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John S. Baker Jr.
Louisiana State University Law Center

CRIMINAL LAW

*John S. Baker, Jr.**

DANGEROUS WEAPON

State v. McMorris[1] presented the recurrent problem of the "dangerous weapon"[2] which is not what it appears to be. While the court's majority opinion seems simply to be an unremarkable application of previous jurisprudence on this point, Justice Dixon raises an objection in his concurring opinion which gives cause to reconsider the judicial gloss on the term "dangerous weapon."[3]

State v. Levi[4] held that "a person who commits a robbery by pointing an unloaded and unworkable pistol at the victim can be adjudged guilty of armed robbery."[5] More particularly, the court stated that "to be classified as a dangerous weapon . . . a pistol need not be capable of firing or inherently dangerous."[6] The court relied heavily upon *State v. Johnston*,[7] which had held that an assault with an unloaded revolver constituted an assault with a dangerous weapon. Following *Levi, State v. Leak*[8] determined that "use of an extension to a ratchet coupled with a socket to convincingly simulate a firearm . . . constituted robbery with a dangerous weapon."[9] In *State v. Elam*,[10] while finding "some evidence" that the defendant was armed with a dangerous weapon, the court specifically

* Associate Professor of Law, Louisiana State University.

1. 343 So. 2d 1011 (La. 1977).

2. LA. R.S. 14:2(3) (1950) provides:

(3) "Dangerous weapon" includes any gas, liquid or other substance or instrumentality, which, in the manner used, is calculated or likely to produce death or great bodily harm.

3. The issue has previously been considered in *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Criminal Law*, 36 LA. L. REV. 502, 508 (1976); *The Work of the Louisiana Appellate Courts for the 1970-1971 Term—Criminal Law*, 32 LA. L. REV. 298 (1972); Note, 32 LA. L. REV. 158 (1971).

4. 259 La. 591, 250 So. 2d 751 (1971).

5. *Id.* at 598-99, 250 So. 2d at 754.

6. *Id.*

7. 207 La. 161, 20 So. 2d 741 (1944).

8. 306 So. 2d 737 (La. 1975).

9. *Id.* at 739.

10. 312 So. 2d 318 (La. 1975).

declined to extend *Levi* or to hold that a "hand in a pocket" is a dangerous weapon.[11]

In *McMorris* an undercover narcotics transaction evolved into an attempted robbery when the defendant pointed an undisclosed object and announced, "This is a rip-off, give me all your money or I'm going to blow you away." What had appeared to have been a pistol under the defendant's shirt proved, after frustration of the robbery, only to be a half-pint liquor bottle. In upholding the conviction as an attempted *armed* robbery, the court found relevant to the issue of "dangerous weapon" "the [state] witness' testimony that a bottle might be used to strike as well as to deceive . . . ."[12] The court cited language from *Levi* that "the continuous threat and capability . . . that it will be used as a bludgeon"[13] is a factor in determining what is a "dangerous weapon."

In his concurring opinion, Justice Dixon objected that the record contained no evidence "that the bottle *in this case* was calculated or likely to produce great bodily harm."[14] He indicated the need to demonstrate that the bottle posed an actual or threatened, as opposed to a possible, danger.[15]

> The bottle was kept in the defendant's pocket, presumably to give the appearance that he was concealing a gun, but no evidence was

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11. *Id.* at 322.

12. 343 So. 2d at 1016.

13. 343 So. 2d at 1016, *citing* State v. Levi, 259 La. 591, 593, 250 So. 2d 751, 754 (1971).

14. 343 So. 2d at 1019.

15. The evidence in the record did not indicate any attempted or threatened use of the bottle as a bludgeon.

> On cross-examination, defense counsel asked Detective Speir whether he considered a bottle a dangerous weapon. Speir responded, "Not whenever I can see it, no sir I don't, but whenever I can't, I don't know." On redirect examination, the State inquired of Speir why he did not consider a bottle a dangerous weapon. Defense counsel's objection to the question was overruled and Speir repeated his testimony that had he known defendant's weapon was a bottle, he would not have been frightened by it. Defense counsel objected on the grounds of relevancy when Speir went on to testify under what circumstances even a visible bottle *might* be dangerous, for instance, *if* it were used as a club.
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> Once the defense had requested Speir's opinion as to the dangerousness of a bottle, the State was authorized on redirect examination to pursue this line of inquiry. Further, the witness' testimony that a bottle *might* be used to strike as well as to deceive was relevant to the jury's consideration of the dangerous nature of the weapon.

343 So. 2d at 1016 (emphasis added).

> offered to show that the bottle was used or intended to be used to do anything else but create that illusion.[16]

Justice Dixon apparently did not consider as relevant the danger created by the illusion of a weapon. Furthermore, he equated a "bottle in the pocket" with a "hand in the pocket" and, on the basis of *State v. Elam*, he concluded that neither constitutes a "dangerous weapon."[17]

The writer suggests that Justice Dixon's position conflicts with *Levi* and miscontrues *Elam*. Quoting *State v. Johnston, Levi* emphasizes primarily the effect on the victim created by the illusion of a weapon.

> Under the definition of article 2 a dangerous weapon is not necessarily an instrumentality that can or will, without some intervening circumstance, produce death or great bodily harm; neither, thereunder, is it only one which in itself is likely to produce the stated result. Rather, the codal provision contemplates and specifically provides for "any * * * instrumentality, which in the manner used, is calculated or likely to produce death or great bodily harm."
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> . . . .
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> Usually in a situation of that kind the person so assaulted attempts to escape, to wrest the gun from the assailant, or to deliver to him some death dealing blow; and, in making any of these attempts, serious injury often results. Moreover, under the circumstances that existed here, as the trial judge correctly points out, "the complainants, in order to repel their assailant, would have been justified if they had either inflicted great bodily harm upon him or slain him, because it was reasonable for them to believe that their lives were placed in danger by the conduct of the defendant".[18]

Although *State v. Elam* declined to extend *Levi* to a "hand in the pocket," the opinion does not discuss the reasons for failing to do so.[19] The reason for not extending *Levi* to the hand in the pocket, it is submitted, has nothing to do with the illusion created; a hand in the pocket can create the very danger adverted to in *Levi* and *Johnston* just as effectively as any other illusionary weapon. Rather, a hand in the pocket is

16. 343 So. 2d at 1019.

17. *Id.*

18. 259 La. 591, 596, 250 So. 2d 751, 753 (1971), *quoting from* State v. Johnston, 207 La. 161, 167, 20 So. 2d 741, 743–44 (1944).

19. The court disposed of the issue by finding "some evidence" that the defendant had been armed with a dangerous weapon although none was recovered when he was arrested shortly after the robbery.

distinguishable from other simulated weapons only because, as *State v. Calvin*[20] states, a hand is not an "inanimate instrumentality"[21] as contemplated by the definition of dangerous weapon. In other words, the *Levi* principle would apply equally well to the hand in the pocket, if a hand were an "instrumentality." Given that a bottle is an "instrumentality," "a bottle in the pocket" is indistinguishable from an unworkable gun or a ratchet extension, while quite distinguishable from a hand in the pocket for purposes of defining a "dangerous weapon."

Nevertheless, the importance of Justice Dixon's view is that it illuminates the possible distortion of the *Levi* rationale stemming from the *McMorris* majority's brief treatment of the issue. The primary rationale of *Levi*, quoted above, stresses that pointing an unloaded gun creates *actual* danger because "in the manner used, [it] is calculated or likely to produce death or great bodily harm."[22] The *McMorris* majority, however, quotes other language from *Levi* focusing upon the *possible* danger, namely "the continuous threat and capability . . . that it will be used as a bludgeon."[23] Given this latter language, Justice Dixon is quite justified insofar as he asks to see evidence either of the threat or the capability of using this bottle as a bludgeon. As pointed out in an earlier review of *Levi*, the possible use as a bludgeon is a "rationale [that] cannot be supported under the statutory standard which requires the court to look at how the weapon actually was used, not how it *may* have been used."[24]

The *Levi* language concerning the possible use as a bludgeon is not essential to the basically sound rationale of *Levi*. Nevertheless, what constituted only a collateral consideration in *Levi*, and grew to "makeweight" for the court's opinion in *Leak*,[25] blossoms forth finally in *McMorris* as "relevant to the jury's consideration of the dangerous nature of the weapon."[26] To the contrary, this writer submits that the possible, as opposed to the intended or threatened, use of an instrument as a bludgeon is not relevant to the definition of "dangerous weapon."

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20. 209 La. 257, 24 So. 2d 467 (1945), discussed in *The Work of the Louisiana Supreme Court for the 1945-1946 Term—Criminal Law*, 7 LA. L. REV. 288 (1947).

21. 209 La. at 266, 24 So. 2d at 469.

22. LA. R.S. 14:2(3) (1950).

23. 343 So. 2d at 1015, *quoting* State v. Levi, 259 La. 591, 598, 250 So. 2d 751, 754 (1971).

24. Note, 32 LA. L. REV. 158, 163 (1971).

25. *See The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Criminal Law*, 36 LA. L. REV. 502, 509 (1976).

26. 343 So. 2d at 1016.

ACCESSORY AFTER THE FACT

Both *State v. Mitchell*[27] and *State v. Jackson*[28] involve the crime of accessory after the fact.[29] Beyond that, however, the cases are very dissimilar, particularly in that they contradict one another on the requirement of intent.

In *State v. Mitchell* the defendant, accompanied by another woman, snatched the purse of a third woman. Rather than trying the defendant for simple robbery, the district attorney charged her in an amended bill of information with being an accessory after the fact to the simple robbery. The defendant contended that she could not be both a principal and an accessory after the fact to the same crime. Rejecting this argument, the court reasoned that, while being a principal, she could also act as an accessory after the fact by aiding the co-principal. Then, interpreting article 25[30] to require only general criminal intent, the court found evidence of such intent to aid the co-principal as follows:

> Although Martha Mitchell's primary motive may well have been to save herself from apprehension and prosecution, she must have adverted to the fact that she was also aiding another principal, Diane Butler, to "escape from arrest, trial, conviction, or punishment."[31]

The court's opinion errs in two respects. First of all, that a person can be both a principal and accessory after the fact to the same crime contravenes the traditional understanding of an accessory after the fact, which was intended to be codified in article 25. As the Reporter's Comment states, the article "corresponds to the common law and usual statutory definition of accessories after the fact, except in one particular."[32] Among the commonly understood requirements for the crime of

27. 337 So. 2d 1189 (La. 1976).

28. 344 So. 2d 961 (La. 1977).

29. LA. R.S. 14:25 (1950).

30. LA. R.S. 14:25 provides in pertinent part: "An accessory after the fact is any person who, after the commission of a felony, shall harbor, conceal, or aid the offender, knowing or having reasonable ground to believe that he has committed the felony, and with the intent that he may avoid or escape from arrest, trial, conviction, or punishment."

31. 337 So. 2d at 1190.

32. The one exception, not here applicable, is that "[w]hile the common law rule required actual knowledge that the person aided had committed a felony, the definition adopted makes it sufficient that the accessory after the fact knew or had 'reasonable ground to believe' that the one assisted had committed a felony." LA. R.S. 14:25 (1950) (Reporter's Comment).

accessory after the fact is that the defendant not be a principal to the crime.[33]

Moreover, the court's rationale hardly offers a convincing case for departing from the traditional requirement. The court finds it "immaterial that Ms. Augusta's purse was actually snatched by [defendant] Martha Mitchell . . . . [because] there were two principals to the robbery, Diane Butler and Martha Mitchell."[34] Significance is seen in the fact that the defendant is charged as an accessory after the fact to the crime of Ms. Butler and not to her own crime.[35] The implication is that the defendant could not have been convicted as an accessory after the fact to her own crime. Such a distinction, however, slights the fact that Ms. Butler became a principal only because she intentionally aided Ms. Mitchell, who actually snatched the purse. In aiding Ms. Butler after the fact, she has aided the person who assisted her during the fact. To affirm her conviction by making a distinction between aiding a co-principal and aiding herself suggests simply a result-oriented reasoning. Convinced that the defendant is guilty of the more serious crime of simple robbery, the court seems disinclined to reverse her conviction for the less serious crime. In so doing, however, the court does violence to the distinction between principal and accessory after the fact intended to be preserved by the Code.[36]

The court commits a second error by characterizing accessory after the fact as a general intent crime. The court's error rests on the mistaken premise that

> La. R.S. 14:25 does not by its terms require specific criminal intent to aid the offender in avoiding detection or punishment.[37]

Article 25, however, specifies that the offender must act "with the intent that he may avoid or escape from arrest." As thus expressed, the article requires a qualified and, therefore, specific intent.[38] Moreover the Repor-

33. W. LAFAVE & A. SCOTT, CRIMINAL LAW § 66, at 523 (1972); R. PERKINS, CRIMINAL LAW 667 (2d ed. 1969).

34. 337 So. 2d at 1190.

35. The opinion noted: "The bill of information as finally amended charged Martha Mitchell with aiding and abetting Diane Butler, knowingly and with reasonable grounds to believe that Ms. Butler had committed a felony. The State did not charge Martha Mitchell as an accessory for aiding and abetting herself, after the commission of the crime." 337 So. 2d at 1190.

36. *Compare* LA. R.S. 14:24 (1950) (Reporter's Comment) *with id.* 14:25 (1950).

37. 337 So. 2d at 1190.

38. *See* State v. Elzie, 343 So. 2d 712, 713-14 (La. 1977), where the court stated:

ter's Comment indicates the importance of article 25's intent requirement.[39] Finally, the later case of *State v. Jackson*,[40] without referring to *Mitchell*, simply declares that article 25 "requires evidence that the defendant harbored, concealed, or aided the felon personally with the *specific intent* of preventing his apprehension and punishment."[41]

In a well-considered opinion by Justice Sanders, *State v. Jackson* reversed the conviction for accessory after the fact to a burglary where the defendant, knowing of a burglary, had asked for and received from the burglars a part of the stolen merchandise in return for an agreement not to report them to the police. The opinion carefully distinguished the crime of accessory after the fact from several other crimes: misprision of a felony (which is not a crime in Louisiana),[42] compounding a felony,[43] and receiving stolen things.[44] Noting that the defendant was guilty of both compounding a felony and receiving stolen things, the court nevertheless reversed the conviction because "[n]o aid [was] given to the fugitive personally to prevent his arrest"[45] as required for an accessory after the fact conviction.

[I]n Louisiana, we require proof of specific intent where the statutory definition of a crime includes the intent to produce or accomplish some prescribed consequence (*the frequent language being "with intent to . . ."*). *See e.g.*, State v. Lewis, 288 So. 2d 348 (La. 1974) (burglary); State v. Fontenot, 256 La. 12, 235 So. 2d 75 (1970) (obscenity); State v. Daniels, 236 La. 998, 109 So. 2d 896 (1959) (public intimidation), (overruled insofar as a procedural point, State v. Gatlin, 241 La. 321, 129 So. 2d 4, 7-8 (1961), but not as to its substantive holding). See also LaFave and Scott, Criminal Law, Section 28 (1972).

(Emphasis added). *See also* LA. R.S. 14:11 (1950) and Reporter's Comments.

39. The Reporter's Comment states in pertinent part:

While the common law rule required actual knowledge that the person aided had committed a felony, the definition adopted makes it sufficient that the accessory after the fact knew or had "reasonable ground to believe" that the one assisted had committed a felony. Proof of actual knowledge is sometimes very difficult; and the really innocent accomplice after the fact will be protected by the concluding requirement that the assistance must be rendered "with the intent that he may avoid or escape from arrest, trial, conviction, or punishment."

LA. R.S. 14:25 (1950) (Reporter's Comment).

40. 344 So. 2d 961 (La. 1977).

41. *Id.* at 963 (emphasis added).

42. *See* LA. R.S. 14:131 (1950) (Reporter's Comment).

43. LA. R.S. 14:131 (1950).

44. *Id.* 14:69 (1950).

45. 344 So. 2d at 964.

OBSCENITY

In several cases last term, the supreme court addressed issues posed by Louisiana's amended obscenity statute.[46] *State v. Amato*[47] upheld the constitutionality of the legislature's definition of obscenity.[48] Finding the statute neither vague[49] nor overbroad,[50] the court reversed the trial judge's action of quashing the bill of information. Writing the majority opinion, Justice Dennis expressed his own doubts about the possibilities of defining obscenity.[51] Nevertheless, as he recognized,[52] the statute so closely track-

46. LA. R.S. 14:106 (Supp. 1974).

47. 343 So. 2d 698 (La. 1977).

48. The defendant challenged LA. R.S. 14:106(a)(2) (Supp. 1974) which provides:

> A. The crime of obscenity is the intentional:
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> . . . .
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> (2) Participation or engagement in, or management, production, presentation, performance, promotion, exhibition, advertisement, sponsorship or display of, hard core sexual conduct when the trier of fact determines that the average person applying contemporary community standards would find that the conduct, taken as a whole, appeals to the prurient interest; and the hard core sexual conduct, as specifically defined herein, is presented in a patently offensive way; and the conduct taken as a whole lacks serious literary, artistic, political or scientific value.
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> Hard core sexual conduct is the public portrayal, for its own sake, and for ensuing commercial gain of:
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> (a) Ultimate sexual acts, normal or perverted, actual, simulated or animated, whether between human beings, animals or an animal and a human being; or
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> (b) Masturbation, excretory functions or lewd exhibition, actual, simulated or animated, of the genitals, pubic hair, anus, vulva or female breast nipples, or
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> (c) Sadomasochistic abuse, meaning actual, simulated or animated, flagellation or torture by or upon a person who is nude or clad in undergarments or in a costume which reveals the pubic hair, anus, vulva, genitals or female breast nipples, or the condition of being fettered, bound or otherwise physically restrained, on the part of one so clothed; or
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> (d) Actual, simulated or animated, touching, caressing or fondling of, or other similar physical contact with a pubic area, anus, female breast nipple, covered or exposed, whether alone or between humans, animals or a human and an animal, of the same or opposite sex, in an act of apparent sexual stimulation or gratification; or
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> (e) Actual, simulated or animated stimulation of a human genital organ by any device whether or not the device is designed, manufactured and marketed for such purpose.

49. 343 So. 2d at 702-03.

50. *Id.* at 703.

51. Justice Dennis noted the following:

ed the language previously approved by the United States Supreme Court in *Miller v. California*[53] and its progeny[54] that the court's decision could not have been otherwise in terms of federal constitutional law. Even Justice Dixon, the lone dissenter, protested only that the statute violated principles of Louisiana law, "the United States Supreme Court to the contrary notwithstanding."[55]

In 1973 the state supreme court, responding to *Miller v. California*, declared unconstitutional Louisiana's then-current definition of obscenity.[56] As a result of that ruling, in 1974 the legislature re-enacted the obscenity statute along the guidelines established by *Miller*.[57] Among other changes in the statute, the legislature made a significant change in the immunity from arrest and prosecution granted to those theater and bookstore employees who have neither "managerial duties" nor any "financial interest" in the operations. Under the previous version of the obscenity statute, this immunity had been unqualified. In the 1974 act, the legislature limited the immunity by making it inapplicable when

> there is no person having managerial duties or a financial interest in the possession, exhibition or sale of obscure[58] [sic] materials *subject*

Mr. Justice Brennan, with whom Mr. Justice Stewart and Mr. Justice Marshall joined, dissenting in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 S. Ct. 2628, 37 L.Ed. 2d 446 (1973), stated: "Although we have assumed that obscenity does exist and that we know it when [we] see it, *Jacobellis v. Ohio*, [378 U. S. 184] at 197 [84 S. Ct. 1676], 12 L. Ed. 2d 793 (Stewart, J. concurring), we are manifestly unable to describe it in advance except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech." 413 U.S. at 84, 93 S. Ct. at 2648, 37 L. Ed. 2d at 473.

Despite the ring of truth in Justice Brennan's words . . . .

343 So. 2d at 701.

52. 343 So. 2d at 701.

53. 413 U.S. 15 (1973).

54. Post-*Miller* cases cited by the court were Jenkins v. Georgia, 418 U.S. 153 (1974); Hamling v. United States, 418 U.S. 87 (1974).

55. 343 So. 2d at 705.

56. State v. Shreveport News, Inc., 287 So. 2d 464 (La. 1973).

57. See *Highlights of the 1974 Regular Session—Obscenity Regulation*, 35 LA. L. REV. 601, 603 (1975).

58. In *State v. Johnson*, 343 So. 2d 705, 707 (La. 1977), discussed in text at notes 60-80, *infra*, the supreme court noted the trial court's finding "that the presence of the word 'obscure' in this paragraph of the statute rendered the entire obscenity statute unconstitutionally vague, because a person of average intelligence, untrained in the law, could not, on reading the statute, determine the applicability of paragraph C, and thus could not ascertain whether contemplated conduct might subject him to criminal prosecution." 343 So. 2d at 707.

The supreme court, however, reserved judgment on this issue. *Id.*

to immediate arrest and prosecution.[59]

In *State v. Johnson*,[60] a companion case to *State v. Amato*, the supreme court declared that this qualifying clause to the immunity provision was unconstitutional, but severable from the rest of the statute. *Johnson* left the employee immunity intact, making it applicable again in all circumstances. Curiously, the court rested its holding on the equal protection clause.

> [U]nder any saving construction of the words "subject to immediate arrest and prosecution," some clerical bookstore and theatre employees would be subjected to criminal proceedings whereas others would not, depending on whether their superiors are subject to immediate arrest and prosecution. Thus the law does not afford all such employees equal treatment and raises a question as to whether the distinction between the two classes of clerical employees has been drawn upon a reasonable basis. We do not think that it has. To make a person's exposure to a possible fine of $2,000 and possible imprisonment at hard labor for five years completely dependent upon whether another person is subject to immediate arrest and prosecution seems to us entirely unfair and unreasonable. Accordingly, we conclude that the last clause of La. R.S. 14:106(C) is unconstitutional because it denied equal protection of the law to one class of clerical bookstore and theatre employees. U.S. Const. amend. XIV, §1; La. Const. art. 1, §3 (1974).[61]

While invoking the equal protection clause, the court avoided the opportunity to find a violation of due process. The defendant had argued that the provision was "ambiguous" and failed to afford "fair notice of the circumstances under which a bookstore or theatre employee . . . may be penalized."[62] A holding under the due process clause that the provision was unconstitutionally vague would have allowed the legislature the option of attempting to clarify the language if it chose to do so. By invoking the equal protection clause, on the other hand, the court has precluded any distinction between the two classes regardless of the statute's clarity.

The writer, however, suggests that the court's reliance upon the equal protection clause is misplaced. The traditional "rational basis" test does not prohibit the state from treating different classes of persons differently;

59. La. R.S. 14:106(c)(Supp. 1974) (emphasis added).
60. 343 So. 2d 705 (La. 1977).
61. *Id.* at 708.
62. *Id.* at 707.

it prohibits only arbitrarily created classifications—those which lack a basis reasonably related to the objective of the statute.[63] In defining the criminal laws, it has not been uncommon to make exemptions for certain persons or situations.[64] As a general rule, "the United States Supreme Court has been quite permissive in allowing state legislatures to draw whatever classifications they choose in enacting criminal laws."[65] Attacks upon such legislative classifications are not likely to succeed because

> the person challenging the statute must ordinarily prove an elusive negative: that no state of facts can be conceived by which the classification can be said to have some reasonable basis. Such facts are readily assumed by the Court even in the absence of any evidence bearing on the reasons behind the legislature's classification.[66]

Yet in *Johnson* the supreme court determined that the challenged classification denied equal protection of the law without even considering possible reasons for the distinction. The opinion "conclude[d] [that] the Legislature would have passed the statute had it been presented with the last clause of paragraph C removed."[67] Not once in the opinion, however, did its writer pause to wonder why the legislature went out of its way to qualify a previously unqualified immunity. Certainly, the change was not wholly without reason.

It occurs to this writer that an obvious inference from the modification of the immunity is that the unqualified immunity poses problems of enforcement. One would expect "adult" bookstores and theaters to calculate every conceivable avoidance of the obscenity law in order to continue in business. Given the unqualified immunity of employees without "managerial duties" or "financial interest," such enterprises are likely to operate through out-of-state corporations and without employing local "managers." On the other hand, legitimate businesses which, among other commodities, stock some "dirty books" or "girlie magazines" are not likely to manipulate their management strategy around the obscenity statute. A corner drugstore, for instance, normally has a manager, if not the owner, on the premises to attend to customers and otherwise supervise. Thus one having "managerial duties" or a "financial interest" is usually available for "immediate arrest and prosecution." Without some qualifi-

63. Reed v. Reed, 404 U.S. 71, 75-76 (1971).
64. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW § 19, at 131-32 (1972).
65. *Id.* at 133.
66. *Id.*
67. 343 So. 2d at 709.

cation to the employee immunity provision, the practical result is that the statute is enforceable against corner drugstores but not against "adult" bookstores.

That the result of *Johnson* is to render the statute unenforceable against the principal purveyors of obscenity was adequately demonstrated in *State v. Terrebonne*.[68] Decided after *Johnson*, the case involved an obviously "adult" bookstore, owned by an out-of-state corporation and manned by a single employee. The court reversed the obscenity conviction of the lone employee because "the record . . . offered no evidence that the defendant either had managerial duties or any financial interest in the store."[69] That the employee had no financial interest was undisputed. The court concluded that the defendant had no "managerial duties" presumably because his position was characterized as that of "cashier." The court seemed to have given no weight to the fact that when asked prior to his arrest whether he was the manager, "the defendant replied that he was in charge at the time."[70] Nor apparently did the fact that he "locked up the store"[71] after being arrested indicate "managerial duties." If being "in charge," locking up the store, and having responsibility for the cash receipts did not constitute "managerial duties," then the court has left the police with no one to arrest in the typical "adult" bookstore.

In rendering a valid criminal law unenforceable, the court has upset the balance of constitutional interests at stake. In *Smith v. California*[72] the United States Supreme Court struck down a local obscenity ordinance because it did not require that the defendant know the obscene nature of the book. Concurring, Justice Frankfurter cautioned that

> the Court does not hold that a bookseller who *insulates himself* against knowledge about the offending book is thereby free to maintain an emporium of smut.[73]

Analogously, the legislature apparently attempted to prevent the purveyor of obscenity from insulating himself and his establishment from the force of the law. That the legislature found it necessary to exempt some but not all conduct of a similar type was justified by the problems of enforcing the law.[74]

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68. 344 So. 2d 1010 (La. 1977).
69. *Id.* at 1012.
70. *Id.* at 1011.
71. *Id.*
72. 361 U.S. 147 (1959).
73. *Id.* at 161 (emphasis added).
74. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW, § 19, at 133.

Given this understanding of the enforcement problem, it is not unfair to make a person's punishment "completely dependent upon whether another person is subject to immediate arrest and prosecution."[75] The employee of the "adult" bookstore or theater has fair notice that he may be arrested if his employer does not have someone with "managerial duties" on the premises. Moreover, subsection F[76] of the statute affords employees substantial protection against a fortuitous arrest in the situation in which the person having "managerial duties" is temporarily absent. With one exception,[77] subsection F requires that, prior to any arrest or prosecution, an adversary hearing to determine the materials' obscenity must be held. If the materials are adjudged obscene, those who continue to distribute or display them have particularized notice that an arrest may be imminent.

For the legislature to emphasize enforcement against the more culpable violator of the law, namely the distributor of hard core pornography as opposed to the corner drugstore, was not only fair but quite reasonable. Implicitly, the court recognized this very principle in *Johnson* by approving the unqualified immunity for ordinary employees although the same immunity did not apply to those employees having "managerial duties." Presumably, the court assumed such unequal treatment to be reasonable in terms of relative culpability. Moreover, in approving the definitions of other crimes such as rape[78] and prostitution[79] which criminalized male but not female conduct, the court has recognized that unequal treatment is

75. 343 So. 2d at 708.

76. LA. R.S. 14:106(F) (Supp. 1974) provides in pertinent part:

> (1) Except for those motion pictures, printed materials and photographic materials showing actual ultimate sexual acts or simulated or animated ultimate sexual acts when there is an explicit, close-up depiction of human genital organs so as to give the appearance of the consummation of ultimate sexual acts, no person, firm or corporation shall be arrested, charged or indicted for any violation of a provision of this section until such time as the material involved has first been the subject of an adversary hearing under the provisions of this section, wherein such person, firm or corporation is made a defendant and, after such material is declared by the court to be obscene, such person, firm or corporation continues to engage in the conduct prohibited by this section. The sole issue at the hearing shall be whether the material is obscene.

77. Note that the prior adversary hearing is not a prerequisite to arrest or prosecution if actual or simulated ultimate sex acts are depicted.

78. State v. Fletcher, 341 So. 2d 340 (La. 1977).

79. State v. Devall, 302 So. 2d 909 (La. 1974), discussed in *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Louisiana Constitutional Law*, 36 LA. L. REV. 533, 535 (1976).

justified because the conduct of only a certain class of persons presents a particular "social problem."

Johnson's uncritical reliance on the equal protection clause results effectively in the obscenity statute's unenforceability against the primary targets of the legislation, distributors of hard core pornography. Justice Dennis is wrong in stating,

> Clearly the main purpose of the obscenity statute will not be defeated by the invalidity of the last clause of paragraph C.[80]

The court's error seems explainable either as merely an honest mistake which ought to be corrected or as an indirect attempt to undermine enforcement of a statute which the court found to be constitutional in *State v. Amato*. The writer urges the court to correct the error by reversing *State v. Johnson* at the next opportunity to do so.

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80. 343 So. 2d at 709.