Louisiana Law Review

Volume 52
Number 5 *May 1992*

Article 2

5-1-1992

The Louisiana Criminal Code of 1942 - Doctrinal Provisions, Defenses, and Theories of Culpability

Dale E. Bennett

Cheney C. Joseph Jr.
Louisiana State University Law Center, cheney.joseph@law.lsu.edu

The Louisiana Criminal Code of 1942—Doctrinal Provisions, Defenses, and Theories of Culpability

*Dale E. Bennett** and
*Cheney C. Joseph, Jr.***

The Louisiana Criminal Code of 1942 was the first major legislative achievement of the Louisiana State Law Institute.[1] Prior to 1942 Louisiana's substantive criminal law had consisted of numerous overlapping and sometimes conflicting criminal statutes superimposed upon a basic system of common law crimes. Unfortunately, the common law definitions and general guiding principles, taken from the English common law, were replete with meaningless, fictitious, and artificial distinctions. In drafting the criminal code, the Law Institute eliminated many of the obsolete distinctions of the common law, and each crime was fully defined, with all of its essential elements spelled out in clear and simple language.

Significant guiding principles were followed in drafting the 1942 Code. Lengthy enumerations, such as those found in the former burglary, forgery, embezzlement and arson statutes were eliminated, and inclusive general terms used in their stead. The advantage of careful generalization over lengthy enumeration was not solely stylistic. It provided a much more adequate coverage of the prohibited anti-social activity, and has precluded the defense frequently raised in pre-Code times that the act or actor involved did not exactly fit within any of the specified enumerations. For example, in one early Louisiana case[2] the court held that the burning of a "merry-go-round outfit" was not within an arson statute which enumerated a long list of objects as the possible subjects of the offense. It made no difference that the defendant's act was "of equal atrocity or of a kindred character with those which are enu-

---

* Professor of Law, Emeritus, Louisiana State University, and Reporter for the Louisiana Criminal Code.

** Erick V. Anderson Professor of Law, Louisiana State University Law Center.

1. Subsequent Law Institute major projects sponsored have been a complete revision of Louisiana's general statute law (1950), the Code of Civil Procedure (1960), the Code of Criminal Procedure (1966), the Mineral Code (1974), and the Code of Evidence (1988). In addition, the Institute has revised various titles of the Civil Code.

2. State v. Fontenot, 112 La. 628, 36 So. 630 (1904). See also discussion of this problem in Dale E. Bennett and Albert S. Lutz, The Work of the Louisiana Supreme Court for the 1940-41 Term, 4 La. L. Rev. 273 (1942).

merated."[3] The drafting of each definition of a crime was preceded by a thorough consideration of pertinent court decisions and commentaries—to the end that the language employed would be broad enough to cover all intended situations, and yet would not be too inclusive or too indefinite to meet state and federal constitutional standards.

An important change, effected throughout the Code, was the elimination of minimum penalties, except for a few very serious offenses. This was in accord with a uniform trend in modern penal legislation to vest a broader discretion in the sentencing judge—to the end that he may consider the criminal's age, his physical and mental characteristics, the chance of rehabilitation, and the special circumstances of the commission of the crime. All of these matters, as well as the particular crime committed, should be relevant to sound sentencing procedures. Not all burglaries and robberies, or burglars and robbers, are identical, and it was felt that our judges must be given a wide discretion in administering the sentencing phase of the criminal justice process. The definitions of and distinctions between substantive crimes are, at best, general legislative categorizations of criminal responsibility.[4] Unfortunately, many of the former minimum sentences have been reinstated, and more have been added by subsequent legislatures, whose desire to punish severely the commission of a serious crime led them to ignore the frequent possibility of rehabilitation of some lesser offenders.

A review of the 1942 Criminal Code and the present provisions of that portion of Title 14 of the Revised Statutes which is still referred to as "the Criminal Code" reveals that there are relatively few forms of behavior which were not criminal under the 1942 Code but which are now covered by a subsequent criminal provision.[5] The pattern of amendment to the Criminal Code is one of "repackaging culpability" to redefine and frequently to punish more severely behavior which was previously included within an existing offense.[6]

In some instances, the repackaging was clearly done to increase the severity of a lesser offense in order to eliminate difficulties encountered in proving an aggravating element of the greater offenses.[7] In order to

---

3. *Fontenot*, 112 La. at 642, 36 So. at 635, citing U.S. v. Wiltzberger, 5 Wheat. 95 (1820).

4. See Donald V. Wilson, Making the Punishment Fit the Criminal, 5 La. L. Rev. 53 (1942).

5. Id.

6. See, e.g., simple robbery (La. R.S. 14:65 (1986)), "purse snatching" (La. R.S. 14:65.1 (1986)), simple battery (La. R.S. 14:35 (1986)) and sexual battery (La. R.S. 14:43.1 (1986)).

7. See, e.g., simple burglary (La. R.S. 14:62 (1986)) and unauthorized entry of an inhabited dwelling (La. R.S. 14:62.3 (1986)). The addition of the unauthorized entry crime was an obvious response to the supreme court's decision in State v. Jones, 426 So. 2d

explain, examples of "repackaging culpability" are helpful. This has occurred frequently in the homicide, rape, robbery, burglary, battery, and theft "families" of crimes. Typically, the legislature has added new and more easily proven elements to lesser grades of the crimes and increased the penalty.

Take a simple example from the series of burglary offenses. Simple burglary prohibits the "unauthorized entry" into any "structure" with intent to commit a theft therein.[8] Due to serious problems with simple burglaries of homes (not amounting to aggravated burglaries due to the absence of elements of the greater offense) and a desire to punish simple burglaries of pharmacies more severely, two new burglary crimes were added: simple burglary of an inhabited dwelling,[9] and simple burglary of a pharmacy.[10] Simple burglary encompasses the conduct proscribed in both new statutes but does not carry the mandatory minimum sentence of the two new crimes.[11] In essence, the purpose of the enactment was really only to impose mandatory minimum sentences.

Another simple example arises from the battery series. Simple battery prohibits the use of force or violence upon the person of another without his or her consent.[12] No minimum sentence is provided. Between 1981 and 1987, three new crimes were enacted proscribing simple battery of certain types of victims: policemen,[13] teachers,[14] and child welfare workers.[15] The purpose of the statutes was clearly to provide for mandatory sentences in those kinds of simple batteries, not to prohibit conduct not previously defined as criminal under the simple battery statute.[16]

1323 (La. 1983) in which the court set aside Jones' conviction based on a finding of insufficient evidence of intent to steal or commit a felony. Jones was caught inside the victim's home at night. He was highly intoxicated. *Jones* was decided in January, 1983. The new felony of unauthorized entry of an inhabited dwelling was enacted during the following legislative session. See 1983 La. Acts No. 285.

8. La. R.S. 14:62 (1986).

9. La. R.S. 14:62.2 (1986).

10. La. R.S. 14:62.1 (1986).

11. The mandatory minimum sentence in both offenses is one year at hard labor without benefit of probation or parole. La. R.S. 14:62.1, 62.2 (1986).

12. La. R.S. 14:35 (1986).

13. La. R.S. 14:34.2 (1986).

14. La. R.S. 14:34.3 (1986).

15. La. R.S. 14:34.4 (as enacted by 1987 La. Acts No. 902).

16. In all three new offenses, the maximum term of imprisonment is six months without hard labor, just as in the simple battery statute. However, a fifteen day minimum sentence without benefit of suspension is required for each of the new offenses. In the case of "school teacher" battery, a suspended sentence is permissible in lieu of the fifteen day sentence if the offender is required to perform five days of community service or serve two days in jail as a condition of suspension.

The reader may well ask what difference it makes to have a variety of statutes dealing with specific kinds of offenses which may also be covered by a "generic" offense. The basic 1942 Criminal Code objective of providing for judicial discretion in sentencing is not furthered by proliferation of "special" crimes to deal with the interests of particular types of victims or particular situations. Certainly, an overview of the sentencing policy of Louisiana should include consideration of the peculiar risks faced by different types of victims of battery. The fact that the defendant was aware that the victim was a police officer acting in the course of duty is very relevant to sentencing and would be given serious consideration by the sentencing judge. However, it is arguably no more serious to push a policeman who is trying to control a crowd at the scene of a fire than it is to push a fireman in an effort to obstruct his efforts to fight the fire. Thus, there is also a special offense involving the simple battery of a fireman.[17] Also relevant to sentencing is the fact that the victim suffered various degrees of physical harm.[18]

The point is not that the nature of the victim of battery or the type of structure burglarized should not be considered as aggravating sentencing factors. These factors, as well as all other relevant factors, should be weighed in the process of developing a rational, comprehensive sentencing policy. Hopefully, the penalty issue can be isolated and evaluated from the broad perspective of the entire sentencing system.

The writers acknowledge that a legitimate argument can be made for the proposition that the factors most relevant to the "level of culpability" as reflected by the sentence ought to be included as essential elements of the offense.[19] Making these factors elements assures the

---

17. See La. R.S. 14:327 (1986).

18. The original 1941 Law Institute Report on the Preparation of Project of a Criminal Code for the State of Louisiana, in the unnumbered articles defining the offenses of "Aggravated Assault and Battery" and "Simple Assault and Battery," provided that the penalty for those offenses vary, depending on whether the offense resulted "in serious personal injury." Almost 40 years later, in the second degree battery statute, the concept of increasing the penalty exposure for battery depending on intentional infliction of "serious bodily injury" was incorporated into Louisiana law. See La. R.S. 14:34.1 (1986) (enacted by 1978 La. Acts No. 394).

19. See McMillan v. Pennsylvania, 477 U.S. 79, 106 S. Ct. 2411 (1986) (Stevens, J., dissenting). Justice Stevens said:

> It would demean the importance of the reasonable doubt standard-indeed, it would demean the Constitution itself-if the substance of the standard could be avoided by nothing more than a legislative declaration that prohibited conduct is not an "element" of a crime. A legislative definition of an offense named "assault" could be broad enough to encompass every intentional infliction of harm by one person upon another, but surely the legislature could not provide that only that fact must be proved beyond a reasonable doubt and then specify a range of increased punishments if the prosecution could show by a prepon-

defendant that the state must prove them beyond a reasonable doubt to the finder of fact at the guilt phase of the proceedings. This also assures that the traditional rules of evidence will govern the admissibility of evidence necessary to prove those facts. The traditional evidentiary rules are generally designed to enhance the reliability of the fact finding process. Thus, one may argue that it is inappropriate to rely heavily on factors in determining the sentence when those factors are not included within the elements of the offense. The critic would thus say that the "on duty police" status of the victim should be an element of an upgraded battery offense if a mandatory minimum fifteen day jail sentence is to be imposed for battery of a police officer.

There is merit to the idea that a factor which significantly enhances the severity of an offense should be an element of that offense. This assures that reliable fact finding will be utilized to determine the existence of such factors. Thus the process of developing sentencing guidelines[20] and restructuring substantive criminal law in conjunction with that effort requires a careful consideration of which "aggravating" factors should be elements of an offense and which should be sentencing factors to be considered by the judge in the exercise of sentencing discretion.

The elimination of mandatory minimum sentences in the statutes, and leaving the matter to the development of workable guidelines, would seem to be the approach most consistent with the original sentencing philosophy of the 1942 Criminal Code.[21]

The general provisions of Title I are, for the most part, applicable to all crimes set out in the Code. Most of them will, unless otherwise clearly indicated by the context of the statute, be applicable to other crimes created by independent statutes. Thus, this title should be carefully considered by prospective draftsmen of criminal statutes. The great majority of the articles codify principles formerly dependent upon jurisprudential rules. A few fill gaps in those rules or cover matters in which our courts had been operating, as one of our respected lawyer

---

derance of the evidence that the defendant robbed, raped, or killed his victim "during the commission of the offense."

Id. at 103, 106 S. Ct. at 2425. In *McMillan*, the Court upheld the constitutionality of Pennsylvania's "firearm enhancement" statute which required a minimum mandatory five year sentence for commission of a felony with a firearm. The Pennsylvania statute did not provide that use of the "firearm" was an element of the offense, but rather was a sentencing factor to be proven by a preponderance of evidence at the sentencing hearing. For a discussion of Louisiana's similar statutory scheme, see Cheney C. Joseph, Jr., Developments in the Law, 1985-1986—Criminal Procedure, 47 La. L. Rev. 267, 274 (1986).

20. See La. R.S. 15:326 (1992).

21. The development of Louisiana substantive law may, indeed, be significantly affected by the development of sentencing guidelines. Louisiana now has advisory sentencing guidelines. Those guidelines have taken account of some of the mandatory minimum sentences provided in the statutes.

friends would frequently say, "by mainforce and awkwardness." In any event, a careful study of Title I is essential to an understanding application of the Criminal Code.

Article 2 defines certain frequently used terms, the exact meanings and scope of which might otherwise be uncertain. This eliminated the necessity of much cumbersome language in subsequent articles defining the various offenses. The distinction between felonies and misdemeanors, based upon the possibility of imprisonment at hard labor, is merely a restatement of the commonly accepted one in this state—as evidenced by the Louisiana Constitutional jury trial provision[22] and Article 933(3) of the 1966 Louisiana Code of Criminal Procedure.

Article 3 epitomizes the "spirit" of the Code. It is purely interpretive. The method of analogical projection, often permitted in civil statutes, is not available to extend the scope of the crimes denounced. In conformity with the modern trend away from strict construction of criminal statutes, Article 3 expressly calls for a natural and logical construction of the terms employed in defining the Code crimes.

It was inevitable that there might be some overlapping of the various Code offenses and also of the Code offenses and criminal offenses found in various parts of the general statute law outside of the Code (since 1950 the Louisiana General Revised Statutes). Article 4 shows a clear legislative intent that where this occurs both provisions shall be legally effective and prosecution may be had "under either." A few examples will serve to illustrate the application of this article. A number of civil statutes contain penal clauses punishing false statements made under oath. Such conduct is also punishable as False Swearing under Article 125. In these and other similar situations, prosecution may be under either, but not under both, provisions. Where the alternative offenses are basically the same criminal conduct, the offender will be protected from dual prosecutions by statutory and constitutional double jeopardy prohibitions.[23]

The effect of adding "specialized offenses" with mandatory penalties is to add to the arsenal of statutes available to the prosecutor. Thus, for example, the district attorney can exercise his constitutional prerogative to prosecute on the specific, mandatory penalty statute, such as simple burglary of an inhabited dwelling, or under the general statute proscribing simple burglary which carries no mandatory sentence. Because the district attorney has the authority to accept a guilty plea to the lesser, non-mandatory penalty statute, the "bargaining power" of the district attorney has been enhanced.[24]

---

22. See former La. Const. art. VII, § 41 (1921) and La. Const. art. I, § 17 (1974).
23. La. Const. art. I, § 15 (1974); La. Code Crim. P. art. 591.
24. La. Code Crim. P. art. 558; La. Const. art. V, § 26(B).

These statutes have the effect of shifting some of the traditional judicial discretion regarding imposition of sentence from the sentencing court to the district attorney.

Article 5 restated and codified a well-settled jurisprudential rule which permitted prosecution for lesser and included offenses. Thus, the district attorney may receive a plea of guilty for a lesser and included offense where he feels, as a practical matter, that a conviction of the greater offense actually committed would be highly improbable. Then too, it should never be a defense for a defendant to assert that an aggravating element was present, making him guilty of a more serious crime. For example, it would not be a defense to a person charged with simple robbery to prove that, having used a dangerous weapon, he was guilty of the more serious crime of armed robbery.

The second sentence of Article 5 codified the established responsive verdict rule which authorizes conviction of "lesser and included offenses." The Reporters' Comment gave the following examples of responsive verdicts: "Aggravated battery-simple battery or aggravated assault-simple assault; Murder-manslaughter-negligent homicide." Also, conviction of the lesser crime of an "attempt" to commit the offense charged was listed as an appropriate responsive verdict. Shortly after the Code went into effect, trial judges reported that juries were often confused by the large number of possible crimes they were instructed to consider as responsive verdicts. Sometimes the verdict returned, like negligent homicide in a clearly intentional killing, was clearly inappropriate to the facts of the case. After a careful study of this problem, the general responsive verdicts provision of the Code of Criminal Procedure was amended to specify appropriate responsive verdicts for the most common crimes, with the deletion of some included offenses where those verdicts were so numerous as to be mind-boggling to a jury.[25] For example, the specific responsive verdicts for murder omitted the formerly appropriate verdicts of negligent homicide and attempted murder. Originally, the only listed responsive included offense for aggravated battery was simple battery. It is noteworthy that while an attempt will generally be treated as a lesser and included offense, some attempts were not included in the statutory list of specific responsive verdicts.

There have also been a few other instances in which the legislature has included in the Code of Criminal Procedure responsive offenses which are not lesser included offenses of the offense charged. Those situations involve responsive offenses which require proof of elements

25. The revised responsive verdicts provision, former R.S. 15:386, was included, with only very minor changes, in the 1966 Code of Criminal Procedure as Article 814.

not required to prove the offense charged.[26] For example, aggravated battery is a responsive offense to an indictment charging attempted second degree murder. The principal offense does not require proof of the use of force of violence on the person of another or the use of a dangerous weapon, both of which are elements of aggravated battery.[27]

In response to this situation, Article 814 of the Code of Criminal Procedure was amended to permit the court to exclude a responsive verdict if the evidence presented "is not sufficient reasonably to permit a finding of guilty to the responsive offense." For example, if the defendant fired a shot at the victim with a specific intent to kill the victim, but missed, he could be guilty of attempted second degree murder but not aggravated battery. However, if the bullet struck the victim in the foot, the jury could reasonably conclude that defendant was guilty only of aggravated battery due to a failure of the evidence to convince the jurors that defendant actively desired to kill the victim, rather than to strike him in the foot, thereby inflicting a non-fatal wound.

Articles 10 through 12 codify traditional and well-settled principles as to the intent element of crimes—an element that was treated with great care in the Code offenses. In some crimes a specific knowledge or intent is required; in others a general criminal intent or even criminal negligence will suffice. In a few offenses the mere act or failure to act is punishable. Under Article 10, a *specific* criminal intent exists where the criminal consequence was "actively desired." A *general* criminal intent will be found in all cases where there is a specific intent, and also where it appears that the offender "must have adverted to the prescribed criminal consequences as reasonably certain to result." For example, the roomer who sets fire to a trunk in his quarters, in order to defraud an insurance company, might well be convicted of the serious offense of aggravated arson.[28] Aggravated arson only requires a general criminal intent, which is supplied by the fact that the offender "must have adverted" that the burning of the dwelling was "reasonably certain to result" from the fire he set.[29] Similarly, a motorist who drove into a crowd of celebrating fans dancing in the street after a football victory would be guilty of aggravated battery if he ran over one of the dancers even though he did not actively desire that result, hoping that the dancers would jump out of the path of his car. The battery offense only requires a general intent,[30] which is satisfied if the driver must have known that

26. Some examples included in the listing of responsive verdicts found in La. Code Crim. P. art. 814(A) (1986) are: Attempted First Degree Murder, Attempted Second Degree Murder, and Attempted Manslaughter. All have aggravated battery as a response offense, although aggravated battery is not a lesser included offense for any of the three.

27. La. R.S. 14:33, 34 (1986).

28. La. Crim. Code art. 51 (1942).

29. See People v. Fanshawe, 32 N.E. 1102 (N.Y. 1893).

30. La. Crim. Code art. 33 (1942).

he was reasonably certain to strike one of the celebrating fans. An important guide to a determination of whether a specific or general intent is required is the provision found in the last sentence of Article 11. When the terms "intent" or "intentional" are used without qualification in the definition of an offense they refer only to "general criminal intent as defined (in Article 10)."[31]

The "intentional" and "with intent to" formulation has not been construed by the supreme court in a consistent manner, thereby creating some significant degree of uncertainty regarding these mental elements. For example, in *State v. Raymo*,[32] the supreme court purported to hold that forgery, the very example given of a specific intent crime in the comments to Article 11, was a general intent crime. Similarly, in *State v. Chism*,[33] the supreme court said that accessory after the fact is a general intent crime. Both the forgery and accessory articles employ the "with intent to" formulation.

In a similar vein, the supreme court has found that some crimes whose definition uses the "intentional" general intent formulation were specific intent crimes. In *State v. Fuller*,[34] the supreme court said that second degree battery, defined in terms of the "intentional infliction of serious bodily injury," was a specific intent crime. Also, earlier in *State v. Fluker*,[35] the supreme court found the illegal carrying of weapons statute, which prohibits "intentional concealment," to be a specific intent crime.

These examples of the confusion created by the failure to set forth in specific statutory terms the intent requirement within each criminal statute is unfortunate. With a code, such as Louisiana's, courts should be able to follow the formulation set forth in a general provision like Article 11. The failure of the supreme court to follow Article 11 in these cases, thereby creating uncertainty, probably suggests the need for revision to clarify.

Due to the legislature's understandable tendency to "borrow" statutory formulations from other jurisdictions, the mental elements of "wilfully" and "knowingly" have also found their way into Louisiana's criminal statutes, particularly in the area of the Uniform Controlled Dangerous Substances Act. The criminal provisions of the Act prohibiting possession frequently prescribe the "knowing" or "intentional" possession of specified controlled substances. The term "intentional" obviously

---

31. Arson is defined in Articles 51 and 52 of the Criminal Code as the "intentional" setting fire to the property or structure. Similarly Battery is defined in Article 33 as "the intentional use of force or violence upon the person of another."

32. 419 So. 2d 858 (La. 1982).

33. 436 So. 2d 464 (La. 1983).

34. 414 So. 2d 306 (La. 1982).

35. 311 So. 2d 863 (La. 1975).

refers to general criminal intent—an aversion to the consequences as reasonably certain to follow. However, the term "knowingly" would seem to require a subjective awareness of the nature of the substance, not simply a reasonable likelihood that the offender must have known, or facts from which an offender ought to have known. However, the use of the two terms in the disjunctive ("knowingly or intentionally") seems to allow the state to prove guilt if the offender ought to have known both that the substance was under his dominion or control and that the substance was of a particular nature. No Louisiana court has suggested that "knowingly" requires the state to prove subjective knowledge that the substance fell within a particular schedule or category of criminally proscribed substances.

The definition of "Criminal Negligence" in Article 12, requiring "a gross deviation below the standard of care expected to be maintained by a reasonably careful man under like circumstances," is in accord with the usual conception of that term. It calls for substantially more than the ordinary lack of care which may be the basis of civil liability.

Article 14, which states the formula for the insanity defense, was one of the most controversial articles of the Code. That was not surprising. It is universally agreed that an offender is not criminally responsible if he was so insane at the time he committed the act that he was incapable of entertaining a criminal intent; but there is and was much disagreement as to the proper way to submit that issue to the jury. Article 14 restated the familiar "right and wrong" test. This test, which originated in the celebrated *M'Naghten's Case*,[36] then prevailed in Louisiana[37] and a majority of American jurisdictions[38] as the sole test of criminal responsibility. Thus, if, because of mental disease or defect, the accused was without the capacity to distinguish between right and wrong with respect to the conduct in question, he is exempt from criminal responsibility. Some states have broadened the scope of the insanity defense by excusing the defendant who may have known that the act was wrong, but was "irresistibly impelled" to its commission by reason of mental disease or defect.[39] The so-called "product" test of the federal court in *Durham v. United States* was also considered and rejected.[40] Such a liberalized test may be theoretically and scientifically sound, but as a practical matter it opens the door to further abuse of the already overworked insanity defense.[41] It was generally agreed by

36. 1 Car. 2 K. 130, 10 Clark & F. 200 (1843).

37. State v. Tapie, 173 La. 780, 138 So. 665 (1931).

38. William Clark and William Marshall, Law of Crimes, at 123 n.375 § 84 (4th ed. 1940).

39. Parsons v. State, 81 Ala. 577 (1887).

40. 214 F.2d 862 (D.C. App. 1954), where insanity was a defense if the criminal act was "a product" of a mental disease or defect.

41. Clark and Marshall, supra note 38, at 128 and 129; questioning the practical efficacy of the so-called "irresistible impulse" test.

experienced judges who served as advisors in the preparation of the Code that the "right and wrong" test came as close to stating an understandable guide for the jury as any which could be devised. Where there was real mental defect, whether it took the form of an irresistible impulse, special mental delusion, or inability to appreciate the wrongness of the defendant's act, evidence of such condition could be channeled into the Louisiana criterion of "ability to distinguish between right and wrong with reference to the conduct in question."[42]

Experience of the past fifty years has borne out the wisdom of that decision. Not only has the Louisiana test remained intact, but in 1972 the federal appellate court which adopted the *Durham* test abandoned the test in *United States v. Brawner*.[43] Further, the United States Congress in 1984 adopted an amended insanity defense in 18 U.S.C. § 17 which is in many significant respects very close to the Louisiana formulation of the *M'Naughten* test.[44]

Article 15 codified the well-settled general rule that voluntary drunkenness or use of drugs does not exempt an offender from criminal responsibility. However, where an offense requires a specific knowledge or intent, an inebriated or drugged offender may defend on the basis that he was incapable of entertaining the required intent or knowledge. Thus, a drunken defendant might defend against a theft charge by showing he had no specific intent to permanently deprive the owner of the property taken. Conversely, the same defendant would have no defense to unauthorized use of movables (the property), since that offense requires no specific intent or knowledge. Where insanity (delirium tremens) has resulted from protracted drinking, the right and wrong test of Article 14 will apply. The courts do not look to the cause when true insanity exists.[45] Thus, a distinction exists between the culpability of a defendant who is "crazy drunk" and one who is "crazy" from previous drinking.

The Code continued the traditional distinction between mistake of fact and mistake of law. Article 16 provides that, unless otherwise provided in the definition of a crime, reasonable ignorance or mistake of fact may preclude the presence of a required mental element and thus constitute a defense. For example, the misappropriation of another's cow under a reasonable belief that it was part of the defendant's milk herd would not constitute theft. Conversely ignorance or mistake of

---

42. La. Crim. Code art. 14 (1942).

43. 471 F.2d 969 (D.D.C. 1972).

44. 18 U.S.C. § 17 (1988) provides, in pertinent part, that

> It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts.

45. State v. Haab, 105 La. 230, 29 So. 725 (1901).

law, subject to well-settled exceptions stated in Article 17, is not a defense.

Articles 18 through 22 codified justification rules which had previously only been available through research of the somewhat inadequate jurisprudence. Article 18 outlines a number of situations where conduct, otherwise criminal, is justifiable. More specifically, it covers compulsion, physical impossibility, and public, domestic and other lawful authority. The most important, or at least the most litigated, instances of justification, defense of person and property, are treated in considerable detail in Articles 19 through 22. Questions of "reasonable necessity" and "reasonable force" could not be codified in more detail and will necessarily be determined by the widely varying facts of the case at hand.

The question of the necessity of retreating in order to justify a killing in self-defense gave the Reporters considerable concern. American writers were in considerable doubt as to the proper rule or prevailing doctrine.[46] Louisiana had generally recognized a duty to retreat, but with many unclear qualifications.[47] Article 20(1) expresses no specific retreat formula. It simply requires that the defendant must have had a reasonable belief that the killing was necessary. The possibility of retreat, along with the possibility of prevention by less force than killing, is merely one of the factors that should be considered in the ultimate question of the apparent necessity for the force employed.

The "justifiable homicide" provisions of Article 20 were subsequently amended to include two additional situations not included in the original code. Article 20(3)[48] permits a person to kill when he "reasonably believes" that the person killed is committing or attempting to commit a burglary of a dwelling or business and is "likely to use any unlawful force against a person present." Arguably this provision permits the owner or occupant of the burglarized premises to kill the intruder even if not in fear of death or great bodily harm at the hands of the burglar. The term "any unlawful force" is broad enough to cover killing a burglar who the occupant believes may merely intend to commit a simple battery upon the occupant in an effort to escape from the scene.

Even more expansive of the "shoot to kill" philosophy regarding burglars is the language of recently amended Article 20(4).[49] That provision significantly varies from the original code in that under its language the lawful occupant of a dwelling may kill to prevent any unlawful

46. Joseph H. Beale, Jr., Retreat from a Murderous Assault, 16 Harv. L. Rev. 567 (1902).

47. State v. West, 45 La. Ann. 14, 12 So. 7 (1893); State v. Thompson, 45 La. Ann. 969, 13 So. 392 (1893); State v. Robertson, 50 La. Ann. 92, 23 So. 9 (1898).

48. As added by 1976 La. Acts No. 655, and amended by 1977 La. Acts No. 392.

49. As added by 1983 La. Acts No. 234.

entry as long as it is reasonably believed that the use of the deadly force is "necessary to prevent the entry or to compel the intruder to leave the premises." This provision makes no reference to any concern with the intruder's possible use of force against a person.

Prior Louisiana jurisprudence had held that the person who intervened in protection of another stood in the shoes of the person protected and had only his actual rights of defense.[50] Article 22 adopted the more liberal and common sense view, consistent with the objective test adopted in the other articles on defense, that the intervenors acts are justifiable if he does what is "reasonably apparent that the party attacked might have done in his own behalf."[51]

The Louisiana Criminal Code adopted an approach to self defense and defense of others which focuses on the result in determining the appropriate test to utilize, rather than focusing on the nature of the force employed (i.e. "deadly" versus "non-deadly" force). The special and more rigorous justification test of Article 20 is applied when the defendant accidentally, or intentionally, killed the assailant either in self defense or to prevent a violent or forcible felony. The broader and more liberal "reasonable and apparently necessary" test of Article 19 is applied only if the resultant injuries do not produce death. In some respects, this may seem unfairly to punish the person who accidentally kills while using force which, if not resulting in death, might otherwise be deemed "reasonable and apparently necessary." However, the Louisiana Code's provision seems to have produced just results. There is no reported case where harsh results were achieved, and no suggestions for change of the Criminal Code's provisions have been submitted in the period of fifty years since the Code's adoption.

An interesting feature of the Louisiana justification provisions of Articles 18 through 22 is the failure of the redactors to address the issue of burden of proof. One of the most interesting questions posed by the 1942 Criminal Code's redefinition of the crime of murder arises in connection with the issue of the burden of proof in cases of self defense. The jurisprudence places the burden on the state to disprove self defense; that is, the state must negate the defense by proof beyond a reasonable doubt that the defendant did not act in self defense.[52] The cases can be traced back to the pre-Code era when the mental element

---

50. State v. Giroux, 26 La. Ann. 582 (1874); Steve v. Atkins, 136 La. 844, 67 So. 926 (1915).

51. This was generally considered as the better view. Amer. Law Inst. Restatement of the Law of Torts (1934) § 76; John W. May, Criminal Law 74, § 62 (4th ed. 1938).

52. For an excellent discussion of the burden of proof in homicide and non-homicide cases, without resolving the issue, see Justice Calogero's opinion in State v. Freeman, 427 So. 2d 1161 (La. 1983).

of murder was the common law's "malice aforethought."[53] Clearly, at common law, a self defensive state of mind was inconsistent with "malice."[54] Thus self defense defeated the state of mind required for murder. In proving that the defendant killed with "malice," the State had to show that his action was not in self defense. Pre-Code Louisiana decisions, such as *State v. Ardoin*,[55] clearly reflect this theory.

In defining murder as a "specific intent" killing,[56] the legislature eliminated the inconsistency between a defendant having an "active desire" to kill (or inflict great bodily harm)[57] and nevertheless believing reasonably that such killing is necessary to save himself (or another).[58] The two states of mind (specific intent and self defense) can coexist without the prior inconsistency. Nevertheless, Louisiana courts, following the enactment of the 1942 Criminal Code, continued to cite the pre-Code cases for the proposition that the state must negate self defense when the issue is "raised" by the evidence.[59]

Recently, in *State v. Cheatwood*,[60] Justice Lemmon, in an extensive footnote, outlined the theoretical distinction between defenses which defeat essential elements of offenses and those which negate culpability, "despite the state's proof beyond a reasonable doubt of all the essential elements."[61] For example, intoxication and mistake of fact are categorized under the first group, because they are "element defeating" defenses. On the other hand, the justification defenses of Articles 18 through 22 in effect add a "mitigatory factor" which eliminates culpability despite proof beyond a reasonable doubt of all essential elements of the offense. These latter defenses are "culpability defeating" as opposed to "element defeating."

The *Cheatwood* footnote concludes that, in such cases of true affirmative defenses, the legislature intended only to require the State to carry the burden of proving the elements of the offense and to require the defendant to prove the mitigatory factor. The footnote correctly

---

53. See State v. Ardoin, 128 La. 14, 54 So. 407 (1911).

54. Id.

55. Id.

56. See La. Crim. Code art. 30, enacted by 1942 La. Acts No. 43. See also La. R.S. 14:30.1(1) (1986), as amended by 1979 La. Acts No. 74.

57. The "specific intent killings" defined in La. R.S. 14:30 (1986) and La. R.S. 14:30.1(1) (1986) require the State to prove that the offender acted with a specific intent to kill or inflict great bodily harm. Specific intent is defined by La. R.S. 14:10 (1986) in terms of an offender acting with an "active desire" to produce certain criminal consequences.

58. La. R.S. 14:19 (1986) and La. R.S. 14:20(1) (1986) set forth the statutory defenses of self defense.

59. See, e.g., State v. Freeman, 427 So. 2d 1161 (La. 1983).

60. 458 So. 2d 907 (La. 1984).

61. Id. at 910 n.4.

refers to the State's "constitutional and statutory burden of proving guilt beyond a reasonable doubt."[62] The statutory law does not require the State to disprove exculpatory circumstances.[63]

This position became the rationale for Judge Wicker's opinion in *State v. Barnes*, in which the fifth circuit affirmed a conviction for aggravated battery.[64] In *Barnes*, the trial court instructed the jury that "the burden of proving that the use of force or violence is justified in

---

62. Id.

63. The pertinent text of this footnote is as follows:

In Patterson v. New York, 432 U.S. 197, 97 S. Ct. 2319 (1977), the Court said:

"[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which defendant is charged. Proof of the non-existence of all affirmative defenses has never been constitutionally required . . . ." 97 S. Ct. at 2327.

Except in a few specific instances, such as La. R.S. 14:63 (trespassing), La.R.S. 14:69 (possession of stolen property) and La.R.S. 14:14 (insanity), Louisiana statutory criminal law does not directly address the burden of proof for "defenses." Nevertheless, there is a logical distinction between those defenses which actually defeat an essential *element* of the offense and those defenses which present exculpatory circumstances that defeat culpability, despite the state's proof beyond a reasonable doubt of all the essential elements. In the first category are defenses such as intoxication (La.R.S. 14:15) and mistake of fact (La. R.S. 14:16), which preclude the presence of a mental element of the offense. When such defenses are raised by the evidence, the state must overcome the defense by evidence which proves beyond a reasonable doubt that the mental element was present despite the alleged intoxication or mistake of fact. Otherwise, the state would fail to meet its constitutional and statutory burden of proving guilt beyond a reasonable doubt of each element of the offense charged. La. Const. Art. I § 16 (1974); La.C.Cr.P. Art. 804; La.R.S. 15:271. However, defenses such as justification (La. R.S. 14:18) are truly "affirmative" defenses, because they do not negate any element of the offense. Compare *United States v. Mitchell*, 725 F.2d 832 (2nd Cir. 1983) with *State v. Burrow*, 293 Or. 691, 653 P.2d 226 (1982); see also Model Penal code, Proposed First Draft No. 1, § 1.12(2) (1961).

It is logical to conclude that the Legislature intended to require the state to prove beyond a reasonable doubt only the elements of the offense and to require defendant to prove by preponderance of evidence the exculpatory circumstances constituting the "affirmative" defense. See W. Lafave & A. Scott, Criminal Law § 8 (1972). The statutory provisions setting forth the state's burden of proof refer only to the requirement that the state *prove* the elements of the crime-not that the state disprove the exculpatory circumstances constituting defenses which defeat criminal culpability despite proof of the presence of all elements of the offense. See La.R.S. 15:271; La.C.Cr.P. Art. 804; former La.C.Cr.P. Arts. 263 and 387 (1928). See also *State v. Freeman*, 427 So. 2d 1161 (La. 1983), Lemmon, J., concurring.

458 So. 2d at 910 n.4.

64. 491 So. 2d 42 (La. App. 5th Cir. 1986).

non-homicide cases is on the defendant and need only be established by a preponderance of the evidence."[65] Judge Wicker's opinion is carefully written and thoroughly analyzes the issues. He has squarely addressed the issue of legislative intent to allocate the burden to the defendant. The issue of the constitutionality of such a legislative allocation is also a critical issue and has been resolved by the United State Supreme Court in *Martin v. Ohio*.[66] The United States Supreme Court upheld such an allocation of the burden for those states with statutory schemes in which self defense defeats no elements of the offense. The Louisiana Supreme Court will eventually have to decide whether the Louisiana Legislature intended such a result. Justice Lemmon's *Cheatwood* footnote and Judge Wicker's application of that theory certainly make sense. Nevertheless, the legislature may indeed have intended to require the State to shoulder the full burden of proof regarding the culpability of the accused. The court must squarely decide whether the legislature meant to require the State not only to prove all elements of the offense, but also to prove the non-existence of mitigating factors which, if present, will lower or eliminate the level of culpability.

The 1942 Code followed the established legislative policy of recognizing only two classes of parties to crimes, i.e., principals and accessories after the fact.[67] The Louisiana Legislature recognized at an early stage the difficulties inherent in the distinction between the doer (principal at common law) and the procurer or pre-crime aider (accessory before the fact), and that these difficulties were not compensated for by any sound reason for the distinction. After a series of earlier statutes had failed to effectively abolish this distinction, a 1932 statute was enacted which explicitly and effectively provided that all persons concerned with the commission of a crime were principals.[68] That statute was the basis of the broad definition of "Principals" in Article 24. Under this definition it is clear that anyone who procures, or assists in, the commission of a crime may be indicted and tried as a principal. While such an offender may be tried before the doer (common law principal), or even though the doer is dead or out of the jurisdiction, the state must still prove the fact of the guilt of the alleged doer, for one cannot procure or assist in a crime which was not committed. Thus, the redactors of the code anticipated that Louisiana courts will continue to hold that an alleged procurer (common law accessory before the fact) cannot be convicted where the alleged doer (common law principal) has actually been tried and acquitted.[69]

---

65. Id. at 44.

66. 480 U.S. 228, 107 S. Ct. 1098 (1987).

67. La. Crim. Code art. 23 (1942).

68. 1932 La. Acts No. 120, Dart's Crim. Stats. arts. 237.1-237.2 (Supp. 1941).

69. State v. St. Phillip, 169 La. 468, 125 So. 451 (1929); State v. Prudhomme, 171 La. 143, 129 So. 736 (1930).

However, in some cases, the principal offender may have been acquitted at his trial due to technicalities often related to the admissibility of evidence. Whether this acquittal should preclude the state from again endeavoring to prove the guilt of the principal offender at the aider and abettor's (principal) trial was addressed by the United States Supreme Court in *United States v. Standefer*.[70] The Court held that the acquittal of one of the offenders does not bar prosecution of the other. The State may try again to establish the guilt of the offender upon whose guilt the guilt of the other offender is dependent.

Whether the Supreme Court's approach in federal criminal cases will be adopted in Louisiana remains to be seen. Louisiana jurisprudence has evolved which, in the writers' opinion, correctly requires the state to prove that the principals acted with the same mental state. Thus, in *State v. McAllister*,[71] the supreme court held that two offenders acting in concert could be guilty of different offenses if they acted with different states of mind. In *McAllister*, a murder case, the court noted that one offender acting in the heat of passion spurred by adequate provocation might only be guilty of manslaughter, while his "cool headed" aider and abettor could be guilty of murder.

In similar fashion, if two offenders took an automobile without the permission of the owner one could be guilty of theft if he intended to permanently deprive and the other guilty of unauthorized use if he only intended to wrongfully use and return the vehicle.

In *State v. Holmes*[72] and *State v. West*,[73] the Louisiana Supreme Court clearly spelled out the requirement that, in cases of specific intent crimes, each alleged principal must be proven to have acted with an "active desire" to produce the criminal consequences prescribed by the offense.

Because the co-conspiracy theory of culpability as expressed in the case of *Pinkerton v. United States*,[74] and as is arguably expressed in Section 455 of Title 15,[75] was not incorporated into the 1942 Criminal Code, the so-called "*Pinkerton* Doctrine" may have no force in Louisiana. Under the so-called "*Pinkerton* Doctrine" co-conspirators are crim-

70. 447 U.S. 10, 100 S. Ct. 1999 (1980).
71. 366 So. 2d 1340 (La. 1978).
72. 388 So. 2d 722 (La. 1980).
73. 568 So. 2d 1019 (La. 1990).
74. 328 U.S. 640, 66 S. Ct. 1180 (1946).
75. La. R.S. 14:455 (1986) provides that

> Each co-conspirator is deemed to assent to or to commend whatever is said or done in furtherance of the common enterprise, and it is therefore of no moment that such act was done or such declaration was made out of the presence of the conspirator sought to be bound thereby, or whether the conspirator doing such act or making such declaration be or be not on trial with his co-defendant. But to have this effect, a prima facie case of conspiracy must have been established.

inally liable for offenses foreseeably committed by fellow conspirators in furtherance of the common goal of the conspiracy. The state of mind required for "co-conspiracy liability" is thus one of "foreseeability."[76] That would clearly not suffice in cases of specific intent crimes, which require proof of an "active desire," not mere "foreseeability" of production of consequences.

Although both *West* and *Holmes* involved specific intent crimes, the specific application of Section 455 and the "*Pinkerton* Doctrine" was not directly presented. Nevertheless, the supreme court treated the issue as though the principal theory of Article 24 was the sole basis for criminal liability for the acts of another. Whether the supreme court will reject the coconspirator doctrine as not applicable in Louisiana due to its failure to be included in the Code remains to be seen because the issue has never been directly presented.

Further, whether the supreme court may accept the "foreseeable offense in furtherance" theory in cases involving only general criminal intent or criminal negligence remains to be seen. If the offense which the conspirators plan to commit is a felony, and an unintentional death results from the actions of a co-conspirator, then the felony murder or felony manslaughter doctrine will provide the basis for criminal liability.[77] If the offense forseeably committed in furtherance of the conspiracy only requires general intent (such as aggravated battery or aggravated criminal damage to property) or criminal negligence (such as criminally negligent use of a dangerous weapon under Article 94), the court may treat the state of mind (foreseeability) required for co-conspiracy liability as equivalent to that required for general intent (aversion to consequences as reasonably certain to follow) or criminal negligence (gross disregard of reasonably foreseeable risks), and may thus apply the "*Pinkerton* Doctrine" to impose criminal liability for general intent or criminal negligence offenses committed in the furtherance of the common criminal scheme.

---

76. La. Crim. Code art. 2 (1942) defined "foreseeable" as referring "to that which ordinarily be anticipated by a human being of average reasonable intelligence and perception."

77. La. R.S. 14:30.1(2) (1986) defines Second-Degree Murder as the "killing of a human being" while the

> offender is engaged in the perpetration or attempted perpetration of aggravated rape, aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, armed robbery, or simple robbery, even though he has no intent to kill or to inflict great bodily harm.

Similarly, La. Crim Code art. 30(2) (1942) provided that

> Murder is the killing of a human being,
>
> * * *
>
> . . . When the offender is engaged in the perpetration or attempted perpetration of aggravated arson, burglary . . . , aggravated kidnapping, aggravated rape, armed robbery, or simple robbery, even though he has no intent to kill.

The accessory after the fact comes into the picture after a felony has been committed. His criminal act is aiding, harboring or concealing the offender or his criminal activity. Generally speaking, virtually any aid given to the felon, such as furnishing a car, shelter or money to evade detection or arrest, will make the person assisting an accessory after the fact. Activities authorized by law, such as the efforts of an attorney on behalf of the accused, would constitute justifiable conduct.[78]

Prior to the Code, the existing Louisiana statutes were inadequate, but the reporters were fortunate to find several well-drafted statutes in other jurisdictions. These, along with relevant treatise material, served as a pattern for Article 25. The common law rule, which had prevailed in Louisiana, required actual knowledge that the person aided had committed a felony. Proof of such knowledge could be very difficult, for the aider would purport to be scrupulously unaware of the guilt of the one he aided. Under Article 25, it is sufficient that the accessory knew or had "reasonable ground to believe" that the person assisted had committed a felony. Paragraph two expressly provides that the trial of the principal shall not be a prerequisite to trial of an accessory after the fact. The fact that the principal has not been tried, or is for some reason (such as death, present insanity or absence from the state) not amenable to justice, should not prevent trial of one who harbored him or otherwise assisted him in evading justice. It is still necessary, however, to establish the principal's guilt, for liability of the accessory is directly dependant upon the guilt of the person aided.[79]

The general conspiracy and attempt articles provide a very useful device for law enforcement. They enable the state to curb criminal activity by dealing with the planned criminal activity before the intended offense is actually completed. Also, where proof of the consummated crime is difficult, the state may choose to prosecute for the lesser inchoate offense with a greater probability of securing a conviction.

Article 26 was based upon a 1940 general conspiracy statute. While there was some ambiguity in that statute,[80] the new criminal conspiracy article made it abundantly clear that a conspiracy to commit *any crime* is covered. Specific intent is an essential element of a criminal conspiracy, for that offense "is heavily mental in composition."[81] The requirement that the agreement or combination must be "for the specific purpose of committing any crime" should be interpreted in light of the general

78. La. Crim. Code art. 18(3) (1942).

79. Note, 25 Mich. L. Rev. 301, 302 (1927). See also State v. Jackson, 344 So. 2d 961 (La. 1977), in which the court held that mere failure to report an offense was not sufficient to commit the offense of accessory after the fact.

80. 1940 La. Acts No. 16 (Dart's Crim. Stats. § 839.21 (Supp. 1941). See, James Bugea, Carlos Lazarus and William Peques, Louisiana Legislation of 1940, 3 La. L. Rev. 98, 157 (1940).

81. Albert J. Harno, Intent in Criminal Conspiracy, 89 U. of Pa. L. Rev. 624, 635 (1941).

mistake provisions of the code. Under Article 16, a reasonable mistake of fact might preclude the required specific intent and constitute a defense. However, under Article 17, a mistake as to the legal nature or effects of the conduct planned would not constitute a defense to a criminal prosecution.

At common law only an unlawful combination or agreement was necessary for a criminal conspiracy, and subsequent change of heart did relieve a participant from liability.[82] The 1942 Code's conspiracy article adopted an additional requirement, found in the 1940 Louisiana statute and in a majority of other conspiracy statutes, that one of the conspirators must do an act in furtherance of the object of the conspiracy. This additional element serves to guarantee the genuineness of the criminal agreement, and to preclude prosecution of those who bonafidedly withdraw before the offense has gone beyond the talking stage.

The Code did not endeavor to codify a doctrine of withdrawal like that found in the Model Penal Code.[83] Rather, the matter was left to the courts to develop. Arguably, given the structure of the Louisiana conspiracy and attempt articles, particularly with respect to the "overt act" requirements, an offender is guilty of the conspiracy or attempt if the "overt act" requirement is met after the formulation of specific criminal intent to complete the intended offense (and, in cases of conspiracy, a true "bilateral" combination of minds occurs).[84] The offender's withdrawal would thus only relieve the offender of culpability for the completed offense (if completed by a co-conspirator or aider and abettor). The withdrawal would also be a proper factor to consider in mitigation of sentence.

Nevertheless, the test for such withdrawal is still left to the courts to develop. Whether a mere uncommunicated "change of heart" would suffice remains to be seen. Obviously, in cases of attempts, if the offender is acting alone, even a "change of heart" arising as a result of fear of apprehension would prevent the completed offense from being committed. However, in cases of multiple actors where, despite the alleged "change of heart" withdrawal, one of the offenders completes the offense, a very different picture is presented. In such an instance, the Louisiana courts would be required, due to the absence of specific guidance from the Code, to look to the "common law" or to the various formulations, such as the Model Penal Code,[85] to develop a test which will produce a fair and just result. At a minimum, a requirement of communicating the intent to withdraw to the co-actors at a point

82. Clark and Marshal, supra note 38, at 168, 169, §§ 126, 127.
83. See M.P.C. § 5.01(4), (6).
84. See State v. Joles, 485 So. 2d 212 (La. App. 2d Cir. 1986).
85. See supra note 83 and accompanying text.

when they too could desist from the criminal purpose would seem appropriate.[86]

The general attempt provision in Article 27 was an important innovation in Louisiana criminal law. Existing statutes had provided only a random coverage of the offense. Attempts to commit murder, manslaughter, rape and robbery were punishable under separate aggravated assault statutes.[87] Occasionally a criminal statute expressly included the person who attempted to commit the offense. In the absence of such a provision, the offender who merely attempted to commit a crime went unpunished. Article 27 embraced an attempt to commit any crime, whether a felony or a misdemeanor. This broad provision has been widely utilized to punish obvious wrongdoers who were apprehended before their crime was complete or where proof of all elements of the completed crime was difficult.

The attempt definition requires a "specific intent" to commit the crime, and an "overt act" directed (i.e. "tending directly") toward that end. The requisite specific intent may be inferred from the circumstances—as specific intent to kill may be inferred from the use of a deadly weapon in a deadly way.[88] The subjective mental intent element is all-important, and it is expressly stated that an apparent, rather than actual, ability to commit the crime is sufficient. An attempted homicide may fail because the gun is defective or the poison is not sufficiently deadly, or an attempted theft may fail because the cash drawer looted or the pocket picked is empty. Where such conditions are unknown to the offender, they will not prevent his being guilty of an attempt.

During the period since the Code's adoption, very little helpful jurisprudence has arisen regarding the problems of the so-called "impossible attempt."[89] For example, suppose that the offender purchases goods reasonably believing them to have been the subject of a theft or robbery. In the event that the goods were not actually stolen, but rather were being sold to the offender (a suspected "fence" for stolen property) during a police "sting" operation, the offender is clearly not guilty of the completed offense of receiving stolen things. If the goods were not

86. See State v. Taylor, 173 La. 1010, 139 So. 463 (1932).

87. See Dart's Crim. Stats. §§ 764-67, 775 (1932).

88. In State v. Lee, 275 So. 2d 757 (La. 1973), a conviction of attempted murder was supported by evidence showing that the defendant had "fired at least one shot at the alleged victim." Certainly, under Sandstrom v. Montana, 442 U.S. 510, 99 S. Ct. 2450 (1979), no "presumption" of specific intent to kill can arise from the mere use of a dangerous weapon.

89. For an excellent discussion of this problem, See Billy J. Tauzin, Note, Impossible Attempts, 26 La. L. Rev. 426 (1966).

in fact stolen,[90] the offender's mere (albeit reasonable) belief that the goods were stolen does not suffice to complete the elements of the offense under the terms of Article 69. Nevertheless, as is reflected by the original comments to Article 69, the offender may be guilty of an attempt to receive stolen goods. Interestingly, the comment provides the above noted example:

> If the offender merely thinks they have been stolen, when in fact they have not, the possibility of an indictment for an attempt to commit this offense would not be precluded. For instance, if a trap were set for a suspected receiver of stolen things, and he actually took some "planted" goods into his possession, the circumstance that the goods were not in fact stolen goods would be defense. However, the individual in question would possibly be guilty of an attempt to receive stolen things.[91]

These comments were included in the original Code and provide possibly the best insight into the way the redactors suggest resolving a problem which has divided courts throughout this country.[92]

One view of the matter is for the court to treat the issue presented above as a "legal impossibility," which precludes any culpability for either the completed or the attempted offense. Proponents of this view would argue that the defendant did the acts intended and, having done them, failed to commit the offense intended. Thus, he cannot be guilty of an attempt, for to make him guilty of an attempt would, in effect, punish him solely for the formulation of criminal intent without requiring that he do an act tending directly toward the accomplishment of an act, which, if completed, would constitute an offense.

The hypothetical example of Lady Eldon bringing English lace back from France without declaring it to Customs, believing it to be French lace, presents a persuasive argument for the position that it is absurd to punish for an attempt if the completed act would not actually constitute the intended crime. Another example given is that of firing a shot, specifically intending it to inflict a fatal wound, into a man who has already died of unrelated natural causes. Can this be attempted murder?

---

90. See State v. Ngyen, 367 So. 2d 342 (La. 1979).

91. La. R.S. 14:69, comment.

92. Compare People v. Rojas, 358 P.2d 921 (Cal. 1961) with Booth v. State, 398 P.2d 863 (Okla. Cr. App. 1964).

Similarly, can an offender be guilty of attempting to possess a controlled dangerous substance if he purchases a substance which he reasonably believes to be cocaine (but which is a fake bearing the appearance of cocaine) from an undercover police officer posing as a "street dealer?"[93]

The redactors' comments under Article 69 clearly imply that such situations should be treated as mere "factual impossibilities" which do not preclude culpability for the attempt. The redactors' original comments to the attempt article state that the article adopts the so-called "Canadian view" which provides that mere factual impossibility would not preclude the offender from being guilty of an attempt.

The comment to Article 27 provides:

> This section adopts the Canadian view that it is immaterial whether there is an actual possibility of committing the intended offense. An attempted homicide may fail because the gun used is defective or the poison used is not sufficiently deadly. An attempted rape may fail because the perpetrator is impotent; or an attempted theft may fail because the cash drawer looted or the pocket picked is empty. Where such conditions preventing the consummation of the crime are unknown to the offender, they do not prevent his being liable for an attempt. The essential elements are an actual specific intent to commit the offense, and an overt act directed toward that end. The subjective mental element is all-important in this offense. Of course, it will be impossible to entertain a specific intent to commit an offense unless the offender has an apparent (to him) ability to consummate the crime.

The original comments to both Articles 27 and 69 appear to adopt the view that an offender is guilty of an attempt if he acts with a specific intent to engage in conduct which in fact constitutes an offense prescribed under Louisiana law and does an act which he reasonably believes will tend directly toward the accomplishment of his intended object. This view punishes the formation of genuine criminal intent when the offender clearly manifests by his actions an intent to carry out that criminal purpose. Such a position is consistent with a view that the law does not punish the mere formation of criminal intent.

The attempt article adopted the generally accepted rule that "mere preparation" is not sufficient, and there must be some act "tending

---

93. See United States v. Oviedo, 525 F.2d 881 (5th Cir. 1976); United States v. Everett, 700 F.2d 900 (3d Cir. 1983); United States v. Hough, 561 F.2d 594 (5th Cir. 1977).

directly toward the accomplishing" of the offender's criminal purpose. The distinction between preparation and a sufficient overt act is one of nearness and degree which generally defies more concise and detailed definition. However, in conformity with then-existing more limited "lying in wait" laws,[94] Article 27 expressly provides that one who arms himself with a dangerous weapon and lies in wait or searches for the intended victim, but is apprehended before the victim appears, is guilty of an attempt. But for this special clause, such activity would probably be held insufficient for attempt liability.[95]

Thus, the "lying in wait" and "searching" provisions are really exceptions to the general provision that "mere preparation" is insufficient. Hence, "lying in wait" *without* a dangerous weapon and "searching for the intended victim" without a dangerous weapon would not be sufficient to constitute an attempt.

An important distinction between these inchoate defenses (conspiracy and attempt) should be noted. Conspiracy requires an additional element, i.e., a combination or agreement of parties. This combination or agreement for the purpose of committing a crime is a separate offense. Thus, the conspiracy article expressly recognizes the generally accepted common law rule that where the conspirators have committed the crime planned they may be tried for either the conspiracy, the basic offense, or both.[96]

As has been recognized by the Louisiana jurisprudence in cases such as the second circuit's opinion in *State v. Joles*,[97] the Louisiana conspiracy article is "bilateral" in nature; a true combination of minds is required. Thus, if an individual "conspires with" an undercover police officer to commit a crime, there can be no conspiracy under Louisiana law. There is no true "combination of minds" because the officer does not actually intend to complete the offense. Although the state of mind and the conduct of the defendant might otherwise be sufficient for culpability as a conspirator, the absence of the "second criminal mind" precludes criminal liability for conspiracy.

Because the attempt is only the first step in the commission of the crime, Article 27 states the well-settled rule that an attempt is a "lesser grade of the intended crime." Applying the rule governing prosecution

---

94. 1892 La. Acts No. 26, Dart's Crim. Stats. § 1092 (1932) punished lying in wait to commit specified dangerous crimes.

95. In People v. Rizzo, 158 N.E. 888 (N.Y. 1927), the defendant and his fellow gangsters toured the city seeking a paymaster they sought to rob, but were apprehended before they located their victim. The court complimented the New York police upon their alertness in preventing a dangerous crime, but released the offender on the ground that since he had not found the paymaster at the time of his arrest he was not near enough to the accomplishment of the crime to be guilty of a criminal attempt.

96. Hymen Knopf, Note, 17 Cornell L. Rev. 136 (1931). See also United States v. Felix, 112 S. Ct. 1377 (1992).

97. 485 So. 2d 212, 214 (La. App. 2d Cir. 1986).

for lesser and included offenses, upon commission of a crime the offender may be prosecuted for either the completed crime or for an attempt to commit that crime, but not for both. This choice of prosecutions, which is generally available as to lesser included offenses, is expressly recognized in the third paragraph of Article 27.[98]

Louisiana courts have consistently and correctly held that the legislature did not intend to apply the inchoate offenses to one another. Thus, courts have held that there can be no attempt to conspire or attempt to attempt. Similarly, the Louisiana Supreme Court has held in *State v. Eames*[99] and *State v. Dyer*[100] that the legislature did not intend for the general attempt article to apply to offenses which are themselves in the nature of an attempt. In *Eames*, the court set aside a conviction for attempted inciting to riot on the theory that the inciting offense is itself in the nature of an attempt. In *Dyer*, the court held that there can be no attempt to carry a concealed weapon because the offense of carrying a concealed weapon is itself in the nature of an attempt. Whether or not one agrees with the ultimate resolution of these cases, it is logical for the supreme court to conclude that the general attempt article was not intended to apply to offenses which the court finds are themselves in the nature of an attempt.

In a similar but unrelated vein, the supreme court has held that the general attempt article cannot apply to crimes like negligent homicide and felony murder because the specific intent requirement of attempt is totally inconsistent with criminal negligence or an unintentional killing.[101]

During the fifty years that have elapsed since the enactment of the Criminal Code there have been many significant changes in Louisiana criminal procedure and in Louisiana substantive criminal law. Those changes reflect the efforts of the legislature to address major societal problems, such as the rampant abuse of controlled dangerous substances, by the enactment of criminal laws. Those changes will be addressed by the authors in a subsequent article which is currently in preparation.

The fact that such major changes have been adopted in the substantive definition of crimes and the procedure to be followed in the adjudication phase makes more remarkable the absence of basic changes in the Criminal Code's doctrinal provisions, defenses, and theories of culpability . These provisions have obviously been subjected to the "test of time" and apparently have served to produce just results.

---

98. "[A]ny person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime intended or attempted was actually perpetrated by such person. . . ." La. Crim. Code art. 27 (1942).

99. 365 So. 2d 1361 (La. 1978).

100. 388 So. 2d 374 (La. 1980).

101. State v. Adams, 210 La. 782, 28 So. 2d 269 (1947).