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Dale E. Bennett
SUFFICIENCY OF DEFINITION OF CRIMES

Even the most elaborately drafted statute cannot always fully illuminate the details of proscribed criminal conduct. In State v. Lindsey1 the Louisiana Supreme Court once again approved the sound and practical principle that general language, as distinguished from detailed specification of the various forms which the proscribed criminal conduct may take, may provide a constitutionally sound definition of a crime. In Lindsey the court upheld the definition of crime against nature,2 rejecting defense counsel’s claim that the statutory language was unconstitutionally vague. Quoting from State v. Bonanno,3 Justice Marcus stated:

The phrase “unnatural carnal copulation” that counsel points to in particular as being of obscure, vague and indefinite meaning, consists of words of common usage and indicate (sic) with reasonable clarity the kind and character of conduct the legislature intended to prohibit and punish . . . . To meet the test of constitutionality it is not necessary that the statute describe the loathsome and disgusting details connected with each and every way in which “unnatural carnal copulation” may be accomplished.4

Similarly, in State v. Heck5 the court upheld the disturbing the peace article of the Criminal Code,6 stressing that due process “does not invariably require a detailed specification of the various ways in which the crime can be committed,”7 and that a generally phrased statute will be upheld “if the phraseology has a well known or commonly understood mean-

* Professor of Law, Louisiana State University.

1. 310 So. 2d 89 (La. 1975).
3. 245 La. 1117, 163 So. 2d 72 (1964).
4. 310 So. 2d at 91.
5. 307 So. 2d 332 (La. 1975).
7. 307 So. 2d at 333.
Chief Justice Sanders concluded that the phrase "engage in a fist encounter" clearly has the usual meaning of "engaging in a fist-fight" and that the limitation "in such manner as would foreseeably disturb or alarm the public" also has a sufficiently definite meaning. That the line between criminal and non-criminal conduct will sometimes depend upon a series of circumstances which will call for court and jury determination did not upset the Chief Justice, who repeated an often quoted admonition of the United States Supreme Court:

That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense.\(^8\)

The court did not agree with the contention that the sweep of the statute is so broad as to invade the area of protected freedoms, concluding that "contrary to the defendant's assertion, we find the statute to be narrowly drawn."\(^9\) It is submitted that dissenting Justice Barham's expressed fear that the statute is in direct contravention to what he considers to be "a person's constitutional right to defend himself"\(^10\) is without substantial foundation. The general disturbing the peace prohibition must, as a matter of statutory and constitutional interpretation, give way to the defendant's constitutional and specific statutory rights of self defense.\(^11\)

Nowhere is the dilemma of drafting constitutionally sound statutes more evident than in the highly technical and detailed area of narcotics regulation and prohibition. State v. Martin,\(^12\) a controlled dangerous substances law decision, held that the word "deliver" in the statute's definition of distribution of controlled dangerous substances\(^13\) does not have such a variety of meanings as to render the statute invalid. Chief Justice Sanders stated:

The word must be taken in its usual sense, in connection with the context. In context, it has a commonly under-

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8. Id.
10. 307 So. 2d at 334.
11. Id. at 335.
13. 310 So. 2d 545 (La. 1975).
stood meaning . . . . It means to transfer possession or control.\textsuperscript{15}

In \textit{State v. Slayton}\textsuperscript{16} the Louisiana Supreme Court rejected another hypertechnical attack upon the controlled dangerous substances law.\textsuperscript{17} Defense counsel had urged that the clause covering methamphetamines was vague, indefinite and overly broad because of the phrase "including its . . . isomers,"\textsuperscript{18} since some isomers were not harmful and were included in the manufacture of compounds so benign in character as to be sold commercially without a prescription. The court looked to the statute as a whole, reasoning that the provision in question is only intended to apply to those isomers which have a stimulating effect upon the nervous system and are "subject to abuse."\textsuperscript{19} As thus limited to potentially harmful isomers, the statute provides clear and adequate warning as to the particular conduct made criminal and is not overly broad in its application. In support of the holding Justice Marcus reiterated the court's previous test that:

\begin{quote}
The requirement of definiteness need only give a person of ordinary intelligence fair notice that his conduct is criminal. To accomplish this the legislature may employ generic terms. Cumbersome enumeration or explicit delineation of all possible situations is not required. "The enumeration in a statute of every item or variation in conduct is frequently impossible."\textsuperscript{20}
\end{quote}

Despite a generally practical and liberal approach as to the sufficiency of statutory definitions of crime, the Louisiana Supreme Court has refused to tailor overly broad statutory language to constitutional proportions by judicial limitation. Thus, in \textit{City of Baton Rouge v. Ewing}\textsuperscript{21} the supreme court affirmed a trial court ruling that a city ordinance punishing the use of "indecent, vile, profane or blasphemous language" in public places is unconstitutional. In rejecting the city's

\textsuperscript{15} 310 So. 2d at 546.
\textsuperscript{16} 301 So. 2d 600 (La. 1974); accord, State v. Franklin, 309 So. 2d 128 (La. 1975).
\textsuperscript{17} LA. R.S. 40:961-84 (1950), as amended by La. Acts 1972, No. 634 § 1.
\textsuperscript{18} LA. R.S. 40:964, Schedule III A(2) (Supp. 1972).
\textsuperscript{19} 301 So. 2d at 603.
\textsuperscript{20} Id. at 602, citing Baton Rouge v. Norman, 290 So. 2d 865 (La. 1974).
\textsuperscript{21} 308 So. 2d 776 (La. 1975).
argument that the court should interpret the statute as only punishing the use of "fighting words," Justice Tate pointed out that the court should not "perform judicial surgery and judicial transplant to save an overbroad disturbing the peace statute.... [T]he restructuring of the statute addresses itself to the legislature." Unlike Slayton, the court in Ewing was unable to interpret the phrase at issue in limiting terms of the manifest purpose of the statutory provision, reading it as a whole.

SECOND DEGREE MURDER

Causing Death of Viable Unborn Fetus

In State v. Gyles the defendant brutally attacked a woman who was eight months pregnant, causing the miscarriage and stillbirth of a previously viable fetus. In holding that the defendant's conduct was not punishable as second degree murder, the Louisiana Supreme Court stressed the fact that Louisiana's murder articles originated as a general codification of the common law crime of murder and should be construed accordingly. Thus, Justice Barham stated:

The common law crime of murder, which proscribes the killing of a "human being," contemplates only the killing of those human beings who have been born alive and who thus have an existence independent of their mothers at the time of their death.

Significantly, the general homicide definition of article 29 of the Criminal Code continued the common law requirement of the "killing of a human being."

The common law "born alive" formula was easily applied in Gyles where, although there was a viable fetus, the process of childbirth had not yet begun at the time of the defendant's attack on the expectant mother. A more difficult situation was presented in a New York case in which a defendant who

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22. Id. at 779, citing State v. Harrison, 280 So. 2d 215 (1973).
23. 313 So. 2d 799 (La. 1975).
24. Id. at 800-01 (citations omitted).
had fathered the child of his fourteen year old daughter strangled the baby with its umbilical cord. Medical experts testified they were reasonably certain that the baby had been born alive at the time of the defendant's act. The court reversed the murder conviction on the ground that since there had been no testimony by an eyewitness to live birth, proof by the medical experts' testimony was insufficient. Of course, even the testimony of participants, when they can and will testify, can be conflicting and confusing as to how far the birth process had progressed at the time of the destruction or killing. *People v. Chavez*27 answers this dilemma. In that case the California court held that killing a viable fetus in the process of being born was murder. Later, in *Keeler v. Superior Court*28 the California Supreme Court reiterated the *Chavez* holding:

*Chavez* thus stands for the proposition—to which we adhere—that a viable fetus “in the process of being born” is a human being within the meaning of the homicide statutes. But it stands for no more; in particular it does not hold that a fetus, however viable, which is not “in the process of being born” is nevertheless a “human being” in the law of homicide.29

Significantly, Justice Barham cites *Keeler* and *Chavez* in his comprehensive listing of the common law authorities which Louisiana should follow in construing the term “human being” in its murder articles. Adoption of the *Chavez* formula would have provided a workable rule in those cases in which the exact stage of the childbirth process at the time of the defendant's killing of the baby or fetus is difficult to ascertain. The new crime of “Killing a child during delivery,”30 enacted in 1973 as one of the proposed statutes in a

29. Id. at 637, 470 P.2d at 629.
30. LA. R.S. 14:87.1 (Supp. 1973): "Killing a child during delivery is the intentional destruction, during parturition of the mother, of the vitality or life of a child in a state of being born and before actual birth, which child would otherwise have been born alive; provided, however, that the crime of killing a child during delivery shall not be construed to include any case in which the death of a child results from the use by a physician of a procedure during delivery which is necessary to save the life of the child or of the mother and is used for the express purpose of and with the specific intent of saving the life of the child or of the mother. Whoever commits the crime of
package of abortion-related bills, generally follows the Chavez rule, providing life imprisonment for destruction of a viable fetus "in a state of being born and before actual birth."

ATTEMPTED SIMPLE RAPE; ATTEMPT TO FORCIBLY RAPE

In State v. Miller the Louisiana Supreme Court upheld simple rape as a responsive verdict to a charge of aggravated rape, where the state alleged that the victim's resistance was prevented by force and threats of great bodily harm. In Miller the court recognized that if a jury could not return a capital verdict of aggravated rape on such a charge, it could still justifiably conclude that the defendant's force and violence had resulted in a sufficient hysteria from fear that the victim was rendered incapable of resisting by reason of a stupor or abnormal condition of mind. Under the broad language of the simple rape article, abnormal condition of mind could be "from any cause."

A broad construction of the simple rape article was applied again in 1975 in State v. Beard, in which the court held that evidence of the defendant's use of physical violence and of the victim's resulting fear supported a verdict of attempted simple rape, responsive to a charge of attempted aggravated rape. In so holding, Justice Calogero stressed the Miller rationale that fear or hysteria resulting from the attack of a would-be rapist came within the "abnormal condition of mind from any cause" clause of the simple rape article.

The Miller-Beard interpretation of the simple rape article provides a logical device whereby a jury, unable to convict of the capital crime of aggravated rape, may return a guilty verdict for simple rape. The rationale of the verdict would be that the female victim's normal resistance had been pre-

35. 312 So. 2d 278 (La. 1975).
vented by hysteria and fear resulting from the defendant's brutal attack.

A 1975 "forcible rape" statute authorizes a similar compromise verdict or charge. Under the statute,

[forcible rape is sexual intercourse without the lawful consent of the female where she is prevented from resisting the act by force or threats of physical violence wherein the victim reasonably believes her resistance to be useless.36

Correspondingly, the responsive verdict article of the Code of Criminal Procedure has been amended to provide that forcible rape and attempted forcible rape are also responsive to a charge of aggravated rape.37 The guidelines for jury determination of the line between capital and non-capital criminal liability are found in the statutory definitions of "aggravated rape" and "forcible rape." Under article 42 of the Criminal Code, aggravated rape requires either resistance of force "to the utmost," or the prevention of resistance "by threats of great and immediate bodily harm." Article 43.1 adds forcible rape, which only requires that resistance be prevented "by force or threats of physical violence wherein the victim reasonably believes her resistance to be useless" (emphasis added). These definitions separate the rapist who accomplishes his purpose with a brutal attack from the one whose victim submits to powerful but less brutal attacks or threats. The new forcible rape crime will cover cases in which an aggravated rape charge would be neither appropriate nor successfully prosecuted.

ARMED ROBBERY

Armed robbery is robbery committed while armed with a "dangerous weapon."38 "Dangerous weapon" is defined as an "instrumentality, which in the manner used, is calculated or likely to produce death or great bodily harm."39 In State v. Levi40 the Louisiana Supreme Court held that an unloaded

38. LA. R.S. 14:64 (1950).
39. Id. 14:2(3) (1950).
40. 259 La. 591, 250 So. 2d 751 (1971). For conflicting views as to the soundness of the court's holding, see Note, 32 LA. L. REV. 158 (1971), and The
and inoperative gun presented by a robber could be a "dangerous weapon." It is enough that the gun is used to put the victim in reasonable fear of being shot with it. Hence, an unloaded or inoperative gun or even a toy gun employed to substantiate a threat of shooting by the robber could constitute a dangerous weapon.

State v. Leak\(^{41}\) clearly came within the Levi guidelines. In Leak the Louisiana Supreme Court held that the defendant's use of an extension of a rachet coupled with a socket to simulate a firearm convincingly to those at the robbery satisfied the "dangerous weapon" requirement of armed robbery. As a make-weight, Justice Marcus stated, "Additionally, as in Levi, the instrument used here was capable of conversion into a bludgeon."\(^{42}\) The weapon's appearance as a firearm, however, appears to have been the principal ground for its classification as a dangerous weapon.

State v. Elam\(^{43}\) raised the possibility that the Levi rationale might be extended even further. According to Justice Barham,

> the victim of the crime testified that during the course of the robbery the perpetrator repeatedly told him, "Don't make me shoot you" and "I'm going to shoot you, boy." The victim further testified that the perpetrator kept one hand inside his jacket pocket at all times during the course of the robbery and motioned with the hand in his pocket in a way which indicated that he had a weapon in his pocket. We consider this testimony some evidence from which the jury might infer that the perpetrator was armed with a dangerous weapon.\(^{44}\)

The statement would appear overly broad but for his footnote admonition that "[t]his holding does not make any extension of Levi nor do we hold that a 'hand in the pocket' is a dangerous weapon."\(^{45}\) The limitation is supported by the supreme court's prior holding in Calvin that the word "instrumentality" in the definition of dangerous weapon requires some

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41. 306 So. 2d 737 (La. 1975).
42. Id. at 739.
43. 312 So. 2d 318 (La. 1975).
44. Id. at 322.
45. Id.
Thus, portions of the human anatomy, such as teeth, a fist or the "hand in the pocket" cannot be treated as dangerous weapons. Even assuming the soundness of the Levi and Leak decisions, some difficulty exists in extending the subjective view of the victim approach to a "hand in the pocket" situation.

In State v. Refuge the Louisiana Supreme Court adopted logical and practical constructions of key phrases in the armed robbery definition. In Refuge the alleged victim was partially financing one of the active participants in a gambling game. The defendant held up the game and seized the "pot" in the middle of the table. In holding immaterial the fact that the victim was not in actual control of the money taken, Justice Barham concluded "[t]aking property from 'the person' of another has repeatedly been broadened in scope to include taking from his presence." He was also unconcerned as to whether the precise nature of the victim's interest in the money taken had been determined:

"The felonious taking, more than the perfect title of the alleged owner, forms the essence of the jury question in cases of robbery . . . . The extent of any of the players' interests in the money in the "pot" at the time when play was interrupted by the robbery is undetermined, but an ownership interest of an undetermined value is no less an ownership interest. Of that interest Aubrey Harris was robbed."

The realistic and practical approach to the Refuge robbery case makes for the sort of non-technical application of the robbery articles which was sought by broad definition employed in the Criminal Code of 1942.

CONCEALED WEAPONS

The issue in State v. Fluker was whether a partially visible weapon is a "concealed" weapon under the Illegal

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47. 300 So. 2d 489 (La. 1974).
48. Id. at 491 (citations omitted).
49. Id.
50. 311 So. 2d 863 (La. 1975).
Carrying of Weapons article of the Criminal Code. The defendant had been stopped as a result of his "driving in an erratic manner." A police officer noticed that he was carrying a small pistol in a brown holster attached to his belt on his right hip. Defendant wore no jacket or coat that concealed the holster and gun from view, and enough of the gun protruded from the holster to be recognized as a pistol. Relying on prior jurisprudence that a partially concealed pistol is a "concealed" weapon within the meaning of the law, the trial judge found the defendant guilty as charged. In reversing, the supreme court stressed the more demanding language of "intentional concealment" in the concealed weapon offense of the 1942 Criminal Code. Actually, the word "intentional" in the concealed weapons definition does not require a specific intent or active desire to conceal the weapon. Under article 11, the term "intentional" has reference to "general criminal intent." Thus the mens rea requirement of the 1942 Criminal Code offense is very similar to the pre-code requirement. However, Justice Marcus is fully justified in concluding that the definition of article 95(A)(1) provides a "realistic proscription that contemplates that a weapon, although not in 'full open view,' is nonetheless not a 'concealed' weapon if it is sufficiently exposed to reveal its identity." The common sense approach to the concealed weapons definition is supported by a normal construction of the simple terms employed in the statute. In Black's Law Dictionary the term "conceal" is defined as "to hide; secrete; withhold from the knowledge of others; to withhold from observation; . . . to cover or keep from sight." The definition is not met in a case like Fluker, where the presence of the pistol on defendant's person would be obvious to any observer. The situation would have been quite different if the pistol had been entirely hidden under defendant's coat in a shoulder holster.

**ENTRAPMENT**

Distinguishing between detection and instigation in connection with alleged entrapment defenses is often difficult.

52. 311 So. 2d at 864.
53. Id. at 865, relying on State v. Bias, 37 La. Ann. 259 (1885).
54. See statute citations in note 51, supra.
55. 311 So. 2d at 866.
For example, the entrapment defense will not lie if officers or agents merely furnish an opportunity and encourage action by a defendant already predisposed to crime; but police cross the line of proper conduct when they induce a suspect character to engage in criminal conduct he did not previously contemplate. The question is largely where the basic criminal purpose really originated. Following an earlier, well-reasoned opinion in *State v. Kelly*, the Louisiana Supreme Court held that an entrapment defense had been properly rejected in *State v. Bates*. In *Bates* the undercover agent had posed as a fellow student and had affirmatively sought marijuana. Justice Tate's decision stressed the fact that

[i]n rejecting the fairly strong testimony that the undercover agent induced the crime, the trial jury apparently determined that the defendant had the necessary intent to commit the crime even before the agent afforded him an opportunity to do so, and that the agent merely afforded the defendant an opportunity to commit the offense rather than induced it.58

Federal courts also recognize the general "predisposition" versus "inducement" test, holding that "[d]ecoys are permissible to entrap criminals, but not to create them..." So

Usually, as in *Bates*, entrapment is a factual question for the jury, after proper instructions along the lines indicated above. A study of the facts recited in the *Bates* opinion indicates that when evidence points to a predisposition toward the commission of a particular crime, law enforcement agents have, and should have, a free hand to actively induce a prosecutable instance of criminal conduct.

56. 263 La. 545, 268 So. 2d 650 (1972).
57. 301 So. 2d 619 (La. 1974).
58. Id. at 621.