Louisiana Law Review

Volume 62 | Number 1
Fall 2001

The Jaws That Bite, the Claws That Snatch

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I. INTRODUCTION

In *State v. Michels*,[1] the Louisiana Fifth Circuit Court of Appeal affirmed the defendant's conviction on a charge of aggravated oral sexual battery when the only "weapon" involved was Michels' pit bull terrier. In affirming the conviction, the court failed to address a longstanding line of Louisiana criminal cases holding that an inanimate object is needed to meet the dangerous weapon requirement within the meaning of Louisiana Revised Statutes 14:2(3).[2] Although the court reached the right result in affirming the conviction, the lack of guidance regarding dogs as dangerous weapons in Louisiana provides no real value for future courts considering the problem.

The scope of this note is limited to an examination of the facts and reasoning of the court in *State v. Michels*, the definition of dangerous weapon, and certain issues of statutory construction.[3] It will also provide a survey of the national jurisprudence on the issue of dangerous weapons and dogs and a proposed solution to the oversight of the court in *Michels*.

II. FACTS

The victim was walking around the trailer park where she lived in Kenner on the evening of July 9, 1997, when she saw the defendant, whom she knew was also a resident of the trailer park. She accepted an offer from the defendant to join him for a beer in his trailer. After a few minutes inside the trailer, while both were drinking their beers, the defendant removed his pants and forced the victim's pants down. Michels then forced her to perform oral sex on him and raped her.

At trial the victim stated that she fought Michels off by kicking and hitting him, but that he ignored her attacks and statements that she did not want to have sex with him. The victim also testified at trial that the defendant's pit bull was in the trailer during the incident and that it bared its teeth and growled at the victim while she was struggling with the defendant. She said she believed the defendant could control the dog's behavior and that he would command the dog to attack her if she continued to struggle.

Based on the victim's testimony, the trial court found that the defendant was armed with a dangerous weapon at the time of the

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* Title taken from "Jabberwocky," by Lewis Carol.

1. 726 So. 2d 449 (La. App. 5th Cir. 1999).
2. *See generally* State v. Calvin, 209 La. 257, 24 So. 2d 467 (1945).
3. The second issue addressed by the appellate court in *State v. Michels*, the defendant's claim of insufficiency of the bill of information, is beyond the scope of this article.

encounter, and thus, defendant's conduct satisfied the elements of aggravated oral sexual battery within Louisiana Revised Statutes 14:43.4(3).[4] The appellate court, in discussing the claimed insufficiency of the bill of information filed against the defendant, makes clear "[f]rom our review of the proceedings in the record prior to trial, it was obvious that only the first three subsections of R.S. 14:43.4 could possibly apply in this case. All three deal specifically with force or threats of force."[5]

The defendant was convicted by jury trial of aggravated oral sexual battery. A motion in arrest of judgment or new trial was denied by the trial court, and the defendant was sentenced to five years at hard labor, suspended, with three years active probation.[6] The appellate court affirmed the conviction and held that sufficient evidence was provided for the jury to find the defendant armed with a dangerous weapon.[7]

III. DISCUSSION

A. Statutes and Cases on Weapon Definition

1. Statutory Definition

Louisiana Revised Statutes 14:2 provides the definitions used throughout the criminal code. Subsection (3) states, "'Dangerous

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4. La. R.S. 14:43.4(A) (Supp. 2001), aggravated oral sexual battery, subsections 1-6 provide that an oral sexual battery is aggravated:

(1) When the victim resists the act to the utmost, but whose resistance is overcome by force.

(2) When the victim is prevented from resisting the act by threats of great and immediate bodily harm, accompanied by apparent power of execution.

(3) When the victim is prevented from resisting the act because the offender is armed with a dangerous weapon.

(4) When the victim is under the age of twelve years. Lack of knowledge of the victim's age shall not be a defense.

(5) When two or more offenders participated in the act without the consent of the victim.

(6) When the victim is prevented from resisting the act because the victim suffers from a physical or mental infirmity preventing such resistance.

5. *Michels*, 726 So. 2d at 452.

6. Defendant appealed to the Louisiana Fifth Circuit Court of Appeal which was granted on April 2, 1998. Two issues were presented on appeal: the claimed insufficiency of the bill of information and the claimed failure of the State to carry its burden of proof as to each element of the crime of aggravated oral sexual battery. On remand, the trial court was ordered to correct its verdict to show that the defendant had in fact been convicted of the lesser included charge of attempted aggravated oral sexual battery; a distinction that has no meaning for purposes of this article. *Michels*, 726 So. 2d at 453.

7. *Michels*, 726 So. 2d at 453.

Weapon' includes any gas, liquid, or other substance or instrumentality, which, in the manner used, is calculated or likely to produce death or great bodily harm."[8]

The rule of interpretation for criminal statutes is expressed in Louisiana Revised Statutes 14:3, which states:

> The articles of this Code cannot be extended by analogy so as to create crimes not provided for herein; however, in order to promote justice and to effect the objects of the law, all of its provisions shall be given a genuine construction, according to the fair import of their words, taken in their usual sense, in connection with the context, and with reference to the purpose of the provision.

In light of these two articles, two questions arise: how do they relate to each other, and how have they been treated in the jurisprudence.

Professor Dale Bennet, who served as Louisiana State Law Institute Reporter for the 1942 revision of the Louisiana Criminal Code, explained that the code was to be read as a civilian document, not a mere compilation of common law rules.[9] The articles of the code were based on the civilian model, with careful generalization, so as to avoid lengthy and specific enumerations as well as the claims of defendants that "my crime doesn't exactly match your statute."[10] Further, the genuine construction indicated by Louisiana Revised Statutes14:3 indicates that the articles should be given a natural and logical interpretation, rather than a mechanistic or overly limiting interpretation.[11] For Professor Bennet, the two articles together were a codification of the Louisiana jurisprudence, which allowed a variety of items to be designated as dangerous weapons, depending on "whether it is dangerous 'in the manner used.'"[12]

2. Louisiana Case Law on Weapons

One of the first cases to deal with the dangerous weapon issue was *State v. Calvin*,[13] in which the Supreme Court of Louisiana reversed a conviction of aggravated battery when the defendant had kicked and bitten her victim. The holding in this regard is quite narrow, and in summary states: teeth and fists are not dangerous weapons within the meaning of Louisiana Revised Statutes14:2(3).

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8. La. R.S. 14:2(3) (1997).

9. Dale E. Bennet, *The Louisiana Criminal Code: Comparison of the Criminal Code with Prior Criminal Law*, 5 La L. Rev. 6, 6 (1942).

10. *Id.* at 7.

11. *Id.* at 9.

12. *Id.* at 28 (citing State v. Washington, 104 La. 443, 445, 29 So. 55, 56 (1900)).

13. 209 La. 259, 24 So. 2d 467 (1945).

The more influential portion of the case is the dicta, wherein Justice Kennon responded to a claim by the district judge that "the Supreme Court of the State of Louisiana held that a person's bare fist could be classed and used as a dangerous weapon, and that a person's teeth could be classed as a dangerous weapon."[14] He stated that "[t]he fact remains that there must be some proof of the use of some inanimate instrumentality before a defendant can be held guilty of assault 'with a dangerous weapon.'"[15]

The case was criticized in academia for its dicta. A casenote on *State v. Calvin* explained that instrumentality, as defined in Webster's Dictionary, was merely a force or means used to achieve an end, and had nothing to do with the animate or inanimate status of the means employed.[16] The same article proposed a more flexible test for defining dangerous weapon, stating, "[t]he potential danger of the method used should be the test of a 'dangerous weapon,' whether it be a knife, the teeth, the fist, a gun, a stick, a dog, or any other animate or inanimate instrumentality."[17] Professor Bennett approved of the result in *Calvin*, but saw the dicta as a potential problem and hoped that it would be restricted to the facts of the case. He noted that it would be absurd if an offender who "set a pack of vicious dogs upon another would not be using a dangerous weapon because the dogs could not be classed as 'inanimate'"[18] and would therefore be guilty only of simple battery.

Despite the academic criticism, subsequent Louisiana cases have cited *Calvin* favorably.[19] Thus, the case for its dicta, if not the holding, may be considered enshrined in the Louisiana jurisprudence. It ought not to be disturbed lightly.

3. National Case Law on Weapons

Nationally, *Calvin* has been cited on both sides of the dangerous weapon issue. The Massachusetts case of *Commonwealth v. Davis*[20] cited *Calvin* for support in holding:

> [T]he notion that parts of the body may be used as dangerous weapons has not been generally accepted elsewhere. The clear

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14. *Id.* at 265, 24 So. 2d at 469 (italics omitted).
15. *Id.* at 266, 24 So. 2d at 469.
16. Ruby Stout, Note, *Aggravated Battery—The Fist or Teeth as a Dangerous Weapon: State v. Calvin*, 7 La. L. Rev 584, 585 (1947).
17. *Id.* at 586.
18. *See* Dale E. Bennett, *The Work of the Supreme Court*, 7 La. L. Rev. 288, 289 (1947).
19. *See* State v. Bonier, 367 So. 2d 824, 826 (La. 1979); State v. Clark, 527 So. 2d 542, 543 (La. App. 3d Cir. 1988); State v. Gould, 395 So. 2d 647, 655 (La. 1981).
20. 406 N.E.2d 417 (Mass. App. Ct. 1980).

> weight of authority is to the effect that bodily parts alone cannot constitute a dangerous weapon for the purpose of an aggravated assault based on the alleged use of such a weapon. This is so, irrespective of the degree of harm inflicted.[21]

In contrast, the Minnesota Supreme Court held in *State v. Born* that "[f]ists, when used to strike, and feet, when used to stomp another person, may or may not be dangerous weapons depending on the circumstances of the case."[22] Regardless, the bulk of authority favors the Louisiana position on unarmed assailants, as shown by the Nebraska case of *State v. Bachelor* which held the "opinions in *VanDiver, Owusu, Davis*, and *Calvin*, to be sound, as is the dissent in *Sturgis*. They represent the majority view"[23] in finding that hands and feet are not dangerous weapons.

Public policy, as a whole, supports the notion that fists and teeth are not ordinarily dangerous weapons. Making any person's hands, feet, or teeth dangerous weapons gives the state an endless capacity to upgrade offenses.[24] Matters of proof become extraordinarily difficult, when a person claims that not only was a defendant behaving in a threatening or menacing manner so as to constitute assault, but that the defendant used his bare hands in a manner that suggested they were dangerous weapons thus making the appropriate charge aggravated assault. Perhaps a boxer or martial arts expert should be so categorized, but the results of such an attack have already been considered by the legislature, and the statutes reflect this consideration, as discussed below.

B. Disparity of Sentencing and Development of Intermediate Offenses

Simple battery is a battery committed without a weapon, and carries a maximum sentence of six months in jail or a fine of up to

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21. *Id.* at 420.

22. 159 N.W.2d 283, 284 (Minn. 1968) (citing *Calvin* as authority of a split in the national jurisprudence, one which the court ultimately decided differently than Louisiana).

23. 575 N.W.2d 625, 631 (Neb. Ct. App. 1998).

24. *See* People v. Van Diver, 263 N.W.2d 370, 373 (Mich. Ct. App. 1977):

> If we were to rule that bare hands could be a dangerous weapon, it would lead to anomalous results, for practically every assault that would qualify as an aggravated assault, M.C.L.A. § 750.81a; M.C.A. § 28.276(1), would also be capable of prosecution as an assault with a dangerous weapon, M.C.L.A. § 750.82; M.S.A. § 28.277. It is our belief that the Legislature did not contemplate this result but instead intended that the statutes should be distinct and separate. To fulfill the Legislature's intent, it is our opinion that the term "dangerous weapon" cannot be construed to include the bare hand.

$500, or both.[25] Aggravated battery is committed with a dangerous weapon, as defined in Louisiana Revised Statutes14:2(3), and is punishable by a fine up to $10,000 or prison with or without hard labor for up to ten years, or both.[26] Sentencing disparity between the two charges was a real problem, insofar as there was no intermediate charge between simple battery and aggravated battery.

The legislative response to the perceived problem was the 1978 revision of the battery statutes, introducing an intermediate charge of second degree battery to resolve this problem.[27] The second degree battery statute is designed to cover situations where serious damage is inflicted without use of a weapon, such that the law would not have to be subverted to reach aggravated battery in order to appropriately sentence a "merciless assailant."[28]

One of the first cases to utilize the intermediate charge was *State v. Fuller*,[29] in which a professional bar bouncer got into a fight with a nineteen year old over a pool game inflicting permanent visual damage with a single blow. The court rejected the defendant's claims that he lacked the intent required for second degree battery as well as his claim that second degree battery was designed for a situation where an assailant continually batters a downed opponent.

Certain post-revision cases using the battery statutes are problematic, such as *State v. Taylor*[30] and *State v. Munoz*,[31] where the defendants were charged with aggravated assault for kicking their victims while wearing rubber soled tennis shoes. While the sentence in *Taylor* would nearly have been within the range for second degree battery (three years at hard labor and a fine of $5,000.00),[32] the sentence in *Munoz* of ten years at hard labor was not.[33] On the other hand, because the aggravated battery charge in *Munoz* was a responsive verdict to the original charge of attempted murder (the victim was in a coma), the prosecution's case becomes more reasonable. Although questionable on theory, such that an everyday

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25. La. R.S. 14:35 (1997).
26. La. R.S. 14:34 (1997).
27. La. R.S. 14:34.1 (1997) (second degree battery punishable by a fine of not more than $2,000, or prison with or without hard labor for up to five years, or both).
28. The court in *Calvin* acknowledged the possibility that " . . . portions of the human anatomy may be dangerous and the bare hands of a merciless assailant may quite readily 'produce death or great bodily harm,' particularly if the victim be young or weak . . ." but still felt policy was better served by their definition of dangerous weapon as inanimate object. State v. Calvin, 209 La. 257, 265, 24 So. 2d 467, 469 (1945).
29. 414 So. 2d 306 (La. 1982).
30. 485 So. 2d 117, 118-120 (La. App. 2d Cir. 1986).
31. 575 So. 2d 848 (La. App. 5th Cir.), *writ denied*, 577 So. 2d 1009 (1991).
32. *Taylor*, 485 So. 2d at 118.
33. *Munoz*, 575 So. 2d at 851 (finding assignment of maximum sentence by trial judge not to be excessive).

garment may be considered a dangerous weapon,[34] *Munoz* at least can be explained on the equities of the case. *State v. Rainey*[35] is much clearer on the proposition of "garment as weapon." There, the defendant was convicted of aggravated battery for kicking his victim with steel-toed boots so as to inflict brain damage and other permanent injuries.

The approach taken in the battery statutes of creating an intermediate charge, however, does not seem applicable to the oral sexual battery series. Currently, oral sexual battery carries a penalty of imprisonment with or without hard labor for up to fifteen years.[36] Aggravated oral sexual battery carries a penalty of imprisonment with or without hard labor for a maximum of twenty years.[37] Given the narrow spread of maximum sentencing, there does not seem to be much room for variation as existed with battery.

The test used[38] for the intermediate charge in the battery series also does not seem appropriate for the oral sexual battery series, because it is the threat level—not necessarily the end damage result that is the primary issue for the potentially upgraded charge. Actual damage to the victim merely provides an additional charge useable against the defendant. However, the ability to properly upgrade the offense without violating the statutory construction rules would seem to have independent value, if only in maintaining judicial integrity and public trust of the system.

C. Dog cases

1. Louisiana Jurisprudence

As the case law now stands, the only two criminal cases in Louisiana in which the issue of a dog as weapon has arisen are *State*

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34. On the contrary, garments and nearly any other inanimate object can be used and classified as a dangerous weapon in Louisiana. *See* State v. Clark, 527 So. 2d 542 (La. App. 3d Cir. 1988) (metal sign post); State v. Leggett, 363 So. 2d 434 (La. 1978) (unloaded, non-functional gun); State v. Reed, 712 So. 2d 572 (La. App. 1st Cir. 1998) (bed sheet, sofa cushions).

35. 722 So. 2d 1097 (La. App. 5th Cir. 1998).

36. La. R.S. 14:43.3 (1997).

37. La. R.S. 14:43.4 (Supp. 2001).

38. Louisiana Revised Statute 14:34.1 provides in part:

> Second degree battery is a battery . . . when the offender intentionally inflicts serious bodily injury. For purposes of this article, serious bodily injury means bodily injury which involves unconsciousness, extreme physical pain or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty, or a substantial risk of death.

La. R.S. 14:34.1 (1997).

v. Michels and *State In Re L.D.L., Jr.*[39] *State In Re L.D.L., Jr.* dealt with a juvenile, adjudicated delinquent, in pertinent part due to a charge of aggravated battery. The state alleged that "[t]he pit bull dog was the 'force or intimidation' but not a dangerous weapon."[40] The state's allegation in the petition should lead an observer at this point to suspect that the prosecution was aware of the required inanimate nature of dangerous weapons and was trying to finesse the point. In the court's order, which was primarily concerned with procedural matters, the court noted the possibility that a dog could be a dangerous weapon for the purposes of aggravated battery. Further, the juvenile was charged with simple robbery, and the court's orders directed defendant's counsel to brief a variety of issues, including: whether a dog can be a dangerous weapon and, if so, whether the juvenile's dog was proven, beyond a reasonable doubt, to be a dangerous weapon for purposes of aggravated battery.[41] Although both cases have been resolved,[42] these are not mere novelties. While rare thus far in Louisiana, the following review of the national jurisprudence will show that these cases are reasonably common.

2. National Jurisprudence

In the national jurisprudence, criminal dog cases are not common in any one state, but taken as a whole they represent a noticeable subset of criminal actions.[43] Almost exactly on point is *State v. Sinks*,[44] where a Doberman Pinscher and a knife were used to provide the force in a sexual assault. Stipulating the dangerousness of the knife, the court went on to discuss the dog as weapon writing:

> Sinks argues that a dog cannot be an instrumentality because instrumentality refers only to an inanimate object. However, the common and ordinary definition of instrumentality contains no such limitation. Instrumentality is defined as "something by which an end is achieved." *Webster's Third New Int'l Dictionary* 1172 (Unabr. 1976). Additionally, the statute does not limit or confine the definition of "dangerous weapon" to only inanimate objects. Therefore, based on the

39. 714 So. 2d 780 (La. App. 3d Cir. 1998).
40. *Id.* at 782.
41. *Id.* at 783.
42. *Michels* has exhausted appellate review and *In Re L.D.L., Jr.* has no further reported actions.
43. The most common sort of complaint regarding a dog attack is a civil rights claim brought under 28 U.S.C.S. 1983 (2001) against the police. Since these cases deal with the proportionality of the force used by the state and bypass the issue of definition, they are outside of the scope of this article, and I will focus on private disputes where dogs have been used or claimed to have been used as weapons.
44. 483 N.W.2d 286 (Wis. Ct. App. 1992).

> plain language of the statute, we conclude that the definition of "dangerous weapon" in sec. 939.22(10),[45] Stats., as applicable to sec. 940.225(1)(b), Stats., is sufficiently broad to include animate, as well as inanimate, objects.[46]

Of course, the Wisconsin court did not have to contend with *Calvin* and its progeny, which are in direct conflict with the holding in *Sinks*. Cases from Massachusetts,[47] California,[48] Wisconsin,[49] Florida,[50] and other states,[51] have held that a dog can be a dangerous weapon under the proper circumstances. As noted above, the holding in *Calvin*[52] appears to be supported by public policy. All that remains to be examined is how to bring Louisiana's dangerous weapon statute into accord with the national jurisprudence without losing the holding of *Calvin*, and then apply it to the facts of *Michels*.

IV. SOLUTIONS

Creation of intermediate offenses for oral sexual battery or other offenses such as assault, robbery, sexual battery, as discussed above, does not seem like a viable solution due to the narrow spread of punishment available for some of these crimes. Because intermediate offenses already exist for battery and aggravated battery,[53] the need is not as pressing for those offenses. There still exists, however, a

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45. Wis. Stat. § 939.22(10) (Supp. 2000) reads:
"Dangerous weapon" means any firearm, whether loaded or unloaded; any device designed as a weapon and capable of producing death or great bodily harm; any electric weapon, as defined in s. 941.295 (4); or any other device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm.

46. *Sinks*, 483 N.W.2d at 289.

47. Commonwealth v. Tarrant, 326 N.E.2d 710 (Mass. 1975) held:
[W]e conclude that the Commonwealth, in order to prove the crime of armed robbery in this case, was not required to have affirmatively demonstrated that the dog was actually dangerous (Commonwealth v. Henson, supra,) or was in fact used in a harm-inflicting manner, since the proper inquiry is whether the instrumentality is such as to present an objective threat of danger to a person of reasonable and average sensibility.

48. People v. Nealis, 283 Cal. Rptr. 376 (Cal. App. Dep't Super. Ct. 1991).

49. State v. Bodoh, 582 N.W.2d 440 (Wis. Ct. App.), *review granted*, 588 N.W.2d 631 (1998), *aff'd*, 595 N.W.2d 330 (Wis. 1999).

50. Clark v. State, 632 So. 2d 88 (Fla. Dist. Ct. App. 4th Dist. 1994), *overruled in part by* T.B. v. State, 669 So. 2d 1085 (Fla. Dist. Ct. App. 4th Dist. 1996).

51. *See generally* Vitauts M. Gulbis, Annotation, *Dog as Deadly or Dangerous Weapon for Purposes of Statutes Aggravating Offenses Such as Assault and Robbery*, 7 A.L.R. 4th 607 (1981) and the authority cited therein.

52. *See supra* note 13 and accompanying text.

53. Second Degree Battery, La. R.S. 14:34.1 (1997); Aggravated Second Degree Battery, La. R.S. 14:34.7 (Supp. 2001).

potential gap assuming that a particularly brutal attack by a person using a dog might be better charged as aggravated battery or aggravated second degree battery rather than second degree battery.

The scheme of upgraded offenses seems to reflect a policy of deterrence of weapon use in the commission of crimes, in order to reduce the threat level and danger, to both victims and perpetrators.[54] The general theory is that an unarmed assailant is not only less likely to seriously injure his victim, but also less likely to provoke a lethal response in self-defense or by law enforcement, thus minimizing the violence involved with the crime. Controlling the use of animals used to assist in the commission of a crime of violence would also serve this policy. The implementation would have to be cautious in order to avoid situations in which simple negligence, such as failure to maintain control of an animal, might lead to serious criminal charges being filed.

A simple solution would be to replace Louisiana Revised Statutes 14:2(3) with a ready-made definition that appears to cover all possibilities, such as the Model Penal Code definition. Under the Model Penal Code, a dangerous weapon is defined as "any firearm, or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner in which it is used or is intended to be used is known to be capable of producing death or serious bodily injury."[55] There are two problems that immediately spring to mind with this solution, the first being that it would appear to overrule the holding of *Calvin*, which would be a loss. If bare hands and bare feet (ignoring the shoe issue) could be considered dangerous weapons, there is no encounter between unarmed antagonists that does not potentially escalate into either aggravated battery or aggravated second degree battery, or that does not, by parties arguing, constitute aggravated assault. A policy of defining hands and feet as weapons under potentially any circumstance is the kind of free upgrade to offenses that should be avoided at all costs. It leads to long sentences for minor crimes and possibly runs afoul of constitutional issues, such as overbreadth and notice. The second, more selfish reason to avoid introduction of a whole definition from

54. *Accord* Commonwealth v. Tarrant, 326 N.E.2d 710, 713-14 (Mass. 1975) (affirming the conviction of a defendant for armed robbery where the primary "weapon" was a German Shepard). The purpose of the statute is to make robbery while possessing a dangerous weapon a more serious offense because such robbery "would naturally lead to resistance and conflict" in which use of the dangerous weapon may be expected to follow. Thus, it is not only the actual use of the weapon in the harm inflicted that makes the crime of armed robbery aggravated. Rather, it is more importantly the potential for injury and the tendency toward resistance, conflict, and violence which exists when robbery is perpetrated with the use of a dangerous weapon.

55. Model Penal Code § 210.0 (1962).

the Model Penal Code is that the Louisiana Criminal Code is a quasi-civilian code,[56] such that it would be better to develop a local remedy than import a foreign one, especially a common law or federal article. If, in fact, a local solution is better than a foreign one, then the courts could simply construe Louisiana Revised Statutes 14:2(3) as intended by Dr. Bennett[57] and allow a dog to be seen as an instrumentality which may be used in a manner calculated or likely to produce death or great bodily harm. Other courts have considered the problem, with highly similar statutory language, and come up with differing results.

State v. Bodoh[58] serves as an example of what Louisiana should avoid. The Wisconsin courts found the defendant criminally liable for a dog attack where the defendant was not present and the dogs were not trained to attack. This sort of liability fails the Louisiana statutory requirement of "in the manner used,"[59] because the owner did not direct the dogs to attack either actively or in any implied fashion. The court found that the defendant's reference to his animals as "guard dogs" in a letter written to police on issues unrelated to the case showed the defendant's intent that the dogs be "dangerous weapons." The court then applied criminal sanctions for his negligent "handling" of the dogs (which had been deemed dangerous weapons), finding that "physical or temporal proximity is not a prerequisite to the statutory requirement that the defendant's criminally negligent handling of a dangerous weapon cause the necessary injury."[60] In Louisiana, applying the definition of dangerous weapon, this result could not be reached, because there would be no evidence that the instrumentality (dog) had been used in any manner and certainly not in a manner calculated or likely to produce death or great bodily harm.

People v. Nealis,[61] a California decision, illustrates a more rational result resolved under a statutory scheme similar to Louisiana. The defendant ordered her Doberman Pinscher to attack the victim, and the dog complied. The court explained California's definition of a dangerous weapon as "any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury."[62] The court reviewed a wide variety of cases, focusing on the cases where the animal was commanded to attack or where the defendant ordered the dog to take

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56. Bennet, *supra* note 9, at 6.

57. Dale E. Bennett, *Criminal Law and Procedure, The Work of the Louisiana Supreme Court for the 1945-1946 Term*, 7 La. L. Rev. 288, 289 (1947).

58. State v. Bodoh, 582 N.W.2d 440 (Wis. Ct. App. 1992), *review granted*, 588 N.W.2d 631 (Wis. 1998), *aff'd*, 595 N.W.2d 330 (Wis. 1999).

59. La. R.S. 14:14:2(3) (1997).

60. *Bodoh*, 582 N.W.2d at 443.

61. 283 Cal. Rptr. 376 (Cal. App. Dep't Super. Ct. 1991).

62. *Id.* at 378.

some action (guard, come, lay down, etc.) which gave the victim an objective and reasonable fear that the dog was under the control of the defendant. The court then held:

> Depending upon the circumstances of each case, a dog trained to attack humans on command, or one without training that follows such a command, and which is of sufficient size and strength relative to its victim to inflict death or great bodily injury, may be considered a 'deadly weapon or instrument'. . . .[63]

This holding does not cover all of the possibilities, but does provide a useful guideline, by giving the court flexibility to analyze each case individually and still requiring objective elements about the animal.

There is a certain logical temptation, which apparently overwhelmed the *Michels* court, to simply rely on the testimony of the victim as to whether the dog was sufficiently menacing to constitute a dangerous weapon. Other than the obvious problem of again allowing free upgrades to prosecutors, such an analysis would also contradict another important line of Louisiana cases holding that the victim's subjective fear of an object, by itself, is not enough to make that object a dangerous weapon.[64]

Applying this new interpretation of dangerous weapon to the facts in *Michels*, the victim was afraid (which should be a factor, though not an extraordinary factor), and the animal was of a type that is objectively frightening (pit bull terriers are well known as fighting and guard dogs). However, the victim's testimony did not indicate any action by the defendant that the dog was being used in the crime. The defendant made no verbal threat that the dog would attack, nor was there any command by the defendant to the animal that would indicate any particular control. The victim's testimony only says that the dog was in the trailer, bared its teeth, and growled—not that the dog was used, in any manner, let alone in a manner "likely or calculated to inflict death or serious bodily injury,"[65] or even to create a reasonable and objective fear of such. Under these circumstances, where there is no obvious intent by the defendant to use the dog in

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63. *Id.* at 379.

64. State v. Bonier, 367 So. 2d 824 (La. 1979) (stating that the dangerous weapon analysis is a factual one, in which subjective fear of victim is significant but not the determinative factor); State v. Byrd 385 So. 2d 248 (La. 1980) (setting aside armed robbery conviction where defendant was armed with toy pistol and clearly not a plausible threat); State Ex Rel Richey v. Butler, 572 So. 2d 1043 (La. 1991) (setting aside armed robbery conviction where defendant was armed with crude simulation of bomb, constructed of 2x4, electrician's tape, and lady's wristwatch, where victim never felt threatened and objective circumstances showed threat not plausible).

65. La. R.S. 14:2(3) (1997).

the commission of a crime, or more generally, to use or threaten to use of the dog as a dangerous weapon, the court ought to have affirmed the conviction on subsection 1, the victim resists but is overcome, and subsection 2, threat of force with ability to execute, of the statute, but not subsection 3, while armed with a dangerous weapon.[66]

V. CONCLUSION

The construction of "dangerous weapon" under Louisiana Revised Statutes14:2(3) should be understood to include animals that are actively used to commit crimes. As the problem has arisen through the judiciary and the manner in which it has construed precedent, it would be a cleaner solution to allow the judiciary to resolve the problem, rather than bring in the legislature. A new understanding would bring Louisiana's position in line with the national jurisprudence, and reflect the intent of the drafters of the code. In total, the State should recognize the possibility that an animate thing could be used as a dangerous weapon, but retain the position that hands and feet are not.

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66. *See supra* note 4, for full text of subsections

** The author wishes to thank Professor Lee Hargrave for advising him on this article. Everything depends on Mary Jo. Thanks to Mark Smylie, who put me as an inspiration in his first published work.