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CRIMINAL LAW

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DEFINITION OF CRIME—VAGUENESS; PROOF OF "UNLAWFUL PURPOSE"

Unlike the Model Penal Code,[1] Louisiana's Criminal Code does not generally use the term "purpose" to designate one of the culpable states of mind.[2] Rather, Louisiana's code categorizes culpability in terms of criminal intent[3]—general and specific—and criminal negligence.[4] Some statutes also include a special knowledge requirement, e.g., possession of stolen things.[5] The term "purpose," however, does appear in the simple kidnapping statute which, *inter alia*, proscribes "[t]he intentional taking, enticing or decoying away, *for an unlawful purpose*, of any child not his own and under the age of fourteen years, without the consent of its parent or the person charged with its custody. . . ."[6] The statute's use of the term "unlawful purpose" is discussed in an attempted simple kidnapping case, *State v. Gill*.[7]

In *Gill*, a stranger approached two young boys, engaged them in conversation, bought them soft drinks, and eventually " 'begged' them to get into his car . . . ."[8] When they refused and ran away, he followed them and was apprehended by the police, who had been alerted by the boys. Gill "admitted that he intended to take the boys to his home 'for a little while,' which he later explained to mean a 'few days.' "[9] He also admitted to having previously taken other young boys to his home. If common sense inferences are entitled to any weight, the conclusion is compelling that Gill intended something improper with the young boys. He contended, however, that the statute was unconstitutionally vague because "the phrase 'unlawful purpose' fails to give fair

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1. Model Penal Code § 2.02 (Official Draft 1962).
2. See La. Criminal Code: La. R.S. 14:8 (1974) [hereinafter cited as La. Crim. Code].
3. La. Crim. Code arts. 10-11.
4. La. Crim. Code art. 12.
5. La. Crim. Code art. 69 (Supp. 1984).
6. La. Crim. Code art. 45(A)(2) (emphasis added).
7. 441 So. 2d 1204 (La. 1983).
8. Id. at 1205.
9. Id.

notice to a reasonable person of the conduct which is prohibited."[10] He also contended that the evidence did not establish beyond a reasonable doubt that he acted with an intent to decoy the boys away for an "unlawful purpose." The court disagreed on both points.

The vagueness claim involved the uncertainty of the term "unlawful purpose." If not limited to purposes which are criminal, the term arguably gave the defendant inadequate notice of what, besides criminal purposes, constitutes "unlawful purposes." If the court had narrowed its interpretation of the term to include only criminal purposes, then the defendant would not have had a constitutional vagueness claim because reference to other criminal statutes would have given him fair notice.[11] The court suggested (after the fact) in a footnote that the unlawful purpose in this case was an intent to imprison falsely or to contribute to the deliquency of a minor, both of which are criminal acts.[12] Yet, in the body of the opinion the court did not take the position that the evidence had proven beyond a reasonable doubt either of these criminal purposes. Instead, the court stated that the statute gave adequate notice "[w]hether the statutory term means a purpose violative of a prohibitory law . . . or one merely disapproved by law . . . ."[13] The court thereby avoided construing the term "unlawful purpose." In addressing the sufficiency of the evidence, however, the court read the statute to require the prosecution to prove only "the absence of any lawful purpose," rather than proving any particular "unlawful purpose."[14] By minimizing the state's burden of proof, the court produced the same effect as it would have by construing the term "unlawful purpose" to encompass more than criminal purposes.

The proof problem involves the statute's uncertain *mens rea*. The simple kidnapping statute requires proof of a general intent insofar as it specifies the "*intentional* taking, enticing or decoying away . . . ."[15] By adding that the taking, etc. must be for an "unlawful purpose," the draftsmen appear to have added a specific intent requirement, except

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10. Id. at 1206.

11. See Village of Hoffman Estates v. Flipside, 455 U.S. 489, 500-01, 102 S. Ct. 1186, 1194-95 (1982).

12. The court stated:

> Defendant's holding the children at his home against their will would constitute a false imprisonment. See La. R.S. 14:46. His enticing and encouraging them to "remain away" from their home without the consent of their parents would also constitute a violation of La. R.S. 14:92 A(8). Hence, defendant admitted that his "purpose" was unlawful, in that it would fall within the scope of prohibitory stautes proscribing false imprisonment and contributing to the delinquency of minors.

441 So. 2d at 1207 n. 7.

13. Id. at 1206.

14. Id. at 1207.

15. La. Crim. Code art. 45 (emphasis added).

that the usual language of specific intent is specifically avoided.[16] The definition of specific intent requires "the offender [to have] actively desired the prescribed criminal consequences . . . ."[17] Proof of the desired "criminal consequences" is statutorily confined to those proscribed by the legislature as criminal.[18] If the language of the simple kidnapping statute is meant to require specific intent, the prosecution should have to prove that the intended purpose was criminal. Possible criminal purposes which come to mind include false imprisonment,[19] carnal knowledge of a juvenile,[20] and contributing to the delinquency of a juvenile.[21] If, however, the statute enumerated these purposes or the prosecution designated one or more of these particular criminal purposes, the prosecution would have great difficulty establishing that the defendant, in fact, specifically desired any particular criminal consequence, especially in a case of an attempt such as *Gill*.

The court follows what appears to have been the reason the legislature included the words "unlawful purpose"—to exclude from criminality those instances when a person, without consent of the parent, takes a child into temporary custody for protection of the child or some other perfectly "lawful purpose." The defendant's admissions in this case negate any such lawful purpose.[22] Requiring only that the state negate any lawful purpose by the defendant, however, effectively seems to lighten the burden of proof on the prosecution. By not requiring proof of a particular intended purpose, but instead leaving this issue to conjecture, the statute appears to impute to the defendant an unlawful purpose. Whether this imputation of an element of the offense has the effect of shifting to the defendant the burden of going forward with the evidence, which is constitutionally permissible, or shifts the burden of persuasion, which is not, the opinion does not discuss.[23]

The state's burden of proving all the elements of the crime beyond a reasonable doubt applies equally to the element of "unlawful purpose." If the statute had used the term "illegal" or the court had construed

16. See La. Crim. Code art. 11 & comments. Compare the simple kidnapping statute, La. Crim. Code art. 45, with the aggravated kidnapping statute, La. Crim. Code art. 44 (Supp. 1984), which prohibits doing certain acts "*with the intent thereby to force the victim*, or some other person, to give up anything of apparent or prospective value, or to grant any advantage or immunity, in order to secure a release of the person under the offender's actual or apparent control . . . ." (emphasis added).

17. La. Crim. Code art. 10(1).

18. La. Crim. Code art. 9.

19. La. Crim. Code art. 46. However, as the comments indicate, false imprisonment is intended to apply to cases not covered by the kidnapping statute.

20. La. Crim. Code art. 80 (Supp. 1984).

21. La. Crim. Code art. 92 (1974 & Supp. 1984).

22. See supra text accompanying note 9.

23. See Sandstrom v. Montana, 442 U.S. 510, 99 S. Ct. 2450 (1979). For a discussion of criminal law doctrine and statutes which impute criminal liability, see generally Robinson, Imputed Criminal Liability, 93 Yale L.J. 609 (1984).

the term "unlawful" to include only those acts proscribed by the criminal law, the problem of notice to the defendant would have been satisfied. The problem of proof for the prosecution, however, would have been more difficult. *Gill* resolves the case in a way that answers these questions to the benefit of the prosecution. In doing so, the court gives appropriate weight to common sense inferences that a stranger who attempts to gain custody of a juvenile is acting in a way that is "presumptively" unlawful. Although the language of "presumption" also carries with it constitutional problems related to the burden of proof,[24] constitutional constraints do not preclude all statutes which allow the jury to draw common sense inferences.[25] The court allowed the jury to do so, in effect, by construing the term "unlawful" to include more than that which has been legally proscribed. While purporting not to decide the issue, the court assumes for proof purposes and, therefore for all practical purposes, the validity of the notion that certain acts, though not prohibited as "criminal," can nevertheless be known to be "unlawful" "because they are immoral or because they are against public policy."[26]

First Degree Murder—Intent to Kill More than One Person

An interesting question addressed in *State v. Andrews*[27] is whether a defendant who kills only one person under circumstances that do not immediately endanger anyone else can be guilty of first degree murder on the basis of "a specific intent to kill or to inflict great bodily harm upon more than one person . . . ."[28] The pertinent part of the first degree murder statute does not require that the defendant have actually killed more than one person. It clearly applies in the case, for instance, of a defendant who shoots at more than one person in a single episode, but succeeds in killing only one. When, however, a defendant fires at only one person, the evidence would not ordinarily indicate an intent to kill more than one person. It is not inconceivable, however, that a person might clearly state his intention to kill more than one person, but only have the opportunity to shoot at one person. In such a case, where a second person was not in immediate danger, the supreme court in *State v. Andrews* has ruled that the evidence was insufficient to

24. See In Re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 1072 (1970) (due process clause requires proof "beyond reasonable doubt" of every essential element of the crime charged); Mullaney v. Wilbur, 421 U.S. 684, 704, 95 S. Ct. 1881, 1892 (1975) (state statute which required defendant to negate a presumption of malice held unconstitutional).

25. See, e.g., Hammontree v. Phelps, 605 F.2d 1371 (5th Cir. 1979).

26. 441 So. 2d at 1206 n.5 (quoting Black's Law Dictionary). The court also cites State v. Bulot, 175 La. 21, 25, 142 So. 787, 788 (1932), as support for this broader concept of "unlawfulness."

27. 452 So. 2d 687 (La. 1984).

28. La. R.S. 14:30(3) (Supp. 1984).

establish the intent to kill or to do great bodily harm to more than one person.

In its analysis the court did more than simply rule that there had been insufficient evidence in this case; in effect, it read the statute to require evidence of something in addition to the intent to kill more than one person. The record in *Andrews* included considerable evidence of a specific intent to kill more than one person. The defendant had quarrelled with two persons who were brothers and left to get a gun. Returning with the gun, he chased off one of the brothers, found and killed the other brother, then attempted to find the one whom he had chased shortly before. Both before and after killing the one brother, he stated quite clearly his intent to kill both.[29] The evidence of specific intent to kill more than one person was unequivocal. Nevertheless, the lack of a second shot or an attempted second shot endangering the second victim at the time of the actual killing apparently troubled the court. As Justice Lemmon discussed in dissent, however, the majority incorrectly assumed the necessity for evidence of an additional act or the imminence of harm to a second person.

Although intent is an element of a crime distinct from the act which must be proven as a fact, the evidence of the act often serves as proof for both the act and intent elements of the crime. Nevertheless, an act that would actually kill is not always necessary to prove intent to kill. Thus in a conspiracy to murder and in some attempted murders the intent to kill may be evident even in the absence of an act immediately aimed at death.[30] The pertinent part of the first degree murder statute in fact requires no second act; nor does it require the evidence of danger to a second person. The act required by the statute is the act of a killing one person, which the defendant had accomplished in this case.[31] What distinguishes this kind of first degree murder from second degree murder is not an additional act requirement, but an additional intent requirement. It is one thing to recognize as an evidentiary matter that a second act, or imminent danger to a second person, may be necessary to prove an intent to kill or to inflict great bodily harm on more than one person in the absence of clear statements of intent. The text of the statute, however, does not justify reading such a requirement into the statute itself.

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29. "He asked for a gun and told his girl friend's mother and sister that he intended to kill both the Anderson brothers. . . . He told police that he intended to 'get' both brothers." 452 So. 2d at 688.

30. It is possible to prove an attempted murder, for example, in cases in which the defendant is not even close to completing the crime. The Louisiana attempt statute, La. Crim. Code art. 27(B), provides that "lying in wait with a dangerous weapon with the intent to commit a crime, or searching for the intended victim with a dangerous weapon with the intent to commit a crime, shall be sufficient to constitute an attempt to commit the offense intended."

31. 452 So. 2d at 689-90 (Lemmon, J., dissenting).

As discussed below the misreading of this part of the first degree murder statute may have little practical impact. Unfortunately, however, the court also gave a distorted reading to the article defining specific intent in the course of justifying its strained reading of the statute.[32] The court quoted the intent statute with emphasis as follows: "that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences *to follow his act.*"[33] The court suggested that there can be no evidence of specific criminal intent unless the act which would produce the criminal consequences has actually been performed. "Firing at and killing Patrick is the act which produced the 'prescribed criminal consequence.' Based on this record, no rational trier of fact could have concluded beyond a reasonable doubt that Andrews, by firing at Patrick, actively intended to kill *both* Patrick and Joel."[34] Again the court confused the act and intent requirements.

It appears that while the jury sentenced this defendant to life imprisonment, the court may have wished to give a narrow reading to the first degree murder statute since it carries a possible death penalty.[35] Even without such a reading, defendants in similar circumstances have other protection because what the court injects into the first degree murder statute is already included in the sentencing hearing statute, Code of Criminal Procedure article 905.4. In the sentencing hearing the state must establish certain aggravating circumstances to justify the death penalty. Although the aggravating circumstances generally track the language of the first degree murder statute, the aggravating circumstance which corresponds to intent to kill more than one person is worded differently. The sentencing statute requires that "the offender knowingly created a *risk* of death or great bodily harm to more than one person."[36] It may be that the jury in this case returned the life imprisonment sentence because it did not believe that the defendant was sufficiently near to the second intended victim in this case to create the required risk. In any event, the result as to this defendant reduces the conviction from first to second degree murder, but has no effect on the sentence. The impact of the case in a future similar situation would be to eliminate the sentencing hearing. In the course of relieving some few defendants from the risk that the jury might improperly apply the sentencing hearing, however, the court has given a tortured reading to the pertinent part of the first degree murder and specific intent statutes.

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32. La. Crim. Code art. 10.
33. 452 So. 2d at 689.
34. Id. (footnotes ommitted).
35. See 452 So.2d at 689 n.2.
36. La. Code Crim. P. art. 905.4(d) (emphasis added).

FIRST AND SECOND DEGREE MURDER—CAUSATION AND CONCURRENCE

It is a general requirement of criminal law that an act and intent must concur to produce the proscribed criminal consequences.[37] Connecting these different elements in a criminal homicide can present problems of concurrence or causation. Even though the act, the intent, and other circumstances may concur, the defendant's responsibility for the resulting death may be in doubt, thus raising an issue of causation. In homicides which also involve aggravated felonies,[38] it may be difficult to distinguish whether doubts about the connection between the felony and the homicide involve an issue of concurrence or of causation. In the context of Louisiana's first and second degree murder statutes, the distinction between the issues of concurrence and causation turns largely on whether the defendant had a specific intent to kill or to do great bodily harm.

The supreme court's opinion in *State v. Shilling*,[39] a first degree murder case, exemplified the confusion over the necessary connection between a killing and the aggravating circumstance of armed robbery. The defendant and another male robbed, beat, stabbed, and left the victim for dead in a deserted area. The two robbers later returned to retrieve a knife and discovered that the victim was still alive. Putting the victim in their automobile, they drove further down the road to a more secluded area, where they beat and slit the throat of the victim. The court quite properly refused to accept the argument that the robbery and the final killing were distinct incidents. Relying on *State v. Anthony*[40] and *State v. West*,[41] the court found it reasonable to view the armed robbery as not being concluded until the defendant and his companion "to avoid detection or simply to reclaim the knife for future use, made off with the knife they used to murder and rob the victim."[42]

The court did not distinguish *Anthony*, a first degree murder case, from *West*, a second degree felony murder case.[43] *West*, although not

37. R. Perkins & R. Boyce, Criminal Law 932 (3d. ed. 1982); W. Lafave & A. Scott, Criminal Law § 34, at 237 (1972).

38. Aggravated kidnapping, aggravated escape, aggravated arson, aggravated rape, aggravated burglary, armed robbery, or simple robbery. See La. Crim. Code art. 30 (Supp. 1984); La. Crim. Code art. 31.

39. 440 So. 2d 110 (La. 1983).

40. 427 So. 2d 1155 (La. 1983); discussed in Baker, Developments in the Law, 1982-1983—Criminal Law, 44 La. L. Rev. 279, 296-99 (1983).

41. 408 So. 2d 1302 (La. 1982); discussed in Baker, Developments in the Law, 1981-1982—Criminal Law, 43 La. L. Rev. 361, 373-374 (1982).

42. 440 So. 2d at 113.

43. See discussion in Baker, supra note 40, at 296-99; Baker, supra note 41, at 373-74.

addressed by the court in such terms, involved the issue of causation. The connection between the felony and the killing concerned not only the concurrence between a criminal act and the equivalent of a *mens rea*, but also the causal relation between these and the death. Neither *Anthony* nor *Schilling* involved a problem of causation, but involved an issue of the concurrence between the killing and the attendant circumstances, *viz.*, an aggravated felony. In *Schilling* the issue was not the defendant's liability for the death, as it would be if the issue were one of causation, but the degree of criminal homicide. In this case the state had clearly proven specific intent to kill. If the court had determined that the death was not linked to the felony, the result would only have been the reduction of the conviction to second degree murder. Unfortunately, the court has continued to cloud rather than clarify these different issues by citing but not distinguishing first and second degree murder cases involving felonies. As a first degree murder case, *Schilling* involved not the problems of causation and *mens rea* associated with felony murder cases, but rather the problem of concurrence between the armed robbery and the killing for the purpose of determining qualification for the death penalty.

State v. Matthews,[44] a case of second degree murder not involving an aggravated felony, did raise an issue of causuation. The defendant and a companion beat the victim at an isolated location and, thinking her dead, left her on a slope above a canal. The victim was found floating in a canal; the immediate cause of death was determined to be drowning. The court affirmed a conviction for second degree murder, labelling the defendant's act the "legal cause" of death. The defendant's acts constituted a "but for" cause, which the court characterized as a contributing cause.[45] Although the defendant did not drown the victim and apparently did not intend the victim to drown, he was the legal cause of death. The defendant intended to kill the victim and thought he had done so; that the immediate cause of death was drowning did not relieve him from liability for the death. It could have been otherwise if another person, acting independently of the defendant, had later come along and pushed the victim into the water.[46] In the absence of an "independent" intervening cause, the defendant was responsible for the consequences of the beating and abandonment because death was the harm intended. Although the court's use of the word "contributory cause" may be somewhat misleading,[47] the court was clearly correct in finding the defendant's act to be the legal cause of the death.

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44. 450 So. 2d 644 (La. 1984).
45. Id. at 647.
46. See R. Perkins & R. Boyce, supra note 37, at 782-85.
47. See Baker, supra note 41, at 372-73.

DEFENSES—THE AGGRESSOR DOCTRINE

The defenses of self-defense[48] and the defense of others[49] are limited by the aggressor doctrine, which requires an aggressor to retreat before he can regain the right of defense.[50] Thus if A strikes B and B strikes back, A cannot claim self-defense on a second blow because he initiated the whole affair. While this much is clear, a problem arises in the case of an escalating response. If A strikes B with non-deadly force and B responds with deadly force, it is clear that the response of B has been excessive. In such circumstances, B's excessive response is unreasonable and, he is therefore not entitled to claim self-defense. Under these circumstances, would A, the original aggressor, ever have the right immediately to defend his life without retreat? If A is able to retreat, it is reasonable to require him to do so. But should the aggressor doctrine deny A the benefit of self-defense if (1) he fails to retreat because to do so would endanger his life, or if (2) able to retreat, he nevertheless does not. A literal application of the Code articles would deny A the right of self-defense even in the case when he is unable to retreat.[51]

In *State v. Gonday*,[52] on a manslaughter conviction, the first circuit confronted such a situation, although it was further complicated in that the defendant was acting to defend another person. The victim had been riding in a car which struck a truck driven by the defendant and carrying a passenger. The defendant pursued and forced the victim's car off the road. Although the circumstances were less than clear, the court assumed that defendant stood outside his truck with a shotgun while his companion-passenger approached the driver of the other car. When the companion reached to take the keys out of the automobile, the driver of the automobile reached for a gun and apparently attempted to shoot the defendant's companion. The defendant shot and killed the driver of the automobile with a shotgun blast. The court acknowledged that when the defendant shot the victim, the defendant might have been considered the aggressor for having chased the victim.[53] However, the court thought that the defendant's actions made him the aggressor *only* with regard to a reasonable response by the victim.[54] In other words,

48. La. Crim. Code art. 19; La. Crim. Code art. 20 (1974 & Supp. 1984).

49. La. Crim. Code art. 22.

50. La. Crim. Code art. 21.

51. "A person who is the aggressor or who brings on a difficulty cannot claim the right of self-defense unless he withdraws from the conflict in good faith and in such a manner that his adversary knows or should know that he desires to withdraw and discontinue the conflict." La. Crim. Code art. 21.

52. 442 So. 2d 703 (La. App. 1st. Cir. 1983).

53. Id. at 706.

54. Not every act of a defendant will make him an aggressor. Is it the character

at least for so long as the victim himself was acting reasonably in terms of his own right of self-defense, the aggressor did not have the right of defending himself or others without the necessary retreat. Finding, however, the victim's action unreasonable because he used a gun to respond to non-deadly aggression, the court determined that the defendant was not the aggressor for purposes of the homicide.

While the court's construction of the facts in this case may be open to question, its approach to the statute generally appears to be a reasonable one. The underlying principle for all the defenses of person and property is that the persons involved must act reasonably, which means that the preservation of life must have the highest priority. Just as the Code limits the taking of life in self-defense to circumstances when the defendant has a reasonable belief of "imminent danger of losing his life" and that the killing is "necessary to save himself from that danger,"[55] the same principle of reasonableness should be applied to the aggressor doctrine. When a non-deadly aggressor faces a potentially deadly response, the original aggressor's right to self-defense should turn on whether he has the opportunity to retreat safely. The Code requires the aggressor to retreat and, as long as he has the opportunity to do so, it is reasonable to hold him to that requirement. Moreover, it is reasonable to hold him strictly to the requirement because he must take into account the fact that the victim who reacts with only marginally excessive force may have understood the non-deadly aggression in terms of a threat to his life. Thus, the Code imposes an unqualified requirement that the aggressor retreat. In the more difficult situation of a non-deadly aggressor who receives a clearly excessive response which threatens his life where he has no opportunity to retreat, it would seem unreasonable for the non-deadly aggressor not to have a defense if he acts to save his life. The statute's unqualified language, however, makes no provision for such a situation. Without inserting an exception to the language of the statute, another way of reaching this result, as did the court in *Gonday*, is to say that the non-deadly aggressor is no longer the aggressor when he meets an excessive response threatening his life.

> of the act coupled with the intent of the defendant that determines whether the defendant is the aggressor . . . .
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> The act of aggression which would thereafter preclude asserting the right of self-defense must be such that the response elicted from the victim by the aggressive act can be termed a reasonable response to that act.[4] If a defendant curses a victim and the victim pulls a gun to kill the defendant certainly the defendant is not precluded by the original aggressive act of cursing from killing the victim in order to save his own life. Under these circumstances the victim's response to the aggressive acts would be unreasonable.

442 So. 2d at 706. Footnote 4 states: "The Civil Law clearly supports this proposition. *Tripoli v. Gurry*, 253 La. 473, 218 So. 2d 563 (1969); *Mut v. Roy*, 185 So. 2d 639 (La. App. 1st Cir. 1966); *Oakes v. H. Weil Baking Co.*, 174 La. 770, 141 So. 456 (1932)." Id.

55. La. Crim. Code art. 20 (1974 & Supp. 1984).

Gonday is complicated by the fact that the defendant was acting not in self-defense but in the defense of another. One may if necessary "kill in the defense of another person when it is *reasonably apparent* that the person attacked could have justifiably used such means himself . . . ."[56] Thus if A attempts to defend B, A must be concerned with whether it is "reasonably apparent" that B is not the aggressor or, if the aggressor, has retreated. In *Gonday*, the court's interpretation of the facts was that the person defended was not the aggressor and therefore had no duty to retreat.[57] The case thus avoids the more difficult situation of a killing in defense of a person who has been a non-deadly aggressor and fails to retreat when it is reasonably apparent that he had an opportunity to do so.[58] It would seem unreasonable to recognize a defense of another in the same situation. It might seem that since (under *Gonday*) the non-deadly aggressor is not considered an aggressor for purposes of a deadly response, he has no duty to retreat. The ability but failure to retreat, however, would remain a factor to be considered by the jury in determining the right to self-defense, and derivatively the right of a defendant to kill in defense of others.[59]

ARMED ROBBERY

In robbery, the doctrine of concurrence requires that the "defendant's acts of violence or intimidation must occur either *before* the taking . . . or at the time of the taking."[60] The concurrence of force with the taking distinguishes robbery, a crime against the person, from theft, a crime against property. In situations where the force appears to occur as part of the getaway rather than the taking, courts sometimes stretch the facts to connect the force to the taking in ways that are questionable. Where a weapon is used only in the getaway, however, the facts may establish an armed robbery as long as the evidence also shows the use of some other force to effect the taking. In *State v. Bridges*,[61] the taking "by use of force" and the "while armed with a dangerous weapon" elements are not clearly distinguished. The court finds the use of the weapon during the getaway sufficient to make out the elements of armed robbery, even though it notes that the weapon had not been used to take possession of the money. Connecting the use of the gun to the robbery is an issue distinct from connecting the force or intimidation to the theft even though in many cases use of a weapon satisfies both

56. La. Crim. Code art. 22 (emphasis added).

57. The court said the "case cannot be analyzed as one involving an aggressor who has withdrawn from the conflict, because the victim did not give Williams or Gonday the opportunity to withdraw." Nevertheless, it indicates that even if the person defended had been the aggressor, he had clearly retreated. 442 So. 2d at 706 n.5.

58. See id.

59. La. Crim. Code art. 20 & comments (1974 & Supp. 1984).

60. W. LaFave & A. Scott, supra note 37, § 94 at 701.

61. 444 So. 2d 721 (La. App. 5th Cir. 1984).

elements. In this case there was evidence of force to effect the taking, separate and apart from the use of the gun. While the robbery may continue for certain purposes until the escape has been completed,[62] if force or intimidation had not been used to effect the taking, the evidence would have established only a theft, not a robbery.[63]

In *State v. Thomas*,[64] the supreme court did face the issue of concurrence between the theft and the force or intimidation. In *Thomas*, a simple robbery case, the court found that the taking had been accompanied not by force, but by "intimidation" when the defendants, posing as police officers, pulled an automobile over, conducted a search, and took money. Although the victims were intimidated by the actions of the imposters, they did not discover until later that the defendants had taken money from the victim's truck. Over a strong dissent by Justice Blanche, the court determined that the taking had been through intimidation. Justice Blanche argued persuasively that the court had failed to distinguish properly between robbery and the crimes of theft and extortion.[65]

The disagreement between the majority and dissent in *Thomas* turns on whether the victim must be aware that the force or intimidation is the means to effect the taking. The statutory language, "theft . . . by use of force or intimidation," and the common understanding of armed robbery reflect the notion that the victim gives up property or fails to resist the taking of property because faced with a threat to his person. In *Thomas*, the facts indicate that the taking resulted from the misrepresentation of the defendants rather than from intimidation. While the victims were generally intimidated, the evidence recited in the opinion reflects that they did not connect the intimidation to the theft until after it had been completed. Although there is authority to support the view that such a situation constitutes robbery,[66] the fact that the intimidation was not directed to the taking suggests that a theft, rather than a robbery, occurred.

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62. The court observed that "the three armed themselves not so much to take possession of the money, but to ensure that they could get away without resistance from the victims." 444 So. 2d at 726.

63. W. LaFave & A. Scott, supra note 37, § 94, at 701; but see R. Perkins & R. Boyce, supra note 37, at 349.

64. 447 So. 2d 1053 (La. 1984).

65. 447 So. 2d at 1056-58 (Blanche, J., dissenting).

66. State v. Parson, 44 Wash. 299, 87 P. 349 (1906). Perkins and Boyce cite the case for the proposition that:

> One may be intimidated into parting with his property without consent by being required to submit to a fraudulent assertion of authority. Robbery was committed, it was held, when rogues pretending to be police officers arrested a man, required him to accompany them, searched him and took money from his pockets under a false pretense of authority.

R. Perkins & R. Boyce, supra note 37, at 348 (footnotes omitted).