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CRIMINAL LAW

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STRICT LIABILITY OFFENSES

State v. Brown[1] is an important limitation on the legislature's power to establish strict liability criminal offenses: in a unanimous decision, the court held unconstitutional a statute making *unknowing possession* of a controlled dangerous substance a felony.[2]

Neither the State nor Federal Constitution has been construed to totally prohibit crimes without a mental element. Moral considerations would suggest requiring a mental element for all offenses, and the common law history attests to the need for a "vicious will." It is also true that a strong maxim of statutory construction of criminal statutes requires a mental element when the legislation does not clearly require strict liability.[3] However, substantive due process has not been used to invalidate all strict liability offenses. The Louisiana Supreme Court recently upheld a conviction for failing to file state income tax returns against an attack based on the lack of a mental element.[4]

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1. 389 So. 2d 48 (La. 1980).

2. LA. R.S. 40:969(c) (Supp. 1972 & 1973). One might quarrel with the word choice of the statute—it may be inconsistent to possess something and not know it. Generally, possession includes both physical detention and the intent to do so. *See, e.g.*, State v. Birdsell, 232 La. 725, 95 So. 2d 290 (1957); LA. CIV. CODE arts. 3426-3431 & 3436; MODEL PENAL CODE § 2.01(4) (Proposed Official Draft, 1962). Nonetheless, the statute must have meant physical detention without the mental element.

One might also question whether the reference to unknowing possession was an error in drafting. The statute as originally enacted referred to "knowingly or intentionally," as did the related statute regarding Schedule I, II, III, and V substances. 1972 La. Acts, No. 634, § 1. The next year, an amendment to the pertinent statutes made technical changes regarding the respective penal provisions of all five Schedules. Only Schedule IV and Schedule V possession was changed to "*un*knowingly or intentionally," even though the penalties for violation remained the same as those of the other Schedules. 1973 La. Acts, No. 207, §§ 3-7 (emphasis added). In addition, it would seem an odd word choice to penalize "unknowingly or intentionally to possess" when simple reference to unknowing possession would be as broad as need be to cast a wide net.

3. Morissette v. United States, 342 U.S. 246 (1952).

4. State v. Terrell, 352 So. 2d 220 (La. 1977). Federal statutes are routinely upheld. *See, e.g.*, United States v. Wiesenfeld Warehouse Co., 375 U.S. 86 (1964); United States v. Balint, 258 U.S. 250 (1922); United States v. Pruner, 606 F.2d 871 (9th Cir. 1979).

In some areas, however, strict liability is limited. If the offense tends to discourage the exercise of first amendment free speech rights, it is required that a mental element be proved. In *Smith v. California*[5] an obscenity conviction was overturned for failure to prove knowledge of the contents of the allegedly obscene book. In a more far-reaching decision, the Court in *Lambert v. California*[6] found a constitutional violation in an ordinance that made it a crime for a convicted felon to remain in the city for more than five days without registration with the chief of police. The Court relied on the due process clause:

> Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community.[7]

This "probability of the knowledge that some act is criminal" distinction became crucial in *United States v. Freed*,[8] a case involving a prosecution under the National Firearms Act for possession of an unregistered firearm. However, as the court in *Brown* points out, the *Freed* defendants knew they were possessing weapons even if they may not have known of the registration requirements. In *Brown*, it would be possible for one to be convicted even if he did not know he had physical control over a dangerous substance.[9]

The due process analysis used in these cases is basically a fundamental fairness inquiry. In *Brown*, arguments on the side of the individual interest are: (1) the fact that the penalty imposed was high[10] (a felony punishable by up to 5 years at hard labor and fine of $5,000), (2) it is not the kind of public welfare offense where absolute

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5. 361 U.S. 147 (1959).

6. 355 U.S. 225 (1957).

7. *Id.* at 229-30.

8. 401 U.S. 601 (1971).

9. *See* 352 So. 2d 220 (La. 1977). Even as the statute there has been amended to make the offense an *intentional* failure to file a tax return, the intent required is the intent to do the act; *i.e.*, intent not to file, as opposed to knowingly not filing when one knows one has a duty to file. In *Terrell*, the defendant's actions were intentional (he must have adverted to the fact of not filing), and therefore arguably he met the present requirement. Part of the confusion comes from a popular, non-technical notion that intent requires some kind of corrupt element. But as defined in the Criminal Code, the requirement is simply that of adverting to consequences. Louisiana might have done better to follow the federal example and refer to a willful failure to file, rather than an intentional failure to file. *See, e.g.*, I.R.C. § 7203.

10. *Cf.* Commonwealth v. Koczwara, 397 Pa. 575, 155 A.2d 825 (1959).

liability is essential to the success of a regulatory plan,[11] (3) it is not the kind of regulation about which a person would have a reasonable sense of the probable wrongness of the act,[12] and (4) it is not the kind of conduct that is generally considered morally bad, and thus known generally to be proscribed.[13] Even as a utilitarian measure, the statute seems to have little to say for itself; if deterrence is its purpose, the statute would seem to be of little effect when one possesses something and does not know he possesses it. Presumably, it could be argued that convictions would be easier if no knowledge need be proved. However, considering the ease with which inferences of knowledge can be made, it is not likely that many convictions will be lost because of this requirement.

CORPORATE LIABILITY—WILLFUL FAILURE

A simple opinion in *State v. Main Motors, Inc.*[14] masks some basic questions about corporate criminal liability and about the meaning of the term "willful" as used in Louisiana criminal statutes. At issue was an alleged violation, by a corporation and its president, of a sales tax collection statute making it an offense to "willfully [fail] to collect or truthfully account for or pay over such tax."[15] The allegations of failure to account focused on transactions which occurred in the automobile dealership's parts department, and did not involve the more substantial sales tax collections on sales of automobiles.[16] Although both the corporation and its president were accused of the offense, the trial court found the president innocent and convicted only the corporation.[17] The supreme court sustained that conviction.

Willful

The Criminal Code does not define "willful" and generally avoids its use, presumably because of the imprecision in the concept.[18]

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11. *See, e.g.*, United States v. Dotterweich, 320 U.S. 277, 280-81 (1943) (shipping adulterated and misbranded drugs in interstate commerce); United States v. Crow, 439 F.2d 1193 (9th Cir. 1971), *vacated on other grounds*, 404 U.S. 1009 (1972) (possession of firearms).

12. United States v. Freed, 401 U.S. 601 (1971). See text at note 7, *supra*.

13. *See generally* W. CLARK & W. MARSHALL, A TREATISE ON THE LAW OF CRIMES 21-22 (6th ed. 1958).

14. 383 So. 2d 327 (La. 1979).

15. LA. R.S. 47:1641 (1950).

16. See Record at 4.

17. *Id.* at 42.

18. Statutes outside the Code occasionally use the term. *See, e.g.*, LA. R.S. 12:959 (Supp. 1969) ("willful misconduct" of corporate directors and officers).

"Willful"—a term derived from general common law notions[19]—is, by virtue of the uncertainty involved, a difficult term to apply. Indeed, Justice Dennis' concurring opinion in *Main Motors* notes these vagueness problems.[20] The majority opinion by Justice Blanche does not attempt to define the concept of "willfullness," but does state, in accord with the common law background: "Proof of willful behavior is similar to proof of intent; it requires that the mind of the defendant be probed."[21] Clearly, more than negligence is required. As in the definition of intent in the Criminal Code, it is at least required that there be adversion to consequences or an active desire of the consequence.[22] As the stated consequence in the relevant statute is not truthfully accounting for the tax collected, the requirement is at least desiring or adverting to failing to truthfully account.

However, to the extent that relevant assistance can be obtained from similar federal tax statutes where the concept of willfullness is well developed, there may be more required—the additional requirement that there be knowledge of the legal duty involved. As the United States Supreme Court has recognized, there must be "a voluntary intentional violation of a known legal duty."[23] The majority opinion in *Main Motors* is not clear as to the extent that such a knowledge requirement is demanded, but the opinion does leave room to develop Lousisiana law in a manner that would ensure a rigorous mental element similar to the common law and the federal standard.

More troublesome in the opinion is the strong reliance on the presumption of correctness in the lower court and the reliance on "some evidence" to support the verdict. That "some evidence" was quite weak. Since the president of the corporation was found not guilty, and since the only other evidence in the record was the testimony of the bookkeeper who made the report and the tax auditor, it is difficult to conclude that agents of the corporation were intentionally violating a known duty or intentionally making untrue reports. The court relies on the fact that for some periods under scrutiny, the "percentages of wrongful deductions disallowed varied from 57% to 99%."[24] The full records reveal, however, that

19. W. LAFAVE & A. SCOTT, CRIMINAL LAW 192 (1972); Turner, *The Mental Element in Crimes at Common Law*, 6 CAMBRIDGE L.J. 31 (1936).

20. 383 So. 2d at 329-30.

21. *Id.* at 328, 329.

22. CRIMINAL CODE: LA. R.S. 14:10 (1950).

23. United States v. Pompino, 429 U.S. 10, 12 (1976). *See also* United States v. Bishop, 412 U.S. 346 (1973); 26 U.S.C. § 7206 (1954).

24. 383 So. 2d at 329.

those errors were not always against the state, and there was no pattern of depriving the state of revenues in determining which sales were tax exempt. The amounts involved were minimal. Indeed, in light of the normal criminal law burden of proof, it is more reasonable on this account to suspect incompetence than intent to violate a known duty. The record reveals that although invoices for sales were written by a salesperson, they were then transferred on a computer to different accounts.[25] While it is true that computer error would not necessarily be an adequate explanation, the incorrect and imprecise coding of computer information by a secretary would seem to be an adequate defense to a crime involving a mental element.

Furthermore, basic policy concerns should call for the court to require a strong burden of proof where criminal statutes are used to enforce what is essentially a civil duty to collect taxes for the state. Use of the criminal process in these areas approaches a misuse of the criminal law; the kind of trivial application of the state's massive machinery that tends to foster disrespect for the criminal law. As Justice Jackson put it in another context:

> The United States has a system of taxation by confession. That a people so numerous, scattered and individualistic annually assesses itself with a tax liability, often in highly burdensome amounts, is a reassuring sign of the stability and vitality of our system of self-government . . . . It will be a sad day for the revenues if the good will of the people toward their taxing system is frittered away in efforts to accomplish by taxation moral reforms that cannot be accomplished by direct legislation.[26]

It is just as apt to say that it will be a sad day for the criminal law if the good will of the people for the criminal justice system is frittered away in efforts to use the coercive apparatus of the criminal law in *de minimus*, technical tax cases when other means of enforcement are available.

Corporate Liability

More disturbing, and not discussed in the opinion, is the issue of corporate criminal liability for the failure to account once it is established that the president of the corporation is not guilty of the offense. The only other natural persons whose conduct could have been willful violations were low level clerical and secretarial employees of the automobile dealership. Making such *acts* of low

25. Record at 30.

26. United States v. Kahriger, 345 U.S. 22, 36 (1952) (Jackson, J., concurring).

level employees the *acts* of the corporation may be consistent with general corporate liability and has been generally accepted with regard to strict liability offenses as adequate to make the corporation guilty.[27] But such a broad *respondeat superior* concept when dealing with crimes involving a mental element is revolutionary and inconsistent with the general view in the United States.

In making corporations liable for crimes involving a mental element, it is usually required that some part of the "thinking" or "policy making" part of the corporation be involved for the corporation to be liable.[28] As the Model Penal Code puts it, the corporation is guilty of such offenses if "the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment."[29]

Louisiana does not specifically address the question of the mental state required for corporate liability, although its adoption of corporate liability was part of the modern movement away from corporate immunity for crime.[30] The related requirement of high managerial misconduct for traditional offenses would seem to be part of that tradition which the state has accepted.

At the least, such a radical imposition of corporate liability for crime would require some discussion and explanation. It is hoped that *Main Motors* is only the beginning of the process of clearly defining corporate criminal liability. There is still a great deal more to be said on the subject as the cases develop.

INTENT

Intent to commit a felony or theft

In addition to an unauthorized entering, commission of the crime of burglary requires that the offender have specific intent to commit a felony or theft therein at the time of entry.[31] This specific intent burden is great—proof that the *offender* subjectively desired the consequence, not that a reasonable person would have so desired. The supreme court in *State v. Marcello*[32] reversed a conviction for burglary when the testimony showed that the defendant, who had

27. W. LAFAVE & A. SCOTT, *supra* note 19, at § 33.

28. *Id. See generally* Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 21 (1957).

29. MODEL PENAL CODE § 2.07 (Proposed Official Draft, 1962).

30. *See* CRIMINAL CODE: LA. R.S. 14:2, comment (Supp. 1962 & 1977).

31. CRIMINAL CODE: LA. R.S. 14:62 (Supp. 1972, 1977 & 1980).

32. 385 So. 2d 244 (La. 1980).

been sleeping near the air conditioning equipment on the roof of an office building, entered a restroom in the building to wash. Use of another's soap and water might well be unauthorized use of movables,[33] but it certainly is not a felony; and without proof of a specific intent to deprive another permanently of those things, it is not a theft.[34] The court has in the past gone to some lengths to allow inferences of intent to commit a felony or theft from slight evidence.[35] In *Marcello* the court was clearly correct in limiting that tendency and in reversing the conviction. The defendant, of course, would be guilty of criminal trepass[36]—for an unauthorized and intentional entry upon a structure—which, with its misdemeanor penalty, seems the more fitting punishment for such slight anti-social conduct. Again, as with the tax enforcement, one would hope that the criminal law would be used more selectively for important and serious offenses that cause substantial danger to other human beings, rather than for stretching the clear meaning of words in an effort to make serous felonies out of conduct that causes little societal harm.

Intent to distribute

In *State v. Harveston*[37] the supreme court reversed a conviction for possession of marijuana with the intent to distribute because of the failure to prove the required specific intent. Justice Lemmon's well-reasoned opinion is an example of an appellate court's application of a strong specific intent standard in order to reverse a conviction based on slim inferences. In *Harveston*, three ounces of marijuana had been found in defendant's wooden leg—in addition to seeds, ashes and gleanings of marijuana discovered in and about his house. While the court agreed that intent to distribute can be inferred,[38] the quantity here was not inconsistent with personal use. The presence of balance scales did not indicate use for weighing pot as they were located in a grocery store and were not shown to be of the type customarily used to measure marijuana. With no other evidence, there was inadequate proof of intent to distribute.

Intent to defraud

Although the Criminal Code requires the intent to defraud as an element in several crimes,[39] it does not provide a definition of the

33. CRIMINAL CODE: LA. R.S. 14:68 (Supp. 1980 & 1981).
34. CRIMINAL CODE: LA. R.S. 14:67 (Supp. 1968, 1970 & 1972).
35. *See, e.g.*, State v. Moore, 302 So. 2d 284 (La. 1974).
36. CRIMINAL CODE: LA. R.S. 14:63 (Supp. 1960 & 1964).
37. 389 So. 2d 63 (La. 1980).
38. *Id.* at 64.
39. CRIMINAL CODE: LA. R.S. 14:53 & 57 (Supp. 1980), 70.1 (Supp. 1979), 71 & 72 (1950).

term.[40] One is forced to turn to the imprecise formulas of the common law, from which the Criminal Code borrowed the concept of fraud, to attempt to gain some guidance in applying the requirements. An example of the difficulties involved may be found in article 53 of the Criminal Code—arson with intent to defraud. Though one might argue for a broad application of the concept of fraud in light of the comment to article 53 ("It [this crime] is intended here to protect any person, firm or corporation which is injured financially by the destruction of the property."), that comment must be read in light of the previous sentence which indicates that the expansion was to go beyond preventing the defrauding of insurance companies and not to broaden the scope of fraudulent conduct.[41]

At the least, the requirement of fraud involves some element of cheating, or of presenting as true information that which is false.[42] This is recognized in *State v. Baize*[43] in which the supreme court reversed a conviction for obtaining hotel accommodations with the intent to defraud.[44] The facts indicate that there existed a dispute between the defendant and the New Orleans Holiday Inn East about whether the defendant had been informed that rates would increase after December 27—the Sugar Bowl season. It was shown that upon registering the defendant had paid for one night and had subsequently paid all that was due through December 27. It was also shown that defendant was willing to pay the amount that would have been due if the increased rates had not gone into effect. The defendant objected to the innkeeper's conduct (including the refusal to release the defendant's dog until she paid the entire amount demanded), and complained to Holiday Inn central management about her situation. It would appear then that the supreme court was clearly correct in reversing for failure to prove beyond a reasonable doubt that the defendant was obtaining accommodations with intent to defraud. Little evidence was presented of intent to cheat or intent to present as true information that which was false.

40. *Cf.* CRIMINAL CODE: LA. R.S. 14:67 (Supp. 1968, 1970 & 1972) defining theft as the taking or misappropriation "by means of *fraudulent* conduct, practices, or representations." (Emphasis added). Again the Code does not define "fraudulent."

41. "In many states this crime is limited merely to fraud against insurance companies." CRIMINAL CODE: LA. R.S. 14:53, comments (1950).

42. The common law offense of "cheating" involved action which affected the public at large as distinguished from a "private fraud" which merely affected a single individual. However, the other requisite elements were substantially the same. *See* W. CLARK & W. MARSHALL, *supra* note 13, at § 12.30 (6th ed. 1958). *See also* W. LAFAVE & A. SCOTT, *supra* note 19, at 652-54, discussing fraud as an element in the crime of embezzlement.

43. 385 So. 2d 221 (La. 1980).

44. LA. R.S. 21:21 (Supp. 1958, 1968 & 1977).

Again, this appears to be the kind of dispute that should be settled in civil court. Cases involving enforcement of increased hotel rates during peak seasons should not be allowed to clutter the dockets of the criminal courts, where more important societal harms demand attention.

ATTEMPT—ATTEMPTED CONCEALMENT

Article 27 of the Criminal Code is a general attempt statute which covers attempts of any crime. Exceptions from this pervasive article are few: to make an offense of attempting to conspire to commit a crime would weaken the "tending directly" act requirement and would thwart the principle against punishing one for evil thoughts when there is little or no act undertaken to carry them out.[45] In addition, since attempt requires a specific intent to commit a crime (to actively desire the prescribed consequences), one cannot logically attempt a crime which is defined so as to preclude the intent to do the act. Since negligent homicide is defined as requiring *disregard* of consequences, it is impossible to also *intend* those consequences. Therefore, attempted negligent homicide is a crime which cannot exist.[46] Similarly, in *State v. Booker*,[47] the supreme court stated that it was impossible to attempt felony murder, since by definition it (felony murder) is a killing without the intent to kill. This rule against inconsistent attempts applies even though the general responsive verdict provision, article 814 of the Code of Criminal Procedure, would nominally provide that such a verdict is responsive.

More troublesome is the case of *State v. Dyer*,[48] which seems to reason that the crime of attempted concealment of a weapon[49] does not exist because it covers the same conduct prohibited by the substantive offense of concealment of a weapon. In *Dyer*, the defendant was arrested on a public street with a weapon protruding visibly from his front pocket. He was charged with attempted concealment, and the supreme court, in a five to two opinion, sustained a motion to quash the information for failure to charge an offense punishable under a valid statute.

A major problem with *Dyer*, assuming that its premises regarding the nature of attempt and concealment are correct, is that there

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45. *See* Note, *Criminal Law and Procedure*, 9 LA. L. REV. 413 (1949), and cases cited therein.

46. State v. Adams, 210 La. 782, 28 So. 2d 269 (1946).

47. 385 So. 2d 1186 (La. 1980) (Lemmon, J., concurring).

48. 388 So. 2d 374 (La. 1980).

49. CRIMINAL CODE: LA. R.S. 14:95(A)(1) (1950).

is no reason why the same conduct cannot fit the definition of more than one crime. Article 4 of the Criminal Code contemplates such a situation and allows the prosecutor the option to charge with either. More in point, article 27(c) clearly states that one can be convicted of an attempt even if one completes the crime. The court is simply without authority in arguing that conduct that meets the elements of attempt cannot be punished as such if it is conduct that also meets the elements of the substantive crime.

Another problem with *Dyer* involves a consideration of mental elements. Even assuming the correctness of the early view that one can be guilty of concealment of a weapon that is only partially hidden,[50] the substantive offense and the attempt are not identical, for the two crimes have different mental elements. Attempt requires the more demanding specific intent to commit the crime. The substantive offense as defined in article 95 requires only a general intent—the language "intentional concealment" is use of the word "intent" or "intentional" without modification, and it therefore fits the requirement of article 11 that such a statement refers to the less rigorous general criminal intent.[51]

It is submitted that the proper approach is to follow the reasoning in *State v. Fluker*[52] and the legislative history traced therein, and to hold that the offense of concealment is not committed unless the weapon is entirely concealed. As is argued in *Fluker*, prior statutes required that weapons be "in full open view," but the current statute suppresses that word formula in favor of the term "concealed." By all meanings of that word, a weapon that is partially shown is not concealed. An example of this approach may be found in *In re Ogletree*.[53]

Indeed, to agree with the rather convoluted approach of *Fluker* (guilt upon partial concealment if there was the intent to totally conceal) is to raise some close constitutional questions. The delegates to the 1974 Constitutional Convention felt quite strongly about protecting the right to keep and bear arms.[54] The constitution does except

50. State v. Bias, 37 La. Ann. 259 (1885).

51. *But see* State v. Fluker, 311 So. 2d 863 (La. 1975), which in dictum suggests that article 95 requires specific intent. That view is inconsistent with article 11.

52. 311 So. 2d 863 (La. 1975).

53. 244 So. 2d 288 (La. App. 4th Cir. 1971).

54. LA. CONST. art. I, § 11 provides: "The right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person." *See* Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 35-37 (1974).

concealed weapons from protection but it also clearly protects the carrying of weapons that are not concealed. The underlying policy is that as long as potential adversaries are warned that a person is carrying a weapon, they can adjust their behavior accordingly. Only if that warning is absent—which would be when the weapon cannot be seen—are members of the public put at an unfair peril. It may have been bad policy not to allow prohibition of carrying all weapons, but that was the clear policy choice, and to allow a strained interpretation of "concealed" to mean partial concealment is to offend this basic policy. After all, how could one ever carry a weapon except perhaps in a clear plastic holder? How could one ever hold a weapon without partially concealing it?

It would appear that the best solution would be to require full concealment for the substantive offense, thus letting the attempt statute cover instances in which there is not full concealment of the weapon, though there is an active desire to fully conceal.

DANGEROUS WEAPON

The Louisiana Supreme Court has been less than consistent in construing the dangerous weapon definition. However, two cases decided this term suggest a more stable approach. The key problem has been that the standard for determining whether a thing is a dangerous weapon depends on the manner of use, and not on any notion of inherent dangerousness.[55] Absent any mention of a pistol as a dangerous weapon in all instances, it follows that even as to a loaded pistol, it must be proven that this was an instrumentality, which "in the manner used, was calculated or likely to produce death or great bodily harm."[56]

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55. CRIMINAL CODE: LA. R.S. 14:2(3) (Supp. 1962, 1976 & 1977) provides: "'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." (Emphasis added).

56. The statement in *State v. Gould*, 395 So. 2d 647, 655 (La. 1981), that "A loaded pistol is undoubtedly a dangerous weapon irrespective of how used or exhibited," is dictum unnecessary to the holding in that case. The statement is inconsistent with the statutory definition. Further, the comment to article 2(3) clearly states, "The test as given in the article is not whether the weapon is inherently dangerous, but whether it is dangerous 'in the manner used.'" If one accepts the court's suggestion that because the article states that "dangerous weapon" *includes* it means that the definition is not exclusive and thus that the court is free to expand the notion of dangerous weapon as it chooses, then one has to apply the same argument to article 2(7). That article provides that "person" *includes* a human being from the moment of fertilization. Thus, the court could expand the term "person" as it chooses, a result hardly consistent with *State v. Brown*, 378 So. 2d 916 (La. 1980).

"Calculated . . . to produce death or great bodily harm."

To fulfill this requirement, it must be shown that in the mind of the offender, there existed a calculation or intent to produce death or great bodily harm. It would seem self-evident that since the emphasis is on the use of the thing, and it is the offender who controls the use and calculates how it is to be used, this element of the test is a subjective one that focuses on the mind of the offender. This aspect of the test has produced little difficulty.

"Likely . . . to produce death or great bodily harm."

The focus here is objective. At issue is not the mind of the defendant nor the mind of the victim, but rather an objective view of the situation. The pertinent inquiry is whether the use of the thing involved is likely to provoke the kind of charged situation in which someone (offender, victim, or third person) is likely to cause death or great bodily harm. This theory, coming from *State v. Levi*[57] and *State v. Johnston*,[58] has problems, for it borders on being a back door approach to using an "inherently dangerous object" theory. Yet, the objective approach does appear to have become relatively well established, and it has colorable support in the statutory word formula. The main problem with this approach has been the attempt to extend it to encompass situations where an objective view would result in the thing *not* being considered a dangerous weapon but the victim subjectively believing he was in great danger. In 1979, the supreme court in *State v. Bonier*[59] rejected this proposed enlargement and clearly held that belief of the victim that he was to receive death or great bodily harm was not determinative of the issue. It was also clearly established that the issue of danger should provoke an objective determination, centering on the method of use and the facts surrounding the use of the weapon.

In the current term *State v. Byrd*[60] has reinforced and further explained *Bonier*. In *Byrd*, a defendant approached the take-out window of a fast food outlet and ordered a piece of fried chicken. The employee asked for payment. The defendant pulled a toy pistol from his pocket, pointed it in the air, and demanded all the money in the register. When the employee said there was no money, the defendant grabbed the chicken and started to walk away. The employee

57. 259 La. 591, 250 So. 2d 751 (1971).
58. 207 La. 161, 20 So. 2d 741 (1944).
59. 367 So. 2d 824 (La. 1979).
60. 385 So. 2d 248 (La. 1980).

then grabbed the piece of chicken and closed the window. The defendant then left.

The lower court convicted the defendant of attempted armed robbery. The supreme court reasoned that there was not sufficient proof of use of a dangerous weapon and entered a judgment of guilty of attempted simple robbery.[61] While the court agreed that, in some instances, a toy weapon might produce a likelihood of death or great bodily harm, the facts here indicated otherwise. No one was hurt and the victim was hardly in fear of his life or bodily harm—he grabbed the chicken piece and closed the window. While the victim's subjective reaction is not conclusive in this regard, it certainly would be evidence of the fact that a reasonable person in such a situation would not react violently.

Instrumentality? The finger in the pocket?

Since *State v. Calvin*,[62] it has been generally accepted that a part of the human body does not qualify as a dangerous weapon. Such a holding is consistent with the existence of the separate offenses of simple battery, second degree battery, and aggravated battery and the gradation of punishment implicit there. It would follow that the "finger in the pocket" would not qualify as a dangerous weapon even if the victims believed the defendant was armed and were so fearful that they might react violently in a way that an objective decision could be made that there was a likelihood of death or great bodily harm.[63] This principle was accepted in *State v. Elam*,[64] although the outcome of the case makes one question how disingenuous the court was in a footnote: "This holding does not make any extension of *Levi* nor do we hold that a 'hand in a pocket' is a dangerous weapon."[65] In *Elam*, the defendant exhibited no weapon during a robbery, although he did threaten to shoot the clerk in a convenience store if the clerk did not cooperate. Officers conducting a surveillance of the store followed the defendant and stopped him two blocks away. No weapon was found on the defendant's person or in his car. The two blocks from the store to the point of apprehension were searched and no weapon was discovered. The facts were

61. For a discussion of the problem of appellate review and judgment of conviction for lesser included offenses, see Note, *Appellate Review and the Lesser Included Offense Doctrine in Louisiana*, 27 LOY. L. REV. 284 (1981).

62. 209 La. 257, 24 So. 2d 467 (1945).

63. The argument that the cloth in the pocket is a non-human instrumentality is probably too facile to stand up in light of the basic policy of gradation of offenses that would be defeated by accepting the argument.

64. 312 So. 2d 318 (La. 1975).

65. *Id.* at 322. See text at note 59, *supra*.

seemingly overwhelming that the defendant, in fact, had no gun. Nevertheless, the supreme court was willing to stretch the "some evidence" rule and hold that the threat to shoot was enough evidence from which the jury could make the inference that the defendant in fact had a weapon with which to shoot.

State v. Gould,[66] on rehearing, rejects *Elam* and reverses a conviction based on similar facts. The supreme court, relying on *Jackson v. Virginia*,[67] found that no rational trier of fact could have concluded beyond a reasonable doubt that the defendant had a pistol on his person at the time of the robbery. In *Gould*, a bank robber exhibited no gun. However, his robbery note handed to the teller read: "BE CALM & RELAX AND YOU WON'T GET SHOT!" The defendant did not have a finger in his pocket, though there was some question about whether there was a bulge in his coat pocket. The court stated that the jury must have believed the defendant had a pistol in his pocket, but it then reversed the conviction of armed robbery on grounds of insufficient evidence to support the verdict.[68]

The case seems correct in applying a more realistic test and moving away from the strained construction of the *Elam* opinion. The solution, if we are to accept some notion of inherent dangerousness, should be a legislative one, and not a bending of the rather clear meaning of the Code definition. Indeed, the substantial volume of state and federal legislation in recent years dealing with controls of handguns indicates that the legislature can move in this direction if it wants to. The wording of article 95 of the Criminal Code, for example, is quite clear; it refers to "concealment of any firearm, *or* other instrumentality customarily used or intended for probable use as a dangerous weapon . . . ." The clearly more demanding formula of article 2(3) should be applied until changed.

THEFT—VALUE

The value of items taken can make a significant difference in the

66. 395 So. 2d 647 (La. 1981).

67. 443 U.S. 307 (1979). The standard to be met under *Jackson* is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime had been proved beyond a reasonable doubt . . . ." 395 So. 2d at 653. The court went so far as to state that if the "some evidence" rule were applicable, it may have ruled differently. 395 So. 2d at 656.

68. The court suggests that if a real pistol were in the pocket, it would be a dangerous weapon, but if it were a toy pistol, it would not be. 395 So. 2d at 656. This is beyond the holding, and indeed would seem questionable. If the issue is the matter of likelihood of death or great bodily harm, it should not matter whether the pistol is real or not. What should matter is whether it looks so real that a reasonable person, judged by an objective standard, would react violently to the situation.

possible penalty upon conviction of theft offenses.[69] However, the Criminal Code does not specify a general test for determination of value. Though an amendment to article 2(2) specifies that in cases of "shoplifting," value is the "actual retail price of the property at the time of the offense,"[70] it does not define shoplifting. Louisiana has not adopted a definition similar to the federal rule that value means "face, par, or market value, or cost price, either wholesale or retail, *whichever is greater*."[71]

In the past, jury determinations of value had been given little attention by the supreme court. Cases have allowed virtually any evidence of value to go to the jury, including the victim's opinions.[72] The court has generally upheld jury determinations—even apparent compromise figures—on the basis of there being "competent" evidence to support the factual determination.[73] However, relatively easy reliance on the jury finding must give way to the requirement under *Jackson v. Virginia*[74] of proving all elements of a crime beyond a reasonable doubt.

In *State v. Peoples*,[75] the Louisiana Supreme Court reversed a jury determination of guilt of receiving stolen goods worth more than $500—involved was office equipment ranging from two to seven years of age. The state's evidence consisted of little more than a showing that the items cost $561.80 when purchased, and that it would cost $969 to replace the stolen items with new ones. Considering the age and condition of the equipment, such testimony did little to determine its value at the time of the crime. Additionally, an expert in the field of used office equipment called by the defense testified that the stolen items could be valued from $220 to $400. This was an adequate basis to support the conclusion that the jury's determination of a value of more than $500 was not supported by the record.

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69. Under CRIMINAL CODE: LA. R.S. 14:67 (Supp. 1968, 1970 & 1972), the penalty for theft can reach ten years imprisonment and a $3,000 fine for theft of items worth $500 or more; two years and $2,000 for theft of items worth $100 up to $500; and six months imprisonment and a $500 fine for items worth less than $100. A similar pattern applies to receiving stolen goods under CRIMINAL CODE: LA. R.S. 14:69 (Supp. 1972).

70. 1977 La. Acts, No. 128, § 1, *amending* CRIMINAL CODE: LA. R.S. 14:2(2) (1950).

71. 18 U.S.C. § 641 (1948) (emphasis added).

72. *See* State v. Curtis, 319 So. 2d 434 (La. 1975); State v. McCray, 305 So. 2d 433 (La. 1974).

73. *See* State v. Tullos, 190 La. 184, 182 So. 321 (1938); State v. Young, 165 La. 120, 115 So. 407 (1928).

74. 443 U.S. 307 (1978).

75. 383 So. 2d 1006 (La. 1980).