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Criminal Law

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CRIMINAL LAW

by

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I. DEFENSES

A. Self-Defense

IN *Brown v. State*[1] the court of criminal appeals had to decide what right to self-defense a defendant had when attacked by two men simultaneously. The defendant, Brown, stabbed a father and son after an altercation that began as a fight with the father. Brown was convicted of attempted murder of the father and of aggravated assault of the son. At the trial the court instructed the jury concerning self-defense, but mentioned the father and son together repeatedly in its instruction, thus implying that to find Brown's use of deadly force against either victim justified, the jury must find that Brown feared death or serious bodily injury from both victims simultaneously. The court of criminal appeals reversed the conviction because the charge had unduly restricted the jury's assessment of the facts.[2] The court held that if evidence shows that a defendant was in danger of unlawful attack from two assailants, the trial court should instruct the jury that the defendant had the right to defend himself against either or both.[3]

One who provokes another's use of force may not plead self-defense.[4] Where the trial court limits the right to self-defense with a "provoking the difficulty" instruction, however, the court must also charge on a defendant's right to carry arms to the scene of a difficulty and to seek an explanation, if the evidence supports such a charge.[5] In *Banks v. State*[6] the court of criminal appeals reversed a murder conviction in a case in which the defense had inexplicably requested the provoker limitation instruction at trial. The lower appellate court ruled that because the defendant had requested the provoker limitation, he could not complain when the court failed to include a charge regarding his potential right to carry arms to the scene of a difficulty.[7] The court of criminal appeals disagreed, holding

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1. 651 S.W.2d 782 (Tex. Crim. App. 1983).
2. *Id.* at 784.
3. *Id.*
4. TEX. PENAL CODE ANN. § 9.31(b)(4) (Vernon 1974).
5. Gassett v. State, 587 S.W.2d 695, 697 (Tex. Crim. App. 1979).
6. 656 S.W.2d 446 (Tex. Crim. App. 1983).
7. *Id.* at 446-47.

that the defendant's request for the first instruction did not prevent him from complaining when the trial court failed to give the other requested charge.[8] The court reversed the decision and remanded the cause for a new trial.[9]

Two dissenting court of criminal appeals judges objected to the "right to carry arms" counterinstruction. They labelled it part of the "Code of the West," which proliferates "the romantic notion that everyone in Texas can tote his .45 and settle his differences at high noon on main street."[10] The two judges argued that the legislature impliedly rejected this longstanding Texas doctrine in 1973 when it comprehensively codified the law of self-defense in the new Penal Code without including a right to arm and to seek an explanation.[11] Continued use of the countercharge, they argued, would amount to advocating a violation of the law by allowing a person to carry prohibited weapons.[12] In answer to the dissent, however, Judge Clinton noted that although one who carries a prohibited weapon violates the law, he does not forfeit his right to use the weapon in self-defense.[13] Judge Clinton further noted that the court had earlier rejected the dissent's argument regarding legislative intent.[14]

B. Necessity

Although a majority in *Banks* held that a violation of the weapons statute would not result in a loss of right to use the prohibited weapon in self-defense, two other court of criminal appeals' decisions during the survey period appear to provide justification for the violation of carrying a weapon in anticipation of violence. *Johnson v. State*[15] and *Armstrong v. State*[16] established that one may carry a prohibited weapon when faced with a specific, imminent necessity. In both cases the Texas Court of Criminal Appeals reversed convictions for carrying pistols contrary to Penal Code section 46.02[17] because the trial courts failed to submit requested

8. *Id.* at 447. The court of criminal appeals also disagreed with the court of appeals' conclusion that no evidence existed to support a charge on the right to arm and to seek an explanation. The court found the defendant's own testimony sufficient to require the jury instruction. *Id.*

9. *Id.*

10. *Id.* (McCormick, J., Campbell, J., dissenting).

11. *See* TEX. PENAL CODE ANN. § 9.31 (Vernon 1974).

12. 656 S.W.2d at 449; *see* TEX. PENAL CODE ANN. § 46.02 (Vernon 1974) (unlawful to carry weapons).

13. 656 S.W.2d at 452; *see* TEX. PENAL CODE ANN. § 46.02 (Vernon 1974).

14. 656 S.W.2d at 451-52 (Clinton, J., concurring); *see* Young v. State, 530 S.W.2d 120 (Tex. Crim. App. 1975). In another case decided during the survey period, the San Antonio court of appeals also upheld the rule on instructing on the right to carry arms. The state had argued that a long line of cases beginning with Shannon v. State, 35 Tex. Crim. 2, 28 S.W. 687 (1894), should be overruled "because the law on the right to arm oneself and seek explanation no longer comports with contemporary times." Martinez v. State, 653 S.W.2d 630, 638 (Tex. App.—San Antonio 1983, pet. ref'd). The court rejected this argument and reversed two murder convictions because the trial court failed to give the countercharge although it burdened the self-defense instruction with the provoker limitation. *Id.*

15. 650 S.W.2d 414 (Tex. Crim. App. 1983) (en banc).

16. 653 S.W.2d 810 (Tex. Crim. App. 1983).

17. TEX. PENAL CODE ANN. § 46.02 (Vernon 1974).

instructions on the necessity defense to the juries. *Johnson* overruled conflicting parts of *Roy v. State*,[18] which appeared to foreclose the possibility of a necessity defense to a weapons offense. In *Armstrong* and *Johnson* the court rejected the state's argument, based on *Roy*, that the necessity defense was unavailable as a matter of law to a violation of section 46.02.[19] The court held that evidence that the defendants reasonably feared for their safety based upon threats from specific persons was sufficient to require a necessity defense instruction.[20] After *Armstrong* and *Johnson*, *Roy* limits the weapon carrying prohibition to situations in which no immediate necessity exists, such as mere presence in a high crime area.

Johnson and *Armstrong* provide a comparison of the related defenses of necessity and duress. In both cases evidence of a specific threat from a specific person who had already committed violent acts against the defendant or whose reputation for violence was known to the defendant made the necessity charge applicable. The more specific the threat from a particular person, however, the more appropriate is a characterization of duress rather than necessity.[21] By failing to discuss the duress defense in *Armstrong* and *Johnson*, the court of criminal appeals blurred the distinction between the duress and necessity defenses. Consequently, defense attorneys should seek a necessity instruction under Penal Code section 9.22[22] instead of, or in addition to, a duress charge.

C. *Defense of Property*

Imminence is a requirement of all necessity justifications.[23] The lack of

18. 552 S.W.2d 827 (Tex. Crim. App. 1977). Roy, who serviced coin-operated vending machines in a high-crime area, was refused an instruction on the necessity defense for a violation of the weapons statute. The court affirmed the conviction, holding that the necessity defense did not apply where legislative intent precluded its use. *Id.* at 831. The court found such an intent in § 46.02 and determined that to allow all those who felt they were in high-crime areas to carry prohibited weapons would openly thwart the purposes of the statute. *Id.*

19. 653 S.W.2d at 810-11; 650 S.W.2d at 416.

20. 653 S.W.2d at 811; 650 S.W.2d at 416.

21. *See* TEX. PENAL CODE ANN. § 8.05 (Vernon 1974). Duress and necessity are closely related defenses of justification. Both defenses involve a person's choosing between two evils, and both may be defenses to criminal acts where that person proves that the violation of the criminal law was a lesser evil than the harm that might have occurred without the violation. *See* R. PERKINS & R. BOYCE, CRIMINAL LAW 1140 (3d ed. 1982). One commentary has explained the distinction as follows: "With the defense of necessity, the pressure must come from the physical forces of nature (storms, privations) rather than from other human beings. (When the pressure is from human beings, the defense, if applicable, is called duress rather than necessity.)" W. LAFAVE & A. SCOTT, JR., HANDBOOK ON CRIMINAL LAW § 50, at 381 (1972) (footnote omitted). The duress defense has several difficulties not present in necessity: (1) duress is only a defense to a felony if the threat is of death or serious bodily injury, TEX. PENAL CODE ANN. § 8.05(a)-(b) (Vernon 1974); (2) duress is unavailable if the actor intentionally, knowingly, or recklessly placed himself in a situation in which he would probably be subject to compulsion, *id.* § 8.05(d); and (3) the defense must prove duress by a preponderance of the evidence (whereas once necessity is raised the state must prove the absence of necessity beyond a reasonable doubt), *id.* §§ 2.04, 8.05, 9.22.

22. *Id.* § 9.22.

23. *See id.* § 9.22(1) (necessity). For specific necessity defenses, see *id.* § 8.05(a) (duress); *id.* §§ 9.31-.32 (self-defense); *id.* § 9.33 (defense of a third person); *id.* § 9.51-.52 (law

imminence was fatal to the defendant's defense of property claim in *Phoenix v. State*.[24] Phoenix, the sole employee of a pool hall, fought outside the hall with the victim. The victim threatened to break the defendant's skull if he tried to re-enter the pool hall. The defendant then hit the victim with a broken bottle and killed him. The trial court refused to instruct the jury concerning the defense of property under Penal Code sections 9.41 and 9.42,[25] and the court of criminal appeals affirmed.[26] The court found that the defendant's testimony that he feared that the victim probably would have destroyed the pool table was only a fear of potential damage to the pool hall and that the defendant offered no evidence of an imminent crime or damage to property.[27]

D. Defense of Third Person

In *Ogas v. State*[28] the trial court refused to instruct the jury on self-defense, in a case involving a pregnant woman who shot a man after he slapped her. The court held that although a resort to simple force may have been justified, her resort to deadly force was unjustified.[29] The court of appeals affirmed the refusal to instruct the jury on self-defense because the victim's slap did not constitute the use or attempted use of deadly force, and only such use or attempted use would trigger a right of responsive deadly force.[30] While the same rationale might have supported rejection of the defendant's claim of defense of a third party based upon protection of the fetus, the court decided the claim on the basis of a threshold issue. An unborn fetus is not included within the definition of a person and, thus, cannot be the basis of a claim of defense of a third person. Ogas argued that a series of cases required a jury charge on self-defense whenever justification for the use of even nondeadly force was supported by the evidence. The court found that those cases involved construction of the prior statute, however, and were no longer of precedential value.[31] The court of appeals considered the fact that the defendant was pregnant, and that "a blow which would not cause death or serious bodily injury to a person of normal health could cause reasonable apprehension of such consequences to her [defendant]."[32] The court concluded, however, that the single slap to the face and not the area of the fetus did not support the required reasonable apprehension of death or serious bodily injury.[33]

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enforcement); *id.* § 9.41-.42 (defense of property); *id.* § 9.43 (defense of third person's property).

24. 640 S.W.2d 306 (Tex. Crim. App. 1982).

25. TEX. PENAL CODE ANN. §§ 9.41, .42 (Vernon 1974).

26. 640 S.W.2d at 307.

27. *Id.* Because evidence indicated that defendant had been unlawfully dispossessed of property, he would have been entitled to a charge under TEX. PENAL CODE ANN. § 9.41 (Vernon 1974) (authorizing the use of force but not deadly force to recover property).

28. 655 S.W.2d 322 (Tex. App.—Amarillo 1983, no pet.).

29. *Id.* at 324.

30. *Id.*

31. *Id.* at 325.

32. *Id.*

33. *Id.*

E. Involuntary Intoxication and Insanity

Both the defense of involuntary intoxication and the mitigation of punishment aspect of voluntary intoxication are tied to the insanity defense because both require that the defendant be rendered insane, albeit temporarily, due to the intoxicant when he committed the crime.[34] In *Shurbet v. State*[35] the court held that the fact that the defendant was an alcoholic did not establish that intoxication on the day of the crimes was involuntary.[36] Involuntariness is a prerequisite for the defense because, by statute, voluntary intoxication is not a defense to a crime.[37] The same statute states, however, that "[e]vidence of temporary insanity caused by intoxication may be introduced . . . in mitigation of the penalty attached to the offense for which he is being tried."[38] In *Shurbet* the trial court's failure to so instruct the jury at the punishment phase of the trial resulted in a reversal because the defendant presented some evidence that intoxication caused him to be temporarily insane at the time of the alleged theft.[39]

The *Shurbet* court might not have reached the same result had the case been tried after August 29, 1983, the effective date of S.B. 7.[40] S.B. 7 changed the Texas definition of insanity[41] by eliminating the "irresistible impulse" portion of the standard[42] and adding the requirement that the mental disease or defect be severe. Under amended section 8.01 the jury can find the defendant not guilty by reason of insanity only if the defendant, "as a result of a *severe* mental disease or defect, did not know that his conduct was wrong."[43] The legislature did not indicate in S.B. 7 whether it

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34. *See* TEX. PENAL CODE ANN. § 8.04(b) (Vernon 1974).

35. 652 S.W.2d 425 (Tex. App.—Austin 1982, no pet.). The Houston court of appeals reached the same result on similar facts in Watson v. State, 654 S.W.2d 730 (Tex. App.—Houston [14th Dist.] 1983, no pet.).

36. 652 S.W.2d at 428. The court, citing cases from other jurisdictions, noted that a majority of states follow the view that an alcoholic's inability to control his drinking does not constitute involuntary intoxication.

37. TEX. PENAL CODE ANN. § 8.04(a) (Vernon 1974). In contrast, involuntary intoxication is a judicially created defense. *See* Torres v. State, 585 S.W.2d 746 (Tex. Crim. App. 1979).

38. TEX. PENAL CODE ANN. § 8.04(b) (Vernon 1974).

39. 652 S.W.2d at 428. Although error occurred only at the punishment phase of trial, because the defense had elected to have the jury assess punishment, the error necessitated a new trial.

40. Act of Aug. 29, 1983, ch. 454, 1983 Tex. Gen. Laws 2640 [hereinafter cited as S.B. No. 7] (codified at TEX. PENAL CODE ANN. § 8.01(a) (Vernon Supp. 1984)).

41. The pre-S.B. 7 definition of insanity was found in TEX. PENAL CODE ANN. § 8.01(a) (Vernon 1974). That section stated:

> (a) It is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of mental disease or defect, either did not know that his conduct was wrong or was incapable of conforming his conduct to the requirements of the law he allegedly violated.

Id.

42. The irresistible impulse test questioned whether the defendant had a mental disease that kept him from controlling his conduct. W. LAFAVE & A. SCOTT, JR., *supra* note 21, § 37, at 283. The part of § 8.01 deleted in S.B. No. 7 reads: "or was incapable of conforming his conduct to the requirements of law he allegedly violated." S.B. 7, 1983 Tex. Gen. Laws at 2640.

43. TEX. PENAL CODE ANN. § 8.01 (Vernon Supp. 1984).

intended to change section 8.04 and its reference to temporary insanity. The legislature did not refer to the defense of involuntary intoxication in S.B. 7, although the decision that first recognized the defense explicitly tied incapacity from involuntary intoxication to the insanity standard of the Penal Code.[44] If involuntary intoxication is tied to the insanity standard of the Penal Code, then S.B. 7 may limit that defense's applicability.

The impact that S.B. 7 will have on the insanity defense depends upon the significance that courts give the word "know."[45] *Schuessler v. State*[46] suggests that Texas courts use a broad definition of "know." Schuessler admitted killing his four-year-old daughter to police officers who were totally unaware of the crime. He told the officers that both he and his daughter had been hexed. According to Schuessler, a devil in the form of a black horse had tried to take his daughter's soul and that her head swelled and her arms and legs shrank. He claimed to have killed her to save her soul. The court of appeals reversed the defendant's murder conviction because the jury's rejection of a verdict of not guilty by reason of insanity was "contrary to the great weight and preponderance of the evidence."[47] Unlike the man who strangles his wife because of an insane delusion that he is squeezing lemons, Schuessler knew he was killing if "knew" simply means "was aware." If, however, "know" refers to the affective ability to appreciate the consequences of actions, then Schuessler was probably insane even under the amended version of section 8.01. The courts should clarify the scope of the new insanity standard and its applicability to voluntary and involuntary intoxication in future cases.

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44. *See* Torres v. State, 585 S.W.2d 746, 749 (Tex. Crim. App. 1979).

45. The only change instituted by S.B. 7, other than limiting the defense's applicability to cases in which the actor did not know his conduct was wrong, is the requirement that any mental disease or defect causing insanity be severe. *See supra* notes 40-43 and accompanying text. Adding the word "severe" before "mental disease or defect" is particularly colorless, since any mental disability that would rob a defendant of his ability to know that his criminal act was wrong is surely severe. This statement is particularly true in light of the fact that an insanity defense is a last resort, usually asserted only for very serious crimes. *See* A. MATTHEWS, MENTAL DISABILITY AND THE CRIMINAL LAW 46-47 (1970).

46. 647 S.W.2d 742 (Tex. App.—El Paso 1983, pet. granted).

47. *Id.* at 749. By making this finding, rather than holding that the evidence to convict was insufficient, the court avoided a double jeopardy bar to retrial. *See* Tibbs v. Florida, 457 U.S. 31 (1982). Whether a Texas appellate court has the authority to reverse on this ground when mere disagreement with the jury's verdict exists rather than a finding that the evidence is insufficient when viewed in a light most favorable to the verdict, is an important question that has not been addressed in Texas. *See* Carter v. Estelle, 691 F.2d 777, 784-85 (5th Cir. 1982).

The jury's guilty verdict may be explained by the fact that the jury's request for supplementary instructions concerning the effect of a verdict of not guilty by reason of insanity was refused. The refusal was consistent with the holding in Granviel v. State, 552 S.W.2d 107, 122 (Tex. Crim. App. 1976), which stated that the consequences of such a verdict were not a matter for the jury's concern. *Id.* The court of criminal appeals reaffirmed *Granviel* in Holder v. State, 643 S.W.2d 718 (Tex. Crim. App. 1983). S.B. 7 amends TEX. PENAL CODE ANN. § 46.03 (Vernon 1974) by adding a subsection (e) that makes adherence to *Granviel* mandatory: "The court, the attorney for the state, or the attorney for the defendant may not inform a juror or a prospective juror of the consequences to the defendant if a verdict of not guilty by reason of insanity is returned." S.B. 7, 1983 Tex. Gen. Laws at 2641 (codified at TEX. CODE CRIM. PROC. ANN. art. 46.03, § (1)(e) (Vernon Supp. 1984)).

II. INCHOATE OFFENSES

A. Conspiracy

If the state's proof is insufficient on an essential element of a crime, the defendant is entitled to an acquittal. *Williams v. State*[48] involved the state's failure to prove the essential element of agreement in the crime of conspiracy. Williams plotted a kidnapping and asked the assistance of a person who was an agent of the police. The agent, who feigned agreement to the plot, was wired for sound and recorded the details of the defendant's scheme. The defendant was arrested two days before he was to have committed the crime. Since no completed offense had occurred, the state could only prosecute the defendant for an inchoate offense.[49] The state obtained a conviction for criminal conspiracy, but the court of criminal appeals reversed the conviction on the ground that the evidence showed no proof of an agreement.[50] The court concluded that because the defendant's only "co-conspirator" had merely feigned agreement, there was no meeting of the minds and hence no conspiracy.[51]

The court relied primarily upon cases decided under former Penal Code conspiracy provisions, which were cast in terms of two or more persons agreeing to commit a felony.[52] The state argued that the present statute, which focuses on the individual who "agrees with one or more persons,"[53] adopts a unilateral approach and should be applied to determine a person's culpability without regard to the culpability of alleged co-conspirators. The court, surprisingly, summarily rejected this argument.[54] The court concluded that despite the wording of the statute, an agreement between two parties was still required.[55] In reaching this conclusion the

48. 646 S.W.2d 221 (Tex. Crim. App. 1983).

49. The inchoate offenses are described in TEX. PENAL CODE ANN. §§ 15.01-.05 (Vernon 1974 & Supp. 1984).

50. 646 S.W.2d at 224.

51. *Id.* at 223; *see* TEX. PENAL CODE ANN. § 15.02 (Vernon 1974) (criminal conspiracy).

52. The court cited Weathered v. State, 128 Tex. Crim. 263, 81 S.W.2d 91 (1935); Odneal v. State, 117 Tex. Crim. 97, 34 S.W.2d 595 (1931); and Woodworth v. State, 20 Tex. App. 375 (1886). 646 S.W.2d at 223. *Weathered* and *Odneal* were decided under Tex. Penal Code art. 1622—29 (1925) (repealed 1974).

53. TEX. PENAL CODE ANN. § 15.02(a)(1) (Vernon 1974).

54. 646 S.W.2d at 223-24. The culpability of a conspirator arguably has little to do with the secret intention of a co-conspirator. Furthermore, the present conspiracy statute closely resembles the American Law Institute's Model Penal Code, which adopts a unilateral approach to the crimes of conspiracy. *See* Searcy & Patterson, *Practice Commentary*, TEX. PENAL CODE ANN. § 15.02 (Vernon 1974).

55. 646 S.W.2d at 223-24. The Texas State Bar Committee on the Revision of the Penal Code whose Proposed Revision formed the basis of the present penal code embraced "a unilateral approach, directing the inquiry to each individual's culpability by formulating the offense in terms of conduct sufficient to establish the responsibility of a given actor rather than the conduct of a group." State Bar Comm. on Revision of the Penal Code, *A Proposed Revision*, Final Draft, Oct. 1970, at 136. The Practice Commentary to the annotated statutes also uses this exact language in describing the unilateral approach of the present statute in contrast to the prior statute. Searey and Patterson, *Practice Commentary*, TEX. PENAL CODE ANN. § 15.02 (Vernon 1974). Given the similarity between the proposed version of § 15.02 and the present statute, the comments in the Practice Commentary to the present statute and the fact that nearly all jurisdictions with recent penal code codifications have elected to

court ignored the legislative history of the Texas conspiracy statute and the fact that almost all jurisdictions have redefined conspiracy as a unilateral crime.[56]

B. Criminal Attempt

Attempt, like conspiracy, is an inchoate crime.[57] Since a defendant cannot be punished for bad thoughts alone,[58] the crime of criminal attempt requires, in addition to a specific intent, some act amounting to more than mere preparation to carry out the actor's intent.[59] Distinguishing between mere preparation and perpetration of an attempt presents one of the most troublesome problems in criminal law.[60]

In *McCravy v. State*[61] the defendant pleaded guilty to the allegations in his indictment. McCravy claimed on appeal that the indictment failed to allege an offense because the acts it attributed to him were not sufficient to constitute an attempt. McCravy's attempted burglary indictment alleged that McCravy "did . . . attempt to enter a building owned by [another] by turning off electrical power to said building and climbing to the roof of said building to gain access, having at the time specific intent to commit the offense of burglary."[62]

On original submission the en banc majority held that the indictment was fundamentally defective because it failed to allege an act beyond mere preparation.[63] The court reasoned that the required act beyond mere preparation must tend toward the commission of the particular felony alleged. The court concluded: "Because an 'entry' is the gravamen of the offense . . . the State must allege . . . in an *attempted* burglary case, that

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follow the Model Penal Code recommendation that conspiracy be redefined as a unilateral, rather than a bilateral (or multilateral) crime, the discussion of the issue in *Williams* is inadequate.

56. Perhaps the strongest argument that Texas has not adopted a unilateral approach to conspiracy was not mentioned in *Williams*. The proposed penal code specifically dealt with the problem of feigned agreement in a proposed subsection that was not adopted by the legislature. The subsection stated: "It is no defense to prosecution for criminal conspiracy . . . (3) that the agreement of a purported conspirator was feigned . . ." State Bar Comm. on Revision of the Penal Code, *supra* note 55 at 135.

The Committee Commentary to the section that was not adopted stated: "this changes present law under which . . . the feigning of one conspirator negates the element of a positive agreement necessary for the offense." *See* Weathered v. State, 81 S.W.2d 91 (Tex. Crim. App. 1935); Woodworth v. State, 20 Tex. App. 375 (1886). Both *Weathered* and *Woodworth* were cited by the majority in *Williams* and because the proposed section was not adopted these cases may still be good law. *See supra* note 52 and accompanying text. In light of the unilateral language that was adopted in defining the crime of conspiracy, the later section on feigned agreement may have simply seemed unnecessary. Regardless of what result is reached, the issue is deserving of more careful attention than it received in Williams.

57. *See* TEX. PENAL CODE ANN. § 15.01 (Vernon Supp. 1984) (criminal attempt).

58. *See* W. LAFAVE & A. SCOTT, JR., *supra* note 21, § 25, at 177-78.

59. TEX. PENAL CODE ANN. § 15.01(a) (Vernon Supp. 1984).

60. *See generally* R. PERKINS & R. BOYCE, *supra* note 21, at 611-41 (discussing attempt).

61. 642 S.W.2d 450 (Tex. Crim. App. 1982) (on rehearing).

62. *Id.* at 452.

63. *Id.* at 457-58.

the accused committed an act which tended but failed to effect the commission of the intended *burglary*, as opposed to some other offense . . . ."[64] Although climbing to the roof and turning off the power were acts, they were not acts that tended to effect an intrusion or entry to the building.

On motion for rehearing the court reversed its earlier opinion and affirmed McCravy's conviction.[65] The court stated that the earlier opinion imposed a last proximate act test for judging the sufficiency of an act for criminal attempt, and noted that although the line between mere preparation and attempt was necessarily a gray area, allegation and proof of the last act was not necessary.[66] Although this case was a very close question that fell into this gray area, the court found allegations that the defendant turned off electrical power and climbed to the roof sufficient to constitute attempted burglary.[67]

In *Ex parte Buggs*[68] the court considered the other required element of criminal attempt, the specific intent to commit a particular felony.[69] The practice commentary to section 15.01 states that the attempt statute applies in conjunction with all offenses in the Penal Code, in contrast to prior codes that contained only specific attempt provisions related to particular offenses.[70] Analytical difficulties arise when this general attempt statute, which requires specific intent, is overlayed upon a statutory offense that requires a lesser culpable mental state. The court of criminal appeals held in *Gonzales v. State*[71] that the crime of attempted involuntary manslaughter did not exist, since an attempt required a specific intent and "[i]nvoluntary manslaughter negates any specific intent to kill."[72] In *Buggs* the applicant in a habeas corpus proceeding had been charged with attempted murder but had been convicted of the lesser included offense of attempted voluntary manslaughter. The applicant, relying on *Gonzales*, argued that the crime of attempted voluntary manslaughter did not exist. The court of criminal appeals disagreed. Unlike involuntary manslaughter, voluntary manslaughter is an intent or knowledge crime distinguished from the crime of murder only by the existence of an immediate influence of sudden passion.[73] This circumstance does not negate the actor's intent

64. *Id.* at 456 n.23 (emphasis in original).

65. *Id.* at 462.

66. *Id.* at 459-60. According to the American Law Institute, no Anglo-American jurisdiction adheres to the last proximate act test, which requires that the last proximate act essential to a crime occur before an attempt can be charged. MODEL PENAL CODE § 5.01 comment (Tent. Draft No. 10, 1960).

67. 642 S.W.2d at 460. For other cases during the survey period pertaining to the sufficiency of an act for criminal attempt, see Hall v. State, 640 S.W.2d 307 (Tex. Crim. App. 1982); Hise v. State, 640 S.W.2d 271 (Tex. Crim. App. 1982); Hudson v. State, 638 S.W.2d 450 (Tex. App.—Houston [1st Dist.] 1982, pet. ref'd).

68. 644 S.W.2d 748 (Tex. Crim. App. 1983).

69. *See* TEX. PENAL CODE ANN. § 15.01(a) (Vernon Supp. 1984).

70. Searcy & Patterson, *Practice Commentary*, TEX. PENAL CODE ANN. § 15.01 (Vernon 1974).

71. 532 S.W.2d 343 (Tex. Crim. App. 1976).

72. *Id.* at 345.

73. 644 S.W.2d at 750; *see* TEX. PENAL CODE ANN. § 19.04(a) (Vernon 1974).

to kill, but is like a defense to murder that reduces the offense to voluntary manslaughter.[74] Thus, the court held that if the unsuccessful attempt to cause the death of another is "generated by immediate influence of sudden passion caused by provocation from the intended victim"[75] there can be an attempted voluntary manslaughter.[76]

III. CULPABLE MENTAL STATES AND STRICT LIABILITY

A. To Which Elements Does the Mens Rea Apply?

Determining to which elements of an offense the prescribed culpable mental state applies presents a recurrent problem in both inchoate and completed crimes. An assault is aggravated when the defendant "causes bodily injury to a peace officer when he knows or has been informed the person assaulted is a peace officer . . . while the peace officer is lawfully discharging an official duty."[77] The defendant must know that the victim is a peace officer, but must the defendant also know that the officer was lawfully discharging an official duty? Under the former code, worded slightly differently,[78] the defendant had to know both facts.[79] In *Salazar v. State*,[80] however, the court overruled precedent and held that under the current statute the defendant need not have known that the peace officer was discharging an official duty.[81]

Because the legislature rejected a proposed general statutory provision that would have made the culpable mental state required in a section applicable to each element of the offense described in the section,[82] courts

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74. *See* Braudrick v. State, 572 S.W.2d 709, 710 (Tex. Crim. App. 1978).

75. 644 S.W.2d at 750.

76. *Id.* For a decision from another jurisdiction holding that attempted voluntary manslaughter is not a possible crime, see *People v. Weeks*, 86 Ill. App. 2d 480, 230 N.E.2d 12, 14 (1967), in which the court stated that:

> the "intent" required for conviction of the offense of attempt must be a "specific intent" . . . that constitutes . . . some calculation on the part of the accused. Voluntary manslaughter, on the other hand precludes any calculation but can result only from "a sudden and intense passion." . . . An act cannot be both the result of a "sudden and intense passion" and a calculated goal of prior deliberations.

At first blush, *Buggs* and *Weeks* appear to disagree. Both opinions, however, are correct under their respective penal codes. Unlike Illinois, no prior calculation is required for murder under TEX. PENAL CODE ANN. § 19.02(a)(1) (Vernon 1974) so long as intent or knowledge is present. Also, the element of sudden passion is merely a mitigating circumstance that reduces the crime to manslaughter, rather than an element that negates the required mental state for murder as in Illinois. For a discussion of the two different views of murder and manslaughter and the historical basis of the split, see Mullaney v. Wilbur, 421 U.S. 684, 692-96 (1975).

77. TEX. PENAL CODE ANN. § 22.02(a)(2)(A) (Vernon Supp. 1984).

78. Tex. Penal Code art. 1147(1) (1925) (repealed 1974) (an assault was aggravated when "committed upon an officer in the lawful discharge of the duties of his office, if it was known or declared to the offender that the person assaulted was an officer discharging an official duty").

79. Crow v. State, 152 Tex. Crim. 586, 216 S.W.2d 201 (1949).

80. 643 S.W.2d 953 (Tex. Crim. App. 1983).

81. *Id.* at 956.

82. *See* Searcy & Patterson, *Practice Commentary*, TEX. PENAL CODE ANN. § 6.02 (Vernon 1974).

must decide the issue on a case-by-case basis. *In Lugo-Lugo v. State*[83] a panel of the court of criminal appeals held, on rehearing, that murder under Penal Code section 19.02(a)(2)[84] required two mental states: a specific intent to cause serious bodily harm, and knowledge or intent that the defendant's voluntary act was clearly dangerous to human life.[85] The indictment alleged that the defendant intended to cause serious bodily harm, but failed to allege that he intentionally or knowingly performed an act clearly dangerous to human life. The panel, therefore, reversed the conviction.[86]

The court of criminal appeals granted the state's motion for rehearing and, sitting en banc, reversed the panel decision.[87] The court reasoned that "intent to cause death" under section 19.02(a)(1)[88] focuses

> upon the result and does not impose any limitation on the manner or means by which death is achieved. Ergo, if with the intent to cause death, an individual throws a small stone at an individual and kills him, the perpetrator is guilty of murder notwithstanding that the act resulting in the death was not *clearly* dangerous to human life.[89]

Serious bodily injury homicide under section 19.02(a)(2) is likewise a "result" type of crime, committed when a person who intends to cause serious bodily injury commits an act that is objectively clearly dangerous to human life.[90] In other words, intent modifies serious bodily injury but not an act clearly dangerous to human life.[91]

The case-by-case determination of the applicability of culpable mental states to various elements of a particular offense sometimes leads to results that are difficult to reconcile. In *Ex parte Smith*[92] the court of criminal appeals made explicit what was previously implicit about the required mens rea for theft; specifically, that "there is no required culpability in the

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83. 650 S.W.2d 72 (Tex. Crim. App. 1983) (on rehearing).

84. TEX. PENAL CODE ANN. § 19.02(a)(2) (Vernon 1974) provides:

> A person commits an offense if he: . . . (2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual . . . .

85. 650 S.W.2d at 81.

86. *Id.* at 74.

87. *Id.* at 85.

88. TEX. PENAL CODE ANN. § 19.02(a)(1) (Vernon 1974) provides that "[a] person commits an offense if he: (1) intentionally or knowingly causes the death of an individual."

89. 650 S.W.2d at 81 (emphasis in original). The exclusive focus on intent ignores the fact that murder under § 19.02(a)(1) may be committed intentionally or knowingly. The court's example of the stone is correct; the defendant is guilty for desiring and causing the result even if he is surprised at the outcome because the act is not dangerous. The converse, however, is also true. Even if a person is indifferent to, but does not desire to kill passengers on a plane on which he has placed a bomb in order to obtain insurance proceeds for some of the plane's cargo, the defendant is nonetheless guilty of murder if the bomb causes death because the actor knew that the passengers' deaths were almost certain to occur due to the manner or means used to accomplish his objective.

90. 650 S.W.2d at 81.

91. *Id. Lugo-Lugo* was applied in later cases during the survey period. *See* Allen v. State, 651 S.W.2d 267 (Tex. Crim. App. 1983); Peterson v. State, No. A14-82-789 CR (Tex. App.—Houston [1st Dist.] June 16, 1983).

92. 645 S.W.2d 310 (Tex. Crim. App. 1983).

offense of theft . . . beyond that of a specific intent to deprive the owner of property."[93] Thus, the state need not allege or prove that the defendant's appropriation of property, done with intent to deprive the owner of the property, is intended or known to be without the effective consent of the owner. In the offense of credit card abuse, however, Penal Code section 32.31(b)(1)(A)[94] requires that the person who intends to obtain property fraudulently know that the card has not been issued to him *and* that he does not have the holder's effective consent to use the card.[95] In *Ex parte White*[96] the court vacated a credit card abuse conviction because the indictment, which alleged "intent to fraudulently obtain property and services . . . without the effective consent of the Complainant, *knowing that* the credit card had not been issued to the Defendant,"[97] was fundamentally defective. The defect lay in the indictment's failure to allege that the defendant knew he did not have the owner's effective consent to use the card.

The fact that the owner's lack of effective consent need not be known to the defendant to support a conviction for theft, but is required to establish the offense of credit card abuse, can be rationally explained by the different wording of the two statutes.[98] The differing results, however, seem difficult to reconcile in light of the similarities of the two statutes. Credit card abuse under this part of the statute[99] is a specific type of theft. As the Practice Commentary points out, this portion of the credit card abuse statute "represents a departure from the general consolidation of theft offenses under Chapter 31 . . . the conduct specified in Subsections (b)(1) and (11)

93. *Id.* at 312. TEX. PENAL CODE ANN. § 31.03(a), (b) (Vernon Supp. 1984) (theft) provides: "A person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property. (b) Appropriation . . . is unlawful if: (1) it is without the owner's effective consent; or (2) the property is stolen and the actor appropriates the property knowing it was stolen by another."

94. *Id.* § 32.31(b)(1)(A) (Vernon 1974) provides: "A person commits an offense if: (1) with intent to obtain property or service fraudulently, he presents or uses a credit card with knowledge that: (A) the card, whether or not expired, has not been issued to him and is not used with the effective consent of the cardholder . . . ." *Id.*

95. *See Ex parte* White, 644 S.W.2d 488 (Tex. Crim. App. 1982); *Ex parte* Sharpe, 581 S.W.2d 183 (Tex. Crim. App. 1980); Baker v. State, 593 S.W.2d 719 (Tex. Crim. App. 1980). The different wording of the theft and credit card abuse statutes supports the finding of different mens rea requirements. *Compare* TEX. PENAL CODE ANN. § 32.31(b)(1)(A) (Vernon 1974); *with id.* § 31.03(a), (b). The differing results reached under the two statutes are hard to reconcile, however, in light of the similarity of the crimes. Credit card abuse under § 32.31 (b)(1)(A) is a specific type of theft. *See* Searcy & Patterson, *Practice Commentary*, TEX. PENAL CODE ANN. § 32.31 (Vernon 1974). As such, it should have the same mens rea requirements as other theft offenses.

96. 644 S.W.2d 488 (Tex. App.—Dallas 1982, no pet.).

97. *Id.* at 489 (emphasis in original).

98. The credit card abuse statute specifies an intent to obtain property or service fraudulently and knowledge that the card has not been issued to him and is not used with the effective consent of the holder. Theft by contrast specifies only an intent to deprive the owner of the property. As a matter of logic and grammar, the additional knowledge requirement in credit card abuse can apply to the element of the effective consent of the owner.

99. TEX. PENAL CODE ANN. § 32.31(b)(1)(A) (Vernon 1974).

clearly is theft under Section 31.03 [theft]."[100]

In contrast to *Ex parte White*, knowledge of the owner's consent was held not to be an element of the offense involved in *Thomas v. State*.[101] Thomas claimed that Penal Code section 31.07[102] required the state to prove that he knew that the vehicle he stole belonged to the complainant. The court rejected this argument and found that the state had only to prove that the defendant knowingly or intentionally operated the vehicle.[103] This decision effectively made section 31.07 a strict liability offense, because virtually everyone who operates a vehicle does so knowingly or intentionally. Under *Thomas*, one who borrows a stolen car under the false impression that the lender owns it is subject to criminal prosecution.

B. Strict Liability Offenses

Penal Code section 6.02(b) requires that a culpable mental state of intent, knowledge, or recklessness be read into any penal statute in which no mens rea is specified, unless the definition plainly dispenses with any mental element.[104] When a mental state requirement is read into a statute, ambiguity as to which elements it applies to can remain. In *Diggles v. State*[105] the court read a mens rea requirement, knowledge, into a voter assistance statute that contained no express mens rea requirement.[106] The defendant argued that the knowledge requirement should apply not only to the conduct proscribed by the statute, but also to the statutory exemption for election clerks and judges. She claimed that the state should have to prove that she knew she was not a clerk, deputy clerk, or judge. The court held, however, that the required mental state applied only to the conduct proscribed by the statute.[107]

In *Exxon Company U.S.A. v. State*[108] the state prosecuted Exxon for the offense of air pollution. Exxon argued that the provisions of section

100. Searey & Patterson, *Practice Commentary*, TEX. PENAL CODE ANN. § 32.31 (Vernon 1974).

101. 646 S.W.2d 565 (Tex. App.—Houston [1st Dist.] 1982, no pet.).

102. TEX. PENAL CODE ANN. § 31.07 (Vernon 1974). This section makes it illegal to operate intentionally or knowingly another's boat, airplane, or motor-propelled vehicle without the owner's consent. *Id.*

103. 646 S.W.2d at 566-67. *But see* Lynch v. State, 643 S.W.2d 737 (Tex. Crim. App. 1983), decided two weeks after *Thomas*, where the defendant presented evidence of his mistaken belief that the person from whom he had borrowed the vehicle was the owner. The court of criminal appeals reversed the conviction because of the failure of the trial court to instruct the jury on the defense of mistake of fact under TEX PENAL CODE ANN. § 8.02 (Vernon 1974).

104. TEX. PENAL CODE ANN. § 6.02(b) (Vernon 1974).

105. 641 S.W.2d 667 (Tex. App.—Dallas 1982, pet. ref'd).

106. TEX. ELEC. CODE ANN. art. 15.30(a) (Vernon Supp. 1984) provides in part:

> In any single election, it is unlawful for a person, other than a clerk or deputy clerk for absentee voting or an election judge or clerk at a regular polling place, to assist in preparing the ballot of more than five voters who are not related as parent, grandparents, spouse, child, brother, or sister to the person rendering the assistance.

107. 641 S.W.2d at 669.

108. 646 S.W.2d 536 (Tex. App.—Houston [1st Dist.] 1982, pet. ref'd).

6.02(b) should be applied to the air pollution statute even though that statute was outside the Penal Code. Although the court of appeals agreed that the statute applied to offenses outside the Penal Code, it held that the legislature had dispensed with a culpable mental state requirement for air pollution statute violators.[109] After noting that the statute had been transferred from the Penal Code to the civil statutes,[110] the court reasoned that "if the Legislature had intended to require proof of a culpable mental state, it could have done so easily when it amended the statute and transferred it from the Penal Code to the civil statutes."[111] Also, in other cases that applied the provisions of section 6.02 to statutes outside the Penal Code, "the nature of the offense required that an identifiable person be aware of a situation."[112] Air pollution cases involving corporations would be difficult to prosecute if the crime required a culpable mental state, because of the difficulty in charging one person with responsibility for causing the problem. The court concluded that "[c]onsidering the risks to public health, to require anything other than a strict liability standard would be to deny the public the right to be protected from hazardous activities."[113]

Two courts resolved differently the issue of whether an offense was strict liability or whether a culpable mental state was required pursuant to section 6.02(b) in cases that involved similar statutes. In *Bryant v. State*[114] the court reversed a conviction for driving with a suspended license because the indictment failed to allege a culpable mental state.[115] Though the statute required no mens rea, the court read a knowledge of suspension requirement into it because the statute did not readily reveal a legislative intent to eliminate mens rea.[116] In *Clayton v. State*,[117] however, the court affirmed the defendant's conviction for driving with a suspended license,[118] despite the state's failure to allege a culpable mental state for the

109. 646 S.W.2d at 538.

110. The air pollution legislation was located at Tex. Penal Code art. 698d, §§ 1-6 (1925) (repealed 1974).

111. 646 S.W.2d at 538 (citing *Ex parte* Ross, 522 S.W.2d 214 (Tex. Crim. App. 1975)). The court based its analysis on American Plant Food Corp. v. State, 587 S.W.2d 679 (Tex. Crim. App. 1979) (involving a water pollution statute); *Ex parte* Ross, 522 S.W.2d 679 (Tex. Crim. App. 1979) (involving a water pollution statute).

112. 646 S.W.2d at 538.

113. *Id.*

114. 643 S.W.2d 241 (Tex. App.—Fort Worth 1982, no pet.).

115. TEX. REV. CIV. STAT. ANN. art. 6701(h), § 32(c) (Vernon 1977). The statute provides:

> Any person whose license or registration or non-resident's operating privilege has been suspended or revoked under this Act and who, during such suspension or revocation drives any motor vehicle upon any highway . . . shall be fined not more than Five Hundred Dollars ($500) or imprisoned not exceeding six (6) months, or both.

Id.

116. 643 S.W.2d at 242.

117. 652 S.W.2d 810 (Tex. App.—Amarillo 1983, no pet.).

118. TEX. REV. CIV. STAT. ANN. art. 6687(b), § 34 (Vernon 1977). The statute provides:

> Any person whose operator's, commercial operator's, or chauffeur's license or driving privilege as a nonresident has been cancelled, suspended, or revoked

offense. The court based the result on the conclusion that section 6.02(b) was inapplicable because "this offense is one of those where the legislature intended to and has dispensed with a culpable mental state."[119]

IV. PRESUMPTIONS

Statutes may contain presumptions to ease the state's burden of proof. Thus, although the *Bryant* court required the prosecution to prove that the defendant knew his license had been suspended, the prosecution's burden was eased by a statutory presumption in article 6701(h).[120] The statute states that notice of license suspension "shall be presumed to be complete upon the expiration of nine (9) days after [notice from the Department] is deposited in the United States mail."[121] In *Rogers v. State*[122] the court upheld this presumption against the defendant's claim that the presumption was unconstitutional. The defendant argued that no rational connection existed between mailing and receipt of notice, and that the presumption, therefore, impermissibly shifted the burden of proving the required mental state to the defendant.[123]

A statutory presumption in the Texas obscenity statute[124] did not fare as well as the presumption upheld in *Rogers*. Section (e) of the statute provides that: "A person who promotes . . . obscene material . . . in the course of his business is presumed to do so with knowledge of its content and character."[125] In *Davis v. State*[126] the court of criminal appeals found this presumption unconstitutional as a violation of the first amendment.[127] The court relied on *Smith v. California*,[128] which declared unconstitutional a Los Angeles ordinance imposing strict liability upon a bookseller found in possession of obscene material. Although *Smith* reaffirmed that obscene material was not protected by the first amendment, the court found the ordinance unconstitutional because of its chilling effect on protected first

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> as provided in this Act, and who drives any motor vehicle upon the highways of this State while such license or privilege is cancelled, suspended, or revoked is guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than Twenty-five Dollars ($25) nor more than Five Hundred Dollars ($500), and, in addition, there shall be imposed a sentence of imprisonment of not less than seventy-two (72) hours nor more than six (6) months.

Id.

119. 652 S.W.2d at 812.

120. TEX. REV. CIV. STAT. ANN. art. 6701(h), § 31 (Vernon 1977).

121. *Id.*

122. 641 S.W.2d 404 (Tex. App.—Dallas 1982, no pet.).

123. *Id.* at 406.

124. TEX. PENAL CODE ANN. § 43.23 (Vernon Supp. 1984).

125. *Id.* § 43.23(e). *Id.* § 43.21(5) defines "promote" as "to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same."

126. 658 S.W.2d 572 (Tex. Crim. App. 1983).

127. *Id.* at 578. The court also stated that the presumption violated due process because: (1) it lacked a rational connection between the basic fact and the presumed fact; and (2) it tended to displace the burden of proof. *Id.* at 580.

128. 361 U.S. 147 (1959).

amendment material.[129] The Texas obscenity statute, as opposed to the ordinance in *Smith*, contains a knowledge requirement. Without the statutory presumption, however, the state could not have proved this element in *Davis*.[130] The trouble with the presumption was that it tended to convert the obscenity statute into the kind of strict liability offense condemned in *Smith*. The presumption, even if permissive or rebuttable, fostered the self-censorship problem because "no matter . . . how numerous and varied the publications or the films . . . inside the premises, an owner, proprieter, exhibitor, manager, or clerk is subject to conviction solely because of the presumption. . . . The risk of suppressing freedom of expression is not just negligible . . . it rises to astronomical proportions."[131]

Two weeks prior to the *Davis* opinion, the court of criminal appeals rejected an opportunity to reach the same holding that it issued in *Davis*. In *Skinner v. State*[132] the court of appeals [hereinafter *Skinner I*] reversed a conviction under the obscenity statute on the same grounds later adopted in *Davis*.[133] On discretionary review, however, the court of criminal appeals held that the court of appeals "was correct in reversing appellant's conviction . . . although we disagree as to the reasons the Court of Appeals used to reach the result it did."[134] According to the court, it was unnecessary for the lower court to reach the constitutionality of the presumption because a review of the record showed that no rational trier of fact could have found appellant guilty.[135] This conclusion was apparently based upon the weak evidence, or absence of evidence, of Skinner's knowledge of the obscene nature of the film: the defendant, a student, had only worked at the theatre one month during hours that fit her school schedule; she had no managerial duties or financial interest in the theatre; she had nothing to do with the operation of the film or the selection of films to be shown; she merely sold tickets and popcorn and performed miscellaneous duties like cleaning the theatre.[136] Yet two weeks later in *Davis*, the threshold finding that the evidence was insufficient absent the presumption, made it necessary to review the statutory presumption of knowledge because the only way the trier of fact could conclude that Davis had knowledge of the character and content of the film was through the presumption.[137] In fact, the converse to the court of criminal appeals decision in *Skinner* [hereinafter *Skinner II*] was held to be true a few months later

129. *Id.* at 154.

130. 658 S.W.2d at 576. The only evidence against Davis was the fact that he was the only employee present in the bookstore and that he gave change to an undercover officer who then viewed an obscene film in one of the store's peepshow booths. The *Davis* court concluded that "the only way one could conclude that appellant [Davis] had knowledge of the character and content of the film . . . is through the presumption contained in subsection 43.23(e)." *Id.*

131. *Id.* at 578-79.

132. 647 S.W.2d 686 (Tex. App.—Houston [1st Dist.] 1982).

133. *See supra* note 127.

134. Skinner v. State, 652 S.W.2d 773, 774 (Tex. Crim. App. 1983).

135. *Id.* at 776.

136. *Id.* at 775.

137. 658 S.W.2d at 576.

in *Hall v. State*.[138]

In *Hall* evidence of the defendant's guilt under the obscenity statute was so overwhelming that the evidence was sufficient even without the presumptions.[139] Thus the Court of Criminal Appeals held that it was error for the same court of appeals that decided *Skinner I* to reverse the conviction on the basis of the unconstitutional statutory presumptions.[140] One can only sympathize with the hapless court of appeals that was scolded twice for reaching the merits; once because the evidence was insufficient without the presumption, and once because evidence was sufficient without the presumption. A further irony is that the decision on the merits in both *Skinner I* and *Hall*, which the higher court disavowed on discretionary review, reached the same result as did the court of criminal appeals in *Davis*, which even adopted the reasoning of the *Skinner I* opinion by reference.[141]

In referring to the court of appeals decision in *Skinner*, the court of criminal appeals stated in *Davis* that it had reversed *Skinner I*.[142] Not only is this statement wrong—*Skinner I* was affirmed not reversed; only the lower court's analysis was rejected—it was also unfortunate. By failing to explicitly admit error in refusing to reach the merits of the constitutional issue in *Skinner II*, the court failed to clarify that the insufficiency of evidence concerning the presumed fact is no reason to fail to review a presumption's constitutionality. In fact, as the court of criminal appeals later acknowledged in *Davis* insufficient evidence concerning the presumed fact makes review of the presumption imperative, because only the existence of the presumption can explain and support the verdict.

When *Skinner I* was belatedly adopted in *Davis*, the decision was characterized as "a well written discussion of the usual rules governing the construction of the usual and ordinary presumptions . . . ."[143] As was previously discussed, the treatment of the presumption in *Davis* was almost entirely devoted to explaining why the presumption in question was not "usual," but was one that infringed upon first amendment rights.[144] The more traditional reasons, adopted from *Skinner I*, were merely listed in conclusionary fashion in *Davis*:[145]

> [First] it cannot be stated with reason and substantial assurance that the presumed fact [defendant's knowledge of the character and content of obscene material] is always more likely than not to flow from

138. 661 S.W.2d 101 (Tex. Crim. App. 1983), *rev'g* Hall v. State, 646 S.W.2d 489 (Tex. App..—Houston [1st Dist.] 1983).

139. 661 S.W.2d at 102. Unlike the defendant in *Skinner* who had no managerial role at the theatre, Hall was the admitted manager who personally promoted the sale of dildos at a concession stand.

140. *Id.*

141. 658 S.W.2d at 576.

142. *Id.*

143. *Id.* at 579.

144. *Id.* at 578-79.

145. *Id.* at 580. Because *Davis* adopted the opinion of the court of appeals in *Skinner I*, by reference some of the discussion that follows will refer to *Skinner*'s analysis.

> the proved fact ["promotion" of the obscene material in the course of defendant's business] upon which it is made to depend. [Second] it [the presumption] tends to displace the burden of proof.[146]

Davis should have been limited to its cogent analysis of the first amendment issue. Reliance on the remaining grounds, adopted from *Skinner I*, was unnecessary and ill-advised. The court did not specify whether the burden of proof, which the presumption tended to displace, was a production or persuasion burden or both. Regardless, the statement is incorrect.

By virtue of Texas Penal Code section 2.05,[147] all statutory presumptions are permissive inferences or permissive presumptions. The jury is instructed that it may find the presumed fact, upon proof of the fact giving rise to the presumption, but is not required to do so. Unlike mandatory presumptions, which involve an inherent shift in the burden of production or persuasion,[148] permissive inferences do not require the defendant to bring forward any evidence. The required permissiveness of presumptions in Texas was enforced by several cases decided during the survey period in which convictions were reversed, even in the absence of an objection, because of the trial court's failure to instruct the jury consistent with the requirements of section 2.05.[149]

The rationale for concluding that the permissive inference at issue in *Davis* unconstitutionally shifted some burden of proof to the defendant was that "the only effective way for a defendant to rebut this presumption is by taking the stand in his own defense and attempting to prove his lack of knowledge . . . ."[150] This analysis confuses the defendant's desire for

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146. *Id.* at 580.

147. TEX. PENAL CODE ANN § 2.05 (Vernon 1974). The statute provides:

> When this code or another penal law establishes a presumption with respect to any fact, it has the following consequences:
>
> (1) if there is sufficient evidence of the facts that give rise to the presumption, the issue of the existence of the presumed fact must be submitted to the jury, unless the court is satisfied that the evidence as a whole clearly precludes a finding beyond a reasonable doubt of the presumed fact; and
>
> (2) if the existence of the presumed fact is submitted to the jury, the court shall charge the jury, in terms of the presumption and the specific element to which it applies, as follows:
>
> (A) that the facts giving rise to the presumption must be proven beyond a reasonable doubt;
>
> (B) that if such facts are proven beyond a reasonable doubt the jury may find that the element of the offense sought to be presumed exists, but is not bound to so find;
>
> (C) that even though the jury may find the existence of such element, the state must prove beyond a reasonable doubt each of the other elements of the offense charged; and
>
> (D) if the jury has a reasonable doubt as to the existence of a fact or facts giving rise to the presumption, the presumption fails and the jury shall not consider the presumption for any purpose.

Id.

148. *See* Hardesty v. State, 656 S.W.2d 73, 76 (Tex. Crim. App. 1983). If the presumption shifts a persuasion burden it is unconstitutional. Sandstrom v. Montana, 442 U.S. 140 (1979).

149. *See* Coberly v. State, 644 S.W.2d 734 (Tex. Crim. App. 1983); Goswick v. State, 656 S.W.2d 68 (Tex. Crim. App. 1983); Jones v. State, 658 S.W.2d 594 (Tex. Crim. App. 1983).

150. 647 S.W.2d at 691. This issue was not discussed in *Davis* except for its adoption by

an acquittal with legal requirements of the burdens of production and persuasion. In a case without a presumption, if the State presents volumes of evidence highly probative of the defendant's guilt of every element of an offense, the defendant will feel pressure to present evidence that will cast doubt on the State's proof on one or more of the elements in order to avoid a conviction. That does not mean, however, that the State's duty to produce evidence that persuades the fact finder has shifted to the defendant on any of the required elements of the offense.[151] Permissive inferences should be subject to careful appellate review,[152] but they are not vulnerable to attack on the ground of an unconstitutional shift in the burden of proof.

It is precisely because permissive inferences shift no burden to the defendant that they have been given favored treatment on appellate review. In *County Court of Ulster County v. Allen*[153] the United States Supreme Court held that mandatory presumptions are to be reviewed "facially" to determine if a rational connection exists between the basic fact, or the fact giving rise to the presumption, and the presumed fact. By "facial" the court referred to review based on the face of the statute without resort to the particular facts in the case.[154] In contrast, permissive inferences may be sustained in a rational connection review if the evidence at trial supports the jury's finding on the presumed fact even if the presumption would be irrational in general experience or in some hypothetical situation.[155] This type of review in light of the evidence is called "applied review."[156] Although all statutory presumptions in Texas are permissive, *Davis* failed to utilize an applied review. The court stated that it could not be said that the presumed fact is *always* more likely than not to flow from the presumed fact on which it is made to depend."[157] The use of the word "always" suggests a review divorced from the facts of the case rather than an applied review. Furthermore, the language used by the court was taken from *Leary v. United States*,[158] which involved the review of a mandatory presumption.[159] *Davis* should have limited the basis of its holding to the first amendment issue and the court of criminal appeals should clarify its

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reference of *Skinner I*. For this reason, the rationale discussed here is derived from *Skinner I*.

151. In fact, the burden of persuasion cannot be shifted constitutionally to the defendant. *See* Sandstrom v. Montana, 442 U.S. 140 (1979); Mullaney v. Wilbur, 421 U.S. 684 (1975).

152. *See* Schmolesky, *County Court of Ulster County v. Allen and Sandstrom v. Montana: The Supreme Court Lends an Ear But Turns Its Face*, 33 RUTGERS L. REV. 261, 295-304 (1981).

153. 442 U.S. 140 (1979).

154. *Id.* at 155-56.

155. *Id.*

156. *Id.*

157. 658 S.W.2d at 580.

158. 395 U.S. 6 (1969).

159. For a critique of the characterization of *Leary* as a mandatory presumption and the use of a lesser standard of review for permissive inferences, see generally Schmolesky, *supra* note 152. If the use of facial review for the permissive inference in *Davis* was a decision to reject the diminished applied review standard of *Allen* on the ground that the Texas Constitution requires a more stringent standard, it would be salutary. No basis for this conclusion

treatment of burden of proof and rational connection issues in future presumption cases.

Section 2.05 of the Penal Code, enforced by cases holding that the failure to instruct the jury consistent with the statute is reversible error even in the absence of objection,[160] insures that statutory presumptions in Texas are permissive inferences. The same may not be true, however, for judicially created presumptions or inferences.

Schenk v. State[161] involved the familiar common law presumption that one is presumed guilty of theft or burglary if he possesses recently stolen property.[162] Schenk argued that the trial court erred by instructing the jury on the presumption or inference without properly charging the jury under section 2.05,[163] even though he had not objected to the instruction at trial. The court of appeals affirmed, distinguishing the cases holding that the failure to instruct the jury under section 2.05 is fundamental error, on the basis that the statute applies only to statutory presumptions and not to judicially created ones.[164]

Hardesty v. State,[165] decided three months after *Schenk*, casts doubt on *Schenk*'s continuing validity. Although *Hardesty* did not deal with instructions under section 2.05 or mention *Schenk*, the court stated that the same judicially created presumption charged in *Schenk* was more correctly characterized as a permissive inference.[166] *Hardesty* may presage that the court intends to treat all presumptions as permissive inferences, whether legislatively or judicially created.

V. Specific Penal Code Provisions

A. Aggravated Possession of Marijuana—Inadequate Caption

The court of criminal appeals declared several Penal Code provisions unconstitutional in 1983. In *Ex parte Crisp*[167] the court declared an

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exists, however, since *Allen* and the difference between facial and applied review is not discussed. 658 S.W.2d at 580.

160. *See supra* note 149.

161. 652 S.W.2d 509 (Tex. App.—Houston [1st Dist.] 1983, pet. ref'd).

162. Other cases decided during the survey period discussing this judicially created presumption include: Hynson v. State, 656 S.W.2d 460 (Tex. Crim. App. 1983); Jackson v. State, 645 S.W.2d 303 (Tex. Crim. App. 1983); Jordan v. State, 658 S.W.2d 675 (Tex. App.—Dallas 1983, no pet.); Cantu v. State, 655 S.W.2d 278 (Tex. App.—Corpus Christi 1983, no pet.); Hite v. State, 653 S.W.2d 455 (Tex. App.—Houston [14th Dist.] 1982), *rev'd on other grounds*, 650 S.W.2d 778 (Tex. Crim. App. 1983).

163. Tex. Penal Code Ann. § 2.05 (Vernon Supp. 1984); *see supra* note 147 (text of statute).

164. 652 S.W.2d at 512. The court emphasized the prefatory words of § 2.05: "When this code or another penal law establishes a presumption . . . ."

165. 656 S.W.2d 73 (Tex. Crim. App. 1983).

166. *Id.* at 76. The term "presumption" has been used throughout this Article as a generic term that includes conclusive, mandatory, and permissive devices. In *Hardesty* the court of criminal appeals stated that although in prior cases it had used the term presumption to refer to the inference of guilt from possession of recently stolen property, it now disavowed that usage and stated that the proper term was permissive inference. *Id.* at 76-77.

167. 661 S.W.2d 944 (Tex. Crim. App. 1983), *aff'g Ex parte* Crisp, 643 S.W.2d 487 (Tex. App.—Austin 1982).

amendment to the Controlled Substances Act[168] unconstitutional although the act it amended was held to remain in effect. H.B. 730[169] created two levels of offenses for possession of marijuana in addition to the three levels already contained in the in the Controlled Substances Act.[170] The most serious of the new offenses created was aggravated possession for possession of more than 50 pounds of the substance. Crisp and his codefendants were charged with aggravated possession under indictments alleging that each of them possessed more than 2000 pounds of marijuana. In pretrial writs of habeas corpus Crisp and his codefendants alleged that the caption to H.B. 730 violated the Texas Constitution, article III, section 35[171] since it failed to provide adequate notice of the major changes contained in the body of the bill. The caption stated simply: "An Act relating to offenses and criminal penalties under the Texas Controlled Substances Act."[172]

The trial court denied the defendant's claims, but the court of appeals agreed with the defendants. The appellate court pointed out that the caption made several changes in the Penal Code and the Code of Criminal Procedure, and found that the caption inadequately described the ten new sections H.B. 730 added to the Controlled Substances Act.[173] The court, however, denied the defendants' petitions for writs of habeas corpus because the indictment alleging possession of over 2000 pounds alleged an offense under the pre-amendment Controlled Substances Act.[174] The decision benefitted the defendants, for they were subject only to the penalty level in the unamended act.[175] In its plurality affirmance the court of criminal appeals stated: "Since the caption refers to one act and has the effect of modifying at least two other separate statutes not mentioned in the caption, it does not give readers fair notice of the subject matter contained within the bill."[176] The plurality rejected the dissent's argument that the fair notice standard should be limited to a determination that the caption is not fraudulent.[177] The dissent warned that the decision would jeopard-

168. TEX. REV. CIV. STAT. ANN. art. 4476—15 (Vernon 1976 & Supp. 1984).

169. Act of Sept. 1, 1981, ch. 268, 1981 Tex. Gen. Laws 696.

170. *See* 643 S.W.2d at 489.

171. TEX. CONST. art. III, § 35. That section provides:

> No bill . . . shall contain more than one subject, which shall be expressed in its title. But if any subject shall be embraced in an act, which shall not be expressed in the title, such act shall be void only as to so much thereof, as shall not be so expressed.

Id.

172. 643 S.W.2d at 489.

173. *Id.* at 490.

174. *Id.* at 492. Prior to H.B. 730 possession of more than four ounces of marijuana was an offense.

175. *Id.* at 489. The amendment authorized imprisonment for life or a term of not less than 15 or more than 99 years as opposed to the unamended statutory maximum of two to ten years and a $5000 fine. *Id.*

176. 661 S.W.2d at 947.

177. *Id. Crisp* will have little impact on prosecutions under the Controlled Substances Act because of the holding that the original act is still valid as it stood prior to passage of H.B. 730. *See* Prescott v. State, No. 2-82-130-CR (Tex. App.—Fort Worth Nov. 9, 1983, no pet.).

In two cases decided during the survey period but before *Ex parte Crisp*, the court of

ize hundreds of statutes.

B. Harassment, Alcohol, and Drugs—Vagueness and Related Problems

In *Kramer v. Price*[178] a federal habeas corpus applicant claimed that the Texas harassment statute[179] was too vague to give fair notice of what was prohibited. Kramer attacked the part of the statute that states: "(a) A person commits an offense if he intentionally: (1) communicates by telephone or in writing in vulgar, profane, obscene, or indecent language or in a coarse and offensive manner and by this action intentionally, knowingly, or recklessly annoys or alarms the recipient . . . ."[180] The court of criminal appeals affirmed Kramer's conviction under the statute,[181] but a federal district court granted Kramer's petition for a writ of habeas corpus.[182] The Fifth Circuit affirmed the issuance of the writ,[183] relying on *Coates v. City of Cincinnati*.[184] *Coates* involved a city ordinance that, like the Texas harassment statute, used the word "annoy." The United States Supreme Court held that the word "annoy" presented some inherent vagueness[185] and that, more importantly, the ordinance did not specify and the state courts "did not indicate upon whose sensitivity a violation does depend—the sensitivity of the judge or jury, the sensitivity of the arresting officer, or the sensitivity of a hypothetical reasonable man."[186]

The Texas harassment statute suffered from the same problems as did the statute in *Coates*. It used the vague term "annoy," and Texas courts had not construed the statute to indicate whose sensitivities must be offended.[187] For this reason the Fifth Circuit rejected the state's argument that any vagueness had been alleviated by the requirement of proof of the actor's intent to harass.[188] Despite the required mental state, statutes like

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criminal appeals rejected inadequate caption claims. *See* Nichols v. State, 653 S.W.2d 768 (Tex. Crim. App. 1981) (reh'g denied 1983) (relating to TEX. PENAL CODE ANN. § 71.02 (Vernon Supp. 1984) (organized crime activity)); Buxton v. State, 646 S.W.2d 445 (Tex. Crim. App. 1983) (relating to TEX. PENAL CODE ANN. § 43.06(d) (Vernon 1974) (accomplice witness provision in section on prostitution)).

178. 712 F.2d 174 (5th Cir. 1983).

179. TEX. PENAL CODE ANN. § 42.07 (Vernon 1974). The statute was amended by H.B. 838 in an attempt to alleviate the vagueness problems of the old statute. *See* Act of Sept. 1, 1981, ch. 411, 1983 Tex. Gen. Laws 2204-06.

180. TEX. PENAL CODE ANN. § 42.07(a)(1) (Vernon 1974).

181. 605 S.W.2d 861 (Tex. Crim. App. 1980).

182. 712 F.2d at 174. The grant of habeas corpus was unpublished.

183. *Id.* at 178.

184. 402 U.S. 611 (1971).

185. "Conduct that annoys some people does not annoy others. Thus, the ordinance is vague . . . in the sense that no standard of conduct is specified at all." *Id.* at 614.

186. *Id.* at 613.

187. 712 F.2d at 178. The Texas Court of Criminal Appeals has held that the words "annoy" and "alarm" are not vague but are words of common usage needing no definition. Kramer v. State, 605 S.W.2d 861, 866 (Tex. Crim. App. 1980); Collection Consultants Inc. v. State, 556 S.W.2d 787, 793-94 (Tex. Crim. App. 1977).

188. 712 F.2d at 178. Judge Rubin, in dissent, agreed with the state's claim: "The possibility of arbitrary or discriminatory enforcement is minimal because the statute requires that the state prove not only that the recipient was annoyed or alarmed but also that the communicator intentionally or recklessly caused the perturbation." 712 F.2d at 180.

the one in *Coates* were vague because the standard of conduct they specified depends on each complainant's sensitivity.[189]

In *Wishnow v. State*[190] the court held the word "vulgar" in the Alcoholic Beverage Code to be impermissibly vague, but found the word "lewd" sufficiently clear with the aid of definitions in other statutes.[191] The defendant was convicted under a part of the Alcoholic Beverage Code that prohibited persons authorized to sell beer at retail to permit "lewd or vulgar entertainment or acts."[192] Though the statutes define "lewd,"[193] neither they nor the Penal Code define the word "vulgar." The meanings of "vulgar" range from "plebian or coarse" to "lewdly or profanely indecent."[194] Because the statute in question proscribed permitting lewd *or* vulgar entertainment, the state could merely have alleged that the entertainment was lewd. Because the state alleged and the court charged that conviction was authorized if the permitted entertainment was lewd or vulgar, however, the conviction was based on an unconstitutionally vague standard of conduct. The court of appeals therefore reversed the conviction.[195]

Closely related to the void for vagueness doctrine is the ex post facto problem created by an unforeseeable judicial interpretation that enlarges the scope of a penal statute.[196] This problem arose in *Chalin v. State*[197] in which the defendant was convicted of delivery of a controlled substance, phentermine, an isomer of methamphetamine. The defendant delivered the substance several months before the court decision in *Ex parte Ashcroft*,[198] which was the first authoritative holding that possession of phentermine could be punished as possession of an isomer of methamphetamine.[199] The court reviewed judicial and executive action taken prior to *Ashcroft* and reversed Chalin's conviction, holding that the construction in *Ashcroft* was so unforeseeable that it would be a denial of due process to apply it retroactively to an act committed prior to that decision.[200]

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189. *Id.*.

190. 638 S.W.2d 83 (Tex. App.—Houston [1st Dist.] 1982, pet. granted).

191. *Id.* at 84.

192. TEX. ALCO. BEV. CODE ANN. § 104.01(6) (Vernon 1978).

193. *See* TEX. PENAL CODE ANN. § 21.07(3) (Vernon 1974) (describing public lewdness as "an act of sexual contact").

194. 638 S.W.2d at 84.

195. *Id.* at 84-85.

196. *See* Bouie v. City of Columbia, 378 U.S. 347 (1964).

197. 645 S.W.2d 265 (Tex. Crim. App. 1982).

198. 565 S.W.2d 926 (Tex. Crim. App. 1978).

199. 645 S.W.2d at 267. Prior judicial decisions overruled by *Ashcroft* include: Lumberas v. State, 560 S.W.2d 644 (Tex. Crim. App. 1977); Riddle v. State, 560 S.W.2d 642 (Tex. Crim. App. 1977). Prior executive action also showed that phentermine was treated quite differently from methamphetamine and its isomers. The Texas Commissioner of Health followed the national standard for phentermine. *See* TEX. REV. CIV. STAT. ANN. art. 4476—15, § 2.06(d)(2) (Vernon Supp. 1984). Texas treated methamphetamine and its isomers more severely, however, by placing them in Penalty Group I, which carries the most severe penalties under the Controlled Substances Act. *See id.* § 2.03(d)(6); 645 S.W.2d at 268-72.

200. 645 S.W.2d at 270.

C. *Homosexual Conduct—Right to Privacy; Equal Protection*

In *Baker v. Wade*[201] a federal district court held that the Texas penal statute prohibiting consensual deviate sexual intercourse[202] by members of the same sex was unconstitutional because it violated both the fundamental right to privacy and the right to equal protection of the laws.[203] The case was brought as a civil suit by an adult male homosexual. The federal court reached the merits of the plaintiff's constitutional claims despite the fact that the plaintiff was neither prosecuted nor threatened with prosecution under the rarely enforced statute.[204] The state argued that the plaintiff lacked standing because no genuine risk of prosecution existed. The court rejected this argument for several reasons. First, homosexuals have in fact been prosecuted under prior Texas sodomy statutes. Second, both the district attorney and the city attorney of Dallas stated that they would prosecute the plaintiff and other homosexuals under section 21.06 if a provable violation of the law came to their attention. Third, it was not necessary that plaintiff expose himself to actual arrest and prosecution in order to challenge the statute. Finally, plaintiff and other homosexuals suffer detriments from section 21.06 aside from the threat of prosecution and the $200 fine, including difficulty in obtaining and maintaining employment because of employer reluctance to hire criminals, severe anxiety caused by threat of criminal punishment, and alleged harassment of patrons of known homosexual bars.[205]

To decide the merits of the plaintiff's right to privacy claim the court examined cases protecting a right to privacy with regard to such issues as marriage, procreation, and contraception. The court concluded that the right extended to private sexual conduct between all consenting adults, whether heterosexual or homosexual.[206] Although the court recognized that the right to privacy was not absolute, it stated that any statute impinging on that right must be justified by a compelling state interest, a standard that the state failed to meet.[207]

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201. 553 F. Supp. 1121 (N.D. Tex. 1982).

202. TEX. PENAL CODE ANN. § 21.06(a) (Vernon 1974). Deviate sexual intercourse is defined by TEX. PENAL CODE ANN. § 21.01 as "any contact between any part of the genitals of one person and the mouth or anus of another person; or . . . the penetration of the genitals or the anus of another person with an object." *Id.* § 21.01(1).

203. 553 F. Supp. at 1147.

204. Neither party presented evidence that anyone had ever been prosecuted under the statute, although there had been prosecutions under prior Texas sodomy statutes. The court also rejected the state's argument that it should not reach the merits because of the abstention doctrine. The court did not abstain because no criminal charges were pending against the defendant, and no unsettled question of state law was present that might have disposed of the issue. *Id.* at 1146.

205. *Id.* at 1146-47.

206. *Id.* at 1140-41. The court rejected the state's argument that the right to privacy was limited to marital intimacy and procreative choice. *Id.*

207. *Id.* at 1143. The court concluded that the statute could not be justified by the asserted state interests of morality, decency, public health, and procreation. *Id.*

Because the statute does not prohibit deviate sexual intercourse between consenting adults of the opposite sex but only between members of the same sex, the discrimination between heterosexuals and homosexuals must bear some rational relationship to legitimate state pur-

D. *Sex Offenses—New Consolidated Statutes*

When H.B. 2008 went into effect on September 1, 1983, it modified most of the sex offense statutes in the Texas Penal Code.[208] Although the bill repealed the crimes of rape,[209] aggravated rape,[210] sexual abuse,[211] aggravated sexual abuse,[212] rape of a child,[213] and sexual abuse of a child,[214] it retained the major provisions of these statutes in two new consolidated statutes covering sexual assault and aggravated sexual assault.[215] The two new statutes are gender neutral; the crimes of sexual assault and aggravated sexual assault may be committed against a victim of either sex by a perpetrator of either sex who forces another to commit a nonconsensual sexual act, or who commits a consensual sexual act with a child. The statutes group the crimes of rape, aggravated rape, and rape of a child, which formerly could only be committed by a male, with the gender neutral offenses of sexual abuse and aggravated sexual abuse.[216] The statutes incorporate the former defenses to rape of a child and sexual abuse of a child—promiscuous sexual conduct by a fourteen- to seventeen- year-old of the opposite sex, and the circumstances that the actor was of the opposite sex and not more than two years older than the victim[217]—into the new sexual assault statute without the opposite sex restriction.[218]

The new offenses must be committed intentionally or knowingly, whereas several of the old statutes did not require a culpable mental state.[219] Even in those former provisions with no statutory mens rea requirement, however, the courts provided one by reference to section 6.02(b).[220]

The statutory exemption of spouses contained in many of the repealed statutes is retained in H.B. 2008. The spousal exemption in the former

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poses. The plaintiff claimed that the discrimination must be justified by a compelling state interest or under the emerging intermediate level of review, but the court found it unnecessary to reach these claims because of its finding that the statute did not even meet the rational basis test. *Id.* at 1144-45.

208. Act of Sept. 1, 1983, ch. 977, 1983 Tex. Gen. Laws 5311-21 [hereinafter cited as H.B. 2008]. The legislation did not modify TEX. PENAL CODE ANN. § 21.07 (Vernon 1974) (public lewdness); *id.* § 21.08 (indecent exposure); *id.* § 21.11 (indecency with a child); *id.* § 21.06 (deviate sexual intercourse).

209. TEX. PENAL CODE ANN. § 21.02 (Vernon 1974 & Supp. 1982-1983) (repealed 1983).

210. *Id.* § 21.03.

211. *Id.* § 21.04.

212. *Id.* § 21.05.

213. *Id.* § 21.09.

214. *Id.* § 21.10.

215. TEX. PENAL CODE ANN. §§ 22.011, .021 (Vernon Supp. 1984).

216. *See id.* § 22.011 (Vernon Supp. 1984).

217. *Id.* §§ 21.09(b)-(c), .10 (Vernon 1974 & Supp. 1982-1983) (repealed 1983).

218. *Id.* §§ 22.011(d)(1), .011(e) (Vernon Supp. 1984).

219. *See id.* § 21.02 (Vernon 1974 & Supp. 1982-1983) (repealed 1983) (rape); *id.* § 21.03 (repealed 1983) (aggravated rape); *id.* § 21.09 (repealed 1983) (rape of child).

220. *Id.* § 6.02(b); *see* Ford v. State, 615 S.W.2d 727 (Tex. Crim. App. 1981); *Ex parte* Smith, 571 S.W.2d 22 (Tex. Crim. App. 1978); Zachery v. State, 552 S.W.2d 136 (Tex. Crim. App. 1977); Braxton v. State, 528 S.W.2d 844 (Tex. Crim. App. 1975).

crimes of rape of a child and sexual abuse of a child,[221] however, has been deleted from the portions of sexual assault dealing with children.[222] In addition, "spouse" is given a new definition that now excludes married persons who do not reside together or who have an action pending between them for divorce or separate maintainance.[223] The former statutes extended the spousal exemption to unmarried cohabitators,[224] but the new statutes do not.[225]

The new statute has also changed the definition of "without consent." Under the former statutes if the lack of consent was based on the use of force, the victim had an implied duty to resist, because the statutory language required that the force would overcome "such earnest resistance as might be reasonably expected under the circumstances."[226] The threat of force was sufficient to establish lack of consent only if it "would prevent resistance by a person of ordinary resolution, under the same or similar circumstances, because of a reasonable fear of harm."[227] The new statute eliminates the "earnest resistance" language by providing that consent is not present if "the actor compels the other person to submit or participate by the use of physical force or violence."[228] There is also no consent when the threat of force is used if the victim "believes that the actor has the present ability to execute the threat."[229] Thus, the new statutes replace the objective standard of a person of ordinary resolution with the victim's subjective belief in the actor's ability to execute the threat. The new statute also contains a new basis for lack of consent. A victim has not consented when "the actor compels the other person to submit or participate by threatening to use force or violence against any person, and the other person believes that the actor has the ability to execute the threat."[230] For the first time, statutes recognize that the lack of consent can be based on a threat directed at someone other than the person compelled to submit to or participate in the sexual act.[231]

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221. TEX. PENAL CODE ANN. §§ 21.09(a), .10(a) (Vernon 1974 & Supp. 1982-1983) (repealed 1983).

222. *Id.* §§ 22.011(a)(2), (c), (d) (Vernon Supp. 1984).

223. *Id.* § 22.011(c)(2) (Vernon Supp. 1984).

224. *Id.* § 21.12 (Vernon 1974) (repealed 1983).

225. *See id.* § 22.011(c)(2) (Vernon Supp. 1984).

226. *Id.* § 21.04(b)(1) (Vernon Supp. 1982-1983) (repealed 1983); *see also id.* § 21.02(b)(1) (repealed 1983) (rape).

227. *Id.* § 21.04(b)(2) (repealed 1983); *see also id.* § 21.02(b)(2) (repealed 1983) (rape).

228. *Id.* § 22.011(b)(1) (Vernon Supp. 1984).

229. *Id.* § 22.011(b)(2) (Vernon Supp. 1984)).

230. *Id.* § 22.011(b)(8) (Vernon Supp. 1984)).

231. A new defense is also added to the portions of sexual assault and aggravated sexual assault offenses pertaining to children. The defense permits conduct that "consisted of medical care for the child." H.B. 2008 at 5314. The defense clarifies that, for example, a doctor's use of a rectal thermometer with a child does not constitute an offense.

E. Theft and More Specific Illegal Appropriations—General/Specific Offenses

The defendants in *Williams v. State*[232] and *Tawfik v. State*[233] won reversals of theft convictions because the state had prosecuted them under the wrong statute.[234] In *Tawfik* the evidence showed that the defendant sold what he stated were two genuine Egyptian artifacts from the New Kingdom Period. The "scarabs" involved were actually low quality reproductions that had been made to appear ancient. In *Williams* the defendant signed a promissory note, which he secured by assigning his accounts receivable to a bank. When the defendant received payment on one of the outstanding accounts, he deposited the funds in his corporate account and immediately withdrew them when he should have transferred them to the bank under the assignment agreement. The consolidated theft statute is broad enough to include the conduct in both cases, and the state produced sufficient evidence of theft. The court, however, decided that the defendants should have been charged under more specific statutes: "Criminal Simulation"[235] in the case of *Tawfik*[236] and "Hindering Secured Creditors"[237] in the case of *Williams*.[238] Violation of either of these statutes is a Class A misdemeanor, and the court held that the defendants were entitled to prosecution under the more lenient specific statutes rather than under the general felony theft statute.[239]

Texas law requiring prosecution under a more specific statute carrying a lesser penalty than an applicable, but more general statute, is arguably more solicitous to criminal defendants than the federal constitution would require. In *United States v. Batchelder*[240] the United States Supreme

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232. 641 S.W.2d 236 (Tex. Crim. App. 1982).

233. 643 S.W.2d 127 (Tex. Crim. App. 1982).

234. The defendants were prosecuted under TEX. PENAL CODE ANN. § 31.03 (Vernon Supp. 1984), which provides in part: "A person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property. (b) Appropriation of property is unlawful if: (1) it is without the owner's effective consent; or (2) the property is stolen and the actor appropriates the property knowing it was stolen by another." *Id.* § 31.03(a), (b).

235. *Id.* § 32.22(b) (Vernon 1974). This section provides in part:

> (a) A person commits an offense if, with intent to defraud or harm another:
>
> (1) he makes or alters an object, in whole or in part, so that it appears to have value because of age, antiquity, rarity, source, or authorship that it does not have;
>
> (2) he sells, passes, or otherwise utters an object so made or altered . . . .

Id.

236. 643 S.W.2d at 128.

237. TEX. PENAL CODE ANN. § 32.33 (Vernon Supp. 1984). This section provides in part: "(b) A person who has signed a security agreement creating a security interest in property . . . commits an offense if, with intent to hinder enforcement of that interest of lien, he destroys, removes, conceals, encumbers, or otherwise harms or reduces the value of the property." *Id.* § 32.33(b).

238. 641 S.W.2d at 239.

239. These cases exemplify the Texas rule that criminals be prosecuted under a more specific statute carrying a lesser penalty rather than under an applicable, more general statute if the statutes have the same general purpose. *See Ex parte* Harrell, 542 S.W.2d 169 (Tex. Crim. App. 1971).

240. 442 U.S. 114 (1979).

Court rejected a claim that the defendant was constitutionally entitled to prosecution under the statute carrying the lesser penalty when his conduct violated two overlapping statutes. The court stated that "[w]hen an act violates more than one criminal statute, the Government may prosecute under either. . . . Whether to prosecute and what charge to file . . . are decisions that generally rest in the prosecutor's discretion."[241]

F. Involuntary Manslaughter—One Crime or Two?

In *Ex parte Rathmell*[242] the defendant, driving while intoxicated, struck an automobile carrying two women. Both women died as a result of the collision. The defendant was separately indicted for involuntary manslaughter of both women.[243] He was convicted and sentenced based on an indictment naming one of the women, and the conviction was affirmed on appeal.[244] The state then attempted to try the involuntary manslaughter indictment naming the other victim. Rathmell filed a petition for writ of habeas corpus alleging that the second indictment should be dismissed on double jeopardy grounds.[245] He argued that one automobile accident could result in only one offense.

The court first noted that the doctrine that previously determined most multiple offense issues in Texas, the carving doctrine, had recently been abolished.[246] Courts now apply the *Blockburger v. United States*[247] test, which allows the state to prosecute under two or more separate statutory provisions even though only one criminal transaction or act is committed so long as each statutory provision requires proof of a fact that the other

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241. *Id.* at 123-24.

242. 664 S.W.2d 386 (Tex. App.—Corpus Christi 1983, no pet.).

243. TEX. PENAL CODE ANN. § 19.05(a)(2) (Vernon 1974).

244. Rathmell v. State, 653 S.W.2d 498 (Tex. App.—Corpus Christi 1983, pet. ref'd).

245. *Ex parte* Rathmell, 664 S.W.2d 386 (Tex. App. — Corpus Christi 1983, no pet.). The court addressed the threshold question of whether habeas corpus was available when the result of a ruling in favor of the petitioner would not result in his release. *Id.* at 387-88. The majority concluded that while petitioner's complete release could not be secured because of his incarceration stemming from the prior involuntary manslaughter conviction, the fact that he was in custody was partly due to the second indictment. *Id.* Justice Kennedy, in an opinion concurring with the majority's disposition on the merits dissented on the jurisdictional issue, stating that habeas relief must result in immediate discharge or it is not available. *Id.* at 391, (dissenting and concurring opinion). This position was based on *Ex parte*, Ruby, 403 S.W.2d 129 (Tex. Crim. App. 1966), which Justice Kennedy said "has not been overruled to this day." *Ruby*'s viability is questionable after Peyton v. Rowe, 391 U.S. 54 (1968), in which a prisoner was allowed to attack only the second of two consecutive sentences in a habeas corpus petition although success on the merits would not result in his immediate discharge. *Peyton* overruled the former prematurity doctrine. *See* McNally v. Hill, 293 U.S. 131 (1934).

246. 664 S.W.2d at 388; *see Ex parte* McWilliams, 634 S.W.2d 815 (Tex. Crim. App. 1982). The carving doctrine permitted the state to "carve" only one offense from a single criminal episode. The court's refusal to consider prior Texas cases because of the abandonment of the carving doctrine is curious. In *Rathmell* the question was how many times the same statute was violated, or in other words, how many "acts" had occurred. Determining the number of "acts" was the central focus of the carving doctrine. *See McWilliams*, 634 S.W.2d at 823-24. The carving doctrine was not a model of clarity, but the decisions under the carving doctrine were hardly irrelevant to the case.

247. 284 U.S. 299 (1932).

does not.[248] The *Rathmell* court correctly noted, however, that the *Blockburger* rule did not apply to this case because the same statutory provision was alleged in the two counts. The court still had to decide, however, whether the existence of two victims meant that two offenses had been committed, or whether the state could charge Rathmel only once because only one criminal transaction had transpired.[249]

The court examined the statute itself and declared that the legislature had not given a clear indication that it intended to authorize multiple convictions in cases where there was one automobile accident but multiple victims.[250] The court held that since the jury that sentenced the defendant at the first trial knew all of the circumstances surrounding the death of the other victim, to allow the defendant to be convicted and punished for the second death would cause him to be sentenced twice for each offense.[251] The court noted that the double jeopardy prohibition is not merely a protection against multiple prosecutions; it is also a protection against multiple punishments.[252]

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248. *Id.* at 304.

249. The court, citing cases from other jurisdictions, noted that the majority rule is to allow as many convictions as victims. *See also* Remington & Joseph, *Charging, Convicting and Sentencing the Multiple Offender*, 1961 WIS. L. REV. 528, 549-50 (stating that in principal a distinction might be drawn based on defendant's knowledge that act would harm more than one victim).

The *Rathmell* court sought guidance from other jurisdictions because of reluctance "to rely on law established prior to the carving doctrine and because so little authority exists since its demise." 664 S.W.2d at 389. The review of cases from other states deciding similar issues was of little assistance for two reasons: first, there was a split of authority, and second, it was a question of state law as to what the legislature intended in passing the particular statute. For example, how the Wisconsin Supreme Court interpreted the intent of the Wisconsin Legislature in passing that state's homicide by intoxicated use of a motor vehicle statute is of little assistance in deciding the unit of the offense of the Texas involuntary manslaughter statute.

250. This conclusion is similar to a rule of statutory construction often used to determine multiple criminality issues, the rule of lenity. Under the rule of lenity, if an ambiguity exists regarding whether a statute authorizes multiple convictions, doubt is resolved in favor of the defendant. *See* Bell v. United States, 349 U.S. 81, 82 (1955). The court in *Rathmell*, however, stated that it was not applying the rule of lenity because TEX. PENAL CODE ANN. § 1.05 (Vernon 1974) states that "[t]he rule that a penal statute is to be strictly construed does not apply to this code."

251. 664 S.W.2d at 390-91.

252. *Id.* The double jeopardy argument is circular. The double jeopardy clause only protects against multiple punishment for the *same offense*. *See* North Carolina v. Pierce, 395 U.S. 711, 717 (1969). The question before the court was whether the involuntary manslaughter of one victim was the *same offense* as the involuntary manslaughter of the other victim. Although *Rathmell*'s double jeopardy analysis is unpersuasive, *Rathmell* is an appropriate case to hold that lack of a separate intent (or state of mind) towards the separate victims and a single physical event should result in only one offense. As one commentary expressed it:

> [A] distinction might well be drawn based on a defendant's knowledge that his act would likely produce harm to more than one person. For example, the person who blows up a plane with 44 persons in it knows of the probable existence of many passengers . . . . On the other hand, a person who drives his car in a manner amounting to a high degree of negligence and who collides with and kills three occupants of another car, is no more culpable than he would have been had the other car contained only one occupant. The conclu-

G. *Enhancement of Sentence—The Second Time Around*

Several cases during the survey period dealt with multiple attempts by the state to prove enhancement allegations, and the court of criminal appeals extended its earlier holding in *Cooper v. State*.[253] In *Cooper* the court held that the failure to prove all of the facts necessary to support an enhancement allegation prevented the state from attempting to establish the same allegations at a new hearing.[254] In *Ex parte Augusta*,[255] a habeas corpus proceeding, the court held that *Cooper* applied retroactively.[256]

In *Carter v. State*[257] the court also gave *Cooper* retroactive effect even though the state did not allege the same two prior offenses for enhancement on retrial as it had in the original proceeding. The defendant was found guilty of aggravated robbery. He was automatically sentenced to life imprisonment under Penal Code section 12.42(d)[258] when the jury found allegations that the defendant had been convicted of two prior felonies to be true. The defendant and the state joined in a motion for retrial when they discovered that one of the two prior felonies used for enhancement had resulted in a probated sentence and was, therefore, not considered a final conviction. On retrial the defendant was charged and convicted of aggravated robbery, but the enhancement allegations were changed because the state substituted a final conviction for the one that had resulted in a probated sentence. The court of criminal appeals vacated the life sentence imposed after retrial under *Cooper*, thus denying the state from taking a second chance to prove the enhancement allegations.[259] The *Carter* court noted, however, that the state could seek to prove two prior felonies if a defendant is tried for a new offense rather than retried for the same one.

After *Carter* was decided, the legislature amended section 12.42(d).[260]

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sion that there might be a number of convictions in the first situation and only one in the second, would not seem to do violence to the legislative objective. Remington & Joseph, *supra* note 249, at 549-50.

253. 631 S.W.2d 508 (Tex. Crim. App. 1982). In *Cooper* the state alleged that the defendant had been convicted of two previous felony offenses. On appeal, however, the court held that the evidence was insufficient to establish that the second conviction was for an offense occurring after the date that the first offense had become final. *Id.* at 512.

254. *Id.* at 514. The court expressly adopted the Fifth Circuit Court of Appeals' reasoning in Bullard v. Estelle, 665 F.2d 1347 (5th Cir. 1982). 631 S.W.2d at 514. The court also relied on Burks v. United States, 437 U.S. 1 (1978), and Greene v. Massey, 437 U.S. 19 (1978), which held that double jeopardy prohibited a retrial if an appellate court has found the evidence insufficient.

255. 639 S.W.2d 481 (Tex. Crim. App. 1982).

256. *Id.* at 484. *Cooper* was also given retroactive application in a habeas corpus proceeding in *Ex parte* Stuart, 653 S.W.2d 13 (Tex. Crim. App. 1983) despite the fact that the applicant had filed at least 10 prior habeas corpus petitions and had been cited for abuse of the writ. *But see Ex parte* Girnus, 640 S.W.2d 619 (Tex. Crim. App. 1982) (holding that *Cooper* was not violated where error of court, not insufficiency of evidence, led to failure to enhance).

257. 652 S.W.2d 530 (Tex. App.—Houston [1st Dist.] 1983, pet. granted).

258. TEX. PENAL CODE ANN. § 12.42(d) (Vernon 1974).

259. 652 S.W.2d at 532.

260. Act of Sept. 1, 1983 ch. 339, 1983 Tex. Gen. Laws 1750 (codified at TEX. PENAL CODE ANN. § 12.42(d) (Vernon Supp. 1984)).

That section no longer carries the mandatory life sentence upon proof that a defendant has been convicted of two prior felonies. The new section provides that after the required showing, punishment shall be assessed for "life, or for any term of not more than 99 years or less than 25 years."[261]

H. Criminally Negligent Homicide—Can a Corporation Commit Homicide?

In *Vaughn & Sons, Inc. v. State*[262] a corporation appealed a conviction of negligent homicide, which was based upon an indictment alleging that the corporation, acting through two of its employees, caused the death of two individuals in an automobile collision.[263] Under Texas law prior to 1974 a private corporation could not be indicted for a criminal offense.[264] Penal Code section 7.22[265] now provides for penal liability of corporations and associations, and section 1.07(a)(27)[266] contemplates corporate penal liability by including corporation within the definition of person.[267] This provision, however, proved to be the undoing of the negligent homicide conviction. The trial court's assumption that the word "person" in the Penal Code was intended to include corporations in each instance led it to conclude that corporations could be guilty of crimes requiring intent. On appeal the court held that since a corporation cannot form an intent, the legislature could not have intended such a result.[268] Although criminally negligent homicide does not necessitate a subjective intent, the similarity between that offense and the homicide offenses that do require intent led the court to state that "whoever is capable of committing criminal homicide must also be capable of intent, knowledge, and recklessness—not just criminal negligence."[269] The court held that a clearer indication of legislative intent to include corporations within the definition of person in the homicide statutes would be required before corporations will be held liable for homicide.[270]

261. TEX. PENAL CODE ANN. § 12.42(d) (Vernon Supp. 1984).
262. 649 S.W.2d 677 (Tex. App.—Texarkana 1983, pet. granted).
263. The trial court imposed a $5000 fine on the corporation. *Id.* at 677.
264. *See* Overt v. State, 97 Tex. Crim. 202, 260 S.W.856 (1924); Judge Lynch Int'l Book Publishing Co. v. State, 84 Tex. Crim. 459, 208 S.W.2d 526 (1919).
265. TEX. PENAL CODE ANN. § 7.22 (Vernon 1974 & Supp. 1984).
266. *Id.* § 1.07(a)(27) (Vernon 1974).
267. *See also id.* § 12.51 (imposing specific penalty provisions applicable only to corporations and associations).
268. 649 S.W.2d at 678.
269. *Id.* at 679.
270. *Id.*