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CRIMINAL LAW

by

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I. DEFENSES

A. Affirmative Defenses—Standard of Appellate Review

A QUESTION plaguing appellate courts recently is what evidentiary standard of review applies to cases involving affirmative defenses.[1] Three separate courts of appeals had previously held that the applicable standard of review was whether the jury's implied finding was so against the great weight and preponderance of the evidence as to be manifestly unjust.[2] The Texas Court of Criminal Appeals granted petitions in all three cases and reversed the lower courts' decisions.[3] In the leading case, *Van Guilder v. State*,[4] the court rejected the standard of great weight and preponderance of the evidence in criminal cases, both in a general review of the evidence and more specifically in a review of the evidence for affirmative defenses.[5] The court stated that allowing the use of a great weight and preponderance standard "would make the courts of appeal a thirteenth juror with veto power."[6] Instead, the court held that appellate courts were bound by the standard set by the United States Supreme Court in *Jackson v. Virginia*.[7]

In *Jackson* the Supreme Court held that in reviewing the sufficiency of the evidence appellate courts must determine whether, after viewing the evi-

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1. In an affirmative defense, the defendant has the burden to prove the defense by a preponderance of the evidence. TEX. PENAL CODE ANN. § 2.04(d) (Vernon 1974). This burden differs from that in other defenses under the Penal Code. In other defenses, the burden of producing evidence lies with the defendant. *Id.* § 2.03(c). If, however, the defendant meets the burden of production, then the state must disprove the allegation beyond a reasonable doubt. *Id.* § 2.03(d). Some examples of affirmative defenses under the Penal Code include mistakes of law, § 8.03, duress, § 8.05, and insanity, § 8.01.

2. Bakker v. State, 682 S.W.2d 701, 704 (Tex. App.—Houston [1st Dist.] 1984, pet. granted); Van Guilder v. State, 674 S.W.2d 915, 919-20 (Tex. App.—San Antonio 1984, pet. granted); Schuessler v. State, 647 S.W.2d 742, 748-49 (Tex. App.—El Paso 1983, pet. granted).

3. Schuessler v. State, 719 S.W.2d 320, 328 (Tex. Crim. App. 1986); Baker v. State, 707 S.W.2d 893, 894-95 (Tex. Crim. App. 1986); Van Guilder v. State, 709 S.W.2d 178, 181 (Tex. Crim. App. 1985), *cert. denied*, 106 S. Ct. 2891, 90 L. Ed. 2d 978 (1986).

4. 709 S.W.2d 178 (Tex. Crim. App. 1985), *cert. denied*, 106 S. Ct. 2891, 90 L. Ed. 2d 978 (1986).

5. *Id.* at 180.

6. *Id.*

7. 443 U.S. 307 (1979).

dence in the light most favorable to the verdict, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt.[8] Applying this test to affirmative defenses, the Texas Court of Criminal Appeals held that the identical standard applied.[9] The appellate courts must first review the evidence in the light most favorable to the implicit finding by the jury with respect to the affirmative defense and next determine whether a rational trier of fact could have found that the defendant failed to prove his defense by a preponderance of the evidence, by examining all evidence concerning the affirmative defense.[10]

B. Insanity—Application of Van Guilder *Standard*

Now that the standard of review has changed, the question remains whether the results will change. For most cases, the answer is probably not. Compare, for example, *Jones v. State*[11] and *Moss v. State*.[12] *Jones* was decided before *Van Guilder*; therefore, the court of appeals applies the great weight and preponderance standard.[13] *Moss*, however, was decided after *Van Guilder*, and the court applied the rational trier of fact standard.[14] Both cases involved the affirmative defense of insanity and had similar facts. In each, experts testified that the defendant was insane, and lay witnesses testified that the defendant appeared rational. Applying the different standards of review, the courts reached the same result. Each held that a conflict existed in the evidence and that this conflict had to be resolved in favor of the jury verdict of guilty.[15]

In a few cases, however, the different standards will lead to different results. The great weight and preponderance standard allows an appellate court more latitude than does the *Van Guilder* standard. This means that, under *Van Guilder*, defendants will find it harder to establish affirmative defenses conclusively when the evidence is close. In *State v. Schuessler*[16] the defendant relied on the affirmative defense of insanity. Evidence of insanity included the opinions of three experts and the testimony of lay witnesses about numerous bizarre acts by the defendant. Evidence of sanity included the inconclusive opinion of one expert and some evidence of an attempt to conceal the crime. The court of appeals held that the jury's verdict was against the great weight and preponderance of the evidence.[17] As basis for its decision, the court cited the "overwhelming evidentiary disparity."[18] The court of criminal appeals reversed the court of appeals and affirmed the ver-

8. *Id.* at 318-19.
9. 709 S.W.2d at 181.
10. *Id.*
11. 699 S.W.2d 580 (Tex. App.—Texarkana 1985, no pet.).
12. 704 S.W.2d 939 (Tex. App.—Austin 1986, no pet.).
13. 699 S.W.2d at 582.
14. 704 S.W.2d at 940-41.
15. *Moss*, 704 S.W.2d at 941-48; *Jones*, 699 S.W.2d at 582.
16. 647 S.W.2d 742 (Tex. App.—El Paso), *rev'd*, 719 S.W.2d 320 (Tex. Crim. App. 1986).
17. 647 S.W.2d at 749.
18. *Id.*

dict.[19] The court stated that if there is conflicting evidence on the issue of insanity, the trier of fact is the sole judge as to weight and credibility of the evidence.[20] Because there was conflicting testimony, the court of appeals was without power to overturn the jury's verdict.[21] In these circumstances, the only time that a court can interfere with the verdict is if the jury's verdict is irrational.[22] To do otherwise, said the court, would allow an appellate court to serve as a "thirteenth juror with veto power."[23]

C. *Defensive Theory—Right to Instruction*

Defendants are entitled to an affirmative defensive instruction on every defense raised by the evidence.[24] The question answered in *Sanders v. State*[25] is what constitutes a "defense." The court reviewed the defenses found in the Penal Code and held that the defenses all sought to justify the defendant's admitted participation in the act itself.[26] The statutory defenses require the defendant first to admit the commission of the crime.[27] When a defendant presents a defensive theory that merely negates an element of the crime, he is denying participation and therefore is not presenting a defense that triggers the right to an instruction.[28] The teaching of *Sanders*, one of questionable value to defendants, is that if the defendant presents a defense that admits the crime, then he is assured an instruction, but if he presents a defense that merely denies the crime then he is not entitled to an instruction.[29]

II. INCHOATE OFFENSES

A. *Attempt—Renunciation Defense*

Renunciation is an affirmative defense to the crime of attempt.[30] *Thomas v. State*[31] involved the issue of whether this defense can be invoked after a completed attempt. The defendant was convicted of attempted burglary. In his confession he stated that he went to a side window of a house, took off

19. 719 S.W.2d at 330.
20. *Id.* at 329.
21. *Id.* at 330.
22. *Id.*
23. *Id.*
24. *See, e.g.*, Booth v. State, 679 S.W.2d 498, 500 (Tex. Crim. App. 1984); Lugo v. State, 667 S.W.2d 144, 146 (Tex. Crim. App. 1984).
25. 707 S.W.2d 78 (Tex. Crim. App. 1986).
26. *Id.* at 81.
27. *Id.*
28. *Id.* at 80-81.
29. *Id.*
30. TEX. PENAL CODE ANN. § 15.04(a) (Vernon 1974) states:
> It is an affirmative defense to prosecution under Section 15.01 of this code [for criminal attempt] that under circumstances manifesting a voluntary and complete renunciation of his criminal objective the actor avoided commission of the offense attempted by abandoning his criminal conduct or, if abandonment was insufficient to avoid commission of the offense, by taking further affirmative action that prevented the commission.
31. 708 S.W. 861 (Tex. Crim. App. 1986).

some weather stripping, and then changed his mind and left. The court of appeals determined that the renunciation defense was irrelevant in this case because the crime of attempted burglary had already been completed at the time the defendant renounced his acts.[32] The court of criminal appeals disagreed with the lower court's logic. Under the court of appeals' interpretation, the renunciation defense could only be invoked prior to the attempt, but if the conduct had not reached the level of an attempt, then no crime had been committed.[33] This interpretation would render the renunciation defense meaningless.[34] Relying on the language of the renunciation statute,[35] the court of criminal appeals held that the renunciation defense could be invoked after an attempt to commit an offense had been committed, but before the object offense (e.g. burglary) had been committed.[36] The renunciation defense applied to the object offense, not the attempt.[37] The defendant was therefore entitled to invoke the defense.[38]

B. Solicitation—Lesser Included Offense

In *Chanslor v. State*[39] the court held that aiding a suicide[40] was a lesser included defense of solicitation to commit murder.[41] A lesser included offense is an offense that differs from a second offense, which a defendant is charged with, only in that its commission is established by a less serious injury or risk of injury to the same person, property, or public interest.[42] The crime of aiding a suicide, a misdemeanor, is less of a threat to the public interest in preserving life than murder solicitation,[43] just as manslaughter represents a less serious injury to the public interest than murder.[44] As with other homicides, the question is merely one of intent.[45] The defendant in *Chanslor* bought poison from an undercover officer. The issue before the court was whether the defendant intended to use the poison to aid a suicide

32. *Id.* at 862.
33. *Id.*
34. *Id.*
35. TEX. PENAL CODE ANN. § 15.04(a) (Vernon 1974).
36. 708 S.W.2d at 863.
37. *Id.*
38. After holding that the facts presented a jury issue on the renunciation defense, the court held that the defendant failed to establish the defense as a matter of law and affirmed the conviction. *Id.* at 863-64.
39. 697 S.W.2d 393 (Tex. Crim. App. 1985).
40. TEX. PENAL CODE ANN. § 22.08(a) (Vernon 1974) states: "A person commits an offense if, with intent to promote or assist the commission of suicide by another, he aids or attempts to aid the other to commit or attempt to commit suicide."
41. *Id.* § 15.03(a) states:

> A person commits an offense if, with intent that a capital felony or felony of the first degree be committed, he requests, commands, or attempts to induce another to engage in specific conduct that, under the circumstances surrounding his conduct as the actor believes them to be, would constitute the felony or make the other a party to its commission.

42. 697 S.W.2d at 396; TEX. CODE CRIM. PROC. ANN. art. 37.09(2) (Vernon 1981).
43. 697 S.W.2d at 397.
44. *Id.* at 396-97.
45. *Id.* at 397.

or to commit murder.[46] The court concluded that whatever the intent, it was a question for the jury.[47]

III. CRIMES AGAINST THE PERSON

A. Homicide

1. Murder—Evidence of Criminally Negligent Homicide

The use of criminally negligent homicide as a defense to murder has always posed an almost insurmountable task for the defendant.[48] In *Thomas v. State*,[49] *Mendieta v. State*,[50] and *Still v. State*,[51] the Texas Court of Criminal Appeals made criminally negligent homicide even harder to assert as a defense. In *Thomas*, the leading case, the defendant claimed that he pointed a loaded gun at the deceased, there was a struggle, and the gun inadvertently fired.[52] The defendant testified that he did not intend to kill the victim, but that it was simply an accident.[53] The court held that this evidence was insufficient to raise the issue of criminally negligent homicide.[54] The essence of criminally negligent homicide is the failure on the part of the defendant to perceive the risk created by his conduct.[55] Evidence that a defendant pointed a loaded gun or lacked the intent to kill, or that the weapon accidentally discharged was, by itself, insufficient to raise the issue, and the court questioned its past holdings that suggested otherwise.[56] Because the defendant knew that pointing a loaded gun at the deceased could cause injury to the deceased, he was aware of the risk of his conduct and therefore was not entitled to an instruction on criminally negligent homicide.[57]

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46. *Id.*
47. *Id.*
48. Criminally negligent homicide is a lesser included offense of murder. Thomas v. State, 699 S.W.2d 845, 847 (Tex. Crim. App. 1985). Criminally negligent homicide is defined in TEX. PENAL CODE ANN. § 19.07(a) (Vernon 1974) as follows: "A person commits an offense if he causes the death of an individual by criminal negligence." This offense is a Class A misdemeanor. *Id.* § 19.07(b). Criminal negligence is defined in *id.* § 6.03(d):

> A person acts with criminal negligence, or is criminally negligent, with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it 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.

49. 699 S.W.2d 845, 850 (Tex. Crim. App. 1985).
50. 706 S.W.2d 651, 652 (Tex. Crim. App. 1986).
51. 709 S.W.2d 658, 660-61 (Tex. Crim. App. 1986).
52. 699 S.W.2d at 849.
53. *Id.*
54. *Id.* at 852.
55. *Id.* at 849; *see also* Lewis v. State, 529 S.W.2d 550, 553 (Tex. Crim. App. 1975).
56. 699 S.W.2d at 849-50. The court specifically questioned Schoelman v. State, 644 S.W.2d 727 (Tex. Crim. App. 1983); Giles v. State, 617 S.W.2d 691 (Tex. Crim. App. 1981); London v. State, 547 S.W.2d 27 (Tex. Crim. App. 1977); and Dockery v. State, 542 S.W.2d 644 (Tex. Crim. App. 1976).
57. 699 S.W.2d at 852. The court of criminal appeals reached the same result in Mendieta v. State, 706 S.W.2d 651 (Tex. Crim. App. 1986), and Still v. State, 709 S.W.2d 658 (Tex. Crim. App. 1986). In *Mendieta* the defense presented evidence showing that the defendant swung a knife in front of him to keep the deceased away. 706 S.W.2d at 651. In *Still* the

2. Cobarrubio *Error—Egregious Harm*

In the past Survey year, *Cobarrubio v. State*[58] met *Almanza v. State*.[59] The issue was whether (1) *Cobarrubio* error was fundamental and (2) if so, under what circumstances was the error egregious harm. In *Lawrence v. State*[60] the court of criminal appeals quickly held that *Cobarrubio* error was fundamental error but then concluded that, under the circumstances, the defendant did not suffer egregious harm.[61] Although there was sufficient evidence to submit sudden passion, the defendant relied only incidentally on this defense;[62] therefore, the court held that no egregious harm existed.[63]

In *Castillo-Fuentes v. State*[64] the court found egregious harm.[65] The difference between this case and *Lawrence* was that here the defendant's only defense was sudden passion.[66] Under these circumstances, actual and egregious harm existed.[67]

3. *Murder—Holocaust Syndrome*

In *Werner v. State*[68] the court of criminal appeals examined the scope of Texas Penal Code section 19.06[69] and the admissibility of psychological "peculiarities" through the dark context of the Holocaust syndrome.[70] At his

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defense presented evidence that the defendant knew how to handle guns, pointed a cocked gun at the deceased, realized that the gun could go off, and attempted to uncock it when it discharged. 709 S.W.2d at 660-61. Relying on *Thomas*, the court in both cases held that the evidence showed that the defendants perceived the risk created by their conduct and that the evidence therefore failed to raise the issue of criminally negligent homicide. *Mandieta*, 706 S.W.2d at 653; *Still*, 709 S.W.2d at 661.

58. 675 S.W.2d 749 (Tex. Crim. App. 1984). In *Cobarrubio* the court held that the state must bear the burden of proving the lack of sudden passion, and that "this burden must be so placed in the paragraph of the charge applying the law of murder to the facts of the case." *Id.* at 751.

59. 686 S.W.2d 157 (Tex. Crim. App. 1985). *Almanza* did away with the automatic reversal rule for fundamental error. *Id.* at 174. Now the standard for reversal for unobjected to fundamental error is egregious harm. *Id.* at 171.

60. 700 S.W.2d 208 (Tex. Crim. App. 1985).

61. *Id.* at 212-13.

62. *Id.* at 211-13.

63. *Id.* Three courts of appeals have followed *Lawrence* and held that when the record supports that the defendant only incidentally relied on a sudden passion defense, then there can be no finding of egregious harm. Shoaf v. State, 706 S.W. 170, 172 (Tex. App.—Fort Worth 1986, no pet.); Waldo v. State, 705 S.W.2d 381, 385-86 (Tex. App.—San Antonio 1986, no pet.); White v. State, 699 S.W.2d 607, 617-18 (Tex. App.—Dallas 1985, no pet.).

64. 707 S.W.2d 559 (Tex. Crim. App. 1986).

65. *Id.* at 563.

66. *Id.* at 562.

67. *Id.* at 562-63.

68. 711 S.W.2d 639 (Tex. Crim. App. 1986).

69. TEX. PENAL CODE ANN. § 19.06 (Vernon 1974) states:

> In all prosecutions for murder or voluntary manslaughter, the state or the defendant shall be permitted to offer testimony as to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense.

70. The Holocaust syndrome is a psychological condition that afflicts survivors and children of survivors of Nazi concentration camps. The syndrome often manifests itself in the person overreacting to situations in which he perceives his safety threatened. The reason is

murder trial, the defendant sought to introduce evidence of his Holocaust syndrome to show that he was acting in self-defense.[71] Both the trial court and the court of appeals excluded the evidence;[72] the Texas Court of Criminal Appeals agreed.[73] First, the court looked to section 19.06 of the Penal Code and held that the statute went no further than the general rules of evidence.[74] Second, the court stated that the issue of self-defense was measured by what an ordinary and prudent man would have done under the same or similar circumstances.[75] The court concluded that the excluded evidence merely showed that the defendant was not an ordinary and prudent man because he suffered from a "psychological peculiarity," i.e. the Holocaust syndrome.[76] The evidence was therefore irrelevant.[77]

B. Sexual Assault

1. Promiscuity—Consent Must Be in Issue

It is a defense to sexual assault of a child that the child was fourteen years or older and had, prior to the time of the offense, engaged promiscuously in sexual conduct.[78] Two courts of appeals have held, however, that it is only a defense when consent is in issue.[79] The courts followed case law interpreting the old statutory rape statute and the promiscuity defense under the 1925 Penal Code.[80] Because the old law was the same as the new law, the courts held that neither evidence nor a charge on promiscuity was proper in the absence of a consent issue.[81]

2. Promiscuity—Sufficient Evidence

Two additional courts of appeals dealt with the issue of what is sufficient evidence to establish the defense of promiscuity. In *Wicker v. State*[82] the court held that if the complainant had only engaged in intercourse with one other person on one occasion the evidence failed to establish promiscuity as

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that he comes from a background in which, he believes, people did not do enough to protect themselves. 711 S.W.2d at 642.

71. *Id.* at 640-43.

72. *Id.* at 640.

73. *Id.* at 646.

74. *Id.* at 644. Section 19.06 states that any party can offer testimony on all relevant facts surrounding the killing. TEX. PENAL CODE ANN. § 19.06 (Vernon 1974); *see supra* note 69.

75. 711 S.W.2d at 645.

76. *Id.*

77. *Id.*

78. TEX. PENAL CODE ANN. § 22.011(d)(1) (Vernon Supp. 1987) (formerly *id.* § 21.09(b) (Vernon 1974)).

79. Lewis v. State, 709 S.W.2d 734, 735 (Tex. App.—San Antonio 1986, pet. ref'd, untimely filed); Moore v. State, 703 S.W.2d 762, 764 (Tex. App.—Houston [14th Dist.] 1985, no pet.).

80. Tex. Penal Code Ann. art. 1183 (Vernon 1925). The Texas Court of Criminal Appeals came to the same conclusion. Wright v. State, 527 S.W.2d 859, 862-63 (Tex. Crim. App. 1975); Esquivel v. State, 506 S.W.2d 613, 616 (Tex. Crim. App. 1974).

81. Lewis v. State, 709 S.W.2d 734, 735 (Tex. App.—San Antonio 1986, pet. ref'd, untimely filed); Moore v. State, 703 S.W.2d 764, 764 (Tex. App.—Houston [14th Dist.] 1985, no pet.).

82. 696 S.W.2d 680 (Tex. App.—Dallas 1985, pet. granted).

a matter of law.[83] Under a different set of facts, the opposite result was reached in *Ormand v. State*.[84] In *Ormand* the complainant had had sexual intercourse with four men, including two in one day.[85] The court held this conduct to be promiscuous as a matter of law.[86]

3. *Evidence of Previous Sexual Conduct*

The court in *Capps v. State*[87] addressed the admissibility of evidence of previous sexual conduct of the complainant under the "rape shield law."[88] The defendant was charged with aggravated sexual assault; his defense was consent. The defendant attempted to introduce evidence of prior sexual conduct by the complainant, including "sex parties" and extramarital affairs, to show promiscuous conduct.[89] The trial court excluded the evidence and the court of appeals agreed.[90] The court of appeals stated that section 22.065[91] had the following prerequisites for admissibility: (1) the evidence must be material to a fact issue, and (2) the evidence's probative value must outweigh its inflammatory or prejudicial impact.[92] The court found that the materiality issue was satisfied, but held that the prejudicial impact outweighed the probative value where the only similarity between the extraneous evidence and the alleged offense was the act of sexual intercourse.[93] To hold otherwise, the court said, would be to sanction "a rule of global admissibility."[94]

C. *Assaultive Crimes*

1. *Aggravated Assault—Special Peace Officer*

Preston v. State[95] answered the question of when a specially commissioned peace officer is acting within the scope of his duties. The defendant in *Preston* was charged with aggravated assault of a peace officer.[96] The peace of-

83. *Id.* at 682-83. The court relied on Scott v. State, 668 S.W.2d 901-02 (Tex. App.—Fort Worth 1984, pet. ref'd), which defined promiscuity as a continuing course of conduct that "connotes a variety of consensual sexual conduct with a variety of partners continuing over a reasonable period of time."

84. 697 S.W.2d 772 (Tex. App.—Corpus Christi 1985, no pet.).

85. *Id.* at 773.

86. *Id.* The court also relied on Scott v. State, 668 S.W.2d 901 (Tex. App.—Fort Worth 1984, pet. ref'd); *see supra* note 83.

87. 696 S.W.2d 486 (Tex. App.—El Paso 1985, pet. ref'd).

88. TEX. PENAL CODE ANN. § 22.065(a) (Vernon Supp. 1986), *repealed pursuant to* TEX. REV. CIV. STAT. ANN. art. 1811f, § 9(b) (Vernon Supp. 1987) (current version at TEX. R. CRIM. EVID. 412).

89. 696 S.W.2d at 488.

90. *Id.* at 488-90.

91. TEX. PENAL CODE ANN. § 22.065(a) (Vernon Supp. 1986), *repealed pursuant to* TEX. REV. CIV. STAT. ANN. art. 1811f, § 9(b) (Vernon Supp. 1987) (current version at TEX. R. CRIM. EVID. 412).

92. 696 S.W.2d at 488-90.

93. *Id.* at 490.

94. *Id.*

95. 700 S.W.2d 227 (Tex. Crim. App. 1985).

96. TEX. PENAL CODE ANN. § 22.02(a) (Vernon Supp. 1987) states: "A person commits an offense if the person commits assault as defined in Section 22.01 of this code and the person . . . causes bodily injury to a peace officer . . . while the peace officer . . . is lawfully discharging an official duty . . . ."

ficer was a Lamar University campus policeman. At the time of the assault the officer was off the campus arresting two suspects for a burglary committed on the campus. The defendant was across the street taking pictures of the arrest. The campus policeman tried to arrest the defendant for a traffic offense, blocking traffic. The defendant responded by macing the policeman. The question was whether, at the time of the assault, the campus policeman was lawfully discharging an official duty as a commissioned campus police officer of Lamar University. The court said no.[97] The campus policeman was a specially commissioned peace officer; therefore, his power was limited to that given him by statute.[98] In this case, the statute limited this power to the jurisdiction of the university or otherwise in the performance of his duty as a campus peace officer.[99] The court concluded that a campus policeman is not acting within his official duties when he tries to make an arrest for traffic offenses that occur outside the jurisdiction of the university.[100] In so holding the court expressly overruled *Christopher v. State*,[101] which stated that a specially commissioned peace officer has lawful authority to make traffic arrests anywhere in Texas.[102]

2. *Injury to a Child—Mens Rea*

In the crime of injury to a child,[103] does the requisite intent go to the act that causes the result or only to the result itself? For example, when a person places a child in scalding water, must the state only prove that the person intentionally put the child is the water, or must it prove that the person intended serious bodily injury?[104] In *Alvarado v. State*[105] the Texas Court of Criminal Appeals held the latter theory of mens rea applied in that the state

97. 700 S.W.2d at 229-30.

98. *Id.*

99. *Id.* TEX. EDUC. CODE ANN. § 51.203 (Vernon 1972).

100. 700 S.W.2d at 230. The court rejected the state's argument of hot pursuit. *Id.* at 229. Under the "hot pursuit doctrine" if a peace officer begins pursuit of a suspect in his jurisdiction he may then continue the pursuit into another jurisdiction. Minor v. State, 153 Tex. Crim. 242, 247, 219 S.W.2d 467, 470 (1949). The court held in *Preston* that the campus policeman was not in hot pursuit of the burglary suspects since the suspects were already handcuffed and in the police car and that he was not in hot pursuit of the defendant since the traffic offense was committed off campus. 700 S.W.2d at 229.

101. 639 S.W.2d 932 (Tex. Crim. App. 1982).

102. *Id.* at 937. *Christopher* was a search and seizure case. The importance of the *Preston* holding is that specially commissioned peace officers can no longer use traffic arrests outside their jurisdiction for probable cause to search.

103. TEX. PENAL CODE ANN. § 22.04(a) (Vernon Supp. 1987) states:

> A person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence, by act or omission, engages in conduct that causes to a child who is 14 years of age or younger . . .
>
> (1) serious bodily injury;
> (2) serious physical or mental deficiency or impairment;
> (3) disfigurement or deformity; or
> (4) bodily injury.

104. The issue is crucial to the defense of mistake of fact. For example, the person may claim that he did not know the water was scalding. If the state need only show an intentional act, e.g. putting the child in water, then this defense would be useless.

105. 704 S.W.2d 36 (Tex. Crim. App. 1985).

must prove that the person intended the result.[106] The defendant in *Alvarado* put her child in a tub of scalding water. Her defense was that she did not know that the water was scalding. The defense requested a series of instructions that required the jury to find the requisite intent with regard to the results, the serious bodily injury, as opposed to just the act itself, placing the child in the scalding water.[107] The trial court denied the instructions and allowed the state to argue that if the defendant intentionally or knowingly placed the child in the water, then the defendant was guilty.[108] The court of criminal appeals reversed.[109] After reviewing the statute, legislative history, the rest of the Penal Code, and public policy, the court concluded that the injury to a child statute[110] focused on the result of the conduct as opposed to the conduct itself; therefore, the requisite mens rea spoke to the result.[111]

IV. CRIMES AGAINST PROPERTY

A. Arson and Criminal Mischief

1. Arson—Intent Allegation

In *Archer v. State*[112] a court considered whether an arson indictment is fundamentally defective if it alleges that a person "intentionally" started a fire as opposed to alleging that he started a fire "with intent to destroy or damage."[113] The San Antonio court of appeals held that the requisite intent for arson is the "intent to destroy or damage" property.[114] "Intentionally" starting a fire is not sufficiently equivalent.[115] An indictment alleging only that the person intentionally started the fire fails to allege the crime of arson.[116]

2. Arson—Lesser Included Offense

In *Prejean v. State*[117] a court of appeals held that criminal mischief[118] was

106. *Id.* at 39.
107. *Id.* at 37. The requested instructions were:
> A person acts intentionally, or with intent, *with respect to a result* of his conduct when it is his conscious objective or desire to cause the result.
> A person acts knowingly, or with knowledge, *with respect to a result* of his conduct when he is aware that his conduct is reasonably certain to cause the result.

Id. (emphasis in original).
108. *Id.*
109. *Id.* at 40.
110. TEX. PENAL CODE ANN. § 22.04(a) (Vernon Supp. 1987).
111. In so holding, the court reaffirmed its reasoning in Beggs v. State, 597 S.W.2d 375 (Tex. Crim. App. 1980).
112. 714 S.W.2d 116 (Tex. App.—San Antonio 1986, no pet.).
113. *Id.* at 118.
114. *Id.*; *see* TEX. PENAL CODE ANN. § 28.02(a) (Vernon Supp. 1987).
115. 714 S.W.2d at 118. The court quoted the trial court's comment that "everytime anyone lights a power light inside the City of Junction they are violating the indictment." *Id.*
116. *Id.*
117. 704 S.W.2d 119 (Tex. App.—Houston [1st Dist.] 1986, no pet.).

not a lesser included offense of arson.[119] Generally, criminal mischief requires proof of the value of the property damaged or destroyed, while arson does not.[120] This difference proved fatal to the defendant in *Prejean* because the court found that this essential element of criminal mischief, the amount of loss, was not included within the proof necessary for arson.[121]

3. *Criminal Mischief—Unconstitutional Presumption*

There is a presumption in the criminal mischief statute that if a utility meter is tampered with, the person in whose name the utility services are billed is presumed to have tampered with it.[122] In *Gersh v. State*[123] the Dallas court of appeals held that this presumption was unconstitutional.[124] The state presented evidence that someone had tampered with the gas meter at the defendant's home. The state presented no evidence, however, that linked the defendant to the tampering. Relying on the presumption, the trial court, sitting as trier of fact, found the defendant guilty.[125] Although the court of appeals found that the presumption had a rational premise, in that those who tamper with meters have an economic incentive to do so, it concluded that the presumption was unconstitutional as applied.[126] The problem with the presumption was that it singled out people who were billed by utilities.[127] The court noted that all sorts of living arrangements exist such as landlord-tenant, roommates, and, as here, husband and wife; therefore, many people other than the person billed could have an economic interest in the utilities.[128] The court concluded that the connection between proven

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118. TEX. PENAL CODE ANN. § 28.03(a) (Vernon Supp. 1987) states:

> A person commits an offense if, without the effective consent of the owner:
>
> (1) he intentionally or knowingly damages or destroys the tangible property of the owner; or
>
> (2) he intentionally or knowingly tampers with the tangible property of the owner and causes pecuniary loss or substantial inconvenience to the owner or a third person.

The severity of the offense ranges from a Class B misdemeanor to second degree felony and is determined by the amount of the loss. *See id.* § 28.03(b).

119. *See* TEX. PENAL CODE ANN. § 28.02(a) (Vernon Supp. 1987)

120. *See id.* and *id.* § 28.03(2).

121. 704 S.W.2d at 122-23. The court relied on the rationale of Sanders v. State, 664 S.W.2d 705 (Tex. Crim. App. 1982). The Court held in *Sanders* that a misdemeanor theft was not a lesser included offense of theft from the person, a felony for which no pecuniary loss is required, because misdemeanor theft contained the additional element of value. *Id.* at 709.

122. TEX. PENAL CODE ANN. § 28.03(6) (Vernon Supp. 1987) states:

> For the purposes of this section [criminal mischief], it shall be presumed that a person in whose name public communications, public water, gas, or power supply is or was last billed and who is receiving the economic benefit of said communication or supply, has knowingly tampered with the tangible property of the owner . . . .

Id. § 2.05 states that the trier of fact may find the presumed fact if the underlying facts are proven beyond a reasonable doubt, but the jury is not required to do so.

123. 714 S.W.2d 80 (Tex. App.—Dallas 1986, no pet.).

124. *Id.* at 82.

125. *Id.* at 80-81.

126. *Id.* at 81-82.

127. *Id.*

128. *Id.*

tampering and the person billed was arbitrary.[129]

B. Burglary

1. Burglary of Habitation—Lesser Included Offense

Criminal trespass[130] is a lesser included offense of burglary of a building or habitation.[131] The question in *Moreno v. State*[132] was whether in a burglary prosecution the evidence raised the right to an instruction on criminal trespass. The defendant testified that he was sleeping in his camper across the street from a trailer. He awoke in the night, heard dogs barking, saw the trailer house door open, and went over "just to see what was going on."[133] At that point, the owner of the trailer appeared from a back bedroom, and a fight ensued.[134] The court held that this evidence raised a fact issue on whether the defendant entered the trailer with the intent to commit a felony or theft, the same element that distinguishes burglary from criminal trespass.[135] If he did not have the requisite intent, his testimony established only criminal trespass.[136] The defendant was therefore entitled to an instruction on criminal trespass.[137]

2. Burglary of Vehicle—Lesser Included Offense

Although criminal trespass is a lesser included offense of burglary of a building or habitation,[138] in *Cadieux v. State*[139] a court of appeals held that criminal trespass is not a lesser included offense of burglary of a vehicle.[140] The state presented evidence that a number of cars on a used car lot had been burglarized and that the defendant was seen entering one of the cars. The defendant testified that the car he entered was unlocked, that he opened the door to unlock the hood, and that he had no intention of stealing anything from that or any other car. The court concluded that this evidence did not raise the issue of criminal trespass because criminal trespass was not a lesser included offense of burglary of a vehicle.[141] Looking to the history of

129. *Id.* at 82.

130. TEX. PENAL CODE ANN. § 30.05 (Vernon Supp. 1987).

131. *Id.* § 30.02. The Texas Court of Criminal Appeals has held on three separate occasions that tresspass is a lesser included offense of burglary. Aguilar v. State, 682 S.W.2d 556, 558 (Tex. Crim. App. 1985); Daniels v. State, 633 S.W.2d 899, 900 (Tex. Crim. App. 1982); Day v. State, 532 S.W.2d 302, 306 (Tex. Crim. App. 1976).

132. 702 S.W.2d 636 (Tex. Crim. App. 1986).

133. *Id.* at 640.

134. The owner testified that he found the defendant in his trailer, that the defendant was holding the owner's blanket, that other property was missing, and that the defendant threatened to kill him.

135. 702 S.W.2d at 640.

136. *Id.*

137. *Id.* The court stated that the question was a "close one." *Id.* at 640 n.8. If the defendant had claimed that he was breaking up a burglary in progress or that he was not guilty of any offense, then he would not have been entitled to the criminal trespass instruction. *Id.*

138. *See supra* note 131 and accompanying text.

139. 711 S.W.2d 92 (Tex. App.—Austin 1986, pet. ref'd).

140. *Id.* at 94; *see also* TEX. PENAL CODE ANN. § 30.04 (Vernon 1974).

141. 711 S.W.2d at 94. The court also held that the defendant's objections at trial failed to preserve the error. *Id.* Arguably then, the court's language on criminal trespass is dictum.

the criminal trespass statute, the court concluded that criminal trespass only proscribed unlawful intrusions onto real property.[142] Because the property was personal property, in this case a vehicle, criminal trespass was not relevant.[143]

3. *Burglary of Vehicle—"Riding the Rails"*

With an espirit de corps to warm the soul of a Woody Guthrie, the El Paso court of appeals held that "riding the rails," more commonly known as hitching a ride on a freight train, did not constitute burglary of a vehicle.[144] Burglary of a vehicle involves entry with intent to commit a felony or, as alleged here, theft.[145] Based on the element of intent, the court held that there is no theft in hitching a ride on a freight train;[146] therefore, the defendant was not guilty of burglary for "riding the rails."[147]

4. *Burglary of Vehicle—Motorless Car*

In *Trevino v. State*[148] a court of appeals was confronted with the issue of whether a person could be charged with burglary of a vehicle if the car had no engine. The court could not find any Texas cases on point, but the court did find one Missouri case.[149] Relying on that case, the court said that the lack of an engine (immobility) did not "change [the car's] character as a vehicle."[150] Consequently, a person can be charged with burglary of an immobile vehicle.[151]

C. *Theft*

1. *Theft—Value*

In *Sullivan v. State*[152] the court of criminal appeals established some rules on proving value in theft cases.[153] When a nonowner gives evidence of value, he must be qualified to testify about value and he must explicitly state

142. *Id.* at 94-95.

143. *Id.* The court relied on Williams v. State, 605 S.W.2d 596, 600 (Tex. Crim. App. 1980), which held that criminal trespass was not a lesser included offense of unauthorized use of a vehicle because criminal trespass involved only real property.

144. Ramirez v. State, 711 S.W.2d 408, 409 (Tex. App.—El Paso 1986, no pet.).

145. *Id.* at 408.

146. *Id.* The court noted that there might be theft involved in hitching on a passenger train because that could be considered theft of service. *Id.* at 409.

147. *Id.* at 408-09. The court in dictum said hitching on a freight train might be criminal trespass. *Id.* at 409. This conflicts with *Cadieux v. State*, which held that criminal trespass only applied to real property. *See supra* notes 138-43 and accompanying text.

148. 697 S.W.2d 476 (Tex. App.—San Antonio 1985, no pet.).

149. *See* State v. Ridinger, 364 Mo. 684, 691-92, 266 S.W.2d 626, 632 (1954) (immobile bus still a "motor vehicle").

150. 697 S.W.2d at 478.

151. *Id.* at 478-79.

152. 701 S.W.2d 905 (Tex. Crim. App. 1986).

153. *See* TEX. PENAL CODE ANN. § 31.08(a) (Vernon 1974):

the fair market or replacement value of the property.[154] When an owner gives evidence of value,[155] he may give his opinion in "general and commonly understood terms."[156] The owner need not say "market value" or "replacement value."[157] The court will presume that the owner's value opinion is in terms of fair market value.[158] To rebut the owner's opinion evidence, the defendant must offer controverting evidence because simply impeaching the owner's credibility on cross-examination is insufficient.[159] Applying these rules, the court held the owner's testimony that the property was "worth $500 at least" sufficient to show a market value over $200.[160]

2. *Theft—Deception Instruction*

Deception is one of the means by which an owner is deprived of his effective consent.[161] Deception is defined by statute.[162] In *MacDougall v. State*[163] the court held that, if deception is the only theory available to the state under the evidence, the trial court must define deception in its charge upon timely request.[164] The court rejected the notion that because deception need not be defined in the indictment,[165] it need not be defined in the charge.[166]

> Subject to the additional criteria of Subsections (b) and (c) of this section, value under this chapter is:
>
> (1) the fair market value of the property or service at the time and place of the offense; or
>
> (2) if the fair market value of the property cannot be ascertained, the cost of replacing the property within a reasonable time after the theft.

154. 701 S.W.2d at 909.

155. The owner of property is competent to testify about the value of his property. Brown v. State, 640 S.W.2d 275, 279 (Tex. Crim. App. 1982); Davila v. State, 547 S.W.2d 606, 610 (Tex. Crim. App. 1977).

156. 701 S.W.2d at 909.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 910.

161. TEX. PENAL CODE ANN. § 31.03 (Vernon Supp. 1987) states: "(a) A person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property. (b) Appropriation of property is unlawful if: (1) it is without the owner's effective consent . . . ." *Id.* § 31.01(4) (Vernon 1974) states, " 'Effective consent' includes consent by a person legally authorized to act for the owner. Consent is not effective if: (A) induced by deception or coercion . . . "

162. *Id.* § 31.01(2) states, " 'Deception' means: (A) creating or confirming by words or conduct a false impression of law or fact that is likely to affect the judgment of another in the transaction, and that the actor does not believe to be true . . . ."

163. 702 S.W.2d 650 (Tex. Crim. App. 1986).

164. *Id.* at 651-52. The evidence showed that the defendant was supposed to bring back the boss's car by the next morning. Instead, the defendant and car were found in Arizona a few months later.

165. The court cited Thomas v. State, 621 S.W.2d 158, 161 (Tex. Crim. App. 1981) for this proposition.

166. The court distinguished *Thomas*, 702 S.W.2d at 652.

> We find the rule of *Thomas* has no bearing on the instant case. That a statutory definition of an element need not be pled to give a defendant notice of what he is charged with does not mean that a jury has no need of the definition in determining whether the State has proved the element beyond a reasonable doubt.

Id.

D. Fraud

1. Hindering Secured Creditors—Refusal to Return Property

In an important consumer case,[167] the Texas Court of Criminal Appeasl held that mere refusal to return property upon demand to a secured party is not a crime under the hindering secured creditors statute.[168] The vehicle for the decision was an information alleging that the defendant "concealed" property from a secured creditor by "refusing to return" the property.[169] The court held that "concealing" involved more than the mere refusal to return property on demand and that mere refusal to return did not generally harm or reduce the value of property.[170] The court concluded that the information did not allege a crime.[171]

2. Securing Document by Deception—Special Statute

In *Ogilvie v. State*[172] the Dallas court of appeals held that a citizen cannot be prosecuted under section 32.46 of the Penal Code, dealing with securing execution of a document by deception,[173] for using a fictitious name on a driver's license application.[174] In Texas, if a defendant's conduct is condemned under a general statute and a specific statute, then the specific statute controls.[175] While defendant's conduct here violated section 32.46,[176] his conduct also violated a more specific statute that specifically condemned driver's license application fraud.[177] Applying the general-specific statute

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167. Anzaldua v. State, 696 S.W.2d 911, 913 (Tex. Crim. App. 1985).

168. *See* TEX. PENAL CODE ANN. § 32.33(b) (Vernon Supp. 1987):

> A person who has signed a security agreement creating a security interest in property or a mortgage or deed of trust creating a lien on property commits an offense if, with intent to hinder enforcement of that interest or lien, he destroys, removes, conceals, encumbers, or otherwise harms or reduces the value of the property.

169. 696 S.W.2d at 911.

170. *Id.* at 912.

171. *Id.* at 913.

172. 711 S.W.2d 365 (Tex. App.—Dallas 1986, pet. ref'd).

173. TEX. PENAL CODE ANN. § 32.46 (Vernon 1974) states: "A person commits an offense if, with intent to defraud or harm any person, he, by deception, causes another to sign or execute any document affecting property or service or the pecuniary interest of any person. . . . An offense under this section is a felony of the third degree."

174. 711 S.W.2d at 367.

175. *Id.* at 366. The court cited the following cases as authority: Williams v. State, 641 S.W.2d 236, 238 (Tex. Crim. App. 1982); Jones v. State, 552 S.W.2d 836, 837 (Tex. Crim. App. 1977); Sarratt v. State, 543 S.W.2d 391, 392 (Tex. Crim. App. 1976); and *Ex parte* Howell, 542 S.W.2d 169, 171 (Tex. Crim. App. 1976).

176. *See supra* note 173.

177. TEX. REV. CIV. STAT. ANN. art. 6687b, § 32(a) (Vernon Supp. 1987) provides:

> Except as provided in subsection (b) of this section, it is unlawful for any person to commit any of the following acts:
>
> . . . .
>
> (6) to use a false or fictitious name or give a false or fictitious address or use a fictitious or counterfeit document in any application for a driver's license or a certificate, or any renewal or duplicate thereof, or knowingly to make a false statement or knowingly to conceal a material fact or otherwise commit a fraud in any such application.

Id. § 44(a) provides: "It shall be a misdemeanor for any person to violate any of the provisions

rule, the court held that the specific statute controlled.[178] Since the specific statute proscribed a misdemeanor, the court ordered the felony indictment dismissed.[179]

V. OTHER CRIMES

A. Felony Gambling Promotion

Under Texas law, gambling, or making a bet, is a class C misdemeanor.[180] Promoting gambling, or receiving a bet, is a third degree felony.[181] In *Adley v. State*[182] the court of criminal appeals explored what was actually meant by "receiving a bet." The court could not find a clear definition; therefore, the court struck down the statute as unconstitutionally vague.[183] The court looked to the legislative intent behind the felony gambling promotion statute, and found that the legislature was attempting to prohibit commercial gambling and bookmaking, not social gambling such as friendly wagers.[184] The court found that the legislature, by using the language "receives a bet," had "painted with too broad a brush."[185] The statute inadvertently punished social gambling because in any betting situation, friendly or professional, at least two parties are always involved, the maker of the bet and the receiver.[186] The former received only a fine, for a class C misdemeanor, while the latter drew prison time for a third degree felony.[187] The court

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of this Act unless such violation is by this Act or other laws of this State declared to be a felony."

178. 711 S.W.2d at 367.

179. *Id.*

180. TEX. PENAL CODE ANN. § 47.02 (Vernon Supp. 1987) states:

(a) A person commits an offense if he:

(1) makes a bet on the partial or final result of a game or contest or on the performance of a participant in a game or contest;

. . . .

(b) It is a defense to prosecution under this section that:

(1) the actor engaged in gambling in a private place;

(2) no person received any economic benefit other than personal winnings; and

(3) except for the advantage of skill or luck, the risks of losing and the chances of winning were the same for all participants.

. . . .

(d) An offense under this section is a Class C misdemeanor.

181. TEX. PENAL CODE ANN. § 47.03 (Vernon 1974) states: "(a) A person commits an offense if he intentionally or knowingly does any of the following acts: . . . (2) receives, records, or forwards a bet or offer to bet . . . . (b) An offense under this section is a felony of the third degree."

182. 718 S.W.2d 682 (Tex. Crim. App. 1985).

183. *Id.* at 685.

184. *Id.* at 684-85; *see* TEX. PENAL CODE ANN. § 47.03 comment (Vernon 1974).

185. 718 S.W.2d at 684-85.

186. *Id.*

187. *Id.* The example the court gave, and one that existed in the case, was as follows:

A and B attend a football game. B asks A to enter into an agreement regarding the final result of the football game. B bets $25.00 that team X will win the game. A accepts B's offer. Once accepted, A and B have made a bet. Clearly, under the terms of section 47.02(a)(1) [Gambling], B and A are both makers of a bet. Likewise, A has received B's offer to bet and, upon acceptance, has received a bet under the terms of section 47.03(a)(2) [Felony Gambling Promotion]. B's

concluded that section 47.03(a)(2), insofar as it prohibited receiving a bet, was unconstitutionally vague.[188]

B. Driving While Intoxicated

1. Intoxication—Not an Irrebutable Presumption

In 1983 the legislature revised the crime of driving while intoxicated.[189] It altered the definition of "intoxicated" by adding the clause "alcohol concentration of 0.10 or more."[190] If a driver has this alcohol level in his blood he is, by definition, "intoxicated." The question raised by this new definition was whether the specified blood alcohol level created an unconstitutional irrebuttable, or mandatory conclusive, presumption of intoxication.[191] In *Forte v. State*[192] the court of criminal appeals held that, in redefining intoxication, the legislature did not create an irrebuttable presumption.[193] The legislature merely created a new definition.[194] There was no irrebuttable presumption because the state still had to prove the element of intoxication beyond a reasonable doubt.[195] Although this element could now be proven by a chemical test, a conviction did not necessarily follow from the offer of the test.[196] The jury would still have to find that (1) the test was trustworthy and (2) the defendant had a 0.10 alcohol concentration at the time of the crime, as opposed to at the time of the test.[197] In any case, by redefining the crime, the legislature had acted within its boundaries in defining criminal conduct as driving with alcohol concentrations of 0.10 or more.[198]

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conduct is only punishable as a misdemeanor. A, having additionally received an offer to bet, is punishable as a felon.

Id. at 685.

188. *Id.*

189. Act of June 16, 1983, ch. 303, § 4, 1983 Tex. Gen. Laws 1568 (now TEX. REV. CIV. STAT. ANN. art. 6701*l*-1 (Vernon Supp. 1987)).

190. *Id.* art. 6701*l*-1(a)(2) provides: " 'Intoxicated' means: (A) not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, or a combination of two or more of those substances into the body; or (B) having an alcohol concentration of 0.10 or more." Before the 1983 amendments, evidence that the defendant had an alcohol concentration of 0.10 or more created only a rebuttable presumption of intoxication. *Id.* art. 6701*l*-5, § 3(a) (Vernon 1977) (now amended).

191. A mandatory conclusive presumption commands the jury to find an element of the crime if the state proves the predicate facts giving rise to the presumption. Francis v. Franklin, 105 S. Ct. 1965, 1971, 85 L. Ed. 2d 344, 354-55 (1985).

192. 707 S.W.2d 89 (Tex. Crim. App. 1986).

193. *Id.* at 94.

194. *Id.* at 94-95.

195. *Id.* at 95.

196. *Id.* at 94-95.

197. *Id.*

198. *Id.* at 95. Judge Clinton filed a cryptic concurring opinion. He stated that the "Court leaves open for another day whether the statue is invalid for different reasons." *Id.* at 96. He did not tell us what he had in mind.