Shifting Burdens in Criminal Law: A Burden on Due Process

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Introduction

It is a mark of the adversary system that the accused, entering the courtroom to undergo ordeal by trial, is perceived as cloaked in the presumption of innocence for "all persons shall be assumed, in the absence of evidence, to be freed from blame."[1] Although more accurately described as an assumption[2] of innocence, the term presumption clings, hovering over the prisoner as a "guardian angel,"[3] persisting through every phase of the drama, as the factual evidence unfolds, protecting the accused against conviction on the basis of bias, appearance or speculation.[4] The presumption of innocence does not derive from the probability that the accused is innocent.[5] It has nothing at all to do with probabilities, but functions to further social policy[6]—in this case, to counteract the suspicion raised by the filing of a formal accusation against the accused.[7] So that "a man . . . charged with a crime, . . . is not bound

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1. J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 560 (1898). *See* Pilon v. Bordenkircher, 444 U.S. 1, 2 (1979) (per curiam); Sandstrom v. Montana, 442 U.S. 510, 523 (1979); *In re* Winship, 397 U.S. 358, 362 (1970); Coffin v. United States, 156 U.S. 432, 460 (1895).

2. Ashford & Risinger, *Presumptions, Assumptions and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165 (1969).

3. J. THAYER, *supra* note 1, at 553.

4. *See generally* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 806 (E. Cleary ed. 1972); J. THAYER, *supra* note 1, at 348; 9 J. WIGMORE, EVIDENCE § 2511 (3d ed. 1940).

5. 9 J. WIGMORE, *supra* note 4, at § 2511.

6. C. MCCORMICK, *supra* note 4, at § 336; J. THAYER, *supra* note 1, at 314.

7. "[I]n a criminal case the term [presumption] . . . convey[s] a special and perhaps useful hint . . . in that it cautions the jury to put away from their minds all the suspicion that arises from the arrest, the indictment, and the arraignment, and to reach their conclusion solely from the legal evidence adduced." 9 J. WIGMORE, *supra* note 4 at § 2511.

to prove that he did not but his accuser is bound to prove that he did commit it. The accused stands innocent until he is proven guilty"[8]; until the prosecution has met the onerous burden of proving, by the facts presented and beyond a reasonable doubt,[9] the individual and personal guilt of the defendant of every element of the crime charged.[10] The adversary system of criminal justice does not permit conviction without proof of the traditional elements of crime: act, intent, causation and social harm.

The requirement of proof beyond a reasonable doubt, a corollary of the presumption of innocence, has been deemed indispensible by the Supreme Court of the United States[11] for it "impresses on the trier of fact the necessity of reaching a subjective state of certitude" before condemning a man for the commission of a crime.[12] Although the reasonable doubt standard is less a precise formula than it is a symbol,[13] it satisfies certain imperatives. It offers society assurance that people innocent of crime shall not be convicted; and, although it creates an inevitable margin of error, "our society [has determined] that it is far worse to convict an innocent man than to let a guilty man go free."[14] Second, the reasonable doubt standard protects the individual against the state's considerable resources and its potentially oppressive power to secure the conviction of the essentially powerless defendant.[15] Perhaps most important, the reasonable doubt standard has captured society's belief in the security of its own standards of criminal justice. "[I]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."[16] It is also important in our

8. J. THAYER, *supra* note 1, at 558.

9. "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt *of every fact necessary to constitute the crime with which he is charged." In re* Winship, 397 U.S. 358, 364 (1970) (emphasis in original).

10. Patterson v. New York, 432 U.S. 197, 205 (1976); *See also* C. MCCORMICK, *supra* note 4, at 681-82; 9 J. WIGMORE, *supra* note 4, at § 2497.

11. *In re* Winship, 397 U.S. 358 (1970).

12. *Id.* at 364 (quoting Dorsen & Reznick, *In re Gault and the Future of Juvenile Law,* FAM. L.Q., March 1970, at 1, 26 (1967)).

13. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases,* 86 YALE L.J. 1299, 1307 (1977).

14. 397 U.S. at 372. *See also* Underwood, *supra* note 13, at 1306-07.

15. Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

16. 397 U.S. at 364.

free society that "every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty."[17]

Of course, society bows to competing necessities and must be wary that the zeal to prevent the conviction of the innocent not result in the freeing of too many of the guilty.[18] Where it is impossible for the prosecutor to overcome the presumption of innocence with proof of guilt beyond a reasonable doubt the law creates artifices to substitute for factual evidence. Presumptions shift the burden of proof to the defendant, relieving the prosecution of the burden of proving some element of the crime charged.[19] Crimes are redefined to transform an essential component of the offense into an affirmative defense.[20] Definitions based on assumptions make it possible to convict the accused of some offenses without evidence either that he committed, or that he intended to commit the particular criminal act charged.[21]

Although the presumption of innocence and the concept of proof beyond a reasonable doubt of the defendant's individual and personal guilt can withstand considerable stress, there are limits. Thus it is important to differentiate the devices that are permissible from those that may not be tolerated. For example, the problem of proving the mental state of the accused, the "vicious will" as Blackstone phrased it,[22] has always presented the prosecution with difficulties and, for that reason "[i]nferences and presumptions [became] a staple of our adversary system of fact-finding."[23] For centuries, trial judges instructed juries that an inference of guilty knowledge or blameworthy intention could be drawn from evidence of the performance of a criminal act.[24] The common law idea that "the law presumes that a person intends the ordinary

17. *Id. But see* Judge Learned Hand's comment that "[o]ur procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime." United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923).

18. *See* Patterson v. New York, 432 U.S. 197, 205 (1977).

19. *See* Part I *infra* in which presumptions are defined.

20. *See* Part II *infra* in which affirmative defenses are defined.

21. *See* Part IV *infra* in which felony-murder and accomplice liability are defined.

22. 4 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 21 (1769).

23. County Court of Ulster County v. Allen, 442 U.S. 140, 156 (1979).

24. Barnes v. United States, 412 U.S. 837, 843 (1973).

consequences of his voluntary acts"[25] has been codified by many jurisdictions[26] and seems no more than a reasonable conclusion. Thayer wrote that

> where a person was found standing over a wounded man with a bloody sword in his hand, there is a presumption (or it may be probably inferred) the one stabbed the other; the fact that the man was found with a bloody sword has, in itself, apart from its consequences, no weight; but it tends to determine the question at issue, who stabbed the wounded man.[27]

Thayer's illustration appears to be an inference rather than a presumption; that is, it is a deduction which the jury may draw, but is not required to draw, from the circumstantial evidence. Since it is the jury's responsibility to determine from all the relevant evidence "who did what, where, when, how and with what motive or intent,"[28] such a deduction is not only proper, it is a necessary aspect of the jury's fact-finding function.

But what of the effect of the more inflexible declaration, "when a man voluntarily kills another, without more or stated, it is presumed to be murder?"[29] Can evidence of a killing, (the proved fact) "without more known or stated," trigger the operation of a presumption, thus supplying the malicious intention (the presumed fact)? Would not such an instruction interject a note of the arbitrary into what we understand to be the truth-seeking function of the adversary process of criminal justice?

The trial judge in *Sandstrom v. Montana*[30] instructed the jury that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts."[31] The Supreme Court of the United States reversed Sandstrom's conviction of murder,[32] holding that the instruction violated his right to due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.[33] The Court concluded that the instruction denied the fun-

25. *Id.*

26. CAL. EVID. CODE § 668 (West 1966); N.Y. PENAL LAW § 15.05 (McKinney 1975); TEX. PENAL CODE ANN. § 6.03 (Vernon 1974); WIS. STAT. ANN. § 903.01 (West 1975).

27. J. THAYER, *supra* note 1, at 547-48.

28. K. DAVIS, ADMINISTRATIVE LAW TREATISE 296 (3d ed. 1962).

29. J. THAYER, *supra* note 1, at 327.

30. 442 U.S. 510 (1979).

31. State v. Sandstrom, 176 Mont. 492, 496, 580 P.2d 106, 109 (1978).

32. 442 U.S. at 527.

33. "No State shall . . . deprive any person of life, liberty, or property, without due

damental right of the defendant to the presumption of innocence by relieving the state of the obligation of proving guilt of every element of the crime beyond a reasonable doubt.[34]

The holding of *Sandstrom* calls into question the methods employed to facilitate criminal convictions. It is the purpose of this article to examine those methods. First, it will explore the use of presumptions and affirmative defenses, and the consequent shifting of the burden of proof. A discussion will follow of the substantive law of conspiracy and felony-murder which, by definition, relieves the prosecutor of the burden of proving some components of the criminal offense and imposes vicarious liability on accomplices for acts committed by partners in crime. It is this author's position that any device that allows conviction of a crime where traditional requirements of proof have been relaxed is to be disapproved if such a device effects incursions into what we have come to understand constitutes the defendant's right to due process—in this case, the right to be free from conviction and the consequences of punishment unless the imposition of criminal liability is grounded on a finding, beyond a reasonable doubt, that he is guilty of conduct properly identified as criminal.

I. Presumptions

In *Sandstrom v. Montana,*[35] the Supreme Court rejected the contention that the trial judge's instruction that "the law presumes a person intends the ordinary consequences of his voluntary acts"[36] described a mere "permissive inference"[37] permitting but not mandating the jury to infer intention from act.[38] The Court also rejected the state's argument that the instruction did not shift the burden of persuasion but placed, at most, the burden of producing "some" contrary evidence on the defendant.[39] Given the language of the instruction, the Court reasoned, it offered the jury two pos-

process of law." U.S. CONST. amend. XIV.

34. 442 U.S. at 524.

35. 442 U.S. 510 (1979), *rev'g* State v. Sandstrom, 176 Mont. 492, 580 P.2d 106 (1978).

36. *Id.* at 515.

37. In order to avoid the issue, the courts have interpreted statutory presumptions as permissive inferences. *See, e.g.,* County Court of Ulster County v. Allen, 442 U.S. 140 (1979); *see also* Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity,* 92 HARV. L. REV. 1187 (1979).

38. 442 U.S. at 514-15.

39. *Id.* at 515-16.

sible interpretations. It was either a conclusive presumption, a mandatory "direction . . . to find intent" once the victim's death was shown to be the result of Sandstrom's voluntary act, or it constituted a presumption that could be rebutted by the defendant's proof that he did not possess the requisite intent.[40] Had the jury followed the literal language of the instruction, which had been given without qualification, an essential element of the offense, the defendant's intent, would have been withdrawn from the prosecution's case, and thus removed from the jury's consideration.

Relying on *Morissette v. United States*[41] and *United States v. United States Gypsum Co.*[42] which emphasize the necessity of proving the element of intent in a criminal offense, the Court held that "a conclusive presumption . . . would 'conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime.' . . . [This] would 'invade [the] factfinding function' which in a criminal case the law assigns solely to the jury [because] Sandstrom's jurors could reasonably have concluded that they were directed to find against defendant on the element of intent."[43] The prosecution would thus be relieved of the necessity of proving beyond a reasonable doubt every element of the crime charged. The effect would be identical to imposing what is recognized as strict liability on Sandstrom, that is, liability for the murder without a showing of culpability.

Nor would the instruction have been saved if the *Sandstrom* jury had viewed the presumption as rebuttable, rather than conclusive. Proof by the state of the killing "without more known or stated" would have shifted the burden of persuasion to the defendant, requiring him to show by some quantum of proof, that he lacked the mental state required for murder. Such a result defies the constitutional mandate that "a State must prove every ingredient of an offense beyond a reasonable doubt, and . . . may not shift the burden of proof to the defendant."[44]

The Court's conclusion appears to be no more than an obvious statement about the law as it is commonly understood. Where the

40. *Id.* at 515.
41. 342 U.S. 246 (1952).
42. 438 U.S. 422 (1978).
43. 442 U.S. at 523 (quoting in part, *In re* Winship, 397 U.S. 358, 364 (1970)).
44. *Id.* at 524 (quoting Patterson v. New York, 432 U.S. 197, 215 (1977)).

crime charged is the traditional *mala in se,* the Court will not tolerate shifting the burden of proof to the defendant to disprove the essential element of *mens rea* or criminal intent. "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."[45]

If Montana attempted to define the crime of felonious homicide by statute, as an act causing the death of a human being, thus allowing the prosecution to make out a prima facie case without proving intent or some equivalent, the statute would not provide a sufficient basis for the determination of guilt to permit the imposition of punishment. It would also be impermissible to shift the burden to the defendant to prove that he had not harbored the requisite *mens rea*[46]—for example that the act was not a first de-

45. Morissette v. United States, 342 U.S. 246, 250 (1952).

46. For a general discussion of *mens rea,* see MODEL PENAL CODE § 2.02 (Prop. Official Draft, 1962):

> (1) *Minimum Requirements of Culpability.* Except as provided in Section 2.05, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.
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> (2) *Kinds of Culpability Defined.*
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> (a) *Purposely.*
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> A person acts purposely with respect to a material element of an offense when:
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> (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
>
> (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.
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> (b) *Knowingly.*
>
> A person acts knowingly with respect to a material element of an offense when:
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> (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
>
> (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.
>
> (c) *Recklessly.*
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> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disre-

gree felony, committed purposely, a second degree felony, committed knowingly, a third degree felony, committed recklessly, a fourth degree felony, committed negligently.[47]

A presumption isolates one fact from the totality of evidence and allows the jury to draw a conclusion as to the existence of an ultimate fact—a fact which constitutes an element of the crime charged[48]—from the prosecutor's presentation of that basic fact. As the Court indicated in *Sandstrom*, there are two kinds of presumptions—conclusive and rebuttable.[49] A conclusive presumption is irrebuttable. It establishes an inflexible relationship between fact A, the basic, evidentiary fact and fact B, the presumed fact in issue. An irrebuttable presumption is "a categorical proposition, or an express rule of law."[50] It "is not really a presumption at all, but rather is a rule of substantive law."[51]

Although the criminal law is intolerant of conclusive presumptions and will not allow proof of fact *A*, the criminal act, to result in a finding of fact *B*, the criminal intent, statutes imposing strict liability[52] achieve the same effect as a matter of substantive law. These are regulatory statutes which require no showing of personal

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gard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

(d) *Negligently.*

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

47. But that, of course, does not end the inquiry. The subtleties of the element of *mens rea* can be characterized in a fashion that permits shifting the burden of proof to the defendant to show that his state of mind negated the essential mental element required for the crime. The discussion of affirmative defenses will explore this possibility. *See* Part II *infra.*

48. United States v. Gainey, 380 U.S. 63 (1965), upheld a statute providing a presumption that the defendant operated a distillery (the ultimate fact) from evidence of his presence at the location (the basic evidentiary fact); *see generally* 9 J. WIGMORE, *supra* note 4, at § 2491; J. THAYER, *supra* note 1, at 314.

49. 442 U.S. at 521.

50. J. THAYER, *supra* note 1, at 545.

51. G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE, § 16, at 50 (1978).

52. Harsh though the result may appear "where unconsciousness of wrongdoing be totally wanting" the Court has emphasized the justice of placing "the burden of acting at hazard upon a person otherwise innocent but standing in a responsible relation to a public danger." United States v. Dotterweich, 320 U.S. 277, 281 (1943).

guilt, and "depend on no mental element but consist only of forbidden acts or omissions."[53] For example, strict liability is imposed on sellers of dangerous drugs,[54] perpetrators of air pollution,[55] purveyors of narcotics,[56] possessors of unregistered firearms,[57] drunk drivers[58] and seducers of underage females.[59]

A rebuttable presumption, sometimes called a permissible inference in criminal cases, is stronger than an inference. An inference is simply a deduction of one fact from evidence of another fact or group of facts.[60] A rebuttable presumption is "a conditional proposition . . . liable to be overcome by evidence on the other side."[61] It is created by legislation[62] or by the court's instruction,

53. United States v. Morissette, 342 U.S. 246, 253 (1952).

54. United States v. Dotterweich 320 U.S. 277 (1943); United States v. Balint, 258 U.S. 250 (1922).

55. State v. Arizona Mines Supply Co., 107 Ariz. 199, 484 P.2d 619 (1971).

56. United States v. Behrman, 258 U.S. 280 (1922).

57. United States v. Freed, 401 U.S. 601 (1971).

58. CAL. PENAL CODE § 192 (West 1970); N.Y. VEH. & TRAF. LAW § 1194 (McKinney 1970); TEX. TRAF. REG. CODE ANN. tit. 116, § 6701(l)-1 (Vernon 1977).

59. Regina v. Prince, L.R. 2 Cr. Cas. Res. 154 (1874), sets forth the traditional view that even a reasonable mistake as to the age of the minor is no defense. *See also* State v. Superior Court, 104 Ariz. 440, 454 P.2d 982 (1969); People v. Doyle, 16 Mich. App. 242, 167 N.W.2d 907 (1969). Chief Justice Traynor articulated the California rule that lack of scienter is a defense to a charge of statutory rape. People v. Hernandez, 61 Cal. 2d 529 (1964).

Furthermore, strict liability may also be imposed vicariously on someone who not only lacks *mens rea*, but has not performed the *actus reus*—the employer of the bartender who sells a drink to an already inebriated customer, Commonwealth v. Koczwara 397 Pa. 575, 155 A.2d 825 (1969); the general manager of a drug company which introduces misbranded or adulterated drugs into interstate commerce, United States v. Park, 421 U.S. 658 (1975). In *Park*, the chief executive officer of Acme Markets was convicted of violating the Federal Food Drug and Cosmetic Act under an instruction that he "held a position of authority and responsibility in the business . . . [and] a responsible relation to the situation." *Id.* at 665. A sentence of $50 fine on each count was imposed on Park. Although the statute required no awareness of wrongdoing, the circumstances did show Park's knowledge of the misconduct charged.

Where the penalties are severe and conviction imposes the stigma associated with crime "[i]t would be unthinkable to impose vicarious criminal responsibility in cases involving true crimes. . . . A man's liberty cannot rest on so frail a reed as whether his employee will commit a mistake . . ." Commonwealth v. Koczwara, 397 Pa. 575, 585-86, 155 A.2d 825, 830.

60. CAL. EVID. CODE § 600(b) (West 1966).

61. J. THAYER, *supra* note 1, at 545.

62. Thus, statutes have provided that a person is guilty of operating a distillery if he is present at the location. *See* United States v. Gainey, 380 U.S. 63 (1965); United States v. Romano, 382 U.S. 136 (1965). *See also* Barnes v. United States, 412 U.S. 837 (1973) (a person possessing recently stolen mail knows it is stolen); Turner v. United States, 396 U.S. 398 (1970) (a person possessing cocaine and heroin knows these drugs to be imported); Leary v. United States, 395 U.S. 6 (1969) (a person possessing marijuana knows it to be imported); Yee Hem v. United States, 268 U.S. 178 (1925) (a person possessing opium

and may be founded on strong social policy[63] having nothing at all to do with probabilities. On the other hand, it may reflect "what history, common sense, and experience tell us about the relations between events in our society."[64]

A presumption requires the party against whom it operates to produce evidence to rebut it. It may have as many as eight different results.[65] Where there is no evidence contradicting either the basic fact or the presumed fact, the party who has proved the basic fact is entitled to an instruction that the presumed fact has been proved.[66] In a civil case, that party would get a directed verdict. In a criminal case, of course, a verdict may never be directed against the accused.[67]

According to the Thayer "bursting bubble" theory, a presumption imposes the burden of going forward with the evidence on the party against whom it operates, and the presumption is destroyed as soon as it is rebutted by contradictory evidence—that is, as soon as evidence to support a finding of the non-existence of the presumed fact is introduced.[68] Once the presumption is overcome, the existence of the presumed fact, the fact in issue, is "determined exactly as if no presumption had ever been applicable."[69] The trier of fact must then weigh the facts creating the presumption against the contrary evidence.

Thayer's theory, approved by Wigmore[70] and followed in the Federal Rules of Evidence[71] and the Model Code of Evidence,[72] has been widely criticized. Professor Morgan has argued that "[i]f there is good reason for putting on one party or the other the burden of going forward with the evidence . . . it ought to be good

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knows it has been imported unless the defendent explains it).

63. *See* C. McCORMICK, *supra* note 4, at 806-11; J. THAYER, *supra* note 1, at 314.

64. County Court of Ulster County v. Allen, 442 U.S. 140, 172 (1979).

65. Laughlin, *In Support of The Thayer Theory of Presumptions*, 52 MICH. L. REV. 195, 196-207 (1953).

66. *See* C. McCORMICK, *supra* note 4, at 832-33.

67. The basic Anglo-American policy of proof beyond a reasonable doubt of all facts necessary to establish a defendant's guilt precludes directing a verdict against an accused. United Bhd. of Carpenters v. United States, 330 U.S. 395, 408 (1947); United States v. Manuszak, 234 F.2d 421 (3d Cir. 1956).

68. *See generally* J. THAYER, *supra* note 1, at ch. 8.

69. MODEL CODE OF EVIDENCE rule 704(2) (1942).

70. 9 J. WIGMORE, *supra* note 4, at § 2491.

71. FED. R. EVID. 303(b).

72. MODEL CODE OF EVIDENCE rule 704(2) (1942).

enough to control a finding when the mind of the trier is in equilibrium."[73] According to the Morgan theory,[74] a presumption imposes not only the burden of going forward with the evidence, but also the burden of persuasion (also called the burden of proof) on the party against whom it operates. The presumption will continue to operate until that party introduces evidence which persuades the jury that the non-existence of the presumption is more likely than not. In other words, if the party against whom the presumption operates introduces evidence of the non-existence of the presumed fact, the jury must be instructed that the presumption will not be overcome until there is evidence that the non-existence of the presumed fact is more probable than its existence.[75]

Because the use of presumptions in criminal cases presents an obvious conflict with the reasonable doubt standard of proof required for criminal convictions, the Court has been faced with the

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73. E. MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 81 n.68 (1956).

74. *See generally* Morgan, *Further Observations on Presumptions,* 16 S. CAL. L. REV. 245 (1943); Morgan, *Presumptions,* 12 WASH. L. REV. 255 (1937).

75. CAL. EVID. CODE §§ 600, 601, 604, 607, 668 (West 1966) includes both the Thayer and Morgan presumptions. The code classifies two kinds of presumptions. Those based on social policy which may or may not have a basis in likelihood, have a Morgan effect in that they operate to fix the burden of production. Those presumptions established "merely to facilitate the determination of the particular action [which] are not expressions of policy but expressions of experience," *id.* § 603 (Comment Law Revision Commission), function as Thayer presumptions—to shift only the burden of production. For example, the presumption that a ceremonial marriage is valid, *id.* § 663; that official duty has been regularly performed, *id.* § 664; that a person not heard of in seven years is dead, *id.* § 667, affect the burden of persuasion. The presumption that things which a person possesses are owned by him, *id.* § 637; and that a letter correctly addressed and properly mailed has been received, *id.* § 641, affect the burden of going forward with the evidence.

The Code provides that a presumption affecting the burden of proof in a criminal action will not establish any fact essential to the defendant's guilt unless it has been proved beyond a reasonable doubt. The effect is that the defendant need raise only a reasonable doubt as to the existence of the presumed fact, *id.* § 607. A presumption that affects only the burden of producing evidence does not require the defendant to assume the burden of proof. The use of Thayer presumptions, requiring only the production of evidence by the defendant, has been touted as a solution to constitutional problems inherent in using presumptions in a system where proof must be "beyond a reasonable doubt," *see* notes 76-78 and accompanying text *infra.* Professors Christie and Pye suggest that practical reforms (broadened discovery by the defendant, adequate resources for investigation, improved communication with the prosecutor) address, more realistically, the problems of the criminal defendant presented with the task of rebutting a statutory presumption, than solutions dependent upon "artificial suggestions . . . to restrict the use of presumptions." Christie & Pye, *Presumptions and Assumptions in the Criminal Law: Another View,* 1970 DUKE L. J. 919, 942 (1970).

necessity of determining the limits of their constitutional permissibility. Several tests have been used to sustain the use of presumptions in criminal cases, among them the "comparative convenience" test, which balances "convenience of proof and opportunity for knowledge,"[76] the "greater includes the lesser"[77] theory and the "rational connection" test.[78]

To sustain a presumption that shifts the burden of persuasion in a criminal case, the Supreme Court requires a rational connection between fact *A* and *B*. As the Court stated in *Tot v. United States*[79]:

> [A] statutory presumption cannot be sustained . . . if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience . . . . [W]here the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts.[80]

The Court in *Tot* struck down, as irrational and arbitrary, a provision of the Federal Firearms Act[81] making possession of a firearm or ammunition by an ex-convict or a fugitive from justice "presumptive evidence that such firearm or ammunition was shipped or transported or received . . . by such person in violation of this Act."[82]

The Court in *Tot* did not explore the implications of the rational connection test for the reasonable doubt standard of proof. Nor was the connection explicitly examined in *Leary v. United States*,[83] where the Court found it impermissible to presume from the defendants' possession of marijuana a knowledge of its having been imported.[84] Having held that this presumption failed *Tot*'s more-likely-than-not test, the Court was not faced with the necessity of examining the test in light of the reasonable doubt

76. Morrison v. California, 291 U.S. 82, 91 (1934). *See generally* C. McCormick, *supra* note 4, at § 343.

77. Ferry v. Ramsey, 277 U.S. 88 (1928).

78. *See, e.g.*, Tot v. United States, 319 U.S. 463 (1943).

79. 319 U.S. 463 (1943).

80. *Id.* at 467-68.

81. Act of June 30, 1938, ch. 850, § 2(f), 52 Stat. 1250 (repealed 1968).

82. Receipt of a firearm in interstate commerce, a requirement for federal jurisdiction, became an element of the offense under the federal statute, *id.*

83. 395 U.S. 6 (1969).

84. *Id.* at 52.

standard.[85]

In *Turner* v. *United States*,[86] however, the Court, on the basis of facts outside the record, announced that there was "no reasonable doubt that . . . heroin is not produced in this country and that therefore the heroin Turner had was smuggled heroin . . . ."[87] Finding that the defendant "doubtless knew that the heroin he had came from abroad,"[88] the Court reasoned that " '[c]ommon sense' . . . tells us that those who traffic in heroin will inevitably become aware that the product they deal in is smuggled, unless they practice a studied ignorance to which they are not entitled."[89] The connection between the presumption operating in that case and the reasonable doubt standard, however, remained unexplored.[90]

The Court finally acknowledged the ambiguous relationship between standards of "reasonable doubt," "more-likely-than-not" and "rational connection" in *Barnes v. United States*.[91] In that case, the Court concluded that the common-law inference of guilty knowledge from the unexplained[92] possession of recently stolen goods may under some circumstances satisfy due process standards.[93] Specifically, the Court held that "if a statutory inference submitted to the jury as sufficient to support conviction satisfies the reasonable-doubt standard (that is, the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt) as well as the more-

85. *Id.* at 36 n.64.

86. 396 U.S. 398 (1970).

87. *Id.* at 408.

88. *Id.* at 416.

89. *Id.* at 417 (citations omitted).

The presumptions in *Leary* and *Turner* (importation of marijuana, cocaine and heroin from proof of their possession) provided the basis for federal jurisdiction. Professor Nesson suggests that the matter of jurisdiction be treated as a legislative rather than an adjudicative fact, that is, one not requiring evidentiary support. Nesson, *supra* note 37, at 1218 n.109. *See also* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 15.03 (1958).

90. *But see* the powerful dissent by Justices Black and Douglas: "The fundamental right of the defendant to be presumed innocent is swept away to precisely the extent judges and juries rely upon the . . . presumptions of guilt found in [the statute]. . . . It would be a senseless and stupid thing for the Constitution to take all these precautions to protect the accused from governmental abuses if the Government could by some sleight-of-hand trick with presumptions make nullities of those precautions." 396 U.S. at 430.

91. 412 U.S. 837 (1973).

92. The requirement of explanation raises the question of who must do the explaining. *See* Part II *infra.*

93. 412 U.S. at 843.

likely-than-not standard, then it clearly accords with due process."[94] Although Justice Brennan protested that actual evidence of knowledge may have been insufficient to establish Barnes' guilt beyond a reasonable doubt,[95] the inference itself appeared to be no more than a deduction drawn from the circumstantial evidence.

Sanctioning a similar leap of proof, the Court, in the earlier case of *United States v. Gainey*[96] upheld a federal statute[97] which allowed proof of the defendant's presence at a distillery to support the conclusion that he was carrying on its business. The trial court delivered contradictory instructions, cautioning the jury that presence of an innocent man at a distillery did not of itself make him guilty of operating the still, but also instructing that proof of the defendant's presence "shall be deemed sufficient [evidence] to authorize conviction."[98] The jury was thus empowered to ignore the circumstantial evidence and reach the guilty verdict on the basis of nothing more than evidence of presence. The Fifth Circuit in an opinion by Judge Minor Wisdom, struck down the statute and conviction,[99] and the United States Supreme Court reversed,[100] finding the inference to be permissive rather than mandatory and finding a rational connection between the facts proved and the ultimate fact presumed:

> Congress was undoubtedly aware that manufacturers of illegal liquor are notorious for the deftness with which they locate arcane spots for plying their trade. Legislative recognition of the implications of seclusion only confirms what the folklore teaches—that strangers to the illegal business rarely penetrate the curtain of secrecy.[101]

Although *Gainey* presented a convincing circumstantial case, the Court failed to consider that the jury may have found Gainey guilty on the basis of the presumption alone, thus casting doubt on the conviction.[102] Further, in assuming that the rationality of the

94. *Id.*
95. *Id.* at 853-54. (Brennan & Marshall, JJ., dissenting).
96. 380 U.S. 63 (1965).
97. 26 U.S.C. § 5601(b)(1)-(2) (amended 1976).
98. 380 U.S. at 70.
99. Barrett v. United States, 322 F.2d 292 (5th Cir. 1963).
100. United States v. Gainey, 380 U.S. 63 (1965).
101. *Id.* at 67-68.
102. This consideration might have merited a reversal. Where the trial court's instruction makes it possible for the jury to find the defendant guilty by two routes, it cannot, of course, be determined which route the jury pursued. Therefore, the conviction must be re-

statute's presumption justified its operation, the Court was really upholding the conviction on the ground that the defendant was, more likely than not, guilty of the crime because he was present at the scene. The Court's approval of the presumption thus transformed presence at a still, an essentially equivocal act, into a criminal offense.

Nor does it resolve the constitutional problem to provide, in the words of *Gainey,* that "the defendant by the evidence in the case and by proven facts and circumstances [may explain] such presence to the satisfaction of the jury."[103] Such an instruction invites the jury to conclude that the defendant is guilty if he fails to provide an explanation of his conduct. This would require the defendant to come forth with evidence in his defense, although the prosecution had not sustained its burden of proving the conduct that constitutes the offense. Shifting the burden to the defendant in this fashion not only conflicts with the presumption of innocence but raises Fifth Amendment problems.[104] As Chief Judge Breitel in *People v. Patterson*[105] stated:

> It would be an abuse of affirmative defenses, as it would be of presumptions in the criminal law, if the purpose or effect were to unhinge the procedural presumption of innocence. . . . Indeed, a by-product of such abuse might well be also to undermine the privilege against self-incrimination by in effect forcing a defendant in a criminal action to testify in his own behalf.[106]

The statute considered in *Yee Hem v. United States*[107] explicitly imposed the burden of proof on the accused to rebut the presumption that the opium found in his possession was imported.[108] The Court dismissed the idea that the statute compelled the accused to bear witness against himself:

> It leaves the accused entirely free to testify or not as he chooses. If the accused happens to be the only repository of the facts nec-

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versed if one of those routes is constitutionally impermissible. This is the "two routes rule." *See* Stromberg v. California, 283 U.S. 359 (1931).

103. 380 U.S. at 70.

104. "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

105. 39 N.Y.2d 288, 347 N.E.2d 898 (1976).

106. *Id.* at 305, 347 N.E.2d at 909 (Breitel, C.J., concurring).

107. 268 U.S. 178 (1925).

108. *Id.* at 182. The presumption of importation from possession, made an element of the offense, had as its purpose the provision of jurisdiction in federal court.

> essary to negative the presumption arising from his possession, that is a misfortune . . . inherent in the case. The same situation might present itself if there were no statutory presumption and a *prima facie* case . . . were made by the evidence. The necessity of an explanation by the accused would be quite as compelling in that case as in this; but the constraint upon him to give testimony would arise there, as it arises here, simply from the force of circumstances and not from any form of compulsion forbidden by the Constitution.[109]

Of course, the prosecution's proof of the fact in issue—knowledge of importation—relied on the presumption that proof of the evidentiary fact, possession alone, "shall be deemed sufficient evidence to authorize conviction."[110] Further, the Court did not require that the connection between the two be established beyond a reasonable doubt but pronounced itself satisfied "that the inference of one fact from proof of another shall not be so unreasonable as to be [a] purely arbitrary mandate."[111] Thus it was not the prosecution's proof of a prima facie case of guilt beyond a reasonable doubt that confronted the defendant with the necessity of choosing between the strategic alternatives of either offering a defense or relying on the privilege against self-incrimination. It was, rather, "the creation of the presumption by the statute that compelled the accused to bear witness against himself."[112]

The New York statute[113] in *County Court of Ulster County v.*

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109. *Id.* at 185.

110. Act of February 9, 1909, ch. 100, 35 Stat. 614, *as amended by* Act of January 17, 1914, ch. 9, 38 Stat. 275.

111. 268 U.S. at 183.

112. Professor Nesson argues that an instruction to the jury that the defendant may explain his presence presents the jury with an inference of guilt based on the defendant's silence thus solemnizing "the silence of the accused into evidence against him," in violation of Griffin v. California, 380 U.S. 609, 614-15 (1965). Nesson, *supra* note 37, at 1211.

113. N.Y. PENAL LAW § 265.15(3) (McKinney 1980):

> The presence in an automobile, other than a stolen one or a public omnibus, of any firearm, defaced firearm, firearm silencer, bomb, bombshell, gravity knife, switchblade knife, dagger, dirk, stilleto, billy, black jack, metal knuckles, sandbag, sandclub or slingshot is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon, instrument or appliance is found, except under the following circumstances:
>
> (a) if such weapon, instrument or appliance is found upon the person of one of the occupants therein;
>
> (b) if such weapon, instrument or appliance is found in an automobile which is being operated for hire by a duly licensed driver in the due, lawful and proper pursuit of his trade, then such presumption shall not apply to the driver; or

Allen,[114] the most recent in a line of cases[115] examining presumptions, made presence in an automobile, with certain exceptions "presumptive evidence"[116] of the possession of certain delineated weapons.[117] The case involved three adult males and a sixteen year-old girl who were jointly tried for possession of two large caliber handguns found near "Jane Doe's" handbag in the automobile in which all four were riding. The trial court gave the usual instruction on the presumption of innocence, that it exists until overcome by the jury's belief, beyond a reasonable doubt, in the defendants' guilt. Then the judge directed the jury's attention to the totality of evidence presented by the prosecution—the eyewitness testimony as well as "the reasonable presumption of illegal possession."[118]

In examining the evidentiary device created by the statute, the United States Supreme Court articulated the traditional test for validity and emphasized that "the device must not undermine the fact finder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt."[119] The Court concluded that the New York statute created a permissible rather than a mandatory presumption[120] and that the jury had thus had the opportunity of rejecting it. It functioned, accord-

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(c) if the weapon so found is a pistol or revolver and one of the occupants, not present under duress, has in his possession a valid license to have and carry concealed the same.

In addition to the three exceptions delineated in § 265.15(3)(a)-(c) as well as the stolen-vehicle and public-omnibus exception in § 265.15(3) itself, § 265.20 contains various exceptions that apply when weapons are present in an automobile pursuant to certain military, law enforcement, recreational and commercial endeavors.

114. 442 U.S. 140 (1979).

115. Barnes v. United States, 412 U.S. 837 (1973); Turner v. United States, 396 U.S. 398 (1970); United States v. Romano, 382 U.S. 136 (1965); United States v. Gainey, 380 U.S. 63 (1965); Tot v. United States, 319 U.S. 463 (1943).

116. N.Y. PENAL LAW § 265.15(3) (McKinney 1980).

117. *See id.* §§ 265.15(3)(a)-(c), 265.20.

118. 442 U.S. at 160-61 n.19. The trial court was affirmed in a memorandum decision by the New York Supreme Court, Appellate Division. People v. Lemmons, 49 A.D.2d 639, 370 N.Y.S.2d 243 (1975). On appeal, the New York Court of Appeals affirmed, 40 N.Y.S.2d 505, 354 N.E.2d 836 (1976).

The defendants then sought a writ of habeas corpus which was granted by the United States District Court for the Southern District. This was affirmed by the Second Circuit, which found the New York statute "unconstitutional on its face." 568 F.2d 998, 1009 (2d Cir. 1977).

119. 442 U.S. at 156.

120. *Id.* at 167.

ing to the trial court's instructions, as an item of evidence susceptible to contradiction by other evidence, rather than as "the sole evidence of an element of the offense."[121]

Once again applying the "rational connection" test, the Court found the presumption of possession to be entirely rational[122] given the circumstantial evidence in the case. The occupants of the Allen car were not hitchhikers; the handguns were within view of all and not likely to be the sole property of any one.[123] Finding that the presumed fact was "more likely than not to flow" from the basic fact, the Court stated, "[t]here is no more reason to require a permissive statutory presumption to meet a reasonable-doubt standard . . . than there is to require that degree of probative force for other relevant evidence."[124]

If the Court's view of the presumption as applied in *Allen* were correct, there would be no more reason to require it to satisfy a "more-likely-than-not" test than there is to require that degree of probative force for other relevant evidence for "[it was] not the sole and sufficient basis for a finding of guilt."[125] According to the trial court's instructions, presence became simply one element to be weighed as it would be weighed in the absence of a statute. Thus it carried no more probative value than Jane Doe's handbag, the length of the gun or the clarity of the window pane through which the officer looked.

The trial court did not, however, leave it at that. The instruction on the statutory presumption making presence presumptive evidence of unlawful possession informed the jury that "upon proof of the presence of the . . . gun and the . . . weapons, you may infer and draw conclusions that such prohibited weapon was

121. *Id.* at 166.

122. *Id.* Actually, the New York Court of Appeals, 40 N.Y.2d 505, 354 N.E.2d 836 (1976), in examining the history of the statute, acknowledged that possession could not be established unless the weapon was within the reach and control of the accused and available for use. Problems had arisen when revolvers were hidden in trunks, glove compartments, under seats and all occupants were, therefore, acquitted of the crime of possession. Legislation making presence of a firearm presumptive evidence of possession by all occupants "required the occupants . . . to explain the presence of the firearm." The statute, in other words, depended for its justification on the defendants' superior access to the information. The U.S. Court of Appeals for the Second Circuit found this explanation insufficient to uphold the statute. Allen v. County Court of Ulster County, 568 F.2d 998 (2d Cir. 1977).

123. 442 U.S. at 163.

124. *Id.* at 167.

125. *Id.*

possessed by each of the defendants who occupied the automobile."[126] Thus, the court isolated the presumption from the array of circumstantial evidence and permitted a finding of guilt from proof of mere presence. The Supreme Court, in upholding Allen's conviction, failed to acknowledge the possibility that it resulted solely from the operation of the presumption. As a result, the error of *Gainey* was repeated.

Moreover, the trial court's assurance that "[t]he presumption . . . is effective only so long as there is no substantial evidence contra indicating the conclusion flowing from the presumption, and the presumption is said to disappear when such contradictory evidence is adduced,"[127] does not address the problem of burden-shifting. Ordinarily, in proving a case of illegal possession by every one of the car's occupants, the prosecution would have to rule out other explanations—that the gun had not been found on the person of one occupant, that the driver was not a licensed driver of a car for hire, or that a single occupant had a valid license to carry a pistol or revolver.[128] By providing for these defenses to overcome the presumption, the statute appears to require the defendant to bear the burden of proving facts that traditionally belong within the prosecutor's prima facie case.

Some would argue that it is the prerogative of the legislature to provide that presence in a car where a firearm is found constitutes a criminal act. Since the legislature is not required to provide for any defenses, so the theory goes, the legislature can determine the rules for the proof of any defenses gratuitously defined.[129]

This reasoning, sometimes referred to as the "greater includes the lesser" test, was first relied upon in *Ferry v. Ramsey*.[130] The statute[131] in issue in that case made bank directors personally liable for losses to depositors for deposits made while the bank was insolvent, if the directors assented to the deposits with knowledge of insolvency. Proof that the bank was insolvent when the deposits were made created a presumption that the directors knew of the

126. *Id.* at 161 n.20 (quoting from the trial court transcript at 743).

127. *Id.*

128. N.Y. PENAL LAW § 265.15(3)(a)-(c) (McKinney 1980).

129. A gratuitous defense is, by definition, one that the legislature is under no obligation to provide. Professor Underwood argues against singling out gratuitous defenses for special treatment. Underwood, *supra* note 13, at 1323.

130. 277 U.S. 88 (1928).

131. REV. STAT. KAN., §§ 9-163-164 (1923) (repealed 1947); *see* 277 U.S. at 94.

insolvency. Because the legislature could make directors liable to depositors for every deposit accepted after the bank became insolvent, reasoned the Court, it could create the presumption of knowledge from insolvency.[132] In affirming the judgment, Justice Holmes held, "[t]he statute in short, imposed a liability that was less than might have been imposed, and that being so, the thing to be considered is the result reached, not the possibly inartificial or clumsy way of reaching it."[133]

Critics of the "greater includes the lesser" test argue that it is not what the legislature can do but what it has done that is crucial. Justice White, rejecting the inference of possession, custody and control drawn from presence at a still in *United States v. Romano*,[134] offered the reminder that "[t]he crime remains possession, not presence, and, with all due deference to the judgment of Congress, the former may not constitutionally be inferred from the latter."[135]

One solution to the problem, as posed by Justice White, is that offered by the Model Penal Code. The Model Penal Code requires the jury to find the presumed fact beyond a reasonable doubt but permits the jury to "regard the facts giving rise to the presumption as sufficient evidence of the presumed fact."[136] This would allow a conviction of possession as long as the "crime" of presence is proved beyond a reasonable doubt.[137]

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132. 277 U.S. at 94.

133. *Id.*

134. 382 U.S. 136 (1965).

135. *Id.* at 144. As shall be shown in Part II *infra*, however, the "greater includes the lesser" test may have acquired new vitality in the holding of Patterson v. New York, 432 U.S. 197 (1977), which sustained the practice of shifting the burden to the defendant to prove an affirmative defense.

136. MODEL PENAL CODE § 1.12(5)(b) (Prop. Official Draft, 1962).

137. California has opted for a similar solution. The California solution requiring the facts giving rise to the presumption be established beyond a reasonable doubt, means that the defendant "need only raise reasonable doubt as to the existence of the presumed fact." CAL. EVID. CODE § 607 (West 1966). The presumption created by the provision of the Dangerous Weapons Control Law making possession of a firearm whose marks of identification have been tampered with prima facie evidence that tampering was done by the possessor merely requires the possessor "to go forward with evidence to the extent of raising a reasonable doubt that he tampered with the identification marks." People v. Scott, 24 Cal. 2d 774, 783, 151 P.2d 517, 521 (1944). Unless the judge instructs that the statutory presumption has no more effect than any ordinary inference that may be drawn from the circumstantial evidence, the presumption would appear to place additional weight on the fact of the defendant's possession.

Since statutes continue to provide that presumptions of criminal activity may be drawn from evidence of innocent activity, it is the responsibility of the trial court to insure that the presumption does not relieve the prosecutor of the necessity of proving all elements of the crime. It should be made clear to the trier of fact that the defendant's guilt of criminal activity cannot be predicated on anything less than proof beyond a reasonable doubt of the conduct defined as criminal. Therefore, proof, by whatever standard, of activity itself innocent—that is, proof of the basic evidentiary fact—can have no more probative force than proof of any other item of circumstantial evidence. The jury must be instructed that a statutory presumption is to be regarded as a mere inference and not as additional independent proof of guilt. Furthermore, an instruction to the jury that the presumption's existence is vulnerable to contrary evidence should make it clear that it is not the defendant's obligation to offer explanations, either by his own testimony or by the production of other evidence. The jury may not be permitted to indulge in an inference of the defendant's guilt from his failure to offer proof of his innocence, but must be cautioned that it is the prosecutor's obligation to present proof beyond a reasonable doubt before there may be a conviction of the crime charged.

II. Affirmative Defenses

Affirmative defenses, which impose the burden of persuasion on the defendant, are sometimes defined by that fact, that is, an affirmative defense is that circumstance or set of circumstances in a criminal case, which places the burden of persuasion on the defendant. Such a definition is, however, no more illuminating than the statement that a fact is an essential element of the crime charged if the burden of proving it is allocated to the prosecutor. It is the result of an affirmative defense, and not its essence, that the burden of proof is imposed on the defendant.[138] It does not appear to be less problematical, however, to characterize an affirmative defense as a fact or set of facts sufficiently detached from the definition of the crime that it does not constitute a central essential element. Elements of crimes and facts constituting defenses are intimately implicated with each other, occupying, as they do, the same arena. A fact defined as an essential element of a crime in

138. *See* C. McCormick, *supra* note 4, at § 346.

one jurisdiction can become an affirmative defense in another. Since the function of an affirmative defense is identical to the effect of a rebuttable presumption, in any case raising the question of whether or not the prosecution has been relieved of the burden of satisfying the reasonable doubt standard, the outcome may depend on the language employed.[139] That is precisely the lesson offered by a comparison of *Mullaney v. Wilbur*[140] with *Patterson v. New York.*[141]

In the murder trial of Stillman Wilbur,[142] the trial court, following Maine's practice, instructed the jury that " 'malice aforethought is an essential and indispensible element of the crime of murder,' . . . without which the homicide would be manslaughter."[143] The court emphasized that "malice aforethought and heat of passion on sudden provocation are two inconsistent things"[144] and further instructed that once the prosecution established an intentional and unlawful homicide, "malice was to be conclusively implied"[145] and the burden of proof would shift to the defendant to prove, by a "fair preponderance of the evidence that he acted in the heat of passion on sudden provocation."[146] In reversing Wilbur's conviction for murder, the United States Supreme Court held unanimously that the instruction violated the due process clause of the Fourteenth Amendment[147] because it relieved the prosecution of the burden of proving every element of the crime charged. Since malice was an essential element of the crime charged, and since it could not exist in a state of mind characterized by heat of passion on sudden provocation, the prosecution's burden included proving, "beyond a reasonable doubt, the absence of heat of passion on sudden provocation."[148]

Wilbur depended for its holding on a reading of *In re Win-*

139. *See* Patterson v. New York, 432 U.S. 197 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975).

140. 421 U.S. 684 (1975).

141. 432 U.S. 197 (1977).

142. 421 U.S. at 685.

143. *Id.* at 686.

144. *Id.* (citation omitted).

145. *Id.*

146. *Id.*

147. "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

148. 421 U.S. at 704.

ship[149] that required the prosecution to prove beyond a reasonable doubt not only all the facts necessary to define the crime charged but also the non-existence of every fact constituting an excuse or justification—that is, every detail necessary for the imposition of criminal liability.[150] Quoting *Winship,* the Court emphasized the defendant's critical interests requiring proof of guilt beyond a reasonable doubt—"the possibility that he may lose his liberty upon conviction and . . . the certainty that he would be stigmatized."[151]

Wilbur appeared to have dire implications for the survival of affirmative defenses. If, for example, a murderous intention cannot coexist in the mind of the accused along with the belief that he is in danger of immediate death or great bodily injury from an enemy, real or hallucinatory, then the prosecutor should logically be required to prove the absence of the affirmative defenses of self-defense,[152] duress,[153] necessity[154] and insanity,[155] on the ground

149. 397 U.S. 358 (1970).

150. Professors Jeffries and Stephan characterize this as the procedural interpretation of *Winship* which they consider "potentially pernicious in effect." Jeffries & Stephan, *Defenses, Presumptions and Burden of Proof in the Criminal Law,* 88 YALE L.J. 1325, 1353 (1979).

151. 421 U.S. at 700 (quoting *In re* Winship, 397 U.S. at 363).

152. One who is unlawfully attacked by another and who has no opportunity to resort to the law for his defense, may take reasonable steps to defend himself from physical harm. The principle of justification will provide a complete defense. The burden of proof is generally upon the defendant to prove self-defense to a charge of criminal homicide. *See* Quillen v. State, 49 Del. 114, 110 A.2d 445 (1955); Richie v. Commonwealth, 242 S.W.2d 1000 (Ky. Ct. App. 1951); De Vaughn v. State, 232 Md. 447, 194 A.2d 109 (1963), *cert. denied,* 376 U.S. 927 (1964). *See generally* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 391-97 (1972).

153. One who, under the pressure of an unlawful threat from another human being to harm him (or to harm a third person) commits what would otherwise be a crime, may under some circumstances be excused. *See generally* W. LAFAVE & A. SCOTT, *supra* note 152, at 374. For statutes imposing the burden of proving the defense of duress, see, *e.g.,* DEL. CODE ANN. tit. 11, § 464 (1975); TEX. PENAL CODE ANN. tit. 1, § 8.05 (Vernon 1974). *See also* United States v. Stevison, 471 F.2d 143 (7th Cir. 1972), *cert. denied,* 411 U.S. 950 (1973); Roy v. Commonwealth, 500 S.W.2d 921 (Ky. 1973); People v. Calvano, 30 N.Y.2d 199, 282 N.E.2d 322, 331 N.Y.S.2d 430 (1972); 9 J. WIGMORE, *supra* note 4, § 2512.

154. One who, under pressure from natural forces, commits what would otherwise be a crime may raise the defense of necessity as justification. *See generally* W. LAFAVE & A. SCOTT, *supra* note 152, at 381. The Model Penal Code states that, "(1) conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that: (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged." MODEL PENAL CODE § 3.02 (Prop. Official Draft, 1962).

155. One half of the states and the federal government impose the burden of proving the defendant's insanity on the prosecution. Those placing the burden on the defendant by a preponderance of evidence standard justify it on the ground that it is an affirmative de-

that the defendant cannot harbor inconsistent intents.

It was predictable that, following *Wilbur,* some courts would strike down schemes shifting the burden of affirmative defenses.[156] However, some courts restricted *Wilbur*'s holding to its facts, and others continued to distinguish between defenses that could be assigned to the prosecutor and those that required proof by the defendant.[157] Seven years after *Wilbur, Patterson v. New York*[158] either restored *Winship* to its appropriate role in the scheme of things, or in the words of Justice Powell, writing for the dissent, "drain[s] *In re Winship* . . . of much of its vitality."[159] *Patterson* involved one of twenty-five affirmative defenses explicitly created by the New York legislature—the defense of extreme emotional disturbance.[160] The trial court instructed that once the prosecution

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fense and there is a presumption of sanity. Leland v. Oregon, 343 U.S. 790 (1952), upheld an Oregon statute, since repealed, that placed the burden of proving insanity on the defendant beyond a reasonable doubt. The problems posed by the insanity defense are too complex for anyone to imagine that the solution lies in determining who shall bear the burden of proof.

156. *See, e.g.,* State v. Anonymous, 33 Conn. Supp. 28, 359 A.2d 715 (1976) (extreme emotional disturbance as mitigation to murder); Fuentes v. State, 349 A.2d 1 (Del. 1975) (extreme emotional disturbance as mitigation to murder); State v. Hankerson, 288 N.C. 632, 220 S.E.2d 575 (1975), *rev'd on other grounds,* 432 U.S. 233 (1977) (self defense). Other courts have imposed a burden of proof on the defendant. *See, e.g.,* United States v. Torquato, 602 F.2d 564 (3d Cir. 1979) (discriminatory enforcement of the law); Cade v. State, 375 So.2d 802 (Ala. Crim. App.), *aff'd,* 375 So.2d 828 (Ala. 1979) (insanity); State v. Grady, 276 Md. 178, 345 A.2d 436 (1975) (alibi).

157. *See, e.g.,* Hallowell v. Keve, 555 F.2d 103 (3d Cir. 1977); Zemina v. Solem, 438 F. Supp. 455, 467 n.13 (D.S.D. 1977); Grace v. Hopper, 425 F. Supp. 1355 (N.D. Ga. 1977), *rev'd,* 566 F.2d 507 (5th Cir. 1978); People v. Tewksbury, 15 Cal. 3d 953, 544 P.2d 1335, 127 Cal. Rptr. 135 (1976).

158. 432 U.S. 197 (1977).

159. *Id.* at 216 (Powell, J., dissenting).

160. N.Y. PENAL LAW § 125.25 (McKinney 1975) provides in relevant part:

A person is guilty of murder in the second degree when:

1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:

(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be.

N.Y. PENAL LAW § 125.20(2) (McKinney 1975) provides:

A person is guilty of manslaughter in the first degree when:

. . .

2. With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as

proved "beyond a reasonable doubt that [Patterson] intended, in firing the gun, to kill either the victim himself or some other human being," the defendant had the burden of proving his affirmative defense by a preponderance of the evidence.[161] If the defendant sustained that burden, the jury could then find him guilty of manslaughter instead of murder.

Since the defense of severe emotional disturbance is equivalent to the common-law defense of heat of passion on sudden provocation,[162] which requires proof, in many jurisdictions, by the defendant, the Court could simply have held that "[p]roof of the non-existence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here."[163] But *Wilbur* required distinguishing. The Court did so on the ground that the New York statute did not define murder as homicide committed with malice aforethought and therefore the prosecution was not required to prove the absence of provocation. Patterson's defense of severe emotional disturbance was not, thus, an element in the case but "constitut[ed] a separate issue on which the defendant is required to carry the burden of persuasion."[164] The Court acknowledged that the due process clause "requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense."[165] It then noted the apparent distinction between *Patterson* and *Wilbur,* "nothing was presumed or implied against Patterson."[166]

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defined in paragraph (a) of subdivision one of section 125.25. The fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subdivision.

161. 432 U.S. at 199-200.

162. Provocation sufficient to induce, in the reasonable person, a temporary loss of normal self control can negate the necessary intent for murder and reduce the conviction to manslaughter. *See* note 160 *supra.*

The New York defense is adapted from the MODEL PENAL CODE § 210(1)(b) (Prop. Official Draft 1962) which does not place the burden of proof on the defendant.

163. 432 U.S. at 210.

164. *Id.* at 207.

165. *Id.* at 210.

166. *Id.* at 216. Professor Allen implies that the Court should have been sufficiently forthright to override *Wilbur.* Allen, *The Restoration of In re Winship: A Comment on Burdens of Persuasion in Criminal Cases After Patterson v. New York,* 76 MICH. L. REV. 30 (1977).

Whether or not the conclusion in *Patterson* is desirable,[167] the Court's reasoning is too insubstantial to support it. Justice Powell, writing for the dissent, perceived that the Court's acceptance of the artificial differences between elements, presumptions and affirmative defenses cleared the way for the legislature to shift the burden of proving any fact in a criminal case from the prosecution to the defendant, as long as the statute did not include non-existence of that fact in the definition of the crime.[168] Justice Powell was not reassured that the Court's approval of New York's statutory scheme would not result in alarming attempts to shift prosecutorial burdens despite the majority's assertion that "there are obviously constitutional limits beyond which the States may not go."[169] Implicitly acknowledging the "greater includes the lesser" rule, Justice Powell warned that the majority opinion would allow a statute to define the crime of murder "as mere physical contact between the defendant and the victim leading to the victim's death, but then set up an affirmative defense leaving it to the defendant to prove that he acted without culpable *mens rea*."[170]

Chief Judge Breitel of the New York Court of Appeals, quoted with approval in the majority opinion in *Patterson*,[171] saw the threat somewhat differently. "In the absence of affirmative defenses the impulse to legislators, especially in periods of concern about the rise of crime, would be to define particular crimes in unqualifiedly general terms, and leave only to sentence the adjustment between offenses of lesser and greater degree."[172] In other words, if it became constitutionally impermissible to shift the burden of proof on defenses to the defendant, New York could retali-

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167. Professor Fletcher correctly viewing *Patterson* as overruling *Wilbur*, cautions that "it does not follow that every principle of justice must be grounded in the due process clause," and interprets *Patterson* as a "decision based on principles of federalism and respect for the independent evolution of state systems of criminal law." G. FLETCHER, RETHINKING CRIMINAL LAW 551 (1978).

168. 432 U.S. at 223 (Powell, J., dissenting).

169. *Id.* at 210.

170. *Id.* at 224 n.8; Professor Underwood also predicts catastrophe. Underwood, *supra* note 13, at 1326.

171. 432 U.S. at 211 n.13.

172. People v. Patterson, 39 N.Y.2d 288, 306, 347 N.E.2d 898, 909 (1976) (Breitel, C.J., concurring). Actually, the possibility is not at all farfetched. Lady Wooten has argued that the requirement of *mens rea* be eliminated from the definition of crimes. The criminal proceeding would aim at determining whether the defendant had committed the act prohibited. Only then would mental state be considered to determine the appropriate disposition. B. WOOTEN, CRIME AND THE CRIMINAL LAW 32-57 (1963).

ate by eliminating defenses—i.e., permitting the defendant's conviction, under a statute defining felonious homicide as the intent to kill and the killing, and leaving it to the judge, at the sentencing proceeding, to hear testimony as to emotional disturbance.

Commentators have perceived what appear to them to be graver dangers—that prohibitions on burden-shifting would impede law reform by discouraging legislators from providing for affirmative defenses. But such prohibitions would not assure fair treatment for the accused because the procedural approach does not address the substantive basis for assigning guilt.[173] The argument is attractive to any writer who can recall Professor Hart's query: "What sense does it make to insist upon procedural safeguards in criminal prosecutions if anything whatever can be made a crime in the first place?"[174]

It is true, of course, that solutions emphasizing procedural formalities cannot correct deficiencies in substantive justice. But procedure is no more separable from substance than elements are from facts of excuse or justification, than presumptions are from affirmative defenses. Nor does it appear useful to separate the two.

Professors Jeffries and Stephan, following Professor Allen's lead, attempt to detach substance from procedure. Surely no one would contradict the thesis that proportionate punishment may be imposed only after conviction, on the basis of proof beyond a reasonable doubt, of a criminal act committed with culpable *mens rea*. But arguing for a constitutional requirement of "proof beyond a reasonable doubt of a constitutionally adequate basis for imposing the punishment authorized,"[175] does not solve the problem it purports to address.

Let us consider the crimes of murder and manslaughter. If murder and manslaughter are defined separately by statute, the former as the intent to kill a human being and causing the death of that person or a third person and the latter as an intentional killing under extreme emotional distress or in the heat of passion on sudden provocation, the prosecution's burden is straightforward. For murder, he must show intent, act, cause and result. For manslaughter, he must show emotional disturbance or heat of passion.

173. *See* Jeffries & Stephan, *supra* note 150, at 1358.

174. Hart, *The Aims of the Criminal Law*, 23 L. CONTEMP. PROB. 401, 431 (1958).

175. Jeffries & Stephan, *supra* note 150, at 1327.

Proof of guilt beyond a reasonable doubt will result in conviction and the appropriate penalty.

In the usual case, however, that is not what happens. The prosecutor will charge murder and the defense will go forward with evidence of heat of passion or extreme emotional disturbance as a defense. The problem is identical to the one presented by a statute that defines murder and manslaughter as different degrees of homicide and provides for reducing murder to manslaughter upon proof of the appropriate defense. Jeffries and Stephan propose this solution:

If the definition of the crime of murder is intent to kill and causing the killing and if that intentional conduct, *whether or not provoked,* justifies the maximum sentence that can be imposed, then the state has fulfilled its constitutional obligation. By providing for an affirmative defense that will mitigate punishment and requiring the defendant to bear the burden of its proof, the state has not infringed on the defendant's right to be proved guilty beyond a reasonable doubt but has, in fact, afforded the defendant more than the constitutional minimum.[176] If proof of intentional or reckless homicide, whether or not provoked, were thought to be adequate to support a life sentence, "nothing would bar the state from going beyond the constitutional minimum to allow mitigation when the defendant can prove his claim to it."[177]

The problem with this solution is that it does not work. As Jeffries and Stephan recognize it is a constitutional requirement that punishment be proportionate to the crime committed.[178] Punishments that are excessive, whether because of method or severity, are offensive to the Eighth Amendment proscription against cruel and unusual punishment and will not be tolerated.[179] Since

176. Jeffries & Stephan, *supra* note 150, at 1370-83. It is not, of course, a novel solution that Jeffries and Stephan offer. *See* Allen, *supra* note 166, at 39-41; Christie & Pye, *supra* note 75, at 931-32. "It would be useless to insist on precise criteria for conviction, formulated in advance of the event, if those criteria could be satisfied by low standards of proof." Underwood, *supra* note 13, at 1348.

177. Jeffries & Stephan, *supra* note 150, at 1382-83.

178. Jeffries & Stephan, *supra* note 150, at 1380-83.

179. The Court applied the doctrine of proportionality in Weems v. United States, 217 U.S. 349 (1910), holding that fifteen years hard labor was disproportionate to the crime of falsification of a public document and therefore cruel and unusual punishment under the Eighth Amendment and, more recently in the death penalty cases. Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972). "Under *Gregg,* punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals

that is the case, it ought to be obvious that the same sentence may not be imposed for murder and manslaughter. Because "[t]he law regards with some tolerance an unlawful act impelled by a justifiably passionate heart [and] has no toleration whatever for an unlawful act impelled by a malicious heart,"[180] punishment justified for the crime of murder will be too severe for the crime of manslaughter, and punishment justified for manslaughter will be too lenient for murder. Hence, the constitutional problem raised by imposing the burden of proving affirmative defenses on the defendant are not solved by the Jeffries-Stephan approach. The question remains: To whom shall the burden of proving which crime occurred be assigned? Shall the defendant be required to prove that the crime was manslaughter? Or shall the prosecutor be required to prove that it was not?

Whether included in the definition of crime, or defined separately, all affirmative defenses raise the same problem. If for example, the defendant has committed a homicide in self-defense, he is not guilty of any crime.[181] Similarly, if he has killed under duress, he may not be entitled to an acquittal but the jury must be instructed on the legal effect of duress.[182] Further, if he was intoxicated[183] at the time of the killing, or under the influence of drugs,[184] he may have been incapable of harboring the mental atti-

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of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." Coker v. Georgia, 433 U.S. 584, 592 (1977). One of the first California cases to analyze the question of excessive punishment was *In re* Lynch, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972), in which the California Supreme Court outlined three tests for determining whether the punishment imposed was disproportionate to the crime committed: the nature of the offense and the offender, a comparison of the punishments imposed in the same jurisdiction for other offenses, a comparison of the punishment imposed in other jurisdictions for the same offense. *See* Jeffries & Stephan, *supra* note 150, at 1396-97; Allen, *supra* note 166, at 46.

180. Commonwealth v. Flax, 331 Pa. 145, 155, 200 A. 632, 637 (1938).

181. *See, e.g.*, CAL. PENAL CODE § 197 (West 1970).

182. *See* note 187 *infra*.

183. Involuntary intoxication resulting in unconsciousness will be a complete defense. People v. Newton, 8 Cal. App. 3d 359, 87 Cal. Rptr. 394 (1970). Voluntary intoxication may negate specific intent where that is an element of the crime charged, thus reducing assault with a deadly weapon to simple assault and burglary to trespassing. People v. Hood, 1 Cal. 3d 444, 462 P.2d 370, 82 Cal. Rptr. 618 (1969). Voluntary intoxication may also result in diminished capacity thus negating the defendant's ability to willfully deliberate a killing or to harbor malice aforethought. People v. Conley, 64 Cal. 2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966).

184. Drug use has consequences similar to alcohol. Excessive use may result in such a

tude required for the crime of murder. Shall the defendant be required to prove, by a preponderance of the evidence, that he is not guilty of the crime charged, that he has committed a lesser offense, or that some alternative to the penal sanction provided for the crime is appropriate? Or shall the prosecutor bear the burden, in proving guilt beyond a reasonable doubt, of proving the non-existence of the defense?

The solutions of the various jurisdictions are not consistent and so it would be unproductive to attempt to make the determination on the basis of whether or not the defense is gratuitous,[185] complete,[186] a matter of justification or excuse,[187] or whether the facts constituting the defense are more accessible to the defendant.[188] Nor can the argument that the reasonable doubt burden is too onerous for the prosecutor, or that it increases the risk of acquitting the guilty, be allowed to overcome the defendant's right to be proved guilty of the conduct that constitutes the crime beyond a reasonable doubt.

The defense of alibi is a good example. If a defendant charged with murder defends on the ground that he is not the person who committed the crime, and an alibi witness can prove his presence elsewhere, he would be required to produce evidence to raise the issue. But he would not be required to assume the burden of proving his defense. Unless the prosecutor eliminated beyond a reasonable doubt the defendant's claim of alibi, he would not have proved the defendant guilty of the offense. And the proof would not justify imposing the penalty authorized for the crime of murder.[189]

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lack of capacity that the rules governing the insanity defense would apply. *See* People v. Baker, 42 Cal. 2d 550, 268 P.2d 705 (1954).

185. A gratuitous defense is one which the legislature can eliminate. Underwood, *supra* note 13, at 1325.

186. A complete defense results in an acquittal; a partial defense results in a finding of a lesser included offense.

187. The claim that a crime is justified means no crime has been committed, *e.g.*, self-defense, law enforcement. The claim of excuse is a claim of mitigation: circumstances excuse the commission of the crime, *e.g.*, duress.

188. *See* note 210 and accompanying text *infra*.

189. Stump v. Bennett, 398 F.2d 111 (8th Cir.), *cert. denied*, 393 U.S. 1001 (1968) held that the Ohio instruction on alibi, requiring the defendant to prove the defense by a preponderance offended due process because "[p]roof of the defendant's presence . . . is a wholly indispensable factor to the government's case . . . a *sine qua non* to sustain a verdict of guilty" and therefore required proof by the prosecution including proof of the absence of alibi. *Id.* at 119-20.

The same rationale applies to any defense that negates some component of the crime charged. If the defendant is required to assume the burden of its proof, by whatever standard, he may be convicted of the crime charged even where a reasonable doubt remains as to guilt.

Two excellent examples of the hardship this may work on defendants are the crimes of conspiracy and felony-murder. Proof of these crimes consists in part of the operation of presumptions which relieve the prosecution of the burden of proving that the defendant intended to commit the crime charged.

The two crimes will be examined separately.

III. Conspiracy

In *Morissette v. United States*,[190] the Supreme Court warned against radical change in "the weights and balances in the scales of justice."[191] It warned against stripping the defendant of common-law benefits in order to "ease the prosecutor's path to conviction."[192] This warning goes unheeded at a time when the legislatures, confronted with increased crime rates, further the admitted objective of easing the prosecutor's burden.

In 1975, the Supreme Court of West Virginia in *Pinkerton v. Farr*[193] found a statute enacted in 1882[194] to be unconstitutional. The West Virginia statute, known as the Red Men's Act, had been enacted because "lawless bands of men, known as . . . 'Vigilante Committees' . . . were in the habit of inflicting punishment and bodily injury upon peaceful citizens . . . and destroying their property."[195] The statute provided that "[i]f . . . it be proved that two or more persons . . . were present, aiding and abetting in . . . [inflicting any punishment or bodily injury upon another person] it shall be presumed that such offense was committed in pursuance of such combination or conspiracy, in the absence of satisfactory proof to the contrary."[196] The statute thus provided for a presump-

190. 342 U.S. 246 (1952).
191. *Id.* at 263.
192. *Id.*
193. 220 S.E.2d 682 (1975).
194. W. VA. CODE § 61-6-7 (1977).
195. State v. Porter, 25 W. Va. 685 (1885).
196. W. VA. CODE § 61-6-7 (1977).

tion of conspiracy on proof of the commission of assault. The court in *Pinkerton* found that the statute obliterated the presumption of innocence and relieved the prosecutor of the burden of proving the defendant's guilt beyond a reasonable doubt. The court interpreted the statute's phrase "in the absence of satisfactory proof to the contrary"[197] as imposing the burden on the defendant of proving his innocence and concluded that the provision violated the constitutionally protected mandate against self-incrimination of the Fifth Amendment to the United States Constitution[198] and article 3, section 5 of the West Virginia Constitution.[199]

The statute in *Pinkerton v. Farr*[200] was no more than a legislative articulation of what is everywhere regarded as traditional conspiracy law. The substantive law of conspiracy defines conspiracy as an agreement between two or more[201] to commit an unlawful act. Although agreement is, in everyone's understanding, the "essence"[202] or "gist"[203] of conspiracy, a tacit understanding will suffice without proof of either written or spoken words.[204] This is because conspiracies are clandestine and the prosecutor "is without the aid of direct testimony . . . [and must] rely on inferences drawn from the course of conduct of the alleged conspirators."[205]

Justice Coleridge, in *Regina v. Murphy*,[206] articulated an early statement of the rule which persists in only slightly modified form today:

> If you find that these two persons pursued by their acts the same object, often by the same means, one peforming one part of an act, and the other another part of the same act, so as to complete it, with a view to the attainment of the object which they were pursuing, you will be at liberty to draw the conclusion that they

197. 220 S.E.2d at 687.

198. "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

199. "[N]or shall any person, in any criminal case, be compelled to be a witness against himself . . . ." W. VA. CONST. art. 3, § 5.

200. 220 S.E.2d 682 (1975).

201. *See, e.g.*, Commonwealth v. Hunt, 45 Mass. (4 Met.) 111, 123 (1842); King v. Jones, 110 Eng. Rep. 485 (K.B. 1832).

202. *See, e.g.*, Black v. United States, 252 F.2d 93, 94 (9th Cir. 1958).

203. *See, e.g.*, People v. Gem Hang, 131 Cal. App. 2d 69, 72, 280 P.2d 28, 29 (1955).

204. *See, e.g.*, American Tobacco Co. v. United States, 328 U.S. 781 (1946).

205. Interstate Circuit, Inc. v. United States, 306 U.S. 208, 221 (1939).

206. 173 Eng. Rep. 502 (Q.B. 1837).

have been engaged in a conspiracy to effect that object.[207]

Under this rule, it would appear reasonable for a jury to conclude that an agreement exists where there is evidence of related activities by co-conspirators directed toward an illegal objective. But an instruction that is no more specific encourages arbitrary action because it fails to impose a standard by which the jury may make its findings. The jury is, rather, "at liberty to draw the conclusion"[208] without any reference to the quantity of proof that must be adduced before evidence of the activity of co-conspirators can, without more, result in a determination that a conspiracy exists. Will a scintilla of evidence suffice? Clear and convincing evidence? Rational connection between act and agreement? One thing is certain: traditional conspiracy law carries no assurance, indeed no hint, that the reasonable doubt standard must be satisfied. In fact, there appears to be little recognition, even by modern writers,[209] that conspiracy law has implications for the constitutional mandate that requires the prosecution to prove guilt beyond a reasonable doubt. The justification for directing the jury to conclude that a conspiratorial agreement exists, because certain acts occurred, stems from the Court's anxiety that facets of the prosecutor's case will "remain undiscovered and undiscoverable. Secrecy and concealment are essential features of successful conspiracy. The more completely they are achieved, the more successful the crime."[210]

The Court has noted that, if the prosecutor were required to observe constitutional standards for the determination of criminal guilt of conspiracy, the difficulties "of certainty in proof . . . would become insuperable, and conspirators would go free by their very ingenuity."[211]

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207. *Id.* at 508.

208. *Id.*

209. *See, e.g.*, Johnson, *The Unnecessary Crime of Conspiracy*, 61 CALIF. L. REV. 1137 (1973).

210. Blumenthal v. United States, 332 U.S. 539, 556 (1947). This is an implicit extension of the comparative convenience test for the sustaining of presumptions. *See* Part I *supra*. Where evidence is peculiarly accessible to the defendant, not only may the defendant be required to assume the burden of proof, but proof of that evidence may be eliminated from the case entirely.

211. 332 U.S. 557. This is reminiscent of the Court's fear in Patterson v. New York, 432 U.S. 197 (1977), that requiring the state to prove the existence of affirmative defenses would be "too cumbersome, too expensive, and too inaccurate." *Id.* at 209. "[T]oo many persons deserving treatment as murderers would escape that punishment." *Id.* at 207. Con-

The prosecutor's evidence of an act or acts innocent in themselves, but sufficient to support the conclusion that there has been an agreement, constitutes a prima facie case of conspiracy and triggers the operation of further inferences. "Slight evidence" will suffice to implicate others as co-conspirators. A crime that is reasonably foreseeable and performed in furtherance of the agreement, if committed by any participant, is attributed to all conspirators.[212] Even if a defendant had no knowledge of the crime, played no part in its commission[213] and did not know "the identity, or even the number, of his confederates,"[214] conspiracy theory would make him an accomplice in the crime. For example, in *Pinkerton v. United States*,[215] Daniel Pinkerton, who had been incarcerated during the perpetration of the crimes in question, was found guilty of offenses committed by his brother, Walter, without any evidence of Daniel's direct participation, simply because Daniel and Walter had previously conspired to commit similar crimes.[216] In *Anderson v. Superior Court*,[217] Anderson was held responsible for twenty-six illegal abortions performed by Dr. Stern on evidence that she had referred several pregnant women to the doctor and had received payment for her services. She had, thus presumably acquired a "stake in the venture."[218]

Pinkerton and Anderson were held strictly accountable for crimes committed by someone else, that is, they were judged guilty as accomplices without the evidence that would otherwise have

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cern that conspirators be convicted has led to other problems in conspiracy law. Conspiracy permits joint trials in the jurisdiction in which any act occurred, thus raising Sixth Amendment problems. It provides for enhanced punishment and permits conviction for a felony where the offense committed is a misdemeanor or "any act injurious to the public health or to public morals." *See, e.g.*, CAL. PENAL CODE § 182.5 (West Supp. 1981). Further, it has added to the proliferation of hearsay exceptions with the co-conspirator exception to the hearsay rule which permits hearsay declarations to be attributed to all co-conspirators.

212. Professor Johnson attributes the problem to the courts' fallacy in viewing conspiracy as an "ongoing business relationship of indefinite scope and duration." Johnson, *supra* note 209, at 1147.

213. *See, e.g.*, Pinkerton v. United States, 328 U.S. 640 (1946).

214. United States v. Andolschek, 142 F.2d 503, 507 (2d Cir. 1944).

215. 328 U.S. 640.

216. *Pinkerton* has been disapproved by the commentators. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW 514 (1972). *See also* MODEL PENAL CODE § 2.04, Comment (Tent. Draft No. 1, 1953).

217. 78 Cal. App. 2d 22, 177 P.2d 315 (1947); *see also* Stern v. Superior Court, 78 Cal. App. 2d 9, 177 P.2d 308 (1947).

218. Direct Sales Co. v. United States, 319 U.S. 703, 713 (1943); *see also* United States v. Falcone, 109 F.2d 579, 581 (2d Cir.), *aff'd*, 311 U.S. 205 (1940).

been necessary for the imposition of accomplice liability, that is, intentionally assisting or encouraging the perpetrator "with the purpose of promoting or facilitating [the commission of the offense]."[219] Had one of Dr. Stern's patients died, the theory of foreseeability could have made Anderson guilty of manslaughter.[220] This result, quite possible under conspiracy analysis, would not be supportable if analyzed strictly in terms of accomplice liability, which would require proof that Mrs. Anderson aided, abetted, assisted, and encouraged the crime of manslaughter with the requisite *mens rea* (at a minimum, criminal negligence).[221]

Even where a conspiracy involves complex objectives and requires the participation of many members assuming various roles, levels of activity, and degrees of responsibility, the court has found every defendant—smugglers, middle men, retail sellers operating at different geographical locations—members of one single conspiratorial scheme,[222] on the theory that their activities are interdependent. Thus it becomes possible to attribute the illegal acts of any conspirator to every other conspirator. Should the participants engage in other criminal activities, the proliferation of liability would be limited by the requirement of common objective that is, a purpose shared by the co-conspirators.[223]

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219. MODEL PENAL CODE § 5.03(1) (Prop. Official Draft, 1962).

220. *See also* Regina v. Creamer, [1965] 3 All. E.R. 2 (Crim. App.). In that case Creamer arranged for an abortion to be performed and was found guilty of manslaughter along with the abortionist when the victim died. Although accomplices who perform the function of aiding and abetting a crime can be found guilty to the same degree as the perpetrator, there is good reason to differentiate. In *Parker v. Commonwealth,* where the evidence showed that Parker, with malice aforethought, incited Shepard to kill in the heat of passion, Parker was found guilty of murder and Shepard of manslaughter. 180 Ky. 102, 201 S.W. 475 (1918). However, Richards' conviction of felony attack, on evidence that she had arranged for two accomplices to attack her husband, was reversed where the accomplices who committed the physical act had been found guilty of a misdemeanor. The court reasoned that only one offense had been committed and that Richards could not be convicted of any offense more serious than the one committed by the accomplices. Regina v. Richards, [1973] 3 W.L.R. 888 (C.A.).

221. A conviction of first degree murder on a felony murder theory is an exception to this principle. *See* Part IV *infra.*

222. Bruno v. United States, 308 U.S. 287 (1939). This is the chain theory of conspiracy, where the links of the chain are joined by a common purpose. *See also* Blumenthal v. United States, 332 U.S. 539 (1947); Braverman v. United States, 317 U.S. 49 (1942). The "wheel" theory of conspiracy, where a central figure acts as a "hub" conspiring with defendants who are the "spokes," requires a connection among the conspirators, a "rim," to form the individual conspiracies into one single conspiracy. Kotteakos v. United States, 328 U.S. 750 (1946).

223. Traditionally, the court will not find a single conspiracy where activities are di-

The Model Penal Code has warned that "[the] law would lose all sense of just proportion"[224] if a member of a conspiracy could be "held accountable for thousands of offenses that he did not influence at all."[225] It is for this reason that a common objective has been required. The requirement has checked, to a degree, the erosion of the traditional ideal of personal, individual guilt proved beyond a reasonable doubt.

An example of the undefined and far-reaching liability against which the Model Penal Code warned is found in the Racketeer Influenced and Corrupt Organizations Act (RICO).[226] RICO makes it "unlawful for any person . . . associated with any enterprise engaged in . . . interstate . . . commerce to . . . participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ."[227] RICO's definition of "racketeering activity" includes twenty-four federal crimes and eight state crimes.[228] The commission of two of these offenses within ten years satisfies the pattern requirement.[229] The establishment of a connection between a pattern of racketeering activities and an interstate "enterprise," defined as a personal or business association, can result in a violation of RICO.[230] Conspiracy to violate the statute is a separate offense.[231]

Cases interpreting RICO are not in agreement as to what conduct constitutes a violation of the statute. *United States v. Elliott*[232] held that "to conduct or participate in the affairs of an enterprise through a pattern of racketeering activity"[233] required the

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verse unless they are performed to achieve a single goal. United States v. Elliott, 571 F.2d 880, 901 (5th Cir.), *cert. denied sub nom.* Delph v. United States, 439 U.S. 953 (1978). Had Walter Pinkerton and Dr. Stern diversified their activities to include the distribution of dangerous drugs and entered into additional agreements to carry out their objective, the liability of Daniel Pinkerton and Anderson would be limited to conspiracies in which they were engaged.

224. MODEL PENAL CODE § 2.04(3), Comment (Tent. Draft No. 1, 1953).

225. *Id.*

226. 18 U.S.C. §§ 1961-68 (1976) enacted as part of Title IX of the Organized Crime Control Act of 1970.

227. 18 U.S.C. § 1962(c) (1976).

228. 18 U.S.C. § 1961(1) (1976).

229. 18 U.S.C. § 1961(5) (1976).

230. 18 U.S.C. §§ 1961(4), 1962(a) (1976).

231. 18 U.S.C. § 1962(d) (1976).

232. 571 F.2d 880 (5th Cir.), *cert. denied sub nom.* Delph v. United States, 439 U.S. 953 (1978). *See also* United States v. Sutton, 605 F.2d 260, 271 n.16 (6th Cir. 1979).

233. 571 F.2d at 902.

commission of two or more unrelated "predicate crimes."[234] *United States v. Stofsky*[235] required that the two crimes be related in order to establish a pattern of racketeering activities. Whether the concept of "enterprise" reaches only legitimate business or all enterprises, legal and illegal, remains an open question.[236]

RICO allows convictions not possible under traditional conspiracy doctrine. If the evidence shows that one defendant solicited prostitution and committed auto theft, and another defendant sold heroin and attempted to bribe a juror in his murder trial, and there is also a connection between the two defendants, however tenuous, they may be deemed participants in some informal *de facto* association.[237] Each may find himself ultimately liable for any number of unrelated crimes that were neither known, foreseen nor contemplated on the ground that the "thread tying . . . these individuals together was . . . the desire to make money."[238]

In *Elliott,* the court applauded RICO for its displacement of "many of the legal precepts traditionally applied to concerted criminal activity . . . [and for freeing] the government from the strictures of the . . . conspiracy doctrine"[239] which would have required a showing of a single common objective before individuals engaged in different activities could be linked as conspirators. In affirming the convictions of four defendants where there was no demonstration of contact between them, the Court of Appeals acknowledged "doubt that a single conspiracy could be demonstrated. . . . The activities . . . are simply too diverse to be tied together on the theory that participation in one activity necessarily implied awareness of others."[240]

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234. *Id.*

235. 527 F.2d 237 (2d Cir. 1975), *cert. denied,* 429 U.S. 819 (1976).

236. United States v. Rone, 598 F.2d 564 (9th Cir. 1979); United States v. Aleman, 609 F.2d 198 (7th Cir. 1979); United States v. Altese, 542 F.2d 104 (2d Cir. 1976). United States v. Sutton, 605 F.2d 260 (6th Cir. 1979), interpreted the enterprise requirement as requiring legitimate business, thus reading RICO as proscribing their infiltration through a pattern of racketeer activities. Any other interpretation, said the court, would be redundant because it "transforms the statute into a simple proscription against 'patterns of racketeering activity' " and results in a "purposeless circumlocution." Every " 'pattern of racketeering activity' becomes an 'enterprise' whose affairs are conducted through the pattern of racketeering activity." *Id.* at 265-66. *See* United States v. Turkette, 101 S.Ct. 2524 (1981); United States v. Webster, 639 F.2d 174 (4th Cir. 1980).

237. United States v. Elliott, 571 F.2d at 898.

238. *Id.*

239. *Id.* at 900.

240. *Id.* at 902.

The court then praised the statute's "legislative innovation in the realm of individual liability for group crime,"[241] and found that it did not offend "the rule that guilt be individual and personal."[242] The court rationalized its approval of the statute's departure from traditional conspiracy law by noting that "[w]e punish conspiracy as a distinct offense because we recognize that collective action toward an illegal end involves a greater risk to society than individual action toward the same end."[243]

This "greater risk" should not, however, mean that the government, in its proof of conspiracy, need not prove beyond a reasonable doubt that each alleged conspirator engaged in conduct that could justifiably result in conviction and the imposition of punishment. Assuming that it is the intentional agreement to commit a criminal offense that is the gravamen of the crime of conspiracy, then the accused has the right to proof beyond a reasonable doubt that he personally entered into an agreement with the purpose of engaging in the commission of a particular crime.[244]

Circumstantial evidence must of course, be permissible; the agreement may be demonstrated from evidence of the act or acts. A court which is presented with a strong case of circumstantial evidence must be free to "reject as beyond the range of probability that [the chain of events] was the result of mere chance."[245]

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241. *Id.* at 903.

242. *Id.*

243. *Id.* at 905. The justification for conspiracy theory stems from deep seated anxiety about the threat posed by collective action. "[C]ollective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise." Callanan v. United States, 364 U.S. 587, 593-94 (1961) (Frankfurter, J.).

244. *See* MODEL PENAL CODE § 5.03(1)(a) (Prop. Official Draft, 1962).

245. Interstate Circuit v. United States, 306 U.S. 208, 223 (1939). This case involved far-reaching changes in the defendants' business practices which could not be explained absent an agreement between them.

Although proof of a widespread effect on prices can support an inference that the defendants intended their actions to have that result, an instruction that the jury could rely "on a legal presumption of wrongful intent from proof of an effect on prices" is error. United States v. United States Gypsum Co., 438 U.S. 422, 435 (1978).

Nevertheless, a presumption of conspiratorial agreement from evidence of an act should not be allowed unless the government can establish the appropriate connection between the act and the agreement.[246] Once the agreement has been proved beyond a reasonable doubt by the government, the criminal objectives advanced by the agreement should not be attributed to all the participants without a sufficient showing of individual complicity. Where one conspirator has engaged in conduct that constitutes the underlying crime, liability should be imposed on the accomplice only "if he acts with the kind of culpability . . . that is sufficient for the commission of the offense."[247] Thus, Daniel Pinkerton should have been held responsible only for the crimes which he agreed to commit, and Mrs. Anderson should have been insulated from liability for crimes in which she played no active or consensual part.

IV. Felony-Murder

The felony-murder rule imposes liability without a finding of malice. A finding by the jury that a death occurred during the commission of a felony results in the conclusion that it was the accused's intention to cause that death and the conviction will be for murder.

Murder is traditionally defined as the unlawful killing of a human being with malice aforethought.[248] The prosecution must prove that the accused harbored the intent to kill or that he committed the act under circumstances showing "an abandoned and malignant heart."[249] First degree murder requires a killing accomplished "by means of a bomb, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem," etc.[250] Killings that occur during the commission of other dangerous felonies are classi-

246. The rational connection test, discussed in notes 78-102 and accompanying text *supra* is inadequate to establish this connection. It would permit a finding of guilt of conspiracy from evidence of an act that is in itself not criminal.

247. MODEL PENAL CODE § 2.06(4) (Prop. Official Draft, 1962).

248. *See* CAL. PENAL CODE § 187 (West 1970); *see also* S.C. CODE § 16-3-10 (1976); TENN. CODE ANN. § 39-2401 (1975).

249. CAL. PENAL CODE § 188 (West 1970).

250. CAL. PENAL CODE § 189 (West 1970); *see also* 18 PA. CONS. STAT. ANN. § 2502 (Purdon 1973); N. H. REV. STAT. ANN. § 630:1-a (1974); TEX. PENAL CODE ANN. tit. 5, § 19.03 (Vernon 1974).

fied as second degree murder.[251]

Although the deaths occurring during the commission of a felony are often accidental, unintended killings which ordinarily would be classified as involuntary manslaughter,[252] the common law felony-murder rule, which survives in many American jurisdictions,[253] classifies them as murder. Thus the prosecution is relieved of the burden of proving that the accused intended to kill. The presumption that the defendant is innocent of the intent to kill is destroyed. Intent is simply imputed: proof of the felony will suffice for proof of malice or in the case of the felonies enumerated by statutes, for proof of willfulness, deliberation and premeditation.

Traditional strictures of criminal law will not tolerate the substitution of the intent to commit one crime for the intent to commit another.[254] This, however, is precisely the result of felony murder. In *State v. Thorne*,[255] for example, defendant Thorne had entered a store with the intention of committing an armed robbery and had killed the storekeeper when his gun accidentally discharged. The court held that the facts supported a first-degree felony-murder conviction.[256]

Similarly, if a robber, accompanied by a number of accomplices, pulls the trigger that kills a victim, the felony-murder rule will allow that conduct to be attributed to every other actor on the theory that all of them acted "in concert . . . or in furtherance of a common object or purpose,"[257] despite the widely different roles each may have played and the different intentions each may have had. Once that step has been accomplished, the intent to murder

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251. *See* CAL. PENAL CODE § 189 (West 1970); N.H. REV. STAT. ANN., § 630:1-b (1974).

252. Manslaughter is the unlawful killing, without malice, of a human being. Involuntary manslaughter occurs in the commission of an unlawful act which does not amount to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. *See* CAL. PENAL CODE § 192 (West 1970). *See also* 18 PA. CONS. STAT. ANN. § 2504 (Purdon 1973); TEX. PENAL CODE ANN. tit. 5, § 19.05 (Vernon 1974).

253. Hawaii and Kentucky have abolished the felony-murder rule by statute. 7A HAWAII REV. STAT. tit. 37, §§ 701-07 (1980); KY. REV. STAT. § 507.020 (1980 Supp.). Michigan recently abolished it by case law. People v. Aaron, 409 Mich. 672, 299 N.W.2d 304 (1980).

254. *See, e.g.*, Regina v. Cunningham, [1957] 41 Crim. App. 155 (Crim. App.), where the court reversed a conviction for asphyxiation where the criminal intent proved was intent to steal. *See also* Regina v. Faulkner, 13 Cox Crim. Cas. 550 (C.C.R. 1877), where an arson conviction was reversed because the *mens rea* proved was intent to steal.

255. 39 Utah 208, 117 P. 58 (1911).

256. *Id.*

257. Commonwealth v. Campbell, 89 Mass. (7 Allen) 541, 544 (1863).

is, in reality, simply assumed.

The felony-murder rule has been justified on the ground that it is designed to protect against the accidental but foreseeable deaths that experience teaches us will occur when an individual or group of individuals set out to rob, rape, or burglarize. It is a rule dependent upon the rationale that a death occurring during a felony is the natural and probable consequence of the defendant's conduct.[258] The phrase is almost identical to the presumption that the Court in *Sandstrom v. Montana*[259] found offensive to due process concepts because it relieved the prosecutor of the burden of proving an essential element of the crime charged—the element of intent. The felony-murder rule would apparently allow an instruction even more offensive to constitutional principles: the law presumes a person intends the ordinary consequences of his accomplices' voluntary acts.

During the period of its extensive proliferation, the felony-murder rule, following a causation theory, permitted convictions where the victim of a robbery killed the defendant's accomplice,[260] a policeman killed a bystander,[261] an accomplice killed himself while attempting arson,[262] the victim of an armed robbery died of a heart attack,[263] a fireman died fighting a fire set by an arsonist,[264] the victim died of an overdose of heroin bought from the defendant.[265] Each of these deaths could be traced to the commission of the felony and the courts did not choose to view the intervening events as independent acts or occurrences breaking the chain of causation.

Most jurisdictions have limited the felony-murder rule to dangerous felonies,[266] and have applied the doctrine only to those killings committed by the physical act of one of the felons. The California Supreme Court in *People v. Washington,*[267] reasoned that

258. Regina v. Horsey, 176 Eng. Rep. 129 (Assizes 1862).
259. 442 U.S. 510 (1979).
260. Commonwealth v. Thomas, 382 Pa. 639, 117 A.2d 204 (1955).
261. Commonwealth v. Almeida, 362 Pa. 596, 68 A.2d 595 (1949).
262. Commonwealth v. Bolish, 381 Pa. 500, 113 A.2d 464 (1955); *cf.* People v. Ferlin, 203 Cal. 587, 265 P. 230 (1928).
263. People v. Stamp, 2 Cal. App. 3d 203, 82 Cal. Rptr. 598 (1969).
264. State v. Glover, 50 S.W.2d 1049 (1932).
265. *But see* State v. Mauldin, 215 Kan. 956, 529 P.2d 124 (1974).
266. *See, e.g.,* People v. Phillips, 64 Cal. 2d 574, 414 P.2d 353, 51 Cal. Rptr. 225 (1966).
267. 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965).

"[w]hen a killing is not committed by a robber or by his accomplice but by his victim, malice aforethought is not attributable to the robber, for the killing is not committed by him in the perpetration or attempt to perpetrate robbery."[268] Nor did the *Washington* court find it sufficient that the killing was foreseeable and could be viewed as the proximate result of the felony.[269] A defendant who initiates a gun battle can, of course, be found guilty of murder, and *Washington* does not bar conviction of accomplices who did not themselves perform the act that resulted in the death. The limitation fails to address the problems created by imposition of vicarious liability. The accused can still be found guilty of murder if the prosecutor proves that the accomplice "with a conscious disregard for life, intentionally commits an act that is likely to cause death, and his victim or a police officer kills in reasonable response to such act."[270] Thus, where one robber points a gun at a victim and the latter draws her gun, fires and kills a bystander, criminal liability for the murder will extend to the driver of the getaway car, sitting outside in the sunlight. He can be found guilty of murder and even face death[271] even though he had no intention of participating in the crime of murder. Attributing the act and the mental state of the first robber to the accomplice in such situations not only assumes the existence of an agreement between them, but makes no allowance for the possibility that the killing may have exceeded the scope of the plan. Moreover, it utterly fails to take into consideration the actual state of mind of the accomplice. The requirement that the death be foreseeable does not solve the problem. At most, the driver is guilty of recklessly failing to foresee

268. *Id.* at 781, 402 P.2d at 133, 44 Cal. Rptr. at 445.

269. *Id.*

270. People v. Gilbert, 63 Cal. 2d 690, 704, 408 P.2d 365, 373-74, 47 Cal. Rptr. 909, 917-18 (1965).

271. In Lockett v. Ohio, 438 U.S. 586 (1978), Lockett was sentenced to death on evidence that she waited in a car with the motor running while her accomplice, Parker, was committing a pawnshop robbery. Lockett was convicted of the aggravated murder of the victim who was killed when Parker's gun discharged. Parker avoided the death penalty by testifying for the state but Lockett rejected plea bargaining. The United States Supreme Court reversed the judgment imposing the death penalty on the ground that the Ohio statute did not provide for "consideration of relevant mitigating factors." *Id.* at 608. Justice White concurred in the judgment on the ground that imposing the death sentence on "those who had no intent to bring about the death of the victim is not only grossly out of proportion to the severity of the crime but also fails to contribute significantly to acceptable . . . goals of punishment" and, thus, constituted a violation of the Eighth Amendment. *Id.* at 626.

that armed robbery can result in death, and he should not be convicted of any crime more serious than manslaughter.

California has devised an ingenious limitation on the doctrine of vicarious liability for co-felons. In *People v. Antick*,[272] a police officer, responding to a robbery suspect's gunfire, killed him. Since the deceased's malicious conduct did not result in the death of another human being but rather in his own death, the court did not find the deceased's accomplice, Antick, guilty of murder. The court reasoned that Antick could not be held vicariously liable for a crime which his accomplice, Bose, could not have committed.[273] Moreover, the killing had occurred several hours after the robbery, some miles from the scene, and Antick had not been present.

Not only had Antick not committed the act, he lacked the *mens rea* of murder. But the court did not reverse his conviction for those reasons. Given the reasoning in *Antick*, the limitation is illusory.

If, for example, Antick had been on the scene and Bose's act, committed in "willful, wanton, disregard" had drawn the police officer's gunfire and resulted in Antick's death, Bose could have been found guilty of murder. The reasoning would also allow an accomplice, awaiting the profits of the crime at home, to be found guilty of first-degree murder of Antick. If Antick had been wounded but did not die, neither Bose nor the absent accomplice could have been found guilty of attempted murder under the traditional theory that they did not possess the requisite specific intent.[274]

The Model Penal Code has proposed a solution to the felony-murder rule which would allow a presumption of recklessness where a homicide occurs when the actor or an accomplice is engaged in the attempt, commission or subsequent flight from certain felonies.[275]

Aside from the obvious burden-shifting objections, the solution does not go far enough. Felony-murder is a rule that should be abolished. Not only does it suffer from the constitutional disabilities this article has examined, it does not appear to be of significant benefit to the prosecution.

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272. 15 Cal. 3d 79, 539 P.2d 43, 123 Cal. Rptr. 475 (1975).
273. *Id.* at 89, 539 P.2d at 49, 123 Cal. Rptr. at 481.
274. *But see* People v. Kessler, 57 Ill. 2d 493, 315 N.E.2d 29 (1974).
275. MODEL PENAL CODE § 210.2 (Prop. Official Draft, 1962).

For a conviction of murder where a homicide occurs during the commission of a felony, the prosecutor must prove the underlying felony—that is robbery, or burglary, for example. If he can do that, it is very likely that he can prove malice on the part of the felon who directly caused the death. Furthermore, if the evidence shows that the accomplice participated in the killing, he too can be found guilty of murder. Unless there is some additional showing, the conviction of both defendants will be for murder in the second degree.

Where the state of mind of the accused is more appropriately described as criminal recklessness, the conviction will not be for murder but for involuntary manslaughter. If the accomplice is merely present, he should not be found guilty of any degree of homicide unless he played a role in its commission, that is, unless he acted with the requisite *mens rea*.

A finding of first-degree murder for both defendants does not rationally follow where proof of the crime committed is not first-degree murder. It is only the predilection of the felony-murder rule to "expand itself to the limits of its logic,"[276] with statutory assistance,[277] that a result so illogical and so unjust can occur.

Conclusion

The presumption of innocence, prized as an example of the moral superiority of our system of justice, is undermined by procedural devices and substantive definitions that relieve the prosecutor of the traditional burden of proof by the reasonable doubt standard. The use of presumptions and affirmative defenses shifts the burden of proof to the defendant to prove the non-existence of some element of the crime charged. The literal application of conspiracy and felony-murder principles results in the additional advantage to the prosecutor of imposing vicarious liability on accomplices upon proof of criminal acts committed by partners in crime. However expedient it may appear to "ease the prosecutor's path to

276. B. CARDOZO, NATURE OF THE JUDICIAL PROCESS 51 (1921).

277. In People v. Gilbert, 63 Cal. 2d 690, 408 P.2d 365, 47 Cal. Rptr. 365 (1965), the defendants were found guilty of murder on a vicarious liability theory rather than the felony-murder rule. The court then elevated the murder to first degree because robbery is one of the felonies enumerated by California's felony-murder rule. *See* CAL. PENAL CODE § 189 (West 1970).

conviction," the ultimate consequence is to cast doubt on the verdicts rendered in our criminal courts and thus to undermine our confidence in the belief that it is only the guilty who shall be condemned.