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The Paradox of the Prosecutor: Justice Versus Conviction During Closing Argument

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COMMENTS

THE PARADOX OF THE PROSECUTOR: JUSTICE VERSUS CONVICTION DURING CLOSING ARGUMENT

"Guilt shall not escape or innocence suffer."[1] These words set forth the dual responsibility of the prosecuting attorney in a criminal trial: the task of seeking justice, while at the same time, as an advocate, the duty of obtaining convictions.[2] In *Berger v. United States*,[3] Justice Sutherland described this dual function and the dangers of its abuse:

> The [prosecutor]—is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . . He may prosecute with eagerness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce wrongful convictions as it is to use every legitimate means to bring about a just one.
>
> It is fair to say that the average jury, in a greater or lesser degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.[4]

Since the paradox of the prosecuting attorney is put to its greatest test during the summation stage of the criminal proceedings, this Comment will analyze the problem of the prosecutor's forensic misconduct during his closing argument.

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1. Berger v. United States, 295 U.S. 78, 88 (1935).

2. "A public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely convict." ARTICLES OF INCORPORATION OF THE LA. STATE BAR ASSOCIATION, ARTICLE XVI, EC 7-13.

3. 295 U.S. 78 (1935).

4. *Id.* at 88. In all cases in which the issue of improper argument by the district attorney is raised, it must be noted that in Louisiana the prosecutor has a strategic advantage in being allowed the final closing argument. LA. CODE CRIM. P. art. 765(6). This is "the final impression implanted in the minds of the jurors by the adversary counsel in the trial, which the accused has no opportunity to rebut either by taking the stand himself, calling witnesses or producing other evidence—not even by denunciation of the remark by his own counsel's argument." State v. Carite, 244 La. 928, 930, 155 So. 2d 21, 23 (1963).

Prosecutor's Forensic Misconduct

One legal writer has defined the prosecutor's forensic misconduct[5] as:

> any activity by the prosecutor which tends to divert the jury from making its determination of guilt or innocence by weighing the legally admitted evidence in the manner prescribed by law. It commonly involves an appeal to the juror's prejudices, fears, or notions of popular sentiment by presenting to them inadmissible evidence; or urging them to make inferences not based on the evidence; or to disregard the evidence altogether and base their determination on wholly irrelevant factors. The jury may also be encouraged to disregard the weighing process prescribed by law and substitute one more favorable to the state, or otherwise to misapprehend its function.[6]

Various writers have characterized such misconduct as an evidence problem created by the prosecutor's remarks beyond the scope of the evidence while not under oath or subject to cross-examination.[7] Others have deemed the issue an ethical one.[8] All agree, however, that such conduct violates a principle basic to the proper administration of criminal justice: the due process right of each accused to a fair trial by an impartial jury.[9]

The scope of the closing argument is set out in article 774 of the Louisiana Code of Criminal Procedure:

> The argument shall be confined to evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant

5. Although none has been wholly satisfactory, many reasons have been suggested for such trial tactics, among which one might include: political motivation; community pressure; inexperience; the spirit of advocacy; an effort to overcome the favorable position which the law affords an accused in the criminal trial; or merely a retaliation to the remarks of defense counsel.

6. Comment, 54 COLUM. L. REV. 946, 949 (1954). *See also* Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629 (1972); Bouska, *The Prosecutor's Closing Argument in Kansas*, 17 KAN. L. REV. 419 (1969); Singer, *Forensic Misconduct by Federal Prosecutors—And How It Grew*, 20 ALA. L. REV. 227 (1968); Comment, 42 J. CRIM. LAW 73 (1951); Comment, 6 UTAH L. REV. 108 (1958); Note, 47 IOWA L. REV. 1131 (1962).

7. *Id.* Argument by the district attorney which exceeds permissible bounds by going beyond the evidence admitted may be violative of the sixth amendment of the United States Constitution which provides that every accused has the right to be confronted by the witnesses against him.

8. Singer, *Forensic Misconduct by Federal Prosecutors—And How It Grew*, 20 ALA. L. REV. 227 (1968); Comment, 6 UTAH L. REV. 108, 111 (1958).

9. U.S. CONST. amend VI; LA. CONST. art. I, §§ 2, 9.

> may draw therefrom, and to the law applicable to the case.
>
> The argument shall not appeal to prejudice.
>
> The State's rebuttal shall be confined to answering the argument of the defendant. . . .

Although the prosecutor's closing argument encompasses a wide range of potential dispute, an analysis of the jurisprudence reveals several areas of recurring controversy.

Inflammatory Remarks and Inferences

During the state's closing argument, it is improper for the prosecutor to make inflammatory remarks or inferences directed toward the accused.[10] This tactic appeals to the prejudices and sympathies of the jury and interjects issues both irrelevant and immaterial to the trial. Such comments are often aimed at persuading the jurors to ignore the evidence and the law and to convict the defendant because of the supposed danger to society if he is allowed to go free.

In *State v. McGregor,*[11] the district attorney in his argument stated that police officers are specially trained to encounter persons such as the defendant, whom he referred to as an "unpredictable animal."[12] The Louisiana supreme court affirmed the murder conviction, finding the trial judge's admonition sufficient to erase the remark from the minds of the jury. The court relied on its earlier decision in *State v. Vernon,*[13] a case involving a murder in which the victim was brutally kicked and beaten to death. The majority there found that "the statement of the prosecuting attorney that appellant was an 'animal' and the question he asked the jury, 'Who's safe in this city with men like him on the street?' were fully *justified by the evidence.*"[14] Going further, it was stated that "[t]his court has held on many occasions that invective remarks by a prosecuting attorney are permissible when supported by the evidence in the case."[15] Such

10. Article 771 of the Code of Criminal Procedure provides that the normal remedy for such remarks is an instruction to disregard; however, "the court may grant a mistrial if it is satisfied that an admonition is not sufficient to assure the defendant a fair trial."

11. 257 La. 956, 244 So. 2d 846 (1971).

12. *Id.*

13. 251 La. 1099, 208 So. 2d 690 (1968).

14. *Id.* at 1114, 208 So. 2d at 695. (Emphasis added.)

15. *Id.* State v. Maney, 242 La. 223, 135 So. 2d 473 (1961) ("narcotic fiend"); State v. Cortez, 241 La. 610, 129 So. 2d 792 (1961) ("hardened criminal"); State v. Davis, 178 La. 203, 151 So. 78 (1933) ("rats"); State v. Thomas, 161 La. 1010, 109 So. 819 (1926) ("infuriated brute"); State v. Meche, 114 La. 231, 38 So. 152 (1905) ("incarnate devil").

inflammatory statements involve a subjective determination of the defendant's guilt, and it is difficult to comprehend how they can be "justified by the evidence," especially in light of article 774 which expressly forbids any "appeal to prejudice" in the argument.[16]

A classic illustration of prosecutorial abuse by appealing to the prejudice and sympathies of the jurors was made by a district attorney in *State v. Brumfield*[17] wherein the following statements were made:

> You have two eye witnesses who looked out that window and saw that defendant with a gun blazing in his hand, still shooting at the victim. That's quite a scene if you will imagine it in your minds, a lady running down the street with blood-curdling screams, with a huge man following her with a gun shooting at her. Think about that when you go back in the jury room . . .[18]
>
> . . . .
>
> But I ask you this, and ask you to think about this when you go in the jury room, how about the rights of Emma Albritton. She was a Christian girl, she worked for a living, she lived with her mother and father, and she was a credit to the City of Hammond. She didn't bother anybody. This man sitting here—look at him—Fred Wilson Brumfield, he arrested her by blocking the road, he prosecuted her in the street, he became her jury, he found her guilty, he sentenced her to death and he went one step further, he was her executioner—right in the streets of Hammond.
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> [A]nd he did all of this because of the lack of response to his unwanted attention—this big man and this little woman. Now when he shot her he took over all the functions of law that are working in this courtroom to protect him—he took them away from her, but he's getting that protection here today. He shot her in the back in cold blood and she never had a chance.[19]

This same approach was taken in *State v. Hills*, 241 La. 345, 360, 129 So. 2d 12, 27 (1960), where the district attorney declared in his argument that the accused, standing trial for aggravated rape, was a "primitive beast of the jungle" and further stated, "I wish I could call him worse than a primitive beast of the jungle . . . ." The court found these remarks to be proper deductions and conclusions based on the testimony of the prosecutrix.

16. See *State v. Kaufman*, 278 So. 2d 86 (La. 1973), where the court on rehearing reversed a murder conviction, partly because of the racial prejudice created by the district attorney's argument which was grounds for a mandatory mistrial upon the defendant's request. *See* LA. CODE CRIM. P. art. 771.

17. 263 La. 147, 267 So. 2d 553 (1972).

18. *Id.* at 157, 267 So. 2d at 556.

19. *Id.* at 161, 267 So. 2d at 557.

Although the Louisiana supreme court affirmed the conviction, Justice Barham dissented, and recognizing that this "unnecessarily melodramatic and lurid" argument was intended to arouse the emotions of the jurors, called for a more rigid interpretation of article 774.[20]

In comparison, the Fifth Circuit appears to be much quicker to reverse when the federal prosecutor exceeds the bounds of permissible argument.[21] This view is illustrated in *Hall v. United States*,[22] wherein the accused was referred to as a "hoodlum."[23] In reversing, the Fifth Circuit declared:

> This type of shorthand characterization of an accused, not based on evidence, is especially likely to stick in the minds of the jury and influence its deliberations. Out of the usual welter of grey facts, it starkly rises—succinct, pithy, colorful, and expressed in a sharp break with the decorum which the citizen expects from the representative of his government.[24]

Personal Opinion of the District Attorney

Closely related to the problem of prejudicial remarks is the district attorney's assertion of his own personal opinion as to the guilt of the accused or the credibility of witnesses. The Canons of Ethics

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20. *Id.* at 163, 267 So. 2d at 559. In *State v. Dennis*, 250 La. 125, 194 So. 2d 720 (1967), a murder trial, the district attorney in his argument declared, in effect, that if the jury could not return a verdict of guilty as charged, they might as well pin a medal on the defendant and turn him loose so he could take his axe to his next victim. As the defense noted "the State did not have the right to make the jury think it was its duty to convict rather than weigh the evidence and render a fair and impartial verdict." *Id.* at 130, 194 So. 2d at 725. However, the court found that no prejudice was created nor did such argument influence the jury or contribute to the verdict. *But see Wingate v. Wainwright*, 464 F.2d 209, 210 (5th Cir. 1972), where the prosecutor made the following appeal to the jury: "I hope you realize that there is more at stake today than one man's freedom. I think there is at stake today the protection and safety of society . . . . I am asking you not to allow this man to go back on the street and to redo those things he has done." The court found this to be harmful constitutional error.

21. *See* Viereck v. United States, 318 U.S. 236 (1943); United States v. Bugros, 304 F.2d 177 (5th Cir. 1962); Traxler v. United States, 293 F.2d 327 (5th Cir. 1961); Handford v. United States, 249 F.2d 295 (5th Cir. 1958); Benham v. United States, 215 F.2d 22 (5th Cir. 1954).

22. 419 F.2d 582 (5th Cir. 1969).

23. *Id.* at 587. In *Hall* the court held that no objection was necessary and that the court on its own motion should have instructed the jury to disregard the prosecutor's remarks. *See also* Steele v. United States, 222 F.2d 628 (5th Cir. 1955) (wherein the court reversed after the prosecution had characterized the defendant as a "Dr. Jekyll and Mr. Hyde").

24. Hall v. United States, 419 F.2d 582, 587 (5th Cir. 1969).

expressly reprobate this type of conduct,[25] primarily because such statements may cause impressionable jurors to believe that the district attorney's opinion is entitled to independent weight, due either to his experience or an unrevealed superior knowledge of facts.[26] In *State v. Landry*,[27] a murder trial wherein the issue of self-defense was crucial, the prosecutor stated:

> *I believe, I'm convinced* that it was that hammer. Somebody said it wasn't, somebody said he thought he [the victim] had a hammer; and somebody said he didn't see anything in his hands. *I believe* he had the hammer . . . .[28]

Affirming the conviction, the supreme court found that this was proper. However, while it is permissible argument to draw logical conclusions from the evidentiary facts, the thrust of these statements appears to have been an assertion of the district attorney's personal opinion concerning the inconsistency in the testimony of the witnesses.

In the earlier case of *State v. Leming*,[29] the court actually condoned the district attorney's personal opinion that the defendant "had sworn under oath to two of the most damnable lies he had ever heard."[30] The court did not find it objectionable since "it was nothing more than a denunciation . . . during the trial."[31] However, since it is the function of the jury alone to weigh the evidence in determining guilt or credibility, such personal opinions do not seem to be within the permissible bounds of closing argument.[32]

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25. ARTICLES OF INCORPORATION OF LA. STATE BAR ASSOCIATION, ARTICLE XVI, DR 7-106: "a lawyer shall not . . . assert his personal opinion as to the justness of a cause, as to the credibility of a witness, . . . or as to the guilt or innocence of an accused; but he may argue, on his analysis of evidence, for any position or conclusion with respect to the matters therein."

26. Even without the insinuation of unrevealed knowledge by the district attorney, the privilege of asserting a personal opinion is given only to an expert and then only while he is under oath and subject to cross-examination. By allowing the district attorney to persist in this tactic, a false issue is interjected into the trial, *i.e.*, the reliability of counsel.

27. 262 La. 32, 262 So. 2d 360 (1972).

28. *Id.* at 37, 262 So. 2d at 362. (Emphasis added.)

29. 217 La. 257, 46 So. 2d 262 (1950).

30. *Id.* at 305, 46 So. 2d at 279.

31. *Id.*

32. See *State v. Goree*, 245 La. 389, 397-98, 158 So. 2d 203, 206 (1963), where the district attorney stated in his closing argument that "each of the four defendants testified to the same story; that they had been well coached; and that he wanted to call the jury's attention to this fact in deciding the case." The court held that an instruction to disregard removed this prejudice. *See also* State v. Jackson, 227 La. 642, 80 So. 2d 105 (1955).

Justice Tate dissented from the court's holding on original hearing in *State v. Kaufman*,[33] declaring that the closing argument of the prosecution consisted of various prejudicial tactics which denied the defendants their right to a fair trial. There the district attorney stated:

> *I say* there's some lying here. Delores Williams lied. *I think* I have already said that Delores Williams is not on trial here today, but she is a *murderess*, she was right there with them, *I am convinced* she drove the car.[34]

Justice Tate found this to be an expression of the district attorney's own personal opinion of one of the co-conspirator's guilt. His only explanation for the majority decision seemed to be that they overlooked the prosecutor's misconduct because of the brutality of the crime.

In contrast to the Louisiana supreme court, the Fifth Circuit strictly limits the expression of personal opinion by the prosecution.[35] The prosecutor in *United States v. Lamerson*[36] said: *"I firmly believe* what they said is the truth. *I know it is the truth,* and I expect you do, too."[37] There, the court held this was reversible error, "the inference being that he had outside knowledge."[38] Such statements as "we try to prosecute only the guilty"[39] have also been found to constitute reversible error since they take "guilt as a pre-determined fact."[40] The Fifth Circuit has recognized that "the prosecutor may neither dispense with the presumption of innocence nor denigrate the function of the trial nor sit as a thirteenth juror,"[41] but the Louisiana supreme court has consistently been more liberal in this regard.[42]

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33. 278 So. 2d 86 (La. 1973). In *Kaufman* the court reversed the conviction on rehearing, but on other grounds.

34. *Id.* at 94-95. (Emphasis added.)

35. *See* United States v. Brown, 451 F.2d 1231 (5th Cir. 1971); United States v. Grunberger, 431 F.2d 1062 (5th Cir. 1970); United States v. Schartner, 426 F.2d 470 (3d Cir. 1970); Gradsky v. United States, 373 F.2d 706 (5th Cir. 1967).

36. 457 F.2d 371 (5th Cir. 1972).

37. *Id.* at 372. (Emphasis added.)

38. *Id.*

39. Hall v. United States, 419 F.2d 582 (5th Cir. 1969).

40. *Id.* at 587.

41. *Id.*

42. For further examples of the leniency reflected by the court in favor of the prosecutor, *see* State v. Daniels, 262 La. 475, 487-88, 263 So. 2d 859, 863 (1972) (where the district attorney argued that it was "only natural that he would testify in this manner. . . . [I]f I were charged with the crime that he is charged with I wouldn't admit it either. I can't think of a more horrible thing for a grown man to commit on a small ten year old girl."); State v. Hopper, 251 La. 77, 115, 203 So. 2d 222, 260 (1967) (wherein the district attorney stated that: "[a] picture is worth ten thousand words.

Comment on the Failure of the Accused to Testify

The United States Supreme Court held in *Griffin v. California*[43] that any comment on the failure of the defendant to take the stand was violative of the fifth amendment privilege against self-incrimination because it destroyed the privilege "by making its assertion costly."[44] Article 770(3) of the Louisiana Code of Criminal Procedure has implemented this decision by providing that a mistrial is mandatory if requested by the defendant whenever the district attorney "in argument, refers *directly* or *indirectly* to . . . the failure of the defendant to testify in his own defense. . . ."[45] An admonition will not suffice unless the defendant limits his request to such an instruction.[46] The jurisprudence is unclear as to exactly what constitutes comment on the failure of the accused to testify. However, recent cases seem to limit *Griffin* and article 770(3) to *direct* comment.

During his closing argument in *State v. Howard,*[47] the district attorney stated that "we don't know, but there are many reasons why he did what he did. *He has not seen fit to tell us* . . . ."[48] The supreme court denied a motion for a mistrial, holding that the district attorney, who had placed a tape recording of the defendant's confession on the rail of the jury box, "did not intend to bring the jury's attention to the failure of defendant to testify, although the state-

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I had a lot of pictures and you all couldn't see them," thus implying outside knowledge.); State v. Hudson, 253 La. 992, 1038, 221 So. 2d 484, 500 (1964) (where the prosecutor stated that "[t]here isn't any evidence that would warrant mercy or clemency on your part . . . .", thus implying duty to convict.). *See also* State v. Wilkerson, 261 La. 342, 259 So. 2d 871 (1972); State v. Viator, 246 La. 809, 815, 167 So. 2d 374, 377 (1964) (where the district attorney argued to the jury "[t]hat the element of intent to influence the conduct of a witness can be an intent to make that witness lose his temper." The court upheld the conviction of public bribery holding that the district attorney had as much right to err in his law as the defense did. It seems that such an inaccurate statement of the law, coupled with the judge's failure to instruct the jury to disregard after overruling the objection, deprived the accused of a fair trial.)

43. 380 U.S. 609 (1965).

44. *Id.* at 614.

45. (Emphasis added.)

46. LA. CODE CRIM. P. art. 770.

47. 262 La. 270, 263 So. 2d 32 (1972).

48. *Id.* at 274, 263 So. 2d at 34. (Emphasis added.) The court's rationale was that the district attorney, who had rested a taped confession on the jury railing, was alluding to the defendant's failure to tell the police rather than making reference to the accused's failure to take the stand. However, this rather dubious explanation might well have been overlooked by the jury who could more easily have become aware of the fact that the accused did not testify.

ment bordered on being prejudicial."[49] Further evidence that the Louisiana supreme court has restrictively applied the prohibition against indirect comment is the decision in *State v. Cryer*.[50] There the court upheld a conviction of selling marijuana in which the district attorney, while pointing toward the defendant, made the following argument:

> Does *ANYBODY deny* that these two people [the defendants] and Falcon were present that night . . . ? Does *ANYBODY attempt to refute* this? No. Does *ANYBODY*, is there any evidence to *refute* the fact that all three of them actively engaged and participated . . . ?[51]

The court found that "the thrust of the argument"[52] was merely that there was no refuting evidence. Further, the court stated:

> In the jurisprudence, this Court has drawn a distinction between a statement that the State's evidence is uncontradicted and a prohibited comment upon the failure of the defendant to testify. The distinction has ample support in law and reason. Defense evidence is not restricted to defendant's own testimony. It may consist of the testimony of other witnesses and demonstrative evidence.[53]

The court's application of this distinction fails to take account of the fact that jurors have no knowledge of other witnesses subpoenaed nor

49. *Id.* at 275, 263 So. 2d at 34. Regardless of whether the court considers them as comments on the failure of the accused to testify, many statements by the district attorneys force the defendant to take the stand to cure their effect, and thus would violate article 1, section 11 of the Louisiana constitution which provides that "no person shall be compelled to give evidence against himself in a criminal case. . . ." *See* State v. Iverson, 251 La. 425, 427, 204 So. 2d 772, 774 (1967) (where the court allowed the district attorney to argue that "had the deputy sheriff not taken a statement from the defendant on the night of the alleged offense, that she would have appeared in court . . . and lied . . . that the deceased had a knife in his hand.") *See also* State v. Beach, 279 So. 2d 657 (La. 1973); State v. Hoover, 219 La. 872, 54 So. 2d 130 (1951).

50. 262 La. 575, 263 So. 2d 895 (1972).

51. *Id.* at 593, 263 So. 2d at 902.

52. *Id.* at 593, 263 So. 2d at 901. *See* United States v. White, 444 F.2d 1274, 1278 (5th Cir. 1971) (where the court stated that "[t]he test in determining whether such a transgression has occurred is whether such remark was manifestly intended or was 'of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.' ").

53. State v. Cryer, 262 La. 575, 593, 263 So. 2d 895, 901 (1972). The court in applying this distinction has taken the language used in *State v. Bentley*, 219 La. 893, 54 So. 2d 137 (1951), that the "evidence is uncontradicted and uncontroverted" and extended this to other statements by the district attorney which, under the circum-

will they illogically reason that the defense has withheld demonstrative evidence which might exonerate the accused. When the district attorney is pointing his finger at the accused,[54] or when there is, to the jury's knowledge, no one else to refute the state's evidence but the defendant,[55] such argument should be classified as an indirect comment on his failure to take the stand.[56]

Extraneous Crimes and Prior Acts of Misconduct

It is not the purpose of this Comment to examine in depth the

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stances, cannot simply be construed by the jury to mean that the evidence is unrefuted by other witnesses. *See, e.g.*, State v. Burch, 261 La. 3, 9, 258 So. 2d 851, 857 (1972) (a forgery case where the prosecutor stated that: "We had three people who had access. You've heard from two of them who told you, no, sir, I didn't sign that. Varn [the prosecuting witness] says that's not my signature and I authorized no one to sign it. Did they refute that? Did anybody get up here and say that Varn had authorized him, no." In this case no one but the defendant could have taken the stand, therefore, this should have been held to be indirect comment on that fact.). In *State v. Bickham*, 239 La. 1094, 1099, 121 So. 2d 207, 212 (1960), the statement that ("Gene Dyson's testimony was not denied by the defense or anyone else," appears to be indirect comment on the failure of the accused to testify when one considers the fact that the accused was the only other person present. Oddly enough, the court found that it was immaterial that there were no other logical third party witnesses, although the jury must surely have noted this.) *See also* State v. Reed, 284 So. 2d 574 (La. 1973).

54. Although the court in *Cryer* distinguished it, the case of *State v. Robinson*, 112 La. 939, 940, 36 So. 811, 812 (1904), seems very much in point. There the court held it to be reversible error when the district attorney pointed his finger at the defendant in arguing that "he has not denied it. He had the right under the law and . . . ."

55. An interesting line of cases has developed concerning the district attorney's argument as to the legal presumption of R.S. 15:432 that "the person in the unexplained possession of property recently stolen is the thief." The objection has been made that argument to the effect that the defendant's possession is "unexplained" constitutes indirect comment on the failure of the defendant to testify. While this argument falls squarely within the prohibition of article 770(3), the court gives effect to the specific statutory presumption. Such a presumption coupled with argument on this fact may be violative of the defendant's constitutional rights. It goes further than a merely rebuttable presumption as it destroys the presumption of innocence and places an affirmative burden on the accused to take the stand in cases where he is the only one who can explain how he came into possession of the goods. By forcing the accused to take the stand it destroys his privilege against self-incrimination by "making its assertion costly." *See* State v. Nelson, 261 La. 153, 259 So. 2d 46 (1972); State v. Issaac, 261 La. 487, 260 So. 2d 302 (1972); State v. Braxton, 257 La. 183, 241 So. 2d 763 (1970); State v. Odom, 247 La. 62, 169 So. 2d 909 (1964); State v. White, 247 La. 19, 169 So. 2d 894 (1964); State v. Shelby, 215 La. 637, 41 So. 2d 458 (1949); State v. Nix, 211 La. 865, 31 So. 2d 1 (1947); State v. Pace, 183 La. 838, 165 So. 6 (1935).

56. The arbitrary limitation imposed by the court confining article 770(3) to comment on the failure of the defendant to take the stand only if "direct *and* the inference plain that such remark was intended to bring the jury's attention to such fail-

problem of other crimes evidence;[57] however, the relationship between the admissibility of such evidence and the permissible scope of the district attorney's argument[58] deserves consideration. In *State v. Prieur*,[59] Justice Barham, speaking for the majority, reflected a definite change in the attitude of the Louisiana supreme court by adopting "a limited, rather than expansive, approach to the admissibility of other acts of misconduct,"[60] thus fully recognizing the prejudicial effect of such evidence.[61] The rules limiting the use of other crimes evidence can be seriously subverted by a district attorney in his closing argument if the court adheres to its present rule that reference to such evidence is permissible if the evidence was properly admitted during earlier phases of the trial. The problem with judging the propriety of these references by the admissibility of the evidence is that the prosecution, without further restraint, may often utilize this evidence to impress upon the jury the theory that the accused is a person of bad character,[62] and, therefore, more likely to have committed the crime charged.

In *State v. Kelly*,[63] an armed robbery trial, the defendant was asked, "Did you ever stick anybody with a knife?"[64] He was also questioned about his vagrancy and a suspected burglary. In his closing argument, the district attorney stated that "it was established on this witness stand he already stabbed somebody."[65] Although the

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ure, . . .", *State v. Howard*, 262 La. 270, 272, 263 So. 2d 32, 34 (1972), would better be left to the legislature than the courts. If the comment is "direct" *or* "plainly an inference" it should be prohibited.

57. *See* Comment, 33 LA. L. REV. 614 (1973); Comment, 33 LA. L. REV. 630 (1973).

58. If the district attorney in his argument "refers directly or indirectly to: (2) Another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible," the court must declare a mistrial if the defendant requests it. LA. CODE CRIM. P. art. 770.

59. 277 So. 2d 126 (La. 1973).

60. *Id.* at 128.

61. The court in *Prieur* noted that in addition to the *res gestae* exception in R.S. 15:447, the general rule of excluding evidence of other crimes and prior acts of misconduct is also subject to the exceptions set out in R.S. 15:445 and 446 which allow the admission of such evidence to prove knowledge, intent and system; and R.S. 15:495 which allows the introduction of convictions for impeachment purposes.

62. Evidence which only tends to show the bad character of the accused is inadmissible, except in rebuttal when the accused has introduced evidence to show his good character. LA. R.S. 15:481 (1950).

63. 262 La. 143, 262 So. 2d 501 (1972).

64. *Id.* at 144, 262 So. 2d at 502.

65. *Id.* at 146, 262 So. 2d at 504. *See also* State v. Carite, 244 La. 928, 929, 155 So. 2d 21, 22 (1963) (The court reversed a conviction where the district attorney argued that "[b]ecause the defendant has not been convicted before does not mean it's the first time he was arrested or possessed narcotics.").

defense objected when this line of questioning was begun and objected to the closing argument, the trial court overruled both and denied a motion for a mistrial. The Louisiana supreme court, holding that the objection to the admissibility of such evidence was not timely, affirmed.[66] Justices Barham and Tate dissented, recognizing that such argument went beyond the ostensible purpose for which it was admitted, *i.e.*, the question of credibility.[67] They pointed out that the district attorney "improperly used it in support of a thesis that the defendant was a dangerous man."[68] Again in *State v. Moore*[69] the court, although reversing a rape conviction on rehearing, seemed to consider the prosecutor's arguments referring to other crimes evidence as simply a question of admissibility during the state's case-in-chief. Justice Tate, however, in his concurring opinion on original hearing, noted that the closing argument was so "replete with emphasis upon the defendant's committing two crimes"[70] that he doubted whether he got a fair trial. Specifically, he referred to the fact that "about 38% of the state's closing argument, and its entire rebuttal argument, concerned other crimes and misconduct."[71] Even if the court finds such evidence admissible for some limited purpose, unrestricted reference to this evidence in the closing argument may undermine its legitimate aim by going much further, prejudicing the accused with character evidence.[72]

Provocation: Its Effect on Rebuttal Argument

The scope of the state's rebuttal "shall be confined to answering

66. Again it should be pointed out that the use of other crimes evidence in a closing argument is a separate and distinct problem, although it is interwoven with the admissibility of such evidence in the state's case-in-chief. The evidence is only admitted for limited purposes, and these are defeated if the prosecutor is allowed to argue and comment as to other crimes in an unrestricted manner to show that the defendant is a bad man.

67. State v. Kelly, 262 La. 143, 146, 262 So. 2d 501, 504 (1972).

68. *Id.* at 152, 262 So. 2d at 504.

69. 278 So. 2d 781 (La. 1973).

70. *Id.* at 783.

71. *Id.* While the case involved only one charge of rape, the district attorney during his argument made the following remarks: "You have two young rape victims . . ."; "about raping that woman—two young ladies"; "those two little girls. . ."; "In this case we have two victims. . ."; and "his conduct against our society and particularly against these young ladies." *Id.* at 783 n.1.

72. If Justice Tate had considered the scope of permissible argument relating to other crimes evidence as a problem in itself rather than a question of admissibility, he would have been afforded an independent ground for advocating a reversal of the conviction instead of having to concur with "great reservations" due to the "present doubtful interpretations of the admissibility of evidence of other crimes, and considering the limited nature of appellate review. . . ." *Id.* at 784.

the argument of the defendant."[73] Even if defense counsel initially engages in improper conduct, this language from article 774 should not give the state unlimited bounds of rebuttal argument.

> *Viewed simply as a means of assuring a fair trial,* reversal should be granted despite provocation. If the remark is so improper as to require reversal by other standards, it should not matter who was originally to blame: for though the jury may realize the argument was in reply to one by the defense, it does not follow that the misconduct will be discounted if it is persuasive in itself.[74]

The Louisiana supreme court, however, in *State v. Cascio*[75] held that the prosecutor's otherwise impermissible rebuttal to an improper argument of defense counsel affords no ground for reversal provided it is a "necessary and reasonable explanation."[76] The court in *Cascio* added uncertainty by its purported adherence to *State v. Brice*[77] which is cited as authority for the rule that rebuttal argument "infringing upon *constitutional rights* could not be justified under any circumstances."[78] Thus, where the retaliation is an obvious infringement of a constitutional right, such as a direct comment on the failure of the accused to testify,[79] there is no doubt that the court will reverse. However, if the remark is a "necessary and reasonable"[80]

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73. LA. CODE CRIM. P. art. 774.

74. Comment, 54 COLUM. L. REV. 946, 972 (1954). (Emphasis added.)

75. 219 La. 819, 54 So. 2d 95 (1951).

76. *Id.* at 823, 54 So. 2d at 99; *see* State v. Wright, 251 La. 511, 202 So. 2d 381 (1967).

77. 163 La. 392, 111 So. 798 (1927).

78. State v. Cascio, 219 La. 819, 823, 54 So. 2d 95, 99 n.1 (1951). (Emphasis added.) Actually, *State v. Brice* involved a reversal of a conviction due to the prosecutor's argument in which the court held that he appealed to racial prejudice, and asked the jurors to violate their oath and duty of giving the defendant a fair and impartial trial. This has been expanded into the present rule. *See* State v. Wright, 251 La. 511, 205 So. 2d 381 (1967).

79. State v. Wright, 251 La. 511, 205 So. 2d 381 (1967).

80. The original hearing opinion in *State v. Blackwell,* No. 53,405 (Louisiana, October 29, 1973), overruling prior jurisprudence, held that "the law applicable to the case" includes the "harshness, oppressiveness, and effect of the penalty" which is within the scope of argument set out in article 774. The court, however, further stated that "this rule is limited to the statutory provisions themselves. The possibility of parole, pardon, suspension, or probation unless contained in the statute is not a part of the law of the case," and not a proper subject for argument. This rule would have allowed the defense to argue the harshness of a penalty provision while the limitation would not have permitted the district attorney to argue any mitigating factors in his rebuttal unless they were in the statute. However, on rehearing the court reversed its position, affirming the decision and prior jurisprudence that the penalty was not a proper subject for argument to the jury.

answer to the argument of the defense, *Cascio* seems to require the affirmance even though the rebuttal was so improper that it would ordinarily require reversal. This raises serious due process objections, for if the court would ordinarily have held the impropriety to merit reversal, the fact that it was in retaliation to defense counsel's prior argument should be of little consequence if the defendant's right to a fair trial is recognized as the real issue.

Remedies

At the trial level, the judge has great discretionary power in controlling the criminal process.[81] If the defendant timely objects to an irrelevant or immaterial remark which "*might* create prejudice against the defendant"[82] in the eyes of the jury, (*e.g.*, inflammatory remarks and personal opinion), the trial judge shall admonish the jury to disregard.[83] However, if the argument causes racial prejudice, refers to inadmissible other crimes evidence, or constitutes a comment on the failure of the accused to testify, the defendant is entitled to a mandatory mistrial if he so requests.[84] Finally, the trial judge may grant a motion for a new trial[85] or declare a mistrial[86] whenever there is doubt as to whether the defendant has received a fair trial.

Article 841 of the Code of Criminal Procedure requires that the defense make a contemporaneous objection. However, one must recognize that the closing argument of the prosecutor may be so permeated with improprieties that constant objections may alienate the jurors or underscore the remark rather than erase it from their minds.[87] Therefore, an objection at the end of the summation should be considered timely, and in some cases should be allowed outside the presence of the jury.[88]

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81. The trial judge "has the duty to require that criminal proceedings shall be conducted with dignity and in an orderly and expeditious manner and to so control the proceedings that justice is done. A court has the power to punish for contempt." LA. CODE CRIM. P. art. 17.

82. LA. CODE CRIM. P. art. 771. (Emphasis added.)

83. In most cases this will be deemed sufficient; however, this remedy is often ineffective since the district attorney has already gotten his point across to the jurors and the prejudicial impact is incalculable. As pointed out in *Dunn v. United States*, 307 F.2d 883, 886 (5th Cir. 1962): "[Y]ou can't throw a skunk into the jury box and expect them not to smell it."

84. LA. CODE CRIM. P. art. 770.

85. *Id.* art. 851.

86. *Id.* art. 775.

87. *See* United States v. Briggs, 457 F.2d 908 (2d Cir. 1972); United States v. Grunberger, 431 F.2d 1062 (5th Cir. 1970); United States v. Sawyer, 347 F.2d 372 (4th Cir. 1965). *Cf.* State v. Simpson, 247 La. 883, 175 So. 2d 255 (1965).

88. *See* United States v. Briggs, 457 F.2d 908 (2d Cir. 1972).

When other crimes evidence is admitted, *Prieur* affords some protection by requiring a limiting instruction at the time such evidence is admitted in the state's case-in-chief and before the general jury charge if the defendant requests it. However, it may be desirable to go even further and make it mandatory that the trial judge, upon request of the accused, issue instructions during the prosecutor's argument as to the limited purpose for which such evidence was admitted. Such a guideline would alleviate the possibility that the jury might disregard the other instructions and allow the district attorney in his argument to leave the impression that the accused is a bad man.

In viewing the scope of appellate review of alleged prosecutorial misconduct during closing argument, the deficiencies in Louisiana's bill of exceptions procedure and its harmless error rule become quite apparent.[89] The United States Supreme Court in *Chapman v. California*[90] indicated that prosecutorial comments in argument could be constitutional error,[91] in which case the federal rule of harmless error must govern.[92] Justice Barham has noted that although the Louisiana supreme court may purport to do so, it cannot meet the requirements of the federal test[93] in light of *State v. Barnes*[94] which

89. *See* Comment, 33 LA. L. REV. 82 (1972).

90. 386 U.S. 18 (1967).

91. In *Chapman* the court stated: "In fashioning a harmless-constitutional-error rule, we must recognize that harmless-error rules can work very unfair and mischievous results when, for example, highly important and persuasive evidence, or *argument*, though legally forbidden, finds its way into a trial in which the question of guilt or innocence is a close one." *Id.* at 22. (Emphasis added.) "Certainly error, constitutional error, in illegally admitting highly prejudicial evidence *or comments*, casts on someone other than the person prejudiced by it a burden to show that it was harmless." *Id.* at 24. (Emphasis added.)

92. The federal rule is that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." 386 U.S. 18, 24. In *Harrington v. California*, 395 U.S. 250, 256 (1969), the court indicated that there must be " 'overwhelming' untainted evidence to support the conviction." *See* LA. CODE CRIM. P. art. 921: "A judgment or ruling shall not be reversed by an appellate court on any ground unless in the opinion of the court after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, is prejudicial to substantial rights of the accused, or constitutes a substantial violation of a constitutional or statutory right."

93. *See* State v. Mixon, 258 La. 835, 850, 248 So. 2d 307, 312 (1971) (concurring opinion); State v. McGregor, 257 La. 956, 963, 244 So. 2d 846, 848 (1971) (concurring opinion) (The court there attempted to apply the federal rule to inflammatory remarks in the prosecutor's argument.) *See also* State v. Hills, 259 La. 436, 455, 250 So. 2d 394, 401 (1971) (dissenting opinion); State v. Anderson, 254 La. 1107, 1140, 229 So. 2d 329, 341 (1969) (dissenting opinion); State v. Hopper, 253 La. 439, 451, 218 So. 2d 551, 555 (1969) (dissenting opinion).

94. 257 La. 1017, 245 So. 2d 159 (1971). *See* Note, 32 LA. L. REV. 360 (1972).

limits review of the complete record only to those cases where the transcript is part of the bill of exceptions;[95] and in view of the fact that "article VII of the Louisiana Constitution limits review in criminal cases to questions of law, which according to the jurisprudence, does not include inquiry into the sufficiency of the evidence supporting a verdict"[96] since passing on the question of guilt or innocence is a jury function.

While prosecutorial misconduct is presently viewed as a technical procedural problem, it is actually of constitutional dimension,[97] striking at the heart of the accused's right to a fair trial by an impartial jury.[98] However, the supreme court's reluctance to disturb the verdict on the ground of improper argument unless it is "thoroughly convinced that the jury was influenced by the remarks, and that they contributed to the verdict"[99] places a heavy burden on the defendant, which is contrary to *Chapman*.

Conclusion

It is important to note that the basic question is always: Has the accused, who is presumed to be innocent until proved guilty, been so prejudiced by the misconduct as to have been denied his constitutional right of a fair trial? Thus, in every case involving the district attorney's argument, the court is confronted with the degree to which

95. LA. CODE CRIM. P. art. 841-45. The "entire record," pursuant to article 21, is limited by the bill of exceptions procedure to "the objection, the ruling, and the facts upon which the objection is based" as taken down by the court stenographers when the bill of exceptions is reserved.

96. Comment, 33 LA. L. REV. 82, 91 (1972).

97. *Id.* *See* Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629 (1972); Singer, *Forensic Misconduct by Federal Prosecutors—And How It Grew*, 20 ALA. L. REV. 227 (1968); Note, 83 HARV. L. REV. 814 (1970).

98. An additional post-conviction remedy available to the defendant is provided by article 362(9) of the Code of Criminal Procedure which allows a writ of habeas corpus to be issued if it is found that the defendant was "convicted without due process of law." The comment to this article suggests that the federal habeas corpus is as broad as the due process concept itself, and this remedy is available under 28 U.S.C. § 2254 if the accused has exhausted all other remedies. However, the Fifth Circuit in the recent case of *Bryant v. Caldwell*, 484 F.2d 65 (5th Cir. 1973), indicated that federal prosecutors are subject to more restrictive standards of argument than state prosecutors, and was therefore reluctant in a habeas corpus proceeding to order the release of a prisoner convicted in a Georgia state court. *But see* United States *ex rel.* Haynes v. McKendrick, 350 F. Supp. 990 (S.D. N.Y. 1972) (where the court did find a federal question raised by allegations of improprieties in argument and ordered the release or retrial of the prisoner upon finding that he had not received his due process rights to a fair trial).

99. State v. Dennis, 250 La. 125, 194 So. 2d 720 (1967).

such argument *may* have affected the constitutional rights of the defendant. In the interest of assuring justice and fair-play at the summation stage of the criminal trial, one should not engage in subjective determinations of guilt or innocence either at the trial or appellate level, but leave this question to an impartial jury by applying the rules of argument to both the state and defendant.

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