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THE TEXAS PENAL CODE OF 1974

by

Charles P. Bubany*

1973 was an important year for the substantive criminal law of Texas. Amid the controversy over capital punishment and drugs, the legislature substantially revised the Texas Penal Code for the first time since its enactment in 1856.¹

The contribution of the new Code to rational and enlightened administration of criminal justice in this state is substantial, but it should not be overstated. Only "significant penal law" is reformed by the Code;² many statutes that merely employ a penal sanction were simply transferred to "appropriate places within the framework of Texas statute law."³ As a result, the Code has increased, without revising, the constantly growing mass of statutes scattered throughout the civil statutes which impose fines and imprisonment.⁴ A large share of these statutes are of a regulatory nature rather than proscriptions of hard core criminality, and many violations are not prosecuted. Nevertheless, they constitute the majority of criminal statutes in this state, and remain virtually unaffected by the new Code.⁵ It should not be concluded that even that part of the penal law affected by the revision has been reformed either radically or completely. Substantive reform of some problem areas was neither achieved nor attempted. Conceptual and verbal inadequacies still exist.

* B.A., St. Ambrose College; J.D., Washington University (St. Louis). Associate Professor of Law, Texas Tech University.

1. Keeton & Searcy, *A New Penal Code for Texas*, 33 TEX. B.J. 580 (1970). The recodifications of 1879, 1895, 1911, and 1925 involved only formal revision rather than efforts to rationalize and restructure the whole penal code. *Committee Foreword to STATE BAR COMMITTEE ON REVISION OF THE PENAL CODE, TEXAS PENAL CODE: A PROPOSED REVISION at III (Final Draft, Oct. 1970)* [hereinafter cited as PROPOSED DRAFT]. The new Texas Penal Code was approved on June 14, 1973, and became effective on Jan. 1, 1974. Texas Penal Code, ch. 399, [1973] Tex. Laws 883 [hereinafter cited as TEX. PENAL CODE and referred to in the text as the "Code" or "new Code"]. In addition to the State Bar Committee Comments in the PROPOSED DRAFT, the following works relied on by the author are recommended for their discussion of the general principles and problems stated herein: G. DIX & M. SHARLOT, *CRIMINAL LAW: CASES AND MATERIALS* (1973) [hereinafter cited as DIX & SHARLOT]; W. LAFAVE AND A. SCOTT, *HANDBOOK ON CRIMINAL LAW* (1972) [hereinafter cited as LAFAVE & SCOTT].

2. *Committee Foreword to PROPOSED DRAFT at IV.*

3. Ch. 399, § 5(a), [1973] Tex. Laws 995.

4. This conclusion is drawn from a study being conducted by the author with research support from the Texas Criminal Justice Council, and Texas Organized Research Funds. Preliminary findings indicate the existence of over 500 such statutes, establishing a range of punishments from one day to life in prison and fines as great as \$20,000.

5. The Penal Code could affect interpretation of these statutes, however, since the general principles of titles 1, 2, and 3 of the Code are made applicable to these other statutory provisions. See note 8 *infra*, and accompanying text.

The legislature annually contributes to the proliferation of penal statutes outside the Penal Code. 1973 was no exception. See Cumulative Index to Laws 1973, chs. 400-658, [1973] Tex. Laws A-286 to -287. Even the Texas Controlled Substances Act, discussed at notes 233-37 *infra*, was not enacted as part of the Penal Code.

The lack of radical change and the existence of defects should not obscure the fact that in light of the obstacles to meaningful revision, the degree of order, rationality, simplicity, and clarity achieved in the new Code is remarkable. Indeed, one of the new Code's major attributes is a structure and format that will tend to highlight defects and facilitate the process of amendment. But perhaps its most significant feature is the analytical approach suggested by the rationalized and restructured formal organization.

The Code follows the trend of modern legislation of adopting and stating at the outset the general principles and definitions that are applicable throughout. Even within the chapters which define specific offenses, a great deal of emphasis is placed on introducing the chapter with definitions applicable only to that part of the Code. This approach simplifies drafting and saves space. More importantly, it helps to provide the necessary background and facility for understanding the application of provisions relating to the specific offenses.

In chapter 1 of title 1, the objectives, principles of construction, and definitions that are applicable throughout the Code are stated. Burden of proof is treated in chapter 2 and multiple prosecution is dealt with in chapter 3. Probably the most important major section of the Code is title 2 (chapters 6-9), which sets forth the "General Principles of Criminal Responsibility" that are fundamental to all types of offenses. Chapters 6 and 7 of title 2 define the basic components of criminal liability, including criminal "act," culpable mental states, causation, complicity, and corporate liability. Chapters 8 and 9 set forth the basic law on excuses or defenses. Title 3 (chapter 12) is devoted entirely to definition of the various grades of offenses and the potential punishment involved in each. The inchoate offenses—attempt, conspiracy, solicitation, and possession of criminal instruments—are contained in title 4 (chapters 15 and 16). The remaining titles define specific criminal offenses, grouping them according to the harm they inflict: offenses against the person in title 5 (chapters 19-22), offenses against the family in title 6 (chapter 25); offenses against property in title 7 (chapters 28-32), offenses against public administration in title 8 (chapters 36-39), offenses against public order and decency in title 9 (chapters 42 and 43), and finally, offenses against public health, safety, and morals are treated in title 10 (chapters 46 and 47).

I. INTRODUCTORY PROVISIONS (TITLE 1)

A. *Scope: Legislative Supremacy, Legality, Preemption, and Jurisdiction*

By declaring that conduct is not an offense unless so defined by statute or other legislative act, the Code supersedes all common-law offenses and reaffirms the so-called principle of "legality," that there can be no crime without law.⁶ Although the Code does not include all Texas penal law, it is established as the preeminent body of law applicable to all the activities covered by its provisions. Any other law, whether a state penal statute,

6. TEX. PENAL CODE § 1.03, expressed in the maxim *nullem crimen sine lege*.

a municipal ordinance, or an administrative rule or regulation, is of no effect to the extent that it overlaps, duplicates, or conflicts with a Code provision.⁷ Furthermore, the general principles of the Code are made applicable to penal statutes found outside the Code, unless the non-Code statutes provide otherwise. However, the penalty attached to a non-Code statute remains applicable unless the statute has been classified according to the scheme of punishments in title 3 of the Code.⁸ In any case, the power of a court to enforce civil remedies, such as license suspension or cancellation, penalties, forfeitures, or damages is unaffected, and the court may include them in the criminal sentence.⁹

In section 1.04 the Code expands Texas criminal jurisdiction to what appears to be the permissible constitutional limit.¹⁰ The state has territorial jurisdiction over the land and water, and air space above it. It has jurisdiction over offenses, any element of which occurs inside this state; out-of-state attempts to commit offenses inside the state; out-of-state conspiracies, if an act in furtherance of the conspiracy occurs inside the state; and, any offense under the law of another state that is also an offense in Texas, if any conduct—including an “attempt, solicitation, or conspiracy” or other conduct that “establishes criminal responsibility” for its commission—occurs in Texas. Section 1.04 permits assertion of jurisdiction over homicides if either the impact causing death or the death itself occurs in the state. To overcome problems of proof when the finding of a body in this state is the sole basis for assertion of jurisdiction, the Code establishes a rebuttable presumption that the death occurred in this state. When death alone is the basis for jurisdiction, it is a defense to a prosecution in this state that the conduct resulting in death was not criminal in the state where it occurred. The Code’s jurisdictional provision also establishes jurisdiction over offenses based on omissions to perform a duty if that duty was imposed on the actor by a statute of this state. This provision probably will have its primary application in the domestic relations offenses of non-support and child desertion.¹¹

B. Interpretation of the Code

The common-law rule of strict construction of penal statutes is expressly abolished by the Code. In its place is substituted a canon of construction that the Code’s provisions “shall be construed according to the fair import of their terms, to promote justice and effect the objectives of the code.”¹² This “fair construction” notion is supplemented by incorporating by reference selected provisions of the Texas Code Construction Act.¹³ Although

7. *Id.* § 1.03; PROPOSED DRAFT § 1.03, Comments at 6-7.

8. TEX. PENAL CODE § 1.03(b).

9. *Id.* §§ 1.03(c), 12.01(c).

10. PROPOSED DRAFT § 1.04, Comments at 8-9.

11. *Id.* at 10.

12. TEX. PENAL CODE § 1.05(a).

13. *Id.* § 1.05(b); Code Construction Act, TEX. REV. CIV. STAT. ANN. art. 5429b-2, §§ 2.01-.02, 2.04-.05, 3.01-.12 (Supp. 1974). This provision may be used to resolve a conflict in language between provisions of TEX. PENAL CODE § 8.07 and TEX. FAM. CODE ANN. § 51.02 (Supp. 1974) relating to jurisdiction of juvenile offenders. Both

the rule of strict construction apparently has been used "only to support a decision already made on other grounds,"¹⁴ its abandonment is salutary. Strained interpretations of criminal statutes in the past have led to distortions of substantive criminal law.¹⁵ Hopefully, the new Code will lessen the need and discourage the temptation to indulge in technical interpretations that seek to avoid the supposed harshness of a literal application of statutory language.

The comments of the Committee of the State Bar on Revision of the Code will be an invaluable aid to the interpretation of numerous provisions of the Code, at least those comments relating to "provisions unchanged during legislative consideration."¹⁶ Even in those instances in which provisions different from those in the draft were enacted, the comments may prove helpful. The rejection of the Proposed Draft provision in itself could be persuasive evidence of the legislative intent to avoid the result that the drafters indicated in the comments would occur under the proposed section. Where it is evident that the proposed draft would have changed prior law, its rejection might be strong evidence of a desire to conform to the prior law as interpreted by the Texas Court of Criminal Appeals.¹⁷

Finally, court decisions of other jurisdictions interpreting provisions similar to Texas Code provisions or comment and commentary on borrowed provisions, such as the Proposed Federal Criminal Code, may provide useful benchmarks of the Code's interpretation.¹⁸

C. Objectives of the Code

The objective of the old Code was tersely stated: its purpose was "to prevent crime and reform the offender."¹⁹ In section 1.02 the new Code attempts to provide a more specific and complete statement of objectives that will be of some benefit in the interpretation and application of its provisions.²⁰ The agreement as to the general objectives reflected in section 1.02 tends to conceal the pervasive conflict of values and widely divergent philosophies involved in the administration of the penal law, but the language gives a clue to the underlying conflict.

statutes make age 17 the dividing line between juvenile court jurisdiction and potential criminal court jurisdiction. However, TEX. PENAL CODE § 8.07(b) makes jurisdiction dependent on age at the time of the *proceedings*, while TEX. FAM. CODE ANN. § 51.02 (Supp. 1974) makes it hinge on age at the time of the *offense*. For an opinion that a fair construction consistent with the Code Construction Act would establish the Family Code test as authoritative, see the final section of Dawson, *Delinquent Children and Children in Need of Supervision: Draftsman's Comments to Title 3 of the Texas Family Code*, 5 TEX. TECH. L. REV. (No. 2 1974) (not yet published).

14. PROPOSED DRAFT § 1.05, Comments at 11.

15. Levine, *The New York Penal Law: A Prosecutor's Evaluation*, 18 BUFFALO L. REV. 269, 273 (1969). See generally Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748 (1935).

16. PROPOSED DRAFT § 1.05, Comments at 12.

17. This seems quite obvious, for example, in the attempt statute, discussed *infra* at notes 189, 190.

18. The authors of the PROPOSED DRAFT drew on the law reform efforts of over half the states, the federal government, and the American Law Institute (Model Penal Code). *Committee Foreword to PROPOSED DRAFT at VIII*.

19. Ch. 1, art. 1, [1925] Penal Code of Texas 3 (repealed 1973).

20. TEX. PENAL CODE § 1.02; PROPOSED DRAFT § 1.02, Comment at 4.

The general purpose of the Code is "to deal with conduct . . . that causes or threatens harm to those individuals or public interests for which state protection is appropriate,"²¹ but it also directs that criminal responsibility shall attach only to conduct that "unjustifiably and inexcusably," or with "guilt" causes or threatens harm. This dual purpose suggests that a continuing controversy has not been solved: Should the penal law be committed to a subjective theory of criminal liability that emphasizes the "responsibility" or moral guilt of the actor;²² or more appropriately and pragmatically, should it focus on harm and objective manifestations of criminality, while limiting the law's inquiry into an actor's subjective state of mind?²³

The statement of objectives also indicates an ultimate conflict in concepts of the *administration* of penal statutes. The goal of the Code, unchanged from that of prior law, is "to insure the public safety" by prevention or deterrence of criminal conduct, and the rehabilitation of individual offenders.²⁴ This is thought to be achieved by inculcating in the offender a sense of why he is being punished, by giving him fair warning of what is prohibited and of the consequences of violation,²⁵ while at the same time allowing sufficient flexibility to "permit recognition of differences in rehabilitation possibilities among individual offenders . . ." ²⁶ Consistent with this goal, the drafters expressed a desire that the Code would "guide and limit the exercise of official discretion in law enforcement to prevent arbitrary or oppressive treatment of persons accused or convicted of offenses."²⁷ Unfortunately, however, the new Code does little to engender confidence that it will have any substantial bearing on whether the discretion of law enforcement officials will be exercised either wisely or well.

As has become increasingly apparent, the criminal justice system is becoming less an adversary system and more a system of post-arrest negotiation in which the vast majority of cases are settled prior to trial.²⁸ In this

21. TEX. PENAL CODE § 1.02.

22. A basic assumption of the penal law is that normal individuals are morally responsible for their actions because they possess free will. However, the term "liability," rather than the "responsibility" of the Code, is used herein to refer to the judgment in law that a person may be found guilty of crimes and subjected to punishment. Usage of "liability" is thought preferable since in many instances the moral responsibility of the actor may be deemed irrelevant.

23. The philosophical conflict is treated in detail in Dubin, *Mens Rea Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility*, 18 STAN. L. REV. 322 (1966). A complete commitment to an actor-oriented criminal law seems unlikely in the face of the typical legislator's sensitivity to public feeling and the charge of "coddling" criminals. See Cohen, *Reflections on the Revision of the Texas Penal Code*, 45 TEXAS L. REV. 413, 415-16 (1967).

24. TEX. PENAL CODE § 1.02(1).

25. *Id.* § 1.02(2). This also is a requirement for satisfaction of the due process clause. *United States v. Evans*, 333 U.S. 483 (1948); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *Horak v. State*, 95 Tex. Crim. 474, 255 S.W. 191 (1923); see *Baker v. State*, 478 S.W.2d 445 (Tex. Crim. App. 1972) (partially striking down a prior vagrancy law).

26. TEX. PENAL CODE § 1.02(3). In the popular jargon, this is "individualized treatment"—making the punishment fit the criminal—as well as making it "proportionate to the seriousness" of the crime. *Id.*

27. *Id.* § 1.02(5).

28. Dash, *Preface to The United States Courts of Appeals: 1971-1972 Term (Criminal Law and Procedure)*, 61 GEO. L.J. 275, 280-84 (1972); see D. NEWMAN, *CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL* (1966);

milieu, the discretion of the prosecutor is virtually unfettered.²⁹ The new Code will not inhibit this trend, and may even encourage it in two respects. First, plea bargaining will be encouraged by the extensive use of degree classifications in the definition of offenses. Numerous basic offenses are defined in ascending order with the lowest degree set out first.³⁰ Second, the wide range of available punishments authorized for each grade of offense tends to provide the prosecutor leverage in the bargaining process. To some extent the discretion exercised by prosecutors and the police is motivated by a desire to individualize the consequences of a criminal conviction.³¹ The most commonly asserted justification for plea bargaining, however, is its utility in disposing of the large number of criminal cases that clog the dockets.³² Clearly, much of plea bargaining is a matter of routine, and in many cases bears little or no relation to the facts of the case, the correctional needs of the defendant, or the social interest served by vigorous prosecution.³³ Even in those cases in which the law enforcement officials desire to fashion a disposition that fits the offender and his offense, no guidelines for doing so exist.³⁴ Hence, the administration of the penal law in this state and the accomplishment of its objectives continues to depend heavily on the competence and good faith of law enforcement officials, particularly that of the prosecutor.

D. Definitions

In section 1.07 definitions are given for thirty-two different terms. Four other terms relating to culpable mental states are listed, but their definition is accomplished by reference to section 6.03. The definitions have little independent significance, but all have critical importance in the context of specific code provisions. For example, two terms, "person" and "individual," are significant because of the Code's expansion of corporate liability. When an offense imposes criminal liability on an "individual," the offense may be committed only by "a human being who has been born and is alive."³⁵ On the other hand, if the offense proscribes activity by a "person," not only natural persons, but also corporations or associations may commit it.³⁶ Two other terms reoccur frequently in specific code provisions, and typically are used in defining aggravated offenses. A "deadly weapon" includes: any "firearm"; "anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury"; and "anything that in the manner of its use or intended use is capable of causing death or serious bodily

Battle, *In Search of the Adversary System—The Cooperative Practices of Private Criminal Defense Attorneys*, 50 TEXAS L. REV. 60 (1972).

29. See F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME (1970).

30. Interview with Richard Denzer, in *Drafting a New Penal Law for New York*, 18 BUFFALO L. REV. 251, 258 (1969).

31. LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532, 547 (1970).

32. See *Santobello v. New York*, 404 U.S. 257, 261 (1971).

33. LaFave, *supra* note 31, at 546.

34. See notes 175, 176 *infra*, and accompanying text.

35. TEX. PENAL CODE § 1.07(a)(17).

36. *Id.* § 1.07(a)(27).

injury."³⁷ "Serious bodily injury," in turn, is defined as "bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."³⁸ Anyone using the Code should refer to section 1.07 when dealing with any of its specific provisions. Although that section does not contain definitions of some key concepts that probably should have been and no doubt will be added, it contains most of the definitions needed to understand the new Code.

E. *Burden of Proof (Chapter 2)*

The constitutionally required burden on the prosecution to prove each element of an offense beyond a reasonable doubt³⁹ is stated at the outset of chapter 2 in section 2.01. "Element of offense" is one of the terms defined in section 1.07 and includes the forbidden conduct, the required culpability, the required result, and the negation of any exception to the offense. The traditional presumption of innocence and the fact that the arrest, confinement, or indictment gives rise to no inference of guilt, standard elements of the typical charge on reasonable doubt, also are stated in section 2.01.

The Code next classifies defensive matter into three categories for procedural purposes: (1) exception; (2) defense; and (3) affirmative defense. An *exception* to an offense in the Code is a matter that must be negated in the accusation and disproved in the state's case in chief.⁴⁰ The drafters of the proposed revision suggest that this device, onerous to prosecutors, "is to be used very sparingly and only after careful consideration of the nature of the proof burden involved."⁴¹ Their suggestion has been heeded. The only example of an exception cited in the Committee Comments—a gift to a public servant (prohibited by section 36.08) excepting a fee prescribed by law—became a defense rather than an exception in the final draft of the Code.⁴² When exculpatory matters are labelled *defenses*, the burden of producing evidence is on the defendant, but the burden of persuasion beyond a reasonable doubt remains on the prosecution.⁴³ If a ground of defense is not clearly labelled as falling within any of the three categories, it is to be treated as a defense.⁴⁴ Finally, some defensive matter falls within the category of *affirmative defenses* which must not only be raised by the defendant, but must be proven by him by a preponderance of the evidence.⁴⁵ Although at first blush, the existence of affirmative defenses seems to conflict with the reasonable doubt doctrine, they have been justi-

37. *Id.* § 1.07(a)(11).

38. *Id.* § 1.07(a)(34). Mere "bodily injury" is "physical pain, illness, or any impairment of physical condition." *Id.* § 1.07(a)(7).

39. *In re Winship*, 397 U.S. 358 (1970).

40. TEX. PENAL CODE § 2.02.

41. PROPOSED DRAFT § 2.02, Comments at 21.

42. TEX. PENAL CODE §§ 36.08, 36.10.

43. *Id.* § 2.03(a)-(d).

44. *Id.* § 2.03(e). The burden of proof of defensive matters not specifically treated in the Code could be shifted from the defendant to the prosecution, e.g., discriminatory enforcement.

45. *Id.* § 2.04.

fied with reference to some defensive matters because of convenience, and because the defendant may have a greater opportunity to know the facts, enabling him to feign a defense which will be difficult to disprove.⁴⁶

Finally, in section 2.05, the Code acknowledges the existence of rebuttable presumptions for the prosecution drawn from both statutory and decisional law. It states the generally accepted rule that once the prosecution has proved the underlying fact or facts to which the presumption attaches, the case must go to the jury, but the jury is not compelled, even in the absence of rebuttal evidence, to find the ultimate fact required for conviction.⁴⁷ The judge is directed to charge the jury that before it can convict it must find beyond a reasonable doubt the "fact or facts giving rise to the presumption, the element to which the presumption applies, [and] any other element of the offense charged."⁴⁸ According to section 2.06, when a statute declares that given facts constitute a prima facie case, rather than simply raising a presumption, a submission of the case to the jury is warranted when those facts are proven. However, a proper charge apparently would not explicitly advise the jury that the prima facie case or presumption is created by statute.⁴⁹

F. Multiple Prosecutions (Chapter 3)

The legislature declined the invitation to clarify the Texas law on multiple prosecutions,⁵⁰ and provided only for more liberal permissive joinder of of-

46. See LAFAYE & SCOTT 47-49. An example is the insanity defense. Placing the burden of proof on the defendant to establish insanity has been held constitutional. *Leland v. Oregon*, 343 U.S. 790 (1952). Requiring the defendant to prove alibi is unconstitutional because the defense is simply a denial of the crime. *State v. Smith*, 454 F.2d 572 (5th Cir. 1972); *Stump v. Bennett*, 398 F.2d 111 (8th Cir. 1967), cert. denied, 393 U.S. 1001 (1968). Restrictions on any defense that tends to negative the existence of an essential element of the crime charged, either by placing the burden of persuasion on the defendant (e.g., insanity) or not allowing him to raise it at all (e.g., intoxication), arguably violates the due process requirement of proof beyond reasonable doubt. However, the U.S. Supreme Court has eschewed establishing a constitutional doctrine of *mens rea*. *Powell v. Texas*, 392 U.S. 514, 535 (1968).

47. LAFAYE & SCOTT 51-52. Examples of case law presumptions are the presumption from recent exclusive unexplained possession of stolen property that the possessor stole it, and that intent to kill may be presumed from the intentional use of a deadly weapon.

An example of a statutory presumption is contained in TEX. PENAL CODE § 31.06, which consolidates and eliminates the archaic common law distinctions between the acquisitive offenses. When a check is used to obtain property or services, the intent to deprive the owner of property or to avoid payment for a service, requisite elements of violations of *id.* §§ 31.03 and 31.04 respectively, are presumed if the issuer of the check did not make the check good after receiving notice that payment was refused because of insufficient funds, or if he had no account in the bank on which the check was drawn. A similar presumption is created under the Class C misdemeanor offense of issuance of a bad check in violation of *id.* § 32.41 in the Code chapter on fraud offenses. In § 32.41 the presumption is of knowledge of insufficient available funds for payment rather than the more serious intent to deprive, which makes the issuance of a bad check a theft offense under chapter 31, potentially punishable by imprisonment.

48. TEX. PENAL CODE § 2.05(2)(D).

49. PROPOSED DRAFT § 2.05, Comments at 24-25.

50. See *id.* §§ 3.01-06. One suspects that this chapter was drafted hastily in lieu of the detailed proposal of the Bar Committee which, because of its emphasis on compulsory joinder by the prosecution of related offenses, was not acceptable. One problem that could arise is whether the term "any one offense" also means lesser included offenses under the new TEX. CODE CRIM. PROC. ANN. art. 37.09 (Supp. 1974), adopted as a conforming amendment to the Code.

fenses against property as defined in title 7. The Code introduces the concept of "criminal episode," the repeated commission of any one offense against property,⁵¹ which is broader than the "same transaction" test of joinder under present Texas Law.⁵² The effect is to allow a prosecutor to try multiple counts of such offenses as burglary, theft, or vandalism that may have been committed at different times and against different victims or property in one prosecution.⁵³ The decision to join multiple counts in one prosecution prevents adding charges of other instances of the same offense on retrial of which probable guilt was known to the prosecutor when the first prosecution commenced.⁵⁴ The sentences for the separate violations are to run concurrently unless the defendant exercises his "right to severance of the offenses" which, if granted, authorizes the judge in his discretion to order consecutive sentences.⁵⁵ The coercive aspect of the possibility of consecutive sentences being assessed in the case of severance should discourage most defendants from requesting it.⁵⁶

II. GENERAL PRINCIPLES OF RESPONSIBILITY (TITLE 2)

Title 2 (chapters 6-9) contains the Code's treatment of the traditional general principles of criminal responsibility. The basic elements of criminal culpability are defined in chapter 6. Chapter 7 establishes the boundaries of culpability of persons, both natural and legal, be they principal actors, or those whose activity is only indirectly related to a criminal offense. Chapters 8 and 9 define the excuses and exemptions from criminal liability, loosely referred to as "defenses."

A. Culpability (Chapter 6)

The first minimum requirement of criminal liability is expressed in section 6.01: "A person commits an offense only if he voluntarily engages in conduct, including an act, an omission, or possession, in violation of a statute that provides that the conduct is an offense." The second requirement is reflected in the Code's definition of "conduct" as "an act or omission *and its accompanying mental state*."⁵⁷ The Code thus restates the two basic premises of criminal liability: *actus reus*, an act or omission, and *mens rea*, guilty mind or culpable mental state. All offenses have, and are probably constitutionally required to have, some form of act or omission coupled with mental awareness,⁵⁸ although the mental element required may not always

51. TEX. PENAL CODE § 3.01.

52. PROPOSED DRAFT § 3.01, Comments at 26. See generally Steele, *The Doctrine of Multiple Prosecutions in Texas*, 22 Sw. L.J. 567 (1968).

53. TEX. PENAL CODE § 3.02(a). If there is more than one indictment, the prosecutor is required to give at least 30 days written notice prior to trial. *Id.* § 3.02(b).

54. *Id.* § 3.02(c).

55. *Id.* §§ 3.03-.04.

56. Comments of George Gilkerson, Seminar on Texas Penal Code, Texas Tech University School of Law, Oct. 13, 1973.

57. TEX. PENAL CODE § 1.07(a)(8) (emphasis added).

58. LAFAYE & SCOTT 144-46, discussing *Powell v. Texas*, 392 U.S. 514 (1968), *Robinson v. California*, 370 U.S. 660 (1962), and *Lambert v. California*, 355 U.S. 225 (1957).

conform to the Code's "culpable mental state." In addition, some offenses may require other elements that may be roughly grouped as circumstances, result, and causation, which consists of concurrence of conduct and result.

The Actus Reus: Act or Omission. By limiting the concept of conduct which may be proscribed as criminal to acts, including possession, or omissions, the Code states a basic premise of criminal liability. The criminal law cannot punish bad thoughts alone or personal condition and status.⁵⁹ Only objective manifestations of criminality that either cause harm or are in themselves proscribed as harmful may be made criminal.

The term "act" is defined in the Code to include "bodily movement, whether voluntary or involuntary, and includes speech."⁶⁰ Omission on the other hand is a "failure to act."⁶¹ Possession is "actual care, custody, control or management."⁶² All may be criminal if they are voluntarily engaged in.⁶³ What "voluntary" means in this context is not defined, but presumably it means willed or done consciously and as the result of determination or effort.⁶⁴

Care should be taken not to confuse the "voluntariness" requirement with the mental state described in sections 6.02 and 6.03, which is required for specific offenses, nor to interpret it too literally, particularly with respect to liability based on omissions. In the case of "act," the concept of voluntariness is probably descriptive, accurate and subject to a slight possibility of confusion. Although it does not enumerate them, the Code should be interpreted to exclude reflex or convulsive movements, activity during unconsciousness or sleep, and movements that otherwise are not a product of the effort or determination of the actor, either conscious or habitual.⁶⁵ Of course, a voluntary act prior to the unwilled movement could be sufficient for liability. For example, criminal liability could be based on an epileptic's decision to drive an automobile, if not on his movements behind the wheel during a blackout, when his auto strikes and injures a pedestrian. The Code also requires that possession be "willed" before it may be considered conduct subject to liability. The possessor must either knowingly obtain or receive the thing, or be "aware of his control of the thing for a sufficient time to permit him to terminate his control," before he can be said to have voluntarily possessed it.⁶⁶ The requirement of voluntariness relates only to possession of the *thing*. The relevance of his awareness of the *nature* of the thing is to be determined by reference to the specific possessory offense charged and its requisite culpable mental state.

59. See *Robinson v. California*, 370 U.S. 660 (1962), indicating that a non-willed status could not be constitutionally made criminal.

60. TEX. PENAL CODE § 1.07(a)(1).

61. *Id.* § 1.07(a)(23).

62. *Id.* § 1.07(a)(28).

63. *Id.* § 6.01(a).

64. See MODEL PENAL CODE § 2.01(2)(d) and Comment (Tent. Draft No. 4, 1955).

65. See *id.* § 2.01 and Comments. The so-called defense of automatism is a contention that the prosecution cannot establish proof of a voluntary act. It has been recognized in Texas. *Bradley v. State*, 277 S.W. 147 (Tex. Crim. App. 1925) (somnambulism called "a species of insanity").

66. TEX. PEN. CODE § 6.01(b).

Conceptually, criminal liability based on omissions or failure to act has always been more troublesome than liability for affirmative action. An omission on its face is completely neutral and cannot in itself, like an act, raise any inference that it was willed. Furthermore, the determination whether an omission is voluntary tends to turn on consideration of the same facts that are relevant to the existence of the requisite *mens rea*.

An omission cannot subject one to liability under the Code unless a statute specifically provides that a failure to act is an offense or that one has the affirmative duty to perform an act.⁶⁷ By requiring that criminal liability for failure to act be based on a statutory obligation, the Code appears to have eliminated much of the uncertainty created by the tendency of the common law to expand criminal liability, particularly with reference to homicide, to include breaches of duties of a rather tenuous nature.⁶⁸ In addition, the limitation to statutorily-imposed duties conforms to the principle of legality that conduct should not be criminal unless forbidden by a law giving advance warning that the conduct is criminal. The duty violated may be imposed by the criminal statute defining an offense, for example, criminal nonsupport of a child,⁶⁹ or by a non-criminal statute, such as section 4.02 of the Family Code⁷⁰ which imposes a duty of support on a spouse or parent.⁷¹ Since the term "statute" is not defined in section 6.01, the question could arise whether a duty to act under this section may be imposed by an ordinance or an administrative regulation or order. In light of the legislative intent expressed in the preemption provision of section 1.08, only those statutes passed by the state legislature would seem to be included.

Arguably, the drafters should have included a provision that no criminal liability should attach for failure to perform an act if the person was physically incapable of acting. Clearly, making it an offense not to do the impossible would be unconstitutional. However, the cases of real and complete impossibility are rare, such as a quadriplegic parent who sees an infant child drowning but cannot render assistance. The parent could not be said to have willed her inaction even if she wanted the child to die. But most cases would not be so clear-cut: for example, the poverty-stricken parent who cannot give aid to a child but possibly could have obtained it elsewhere, or the parent who might have saved his drowning child, but also could have drowned in the attempt.⁷² In the cases where it is unclear whether the person failing to act did so voluntarily, the dispute may merge into the question of whether the person had the requisite *mens rea* of the specific offense charged.⁷³

67. *Id.* § 6.01(c).

68. See LAFAYE & SCOTT 182-87, including duties based on contract, voluntary assumption of care and creation of peril.

69. TEX. PENAL CODE § 25.05.

70. TEX. FAM. CODE ANN. § 4.02 (Supp. 1974).

71. PROPOSED DRAFT § 6.03, Comments at 39.

72. The discussion to the end of this section is based on material in LAFAYE & SCOTT 187-89.

73. Analytically, the issues of voluntariness of the omission and existence of the required culpable mental state are distinct, but in a given case, proof of voluntary disregard of a duty would also establish intent as to the result.

A harder question may be posed by omissions of a defendant who has a statutory duty to act, but who is unaware of either the existence or scope of his duty to act, or knowing of the duty, is unaware of the facts giving rise to it. In either case, the non-acting defendant's argument that his omission was thus involuntary will be akin to an ignorance or mistake of fact defense. The United States Supreme Court has held in *Lambert v. California* that due process is violated by imposing criminal liability for failure to perform an act when "circumstances which might move one to inquire as to the necessity of [acting] are completely lacking,"⁷⁴ in other words, a reasonable man would not have known of the existence of the duty to act. It has been suggested that the *Lambert* defense "would most likely not be available when the legal duty is consistent with a strong moral duty."⁷⁵ Treating ignorance as no excuse may be justified in situations in which the reasonable man would know of the duty to act, thereby placing the burden on the defendant to raise a reasonable doubt that he did not know. In effect the prosecution is allowed the benefit of an inference that the duty was so common that any person would have known of it. The question of the voluntariness of an omission might arise when the defendant acknowledges he knows of the duty, but claims he did not will his failure to act. For example, assume a mother became intoxicated and as a result of the alcohol-induced stupor was unaware that her child was smothering to death. In a prosecution for intentional homicide, the issue of whether her failure to prevent the smothering was voluntary might become indistinguishable in fact from the question of her intent. But assume that intent in the sense of purpose was not found, or that she was charged initially with criminally negligent homicide. She could argue that even if she were negligent, her omission to act was not willed. This could hardly be disputed since her act of drinking in itself, though willed, could hardly make her inattention to the fact of smothering willed.⁷⁶ The prosecution could argue that this case is analogous to that of an epileptic. However, if the prosecution relies on the voluntary act of drinking, it still must prove beyond a reasonable doubt that the drinking was done with the requisite mental state, and was the legal cause of the death. If the offense charged was criminally negligent homicide, proof would have to be shown by evidence of the defendant's knowledge of past effects of alcohol, and that she should have considered the fact that the child might smother or otherwise meet death when she drank.

The effect of the requirement of volition is that a movement must be *willed*, whereas an omission or non-movement at a minimum must be accompanied by proof that the actor had *knowledge* of a duty to act or of the facts giving rise to it.

Mens Rea: Culprable Mental States. The doctrine expressed in the maxim

74. 355 U.S. 225, 229 (1957).

75. LAFAYE & SCOTT 188.

76. But total inattention to a *result* is different than the question of voluntariness of the *act* of drinking and getting drunk. Voluntariness of conduct does not require a willed result.

actus non facit reum nisi mens sit rea (an act does not make one guilty unless his mind is guilty), if not always adhered to, has consistently been paid lip-service in Anglo-American law.⁷⁷ The notion that conduct, to be criminal, must be accompanied by an "evil-meaning mind," or an awareness of wrongdoing, developed in the common law as a prerequisite of serious offenses, and underlay the creation of new defenses based on the absence thereof. The historical emphasis of the criminal law on the state of mind of the offender, expressed in the *mens rea* doctrine, has crystallized into basic gradations of now widely-accepted culpable mental states. These culpable mental states are now adopted in the Code to replace the "welter of ambiguous and sometimes contradictory terms"⁷⁸ (67 different ones by actual count) used in the prior law to define the requisite *mens rea* for various offenses. The mental states, in descending order, are intentional, knowing, reckless, and criminally negligent, with proof of the higher necessarily including the lower degree of culpability.⁷⁹ Although labelled a culpable mental state, criminal negligence is really the absence of a mental state (inadvertence) and when made an adequate degree of culpability, it results in a form of objective, as opposed to subjective, liability. As a result, liability based on criminal negligence is, like liability without fault, not to be read into a statute, but must be expressly provided as a sufficient degree of culpability. If the statute does not specify any particular mental state and does not "plainly dispense with any mental element," the actor must be at least reckless to be held in violation of the statute.⁸⁰

According to section 6.03, a person acts *intentionally* when his "conscious objective or desire" is to cause the result or to engage in conduct proscribed by the statute defining the offense. He acts *knowingly* with respect to a described result when he is "aware" that it is "reasonably certain" his conduct will cause the result; he acts knowingly with respect to particular conduct or circumstances, when he is "aware" that his conduct is of such a nature or that the circumstances exist.⁸¹ A person acts *recklessly* when he "consciously disregards" a substantial and unjustifiable risk that a proscribed result will occur or that a circumstance described by a criminal statute exists,⁸² but acts with *criminal negligence* if he only "ought to be aware of"

77. See Dubin, *supra* note 23.

78. PROPOSED DRAFT § 6.05, Comments at 41. The four categories of culpable mental states originated in the Model Penal Code. Cohen, *supra* note 23, at 419 n.17.

79. TEX. PENAL CODE §§ 6.02(d), (e).

80. *Id.* §§ 6.02(b), (c). Negligence is an "exceptional basis" of criminal liability. MODEL PENAL CODE § 2.02, Comments at 127 (Tent. Draft No. 4, 1955); see PROPOSED DRAFT § 6.04, Comments at 40.

81. TEX. PENAL CODE § 6.03(b). Note that the culpable mental states are defined with reference to the conduct itself, the results of the conduct, and the circumstances surrounding it. This is because numerous offenses may have a different minimum degree of culpability as to each. For example, to be guilty of the offense of indecent exposure (*id.* § 21.08), the defendant must *voluntarily* (see *id.* § 6.01, and discussion at text accompanying notes 60-65 *supra*) expose his anus or genitals with *intent* to arouse or gratify the sexual desire of another and be *reckless* concerning whether another is present who will be offended or alarmed. Interestingly, this definition apparently has moved some ingenuous club proprietors to give advance warning to patrons that entertainment in the club will involve nudity, for the purpose of negating the recklessness required for criminal liability.

82. TEX. PENAL CODE § 6.03(c).

that risk.⁸³ In neither case will the mental culpability of recklessness or criminal negligence be satisfied unless the disregard or unawareness of the risk constitutes a "gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint."⁸⁴

In many situations, little reason exists to distinguish between a man who engages in conduct purposefully and the one who engages in the same conduct "not on purpose but knowing that he is doing so."⁸⁵ But in some cases, it is appropriate that the distinction be made. The man who fires wildly into a crowded passenger aircraft may not consciously desire that anyone die, but obviously contemplates or anticipates death of one or more passengers as a result. The difference is between a person who wills a particular act or result, and one who is merely aware of his act and "reasonably certain" of the result. "Reasonably certain," though not defined in the Code, is not markedly different from the "practically certain" of the Model Penal Code and the proposed Texas revision.⁸⁶ Both imply a high degree of probability and no substantial doubt.

"Recklessness" resembles "knowingly," since a state of awareness is involved in both. But the awareness of recklessness is of risk, rather than of a high degree of probability; the matter is contingent from the actor's point of view.⁸⁷ The risk involved in recklessness and criminal negligence cannot be measured in terms of probability that harm will occur. Whether a risk is "substantial" and "unjustifiable" would depend on the following equation: the probability of injury and the gravity of the potential harm, balanced against the desirability of the conduct, and in the case of a possible beneficial result, the availability of less dangerous alternatives.⁸⁸ In the case of serious possible harm, a slight chance that it would occur would be an unjustifiable risk if the social utility of the conduct were nil, such as firing a gun in the air for amusement. However, if probability of injury is great, for example in a dangerous life-saving operation, an unreasonable or unjustifiable risk is not created by the surgeon who, because of the lack of any feasible alternative, conducts the operation.

Finally, since the culpability of the actor's disregard of risk in recklessness and the inadvertence to risk involved in criminal negligence are to be measured according to the standard of an "ordinary person" from the "actor's standpoint,"⁸⁹ the facts known or the degree of risk perceived by the allegedly reckless actor, or of which the reasonably prudent man would have been aware in the circumstances of the allegedly negligent actor,

83. *Id.* § 6.03(d).

84. *Id.* §§ 6.03(c), (d).

85. Weinreb, *Comment on Basis of Criminal Liability*, in 1 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS (1970), reprinted in part in DIX & SHARLOT 443.

86. MODEL PENAL CODE § 2.02(2)(b)(2) (Proposed Official Draft, 1962); PROPOSED DRAFT § 6.05(b).

87. MODEL PENAL CODE § 2.02, Comments at 125 (Tent. Draft No. 4, 1955); PROPOSED DRAFT § 6.05, Comments at 42-43.

88. See LAFAVE & SCOTT 210-11; PROPOSED DRAFT § 6.05, Comments at 43-44.

89. TEX. PENAL CODE §§ 6.03(c), (d).

should be relevant. The trier of fact must make an evaluative judgment whether the actor's failure of perception constituted a gross deviation from acceptable standards of conduct. A jury might conclude that even if the defendant was conscious of risk, he was not aware of the true nature and extent of the risk, or that he had what he thought were good reasons for his disregard of it. Hence, his conduct may not be reckless, but his failure of perception could amount to criminal negligence.

The differences in culpable mental states may best be illustrated by an example. Assume that a defendant strikes a pregnant woman in the abdomen and as a result the baby dies shortly after birth. In a homicide prosecution, the evidence might show any of the following:

- (1) if he struck the woman knowing she was pregnant and for the purpose of killing the child, his conduct was *intentional*;
- (2) if he knew she was pregnant and that his blows were likely to cause the death, his conduct was *knowing*, even if his only purpose was to cause her pain;
- (3) if he knew she was pregnant and knew that death of the baby might result, but he did not care, he was only *reckless*;
- (4) if he knew she was pregnant but did not think his blow was hard enough to hurt the baby, or he did not advert to the fact that she was pregnant although it was plainly observable, he acted with *criminal negligence*; or
- (5) if he did not know she was pregnant and to the ordinary observer she did not look pregnant, he did not have any culpable mental state, at least with respect to the baby's death as a result.

A number of offenses in the Code contain no express requirement of *mens rea*, most notably the offenses involving sexual misconduct. In some of these offenses the intention or knowledge is manifested by the nature of the conduct proscribed. Others appear necessarily to involve a culpable mental state. For example, to be guilty of homosexual conduct a person need only engage in "deviate sexual intercourse with another individual of the same sex."⁹⁰ Proof of the requirement of volition would appear to be identical to that of the minimum culpable mental state of intention to engage in the prohibited conduct. The defendant would be adequately protected by the "defenses" establishing absence of volition.⁹¹

A problem may arise when a culpable mental state must be read into a statute in those rare instances in which one is neither specified, implied, nor expressly excluded. The Code states the actor must be at least reckless in those instances,⁹² but does not state whether that culpable mental state must be applied to all elements of the offense. For example, a person commits a Class B misdemeanor "if he contrives, prepares, sets up, proposes, operates, promotes, or participates in an endless chain."⁹³ Apparently, he would have to be reckless as to whether his conduct amounted to participa-

90. *Id.* § 21.06.

91. See note 65 *supra*, and note 140 *infra*, and accompanying text.

92. TEX. PENAL CODE §§ 6.02(b), (c).

93. *Id.* § 32.48.

tion or promotion *and* whether what he was participating or promoting was an endless chain.

Concurrence of Conduct and Result: Causation. Perhaps the best evidence that legislative draftsmanship may not be even theoretically adequate to the task of covering the unusual problems of causation is the absence in many penal codes of an explanatory statutory formula of causal relation.⁹⁴ Nonetheless, the Code, possibly on the theory that any provision is better than none at all, attempts to set forth a formula which, if not pure enough to handle all cases, should be at least adequate in most situations. Under section 6.04 a defendant's conduct is considered a cause of a required result if that result would not have occurred "but for" his conduct, operating either alone or concurrently with another cause, unless "the concurrent cause was clearly sufficient" and the defendant's conduct was "clearly insufficient" to produce the result.⁹⁵ To handle the situation in which the result comes about in a manner or by a means not desired, contemplated, or risked by the actor, the Code adds that the actor is still responsible as a cause "if the only difference" in "what actually occurred" was that "a different offense was committed" or "a different person or property was injured, harmed, or otherwise affected."⁹⁶

The typical case may be handled by the first clause of section 6.04 which states the familiar "but for" test of causation—that defendant's conduct is a cause of a result if the result would not have happened the way it did without defendant's conduct. In other words, his conduct is a necessary condition in order for the result to occur. However, when the defendant claims that, because of other causes in the chain of events preceding the result, it would have occurred in the same or substantially similar fashion regardless of his individual conduct, the problem of concurrent cause (a favorite of criminal law theoreticians) is raised. In this vein, care should be taken to realize that problems in this area are exaggerated by examples that deal with given facts. In many cases, the causation problem merely reduces to evidentiary and proof considerations.⁹⁷

To handle the problem of concurrent cause, the Code adopts "sufficient" cause as a basic concept in lieu of "proximate cause" and all that term implies. The sufficient cause notion, like that of proximate cause, apparently owes its genesis to tort law.⁹⁸ The sufficient cause formula is relevant in three types of situations: (1) when the defendant's conduct would have

94. See, e.g., PROPOSED FEDERAL CRIMINAL CODE § 1-2A2 (1972): "Conduct is a cause of a result when it is an antecedent but for which the result would not have occurred. This provision is not exclusive."

95. TEX. PENAL CODE § 6.04(a).

96. *Id.*

97. Carpenter, *Concurrent Causation*, 83 U. PA. L. REV. 941, 952 (1935); see, e.g., *Duque v. State*, 56 Tex. Crim. 214, 119 S.W. 687 (1909).

98. See RESTATEMENT OF TORTS § 432 (1934). The combination "but for" (*sine qua non* or necessary condition) and "sufficient cause" test of the Code resembles the *Restatement* test. Sufficient cause may be analogized to the "substantial factor" test of tort law. See R. PERKINS, CRIMINAL LAW 695-96 (2d ed. 1969). It also may be characterized as an "efficient" or "substantially effective" cause. See J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 282-83 (2d ed. 1960).

caused the result notwithstanding the other causes; (2) when the defendant's cause, or the other cause or causes, were not sufficient in themselves, but when combined they produced the result; or (3) when either the defendant's cause, or the other cause or causes, would have been enough individually to produce the result.

Situations two and three create hypothetical difficulties. Assume the defendant non-fatally wounds *X*, and because of the wound, *X* is unable to escape when his house is set on fire and dies. Defendant's conduct is clearly a "but for" or necessary cause of the death, but the death would not have occurred but for other causes for which he cannot be considered responsible. According to the Code's "sufficient cause" formula, defendant's conduct is a cause unless the other causes were clearly sufficient (and we have assumed they were not), and defendant's act clearly insufficient (and they are assumed not). Hence, he is liable as a cause. Stated differently, his act was a material factor in causing the result.

The third situation "has been thought to present metaphysical difficulties."⁹⁹ Suppose *X* is dying from causes not attributable to the defendant when the defendant shoots and kills him. Defendant's action is a cause since he brought about the death when it happened; the other causes were clearly not sufficient to bring about the death when it occurred and defendant's act clearly was not insufficient. Assume now that *A* inflicts a mortal wound on *X*, who has an hour to live, when *B* kills him instantaneously. *B* has hastened *X*'s death and would be a cause as seen in the previous hypothetical, but what of *A*? Under the Code formula, *A*'s act is a "but-for" cause, since the death would not have happened as it did except for his conduct, but it does not seem to meet the sufficient cause formula. *B*'s act was clearly sufficient in itself to cause death, since in fact, it did and because "causing death" is normally thought of as hastening death and not merely determining the manner of dying. *A*'s act, however, although hypothetically sufficient to cause death, was clearly insufficient to cause death in the manner in which it occurred. Of course, if the position is taken that we should view the situation hypothetically in terms of what would have occurred, rather than what did in fact occur, *A*'s act would be a cause. But to be consistent analytically, even if it might offend our sense of justice, *A* should not be held responsible for causing the death. A defendant's intent to do something more serious than actually occurs cannot by itself make him liable for a more serious offense. This, of course, would not relieve him of potential liability for crimes such as attempted murder or aggravated assault.

B. *Complicity*

In chapter 7 a person is made criminally liable as a party if the offense is committed by his own conduct, or when committed by the conduct of another, if: (1) he procures the commission of the offense by causing or aiding it through "an innocent or nonresponsible person" with the "kind of culp-

99. R. PERKINS, *supra* note 98, at 689.

ability required" for its commission; (2) "he solicits, encourages, directs, aids, or attempts to aid" another in its commission "with the intent to promote or assist" its commission; (3) he fails to make a "reasonable effort to prevent" its commission "with intent to promote or assist," having "a legal duty to prevent" it; or (4) the offense is "committed in furtherance of the unlawful purpose" of a conspiracy of which he is a member and it "should have been anticipated as a result" of the conspiracy, whether he actually intended it or not.¹⁰⁰ The inclusion of conspiratorial liability for conduct of a co-conspirator can be questioned. As with felony-murder, it has been used in the past to ease the burden on the prosecution of establishing proof of guilt, or as a kind of "back-up" theory of the case. But the requirement that co-conspirator liability may attach only if the conspirator "should have anticipated" the offense as a result of the conspiracy could prove as troublesome as the old "natural and probable consequence" test. Omission of such a basis for liability and reliance instead on the regular complicity provisions would still allow the state to catch the "big fish." It also would be more consistent with the Code's purported reliance on determining the grade of offense and subsequent punishment on the basis of actual culpability.¹⁰¹

The Code excludes any defense to accomplice liability based on the fact that the defendant was "legally incapable of committing the offense in an individual capacity" or that the principal actor had been acquitted, not prosecuted or convicted, or convicted of a different offense, or was immune from prosecution.¹⁰² This follows prior law. However, the Code does not include provisions relating to limitations on complicity that have been previously recognized. Perhaps, for example, it was felt obvious that offenses that are so defined as to make participation by another inevitably incident to their commission would be excluded (*e.g.*, the "victim" of prostitution). Also the Code does not provide the defense of voluntary renunciation of criminal objective (as it does, curiously, with reference to the inchoate offenses), and hence appears to leave it merely as "a factor considered by prosecutors and grand juries in deciding whether to prosecute."¹⁰³

C. *Enterprise Liability: Corporations and Associations*

At common law a corporate body could not be guilty of a crime, and under prior Texas law corporate criminal liability was recognized "only to a very limited extent."¹⁰⁴ In subchapter B of chapter 7, the Code presents statutory provisions for expanded corporation and association liability that track the language of the State Bar Committee's proposed revision.

100. TEX. PENAL CODE § 7.02.

101. The criminal law has reflected a traditional tendency to inject treatment considerations into the definition of substantive crimes. See Michael & Wechsler, *A Rationale of the Law of Homicide*, 37 COLUM. L. REV. 701, 713-17, 722-23, 745 n.161 (1937). The new codes, including that of Texas, have not purged the law of this tendency, indicating that the criminal law is still heavily result-oriented.

102. TEX. PENAL CODE § 7.03.

103. PROPOSED DRAFT § 7.05, Comments at 55.

104. *Id.* § 7.22, Comments at 57. See generally Hamilton, *Corporate Criminal Liability in Texas*, 47 TEXAS L. REV. 60 (1968).

Section 7.22 provides that a corporation or association may be guilty of a criminal offense if the proscribed conduct is "performed by an agent acting in behalf of a corporation or association and within the scope of his office or employment," and constitutes (1) an offense in the Penal Code to which corporations or associations are made subject; (2) an offense defined "by law other than this [the penal] code" which plainly indicates a legislative purpose to impose enterprise liability; or (3) a "strict liability" offense outside the Code "unless a legislative purpose not to impose criminal responsibility on corporations or associations plainly appears." However, a corporation or association¹⁰⁵ may be guilty of a felony only if the felonious conduct is "authorized, requested, commanded, performed or recklessly tolerated" by a "majority of the board of directors" or "high managerial agent" acting within the scope of his office or employment, in behalf of the corporation or association.

The provision imposing absolute or strict liability for some offenses has the effect of limiting criminal liability without fault under Texas law to corporations and associations.¹⁰⁶ This is reinforced by the provision of section 7.24 that "due diligence" of the high managerial agent having supervisory responsibility over the subject matter of the offense, while applying generally to offenses that may be committed by corporations, does not provide a defense to strict liability offenses, or offenses in which the legislative purpose expressed in the law defining the particular offense plainly excludes a *mens rea*. Even with respect to those offenses in which the "due diligence" defense is recognized, the corporation has the burden of proof,¹⁰⁷ because the

105. TEX. PENAL CODE § 7.22(b) ("Criminal Responsibility of Corporation or Association") reads:

A corporation is criminally responsible for a felony offense only if its commission was authorized, requested, commanded, performed, or recklessly tolerated by:

(1) a majority of the board of directors acting in behalf of the corporation or association; or

(2) a high managerial agent acting in behalf of the corporation or association and within the scope of his office or employment.

(Emphasis added.)

Since the phrase "corporation or association" is used in defining the conditions of enterprise felony liability in clauses (1) and (2), the omission of the words "or association" after "corporation" in the first line of subparagraph (b) appears inadvertent. Furthermore, nowhere in the subchapter on corporations and associations is there an indication of an intent to treat associations and corporations differently for purposes of criminal liability.

106. In effect, the Code creates a presumption against liability without fault with respect to offenses committed by individuals. See note 80 *supra*. The contrary presumption in favor of imposition of strict liability on corporations or associations in the case of an ambiguous statute, created by TEX. PENAL CODE § 7.22(a)(3), has several possible justifications. A greater willingness to impose strict liability on enterprises exists because of a feeling that punishment for offenses without culpability may have some deterrent impact on enterprises, *i.e.*, might improve their performance, but not on individuals. Furthermore, imposition of strict liability may be justified when the offenses are not "true" crimes, but are really only "civil" or "public welfare" offenses, conviction of which involves no moral stigma as with conventional crimes. Finally, the requirement of proof of objective fault would make the sanction practically unenforceable. Hence, the law in effect creates an irrebuttable presumption of fault when the "dangerous" act is committed. Of course, the argument has been forcefully made that the relatively minor punishment meted out to offending corporations, particularly in cases of absolute liability crimes, have little effect on future conduct anyway. See Hamilton, *supra* note 104, at 69.

107. TEX. PENAL CODE § 7.24(a).

facts relating to diligence are peculiarly within the corporation's possession, and the requirement to show affirmatively that the supervisory personnel failed to exercise due diligence would place an unreasonable burden on the prosecution.

The subchapter adds a provision making it clear that the criminal liability or punishment of an individual is not affected by a claim that the conduct was performed in behalf of the corporation or unincorporated association.¹⁰⁸

D. Defenses

Matters of exculpation and excuse of general applicability are collected in chapter 8 (general defenses) and chapter 9 (justification). Although all exculpatory matters on behalf of the accused are loosely referred to as defenses, important differences between types of defensive matter exist that suggest at least two, and possibly three, distinct categories. First is the class of true defenses which either prevent (or reduce) liability notwithstanding proof of all elements of the offense. Most notable in this group are the justification defenses such as self-defense, necessity, and public duty, but other examples are entrapment and duress. Secondly, there are the so-called "defenses" which are really not defenses at all, but are nothing more than direct attacks on the sufficiency of the prosecution's proof of one or more of the essential elements of the offense. The most significant are alibi, accident, mistake, and intoxication. Finally, a third category may be stated somewhat more tentatively which includes in effect only one defense, that of non-responsibility because of lack of mental capacity.¹⁰⁹ Generally referred to by the misleading label of the "insanity" defense, this exception to criminal liability is difficult to categorize because of its chameleon-like quality.

The Lack of Mental Capacity Defenses: Insanity. The insanity defense as treated in section 8.01 of the Code deserves more than passing comment. It may be true that in proportion to the relatively small percentage of cases in which it is formally involved, the defense receives an unwarranted amount of attention. The suspicion has even been expressed that all the verbiage and controversy concerning it may largely involve a question of semantics.¹¹⁰ But the squabble over the proper test of lack of mental capacity as a defense is much more than that and cannot be dismissed as simply a harmless academic exercise. Much like the issue of capital punishment, the

108. *Id.* § 7.24(b).

109. Although immaturity ("Age Affecting Criminal Responsibility" in *id.* § 8.07) is often labelled a defense, it is not so treated here because it actually is a conclusive presumption, or rule of law, that a person younger than 15 cannot be criminally liable for any offenses other than aggravated perjury if the child "had sufficient discretion to understand" the oath, or relating to traffic laws. Between the ages of 15 and 17, a minor may be prosecuted in a criminal court if jurisdiction is waived by the juvenile court. *Id.* § 8.07(b). In a sense, immaturity is like insanity because it too establishes a class of persons who are not held liable for conduct that would be criminal if committed by another. The whole thrust of the insanity defense, however, is to establish membership in that class because the legislature cannot, as with immaturity, define it prospectively.

110. *Pope v. United States*, 372 F.2d 710, 735 (8th Cir. 1967).

defense of insanity is highly visible to the public and involves questions fundamental to the criminal process. The danger is not that too much is said, but that what is said will continue to divert our attention away from the real issues involved and to obscure what actually occurs in its administration.

The Code makes insanity an affirmative defense. The defendant must raise and prove by a preponderance of the evidence that "at the time of the conduct charged . . . as a result of mental disease or defect [he] either did not know that his conduct was wrong [or that he] was incapable of conforming his conduct to the requirements of the law he allegedly violated."¹¹¹ The term "mental disease or defect" is not defined, but "an abnormality manifested only by repeated criminal or otherwise antisocial conduct" is expressly excluded.¹¹² The Code thus adopts a variation of the widely accepted Model Penal Code formulation of the test of mental responsibility. It combines the alternatives of impairment of cognitive capacity emphasized in the *M'Naghten* formula of the prior Texas law, and impairment of volitional capacity that is the basis of the irresistible impulse test. Unlike the Model Penal Code test which requires only lack of substantial capacity, the Texas Code formulation seems literally to require *complete* impairment of either cognitive or volitional capacity.¹¹³

Section 8.01 continues the trend of Anglo-American law of treating the insanity defense as a *non sequitur* exception to criminal liability. By historical accident, insanity as a separate defense arose out of attempts by common-law judges to state the law and procedures applicable to a case in which the *mens rea* of a crime was claimed to be absent because of a delusion or mistake resulting from a claimed mental disorder.¹¹⁴ This extension of the traditional mistake of fact defense to cases of "insanity" resulted in the evolution of a defense which, if successfully presented, results in a finding of not guilty, but which in reality is nothing more than a device for identification of a special group of persons whom the state may need to continue to supervise.¹¹⁵ The person found to be "insane" at the time of his alleged crime receives the only special verdict in criminal cases, not guilty by reason of insanity. He is thus found "guilty," as it were, of being insane and hence to be feared by society.

111. TEX. PENAL CODE § 8.01(a).

112. *Id.* § 8.02(b). This is the exclusion of the psychopathic personality. MODEL PENAL CODE § 4.01(2), Comments at 160 (Tent. Draft No. 4, 1955).

113. One federal judge has said that "considering the complex nature of the human machine and the myriad of motivations which bring about human conduct, it is (in my opinion) nothing short of absurd for a court ever to demand, or hope to get credible proof on, the crime having been caused *solely* by 'such mental disease.'" *Carter v. United States*, 325 F.2d 697, 708 n.4 (5th Cir. 1963) (Brown, J., dissenting). But section 8.01 of the Code seems to do precisely that—establish that "mental disease or defect" was the sole cause of his conduct, when it might be stated accurately that there is no sole cause of anything. The Model Penal Code test, on which § 8.01 is based, would require only *substantial* impairment. MODEL PENAL CODE § 4.01, Comments at 158-59 (Tent. Draft No. 4, 1955).

114. Dershowitz, *Psychiatry in the Legal Process*, TRIAL, Feb.-Mar. 1968, at 29, discussing the famous *M'Naghten* case.

115. This is acknowledged in PROPOSED DRAFT § 8.01, Comment at 64, and criticized in Goldstein & Katz, *Abolish the "Insanity Defense"—Why Not?*, 72 YALE L.J. 853, 864-68 (1963).

If the only justification for the special treatment of insanity lies in its identification function, the defense is suspect. The defense, as formulated in the Code and as presently administered, cannot hope to identify with any precision or logic "those persons accused of crime who suffer from such a grossly disordered mental condition that the criminal law is incapable of influencing their behavior."¹¹⁶ First of all, the defense cannot be expected to sort out all those in need of psychiatric treatment since defense counsel will raise the defense in only a small minority of cases. Because it may result in indeterminate commitment to a mental institution, it is normally used by defense counsel only as a last-resort defense in serious cases, particularly those involving the possibility of the death penalty.¹¹⁷ Furthermore, a test of insanity of limited scope, as under section 8.01, will discourage not only its use, but also its successful assertion. Secondly, since automatic commitment on a finding of not guilty by reason of insanity verdict alone is of doubtful constitutionality,¹¹⁸ and in any event is no longer permissible in Texas,¹¹⁹ the identification rationale of the defense makes little sense. Now, cases in which the question of insanity is formally injected into the trial on guilt or innocence must be treated similarly to those in which it is not, but which might have given the state cause to question the post-trial sanity of the defendant. It would be appropriate in any case in which the mental stability of the defendant is put into question by the evidence at trial, whether by the insanity defense or not, for the judge or the state to institute commitment proceedings.¹²⁰

Part of the reluctance to expand the definition of insanity is a lack of confidence in the competence of a jury and perhaps even judges. The fear is that the trier of fact will be confused by psychiatric testimony or will abdicate its function of deciding the facts by rubber stamping the experts' opinions. Either fear is largely unfounded.¹²¹

116. This is the class of individuals the Bar Committee sought to identify by use of the insanity test. PROPOSED DRAFT § 8.01, Comment at 64.

117. See A. MATTHEWS, *MENTAL DISABILITY AND THE CRIMINAL LAW* 193 (1970). Interestingly, many proponents of capital punishment also argue for limitation of the defense of insanity. See *President Nixon's Proposal on the Insanity Defense*, 1 J. PSYCHIATRY & L. 297 (1973): "It is a defense to a prosecution under any federal statute that the defendant, as a result of mental disease or defect, lacked the state of mind required as an element of the offense charged. Mental disease or defect does not otherwise constitute a defense." Ironically, such a proposal, eliminating the insanity defense, could well expand the opportunity for an effective defense based on mental disorder. See discussion of "diminished capacity" at text accompanying notes 122, 123 *infra*. See also Morris, *Psychiatry and the Dangerous Criminal*, 41 S. CAL. L. REV. 514, 518 (1968).

118. *Bolton v. Harris*, 395 F.2d 642 (D.C. Cir. 1968); LAFAVE & SCOTT 319-20.

119. TEX. CODE CRIM. PROC. ANN. art. 46.02, § 2(d)(3) (Supp. 1974).

120. Since *Jackson v. Indiana*, 406 U.S. 715 (1972), the state cannot indefinitely commit a mental incompetent under the guise of allowing him time to recover sufficiently to assist in his defense. However, the prosecutor can, and does, institute civil commitment proceedings in many cases in lieu of a criminal trial. A. MATTHEWS, *supra* note 117, at 162.

121. See generally R. SIMON, *THE DEFENSE OF INSANITY* (1967). In fact, the jurors may need more evidence of the defendant's mental condition. Most persons, with little or no knowledge of the psychology of human behavior, have great difficulty in trying to arrive at a conceptual picture of a typically insane person. In the ordinary case, there is little difference between deciding what in fact was the defendant's state of mind by reasonable inferences from objective circumstances, and deciding what an ordinary

Perhaps the most telling argument against an expanded defense based on lack of mental capacity is the lack of knowledge concerning mentally disordered individuals, and the absence of adequate facilities for their treatment. Unfortunately, the insanity defense as now formulated and administered may be in itself one of the most significant impediments to development of adequate facilities. It is to be expected that, for the present at least, the penal law of Texas and many other states will continue to accomplish identification and treatment of only the more seriously disabled mental defectives.

Absence-of-Essential-Element Defenses. "Defenses" that constitute a direct attack on the sufficiency of the state's evidence amount to a claim either that the defendant did not commit the offense, or that the offense did not occur. The classic example is that of alibi, which apparently is so obvious that it is not even mentioned in the Code. Another so-called defense not specially mentioned is that of accident. It too is available to the defendant, since the prosecutor must prove as a minimum of criminal liability that the act charged was voluntary, and in the case of offenses with a required result, that it was caused by the defendant. The only limit on the alibi and accident defenses is the strength of the prosecution's evidence. Several other defenses of this class are specifically treated because of the legislative decision to place definite limits on their availability.

Diminished Capacity (Section 19.06). Though not denominated a defense in the Code nor included in the chapters relating to defenses, section 19.06 provides resourceful defense counsel with the potential for a new defense in Texas murder and voluntary manslaughter prosecutions. In this limited class of cases, section 19.06 makes admissible into evidence not only "all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased," but also those facts "going to show the condition of the mind of the accused at the time of the offense." Authority from other jurisdictions exists to support the admissibility of evidence of abnormal mental condition in these cases, even in the absence of a provision similar to section 19.06, and without the defense of insanity being raised.¹²² The rationale is simply that psychiatric evidence should be admissible when relevant to prove or disprove a requisite culpable state of mind to the same extent as any other relevant evidence.¹²³ This seems eminently correct and consistent with the notion that evidence of mental disease or disorder and its effect on the existence of *mens rea* has a direct bearing on the moral blameworthiness or guilt of the actor, and his amenability to criminal punishment. But the previous discussion of the "insanity" defense should suggest a caveat. The Texas courts could hold, not without

person would have thought. But there is no such thing as a typical or average insane person. Why else would jury researchers conclude that one of the most influential factors in an insanity juror's decision process is the "extent to which the defendant resembled or failed to resemble someone whom the juror knew to be mentally ill"? *Id.* at 154.

122. Annot., 22 A.L.R.3d 1228, 1239 (1968); *Commonwealth v. McCusker*, 448 Pa. 382, 292 A.2d 286 (1972).

123. MODEL PENAL CODE § 4.02, Comments at 193 (Tent. Draft No. 4, 1955).

case authority,¹²⁴ that the phrase relating to "condition of mind" in section 19.06 is to be treated merely as a rule of *evidence* relating to the insanity issue, because to hold that the phrase has independent significance would create a conflict between it and definition of the insanity defense found in section 8.01. If the defense of diminished capacity were allowed, the defendant could receive a straight verdict of not guilty of murder or voluntary manslaughter if the trier of fact determined that evidence of his mental condition raised a reasonable doubt whether he could entertain the "intent" or "knowledge" necessary for those crimes. If evidence of mental condition is admitted on the insanity defense, however, the defendant must shoulder the burden of persuasion that his cognitive or volitional capacity was completely impaired; if the insanity defense is successful, the defendant also is acquitted but not completely, for he has now been labelled a likely candidate for continued state supervision.

Hence, a dilemma is posed by a doctrine that is logically unassailable but arguably fraught with practical difficulties, such as likelihood of confusing the jury, encouragement of compromise verdicts, and inadequate protection of the public. These difficulties are probably exaggerated, but they may be felt compelling enough to warrant rejection of the diminished capacity doctrine in Texas.

Mistake of Fact. In section 8.02, the Code limits the mistakes of fact that will negate culpability to those concerning which the actor has a "reasonable belief." The Code thus roughly restates the prior law that denied the defense in the case of a merely honest mistake and made it available with respect only to those mistakes that did not result "from a want of proper care."¹²⁵ In doing so, it does not follow the trend of modern law nor the proposed revision.

The requirement that a mistake of fact be "reasonable" cannot be reconciled with the culpable mental state requirement. For example, where a defendant is charged with possession of marijuana, even negligent ignorance of the character of the cigarettes should negate his knowledge in fact that the substance was marijuana. However, literal application of section 8.02 to allow only a "reasonable" mistake as a defense would make his negligence sufficient for criminal liability, contrary to the language and intent in the definition of the specific offense.¹²⁶

Section 8.02 should be interpreted as only supplementary to the general principles of culpability, not exclusive. In cases in which a specific culpable mental state is required, evidence of any mistake, whether reasonable or not, should be allowed unless specifically limited by the statute defining the particular offense. The basic requirement of the Code that an essential element of any crime is the "forbidden conduct" which means the "act or omission and its accompanying mental state" in the statute defining the of-

124. Annot., 22 A.L.R.3d 1228, 1235 (1968); see *State v. Garrett*, 391 S.W.2d 235 (Mo. 1965).

125. PROPOSED DRAFT § 8.02, Comments at 67.

126. Texas Controlled Substances Act, TEX. REV. CIV. STAT. ANN. art. 4476-15 (Supp. 1974).

fense, seems to require no less. Enumeration of a particular defense of reasonable mistake of fact does not necessarily compel a conclusion that it was intended to limit other defenses of a like character, but more logically evidences an intent to establish a minimum defense that is applicable to crimes generally.¹²⁷

This interpretation is supported by examination of subparagraph (b) of section 8.02 which states that if the defendant successfully asserts the mistake of fact defense, "he may nevertheless be convicted of any lesser included offense of which he would be guilty if the fact were as he believed." If the mistake must be reasonable in all instances, this section is of little utility. For example, a defendant charged with theft for having destroyed

127. Of course, notwithstanding his claim of honest, but possibly unreasonable mistake, a defendant may not be able to *prove* that he did not have the culpable mental state. When a defense based on mistake is expressly included within the specific provision defining the offense, the maxim of interpretation, *expressio unius est exclusio alterius*, apparently would compel a conclusion that the particular defense mentioned (and its limitations) impliedly excludes other exceptions to criminal liability based on that ground. For example, the bigamy statute (TEX. PENAL CODE § 2501) expressly provides a defense of *reasonable* belief of freedom in law to remarry. An honest, but unreasonable, belief likely would be no defense. It is unclear, however, whether the *expressio unius* notion would operate to make the general defense of mistake of fact in *id.* § 8.02 exclusive, contrary to the interpretation urged in the text. The maxim may not apply in this instance, but support for the conclusion that this section is exclusive may be found in the legislative decision to reject the proposed draft's inclusion of even unreasonable, but honest, mistakes as potential negations of a required culpable mental state. See PROPOSED DRAFT § 8.02(a) and Comments at 67. Rejection of the draft provision could be interpreted as a decision to continue the commitment of the common law and the prior Texas law to a limited mistake of fact defense, which in effect makes negligence the culpable mental state. Such an interpretation, however, would be contrary to the purported objective of the Code to assess guilt on the basis of actual culpability by defining offenses in terms of subjective culpable mental states.

A serious problem of interpretation could arise concerning the status of mistake as a defense to sexual assaults against children, a subject causing considerable litigation. See *People v. Hernandez*, 61 Cal. 2d 529, 393 P.2d 673, 39 Cal. Rptr. 361 (1964). The problem arises because of the omission of any requisite culpable mental state for the offense of Rape of Child (TEX. PENAL CODE § 21.09) or Sexual Contact with a Child (*id.* § 21.11(a)(1)) and any specific inclusion or exclusion of a mistake of fact defense in the Rape of Child definition or the Sexual Abuse of a Child (*id.* § 21.10) and the Indecency with a Child (*id.* § 21.11) statutes. All these offenses provide a defense when the alleged victim is a child 14 years or older who has previously engaged promiscuously in sexual misconduct. Two of them, rape and sexual abuse of a child, provide an affirmative defense if the victim was of the opposite sex and was two years or less in age than the defendant. Nowhere is a defense based on mistake as to age mentioned, unlike the proposed draft, which expressly provided a defense based on reasonable mistake of age when criminality depended on the child's being younger than 16, and expressly excluded it if criminality depended on the child's being younger than 14. PROPOSED DRAFT § 21.12. The hiatus is aggravated by the failure to provide any culpable mental state for the offenses of Rape of a Child (TEX. PENAL CODE § 21.09(a)) and Sexual Contact with a Child (*id.* § 21.11(a)(1)). Hence, it appears that the minimum culpable mental state of recklessness must be read into those offenses by virtue of *id.* §§ 6.02(b), (c), discussed at notes 92, 93 *supra*. Since the general defense of mistake of fact afforded by § 8.02 is not excluded expressly, nor it seems by implication, the defendant should be allowed to present evidence of reasonable mistake of age to establish that, if anything, he was only negligent concerning whether the child was underage. Even in the case of those sexual assaults of children that expressly require a mental state (*i.e.*, "intent to arouse or gratify the sexual desire of any person"), a strong argument could be made that the defense of reasonable mistake of age is applicable. See *People v. Hernandez*, *supra*. However, a court might hold that by its language, the general mistake of fact section applies only if it would negate "the kind of culpability required for commission of the offense." Thus, since the offenses require no mental state other than an "intent to gratify," evidence of mistake would be irrelevant.

another's property who successfully defends on the ground that he mistakenly and reasonably concluded that it was abandoned cannot be found guilty even of negligent destruction of property (if there were such an offense) since negligence implies unreasonableness on the part of the actor. On the other hand, if his defense is unsuccessful, there is no need to resort to subparagraph (b).

Mistake or Ignorance of Law. Where a person acts under a mistaken belief that "the conduct charged did not constitute a crime," he is not relieved of liability unless the belief was reasonable and based on "reasonable reliance" on an "official statement of the law" or "an opinion" emanating from a court of record or a public official charged "with responsibility for interpreting the law."¹²⁸ This narrowly circumscribed affirmative defense constitutes an exception to the codification in section 8.03 of the established common-law maxim that ignorance of law is no defense.¹²⁹

The ignorance or mistake referred to in section 8.03 relates to a purported misinterpretation or misunderstanding of the existence or meaning of the criminal law itself, not to the effect of some other non-criminal law. In situations in which the defendant does not argue he was ignorant of the criminal law or mistaken as to its meaning, but that his mistake instead related to the effect of a law other than that violated, in other words, a non-criminal law, his defense should be treated as a mistake of fact. This is the effect of section 25.01 relating to bigamy which provides a defense if the actor "reasonably believed" that under the civil statutes his prior marriage was void or had been dissolved.

Reliance on the advice of a lawyer is not specifically made an affirmative defense. However, a defendant who relied on his lawyer's interpretation of a case construing a statute or an attorney general's opinion presumably might claim a defense on the ground that his conclusion based on such advice was one that a reasonable person would reach. However, the potential risk of fabrication of such a defense out of disingenuous legal advice, or the fostering of dishonesty among attorneys apparently dissuaded its inclusion.

Intoxication. Section 8.04 restates the "peculiar" position of the former Texas law on intoxication as a defense that has been referred to as "a perversion of the common-law rule."¹³⁰ In effect, it is not a statement of a defense, but rather of a non-defense, and is actually a rule of evidence. Under it, voluntary intoxication "does not constitute a defense" and "evidence of temporary insanity caused by intoxication" is admissible only in mitigation of punishment.¹³¹ Apparently, although not stated, the "temporary insanity" caused by the "intoxication" resulting from "any substance," for example, drugs, does not include the rare "involuntary intoxication" or stuporous condition that is neither self-induced nor involuntary. Evidence of such conditions should be admissible on the issue of whether the actor pos-

128. TEX. PENAL CODE § 8.03(b).

129. *Id.* § 8.03(a).

130. PROPOSED DRAFT § 8.03, Comments at 69.

131. TEX. PENAL CODE § 8.04.

sessed the requisite culpable mental state of the offense (or was at the time of his act, suffering from an incapacitating mental disease or defect).¹³²

The Code thus rejects the prevailing view that even voluntary intoxication is a defense to a crime requiring intent or knowledge if it negatives the existence of those elements, but is immaterial to the existence of the awareness of risk required when recklessness is sufficient for culpability. The Code's departure from the prevailing view, though theoretically inconsistent with the general principles of culpability, may be justified in light of practical reality. Considerable evidence exists that intoxication has less effect on one's mental functions than is commonly believed, and in many cases a defense counsel's decision to introduce evidence of intoxication may be counterproductive.¹³³

The True Defenses

Entrapment. The judge-made entrapment defense becomes a part of Texas statutory law in section 8.06. To be available, the defendant must allege and the prosecution must be unable to disprove that: (1) the defendant committed the offense charged "because he was induced to do so by a law enforcement agent," and that (2) the inducement of the agent consisted of "persuasion or other means likely to cause persons to commit an offense." Inducement amounting to entrapment is not established by law enforcement activity that merely affords "an opportunity to commit an offense."¹³⁴

The subject of a defense based on improper inducement by police to criminal activity has been part of the wider debate over the proper role of the police in investigation and detection of crime. The battle lines over entrapment have formed around two separate theories of the defense. The so-called "origin of intent" theory focuses on the subjective intent of the defendant (the existence of criminal predisposition), while the "police conduct" or objective theory of entrapment emphasizes the nature of the methods used by the police. Proponents of the latter view, including the drafters of the Model Penal Code, were dealt a blow by the United States Supreme Court holding this past year in *United States v. Russell*, that the "police conduct" theory of entrapment was not constitutionally required.¹³⁵ The analogy to the exclusionary rule or suppression of unlawfully-obtained evidence doctrine used to support the objective test was rejected.¹³⁶ Of

132. See discussion of insanity and diminished capacity, notes 111-24 *supra*, and accompanying text.

133. See DIX & SHARLOT, notes and authorities at 552-55.

134. TEX. PENAL CODE § 8.06(a). The section applies to activity by personnel of any federal, state and local law enforcement agency or any person acting pursuant to their instructions. *Id.* § 8.06(b).

135. 411 U.S. 422 (1973).

136. Aside from questions of fairness, one objective of the entrapment defense is to discourage official misconduct. It may have less impact in this regard than the exclusionary rule. The reason is that methods raising the possibility of entrapment are almost always confined to offenses that the police claim have no other effective alternatives for detection and obtaining of convictions, primarily narcotics and sex offenses. See Rotenberg, *The Police Detection Practice of Encouragement*, 49 VA. L. REV. 871, 874 (1963). In fact, the defense presumably would not be available in prosecutions

course, the Supreme Court's decision does not prevent any jurisdiction from utilizing the police conduct test, which now appears to be law in Texas.

The new provision, like the origin-of-intent test, first requires evidence that the defendant was in fact induced by the police to commit the crime. But after that finding, the Texas formula asks whether the methods used were "likely to cause persons to commit the offense."¹³⁷ It thus appears that whether the means used by the police are sufficient to establish entrapment depends on their probable effect on persons who normally would not commit the crime, rather than on a determination whether the actor would not have committed the crime had he not been so induced.¹³⁸ As a result, the Code eliminates the danger to defendants in raising the entrapment defense that the evidence of prior misconduct, admissible under the subjective test on the issue of the criminal disposition, will be used to establish guilt of the crime charged.

The real value to the defendant of the entrapment defense lies in its procedural consequences. Under the Code, it is a "defense," requiring the prosecution to disprove its existence beyond a reasonable doubt.¹³⁹ Since section 8.06 does not speak to the issue of whether denial of the commission of the offense and a claim of entrapment are inconsistent, the prior law that a defendant must elect either one or the other presumably is unaffected.¹⁴⁰ Finally, one assumption underlying the police conduct theory is that the issue will be decided initially as a matter of law by the judge, as in the case of a hearing on a motion to suppress based on police misconduct. If the judge decides the issue against the defendant, it is then to be submitted to the jury. Section 8.06 is silent on this aspect of the defense. However, in the conforming amendment to the Code of Criminal Procedure, article 28.01, entrapment is included as a matter that the judge "shall" determine at pretrial hearing.¹⁴¹

Duress. Section 8.05 provides that a person may not be convicted of a felony if the criminal conduct was coerced by a threat of imminent death or serious bodily injury to himself or another that "would render a person of reasonable firmness incapable of resisting." The defense is more liberal as to non-felony offenses, in which the compulsion that a person of reason-

for offenses involving bodily injury or the threat thereof. R. PERKINS, *supra* note 98, at 1036. MODEL PENAL CODE § 2.13(3) (Proposed Official Draft 1962). In such cases, the encouraging officers probably would be held liable as co-conspirators or accomplices.

137. TEX. PENAL CODE § 8.06(a) (emphasis added).

138. This is expressly stated in PROPOSED DRAFT § 8.05(a) ("creating a substantial risk that the offense would be committed by one not otherwise ready to commit it"). Although not expressly stated in the entrapment section as enacted, it appears that the trier of fact must use the hypothetical construct of a normal person, *i.e.*, one not otherwise criminally disposed, as an objective standard against which to measure the intensity of the officer's encouragement.

139. TEX. PENAL CODE § 8.06(a).

140. See PROPOSED DRAFT § 8.05, Comments at 73. However, since it is possible that the defense will now be ruled on as a preliminary matter before trial, it would seem more reasonable to allow it to be raised in the alternative.

141. Of course, the trial judge is not obliged to hold a pre-trial conference. TEX. CODE CRIM. PROC. ANN. art. 28.01, § 1 (Supp. 1974) ("the court may set any criminal case for a pre-trial hearing").

able firmness could not resist need only be "force or threat of force." An affirmative defense, duress is not available if an actor either intentionally, knowingly, or recklessly placed himself in a situation in which it was probable that he would be subjected to compulsion. Finally, the Code expressly rejects the special rule of prior law of duress between spouses.¹⁴²

Justification Generally. Sections 9.21 and 9.22 contain the general defense of justification that will exonerate a defendant from criminal liability for conduct proscribed as specific offenses in the penal law. Unless inconsistent with other provisions of the subchapter, conduct that would otherwise constitute an offense is justifiable and not criminal when it is "required or authorized" by law or by judicial decree¹⁴³ or is justified by necessity, in other words, reasonable belief that the conduct is immediately necessary to avoid imminent harm.¹⁴⁴ The defense of necessity is limited to situations in which the injury or evil to be avoided, according to "ordinary standards of reasonableness" clearly outweighs "the harm sought to be prevented by the law proscribing the conduct"¹⁴⁵ and a legislative purpose to exclude the claimed justification "does not otherwise plainly appear."¹⁴⁶

Justification—Special Relationships. Subchapter F of chapter 9 delineates specific situations in which the use of physical force on another person may be justified.¹⁴⁷ A parent, teacher, or other person entrusted with the care and supervision of a minor or incompetent may use physical force when necessary to maintain discipline or to promote the welfare of the child or incompetent. The force is justified "when and to the degree the actor reasonably believes is necessary" either for the purpose of discipline, or welfare of the individual, and in the cases of institutional supervision, to maintain the institution's integrity.

Justification—Defense of a Person. Section 9.31 justifies the use of physical but non-deadly force when and to the extent that the actor "reasonably believes" it is "immediately necessary to protect himself against the other's use or attempted use of unlawful force."¹⁴⁸ Deadly force may be employed only when the actor reasonably believes it immediately necessary to protect himself or a third person from the other's use or attempted use of unlawful deadly force on himself or a third person, or to prevent "imminent commission of aggravated kidnapping, murder, rape, aggravated rape, robbery, or aggravated robbery."¹⁴⁹ Even then, such force may be used only if "a reasonable person in the actor's situation would not have retreated."¹⁵⁰

142. TEX. PENAL CODE § 8.05(e). Under the prior law, a wife committing a crime by command of her husband was criminally liable for only half the punishment to which he could be subjected. Ch. 3, art. 32, [1925] Penal Code of Texas 7 (repealed 1973).

143. *Id.* § 9.21(a).

144. *Id.* § 9.22(1).

145. *Id.* § 9.22(2).

146. *Id.* § 9.22(3).

147. *Id.* §§ 9.61 (Parent-Child), 9.62 (Educator-Student), 9.63 (Guardian-Incompetent).

148. *Id.* § 9.31(a).

149. *Id.* § 9.32(3).

150. *Id.* § 9.32(2).

A defendant may not rely on this justification if he provokes another person's use of unlawful force to provide himself with an excuse for causing physical injury or death to that person. Nor will he be excused if he is the initial aggressor, unless he "abandons the encounter, or clearly communicates to the other his intent to do so reasonably believing he cannot safely abandon" it, but "the other nevertheless continues or attempts to use unlawful force against the actor."¹⁵¹ Physical force that was "consented to" by the actor can never justify the response of physical force¹⁵² unless, of course, it was also consented to by the other party, nor can mere verbal provocation.¹⁵³ Finally, a person is not allowed to use any force to resist an arrest, whether lawful or not, when made by "a peace officer," or by his agent in the officer's presence,¹⁵⁴ unless the peace officer or his agent, not in response to resistance, "uses or attempts to use greater force than necessary."¹⁵⁵

Finally, the use of non-deadly force is authorized "when and to the degree [the actor] reasonably believes" it immediately necessary to frustrate an attempt by another to commit suicide or inflict serious bodily injury on himself.¹⁵⁶ Deadly force is even justified when reasonably believed to be "immediately necessary to preserve the other's life in an emergency."¹⁵⁷

Justification—Defense of Property. Section 9.41 provides: "A person in lawful possession of land or tangible, movable property" may use such physical force as he reasonably believes is necessary to prevent or terminate a criminal trespass on, or interference with, such property. He may use deadly force only when reasonably necessary to prevent a trespasser or potential thief from committing arson, burglary, robbery, aggravated robbery, or theft, or criminal mischief during the nighttime, or to prevent immediate flight from a burglary, robbery, or theft offense with the property, and he reasonably believes that the "land or property cannot be protected or recovered by any other means" or that not to use the force "would expose the actor or another to a substantial risk of death or serious bodily injury."¹⁵⁸ A person is justified in using force against another to protect a third person's property if he would be justified in using the force to protect his own property, and he either reasonably believes the intrusion constitutes "attempted or consummated theft" or "criminal mischief" or he has a legal duty to protect the property, was requested by a third person to protect it, or the third person is a family member.¹⁵⁹ The justification provided in the sections outlined above applies to the use of a protective device if it

151. *Id.* § 9.31(b)(4).

152. *Id.* § 9.31(b)(3).

153. *Id.* § 9.31(b)(1).

154. *Id.* § 9.31(b)(2). This is directly contrary to prior law. PROPOSED DRAFT § 9.31, Comments at 88. Denial of the privilege of self-help in response to unlawful police conduct is consistent with the trend toward expansion of civil remedies against the police. See *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

155. TEX. PENAL CODE § 9.31(c).

156. *Id.* § 9.34(a).

157. *Id.* § 9.34(b).

158. *Id.* § 9.42.

159. *Id.* § 9.43.

is "not designed to cause, or known by the actor to create a substantial risk of causing, death or serious bodily injury" and its use is "reasonable under all the circumstances as the actor reasonably believes them to be when he installs the device."¹⁶⁰

Justification—Law Enforcement. Under section 9.51 the use of force is justified when and to the extent that the actor reasonably believes is immediately necessary to make an arrest or search which he "reasonably believes to be lawful," or with a warrant that he "reasonably believes" to be valid. Before so doing he must manifest his purpose and identify himself as a peace officer, "unless he reasonably believes his purpose and identity are already known by or cannot reasonably be made known to the person to be arrested."¹⁶¹ Resort to deadly physical force in addition to justifiable non-deadly force by a peace officer, or a private person assisting him at his direction, is justifiable to effect an arrest or to prevent an escape, only when he reasonably believes that the felony or offense against the public peace for which the arrest is authorized included the use or attempted use of deadly force, or that there is a "substantial risk that the person to be arrested will cause death or serious bodily injury to the actor or another if the arrest is delayed."¹⁶² The Code thus rejects the limitations of the proposed revision on the use of deadly force by private citizens, even those acting at the direction of a peace officer.¹⁶³ However, the Code discourages citizens' arrests by making the actor determine the legality of the supposed law enforcement activity at his peril; an arrest must be lawful in fact and in law before a private citizen is justified in using force to effect it.¹⁶⁴

Finally, the same degree of force to prevent "the escape of an arrested person from custody" is justified if it would have been to effect the arrest under which the prisoner is in custody, except that "a guard employed by a penal institution or a peace officer" may use "any force, including deadly force," that is believed, though not necessarily reasonably, "to be immediately necessary to prevent the escape."¹⁶⁵

III. CLASSIFICATION OF OFFENSES AND PUNISHMENT (TITLE 3, CHAPTER 12)

The traditional felony-misdemeanor classification of criminal offenses is retained in the Code.¹⁶⁶ As in prior law, unless specifically designated as such only those offenses that carry a potential term in a penitentiary are felonies.¹⁶⁷ All the offenses that are felonies in the new Code have a minimum prison term of two years. All other offenses are misdemeanors.¹⁶⁸

160. *Id.* § 9.44.

161. *Id.* § 9.51(a).

162. *Id.* § 9.51(c).

163. PROPOSED DRAFT § 9.51(c).

164. TEX. PENAL CODE § 9.51(d).

165. *Id.* § 9.52. Note the absolute nature of this privilege, *i.e.*, there is no qualification that the belief be reasonable.

166. *Id.* § 12.02.

167. *Id.* § 1.07(a)(14).

168. *Id.* § 1.07(a)(21).

Unlike the old Code, however, the new Code does not assign a specific penalty in the definition of each offense which determines the grade of the offense. Instead, it establishes a graded scheme of felony and misdemeanor classifications—capital, first, second, and third degree felonies, and Class A, B and C misdemeanors—into which each specific offense is placed.¹⁶⁹ The classification assigned to an offense operates to incorporate by reference the authorized punishment designated in chapter 12 for the appropriate felony or misdemeanor grade. In addition to the ordinary punishments for each category of offense, the Code contains recidivist provisions which authorize enhanced punishment for habitual or repeat offenders, both felony¹⁷⁰ and misdemeanor.¹⁷¹ Also added is the authority to assess against corporations fines based on gain.¹⁷² The resulting punishment structure is set forth in Appendix A.

The Code introduces two novel provisions into Texas sentencing law. First, the trial court is authorized to reduce either the charge or a conviction of a third degree felony to that of a Class A misdemeanor "if, after considering the gravity and circumstances of the felony committed and the history, character, and rehabilitative needs of the defendant," the judge finds that such action "would best serve the ends of justice."¹⁷³ Second, a defendant at sentencing may, with consent of the prosecutor and the court, admit all uncharged offenses other than those of a higher category than that of which he stands convicted, and be sentenced thereon.¹⁷⁴ Offenses outside the venue of the sentencing court may not be admitted under this section without the consent of the prosecuting attorney of the county having jurisdiction and venue. Any admitted offense taken into account by the court under this provision cannot later be prosecuted.

The new sentence structure, although still relying primarily on the penalties of fine and imprisonment, seeks to make sentences more rational and to expedite the disposition of offenders. Aside from making the definition of crimes shorter, the prospective designation of authorized punishment by category may help prevent disproportionate sentences between like offenses, by allowing observation of offenses as a group according to category. A complete grouping of offenses by penalty classification is presented in Appendix B. The neat division accomplished by the classification of offenses and gradation of punishments cannot be expected to be a panacea for all the sentencing problems confronting the criminal law. The legislative decision to offer a wide range of possible dispositions of convicted offenders is based on the premise that the goal of individualized treatment is thereby enhanced. Unfortunately, the establishment of this flexible sentencing structure is only a first step that seems doomed to failure, part of which may be inevitable since the goal of "individualized treatment" may be only partly

169. *Id.* §§ 12.03, 12.04.

170. *Id.* § 12.42.

171. *Id.* § 12.43.

172. *Id.* § 12.51(c). Corporations also are subject to larger fines generally than individuals. *Id.* § 12.51(b).

173. *Id.* § 12.44.

174. *Id.* § 12.45.

achievable, given the limits on our present knowledge of what motivates human behavior and on our capability to fashion programs designed to rehabilitate the individual offender.¹⁷⁵ But to the extent that the goal of individualized treatment is theoretically attainable, the omission from the Code of several proposals relating to the exercise of sentencing discretion by the trial judge raises doubts about its being achieved in fact.¹⁷⁶ A judge need not utilize a presentence report nor state his reasons for imposing a sentence. No standards are provided to guide the sentencing decision nor is appellate review of sentences authorized.

The punishments available under the new Code are substantially more severe than those proposed by the State Bar Committee on Revision.¹⁷⁷ No doubt this was at least partly in response to the belief that community sentiment, expressed in the "law and order" battle cry, is in favor of additional behavior being declared criminal and more severe penalties.¹⁷⁸ The effectiveness of long prison terms in affecting the incidence of crime can be questioned, particularly for first offenders. On the whole, increasing the severity of sentences does not substantially increase the amount of time served, but it does tend to promote delay, which may have the corresponding effect of diminishing the rehabilitative impact of the ultimate sentence imposed.¹⁷⁹

A final comment should be made concerning the decision of the legislature to reinstitute capital punishment in certain cases of aggravated murder. The death penalty provisions,¹⁸⁰ like those concerning drugs, were not submitted to the legislature as part of the Penal Code package, undoubtedly for fear of placing the Code in jeopardy. One cannot resist the temptation to conclude that political expediency was a major factor in the decision to reinstitute capital punishment, even in the face of doubts concerning its constitutional validity.¹⁸¹ The provision clearly seems inadequate to overcome the constitutional objections of the United States Supreme Court to the procedures by which the decision to impose the death penalty is made. After

175. Brancale, *Diagnostic Techniques in Aid of Sentencing*, 23 LAW & CONTEMP. PROB. 442, 456-60 (1958). See also Cohen, *supra* note 23, at 416-17; Motley, "Law and Order" and the Criminal Justice System, 64 CRIM. L. & CRIMINOLOGY 259, 265 (1973). Judge Motley goes so far as to say that the present system is a failure and advocates instead a system of mandatory sentences of shorter duration. *Id.* at 266-69.

176. See Motley, *supra* note 173; Rubin, *Allocation of Authority in the Sentencing-Correction Decision*, 45 TEXAS L. REV. 455, 465-69 (1967). In addition to the omissions noted in the text, the Code does not contain any provision purporting to regulate the trial court's discretion to impose either consecutive or concurrent sentences for multiple offenses, as was proposed. PROPOSED DRAFT § 12.45.

177. Compare Appendix A *infra*, with Appendix B to PROPOSED DRAFT at 495-96.

178. See Cohen, *supra* note 23, at 415-17; Schwartz, *Introduction to Symposium: New York's New Penal Law*, 18 BUFFALO L. REV. 211-12 (1969).

179. DIX & SHARLOT 68. However, when delay is eliminated by the plea bargaining process, the "playing of numbers" therein may, in many instances, have an undesirable effect on the convicted offender's attitude. He may think he has beaten the "system," or has been manipulated and treated unfairly. Clearly, severe sentences encourage the "numbers" game. Also, one cannot help but wonder what real effect more severe sentences will have on the time actually served. See *id.* at 69-70; TEX. CODE CRIM. PROC. ANN. art. 42.12(C), § 15(a) (Supp. 1974) (prisoner may be paroled after serving one-third of his sentence or 20 years, whichever is less).

180. TEX. PENAL CODE §§ 12.31, 19.01, .03; TEX. CODE CRIM. PROC. ANN. art. 37.071 (Supp. 1974).

181. See *Furman v. Georgia*, 408 U.S. 238 (1972).

a finding of aggravated or capital murder, three issues are submitted to the jury, which must be answered "yes" unanimously before a verdict of death is possible.¹⁸² Two of the issues relate to the state of mind of the defendant and the reasonableness of his actions at the time of the killing, issues which add little, since presumably they must be answered affirmatively on the question of guilt.¹⁸³ The third question is "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."¹⁸⁴ This vague standard presents obliquely what apparently was the unstated test, or part of it, under the prior unconstitutional law: whether the convicted murderer could be rehabilitated, or whether he was incorrigible, in other words, is society justified in "giving up" and eliminating him?¹⁸⁵

IV. INCHOATE OFFENSES

Title 4 of the Code undertakes for the first time in Texas history to treat systematically four separate "inchoate" offenses—attempt, conspiracy, solicitation, and criminal instruments—all of which involve uncompleted criminal activity in the sense that they are punishable even if their ultimate objective is not achieved. The fact that an actor's criminal purpose is not achieved does not detract from either his culpability or his demonstrated danger to society, and hence he may be punished severely—one grade below that of the completed offense.¹⁸⁶ Possession of criminal instruments, however, is always a third degree felony.¹⁸⁷ The inchoate offenses serve several purposes, not the least of which is to allow early intervention by law enforcement officials into criminal activity for the protection of the public. However, they pose the special danger of casting too broad a net, and must be defined carefully to protect the innocent.

A. Attempt

In section 15.01 of the Code Texas for the first time has a general attempt

182. TEX. CODE CRIM. PROC. ANN. art. 37.071 (Supp. 1974).

183. *Id.* arts. 31.071(b)(1), (3). Question (1) asks whether the conduct causing death was committed "deliberately" and with "reasonable expectation" of death, and question (3) inquires whether it was "unreasonable in response to the provocation, if any." To find the defendant guilty of murder, the trier of fact must determine that the defendant contemplated or expected death to result and that he acted unreasonably. See discussion of murder in text accompanying notes 212-15 *infra*.

184. TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(2) (Supp. 1974).

185. Apparently, then, the jury has no more, and probably less guidance than it had under the prior law. Even if it were possible to enact a death penalty provision that would pass constitutional muster, Texas has not yet done so. Comments of Frank Maloney, Chairman, Section on Criminal Law, State Bar of Texas, Seminar on the Texas Penal Code, Texas Tech University School of Law, Oct. 13, 1973. Also, it should be noted that the hypothetically mandatory death penalty of the Code does not eliminate prosecutor discretion in charging non-capital murder, nor the jury's power to find a lower grade of homicide.

186. TEX. PENAL CODE §§ 15.01(c), 15.02(d), 15.03(d).

187. The offense of possession of criminal instruments (TEX. PENAL CODE § 16.01) proscribes the possession or providing of things specifically "designed, made, or adapted" for criminal activity with intent or knowledge that they will be so used. It thus includes part of what is known as the offense of "criminal facilitation" and will include persons whose aid may not be sufficient for liability based on a complicity or conspiracy theory. See Note, *The Proposed Penal Law of New York*, 64 COLUM. L. REV. 1469, 1523-24 (1964).

statute that applies to all offenses in the Code. An attempt consists of (1) "an act amounting to more than mere preparation that tends but fails to effect the commission of the offense" that is (2) done "with specific intent to commit [the] offense."¹⁸⁸ Notwithstanding this language, subparagraph (b) makes it clear that failure to commit the offense is not an essential element. In other words, proof that the object offense was committed is not a bar to prosecution for an attempt to commit the offense.

The absence of any detail in the general attempt definition in section 15.01 is an obvious concession to the extreme difficulty in drawing the line between mere preparation and attempt, that is, finding a step toward perpetration.¹⁸⁹ Apparently, the drafters intended that the question be decided on the particular circumstances of each case. However, the failure to include at least some guidelines for the trier of fact seems unfortunate. The new Code's extension of the scope of a number of object offenses, such as arson, robbery, and theft, should tend to ameliorate the lack of specific standards. But, judging from the problems that courts generally have had with similar general attempt definitions, the Texas courts are virtually on their own in the cases which present "hard" facts or unusual situations.¹⁹⁰

A troublesome problem in the law dealing with criminal attempt has been the impossibility defense. This defense generally arises when the defendant's conduct, unknown to him, could not have effected the commission of the crime allegedly attempted. The proposed Texas provision would have eliminated the impossibility defense by holding the actor responsible for attempt on the basis of what he believed, rather than on what fortuitously occurred.¹⁹¹

It is not clear from the language of section 15.01, as enacted, whether impossibility of commission of the object offense is a potential defense to a charge of attempt. Arguably, an act of the defendant cannot "tend" to effect its commission if the acts result in no object crime being committed. For example, a defendant who buys talcum powder thinking it is heroin has not "tended" to effect commission of a crime. On the other hand, if the means used and the acts done are of the type designed to effect commission of the crime, they do "tend" to effect its commission. Since an act that "tends but fails" is sufficient, the fact that in retrospect we can say the crime was impossible should make no difference if the acts can be considered more than mere preparation, and evidence of intent to commit the offense can

188. TEX. PENAL CODE § 15.01(a).

189. See MODEL PENAL CODE § 5.01, Comment at 39-47 (Tent. Draft No. 10, 1960). One is reminded of the rhetorical question asked by counsel in an appellate argument, "Where, your honors, will you draw the line?", to which one justice responded immediately, "Why, counsel, in the right place, of course."

190. Prior cases in Texas interpreting special attempt statutes will be of little help. See, e.g., *Hines v. State*, 458 S.W.2d 666 (Tex. Crim. App. 1970). The statutory language of the new general attempt statute is similar to that of the prior New York law. See *People v. Rizzo*, 246 N.Y. 334, 158 N.E. 888 (1927). That statute was interpreted to require conduct physically proximate to consummation of the object offense. *Id.* See also Note, *supra* note 187, at 1518-19. For the reasons stated in the Comment to the Model Penal Code, *supra* note 189, the approach of the Proposed Draft seems preferable.

191. PROPOSED DRAFT § 15.01.

be established. Only instances of real impossibility such as those involving attempts by persons who cannot be responsible for the completed offense as a matter of law, or those in which no crime such as that allegedly attempted exists—should be held to raise the defense.¹⁹²

B. Conspiracy

Under section 15.02 a person is guilty of conspiracy when (1) "with intent that a felony be committed," (2) "he agrees with one or more persons that they or one or more of them engage in conduct that would constitute" the felony, and (3) "he or one or more of them performs an overt act in pursuance of the agreement." This section departs from the common-law concept of conspiracy. The offense is limited to conspiracies that contemplate the commission of a felony rather than any criminal offense.¹⁹³ In addition, a single actor clearly may be convicted of conspiracy by his act of agreeing, even if those with whom he agrees cannot, either because they feigned agreement or did not share the actor's intent.¹⁹⁴ This so-called unilateral approach to conspiratorial liability is carried through by provisions providing that a conspirator's liability is not affected by the amenability to prosecution of the other alleged co-conspirators.¹⁹⁵ The only exception is that in a prosecution of a multi-party conspiracy, the acquittal of all parties except one bars further prosecution.¹⁹⁶ Finally, the overt-act requirement of the common law, proof of which is a practical necessity for evidentiary, limitation, or venue purposes, has been made an essential element of the offense.¹⁹⁷

A person who is by law incapable of committing the object offense in an individual capacity may nevertheless be guilty of a conspiracy to commit it.¹⁹⁸ But apparently the state could not make out a conspiracy between only two parties to commit a crime which necessarily requires two parties for its commission. For example, a husband could be guilty of a conspiracy with another man to commit rape of the wife, but a man and someone else's wife could not be guilty of a conspiracy to commit bigamy.¹⁹⁹ The provision that "the object offense was actually committed" is no defense²⁰⁰ is merely a statement of the established rule of non-merger of conspiracy into the completed offense. Conspiracy, unlike attempt, is an offense of a

192. See LAFAYE & SCOTT 442.

193. At common law, a combination for the purpose of committing any crime or a lawful act by unlawful means could be a conspiracy. Prior Texas law contained the felony limitation with certain exceptions, *e.g.*, conspiracy to violate the obscenity law. Ch. 35, § 1, [1943] Texas Laws 38 (repealed).

194. TEX. PENAL CODE § 15.02(b) states that the agreement "may be inferred from acts of the parties." Presumably, under the unilateral view taken in the Code, the actor's act of agreement can be inferred despite the absence of a "meeting of minds."

195. *Id.* § 15.02(c).

196. *Id.* § 15.02(c)(2).

197. Mere agreement to commit a crime is insufficient. Requiring an overt act in addition should burden the prosecutor little, since cases in which a conspiracy could be shown without proof of some act by one of the parties would be rare.

198. TEX. PENAL CODE § 15.02(c)(4).

199. The latter is an illustration of the so-called "Wharton Rule" which is applied to offenses that require cooperative action.

200. TEX. PENAL CODE § 15.02(c)(5).

distinctly different nature from the object offense, and thus allows prosecution and punishment for both.

C. *Solicitation*

The Code's introduction of the crime of solicitation to Texas penal law in section 15.03 creates an offense for conduct that amounts to a request, command, or attempted inducement of another to commit what is believed to be a felony. The offense of solicitation fills a gap in the prior law and alleviates the danger that the attempt or conspiracy statutes will be perverted by pressure to include conduct that unequivocally demonstrates an intent that a crime be committed, but is technically insufficient to establish attempt or conspiracy.²⁰¹ Impossibility of the commission of the offense by the person solicited, or the inability to convict him of any offense is no defense.²⁰² Solicitation, like conspiracy, is not merged into the completed offense,²⁰³ for which the solicitor also may be liable under complicity principles.²⁰⁴

D. *The Renunciation Defense to Preparatory Offenses*

The defendant in a prosecution for attempt, conspiracy, or solicitation has an affirmative defense based on either a "voluntary and complete" renunciation of the criminal objective—by abandonment of attempt, countermand of solicitation, or withdrawal from the conspiracy—or "affirmative action that prevented the commission of the object offense."²⁰⁵ Renunciation sufficient to constitute a complete defense in cases in which the defendant does not prevent commission of the object offense must be proven by the defendant to be completely voluntary, and must not be "motivated in whole or in part" either by increased awareness of the probability of detection or apprehension, recognition of greater difficulties in commission than were initially apparent, or by a decision merely to postpone or to change "to another but similar objective or victim."²⁰⁶ However, even if the renunciation of the defendant was insufficient to constitute a complete defense, the preparatory offense of which the defendant was convicted is to be reduced by one grade at the hearing on punishment if his incomplete renunciation was accompanied by "substantial effort to prevent commission of the object offense."²⁰⁷

V. SELECTED SPECIFIC OFFENSES

Little purpose would be served by a complete summary of the provisions of the Code relating to specific offenses. Only those relating to homicide, obscenity, and drugs are discussed herein. A comment should be made, however, concerning the method which should be employed in using the Code.

201. PROPOSED DRAFT § 15.03, Comments at 139-40.

202. TEX. PENAL CODE § 15.03(c).

203. *Id.* § 15.03(c)(4).

204. See discussion of complicity, notes 100-03 *supra*, and accompanying text.

205. TEX. PENAL CODE §§ 15.04(a), (b).

206. *Id.* § 15.04(c).

207. *Id.* § 15.04(d).

Assume the accused was arrested after a bullet from a gun he had fired into the side of a warehouse struck a flammable substance, causing a fire that was extinguished before it damaged the building. The prosecuting attorney (or defense attorney after formal charges had been filed) would first turn to title 7 entitled "Offenses Against Property," and would note that arson and other property damage offenses are included in the first chapter of that title. Section 28.02 defines arson as follows:

(a) A person commits an offense if he starts a fire or causes an explosion:

(1) without the effective consent of the owner and with intent to destroy or damage the owner's building or habitation; or

(2) with intent to destroy or damage any building or habitation to collect insurance for the damage or destruction.

(b) An offense under this section is a felony of the second degree, unless any bodily injury less than death is suffered by any person by reason of the commission of the offense, in which event it is a felony of the first degree.

Counsel would then break the offense down into its component elements: (1) the starting of a fire or causing of an explosion; (2) without the owner's effective consent (or with consent if to collect insurance); (3) with the intent to destroy or damage; (4) the owner's building or habitation. He would conclude that the state could establish element (1). By reference to the definition of "effective consent" in the general definition section, 1.07, he could probably assume that the evidence would establish element (2). To decide whether element (3) could be proved, he must look first to the definition of "intentionally" in section 6.03(a), and will find that defendant must be shown to have had the conscious objective to damage the building when he fired the gun. Finally, he would note that the definition of the term "building" used in element (4) is defined in the special definition section of the property damage chapter to include any structure intended for use in trade or manufacture, and, therefore, includes a warehouse.²⁰⁸ Counsel would also note that the new arson statute does not contain the common-law element that some burning of the building must actually occur. Element (3) could become the focal point of counsel's analysis. If the accused fired the gun in anger desiring only to put bullet holes in the building, he may be liable, since the intent required does not relate to starting a fire or the kind of damage, but only the intent to damage. But was his conduct in starting the fire voluntary? By reference to section 6.01, counsel will find that only the act of firing the gun need be voluntary, the actual result need not be willed or intended unless so specified in the statute defining the offense. But the result was totally unforeseen, so how could the defendant be responsible as a cause? Reference to the causation section 6.04 answers that: If the defendant had the requisite mental state for the offense charged, it makes no difference that under the circumstances as he believed them to be, a different offense was being committed. Counsel might an-

208. *Id.* § 28.01(2).

ticipate that defendant's best defense will be a claim that he either did not intend to damage the property, but was only reckless as to the risk of damage, or that through a mistake of fact he thought the building was abandoned and not owned by anyone. This would point counsel to the general defense sections or to other offenses such as reckless destruction of property.²⁰⁹ With reference to the latter, a similar analysis would be made.

A. *Criminal Homicide*

Criminal homicide generally is the causing of the death of an individual, and with two notable exceptions, the degree depends on the mental state accompanying the defendant's conduct causing the death.²¹⁰ The types of criminal homicide are murder, capital or aggravated murder, voluntary manslaughter, involuntary manslaughter, and criminally negligent homicide.²¹¹

Murder, a first degree felony, is committed when a person either: (1) "intentionally or knowingly causes" death; or (2) "intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes death"; or (3) "commits or attempts to commit an act clearly dangerous to human life that causes" death during the commission, attempted commission, or flight from a felony.²¹² Categories (1) and (2) are comparable to the old murder with malice. The third category of murder perpetuates the traditional form of objective liability for murder embodied in the felony-murder doctrine. It is based on the notion that the willingness to engage in certain kinds of dangerous conduct suffices to establish liability for murder, notwithstanding the absence of any specific mental state as to death as a result.²¹³ Limiting the application of the doctrine to the person who actually committed the act and not including liability for those acts committed by co-perpetrators is salutary.²¹⁴ The drafters obviously intended to exclude from the felony-murder rule accidental and not-to-be-anticipated fatalities caused by the accused. Whether they were successful depends on the ultimate interpretation of the potentially confusing phrase "an act clearly dangerous to human life" which apparently is intended to include those acts that are patently dangerous, not from the standpoint of the accused, but of the ordinary person.²¹⁵

Capital murder is a form of aggravated murder which may be committed by a person who is guilty of murder in any of five different aggravating circumstances: (1) the victim is a peace officer or fireman acting in the line of duty when defendant knows his official capacity; (2) there is an intentional murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated rape, or arson; (3) the murder is for hire (both the employer and the person employed are included); (4)

209. *Id.* § 28.04.

210. *Id.* § 19.01(a).

211. *Id.* § 19.01(b).

212. *Id.* § 19.02.

213. This is expressed in the shorthand of "implied malice" or "constructive intent."

214. Of course, co-perpetrators could be liable on a complicity theory. See discussion of complicity at notes 100, 101 *supra*, and accompanying text.

215. See LaFave, *supra* note 31, at 547-48; Annot., 50 A.L.R.3d 397 (1973).

the murder is committed while the defendant is escaping or attempting to escape from a penal institution; or (5) the murder is by a prisoner of an employee of a penal institution.²¹⁶ Doubts concerning the constitutionality of the capital murder statute have already been expressed.²¹⁷

The voluntary manslaughter provision of section 19.04 is a restatement of that part of the prior law's murder without malice provision which included murder mitigated by reasonable provocation. It defines provocation adequate to reduce murder to voluntary manslaughter to be conduct of the deceased or "another acting with" him at the time of the killing that would render a "person of ordinary temper" incapable of "cool reflection." The use of the phrase "person of ordinary temper" apparently excludes a test which takes into account individual variations in temperament or emotional and mental stability. However, section 19.06 mandates consideration of evidence not only of the "circumstances surrounding the killing," but of that "going to show the condition of the mind of the accused at the time of the offense." Although most jurisdictions support a test of provocation that allows consideration of the "circumstances" as viewed from the standpoint of the actor, they have resisted the injection of a larger element of subjectivity into the test that would result from expansion of the circumstances to be considered to include evidence of defendant's mental or emotional distress.²¹⁸ The ultimate resolution of the apparent conflict of Code provisions on this point may depend on how seriously the Texas courts view the Code's purported commitment to subjective culpability as a basis of criminal liability, and how much they fear that a complete commitment to that concept, at least in this area, would confuse the trier of fact or result in sympathy verdicts.

Involuntary manslaughter includes homicides either committed recklessly or caused by intoxication in the operation of a motor vehicle.²¹⁹ The homicide-by-motor-vehicle provision is a limited application of the stepchild doctrine of felony-murder, that of unlawful act-manslaughter, which makes the mental state of the defendant as to the death itself irrelevant. Stated another way, the voluntary decision to drink (or the allowing of oneself to become intoxicated) is sufficiently blameworthy to be treated as a form of transferred intent. Even without this provision, the Code's elimination of intoxication as a defense would make most vehicular homicides in these instances involuntary manslaughter in any event.

Finally, by establishing the new offense of criminally negligent homicide, the Code eliminates the degrees of negligent homicide in the prior law, and the sufficiency of ordinary tort negligence as a basis for criminal liability.²²⁰

B. *Obscenity*

The Code's provisions concerning obscenity treat perhaps the most con-

216. TEX. PENAL CODE § 19.03.

217. See notes 181-85 *supra* and accompanying text.

218. LAFAYE & SCOTT 578-79.

219. TEX. PENAL CODE § 19.05.

220. *Id.* § 19.07.

troversial of the offenses which relate generally to the state's attempted regulation of matters not resulting in readily identifiable harm to persons, property, or the public interest.

A growing feeling exists that the law should not attempt to legislate morality nor cure all the potential evils of society.²²¹ To a limited extent, this feeling is evidenced by the new Code's elimination of "private" crimes, and emphasis on criminalizing commercial ventures in the area of morals.²²² Offenses that punish conduct which is only offensive or immoral and does not pose a serious threat to individuals or society have been attacked as doing more harm than good.²²³ The same suspicion has been expressed by many toward obscenity legislation. Nonetheless, the legislature adopted a statute in the new Code regulating the possession, distribution, exhibition, and participation in "obscene" matter.²²⁴ The legislative decision to continue the regulation of obscenity was vindicated by a United States Supreme Court decision handed down only a week after the statute's passage, *Miller v. California*, in which the Court reaffirmed its previous position that obscenity was not protected by the first amendment guarantee of freedom of expression.²²⁵

The Code's obscenity statute (sections 43.21-43.24) contains three basic offenses: (1) intentional and knowing display or distribution of obscene matter with recklessness concerning whether another will be offended or alarmed (a Class C misdemeanor); (2) commercial distribution or exhibition, possession for sale, distribution or exhibition, and participation in, obscene matter (a Class B misdemeanor); and (3) sale, distribution, or display of "harmful material" (obscene to minors) to children under 17 (a Class A misdemeanor). The latter two offenses are aggravated and increased one grade if minors are employed in the enterprise.²²⁶ "Obscene" is defined in the statute as "having as a whole a dominant theme that: (A) appeals to a prurient interest in sex, nudity, or excretion; (B) is patently offensive because it affronts contemporary community standards relating to the description or representation of sex, nudity, or excretion; and (C) is utterly without redeeming social value."²²⁷ This definition is nearly identical to the three-pronged test of the prior Texas statute, except that the predecessor statute limited what could be obscene to depictions of "sexual matters"²²⁸ rather than the "sex, nudity, or excretion" of the new section 43.21. The new standard was not intended to change prior law,²²⁹ which was based on the constitutional test evolved by the United States Supreme Court prior to its decision in *Miller*.

221. See, e.g., Cohen, *supra* note 23, at 421-26.

222. For example, adultery is not a crime, nor is indecent exposure unless the offender "is reckless about whether another is present who will be offended or alarmed . . ." TEX. PENAL CODE § 21.08. Aggravated promotion of prostitution (*id.* § 43.04) and promotion of gambling (*id.* § 47.03) are third degree felonies.

223. See, e.g., H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 249-366 (1968).

224. TEX. PENAL CODE §§ 43.21-24.

225. 413 U.S. 15 (1973).

226. TEX. PENAL CODE § 43.23(c).

227. *Id.* § 43.21(1).

228. Ch. 468, § 1, [1969] Tex. Laws 1547 (repealed).

229. PROPOSED DRAFT § 43.21, Comments at 312.

The *Miller* decision made two major changes in the constitutional test of obscenity. It rejected the "utterly without redeeming social value" element of the test of obscenity in favor of a condition that the whole work lack "serious literary, artistic, political, or scientific value,"²³⁰ and also held that hard core sexual conduct which is the object of state regulation "must be specifically defined by the applicable state law, as written or authoritatively construed."²³¹ In *West v. State*,²³² a case involving a conviction for exhibiting obscene matter under the old Texas statute, on remand to the Texas Court of Criminal Appeals for reconsideration in light of *Miller*, the Texas court held that the statute and its successor in the new Code, section 43.21, met the modified constitutional standard. The "utterly without redeeming social value" condition of both statutes was easily found to be constitutional, albeit unnecessarily narrow under the relaxed constitutional minimum of *Miller*. But the court had some difficulty in deciding whether the Texas obscenity legislation met the new "specifically defined" requirement of *Miller*. The court did not attempt to find a saving construction of the language by reference to prior decisions under the statute, as many courts of other jurisdictions have done, but instead determined that the term "sexual matters," which it found was functionally synonymous with "sex, nudity, or excretion" in the new statute,²³³ was specific enough "as written," and did not violate due process as being vague or overbroad. Operating under the assumption that "a statute could define all conceivable sexual conduct, and thereby satisfy the requirement of a specific definition,"²³⁴ the court held that the term "sexual matters" was intended by the legislature to include, and did in its ordinary meaning include, "all sexual matters,"²³⁵ by which the court meant all conceivable sexual conduct. As a result, it met the *Miller* standard of specificity.

If *Miller* is to mean anything, it should be given a different reading from that of the Texas court. It is one thing to conclude that a state may prohibit all obscenity, which *Miller* did. But it is quite another to say that

230. 413 U.S. at 24.

231. *Id.* See also *United States v. 12 200-ft. Reels of Super 8 mm. Film*, 413 U.S. 123, 130 n.7 (1973), in which the Court stated that it is "prepared to construe" the federal obscenity legislation as being limited to "patently offensive representations or descriptions of that specific 'hard-core' sexual conduct given as examples in *Miller v. California*," i.e., "ultimate sexual acts, normal or perverted, actual or simulated" and "masturbation, excretory functions, and lewd exhibition of the genitals." 413 U.S. at 25.

232. No. 45,090 (Tex. Crim. App., Feb. 13, 1974).

233. "We give a like construction to the language used by the Legislature in its drafting of Section 43.21, Subsection 1, supra, wherein it refers to the 'description or representation of sex, nudity, or excretion.' Certainly at a minimum such language includes each stated type of conduct above construed as being within the intent expressed by the term 'sexual matters' in Article 527, V.A.P.C." *Id.* at 5.

234. *Id.* at 4.

235. *Id.* A comprehensive definition of matter to be regulated is not precluded by *Miller*. The Court's "plain examples of what a state statute could define for regulation" consistent with the "specific definition" requirement, *supra* note 231, were not intended to be exclusive. The Court suggests that the Oregon statute (ORE. REV. STAT. § 167.060 (1971)), for example, which includes detailed descriptions of nudity, sexual conduct, sexual excitement, and sadomasochistic abuse, would pass constitutional muster insofar as specificity of definition is concerned. 413 U.S. at 24 n.6. However, the Texas obscenity statute, like the California statute involved in *Miller*, does not on its face describe any particular conduct.

it may make portrayal of all sexual matters potentially obscene, which *Miller* did not do, but which *West* apparently does. There is little wonder the court expressed doubts that the "specifically defined" requirement of *Miller* would operate to make a statute any less vague, or provide any better notice to "purveyors."²³⁶ As interpreted by the Texas court, it probably will not. Indeed, the court acknowledged that its construction of the phrase "sexual matters," and its apparent synonym, "sex, nudity, or excretion," would include portrayals of "some sexual matters, such as courtship" that factually would never be found obscene.²³⁷ If so, the statute, as interpreted by the court, arguably is infected with the precise defect of vagueness and overgenerality that the *Miller* decision condemned. Reference to the decisions of other jurisdictions in the post-*Miller* scramble would have counseled a seemingly more certain approach.²³⁸ The *West* court could have found that prior Texas decisions provide an adequate, albeit more permissive, standard, namely, portrayal of explicit or overt sexual activity including exposure of genitalia between persons of the same or different sexes²³⁹—conduct which in certain circumstances may be criminal.²⁴⁰ But this approach was effectively foreclosed by the decision of the court in *West* to indulge in a textual interpretation designed to give the obscenity statute a new post-*Miller* prospective (and less permissive) definition.²⁴¹ In doing so, the court appears

236. *West v. State*, No. 45,090, at 4 (Tex. Crim. App., Feb. 13, 1974).

237. *Id.* at 5.

238. Numerous state courts have upheld state obscenity legislation by finding an authoritative construction in prior judicial decisions. *See, e.g.*, *Rhodes v. State*, 283 So. 2d 351 (Fla. 1973); *Commonwealth v. Clafin*, 298 N.E.2d 888 (Mass. 1973); *State ex rel. Keating v. "Vixen"*, 35 Ohio St. 2d 215, 301 N.E.2d 880 (1973). *See also Redlich v. Capri Cinema, Inc.*, 349 N.Y.S.2d 697 (App. Div. 1973). However, some jurisdictions have left the specific definition of obscenity to the legislature. *See, e.g.*, *Stroud v. State*, 300 N.E.2d 100 (Ind. 1973); *State v. Shreveport News Agency, Inc.*, 287 So. 2d 464 (La. 1973).

239. *See, e.g.*, *Sharp v. State*, 495 S.W.2d 906 (Tex. Crim. App. 1973); *Thacker v. State*, 490 S.W.2d 854 (Tex. Crim. App. 1973); *West v. State*, 489 S.W.2d 597 (Tex. Crim. App. 1972); *Hunt v. State*, 475 S.W.2d 935 (Tex. Crim. App. 1972).

240. *See* TEX. PENAL CODE § 21.07 ("Public Lewdness"). A Texas court of civil appeals, in upholding an injunction against exhibition and distribution of obscenity, suggested that the Texas obscenity statute could be read as incorporating by reference the conduct proscribed as "public lewdness"—acts of sexual intercourse, deviate sexual intercourse, sexual contact, and sodomous acts with animals or fowl. *Richards v. State*, 497 S.W.2d 770, 779 (Tex. Civ. App.—Beaumont 1973). Although *Miller* comes close to saying that the specific conduct, the depiction of which may constitutionally be made obscene, is the same as that which may constitutionally be proscribed as criminal, it did not so hold. *See Miller v. California*, 413 U.S. 15, 25-26 (1973). The Court in fact stated that "the States have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior." *Id.* at 26 n.8. Public lewdness may be made criminal because it is patently offensive by definition, but its depiction may not be without some "serious literary, artistic, political, or scientific value" in the context in which presented. It could be argued, however, that the admission by the court in *West* that depictions of matter such as abortion and birth control could technically, if not factually, be obscene under the Texas statute reinforces doubts concerning its holding. Since a general prohibition of abortion and birth control is impermissible as an invasion of the fourth amendment right to privacy, *Roe v. Wade*, 410 U.S. 113 (1973), and *Griswold v. Connecticut*, 381 U.S. 479 (1965), *quaere* whether their depiction should ever be obscene?

241. Aside from possible objections to the *West* decision on federal constitutional grounds, other questions could be raised as suggested by the following:

the judicial amendment of a legislative statute so as to specifically describe conduct criminally penalized seems to me to raise serious questions of true judicial legislation. As another concurring opinion suggests,

to have increased, rather than to have diminished, doubts concerning the constitutionality of the new Texas obscenity law.

C. Drugs

The Texas Controlled Substances Act,²⁴² not enacted as part of the Penal Code but as an amendment to the civil statutes concerning drugs, establishes a new structure of drug offenses based on an elaborate classification scheme. The Act defines offenses relating to the manufacture, delivery, possession, or fraud in connection with controlled substances, and possession of controlled substance paraphernalia. The grade of offense is determined by which of the four "penalty groups" in which the substance involved is classified, and punishment is set by the table of punishments taken from the Penal Code. The resulting structure of offenses and punishments is outlined in Appendix C.

Marijuana receives special treatment.²⁴³ The severity of offenses relating to its possession and delivery have been reduced substantially from the prior law.²⁴⁴ The reduced offenses will operate prospectively and apply only to offenses committed after August 27, 1973, the effective date of the Act. Those parts of the Act that would have required the trial court, on motion of defendant, to resentence any defendant previously convicted in a marijuana case and other drug offenders previously convicted with cases pending on appeal have been declared unconstitutional.²⁴⁵

VI. CONCLUSION

The existence of theoretical and practical limitations on the capacity of legislative draftsmanship to achieve a clear definition of crimes that is completely rational and easily applied should be obvious. Among these limitations are a lack of consensus concerning theories of human behavior and the proper objectives of the criminal law, the pressure for compromise cre-

why this standard of conduct [the examples stated in *Miller*] and not instead the terms of the Oregon or Hawaii statutes or the City of New Orleans ordinance?

Rather than re-interpret our obscenity statute so as in effect to amend it, rather than give it a prospective interpretation so as to regulate future conduct (but exempt pre-*Miller* conduct), the majority has, it appears to me, adopted the most sensible approach to solution of the shambles of our obscenity laws wrought by the new *Miller* standards: We have left the specific definition and regulation of obscenity to the legislature.

State v. Shreveport News Agency, Inc., 287 So. 2d 464, 471 (La. 1973) (Tate, J., concurring).

242. TEX. REV. CIV. STAT. ANN. art. 4476-15 (Supp. 1974).

243. Id. §§ 4.05, 4.06.

244. Compare ch. 1023, §§ 1-4, [1971] Tex. Laws 3069 (Tex. Penal Code art. 725b, repealed 1973) with the Texas Controlled Substance Act, TEX. REV. CIV. STAT. ANN. art. 4476-15 (Supp. 1974).

245. *Ex parte* Giles, 502 S.W.2d 774 (Tex. Crim. App. 1973) (§ 6.01—drug offenses generally); State *ex rel.* Smith v. Blackwell, 500 S.W.2d 97 (Tex. Crim. App. 1973) (§ 4.06—marijuana). Another case held that an individual tried on the effective date of the Controlled Substance Act for possession of less than two ounces of marijuana could not be convicted of a felony. Jones v. State, 502 S.W.2d 771 (Tex. Crim. App. 1973).

ated by political reality and the legislative process, and the inherent shortcomings of verbal formulations in achieving precision and eliminating ambiguity. Of course, a rational law of crimes is only a part of the response needed to solve the problems and fulfill the expectations of our creaking criminal justice system. This is acknowledged by the drafters of the proposed penal code, who observe: "The penal law is but one of several important tools necessary to govern society, and its reform, although essential, is by no means sufficient. The draft code is offered, however, as the logical beginning of what we hope will be a continuing law reform effort."²⁴⁶ This discussion of the Code as finally enacted is offered in the same spirit.

APPENDIX A

ORDINARY PUNISHMENTS

<i>Offense Grade</i>	<i>Imprisonment</i>		<i>Maximum Fine</i>	
	<i>Min.</i>	<i>Max.</i>	<i>Person</i>	<i>Corp./Ass'n</i>
<i>Felony</i>				
Capital	Life	Death	0	} \$10,000*
1st Degree	5 yrs.	99 yrs./life	0	
2d Degree	2 yrs.	20 yrs.	\$10,000	
3d Degree	2 yrs.	10 yrs.	\$5,000	
<i>Misdemeanor</i>				
Class A	0	1 yr.	\$2,000	} \$2,000*
Class B	0	180 days	\$1,000	
Class C	No imprisonment		\$200	

* Or double the amount gained in lieu hereof.

ENHANCED PUNISHMENTS

<i>Conviction</i>	<i>Punishment</i>	
	<i>Min.</i>	<i>Max.</i>
Third Felony { and 2d previous conviction for felony occurring after 1st previous conviction	---	Life
Second Felony { 1st degree 2d degree 3d degree	15 yrs.	99 yrs./Life as 1st degree felon as 2d degree felon
Class A Misdemeanor (any previous Class A Misdemeanor or Felony)	90 days	1 yr.
Class B Misdemeanor (any previous Class A or B Misdemeanor or any Felony)	30 days	180 days

APPENDIX B

CLASSIFICATION OF OFFENSES UNDER THE PENAL CODE OF 1974

<i>Section</i>	<i>Offense</i>	<i>Section</i>	<i>Offense</i>
	<i>Capital Felony</i>	31.05	Theft of Trade Secret
19.03	Capital Murder	31.07	Unauthorized Use of Vehicle
	<i>1st Degree Felonies</i>	32.21	Forgery (will, deed, mortgage, check, credit card, etc., i.e., documents of commerce and property transfer)
19.02	Murder		
20.04	Aggravated Kidnapping	32.33	Hindering Secured Creditors (removal of property)
21.03	Aggravated Rape		
21.05	Aggravated Sexual Abuse	32.43	Commercial Bribery
22.03	Deadly Assault on a Peace Officer	32.44	Rigging Publicly Exhibited Contest (connected with betting or wagering on contest)
28.02	Arson (involving bodily injury less than death)		
29.03	Aggravated Robbery	32.31	Credit Card Abuse
30.02	Burglary (aggravated)	32.45	Misapplication of Fiduciary Property or Property of Financial Institution (between \$200.00 and \$10,000)
	<i>2d Degree Felonies</i>		
19.04	Voluntary Manslaughter	32.46	Securing Execution of Document by Deception
20.04	Aggravated Kidnapping (but victim released safe)		
21.02	Rape	32.47	Fraudulent Destruction, Removal or Concealment of Writing (will, deed, mortgage, security instrument, etc.)
21.04	Sexual Abuse		
21.09	Rape of a Child		
21.10	Sexual Abuse of a Child	36.02	Bribery (public servant or party official)
22.04	Injury to a Child		
28.02	Arson	36.03	Coercion of Public Servant or Voter (aggravated)
28.03	Criminal Mischief (loss of \$10,000 or more)		
29.02	Robbery	36.05	Tampering with Witness
30.02	Burglary (other than habitation)	36.06	Retaliation
31.03	Theft (\$10,000 or more)	37.03	Aggravated Perjury
32.21	Forgery or Counterfeiting (involving money, stamps, stocks, bonds, etc.)	37.10	Tampering with Governmental Record (intent to defraud or harm)
32.45	Misapplication of Fiduciary Property or Property of Financial Institution (\$10,000 or more)	38.03	Resisting Arrest or Search (aggravated)
36.02	Bribery (acceptance of a bribe by a public official)	38.07	Escape (from arrest or confinement)
38.07	Escape (with deadly weapon)	38.08	Permitting or Facilitating Escape (aggravated)
38.10	Implements for Escape (deadly weapon)	38.10	Implements of Escape
43.05	Compelling Prostitution	38.11	Bail Jumping and Failure to Appear (felony charge)
46.06	Prohibited Weapons (possession or dealing)	39.02	Official Misconduct (involving things of value taken from the government)
	<i>3d Degree Felonies</i>	43.04	Aggravated Promotion of Prostitution
20.02	False Imprisonment (aggravated)	43.24	Sale, Distribution, or Display of Harmful Material to Minor (aggravated)
20.03	Kidnapping		
21.11	Indecency with a Child	46.02	Unlawfully Carrying a Weapon (where liquor is served)
22.02	Aggravated Assault		
22.08	Aiding Suicide (aggravated)	46.05	Unlawful Possession of Firearm by Felon
25.01	Bigamy		
25.02	Incest	46.06	Prohibited Weapons (possession of switchblade knife or knuckles)
25.03	Interference with Child Custody		
25.05	Criminal Nonsupport (repeat or while outside the state)	47.03	Gambling Promotion
28.03	Criminal Mischief (loss between \$2,000 and \$10,000)	47.04	Keeping a Gambling Place
30.04	Burglary of Vehicles	47.05	Communicating Gambling Information
31.03	Theft (value greater than \$200 but less than \$10,000)	47.06	Possession of Gambling Device or Equipment

<i>Section</i>	<i>Offense</i>	<i>Section</i>	<i>Offense</i>
	<i>Class A Misdemeanors</i>		
19.07	Criminally Negligent Homicide	39.03	Misuse of Official Information
21.07	Public Lewdness	42.06	False Alarm or Report
22.01	Assault (causing injury)	42.09	Desecration of Venerated Object
22.07	Terroristic Threat (affecting public)	42.10	Abuse of Corpse
25.05	Criminal Nonsupport	42.11	Cruelty to Animals
28.03	Criminal Mischief (loss more than \$20 but less than \$200)	43.03	Promotion of Prostitution
30.03	Burglary of Coin-Operated Machine	43.23	Commercial Obscenity (aggravated)
30.05	Criminal Trespass (in habitation)	43.24	Sale, Distribution, or Display of Harmful Material to Minors
31.03	Theft (Between \$20 and \$200)	46.02	Unlawful Carrying Weapons
32.21	Forgery	46.04	Places Weapons Prohibited (educational institution or polling place)
32.22	Criminal Simulation	46.07	Unlawful Transfer of Firearm
32.32	False Statement to Obtain Property or Credit	47.07	Possession of Gambling Paraphernalia
32.33	Hindering Secured Creditors		<i>Class B Misdemeanors</i>
32.34	Fraud in Insolvency	20.02	False Imprisonment
32.35	Receiving Deposit, Premium, or Investment in Failing Financial Institution	22.05	Reckless Conduct
32.42	Deceptive Business Practices	22.07	Terroristic Threat
32.44	Rigging Public Contest	25.04	Enticing a Child
32.45	Misapplication of Fiduciary Property or Property of Financial Institution (less than \$200.00)	28.03	Criminal Mischief (loss between \$5 and \$20)
32.47	Fraudulent Destruction, Removal, or Concealment of Writing	31.03	Theft (between \$5 and \$20)
36.03	Coercion of Public Servant or Voter	32.48	Endless Chain Scheme
36.04	Improper Influence	37.08	False Report to Peace Officer
36.07	Compensation for Past Official Behavior	38.04	Evading Arrest
36.08	Gift to Public Servant by Person Subject to His Jurisdiction	42.01	Disorderly Conduct (display or discharge firearm in public)
36.09	Offering Gift to Public Servant	42.02	Riot
37.02	Perjury	42.03	Obstructing Highway or other Passageway
37.09	Tampering With or Fabricating Physical Evidence	42.05	Disrupting Meeting or Procession
37.10	Tampering With Governmental Record	42.07	Harassment
37.11	Impersonating Public Servant	43.02	Prostitution (aggravated—repeat offender)
38.03	Resisting Arrest or Search	43.23	Commercial Obscenity
38.05	Hindering Apprehension or Prosecution		<i>Class C Misdemeanors</i>
38.06	Compounding	21.06	Homosexual Conduct
38.07	Escape	21.08	Indecent Exposure
38.08	Permitting or Facilitating Escape	22.01	Assault
38.11	Bail Jumping and Failure to Appear	22.08	Aiding Suicide
38.12	Barratry	28.03	Criminal Mischief (loss less than \$5)
38.13	Hindering Proceedings by Disorderly Conduct	30.05	Criminal Trespass
39.01	Official Misconduct	38.02	Failure to Identify as Witness
39.02	Official Oppression	38.11	Bail Jumping and Failure to Appear (for offense punishable by fine only)
		42.01	Disorderly Conduct
		42.08	Public Intoxication
		42.12	Shooting on Public Road
		43.02	Prostitution
		43.22	Obscene Display or Distribution
		47.02	Gambling

APPENDIX C

OFFENSES AND PUNISHMENTS UNDER THE TEXAS CONTROLLED SUBSTANCES ACT*

<i>Group</i>	<i>Trafficking</i>	<i>Possession</i>	<i>Paraphernalia</i>
1. Narcotics (opium, heroin) & LSD	1st° Felony	2d° Felony	Class A Misd.
2. Hallucinogens	3d° Felony	3d° Felony	Class A Misd.
3. Stimulants & Depressants	3d° Felony	Class A. Misd.	-----
4. Mixtures with narcotics	Class A. Misd.	Class B. Misd.	-----
5. Marijuana	{ <i>Delivery:</i> 3d° Felony <i>1/4 oz. without remuneration:</i> Class B. Misd.	<i>More than 4 oz.:</i> 3d° Felony	-----
		<i>2-4 oz.:</i> Class A Misd.	
		<i>2 oz. or less:</i> Class B. Misd.	

Persons authorized to manufacture or dispense controlled substances who are guilty of irregularities in connection with dispensing or maintenance of records are guilty of a second degree felony. Fraud in connection with controlled substances is also separately defined. Controlled Substances Act § 4.09.

* Texas Controlled Substances Act, TEX. REV. CIV. STAT. ANN. art. 4476-15 (Supp. 1974).