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John S. Baker Jr.
Louisiana State University Law Center

CRIMINAL LAW

*John S. Baker, Jr.**

THE DEFINITION AND PROOF OF CRIMINAL CONDUCT

Traditionally, the scope of appellate review of criminal convictions on matters of guilt or innocence has been rather restricted in Louisiana due to state constitutional provisions[1] and the broad language of the Criminal Code which leaves most issues to be resolved by the jury as questions of fact. Louisiana law has been displaced in part by fourteenth amendment due process standards which require appellate courts to review whether the evidence has proven guilt beyond a reasonable doubt.[2] *State v. Shapiro*[3] provides an alternate basis for an enlarged scope of appellate review. This alternate basis is premised not on any federal or state constitutional standard, but on the statutory basis of the circumstantial evidence rule, contained in Louisiana Revised Statutes 15:438.[4] The circumstantial evidence standard of review, because it involves the reversal of convictions for insufficient evidence when the evidence is nevertheless constitutionally sufficient, is likely to accelerate a legislative trend of redefining crimes to eliminate difficult to prove elements, especially the mental requirements of criminal conduct.

In *Jackson v. Virginia*,[5] a state habeas corpus case, the United States Supreme Court held that the due process clause of the fourteenth amendment requires federal courts to review state convictions to determine whether the defendant has been proven guilty beyond a reasonable doubt. As a result of *Jackson*, Louisiana was required to abandon its appellate review standard, which had affirmed convictions if there was "some evidence" to support the verdict.[6] *Jackson*, however, did not require, and indeed declined to adopt a rule, that in cases of circumstantial evidence, the prosecution be held to a standard of excluding every hypothesis except that of guilt beyond a reasonable doubt.[7]

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* Associate Professor of Law, Louisiana State University.

1. *See* LA. CONST. art. V, § 5(C).
2. Jackson v. Virginia, 443 U.S. 307 (1979).
3. 431 So. 2d 373, 378 (La. 1982) (on rehearing).
4. LA. R.S. 15:438 provides: "The rule as to circumstantial evidence is: assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence."
5. 443 U.S. 307 (1979).
6. State v. Matthews, 375 So. 2d 1165 (La. 1979).
7. Only under a theory that the prosecution was under an affirmative duty to rule out every hypothesis except that of guilt beyond a reasonable doubt could this petitioner's challenge be sustained. That theory the Court has rejected in the past. *Holland v. United States*, 348 U.S. 121, 140 . . . . We decline to adopt it today.

443 U.S. at 326.

Since *Jackson*, the Louisiana Supreme Court has had difficulty relating the constitutionality required reasonable doubt standard and the Louisiana circumstantial evidence rule which previously only affected the trial of the case.[8] In *State v. Austin*,[9] the court read the due process standard and Louisiana Revised Statutes 15:438 together.[10] Then in *State v. Graham*,[11] the court backed away from merging these standards.[12] In *Shapiro*, the court formalized the distinction between these standards, concluding that while proof may have been sufficient to satisfy section 438. The court in *Shapiro* held that "there [was] no direct proof that the defendant fired the weapon or that he did so with an intent to kill."[13] The court said "the state had to exclude the defense's suggested hypothesis of an intentional suicide or an accidental firing by the victim while threatening suicide."[14] In this case, which came down to a question of "who fired the gun," the court found the forensic evidence "inconclusive."[15] Regarding other evidence, the court rejected a state expert's testimony, stating it "does not have a 'legitimate tendency to compel belief in [nor to compel] a finding of defendant's guilt;' nor does his testimony 'tend to prove' defendant's guilt exclusively."[16] Moreover, the court determined the testimony was countered by other expert

8. LA. R.S. 15:438 (1981).

9. 399 So. 2d 158 (La. 1981).

10. Regarding circumstantial evidence, R.S. 15:438 sets forth the rule that, in order to convict, the evidence must exclude every reasonable hypothesis of innocence. Under *Jackson*, the evidence is viewed in the light most favorable to the prosecution and from the viewpoint of a rational trier of fact. Therefore, when we review a conviction based upon circumstantial evidence we must determine that, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have concluded beyond a reasonable doubt that every reasonable hypothesis of innocence had been excluded.

Id. at 160.

11. 422 So. 2d 123 (La. 1982).

12. In previous opinions we have attempted to formulate a single precept incorporating both standards. See, e.g., *State v. Austin*, 399 So.2d 158 (La.1981). . . . Upon further reflection, however, a merger does not appear to promote clarity but could lead to a distortion of the standards. A combination of the rules may incorrectly imply that, when all of the evidence of the defendant's guilt is circumstantial, due process requires more than evidence which would satisfy any rational juror of proof of guilt beyond a reasonable doubt. On the other hand, an in-tandem articulation may seem improperly to diminish the requirement of the circumstantial evidence rule by implying that, in a close case, this court will defer to the jury's finding rather than follow its own determination of whether there is a reasonable hypothesis of innocence. Although in many instances separate and dual applications of the rules will yield the same result, out of an abundance of caution we will proceed to apply each standard separately, as it was given to us by the framers.

Id. at 129.

13. 431 So. 2d at 385.

14. *Id.* at 386.

15. *Id.*

16. *Id.* at 387 (quoting Kassin v. United States, 87 F.2d 183, 184 (5th Cir. 1937)).

testimony. Finally, discounting "the best part of the state's case," namely discrepancies in statements made by the defendant, the court "conclude[d] that the state did not exclude the reasonable hypothesis that [the victim's] death resulted from a self-inflicted gunshot wound."[17]

In reviewing the record for sufficiency of evidence, a question of law, the court is not able to make credibility choices concerning witnesses whose demeanor they have had no opportunity to observe. The standard in *Shapiro*, however, involves the court in second guessing the credibility choices made by the jury. This second guessing is neither required nor authorized by *Jackson*. According to *Jackson*, a "court faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution."[18] While *Jackson* "does not require a court to 'ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt,'"[19] *Shapiro* in effect does do so by requiring the appellate court, not only the jury, to be convinced to a "moral certainty."[20]

The court justifies its weighing of the evidence as required by the circumstantial evidence rule and as supported by two cases, one federal and one state. Not only is the federal case not controlling, but the practice in federal courts does not support the broad ranging review justified in *Shapiro*.[21] The state case, *State v. Gould*,[22] which approved a jury charge from a much earlier case, is noteworthy, not for the substance of the jury charge, but for the court's assumption that the "moral certainty" provision applies to an appellate court as it does to a jury. Although the statute governing circumstantial evidence is not by its terms limited to trial, it does not necessarily follow that the statute applies on appeal.[23] *Shapiro* and *Gould* assume without discussion that the circumstantial evidence rule does apply on appeal. The *Shapiro* court stated that "[t]he

17. *Id.* at 388.

18. 443 U.S. at 326.

19. *Id.* at 318-19 (quoting Woodby v. INS, 385 U.S. 276, 282 (1966)).

20. 431 So. 2d at 387 (quoting State v. Jefferson, 43 La. Ann. 995, 996, 10 So. 199, 200 (1891)); *see also id.* at 389 (Lemmon, J. concurring).

21. *Shapiro*, 431 So. 2d at 387 (citing Ah Ming Cheng v. United States, 300 F.2d 202 (5th Cir. 1962)). The concurring opinion in *Jackson*, however, points out that in practice very few federal convictions are overturned on grounds of insufficient evidence. 443 U.S. at 328-29 (Stevens, J., concurring).

22. 395 So. 2d 647, 654 (La. 1981) (on rehearing).

23. Justice Stevens, concurring in *Jackson*, disputed the logic of requiring a reviewing court to apply the same reasonable doubt standard as applied by the jury. 443 U.S. at 334. Although not persuaded by this argument insofar as the reasonable doubt standard is concerned, the majority did not go so far as to require a reviewing court to apply the circumstantial evidence standard even if applied by the jury. *Id.* at 326. Justice Stevens' point, therefore, remains relevant to the question of whether the circumstantial evidence rule applied at trial should necessarily apply on review.

Louisiana legislature has, through [Louisiana Revised Statutes 15:438], provided greater protection against erroneous convictions based on circumstantial evidence than is provided by the Fourteenth Amendment."[24] This statement, however, is divorced from context. The Louisiana legislature has also provided a limited scope of appellate review,[25] which had to give way in the face of *Jackson*. For the court to use section 438 to expand the scope of appellate review beyond *Jackson* is in accord with neither legislative intent nor the state constitution which reflects a design to leave fact-finding to juries.[26] Indeed, the legislature has expressed its attitude toward judicial interference with the jury's function by eliminating the directed verdict as one way to curtail the discretion of both trial and appellate courts to override a jury's verdict.[27]

Due process standards require appellate courts to reverse those relatively few convictions in which adequate proof has not been produced. Under the former "no evidence" standard and because of the lack of a directed verdict, the appellate courts' role may have been too limited. As a result, the supreme court may have found "no evidence" in a few cases in which there was "some evidence," or have reversed on other technicalities where it was actually concerned about the sufficiency of the evidence. With the application of the due process standard of *Jackson*, the court has sufficient means for reversing truly unjust convictions. Beyond that, the court is neither required nor authorized to extend its review, contrary to its assertion in *Shapiro* that it is "constrained in a case of this sort by Louisiana law of long standing."[28] Moreover, the courts intrusion on the jury's role as fact finder, which was operative even before *Shapiro*,[29] appears to have prompted an overreaction from the legislature in an attempt to curtail what may be perceived to be an abuse of appellate review.

The weighing of circumstantial evidence by an appellate court can have a substantial impact on the proof of intent if the court regularly refuses to accept inferences and credibility choices made by the jury. Intent "need not be proven as a fact, [but] it may be inferred from the circumstances of the transaction."[30] Indeed, specific intent often cannot

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24. 431 So. 2d at 384 (quoting State v. Lenon Williams, 423 So. 2d 1048, 1052 (La. 1982)).

25. LA. CONST. art. V, § 5(C); *see, e.g.*, State v. Thompson, 366 So. 2d 1291 (La. 1978); State v. Williams, 354 So. 2d 152 (La. 1977).

26. LA. CONST. art. V, § 5(C).

27. LA. CODE CRIM. P. art. 778. The legislature later provided a motion for a post-verdict judgment of acquittal in order to implement *Jackson*. LA. CODE CRIM. P. art. 821; *see* State v. Lenon Williams, 423 So. 2d 1048, 1053 n.1 (Lemmon, J., concurring).

28. 431 So. 2d at 388.

29. *See, e.g.*, State v. Ricks, 428 So. 2d 794 (La. 1983); State v. Graham, 422 So. 2d 123 (La. 1982).

30. LA. R.S. 15:445 (1981).

be proven by direct evidence such as a confession. Rather, the prosecution must prove specific intent through circumstantial evidence, which requires the jury to make common sense inferences. A jury's inferences routinely rest on judgments about the credibility of the witnesses. The jury must, in a case of circumstantial evidence, exclude every reasonable hypothesis of guilt. In *all* cases, whether based on circumstantial evidence or otherwise, the jury must be convinced to a "moral certainty," as often instructed by the court in explaining proof beyond a reasonable doubt.[31] The court of appeal, with only a written record, is not in a position to review such credibility choices. Thus, a court might not be convinced to a "moral certainty" in some cases even though it was unreasonable for the jury to have been convinced to a moral certainty. Under the *Shapiro* standard, however, the court unavoidably gets involved in weighing the evidence and making choices about the jury's judgment on credibility. Quite apart from the merits of the court's view of the facts in *Shapiro*,[32] this standard will result in the reversal of convictions, based on evidence which satisfied both a jury and the constitutional standards, which cannot be retried due to double jeopardy provisions.[33]

A perception that the court is reversing constitutionally sufficient convictions apparently has prompted the legislature to loosen the requirements for intent. In its last session, the legislature substituted the term "taking" for the theft requirement of armed robbery.[34] This eliminated the requirement of proof of intent "to permanently deprive." The author of the bill was concerned about proving armed robbery where a defendant discards the thing taken shortly after the "robbery." Under such circumstances, the defendant might argue that his action constituted only unauthorized use of a movable coupled with a weapon, rather than theft coupled with a weapon. In the course of making this change, however, the legislature also unwittingly eliminated the intent to steal.[35] Arguably,

31. *See* State v. Jefferson, 43 La. Ann. 995, 10 So. 199 (1891).

32. All the justices concurred in the judgment in *Shapiro*.

33. 431 So. 2d at 389.

34. 1983 La. Acts, No. 70, § 1, *amending* CRIMINAL CODE: LA. R.S. 14:64(A) (1974). The amendment provides: "Armed robbery is the taking of anything of value belonging to another from the person of another or which is in the immediate control of another, by use of force or intimidation, while armed with a dangerous weapon."

35. Whether Louisiana's new theft article contains an "intent to steal" might be debated. The definition of theft in LA. R.S. 14:67 does include the "intent to deprive the other permanently." This way of formulating the intent is said to equate with the "intent to steal." *See* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 637 (1972). Whether or not the phrase "intent to deprive" in LA. R.S. 14:67 equates to, or includes, an intent to steal, the statute as a whole must be read to include the intent to steal, as evident from the mistake of fact defense. CRIMINAL CODE: LA. R.S. 14:16 (1974). Suppose, for instance, a defendant takes property believing the property to be his. It is possible under such circumstances for the property to be in the possession of another and for the defendant to take the property, believing it to be his and, therefore, intending to deprive the other permanently of possession. Although the thing taken belongs to another, there is no intent

therefore, the legislature has made it an armed robbery for a person to collect a debt or otherwise reclaim his property by using a gun. While use of a gun is unlawful for such purposes and should be punished as aggravated assault, the action of taking or reclaiming what one reasonably thinks is his, previously appeared not to be an armed robbery.[36]

The legislature may justifiably be concerned about the supreme court's reversal of some cases, but the legislature's elimination of intent from the definition of crimes traditionally requiring a *mens rea* is unjustified. A mental element or *mens rea* is generally essential to the definition of criminal conduct.[37] The often cited statement by the United States Supreme Court in *Morissette v. United States*[38] says it well:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a "vicious will."[39]

Unfortunately, in the tug-of-war which may be occurring between the court and the legislature over how much proof is sufficient for a conviction, the process of defining crime suffers. The court cannot define crime, but its procedural and evidentiary decisions can make the proof of certain crimes more difficult. If the legislature feels strongly enough, it may react by eliminating the difficult-to-prove element or creating a new crime without that element. If the eliminated element is intent, the court's well-intentioned attempt to assure adequate proof actually has the effect of

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to steal under those circumstances. *See* W. LAFAVE & A. SCOTT, *supra* at 638, 641. If the defendant has made a reasonable mistake of fact regarding his claim of right to the property, his action will not constitute theft. *See* CRIMINAL CODE: LA. R.S. 14:16, reporter's comment (1974).

36. *See* State v. Randolph, 275 So. 2d 174 (La. 1973). It might be thought that the amended armed robbery statute would not conflict with *Randolph* because it retains a requirement of "belonging to another." In mistake of fact or claim of right situations, however, the issue is not whether it does in fact belong to another, but whether the defendant intends to take that which he knows belongs to another and not to himself.

37. State v. Brown, 389 So. 2d 48 (La. 1980).

38. 342 U.S. 246 (1952).

39. *Id.* at 250-51 (footnotes omitted).

promoting an erosion of the principle of *mens rea*, the very principle which the proof requirement was designed to protect and which the supreme court has recognized as generally required for criminal conduct.

The legislature, during the past session, not only eliminated the intent of theft from armed robbery, but also created a new burglary-like statute, without the intent for burglary. These developments are ill-considered responses prompted in part by the legislature's perception that the supreme court is overturning legitimate convictions. The legislature, however, has available alternatives other than eliminating intent requirements from the definition of crimes. To legislatively repeal the rule of *Shapiro* would not only be more defensible, but also more efficient because curtailing the opportunity for reversal of convictions on evidentiary grounds would minimize the instances in which the legislature would be urged to redefine particular crimes on an ad hoc basis. The legislature could eliminate the application of the circumstantial evidence rule as a standard for review on appeal, while maintaining the rule as applicable at trial. The legislature would thereby codify the standard articulated in *Jackson*, including its rejection for purposes of appeal of the "theory that the prosecution [is] under an affirmative duty to rule out every hypothesis except that of guilt beyond a reasonable doubt."[40]

BURGLARY

Three cases, *State v. Ricks*,[41] *State v. Jones*,[42] and *State v. Pike*,[43] which involved completed or attempted burglaries, indicate how problematic the proof of burglary has become under the state supreme court's application of *Jackson v. Virginia*.[44] The difference between *Ricks* and *Jones*, which reverse convictions, and *Pike*, which affirms one, seems to be whether the court agrees with the fact finder's weighing of the evidence and credibility choices, particularly on the issue of intent.

The court in *Ricks* reversed a conviction of attempted simple burglary of an inhabited dwelling.[45] Shortly after midnight, the defendant attempted to enter an apartment by breaking the screen door latch. The occupant called out to the intruder with a warning that he would shoot. When Ricks responded with a profane negative and continued his advance, the occupant shot the defendant in the leg. Ricks fled and hid in a neighbor-

40. 443 U.S. at 325-26.
41. 428 So. 2d 794 (La. 1983).
42. 426 So. 2d 1323 (La. 1983).
43. 426 So. 2d 1329 (La. 1983).
44. 443 U.S. 307 (1979).
45. CRIMINAL CODE: LA. R.S. 14:62.2 (Supp. 1983). It provides in pertinent part:
> Simple burglary of an inhabited home is the unauthorized entry of any inhabited dwelling, house, apartment or other structure used in whole or in part as a home . or place of abode by a person or persons with the intent to commit a felony or any theft therein, other than as set forth in Article 60.

ing building. Ricks testified that he had been drinking; he went to visit a friend who lived in the same apartment, and, after knocking loudly and calling her name, was shot when he started to leave. The friend admitted she had known Ricks for about a year, but denied that he had ever been in the apartment. Nevertheless, the court reversed the jury's finding of guilt, stating that the "evidence introduced by the state [did] not exclude reasonable hypotheses that the defendant intended to commit a misdemeanor or intended a social visit as he asserted."[46] Justice Lemmon dissenting, and inferentially also Justice Marcus dissenting, charged the majority with distorting the *Jackson* standard by "ignor[ing] the rational juror element."[47]

Ricks cited the court's earlier reversal of an attempted burglary conviction in *State v. Jones*,[48] a case in which evidence of intent where no property was missing and no burglary tools were present was held to be insufficient. Jones had been in a neighbor's bedroom at midnight and refused to identify himself. He had previously been treated for mental illness and contended he was in the neighbor's bedroom seeking someone to drive him to the hospital. The court cited this contention as the basis for reversal on an "evidentiary insufficiency,"[49] *i.e.*, a lack of proof that the defendant had the intent to commit a felony or theft. Here, too, Justice Lemmon dissented because the court was crediting testimony of the defendant rejected by the jury.

State v. Pike,[50] decided the same day as *Jones* and later cited by *Ricks* as an example of a case in which there had been sufficient evidence of intent for burglary, affirmed a burglary conviction without adverting to a possible issue regarding the legal sufficiency of the evidence. The defendant was discovered hiding in a neighbor's closet at 2:30 A.M. Claiming he and his neighbors enjoyed a mutual "open house" policy, he said he had come to "borrow" some marijuana from his neighbor.[51] The trial judge credited, and the appellate court accepted, the occupant's testimony that the defendant's entry was unauthorized. Regarding the issue of intent, however, there seemed to have been no question that the defendant was looking for marijuana, and he apparently had some reasonable basis for believing that the marijuana was present in the dwelling. The court focused on the circumstances surrounding the entry and the intent to take the marijuana as providing sufficient evidence of intent to commit a theft.[52]

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46. 428 So. 2d at 796.
47. *Id.* at 798.
48. 426 So. 2d 1323 (La. 1983).
49. *Id.* at 1327.
50. 426 So. 2d 1329 (La. 1983).
51. *Id.* at 1332-33.
52. *Id.* at 1333.

Without discussing the issue, the court apparently assumed that an intent to take contraband is sufficient to prove an intent to commit a theft.[53] The intent of burglary, which must exist at the the point of entry, is a specific intent either to commit a felony or theft therein.[54] The defendant need not intend to steal any particular item to have the requisite intent to commit a theft.[55] If, however, the defendant's only intent is to take contraband, whether he has the specific intent of theft, *i.e.*, to take "anything of value which belongs to another" is debatable. The definition of "anything of value," a term chosen to avoid the historical difficulties of the term "property," is so broad that it would seem to include contraband.[56] As contraband, however, marijuana does not "belong" to the person who happens to possess it. Although the object of the theft need not belong to the person from whom it is taken for purposes of theft[57] (*e.g.*, a thief may be guilty of theft from another thief), the issue arises as to whom does contraband belong for purposes of theft. The weight of case authority from other jurisdictions is that the taking of contraband is nevertheless larceny.[58] Presumably, the taking of contraband with an intent to deprive should also constitute theft in Louisiana, and the requirement that it "belong to another" could be satisfied by arguing the contraband belongs to the state. The point, for present purposes, is that because the marijuana can not belong to the occupants, the defendant might have challenged the sufficiency of the evidence of intent, as a matter of law, without questioning the factual findings.

While the defendant appears to have been properly convicted, the case can be instructive on the question of what is necessary to constitute a "question of law" for purposes of reviewing the sufficiency of the evidence on appeal.[59] As framed by this writer, the question of law in *Pike* on the issue of intent might have been considered without reconsideration of the fact findings. This type of review of the sufficiency of the evidence

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53. In the instant case the defendant admitted that he was in his neighbors' home for the purpose of looking for drugs. The state contends that the only reason defendant was present in the house was to commit a theft. . . .

. . . .

. . . Defendant admitted to the police that he was looking for a joint in the house.

Id.

54. LA. R.S. 14:62 states in pertinent part: "Simple burglary is the unauthorized entering . . . with the intent to commit a felony or any theft therein . . . ." LA. R.S. 14:62.2 states in pertinent part: "Simple burglary of an inhabited home is the unauthorized entry . . . with the intent to commit a felony or any theft therein . . . ."

55. LA. R.S. 14:62 and 14:62.2 require only the intent to commit "any theft."

56. *See* CRIMINAL CODE: LA. R.S. 14:2(2), :67 & reporter's comments (1974).

57. State v. McClanahan, 262 La. 138, 262 So. 2d 499 (1972).

58. *See* W. LAFAVE & A. SCOTT, *supra* note 35, at 634; R. PERKINS & R. BOYCE, CRIMINAL LAW 1085 (3d ed. 1982).

59. Admittedly legal issues sometimes "masquerad[e] as sufficiency questions." *Jackson*, 443 U.S. at 329 (Stevens, J., concurring) (footnote omitted).

is not all that *Jackson* requires, however. *Jackson* requires that the courts look at all the evidence. What makes such a review a question of law rather than of fact is that the reviewing court is to view the evidence "in the light most favorable to the prosecution" and to affirm the conviction if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[60]

Admittedly, any distinction between reviewing the sufficiency of the evidence, as a question of law, and weighing the evidence, as a question of fact, is difficult to discern. The writer submits, however, that in *Ricks* and *Jones* the court is not giving sufficient weight to the judgment of the jury on the issue of intent, which usually must be inferred from the testimony and is often influenced by the credibility of the witnesses. Certain claims made by a defendant based on intoxication, mental illness, or other circumstances may appear plausible on appeal when abstracted from a trial record. To succumb to the temptation to second guess the credibility choices and inferences made by the jury creates the impression that the court is invading the province of the jury and making the task of proving the defendant's intent in burglary prosecutions too difficult.

The legislature, during the last session, reacted to the reversal of burglary convictions by creating the crime of "unauthorized entry of an inhabited dwelling."[61] The new statute resembles the burglary statute without a specific intent requirement, *i.e.*, the crime is a trespass with a possible six year prison term. As discussed above,[62] the elimination of intent from the definition of a basic crime is a predictable, although unwarranted, response of the legislature to the unnecessary reversal of convictions based on the court's application of *Jackson*. The ultimate result is that some of the assessment of guilt is transferred from the jury to the trial judge and then to the appellate court, as the trial judge determines, for purposes of sentencing, the seriousness of the unauthorized entry of the inhabited dwelling according to the sentencing guidelines.[63] The trial judge will decide *sub silentio* whether the unauthorized entry was in the nature of a trespass or of a burglary.

The tendency to eliminate the distinction between trespass and burglary has been further reinforced by the legislature's passage of the so-called

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60. *Id.* at 319.

61. 1983 La. Acts, No. 285, § 1, *adding* CRIMINAL CODE: LA. R.S. 14:62.3. It states:

> Unauthorized entry of an inhabited dwelling is the intentional entry by a person without authorization into any inhabited dwelling or other structure belonging to another and used in whole or in part as a home or place of abode by a person.
>
> Whoever commits the crime . . . shall be fined not more than one thousand dollars or imprisoned with or without hard labor for not more than six years or both.

62. *See supra* text accompanying notes 34-40.

63. LA. CODE CRIM. P. art. 894.1 (Supp. 1983).

"Shoot-a-Burglar" bill.[64] While existing legislation already protects homeowners, and even business owners, in their ability to defend themselves from burglars,[65] the new loosely-worded legislation significantly and unreasonably enlarges the area in which the homeowner may act. The legislation appears to justify the killing of any person who makes "an unlawful entry into [a] dwelling" and who will not leave without being "compel[led] . . . to leave the premise," although the circumstances are not and do not reasonably appear to the occupant to constitute a burglary (*e.g.*, an estranged spouse returning to retrieve his or her belongings). To the extent the bill might appear to justify the killing of a simple trespasser, the language goes beyond what the legislature obviously intended, and what reason would allow. On the other hand, the unnecessary reversal of burglary convictions makes it more difficult to argue against the wording of such legislation because the court has placed in doubt what it takes to constitute a burglary and, therefore, what circumstances might reasonably justify the homeowner in acting in self-defense or defense of his habitation. Thus, the overbroad definition of the defense of habitation is tied to the new crime of unauthorized entry of an inhabited dwelling, which in turn appears to be a reaction to the reversal of constitutionally adequate convictions.

INTENT TO DEFRAUD

The phrase "intent to defraud," which appears in several statutes but is undefined in the Criminal Code, has proven to be a difficult concept for Louisiana courts.[66] The Louisiana Supreme Court in *State v.*

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64. 1983 La. Acts, No. 234, § 1 *amending* CRIMINAL CODE: LA. R.S. 14:20 (1974). It states:

> A homicide is justifiable:
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> . . . .
>
> (4) When committed by a person lawfully inside a dwelling against a person who is attempting to make an unlawful entry into the dwelling or who has made an unlawful entry into the dwelling and the person committing the homicide reasonably believes that the use of deadly force is necessary to prevent the entry or *to compel the intruder to leave the premises*. The homicide shall be justifiable even though the person committing the homicide does not retreat from the encounter.

(Emphasis added).

65. LA. R.S. 14:20(3) provides:

> A homicide is justifiable:
>
> . . . .
>
> (3) When committed against a person whom one reasonably believes to be likely to use any unlawful force against a person present in a dwelling or a place of business while committing or attempting to commit a burglary of such dwelling or business. The homicide shall be justifiable even though the person does not retreat from the encounter.

66. *See* State v. Bias, 400 So. 2d 650 (La. 1981), *discussed in* Baker, *Developments in the Law, 1981-1982—Criminal Law*, 43 LA. L. REV. 361, 361-64 (1982); State v. Baize,

Raymo[67] held that the defendant's falsifying a signature on a medical prescription did not constitute attempted forgery because the state produced no evidence of an intent to injure or prejudice the rights of another. Although the case does not altogether rule out the possibility of a forgery conviction for falsifying a prescription, "given the proper factual setting,"[68] the opinion did little to clarify the meaning of intent to defraud in this or other statutes.[69]

The majority opinion equated "intent to defraud" with an intent "to injure or prejudice the rights of another,"[70] while noting but not resolving the ambiguity as to whether intent to defraud includes "intent to injure."[71] The majority and the dissent apparently disagreed about the necessary object of the criminal intent, namely whether "the intent to injure or prejudice" must be directed at a pecuniary interest.[72] Justice Lemmon said the majority incorrectly limits the intent to an intent to injure a pecuniary interest.[73] The majority, however, denied having resolved that issue.[74]

Neither the majority nor the dissent focused on the more basic question regarding intent to defraud. The majority assumed without discussion, and the dissent did not dispute, that the intent to defraud is a general intent.[75] To the contrary, however, commentators have characterized an

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385 So. 2d 221 (La. 1980), *discussed in* Hargrave, *Developments in the Law, 1980-1981—Criminal Law*, 42 LA. L. REV. 541, 547-48 (1982).

67. 419 So. 2d 858 (La. 1982).

68. *Id.* at 860.

69. While an intent to defraud is common to several statutes, the object of the intent will differ because the criminal consequences intended by the defendant differentiate the harm of one crime from another. Thus, whether a forged prescription is sufficient to prove an intent to defraud under LA. R.S. 14:72 presents a different issue, in some respects, from whether a forged prescription proves intent to defraud under LA. R.S. 40:971(B)(1)(b), the prohibition against obtaining a controlled dangerous substance via a forged prescription. The forgery statute, as implied in *Raymo*, does not designate the object of the intent to defraud. The narcotics statute, on the other hand, specifies the object of the fraud to be obtaining possession of a controlled dangerous substance. *Raymo* distinguishes these two statutes, not in terms of the different objects of the intent, but only by saying that LA. R.S. 40:971(B)(1)(b) can be proven without proof of an intent to defraud. *See also* State v. Mitchell, 421 So. 2d 851 (La. 1982) (upholds a conviction for knowingly obtaining a controlled substance by using a forged prescription in violation of LA. R.S. 40:971(B)(1)(b); distinguishes *Raymo; Mitchell*, 421 So. 2d at 853 n.8).

70. 419 So. 2d at 859.

71. *Id.* at 859 n.1.

72. *Id.* at 860 n.2.

73. *Id.* at 861 (Lemmon, J., dissenting).

74. *Id.* at 860 n.2.

75. The opinion states: "That a general intent to defraud is an essential element of forgery is evident from the statute and the comment." *Id.* at 859. The court also gave a definition of intent which included that for general intent. *Id. But see* State v. Mitchell, 421 So. 2d 851, 853 n.8 (1982) (distinguishes *Raymo*, "[b]ecause the indictment charged defendant under R.S. 40:971, rather than under the general forgery article (R.S. 14:72),

intent to defraud as a specific intent.[76] Moreover, the Criminal Code has used the words "with an intent to" to denote a specific intent.[77] The court apparently concluded that the statute requires only a general intent because reference is made in the reporter's comments to a "general intent." In context, however, the comments seem to refer not to the distinction between general and specific intent, but to the generality of the intent. That is to say, given even a specific intent, the offender *need not have intended to defraud a specific person.* The majority's concern that an overbroad reading of the statute would give too little weight to the term "with intent to defraud"[78] is the very reason why the statute should be read to require a specific intent. If the court had clarified that this statute does indeed require a specific intent,[79] the subsidiary issues regarding the meaning of intent to defraud might have proven to be more readily resolvable.[80]

CORPORATE CRIMINAL LIABILITY

The Louisiana Supreme Court in *State v. Chapman Dodge Center*,[81] while reversing a corporation's conviction on narrow factual grounds, discussed at length the broad difficulties posed by corporate criminal liability. An automobile dealership and its owner-president were charged with multiple counts of theft and convicted on all counts of the lesser crime of unauthorized use of movables. The dealership had failed to pay state sales taxes on a number of automobiles which were sold before the agency closed due to economic conditions in the automobile industry. The evidence showed not only that the president, who lived out of state and left the day-to-day management to others, was not aware of the failure to pay the taxes, but also that he had ordered all taxes paid and, after inquiry,

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[and, therefore,] the state was not required to prove that defendant acted with a specific intent to defraud").

76. *See* R. PERKINS & R. BOYCE, *supra* note 58, at 378-82; *see also* W. LAFAVE & A. SCOTT, *supra* note 35, at 667-68.

77. *See* CRIMINAL CODE: LA. R.S. 14:11 (1974); *cf.* CRIMINAL CODE: LA. R.S. 14:67 (1974).

78. 419 So. 2d at 861.

79. The defendant was actually convicted of *attempted* forgery, which does require proof of a specific intent. *See* CRIMINAL CODE: LA. R.S. 14:72 (1974).

80. Clarification about "intent to defraud" is needed to avoid conviction in commercial transactions where there is no evidence of intent to defraud as was the case in State v. Chapman Dodge Center, 428 So. 2d 413 (La. 1983). A corporation and its owner, charged with theft, were convicted of unauthorized use of movables. The court, citing State v. Bias, 400 So. 2d 650 (La. 1981), concluded that "the state . . . failed to prove *any* intent . . . fraudulent or otherwise." 428 So. 2d at 416. Had it been understood that the intent to defraud is a specific intent, it should have been clear from the facts that the defendants did not "actively desir[e] the prescribed criminal consequences," as required by LA. R.S. 14:10. The case is discussed in more detail *infra* text accompanying notes 81-101.

81. 428 So. 2d 413 (La. 1983).

had been told "*all* taxes had been paid."[82] The court not only reversed the president's conviction for lack of any evidence of fraudulent intent, but also decided: "that since this record reveals no evidence of complicity by the officers or the board of directors, explicit or tacit, that the actions of these managers and/or employees were insufficient to cause this corporate entity to be guilty of the offense of an unauthorized use of a movable."[83]

Although unable to resolve some basic issues concerning corporate liability in this case,[84] the court terms the problem "a grave and troubling one."[85] "These issues have not been generally considered with respect to corporations in this jurisdiction."[86] Such issues arise because the concept of corporate criminal liability strains the basic general requirement in criminal law that criminal conduct require a *mens rea*.[87] Although a corporation is "considered as a natural person,"[88] the analogy to a human person is limited. As the court stated: "Holding a corporation criminally responsible for the acts of an employee may be inconsistent with basic notions of criminal intent, since such a posture would render a corporate entity responsible for actions which it theoretically had no intent to commit."[89]

Although criminal liability has been extended to corporations, it is still limited in a number of ways. First, the liability applies primarily to regulatory or civil offenses.[90] Further extensions of corporate criminal liability have usually required high corporate officers to have actually known of or been involved in the activity.[91] While some jurisdictions have gone beyond these limitations, the imposition of criminal liability under such circumstances based on the tort doctrine of respondeat superior "is revolutionary and inconsistent with the general view in the United States."[92] While a previous case failed to indicate any constraints on corporate criminal liability,[93] *Chapman* clearly does so.

The question may be raised on what basis would the court be justified in limiting corporate criminal liability. Article 2(7) of the Criminal Code defining "person" includes corporations, without qualification on potential criminal liability.[94] The court cannot readily resort to a general find-

82. *Id.* at 415.
83. *Id.* at 420.
84. *Id.* at 419.
85. *Id.* at 417.
86. *Id.* at 416.
87. *Id.* at 417; R. PERKINS & R. BOYCE, *supra* note 58, at 718-21.
88. LA. CIV. CODE art. 427.
89. 428 So. 2d at 417.
90. R. PERKINS & R. BOYCE, *supra* note 58, at 718-19.
91. *Id.* at 719-20.
92. *See* Hargrave, *supra* note 66, at 546.
93. State v. Main Motors, Inc., 383 So. 2d 327 (La. 1979).
94. *See* CRIMINAL CODE: LA. R.S. 14:2, reporter's comments (1974).

ing of unconstitutionality for corporate criminal liability, given federal cases to the contrary.[95] The court does note a different attitude towards corporate criminal liability in Louisiana and other civil law jurisdictions, which reference might appear to be laying the foundation for Louisiana criminal jurisprudence different from other states.[96] The comments to Louisiana Revised Statutes 14:2, however, state that the "obsolete concept of Article 443 of the Civil Code that a corporation cannot be guilty of a crime has been repudiated."[97]

Nevertheless, the criminal law clearly cannot apply equally as well to a corporation as it does to an individual, despite the language of the Criminal Code. The comments to the Criminal Code, as the court noted, indicate that the corporation obviously cannot be imprisoned or executed in punishment for the crime. There are other common sense limitations on the criminal liability of a corporation for crimes such as rape. Although the Criminal Code contains no express limitation precluding such liability, such acts are generally not thought to be attributable to the corporation even if committed by an employee during the course of company business. The same common sense reasons that limit attributing individual acts to the corporation should also limit the attribution of mental states to the corporations for purposes of criminal liability. While some states have attributed mental states to corporations, the concept remains controversial.[98] Such attribution seems inconsistent with the requirement that the prosecution must prove as to each defendant all of the elements of the crime charged beyond a reasonable doubt. The state supreme court might well take the position that with respect to a corporation the element of criminal intent cannot be proven beyond a reasonable doubt. Such a decision would complement the court's decision in *State v. Brown*,[99] which "is an important limitation on the legislature's power to establish strict liability criminal offenses."[100]

The justification generally given for broad corporate criminal liability is deterrence. Arguments supporting this notion are: (1) criminal liability provides an incentive for corporations to control their agents more closely; (2) corporations ought not to benefit from the criminal acts of their agents; and (3) the complexity of modern corporations justifies criminal liability due to the difficulty of proving the responsibility of a particular individual.

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95. New York Cent. & Hudson River R.R. v. United States, 212 U.S. 481 (1909); United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

96. 428 So. 2d at 418-19.

97. Civil Code article 443 which relieved a corporation of criminal liability was repealed by Act 43 of 1942.

98. R. PERKINS & R. BOYCE, *supra* note 58, at 719.

99. 389 So. 2d 48 (La. 1980).

100. *See* Hargrave, *supra* note 66, at 541.

Given that a fine is the only punishment possible for a corporation, whether criminal liability is the best way to achieve the desired results in light of the countervailing considerations is questionable. A criminal prosecution provides the corporation with constitutional protections, including the requirement of proof beyond a reasonable doubt, not available in a civil proceeding. Moreover, the state could move more quickly in a civil proceeding, by way of injunction and forfeiture, and upon final judgment could effect as great or greater a financial impact upon the corporation in terms of civil damages than it could with a fine. The only added deterrent associated with criminal conviction is the moral condemnation it carries. Moral condemnation, however, based as it is on the notion of individual culpability, is not justified for an artificial entity composed of many individuals who are not in fact personally culpable for any crime.

The reason for limiting corporate criminal liability does not reflect a bias in favor of corporations but rather a special concern to protect human persons. Admittedly, one of the arguments for using corporate criminal liability is to protect the individual employee from prosecution and conviction by allowing the corporation to be convicted.[101] Nevertheless, the principle of personal responsibility also dictates that if the individual is personally culpable, he should not be shielded by the corporation. It may be more often the case, however, that the individual employee is not in fact personally culpable. Nevertheless, there may be a strong desire to find someone or something guilty. General acceptance of a policy of preferring a corporate conviction does not protect the individual because the policy choice of prosecuting the corporation presumes the guilt of the employee even if he is not prosecuted since the corporation's guilt rests on the act and intent of some employee. If the employee is not in fact guilty because he lacks a *mens rea*, he may nevertheless suffer some of the same stigma if the corporation is found guilty. Moreover, the facts in *Chapman* serve as a reminder that the decision to prosecute the individual remains a matter of prosecutorial discretion. In *Chapman*, the owner should not have been prosecuted and probably would not have been prosecuted except jointly with the corporation. Having accepted without question the concept of corporate criminal liability, the prosecutor apparently had little problem presuming criminal liability for a corporate president despite his lack of personal culpability. Broad corporate criminal liability involves increased acceptance of strict liability for crimes as a general rule and erosion of the principle of *mens rea*. Such a development inevitably affects not only corporations, but also individuals.

101. *See* R. PERKINS & R. BOYCE, *supra* note 58, at 719.

PURSE SNATCHING

State v. Anderson,[102] construing the crime of "purse snatching,"[103] held that "'snatching' does not require an actual face-to-face confrontation."[104] The victim, who had been seated at a football game with her purse on the floor between her legs, testified that she felt a vibration, looked down, and her purse was gone.[105] The defendant contended the term "snatching" was ambiguous and should be read to imply a physical confrontation. The court observed that the wording of the statute distinguishes "snatching" from the terms *use of force* and *intimidation*. To equate the word *snatching* with the phrase *use of force*, which also appears in the statute, would eliminate the difference between purse snatching and simple robbery.[106] The legislature enacted a special purse snatching statute because the circumstances of taking a purse often do not involve the use of force or intimidation necessary for simple robbery, but do subject the person to a form of violence not found in a simple theft.

The court's affirmation without comment of the defendant's sentence of seven years points up a certain incongruity about the relationship between simple robbery and purse snatching. Although not a lesser included offense as such,[107] purse snatching contains much of the same wording as simple robbery and appears to be a less serious crime than simple robbery in the sense that, as discussed above, the crime is provable under circumstances which may not amount to simple robbery. The legislature, however, has provided a stiffer penalty for purse snatching than for simple robbery: whereas simple robbery is punishable with a potential prison term of up to seven years, purse snatching carries from a mandatory minimum of two years to a maximum of twenty years. The defendant's seven-year sentence is within the permissible range for either simple rob-

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102. 418 So. 2d 551 (La. 1982).

103. CRIMINAL CODE: LA. R.S. 14:65.1 (Supp. 1983). It provides:

> A. Purse snatching is the theft of anything of value contained within a purse or wallet at the time of the theft, from the person of another or which is in the immediate control of another, by use of force, intimidation, or by snatching, but not armed with a dangerous weapon.
>
> B. Whoever commits the crime of purse snatching shall be imprisoned, with or without hard labor, for not less than two years and for not more than twenty years.

104. 418 So. 2d at 552.

105. *Id.*

106. CRIMINAL CODE: LA. R.S. 14:65 (Supp. 1983). It provides:

> Simple robbery is the theft of anything of value from the person of another or which is in the immediate control of another, by use of force or intimidation, but not armed with a dangerous weapon.
>
> Whoever commits the crime of simple robbery shall be fined not more than three thousand dollars, imprisoned with or without hard labor for not more than seven years, or both.

107. *See* LA. CODE CRIM. P. art. 814.

bery or purse snatching. If a purse snatching defendant were to receive a sentence exceeding the maximum possible for simple robbery, seven years, he would seemingly have a good argument that the statutorily permissible sentence of up to twenty years is excessive when compared to the more serious crime of simple robbery. Nevertheless, the supreme court has previously upheld a twenty year sentence for purse snatching.[108]

Appellate review of sentence, pursuant to article I, section 20 of the 1974 Louisiana Constitution,[109] has been interpreted to permit reversal of sentences deemed "excessive" though within the statutorily provided range.[110] As a result, the court has reversed many sentences which are within the statutorily provided range despite arguments that the constitutional provision should apply only to those cases in which the statute itself has provided an excessive sentence.[111] Rarely, however, has the supreme court declared statutorily provided sentences unconstitutionally excessive.[112] The legislatively provided sentence for purse snatching, however, certainly appears disproportionate, if not "excessive," when compared to that provided for simple robbery.

Murder—Killing During the Perpetration of a Felony

Both the first and second degree murder statutes punish killings which occur "[w]hen the offender . . . is engaged in the perpetration or attempted perpetration" of certain felonies.[113] The connection between the killing and the felony is usually resolved as a question of fact by the jury.[114] Occasionally, the factual connection between the killing and the other crime

108. *See* State v. Reed, 396 So. 2d 1316 (La. 1981).

109. Article I, section 20 provides in part: "No law shall subject any person . . . to cruel, excessive or unusual punishment."

110. State v. Sepulvado, 367 So. 2d 762 (La. 1979).

111. *See* State v. Tilley, 400 So. 2d 1363 (La. 1981); State v. Touchet, 372 So. 2d 1184 (La. 1979); State v. Sepulvado, 367 So. 2d 762 (La. 1979); State v. Goodman, 427 So. 2d 529 (La. App. 3d Cir. 1983).

112. *See* State v. Goode, 380 So. 2d 1361 (La. 1980) (held LA. R.S. 14:50.1 (mandatory minimum five-year imprisonment for offenses against the person of someone 65 years of age or older) unconstitutional as providing an excessive punishment).

113. CRIMINAL CODE: LA. R.S. 14:30 (Supp. 1983). It states in pertinent part: "First degree murder is the killing of a human being: (1) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated escape, aggravated arson, aggravated rape, aggravated burglary, armed robbery, or simple robbery . . . ."

LA. R.S. 14:30.1 states in pertinent part:

> Second degree murder is the killing of a human being:
>
> . . . .
>
> (2) When the offender is engaged in the perpetration or attempted perpetration of aggravated rape, aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, armed robbery, or simple robbery, even though he has no intent to kill or to inflict great bodily harm.

114. *See* State v. Bessar, 213 La. 299, 34 So. 2d 785 (1948).

presents a question of law for the court, thus revealing the complexity of the underlying legal issues. Such is the case of *State v. Anthony*[115] in which the court determined that a "homicide occurring during defendant's flight from the aggravated burglary could be found by the trier of fact to be first degree murder under R.S. 14:30(1)."[116]

The court's seemingly simple conclusion was considerably complicated by the facts and the court's opinion. The supreme court reversed the district court's quashing of an indictment for first degree murder and remanded the case for further proceedings. It was undisputed

> that Michael Anthony burglarized the apartment . . . located at 710 Park Boulevard; that he left that apartment, went a couple of blocks and snatched a lady's purse and that he was pursued and the purse was retrieved. He escaped by going back into the . . . [same] apartment at which time he armed himself with a knife. . . . He left the apartment and . . . Miss Summer. . . saw him in his attempt to escape and at that time he slashed her throat and killed her.[117]

Three aspects of the opinion deserve comment: (1) the court's characterization of the pertinent part of the first degree murder statute as felony murder; (2) the court's determination that the killing occurred during the perpetration of an aggravated burglary; and (3) the disagreement between the majority and concurring opinions regarding the scope and duration of the initial burglary.

The court incorrectly implies that the pertinent provision of first degree murder is one of felony murder.[118] Although an indictment under the first section of the first degree murder statute does require proof of one of the enumerated felonies, which includes aggravated burglary,[119] neither this nor any part of the first degree murder statute constitutes felony murder. These same aggravated felonies are listed as elements of that part of second degree murder which is known as felony murder.[120] The distinction between the pertinent part of first degree murder and the felony murder section of second degree murder lies in the element of specific intent. All forms of first degree murder require specific intent to kill or

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115. 427 So. 2d 1155 (La. 1983).

116. *Id.* at 1159.

117. *Id.* at 1156-57.

118. R.S. 14:30 defines first degree murder as the "killing of a human being . . . when the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated . . . burglary . . ." *Aggravated burglary falls expressly within the purview of Louisiana's felony murder rule.*
Id. at 1157 (emphasis added).

119. *See supra* note 113.

120. *Id.*

to inflict great bodily harm. The felony murder part of second degree murder, however, requires no such specific intent. Rather, the felony and its intent supply the *mens rea* which otherwise would be missing.[121] The court's likely inadvertent mischaracterization of this case as one of felony murder has no adverse effect on its ultimate conclusion, but it does pose the possibility of future confusion regarding the felony murder doctrine.

Both felony murder and the first section of first degree murder require that the killing occur "[w]hen the offender . . . is engaged in the perpetration or attempted perpetration" of an enumerated felony. As mentioned, however, the requirement of an enumerated felony serves somewhat different purposes in the two statutes, and therefore, the policies affecting construction of the two statutes may differ. In order to construe the felony murder provision so that the listed felonies do provide evidence of a *mens rea* the killing and the felony should be connected in terms of legal causation.[122] This suggests some limits to linking the felony and the killing.[123] For first degree murder, the felony is an element of the crime, but it does not substitute for the *mens rea*; rather, it supplies the aggravating circumstance which distinguishes first from second degree murder and which is necessary to justify imposition of the death penalty.[124] While concern for the death penalty may motivate a court to construe the first degree murder statute narrowly, such concern represents a policy consideration different from causation issues inherent to felony murder.

Although the rationales for felony murder and first degree murder may differ, determining whether the killing occurred "[w]hen the offender . . . [was] engaged in the perpetration or attempted perpetration" of an enumerated felony need not differ so long as the construction given is one that, in the context of felony murder, connects the felony to the killing in terms of legal causation, *i.e.*, in a way consistent with the principle of *mens rea*. Moreover, since second degree murder is responsive to first degree murder, to give a different construction to the same clause in the two statutes would be unworkable. Therefore, the court may appropriately rely on felony murder cases as authority to resolve the issue in a first degree murder case of whether the killing occurred during the perpetration or attempted perpetration of the felony.[125]

The remaining question is whether the court's resolution of the issue in *Anthony* creates problems of causation if applied in a true felony murder

121. See R. PERKINS & R. BOYCE, *supra* note 58, at 71.

122. *See* J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 257-60 (2d ed. 1960).

123. *But see* R. PERKINS & R. BOYCE, *supra* note 58, at 134 ("The phrase 'committed in the perpetration or attempt to perpetrate,' as it appears in the common type of [felony murder] statute, has not been narrowly construed.").

124. *See* Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Jurek v. Texas, 428 U.S. 262 (1976) (the death penalty cases).

125. State v. West, 408 So. 2d 1302 (La. 1982); State v. Bessar, 213 La. 299, 34 So. 2d 785 (1948).

context. This question is best considered by contrasting the majority opinion with the concurring opinion of Justice Blanche. According to both the majority and concurring opinions, the killing in this case could have been in the course of the second entry, which may or may not have been a burglary. There is disagreement, however, on whether the killing could be said to be in the course of the first burglary. In Justice Blanche's view "neither the purse snatching, the second entry into the apartment, nor the homicide fall within the res gestae of the first burglary."[126] If it is shown at trial that the defendant made the second entry only to hide, as he contended, the jury might conclude that the second entry was not a burglary—although admittedly there was ample evidence for the jury to conclude that it was indeed an aggravated burglary. If the second entry was not a burglary, the killing would constitute first degree murder only if it occurred during the perpetration of the first burglary and if that burglary was an aggravated one. The majority's opinion cites the first burglary as "the indictable event."[127] Connecting the first burglary to the killing and overcoming the fact that the first burglary was not aggravated because the defendant apparently did not strike anyone and did not seize a weapon until the second entry would be accomplished by applying the *res gestae* doctrine. As the court noted, this is an evidentiary doctrine not previously used in Louisiana to analyze the substantive law of murder.[128] In terms of the *res gestae* doctrine, the whole series of events becomes one transaction.

To connect all of these events into a single transaction may be justifiable for purposes of Louisiana's first degree murder statute, but to do so would create causation problems in the context of felony murder. While other jurisdictions have used the "*res gestae*" concept in felony murder,[129] the court would have done well to avoid reference to the *res gestae* doctrine by limiting itself to analyzing the separate crimes. As stated by Justice Blanche in his concurring opinion, the second entry provides a sufficient basis for a jury to conclude that the killing occurred in the perpetration of an aggravated burglary. While even the killing following the second entry could raise causation problems, if some of the facts were different,[130] limiting the construction of "when the offender . . . is engaged in the perpetration or attempted perpetration" to the second entry would not itself appear to expand previous Louisiana cases applying this phrase in the context of felony murder.

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126. 427 So. 2d at 1160.

127. *Id.* at 1158.

128. *Id.*

129. *See* R. PERKINS & R. BOYCE, *supra* note 58, at 135.

130. If there had been an accomplice to the aggravated burglary in *Anthony* and he was charged with felony murder under the second degree murder statute, there might have been an issue whether his actions, following the burglary, were sufficiently related to those of the killer to justify attributing the action of the killer to the accomplice in the burglary. *See* Baker, *supra* note 66, at 373-74.