

Should You Go to Jail if Someone Puts
an Undersized Catfish in Your Cooler?

MENS REA in **LOUISIANA**



INTRODUCTION

One of the most powerful functions government can exercise is holding someone criminally accountable for an action. This can result in a person's loss of life, liberty, or property. Because of the ramifications that being found guilty of a crime can have, government should ensure that criminal laws are written clearly and unambiguously to ensure that they are not unintentionally capturing activities and behaviors that weren't intended to be criminalized in the first place. Just as important, ensuring that consideration of intent is incorporated into laws that carry a criminal penalty is paramount so that innocent actions do not turn someone into a criminal.

For many offenses, such as murder, arson, or assault, this is generally not an issue. But in the Pelican State, hundreds of activities not traditionally dealt with by the criminal justice system carry criminal penalties. Some are for ordinary business activities and some are downright silly. For example, it is illegal to sell bread in Louisiana unless it contains a state-approved vitamin profile.¹ It is also illegal to ride a bicycle in Louisiana without at least one hand on the handlebars.² These offenses may rarely be enforced; nevertheless, these laws can provide the pretext for police to engage citizens who have no malicious intent and are unaware that they are doing anything wrong.³

Although almost all states have criminalized behavior not traditionally considered criminal, the Pelican State takes it a step further. Many offenses that statutorily seem to require some form of intent—a pillar of the American criminal justice system—do not in fact protect innocent behavior in practice and merely require the government to prove negligence on part of the actor. Even more problematic is that Louisiana courts have determined that, for many offenses, merely doing the act is enough to convict an individual, with no regard to their intent—also called “strict liability.”

This paper will delve into Louisiana's unique laws on criminal intent, the issues with the current system, and what Louisiana can do to help ensure innocent activity does not put someone behind bars.

1. LA RS 40:787.

2. LA RS 32:195(C).

3. *State v. Washington*, 775 So.2d 1066 (La. 2000) (noting that the defendant's illegal bicycle operation provided grounds for officers to stop the defendant).



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LOUISIANA MENS REA LAW COMPARED TO OTHER JURISDICTIONS

There are two basic requirements for every crime: (1) the act (or failure to act) that makes up the physical aspects of a crime (also known as actus reus),⁴ and (2) the intent or state of mind required to convict the individual of a certain crime (also known as mens rea).

In Louisiana, the levels of culpability required by the government to prove the “mens rea” aspect of a

4. *Schad v. Arizona*, 501 U.S. 624 (1991).

crime are the same today as they were in the 40s, when they were first written into statute, and are dissimilar to the ones outlined in the United States Model Penal Code (MPC). In the MPC and many jurisdictions, there are four distinct levels of culpability. A good way of showing the differences between the four levels is to examine them in the context of homicide:

PURPOSEFULLY: The person caused another's death with the intent to kill that person. For example, intending to shoot a specific person to kill them and accomplishing that task.

KNOWINGLY: The person's actions made death a near certainty. For example, beating someone with a bat over the head only to cause harm to them.

RECKLESSLY: The person made a decision to disregard a "substantial and unjustifiable risk" that would result in a death. For example, throwing a large rock off an overpass onto traffic.

NEGLIGENTLY: A reasonable (objective rather than subjective as the three above) person should have known of a "substantial and unjustifiable risk" that death would result from their actions, even if the person was not aware of the risk. For example, running a red light and hitting a pedestrian.

However, in Louisiana, pursuant to statute, there are three different levels of culpability: specific intent, general intent, and criminal negligence.⁵ Depending on the offense, the government, in theory, must prove a specific level of intent to support a conviction based upon the act, or in the case of negligence, no intent at all.

Specific intent "exists when the circumstances indicate that an individual actively desired the

prescribed criminal consequences to follow his act or failure to act."⁶ In other words, the government must prove that a person had some sort of subjective intent to do the act itself. For example, second degree murder is a specific intent crime. In Louisiana, it requires proof of (1) the killing of another human being (the act), and (2) the individual had intent to kill or cause great bodily harm to that person (the state of mind). For a specific intent crime, the intent can be inferred. For example, in a second degree murder conviction, the use of a weapon involved or the types of injuries sustained can show the individual had the intent to kill or cause great bodily harm.

General intent exists "whenever there is specific intent, and also when the circumstances indicate that the offender, in the ordinary course of human experience, must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act."⁷ As will be discussed, this can be proven by an objective reasonableness standard (similar to civil or criminal negligence) or sometimes by merely doing the act itself.

ISSUES WITH GENERAL INTENT LAWS AND INTERPRETATION IN LOUISIANA

Negligence exists if an individual's conduct falls grossly below that of a reasonable person under similar circumstances.⁸

Recently, Louisiana courts have interpreted that general intent can be proven in either one of two

5. LA RS 14:10.

6. LA RS 14:10(1).

7. LA RS 14:10(2).

8. LA RS 14:12.

ways. First, general intent “exists when from the circumstances the prohibited result may reasonably be expected to follow from the offender’s voluntary act, irrespective of any subjective desire on his part to have accomplished such result.”⁹ The accused’s actual thoughts and intent are irrelevant, while a jury is only to consider the person’s actions and what consequences will likely come from them.¹⁰ This is akin to a negligence standard in a civil or criminal matter.

This interpretation is unique to Louisiana and poses considerable problems. In other jurisdictions across the country, “general intent” at the very least looks at the accused’s subjective intent to do the actual act.¹¹ Louisiana law on the other hand requires a jury only to consider the facts and circumstances surrounding the incident, and whether a reasonable person would have been aware that their actions would bring about a criminal consequence, regardless of their state of mind at the time.

As Dane Ciolino, law professor at Loyola University New Orleans College of Law noted, this criminal negligence standard for a wide array of offenses that in almost every other jurisdiction in the country would require a jury to consider the state of mind of the defendant can lead to unwanted results:

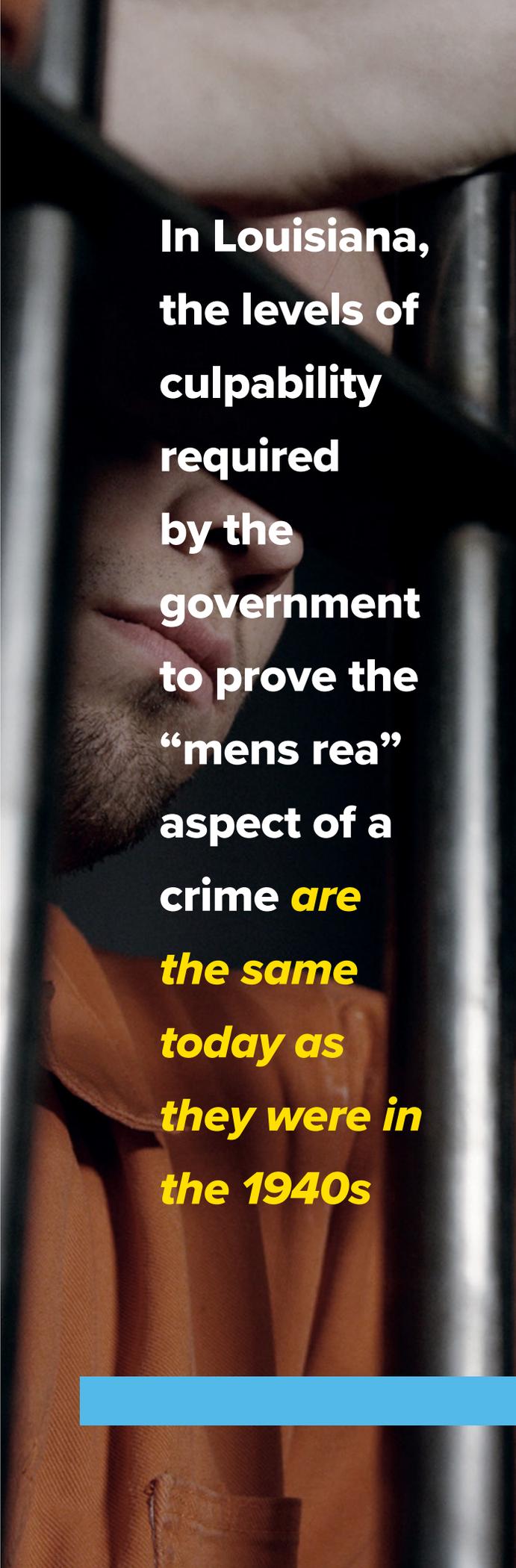
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For example, if a reasonable person would have been aware that, ‘in the course of ordinary human experience,’ it was ‘reasonably certain’ that raising his arm at a crowded Mardi Gras parade would result in striking

9. *State v. Elzie*, 343 So.2d 712, 714 (La. 1977); *State v. Smith*, 23 So.3d 291, 298 (La. 2012).

10. *City of Baton Rouge v. Ross*, 654 So.2d 1311, 1333 (La. 1995) (Calagro concurring); Douget, Andre. Comment, the Louisiana Criminal Code and Criminal Intent: Distinguishing Between Specific and General Intent. 46 La.L.Rev. 1061 (1986).

11. Dane Ciolino, The Mental Element of Louisiana Crimes: It Doesn’t Matter What You Think, 70 Tul. L. Rev. 855 (1996), citing LaFave & Scott, supra note 32, §3.5 at 225-226; 22 C.J.S. Criminal Law, supra note 10, § 32.



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a fellow reveler, then the offender would be deemed to have had that awareness regardless of whether he, in fact did nor did not. Thus, a careless parade-goer who meant no one harm would be considered to possess general intent sufficient enough to land him six months in Orleans Parish Prison for the crime of simple battery.”¹²

Second, courts more recently have interpreted general intent to be satisfied by merely doing the act itself.¹³ This is a flawed and possibly unconstitutional interpretation of the general intent statute. This essentially amounts to strict liability standard that is normally held for fine-only offenses such as speeding or for very specific criminal offenses such as statutory rape. No other jurisdiction in the country could be found that interprets the term “intent” to be satisfied without a review of intent at all. Indeed, Professor Dane Ciolino pointed out that

“

[U]nder present Louisiana law, a person conceivably can be found guilty beyond a reasonable doubt of a crime requiring general intent (such as simple battery) but be cleared of any intentional tort liability for the same act.”¹⁴

Additionally, Louisiana law isn’t entirely clear what the standard is when the statute is silent as to the intent standard. In some cases, the courts have read in an intent. In others, they have refrained from doing so and have assumed strict liability. The 1996 Louisiana case of *State v. Wingate* exemplifies the consequence of having no standard of

intent when a statute is silent on such.¹⁵ Wingate, a truck driver, was transporting a shipment of over 30,000 frozen catfish when he was pulled over by a Louisiana Wildlife and Fisheries agent. The agent determined the shipment contained too many undersized catfish. Wingate was arrested and sentenced to 60 days in jail in addition to a \$400 fine, or 30 days in jail for failure to pay the fine because he possessed undersized catfish.

On appeal, Wingate argued that he did not intend to possess the undersized catfish; moreover, he asserted that there was no reasonable way for him to know that he possessed undersized catfish because doing so would have required him to un-package, defrost, and measure over 30,000 fish. The appellate court rejected Wingate’s argument and affirmed his conviction because criminal intent is not required to violate the statute. The appellate court stated:

“

While we are not unsympathetic to relator’s argument that an unknowing and otherwise innocent person might be convicted of a violation of this statute simply by doing his job as a truck driver, we note that all persons (hunters, recreational fishermen, commercial fishermen, seafood dealers, etc.) must familiarize themselves with all applicable Wildlife and Fisheries laws or risk prosecution for violations thereof.”¹⁶

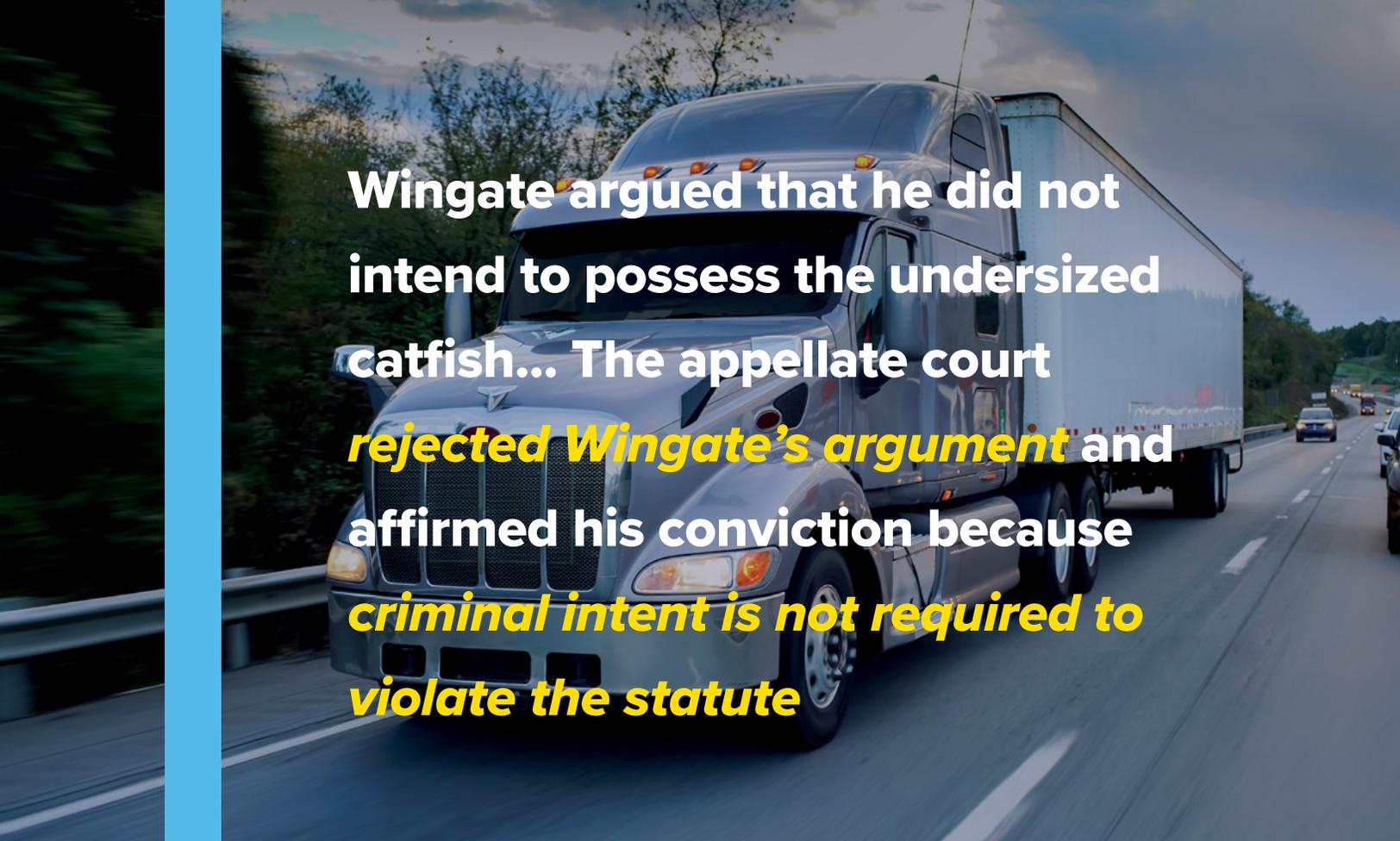
It’s very likely that the truck driver in Wingate would have actually never been found liable in a civil court if he had been sued. This highlights the issue of not requiring some sort of intent on the part of the individual, particularly for ordinary business activity.

12. Dane Ciolino, *The Mental Element of Louisiana Crimes: It Doesn’t Matter What You Think*, 70 Tul. L. Rev. 855, 879 (1996).

13. *State v. Gaubert*, 179 So.3d 982 (La. App. 4 Cir. 12/9/15); *State v. Watson*, 993 So.2d 779, 784 (“once the defendant voluntarily commits the proscribed act, general criminal intent may be presumed”).

14. Dane Ciolino, *The Mental Element of Louisiana Crimes: It Doesn’t Matter What You Think*, 70 Tul. L. Rev. 855 (1996).

15. *State v. Wingate*, 668 So.2d 1324 (La. App. 1st Circ. 1996).
16. *Id.* at 1329.



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RECOMMENDATIONS

There are several measures lawmakers can undertake to prevent Louisianans from being subjected to and convicted for activities that either do not warrant criminal penalties and/or do not currently provide proper due process safeguards. First, Louisiana lawmakers should set up a task force to analyze every law outside their penal code to determine whether it is duplicative, unnecessary, overly broad, unclear, or otherwise insufficient to serve its intended purpose. In 2015, Texas passed a law for this purpose, and the findings and recommendations are forthcoming.¹⁷

Second, to avoid continued confusion amongst different courts and to give proper notice to in-

dividuals, Louisiana should set a default standard of general intent when a statute is silent on the proscribed intent. Several states have passed laws setting a default standard of intent, including Texas, Michigan, and Ohio. Lawmakers at the federal level are also pushing criminal intent reform.

Third, the term “general intent” should be defined in a manner consistent with its plain meaning and with how almost every other state in the union interprets it. That is, look at the actual offender’s subjective intent to commit the act itself that has been codified as criminal. This will establish a clear distinction between general intent and mere negligence and/or strict liability.

*By Adam Crepelle
Co-Author Greg Glod*

17. HB 1396. Texas Legislature. 84th Legislature. 2015.



Pelican Institute for Public Policy
400 Poydras Street • Suite 900 • New Orleans,
LA 70130

504-500-0506 • info@pelicaninstitute.org
pelicaninstitute.org