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CRIMINAL LAW

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CERTAINTY IN DEFINITION OF CRIMES—DISTURBING THE PEACE

Vagrancy and disturbing the peace laws and ordinances have long been used to get undesirable and suspicious persons off the streets and under arrest. The United States Supreme Court, in a series of fairly recent decisions, has served notice that such legislative enactments must be clearly stated and not overly broad in their scope if they are to meet due process standards.[1] Following this mandate, a federal district court held the last part of clause (7) of Louisiana's vagrancy article, which punished loitering "around any public place of assembly, without lawful business or reason to be present," to be unconstitutionally vague and overly broad.[2]

The most recent public order offenses to flunk the constitutionality test have been clauses (2) and (7) of Louisiana's disturbing the peace statute.[3] Following a recent sweeping holding of the United States Supreme Court in *Gooding v. Wilson*,[4] the Louisiana supreme court posited its holdings that clauses (2) and (7) were unconstitutional upon the ground that those broadly stated provisions constituted an impairment of the first amendment privilege of freedom of speech. In two briefly stated opinions,[5] the court stressed the importance of avoiding possible impairment of constitutionally protected freedom of expression. In connection with clause (2), for example, the court stated that the punishment of "unnecessarily loud, offensive or insulting language in such a manner as would foreseeably disturb and alarm the public" might be "susceptible of application to speech, although vulgar or offensive, that is protected by the First and Four-

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1. Coates v. City of Cin., 402 U.S. 611 (1970); Papachristou v. Jacksonville, 405 U.S. 156 (1971) (where a Jacksonville, Florida ordinance was found by a unanimous court to flunk every constitutional test, giving unbridled sanction to police for arrest of non-conformists). *See also* Palmer v. City of Euclid, 402 U.S. 544 (1971) (holding invalid a "suspicious person" ordinance used to pick up late night street loiterers).

2. Scott v. District Att'y, 309 F. Supp. 833, 836 (E.D. La. 1970).

3. LA. R.S. 14:103 (1950).

4. 405 U.S. 518 (1972); Lewis v. City of New Orleans, 408 U.S. 913 (1972).

5. State v. Adams, 263 La. 286, 268 So. 2d 228 (1972) (holding clause (7) unconstitutional); State v. Ganch, 263 La. 251, 268 So. 2d 214 (1972) (holding clause (2) unconstitutional). Other even more broadly stated supplemental disturbing the peace statutes were similarly held unconstitutional in *State v. Brown*, 282 So. 2d 707 (La. 1973) (holding R.S. 14:103(B)(2)(e) unconstitutional); and *State v. Harrison*, 280 So. 2d 215 (La. 1973) (holding R.S. 14:103.1(A)(1) unconstitutional).

teenth Amendments to the Constitution of the United States."[6]

Just when a statute is overly broad and provides an impermissible invasion of the constitutional right of free speech, is only indicated in a negative way by the decisions. Fortunately, *City of New Orleans v. Lewis*[7] provides solace and further guidance to those who may be drafting vagrancy and disturbing the peace statutes or ordinances. In upholding a New Orleans police cursing ordinance the Louisiana supreme court stressed the limiting nature of the language of the ordinance, which made it an offense "for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty."[8] Justice Hamlin's majority opinion concluded that the ordinance only covered "fighting words" which were likely to produce public violence; and further stressed the paramount importance of protecting police while in the performance of their duties to protect the community. Thus, it was concluded that the ordinance was "narrowly tailored to further the State's legitimate interest. Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would riase no question under that instrument."[9] Dissenting Justice Tate[10] did not disagree with the general principles announced by Justice Hamlin, but concluded that those criteria were not met by the New Orleans ordinance. Justice Tate found it difficult to agree that the ordinance was limited to "fighting words." Even more importantly, the ordinance was violated by opprobrious language "with reference to" an officer engaged in the performance of his duty. The ordinance did not require that the language be used in the officer's presence. Thus, the potential breach of peace and actual interference with law enforcement were not essential elements of a violation. It would appear that the ordinance draftsman's objectives (stressed by Justice Hamlin) were sound, but its implementation (as shown by Justice Tate's dissent) may have been somewhat defective. Statutes and ordinances in the vagrancy, disorderly conduct and breach of the peace area are of major social significance, and their purpose should not be defeated

6. State v. Adams, 263 La. 286, 287, 268 So. 2d 228, 229 (1972).

7. 263 La. 809, 269 So. 2d 450 (1972).

8. *Id.* at 814, 269 So. 2d at 452.

9. *Id.* at 823, 269 So. 2d at 455.

10. *Id.* at 828-37, 269 So. 2d at 457-60. (Justices Barham and Dixon concurred in the dissent.)

by hyper-technical construction.[11] Yet such statutes must be carefully drawn with such specificity that they will not serve as a dragnet for the arrest of unsavory characters who have not committed or are not planning any substantial identifiable wrong. Such drafting requires skill of the proverbial "Philadelphia lawyer." The *Lewis* opinions, whether one agrees with the majority opinion or the dissent, provide substantial guidance for prospective draftsmen and should be carefully studied.

FURMAN V. GEORGIA—LOUSIANA APPLICATIONS AND IMPACTS

Furman v. Georgia[12] was the key decision in a triology of cases wherein the United States Supreme Court set aside death sentences in two Georgia capital cases (one for rape and the other for murder) and in a Texas rape conviction, as constituting cruel and unusual punishment in violation of the eighth and fourteenth amendments. In these cases the death sentences were pursuant to a procedure, similar to the then controlling Louisiana procedure,[13] whereby the jury was given the discretionary authority to return a qualified verdict of guilty without capital punishment. In each of the cases the jury had not seen fit to qualify its verdict. The cases were remanded for re-sentencing to life imprisonment. Because of the importance of the holding, and also because of the variety of considerations which motivated their conclusions, separate opinions were filed by the various Supreme Court Justices. The decision was 5 to 4 and only two of the majority Justices, Brennan and Marshall, were ready to hold that capital punishment was per se "cruel and unusual" by reason of its severe and degrading nature. Concurring Justices Stewart, White and Douglas stressed the nature of the Georgia procedure which had resulted in the random selection of a few defendants for the death penalty. Justice Stewart concluded "that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and freakishly imposed."[14] Justice White recognized the probable validity of statutes requiring imposition of the death penalties for narrowly defined categories of murder or rape, but condemned

11. In an important and well-reasoned case, upholding the public bribery article of the criminal code, Chief Justice Fournet logically pointed out that the court should not strike down a statute because there may be marginal cases where doubt might arise. State v. Smith, 252 La. 636, 212 So. 2d 410 (1968).

12. 408 U.S. 238 (1972).

13. LA. CODE CRIM. P. art. 817.

14. 408 U.S. 238, 310 (1972).

the Georgia procedure that provided for infrequent application of the death penalty with no guiding critiera.[15] Justice Douglas posited his concurring opinion upon the discriminatory way the penalty was imposed on poor and minority classes "whose numers are few, who are outcasts of society, and who are unpopular."[16] Dissenting Chief Justice Burger was most helpful in suggesting that even-handed justice must be provided if capital punishment is to be upheld. It was implicit in Justice Burger's opinion that capital punishment should be upheld if it was uniformly applied to all and reserved for "a small category of the most heinous crimes."[17] Justice Burger's clearly stated dissent, fortified by a careful study of the Stewart, White and Douglas opinions, has guided the thinking of subsequent state legislation aimed at preserving capital punishment in a form that would, hopefully, meet with Supreme Court approval.

Post-*Furman* Louisiana decisions have provided a logical implementation of the *Furman* mandate. *State v. Franklin*[18] and a series of similarly decided cases,[19] upon setting aside imposition of the death penalty as cruel and unusual punishment, affirmed the conviction, and remanded the case with instructions to the trial judge to sentence the defendant to life imprisonment. This was in conformity with the disposition of the case in *Furman*, and was also in accord with the disposition of analogous cases where capital penalties had been set aside under *Witherspoon v. Illinois*.[20] In those instances where death penalties had been invalidated because of exclusion of prospective jurors who had only general conscientious scruples against capital punishment, the convictions were affirmed but the cases were remanded for sentences of life imprisonment to be imposed. It should be noted that there had been no reversible defects in the trial procedures in *Franklin*, and the only constitutional infirmity was in the nature of the verdict and sentence. This defect could be remedied by the imposition of a constitutionally permissible sentence.

The impact of *Furman* upon special state procedures to be followed in so-called "capital" cases was presented in two 1972 cases.

15. *Id.* at 238.

16. *Id.* at 245.

17. *Id.* at 375.

18. 263 La. 344, 268 So. 2d 249 (1972).

19. State v. Square, 263 La. 291, 268 So. 2d 229 (1972); State v. Williams, 263 La. 284, 268 So. 2d 227 (1972); State v. Poland, 263 La. 269, 268 So. 2d 221 (1972); State v. Singleton, 263 La. 267, 268 So. 2d 220 (1972).

20. 391 U.S. 510 (1968).

In *State v. Holmes*[21] the Louisiana supreme court held that, although capital punishment could no longer be imposed under Louisiana's qualified verdict procedures, murder was still classified by the legislature as a "capital" crime. As a result, the special capital crime procedural requirements of a unanimous verdict[22] and for sequestration of the jury during the trial,[23] were still applicable to a murder trial. The importance of this holding, on a question where authority from other states was clearly divided, is illustrated by the list, in Justice Dixon's thorough and helpful appendix, of the numerous special procedural rules which must be followed in capital cases.[24] In essence, murder, aggravated rape and aggravated kidnapping are still capital crimes in Louisiana, even though death sentences can not be imposed under Louisiana's special verdict procedures which provide for the same unguided jury determinations which were held unconstitutional in *Furman*. "Nor indeed," aptly stated Justice Dixon, "has the United States Supreme Court eliminated the possibility that the Louisiana legislature might enact statutes which could constitutionally impose the death sentence, when the sentence is mandatory and cannot be applied in a discriminatory manner."[25] Justices Barham and Tate filed vigorous dissents predicated on the idea that "capital" offenses should be limited to crimes for which a death sentence could actually be imposed. Justice Barham stated, "It was the severe and irreparable consequences which accompanied a verdict of guilty that impelled the Legislature and courts to afford additional safeguards for the defendant."[26]

In *State v. Flood*[27] the other side of the *Holmes* coin was presented, and the issue was whether the constitutional and statutory restrictions on bail in capital cases were still applicable to a defendant accused of murder.[28] In holding that a murder defendant was not entitled to bail where the proof was evident or the presumption great, the supreme court again stressed the classification theory, and held that the intended procedural structures for the trial of crimes designated by the legislature as capital had not been changed by *Furman*. Again, as in *Holmes*, Justice Barham dissented concluding that, "the

21. 263 La. 685, 269 So. 2d 207 (1972).
22. LA. CODE CRIM. P. art. 782.
23. *Id.* art. 791.
24. 263 La. 685, 694, 269 So. 2d 207, 210 (1972).
25. *Id.* at 691, 269 So. 2d at 209.
26. *Id.* at 696, 269 So. 2d at 211.
27. 263 La. 700, 269 So. 2d 212 (1972).
28. LA. CONST. art. I, § 12; LA. CODE CRIM. P. art. 313.

end of the death penalty tolls the end of the denial of bail."[29]

Discussion of the impacts of *Furman* would not be complete without a brief statement of Louisiana's 1973 legislative efforts to provide constitutionally effective capital punishment. An experienced and capable committee was appointed by Governor Edwards to prepare and propose appropriate legislation.[30] In view of the variously stated opinions of the Justices in *Furman* it was difficult to determine whether, or in what form, capital punishment would be sanctioned by the United States Supreme Court. The committee's package of capital punishment bills, following suggestions of dissenting Chief Justice Burger in *Furman* and Louisiana's Justice Dixon in *Holmes*, were predicated upon two cardinal principles. First, where capital punishment is provided it must be mandatory, and not imposed by the unguided whim or caprice of individual juries. Thus, the qualified verdict provision of article 817 of the Code of Criminal Procedure was eliminated. Secondly, capital punishment should be limited to super-atrocious crimes and crimes where effective administration of justice demands this extreme penalty. This was accomplished by providing first degree murder which was limited to killings where there was a specific intent to kill or inflict great bodily harm, and where one of five separately stated aggravated situations was present. In brief, these included intentional killings in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping or armed robbery; intentional killing of a police officer or fireman who was engaged in the performance of his duties; or intentional killings where the offender had been previously convicted of an unrelated murder or was serving a life sentence, where multiple killings were intended, or where the killing was for hire.[31] Other criminal homicides, which had previously been murder under the 1942 Criminal Code, were shifted to the lessor crime of second degree murder and carried the penalty of life imprisonment without eligibility for parole or probation until at least twenty years had been served.[32]

It was contemplated that first degree murder would be the only capital crime, so the committee's legislative package included bills reducing the penalty for aggravated kidnapping, aggravated rape and

29. 263 La. 685, 711, 269 So. 2d 207, 216 (1972) (citing New Jersey and Texas cases).

30. The committee was composed of John Mamouledes, John Parkerson, Joe Tritico, Edwin Ware, III, Jack Yelverton and Robert Pugh, chairman.

31. LA. R.S. 14:30 (1950), *as amended by* La. Acts 1973, No. 110, § 1.

32. LA. R.S. 14:30.1 (Supp. 1973).

treason to life imprisonment with no parole eligibility for twenty years. Unfortunately these supplemental bills were not enacted. The most tragic loss was the non-enactment of the bill that would have reduced the penalty for aggravated rape to life imprisonment. As a purely practical matter, it might have discouraged killing of rape victims if a greater penalty were provided where the victim was killed. As the law now stands, the rapist has nothing to lose by killing the one and only eye-witness to his crime. Also a survey of the aggravated rape laws of other states indicated that capital punishment is a rare and unusually harsh penalty for that crime.

It is submitted that the very limited first degree murder offense which was carved out by the 1973 statute should meet the constitutional tests which are indicated by the variously articulated opinions in *Furman*. The requirements for first degree murder, as distinguished from second degree murder, are clearly drawn. First degree murder covers situations where there is real justification for the ultimate penalty. Also by the deletion of the qualified verdict provision in article 817 of the Code of Criminal Procedure,. the imposition of capital punishment is mandatory in first degree murder convictions.

In addition to the crucial amendment of article 817, a number of other provisions of the Code of Criminal Procedure were amended to adjust their procedure to the newly created first degree murder offense. Article 465 was amended to provide specific indictment forms for first and second degree murder. Article 557 was amended to remove the qualified plea of guilty without capital punishment, which it was thought might be subject to the same constitutional infirmity as the qualified verdict. Article 598, relative to the effects of lesser pleas, was amended. In article 814, responsive verdicts for first and second degree murder were added. These responsive verdicts conform with the original special responsive verdicts for murder. In first degree murder, responsive verdicts of second degree murder and manslaughter give the jury an opportunity to return those lesser verdicts when the elements of first degree murder are not fully proven. The definitions of those homicidal crimes provide definite guidelines for the jury in making such determinations. The jury does not have unguided discretion, such as that which was held unconstitutional in *Furman*.

OTHER "CRUEL OR UNUSUAL PUNISHMENT" DECISIONS

While the eighth amendment prohibition against cruel or unusual punishment is applicable to the states via the fourteenth amend-

ment,[33] the Louisiana supreme court has been consistently reluctant to restrict legislative penalty determinations in non-capital cases.[34] In *State v. Neal*[35] and in *State v. Howard*,[36] the supreme court again upheld armed robbery sentences despite the Draconic nature of the penalty which the Louisiana legislature had fixed at 5 to 99 years "without benefit of parole, probation or suspension of sentence."[37] The wisdom of such a penalty, where a youthful first offender who played a very minor part in the planning and execution of the robbery must always serve at least five years in the state penitentiary, is very doubtful,[38] and is out of line with the more flexible handling of armed robbery penalties in most other states. However, the supreme court reiterated its established policy that "the type of punishment (and not the severity as to time imposed) determines what is prohibited as cruel and unusual punishment."[39] Clutching at a judicial straw, defense counsel in *State v. Miller*[40] urged that the worthless check statute, which gives felony status to the issuing of a bad check of $100.00 or more, constituted cruel and unusual punishment. In rather summarily rejecting that contention, the supreme court stated that under the federal and Louisiana constitutions, "[c]ruel and unusual punishments are those that are barbarous, extraordinary, or grossly disproportionate to the offense. In short, the constitutional prohibition is directed to punishments that shock the conscience of civilized men."[41] It may be suggested that, while considerable legislative leeway is recognized, if the worthless check statute had imposed the armed robbery penalty of 5 to 99 years without possibility of probation or parole for issuing checks of less than $100, the claim of "cruel and unusual punishment" would probably have succeeded.

In considering claims of "cruel and unusual punishment" article 878 of the Louisiana Code of Criminal Procedure is significant. That article, which is well supported by Louisiana and federal jurisprud-

33. Robinson v. California, 370 U.S. 660 (1962); LA. CONST. art. I, § 12 similarly provides.

34. State v. Thomas, 224 La. 431, 69 So. 2d 738 (1953) (upholding drastic narcotic penalties and stressing the moral degeneration resulting from such crimes).

35. 275 So. 2d 765 (La. 1973).

36. 262 La. 270, 263 So. 2d 32, 35 (1972).

37. LA. R.S. 14:64 (1950), *as amended by* La. Acts 1958, No. 380, § 1; 1962, No. 475, § 1; 1966, Ex. Sess., No. 5, § 1.

38. A Louisiana Law Institute bill which would have authorized probation or parole for first offenders was rejected by the 1972 Louisiana Legislature.

39. State v. Neal, 275 So. 2d 765, 768 (La. 1973).

40. 263 La. 960, 269 So. 2d 829 (1972).

41. *Id.* at 962, 269 So. 2d at 830.

ence,[42] states that "[a] sentence shall not be set aside on the ground that it inflicts cruel or unusual punishment unless the statute under which it is imposed is found unconstitutional."[43] Thus, it is the general statutory penalty, rather than the particular sentence imposed, which is subject to constitutional review.

SPECIFIC INTENT ELEMENT OF MURDER AND ATTEMPTED MURDER

Both first degree murder[44] and intentional second degree murder[45] require "a specific intent to kill or to inflict great bodily harm."[46] Such an intent will be implied from the use of a deadly weapon—as by stabbing or shooting the victim.[47] A more difficult burden of proof is imposed for a conviction of attempted murder which requires a specific intent *to kill.* In *State v. Lee*[48] a conviction of attempted murder was supported by evidence showing that the defendant had "fired at least one shot at the alleged victim."[49] It is conceivable, however, that a deadly weapon may be used with a specific intent to maim or seriously injure, rather than to kill. In such a situation the defendant would be guilty of murder if the victim died, but would not be guilty of attempted murder if the shot or blow did not kill the victim. By the nature of the attempt definition[50] a specific intent to commit the crime, which may be more demanding than the intent required for the completed offense, is an essential element of that offense. Similarly, an attempt to commit aggravated arson requires a specific intent, while the basic crime of aggravated arson only requires a general intent.[51]

FELONY-MURDER PROVISION

Louisiana's felony-murder offense, which is now included in the

42. State v. Vittoria, 224 La. 258, 261, 69 So. 2d 36, 37 (1953); State v. Gros, 208 La. 135, 139, 23 So. 2d 24, 25, *cert. denied*, 326 U.S. 766 (1945).

43. LA. CODE CRIM. P. art. 878.

44. LA. R.S. 14:30 (1950), *as amended by* La. Acts 1973, No. 110, § 1.

45. LA. R.S. 14:30.1(1) (Supp. 1973).

46. *Id.*

47. This presumption was recently recognized in *State v. Jordan*, 276 So. 2d 277, 279 (La. 1973).

48. 275 So. 2d 757 (La. 1973).

49. *Id.* at 760.

50. LA. R.S. 14:27 (1950), *as amended by* La. Acts 1970, No. 471, § 1.

51. LA. R.S. 14:51 (1950), *as amended by* La. Acts 1964, No. 117, § 1. Aggravated arson requires "the intentional damaging . . . or setting fire to. . . ." *See also* LA. R.S. 14:10(2) (1950); 14:11 (1950).

crime of second degree murder,[52] follows the modern trend to limit felony-murder liability to unintended homicides committed in the perpetration of "such felonies as are in themselves inherently dangerous to human life."[53] It applies to enumerated dangerous felonies where there is a great likelihood that death or great bodily harm will result.[54] In *State v. Frezal*[55] defense counsel attacked the felony-murder rule on the ground "that it allegedly 'imposes an intent where none actually existed,' and 'punishes the defendant where there is no criminal intent.' "[56] In overruling defendant's contention of unconstitutionality, the Louisiana supreme court pointed out that, although the felony-murder rule does not require proof of a specific intent to kill or inflict great bodily harm, it is not without a substantial mens rea requirement. It requires proof that the killer was committing or attempting to commit one of the enumerated dangerous felonies, and the state's burden of proof as to the underlying felony "requires the state to prove the criminal intent, be it general or specific, requisite to convict defendant of such felony."[57]

It is significant, though academic as to that case, to note the effects of the 1973 revision of Louisiana's homicide articles on the factual situation presented in *Frezal*. In *Frezal* the felony-murder doctrine of original article 30(2) of the criminal code was applied to the killing of the victim of an attempted rape. The new felony-second degree murder provision generally followed the original dangerous felony enumeration, but with two changes. Aggravated escape, which is characterized by the endangering of human life,[58] has been added to the felony-murder list. Aggravated rape was deleted from the list of enumerated felonies in the new second degree murder article[59] by a legislative committee which apparently wanted to make doubly sure that all rapists would be prosecuted for a capital crime. The attempted rape homicide in *Frezal* was a situation which that committee may have overlooked. The only crime which the would-be rapist, who unintentionally killed his intended victim, could be

52. LA. R.S. 14:30.1(2) (Supp. 1973).

53. People v. Phillips, 64 Cal. 2d 574, 582, 414 P.2d 353, 360 (1966).

54. LA. R.S. 14:30.1(2) (Supp. 1973): "Second degree murder is the killing of a human being: . . . (2) When the offender is engaged in the perpetration or attempted perpetration of aggravated arson, aggravated burglary, aggravated kidnapping, aggravated rape, armed robbery, or simple robbery, even though he has no intent to kill."

55. 278 So. 2d 64 (La. 1973).

56. *Id.* at 68.

57. *Id.* at 69.

58. LA. R.S. 14:110B (Supp. 1972).

59. LA. R.S. 14:30.1(2) (Supp. 1973).

charged with would be manslaughter. Clause (2)(a) of the manslaughter article applies to unintentional killings in the perpetration or attempted perpetration of "any felony not enumerated in articles 30 or 30.1, or of any intentional misdemeanor directly affecting the person."[60] While aggravated rape is enumerated in clause (1) of article 30, attempted rape resulting in death will almost always involve a battery, which is a misdemeanor directly affecting the person. The maximum penalty for manslaughter, however, is only imprisonment for twenty-one years.[61] It might be argued that the specific intent to rape should be equated with a specific intent to inflict great bodily harm. Then the accidental killing in attempting to perpetrate rape could be prosecuted for first degree murder under clause (1) of article 30, as amended in 1973. Such a broad construction of the phrase "intent to inflict great bodily harm" does not appear logical or probable.

BURGLARY—UNAUTHORIZED ENTRY REQUIREMENT

Common law burglary, and the burglary statutes of many states, require a "breaking and entry" of the building burglarized. The "breaking" requirement was easily satisfied by the displacement of any obstruction to free entry, such as the pushing open of an unlocked screen door.[62] It was "not necessary that splinters fly to have a breaking."[63] As one court succinctly stated, any "act of force, however slight, by which an obstruction to entrance is removed . . . is sufficient . . . where the entry is unlawful."[64] The burglary articles in the criminal code deleted the technical "breaking" requirement, and this element of the burglary crimes was satisfied by an "unauthorized entry." In *State v. Dunn*[65] the defendants had entered a washateria and a high school building for the purpose of stealing money from vending machines therein. The Louisiana supreme court held that the trial court had committed reversible error when it refused to instruct the jury to the effect that entering a building open to the public could not be an "unauthorized entry" for purposes of the simple burglary offense.[66] In so holding the court stated, "[i]n the case of a building which is open to the public, the consent to enter the

60. LA. R.S. 14:31 (1950), *as amended by* La. Acts 1973, No. 111, § 2.
61. *Id.*
62. State v. Gendusa, 193 La. 59, 190 So. 332 (1939).
63. United States v. Evans, 415 F.2d 340, 342 (5th Cir. 1969).
64. Byington v. State, 363 P.2d 301, 303 (Okla. Ct. Crim. App. 1961).
65. 263 La. 58, 267 So. 2d 193 (1972).
66. LA. R.S. 14:62 (1950), *as amended by* La. Acts 1972, No. 649, § 1.

building at the times which it is open to the public, and within the confines designated is *implied*. Therefore, there is no unauthorized entry because consent is present."[67] The court rejected the state's ingenuous contention that the authority to enter the buildings was limited to entry for lawful purposes, and that entry to steal was always unauthorized. If the authority to enter was to be vitiated by the defendant's intent to steal, the "unauthorized entry" requirement would be meaningless, and all shoplifters would, surprisingly, be guilty of simple burglary. In a very sound and practical interpretation of the Louisiana criminal code requirements, the court stated, "[a]s we construe the burglary statute, the entry must be unauthorized and this *must be determined as a distinct element of the offense separate and apart* from the intent to steal. If the legislature desired that burglary consist of only an entry with intent to steal, they would have omitted the word unauthorized."[68]

ATTEMPTED THEFT BY FRAUDULENT USE OF STUDENT I.D. CARD

In *State v. McIntyre*[69] the defendant had sought to gain admission to an L.S.U. football game by presenting a borrowed I.D. card and representing that he was the student to whom the card had been issued. Student I.D. cards are issued for the sole use of the student owner and are expressly non-transferable. Defendant was denied admission to the game and was prosecuted for attempted theft of entertainment services valued at seven dollars, *i.e.*, the right to view an L.S.U. football game. In support of the attempted theft charge, it should be noted that the privilege of viewing a football game is a thing of value and a proper subject of theft. The term "anything of value" is broadly defined, to "be given the broadest possible construction, including any conceivable thing of the slightest value—and including—any other service available for hire."[70] Seeking to obtain admission to a game by "fraudulent conduct, practices or representations" would constitute attempted theft.[71] Why, then, did the Louis-

67. 263 La. at 63, 267 So. 2d at 195 (1972).

68. *Id.* (Emphasis added.) *Accord*, Macias v. People, 161 Colo. 233, 421 P.2d 116 (1966); State v. Starkweather, 89 Mont. 381, 297 P. 497 (1931).

69. 263 La. 803, 269 So. 2d 448 (1972).

70. *See* LA. R.S. 14:67 (1950), *as amended by* La. Acts 1968, No. 647, § 1; 1970 No. 458, § 1; 1972 No. 653, § 1 (theft); 14:2(2) (1950), *as amended by* La. Acts 1962, No. 68, § 1 (definition of "anything of value").

71. *See* LA. R.S. 14:67 (1950), *as amended by* La. Acts 1968, No. 647, § 1; 1970 No. 458, § 1; 1972, No. 653, § 1 (theft); 14:27 (1950), *as amended by* La. Acts 1970, No. 471, § 1.

iana supreme court hold that it was not attempted theft when the defendant sought to gain admission to a football game by falsely representing himself as a student with an I.D. card? The basis of the court's holding is indicated by two statements in the opinion. First, the court concluded that the matter was one which "addresses itself to the internal discipline of Louisiana State University. . . . Any discipline administered the student lender had to be imposed by the University."[72] This argument is weakened by the fact that defendant McIntyre was a non-student who had sought to obtain something of value from the University by representing himself as a student holder of the I.D. card. Further insight into the court's holding is evidenced by the court's conclusion that the University had lost nothing by the thwarted attempted fraud. "The loser," said the court, "was the student, he missed seeing the game. The University under the circumstances herein presented lost nothing."[73] This method of reasoning loses sight of the true nature of attempts under article 27 of the criminal code. The attempt is punishable even though the defendant failed to accomplish his criminal purpose and no harm was actually suffered by the intended victim. The *McIntyre* decision appears to follow the premise that the essential basis of purported liability was a student's violation of the non-transferable nature of the I.D. card holder's privilege. It was felt that this matter could best be handled by internal University sanctions, rather than by criminal prosecutions. In essence the court was not ready to treat defendant's conduct as "fraudulent", within the meaning of the Louisiana theft article. A very close case, which might well have been decided the other way, was presented.

ARMED ROBBERY—SLIGHT PERIOD OF POSSESSION

Robbery is theft which has been accomplished "by use of force or intimidation," and armed robbery includes the aggravating element that the criminal was "armed with a dangerous weapon."[74] In *State v. Neal*[75] the armed defendant had seized the victim's wallet, but had immediately dropped it when fired upon by the victim. The handing over of the wallet and defensive firing by the victim had been substantially simultaneous. One of the issues on appeal was whether

72. 263 La. at 807, 269 So. 2d at 449.

73. *Id.*, 269 So. 2d at 450.

74. LA. R.S. 14:64 (1950), *as amended by* La. Acts 1958, No. 380, § 1; 1962 No. 475, § 1; 1966, Ex. Sess. No. 5, § 1.

75. 275 So. 2d 765 (La. 1973).

there had been a sufficient "taking" of the wallet to constitute the basic crime of theft, which was essential to the armed robbery conviction. In affirming the conviction the supreme court held that it was sufficient if "the robber did have, at some time *if only momentarily*, Mr. Howard's wallet in his hand."[76] If, however, the robber had never taken possession of the wallet, and had merely knocked it from the victim's outstretched hand, there would have been no "taking" within the meaning and requirements of Louisiana's general theft article.[77] The *Neal* decision appears to equate the "taking" required under Louisiana's theft article with the "taking and asportation" requirement of common law larceny; but it fortunately continues the common law liberal construction of that requirement when it approved the trial courts per curiam

> to the effect that the slightest asportation of anything of value . . . the slightest deprivation for the slightest period of time . . . the slightest segregation of the property moved for the slightest distance is sufficient to satisfy the elements of theft, which is a part of the crime charged. A theft occurs, when the thing is taken, although it may remain in possession of the thief for only seconds.[78]

It is of the essence in theft that the thief must have acquired control of the property. As illustrated by the facts of *Neal*, the duration of such control, and the extent and nature of the movement (asportation) of the article, is immaterial.

DEFENSE OF INSANITY—MCNAUGHTEN TEST

In *State v. Frezal*[79] the defendant in a felony-murder trial had urged insanity at the time of the alleged crime as a defense on the merits. In refusing to give a requested special charge on "irresistible impulse," the supreme court applied the "right and wrong" test, which originated in *McNaughten's* case[80] and had been expressly continued in Louisiana's criminal law by article 14 of the 1942 criminal code. In answer to appellant's argument that the "right and wrong" test was "outmoded and archaic," the supreme court reaffirmed its

76. *Id.* at 770. (Emphasis added).

77. LA. R.S. 14:67 (1950), *as amended by* La. Acts 1968, No. 647, § 1; 1970, No. 458, § 1; 1972, No. 653, § 1. For early recognition of this distinction, see *Thompson v. State*, 94 Ala. 535, 10 So. 520 (1892).

78. 275 So. 2d at 770.

79. 278 So. 2d 64, 73 (La. 1973).

80. 8 Eng. Rep. 718 (1843).

previously stated position that any change in the test for the insanity defense was "a matter which addresses itself to the legislature."[81] Looking at the problem from a standpoint of policy and practicality, it is submitted that the "irresistible impulse" test, which was urged, is far from a complete or proper criteria for determining criminal responsibility. That test contemplates a crime committed in sudden frenzy and does not recognize that mental illness is sometimes characterized by brooding and reflection. Also there is a serious difficulty in determining whether the impulse was really irresistible or whether the defendant just didn't resist. The so-called *Durham* "product" test, which was similarly rejected by the Louisiana supreme court in *State v. Plaisance*,[82] is so broad that it provides virtually no guidance for the jury and "almost all criminals could come under such a definition."[83] If the legislature should re-examine the insanity test of article 14 of the criminal code, the substantial capacity standard of the American Law Institute's Model Penal Code may offer a workable standard which is keyed to modern developments in psychiatry and also provides some fairly solid jury guidelines.[84] As a practical matter, the "right and wrong" test has seldom served to preclude successful urging of the insanity defense in really meritorious cases. Where there is a solid insanity defense, appropriate psychiatric testimony and other relevant evidence can be channelled into the "right and wrong" test, which is aimed at showing that at the time of the criminal act the mentally deficient defendant was unable to appreciate the wrongness of his conduct. Such an approach will be particularly effective in so-called "irresistible impulse" situations.

ENTRAPMENT

An excellent reiteration of the law of entrapment is provided in *State v. Kelley*[85] where the defense of entrapment was denied to a convicted liquor law violator. The distinction between improper en-

81. 278 So. 2d 64, 74 (citing prior cases so holding).

82. 252 La. 212, 210 So. 2d 323 (1968).

83. State v. White, 60 Wash. 2d 551, 374 P.2d 942 (1962).

84. A.L.I. MODEL PENAL CODE § 4.01 (1962): *Mental Disease or Defect Excluding Responsibility*. "(1) a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.

(2) As used in this Article, the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct."

85. 263 La. 545, 268 So. 2d 650 (1972).

trapment which constitutes a defense to crime, and proper police activity is largely a question of where the criminal intent originated. It is entrapment where the defendant is lured into a crime upon suggestion of the police or their agent. It is not entrapment where the defendant was "ready and willing" and the police merely induced him to furnish an instance of such violation. Along this line the *Kelly* opinion states

> [t]here is a clear distinction between inducing a person to do an unlawful act for the purpose of prosecuting him, and catching him in a criminal design of his own conception. . . . Entrapment exists when the offender instigates the crime; that is, the officer must plan and conceive the crime and the defendant must have perpetrated it only because of trickery, persuasion or fraud of the officer. The fact that the officer afforded the opportunities for the commission of the crime does not defeat the prosecution.[86]

In essence, the court concludes, "It is a question of fact for the trier of facts to determine whether the accused had the necessary intent or persuasion before the suggestion by the officer to commit the crime."[87]

86. *Id.*, 268 So. 2d at 652. An excellent statement of the law of entrapment is found in *Butler v. United States*, 191 F.2d 433 (4th Cir. 1951).

87. State v. Kelly, 263 La. 545, 550, 268 So. 2d 650, 652 (1972).