IS LOUISIANA SHUTTING ITS DOORS IN THE FACE OF PROBATIVE AND RELIABLE OPINION CHARACTER EVIDENCE?

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I. INTRODUCTION

A comparison of the various judicial systems throughout the world reveals some noteworthy differences. As explained in Part III of this Article,[1] this observation certainly holds true for the law of evidence. For example, civil law jurisdictions allow cases to operate *without* a jury, where the main fact-finder in a case is the presiding judge.[2] In other words, the judge's role is to investigate the matter, determine pertinent facts, and render a decision by applying the facts to the relevant codal provisions.[3] Although civil-law judges adjudicate cases, their decision-making authority is restricted by an exhaustive set of laws.[4] Consequently, unlike countries that follow the principle of stare decisis, judges in civil law jurisdictions have less of an impact on sculpting the law than do those who create the framework of the law in which judges operate, such as legislators and drafters of legal commentaries.[5] Hence, this type of system is characterized as "inquisitorial" because the judge obtains all relevant and necessary evidence by "inquiring" as to such information.[6]

On the other hand, in the Anglo-American judicial system, the key feature is the use and role of the jury in a trial.[7] This type of system, also known as the "common law system," is "adversarial" because counsel for each party goes head-to-head in the courtroom in an attempt to get the jury to believe their respective sides of the story, while the judge's role is that of an observer and gatekeeper.[8]

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1. *See infra* Part III.

2. *See The Common Law and Civil Law Traditions*, THE ROBBINS COLLECTION, https://www.law.berkeley.edu/wp-content/uploads/2017/11/CommonLawCivilLaw Traditions.pdf (last visited Feb. 5, 2019).

3. *See id.*

4. *Id.*

5. *Id.*

6. *See id.* For a more detailed description of the inquisitorial procedure, see *Inquisitorial Procedure*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/inquisitorial-procedure (last visited Feb. 5, 2019), which states as follows:

> Under the inquisitorial procedure, the pretrial hearing for bringing a possible indictment is usually under the control of a judge whose responsibilities include the investigation of all aspects of the case, whether favourable or unfavourable to either the prosecution or defense. . . .
>
> At the trial the judge, once more, assumes a direct role, conducting the examination of witnesses, often basing his questions on the material in the dossier. Neither the prosecution nor the defense has the right to cross-examine, but they can present effective summations. The jury does not consult the dossier, instead relying on the facts brought out in the trial.

7. *See The Common Law and Civil Law Traditions*, *supra* note 2.

8. *See id.* For a more detailed description of the adversarial procedure, see *Adversary Procedure*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/

It is perhaps due to this distinction that the adversarial system has been particularly concerned with obtaining the *best evidence* to aid the jury—a group of people usually possessing a limited understanding of the applicable law and particularities of the case—in determining the issues presented and reaching conclusions supported by law. Stated differently, while certain issues of the law of evidence may not be especially concerning for a civil-law judge due to the lack of a jury, those same issues may be of particular significance for a common-law judge because of his duty to "filter out" certain evidence not proper for a jury's consideration.

Throughout their history and development, an overwhelming majority of countries have opted for one of the two legal traditions—civil law or common law. The line between these two legal systems, however, has not been as clear in the United States, especially in states such as Louisiana and California.[9] The rich legal heritage of some states has, over time, resulted in an array of eclectic legal sources,[10] thereby making the judge's task much more difficult in terms of determining the applicable law.

Be that as it may, there is yet another complexity that plagues the Anglo-American system that is virtually non-existent in civil-law countries—*federalism*. The constitutional-federalist relationship between the states and the federal government in the

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adversary-procedure (last visited Feb. 5, 2019), which states as follows:

> In adversary proceedings before juries, the judge functions as moderator and referee on points of law, rarely taking part in the questioning unless he or she feels that important points of law or fact must be made clearer.

9. *See The Common Law and Civil Law Traditions*, *supra* note 2.

> The American legal system remains firmly within the common law tradition brought to the North American colonies from England. Yet traces of the civil law tradition and its importance in the hemisphere maybe [sic] found within state legal traditions across the United States. Most prominent is the example of Louisiana, where state law is based on civil law as a result of Louisiana's history as a French and Spanish territory prior to its purchase from France in 1803. Many of the southwestern states reflect traces of civil law influence in their state constitutions and codes from their early legal heritage as territories of colonial Spain and Mexico. California, for instance, has a state civil code organized into sections that echo traditional Roman civil law categories pertaining to persons, things, and actions; yet the law contained within California's code is mostly common law.

Id.

10. Vernon Valentine Palmer & Harry Borowski, *Louisiana*, *in* MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY 349 n.354 (Vernon Valentine Palmer ed., 2d ed. 2012) ("For example, [in Louisiana] the property provisions are heavily reliant upon Greek and German sources, while the obligations articles cite sources from Italy, Quebec, Argentina, Austria, France, Germany, Greece, Ethiopia, Israel, Switzerland, the Restatement (Second) of Contracts, and the Uniform Commercial Code.").

United States has, since the country's inception, introduced certain intricacies.[11] The interplay between the Federal Rules of Evidence and each state's own version of the evidence rules, provided there is one (such as the Louisiana Code of Evidence), reveals some notable distinctions between the two. And this has been the case throughout the country's history. To illustrate, in 1961, a special committee created by the Judicial Conference of the United States conducted a survey on the history of evidence law in, inter alia, the areas of civil and criminal law. The survey revealed several oddities in the development of evidence law in the United States.[12] For example, until 1933, federal courts presiding over criminal matters in states that joined the union *before* 1789 (the year that the United States federal courts were formed) had to apply the evidentiary rules that were in effect in the states where the federal courts were located.[13] But, the federal courts in those states that joined the union *after* 1789 had to apply the evidentiary rules in effect in the states at the times that those states joined the union.[14] Thus, the evidentiary rules that applied in the federal courts before 1933 depended on the evidentiary rules in effect in the state where the particular federal court was located on the date that state entered the union, either before or after 1789.[15]

The state of evidence law at that time and in the years to follow was so chaotic and poor that many legal scholars agreed that an overhaul of the rules of evidence was necessary.[16] In his 1942 article, *A Modern Code of Evidence*, Dean Mason Ladd of the University of Iowa stated that "[a]ll of the law of evidence needs clarification and simplification."[17] Dean Ladd noted that "[a] review of the history of evidence, with its spotted and often

11. The concept of federalism within a constitutionalist-federalist government connotes a federal government that has certain powers, and that government coexists with individually sovereign states. *See* Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 UTAH L. REV. 489, 499–500 (2011).

12. *See* Josh Camson, *History of the Federal Rules of Evidence*, A.B.A: LITIG. NEWS (2010) (available at https://apps.americanbar.org/litigation/litigationnews/trial_skills/061710-trial-evidence-federal-rules-of-evidence-history.html) [https://perma.cc/ZE6C-3B4K] (noting that in 1961, the Committee on Rules of Practice and Procedure established by the Judicial Conference of the United States made a request that an Advisory Committee on Rules of Evidence be created, which was approved by the Judicial Conference).

13. *Id*.

14. *Id*.

15. *Id*.

16. *Id*.

17. Mason Ladd, *A Modern Code of Evidence*, 27 IOWA L. REV. 213, 214 (1942).

accidental growth, is persuasive proof of the need of introspective study of the law of evidence with a view to far-reaching improvement."[18] Of course, the needed change would not come for another thirty years, with the enactment of the Federal Rules of Evidence in 1975.[19]

While the contemporary confusion in evidence law is perhaps not as troubling as it was in the past, the fact that—depending on the case—the governing evidentiary law could come from federal jurisprudence, federal statutes, or a state's own evidence rules is concerning because of possible conflicts in the laws. As discussed below in Part III,[20] a top-to-bottom comparison of the Louisiana Code of Evidence and the Federal Rules of Evidence shows that one such conflict exists with respect to the methods for proving a person's character and for attacking and defending a witness's credibility.

This Article discusses why the Louisiana Code of Evidence, unlike the Federal Rules of Evidence and the evidence rules of most states, does not allow the use of opinion character evidence. Part II of this Article discusses the history of character evidence in Louisiana generally. Part III explores the differences between the Louisiana Code of Evidence and the Federal Rules of Evidence. Part IV then addresses some criticisms about opinion evidence and its reliability and further argues that opinion evidence is at least equally probative as, and perhaps more reliable, than reputation evidence. Part V offers an insight into the science behind the formation of opinions and reputations, while Part VI provides an overview of the use of opinion character evidence in other states. Finally, Part VII concludes by proposing that Louisiana join the majority of states by amending its character evidence rules and adopting the Federal Rules of Evidence, thereby allowing the use of opinion character evidence.

II. A BRIEF HISTORY OF CHARACTER EVIDENCE IN LOUISIANA

The following sections first address the development of evidence law in Louisiana prior to the enactment of the Louisiana Code of Evidence and then examine the evolution of character evidence in Louisiana after its enactment.

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18. Ladd, *supra* note 17, at 218.
19. Camson, *supra* note 12.
20. *See infra* Part III.

A. PRIOR TO THE ENACTMENT OF THE LOUISIANA CODE OF EVIDENCE

As discussed in greater detail below,[21] throughout modern legal history, judges have struggled with allowing non-factual evidence in their courtrooms. Notably, in the seventeenth and eighteenth centuries, judges routinely precluded witnesses from testifying about their personal opinions, fearing that such testimony—being less reliable than factual testimony—would confuse or mislead the jury and prolong judicial proceedings.[22] In Louisiana, it seems that this skepticism about non-factual evidence existed until the enactment of the Louisiana Code of Evidence, especially with respect to character evidence. This is perhaps best illustrated by the 1913 Louisiana Supreme Court decision in *Gould v. Bebee*, which provides a useful synopsis of the animus toward character evidence at that time.[23]

In *Gould*, the plaintiffs alleged that they owned tracts of unimproved land in the parishes of Vernon and Sabine that contained merchantable long-leaf pine timber.[24] According to the plaintiffs, the defendants engaged in a conspiracy to trespass upon their land to remove any profitable timber they could find.[25] The plaintiffs, who established title to the land in their petition, further contended that the defendants cut and destroyed over 200,000 feet of yellow pine timber, damaging the plaintiffs in the aggregate of $3,361.44.[26] Bebee, one of the alleged conspirators, without setting up title in himself,[27] objected on different grounds, denying the trespass and the conspiracy.[28] In his answer, defendant Bebee also denied severing or damaging any timber belonging to the plaintiff.[29] Instead, he argued that he bought the timber in question for a fair price and that he was the legal owner of the

21. *See infra* Part IV.

22. *See id.*

23. *See* Gould v. Bebee, 63 So. 848, 850 (La. 1913).

24. *Id.* at 848.

25. *Id.*

26. *Id.*

27. *Id.* at 849 ("A mere alleged trespasser, who sets up no color of title in himself, or cotrespassers, *cannot question the validity of plaintiffs' title*, and it is not necessary for such plaintiff to show title perfect in all respects; and, even if there be defects in plaintiffs' title, they are not available as a defense by an alleged trespasser who does not claim title.") (emphasis added).

28. *Gould*, 63 So. at 848–49.

29. *Id.*

timber.[30]

At some point during the proceeding, defendant Bebee called character witnesses to testify, and these witnesses were allowed to testify over the plaintiffs' objections.[31] Having already noted that the trial was time-consuming and that it produced a substantial record replete with oral evidence that should have been excluded,[32] the Louisiana Supreme Court stated that admission of defendant Bebee's character evidence was erroneous and that such evidence had improperly and needlessly overburdened the record.[33] In its reasoning, the court readily admonished the use of character evidence:

> Because of the usual slight probative value of a party's character, and of its confusion of issues to little purpose, and for other reasons variously stated by different judges and not easy to disentangle or to define, it has come to be generally accepted that the character of a party in a civil cause cannot be looked to as evidence that he did or did not do an act charged.[34]

The court further noted that the exclusion of such oral evidence was warranted because of a secondary policy: "its practical inconvenience."[35] This kind of evidence, the court explained, "is easily manufactured, is liable to abuse, and if in common use in the courts, as likely to mislead as to guide aright . . . ."[36] The Court also cited Chief Justice Hosmer's opinion in *Stow v. Converse*,[37] where the Court refused to admit evidence of the plaintiff's good character in a defamation action.[38] There, Chief Justice Hosmer wrote:

> It is not only in contravention of the fundamental rule that evidence shall be confined to the issue, to admit such testimony, but it would be infinitely dangerous to the administration of justice. Instead of meeting a charge of misconduct by testimony evincive of not having misconducted,

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30. Gould v. Bebee, 63 So. 848, 849 (La. 1913).

31. *Id.* at 850.

32. *Id.* at 849.

33. *Id.* at 850.

34. *Id.* (internal quotation marks omitted) (quoting 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 14b(4) (16th ed. 1899)).

35. *Gould*, 63 So. at 850.

36. *Id.*

37. *See generally* Stow v. Converse, 3 Conn. 325 (1820).

38. *Gould*, 63 So. at 850 (citing *Stow*, 3 Conn. 325).

> general character would become the principal evidence in most cases; and he who could throng the court with witnesses to establish his reputation in general would shelter himself from the wrongs he had perpetrated.[39]

If character evidence were admissible in all cases where a lack of honesty has been alleged, then there would be very few instances, in the court's opinion, which would *not* call for the introduction of such evidence.[40] That is, because character evidence as to one's honesty or dishonesty could be used in nearly every case, "trials would be insupportably tedious, and the result of a trial would as often depend upon the popularity of a party as upon the merits of his case."[41] The *Gould* court further suggested that these considerations support *strict compliance* with the evidentiary rules, which have been put in place to police the admission of reputation evidence.[42] The court held that, as a general rule, character evidence should *not* be admitted, and certain exceptions to the rule that have been carved out[43] (which the court also called into question) should be strictly observed.[44] Thus, because defendant Bebee was charged with a specific act of dishonesty, the court held that "testimony as to [defendant Bebee's] character, or general reputation, could have no direct effect or probative value upon the specific charges made against him."[45] Put simply, such evidence was completely irrelevant. In fact, the court opined that this erroneously admitted testimony of defendant Bebee's character witnesses confused even the trial judge.[46] As evidenced by his written reasons for judgment, the trial judge dismissed the plaintiffs' suit on the grounds that "Bebee was shown by the evidence of the best citizens of the vicinity where the

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39. Gould v. Bebee, 63 So. 848, 850 (La. 1913) (quoting Stow v. Converse, 3 Conn. 325, 345–46 (1820)).

40. *Id*.

41. *Id*.

42. *Id*.

43. *Id*. ("Such evidence has been received where character is the matter at issue in the cause, and some courts have admitted it, exceptionally, as to the character of a person charged with a negligent act (contributory negligence), if a plaintiff, as throwing light on the probability of his having acted carelessly on the occasion in question, or where other evidence leaves the matter in great doubt, or where the other evidence is purely circumstantial, or (as sometimes put) that there are no eyewitnesses testifying, or in a case for defamation, where plaintiff is shown to have a bad character, or in cases where character is indicative of a motive, etc.").

44. *Gould*, 63 So. at 850.

45. *Id*.

46. *Id*.

ties were purchased to be honest and honorable."[47] Ultimately, the court concluded that character evidence should not be admissible because, while it could have a dispositive effect on the outcome of a case, it often confuses the trier of fact.[48]

B. FOLLOWING THE ENACTMENT OF THE LOUISIANA CODE OF EVIDENCE

Some seven decades after the *Gould* opinion, the Louisiana Code of Evidence was enacted. Effective on January 1, 1989, the Louisiana Code of Evidence applied to all civil and criminal proceedings in Louisiana courts instituted on or after that date.[49] Being primarily based on the Federal Rules of Evidence,[50] much of the substantive content of the Louisiana Code of Evidence is verbatim the same as—and even corresponds to the rule numbers of—the Federal Rules of Evidence. And because the Federal Rules of Evidence did not frown upon character evidence as much as the prior Louisiana jurisprudence,[51] by substantively mirroring the federal provisions, Louisiana eased up on its skepticism towards character evidence.

Additionally, the Louisiana Supreme Court made it clear that in instances where the text of the Louisiana Code of Evidence is indistinguishable from the federal rules, it seems appropriate for Louisiana courts to use the jurisprudence explicating the federal rules when interpreting the articles of the Louisiana Code of Evidence, all with the goal of "facilitat[ing] a movement towards a uniform national law of evidence."[52] Still, despite this paramount objective and the initial willingness to treat character evidence in the same manner as the Federal Rules of Evidence, the Louisiana State Legislature decided to depart from the federal rules in articles 405 and 608.

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47. Gould v. Bebee, 63 So. 848, 850 (La. 1913).

48. *Id.* ("The testimony certainly serves to confuse the issue, and it has been a great factor in deciding the case in the trial court.").

49. LA. CODE EVID. ANN. art. 101 cmt. (b) (2019).

50. LA. CODE EVID. ANN. art. 101 cmt. (a) (2019); Boudreaux v. Bollinger Shipyard, 2015-1345, p. 13 (La. App. 4 Cir. 6/22/16); 197 So. 3d 761, 769.

51. *See generally* FED. R. EVID. 405 advisory committee's notes to 1972 proposed rules.

52. State v. Foret, 628 So. 2d 1116, 1122–23 (La. 1993) (internal quotation marks omitted) (quoting LA. CODE EVID. art. 102 cmt. (a)).

III. COMPARISON OF THE FEDERAL RULES OF EVIDENCE AND THE LOUISIANA CODE OF EVIDENCE—ARTICLE 405 AND ARTICLE 608

Article 405 of the Louisiana Code of Evidence, "Methods for Proving Character," provides in pertinent part: "Except as provided in Article 412, in all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to *general reputation only*."[53] Conversely, its federal counterpart, Federal Rules of Evidence (F.R.E.) Rule 405, provides: "When evidence of a person's character or character trait is admissible, it may be proved by *testimony about the person's reputation or by testimony in the form of an opinion*."[54] To be sure, these rules only govern the allowable methods of proving character and do not deal with the admissibility of character evidence, which is covered in F.R.E. Rule 404. Similarly, article 608(A)(2) of the Louisiana Code of Evidence provides:

> **A. Reputation evidence of character.** The credibility of a witness may be attacked or supported by evidence in the form of *general reputation only*, but subject to these limitations:
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> . . . .
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> (2) A foundation must first be established that the character witness is familiar with the reputation of the witness whose credibility is in issue. The character witness *shall not express his personal opinion* as to the character of the witness whose credibility is in issue.[55]

On the other hand, the federal counterpart to article 608, F.R.E. Rule 608(a), clearly states that the credibility of a witness may be corroborated or disputed in two different ways: (1) by reputation testimony regarding that witness's character for (un)truthfulness; and (2) by opinion character testimony.[56] The differences between these provisions are readily apparent. While the Federal Rules of Evidence allow opinion testimony as a means of proving character and as a method for attacking or supporting a witness's credibility, the Louisiana Code of Evidence—though generally based on the federal rules—does not. However, what is not as apparent is the reason *why* the Louisiana State Legislature

53. LA. CODE EVID. ANN. art. 405(A) (2019) (emphasis added).
54. FED. R. EVID. 405(a) (emphasis added).
55. LA. CODE EVID. ANN. art. 608(A)(2) (2019) (emphasis added).
56. FED. R. EVID. 608(a).

decided to retain this "grotesquely outdated ban"[57] on opinion character evidence and use its evidentiary rules to exclude such evidence.[58]

In his 1989 *Louisiana Law Review* article, *An Overview of the New Louisiana Code of Evidence—Its Imperfections and Uncertainties*, Professor Rault offered a slight indication as to why Louisiana might have opted to do away with opinion evidence.[59] Curiously, in his article, Professor Rault explained that the initial version of article 405 proposed by the Louisiana State Law Institute *allowed* opinion character evidence in all instances where reputation character evidence could be used.[60] According to Professor Rault, the Louisiana State Law Institute endorsed the initial version of article 405 because of Rule 405 of the Federal Rules of Evidence and the national trend toward allowing opinion character evidence.[61] Nevertheless, the version supported by the Louisiana District Attorneys Association (LDAA)[62]—which still

57. *See generally* Marc R. Kadish & Jason J. Elmore, *Illinois' "Grotesquely Outdated" Ban of Opinion Character Evidence in Criminal Cases*, 86 ILL. B.J. 268, 268 (1998) (citing Michelson v. United States, 335 U.S. 469 (1948) & Richard C. Wydick, *Character Evidence: A Guided Tour of the Grotesque Structure*, 21 U.C. DAVIS L. REV. 123 (1987)).

58. While the reason behind the disfavoritism of opinion evidence may not be as clear, in *Michelson v. United States*, 335 U.S. 469, 477 (1948) (quoting *Badger v. Badger*, 88 N.Y. 546, 552 (1882)), the United States Supreme Court nicely encapsulated the reasons why reputation evidence is admissible:

> The witness is, however, allowed to summarize what he has heard in the community, although much of it may have been said by persons less qualified to judge than himself. The evidence which the law permits is not as to the personality of defendant but only as to the shadow his daily life has cast in his neighborhood. This has been well described in a different connection as "the slow growth of months and years, the resultant picture of forgotten incidents, passing events, habitual and daily conduct, presumably honest because disinterested, and safer to be trusted because prone to suspect. . . . It is for that reason that such general repute is permitted to be proven. It sums up a multitude of trivial details. It compacts into the brief phrase of a verdict the teaching of many incidents and the conduct of years. It is the average intelligence drawing its conclusion."

59. *See* Gerard A. Rault, Jr., *An Overview of the New Louisiana Code of Evidence—Its Imperfections and Uncertainties*, 49 LA. L. REV. 697, 710 (1989).

60. *Id.* (citing proposed LA. CODE EVID. art. 405(A) (1989)).

61. *Id.* (citing FED. R. EVID. 405(a)); *see also* H.R. REP. NO. 93-650 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 7075, 7081 ("Rule 405(a) as submitted proposed to change existing law by *allowing evidence of character in the form of opinion* as well as reputation testimony.") (emphasis added).

62. The LDAA's mission is "to improve Louisiana's justice system and the office of District Attorney by enhancing the effectiveness and professionalism of Louisiana's District Attorneys and their staffs through education, legislative involvement, liaison, and information sharing." *Our Mission*, LA. DIST. ATTORNEYS ASS'N, https://www.ldaa.org/main/mission (last visited May 5, 2019).

stands today—provided for reputation evidence *only*.[63]

Indeed, the Advisory Committee Notes to F.R.E. Rule 405 provide that the use of opinion testimony to prove or disprove one's character "departs from usual contemporary practice."[64] The United States House of Representatives Report from November 1973 further supports this conclusion:

> Rule 405(a) as submitted proposed to change existing law by *allowing* evidence of character *in the form of opinion as well as reputation testimony*. Fearing, among other reasons, that wholesale allowance of opinion testimony might tend to turn a trial into a swearing contest between conflicting character witnesses, *the Committee decided to delete from this Rule,* as well as from Rule 608(a) which involves a related problem, *reference to opinion testimony*.[65]

The House Report included the same mistrust and skepticism towards incorporating opinion evidence into Rule 608(a):

> Rule 608(a) as submitted by the Court *permitted* attack to be made upon the character of truthfulness or untruthfulness of a witness *either by reputation or opinion testimony*. For the same reasons underlying its decision to eliminate the admissibility of opinion testimony in Rule 405(a), *the Committee amended Rule 608(a) to delete the reference to opinion testimony*.[66]

Even in its current form, article 608 provides that "the *only form* of character evidence that may be used to attack or support the credibility of a witness is *reputation evidence*."[67] Hence, the

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63. Rault, *supra* note 59, at 710.

64. FED. R. EVID. 405 advisory committee's notes to 1972 proposed rules. Please note that the Comments also provide that the earlier practice permitted opinion evidence. *See infra* Part IV.

65. H.R. REP. NO. 93-650 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 7075, 7081 (emphasis added).

66. *Id*. at 7084 (emphasis added).

67. BOBBY MARZINE HARGES & RUSSELL L. JONES, LOUISIANA PRACTICE SERIES: LOUISIANA EVIDENCE 230–31 (2018).

> State v. Thompson, 2015-1518, 2016 WL 1535160 (La. Ct. App. 1 Cir. Apr. 15, 2016) (ten defense witnesses testified that rape victim's "reputation for truthfulness and veracity in the community was bad"); State v. Robertson, 2012-743, 2012 WL 6681830 (La. Ct. App. 1 Cir. Dec. 21, 2012) (holding that internet blog entry of rape victim stating that she was a compulsive liar was inadmissible credibility evidence; evidence was not reputation evidence as required under Article 608 and the court found that evidence was also irrelevant); State v. Carter, 1997-2902 (La. App. 4 Cir. 5/10/00); 762 So. 2d 662 (domestic violence pamphlets not admissible to support expert's credibility because not general reputation).

application of this article prevents a witness from giving an opinion as to whether another witness is lying.[68] Similarly, article 608(A)(2) precludes a character witness from expressing a personal opinion about the character of the witness whose credibility is at issue.[69] As explained by Professors Harges and Jones:

> [T]he character witness is allowed to express the opinion of the community, *not his own opinion*, of the witness' character trait for truthfulness or untruthfulness. In a sense, the reputation witness is actually expressing his impression or opinion of what the community thinks of the witness whose credibility is being questioned.[70]

Besides the judiciary committees' reports and Professor Rault's observations, little authority exists on the reason behind Louisiana's reluctance to recognize and allow opinion evidence as a method of proving character and attacking or supporting a witness's credibility. Nonetheless, guided by historical interpretations, modern state practices, and analogical reasoning, the Authors propose that Louisiana amend article 405 and article 608, adopt the federal approach in this regard, and join the trend of permitting both reputation and opinion character evidence in the courtroom.

IV. CRITICISM OF OPINION EVIDENCE AND ITS VALIDITY

It should first be pointed out that—by "recognizing opinion as a means of proving character"—the Federal Rules of Evidence

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HARGES & JONES, *supra*, at 231 n.1.

68. *Id.* at 231.

State v. Burtis, 2008-373 La. App. 1 Cir. 9/23/08, 2008 WL 4332529 (La. Ct. App. 1st Cir. 2008) (finding error when the trial court allowed mother of child sexual abuse victims to testify about whether she believed children were lying—harmless). The court in *Burtis*, relying on Article 701, also stated that a detective who interviewed the victims and several family members and consulted with child psychologists where the victims were interviewed was allowed to give an opinion about whether the victims were lying since this opinion was based on her experience, observations, and interviews conducted and it was helpful to the determination of a fact in issue. However, this decision appears to be in error relative to the detective's testimony on the victim's credibility because Article 608(A) is a more specific article governing the credibility of witnesses and should prevail over Article 701. Nevertheless, the court stated that if the trial court erred in allowing the detective to testify in violation of Article 608, the error was harmless.

Id. at 231 n.2.

69. *Id.* at 231 (citations omitted).

70. *Id.* at 231–32 (emphasis added).

adopted the earlier practice favoring opinion testimony.[71] The Advisory Committee Notes to F.R.E. Rule 405 state that "the earlier practice permitted opinion and argu[ed] strongly for evidence based on personal knowledge and belief as contrasted with the secondhand, irresponsible product of multiplied guesses and gossip which we term reputation."[72] While character has traditionally concerned mostly "moral overtones," (e.g., whether a person is good or bad) that is no longer the case, as "nonmoral considerations" (e.g., whether a person is a competent driver) are frequently raised in today's jurisprudence.[73] And, if character is defined as the kind of person one is, then the rules should reflect and account for the different ways one may arrive at that determination.[74] For example, if mental capacity can be proven by opinion, then opinion evidence should be admissible as a way to prove character as well.[75]

But what has been the general criticism of opinion evidence? An "opinion" is defined as a "belief, inference, or impression held by a witness about an issue in question."[76] Since "as early as the seventeenth or eighteenth century," courts have "regularly prohibited witnesses" from testifying about their personal opinions, primarily because such testimony is regarded as "less positive than strictly factual testimony."[77] Additionally, courts were concerned that opinion testimony might "unduly influence" the jury.[78] Interestingly enough, while English courts allowed statements of opinion based on the personal knowledge of

71. FED. R. EVID. 405 advisory committee's notes to 1972 proposed rules. The interpretation of the Committee's Notes shows that the chronology of favoring opinion evidence seems to have developed as follows: first, "the earlier practice"—effective prior to the enactment of the Federal Rules of Evidence in 1975—permitted opinion evidence and argued strongly for evidence based on personal knowledge and belief; second, "the contemporary practice"—followed around the time when the Federal Rules of Evidence were enacted—frowned upon opinion evidence; and lastly, "the modern practice"—from 2011 onward—broke away from the contemporary practice in favor of the earlier practice and advocated for inclusion of opinion evidence in both article 405 and article 608. *Id.*

72. *Id.* (internal quotation marks omitted) (citing 7 WIGMORE, EVIDENCE § 1986 (3d ed. 1940)).

73. *Id.*

74. *Id.*

75. FED. R. EVID. 405 advisory committee's notes to 1972 proposed rules.

76. Herman Edgar Garner, Jr., *Opinion and Expert Evidence Under the Federal Rules*, 36 LA. L. REV. 123, 124 (1975). "Opinion is to be distinguished from personal knowledge of fact." *Id.* at 124 n.9 (citations omitted).

77. *Id.* at 124.

78. *Id.* (citations omitted).

witnesses, with the requirement that the witnesses testify only as to "what they see and hear" (i.e., from personal experience), the Anglo-American jurisprudence—as a cousin of English jurisprudence—completely excluded *all opinion testimony*, allowing only testimony of fact.[79] It is important to note, however, that the latter approach—allowing only fact testimony and prohibiting opinion testimony—has been severely criticized.[80]

One argument is that making a distinction between factual and opinion testimony is difficult because "[a]ll statements are products of observation and interpretation, and a witness's environment influences both the manner and content of his testimony."[81] "Persons who are accustomed to speaking in the form of opinion cannot," as a practical matter, be expected to take the stand and exclude all "logical conclusions" they drew from observing an event.[82] As explained by Justice Harrison of the California Supreme Court:

> Impressions or sensations caused by external objects are not susceptible of *exact reproduction or description in words*, nor do they affect every individual alike, and the judgment or opinion of the witness[es] by whom they have been experienced is the *only mode* by which they can be presented to a jury.[83]

For instance, although people generally do not have the necessary tools, as police do, to determine whether a car was *in fact* speeding, they can still successfully identify a speeding car by other pertinent parameters, such as personal experiences or comparison of that car's speed to the speed of other cars on the road.[84] If courts were to apply the strict, traditional "fact versus opinion" rule, even this invaluable and predominantly accurate

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79. Garner, *supra* note 76, at 124 (footnotes omitted).

80. *Id.* at 125.

81. *Id.* (citations omitted).

82. *Id.* at 124.

83. Healy v. Visalia & T.R. Co., 36 P. 125, 125–26 (Cal. 1894) (emphasis added).

84. *See, e.g.*, Mitchell v. Roy, 10-563, pp. 5–7 (La. App. 3 Cir. 11/3/10); 51 So. 3d 153, 159–60 (finding that the trial judge did not err when he allowed a lay witness who was an eyewitness to a collision between a car and a bicycle to testify that the car was traveling between thirty-five and forty miles per hour before the collision); Rideau v. State Farm Mut. Auto. Ins. Co., 2006-0894, p. 7 (La. App. 1 Cir. 8/29/07); 970 So. 2d 564, 572 (lay witness allowed to state, "my estimate would be he wasn't going any faster than the speed limit") (internal quotation marks omitted); State v. Beason, 26,725 (La. App. 2 Cir. 4/07/95); 653 So. 2d 1274; Gianfala v. State Farm Mut. Auto. Ins. Co., 615 So. 2d 558 (La. Ct. App. 3 Cir. 1993); *see also* HARGES & JONES, *supra* note 67, at 269–75.

testimony would be excluded.[85] Louisiana courts recognized the detrimental effect of such rigid application early on when they allowed witnesses to draw natural inferences from the event in question and testify to them in court.[86]

In support of their position, opponents of opinion testimony further state that a "wholesale allowance" of such testimony may turn a trial into a battle of opposing character witnesses.[87] This battle may unnecessarily prolong proceedings and confuse juries.[88] In *Michelson v. United States*, the United States Supreme Court noted that an attempt to prove character by opinion evidence may overshadow the main issues in the case, muddle up the proceeding, and mislead the jury.[89] One might argue, however, that this conclusion is without merit.

First, hearing properly admitted opinion character testimony will not make the members of the jury so gullible as to render them incapable of attaching due weight to such testimony. Second, there is hardly any conceivable difference between a *battle of opposing character witnesses*, on the one hand, and a *battle of experts* on the other. Even if an argument can be made that opinion testimony is too elusive for the jury, the same can be said for expert testimony. Expert witnesses, unlike character witnesses, more often than not make or break a case, regardless of whether they testify about causation or damages (in a civil matter) or blood or DNA analysis (in a criminal matter). Moreover, unlike lay opinion witnesses, expert witnesses offer opinions on technical, scientific, or other highly specialized topics which can easily confuse the jury, particularly if both parties introduce reputable experts reaching

85. *See* Garner, *supra* note 76, at 125 ("For example, most people can identify a speeding car, even though they do not have the mechanical tools to establish the car's speed as a fact. Nevertheless, a rigid application of the traditional opinion rule would preclude such testimony.").

86. *See* State v. Cole, 109 So. 505, 512 (La. 1926) ("An ordinary observer is permitted to state a natural inference from observed conditions or occurrences, or the impressions made on his mind by a number of connected facts which it is impractical to place before the jury in detail.") (citation omitted).

87. *See* H.R. REP. NO. 93-650 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 7075, 7081.

88. *See* Michelson v. United States, 335 U.S. 469, 475–76 (1948) ("The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.").

89. *Id.* at 477–78 (citing People v. Van Gaasbeck, 189 N.Y. 408, 418 (1907)).

opposite conclusions on the same subject. There is no valid reason to believe that juries will be confused by conflicting opinion testimony as to whether someone is a good or bad person but not by conflicting expert testimony on scientific or technical explanations of a complex matter.[90] Yet, while the battle of opinion character witnesses is prohibited under articles 405 and 608 of the Louisiana Code of Evidence, article 702[91] allows for the battle of expert testimony.[92]

Comparing opinion and reputation evidence can produce a similar argument, which is analyzed in greater detail below.[93] For now, it suffices to say that it is more difficult for the jury "to evaluate the validity [and accuracy] of so nebulous a concept as the opinion held of the defendant by the general community,"[94] because the "general community" cannot be cross-examined for credibility, bias, and reliability issues. On the other hand, a witness testifying to a personal opinion about a defendant's character trait is readily available for withstanding all of these challenges.

Moreover, many believe that one's general reputation is stronger evidence of a certain trait than a person's opinion about

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90. *See* Sara Parikh & Terrence Lavin, *Lessons from Jury Research*, 96 ILL. B.J. 190, 193 (2008) (suggesting that "juries tend to be somewhat cynical about expert witnesses and will evaluate them through the same critical eye they would evaluate any witness").

91. LA. CODE EVID. ANN. art. 702 (2019).

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
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> (1) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (2) The testimony is based on sufficient facts or data;
>
> (3) The testimony is the product of reliable principles and methods; and
>
> (4) The expert has reliably applied the principles and methods to the facts of the case.

Id.

92. On this note, it could also be argued that the analogy of article 702 operates in favor of allowing opinion evidence because, as Professor Kadish explains in his article, "[u]nlike the witness to reputation, the opinion witness is more like *an expert observer* of that trait." Kadish & Elmore, *supra* note 57, at 270 (emphasis added). And just like with expert testimony on other matters, we should allow character witnesses (who can be said to be expert witnesses on a defendant's particular trait) and "trust the trier of fact in interpreting its weight." *Id.*; *see also* Michelson v. United States, 335 U.S. 469, 478 (1948) (stating that a "paradox" in the law of evidence regarding reputation evidence is that "the delicate and responsible task of compacting reputation hearsay into the 'brief phrase of a verdict' is one of the few instances in which conclusions are accepted from a witness on a subject in which he is not an expert").

93. For a more detailed discussion, see *infra* Part V.

94. Kadish & Elmore, *supra* note 57, at 272 (internal citations and quotation marks omitted).

that trait.[95] The Authors disagree. As pointed out by Professor Kadish, "reputation is merely a product of organized gossip."[96] Certainly, as is discussed below,[97] opinion evidence—disallowed by Louisiana Code of Evidence articles 405 and 608—is, if not more valuable, at least equally valuable as the admissible reputation evidence. To find support for this argument, the Authors explored the field of psychology and other social sciences to ascertain, to the extent possible, how opinions are formed and the value of reputation (i.e., collective opinion).

V. THE SCIENCE BEHIND OPINION FORMATION AND REPUTATION

On a group level, research has shown that recurrent influences within a group may affect the way that the members of that group form an opinion, be it through solidarity, polarization, or disintegration.[98] This is because "the collective dynamics of opinion formation in large groups," (which are, in fact, necessary for establishing a reputation in the eyes of the law), "are driven by two major 'attractors of opinion': (*i*) the presence of a highly confident individual [the expert effect]; and (*ii*) the presence of clusters of low-confidence individuals sharing a similar opinion [the majority effect]."[99]

This indicates that, with the "expert effect," a person that exudes more confidence in an opinion can largely influence, and essentially alter, a group's opinion on a certain matter.[100] As such, what the law would consider a person's reputation formed by a large group would essentially be a single person's opinion that has been adopted by the large group. Likewise, with the "majority effect," a group's opinion can be impacted by a smaller sub-group (which may *not* have the legally sufficient number of members,

95. Kadish & Elmore, *supra* note 57, at 269.

96. *Id.*

97. *See infra* Part V.

98. *See* Mehdi Moussaïd et al., *Social Influence and the Collective Dynamics of Opinion Formation*, PLOS ONE (Nov. 5, 2013), https://doi.org/10.1371/journal.pone.0078433 (footnotes omitted).

99. *Id.*

100. *Id.*

such as three or four)[101] "sharing similar opinions."[102] The 2013 study titled *Social Influence and the Collective Dynamics of Opinion Formation* suggests that 15% of experts are needed to frustrate a group's opinion formed due to the pressure of its community gathered around the same values.[103] In other words, it is difficult to alter an opinion formed under the impact of a group of laypersons, even if such opinion is distorted.

Further, studies show that people grow more assured of their opinions upon realizing that people around them share the same or comparable opinions, even if those other opinions are not accurate.[104] Experts and researchers have interpreted this to mean that a person's confidence in his judgment is a measure of its accuracy only when the judgment is formed autonomously, as is the case with personal opinions.[105] Conversely, if a judgment is formed as a result of social influences, as is the case with reputation, then the person's confidence in her judgment is merely a measure of consensus—not accuracy.[106] For these reasons, even from a scientific view, personal opinion is at least as valid as reputation, as it is not weakened or distorted by external influences.

The issues of opinion fragmentation and polarization present in the context of forming general reputation is yet another drawback worthy of discussion. Namely, on a basic level, reputation in the community is merely a collection of statements and opinions passed from one person to the next or shared with a group. Throughout this sharing process, which is not restricted by

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101. *See* State v. Clark, 402 So. 2d 684, 686–87 (La. 1981) (noting that generally, to constitute proof of a person's reputation, such reputation must be "general and established in any *substantial community* of people among whom he is well known, such as the group with whom he works, does business or goes to school") (emphasis added) (citations omitted). *But see* State v. Terry, 94-0622 (La. App. 1 Cir. 4/07/95); 654 So. 2d 455, *writ denied*, 95-1180 (La. 10/13/95); 661 So. 2d 494 (finding that a witness's testimony that he lived in the same community as the victim and had spoken with *three or four* unidentified people in the community about the victim's reputation for truthfulness ***did not*** establish a sufficient foundation for testimony concerning the defendant's reputation for truthfulness).

102. Moussaïd et al., *supra* note 98.

103. *Id.* ("In particular, we show that a critical amount of approximately 15% of experts is necessary to counteract the attractive effect of a large majority of lay individuals.").

104. *Id.* (referring to other experiments that support this conclusion).

105. *Id.* (citing Asher Koriat, *When Are Two Heads Better than One and Why?*, 336 SCIENCE 360 (2012) & Ralph Hertwig, *Tapping into the Wisdom of the Crowd—with Confidence*, 336 SCIENCE 303 (2012)).

106. Moussaïd et al., *supra* note 98.

any of the legally acknowledged considerations (e.g., hearsay), these statements and opinions can be filtered out or spiced with various other factors, such as personal biases.[107] Because reputation is formed in the community of people where one "is well known, such as the group with whom [one] works, does business or goes to school,"[108] certain biases—for better or for worse—are unavoidable.

An analogy to the famous "Telephone Game" helps illustrate fragmentation and polarization of opinion formation. Throughout the game, a sentence or a brief story communicated to the first person undergoes drastic changes by the time the same sentence or story reaches the final player. Even stripped of the element of bias and other external factors, the ultimate outcome is by no means a faithful or accurate copy of the original statement or story. Certainly, allowing the final player in the Telephone Game to testify in a trial about what others told him is not the ideal way to share valuable information with the trier of fact. And although reputation is not formed serially like this, or in the same manner and timeframe in which this game develops, reputation may very well be tainted by some of the same issues that surface in the game. Still, the Louisiana State Legislature made a conscious decision to run the risks that surface in the game (such as disinformation, other people's biases, and selective memory). A fair and objective evaluation of both reputation and opinion evidence leads to the inescapable conclusion that opinion evidence—if not more valuable than reputation—is surely at least equally worthy of consideration as reputation and ought to be included in article 405 and article 608.

Lastly, some opponents of opinion evidence express concern that such evidence is personally biased and represents an inaccurate depiction of one's character traits. As explained by Professor Kadish, concerns of that nature are unfounded because a witness's knowledge is an indispensable part of the witness's testimony.[109] In his article advocating for allowing opinion

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107. *See* Kadish & Elmore, *supra* note 57, at 272 ("Reputation testimony amounts to a collage of opinions and interpretations stated out of court, then filtered through the reporting witness.").

108. State v. Clark, 402 So. 2d 684, 686–87 (La. 1981) ("Thus, today it is generally agreed that proof may be made not only of the reputation of the person where he lives, but also of his repute, as long as it is 'general' and established, in any substantial community of people among whom he is well known, such as the group with whom he works, does business or goes to school.") (citations omitted).

109. Kadish & Elmore, *supra* note 57, at 271 (citing FED. R. EVID. 602).

evidence in the state of Illinois (which ultimately did occur in January of 2011),[110] Professor Kadish points out that "[i]t is generally accepted that first-hand testimony is more valuable than that passed on from others (i.e., hearsay)."[111] He further stated, "Logically, '[t]he testimony of one witness who speaks from an intimate personal knowledge of the character of another is worth more than that of 50 witnesses whose information is based solely on hearsay . . . .'"[112] Moreover, an opinion is formed based on an individual's personal knowledge of another individual's characteristic.[113] However, the same cannot be said about reputation, because reputation is a product of what others—based on hearsay—think about that characteristic.[114] Therefore, even if there were no sufficient logical, scientific, or equity-based reasons to allow opinion character evidence, opinion evidence should at

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110. In January of 2011, Illinois took some baby steps on its path toward admitting opinion evidence. For instance, with the ban against opinion evidence still in place, Illinois courts did admit opinion evidence in the early twentieth century provided that witnesses confined their testimony to the defendant's general reputation. *See generally* People v. Lehner, 157 N.E. 211 (Ill. 1927). The ultimate shift towards incorporating opinion evidence in Rules 405 and 608 of the Illinois Rules of Evidence occurred in 2011, over eight decades later, as a result of the efforts invested by a Special Supreme Court Committee on Evidence, which was charged with codifying the law of evidence in the State of Illinois:

> The Committee recommended to the Illinois Supreme Court a limited number of changes to Illinois evidence law (1) where the particularized evidentiary principle was neither addressed by statute nor specifically addressed in a comprehensive manner within recent history by the Illinois Supreme Court, and (2) where prior Illinois law simply did not properly reflect evidentiary policy considerations or raised practical application problems when considered in light of modern developments and evidence rules adopted elsewhere with respect to the identical issue. The Committee identified, and the Illinois Supreme Court approved, recommendations in only two areas:
>
> > (a) Opinion testimony is added to reputation testimony as a method of proof in Rule 405, when character evidence is admissible, and in Rule 608 with respect to character for truthfulness . . . .

ILL. R. EVID., Committee Commentary (available at http://www.illinoiscourts.gov/SupremeCourt/Announce/2010/092710_2.pdf).

111. Kadish & Elmore, *supra* note 57, at 271.

112. *Id.* (quoting 2 ROY R. RAY, TEXAS LAW OF EVIDENCE: CIVIL AND CRIMINAL § 1432, at 105 (3d ed. 1980)).

113. *Id.* at 271 n.37 (citing People v. Pieper, 101 N.E.2d 109, 111 (Ill. 1951)) ("Evidence of reputation, to be admissible, must be based upon contact with the defendant's neighbors and associates rather than upon the personal opinion of the witness."); *see also* Michelson v. United States, 335 U.S. 469, 477–78 (1948) (quoting People v. Van Gaasbeck, 189 N.Y. 408, 418 (1907)) (stating that "courts have recognized logical grounds for criticism of this type of opinion-based-on-hearsay testimony," i.e., reputation, while also recognizing that the same "is said to be justified by 'overwhelming considerations of practical convenience' in avoiding innumerable collateral issues which . . . would complicate and confuse the trial, distract the minds of jurymen and befog the chief issues in the litigation").

114. *See supra* note 111 and accompanying text.

least be allowed because of legally established evidentiary principles.

VI. OPINION EVIDENCE IN OTHER STATES

To be clear, both the Louisiana Code of Evidence and the Federal Rules of Evidence bar the admission of hearsay.[115] Yet, both allow questionable general reputation testimony plagued with hearsay issues as a method for proving character.[116] The Federal Rules of Evidence Advisory Committee recognized the absurdity of allowing reputation evidence and disallowing opinion evidence as a means of proving character, and the rules were amended to reflect that observation.[117] Despite its commitment to rule uniformity based on principles of "fairness, efficiency, and progress," Louisiana has refused to follow suit and has not enacted rules of evidence that allow both reputation *and opinion* as a method to prove character.[118] As of today, Louisiana is one of only seven states that refuse to adopt evidentiary rules allowing opinion evidence. The other six states are Florida,[119] Maine,[120]

115. *See* LA. CODE EVID. ANN. art. 802 (2019); FED. R. EVID. 802.

116. *See* Michelson v. United States, 335 U.S. 469, 477–78 (1948) (recognizing that logical grounds exist for criticism directed against reputation evidence in terms of hearsay).

117. 22B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE: FEDERAL RULES OF EVIDENCE § 5261 (2d ed.), Westlaw (database updated Apr. 2019).

118. Kenneth W. Graham, Jr., *State Adaptation of the Federal Rules: The Pros and Cons*, 43 OKLA. L. REV. 293, 298–300 (1990) ("Uniformity as a procedural value is so deeply embedded in American legal thought that many proceduralists find it difficult and unnecessary to explain why uniformity is thought to be good . . . . Uniform rules may make it easier for law students, lawyers, and legal business to flow across state lines and thus reduce the costs of legal services in those states where there are too few lawyers to meet the demand for legal service with resulting monopoly profits to local lawyers.").

119. *See* FLA. STAT. ANN. § 90.405 (West, Westlaw through 2019 First Reg. Sess.) ("**(1) Reputation**. When evidence of the character of a person or of a trait of that person's character is admissible, proof may be made by testimony about that person's reputation.").

120. *See* ME. R. EVID. 405 (West, Westlaw through Mar. 1, 2019) ("**(a) By reputation**. When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.").

Massachusetts,[121] Pennsylvania,[122] Washington,[123] and Vermont.[124]

Louisiana should join the Federal Rules of Evidence and over forty of its sister states by recognizing the importance and value of opinion testimony and amending its Code of Evidence to provide for the admissibility thereof. Article 405, as it currently stands,

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121. *See* MA. R. EVID. § 405 (West, Westlaw through Feb. 15, 2019) ("**(a) By Reputation**. Except as provided in (b) and (c), when evidence of a person's character or a character trait is admissible, it may be proved by testimony about the person's reputation only. On cross-examination of the character witness, the court may allow impeachment by an inquiry into relevant specific instances of the person's conduct.").

122. *See* PA. R. EVID. 405 (West, Westlaw through Apr. 1, 2019) ("**(a) By Reputation**. When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation. Testimony about the witness's opinion as to the character or character trait of the person is not admissible."). However, Pennsylvania arguably allowed opinion evidence through its jurisprudence. *See* Butler v. Flo-Ron Vending Co., 557 A.2d 730, 734 (Pa. Super. Ct. 1989) ("Character can be proven by evidence of specific bad acts, by a witness's opinion of a person's character, or by testimony of a person's general reputation in the community. Traditionally, however, the preferred method, where evidence of character is admissible, is through evidence of reputation.") (citations omitted).

123. *See* WASH. R. EVID. 405 (West, Westlaw through Mar. 1, 2019) ("**(a) Reputation.** In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation. On cross examination, inquiry is allowable into relevant specific instances of conduct.").

124. *See* VT. R. EVID. 405 (West, Westlaw through Mar. 1, 2019) ("**(a) Reputation.** In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation. On cross-examination, inquiry is allowable into relevant specific instances of conduct."). However, it should be noted that three states have a somewhat different rule regarding opinion character evidence. For instance, in California, it seems that opinion evidence is only allowed in criminal cases:

> In a criminal action, evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation is not made inadmissible by Section 1101 if such evidence is:
>
> (a) Offered by the defendant to prove his conduct in conformity with such character or trait of character.
>
> (b) Offered by the prosecution to rebut evidence adduced by the defendant under subdivision (a).

CAL. EVID. CODE § 1102 (West, Westlaw through Ch. 5 of 2019 Reg. Sess.). In Missouri, it seems that opinion evidence is only admissible when "character is at issue." *See* KATHLEEN A. FORSYTH, 22 MISSOURI PRACTICE SERIES: MISSOURI EVIDENCE § 405:1 (4th ed.), Westlaw (database updated Apr. 2019). And, in Virginia, though opinion evidence is not specifically provided for, the rule points out that reputation testimony cannot be given except upon personal knowledge of reputation:

> (a) Reputation Proof. Where evidence of a person's character trait is admissible under these Rules, proof may be made by testimony as to reputation; but a witness may not give reputation testimony except upon personal knowledge of the reputation. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

VA. SUP. CT. R. 2:405 (West, Westlaw through Mar. 15, 2019).

excludes opinion character evidence and admits reputation character evidence,[125] which is a form of character evidence that has not been proven to be any more reliable than opinion character evidence. Relying solely on inherently frail reputation testimony "has been criticized as an anachronism given the increasingly anonymous urban community."[126] Also, "[r]eputation in modern . . . urban centers is often evanescent, fragile or actually nonexistent."[127] This point was made by Justice Cardozo almost a century ago:

> In 1921, [Justice] Cardozo commented that faith in the collective judgment of the community over the opinion of one witness "is a survival of more simple times. It was justified in days when men lived in small communities. Perhaps it has some justification even now in rural districts. In the life of great cities, it has made evidence of character a farce."[128]

It should be undisputed that opinion testimony has probative value, as it is "more natural and generally more believable than the stilted form of 'reputation in the community,' particularly when the witness is given an opportunity to explain the basis for her opinion."[129] The opinion of those whose personal intimacy provides them with firsthand knowledge of a person's character is an incomparably more valuable indication of that person's character than reputation, which is nothing but accumulated hearsay.[130] While opinion may prove prejudicial or, in certain cases, may otherwise fail article 403's balancing test, that alone does not justify *a complete bar* against such evidence, which, in other cases, will likely be probative and important for the trier of fact to consider. Hence, one way to ensure the quality of opinion evidence is to rely on article 403, as the danger of collateral issues does not seem any greater than it is with reputation evidence.[131]

Another way to ensure that opinion evidence is properly

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125. *See* LA. CODE EVID. ANN. art. 405 (2019).

126. Rogers v. United States, 566 A.2d 69, 74 (D.C. 1989).

127. *Id.* (quoting CHARLES T. MCCORMICK, EDWARD CLEARY & KENNETH BROUN, MCCORMICK ON EVIDENCE § 44, at 101 (1984)).

128. *Id.* (quoting BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 157 (1921)).

129. Kadish & Elmore, *supra* note 57, at 270 & n.26 ("Judge Pratt from the U.S. District Court for the Eastern District of New York made this statement in the article *A Judicial Perspective on Opinion Evidence Under the Federal Rules*, 39 WASH. & LEE L. REV. 313, 319 (1982).").

130. *See id.* at 271 n.38 (quoting 7 WIGMORE, EVIDENCE § 1986, at 244 (3d ed. 1940)).

131. *See* LA. CODE EVID. ANN. art. 403 (2019).

admitted is to lay a proper foundation, just like with reputation testimony. As suggested by Professor Kadish, only a witness who has a relationship with a person sufficient to enable the witness to form a conscientious opinion about the person's disputed character trait should be allowed to offer opinion testimony.[132] Thus, a framework can certainly be put in place to ensure that opinion evidence indeed offers only the permitted probative value.

VII. CONCLUSION

The main objective of Anglo-American jurisprudence is the gathering of the best evidence possible to aid the trier of fact in resolving a dispute. Perhaps it is due to this goal that the Federal Rules of Evidence have continuously changed since their promulgation in 1975.[133] Indeed, over the last forty-plus years, the Federal Rules of Evidence have withstood a number of linguistic and substantive amendments.[134] Some of these revisions were undoubtedly necessitated by the substandard state of the law of evidence prior to 1975. However, other amendments occurred because the law of evidence has seen many changes throughout the past several decades.[135] "Those changes occur with amendments to the actual rules, as well as formative case law from courts around the country."[136] Surely, as the practice of law becomes more mobile, digital, and technology-dependent, the law of evidence will undergo more changes in the years to come. And while the Federal Rules of Evidence are at the forefront of most of those changes, states such as Louisiana still hold on to the outdated lines in evidentiary law drawn to exclude probative evidence.

Thus, without valid justification, or any justification at all for that matter, Louisiana has excluded opinion testimony, which is at least equally probative and reliable as reputation evidence, from articles 405 and 608. The Federal Rules of Evidence seemingly recognized that exclusion of such evidence is nonsensical and amended its rules accordingly, and an overwhelming majority of states followed. Although Louisiana was initially inclined to follow in the footsteps of the Federal Rules of Evidence when it comes to character evidence, it has yet to do so with opinion testimony related to a person's character. As have so many of its sister states,

132. Kadish & Elmore, *supra* note 57, at 270.
133. *See* Camson, *supra* note 12.
134. *Id*.
135. *Id.*
136. *Id*.

Louisiana should amend articles 405 and 608 to allow opinion character evidence because a failure to do so runs contrary to all evidentiary principles of logic and fairness.

It is true that Louisiana, due to its rich and eclectic legal history, differs from its sister states in many respects and pridefully and stubbornly safeguards those differences. And rightfully so. However, this is not an instance worthy of continued defiance.