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Substantive Law

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PART III: PUBLIC LAW

CRIMINAL LAW AND PROCEDURE

I. SUBSTANTIVE LAW

by

Walter W. Steele, Jr.*

Statutory Construction, Substantive Law, Juvenile Delinquency

A. *Statutory Construction*

As might be expected with any relatively new penal code, there are several apparently conflicting provisions in the Texas Penal Code. One example is section 16.01,¹ defining the felony of unlawful possession of a criminal instrument, which appears to overlap in part with section 32.21,² defining forgery.³ This apparent conflict was raised in *Ex parte Harrell*,⁴ in which Harrell possessed a forged prescription with the intent to obtain a controlled substance. Charged and convicted of the felony offense of possessing a criminal instrument under section 16.01, Harrell contended that he should have been charged and convicted of the misdemeanor offense of forgery under section 32.21. Applying a well-recognized rule of statutory construction,⁵ the court of criminal appeals held:

[Section 16.01] is a broad and general statute applicable to all types of possession of criminal instruments with intent to use them in the commission of an offense, etc., while possession of a forged writing with intent to utter it is a forgery under . . . [section] 32.21(a)(1)(C) and is a special statute The statutes are in *pari materia* and when construed together can be harmonized and given effect with the special governing the general in the event of any conflict. . . . We conclude that the petitioner was improperly convicted of unlawful possession of a criminal instrument and should have been charged with forgery⁶

In *Baker v. State*⁷ a different problem of statutory construction was presented. The defendant was charged with conspiracy to sell marijuana.

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1. TEX. PEN. CODE ANN. § 16.01 (Vernon Supp. 1978).

2. *Id.* § 32.21 (Vernon 1974).

3. Forgery is generally a misdemeanor unless the instrument altered or created is one that affects title or a monetary obligation. *See id.* §§ 32.21(c)-(e).

4. 542 S.W.2d 169 (Tex. Crim. App. 1976).

5. The Code Construction Act provides:

If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later enactment and the manifest intent is that the general provision prevail.

TEX. REV. CIV. STAT. ANN. art. 5429b-2, § 3.06 (Vernon Supp. 1978).

6. 542 S.W.2d at 173.

7. 547 S.W.2d 627 (Tex. Crim. App. 1977).

The Controlled Substances Act,⁸ however, does not contain a conspiracy provision; Texas' only conspiracy provision is found in section 15.02⁹ of the Penal Code. The Texas Court of Criminal Appeals correctly held that section 15.02 does not apply to offenses defined outside of the Penal Code;¹⁰ therefore, there is no offense of conspiracy to possess marijuana in Texas.

Section 1.07¹¹ of the Texas Penal Code contains the definitions of most of the significant terms in the Penal Code. One such term is "deadly weapon," defined in section 1.07(a)(11)(B) as "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury."¹² That definition is important because the display of a deadly weapon enhances the punishment for many crimes.¹³ In *Danzig v. State*¹⁴ the court held that the nature of wounds inflicted on the injured party is to be considered in determining whether or not a weapon meets that statutory definition of "deadly weapon."

B. Arrest

Although *Terry v. Ohio*¹⁵ is approximately nine years old, this is the first survey year that the Texas Court of Criminal Appeals has made extensive use of its doctrine. *Greer v. State*¹⁶ is a typical example. In *Greer* the circumstances clearly amounted to less than probable cause, but the court justified an arrest for driving while intoxicated on the grounds of "temporary detention for purposes of investigation."¹⁷ After the driver in *Greer* was stopped he displayed signs of intoxication which justified turning the "temporary detention" into an arrest.¹⁸ Thus the need for grounds to arrest *ab initio* was avoided. In *Milton v. State*¹⁹ the tension between the relatively strict standards for arrest and the more casual standards for stop and frisk is even more evident. In *Milton*, the defendant expressly drew the court's attention to article 14.04 of the Code of Criminal Procedure,²⁰ which sets forth a very narrow justification for arrest without a warrant.²¹ After conceding that there was insufficient evidence in the record to justify a warrantless arrest, the court of criminal appeals evaded the issue by holding

8. TEX. REV. CIV. STAT. ANN. art. 4476—15 (Vernon 1976 & Supp. 1978).

9. TEX. PEN. CODE ANN. § 15.02 (Vernon 1974).

10. 547 S.W.2d at 628-29. Only the provisions of titles 1, 2, and 3 of the Penal Code apply to offenses defined by other laws. TEX. PEN. CODE ANN. § 1.03(b) (Vernon 1974). Since § 15.02 is in title 4 of the Penal Code, it cannot apply to offenses defined outside the Penal Code.

11. TEX. PEN. CODE ANN. § 1.07 (Vernon 1974).

12. *Id.* § 1.07(a)(11)(B).

13. *See, e.g., id.* § 22.02(a)(3) in the case of aggravated assault; *id.* § 30.02(d)(2) in the case of burglary.

14. 546 S.W.2d 299, 301 (Tex. Crim. App. 1977).

15. 392 U.S. 1 (1967).

16. 544 S.W.2d 125 (Tex. Crim. App. 1976).

17. *Id.* at 127.

18. *Id.* at 128.

19. 549 S.W.2d 190 (Tex. Crim. App. 1977).

20. *Id.* at 192.

21. TEX. CODE CRIM. PROC. ANN. art. 14.04 (Vernon 1977) states:

Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the accused.

that there were grounds for a stop and frisk leading to discovery of narcotics which justified the arrest post-factum.²²

In those rare instances when officers do obtain a warrant to arrest a suspect,²³ the question arises as to what extent the warrant authorizes them to enter the house of another in search of that suspect. In a lengthy and well-reasoned opinion, the Fifth Circuit Court of Appeals concluded that when an officer holds a valid arrest warrant and reasonably believes that the suspect is inside premises belonging to another, he can legally enter those premises for the purposes of arresting the suspect.²⁴

C. Entrapment

The accused's lack of predisposition to commit a crime is central to the entrapment defense.²⁵ Apparently, even an intolerable degree of governmental participation in the criminal enterprise will not give rise to the entrapment defense from a constitutional standpoint.²⁶ In *Guerrero v. State*,²⁷ however, the Texas Court of Criminal Appeals held that the conduct of law enforcement agents *shall* be considered in an entrapment defense along with the predisposition of the defendant. Furthermore, in the now famous case of *United States v. Bueno*,²⁸ the Fifth Circuit Court of Appeals held that the government entrapped a drug defendant as a matter of law by having an informer sell heroin to the defendant and then having an agent buy the drug back from the defendant. In *Hampton v. United States*,²⁹ however, the Supreme Court apparently rejected the type of defense approved in *Bueno* by emphasizing once again that the essence of entrapment is the predisposition of the accused rather than intolerable government conduct.

Therefore, the question arises: Is the *Bueno* defense still available in the Fifth Circuit? Unfortunately, the Fifth Circuit has not provided an une-

22. 549 S.W.2d at 194.

23. See generally *United States v. Watson*, 423 U.S. 411 (1976).

24. *United States v. James*, 528 F.2d 999, cert. denied sub nom. *Henry v. United States*, 429 U.S. 959 (1976). The court, quoting from *Rodriguez v. Jones*, 473 F.2d 599, 606 (5th Cir.), cert. denied, 412 U.S. 953 (1973), stated:

A search warrant was not necessary to execute an arrest warrant on the premises of a third party; 'and although the person sought is not in the dwelling the actor is privileged to use force if he reasonably believes him to be there and enters in the exercise of a privilege to make a criminal arrest under a valid warrant. . . .'

528 F.2d at 1017.

In *Rodriguez*, a civil rights action arising under 42 U.S.C. § 1983 (1970), the Fifth Circuit cited with approval the standard of "reasonable belief" of the arresting officer adopted in the *Restatement (Second) of Torts*:

The privilege to make an arrest for a criminal offense carries with it the privilege to enter [premises] in the possession of another for the purpose of making such an arrest, if the person sought to be arrested is on the [premises] or if the actor reasonably believes him to be there.

473 F.2d at 605-06 (quoting RESTATEMENT (SECOND) OF TORTS § 204 (1964)). See also *Pecina v. State*, 516 S.W.2d 401 (Tex. Crim. App. 1974) (authority to arrest under arrest warrant is not limited to premises described in search warrant).

25. *Sorrels v. United States*, 287 U.S. 435 (1932).

26. *United States v. Russell*, 411 U.S. 423 (1973). The Court referred to such governmental involvement as "over-zealous law enforcement." Nevertheless, the fact that the government affords opportunities or facilities for the commission of the crime does not defeat the prosecution. *Id.* at 435.

27. 487 S.W.2d 729, 731 (Tex. Crim. App. 1972).

28. 447 F.2d 903, 906 (5th Cir. 1971).

29. 425 U.S. 484 (1976). In *Hampton*, as in *Bueno*, the accused sold to government agents heroin which was allegedly supplied by a government informer.

quivocal answer. In *United States v. Evers*³⁰ the court stated: "The Court's decision in *Hampton v. U.S.* . . . may well have eliminated the *Bueno* defense."³¹ In *United States v. Graves*,³² however, the court referred to the *Evers* opinion as one that merely "expressed doubt" as to the viability of *Bueno*.³³ Subsequently, in *United States v. Benavidez*,³⁴ where the defendant appealed because the trial judge had refused his request for a *Bueno* instruction, the Fifth Circuit stated: "In *United States v. Hampton* . . . decided only a few days before the instant case, the Supreme Court effectively reversed *United States v. Bueno* The trial court was, therefore, correct in refusing the requested instruction."³⁵ Thus it appears that the *Bueno* defense is now foreclosed.

Despite its concentration on the defendant's lack of predisposition as the sole element of the entrapment defense, the Supreme Court has left open the possibility that there may be cases in which the conduct of law enforcement agents is so outrageous that due process principles would bar the government from invoking judicial processes to obtain a conviction.³⁶ Hypothetically, at least, one example of such outrageous conduct would be paying fees to informants contingent upon the number of defendants betrayed. The facts in *United States v. McClure*³⁷ merit consideration. A Drug Enforcement Agency (DEA) agent hired an informant knowing that he had a "speckled reputation." The agent promised the informant \$50 for every new seller of a gram of heroin and \$100 for every new seller of an ounce; the DEA was the informant's only source of income. Is a seller betrayed by such an informant entitled to the defense that the DEA agent's conduct is so outrageous as to violate due process? The answer, the court held, depends upon additional factors or combinations of factors. For example, payment of contingent fees to informants does not violate due process if the informant is instructed in the law of entrapment, if the agent, and not the informant, makes the buy of contraband, and if the informant has no specific target in mind when the contingent fee arrangement was made.³⁸

*Craddock v. State*³⁹ presented an interesting dilemma for a defendant trying to assert an entrapment defense. First, the defendant filed a motion to suppress which was overruled. Then the defendant testified and admitted possessing the items that were the fruits of the alleged illegal search, thereby running afoul of the general rule that the legality of the search is moot if the defendant testifies to or otherwise admits possessing the fruits of the

30. 552 F.2d 1119 (5th Cir. 1977).

31. *Id.* at 1122. The court, however, also distinguished *Bueno* since in *Bueno*, unlike *Evers*, the defendant was a victim of a "full circle" government scheme. *Id.* at 1123.

32. 556 F.2d 1319 (5th Cir. 1977).

33. *Id.* at 1324.

34. 558 F.2d 308 (5th Cir. 1977).

35. *Id.* at 309.

36. *United States v. Russell*, 411 U.S. 423, 431-32 (1973).

37. 546 F.2d 670 (5th Cir. 1977).

38. *Id.* at 673-74. See also *United States v. Haynes*, 554 F.2d 231, 234 (5th Cir. 1977). One should note, however, that a combination of factors would further complicate the issue; for example, if an informant, instructed in the law of entrapment, actually made the buy of contraband.

39. 553 S.W.2d 765 (Tex. Crim. App. 1977).

search;⁴⁰ however, in this case the defendant admitted possession in order to establish an entrapment defense. Given the fact that the defendant in this situation was forced either to waive his illegal search defense by admitting possession or to waive his entrapment defense by not admitting possession, the court of criminal appeals ruled that in those special circumstances the defendant's admission of possession did not waive the search issue. To force such a dilemma on the defendant would foster "an impermissible and unconstitutional chill" on the defendant's right to assert all his defenses.⁴¹

D. Competency to Stand Trial and Insanity as a Defense

Section 4(f) of article 46.02 of the Texas Code of Criminal Procedure⁴² provides that if, after a hearing on the matter, a defendant is found competent to stand trial, the court shall dismiss the jury that decided that issue and shall continue the trial with a separate jury. The reason for utilizing a separate jury is so that a determination of a defendant's competency can be made uncluttered by the evidence of the offense itself and vice versa. In *Martin v. Estelle*⁴³ the Fifth Circuit stated:

Such an uncluttered hearing makes it easier to determine fairly the issue of competency without introducing facts which might tend to cloud the issue at hand, 'facts which alone might [*sic*] so stir the minds of the jury as to make difficult the exercise of calm judgment upon the question of present [incompetency].'⁴⁴

Regardless of these extra efforts to insure that the issue of competency is kept separate from the issue of guilt, prosecutors sometimes employ the tactic of packing the record in a competency hearing with evidence of the alleged offense. Obviously, this prosecution tactic is an effort to prejudice the jury's finding on competency by making them believe that the defendant is a mean and a dangerous person who deserves to be dealt with as a criminal instead of as a patient. *Martin v. Estelle* stands as a beacon for defense lawyers who wish to conduct competency hearings unfettered by such biasing tactics from the prosecution. The *Martin* court reasoned as follows:

During appellant's competency trial, the prosecution continually introduced evidence material in the main only to the substantive offense with which the appellant was charged. This is not to infer that any mention of such facts would be prejudicial. But here highly inflammatory evidence was continually referred to before the competency jury, coupled with argument by the prosecution that appellant would be 'back on the streets' if found incompetent to stand trial. These circumstances support Martin's position that he was denied a full, fair, and meaningful competency trial. . . .

We conclude from a review of the state court transcript that appellant's competency trial was not full, fair, and meaningful for the reasons stated above.⁴⁵

40. See *Stein v. State*, 514 S.W.2d 927, 930 (Tex. Crim. App. 1974); *Warren v. State*, 514 S.W.2d 458, 464 (Tex. Crim. App. 1974).

41. 553 S.W.2d at 766.

42. TEX. CODE CRIM. PROC. ANN. art. 46.02, § 4(f) (Vernon Supp. 1978).

43. 546 F.2d 177 (5th Cir. 1977).

44. *Id.* at 179 (quoting *Ramirez v. State*, 92 Tex. Crim. 38, 40, 241 S.W. 1020, 1021 (1922)).

45. 546 F.2d at 179-80 (citations omitted).

Although no statement made by a defendant during the examination or hearing on his competency to stand trial may be admitted in evidence on the issue of guilt,⁴⁶ nevertheless, the decision to allow a defendant to testify at his competency hearing is especially troublesome; if the prosecutor is allowed to explore into the facts of the alleged crime on cross-examination, he may obtain discovery to which he would not otherwise be entitled. In a footnote in *Leyva v. State*⁴⁷ the Texas Court of Criminal Appeals held that it would be error to refuse a defendant the right to take the stand for the limited purpose of establishing his mental condition if that were the issue before the court. Henceforth, therefore, counsel for a defendant at a competency hearing should file a motion in limine seeking to limit the state's cross-examination of the defendant to the issue of competence. Under the authority of *Leyva* such a motion should be granted.

The last session of the Texas Legislature amended article 46.02, Incompetency to Stand Trial, and article 46.03, Insanity Defense.⁴⁸ For the most part, the amendments are of minor significance, dealing mainly with administrative matters. It should be noted, however, that the time during which a defendant may be involuntarily committed for an examination of his competency has been set at twenty-one days.⁴⁹

E. Attempts

Attempt is defined in the Texas Penal Code in classic terms: "A person commits an offense if, with specific intent to commit an offense, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended."⁵⁰ Accordingly, lawyers in Texas are faced with a classic problem: precisely what is meant by the phrase, "an act amounting to more than mere preparation."⁵¹ To some extent, the conundrum of where to draw the line between mere preparation on the one hand and criminal attempt on the other has been simplified by recent well-reasoned opinions from the United States Court of Appeals for the Fifth Circuit.⁵² These cases were recently reaffirmed and summarized by the Fifth Circuit in *United States v. Rivero*.⁵³ That opinion states the following criteria for locating the line between preparation and attempt:

- (1) the defendant must have the mens rea required for the commission of the crime which he is charged with attempting; (2) the defendant's

46. TEX. CODE CRIM. PROC. ANN. art. 46.02, § 3(g) (Vernon Supp. 1978).

47. 552 S.W.2d 158, 160 n.2 (Tex. Crim. App. 1977).

48. TEX. CODE CRIM. PROC. ANN. arts. 46.02, .03 (Vernon Supp. 1978).

49. *Id.* arts. 46.02, § 3(b), 46.03, § 3(b) (Vernon Supp. 1978).

50. TEX. PEN. CODE ANN. § 15.01(a) (Vernon Supp. 1978).

51. *See, e.g.*, *Hobbs v. State*, 548 S.W.2d 884 (Tex. Crim. App. 1977), which held that an allegation in the indictment that A attempted murder by promising B \$100 to kill C was not a sufficient allegation of acts beyond mere preparation. Therefore, the indictment did not allege the crime of attempted murder, it only alleged the crime of solicitation.

52. *See, e.g.*, *United States v. Oviedo*, 525 F.2d 881 (5th Cir. 1976) (to constitute criminal attempt defendant's acts must mark his conduct as criminal in nature; the acts should be unique rather than so commonplace as to be engaged in by persons not in violation of the law); *United States v. Mandujano*, 499 F.2d 370 (5th Cir. 1974) (to constitute criminal attempt conduct must be substantial step toward commission of the crime, must corroborate the firmness of the criminal intent, and must be more than remote preparation).

53. 532 F.2d 450 (5th Cir. 1976).

conduct must be strongly corroborative of his criminal intent; (3) in determining whether the conduct is corroborative, the fact finder must examine the acts performed objectively without relying on other evidence of the defendant's intent; (4) as an additional objective measure, the acts should be unique rather than so commonplace that they are engaged in by persons not in violation of the law.⁵⁴

Since attempt is an effort to commit some other offense, the question arises as to whether the constituent elements of the other offense must be set forth in an indictment for attempt. That problem was presented in *Garcia v. State*,⁵⁵ a case in which the indictment alleged that the defendant "did then and there attempt to cause the death of [M.A.] by shooting him with a gun, having at the time the specific intent to commit the offense of murder."⁵⁶ Murder may be committed *either* through an act intentionally or knowingly designed to cause death *or* through an act intended to cause only serious bodily injury that causes death instead.⁵⁷ In *Garcia*, however, the defendant made no complaint about the sufficiency of the indictment and therefore the court did not reach the question of whether the indictment must specify which particular type of murder was intended. The court of criminal appeals did address the issue in *Williams v. State*,⁵⁸ holding that an indictment for attempted burglary that merely alleged "having intent to commit burglary" was sufficient, although there are obviously several ways in which burglary may be committed.⁵⁹ The conclusion is, therefore, that an indictment for attempt is not fundamentally defective for failure to allege the constituent elements of the crime attempted.

Because of the peculiar wording of the statute defining robbery, the crime of attempted robbery will probably be rare in Texas. Consider the facts of *Johnson v. State*⁶⁰ in which defendants entered a Safeway Store armed. Immediately confronted by the police, who were lying in wait, one of the defendants pointed a gun at the store manager and demanded keys to the back door in order to escape. There was no evidence of a demand, taking, or attempted taking of any money or other property from the store. Although these facts look like a textbook-perfect case of attempted robbery, the defendant was convicted of aggravated robbery, and the conviction was sustained by the court of criminal appeals. The rationale for such a result is that the Texas statute defines robbery, *inter alia*, as the use of force in the immediate flight from an attempted theft.⁶¹ Thus, the crime of aggravated robbery was committed even though money or other property was not actually taken, because, under Texas law, the use of force during an attempted theft is sufficient conduct to comprise *completed* robbery.⁶²

54. *Id.* at 454-55.

55. 541 S.W.2d 428 (Tex. Crim. App. 1976).

56. *Id.* at 429.

57. TEX. PEN. CODE ANN. § 19.02(a) (Vernon 1974).

58. 544 S.W.2d 428 (Tex. Crim. App. 1976).

59. See generally TEX. PEN. CODE ANN. § 30.02 (Vernon 1974).

60. 541 S.W.2d 185 (Tex. Crim. App. 1976).

61. See TEX. PEN. CODE ANN. §§ 29.01(1), .02 (Vernon 1974).

62. 541 S.W.2d at 187.

F. Murder

Most of the recent noteworthy developments in the law of criminal homicide are probably of more interest to academicians than to practicing lawyers. For example, one of the conundrums in the law of felony-murder is whether or not the underlying felony must be a violent one.⁶³ The issue was raised in *Rodriguez v. State*,⁶⁴ which called for an interpretation of section 19.02(a)(3), the Texas felony-murder statute.⁶⁵ The Texas Court of Criminal Appeals held that section 19.02(a)(3) does not require that the underlying felony be a violent one.⁶⁶

Somewhat like felony-murder, capital murder is a homicide committed under the narrowly defined circumstances set forth in section 19.03 of the Texas Penal Code.⁶⁷ One such circumstance is murder perpetrated in the course of committing a robbery.⁶⁸ In *Smith v. State*⁶⁹ the defendant contended that his indictment for capital murder based on homicide committed during a robbery was fatally defective for failing to allege the elements of the underlying robbery. On appeal the court stated the general rule that an indictment charging the perpetration of one offense during the commission of another offense need not allege the elements of the latter offense.⁷⁰

In considering the issue of justifiable use of deadly force in *Sternlight v. State*⁷¹ the Texas Court of Criminal Appeals stated: "One of the most drastic changes made in the new penal code is that before deadly force may be used in self-defense the actor (defendant) is required to retreat if a reasonable person in the actor's (defendant's) situation would have retreated."⁷² For Texas to adopt the retreat rule is a drastic change; but even more drastic is the fact that the court applied an *objective* test to determine the actor's duty to retreat. In *Sternlight* the court approved the following charge:

A person is justified in using deadly force against another if he would be justified in using force against the other in the first place, as above set out, and when he reasonably believes that such force is immediately necessary to protect himself against the other person's use or attempted use of unlawful deadly force, *and if a reasonable person in defendant's situation would not have retreated.*⁷³

63. See W. LAFAYE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 71, at 547-48 (1972), stating that the felony must be dangerous to life, *i.e.*, either an inherently dangerous felony, or a felony which in particular circumstances creates a foreseeable danger to human life.

64. 548 S.W.2d 26 (Tex. Crim. App. 1977).

65. TEX. PEN. CODE ANN. § 19.02(a)(3) (Vernon 1974) provides:

A person commits an offense if he: . . . commits or attempts to commit a felony, other than voluntary or involuntary manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

66. 548 S.W.2d at 29. The court stated that the legislature had exempted only the felonies of voluntary and involuntary manslaughter and refused to add to the statutory exemption.

67. TEX. PEN. CODE ANN. art. 19.03(a) (Vernon 1974).

68. *Id.* art. 19.03(a)(2).

69. 540 S.W.2d 693 (Tex. Crim. App. 1976).

70. *Id.* at 697.

71. 540 S.W.2d 704 (Tex. Crim. App. 1976).

72. *Id.* at 705.

73. *Id.* at 706 (emphasis added).

Other jurisdictions that have adopted the retreat rule have applied the subjective test, under which the defender need not retreat unless he *knows* that he can do so in complete safety.⁷⁴ The Model Penal Code also applies the subjective test when it states, "The use of deadly force is not justifiable . . . if . . . the actor knows that he can avoid the necessity of using such force with complete safety by retreating"⁷⁵ Requiring a person to accept the ignoble alternative of retreating before using deadly force in self-defense can be easily justified as a civilized and humanistic approach; however, requiring that person to accept the added burden of retreating whenever the mystical "reasonable man" would have done so is an insult to self-preservation.

G. Rape

At common law rape is a general intent crime, *i.e.*, no specific mental state is required.⁷⁶ Similarly, no mention of mental state is made in the definition of rape contained in the new Texas Penal Code.⁷⁷ Nevertheless, in *Zachery v. State*⁷⁸ the court of criminal appeals found a rape indictment fundamentally defective for failure to allege a mens rea. Pointing out that mens rea is a requirement of section 6.02 of the Penal Code,⁷⁹ the court was left with no choice but to hold that the indictment was fundamentally defective.⁸⁰

In *Childs v. State*⁸¹ the indictment alleged that the defendant committed rape by threatening imminent infliction of death. Although no motion to quash was filed, the defendant contended on appeal that the indictment was fundamentally defective for two reasons. First, the indictment did not directly specify the person threatened with imminent infliction of death.⁸² Secondly, the indictment merely alleged "force and threats" without alleging the type of force or threats.⁸³

The court of criminal appeals overruled both contentions but pointed out that the first contention would have been sustained if it had been raised

74. See W. LAFAVE & A. SCOTT, *supra* note 63, § 53, at 396.

75. MODEL PENAL CODE § 3.04(2)(b)(ii) (1962).

76. See W. LAFAVE & A. SCOTT, *supra* note 63, § 28, at 196.

77. TEX. PEN. CODE ANN. § 21.02 (Vernon 1974 & Supp. 1978).

78. 552 S.W.2d 136 (Tex. Crim. App. 1977).

79. TEX. PEN. CODE ANN. §§ 6.02(a)-(c) (Vernon 1974) states:

(a) Except as provided in Subsection (b) of this section, a person does not commit an offense unless he intentionally, knowingly, recklessly, or with criminal negligence engages in conduct as the definition of the offense requires.

(b) If the definition of an offense does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with any mental element.

(c) If the definition of an offense does not prescribe a culpable mental state, but one is nevertheless required under Subsection (b) of this section, intent, knowledge, or recklessness suffices to establish criminal responsibility.

80. 552 S.W.2d at 137. See also *Victory v. State*, 547 S.W.2d 1, 2 (Tex. Crim. App. 1976) (quashing indictment charging indecency with a child which failed to allege "intent to arouse or gratify the sexual desire of any person").

81. 547 S.W.2d 613 (Tex. Crim. App. 1977).

82. *Id.* at 615. Section 21.03 of the Texas Penal Code defines aggravated rape as an offense defined in § 21.02 which compels submission to the rape by threat of death to be imminently inflicted upon *anyone*. TEX. PEN. CODE ANN. § 21.03 (Vernon 1974).

83. 547 S.W.2d at 615; see TEX. PEN. CODE ANN. §§ 21.02(b)(1), (2) (Vernon Supp. 1978).

initially by a motion to quash.⁸⁴ As to the second contention, the court held that the terms "force" and "threats" have only one meaning under the rape statute and need no further elaboration.⁸⁵

In *Blount v. State*⁸⁶ the court drew the distinction between rape and aggravated rape in a classic set of facts. After the victim was raped by force she was told that if she informed the police she would be killed. The defendant was convicted in the district court of aggravated rape because of that threat of death.⁸⁷ Reversing the conviction, the court of criminal appeals observed that the threat was insufficient to satisfy the requirement in the definition of aggravated rape that the threat be imminent.⁸⁸ Thus, to meet the statutory requirement for aggravated rape, the threat employed must be one to be imminently carried out, not one conditioned upon some later event such as a call to the police.

H. False Imprisonment

By its nature false imprisonment is closely akin to kidnapping. The confusing similarity between the two offenses is exacerbated by the definitions in the Texas Penal Code.⁸⁹ In *Carpenter v. State*⁹⁰ the State attempted to charge the defendant with kidnapping, the indictment alleging that the defendant intentionally and knowingly restrained K.R. without her consent. Analyzing the sufficiency of this indictment, the court of criminal appeals noted that the distinction between the felony of kidnapping and the misdemeanor of false imprisonment is the distinction between the word "abduct," which is a necessary element of kidnapping, and the word "restrain," which is a necessary element of false imprisonment.⁹¹ Abduction is restraint intended to prevent the liberation of the victim; therefore, a kidnapping indictment must allege that the restraint is intended to prevent liberation of the victim. Since the indictment in *Carpenter* omitted this extra allegation, it

84. 547 S.W.2d at 615.

85. *Id.*; accord, *Watson v. State*, 548 S.W. 2d 676, 679 (Tex. Crim. App. 1977) (indictment sufficient even though it did not allege the character of the force or specify the threats).

86. 542 S.W.2d 164 (Tex. Crim. App. 1976).

87. *Id.* at 165. TEX. PEN. CODE ANN. § 21.03(a) (Vernon 1974) defines aggravated rape as follows:

(a) A person commits an offense if he commits rape as defined in Section 21.02 of this code or rape of a child as defined in Section 21.09 of this code and he:

- (1) causes serious bodily injury or attempts to cause death to the victim or another in the course of the same criminal episode; or
- (2) compels submission to the rape by threat of death, serious bodily injury, or kidnapping to be imminently inflicted on anyone.

88. 542 S.W.2d at 166.

89. See TEX. PEN. CODE ANN. §§ 20.02, .03 (Vernon 1974).

90. 551 S.W.2d 724 (Tex. Crim. App. 1977).

91. Section 20.01 of the Texas Penal Code provides:

In this chapter:

(1) 'Restrain' means to restrict a person's movements without consent, so as to interfere substantially with his liberty, by moving him from one place to another or by confining him. . . .

(2) 'Abduct' means to restrain a person with intent to prevent his liberation by:

- (A) secreting or holding him in a place where he is not likely to be found; or
- (B) using or threatening to use deadly force.

TEX. PEN. CODE ANN. §§ 20.01(1), (2) (Vernon 1974). See also *id.* §§ 20.02, .03.

was held to charge no more than the misdemeanor offense of false imprisonment.⁹²

I. *Burglary*

There must be both an actus reus and a mens rea for every crime.⁹³ Although that doctrine is doubtlessly well understood at a philosophical level, at a practical level the doctrine often creates confusion. The crime of burglary provides a useful illustration. Too often lawyers confuse the actus reus of burglary with the mens rea of burglary. For example, in *Ex parte Winton*⁹⁴ the indictment, tracking the language of section 30.02(a)(3),⁹⁵ alleged that the defendant "did then and there enter a building without the effective consent of . . . the owner, and therein attempted to commit and committed theft."⁹⁶ That indictment was held to be fundamentally defective because it alleges only an actus reus; it wholly fails to allege a mens rea because it does not use the words "intentionally," "knowingly," or "recklessly."⁹⁷

A somewhat different aspect of the same problem was presented in *Ex parte Cannon*.⁹⁸ In *Cannon* the indictment alleged that the defendant "did unlawfully, then and there, with intent to exercise control over the property of [R.S.], enter a habitation without the effective consent of [R.S.], said owner."⁹⁹ The *Cannon* indictment failed, however, to allege part of the actus reus of burglary, to wit: entry or concealment with the intent to commit a felony or a theft.¹⁰⁰ According to the court in *Cannon*, that part of the actus reus of burglary may be alleged in the indictment in one of two ways: (1) the elements of the theft or the named felony may be fully set out in the indictment, or (2) the indictment may state in conclusive terms that the entry was effected with intent to commit theft or a specifically named felony. Since neither of these methods was followed in the *Cannon* indictment, it was held to be fundamentally defective.

Alleging the ownership of the property burglarized can sometimes raise serious problems. For example, if a rented motel room is burglarized, how should the ownership of the premises be alleged—in the title owner of the property, in the guest assigned to the room, or in the motel manager? That question was answered in *Salas v. State*.¹⁰¹ The court held that ownership for purposes of the indictment can be alleged in either the guest, the hotel manager, or the title holder, because all of them have a greater right of

92. 551 S.W.2d at 726.

93. See W. LAFAVE & A. SCOTT, *supra* note 63, §§ 25, 28.

94. 549 S.W.2d 751 (Tex. Crim. App. 1977).

95. TEX. PEN. CODE ANN. § 30.02(a)(3) (Vernon 1974) states: "(a) A person commits an offense if, without the active consent of the owner, he: . . . (3) enters a building or habitation and commits or attempts to commit a felony or theft."

96. 549 S.W.2d at 752.

97. See TEX. PEN. CODE ANN. § 6.02(a) (Vernon 1974).

98. 546 S.W.2d 266 (Tex. Crim. App. 1976).

99. *Id.* at 267.

100. TEX. PEN. CODE ANN. §§ 30.02(a)(1), (2) (Vernon 1974).

101. 548 S.W.2d 52 (Tex. Crim. App. 1977).

possession than the defendant.¹⁰² This question was thoroughly discussed in *Ex parte Davis*,¹⁰³ a case with somewhat bizarre facts. Davis was charged with capital murder on the grounds that he intentionally committed murder in the course of committing burglary; it was alleged that he entered a residence that had been set aside to his wife with intent to kill her and in the process intentionally killed his stepdaughter. As one might expect, these allegations gave rise to a rather thorough examination of the concept "owner," a term used in section 30.02¹⁰⁴ to define burglary and which is itself defined in section 1.07(a)(24).¹⁰⁵ In the *Davis* case, the court of criminal appeals pointed out that the wife had been given temporary exclusive possession of the house by a court order arising out of a pending divorce suit although the legal title of the residence was in the defendant. According to the court of criminal appeals, the Texas statute, by its use and definition of the term "owner," is designed to protect those persons who have a greater right to *possession* of the property than the criminal actor. Questions of legal title, therefore, are largely irrelevant when alleging who is the owner of the premises in a burglary case.¹⁰⁶

J. Theft

The specificity with which stolen property must be described in a theft indictment is a common problem.¹⁰⁷ Changes in the Texas Code of Criminal Procedure might suggest that the legislature is moving towards requiring a detailed description of stolen property. For example, the 1965 version of article 21.09 of the Texas Code of Criminal Procedure read: "When it becomes necessary to describe property of any kind in an indictment, a general description of the same by name, kind, quality, number and ownership, if known, shall be sufficient;"¹⁰⁸ however, in 1975 the statute was amended to read: "If known, personal property alleged in an indictment shall be identified by name, kind, number, and ownership."¹⁰⁹ In *Welch v. State*¹¹⁰ a theft indictment described the stolen property as "seven rifles." The defendant contended that the indictment was defective for failing to describe the property more specifically as a "243 Remington bolt action rifle with a scope" and an "1892 Winchester."¹¹¹ Nevertheless, the Texas Court of Criminal Appeals disagreed with the defendant, concluding that the 1975

102. The court noted that "owner" is defined in TEX. PEN. CODE ANN. § 1.07(a)(24) (Vernon 1974) as a "person who has title to the property, possession of the property, whether lawful or not, or a greater right to possession of the property than the actor." 548 S.W.2d at 53 (emphasis added). See also TEX. CODE CRIM. PROC. ANN. art. 21.08 (Vernon Supp. 1978).

103. 542 S.W.2d 192 (Tex. Crim. App. 1976).

104. See TEX. PEN. CODE ANN. § 30.02 (Vernon 1974).

105. *Id.* § 1.07(a)(24). See note 102 *supra* for the text of the statutory definition.

106. 542 S.W.2d at 196. See also *Black v. State*, 505 S.W.2d 821 (Tex. Crim. App. 1974) (ownership sufficiently alleged in tenant who had right to occupy and control premises); *Gilbreath v. State*, 158 Tex. Crim. 616, 259 S.W.2d 223 (1953) (care, control, and management may show ownership in law, but control and management must be proven).

107. See generally 41 AM. JUR. 2D *Indictments and Informations* §§ 137-42 (1968).

108. Tex. Code Crim. Proc. Ann. art. 21.09 (Vernon 1966).

109. TEX. CODE CRIM. PROC. ANN. art. 21.09 (Vernon Supp. 1978).

110. 543 S.W.2d 378 (Tex. Crim. App. 1976).

111. *Id.* at 380.

version of article 21.09 is not a substantive change from the 1965 version.¹¹² Thus, if the legislature does in fact intend to give the defendant a right to a specific and detailed description of the property he is accused of stealing, it will have to amend article 21.09 once again.

Under section 31.03 of the Texas Penal Code, theft is committed in one of two ways: either the property is taken by the actor without the owner's consent, *i.e.*, common law theft, or the actor appropriates the property knowing that it is stolen, *i.e.*, common law receiving and concealing.¹¹³ In *Johnson v. State*¹¹⁴ the court ruled that an indictment must specify which of the two unlawful methods was used by the defendant. The indictment disapproved in *Johnson* merely alleged that the defendant "did then and there unlawfully exercise control over property . . . with the intent to deprive the owner . . ." ¹¹⁵ *Long v. State*¹¹⁶ also points up the importance of making the distinction between the two forms of theft. In *Long*, the indictment alleged one form of theft but the court charged the jury on the other form of theft. The conviction was reversed because the court's charge authorized the jury to convict under a theory not set forth in the indictment.

Other recent cases dealing with the law of theft point up some of the nuances of the specialized theft provisions. Welfare fraud is a good example. The court of criminal appeals in *Valdez v. State*¹¹⁷ held that welfare fraud must be prosecuted under article 695c of the Public Welfare Act¹¹⁸ rather than under the general theft provision in section 31.03 of the Texas Penal Code. After the *Valdez* decision the legislature enacted Senate Bill 154 which amended the Public Welfare Act to change the penalty provisions for welfare fraud;¹¹⁹ however, in the process the legislature failed to include a savings clause. The consequence appears to be that all welfare fraud cases pending on May 25, 1977, the effective date of Senate Bill 154, are moot because the law applicable to those cases no longer exists.¹²⁰

Forgery was formerly defined as creating a false instrument giving rise to or defeating some pecuniary obligation such as a check or a release.¹²¹ Prosecutors experienced some difficulty with forgery cases if the forged check was stamped by the bank with the word "Forgery." When a copy of such a check was attached to the indictment it did not truly represent the instrument allegedly forged, and clearly was not an instrument creating a pecuniary obligation.¹²² That problem, however, has been solved by the new

112. *Id.* The court noted that although the 1975 version omits the phrase "general description," it adds no specific requirements for describing property such as quality, brand name, or date of manufacture.

113. See TEX. PEN. CODE ANN. § 31.02 (Vernon Supp. 1978).

114. 547 S.W.2d 599 (Tex. Crim. App. 1977).

115. *Id.* at 600.

116. 548 S.W.2d 897 (Tex. Crim. App. 1977).

117. 553 S.W.2d 110 (Tex. Crim. App. 1977).

118. TEX. REV. CIV. STAT. ANN. art. 695c (Vernon 1964 & Supp. 1978).

119. *Id.* art. 695c, § 34 (Vernon Supp. 1978).

120. See generally *Bell v. Maryland*, 378 U.S. 226 (1964); *Webb v. Beto*, 457 F.2d 346 (5th Cir. 1972).

121. TEX. PEN. CODE ANN. app. art. 979 (Vernon 1974) (repealed 1974).

122. See generally *Payne v. State*, 391 S.W.2d 53 (Tex. Crim. App. 1965).

Penal Code which defines forgery as any unauthorized writing purporting to be the act of another.¹²³

Forgery, as defined in the new Penal Code, also includes passing or otherwise uttering the forged instrument.¹²⁴ Since the mens rea for the crime of forgery is the "intent to defraud or harm another,"¹²⁵ one could commit the offense by passing a forged instrument with the intent to harm another, even though he does not realize that the instrument is a forgery. This problem was dealt with by the court of criminal appeals in *Jones v. State*.¹²⁶ The indictment alleged the passing of a forged instrument with intent to defraud or harm another, but did not allege that the actor knew the instrument to be forged. The court of criminal appeals read into the statute the requirement that the actor know that the instrument is forged, but went on to hold that the indictment was not fundamentally defective for failure to allege such knowledge. Although the court determined that the omission did not render the indictment fundamentally defective when raised for the first time on appeal, it pointed out that this defect could properly be raised by a motion to quash.¹²⁷ Therefore, the state will henceforth be required to prove both intent to defraud and knowledge that the instrument was forged.

K. Robbery

In the new Penal Code robbery is divided into three categories: (1) the classic, common-law type robbery defined in section 29.02;¹²⁸ (2) "aggravated robbery," defined in section 29.03;¹²⁹ and (3) one of the felonies listed in section 19.03¹³⁰ which leads to a charge of capital murder if the victim is intentionally killed.

Aggravated robbery, a new concept, is attracting some attention in the courts. In *Robinson v. State*¹³¹ the court pointed out that aggravated robbery may be committed in two ways, and that the required culpable mental state is different in each instance. Aggravated robbery can be committed if a person causes serious bodily injury in the course of committing theft. The culpable mental state for this form of aggravated robbery requires that the act be performed intentionally, knowingly, or recklessly. Aggravated robbery can also be committed if a person uses or exhibits a deadly weapon in the course of committing theft. The culpable mental state for this form of aggravated robbery requires an intentional or knowing act. Thus, the mental states of knowledge or intent are common to both forms of aggravated robbery, but the mental state of recklessness is applicable only to robbery which results in serious bodily injury.¹³²

123. TEX. PEN. CODE ANN. §§ 32.21(a)(1), (2) (Vernon 1974); see *Martinez v. State*, 551 S.W.2d 735 (Tex. Crim. App. 1977).

124. TEX. PEN. CODE ANN. § 32.21(a)(1)(B) (Vernon 1974).

125. *Id.* § 32.21(b).

126. 545 S.W.2d 771 (Tex. Crim. App. 1977).

127. *Id.* at 777-78.

128. TEX. PEN. CODE ANN. § 29.02 (Vernon 1974).

129. *Id.* § 29.03.

130. *Id.* § 19.03(a)(2).

131. 553 S.W.2d 371 (Tex. Crim. App. 1977).

132. *Id.* at 373.

In *Robinson* the indictment alleged only intentional and knowing use of a deadly weapon. The court's charge to the jury, however, authorized a conviction not only for that form of aggravated robbery, but for the other form as well, that is, for intentionally, knowingly, or recklessly causing serious bodily injury. The court of criminal appeals held that the trial court's charge amounted to fundamental error, because it authorized a conviction for crimes not alleged in the indictment.¹³³

In *Walker v. State*¹³⁴ the court discussed the kind of weapon that would result in aggravated robbery under the "uses or exhibits a deadly weapon" provision of section 29.03(a)(2).¹³⁵ The court held that a forty-five automatic pistol was a deadly weapon under the statute even though the clip and firing pin were missing when the gun was found following the robbery.¹³⁶

As mentioned above, robbery is one of the felonies leading to a charge of capital murder if the victim is intentionally killed.¹³⁷ At the conclusion of the evidence in such a case the court would presumably charge on murder intentionally committed during a robbery, and then charge on robbery as a lesser included offense. Nevertheless, such a charge was disapproved by the court of criminal appeals in *Woodkins v. State*.¹³⁸ The court held that robbery was *not* a lesser included offense of capital murder. Consequently, one must assume that if the jury found that the murder was not intentional in a capital case, their only alternative would be to return a verdict of not guilty, necessitating a second trial on the robbery charge. Query: Would the doctrine of carving prohibit the State from bringing an indictment for robbery?¹³⁹

L. *Parties to Crime*

All traditional distinctions between accomplices and principals have been abolished in Texas, and each party is criminally responsible for the offense as if he had committed it himself.¹⁴⁰ An interesting application of that principle is found in *Cross v. State*.¹⁴¹ Cross testified that he was present and participated in the planning of a robbery, but that he was too scared to participate in the actual commission of the crime, and went home instead of manning his lookout post. Because Cross acted with intent to promote the robbery¹⁴² and thus would have been an accomplice at common law, his conviction for aggravated robbery was affirmed.

133. *Id.* at 373-75.

134. 543 S.W.2d 634 (Tex. Crim. App. 1976).

135. TEX. PEN. CODE ANN. § 29.03(a)(2) (Vernon 1974).

136. The court stated: "We find that the forty-five automatic, even though missing a firing pin and without a clip *when found* (following the robbery), was *manifestly designed and made for the purpose of inflicting death or serious bodily injury*" 543 S.W.2d at 637. *But cf.* *Cook v. State*, 11 Tex. Crim. 19 (1881) (not an offense to carry the barrel and stock of a revolver with the cylinder missing).

137. TEX. PEN. CODE ANN. § 19.03 (Vernon 1974).

138. 542 S.W.2d 855 (Tex. Crim. App. 1976).

139. "Under the carving doctrine the State may carve as large an offense out of a single transaction as it can but it must cut only once." *Douthit v. State*, 482 S.W.2d 155, 161 (Tex. Crim. App. 1972).

140. TEX. PEN. CODE ANN. § 7.01 (Vernon 1974).

141. 550 S.W.2d 61 (Tex. Crim. App. 1977).

142. *See* TEX. PEN. CODE ANN. §§ 7.02(a)(2), .03 (Vernon 1974).

M. Juvenile Delinquency

Definitions. By definition in section 51.03 of the Family Code,¹⁴³ "conduct indicating a need for supervision" consists of relatively inoffensive conduct that may result in an order of probation, but which cannot result in a commitment to the Texas Youth Council.¹⁴⁴ To the list of acts constituting conduct indicating a need for supervision, the legislature has added "conduct prohibited by city ordinance or by state law involving the inhalation of the fumes or vapors of paint and other protective coatings or glue and other adhesives."¹⁴⁵ Glue sniffing is normally charged as a Class C misdemeanor under a city ordinance, and heretofore, juvenile court jurisdiction could not be acquired for glue sniffing unless the child committed the offense on three or more occasions.¹⁴⁶ Now, one act of glue sniffing will apparently be adequate for a child in need of supervision (CINS) adjudication.

The 65th Legislature also made changes in the disposition of a person who is adjudicated a CINS. Section 12(b) of article 5143d¹⁴⁷ was repealed;¹⁴⁸ the net effect of the repeal is that if a CINS on probation is committed to the Texas Youth Council for the delinquent act of violating that probation, he can be housed by the Texas Youth Council with other delinquents. Under the former statute such persons had to be housed separately from other delinquents.¹⁴⁹

Jurisdiction over juveniles may be vested by the juvenile board in either a district court or a county court.¹⁵⁰ Since the district courts have twelve-person juries and the county courts have six-person juries, the number of jurors hearing a juvenile's case clearly depends upon which court has been designated as the juvenile court. In *In re A.N.M.*¹⁵¹ this discrepancy in the number of jurors was held not to contravene the equal protection and due process guarantees of the fourteenth amendment to the United States Constitution.

A serious question, however, has arisen regarding the jurisdiction of county courts to hear juvenile matters generally. As mentioned above, section 51.04(b) of the Family Code delegates to the juvenile board of every county the power to designate a county court as the juvenile court. In 1974 the Texas attorney general issued Opinion No. H-325,¹⁵² stating, *inter alia*, "It is clear that jurisdiction of the juvenile court comes from an act of the Legislature and not from the juvenile board. . . . Section 51.04 . . . does not confer the jurisdiction of a juvenile court on courts not already possessing it." In a later case, *E.S. v. State*,¹⁵³ the court held that designation by

143. TEX. FAM. CODE ANN. § 51.03(b) (Vernon Supp. 1978).

144. *Id.* §§ 54.04(d)(1), (2) (Vernon 1975).

145. *Id.* § 51.03 (Vernon Supp. 1978).

146. *Id.* § 51.03(b)(1)(B).

147. 1975 Tex. Gen. Laws, ch. 693, § 25, at 2159.

148. TEX. REV. CIV. STAT. ANN. art. 5134d, § 12(b) (Vernon Supp. 1978).

149. 1965 Tex. Gen. Laws, ch. 693, § 25, at 2159.

150. TEX. FAM. CODE ANN. § 51.04(b) (Vernon 1975).

151. 542 S.W.2d 916, 918 (Tex. Civ. App.—Dallas 1976, no writ).

152. TEX. ATT'Y GEN. OP. NO. H-325 (1974).

153. 536 S.W.2d 622 (Tex. Civ. App.—San Antonio 1976, no writ).

the juvenile board under section 51.04(b) cannot enlarge the jurisdiction of a county court at law beyond that conferred in the court's enabling legislation. Consequently, all courts exercising juvenile jurisdiction may be forced to rely for their powers not only upon a designation by the juvenile board, but also upon a grant of power in the enabling legislation for that particular court. Unfortunately, the list of powers contained in enabling legislation for the courts in this state varies tremendously from court to court,¹⁵⁴ and the power over matters affecting minors is not uniformly included. Lawyers, therefore, would do well to read carefully the enabling legislation of every juvenile court with which they deal.

Pleading and Pre-Trial. In criminal courts an indictment for one offense will often authorize a conviction for other lesser included offenses; in civil courts, however, all of the elements of each cause of action must be pleaded, and nothing will be implied by innuendo. In *A.E.M. v. State*¹⁵⁵ the apparent inconsistency between those two doctrines was brought to light. In *A.E.M.* the petition for delinquency charged the juvenile with aggravated rape, but at the conclusion of the evidence the court charged not only on aggravated rape but also on the lesser included offenses of rape, aggravated assault, and assault. On appeal the practice of charging the jury on lesser included offenses, as in criminal cases, was approved. Nevertheless, the case was reversed because of another pitfall that faces judges whenever a lesser included offense is involved. The trial judge admonished the juvenile only on the aggravated rape charge. "The court did not tell appellant that he could be found to have engaged in delinquent conduct if the jury found that he had committed the offense of . . . rape, or the offense of aggravated assault."¹⁵⁶ The conviction was therefore reversed because of the trial court's failure to comply strictly with section 54.03(b)¹⁵⁷ which requires that the juvenile be fully warned by the judge of the consequences of trial.¹⁵⁸

In particular, the court of civil appeals held that the juvenile court failed to give the explanation required in section 54.03(b) by merely inquiring whether the juvenile's attorney had discussed the charge of aggravated rape with him, and whether the attorney had explained his rights to him. The court stated:

The [trial] court, in fact, 'explained' nothing to appellant. The explanation is essentially an inquiry as to whether appellant's attorney had 'explained' the allegations to appellant. The court made no effort to explain the meaning of the term, 'aggravated rape.' The court did not explain that, under the allegation of aggravated rape, he could also be found guilty of rape or aggravated assault.¹⁵⁹

154. See, e.g., TEX. REV. CIV. STAT. ANN. art. 1970—301e.1, § 2a (Vernon Supp. 1978) (granting Bexar County Court at Law Nos. 4 and 5 jurisdiction to hear and determine all matters affecting minors'). Cf. *id.* art. 1970—301d, § 2 (Vernon 1964) (granting Bexar County Court at Law No. 3 jurisdiction over juvenile matters not mentioned in enabling statute).

155. 552 S.W.2d 952 (Tex. Civ. App.—San Antonio 1977, no writ).

156. *Id.* at 955.

157. TEX. FAM. CODE ANN. § 54.03(b) (Vernon 1975).

158. See generally *In re N.S.D.*, 555 S.W.2d 807 (Tex. Civ. App.—El Paso 1977, no writ) (trial court must comply with mandatory requirements of § 54.03(b) including explanation of right against self-incrimination).

159. 552 S.W.2d at 955. According to the court:

To 'explain' is to make something plain. It is difficult to conclude that a statement

Section 53.05¹⁶⁰ of the Family Code requires that the hearing shall be set not later than ten days after the petition is filed if a child is in detention. In *In re J.R.C.*¹⁶¹ the hearing date was delayed beyond ten days because of a need for psychological reports and various pretrial hearings. On appeal the juvenile argued that the proceedings against him should have been dismissed for failure to provide a speedy trial. Rejecting this argument, the court emphasized the cause of the delays and stated:

Section 53.05 merely requires that the time initially set for the hearing be not later than 10 days after the filing of the petition. It does not preclude continuing the hearing by agreement or for good cause. . . . As for delays which occurred after the time initially set for the hearing, appellant participated in or was responsible for a considerable portion of those delays, and under the record presented here he is in no position to complain of them.¹⁶²

Mental Illness. Sections 55.01 and 55.03¹⁶³ of the Texas Family Code deal with the procedure for committing a mentally retarded juvenile charged with a delinquent act. These sections were amended by the 65th Legislature to make them conform with the Mentally Retarded Persons Act.¹⁶⁴ In doing so, the legislature created a statutory definition of the level of retardation that will authorize a court to commit.¹⁶⁵

Recent cases demonstrate the importance of the mental illness and mental retardation provisions of the Family Code.¹⁶⁶ In *In re A.N.M.*¹⁶⁷ the court of civil appeals construed section 55.05(b) which states:

If it appears to the juvenile court, on suggestion of a party or on the court's own notice, that a child alleged to have engaged in delinquent conduct or conduct indicating a need for supervision may not be responsible as a result of mental disease or defect, the court shall order appropriate medical and psychiatric inquiry to assist in determining whether the child is or is not responsible.¹⁶⁸

The phrase "may not be responsible" in this section was construed on appeal to mean a reasonable *possibility* rather than a reasonable *probability* that the minor is mentally irresponsible.¹⁶⁹ Therefore, if mental illness is

of an assumption by the court that the required explanation has been given by someone else, followed by a question asking whether appellant had discussed the 'contents' of the State's pleading with appellant, made anything plain to anyone.

Id.

160. TEX. FAM. CODE ANN. § 53.05 (Vernon 1975).

161. 551 S.W.2d 748 (Tex. Civ. App.—Texarkana 1977, writ ref'd n.r.e.).

162. *Id.* at 755.

163. TEX. FAM. CODE ANN. §§ 55.01, .03 (Vernon 1975 & Supp. 1978).

164. TEX. REV. CIV. STAT. ANN. art. 5547—300 (Vernon Supp. 1978).

165. The standard is set out in § 55.03(a) as follows:

If the court finds that the results of . . . comprehensive diagnosis and evaluation indicate a significantly subaverage general intellectual function of 2.5 or more standard deviations below the age-group mean for the tests used existing concurrently with deficits in adaptive behavior of Levels I-IV, the court shall initiate proceedings to order commitment of the child to a facility for the care and treatment of mentally retarded persons.

TEX. FAM. CODE ANN. § 55.03(a) (Vernon Supp. 1978).

166. *Id.* §§ 55.01-.05 (Vernon 1975 & Supp. 1978).

167. 542 S.W.2d 916 (Tex. Civ. App.—Dallas 1976, no writ).

168. TEX. FAM. CODE ANN. § 55.05(b) (Vernon 1975).

169. 542 S.W.2d at 918.

suggested by any party and there is at least some evidence to corroborate it, the court must order testing and conduct an inquiry.

The holding in *A.N.M.* is further explicated in *Meza v. State*.¹⁷⁰ In *Meza* a motion was filed by the juvenile's attorney suggesting "mental illness or defect," but there was no evidence in the record to support the motion. To the contrary, the evidence was that the juvenile had no symptoms of mental illness. The trial court overruled the motion, and that ruling was sustained on appeal.¹⁷¹ Consequently, it can be said with confidence that the mere filing of a motion suggesting mental illness is not sufficient without some supporting evidence placed in the record.

*R.K.A. v. State*¹⁷² is probably the most significant case yet decided concerning the determination of mental illness by the juvenile court. *R.K.A.* examines the relationship between various mental conditions such as mental illness, insanity at the time of the act, mental capacity to proceed, as well as the relationship between those mental states and a transfer proceeding. According to *R.K.A.* only the question of mental capacity to proceed as defined in section 55.04¹⁷³ can be litigated at a transfer hearing.

The court, however, did not adequately discuss its rationale for holding that other mental conditions defined in chapter 55 do *not* apply to transfer proceedings. Other mental conditions defined in chapter 55 which arguably apply to transfer proceedings are sections 55.02(a) and 55.03(a). Section 55.02(a) states:

If it appears to the juvenile court, on suggestion of a party or on the court's own notice, that *a child alleged by petition* or found to have engaged in delinquent conduct or conduct indicating a need for supervision may be mentally ill, the court shall initiate proceedings to order temporary hospitalization of the child for observation and treatment.¹⁷⁴

Section 55.03(a) states:

If it appears to the juvenile court, on the suggestion of a party or on the court's own notice, that *a child alleged* or found to have engaged in delinquent conduct or conduct indicating a need for supervision may be mentally retarded, the court shall . . . initiate proceedings to order commitment of the child to a facility for the care and treatment of mentally retarded persons.¹⁷⁵

A child who appears before a court for a transfer hearing is also a "child alleged by petition, . . . to have engaged in delinquent conduct" as described in section 55.02, or a "child alleged . . . to have engaged in delinquent conduct" as described in section 55.03. Consequently, the holding in *R.K.A.*, that the conditions of mental illness and mental retardation are not to be litigated in a transfer hearing, ignores rather plain language to the contrary in sections 55.02 and 55.03.

170. 543 S.W.2d 189 (Tex. Civ. App.—Austin 1976, no writ).

171. *Id.* at 191.

172. 553 S.W.2d 781 (Tex. Civ. App.—Fort Worth 1977, no writ).

173. TEX. FAM. CODE ANN. § 55.04(a) (Vernon 1975).

174. *Id.* § 55.02(a) (emphasis added).

175. *Id.* § 55.03(a) (Vernon Supp. 1978) (emphasis added).

*Dominguez v. State*¹⁷⁶ provides useful insight into the procedure to be followed whenever a child is returned from a mental institution after a commitment on a finding of lack of capacity to stand trial. *Dominguez* held that after the child is returned, a hearing must be held, and an order entered *judicially* declaring the child fit to proceed. Without such a hearing the court's original order, declaring the child unfit to proceed, continues in effect, and any further proceedings are a nullity.

Confessions. Section 52.02 of the Texas Family Code requires that a person taking a child into custody must release the child to a parent or bring the child to a suitable office designated by the juvenile court "without unnecessary delay and without first taking the child elsewhere."¹⁷⁷ In response to section 52.02, many police departments have secured an order from the juvenile court designating police headquarters as a suitable place to take a child after arrest. In *In re D.M.G.H.*,¹⁷⁸ however, there was apparently nothing in the record to establish that the local police headquarters had been so designated; but the record did show that the child was held at police headquarters from 12:30 p.m. to 10:20 p.m., during which time he confessed. On appeal the confession was disallowed because of the obvious violation of section 52.02. Query: If a child is taken to police headquarters following an arrest, who has the burden of establishing in the record that the police headquarters has been, in fact, properly designated as a suitable place for holding the juvenile? Can a court take judicial notice of a previously entered designation order? *R.C.S. v. State*¹⁷⁹ is another case in which a confession was disallowed on appeal because of illegal police conduct. A confession was taken from a child in violation of section 51.09¹⁸⁰ of the Texas Family Code which requires specified prior warnings by a magistrate in order for the statement to be admissible. In an effort to cure the obvious illegality, the police took a second confession two days later. On the second occasion the police complied with section 51.09, but did not advise the magistrate who gave the warnings that the child had confessed without warnings two days earlier. In disallowing the *second* confession as fruit of the poisonous tree, the appellate court said, *inter alia*:

Apparently, the question is whether the second statement, viewed in the light of the 'totality of the circumstances,' is free from the coercive influences which render the first inadmissible. . . .

Our courts have recognized that once a confession is given, the ability of the accused to resist the information-seeking process is substantially reduced. The impact of a warning given after the first incriminating statement has been made is much weaker than it would have been absent a prior confession, for one cannot be reasonably expected to persist in the denial of that which he has already admitted.¹⁸¹

176. 546 S.W.2d 398 (Tex. Civ. App.—Austin 1977, no writ).

177. TEX. FAM. CODE ANN. § 52.02 (Vernon 1975).

178. 553 S.W.2d 827 (Tex. Civ. App.—El Paso 1977, no writ).

179. 546 S.W.2d 939 (Tex. Civ. App.—San Antonio 1977, no writ).

180. TEX. FAM. CODE ANN. § 51.09 (Vernon Supp. 1978).

181. 546 S.W.2d at 947.

If the police had informed the warning magistrate of their earlier illegal conduct, thus allowing the magistrate an opportunity to fully explain the circumstances to the child and to assure the child that he was not required to repeat his earlier confession, the result in this case might have been different. The most significant new case concerning confessions by juveniles is *E.A.W. v. State*.¹⁸² In that case the procedure outlined in section 51.09(b) had been scrupulously followed. Yet the juvenile, an eleven-year-old girl of average intelligence and sixth grade education, had remained from midnight to 9:00 a.m. in the Juvenile Detention Center without guidance from parents, any adult in loco parentis, or an attorney. In these circumstances the court of civil appeals held that the juvenile did not waive her fifth amendment privilege. Significantly, the court stated: "In our opinion, a child of such immaturity and tender age cannot knowingly, intelligently, and voluntarily waive her constitutional privilege against self-incrimination in the absence of the presence and guidance of a parent or other friendly adult, or of an attorney."¹⁸³ *E.A.W.* negates the notion that a confession is valid, ipso facto, whenever section 51.09 is meticulously followed. At a minimum, *E.A.W.* makes the validity of a confession given by a juvenile a matter of case-by-case determination. The probable result of this decision is that counsel for the juvenile will henceforth habitually raise an issue as to the validity of the child's confession on the grounds that the child was not sufficiently mature or intelligent to make the decision to waive fifth amendment privileges and to incriminate himself. An extra-judicial confession by an adult must be corroborated with other evidence of the corpus delicti.¹⁸⁴ In *R.C.S. v. State*,¹⁸⁵ in a carefully reasoned opinion, the court held that the same rule applies to proceedings in juvenile court. In *In re A.N.M.*, however, the notion of procedural parity between adult and juvenile cases was not sustained.¹⁸⁶ Invoking the rule that an adult defendant must be formally identified in court as the person who committed the crime, the juvenile in *A.N.M.* contended that the trial court erred in refusing to grant him an instructed verdict because he was not so identified. On the rather threadbare theory that a juvenile delinquency trial is a civil action rather than a criminal action, the court in *A.N.M.* held that it is not necessary to formally identify a juvenile defendant in court if there is some other evidence in the record that the juvenile committed the act.¹⁸⁷

Transfer. Subsection (f) of section 54.02¹⁸⁸ lists six factors which a juvenile court must consider in determining whether to transfer a juvenile

182. 547 S.W.2d 63 (Tex. Civ. App.—Waco 1977, no writ).

183. *Id.* at 64.

184. *See, e.g.*, *Self v. State*, 513 S.W.2d 832, 835 (Tex. Crim. App. 1974) (proof of corpus delicti of crime may not be made by extra-judicial confession alone; but if there is some evidence corroborating the confession, confession may be used in establishing corpus delicti). *See also* *Gutierrez v. State*, 502 S.W.2d 746, 749 (Tex. Crim. App. 1973); *Bosquez v. State*, 166 Tex. Crim. 147, 311 S.W.2d 855 (1958).

185. 546 S.W.2d 939, 942 (Tex. Civ. App.—San Antonio 1977, no writ).

186. 542 S.W.2d 916 (Tex. Civ. App.—Dallas 1976, no writ).

187. *Id.* at 919.

188. TEX. FAM. CODE ANN. § 54.02(f) (Vernon 1975).

from the juvenile court to the appropriate district court for trial as an adult. Several recent cases make the cogent point that although all six factors must be considered, it is not necessary that all six factors be clearly established.¹⁸⁹ Thus, a child who does not seem sufficiently sophisticated and mature as required by section 54.02(f)(4) may be transferred, nevertheless, if he meets several of the other criteria mentioned in section 54.02(f). Sufficiency of the evidence at a transfer hearing continues to be a problem. In *B.L.C. v. State*¹⁹⁰ the sufficiency problem arose because there was no evidence connecting the juvenile to the alleged felony except a confession introduced over the objection of the juvenile's counsel. Referring to section 54.02(f)(3), the court reasoned that whether or not there is enough evidence for a grand jury to indict is a factor to be considered; since a grand jury is not a proper forum to determine the admissibility of a confession, a transfer hearing was likewise not a proper forum to consider the admissibility of a confession.¹⁹¹ In reaching that result, the court seemed to overlook or to simply ignore the fact that a transfer hearing takes place in a court—not a grand jury—and that questions of admissibility of evidence are inextricably a court's business, although concededly not the business of a grand jury.

*R.E.M. v. State*¹⁹² raised another issue concerning admissibility of evidence at a transfer hearing. An earlier transfer order had been set aside on appeal, and in the second attempt to transfer the juvenile the state sought to introduce a transcript of some of the testimony from the previous hearing without establishing the required predicate for the admission of such testimony. Relying on the "settled rule in this State," the court rejected use of the transcript unless a predicate for its use is laid by showing that the witness is dead, insane, physically unable to testify, or beyond the jurisdiction of the court.¹⁹³

189. See *In re J.R.C.*, 551 S.W.2d 748, 753 (Tex. Civ. App.—Texarkana 1977, writ ref'd n.r.e.) (section 54.02 does not require that all matters listed in subsection (f) be established for juvenile court to waive jurisdiction); cf. *R.E.M. v. State*, 541 S.W.2d 841, 846-47 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.) (to transfer juvenile for trial as an adult evidence should be shown concerning a majority of the factors which subsection (f) requires the juvenile court to consider).

190. 543 S.W.2d 151 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.).

191. *Id.* at 154.

192. 541 S.W.2d 841 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.).

193. *Id.* at 845.