Louisiana Law Review

Volume 46 | Number 3
Developments in the Law, 1984-1985: A Symposium
January 1986

Criminal Law

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CRIMINAL LAW

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ARSON

In *State v. Williams*,[1] the court found "slight damage" sufficient to sustain a conviction for aggravated arson.[2] The majority, however, failed to explain whether they were construing Louisiana's arson statutes to depart from the common law on the element of damage. The court created doubts by characterizing the damage in terms of "scorching": "[The] defendant poured gasoline onto the ground next to the wall of an occupied motel and ignited it. The flames made contact with the wall which, was composed of brick and wood, *and scorched it*, causing damage to the building estimated at about ten dollars."[3] Justice Lemmon contended in his concurring opinion that "we are declining to construe the Louisiana arson statutes only according to the traditional common law notions of fire-caused property damage that results in some actual 'wasting' (as opposed to 'scorching') of the structure."[4] In dissent, Chief Justice Dixon noted there was no evidence of "setting fire to any structure."[5] The significance of the degree of damage may not have seemed great in this particular case where the facts clearly indicated the defendant's specific intent to commit the criminal act; it meant conviction for the completed, rather than only the attempted crime. Given other circumstances, however, the same construction could mean the difference between guilt and innocence.

Under the common law, "slight damage" to property which can be characterized as "charring" is required to establish the damage element of arson.[6] The term "charring" corresponds to having been "burned," which is the essence of arson.[7] Use of the term "scorched" does not necessarily indicate "charring."[8] In *Williams*, the court's statement of

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1. 457 So. 2d 610 (La. 1984).
2. Id. at 614.
3. Id. (emphasis added).
4. Id. at 615 (Lemmon, J., concurring).
5. Id. at 614 (Dixon, J., dissenting).
6. R. Perkins & R. Boyce, Criminal Law 278 (3d ed. 1982).
7. Id.
8. Id.

facts reflects that the building was not burned or "charred." The majority's reliance on the term "scorched" without elaboration leaves a certain ambiguity. As a leading criminal law text notes, the word "scorching"

> is not to be recommended because of the possible doubt as to its meaning. If the word is used to imply a discoloration or even a shriveling from the heat, there is no inaccuracy, but some might use it where there had been a charring of the wood but no blaze.[9]

Neither the text nor the commentary to the arson statutes suggests that any damage less than a burning or charring should be deemed sufficient to complete the crime. As indicated by Justice Dixon's dissent, the statute's words, "setting fire," are significant. The term "set fire to" has been considered synonymous with "burn."[10] Generally, it has *not* been taken to mean simply "apply fire to."[11] Given that Louisiana's statute uses virtually the same words which have had a settled meaning, it would be reasonable to presume that the draftsmen intended to follow, rather than abandon, the settled meaning. The draftsmen clearly set out the matters on which Louisiana's statutes depart from the common law view of arson; and, most persuasively, their comments cite with approval cases holding that "mere scorching is not sufficient to constitute the crime."[12]

In addition, a comparison with Louisiana Revised Statutes (La. R.S.) 14:54, "Placing Combustible Materials," shows the inconsistency of making "scorching" sufficient to complete the arson. La. R.S. 14:54 specifies that the "placing of any combustible or explosive material in or near any structure . . . with the specific intent eventually to set fire to such structure . . . shall constitute an attempt to commit arson . . . ."[13] This section rejects the view of those jurisdictions which require an immediate intent to set the fire (something difficult to prove) in order to constitute an attempt.[14] Without the statute, there might be doubt as to whether the placing of a combustible with intent to start a fire is sufficient to constitute an attempt.[15] With or without La. R.S. 14:54, however, the actual setting of fire to a combustible "in or near any structure" is an attempt. The attempt becomes a completed arson when the required damage occurs. But if

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9. Id.
10. Id. at 279-80.
11. Id.
12. La. R.S. 14:52 comment (damage to property) (1974).
13. La. R.S. 14:54 (1974).
14. Id. comment (scope).
15. La. R.S. 14:27 (1974 & Supp. 1985).

the damages for the completed crime are no more than would always result from setting fire to a combustible in or near a building, i.e. "scorching," then there would be no distinction between an attempt and the completed crime in cases such as *Williams*.[16]

It may seem relatively unimportant whether the defendant "chars" or merely "scorches" a building. If, as in *Williams*, the defendant has the specific intent to burn a structure, but fails because he is stopped, it is a matter of fortuity whether he actually chars or merely scorches the structure. If, however, the defendant does not have a specific intent to commit arson, the distinction between charring and scorching may mean the difference between guilt and innocence. The completed crime requires only a general intent to damage,[17] although aggravated arson also requires it to be "foreseeable that human life might be endangered."[18] Thus, one who damages his own property by fire can be guilty of aggravated arson if "it is foreseeable that human life might be endangered," but he cannot be guilty of simple arson which requires that the arson be done "without the consent of the owner."[19] The owner is generally free to burn his property (apart from an intent to defraud)[20] without being subject to criminal consequences. He may burn his property in an open field or under other circumstances which do not involve danger to human life; but if he burns property in an urban setting, the circumstances are more likely to involve danger to human life. Suppose, therefore, a homeowner carelessly uses fire in or near his urban home, but that he quickly brings the fire under control before any *significant* damage is done to his home. He will not be guilty of an attempt because

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16. Compare State v. Bonfanti, 254 La. 877, 227 So. 2d 916 (1969) which refused to interpret La. R.S. 14:51 (Supp. 1985), aggravated arson (an arson committed "whereby it is foreseeable that human life might be endangered"), "to include anticipation of injury to firemen or to others who might come to the site of the fire after its commencement." 254 La. at 882, 227 So. 2d at 918. As the court noted,

> A very compelling reason for adhering to this interpretation of the now LRS 14:51 is that if we adopt the state's interpretation so as to include all of those who might foreseeably come to a fire after it has been started, for the purpose of extinguishing it, we would (for all practical purposes) render ineffective LRS 14:52. Because in virtually every case of intentional burning there is the possibility that someone will attempt to extinguish the conflagration and life will thereby be endangered. We cannot presume that the legislature, in enacting both of such provisions at one and the same time (and then reenacting them in the system of the Revised Statutes of 1950), intended one to be interpreted so as to render the other immediately inoperative.

17. La. R.S. 14:51 and 14:52 (Supp. 1985); State v. Simmons, 443 So. 2d 512, 521-22 (La. 1983).

18. La. R.S. 14:51 (Supp. 1985).

19. La. R.S. 14:52 (Supp. 1985).

20. La. R.S. 14:53 (Supp. 1985): "Arson with intent to defraud is the setting fire to . . . *any* property . . . ." (emphasis added).

he lacked the specific intent.[21] If, however, the damage necessary to complete the crime is so slight as to be less than charring, then his action may literally constitute aggravated arson which requires only general intent. In order to avoid overextending the statute's coverage as well as to adhere to the apparent legislative intent, the court should, in the writer's opinion, reject a departure from the common-law understanding of arson if and when a majority of the court actually addresses the issue.

AMBIGUITY AND VAGUENESS

In *State v. Liuzza*,[22] the Louisiana Supreme Court declared unconstitutional part of the pandering statute, La. R.S. 14:84(4), which defined the crime in part as "receiving or accepting by a person as *a substantial part of* support or maintenance anything of value which is known to be from the earnings of any person engaged in prostitution."[23] The court deemed the phrase "a substantial part of," added by the Legislature in 1978,[24] unconstitutionally vague because it failed to give the trier of fact "an objective fixed standard" and also failed to give the defendant notice.[25] Without the offending phrase, "a substantial part of," the statute was not unconstitutionally vague.[26] The court acknowledged that in other statutes, use of the word "substantial" may not be vague, but found its use in the pandering statute unacceptable because "individuals may be guilty of pandering on the basis of such extraneous factors as the amount of their income from sources other than prostitution."[27]

The United States Supreme Court has warned that the vagueness doctrine "is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited."[28] The approach adopted in the *Liuzza* opinion to the vagueness doctrine, however, did just that. It failed to give adequate consideration to the background against which the Legislature amended the statute by adding the words "a substantial part of." As the court

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21. La. R.S. 14:27 (1974 & Supp. 1985).

22. 457 So. 2d 664 (La. 1984).

23. The court's decision affected only La. R.S. 14:84(4) (Supp. 1985) (emphasis added).

24. 1978 La. Acts No. 219, § 1.

25. 457 So. 2d at 666.

26. See State v. Bourg, 248 La. 844, 182 So. 2d 510, cert. denied, 385 U.S. 866 (1966); State v. Arnold, 351 So. 2d 442 (La. 1977), cited with approval in *Liuzza*, 457 So. 2d at 666.

27. 457 So. 2d at 666.

28. Colten v. Kentucky, 407 U.S. 104, 110, 92 S. Ct. 1953, 1957 (1972).

noted,[29] the Legislature amended the pandering statute in 1978 following *State v. Arnold*,[30] a case which addressed proof of the requirement in section 4 of the statute that the value be received "as support or maintenance." *Arnold* found the evidence produced, namely that the defendant had received on one occasion $10 of a $60 prostitution date, insufficient to establish "support or maintenance."[31] It was, however, unclear from the court's original and rehearing opinions just how much evidence was sufficient. In its original opinion, the court indicated that the statute might require proof that most of the defendant's income came from pandering.[32] On the rehearing, which adhered to the original decision, a different writer for the court stated what the state had to prove "at a minimum" in terms turning on the defendant's intent or purpose in receiving the money.[33] However uncertain the evidentiary requirement, it was clear that the court intended to preserve the distinction between pandering and soliciting for prostitution [34] as reflected by the different penalties and in the reporters' comments to the two statutes.[35] If the court in *Arnold* had not made the evidentiary requirement of some substance for section 4, there would have literally been no distinction between pandering and soliciting. Anyone who received "anything of value" known to be from the earnings of a prostitute which contributed at all to their "support or maintenance" would have been guilty of pandering.

The Legislature thereafter apparently attempted to clarify its intent regarding the level of support necessary to establish the element. Although the Legislature's attempt may not have, in fact, added to the clarity, it hardly added to the uncertainty of the statute as construed by the court. The words used, "a substantial part of," fairly summarized the standard set forth by the court in *Arnold*. Whatever uncertainty it involved, it was no greater than that created by the court in its con-

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29. 457 So. 2d at 666.
30. 351 So. 2d 442, 446 (La. 1977) (on rehearing).
31. Id. at 445, 447.
32. Id. at 445.
33. Id. at 447-48; see also La. R.S. 14:83 (Supp. 1985).
34. 351 So. 2d at 445.
35. The words "as support or maintenance" in R.S. 14:84(4) require the state, at a minimum, to introduce some evidence which establishes, or from which it can be inferred, that the defendant received the earnings of a prostitute with the intention of using them as support or maintenance. Proof that defendant on one occasion received money without any evidence of his purpose in accepting the money, his past similar acts in accepting such money, or any other evidence which would go toward proving that defendant intended to receive and use the money in question to support himself does not constitute "some evidence" that the money was received as support or maintenance.
351 So. 2d at 447-48.

struction of the statute. Moreover, the court criticized the effect of the additional phrase because "individuals may be guilty of pandering on the basis of such extraneous factors as the amount of their income from sources other than prostitution."[36] This "extraneous factor," however, was in fact the basis for the court's construction of the statute in *Arnold* where it distinguished the felony of pandering from the misdemeanor of soliciting for prostitutes.[37] Thus, the court has made it unnecessarily difficult to punish the more serious crime of exploiting women through pandering.

In archetypical cases of solicitation for prostitution, the offender is an otherwise employed person, e.g., a bartender, cab driver, or bellman working on a finder fee basis for a prostitute who freely engages in her profession. In cases of pandering, the offenders control, as employers or managers, often unwilling prostitutes, including many runaway juveniles.[38] The obvious importance of the words "a substantial part of" is to distinguish between these two very different levels of culpability as the court had previously in *Arnold*.

VEHICULAR HOMICIDE

As one of several statutory changes adopted in recent years which deal with drunk driving,[39] the Legislature in 1983 added a new crime of

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36. 457 So. 2d at 666.

37. 351 So. 2d at 445.

38. Senate Comm. on the Judiciary, Subcomm. on Juvenile Justice, 97th Cong., 1st Sess., Exploitation of Children (1981).

39. 1978 La. Acts No. 682, §1 (amended La. R.S. 14:98(C)(D) & (E) by adding to each of these subsections a clause relating to whether the offense "occurred before or after an earlier conviction"); 1979 La. Acts No. 730, §1 (amended La. R.S. 14:98(C) by providing that, in lieu of imprisonment, the court may order treatment at a substance abuse treatment facility; amended La. R.S. 14:98(A) by adding to its beginning the clause "The crime of"; rewrote La. R.S. 14:98(B) to include, as an additional discretionary penalty, treatment at a substance abuse treatment facility); 1982 La. Acts No. 14, §1 (amended La. R.S. 14:98 (B) & (C) to allow for an increase in fines that could be charged and provided for suspension of sentences upon completion of community service activities and participation in substance abuse and driver improvement programs; rewrote La. R.S. 14:98(B) to change the provision of imprisonment from discretionary to mandatory; deleted from La. R.S. 14:98(D) the word "third" before "offense" and added a provision concerning probation, parole, and suspension of sentence; added La. R.S. 14:98(G) which provided for the inclusion of a screening procedure in the use of substance abuse programs); 1983 La. Acts No. 634, § 1 (rewrote La. R.S. 14:98(A) to provide that the crime included the operation of a vehicle with 0.10 percent or more blood alcohol concentration); 1983 La. Acts No. 632, § 1 (added to La. R.S. 32:661(C) a provision requiring arresting officers to inform the person of the consequences of a test conducted if results indicate a blood alcohol concentration of 0.10 percent or greater; amended La. R.S. 32:666(A) by making submission to chemical testing mandatory in cases of traffic fatalities or serious bodily injuries and outlined consequences of refusal in other cases where arrested person

"vehicular homicide."[40] The statute sought to achieve certainty of conviction and mandatory minimum jail sentences for drunk driving homicides. It was intended to displace the problematic approach of prosecuting for negligent homicide. Rather than require proof of criminal negligence, the Legislature provided that the prosecutors need only prove a defendant operated or controlled a vehicle while having an unlawful blood alcohol concentration and thereby "caused proximately or caused directly" the death of a human being. The statutory formulation was declared unconstitutional by a district court which found it included unconstitutional presumptions of criminal negligence and causation. The Louisiana Supreme Court reversed without dissent in *State v. Taylor*.[41]

As construed by the supreme court, the statute did not establish any presumptions; it simply did not require proof of criminal negligence, but did require proof of causation.[42] Twice referring to the principle of genuine construction, the opinion cited the "evident purpose" of the statute and

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could refuse testing; amended La. R.S. 32:667(A)(B) by outlining procedure for seizure of license to be followed when person arrested for violation of La. R.S. 14:98 either refuses to submit to test or has blood alcohol concentration of 0.10 percent or more); 1983 La. Acts No. 633, §1 (enacted La. R.S. 14:39.1 providing for the crime of vehicular negligent injuring); 1984 La. Acts No. 409, §1 (amended La. R.S. 32:661(C) by deleting the provision of the inadmissability of the test results if the procedures outlined were not followed; amended La. R.S. 32:667(A) by adding a provision which allows a person, who submits to chemical test, a hearing when results are not immediately available and provides for the return of his license if the test results are not received in thirty days or does not show blood alcohol concentration of 0.10 percent or greater); 1985 La. Acts No. 194, §1 (amended La. R.S. 32:666(A) and 32:667(A) by extending same provisions applicable to persons arrested for violation of La. R.S. 14:98 to persons arrested for violations of "any other law or ordinance that prohibits operating a vehicle while intoxicated"); 1985 La. Acts No. 746, § 1 (amended La. R.S. 14:98(A)(3) to provide that the crime include the operation of a vehicle while under the influence of a controlled substance and repealed La. R.S. 14:98.1 which provided for the crime of operating a vehicle while under influence of marijuana, morphine, or cocaine); 1985 La. Acts No. 572, §-1 (amended La. R.S. 32:667(D) by authorizing waiver of three day written notification for rescheduling of hearing and extends time for scheduling of hearing); 1985 La. Acts No. 579, §1 (added La. R.S. 14:98(H) which specifically provided that community service activities include work at morgue or hospital emergency treatment facilities); 1985 La. Acts No. 382, § 1 (amended La. R.S. 32:661(C) so as to require the person arrested to sign a single form which informed them of their constitutional rights and of the consequences for refusing to submit to chemical test or the consequences of a test result showing blood alcohol concentration of 0.10 percent or greater); 1985 La. Acts No. 816, § 1 (amended La. R.S. 32:666(A) & 32:667(A) by extending provisions applicable to persons arrested for violating La. R.S. 14:98 to persons arrested for violating of "any other law or ordinance that prohibits operating a vehicle while intoxicated"); 1985 La. Acts No. 747, § 1 (amended La. R.S. 14:39.1(A) by providing that the crime of vehicular negligent injury includes the operation of a vehicle while under the influence of a controlled substance).

40. La. R.S. 14:32.1 (Supp. 1985).

41. 463 So. 2d. 1274 (La.1985).

42. Id. at 1275.

employed common law principles of interpretation in order to avoid a construction which would have made the statute applicable in cases where causation was lacking.[43] It distinguished situations in which the defendant's drunk driving merely "coincides" with a death from those in which the drunk driving "causes" the death. While saying that those "without fault" should not be punished, the court also maintained that the statute required no proof of negligence. In concurring, Justice Calogero "hesitate[d] to subscribe fully to [the] opinion" because he thought the opinion "either ambiguous or wrong" by saying the statute required no proof of negligence.[44] In criminal law, as opposed to torts, it is not possible to speak sensibly of causation and fault on the one hand while also denying the presence (as distinguished from the proof of) of a mental element which is the basis for establishing fault and causation.[45] Various occurrences may precede or coincide with a prohibited result and be classified as "but for" causes. From many possible "but for" causes of a particular result, criminal law determines the legal cause (sometimes called the proximate cause) in accordance with the policies related to the purposes of criminal law, which often differ from those of tort law. The principal policy of criminal law concerns the principle of personal culpability as reflected in the term *mens rea*. This principle is the paramount consideration in explaining causation.[46]

The court's construction of the statute to require causation in the sense of fault certainly seems correct. The inartfully drafted statute does not clearly convey the legislative intent. The draftsmen obviously intended to make criminal homicide convictions more mechanical. Yet, in a departure from the form of the other homicide statutes, they made the requirement of causation explicit. The explicitness is striking because the other homicide statutes also require proof of causation or its equivalent.[47] Whether or not a statute mentions causation, it is understood as inherently part of the *actus reus* of the homicide statutes, with the arguable exception of the felony-murder or felony-manslaughter statutes.[48] The Louisiana Supreme Court has construed the felony-murder rule in terms consistent with causation by limiting it to situations in which the "offender" rather than a third party inflicts the fatal wound.[49] Moreover, to have construed the causation requirement in terms unrelated to fault would have been to

43. Id.

44. Id. at 1276.

45. For a discussion of the difference between criminal law and tort law on the issue of causation, see J. Hall, General Principles of Criminal Law, 254-57 (2d ed. 1960).

46. Id. at 295.

47. See Baker, Developments in the Law, 1981-1982—Criminal Law, 43 La. L. Rev. 361, 371 (1982).

48. See LaFave & Scott, Criminal Law 264 (1972).

49. See State v. Garner, 238 La. 563, 115 So. 2d 855 (1959).

create a strict liability crime, which is disfavored in criminal law and may well be unconstitutional.[50]

Having construed the causation requirement in terms of fault, the court in effect said that the statute involves a *mens rea*. But by also stating that the statute does not require proof of criminal negligence, the court seemed to eliminate the most likely *mens rea*. The apparent contradiction prompted Justice Calogero to characterize the majority opinion as "either ambiguous or wrong."[51] The court was obviously caught between two problems, one of substantive criminal law and one of constitutional dimension. On the one hand, the court was attempting to effect as closely as possible the legislative intent without over-extending the statute to the point of strict liability. On the other hand, the court declined to read into the statute a requirement of negligence, not only because it is not included, but also because to do so would have given weight to the argument that the statute involved an unconstitutional presumption of negligence. The court's opinion, however, failed to slide between the Scylla and Charybdis and left the statute floating in a sea of ambiguity.

It appears that the Legislature has attempted to achieve with vehicular homicide something analogous to the felony-murder doctrine as implemented in part of Louisiana's second degree murder[52] and manslaughter statutes.[53] That is, if the defendant's conduct violates the DWI statute[54] and produces a death, a vehicular homicide conviction should follow. The vehicular homicide statute does not actually incorporate the DWI statute by reference in the way that the felony-murder and felony/misdemeanor manslaughter statutes do. (Compare a third DWI conviction, which is a felony, coupled with a death as constituting felony manslaughter—assuming proof of causation). Despite this difference in form, the vehicular homicide statute does adopt the mechanical approach of the felony-murder rule. As a result, the statute creates problems similar to the felony-murder rule.

The criticism of the felony-murder rule derives from its departure, when rigidly applied, from the principle of *mens rea*.[55] Although it has been referred to as a strict liability offense, the common law concept of felony-murder involves malice and, therefore, is not considered a strict liability offense.[56] The *mens rea* of murder is imputed from the mental element of the included felony. In fact, the sufficiency of the *mens rea*

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50. United States v. Wolff, 758 F.2d 1121, 1125 (6th Cir. 1985) (Failure to require some degree of scienter violates defendant's right to due process.).

51. *Taylor*, 463 So. 2d at 1276.

52. La. R.S. 14:30.1(2) (1974 & Supp. 1985).

53. La. R.S. 14:31(2) (1974).

54. La. R.S. 14:98 (1974 & Supp. 1985) (operating a vehicle while intoxicated).

55. See J. Hall, supra note 45, at 259-60.

56. R. Perkins & R. Boyce, supra note 6, at 71.

for felony-murder or felony/misdemeanor manslaughter often turns on whether there is an adequate causal relationship between the *mens rea* of the underlying crime and the death.[57] If a person intentionally arms himself to commit a robbery, he acts recklessly even with regard to an accidental killing. Nevertheless, the state does not prove recklessness as an element of the offense. As a result there are some instances in which the felony-murder rule has been over-extended and seems to depart from a necessary causal relationship between recklessness and the death. In those crimes in which a third party rather than a felon does the killing, courts have generally limited the felony-murder rule by exempting the felon from criminal responsibility for the death.[58] Thus, while the state may not have to prove recklessness as such, the limits on the felony-murder rule generally guarantee the existence of recklessness.

Could not the court simply have explained the vehicular homicide statute in terms analogous to the felony-murder rule? That is to say, should not the court have followed Justice Calogero's suggestion to construe the statute as one involving criminal negligence? Such a construction would raise the objection, as it apparently did in *Taylor*, that the statute involves an unconstitutional presumption. If the statute punishes criminally negligent conduct, then the statutory element of unlawful blood-alcohol content is arguably being used as a presumption to prove the criminally negligent state of mind.

The vice of certain evidentiary presumptions is that they violate the constitutional requirement of proving all the essential elements of a crime beyond a reasonable doubt.[59] The felony-murder rule and Louisiana's vehicular homicide statute do not utilize presumptions; instead, they simply eliminate the difficult-to-prove elements. While they may satisfy formalistically the constitutional prohibition against certain kinds of presumptions, such formulations border on being strict liability crimes.[60] If avoiding the problem of unconstitutional presumptions means the Legislature simply eliminates the difficult-to-prove elements of the crime, in particular the *mens rea*, the attempts to protect defendants through a rigorous burden

57. J. Hall, supra note 45, at 260.

58. See State v. Garner, 238 La. 563, 115 So. 2d 855 (1959).

59. The due process requirements of the federal Constitution oblige the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged. *In Re Winship*, 397 U.S. 359, 364, 90 S. Ct. 1068, 1073 (1970). Furthermore, a state may not shift the burden of ultimate persuasion of an essential element of the crime charged to the defendant in a criminal case. Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881 (1975). The constitutionality of evidentiary presumptions turns on whether in a given case it "undermine[s] the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts, beyond a reasonable doubt." County Court of Ulster County v. Allen, 442 U.S. 140, 156, 99 S. Ct. 2213, 2224 (1979).

60. See supra text accompanying notes 55 and 56.

of proof standard actually redound to the detriment of defendants.[61] The vehicular homicide statute is just such an example, being the legislative response to the constitutionally-connected difficulties of convicting drunk drivers of negligent homicide.

Negligent homicide is defined as "the killing of a human being by criminal negligence."[62] The statute adds that "violation of a statute or ordinance shall be considered only as presumptive evidence of such negligence." This "presumptive evidence" language was the subject of considerable litigation, ending in the United States Fifth Circuit Court of Appeals decision in *Hammontree v. Phelps*.[63] The *Hammontree* court held that the term "presumptive evidence" is not unconstitutional,[64] concluding that the statutory language merely provides for a permissive inference pursuant to which the jury may, but is not required to, conclude that a defendant who has violated a statute or ordinance is guilty of criminal negligence.[65] Nevertheless, as exemplified by *Hammontree*, a court's jury charge under the negligent homicide statute may produce a prohibited presumption in a particular case.[66]

Hammontree involved a defendant who had been intoxicated while driving, but the court found it unnecessary to address the question of presumptions related to intoxication.[67] Nevertheless, the state supreme court has had to address the problem of combining the "presumptive evidence" language of the negligent homicide statute with the rebuttable presumptions associated with the proof of intoxication in La. R.S. 32:662. In *State v. Williams*,[68] the court found that the "practical effect" of piggy-backing the rebuttable presumption in La. R.S. 32:662, that 0.10 percent blood alcohol establishes intoxication, onto the "presumptive evidence" language of the negligent homicide statute produced an unconstitutional result under *County Court of Ulster County v. Allen*.[69] The court, therefore, directed that the presumption not be utilized in prosecutions for negligent homicide.[70] In *State v. Daranda*[71] and *State v. Green*,[72] however, the state supreme court approved jury instructions in negligent homicide cases which

61. See Baker, Developments in the Law, 1982-1983—Criminal Law, 44 La. L. Rev. 279, 283-85 (1983).

62. La. R.S. 14:32 (1974 & Supp. 1985).

63. 605 F.2d 1371 (5th Cir. 1979).

64. Id. at 1379.

65. Id.

66. *Hammontree* also held that the instruction given in the particular case created an unconstitutional presumption. 605 F.2d at 1380.

67. Id.

68. 375 So. 2d 931 (La. 1979).

69. 442 U.S. 140, 99 S. Ct. 2213 (1979).

70. *Williams*, 375 So. 2d at 935-36.

71. 388 So. 2d 759 (La. 1980).

72. 418 So. 2d. 609 (La. 1982).

in fact referred to the presumption of intoxication. As a result there was some confusion created in the lower courts about whether the presumption of intoxication could be used in negligent homicide cases.[73] As the supreme court explained in *Daranda*[74] and as the district court's instructions in *Green*[75] clearly reflected, the presumption of intoxication was *not combined* with the permissive presumption of negligent homicide. The *Daranda* and *Green* cases, in other words, were consistent with *Williams* insofar as they did not create "the linking or piggy-backing" of the two presumptions. The trial courts did not follow the *Williams* directive to delete the presumption of intoxication, however. Rather, they simply made no reference to the permissive presumption of negligence.

After these cases it was clear that the prosecution could not simply bootstrap the two "presumptions" into an automatic negligent homicide conviction.[76] Then, during the 1983 session in which the vehicular homicide statute was enacted, the Legislature also amended La. R.S. 14:98 so as to equate 0.10 percent blood alcohol with drunk driving.[77] This amendment eliminated the necessity of relying on the presumption of La. R.S. 32:662. Thus, proof that a driver has 0.10 percent blood alcohol concentration automatically became proof of a DWI violation. It, therefore, raised the possibility that the state might use this permissive presumption in a negligent homicide case based on drunk driving without technically violating *State v. Williams*' "piggy-backing prohibition." If properly worded the jury instructions would not shift the burden of proof to the defendant because the Legislature had merely simplified the proof. Such a procedure was not necessary or even as advantageous to the prosecution, however, as was the Legislature's enactment of the vehicular homicide statute.

The Legislature has gone one step further by making the proof of driving with 0.10 percent of blood alcohol sufficient for a criminal hom-

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73. See discussion in State v. Tanner, 446 So. 2d 370, 373 (La. App. 3d Cir.), rev'd, 457 So. 2d 1172 (La. 1984).

74. 388 So. 2d at 762.

75. 418 So. 2d at 611 n. 1.

76. Indeed, it was clear even before these cases that the prosecution could not use that bootstrap. In an earlier case, also entitled State v. Williams, 354 So. 2d 152 (La. 1977), the court reversed a negligent homicide conviction where the defendant's blood alcohol had been proven to be 0.16 because the trial judge stated that driving while intoxicated "constitutes criminal negligence."

77. La. R.S. 14:98 (1974 & Supp. 1985) provides in pertinent part:

> Operating a vehicle while intoxicated
>
> A. The crime of operating a vehicle while intoxicated is the operating of any motor vehicle, aircraft, watercraft, vessel, or other means of conveyance when:
>
> (1) The operator is under the influence of alcoholic beverages; or
>
> (2) The operator's blood alcohol concentration is 0.10 percent or more by weight based on grams of alcohol per one hundred cubic centimeters of blood; or . . . .

icide conviction if the defendant's action "causes proximately or causes directly" the death.[78] This statute has eliminated not only the need to rely on the mandatory presumption of La. R.S. 32:662 (as did the amendment to La. R.S. 14:98) but also the permissive presumption language of negligent homicide. The statute appears to avoid the constitutional problem, while achieving the same result by lessening what the prosecution must prove and by giving the result a new name—vehicular homicide. Not surprisingly, the defendant in *Taylor* contended the Legislature had brought about the same result that by other means was constitutionally barred. The court disposed of the argument by saying that the statute does not require the proof of negligence, while at the same time not reading the statute to cover all the cases to which it might literally apply. But to do so, the court's decision suggested, first, that it is permissible to find the defendant guilty of a criminal homicide without any mental element and second, that it is possible to construe this statute in a way that makes sense without any mental element.

Can the constitutional contraints imposed by the requirement of proof beyond a reasonable doubt and the limitation of presumptions be reconciled with the general criminal requirements of culpability while still achieving what the legislature has intended, namely greater certainty of conviction in cases involving drunk driving deaths? The court's resolution in *Taylor* is awkward, if not contradictory, but preferable to construing the statute as a strict liability statute. As Justice Calogero observed, the consequence of the case is likely to be confusion. Given what it had to work with, though, any resolution by the court would have been unsatisfactory. If a better solution is to be found, the Legislature will have to find it. But to do so, it should recognize that a great part of the difficulty is attributable to the inadequacies of the negligent homicide statute as drafted almost fifty years ago.

The negligent homicide statute was created due to the difficulty of obtaining convictions from juries reluctant to return manslaughter convictions in cases of criminal negligence. Apparently, like the author of the vehicular homicide statute, the draftsmen of the then recently-created negligent homicide statute thought a statute carrying less stigma would make juries more willing to convict.[79] Juries, however, seem to have continued their unpredictability in negligent homicide cases, even when the driver is intoxicated. If this history had been in mind, it should have suggested to the sponsors of the vehicular homicide statute that creation of a new statute was not necessarily the answer. What was called for was a clarification of the distinction between criminally culpable and non-

78. La. R.S. 14:32.1 (Supp. 1985).
79. See La. R.S. 14:32 comments (1974).

culpable automobile homicides. That would have required reconsideration of the uncertain concept of criminal negligence.

The usual definition of criminal negligence as involving something more than ordinary tort negligence does not convey a sufficiently clear standard.[80] As Professor Jerome Hall has stated, the difference between tort and criminal negligence is not a difference in degree, but a difference in kind.[81] Both Professor Hall and the Model Penal Code[82] distinguish between negligence and recklessness whereas Louisiana has equated gross negligence and recklessness.[83] It would be preferable if the Legislature substituted the term recklessness for that of criminal negligence. The essence of recklessness is the *awareness* of risk that the person consciously disregards. It is distinguishable from negligence, which applies to a person who does not avoid a risk because he is *unaware* of it.

In a case of drunk-driving homicide, it might seem that the defendant would not be reckless because his intoxicated state precludes an awareness of the risk. But the focus should not be on whether the defendant is aware of the particular risks on the road at the time he drives. One who voluntarily becomes intoxicated is aware beforehand of the risks that will follow if he later assumes physical control of an automobile. It might well be constitutionally permissible for a legislator to create a presumption of recklessness which would make the drunken driver responsible for almost any homicide that results.[84] The problem remains one of choosing appropriate statutory language.

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80. In People v. Calvaresi, 188 Colo. 277, 534 P.2d 316 (1975), the Colorado Supreme Court declared that state's manslaughter statute unconstitutional because it could not be distinguished from the less serious offense of criminally negligent homicide.

> A statue which prescribes different degrees of punishment for the same acts committed under like circumstances by persons in like situations is violative of a person's right to equal protection of the laws. . . .
>
> Under the criminal negligence statute, the jury must determine whether the failure to perceive an unjustifiable risk constitutes a gross deviation from the standard of care that a reasonable person would observe in the situtation. The distinction between a gross deviation from, and a wanton and willful disregard of, a standard of care is not sufficiently apparent to be intelligently and uniformly applied. The legislative attempt to distinguish between recklessness, and its purportedly less culpable counterpart, criminal negligence, constitutes a distinction without a sufficiently pragmatic difference.

81. J. Hall, supra note 45, at 128.

82. Model Penal Code § 2.02(2) (Official Draft 1962).

83. The comments to La. R.S. 14:32 (1974) state that criminal negligence "is similar to the terms 'gross negligence or recklessness.'"

84. See *Hammontree*, 605 F.2d at 1380, where the court states: "The second statutory violation—driving while intoxicated—presents a much harder case. . . . Driving in that condition could indicate criminal negligence beyond a reasonable doubt. Whether it does so we need not decide."