 445 (6th Cir. 1967); (4) any felony but misdemeanors only if they involve moral turpitude: United States v. Saitta, 443 F.2d 830 (5th Cir.), *cert. denied*, 404 U.S. 938 (1971); United States v. Frazier, 418 F.2d 854 (4th Cir. 1969); (5) any crime amounting to *crimen falsi*: Johnson v. United States, 424 F.2d 537 (9th Cir. 1970); (6) only crimes involving dishonest conduct: United States v. Remco, 388 F.2d 783 (3d Cir. 1968); (7) trial court discretion: United States v. Williams, 445 F.2d 421 (10th Cir. 1971); United States v. Vigo, 435 F.2d 1347 (5th Cir. 1970). A leading case in this regard is *Luck v. United States*, 348 F.2d 763 (D.C. Cir. 1965). The author of the opinion discusses the case and its implications in McGowan, *Impeachment of Criminal Defendants by Prior Convictions*, 1970 LAW & SOCIAL ORDER 1. *But see* Dixon v. United States, 287 A.2d 89 (D.C. Cir. 1972), *noted in* 34 U. PITT. L. REV. 67 (1972), which rejected the Luck decision.

14. Inquiry has been allowed even though an appeal is pending, United States v. Franicevich, 471 F.2d 427 (5th Cir. 1973); United States v. Allen, 457 F.2d 1361 (9th Cir. 1972); *contra*, United States v. Semenshohn, 421 F.2d 1206 (2d Cir. 1970), or the witness has received a full pardon, Gurleski v. United States, 405 F.2d 253 (5th Cir. 1968); United States v. Denton, 307 F.2d 336 (6th Cir.), *cert. denied*, 371 U.S. 923 (1962). *But see* United States v.

ever, a significant limitation would be placed on this use of prior convictions in federal courts by the adoption of rule 609 of the *Proposed Federal Rules of Evidence.* That provision states as the general rule that a prior conviction can be used to impeach a witness only if the previous crime was punishable by death or imprisonment in excess of one year, or, if the crime involved "dishonesty or false statement" regardless of the punishment.[15] The rule also provides certain other safeguards, such as the imposition of definite time limitations; giving effect to a pardon, annulment, or certificate of rehabilitation; and a general exclusion of juvenile adjudications. However, the pendency of an appeal from the conviction would not render the evidence of the conviction inadmissible.

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Under R.S. 15:495,[16] a cross-examiner[17] in any criminal

McCarthy, 445 F.2d 587 (7th Cir. 1971), which followed the *Proposed Federal Rules of Evidence* rule 609(c) as a guideline, and reversed a conviction because of the use of a prior conviction which had been pardoned. Although there are no statutes, most courts have held an adjudication of juvenile delinquency not to be a crime, and thus it cannot be used to impeach, Jones v. United States, 404 F.2d 212 (D.C. Cir. 1968); Brown v. United States, 338 F.2d 543 (D.C. Cir. 1964). Contrary to most state courts, most federal courts have allowed inquiry into remote convictions, United States v. Stroud, 474 F.2d 737 (9th Cir. 1973); United States v. DiLorenzo, 429 F.2d 216 (2d Cir.), *cert. denied,* 402 U.S. 950 (1970); Gurleski v. United States, 405 F.2d 253 (5th Cir. 1968). *But see* United States v. McCarthy, 445 F.2d 587 (7th Cir. 1971), where the court reversed because of the use of a 38-year-old conviction, citing *Proposed Federal Rules of Evidence* rule 609(b) as a guideline.

Under federal practice, to be admissible, the conviction must be called to the attention of the witness. The cross-examiner may then establish the number of convictions, the nature of the crime charged, and the date and time of the conviction, Beaudine v. United States, 368 F.2d 417 (5th Cir. 1966). However, he may not question the witness about details of the conviction, United States v. Mitchell, 427 F.2d 644 (3d Cir. 1970); United States v. Senior, 274 F.2d 613 (7th Cir. 1960). It has been held that the witness may rehabilitate himself, subject to trial court control, United States v. Crisafi, 304 F.2d 803 (2d Cir. 1962); Wittenburg v. United States, 304 F. Supp. 744 (D. Minn. 1969).

15. *Proposed Federal Rules of Evidence* rule 609(a). *See* Glick, *Impeachment by Prior Convictions: A Critique of Rule 6-09 of the Proposed Rules of Evidence for the U.S. District Courts,* 6 CRIM. L. BULL. 330 (1970).

16. LA. R.S. 15:495: "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 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."

17. It is clear under the statute that before proof of conviction may be

trial[18] may question a witness about prior convictions to impeach his credibility. If the witness fails to admit the conviction, then evidence of it may be adduced from any other source.[19] However, the witness may not properly be asked about any previous arrest, indictment, or prosecution.[20] But, according to recent Louisiana supreme court decisions, *any conviction* including misdemeanors,[21] regardless of the remoteness in time of the conviction, and whether the conviction directly bears upon the witness' veracity,[22] may be the subject of this inquiry. Additionally, it has

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adduced from any other source, the witness must have been questioned as to the conviction on cross-examination. State v. Scott, 237 La. 71, 110 So.2d 530 (1959); State v. Brown, 185 La. 1023, 171 So. 433 (1936). Accordingly, it has been held that prospective jurors could not be asked on voir dire examination whether the use of prior convictions for impeachment purposes would influence their decision in the case. State v. Harper, 260 La. 715, 257 So.2d 381 (1972). *See also* State v. Carite, 244 La. 928, 155 So.2d 21 (1963).

18. The statute has also been applied in civil cases. *See* Fusilier v. Employer's Ins., 235 So.2d 618 (La. App. 3d Cir. 1970); Middleton v. Consolidated Underwriters, 185 So.2d 307 (La. App. 1st Cir. 1966); Jacobs v. Landry, 82 So.2d 481 (La. App. Orl. Cir. 1955). *See also The Work of the Louisiana Appellate Courts for the 1965-1966 Term—Evidence*, 27 LA. L. REV. 551, 552 (1967).

19. The record of conviction may be produced as evidence of the prior conviction. State v. Vastine, 172 La. 137, 133 So. 389 (1931).

20. Prior to the amendment of the statute in 1952, a cross-examiner could ask a witness about prior arrests and indictments. This inquiry is strictly forbidden by the present statute. *See* 3 WIGMORE § 980a and Comment, 19 LA. L. REV. 684 (1959).

21. State v. Odom, 273 So.2d 261, 264 (La. 1973). Defense counsel objected to the state's inquiry into a prior misdemeanor conviction. The court held that no reversible error was committed by the trial court in overruling the objection, and further stated: "Neither do we find defense counsel's interpretation that R.S. 15:495 pertains only to felony convictions and not to misdemeanors to have any validity." The court referred to LA. R.S. 14:7 (1950), which defines crime as "that conduct which is defined as criminal in this Code, or in other acts of the legislature or in the constitution of this state." The court concluded that "[t]here is no limitation to crimes of felony status." 273 So.2d at 264 n.2. *See also* State v. Dundas, 168 La. 95, 121 So. 586 (1929). However, "crime" does not include violations of municipal ordinances, LA. R.S. 14:7 (1950), comment: "It is intended to exclude from the designation 'crime' all offenders [*sic*] denounced in municipal ordinances." Also, in *State v. Green*, 273 So.2d 288 (La. 1973), the district attorney asked the defendant, charged with murder, on cross-examination whether he had been convicted of anything. After answering in the affirmative, he was asked of what, to which he replied "misdemeanor theft." The trial court denied the defense motion to have the jury instructed to disregard the cross-examination. The supreme court held that the refusal was proper, stating that R.S. 15:495 "clearly permits" cross-examination as to "any crime" for the purposes of impeachment. 273 So.2d at 290.

22. State v. Rossi, 273 So.2d 265, 268 (La. 1973). Objection was made

been held that a gubernatorial pardon of the conviction does not prevent the inquiry, but the witness is entitled to rehabilitate himself by explanation of the pardon in support of his credibility.[23] An adjudication of juvenile delinquency is not a conviction of crime in Louisiana,[24] and thus may not be used to impeach.[25] The extent of the inquiry relative to the crime is limited to the particular offense committed, the nature of the crime, and the number of convictions.[26] A cross-examiner may not interrogate the witness concerning the details of these prior offenses.[27]

Effect on the Defendant

When a defendant's past criminal record is placed before the jury ostensibly to attack his credibility, it exposes him to

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that the prior conviction of a defense witness was "very, very remote" and that the trial court did not let the defendant Rossi explain his prior convictions to show that they did not bear upon his veracity. The court felt that no error was committed in overruling the objection, holding that "[t]he Louisiana jurisprudence does not now interpret this statute as limiting such impeachment testimony to recent crimes, nor to crimes indicative of the credibility of the witness or of the testifying defendant." *Id.*

23. State v. Boudreaux, 221 La. 1078, 61 So.2d 878 (1952); State v. Taylor, 72 La. 20, 133 So. 349 (1931); State v. Duplechain, 52 La. Ann. 448, 26 So. 1000 (1899). *See also* Note, 25 TUL. L. REV. 281, 283 (1951), and Slovenko, *The Treatment of the Criminal in Louisiana & Elsewhere*, 34 TUL. L. REV. 523, 545 n.81 (1960).

24. LA. R.S. 13:1580 (1950): "No adjudication by the court upon the status of any child shall operate to impose any of the civil disabilities ordinarily resulting from conviction, nor shall any child be deemed a criminal by reason of such adjudication on, *nor shall such adjudication be deemed a conviction.*" (Emphasis added.)

25. State v. Kelly, 169 La. 753, 126 So. 49 (1930).

26. State v. Green, 273 So.2d 288 (La. 1973) (allowed the state to ask defendant if he was convicted of anything, and if so, what); State v. Keen, 215 La. 577, 41 So.2d 223 (1949) (allowed inquiry as to nature of indictment; though it must be noted that this case was decided before the 1952 amendment to R.S. 15:495 that prohibited inquiry into prior indictments); State v. Quinn, 131 La. 490, 59 So. 913 (1912) (allowed questioning as to the nature of the crime and the number of times convicted).

27. State v. Kelly, 271 So.2d 870 (La. 1973): "La. R.S. 15:495 allows the introduction of evidence as to prior convictions for the purpose of impeaching the credibility of a witness. This court has held, that, in so doing, only the fact of conviction is admissible and not the details of the prior offenses." State v. Brent, 248 La. 1072, 184 So.2d 14 (1966); State v. Perkins, 248 La. 293, 178 So.2d 255 (1965); State v. Danna, 170 La. 755, 129 So. 154 (1930); *see The Work of the Louisiana Appellate Courts for the 1965-1966 Term—Evidence*, 27 LA. L. REV. 551, 552-56 (1967). *But see* State v. Clark, 117 La. 920, 42 So. 425 (1906), where the court found no error in the trial court's overruling objections to cross-examination regarding the nature of conviction, the name under which defendant was convicted, and why he used that name.

a grave danger of prejudice.[28] In order to properly affect veracity, the jury must be willing to infer from the fact of the past convictions that the defendant is the kind of man who would disregard the obligations of the oath and hence falsify testimony on the stand.[29] Although the defendant is entitled to an instruction that the prior conviction must be used only on the question of credibility and not on the question of guilt or innocence,[30] the jury might well disregard the instruction[31] and

28. Ladd, *Credibility Tests—Current Trends*, 89 U. PA. L. REV. 166, 168 (1940): "The effect of showing a previous conviction of crime is so strong in either creating prejudice in the minds of the jury or causing them to believe that the accused has a propensity to do evil that the desirability of the use of this type of evidence for impeachment purposes when the accused is a witness is very doubtful." Note, 19 HASTINGS L.J. 919, 922 (1968): "When the witness is the accused testifying in his own behalf the weakness of this [prior convictions] evidence may be fatal to its value, because a veritable amount of prejudice is then imposed against it."

29. The theory of the use of previous convictions to test credibility was stated by former Justice Holmes in an oft-cited decision, *Gertz v. Fitchburg Ry. Co.*, 137 Mass. 77, 78 (1884): "[W]hen it is proved that a witness has been convicted of a crime, the only ground for disbelieving him which such proof affords is the general readiness to do evil which the conviction may be supposed to show. It is from that general disposition alone that the jury is asked to infer a readiness to lie in the particular case, and thence that he has lied in fact. The evidence has no tendency to prove that he was mistaken, but only that he has perjured himself, and it reaches that conclusion solely through the general proposition that he is of bad character and unworthy of credit."

30. State v. Rocco, 222 La. 177, 183 n.3, 62 So.2d 265, 267 n.3 (1952): "[W]here impeaching evidence is received, it becomes the duty of the judge to caution the jury that such evidence should not be considered as proof of defendant's guilt." (This case involved the use of a prior inconsistent statement.) In *State v. Lamison*, 220 La. 878, 885-86, 57 So.2d 755, 757 (1952), the following charge was held to have "adequately instructed the jury" with regard to prior conviction evidence to impeach: "'If you find from the evidence that the defendant, before the crime for which he is now on trial, had been convicted of other crimes . . . and if you also find from the evidence . . . these previous crimes and offenses had no connection with the charge in the indictment for which he is now on trial, then I charge you that you are not to consider his having been . . . convicted of the said previous offenses as proof of his guilt of this charge, but you are to consider such previous . . . convictions only in deciding the weight you are to give to his testimony as a witness.'" However, in *State v. Green*, 244 La. 80, 105, 150 So.2d 571, 580 (1963), the following sentence in the charge was held improper: "[I]t is the law of Louisiana that the proof of a prior conviction of a felony is valid impeachment of that witness." The court held: "This is not a correct statement of the law, as proof of a felony does not of itself impeach the witness. The law is that evidence of conviction of a crime is admissible for the purpose of impeaching the credibility of the witness . . . and it is for the jury to decide whether it believes the witness." *Id. See also* 1 C. BLACKMAR & E. DEVITT, FEDERAL JURY PRACTICE & INSTRUCTIONS §§ 12.01-.07 (1970); *Manual on Jury Instruction in Federal Criminal Cases* § 6.06-2, in 33 F.R.D. 525, 575 (1964).

31. It has been argued that this limiting instruction is ineffective. Glick, *Impeachment by Prior Convictions: A Critique of Rule 6-09 of the Proposed Rules of Evidence for U.S. District Courts*, 6 CRIM. L. BULL. 330, 333 (1970):

accept this evidence prejudicially. The jury's exposure to the defendant's past convictions can be prejudicial in two respects:[32] the jury may automatically conclude that the accused is an incorrigible who, though not guilty of the crime charged, should be punished because of his past crimes; and, because the defendant has committed other crimes, he probably committed the crime charged. Because of this strong likelihood of prejudice, there have been three areas of constitutional attack on the use of prior convictions as impeaching evidence:[33] (1) It may operate to keep the defendant from testifying, thus effectively "chilling" his right to testify. Rather than expose his "sordid past" to the jury, he may well decide not to exercise his right to testify.[34] (2) It could so prejudice the jury against him that, in effect, he is denied his due process right of trial by an impartial jury.[35] (3) It arguably may deny the defendant equal protection of law,

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"[F]ew would believe that when a jury is informed of a person's past crimes, they can departmentalize their minds and consider it solely for impeachment purposes and not as proof of his likelihood to commit the present offense. Instructions to the jury to consider prior offenses only for impeachment purposes are patently inadequate and have been properly described as, 'a ritualistic counsel of psychologically impossible behavior.'" *See also* Jackson v. Denno, 378 U.S. 368 (1964); Rideau v. Louisiana, 373 U.S. 723 (1963); McGowan, *Impeachment of Criminal Defendants by Prior Convictions*, 1970 LAW & SOCIAL ORDER 1, 9 n.33 (1970); Comment, 51 MINN. L. REV. 264 (1966).

32. Cohen, *Impeachment of a Defendant-Witness by Prior Conviction*, 6 CRIM. L. BULL. 26, 33 (1970). In a recent scientific study of the American jury system, it was reported that jurors who learned of past convictions through impeachment convicted more often than those who did not, where the charge and the evidence were similar. H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966). *See also* Comment, 70 YALE L.J. 763 (1961); Comment, 19 HASTINGS L.J. 919, 922 (1968).

33. *See generally* Comment, 36 Mo. L. REV. 472, 488 (1971); Comment, 37 U. CIN. L. REV. 168 (1968).

34. "While no specific provision in terms confers constitutional status on the right of an accused to take the stand in his own defense, the existence of the right is so completely recognized that a denial of it would surely be of due process dimensions." *Proposed Federal Rules of Evidence* rule 608, *Advisory Committee note*, at 82 (1971). Comment, 70 YALE L.J. 763, 776 (1961) states: "In practice, the possibility of 'opening the door' to prejudicial other crimes evidence discourages many defendants from taking the stand. The impeachment doctrine thus effects an anomalous distinction between defendants with and those without a criminal record in the exercise of the right to testify in their own behalf." The Hawaii supreme court declared unconstitutional the use of prior convictions to impeach because, *inter alia*, it unreasonably burdens the defendant's right to testify in his own defense. State v. Santiago, 492 P.2d 657 (Hawaii 1971). *See* note 10 *supra*.

35. Cohen, *Impeachment of a Defendant-Witness by Prior Conviction*, 6 CRIM. L. BULL. 26, 38 (1970): "It would seem that the Constitution requires the juror to remain in a mental state so that no matter what a man had done in the past there would be a fair opportunity to prove his innocence."

for an invidious discrimination is said to exist between the defendant with a prior record and one who has none.[36]

Of course, the risk of undue prejudice to the accused would be reduced if cross-examination to impeach were limited to those crimes which bear a direct relation to impairment of the truth-telling capacity.[37] Where the prior conviction relates directly to falsification and untruthfulness, the jury may more reliably infer false testimony on the stand. This approach has been urged by commentators and is the rule in several jurisdictions.[38] In Louisiana, though *any conviction* may be the subject of cross-examination to impeach,[39] a recent concurring opinion by Justice Barham in *State v. Odom* has advocated the more limited view: "In the proper case we should exclude the introduction of other convictions for the purpose of impeachment and as an attack upon credibility unless the convictions are offenses which, by their very nature, charge perjury, falsification, or lack of truthfulness."[40]

36. *Id.* at 37: "Invidious discrimination is said to exist between the defendant with a prior record and one who has none. However, there is no invidious discrimination when there is a reasonable basis upon which the distinct classifications are made. . . . Where . . . there is at least a logical possibility of nexus between the prior crimes of dishonesty and the defendant's testimony, the invidious discrimination argument will be to no avail."

37. It has been suggested that there is no justification for the use of all crimes to impeach. Ladd, *Credibility Tests—Current Trends*, 89 U. PA. L. REV. 166, 178 (1940): "There should be . . . a rationalization of the kind of crimes which may be used to test credibility. There is no justification for the use of crimes in omnibus. Many crimes give no light on the credibility of the offender. Murder is both an infamous crime and a felony and yet it may have no bearing upon veracity." The article then suggests the type of crimes that should be used: "The group of offenses including forgery, uttering forged instruments, bribery, suppression of evidence, false pretenses, cheating, embezzlement, roughly discloses a type of dishonesty and unreliability characteristic of those lacking veracity. Not only would witnesses with such records tend to be conscience free in giving false testimony, but these crimes . . . might indicate the propensity to gain by false means and thus to falsify." *Id.* at 180. *See also* 19 HASTINGS L.J. 919, 922 (1968).

38. Shaefer, *Police Interrogation & the Privilege Against Self-Incrimination*, 61 N.W.U.L. REV. 506, 512 (1966): "When the accused takes the stand in his own behalf, he should . . . be subject to impeachment only by proof of past crimes which directly bear on testimonial deception, such as perjury. Past convictions not in this category should be inadmissible unless they are relevant for some purpose other than impeachment. . . . The contrary and current practice lies close to the borders of the due process clause, and it should be eliminated." This approach is also proposed by the UNIFORM RULE OF EVIDENCE 21 (1953) and MODEL CODE OF EVIDENCE rule 106 (1942). For a discussion of the proposition that even veracity-related convictions should not be admitted, see Comment, 70 YALE L.J. 763, 778 (1961). *See* note 7 *supra.*

39. *See* note 22 *supra.*

40. State v. Odom, 273 So.2d 261, 265 (La. 1973) (concurring opinion).

Other Acts of Misconduct

Jurisdictions Other than Louisiana

Inquiry into prior misconduct other than convictions has been governed by a variety of rules in the state courts.[41] Several states have adopted statutes which do not allow such questioning.[42] Even without the presence of a statute, a significant number of jurisdictions have prohibited the inquiry.[43] Of the remaining states, the overwhelming majority subject this type of cross-examination to a discretionary control by the trial judge.[44] Some have limited the inquiry to those acts which bear

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41. *See generally* McCORMICK § 42; 3 WIGMORE §§ 982, 987. *See also* Hale, *Specific Acts & Related Matters as Affecting Credibility*, 1 HASTINGS L.J. 89 (1950); Slough, *Impeachment of Witnesses: Common Law Principles & Modern Trends*, 34 IND. L.J. 1 (1958); Slough, *Other Vices, Other Crimes*, 41 IOWA L. REV. 325 (1956); Udall, *Character Proof in the Law of Evidence—A Summary*, 18 U. CIN. L. REV. 283 (1949); Comment, 14 BAYLOR L. REV. 59, 66 (1962).

42. Such statutes include: CAL. EVIDENCE CODE § 787 (West 1966): "Subject to § 788 [which allows cross-examination as to prior felony conviction to attack credibility], evidence of specific instances of his conduct relevant only to prove a trait of his character is inadmissible to attack or support the credibility of a witness." IDAHO GEN. LAWS § 9-1209 (1948): "A witness may be impeached by the party against whom he was called, by contradicting evidence that his general reputation for truth, honesty or integrity is bad, but not by evidence of particular wrongful acts, except that it may be shown by examination of the witness, or the record of the judgment, that he had been convicted of a felony." This exact language is also found in MONT. REV. CODES § 93-1901-11 (1964). OREGON REV. STAT. § 45.600 (1969): "A witness may be impeached by the party against whom he was called, by contradictory evidence or by evidence that his general reputation for truth is bad or that his moral character is such as to render him unworthy of belief; but he may not be impeached by evidence of particular wrongful acts, except that it may be shown by his examination or by the record of judgment, that he has been convicted of a crime."

43. People v. Pilgrim, 160 Cal. App. 2d 528, 325 P.2d 143 (1958); Shropshire v. State, 279 N.E.2d 225 (Ind. 1972); Williams v. State, 15 Md. Sp. App. 320, 290 A.2d 542 (1972); People v. Robinson, 386 Mich. 551, 194 N.W.2d 709 (1972); Webber v. State, 472 S.W.2d 136 (Tex. Crim. App. 1971). This approach is taken in UNIFORM RULE OF EVIDENCE 22 (1953): "As affecting the credibility of a witness . . . (d) evidence of specific instances of his conduct relevant only as tending to prove a trait of his character, shall be inadmissible."

44. Slough, *Impeachment of Witnesses: Common Law Principles & Modern Trends*, 34 IND. L.J. 1, 20 (1958): "In the majority of American jurisdictions, the extent of [cross-]examination in this regard will be determined by the trial judge." *See* People v. Smith, 63 Cal. 2d 779, 409 P.2d 222, 46 Cal. Rptr. 382 (1966), *cert. denied*, 388 U.S. 913 (1967); State v. Stout, 83 N.M. 624, 495 P.2d 802 (1972); People v. Sorge, 301 N.Y. 198, 93 N.E.2d 637 (1950); State v. Neal, 222 N.C. 546, 23 S.E.2d 911 (1943); Dungan v. State, 135 Wis. 151, 115 N.W. 350 (1908).

directly upon the witness' truth and veracity,[45] while others allow broad cross-examination concerning any prior misconduct.[46] All courts agree, however, if the witness denies the alleged misconduct, the cross-examiner must "take his answer," and is not allowed to prove discrediting acts extrinsically.[47]

Most of the federal courts of appeals have prohibited cross-examination concerning past acts of misconduct of a witness to impeach;[48] but there is some authority for allowing the inquiry if the misconduct involved relates directly to veracity.[49] This

45. State v. Goldberger, 118 Conn. 444, 173 A. 216 (1934); State v. Schutte, 97 Conn. 444, 117 A. 508 (1922); Nelson v. State, 99 Fla. 1032, 128 So. 1 (1930); State v. Knox, 98 S.C. 114, 82 S.E. 278 (1914); State v. Hougensen, 91 Utah 351, 64 P.2d 229 (1936).

46. Heath v. State, 249 Ark. 217, 459 S.W.2d 420 (1970); Weeks v. State, 241 So.2d 203 (Fla. App. 1970); People v. Kass, 25 N.Y.2d 123, 250 N.E.2d 219, 302 N.Y.S.2d 807 (1969); State v. Haith, 7 N.C. App. 552, 172 S.E.2d 912 (1970); Wilson v. State, 452 S.W.2d 355 (Tenn. Crim. App. 1969); State v. Goddard, 56 Wash. 2d 33, 351 P.2d 159 (1960). *See* Heilbron, *Cross-examination & Impeachment*, 15 ARK. L. REV. 39 (1960); Paine, *Impeachment of Witnesses in Tennessee*, 36 TENN. L. REV. 728 (1969). The military courts allow cross-examination of all witnesses except the accused concerning prior acts of misconduct for credibility purposes. MANUAL FOR COURTS-MARITAL, UNITED STATES ¶ 149 b(1) (rev. ed. 1969) provides: "On the question of his credibility and within the limits imposed by the privilege against self-incrimination, a witness may be cross-examined as to any matter touching upon his worthiness of belief. For instance, unless a military judge . . . determines as a matter of discretion that the particular subject of inquiry would be so remote with respect to the credibility of the witness as to be irrelevant, a witness may be cross-examined as to his . . . acts of misconduct . . . ."

¶ 153b(2)(b) further provides: "It is permissible on cross-examination of any witness other than the accused to adduce, for the purpose of impeaching the witness, evidence that he has committed an offense involving moral turpitude or otherwise affecting his credibility, even if that evidence does not amount to proof of conviction of the offense and even if the witness has not in fact been convicted of the offense." *See* Amery, *Impeachment of Witnesses by Evidence of Prior Misconduct*, 10 USAF JAG L. REV. No. 4, at 16 (1968).

47. Wells v. State, 239 Ind. 415, 158 N.E.2d 256 (1959); Martinez v. Avila, 76 N.M. 372, 415 P.2d 59 (1966); MCCORMICK § 42, at 84: "[P]roof is limited to what can be brought out on cross-examination. Thus, if the witness stands his ground and denies the alleged misconduct, the examiner must 'take his answer,' not that he may not further cross-examine to extract an admission, but in the sense that he may call other witnesses to prove the discrediting acts."

48. United States v. Fox, 473 F.2d 131 (D.C. Cir. 1972); United States v. Davenport, 449 F.2d 696 (5th Cir. 1971); United States v. Rudolph, 403 F.2d 805 (6th Cir. 1968); United States v. Normand, 402 F.2d 73 (9th Cir. 1968), *cert. denied*, 397 U.S. 938 (1970); Tafoya v. United States, 386 F.2d 537, (10th Cir. 1967); United States v. Provoo, 215 F.2d 531 (2d Cir. 1954), *noted in* 1955 WASH. U.L.Q. 209 (1955). *See also* Orfield, *Impeachment & Support of Witnesses in Federal Criminal Cases*, 11 U. KAN. L. REV. 447, 460-64 (1963).

49. United States v. Varelli, 407 F.2d 735 (7th Cir. 1969); United States v. Stirone, 168 F. Supp. 490 (W.D. Penn. 1957), *aff'd*, 262 F.2d 571 (3d Cir. 1958), *rev'd on other grounds*, 361 U.S. 212 (1959).

latter approach, though not the prevailing view in the federal courts, is found in rule 608(b) of the *Proposed Federal Rules of Evidence.* If adopted, the rule would provide that specific instances of conduct of a witness may be inquired into on cross-examination of the witness himself for the purposes of attacking or supporting his credibility, provided the conduct be "probative of truthfulness or untruthfulness and not remote in time."

Louisiana

Louisiana statutory law makes no provision for cross-examination to impeach as to past criminal acts where no conviction has been obtained. Early Louisiana cases seemed to indicate that no witness, defendant or otherwise, might be impeached by using prior acts of misconduct for which no conviction had been obtained. The court assigned as reasons for the exclusion either that the inquiry was unduly prejudicial to the rights of the defendant,[50] or that the questioning was irrelevant and immaterial.[51] A recent case seems to imply, however, that a witness

50. In *State v. Allemand*, 153 La. 741, 747, 96 So. 552, 554 (1923), one of the defendants, charged with murder, was asked on cross-examination: "Then on . . . the night [the victim] was shot, you did run a public ball without a license?" In the lower court objection was made that the purpose of the question was to prejudice the jurors by showing that the defendants were violators of the law in other respects. The objection was overruled by the trial court because the question could be "'asked for the purpose of testing his memory, his credibility, or otherwise.'" The supreme court reversed, holding: "We are convinced therefore that, under the circumstances of this case, it could have had but one purpose and effect, and that was to prejudice the jury against the accused, and should not have been permitted." *Id.* at 748, 96 So. at 555. Later, in *State v. Frazier*, 165 La. 758, 761, 116 So. 176, 177 (1928), defendant, charged with murder, was asked on cross-examination: "Are you the same [N]egro that a crowd had and was going to whip and the sheriff took you away from them?" The trial court sustained objection to the questioning but refused to give a special limiting instruction. The supreme court held not only that the questioning was improper, but also that an instruction to the jury was essential in order to avoid the prejudicial effect on the jury. In reversing the conviction, the court stated: "The questions themselves were objectionable, not only because of their tendency to invoke race prejudice, but because they had reference to three supposed previous troubles on the part of the defendant, which had no connection whatever with the crime for which he was on trial, and which were brought out by implication merely for the purpose of showing that the defendant was a man of bad character . . . ." *Id.* at 762, 116 So. at 177.

51. In *State v. LeBleu*, 137 La. 1007, 69 So. 808 (1915), defendants were convicted of stealing cows. One of the victims was asked on cross-examination whether the cattle in question had been assessed. The supreme court upheld the lower court's sustaining an objection to the question as being immaterial and irrelevant, stating that: "'[T]he purpose of the question was to test the credibility of the witness. The credibility of the witness cannot be impeached by particular acts, irrelevant to the issue and sought to

other than the accused may be interrogated about his own criminal acts within the discretion of the trial court.[52]

State v. Perkins[53] apparently made clear that cross-examination of the *defendant* concerning past criminal acts is limited *solely* to past convictions. In *Perkins*, the defendant, charged with negligent homicide, was asked on cross-examination, "This is not the first stop sign you have ever run, is it, Mrs. Perkins?"[54] The court held the inquiry to be improper because "[a]s phrased the question had no reference to prior convictions. Instead, it inquired of specific traffic misconduct on other occasions."[55] And, in reference to R.S. 15:495, the court held:

> "The statute is explicit that, in this type of impeachment, only evidence of convictions is admissible to attack the

be brought out on cross-examination for the purpose of impeaching him.'" *Id.* at 1014, 69 So. at 810. In *State v. Morgan*, 147 La. 205, 226, 84 So. 589, 596 (1920), a defense witness was asked on cross-examination: "Isn't it true that you ran off with another man's wife . . . and took her to New York and lived with her there?" The supreme court affirmed the trial court's sustaining the objection to the question as "impertinent, impudent, and irrelevant." The court concluded: "The district attorney should not have asked the witness . . . a question which was not material to the issues of the case." *Id.* at 226, 84 So. at 597. In *State v. Danna*, 170 La. 755, 129 So. 154 (1930), defendants were charged with cutting with intent to murder. A prosecution witness was asked on cross-examination: "How many fights have you had before this?" The supreme court upheld the sustaining of the objection, stating: "The number of fights which the witness . . . may have had with other persons prior to the prosecution in this, was . . . immaterial and irrelevant." *Id.* at 757, 129 So. at 154. Later, in *State v. DiVincenti*, 225 La. 689, 704, 73 So.2d 806, 811 (1954), defendant was charged with simple burglary. A prosecution witness was asked on cross-examination: "How many times were you in the hole [solitary confinement] while you were held in the parish prison?" The ruling of the trial court sustaining the objection on the ground of immateriality was upheld by the supreme court.

52. In *State v. Davis*, 259 La. 35, 249 So.2d 193 (1971), defendant was charged with manslaughter resulting from a scuffle with one Reverend Dyer. On cross-examination, Dyer was asked whether he had ever been identified as an active participant in militant civil rights groups, and also whether he had ever been involved in an act of physical violence with his wife. The trial court sustained objections to the questions as being neither germane nor relevant. The supreme court upheld the exclusion, stating, "While cross-examination is afforded a broad scope . . . nevertheless, the trial judge is vested with a sound discretion to stop irrelevant examination . . . . Further, the discretion of the trial court in determining a question of relevancy should not be disturbed in the absence of clear abuse." *Id.* at 44, 249 So.2d at 196. *See also* State v. LeBleu, 137 La. 1007, 69 So. 808 (1915); State v. High, 116 La. 79, 86, 40 So. 538, 540 (1906): "The rule is that a large discretion is left to the trial judge in the matter of how far a witness may on cross-examination be questioned as to irrelevant matters for the purpose of affecting his credibility; and that this discretion will not be interfered with unless abused."

53. 248 La. 293, 178 So.2d 255 (1965).

54. *Id.* at 297, 178 So.2d at 256.

55. *Id.*

> credibility of the defendant. *The defendant can only be questioned as to such prior convictions. He cannot be asked about specific misconduct* or the details of prior offenses. (Emphasis added.)"[56]

The approach of the Perkins decision has been generally followed in subsequent cases. In *State v. Gray*,[57] defendant, charged with attempted murder, was asked on cross-examination whether he had previously threatened and raped one of the state's witnesses subsequent to the attempted murder. The court found the questioning improper and reversed the conviction, stating that "[f]or the purpose of impeachment, the commission of other offenses is strictly limited by the provisions of R.S. 15:495."[58] Later in *State v. Kelly*,[59] defendant, charged with armed robbery, was asked on cross-examination, "Did you ever stick anybody with a knife?"[60] The court recognized that the question was improper under the Perkins decision because it did not refer to any conviction. However, a bill of exceptions was not properly taken to the form of the question at the time it was made, and the objection was considered waived.

More recently, in *State v. Prieur*,[61] defendant was charged with armed robbery. During cross-examination, he was asked:

> "'You got them [30 $1.00 bills found on defendant at the time of his arrest] from other robberies?' and 'Who did you tell the police you stole that car from?' . . . 'Are you familiar with the two bus holdups on Tchoupitoulas and Louisiana?' . . . 'They charged you with seven robberies?'"[62]

Citing *Perkins*, the supreme court reversed the conviction because the crimes brought out on cross-examination did not refer to convictions, but rather to offenses for which the defendant had not been convicted. "A limitation is placed on the State, . . ." the court held, "insofar as it may use evidence of other crimes. Only evidence of conviction of a crime is admissible, not arrests, indictments, or prosecutions."[63]

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56. *Id.* at 298, 178 So. at 257.
57. 262 La. 53, 262 So.2d 367 (1972).
58. *Id.* at 57, 262 So.2d at 369.
59. 262 La. 143, 262 So.2d 501 (1972).
60. *Id.* at 146, 262 So.2d at 502.
61. 277 So.2d 134 (La. 1973).
62. *Id.* at 135-36.
63. *Id.* at 136.

Although a recent decision, *State v. Morris*,[64] casts doubt upon the Perkins line of cases, it is believed that, properly understood, it purports no basic change. Defendant was charged with armed robbery. Police authorities testified regarding inculpatory statements made by defendant during interrogation, including a reference to a pawn ticket found in defendant's possession as representing a watch taken in a prior robbery. The court's per curiam decision stated that the "questioning was within the permissible scope of cross-examination" and that it "was not error for the State to attempt to impeach the defendant regarding the circumstances surrounding the pawn ticket."[65] The court reasoned that since it had been referred to in the confession, and since a confession must be used in its entirety,[66] then evidence of the prior crime was admissible. It seems that this case does not reflect a rejection by the court of the Perkins rationale. Rather, *Morris* refers to cross-examination of a defendant about prior criminal acts referred to in a confession previously held to be properly admissible.[67]

64. 261 La. 1069, 262 So.2d 324 (1972). *See* the discussion of *Morris* in *The Work of the Louisiana Appellate Courts for the 1971-1972 Term—Evidence*, 33 LA. L. REV. 306, 309-10 (1973).

65. State v. Morris, 261 La. 1069, 1072-73, 262 So.2d 324, 325 (1972).

66. LA. R.S. 15:450 (1950).

67. Two other recent decisions seem to indicate that prior acts of misconduct which are not convictions can be used to impeach. However, it is submitted that on a proper interpretation, these cases do not indicate that the Perkins rule has been rejected by the court. In *State v. Dotson*, 260 La. 471, 256 So.2d 594 (1971), defendant, charged with the possession of narcotics, was asked on cross-examination whether he had used marijuana on previous occasions. After the defendant's persistent denial, the state was permitted by cross-examination of a defense witness, a police officer, to bring out testimony which the supreme court viewed as implying that the defendant had previously used marijuana. On rehearing, the court held that the admission of the officer's testimony was not reversible error. The court reasoned that, although the prior conduct was criminal, it had an independent relevance to show guilty knowledge under R.S. 15:445 and 446. "On the issue of guilty knowledge or intent, the defendant denied prior use of marijuana. Hence, the State had the right to contradict this testimony." 260 La. at 519, 256 So.2d at 611. Despite the fact that the district attorney had referred to the testimony as *impeaching*, the court ruled: "The term *impeaching* is a misnomer. Technically, the testimony should be designated as rebutting or contradicting. . . . The evidence of prior use of marijuana was properly admitted to rebut or contradict the defendant's testimony on an essential issue." *Id.* at 519-20, 256 So.2d at 611. Although there may well be doubt as to whether the prosecution's questioning of the defendant about the prior use of marijuana properly fits within the knowledge-intent-system exception to the past crimes exclusionary rule, it is important for the purposes of this Comment to note that the supreme court treated the question as a "knowledge-intent-system" problem, rather than an impeachment matter. Further, it should be emphasized that the defendant made no objection to the initial questioning. Thus, the holding

Conclusion

It is submitted that in Louisiana, pursuant to the Perkins rule, a defendant may not be cross-examined as to his prior acts of misconduct for the purposes of impeachment. Cross-examination in this regard is limited *solely to prior convictions*, and is governed by R.S. 15:495 and the rules discussed heretofore in this Comment. Cross-examination as to prior acts of misconduct not for impeachment purposes, but to prove the crime charged, are regulated by the rules discussed in the companion article to this Comment.[68]

W. Michael Adams

THE UNIFORM ACT ON BLOOD TESTS: DISAVOWAL AND DIVORCE

The Uniform Act on Blood Tests to Determine Paternity[1]

in *Dotson* is based upon the admissibility of the rebuttal testimony, not upon the propriety of the questioning of the defendant on cross-examination.

Later, in *State v. St. Amand*, 274 So.2d 179 (La. 1973), defendant, charged with armed robbery, was asked on cross-examination whether or not he used narcotics. After his denial, the prosecution was permitted to show that he had stated to the contrary on a prior occasion. A majority of the court found that the initial questioning was proper because the state during its case in chief had produced evidence of narcotic paraphernalia found in St. Amand's apartment at the time of his arrest. The court rejected the defendant's contention that the state was attempting to impeach the defendant on an irrelevant matter because "the evidence of narcotic paraphernalia found in St. Amand's apartment made the questioning within the scope of that subject." *Id.* at 192. The court held that the initial inquiry into defendant's prior narcotics addiction was permissible because "[i]t is almost axiomatic today that most armed robberies are associated with drug addicts trying to obtain funds to sustain their grim appetites. In armed robbery prosecutions, therefore, the subject of drug use by the accused is relevant." *Id.* Since the prior drug use of the defendant was deemed to be relevant and non-collateral, the court reasoned that he could be "impeached" on the matter.

Again, properly understood, this case appears to involve the application of the knowledge-intent-system exception to the prior crimes exclusionary rule in the court's determination of whether the narcotic paraphernalia found in defendant's room and brought out by the state in its case in chief, justified questioning the defendant on cross-examination about prior drug use. Thus, the decision should not be interpreted as standing for the proposition that it is proper *impeachment* to ask a defendant about prior use of narcotics.

68. 33 LA. L. REV. 614 (1973).

1. The Uniform Act on Blood Tests to Determine Paternity [hereinafter cited as UNIFORM ACT] states in part:

"Section 1. *Authority for Test.* In a civil action, in which paternity is a relevant fact, the court, upon its own initiative or upon suggestion made by or on behalf of any person whose blood is involved may, or upon motion of any party to the action made at a time so as not to delay the proceedings unduly, shall order the mother, child and alleged father