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Defenses, Presumptions, and Burden of Proof in the Criminal Law*

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Introduction

Criminal conviction in the United States requires proof beyond a reasonable doubt. This proposition is not merely descriptive. It also states a fundamental normative precept of the Anglo-American conception of justice. As such, the reasonable-doubt standard has been accepted as constitutional command and thus secured against legislative abandonment.

While the validity of this principle is not much doubted, its implementation has spawned controversy. In particular, the courts have been troubled by recent challenges to the constitutionality of defenses and presumptions in the criminal law. Defenses, or at least some of them, shift to the accused the burden of establishing exculpatory facts. Presumptions allow the prosecution to make out its case by means of evidence less persuasive than might otherwise be required under the reasonable-doubt standard. Both of these devices are established features of the penal law, yet both are arguably inconsistent with the constitutional commitment to proof beyond a reasonable doubt.

This article suggests a framework for determining the constitutionality of defenses and presumptions in the criminal law. We reject the view that would limit the reasonable-doubt requirement to those facts formally identified as elements of the offense charged. We also reject the approach that would condemn every exception to the reasonable-doubt standard as constitutionally impermissible. Instead, we propose a rule that would require proof beyond a reasonable doubt of a constitutionally adequate basis for imposing the punishment authorized.

This proposal posits a relationship between the standard of proof and the substance of the penal law. In our view, proof beyond a reasonable doubt is a procedural standard designed to protect the innocent. Innocence, however, is not a procedural concept. Its meaning under law derives from the exercise of legislative authority over the definition of criminal conduct. A constitutional rule governing procedural allocation of the burden of proof, therefore, should take account of the substantive content of crime definition as well as the degree of certainty with which specified facts are established. In other words, the constitutional guarantee of proof beyond a reasonable doubt should be premised in part on a constitutional conception of what must be proved.

Part I of this article criticizes efforts to treat the constitutional commitment to proof beyond a reasonable doubt as a purely procedural issue, unrelated to the substance of the penal law. Part II describes the

evolution of judicial opinion toward a more substantive conception of the meaning of the reasonable-doubt requirement and criticizes as insufficient two suggested interpretations that move in that direction. Part III outlines an approach that relates the constitutional requirement of proof beyond a reasonable doubt to an assessment of a constitutionally adequate basis for punishment.

I. Burden of Proof as an Exclusively Procedural Concern

A. *The Constitutionalization of Burden of Proof and the Inadequacies of Formalism*

The constitutionalization of burden of proof began with *In re Winship*.[1] That case involved a New York statute permitting adjudication of juvenile delinquency based on a preponderance of the evidence. The challenge to that scheme raised two related issues: whether proof beyond a reasonable doubt was essential for criminal conviction; and, if so, whether that standard was also required in delinquency proceedings. The Court answered both questions in the affirmative and announced the constitutionalization of burden of proof: "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."[2]

On its face, this pronouncement was scarcely revolutionary. By the time of *Winship*, no American jurisdiction authorized conviction of an adult based on anything less than proof beyond a reasonable doubt. As a general rule of criminal procedure, therefore, *Winship* merely confirmed the status quo, and the application of its requirement in most cases seemed to pose no particular problem. Absent from the *Winship* opinion, however, was any discussion of the scope of the constitutional commitment to proof beyond a reasonable doubt: What, exactly, was included by the phrase "every fact necessary to constitute the crime . . . charged?"

On a purely formal level, the answer may seem obvious. A fact may be deemed "necessary to constitute the crime . . . charged" if it is an element of the offense, that is, if it is one of the components of actus reus or mens rea needed to establish liability under a penal statute. Not every fact relevant to outcome would meet this test. A fact showing

1. 397 U.S. 358 (1970).
2. *Id.* at 364.

excuse or justification might be determinative of guilt or innocence, but it is still extrinsic to the definition of the crime and hence removed from the constitutional requirement of proof beyond a reasonable doubt. Because this reading of *Winship* confines its scope to matters formally incorporated in the definition of crime by statute or judicial interpretation, it will be referred to as the "formal" interpretation of that decision.[3]

At first blush, the formal reading of *Winship* has much to recommend it. It is not only consistent with the language of the decision, but also in accord with the traditional assumption of a generic difference between the definition of crime and the recognition of defenses.[4] Moreover, the limitation of *Winship* to those matters formally identified as elements of a crime finds confirmation in familiar patterns of state law regarding burden of proof. Except in the arguably special case of presumptions,[5] no state has ever required an adult defendant to disprove a "fact necessary to constitute the crime . . . charged."[6] According to the formal interpretation, therefore, *Winship* would have little practical consequence beyond the context of juvenile proceedings.[7]

If *Winship* were read to extend the reasonable-doubt requirement to defenses, its impact on existing law would be substantial. Most American jurisdictions have placed on the accused the burdens of production and persuasion[8] for one or more of the recognized defenses to criminal

3. In the discussion that follows, we state our reasons for rejecting the formal interpretation of *Winship*. Professor Allen calls this interpretation the "elements test" and reaches the same conclusions as to its validity. *See* 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, 49-50 (1977).

4. *See generally* Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 YALE L.J. 880, 883-86 (1968).

5. *See* pp. 1535-37 *infra*.

6. Sometimes, however, an element of an offense and a defense to liability may cover the same ground. For example, proof of insanity may be considered to negate the mens rea required by the definition of an offense. For those jurisdictions that place the burden of proof on the accused for the issue of insanity, *see* note 9 *infra*, the effect may be to require that the defendant disprove an element of the offense charged when the reason for doubting its existence depends on evidence of mental disease or defect.

7. It may be argued, however, that *Winship* should have influence beyond the criminal law. Principles of due process may demand its extension to certain kinds of civil proceedings, such as immigration and citizenship determinations. *See* Terrazas v. Vance, 577 F.2d 7 (7th Cir. 1978), *cert. granted*, 439 U.S. 1532 (1979) (No. 78-1143). *But see* Addington v. Texas, 47 U.S.L.W. 4473 (1979) (mental hospital commitment proceedings require only clear and convincing proof). These problems are outside the scope of this article.

8. The burden of production refers to the obligation to raise an issue. The burden of persuasion refers to the risk of uncertainty as to the issue's resolution. Thus, the party bearing the burden of production will have an issue resolved against him if it is not raised by the evidence. The party bearing the burden of persuasion will have an issue resolved against him if, after all the evidence is considered, the trier of fact remains un-

liability. Many states require the defendant to prove insanity.[9] Various jurisdictions have also shifted the burden of proof for self-defense,[10]

certain on the point. The degree of certainty required is determined by the standard of proof—*e.g.*, beyond a reasonable doubt or by a preponderance of the evidence. *See* F. JAMES, CIVIL PROCEDURE §§ 7.5-.7 (1965); J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 355-59 (1898); 9 J. WIGMORE, EVIDENCE §§ 2485-2588 (3d ed. 1940 & Supp. 1977); McNaughton, *Burden of Production of Evidence: A Function of a Burden of Persuasion*, 68 HARV. L. REV. 1382 (1955).

The burdens of production and persuasion may or may not be assigned to the same party. Unfortunately, that fact is sometimes obscured by indiscriminate use of the term "burden of proof" to refer to either or both kinds of burdens. Professor Fletcher has argued that this imprecision of terminology has led some courts to assign the burden of persuasion to criminal defendants merely because the rules of pleading required the defendant to raise the question for consideration. Fletcher, *supra* note 4, at 902-10.

In this article, the phrase "burden of proof" is used to refer to both the burden of production and the burden of persuasion. When we mean to refer to only one type of burden, we shall say which one.

9. This requirement is included in some state statutes. *See* KY. REV. STAT. §§ 500.070(3), 504.020 (1975 & Supp. 1978); OR. REV. STAT. §§ 161.055(2), .305 (1977); TEX. PENAL CODE ANN. tit. 1, § 2.04(d), tit. 2, §§ 8.01(a), (d) (Vernon 1974 & Supp. 1978-79); WASH. REV. CODE § 9A.12.090(2) (1977).

It has also been required by many courts. *See* Leland v. Oregon, 343 U.S. 790 (1952); Bell v. State, 120 Ark. 530, 180 S.W. 186 (1915); People v. Baker, 42 Cal. 2d 550, 268 P.2d 705 (1954); Rivera v. State, 351 A.2d 561 (Del.), *appeal dismissed for want of substantial federal question*, 429 U.S. 877 (1976); Shanahan v. United States, 354 A.2d 524 (D.C. 1976); Grace v. Hopper, 234 Ga. 669, 217 S.E.2d 267 (1975), *cert. denied*, 423 U.S. 1066 (1976); State v. Booth, 169 N.W.2d 869 (Iowa 1969); State v. Daigle, 334 So. 2d 1380 (La. 1977); State v. Melvin, 341 A.2d 376 (Me. 1975); State v. Holmes, 439 S.W.2d 518 (Mo. 1969); State v. Caryl, 168 Mont. 414, 543 P.2d 389 (1975); Guynes v. State, 92 Nev. 693, 558 P.2d 626 (1976); State v. Lewis, 67 N.J. 47, 335 A.2d 12 (1975); State v. Harris, 290 N.C. 718, 228 S.E.2d 424 (1976); State v. Jackson, 32 Ohio St. 2d 203, 291 N.E.2d 432 (1972), *cert. denied*, 411 U.S. 909 (1973); State v. Page, 104 R.I. 323, 244 A.2d 258 (1968); State v. Hinson, 253 S.C. 607, 172 S.E.2d 548 (1970); Taylor v. Commonwealth, 208 Va. 316, 157 S.E.2d 185 (1967); State v. Canaday, 79 Wash. 2d 647, 488 P.2d 1064 (1971), *vacated on other grounds*, 408 U.S. 940 (1972); State v. Pendry, 227 S.E.2d 210 (W. Va. 1976); State v. Bergenthal, 47 Wis. 2d 668, 178 N.W.2d 16 (1970). *See generally* Note, *Constitutional Limitations on Allocating the Burden of Proof of Insanity to the Defendant in Murder Cases*, 56 B.U. L. REV. 499 (1976). In federal cases, the defendant bears the burden of production but not persuasion on the insanity issue. Davis v. United States, 160 U.S. 469 (1895).

10. At one time or another, many jurisdictions have placed on the defendant the burden of proving self-defense to a charge of criminal homicide. *See* Quillen v. State, 49 Del. 114, 121, 110 A.2d 445, 449 (1955); Richie v. Commonwealth, 242 S.W.2d 1000, 1004 (Ky. 1951); DeVaughn v State, 232 Md. 447, 453, 194 A.2d 109, 112 (1963), *cert. denied*, 376 U.S. 927 (1964); State v. Skinner, 32 Nev. 70, 74, 104 P. 223, 224 (1909); State v. Jennings, 276 N.C. 157, 160, 171 S.E.2d 447, 449 (1970); State v. Farley, 112 Ohio App. 448, 451-52, 176 N.E.2d 232, 234 (1960), *appeal dismissed*, 171 Ohio St. 483, 172 N.E.2d 298 (1961); Commonwealth v. Wilkes, 414 Pa. 246, 249-50, 199 A.2d 411, 413, *cert. denied*, 379 U.S. 939 (1964); People v. González, 69 P.R.R. 533, 535 (P.R. Dist. Ct. 1949); State v. Mellow, 107 A. 871 (R.I. 1919); State v. Osborne, 202 S.C. 473, 478-79, 25 S.E.2d 561, 563, *cert. denied*, 320 U.S. 763 (1943); Keith v. State, 218 Tenn. 395, 400, 403 S.W.2d 758, 760 (1966); State v. Turpin, 158 Wash. 103, 110-11, 290 P. 824, 826 (1930); State v. Zannino, 129 W. Va. 775, 780-81, 41 S.E.2d 641, 644 (1947).

Others place the burden of proving that the defendant did not act in self-defense on the state. *See, e.g.*, Bange v. State, 237 Ind. 422, 426, 146 N.E.2d 811, 813 (1958); State v. Badgett, 167 N.W.2d 680, 683 (Iowa 1969); State v. Archbold, 178 Neb. 433, 436, 133

duress,[11] and many other specifications of justification or excuse.[12] To read *Winship* as applicable to *those* issues would raise a substantial challenge to the validity of much of the existing law of defenses. Confining *Winship* to the elements of crime, in contrast, brings the case into general conformity with current practice and avoids the prospect of wholesale invalidation of existing law. For these and perhaps for other reasons as well, *Winship* has been taken uncritically to apply only to those aspects of the substantive law that are formally incorporated in the definition of a criminal offense. This restrictive reading of the case is grounded in, and dependent on, the traditional assumption of some generic difference between the facts necessary to constitute a crime and those needed to establish a defense to, or mitigation of, liability.

The trouble, of course, is that the distinction is essentially arbitrary.

N.W.2d 601, 603 (1965). Some states have recently removed the burden of proof from the defendant in general recodifications of their criminal laws. *See, e.g.*, Hamilton v. State, 343 A.2d 594 (Del. 1975) (interpreting DEL. CODE ANN. tit. 11, §§ 304, 464 (1974 & Supp. 1978)); Commonwealth v. Cropper, 463 Pa. 529, 345 A.2d 645 (1975) (interpreting 18 PA. CONS. STAT. ANN. § 505 (Purdon 1973)).

11. *See, e.g.*, 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); State v. Sappienza, 84 Ohio St. 63, 95 N.E. 381 (1911); 9 J. WIGMORE, *supra* note 8, § 2512.

12. At one time or another, several states have required that the defendant bear the burden of proving that a homicide was accidental. *See, e.g.*, Pixley v. State, 203 Ark. 42, 155 S.W.2d 710 (1941); Chandle v. State, 230 Ga. 574, 198 S.E.2d 289 (1973); State v. Deane, 75 Idaho 149, 268 P.2d 1114 (1954); People v. Slaughter, 29 Ill. 2d 384, 194 N.E.2d 193 (1963); Partin v. Commonwealth, 445 S.W.2d 433 (Ky. 1969); State v. Enlow, 536 S.W.2d 533 (Mo. App. 1976); State v. Bonds, 2 Nev. 265 (1866).

Several cases hold that the defendant bears some part of the burden of proving entrapment, *see* United States v. Braver, 450 F.2d 799 (2d Cir. 1971), *cert. denied*, 405 U.S. 1064 (1972); Gorin v. United States, 313 F.2d 641 (1st Cir.), *cert. denied*, 374 U.S. 829 (1963); Averett v. State, 246 Miss. 49, 149 So. 2d 320, *cert. denied*, 375 U.S. 5 (1963); State v. Parr, 129 Mont. 175, 283 P.2d 1086 (1955); State v. Dolce, 41 N.J. 422, 197 A.2d 185 (1964); State v. Good, 110 Ohio App. 415, 165 N.E.2d 28 (1960).

When an element of the crime charged is the formation of a specific intent, several states have imposed on the defendant the burden of proving that intoxication prevented the formation of such intent. *See* State v. Linzmeyer, 248 Iowa 31, 79 N.W.2d 206 (1959); State v. Quigley, 135 Me. 435, 199 A. 269 (1938); State v. Kelly, 216 N.C. 627, 6 S.E.2d 533 (1940); State v. Tune, 17 N.J. 100, 110 A.2d 99 (1954), *cert. denied*, 349 U.S. 907 (1955); State v. French, 171 Ohio St. 501, 172 N.E.2d 613, *cert. denied*, 366 U.S. 973 (1961).

Jurisdictions recognizing a mistake of fact as to marriage or an honest belief that a marriage was dissolved as a defense to bigamy usually require the defendant to bear the burden of proving the defense. *See, e.g.*, State v. Cain, 106 La. 708, 31 So. 300 (1902); Coy v. State, 171 S.W. 221 (Tex. Crim. App. 1914).

A good faith belief that the prosecutrix had reached the age of consent has recently been accepted as a defense to statutory rape in a few jurisdictions. Allocation of the burden of proof of this defense appears to vary. *Compare* People v. Battles, 240 Cal. App. 2d 122, 49 Cal. Rptr. 367 (1966) (burden on defendant to prove good faith belief to satisfaction of court) *with* State v. Guest, 583 P.2d 836 (Alaska 1978) (upholding instruction placing burden on prosecution) *and* People v. Winters, 242 Cal. App. 2d 711, 51 Cal. Rptr. 735 (1966) (burden on prosecution).

"Crimes" and "defenses" both set forth substantive conditions of liability. The issues raised in both categories of doctrine must be resolved against the defendant in order to convict. A legislative decision to treat a particular matter as an element of an offense or as a defense to liability may depend simply on convenience or ease in phrasing. Thus, there is no substantive difference between a penal code that states the doctrines of murder and self-defense in separate provisions and one that redefines murder as the killing of a human being done with malice aforethought and not in self-defense. There are, to be sure, issues of statutory economy at stake. Self-defense applies to many crimes other than murder, and no doubt it is easier to state the doctrine separately than to repeat it for each of the various homicide and assault offenses. But this matter of convenience does not itself furnish any functional basis for distinguishing the applicability of a constitutional doctrine regarding burden of proof.

Traditionally, the only functional difference between a "crime" and a "defense" has been precisely the issue under consideration—allocation of the burden of proof. The essential consequence of labeling an issue as a defense rather than as an element of the crime is that consideration of the issue is precluded unless the matter is raised by competent evidence. In other words, a defense places the risk of nonproduction on the defendant.[13] Some defenses may also require the defendant to carry the burden of persuasion, that is, to bear the risk of failing to convince the trier of fact, usually by a preponderance of the evidence, that the specified exculpation does exist. For an issue designated an element of the crime, by contrast, both the burdens of production and persuasion ordinarily remain on the prosecution. This is a nonformal difference between a "crime" and a "defense," and it leads to a point of some difficulty in the application of *Winship*. *Winship* purported to fix the burden of proof as a matter of constitutional law. To make the scope of that doctrine depend on the legislative allocation of the burden of proof is to assume the point in issue and thus to reduce *Winship* to a circularity.

In short, "crime" and "defense" are substantively equivalent, if not procedurally identical. Whether a particular factor is part of one or the other cannot be derived from principle or logic. The original

13. Assignment of the burden of production to the defendant is assumed to be implicit in the designation of an issue as a defense. *See, e.g.*, W. LAFAVE & A. SCOTT, CRIMINAL LAW 269 (1972) (footnote omitted and emphasis added):

> There exist in the criminal law a number of substantive defenses to a charge of criminal conduct. These defenses are usually defined in terms of unusual circumstances which, *when raised by the defendant*, evidence a situation in which the purposes of the penal law would not be served by conviction of the defendant.

reasons for regarding insanity as a defense but malice as an element of murder are obscured by the passage of time. Today, that distinction is perpetuated by habit and convenience. There is no reason in policy to limit *Winship* to essentially formal distinctions among the facts relevant to criminal liability. Indeed, there is good reason to try to make more of the decision, for it is a singularly shallow constitutional principle that is subject to defeat by a single stroke of the drafter's pen.

Once one recognizes the substantive interchangeability of "crimes" and "defenses," the pronouncement of *Winship* takes on an entirely different cast. It no longer seems clear that the reasonable-doubt requirement should be limited to those facts formally identified as elements of an offense. In fact, it becomes at least plausible to read the Court's reference to "every fact necessary to constitute the crime . . . charged" as embracing any of a number of nonformal standards for determining the scope of *Winship*.

B. *The Procedural Interpretation of* In re Winship

To date, interest has focused on what we shall call the procedural interpretation of *Winship*. That interpretation would read "every fact necessary to constitute the crime . . . charged" to mean every fact that might be determinative of penal liability. It would require the prosecution to prove beyond a reasonable doubt not only the presence of every element of the offense but also the absence of justification, excuse, or other grounds of exculpation or mitigation. In other words, the state bears the burden of proof beyond a reasonable doubt for every fact regarded by statute as relevant to the imposition of penal liability. Read this way, *Winship* did not affirm the status quo. Instead, it launched a sweeping, though probably unintended, attack on the constitutionality of many familiar aspects of the criminal law. This is referred to as the "procedural" interpretation of *Winship* because it emphasizes proof beyond a reasonable doubt as a procedural standard to be enforced without regard to the substantive content of the penal law.

In its broadest reach, a purely procedural insistence on proof beyond a reasonable doubt might lead to the invalidation of every "defense" to criminal liability. All defenses shift at least the burden of production to the accused. If neither the defendant nor the government provides evidence suggesting self-defense, for example, the issue is resolved in favor of the state, and no instruction on the point is given to the jury. As a result, the prosecution is relieved of the duty, imposed

by the procedural interpretation of *Winship*, to prove beyond a reasonable doubt every fact essential to criminal liability.

Theoretical inconsistency notwithstanding, placing the burden of production on the defendant has not been thought to raise any practical challenge to the reasonable-doubt standard. A shift in the burden of production, when not accompanied by a shift in the burden of persuasion, has little, if any, impact on the substantive relation between the state and the criminal accused. Instead, placing the burden of production on the defendant is an economical way to screen out issues extraneous to the case at hand and thus to promote efficient litigation. Moreover, the apparent theoretical inconsistency disappears if one assumes that the prosecution could prove beyond a reasonable doubt the absence of any exculpatory fact for which the defendant could produce no affirmative evidence.[14] Accordingly, there appears to be a consensus that shifting the burden of production is a permissible housekeeping device and not a true exception to the procedural interpretation of *Winship*.[15]

Some defenses, however, shift to the defendant both the burdens of production and persuasion. In such a case, the accused must prove by a preponderance of the evidence that the asserted exculpation does exist. As to that issue, he bears the risk of nonpersuasion; the jury is instructed to resolve uncertainty against him.[16] This kind of burden-

14. In Mullaney v. Wilbur, 421 U.S. 684, 701 n.28 (1975), for example, the Supreme Court expressly noted that nothing in that decision was intended to affect the traditional requirement that the defendant bear the burden of production by showing "some evidence" of provocation. *See* State v. Roberts, 88 Wash. 2d 337, 562 P.2d 1259 (1977).

Other authorities have suggested, however, that there may be "outer limits" on the authority of the state to shift the burden of production to the defendant. *E.g.*, Patterson v. New York, 432 U.S. 197, 230 n.16 (1977) (Powell, J., dissenting); *see* Ashford & Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165, 186-93 (1969); Comment, *Unburdening the Criminal Defendant:* Mullaney v. Wilbur *and the Reasonable Doubt Standard*, 11 HARV. C.R.-C.L. L. REV. 390, 420-24 (1976). To date, no court has held unconstitutional a defense that shifted only the burden of production.

15. *See, e.g.*, Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1335-36 (1977).

Mr. Justice Black held the view that a shift in the burden of production infringed a defendant's Fifth Amendment privilege against self-incrimination by coercing him to take the witness stand in his own behalf. Turner v. United States, 396 U.S. 398, 432-33 (1970) (Black, J., dissenting); United States v. Gainey, 380 U.S. 63, 87-88 (1965) (Black, J., dissenting). The Court consistently has rejected this position, and has perceived such a burden as no different in kind from the introduction of direct evidence that demands some kind of rebuttal. Barnes v. United States, 412 U.S. 837, 846-47 (1973); Turner v. United States, 396 U.S. 398, 417-18 (1970); Yee Hem v. United States, 268 U.S. 178, 185 (1925).

16. An alternative formulation is that the accused must prove the issue "to the satisfaction of the jury." *See, e.g.*, Ashford & Risinger, *supra* note 14, at 169. In very rare instances, the defendant has been required to prove an issue beyond a reasonable doubt. *E.g.*, Leland v. Oregon, 343 U.S. 790 (1952) (insanity).

shifting device is often, though not uniformly, called an "affirmative defense."[17] It does far more than screen out extraneous issues; it helps to determine the relationship between the state and the accused by defining the conditions for imposition of criminal liability. By altering the rule of decision for resolving close questions, shifting the burden of persuasion should produce convictions in some cases where acquittal would have resulted if the prosecution had been required to disprove beyond a reasonable doubt the existence of exculpatory facts. Indeed, the explicit justification for shifting the burden of persuasion to the defendant is often to ease the prosecutor's difficulty in disproving facts peculiarly within the defendant's knowledge. The use of an affirmative defense, therefore, is inconsistent with the procedural reading of *Winship* that requires proof beyond a reasonable doubt of every fact relevant to the imposition of penal liability.

Moreover, a procedural interpretation of *Winship* also undercuts the use of presumptions in the criminal law. Through presumptions, the existence of one fact is presumed from proof of another. Unfortunately, this description covers a range of procedural effects, and the language used to differentiate among them is, in the phrase of one authority, "exasperatingly indiscriminate."[18] The "true" presumption creates an inference that is mandatory unless rebutted.[19] Thus the law might declare that fact *X* must be presumed from fact *Y* unless the opposing party produces sufficient rebuttal evidence to show that fact *X* did not exist.[20] Although some penal statutes purport to create presumptions in mandatory terms,[21] they are generally not given compulsory

17. The use of the term "affirmative defense" to identify an issue for which the defendant bears the burdens of production and persuasion is a feature of many modern statutes. *E.g.*, ALASKA STAT. § 11.81.900(b)(1) (1978) (effective Jan. 1, 1980); CONN. GEN. STAT. § 53a-12(b) (1977); GA. CODE ANN. § 26-907 (1978).

The usage is also followed in the proposed federal criminal code as passed by the Senate. S. 1437, 95th Cong., 2d Sess. § 111 (1978). A different meaning is attached to the term "affirmative defense" by the Model Penal Code. There, the term is used to identify an issue for which the defendant bears the burden of production but for which the prosecution retains the burden of persuasion beyond a reasonable doubt. MODEL PENAL CODE § 1.12(2), (3) (Proposed Official Draft (P.O.D.) 1962).

18. G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 49 (1978).

19. *See* E. MORGAN, BASIC PROBLEMS OF EVIDENCE 31-37 (1963). Ashford and Risinger evidently mean to incorporate this type of presumption in their definition of an "assumption." Ashford & Risinger, *supra* note 14, at 173-74. Their terminology apparently derives from O. FISK, THE LAW OF PROOF IN JUDICIAL PROCEDURES (1928).

20. For example, some jury instructions state that a presumption "shall be deemed sufficient evidence to authorize conviction, unless the defendant explains [the contrary fact] to the satisfaction of the jury." United States v. Romano, 382 U.S. 136, 137 n.4 (1965) (in effect shifting burden of persuasion on that issue to defendant). Others have the effect of shifting only the burden of production. *E.g.*, MODEL PENAL CODE § 1.12(5) (P.O.D. 1962); *cf.* J. THAYER, *supra* note 8, at 337-39 (error to confuse presumptions with actual evidence).

21. *See, e.g.*, 18 U.S.C. § 5601(b) (1976).

effect.[22] Instead, the term "presumption" is used in the criminal law to describe what might better be termed a permissible inference. The law might authorize the trier of fact to infer fact *X*, an element of the crime charged, from proof of act *Y*. Under this scheme, evidence of *Y* would allow the prosecution to put its case to the jury and to avoid a directed verdict of acquittal based on failure to prove *X* beyond a reasonable doubt.[23]

The effect of this kind of rule is difficult to assess in the abstract. It depends on how closely facts *X* and *Y* are related by experience and common sense. If *X* and *Y* are closely linked, then the presumption of one from the other may simply restate the obvious. If, however, the two facts are sufficiently unrelated that proof of *Y* would not ordinarily be regarded as sufficient evidence of *X*, the presumption allows the jury to convict on the basis of otherwise inadequate evidence.

Even a nonmandatory presumption is plainly inconsistent with a rigorously procedural interpretation of *Winship*. Allowing the jury to find one fact upon proof of another relieves the prosecution of the obligation to establish the presumed fact beyond a reasonable doubt. To the extent that the relationship between the proved and presumed facts falls short of near certainty, the presumption of one from the other, like an affirmative defense, constitutes an exception to the reasonable-doubt standard. In this respect, a presumption is functionally equivalent to an affirmative defense.

Unlike affirmative defenses, however, presumptions have long been subject to constitutional scrutiny. Even before *Winship*, presumptions were attacked on constitutional grounds, and various rules were devised to determine whether a particular presumption comported with due process. Early cases looked for a "rational connection" between the proved and presumed facts.[24] Other decisions asked whether it would be more convenient for the government or accused to adduce direct evidence of the presumed facts.[25] Still another test was advanced by Mr. Justice Holmes in *Ferry v. Ramsey*.[26] There the Court

22. *See generally* G. LILLY, *supra* note 18, at 50-52 (citing sources).

23. *See, e.g.*, MODEL PENAL CODE § 1.12(5) (P.O.D. 1962). Under the Code, the device has two consequences. First, it allows the prosecution to satisfy the burden of production as to the presumed fact by introducing evidence of the fact giving rise to the presumption. Additionally, the Model Code authorizes an instruction to the effect that, although the presumed fact must be shown beyond a reasonable doubt, the jury may regard proof of the fact giving rise to the presumption as sufficient evidence of the presumed fact.

24. *See, e.g.*, Western & A.R.R. v. Henderson, 279 U.S. 639, 644 (1929); McFarland v. American Sugar Ref. Co., 241 U.S. 79, 86 (1916); Mobile, J. & K.C.R.R. v. Turnipseed, 219 U.S. 35, 43 (1910).

25. *See, e.g.*, Morrison v. California, 291 U.S. 82 (1932).

26. 277 U.S. 88 (1928) (presumption of director's knowledge of insolvency of bank upon proof of bank's insolvency).

permitted a presumption whenever the state could have based liability on the facts that had to be proved in order to trigger the presumption. This standard, sometimes called the "greater-includes-the-lesser" rule, focused on the substantive content of what the state had to prove and ignored the procedural embellishments with which those requirements were stated.[27] The state's power to abolish *X* as an element of a given offense was thought to include a lesser power to presume the existence of *X* upon proof of *Y*. Under this reasoning, a defendant had no cause for complaint when he was required to rebut a fact presumed against him as long as the state had the authority to make the presumed fact altogether irrelevant to guilt or innocence.

More recent cases have rejected the "greater-includes-the-lesser" rule.[28] In *Tot v. United States*,[29] the Court returned to the "rational connection" test, which requires the existence of a "rational connection between the fact proved and the ultimate fact presumed."[30] In *Leary v. United States*,[31] the Court added the gloss that a presumption is to be deemed " 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."[32] Indeed, recent decisions suggest a movement toward requiring that the presumed fact follow from the proved fact beyond a reasonable doubt, although no case has expressly so held.[33] The effect of this rule would be to restrict presumptions to inferences of such certainty as to rob the device of any practical consequence and thus to eliminate it as a meaningful feature of the definition of crimes.

Under a procedural interpretation of *In re Winship*, therefore, affirmative defenses and presumptions are equivalent. A formal inter-

27. As Justice Holmes put the point: "The 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." *Id.* at 94.

28. Professor Allen contends that the Court has never expressly overruled *Ferry* and that the position of Justice Holmes remains good law. Allen, Mullaney v. Wilbur, *the Supreme Court, and the Substantive Criminal Law—An Examination of the Limits of Legitimate Intervention*, 55 TEX. L. REV. 269, 286-90 (1977). Apparently, he construes later decisions as resting on statutory rather than constitutional grounds. Allen, *supra* note 3, at 50 n.70. Although there is much good sense in Professor Allen's position, his efforts to find his view confirmed by the Supreme Court are more heroic than plausible.

29. 319 U.S. 463 (1943).

30. *Id.* at 467.

31. 395 U.S. 6 (1969).

32. *Id.* at 36 (footnote omitted).

33. Barnes v. United States, 412 U.S. 837, 842-43 (1973); Turner v. United States, 396 U.S. 398, 405 (1970); Leary v. United States, 395 U.S. 6, 36 n.64 (1969); *see* Mullaney v. Wilbur, 421 U.S. 684, 702 n.31 (1975) (prosecution meets its burden with respect to presumed or inferred fact "by having satisfactorily established" other facts). *See also* Underwood, *supra* note 15, at 1332 n.95; Comment, *supra* note 14, at 421 (many courts avoid issue).

pretation of *Winship* might differentiate the devices, as presumptions generally are confined to facts characterized as elements of the offense. Any functional construction of the reasonable-doubt standard, however, will treat presumptions and affirmative defenses the same. What we have called the procedural interpretation of *Winship* would suggest that the constitutionality of both devices should turn on the same criteria, and would require, as a matter of federal constitutional law, that the state prove beyond a reasonable doubt every fact that it chooses to regard as relevant to the imposition or grade of criminal liability. This reading of *Winship* would disable legislatures from employing either presumptions or affirmative defenses in the definition of crimes, and it would enforce this disability even in the face of undoubted legislative authority to adopt a substantively harsher rule of liability.

The revolutionary implications of this procedural analysis went largely unnoticed in the years immediately following the announcement of *Winship*. The message was there, however, waiting to be articulated and tested in the courts. That opportunity arose in the 1975 decision of *Mullaney v. Wilbur*.[34]

C. *The Rise and Fall of* Mullaney v. Wilbur

The containment of *Winship* within the essentially formal boundaries of elements of the offense was shattered by the decision in *Mullaney v. Wilbur*. There, for the first time, the Court used *Winship* to invalidate a selective shift in the burden of proof. A unanimous Court held unconstitutional Maine's practice of requiring that a homicide defendant prove by a preponderance of the evidence that he killed in a sudden heat of passion based on adequate provocation. Under Maine's system, sufficient proof of adequate provocation would reduce intentional homicide from murder to manslaughter,[35] classifica-

34. 421 U.S. 684 (1975). For discussion of the history of this case and of the decisions rendered by the lower courts, see *The United States Court of Appeals for the First Circuit 1972-1973 Term*, 8 SUFFOLK U.L. REV. 183, 521-31 (1974); Comment, *The Constitutionality of the Common Law Presumption of Malice in Maine*, 54 B.U. L. REV. 973 (1974); Comment, *Due Process and Supremacy as Foundations for the Adequacy Rule: The Remains of Federalism after* Wilbur v. Mullaney, 26 ME. L. REV. 37 (1974).

35. Maine law punished as murder the unlawful killing of a human being with "malice aforethought." ME. REV. STAT. ANN., tit. 17, § 2651 (1964). Ordinarily, the requirement of malice would be satisfied by proof of intent to kill. But under Maine law, the defendant's showing of heat of passion based on sudden provocation could preclude a finding of malice, even though such a showing would not necessarily negate the presence of an intent to kill. Thus, in Maine, malice aforethought was construed to mean both the presence of mens rea with respect to the homicide and the absence of heat of passion based on sudden provocation. *See* Mullaney v. Wilbur, 421 U.S. 684, 688 n.9 (1975); State v. Lafferty, 309 A.2d 647 (Me. 1973). *See generally* Wechsler & Michael, *A Rationale of the Law of Homicide: I*, 37 COLUM. L. REV. 701 (1937).

tions treated as grading distinctions within the single offense of felonious homicide.[36] The absence of provocation was thus not formally an element of the crime of murder but rather a grading factor within the broader category of criminal homicide. By applying *Winship* to facts not formally classified as elements of the offense, *Mullaney* suggested that the requirement of proof beyond a reasonable doubt would not be limited by the characterizations of state law, but would apply to some facts extrinsic to the formal definition of an offense.

Beyond this, the decision was ambiguous. Parts of the opinion seemed to emphasize the traditional role of provocation in distinguishing murder from manslaughter and the sentencing consequence of that distinction.[37] These factors suggested a focus on the substantive importance of the rule of provocation rather than on a purely procedural principle for allocating the burden of proof. On this basis, *Mullaney* was susceptible to interpretation as a constitutional affirmation of the traditional content of homicide offenses rather than as a procedural doctrine of broad applicability beyond that context.[38]

Yet *Mullaney* also purported merely to follow *Winship*, which had said nothing at all about the substantive content of the criminal law. Moreover, the *Mullaney* Court emphasized the differential severity of the penalties for murder as opposed to those for manslaughter. Under this analysis, the Court strongly suggested that the reasonable-doubt requirement would apply to any fact of similar significance.[39] In short, *Mullaney* could be read as rejecting outright the largely artificial distinction between elements of the offense and other kinds of facts relevant to the imposition or grade of penal liability.

Mullaney tore down the formal constraints on the reasonable-doubt

36. State v. Lafferty, 309 A.2d 647, 661-63 (Me. 1973); State v. Robbins, 295 A.2d 914 (Me. 1972); State v. Wilbur, 278 A.2d 139, 144-46 (Me. 1971). In Wilbur v. Mullaney, 473 F.2d 943 (1st Cir. 1973) (habeas corpus proceeding), *vacated and remanded*, 414 U.S. 1139 (1974), *on remand*, 496 F.2d 1303 (1st Cir. 1974), *aff'd*, 421 U.S. 684 (1975), the Court of Appeals refused to accept this interpretation of Maine law and characterized it as a novel construction of state law designed to defeat the defendant's federal constitutional rights. *Compare* Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95 (1938) *with* Ward v. Love County, 253 U.S. 17 (1920). In *Mullaney v. Wilbur*, however, the Supreme Court overruled the First Circuit on this point and accepted at face value the previous state-court constructions of state law. 421 U.S. at 690-91.

37. 421 U.S. at 693-98, 700.

38. For the possibility of this reading of the case, see Allen, *supra* note 28, at 298; Low & Jeffries, *DICTA: Constitutionalizing the Criminal Law?* Va. L. Weekly, Mar. 25, 1977, at 1. Factors supporting this interpretation include the *Mullaney* Court's extensive discussion of the traditional law of homicide, 421 U.S. at 692-96, and the suggestion in Mr. Justice Rehnquist's concurrence that *Mullaney* would not override an earlier decision sustaining a requirement that the defendant bear the burden of persuasion for insanity. *Id.* at 705 (discussing Leland v. Oregon, 393 U.S. 790 (1952)).

39. 421 U.S. at 698-701.

requirement and seemed to set no clear limits on its application. Not surprisingly, the prevailing response was confusion. Some courts and most commentators read the case as a condemnation of all affirmative defenses.[40] Many other courts concluded that *Mullaney* invalidated some, but not all, burden-shifting defenses.[41] Still other jurisdictions

40. *See* Hallowell v. Keve, 555 F.2d 103, 108-09 (3d Cir. 1977); Zemina v. Solem, 438 F. Supp. 455, 467 n.13 (D.S.D. 1977); Berrier v. Egeler, 428 F. Supp. 750 (E.D. Mich. 1976), *aff'd*, 583 F.2d 515 (6th Cir.), *cert. denied*, 439 U.S. 555 (1978); Grace v. Hopper, 425 F. Supp. 1355 (M.D. Ga. 1977), *rev'd*, 566 F.2d 507 (5th Cir. 1977); Gagne v. Meachum, 423 F. Supp. 1177, 1179 (D. Mass. 1976); Frazier v. Weatherholtz, 411 F. Supp. 349, 353 (W.D. Va. 1976), *rev'd*, 572 F.2d 994 (4th Cir.), *cert. denied*, 439 U.S. 876 (1978); Moore v. State, 137 Ga. App. 735, 739, 224 S.E.2d 856, 857, *rev'd*, 237 Ga. 269, 227 S.E.2d 247 (1976); State v. Monroe, 236 N.W.2d 24 (Iowa 1975); Evans v. State, 28 Md. App. 640, 349 A.2d 300 (1975), *aff'd*, 278 Md. 197, 362 A.2d 629 (1976); State v. Stockett, 278 Or. 637, 565 P.2d 739, 742-43 (1977); Osenbaugh, *The Constitutionality of Affirmative Defenses to Criminal Charges*, 29 ARK. L. REV. 429 (1976); Underwood, *supra* note 15; Comment, *Constitutionality of Affirmative Defenses in the Texas Penal Code*, 28 BAYLOR L. REV. 120 (1976); Note, *supra* note 9; Comment, *Affirmative Defenses After* Mullaney v. Wilbur: *New York's Extreme Emotional Disturbance*, 43 BROOKLYN L. REV. 171 (1976); Note, *Affirmative Defenses and Due Process: The Constitutionality of Placing a Burden of Persuasion on a Criminal Defendant*, 64 GEO. L.J. 871 (1976); Comment, *supra* note 14; Comment, *Constitutional and Legislative Issues Raised by the Entrapment Defense in Maine*, 29 ME. L. REV. 170 (1977); Note, *Due Process and the Insanity Defense: Examining Shifts in the Burden of Production*, 53 NOTRE DAME LAW. 123 (1977); Comment, *Affirmative Defenses in Ohio After* Mullaney v. Wilbur, 36 OHIO ST. L.J. 828 (1975); Comment, *Mens Rea, Due Process and the Burden of Proving Sanity or Insanity*, 5 PEPPERDINE L. REV. 113 (1977); Note, *The New York Penal Law's Affimative Defenses After* Mullaney v. Wilbur, 27 SYRACUSE L. REV. 834 (1976); Comment, *The Constitutionality of Criminal Affirmative Defenses: Duress and Coercion*, 11 U.S.F. L. REV. 123 (1976); 12 WAKE FOREST L. REV. 423 (1976). These commentaries were generally quite favorable to the supposed abolition of affirmative defenses. Dissenting voices were raised by Low & Jeffries, *supra* note 38, and Allen, *supra* note 28.

41. The courts commonly uphold a shift of burden through the insanity defense. This position received support in Justice Rehnquist's concurring opinion in *Mullaney*, 421 U.S. at 704-06, and in the Court's earlier decision in Leland v. Oregon, 343 U.S. 790, 795-800 (1952). Neither these opinions nor the lower courts have developed any principled rationale for distinguishing insanity from provocation as a permissible departure from the reasonable doubt standard. *See* United States v. Caldwell, 543 F.2d 1333 (D.C. Cir. 1976); Buzynski v. Oliver, 538 F.2d 6 (1st Cir.), *cert. denied*, 429 U.S. 984 (1976), *discussed in* 63 VA. L. REV. 147 (1977); Hand v. Redman, 416 F. Supp. 1109 (D. Del. 1976); Rivera v. State, 351 A.2d 561 (Del.), *appeal dismissed for want of substantial federal question*, 429 U.S. 877 (1976); Shanahan v. United States, 354 A.2d 524 (D.C. 1976); Grace v. Hopper, 234 Ga. 669, 217 S.E.2d 267 (1975), *cert. denied*, 423 U.S. 1066 (1976); State v. Berry, 324 So. 2d 822 (La. 1975); State v. Melvin, 341 A.2d 376 (Me. 1975); State v. Bott, 310 Minn. 331, 246 N.W.2d 48 (1976); Guynes v. State, 92 Nev. 693, 558 P.2d 626 (1976); State v. Taylor, 290 N.C. 220, 226 S.E.2d 23 (1976).

Decisions upholding other affirmative defenses were similarly unsuccessful in distinguishing *Mullaney*. *See* United States v. Shaffer, 520 F.2d 1369 (3d Cir. 1975) (upholding claim-of-right defense to extortion); United States *ex rel.* Robinson v. Warden, 419 F. Supp. 1 (E.D.N.Y. 1976) (upholding unforeseeability defense to felony murder); Farrell v. Czarnetsky, 417 F. Supp. 987 (S.D.N.Y. 1976), *aff'd*, 566 F.2d 381 (2d Cir. 1977), *cert. denied*, 434 U.S. 1077 (1978) (upholding unarmed defense to aggravated robbery); Mitchell v. State, 342 So. 2d 927 (Ala. Crim. App. 1977) (upholding defense of self-defense); State v. Crawford, 172 Conn. 65, 372 A.2d 154 (1976) (upholding intoxication defense); James v. United States, 350 A.2d 748 (D.C. 1976) (upholding defense of innocent possession of controlled substance); Little v. State, 237 Ga. 391, 393-94, 228 S.E.2d 801, 802-03 (1976) (Hill, J., con-

refused to follow *Mullaney* beyond its facts and insisted that the crime-defense distinction should continue to govern elsewhere.[42] Only a few courts struck down previously approved presumptions in light of *Mullaney*.[43] Virtually everybody, however, concluded that *Mullaney* abandoned any purely formal constraints on the applicability of *Winship*. Conversely, almost no one interpreted the decision as affecting the scope of legislative authority to redefine the substantive law.[44]

Confusion invited clarification, and the opportunity arose after the New York Court of Appeals refused to follow *Mullaney* in an almost identical case. *Patterson v. New York*[45] involved a modern restatement of the rule of provocation. It allowed a defendant to mitigate a charge of murder to manslaughter if he could prove by a preponderance of the evidence that he acted under extreme emotional disturbance for which there was reasonable explanation or excuse.[46] Despite *Mullaney*,

curring) (upholding defense of justifiable homicide); Cowart v. State, 136 Ga. App. 528, 221 S.E.2d 649 (1975) (upholding abandonment defense to rape); St. Pierre v. State, 92 Nev. 546, 554 P.2d 1126 (1976) (upholding defense of self-defense); State v. Braun, 31 N.C. App. 101, 228 S.E.2d 466 (1976) (upholding entrapment defense); State v. Downs, 51 Ohio St. 2d 47, 364 N.E.2d 1140 (1977) (upholding defense to imposition of death penalty); State v. Bolton, 266 S.C. 444, 223 S.E.2d 863 (1976) (upholding defense of self-defense).

Other courts, however, have invalidated defenses that shift the burden to the defendant. *See* State v. Anonymous, 33 Conn. Supp. 28, 359 A.2d 715 (Sup. Ct. 1976) (extreme emotional disturbance mitigation to murder); Fuentes v. State, 349 A.2d 1 (Del. 1975) (same); Henderson v. State, 234 Ga. 827, 218 S.E.2d 612 (1975) (self-defense); 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); State v. Roberts, 88 Wash. 2d 337, 562 P.2d 1259 (1977) (self-defense).

42. *See* United States v. Parr, 516 F.2d 458 (5th Cir. 1975); Johnson v. State, 261 Ark. 714, 551 S.W.2d 203 (1977); People v. Tewksbury, 15 Cal. 3d 953, 544 P.2d 1335, 127 Cal. Rptr. 135 (1976); People v. Patterson, 39 N.Y.2d 288, 347 N.E.2d 898, 383 N.Y.S.2d 573 (1976), *aff'd*, 432 U.S. 197 (1977); State v. Pendry, 227 S.E.2d 210 (W. Va. 1976), *overruled in part on unrelated grounds*, Jones v. Warden, 241 S.E.2d 914 (1978).

43. *See* United States v. Robinson, 545 F.2d 301, 305-06 (2d Cir. 1976); State v. Searle, 339 So. 2d 1194, 1201, 1202-05 (La. 1976); Pinkerton v. Farr, 220 S.E.2d 682, 687-88 (W. Va. 1975); Note, *The Validity of Criminal Presumptions in Louisiana*, 37 LA. L. REV. 1155, 1155-66 (1977); Comment, *Presumptions in the Criminal Law of Louisiana*, 52 TUL. L. REV. 793, 795-800 (1978).

44. *See* Westberry v. Murphy, 535 F.2d 1333 (1st Cir. 1976); United States *ex rel.* Rock v. Pinkey, 430 F. Supp. 176 (N.D. Ill. 1977); Street v. Warden, 423 F. Supp. 611 (D. Md. 1976); State v. Nowlin, 244 N.W.2d 596 (Iowa 1976); Evans v. State, 28 Md. App. 640, 349 A.2d 300 (1975), *aff'd*, 278 Md. 197, 362 A.2d 629 (1976); People v. Martin, 75 Mich. App. 6, 254 N.W.2d 623 (1977); State v. Swift, 290 N.C. 283, 226 S.E.2d 656 (1976); State v. Thompson, 88 Wash. 2d 13, 558 P.2d 202, *appeal dismissed for want of a substantial federal question*, 434 U.S. 898 (1977); State *ex rel.* Peacher v. Sencindiver, 233 S.E. 425 (W. Va. 1977). *But cf.* Tushnet, *Constitutional Limitations of Substantive Criminal Law: An Examination of the Meaning of* Mullaney v. Wilbur, 55 B.U. L. REV. 775 (1975) (*Wilbur* restricts state imposition of strict liability and requires mental element to be included in definition of crime).

45. 432 U.S. 197 (1977) (aff'g 39 N.Y.2d 288, 347 N.E.2d 898, 383 N.Y.S.2d 573 (1976)).

46. *See* N.Y. PEN. LAW §§ 125.20(2), .25(1)(a) (McKinney 1975). The New York statutes defining first-degree and second-degree murder made it an affirmative defense that 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

the New York court upheld the statute,[47] and the Supreme Court affirmed.

The Court pinned its change of direction on an exceedingly fine distinction between *Patterson* and *Mullaney*. Maine law had specified "malice" as an essential ingredient of murder. "Malice" denoted both mens rea with respect to homicide *and* the absence of sudden heat of passion based on adequate provocation. Therefore, said the Court, requiring the defendant to prove provocation impermissibly relieved the state of its due process obligation to prove beyond a reasonable doubt every element of the crime charged.[48] The *Patterson* statute, in contrast, avoided the term "malice." Because this law did not formally identify the absence of extreme emotional disturbance as part of its definition of murder, *Winship* did not apply.[49] In essence, the *Patterson* Court evaded *Mullaney* by reviving the formal distinction between an element of the crime and a fact necessary for a defense to criminal liability.

This analysis drew a dissent from the author of *Mullaney*, Justice Powell. He argued that the majority's formalistic approach disregarded the concerns of the earlier opinion and made the command of *Winship* entirely dependent on legislative classifications: "The test the Court today establishes allows a legislature to shift, virtually at will, the burden of persuasion with respect to any factor in a criminal case, so long as it is careful not to mention the nonexistence of that factor in the statutory language that defines the crime."[50] Powell decried this implicit overruling of *Mullaney*[51] and advanced instead his own reinterpretation of that precedent—a quasi-historical view that would have barred shifting the burden of proof with respect to any factor historically significant in determining punishment and stigma.[52]

Doctrinally, at least, *Mullaney* and *Patterson* appear to have been a wash. The general understanding of *Winship* after *Patterson* is just what it was before *Mullaney*: A state must prove beyond a reasonable

from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be." *Id.* The statutes further provided that extreme emotional disturbance would not constitute a defense to manslaughter. *Id.*

The New York formulation of the rule of provocation derived from MODEL PENAL CODE § 210.2 (P.O.D. 1962), which is similar in substance but which does not shift the burden of persuasion to the defendant.

47. People v. Patterson, 39 N.Y.2d 288, 347 N.E.2d 898, 383 N.Y.S.2d 573 (1976), *aff'd*, 432 U.S. 197 (1977).

48. 432 U.S. at 215.

49. *Id.* at 206-07, 216.

50. *Id.* at 223 (Powell, J., dissenting); *see* Note, *The Constitutionality of Affirmative Defenses After* Patterson v. New York, 78 COLUM. L. REV. 655, 666-67 (1978).

51. 432 U.S. at 221-25.

52. *Id.* at 226-27. For criticism of this approach, see pp. 1361-64 *infra*.

doubt those facts that formally define the crime charged but not those facts that establish a defense or a mitigation of liability. However familiar the distinction, this resolution of *Winship* seems unstable and unsatisfactory. The distinction between "crime" and "defense" remains essentially arbitrary.[53] Even agreeing, as we do, with the outcome of *Patterson*, we must conclude that the element-of-the-offense analysis is too flimsy to sustain that result. Not only is that analysis easier to state than to apply; as subsequent experience indicates,[54] it

53. Emphasis on the formal distinction between an element of an offense and a defense may well ensure that courts do not frustrate the legislature's presumed intent as to which side should bear the burden of persuasion on any given issue. In other words, a purely formal and limited reading of *Winship* might be grounded in an understanding that due process requires a state to employ in every particular instance the allocation of the burden of proof that the legislature has mandated to be used generally. But several problems arise with this approach. It is true that in at least some instances a judicial creation of a presumption or an affirmative defense might depart from legislative intent. But, as *Mullaney* held, "state courts are the ultimate expositors of state law," 421 U.S. at 691. Absent "obvious subterfuge to evade consideration of a federal issue," a state court's construction of what the legislature intended is binding on a federal court. *Id.* at 691 n.11 (quoting Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 129 (1945)). And even if a legislature's intent were unquestionably frustrated in a given case, the court would merely have misconstrued state law, an error that does not in and of itself assume constitutional dimensions. *Cf.* Screws v. United States, 325 U.S. 91, 108-09 (1945) (state officials acting in violation of state law do not necessarily cause deprivation of constitutional rights). Moreover, the formal interpretation has clearly not been applied to presumptions. Many of the cases in which the courts have held a presumption unconstitutional involved jury instructions that were mandated expressly by the legislature. *See* Leary v. United States, 395 U.S. 6, 30-32 (1969); United States v. Romano, 382 U.S. 136, 138-39 (1965); Tot v. United States, 319 U.S. 463, 467 (1943); United States v. Moore, 571 F.2d 76, 87-89 (2d Cir. 1978).

54. The courts have interpreted *Patterson*'s impact on *Mullaney* to permit a range of results. *Compare* Frazier v. Weatherholtz, 512 F.2d 994 (4th Cir.), *cert. denied*, 439 U.S. 876 (1978) (approving burden on defendant to prove self-defense) *and* State v. Humphries, 51 Ohio St. 95, 364 N.E.2d 1354 (1977) (defendant waived objections to jury instruction giving him burden of persuasion for affirmative defenses) *with* Berrier v. Egeler, 583 F.2d 515, 518-19 (6th Cir.), *cert. denied*, 439 U.S. 555 (1978) (rejecting placement on defendant of burden to prove self-defense) *and* United States v. Jackson, 569 F.2d 1003 (7th Cir. 1978) (same; held not plain error) *and* Cole v. Stevenson, 447 F. Supp. 1268 (E.D.N.C. 1978) (self-defense and malice instructions unconstitutionally place burden of persuasion on defendant) *and* State v. Columbus, 258 N.W.2d 122, 123 (Minn. 1977) (not reversible error, although incorrect instruction placing burden to prove self-defense on defendant). At least one state has read *Patterson* to invalidate presumptions. State v. McGhee, 350 So. 2d 370, 375 (La. 1977) (reversible error that state relieved of burden in presuming theft from unexplained possession).

In addition, courts have attributed their holdings to the peculiarities of particular defenses or statutory schemes. *Compare* People v. Smith, 71 Ill. 2d 95, 374 N.E.2d 972 (1978) (states need not negate statutory exemptions to crime) *and* People v. D'Angelo, 401 Mich. 167, 257 N.W.2d 655 (1978) (approving defendant's burden to prove entrapment because that defense concerns not guilt but police conduct) *and* Stillwell v. Commonwealth, 247 S.E.2d 360 (Va. 1978) (approving defendant's burden to rebut statutory presumptions with proof of accomodation in distributing marijuana) *with* Turner v. Wolff, 581 F.2d 235 (9th Cir. 1978) (rejecting statutory presumption of intent to commit larceny or felony because presumption imposes burden on defendant to explain breaking and entering) *and* Graham v. Maryland, 454 F. Supp. 643 (D. Md. 1978) (unconstitutional placement of

also fails to respond to the genuine concerns that underlay *Winship* and *Mullaney*. Furthermore, *Patterson* provides no resolution of the confusion and irrationality that have long pervaded the constitutional analysis of presumptions in the penal law.

As a first step toward addressing these problems, it is necessary to show why, at least in terms of results, *Patterson* was right and *Mullaney* wrong. As the reactions of commentators have made clear,[55] that conclusion is not intuitively obvious. It derives from an analysis of the constitutional underpinning and practical implications of what we have called the procedural interpretation of *Winship*.

D. *Flaws in the Procedural Approach*

We begin by considering the paradigmatic case of a purely procedural interpretation of *Winship*. This is the position suggested by *Mullaney*, but disavowed in *Patterson*. It is the solution adopted by more than a few lower courts and by most academic commentators.[56] Moreover, analysis of the paradigmatic case reveals most starkly the error of treating a constitutional rule regarding burden of proof as a question divorced from the substance of the penal law.

1. *A Theoretical Critique*

As has been noted, a purely procedural interpretation of *Winship* would enforce the reasonable-doubt requirement without reference to the scope of legislative authority over the substance of the law. The prosecution would be constitutionally required to prove beyond a reasonable doubt every fact material to the imposition or grade of penal liability. This rule would disallow presumptions and affirmative defenses in the definition of crimes, but it would not alter legislative

burden on defendant to prove alibi defense) *and* State v. Templeton, 258 N.W.2d 380, 384 (Iowa 1977) (Rowlings, J., dissenting) (objecting to burden placed on defendant to establish intent-negating intoxication). For discussions of the variety of possible interpretations of *Patterson*, see Farrell v. Czarnetsky, 566 F.2d 381, 382 (2d Cir. 1977) (Oakes, J., concurring) and Note, *supra* note 50.

55. *See* Eule, *The Presumption of Sanity: Bursting the Bubble*, 25 U.C.L.A. L. REV. 637, 677-83 (1978); Note, *supra* note 50; Note, *Burden of Proving Affirmative Defense Can Be Placed on Defendant*, 29 MERCER L. REV. 875 (1978); Note, *Affirmative Criminal Defenses—The Reasonable Doubt Rule in the Aftermath of* Patterson v. New York, 39 OHIO ST. L.J. 393 (1978); 23 N.Y.L.S. REV. 802 (1978); 31 OKLA. L. REV. 411 (1978).

The only major effort to defend *Patterson* is in Allen, *supra* note 3. Professor Allen's defense of *Patterson* seems to be grounded in part on his view that the Court did not in fact revert to the formalistic limitation of the reasonable-doubt requirement to elements of the offense, despite the majority opinion's statements to the contrary. *Compare id.* at 48-49 *with* p. 1342 & notes 48-49 *supra*. Professor Allen believes that *Patterson* embraces the "greater-includes-the-lesser" rule.

56. *See* note 40 *supra*.

authority over the substance of the law. The state would be free, within otherwise applicable constitutional limits, to choose what facts to make relevant to criminal liability and grading. Once having chosen, however, the state would be required to establish the existence of the specified facts beyond a reasonable doubt. Thus, for example, a state would be forbidden from basing a defense on the defendant's ability to show the exculpatory facts, even if it could eliminate the defense altogether. Similarly, the government would be barred from regarding proof of *Y* as sufficient evidence of *X*, even though it could make *Y* alone an independently sufficient basis of liability. In the usual case in which the shift in the burden of proof is not accompanied by any violation of the applicable constitutional limits on the content of crime definition, the legislature would be free to respond to the invalidation of a presumption or an affirmative defense by undertaking to prove *either* more or less, as it sees fit.

The first fault of this approach is its illogic. The procedural interpretation of *Winship* would allow the government to abolish a given ground of exculpation, but not to retain it as an affirmative defense. It would permit the state to punish *Y* without reference to *X* but not to allow conviction based on an authorized inference of *X* from proof of *Y*. Normally, one would expect the greater power to include the lesser. As Mr. Justice Holmes pointed out,[57] legislative authority to punish *Y* standing alone should encompass the lesser authority to punish *Y* when *X* is not rebutted. Similarly, legislative competence to abolish a defense altogether should include a fortiori the power to shift to the defendant the burden of establishing its existence. Yet the procedural interpretation of *Winship* would contradict this logic and deny the validity of the greater-includes-the-lesser argument. Instead, the procedural approach to burden of proof would force the state to choose between the extremes of proving more or proving less. On the face of it, we find it hard to believe that this incongruity is constitutionally mandated.

The logic of the greater-power-includes-the-lesser argument seems compelling; it could be avoided only if one could identify an independent rationale for proof beyond a reasonable doubt. In other words, a purely procedural interpretation of *Winship*—one that is wholly illogical as a statement of substantive policy—must find its justification in an exclusively procedural concern that exists no matter what the content of the underlying substantive issue. The case for reading *Winship* to disallow every exception to proof beyond a rea-

57. *See* p. 1337 & note 27 *supra*.

sonable doubt boils down to a search for some such exclusively procedural justification.

The chief justification for proof beyond a reasonable doubt in general has always been thought to be that it enhances the certainty of the factual findings needed for criminal conviction.[58] Close questions are resolved in favor of the accused, and the use of penal sanctions is thereby restricted to cases in which the proof of guilt is overwhelming. To this end, the requirement of proof beyond a reasonable doubt introduces a deliberate imbalance into the factfinding process.[59] It favors individual liberty at the expense of societal order and thus gives voice to the basic political value choice captured in the phrase "presumption of innocence."[60] This preference is reflected in a standard of proof that biases factual dispute resolution in favor of the criminal accused.[61]

The trouble is that this rationale does not justify the rule for which it is offered. Implementing the presumption of innocence—whether on an actual or a symbolic level—requires that *something* be proved beyond a reasonable doubt. It does not, however, speak to the question of *what* that something must be. In particular, the proffered justifications for the reasonable-doubt requirement do not establish that *every* fact relevant to the imposition or grade of penal liability must be subject to that standard. In our view, these rationales extend only

58. *See, e.g.*, Ashford & Risinger, *supra* note 14, at 190-91; Underwood, *supra* note 15, at 1306-07.

59. Professor Underwood accepts this justification for the reasonable-doubt requirement, but also suggests that this standard of proof may in addition be understood as a corrective measure designed to redress the problem that factfinders may favor the prosecution. Underwood, *supra* note 15, at 1306-07. The basis for this supposition is, however, not documented—a point that Professor Allen emphasizes in his rebuttal of the argument. Allen, *supra* note 3, at 43 n.60.

60. *See In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.")

61. Professor Underwood endorses this rationale but posits as a second and distinct purpose for the reasonable-doubt requirement a "symbolic function . . . to single out criminal convictions as peculiarly serious among the adjudications made by courts." Underwood, *supra* note 15, at 1307. Professor Underwood suggests a deterrent effect from this symbolic function. The hypothesis seems to be that requiring proof beyond a reasonable doubt increases the stigma that attaches to criminal conviction and thereby increases the deterrent effect of the threat of conviction. We would have thought, and Professor Underwood admits the possibility, *see id.* at 1307-08, that any such effect would be more than offset by the reduced likelihood of obtaining conviction in the first place. A third hypothesis, which may be the most plausible of all, is that the standard of proof probably has an insignificant impact on deterrence one way or the other.

Professor Underwood also suggests that the symbolism of the rule affirms our "shared moral purpose" regarding the appropriate relationship between the state and the criminal accused. *Id.* at 1308. It is unclear what this formulation adds to the accepted prodefendant purpose of the reasonable-doubt requirement.

so far as the substantive issue at stake is thought to be an essential ingredient of the state's case. When, in contrast, the state considers a gratuitous defense, that is, one that it may grant or deny as it sees fit, a constitutional insistence on proof beyond a reasonable doubt no longer make sense. Such a rule would purport to preserve individual liberty and the societal sense of commitment to it by forcing the government *either* to disprove the defense beyond a reasonable doubt *or* to eliminate the defense altogether. The latter solution results in an extension of penal liability despite the presence of mitigating or exculpatory facts. It is difficult to see this result as constitutionally compelled and harder still to believe that it flows from a general policy, whether actual or symbolic, in favor of individual liberty.[62] When a constitutional commitment to individual liberty is construed to induce harshness in the penal law, something is plainly amiss.

The trouble lies in trying to define justice in exclusively procedural terms. *Winship*'s insistence on the reasonable-doubt standard is thought to express a preference for letting the guilty go free rather than risking conviction of the innocent. This value choice, however, cannot be implemented by a purely procedural concern with burden of proof. Guilt and innocence are substantive concepts. Their content depends on the choice of facts determinative of liability. If this choice is remitted to unconstrained legislative discretion, no rule of constitutional procedure can restrain the potential for injustice. A normative principle for protecting the "innocent" must take into account not only the certainty with which facts are established but also the selection of facts to be proved. A constitutional policy to minimize the risk of convicting the "innocent" must be grounded in a constitutional conception of what may constitute "guilt." Otherwise "guilt" would have to be proved with certainty, but the legislature could define "guilt" as it pleased, and the grand ideal of individual liberty would be reduced to an empty promise. This doctrine would force a legislative election between proving more or proving less, but it would not reduce the risk of convicting the "innocent" in any save a cruelly formal sense. There would be no virtue in such a result, and it defies reason to believe that this constitutional coercion to extend criminal liability is justified by a general constitutional bias in favor of the criminal accused.

62. There is no apparent reason to believe that the symbolic value of society's commitment to proof beyond a reasonable doubt is in any way impaired by the existence of presumptions and affirmative defenses. These devices have existed for a long time and have not been widely perceived or popularly condemned as invasions of the presumption of innocence.

It may clarify the argument to consider statutory rape. Legislatures have long been thought competent to punish consensual intercourse with an underage female without regard to the defendant's state of mind as to her age. Under existing precedents, a state may authorize conviction of statutory rape despite mistake as to age, and many states do just that.[63] If, despite such authority, a legislature chooses to create an affirmative defense of honest and reasonable mistake, what sense would it make to disallow that defense on the grounds that it inadequately protects the innocent? If the state can simply declare the accused guilty no matter how plainly an honest mistake could be shown, constitutional disallowance of the more generous scheme of an affirmative defense for reasonable mistake borders on the perverse. Yet a constitutional preference for the harsher solution is exactly what is achieved by a rigidly procedural interpretation of *Winship*.

The point, of course, is not that the reasonable-doubt requirement is inappropriate, but only that constitutional insistence on that standard should take account of the scope of legislative authority over the definition of crimes. Within the range of permissible legislative choice, the greater-power-includes-the-lesser argument is fully applicable. On the other hand, federal constitutional law appropriately should require proof beyond a reasonable doubt of those matters that the state is constitutionally required to establish. For example, the fundamental requirement that every definition of a crime should include a criminal act would bar a legislature from punishing as criminal the bare desire to have sexual intercourse with an underage person. Because the act of intercourse or some conduct preparatory thereto would be an essential prerequisite for criminal liability, it is entirely sensible to insist that such conduct be proved beyond a reasonable doubt. Any lower standard would fail to vindicate the strong societal bias against conviction of the innocent. A constitutional rule fixing the burden of proof is sensible in the case of statutory rape precisely because the rule would not be subject to evasion by exercise of the legislature's "greater power" over the substance of the penal law.

Virtually alone among the proponents of a procedural interpretation of *Winship*, Professor Underwood has attempted to answer the point that legislative power to withdraw an exculpation altogether would ordinarily include the lesser power to shift the burden of proof

63. *See, e.g.*, IDAHO CODE § 18-6101(1) (1948 & Supp. 1978) (as interpreted in light of State v. Suennan, 36 Idaho 219, 209 P. 1072 (1922)); N.C. GEN. STAT. § 14-26 (1970 & Supp. 1975) (as interpreted in light of State v. Wade, 224 N.C. 760, 32 S.E.2d 314 (1944)); S.C. CODE § 16-3-650 (1976) (as interpreted in light of State v. Whitener, 228 S.C. 244, 89 S.E.2d 701, *cert. denied*, 350 U.S. 861 (1955)).

pertaining to it. As has been noted, the fundamental and pervasive defect in her argument is the unarticulated assumption that the rationales for requiring proof of *something* beyond a reasonable doubt necessarily state rationales for requiring proof of *everything* by that standard. Once that error is exposed, it becomes clear that the traditional understanding of the reasonable-doubt requirement provides no affirmative case for extending *Winship* to cover every fact relevant to criminal liability or grading. To her credit, Professor Underwood confronts this prospect and responds by suggesting four additional and independent justifications for a constitutional requirement of proof beyond a reasonable doubt.[64] Each of them purports to apply even within the scope of undoubted legislative authority over the substance of the penal law.

First, Professor Underwood contends that a purely procedural interpretation of *Winship* would conform to a constitutional pattern of regulating process without regard to substance.[65] She seems to contend that because such guarantees as the right to counsel and trial by jury are applicable no matter what the content of the law, the constitutional requirement of proof beyond a reasonable doubt must apply on the same terms. The trouble is that the argument begs the question. The issue is not whether there is a purely procedural justification for right to counsel or trial by jury. The issue is whether there is a purely procedural justification for a constitutional rule fixing the burden of proof, that is, a justification of the reasonable-doubt standard in terms not related to or limited by the scope of legislative authority over the substance of the law. No such justification is established by pointing to the undisputed existence of purely procedural guarantees elsewhere in the Constitution.[66]

64. Underwood, *supra* note 15, at 1316-30.
65. *Id.* at 1317-20.
66. Moreover, Professor Underwood's description of constitutional text and pattern is at times quite forced. She uses an analogy to the equal protection clause as a means of avoiding the greater-power-includes-the-lesser analysis:

> A denial of equal protection can be remedied by treating everyone equally badly, or by treating everyone equally well. A legislature that is ambivalent about extending a substantive right might choose to compromise by extending it to part of the population. Because the requirement of equal protection at least sometimes prevents that sort of compromise, it might push a legislature to abandon a wise policy rather than extend it equally to everyone. For this reason the wisdom of requiring equality, like the wisdom of requiring procedural uniformity, might be questioned.

Id. at 1319 (footnote omitted). The argument seems to ignore the fact that, precisely for the reason stated, equality has *not* been required, despite a reasonably explicit textual mandate. The equal protection clause has never been taken to enforce a generally applicable guarantee against differential treatment. On the contrary, review under the equal protection clause tends to have bite only when some independent value is at stake. Thus, most emphatically the equal protection clause protects racial and ethnic minorities

Underwood's second point is that the kind of legislative compromise represented by the adoption of an affirmative defense is inappropriate under any circumstances.[67] This observation is more in the nature of epithet than argument. The discussion designed to support it merely reiterates Professor Underwood's conclusion that the reasons for the reasonable-doubt requirement apply in all cases.[68]

Underwood's third and most important point is advanced under the rubric of "truth-in-labeling."[69] She finds in the use of affirmative defenses a tendency "to trap an unsuspecting public"[70] and "to deny citizens the fair notice that is constitutionally required of the criminal law."[71] This argument merely derives from the somewhat more plausible point that presumptions work to disguise the substance of the law. That contention is discussed elsewhere.[72] For present purposes, it is necessary only to note that, whatever one's view of the obfuscatory potential of presumptions, there is no reason to regard an affirmative defense as misdescriptive of anything. Interestingly, on close inspection it appears that Professor Underwood herself does not claim that af-

against discrimination on that basis. With respect to this independent value—independent, that is, of the scope of legislative authority over the subject matter of the law in question—the legislature simply has no "greater power."

67. *Id.* at 1320-23.

68. Like so much of the argument for a procedural interpretation on *Winship*, Underwood's discussion of an "inappropriate form of compromise" tends to assume the point in issue. Consider, for example, the following passage:

> A legislature uncertain as to the merits of a proposed defense might reasonably wish to change its assessment of the relative costs of errors [relating to the admitted function of the reasonable-doubt requirement in order to introduce a deliberate imbalance into that assessment]. But a constitutional valuation of the relative costs of errors cannot be avoided by legislative fiat. So long as the factual determination has the function and consequences that characterize other issues in a criminal case, such as enhanced stigma and an increased period of potential incarceration, the reasons for the constitutional rule remain. The costs of erroneous convictions and erroneous acquittals are not different by virtue of the gratuitous character of the defense.

Id. at 1322. Now, of course it is true that a constitutional rule cannot be overturned by legislative fiat, but the question in dispute is the scope of the constitutional rule. The case for a given rule is not made by assuming its existence.

Beyond that, Underwood's point is a reformulation in the language of "error" of her earlier point about the necessity of an exceptionless adherence to proof beyond a reasonable doubt in order to protect the "innocent." In both manifestations, the argument would embrace as a matter of constitutional law a purely procedural conception of the evil at stake. Thus, for example, Professor Underwood would regard as a constitutional error the conviction of one who was unable to establish an affirmative defense of mistake of age for statutory rape, but would accept as involving no such error the conviction of one whose undoubted mistake was disregarded by the substantive law. The content of this concept of "error" is thus dependent on legislative crime definition. A purportedly constitutional rule that fails to take account of that fact in its effort to prevent "error" is an exercise in pointless illogic.

69. *Id.* at 1323-25; *see* Note, *supra* note 50, at 667.

70. Underwood, *supra* note 15, at 1323.

71. *Id.* at 1324.

72. *See* pp. 1390-92 *infra*.

firmative defenses are descriptively confusing. Instead, she asserts that affirmative defenses, although by hypothesis perfectly intelligible to anyone who bothers to look, are nevertheless deceptive in that they depart from what she supposes that an ordinary citizen thinks the law to be.[73] Professor Underwood apparently believes that there exists a "widely shared expectation" in society that every jot and tittle of crime definition must be proved beyond a reasonable doubt and further that it would be unconstitutional to contradict that expectation.[74] Both assumptions are faulty. A heroic effort would be required to show *any* settled expectation regarding the allocation of the burden of proof for an "affirmative defense." Of course, there may be widespread appreciation that something must be proved beyond a reasonable doubt, but that is not the point of dispute. More importantly, this argument has nothing to do with descriptive deceptiveness in the definition of crime. No matter who may wish to create a constitutional obligation to match popular understanding of the content of the penal law, no such obligation exists, nor may it be invented by mere assertion.

Finally, Professor Underwood invokes the bugaboo of the "slippery slope."[75] She argues that the greater-power-includes-the-lesser argument is hard to confine within acceptable limits. In other words, Underwood assumes that the Constitution places few limits on the definition of crimes and consequently that the legislature's "greater power" is too great to be tolerated. Whether or not this supposition is true, it is irrelevant to the task of justifying a procedural interpretation of *In re Winship*. The force of the greater-power-includes-the-lesser argument in no way depends on the scope of the greater power. The illogic of coercing legislatures toward substantively extreme choices in their definition of crimes remains exactly the same no matter what one assumes to be the permissible range of legislative choice. Whatever the reach of legislative authority over the substance of the law, within that sphere it remains fundamentally unsound to require adherence to a constitutional rule fixing the standard of proof.[76]

Our purpose is not to debate every aspect of Underwood's exposition. It is only to ensure that all of the suggested justifications for a procedural interpretation of *Winship* have been taken into account. In

73. Underwood, *supra* note 15, at 1325.
74. *Id.* at 1324-25.
75. *Id.* at 1325-30.
76. As part of her "slippery slope" discussion, Professor Underwood also suggests that the greater-power-includes-the-lesser argument is defective in that it would necessarily encompass such procedural guarantees as the defendant's right to fair notice of the charges against him. *Id.* at 1329-30. For a convincing refutation of this contention, see Allen, *supra* note 3, at 35 n.60.

our view, none of these arguments can fairly be taken to support an exceptionless constitutional requirement of proof beyond a reasonable doubt. More specifically, none has force in the context of legislative authority to redefine the substance of the law. Especially is this failure evident when one remembers the constitutional standard by which the issue must be judged. Due process means "fundamental fairness."[77] It requires the government to observe the essentials of fair treatment.[78] The standard is hardly self-executing, but at least it should be clear that the procedures embraced as essentials of due process should be in some sense important—not merely convenient or familiar, but fundamental to justice. No doubt the reasonable-doubt standard is fundamental in its application to the essential prerequisites of penal liability. But within the sphere of the legislature's "greater power" over the substance of the law, such is not the case. Far from being fundamental, the reasonable-doubt standard is, within that context, entirely unrelated to any plausible perception of unfairness in the penal law.

Furthermore, a purely procedural insistence on proof beyond a reasonable doubt is not only a rule without apparent justification; it is also a doctrine without principled limit. Specifically, no reason appears to confine the reasonable-doubt requirement to facts material to liability or grading. For example, this purportedly constitutional standard of proof may just as easily apply to facts relevant to sentencing. From the defendant's point of view, variations in sentencing within an authorized range may be of far greater consequence than conviction of an offense of one or another grade of liability.[79] Might

77. *In re* Winship, 397 U.S. 358, 369 (1970) (Harlan, J., concurring).

78. *See id.* at 359; *In re* Gault, 387 U.S. 1, 30 (1967); Kent v. United States, 383 U.S. 541, 562 (1966).

79. In *Mullaney* the Court quite correctly rejected the state's contention that the reasonable-doubt standard should not apply simply because the rule of provocation was a grading distinction within the crime of felonious homicide rather than an element of the offense of murder:

> The safeguards of due process are not rendered unavailable simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty. The fact remains that the consequences resulting from a verdict of murder, as compared with a verdict of manslaughter, differ significantly. *Indeed, when viewed in terms of the potential differences in the restrictions of personal liberty attendant to each conviction, the distinction established by Maine between murder and manslaughter may be of greater importance than the difference between guilt and innocence for many lesser crimes.*

421 U.S. at 698 (emphasis added). This reasoning would seem to apply with equal force to facts relevant to sentencing, for the "potential differences in the restrictions of personal liberty" arising from different sentences for the same crime may be even greater. Thus, for example, Maine law specified the penalty for murder as life imprisonment and set a maximum penalty for manslaughter of imprisonment for 20 years. ME. REV. STAT. ANN. tit. 17, § 2551 (1964) (repealed 1975). The difference between 20 years and life is certainly great, but so is the difference between 20 years and 10 or 5 or 1. Although the

not the rationale (whatever it is) for requiring proof beyond a reasonable doubt of all facts determinative of liability or grading also extend to facts influential in sentencing? The result would be wholesale displacement of the existing law of sentencing and imposition in its place of a highly rigid system with individual outcomes entirely controlled by specified facts established beyond a reasonable doubt through the process of adversarial litigation. Perhaps there may be something to be said for such a scheme, but we know of no one who has proposed so radical a constitutionalization of the law of sentencing.[80] At the same time, a purely procedural interpretation of *Winship* lacks any internal reason to stop short of this result, and advocates of that view have neglected to explain this point.[81]

2. *A Practical Evaluation*

The procedural interpretation of *Winship* would not only be illogical in concept; it would also be potentially pernicious in effect. It is at least plausible, indeed we think it likely, that a rule barring reallocation of the burden of proof would thwart legislative reform of the penal law and stifle efforts to undo injustice in the traditional law of crimes. Even if one were to believe that rigid insistence on proof beyond a reasonable doubt might in some purely symbolic sense reaffirm the "presumption of innocence," it would do so at the risk of a harsh and regressive expansion in the definition of guilt.

This is a point of some importance, for, quite surprisingly, proponents of a procedural interpretation of *Winship* have made exactly the contrary argument.[82] They assume that forcing legislatures to

former disparity would be resolved by the terms of the conviction, and the latter would be left to sentencing, no reason appears to distinguish between the two in terms of the *Mullaney* interpretation of *Winship*.

80. *See generally* Hollis v. Smith, 571 F.2d 685, 694-96 (2d Cir. 1978); Note, *A Hidden Issue of Sentencing: Burdens of Proof for Disputed Allegations in Presentence Reports*, 66 GEO. L.J. 1515 (1978).

81. Professor Underwood suggests that the reasonable-doubt requirement should extend to facts pertinent to sentencing when such facts "involve labeling and stigma as well as incarceration." Underwood, *supra* note 15, at 1326 n.83. Yet the conceptual framework adopted in her article does not reach sentencing explicitly. *See id.* at 1338-47. Proferror Underwood identifies as facts to which, even under her scheme, the reasonable-doubt requirement would not apply those "facts that are tied more closely to the proper administration of institutions than to the justification for convicting the defendant," *id.* at 1340, and those facts that "must be resolved to determine whether a case is properly before a court," *id.* at 1342. The former category includes issues of the admissibility of evidence, while the latter encompasses such questions as double jeopardy, jurisdiction, and venue. Neither category would seem to reach facts relevant to determining the sentence. In contrast, the alternative construction of *Winship* advanced in this article would not apply to sentencing facts.

82. *See, e.g.*, Ashford & Risinger, *supra* note 14, at 189; Underwood, *supra* note 15, at 1318; Note, *supra* note 50, at 667.

choose between proving more and proving less would produce good choices. In other words, they argue that a legislature required to abandon an affirmative defense would be likely to force the prosecution to disprove the existence of a ground of exculpation beyond a reasonable doubt rather than to eliminate it altogether. Popular pressure, it is asserted, would act as a check against untoward expansion of criminal liability. The net effect, therefore, of disallowing the intermediate solution of an affirmative defense would be a benign and progressive influence on the substance of the penal law.

Aside from failing to demonstrate whether this supposition, even if true, would be sufficient basis for constitutional adjudication, advocates of the procedural approach fail to produce evidence to support the supposition. The best evidence of what legislatures would do if they were forced to abandon the affirmative defense is the catalogue of uses to which that device is currently put. If it were used to disguise harsh innovations in the law of crimes, one might reasonably infer that elimination of the procedural device would have an ameliorative effect on substance. In point of fact, however, the burden-shifting defense quite generally is employed to moderate traditional rigors in the law of crimes. There is, therefore, reason to believe that rejection of this device would result in abandonment of the underlying substantive innovations and reversion to older and harsher rules of penal liability.

In order to test this proposition, we surveyed the practices of the 33 American states that have recently enacted comprehensive revisions of their penal laws.[83] These are the jurisdictions that in modern times

83. ALA. CODE §§ 13A-1-1 to -14-5 (Supp. 1977 & Supp. 1978) (effective June 1, 1979); ALASKA STAT. §§ 11-16-100 to -81-900 (Supp. 1978) (effective Jan. 1, 1980); ARIZ. REV. STAT. ANN. §§ 13-101 to -4202 (Supp. 1978); ARK. STAT. ANN. §§ 41-123 to -4706 (1964 & Supp. 1975) (scattered sections amended 1977); COLO. REV. STAT. §§ 18-1-101 to -15-108 (1973 & Supp. 1978); CONN. GEN. STAT. §§ 53a-1 to -212 (1979); DEL. CODE ANN. tit. 11, §§ 101-9017 (1974 & Supp. 1978); FLA. STAT. ANN. §§ 775.01-893.15 (West 1976 & Supp. 1978); GA. CODE ANN. §§ 26-101 to -9948a (1978 & Supp. 1978); HAWAII REV. STAT. §§ 701-100 to -853-4 (1976 & Supp. 1978); Criminal Code of 1961, ILL. ANN. STAT. ch. 38, §§ 1-1 to -1105 (Smith-Hurd 1972 & Supp. 1978); IND. CODE ANN. §§ 35-1-2-3 to -50-6-6 (Burns 1975 & Supp. 1978); IOWA CODE ANN. §§ 701.1-732.6, 901.1-909.6 (West Supp. 1978); KAN. STAT. ANN. §§ 21-3101 to -4619 (1974 & Supp. 1978); KY. REV. STAT. §§ 500.010-534.060 (1975 & Supp. 1978); ME. REV. STAT. ANN. tit. 17-A, §§ 1-1357 (Supp. 1978); MINN. STAT. ANN. §§ 609.01-624.73 (West 1964 & Supp. 1979); MO. ANN. STAT. §§ 556.011-578.010 (Vernon Supp. 1978); MONT. REV. CODES ANN. §§ 94-1-101 to -8-431 (Supp. 1976) (scattered sections amended 1977); NEB. REV. STAT. §§ 28-101 to -1462 (Supp. 1977) (scattered sections amended 1978); N.H. REV. STAT. ANN. §§ 625:1-651:61 (1974) (scattered sections amended 1977); New Jersey Code of Criminal Justice, L.1978, ch. 95, 1978 N.J. Sess. Law Serv. 292 (West) (to be codified as N.J. STAT. ANN. §§ 2C:1-1 to :98-4) (effective Sept. 1, 1979); N.M. STAT. ANN. §§ 40A-1-1 to -29-25 (1953 & Supp. 1975) (scattered sections amended 1977); N.Y. PENAL LAW §§ 1.00-500.5 (McKinney 1975 & Supp. 1978-79); N.D. CENT. CODE §§ 12.1-01-01 to -33-04 (1976 & Supp. 1977); OHIO REV. CODE ANN. §§ 2901.01-

have had an occasion to confront the issues here under discussion. Eight of these states provide no statutory guidance on this point,[84] and six more expressly require that the prosecution bear the burden of proof beyond a reasonable doubt for every fact needed to obtain conviction.[85] However, nineteen states have enacted revised codes that include burden-shifting defenses. Virtually all of these uses of the burden-shifting defense mark instances of benevolent innovation in the penal law.[86] Thirteen states recognize an affirmative defense of renunciation for the crime of attempt.[87] Nine permit reasonable mistake as to age as an affirmative defense to statutory rape.[88] Eight create an affirmative defense to liability for felony murder,[89] and six exonerate the accused if he can show reasonable reliance on an official misstatement of law.[90] In each of these cases, the affirmative defense is used to introduce a new ground of exculpation, often in circumstances where an obligation to disprove its existence beyond a reasonable doubt would be especially onerous. None of the named defenses existed at common law,[91] and none is a traditional feature of

2929.61 (Page 1975 & Supp. 1978-79); OR. REV. STAT. §§ 161.005-169.690 (1977); 18 PA. CONS. STAT. ANN. §§ 101-7505 (Purdon 1973 & Supp. 1978-79); S.D. COMP. LAWS ANN. §§ 22-1-1 to -42-13 (Supp. 1978); TEX. PENAL CODE ANN. tit. 1, § 1.01 to tit. 11, § 71.05 (Vernon 1974 & Supp. 1978-79); UTAH CODE ANN. §§ 76-1-101 to -10-1401 (1978); WASH. REV. CODE ANN. §§ 9A.04.010-.88.100 (1977); WIS. STAT. ANN. §§ 939.01-949.18 (West 1958 & Supp. 1978-79).

We have omitted Louisiana, Puerto Rico, and Virginia from the list of jurisdictions that have recently reformed their penal laws. In the case of Louisiana, the date of the last revision (1942) prevents attribution of the change to the inspiration of the Model Penal Code. *See* LA. REV. STAT. §§ 14:7-:501 (West. 1974 & Supp. 1979). In the cases of Puerto Rico and Virginia, the revision did little more than memorialize prior law; the condifications there cannot fairly be categorized as comprehensive revisions. *See* P.R. LAWS ANN. tit. 33, §§ 3001-4628 (Supp. 1977); VA. CODE §§ 16.1-69.1 to 21-428 (Supp. 1975).

84. These states are Arizona, Florida, Indiana, Iowa, Kansas, Montana, New Mexico, and Wisconsin.

85. ALA. CODE § 13A-1-2(14) (Supp. 1978); COLO. REV. STAT. § 18-1-407 (1973 & Supp. 1976); Criminal Code of 1961, ILL. ANN. STAT. ch. 38, § 3-2 (Smith-Hurd 1972); OHIO REV. CODE ANN. § 2901.05 (Page Supp. 1977); S.D. CODIFIED LAWS ANN. § 22-1-2(3) (Supp. 1978); UTAH CODE ANN. §§ 76-1-501, -502(2)(b), -504 (1978).

86. *See* Appendix, p. 1398 *infra* (describing uses of these defenses).

87. These states are Alaska, Arkansas, Connecticut, Delaware, Georgia, Hawaii, Maine, New Hampshire, New Jersey, New York, North Dakota, Oregon, and Texas. *See* Appendix, p. 1400 *infra*.

88. These states are Alaska, Arkansas, Kentucky, Minnesota, Missouri, North Dakota, Oregon, Pennsylvania, and Washington. *See* Appendix, p. 1403 *infra; id.* (six states provide defense to rape of reasonable mistake as to capacity of victim to consent).

89. These states are Alaska, Arkansas, Connecticut, Maine, New York, North Dakota, Oregon, and Washington. *See* Appendix, p. 1401 *infra*.

90. These states are Arkansas, Maine, New Hampshire, New Jersey, North Dakota, and Texas. *See* Appendix, p. 1398 *infra*. *See also* MODEL PENAL CODE § 2.04(3) (P.O.D. 1962).

91. *See, e.g.*, G. FLETCHER, RETHINKING CRIMINAL LAW § 9.3 (1978) (mistake as to age not traditionally recognized as defense to rape); R. PERKINS, CRIMINAL LAW 37-45 (2d ed.

American statutes.[92] A plausible conclusion is that shifting the burden of proof is often politically necessary to secure legislative reform.[93] It seems quite possible, therefore, that disallowance of this procedural device would work to inhibit reform and induce retrogression in the penal law.

II. Substantive Justice

Ultimately, the procedural interpretation of *Winship* fails to promote the primary concern that motivates its own adherents: the concern for substantive justice. It is this concern that condemns the formalistic formulation of the rule of *Winship* that enshrines the "elements of the offense" as the only items worthy of the reasonable-doubt standard.[94] To some extent, this is also the interest that joins different factions on the Court in the effort to define the scope of *Winship*. Although serious shortcomings mar recent attempts to link the rules governing proof and presumptions to the underlying concern for substantive justice, these efforts improve upon the categorically procedural interpretation of *Winship* that *Mullaney* suggested. To promote justice, the scope of the reasonable-doubt standard must turn on the substantive limits on the legislative power to define crime and punishment.

1969) (traditionally no mitigation of felony-murder); *id.* at 927 n.71 (traditionally, reliance on official statements was no excuse because there was no defense of ignorance of law); Perkins, *Criminal Attempt and Related Problems*, 2 U.C.L.A. L. REV. 319, 354 (1955) (abandonment not traditionally recognized as defense to attempt charge).

92. The best general source on prior statutory law in this country is the official commentaries for the Model Penal Code that are scheduled for publication by the American Law Institute in 1979.

93. This experience is documented in the case of the statute considered in Patterson v. New York, 432 U.S. 197 (1977). That law allowed a person otherwise guilty of murder to reduce his crime to manslaughter upon proof by a preponderance of the evidence of "extreme emotional disturbance for which there was a reasonable explanation or excuse." N.Y. PENAL LAW § 125.25(1)(a) (McKinney 1975). This formulation was derived from a substantially similar provision of the Model Penal Code. MODEL PENAL CODE § 210.3(b) (P.O.D. 1962). It defines a ground of mitigation far more expansive than the common law doctrine of sudden heat of passion based on adequate provocation.

As stated in the Model Penal Code and as originally proposed to the New York legislature, the "extreme emotional disturbance" defense involved no shift in the burden of persuasion. The legislature balked, however, and refused to enact the more liberal rule other than as an affirmative defense. *See* People v. Patterson, 39 N.Y.2d 288, 301, 347 N.E.2d 898, 906, 383 N.Y.S.2d 573, 581 (1976), *aff'd*, 432 U.S. 197 (1977).

For an analogous tradeoff, see State v. Toscano, 74 N.J. 421, 378 A.2d 755 (1977), where the Supreme Court of New Jersey adopted the Model Penal Code version of a duress defense but only with the burden of persuasion placed on the accused. *Cf.* Novosel v. Helgemoe, 384 A.2d 124 (N.H. 1978) (insanity as affirmative defense; overruling earlier doctrine that sanity, once controverted, became substantive element of crime); State v. Shoffner, 31 Wis. 2d 412, 143 N.W.2d 458 (1966) (defendant given option to plead insanity as affirmative defense and accept burden of proof).

94. 397 U.S. at 364.

A. *Substantive Justice and the Limits of Procedure*

The concern for substantive justice may be best revealed in the various horror stories that accompany virtually every call for a predominately procedural requirement of proof beyond a reasonable doubt. Justice Powell's dissent in *Patterson* is illustrative. There he speculates that a state might define 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*."[95] By this device, the government "could be relieved altogether of responsibility for proving *anything* regarding the defendant's state of mind."[96]

Professor Underwood voices a similar fear. She hypothesizes a legislative collection of all homicide and assault offenses in a single crime called "personal attack." Without a constitutional bar against burden-shifting defenses, "a legislature could authorize conviction and punishment for that crime on proof of a trivial assault, with the burden on the defendant to establish the mitigating defenses of the victim's survival, his freedom from injury, or the defendant's lack of intent to harm or injure."[97]

Other commentators[98] and jurists[99] have sounded the same theme. Use of affirmative defenses may relieve the state of its duty to prove a sufficient factual basis for punishment. By shifting to the defendant the burden of establishing any mitigation or excuse, the legislature may impose serious penalties for conduct that is, at worst, a trivial wrong. When this fear is realized, the result is not simply an exception to the usual allocation of the burden of proof; it is a case of substantive injustice.

Certainly, these results would be intolerable. It would be unconscionable, as Justice Powell suggests, to base liability for murder on proof of "mere physical contact" between defendant and deceased. And Professor Underwood is undoubtedly correct in objecting to the imposition of major felony sanctions following proof of a "trivial assault." Both hypotheticals depict an enormous disparity between the penalties authorized by law and any proven basis for subjecting an individual citizen to censure and punishment. We all are outraged if penal liability is imposed without any element of blameworthiness

95. 432 U.S. at 224 n.8.
96. *Id.* Justice Powell made essentially the same point in his opinion for the Court in *Mullaney*. 421 U.S. at 699.
97. Underwood, *supra* note 15, at 1324.
98. *See* Ashford & Risinger, *supra* note 14, at 188.
99. *See* Leland v. Oregon, 343 U.S. 790, 802 (1952).

or if sanctions bear no proportional relationship to the seriousness of the crime.

The trouble lies in the unspoken assumption that excessive punishment is somehow a product of shifting the burden of proof. In fact, use of a burden-shifting defense or presumption does not necessarily result in excessive punishment, nor does excessive punishment necessarily involve reallocation of the burden of proof. Thus, to forbid burden-shifting devices *in order to* reduce disparity between proven fault and authorized penalties is a non sequitur. In point of fact, a constitutional stricture against shifting the burden of proof would not prevent the injustice of unwarranted or disproportionate criminal punishment. It would withdraw from legislative choice certain procedural options, but it would not address the real evil of substantive disproportionality in the assignment of criminal penalties.

In this light, Professor Underwood's horror story is appropriately revealed as an example of substantive injustice. By collecting all the crimes of assault and homicide under the single rubric of "personal attack," and by requiring the defendant to establish such mitigations as the victim's survival, the state could predicate serious felony sanctions on affirmative proof of nothing more than a "trivial assault." The result would be a gross disparity between the punishment authorized and any proven basis for inflicting it on the accused. But the problem of excessive punishment is not cured by a rule against shifting the burden of proof. The hypothetical legislature that would assign the fact of the victim's survival to an affirmative defense to a "personal attack" charge just as easily could eliminate the victim's death as a grading factor for assaultive behavior. The state could simply authorize serious sanctions for any physical assault, whether fatal or trivial, and leave distinctions among cases to the sentencing stage.[100] This scheme involves no reallocation of the burden of proof, but it is just as objectionable as Underwood's original hypothetical. Both schemes would authorize major felony sanctions on proof of nothing more than a trivial assault; both involve the infliction of punishment grossly disproportionate to any proven blameworthiness of the defendant.

Furthermore, no such disproportionality results from every shift in the burden of proof. Consider the case of an affirmative defense of renunciation for the crimes of attempt, conspiracy, and solicita-

100. We do not mean to suggest that there would not be serious constitutional objection to a law authorizing murder sanctions for a "trivial assault," but only that the objection does not depend on a shift in the burden of proof. *See* pp. 1376-79 *infra*.

tion. This defense would permit exculpation for the defendant who can establish by a preponderance of the evidence that, as a result of complete and voluntary renunciation of criminal intent, he avoided or prevented commission of the crime that was the object of the attempt, conspiracy, or solicitation.[101] This defense involves a reallocation of the burden of proof, but it does not raise a problem of excessive or unwarranted criminal punishment. The defendant's opportunity to exculpate himself by proving voluntary renunciation in no way vitiates the fact that the state has established an adequate basis for punishment by proving beyond a reasonable doubt the elements of attempt, conspiracy, or solicitation. Here there is simply no parallel to Professor Underwood's fear of a murder sanction imposed on proof of a trivial assault.

In sum, not only would a rule against burden-shifting devices foreclose many laudable features of penal-law reform; it would also fail to resolve the underlying concern about unfairness to criminal defendants. That is not surprising, for the kind of unfairness involved in these hypotheticals does not flow from the reallocation of the burden of proof, and it is not susceptible to solution by a rule barring that practice. The problem is the excessive or unwarranted imposition of criminal liability. This evil arises from the substantive content of the penal law. It can be cured only by a rule that relates the requirement of proof beyond a reasonable doubt to the substantive content of crime definition.

B. *Burden of Proof and Substantive Justice*

Only in the aftermath of *Mullaney* were the objections to a rigidly procedural insistence on proof beyond a reasonable doubt widely appreciated.[102] In particular, efforts to apply that decision led to widespread recognition of its unhappy implications for legislative

101. An illustrative provision is N.Y. PENAL LAW § 40.10(3) (McKinney 1975):

> In any prosecution pursuant to section 110.00 for an attempt to commit a crime, it is an affirmative defense that, under circumstances manifesting a voluntary and complete renunciation of his criminal purpose, the defendant avoided the commission of the crime attempted by abandoning his criminal effort and, if mere abandonment was insufficient to accomplish such avoidance, by taking further and affirmative steps which prevented the commission thereof.

Subsection (5) of the same statute elaborates this defense by specifying circumstances that render a resulting renunciation of criminal purpose less than "voluntary and complete." *Id.* § 40.10(5).

For a list of affirmative defenses of renunciation in the 33 American jurisdictions that have recently enacted comprehensive revisions of their penal laws, see Appendix, pp. 1400-01 *infra*.

102. The only early hint of the problems to come was Christie & Pye, *Presumptions and Assumptions in the Criminal Law: Another View*, 1970 DUKE L.J. 919.

law reform.[103] While at least one commentator seems content to ignore that concern,[104] other adherents to the *Mullaney* approach have sought to redesign that doctrine to make it less of an obstacle to substantive law reform. These efforts deserve attention, for they are tentative first steps toward providing a sensible answer to the question: proof *of what* beyond a reasonable doubt?

Perhaps the most obvious solution of this sort would be to construe *Winship* to bar any shift in the burden of proof except those that are ameliorative in impact.[105] Because proof beyond a reasonable doubt is a standard designed to protect criminal defendants, so the argument might run, devices reallocating the burden of proof should be condemned only when they work to the disadvantage of defendants. When the burden-shifting defense or presumption involves an innovation favorable to defendants, it should be tolerated because it is not inconsistent with the policy underlying *Winship*.

This scheme would transform *Mullaney* from a narrowly procedural reading of *Winship* to a test for evaluating substantive law. It would shift the focus from a purely procedural emphasis on the burden of proof to a rule requiring preliminary categorization of the substantive content of the law in question. Although the direction of this shift is commendable, the substantive standard suggested is difficult to understand on its own terms and even harder to accept as a statement of constitutional policy.

In the first place, it is no easy task to tell whether a particular legal device is ameliorative or not. The question arises: as compared with what? The answer must be that the notion of amelioration refers to a direction of movement. Thus, a new rule of law is either more or less advantageous to defendants than the rule that preceded it. The problem, of course, is that rationalization of the substantive law is seldom unidirectional. Reformulation of a criminal offense is likely to involve a complex balance of factors and not simply

103. *See, e.g.*, People v. Patterson, 39 N.Y.2d 288, 305-07, 347 N.E.2d 898, 909-10, 383 N.Y.S.2d 573, 583 (1976), *aff'd*, 432 U.S. 197 (1977) (Breitel, C.J., concurring); Allen, *supra* note 28; Low & Jeffries, *supra* note 38. No doubt this realization helped move the *Patterson* Court to gut its recent precedent in favor of a return to legislative authority over the burden of proof. *See* 432 U.S. at 207-11 & nn.10-11.

104. As has been noted, Professor Underwood has faith that putting legislatures to hard choices will in fact prompt them to choose well. *See* Underwood, *supra* note 15, at 1318-19. Much the same view is expressed in Ashford & Risinger, *supra* note 14, at 189. The contention is dealt with at pp. 1354-56 *supra*.

105. A number of commentators have made suggestions of this sort. *See, e.g.*, Osenbaugh, *supra* note 40, at 459-67; 51 WASH L. REV. 953, 964 (1976); *cf.* W. LAFAVE & A. SCOTT, *supra* note 13, at 49; Fletcher, *supra* note 4, at 928-29 (when greater probability of acquittal results from affirmative defense, shift of burden to defendant is legitimate).

progress or regress along one dimension. In such a case, it would be futile to ask whether one aspect of the revised offense was ameliorative in character. Moreover, even an isolated change in the substantive law is unlikely to work either to the advantage or disadvantage of *all* defendants. It is more likely that a new substantive standard would favor some defendants but not all.[106] The foreseeable results of trying to classify changes in the law as ameliorative or not are doctrinal instability and hopeless confusion.

Additionally, a doctrine that makes a statute's validity turn on whether it favors or disfavors criminal defendants reflects a crude misunderstanding of constitutional policy. The Constitution is deeply concerned with fairness to criminal defendants. But that concern is quite different from asserting a constitutional bias against criminal liability *regardless of the merits*. From the vantage point of the Constitution, a change in law favorable to defendants is not necessarily good, nor is an innovation favorable to the prosecution necessarily bad. In short, determining the constitutionality of an affirmative defense according to whether it makes conviction more or less likely than under some prior regime seems to us unsound in principle, as well as unworkable in practice.

A more interesting and potentially more fruitful refinement of *Mullaney* was suggested by Justice Powell in his dissent in *Patterson*.[107] There Justice Powell proposed a quasi-historical approach that combined both procedural and substantive elements. On the one hand, he stuck by an essentially procedural interpretation of *Winship*. Indeed, he was especially clear in rejecting the notion that a constitutional requirement to prove X beyond a reasonable doubt should depend on the scope of legislative authority simply to regard X as irrelevant.[108] Thus, he adhered to the view that *Winship* and

106. A good example is the law involved in *Patterson*. That statute was a modern reformulation of the traditional rule of provocation; New York provided an affirmative defense whenever the "defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse." The statute further provided that the reasonableness of such an explanation or excuse should "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 § 125.25(1)(a) (McKinney 1975) (second-degree murder); *id.* § 125.27(2)(a) (first-degree murder). This reformulation marked a considerable expansion in the coverage of the rule of provocation. The change would be termed ameliorative with respect to those defendants previously excluded from, and now brought within, the mitigation of murder to manslaughter. But the reform was not similarly advantageous to those defendants who would have been covered by the narrower doctrine of prior law. For them, the net effect of the change was clearly negative.

107. 432 U.S. at 216.

108. *See id.* at 228:

> *Winship* and *Mullaney* specify only the procedure that is required when a State elects to use [a given factor] as part of its substantive criminal law. They do not say

Mullaney were exclusively procedural in consequence and not "outposts for policing the substantive boundaries of the criminal law."[109]

On the other hand, Justice Powell suggested overtly substantive criteria for deciding when to invoke the bar against burden-shifting devices. In view of the likely impact on law reform, Justice Powell declined to apply his reading of *Winship* to every aspect of the definition of crime. Instead, he advanced a two-pronged test for identifying those issues for which burden-shifting should be disallowed:

> The Due Process Clause requires that the prosecutor bear the burden of persuasion beyond a reasonable doubt only if the factor at issue makes a substantial difference in punishment and stigma. The requirement of course applies *a fortiori* if the factor makes the difference between guilt and innocence. But a substantial difference in punishment alone is not enough. It must also be shown that in the Anglo-American legal tradition the factor in question historically has held that level of importance. If either branch of the test is not met, then the legislature retains its traditional authority over matters of proof.[110]

In other words, *Winship* should be construed to forbid reallocation of the burden of proof, but only with respect to those issues that make, and that historically have made, a substantial difference in stigma and punishment.

This scheme is conceptually schizophrenic. It proposes a rule that is entirely procedural in consequence—that is, a rule that would disallow shifting the burden of proof even as it recognizes legislative authority to redefine the substance of the law. Yet this ban against burden-shifting devices would apply only when the substantive issue involved makes, and in the Anglo-American legal tradition has made, a substantial difference in punishment and stigma. In other contexts, apparently, departures from the reasonable-doubt standard would be allowed. The result of this rule would be a striking incongruence

that a State must elect to use it. For example, where a State has chosen to retain the traditional distinction between murder and manslaughter . . . , the burden of persuasion must remain on the prosecution with respect to the distinguishing factor . . . . But nothing in *Mullaney* or *Winship* precludes a State from abolishing the distinction between murder and manslaughter and treating all unjustifiable homicide as murder.

109. *Id.* Somewhat surprisingly, at least one commentator had read *Mullaney* as holding that the rule of provocation was a constitutionally mandated ingredient of the law of homicide. *See* Tushnet, *supra* note 44, at 783. Other commentators noted the possibility of so construing *Mullaney*, but declined to endorse that interpretation absent more explicit support from the Court. Allen, *supra* note 28, at 284 n.82; Low & Jeffries, *supra* note 38.

110. 432 U.S. at 226-27. This approach is criticized in Note, *supra* note 50, at 669-77 & 670 n.115.

between the consequence of the doctrine (entirely procedural) and the conditions governing its applicability (overtly substantive). We know of no plausible rationale to bridge that discontinuity.

Moreover, even if one is prepared to ignore the conceptual disunity of the *Patterson* dissent, the approach must be faulted for excessive reliance on history. Under Justice Powell's test, reallocation of the burden of proof would be forbidden for any factor that makes a substantial difference in punishment and stigma *and* that "historically has held that level of importance" in the Anglo-American legal tradition.[111] At least in the context of the penal law, we see little reason to ascribe virtue to antiquity. As the multiplicity of traditional theft offenses demonstrates, much of the common law of crimes reflects the vagaries of historical evolution rather than any coherent rendition of public policy.[112] Sometimes the common law was simply confusing, as in the proliferation of highly elastic mens rea concepts.[113] In other respects, the problem was analytical unintelligibility, as in the common law insistence that mistake was something different from, and unrelated to, the culpability required for commission of an offense.[114] In still other aspects, the common law was perversely and wrong-headedly logical, as in the requirement that an accessory could be punished only if his principal had been caught,

111. 432 U.S. at 226.

112. *See generally* MODEL PENAL CODE art. 206, app. A at 101-09 (Tent. Draft No. 1, 1953); W. LAFAVE & A. SCOTT, *supra* note 13, at 618-77.

113. The elasticity and indeterminacy of traditional specifications of mens rea is illustrated wonderfully by the case of Regina v. Cunningham, 41 Crim. App. 155 (1957). *Cf.* 1 NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 118-20 (1970) (as of 1970, federal penal statutes specified mental states required by various offenses by "staggering array" of 78 different words and phrases).

114. The idea that mistake is something unrelated to the culpability required for commission of the offense is not merely a misconception; it is an analytical impossibility. Yet, surprisingly, it persists in some quarters. Thus, for example, one recent treatise deals with ignorance or mistake of fact as a question separate from mens rea and purports to state a general rule governing the effect of such ignorance or mistake:

> It may be stated as a general rule (subject, however, to exceptions in certain cases) that mistake of fact will disprove a criminal charge if the mistaken belief is (a) honestly entertained, (b) based upon reasonable grounds and (c) of such a nature that the conduct would have been lawful and proper had the facts been as they were reasonably supposed to be.

R. PERKINS, *supra* note 91, at 939-40 (footnotes omitted). The trouble is that the general specification that the mistake must be reasonable implicitly allows criminal conviction on proof of negligence, and penal liability based on negligence is plainly the exception rather than the rule. The correct rule is that, although only a reasonable mistake would negate a culpability of negligence, any honest mistake, no matter how unreasonable, would negate liability for a crime requiring knowledge. As Glanville Williams put it: "It is impossible to assert that a crime requiring intention or recklessness can be committed although the accused laboured under a mistake that negatived the requisite intention or recklessness. Such an assertion carries its own refutation." G. WILLIAMS, CRIMINAL LAW 137 (1953); *see* Woozley, *Negligence and Ignorance*, 53 PHILOSOPHY 293 (1978).

tried, and convicted.[115] Further, even the wisest and most considered judgments of an eighteenth-century English court may lack relevance in twentieth-century America. Thus, at least by modern lights, many prominent aspects of the common law tradition of crime definition seem unfortunate models for modern lawmaking.

The resort to an assumed historical benchmark is especially inappropriate now, for it comes in the midst of the greatest surge of penal law reform that this country has ever known. Beginning with the promulgation of the Model Penal Code in 1962, fifty American jurisdictions have undertaken to recodify their penal laws; those efforts have reached fruition in thirty-three jurisdictions and are still pending in many more.[116] In virtually every case, the codes depart from much of the common law legacy in favor of new constructs and formulations, many of them derived from the Model Penal Code and its principal progeny.[117] It would be particularly unfortunate to inject into this current of legislative reform and innovation a constitutional doctrine exalting the traditional law of crimes and fixing its content as a normative standard for constitutional adjudication. Although history may serve as a starting point for inquiry into what is fundamental in the criminal law, it cannot be more than that. Of necessity, the states and the courts have begun to turn to general principles derived from concepts of fairness and the purposes of the criminal law to impose substantive limits on the legislative power to define crime and prescribe punishment.

On this critical goal, the opinions of dissent and majority in *Patterson* seem to converge. As Mr. Justice White noted in his opinion for the Court, "there are obviously constitutional limits beyond which the States may not go" in redefining crime to shift the burden of proof.[118] Both the context of that statement and the result in the case make clear that the limits envisioned by the *Patterson* majority are substantive in nature. Thus, a legislature may not, for example, simply " 'declare an individual guilty . . . of a crime,' "[119] nor

115. *See* W. LAFAVE & A. SCOTT, *supra* note 13, at 495-500; R. PERKINS, *supra* note 91, at 669-76.

116. Thirty-three jurisdictions have enacted comprehensively revised penal codes. *See* note 83 *supra*. The American Law Institute reports that some form of penal-law codification is under way in California, the District of Columbia, Maryland, Massachusetts, Michigan, Mississippi, North Carolina, South Carolina, West Virginia, and on the federal level, and that at one time or another similar efforts have been undertaken in seven other jurisdictions. REPORT OF THE DIRECTOR, ALI ANN. REP. (forthcoming 1979).

117. The impact of the Model Penal Code in the substantive criminal law will be covered in exhaustive detail in the American Law Institute's forthcoming commentaries to the Proposed Official Draft.

118. 432 U.S. at 210.

119. *Id.* (quoting McFarland v. American Sugar Ref. Co., 241 U.S. 79, 86 (1916)).

may it " 'create a presumption of the existence of all the facts essential to guilt.' "[120] The fatal defect in these two statutes, of course, would not be an isolated shift in the burden of proof. It would be, rather, that the state has inflicted criminal punishment without establishing beyond a reasonable doubt an adequate factual basis for imposing the authorized penalties. The underlying concept is that of a constitutional floor for the substantive criminal law, that is, a notion of prerequisites essential for imposing liability along with a required proportionate relationship between the wrong done and the punishment authorized. It is toward this conception of the meaning of *Winship* that both the *Patterson* majority and dissent appear to be moving.

III. A Constitutional Basis for the Scope of *Winship*

Restricting *Winship*'s application to the elements of an offense would expose the reasonable-doubt standard to the vagaries of the language adopted in state statutes; on this basis, *Winship* would emerge as an exercise in formalism. Alternatively, converting *Winship* to a rigid rule of procedure would have the illogical result that a state would be required to prove beyond a reasonable doubt whatever it chose to consider, but it would have no proof requirements at all for what it chose to ignore. Efforts to derive a substantive basis for applying the reasonable-doubt requirement strike out in the right direction, but the chief proposals to date—looking to ameliorative effects or to common law definitions of crimes—are inadequate and unworkable.

In our view, the only sensible construction of *Winship* is one that demands, as an essential of due process, proof beyond a reasonable doubt of facts sufficient to justify penalties of the sort contemplated. In other words, *Winship* should be read to assert a constitutional requirement of proof beyond a reasonable doubt of a constitutionally adequate basis for imposing the punishment authorized. This reading of the case would avoid extending a constitutional doctrine beyond the scope of any coherent justification for it. It would also avoid the illogical and potentially retrogressive implications of a purely procedural insistence on the reasonable-doubt standard. Perhaps most importantly, this interpretation of the scope of *Winship* would serve the essential purpose of the reasonable-doubt requirement in the only meaningful way possible—that is, by explicit rec-

120. 432 U.S. at 210 (quoting Tot v. United States, 319 U.S. 463, 469 (1943)).

ognition of the interaction between a constitutional rule governing the burden of proof and residual legislative authority over the definition of crimes and prescription of punishments. Given this allocation of institutional responsibilities, a constitutional standard designed to bias factfinding in favor of the innocent can be effective only if it incorporates a constitutional conception of what innocence is.

As always, there is a problem. The task of identifying constitutional minima for the law of crimes is analytically unavoidable, but it is also more than a little forbidding. At least in terms of judicial exposition, the existence of constitutional constraints on the substantive criminal law is largely *terra incognita.* Indeed, one suspects that some of the reluctance to embrace a substantive interpretation of *Winship* stems not so much from any analytical objection to that approach as from a vague sense of uncertainty as to how to proceed. It may be useful, therefore, to sketch the background of this question and to outline, albeit in highly tentative terms, the Constitution's minimum requirements for the substantive criminal law. No attempt is made here to do more than to suggest a direction of analysis, but it is hoped that the importance of that small step will be revealed by the discussion of illustrative problems at the end of this section.

A. *Historical Neglect of Constitutional Requirements for the Substantive Criminal Law*

The Supreme Court has devoted considerable attention to issues of procedural justice[121] and, to a lesser extent, to the sufficiency and reliability of the evidence on which conviction is based.[122] Yet even

121. Indeed, no subject occupies a more prominent place in recent volumes of the United States Reports than criminal procedure. Over the years, the Supreme Court has stated constitutional standards for virtually every aspect of the criminal justice process, whether state or federal. In most instances, the Court's decisions spring from relatively specific procedural protections defined in the Bill of Rights, such as the Fourth Amendment guarantee against unreasonable search and seizure, the Fifth Amendment privilege against self-incrimination, and the Sixth Amendment right to counsel. Other procedural safeguards have been found within the spacious contours of the Fifth and Fourteenth Amendments' guarantee of due process of law. *See, e.g., In re* Winship, 397 U.S. 358 (1970). Most of these decisions are concerned with preserving individual liberty by restraining various kinds of overreaching by the state.

122. Perhaps the best illustration of a constitutional concern with the reliability of evidence and with its impact upon substantive justice is Chambers v. Mississippi, 410 U.S. 284 (1973). In that case the Court reversed a murder conviction because otherwise valid state hearsay rules barred introduction of testimony concerning confessions of guilt by someone other than the accused. The Court noted the spontaneity of the confessions, the existence of corroborative evidence, and the against-interest character of the statements as factors in favor of crediting the testimony and held that a conviction based on

as the Supreme Court was fashioning an entire body of federal constitutional law on criminal procedure, it remained reluctant to restrict legislative authority over the substantive definition of crime. With few, though important, exceptions,[123] the Court's opinions in the field of substantive criminal law have been confined to the construction of federal statutes, and the states have remained largely free to define the penal law as they see fit. This state of affairs prompted Professor Henry Hart to ask: "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?"[124] The complaint may be overstated, but it is not unfounded. There exists today, as there has for many years, a decided imbalance in the development of constitutional doctrine. The result is an elaborate body of law governing procedural rights and a dearth of constitutional authority on the minimal conditions of substantive justice.

Two factors may explain at least in part this historic imbalance. The first is the decline and disgrace of substantive due process, the doctrine that is perhaps the most immediately relevant to concerns for substantive fairness in crime definition. The excesses to which that doctrine had been put led to a reaction of equal force.[125] There followed a long eclipse of substantive due process from the favor of the Court and commentators. The result was to leave the Court and the bar without any familiar doctrinal basis for prescribing the minimal content of the law of crimes. Procedural decisions, on the other hand, could be explained by reference to the explicitly procedural provisions of the Bill of Rights, thereby avoiding the concept of substantive due process and the special burden of justifying a return to that approach.

A second factor contributing to neglect of substantive law was the traditional conception of the law of crimes as essentially static and unchanging, determined more by Anglo-Saxon inheritance than by

the exclusion of such testimony violated due process. *Id.* at 300-02; *see* Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases,* 91 HARV. L. REV. 567 (1978).

123. Of course, the scope of the criminal law is subject to substantive limits imposed by special constitutional protections for certain kinds of activity. The First Amendment is especially notable in this regard, but there are also instances of personal autonomy that have been afforded constitutional protection. *E.g.,* Moore v. City of East Cleveland, 431 U.S. 494 (1977); Griswold v. Connecticut, 381 U.S. 479 (1965). These incidental limits imposed on the criminal law by virtue of special constitutional protection for certain activities do not, however, contribute much to the notion of minimal constitutional standards applicable to crime definition generally.

124. Hart, *The Aims of the Criminal Law,* 23 LAW & CONTEMP. PROB. 401, 431 (1958).

125. *See generally* McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial,* 1962 SUP. CT. REV. 34.

any fresh perception of public policy, and quite unlikely to be subject to radical legislative innovation. Theoretically, of course, everyone recognized the authority of legislatures to redefine crimes, but in practice most legislative enactments simply memorialized the common law. Indeed, the chief outlet of legislative activity was not the reform of existing law but the haphazard addition of new offenses to fill some real or imagined gap in coverage. Most of the detail of existing doctrine was judicial in origin and apt to change, if at all, only in the incremental fashion of judicial construction. The perception of common ancestry and continuity of tradition in the law of crimes dominated any thought of the potential for diversity and change. To be sure, the law differed from state to state, but every jurisdiction played variations on a theme by Coke, Blackstone, and Stephen. In short, the basic content of the penal law was accepted as a given. In light of that background, it is scarcely surprising that no one had much occasion to worry about the need for constitutional restraints on the definition of crime.

Today these inhibitions have diminished. Substantive due process has experienced a revival among Supreme Court justices and commentators.[126] The lesson now drawn from earlier excesses is not rejection of the concept but acceptance with "caution and restraint."[127] Thus, the way is now open for explicit recognition of at least certain central principles of substantive justice as part of that substantive "liberty" specially protected against state interference by the constitutional guarantee of due process of law.

Moreover, another doctrinal avenue has become available to permit specification of constitutional minima for the law of crimes. In recent years the Eighth Amendment guarantee against cruel and unusual punishment has been construed to ban not only punishments

126. The most elaborate judicial discussion of this development occurs in Moore v. City of East Cleveland, 431 U.S. 494 (1977). Justice Powell announced the judgment of the Court in an opinion joined by Justices Brennan, Marshall, and Blackmun. This opinion expressly relies on the substantive content of the due process clause as the basis for invalidating the law in question. Three dissenting Justices also seemed to accept the validity of substantive due process, even though they disagreed with the plurality's application of that doctrine in the case at hand. *See id.* at 536-37 (Stewart, J., joined by Rehnquist, J., dissenting); *id.* at 541-51 (White, J., dissenting). The same point was also explicitly recognized in Kelley v. Johnson, 425 U.S. 238 (1976), both in Justice Rehnquist's opinion for the Court, *id.* at 244, and in the dissenting opinion authored by Justice Marshall and joined by Justice Brennan, *id* at 250-51.

Recent decisions now generally conceded to have involved substantive due process also include Roe v. Wade, 410 U.S. 494 (1977), and Griswold v. Connecticut, 381 U.S. 479 (1965).

127. Moore v. City of East Cleveland, 431 U.S. 494, 502 (1977) (plurality opinion of Powell, J.).

that are bizarre but also punishments that are unwarranted.[128] This constitutional source may well be fruitful in articulating the concept of constitutionally mandated prerequisites for the imposition of criminal liability. A mere assertion of possible doctrinal support does not make the case for recognition of constitutional restraints on the definition of crimes. But it is important to note that the lack of doctrinal opportunity that long thwarted any attempt to specify constitutional minima for the substantive law has now been twice remedied.

The passage of time has also laid to rest the outdated perception of an essentially static law of crimes. The reform movement begun by the Model Penal Code has swept away any excuse for ignoring the crucial role of legislative control over the substance of the penal law. Today, at least, it is inescapably apparent that the definition of a crime is whatever the legislature chooses to specify as sufficient for criminal liability. This recognition should confirm the need for some limitation of the power to define crimes if our commitment to individual liberty and substantive justice is to be made meaningful.

Despite these shifts in doctrine and attitude, to date the Court has made only sporadic efforts to spell out constitutional minima for the imposition of criminal liability. To some extent, this lack of development simply reflects a lack of pressure from the docket. The Court does not invent opportunities to make constitutional pronouncements but awaits, quite properly, the necessity of a case. Further, defense lawyers have been more inclined to repeat the familiar claims of procedural error, rather than to venture into the less certain terrain of constitutional restraints on the definition of crime.

There is, however, reason to expect fresh activity in this area. Especially now, when traditional reliance on a historical, common law heritage defining the content and scope of criminal liability has been replaced by model legislation and a flurry of state legislative reforms,

128. *See* Coker v. Georgia, 433 U.S. 584, 591-92 (1977) (plurality opinion); Ingraham v. Wright, 430 U.S. 651, 667 (1977); Gregg v. Georgia, 428 U.S. 153, 173 (1976) (opinion of Stewart, Powell, and Stevens, JJ., announcing judgment of Court); Robinson v. California, 370 U.S. 660 (1962); United States v. Wardlaw, 576 F.2d 932, 937 (1st Cir. 1978); Carmona v. Ward, 576 F.2d 405, 408-09 (2d Cir. 1978), *cert. denied*, 99 S. Ct. 874 (1979); Rummel v. Estelle, 568 F.2d 1193 (5th Cir. 1978), *cert. granted*, 47 U.S.L.W. 3760 (May 21, 1979) (No. 78-6386); Roberts v. Collins, 544 F.2d 168 (4th Cir. 1976), *cert. denied*, 430 U.S. 973 (1977); Downey v. Perini, 518 F.2d 1288 (6th Cir.), *vacated and remanded*, 423 U.S. 993 (1975); Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974); *In re* Lynch, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1973); People v. Lorentzen, 387 Mich. 167, 194 N.W.2d 827 (1972); People v. Broadie, 37 N.Y.2d 100, 332 N.E.2d 338, 371 N.Y.S.2d 471, *cert. denied*, 423 U.S. 950 (1975). *See generally* Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838 (1972).

challenges to the constitutionality of defenses and presumptions will continue to arise. Resolving those issues appropriately will require consideration of the constitutionally essential ingredients of substantive justice. Comprehensive exposition of that subject far exceeds the ambition of this piece. Our goal here is only to indicate the proper analytical framework for determining the constitutionality of defenses and presumptions in the criminal law. Even for that limited purpose, however, it may be useful to recount enough of the settled understanding of the essentials of substantive justice to demonstrate the analytic utility of the substantive interpretation of *Winship*.

B. *Constitutional Minima for the Criminal Law*

Fortunately, we are not without instruction in seeking to identify the constitutional minima for criminal punishment. The chief features of that landscape are described, albeit only in broad outline, by the convergence of criminal law doctrine and a handful of applicable constitutional precedents. As used here, "criminal law doctrine" refers not to the traditional definitions of specific offenses but rather to the conceptual structure of crime definition. This structure has been distilled from the common law tradition by generations of scholars and judges. It provides the conceptual basis for modern legislative reforms of the penal law. As commonly understood, criminal law doctrine postulates two essential components of crime definition and a proportionate relationship between the penalty authorized and the wrong done.

1. *Actus Reus*

The first essential component is the requirement of an act. Penal liability may not be imposed for mere intention, but is reserved for behavior. Thus, the starting point for any definition of crime is the statement of proscribed conduct, the actus reus of the offense. The state is generally free to define the actus reus as it will, but it may not dispense with the requirement of conduct as a prerequisite of criminal liability. The conduct specified need not be affirmative; it may consist of an act or a failure to act. It may even consist of possession—a relationship created by an act of acquisition and continued by a failure to divest. But because of the requirement of conduct as an essential component of crime definition, the state may not punish the bare desire to do wrong, nor may it premise liability on a mere personal characteristic or status.

The act requirement is so fundamental to our understanding of the penal law that it is not often called into question or disregarded by

legislative enactment. Nevertheless, the Supreme Court has had occasion to consider the act requirement, and has held that conduct—some act, omission, or possession committed personally by the accused—is a constitutionally required element of crime definition.[129] It is true, of course, that the act requirement, standing alone, does not ensure a rational or humane penal law. But it is a critical doctrinal construct, deeply embedded in the Anglo-American concept of just punishment, and its acceptance as constitutional mandate marks the starting point for analysis of a constitutional criminal law.[130]

2. *Mens Rea*

The other essential of crime definition is culpability. To be culpable, the actor must have a mental attitude, or mens rea, indicative of blameworthiness. Typically, this means that he must have a speci-

129. Robinson v. California, 370 U.S. 660 (1962). In *Robinson* the Supreme Court held violative of the Eighth Amendment a law against being addicted to the use of narcotics. The penalty prescribed, imprisonment for 90 days, was conventional and moderate, but the Court concluded that it would be cruel and unusual to impose *any* criminal punishment for the status of addiction. *Id.* at 667. *Robinson* therefore established the traditional requirement of an act as a constitutional prerequisite of criminal liability.

Many observers read the case even more broadly to bar penal liability when the actor's conduct could not meaningfully be described as "voluntary." *See* Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 648-51 (1966). Followed to its logical conclusion, this notion would cast a very long shadow. If an addict could not be punished for the involuntary condition of addiction, he should also be immune from punishment for the related acts of use, possession, and purchase of narcotics, and perhaps even for unrelated crimes committed to finance his habit. The lack of discernible limits to a constitutional requirement of voluntariness prompted the Court in Powell v. Texas, 392 U.S. 514 (1968), to withdraw from the broader implications of *Robinson*. Specifically, the *Powell* Court held that it would not be unconstitutional to convict a chronic alcoholic of public drunkenness. *Id.* at 532. In reaching that conclusion, the plurality made clear that it construed *Robinson* not as a broad requirement of "voluntariness" but as a narrower insistence on conduct as an essential ingredient of crime definition. *Id.* at 533 (Marshall, J., announcing judgment of Court). To that extent, at least, *Powell* left *Robinson* intact, and so it remains to this day.

130. The significance of the act requirement should not be understated. First, it serves a critical evidentiary function in corroborating other proof going to the existence of evil intent. The inevitable risk of error in assessing mental attitude is intolerably great when state of mind is not anchored in evidence of objectively demonstrable conduct. Thus, proof of conduct is necessary to establish culpability.

Second, the act requirement serves an equally important function in differentiating daydreams from fixed intentions. Mental attitude is not only difficult to demonstrate; it is also evanescent, fluid, and various. When there is no real prospect that evil thought will be translated into evil deed, there is no legitimate occasion for punishment. The act requirement therefore precludes criminal penalty for fantasy, wish, or conjecture. It insists that antisocial thought be manifest in behavior tending toward the harm ultimately feared. Thus, proof of conduct is necessary to establish dangerousness as well as culpability. Finally, the act requirement preserves the liberty of the individual citizen by constraining penal liability within a tolerable sphere. It states a limit on the coercive power of the state and marks a boundary of individual accountability to the collective will. As Herbert Packer put the point, the act requirement provides a *locus poenitentiae* to enable the law-abiding citizen to avoid criminal liability. H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 73-75 (1968). *See generally* G. WILLIAMS, *supra* note 114, at 1-28.

fied state of mind with respect to the conduct proscribed by the offense.[131]

Most modern authorities accept the formulation of mens rea advanced by Professor Herbert Wechsler in the Model Penal Code.[132] He concluded that state of mind can usefully be described in four necessary and sufficient categories: (1) "purpose," denoting the actor's conscious objective or desire; (2) "knowledge," meaning awareness; (3) "recklessness," referring to conscious creation of risk; and (4) "negligence," indicating inadvertent risk creation. These categories comprise a hierarchy of culpability ranging from carelessness to conscious disregard of risk to actual awareness to intention.

Some scholars have questioned the sufficiency of negligence, that is, failure to perceive a risk of which the actor should have been aware, as a ground for imposing penal liability.[133] Most authorities, however, accept negligence as a minimally sufficient basis of guilt, at least in some cases.[134] Legislatures apparently agree, for American jurisdictions generally punish negligent homicide as a criminal offense.[135] More commonly, however, criminal liability is confined to some variety of conscious wrongdoing. Thus, the minimum culpability most widely found in the penal law is recklessness—a requirement of conscious disregard of a substantial and unjustifiable risk that the actor is doing that which the law forbids.[136] Negligence as an occasion for penal sanctions tends to be reserved for conduct that

131. The language traditionally used to specify the mental element required for a crime is regrettably elastic. A word such as "willfully" has invited confusion. *Compare* Bishop v. United States, 455 F.2d 612 (9th Cir. 1972), *rev'd*, 412 U.S. 346 (1973) *and* Abdul v. United States, 254 F.2d 292 (9th Cir. 1958) *with* United States v. Vitiello, 363 F.2d 240 (3d Cir. 1966) (different meanings attributed to "willfully" used in tax-fraud offenses defined by I.R.C. §§ 7206, 7207).

The various assertions of difference between "general" and "specific" intent continue to bedevil the penal law. *See, e.g.*, Screws v. United States, 325 U.S. 91 (1945); People v. Hood, 1 Cal. 3d 444, 462 P.2d 370, 82 Cal. Rptr. 618 (1969); MODEL PENAL CODE § 2.02, Comment 3 (Tent. Draft No. 4, 1955).

132. MODEL PENAL CODE § 2.02 (P.O.D. 1962).

133. *See, e.g.*, Fletcher, *The Theory of Criminal Negligence: A Comparative Analysis*, 119 U. PA. L. REV. 401 (1971); Hall, *Negligent Behavior Should Be Excluded From Penal Liability*, 63 COLUM. L. REV. 632 (1963). *Compare* G. WILLIAMS, *supra* note 114, at 82-100 *with* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 136-57 (1968) (discussing imposition of criminal punishment for negligence).

134. *See, e.g.*, Hart, *supra* note 124, at 416-17; Wechsler & Michael, *supra* note 35, at 749-51; Woozley, *supra* note 114. *See generally* MODEL PENAL CODE § 2.02, Comment 3 (Tent. Draft No. 4, 1955).

135. *See generally* MODEL PENAL CODE § 201.4, Comment 1 (Tent. Draft No. 9, 1959) (citing statutes); Riesenfeld, *Negligent Homicide—A Study in Statutory Interpretation*, 25 CALIF. L. REV. 1 (1936).

136. For a more elaborate and precise definition of the concept of recklessness, see MODEL PENAL CODE § 2.02(2)(c) (P.O.D. 1962).

the law-abiding citizen would be especially anxious to avoid—*e.g.*, causing the death of another.

The remaining possibility is to impose liability without fault. The paradigm case of liability without fault is a penal statute that punishes conduct without reference to any state of mind indicative of blameworthiness. For example, a law might condemn as criminal the sale of impure food without requiring that the actor know of the impurity or even that he be aware of facts giving reason to know. Liability with respect to the impurity would be strict—that is, it would not depend on proof of any mental attitude with respect to that element of the offense. Thus, the actor could be convicted even though he believed his products to be pure and had done all that could have been done to ensure purity.[137]

Punishment on this basis is not uncommon in this country. Generally, however, liability without fault is confined to so-called "regulatory" or "public welfare" offenses.[138] The distinguishing characteristics of these offenses are said to be that they result from neglect rather than from positive aggression or invasion of the rights of others, that they often inflict no immediate injury to persons or property but merely create the risk thereof, that they carry relatively minor penalties, and that their violation does not cause grave damage to the reputation of the offender.[139] Some have suggested that these laws should be viewed as criminal in form only and therefore removed from the usual restraints placed on the use of the penal law.[140] Even in this context, however, judicial and academic acceptance of liability without fault has not been enthusiastic.[141] And with

137. It is worth emphasizing that dispensing with proof of culpability for one aspect of an offense often involves no hint of injustice. Indeed, there may be no criminal offense that requires fault with respect to *every* element of the actus reus. The law of perjury, for example, punishes one who makes a material false statement under oath in an official proceeding. *See, e.g., id.* § 241.1(1). Culpability is required for the falsity of the sworn statement but not for its materiality to the proceeding at hand. The result is strict liability with respect to materiality, but no one would suggest that the law of perjury imposes liability without fault. A sufficient basis for punishment is shown by proof of a knowing falsehood under oath without regard to whether the actor knew or should have known of the materiality of his lie.

On the other hand, it is also true that liability without fault may exist even though the offense includes a technical requirement of mens rea. The critical element is that the law require state of mind with respect to facts indicative of blameworthiness.

138. *See generally* Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933).

139. Morissette v. United States, 342 U.S. 246, 255-56 (1952).

140. Tenement House Dep't v. McDevitt, 215 N.Y. 160, 168-69, 109 N.E. 88, 90 (1915) (Cardozo, J.); *see* J. FEINBERG, DOING AND DESERVING 111-13 (1970).

141. *See, e.g.*, Commonwealth v. Koczwara, 397 Pa. 575, 155 A.2d 825 (1959); Sweet v. Parsley [1970] A.C. 132 (H.L.); Hart, *supra* note 124, at 422-25; Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1109 (1952).

respect to traditional crimes, it is a widely accepted normative principle that conviction should not be had without proof of fault.[142] At least when the offense carries serious sanctions and the stigma of official condemnation, liability should be reserved for persons whose blameworthiness has been established. Otherwise, punishment lacks a moral basis, and conviction is unjust. Thus, a requirement of some mens rea indicative of moral fault should be regarded as the second essential ingredient of crime definition.

The requirement of culpability is not much disputed among those who concern themselves with the theoretical justifications for criminal punishment.[143] Indeed, the longevity and importance of this component of crime definition has received eloquent testimonials from the Supreme Court.[144] Constitutional acceptance of a requirement of culpability, however, is at best uncertain.

In fact, the Supreme Court's decisions in *United States v. Dotterweich*[145] and *United States v. Park*[146] are widely understood to have sanctioned the abandonment of mens rea in the definition of crime. There are reasons, however, to regard the conventional reading of these cases as overstatement. The principal question in *Dotterweich* was an issue of statutory construction of the Federal Food, Drug, and Cosmetic Act.[147] The constitutional point was passed over in a markedly brief and casual discussion, authorizing the imposition of liability upon "a person otherwise innocent but standing in a responsible relation to a public danger."[148]

142. *See* Cuomo, Mens Rea *and Status Criminality*, 40 S. CAL. L. REV. 463, 525-26 (1967); Dubin, Mens Rea *Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility*, 18 STAN. L. REV. 322 (1966); Hart, *supra* note 124; Hippard, *The Unconstitutionality of Criminal Liability Without Fault: An Argument for a Constitutional Doctrine of Mens Rea*, 10 HOUS. L. REV. 1039 (1973); Laylin & Tuttle, *Due Process and Punishment*, 20 MICH. L. REV. 614 (1922); Mueller, *On Common Law Mens Rea*, 42 MINN. L. REV. 1043, 1101-04 (1958); Packer, *The Aims of the Criminal Process Revisited: A Plea for a New Look at "Substantive Due Process,"* 44 S. CAL. L. REV. 490 (1971); Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107 [hereinafter cited as Packer, *Mens Rea*]; Scott, *Constitutional Limitations on Substantive Criminal Law*, 29 ROCKY MTN. L. REV. 275 (1957).

143. *See, e.g.*, Hart, *supra* note 124; Hippard, *supra* note 142.

144. *See* Morissette v. United States, 342 U.S. 246 (1952). The case involved construction of a federal statute and thus does not implicate directly the constitutional status of the requirement of culpability. The *Morissette* Court, however, did go out of its way to emphasize the importance of mens rea as a prerequisite to penal liability and suggested, at least, that statutes dispensing with culpability for traditional criminal offenses would impair the constitutional protections accorded to defendants. *Id.* at 260-63. *See generally* Packer, *Mens Rea, supra* note 142, at 122-26 (discussing dictum on importance of mens rea).

145. 320 U.S. 277 (1943).

146. 421 U.S. 658 (1975).

147. 21 U.S.C. §§ 301-392 (1976).

148. The following is the Court's discussion in its entirety:

The prosecution to which Dotterweich was subjected is based on the now familiar type

The language of "responsible relation" arose again in *United States v. Park*.[149] In a decision under the same statute, the Court again purported to accept criminal conviction without proof of mens rea, but it also discussed "responsible relation" in a way that came close to requiring negligence.[150] Justice Stewart, writing for himself and for Justices Marshall and Powell, so construed the majority opinion and dissented from the result only because he concluded that the trial judge's instructions did not meet the standards for "responsibility" set out in the Court's decision.[151]

Thus, although *Dotterweich* and *Park* may be read as indicative of the Court's willingness to tolerate abandonment of mens rea in some circumstances, neither constitutes an unequivocal acceptance of penal liability without fault. *Dotterweich* is notable for the offhand manner in which the issue is treated,[152] and *Park* is notable for the ambiguity surrounding the Court's reconsideration of the question.[153] Perhaps most important of all, neither *Dotterweich* nor *Park* involved a traditional crime carrying the societal stigma usually associated with criminal conviction, and neither case resulted in a sentence of imprisonment. Each defendant was found guilty of an offense the history and subject matter of which suggest the "regulatory" classification,[154] and each was subjected only to nominal fines.[155] As justifications for these decisions, these considerations may or may not be thought persuasive. They are, however, certainly adequate to debunk the erroneous notion that *Dotterweich* and *Park* mark unqualified constitutional acceptance of criminality without culpability.[156]

> of legislation whereby penalties serve as an effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in a responsible relation to a public danger.

320 U.S. at 280-81.

149. 421 U.S. at 671-72.

150. *Id.* at 672-74.

151. *Id.* at 678-79.

152. *See* Packer, *Mens Rea, supra* note 142, at 119.

153. Indeed, although *Park* is generally understood as a qualified affirmation of *Dotterweich* at least one commentator has found in *Park* an implicit overruling of the prior decision. Tushnet, *supra* note 44, at 794-95.

154. *See* p. 1373 *supra*.

155. Dotterweich was fined $500 and sentenced to 60 days' probation. United States v. Buffalo Pharmacal Co., 131 F.2d 500, 501 (2d Cir. 1942), *rev'd sub nom.* United States v. Dotterweich, 320 U.S. 277 (1943). Park was fined $250. 421 U.S. at 666.

156. The Court's willingness to tolerate imposition of liability without fault may be growing more selective. In Lambert v. California, 355 U.S. 225 (1957), the Supreme Court reversed a conviction under a municipal ordinance requiring convicted felons in Los Angeles to register with the police. Although not explained on this ground, the decision may be understood as a rejection of liability without fault. The opinion criticized the ordinance for punishing an omission, the "mere failure to register," rather than some

Based on the precedents, therefore, the matter remains unsettled. As a question of principle, however, there can be little doubt of the morally objectionable character of liability without fault or of its inconsistency with the traditional Anglo-American concept of fairness to the individual.[157] At least when nonregulatory crimes are concerned,[158] penal liability should be limited to cases in which it is shown that the actor has departed from that which the prototypical law-abiding citizen would have done in the actor's situation. Otherwise, criminal conviction is a deprivation of individual liberty without basis in proof of personal fault.

3. *Proportionality*

The third fundamental constraint on the imposition of penal sanctions is the principle of proportionality. Even when the essential prerequisites of criminal liability are established, there must be some limit on the severity of authorized punishment.[159] Otherwise, there is potential for barbaric excess in the infliction of serious penalties for trivial misconduct. There is, of course, no way to calculate exact relationships between wrong done and punishment earned, for the perception of good and bad and harm and blame flows from normative judgments that defy precise quantification. Nonetheless, a

affirmative misconduct. *Id.* at 228. The opinion also found constitutional defect in the government's failure to give Lambert notice of her duty to register. *Id.*

Neither of these rationales sufficiently explains the decision. The Court has not registered doubts about the common use of criminal punishment for omissions in other contexts, and there seems to be no reason to regard liability based on omission as presumptively objectionable. *See generally* Hughes, *Criminal Omissions*, 67 YALE L.J. 590 (1958). Moreover, the notion that *Lambert* stands for a constitutional requirement of notice of illegality is also defective. As the dissenters correctly pointed out, 355 U.S. at 230 (Frankfurter, Harlan, and Whittaker, JJ., dissenting), the proposition proves too much. Penal laws are everywhere enforced without any special effort to apprise the populace of their content and certainly without individual notice of the sort discussed in *Lambert.*

What was distinctive about *Lambert* was not punishment of an omission or the lack of actual notice of the requirements of law, but instead the law's assignment of criminal penalties to conduct that was not blameworthy. There was no indication that the prototypical law-abiding citizen, if placed in Lambert's situation, would have behaved otherwise. Therefore, *Lambert* may well be explained as a rejection of liability without fault, even though the case is not explicitly disposed of on that ground.

157. *See generally* J. BENTHAM, *Principles of Penal Law*, in 1 THE WORKS OF JEREMY BENTHAM 399-402 (J. Bowring ed. Edinburgh 1843); H.L.A. HART, *supra* note 133, at 13-24.

158. Whatever one's opinion on strict liability in the regulatory context, it should be clear that strict liability in other contexts is objectionable in principle.

159. The following analysis adopts the conventional approach of judging the outer limit of the permissible severity of punishment. The emphasis on the maximum authorized penalty rather than on that actually imposed may well deserve closer examination, but it will be accepted here as part of the general analysis accorded to the constitutional minima of substantive criminal law.

just penal law must reflect some rough sense of proportion in the assignment of sanctions.

It is increasingly clear that this principle of proportionality rises to the level of a constitutional stricture. A growing body of case law, starting with *United States v. Weems*,[160] confirms that the Eighth Amendment bar to cruel and unusual punishment relates not only to the nature of the penalty imposed but also to the severity of punishment relative to the gravity of the underlying offense. In *Weems*, the Supreme Court held unconstitutional a sentence of fifteen years' hard labor at least in part because it violated the "precept of justice that punishment for crime should be graduated and proportioned to offense."[161] In the course of its opinion, the Court had occasion to approve and adopt Justice Field's earlier observation that the prohibition of cruel and unusual punishment "was directed, not only against punishments which inflict torture, 'but against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged.' "[162]

The proportionality principle established by *Weems* remained for many years unquestioned but not explicitly used.[163] Express Supreme

160. 217 U.S. 349 (1910). Weems was a disbursing officer in the Philippine Coast Guard. He was sentenced to 15 years' hard labor for certain minor falsifications that apparently harmed no one. The statute in question required neither an intent to defraud nor any objective of personal gain. The accused challenged the sentence as cruel and unusual punishment under the applicable provision of the Philippine bill of rights; the Supreme Court ruled that the content of that guarantee should be determined by reference to the parallel provision of the United States Constitution and based its decision on an extensive review of American authorities and precedents. *Id.* at 366-75.

161. *Id.* at 367.

162. *Id.* at 371 (quoting O'Neil v. Vermont, 144 U.S. 323, 337 (1892) (Field, J., dissenting)).

163. On a number of occasions, however, the *Weems* principle has elicited approving references from various justices. *See, e.g.*, Powell v. Texas, 392 U.S. 514, 531-32 (1968) (plurality opinion of Marshall, J.); Trop v. Dulles, 356 U.S. 86, 100 & n.32 (1958) (plurality opinion of Warren, C.J.); Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U.S. 407, 435 (1921) (Brandeis, J., dissenting).

The Court disallowed a disproportionate sentence but relied on a different explanation in Specht v. Patterson, 386 U.S. 605 (1967). The defendant in *Specht* was convicted of indecent liberties. That offense normally carried a maximum term of 10 years' imprisonment, but the defendant was sentenced to an indeterminate term of one year to life under a special sex-offender statute. Sentencing under the sex-offender statute, as distinct from conviction of the underlying offense, was not based on an adversary proceeding, and the defendant challenged the result on that ground. The Court accepted that argument and reversed the conviction, even while announcing continued adherence to precedents holding that sentencing need not be based on such proceedings. Professor Low has persuasively analyzed *Specht* as an instance of unconstitutionally disproportionate punishment. Low, *Special Offender Sentencing*, 8 AM. CRIM. L.Q. 70, 74-75 (1970). Had the underlying crime been forcible rape rather than the trivial offense of indecent liberties, he suggested, the case would probably have come out the other way. *Id.* at 75. Instead of turning on defective procedures, the decision marks outer limits on the severity of punishment for a specific offense.

Court reliance on the proportionality concept returned with the death-penalty litigation. Justices on both sides of that recurring dispute have agreed that the Eighth Amendment incorporates the proportionality principle.[164] The Court has not had occasion to invoke the principle of proportionality outside the context of capital punishment.[165] The lower courts, however, have developed a growing body of case law applying proportionality in other areas. A typical illustration is *Hart v. Coiner*,[166] in which the Court of Appeals for the Fourth Circuit invoked the proportionality principle to invalidate a mandatory life sentence imposed under a recidivist statute. The underlying offenses involved writing a bad check for $50, transporting across state lines a forged check for $140, and perjury. The court found the life sentence "wholly disproportionate to the nature of the offenses"[167] and therefore unconstitutional.

The clear constitutional acceptance of the principle of proportionality should not be mistaken for certainty as to its content. Hard questions remain to be confronted in determining the factors to be considered in assessing proportionality[168] and the theoretical con-

164. In *Furman v. Georgia*, Justice Marshall acknowledged that "*Weems* is a landmark case because it represents the first time that the Court invalidated a penalty prescribed by a legislature for a particular offense. The Court made it plain beyond any reasonable doubt that excessive punishments were as objectionable as those that were inherently cruel." 408 U.S. 238, 325 (1972) (Marshall, J., concurring). Justice Powell, although disagreeing as to result, concurred in the acceptance of proportionality as a concept of constitutional dimensions. *Id.* at 457 (Powell, J., dissenting).

Other justices who differ in their ultimate views on the death penalty have also embraced the proportionality principle established in *Weems* as a prime component of the Eighth Amendment guarantee against cruel and unusual punishment. Gregg v. Georgia, 428 U.S. 153, 173 (1976) (opinion of Stewart, Powell, and Stevens, JJ., announcing judgment of Court); *id.* at 229 (Brennan, J., dissenting); *id.* at 231 (Marshall, J., dissenting); *cf.* Coker v. Georgia, 433 U.S. 584, 591-92 (1977) (plurality opinion) (capital punishment for rape "grossly disproportionate and excessive punishment" forbidden by Eighth Amendment).

165. *But see* Carmona v. Ward, 99 S. Ct. 874, 876-77 (1979) (Marshall, J., dissenting from denial of certiorari).

166. 483 F.2d 136 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974). The same court later qualified *Hart*, and held that the factors considered in that case were not intended to be "mandatory." Davis v. Davis, 585 F.2d 1226, 1231 (4th Cir. 1978) (petition for rehearing granted).

167. 483 F.2d at 143.

168. Lower courts have based their analysis on four factors: the nature of the offense, the legislative purpose in proscribing the prohibited conduct, the penalties authorized for such an offense in other jurisdictions, and the sanctions imposed for crimes of comparable severity by the sentencing jurisdiction. *See, e.g.*, *id.* at 140-42; Davis v. Zahradnick, 432 F. Supp. 444, 451-53 (W.D. Va. 1977), *rev'd sub nom.* Davis v. Davis, 585 F.2d 1226 (4th Cir. 1978) (petition for rehearing granted). Even these specified considerations do not identify the standards that a judge should use to determine the "nature" of the offense. Relevant concerns might include the directness of the harm to others and the degree of conscious wrongdoing required for conviction, but even these factors fail to assist some difficult judgments.

structs by which that assessment should be made.[169] The likelihood of such questions, however, does not threaten effective legislative decisions. Great deference has been accorded to legislative judgments under every formulation of the proportionality doctrine. Thus, even under a highly refined approach to proportionality, legislatures would retain a very broad range of discretion to fix whatever punishment seemed appropriate. Only in the extreme case of a penalty so "grossly disproportionate and excessive" as to defy rational judgment could the punishment be found cruel and unusual in violation of the Eighth Amendment. In any event, even if the exact formulation of proportionality concepts remains subject to debate, there is virtue in asking the right question. For the purpose of the inquiry at hand—and for the purpose of promoting the constitutional exercise of legislative power to define crimes—simple acknowledgment of the principle of proportionality advances the likelihood that the extreme, impermissible cases will be exposed. As the succeeding discussion of illustrative problems attempts to demonstrate, recognition of the appropriate analytical framework is a long, though not sufficient, step toward sensible adjudication of the constitutionality of defenses and presumptions.

C. *Illustrative Problems*

Under this substantive reinterpretation of *In re Winship,* the constitutional command of proof beyond a reasonable doubt would not be limited to factors formally identified as elements of the offense. Neither, however, would the reasonable-doubt standard govern every legislative choice of the factors relevant to criminal liability or exoneration. Instead, the constitutional rule governing certainty of proof would be linked to a constitutional conception of what must be proved.

The remainder of this article applies that framework to a series of illustrative problems. Of course, no general statement leads ineluctably to the disposition of every case decided under its authority. Even within this framework for analysis, disagreement may arise in the application of principle to discrete situations. The following examples are not intended to provide irrefutable resolutions of particular controversies. Rather, they are offered in the hope of expli-

169. For example, some may argue that disproportionality may arise from the stigmatizing effect of the label used rather than from the severity of the authorized penalties. Thus, punishment of merely accidental homicide as "murder" might be viewed as potentially disproportionate even if the sanctions authorized were less severe than those normally associated with the crime of that name.

cating our general thesis by exploring its explanatory potential in specific contexts.

1. *Affirmative Defenses*

a. *Heat-of-Passion Homicide*

The first illustration comes from *Mullaney* and *Patterson*.[170] Both cases questioned the constitutionality of requiring the accused to prove provocation in order to reduce murder to manslaughter. The Maine law considered in *Mullaney* was unusual in treating murder and manslaughter as grading categories within a single offense of felonious homicide, but it maintained the distinction between those categories in historically familiar terms. Homicide that was otherwise murder would be reduced to manslaughter if it was done in a sudden heat of passion based on adequate provocation. Once established, this mitigation was said to negate the "malice" required for liability for murder and thus to leave manslaughter as the most serious conviction possible for heat-of-passion homicide.[171]

Over time, judicial notions of the kinds of affront that might constitute adequate provocation had become increasingly rigid.[172] New York therefore reformulated the rule so as to avoid the encrusted language of the common law. The statute involved in *Patterson* recognized as a defense to murder the fact that the accused "acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse."[173] Despite this broader phrasing, the New York law performed essentially the same function as the older rule of provocation. It reduced murder to manslaughter when there was ground "for attributing the intensity of the actor's passions and his lack of self control on the homicidal occasion to the extraordinary character of the situation . . . rather than to any extraordinary deficiency in his own character."[174] Both

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

171. State v. Lafferty, 309 A.2d 647 (Me. 1973); State v. Wilbur, 278 A.2d 139 (Me. 1971).

172. *See* Wechsler & Michael, *supra* note 35, at 717-23; Williams, *Provocation and the Reasonable Man*, 1954 CRIM. L. REV. 740, 750. For a comprehensive survey of the common law development, see R. PERKINS, *supra* note 91, at 53-69.

173. N.Y. PENAL LAW § 125.25(1)(a) (McKinney 1975) (murder in second degree); *cf. id.* § 125.27(2)(a) (murder in first degree). This formulation derives from a substantially identical proposal by the American Law Institute. MODEL PENAL CODE § 210.3(1)(b) (P.O.D. 1962). For a discussion of the objectives of this reformulation of the common law rule of provocation, see MODEL PENAL CODE § 201.3, Comment 5 (Tent. Draft No. 9, 1959).

174. Wechsler & Michael, *A Rationale of the Law of Homicide II*, 37 COLUM. L. REV. 1261, 1281 (1937).

Maine and New York required that the defendant bear the risk of nonpersuasion with respect to this category of mitigation.

The *Mullaney* and *Patterson* decisions suggest a number of blind alleys for analyzing the constitutionality of this scheme. First, Maine tried to attach some importance to the fact that it described murder and manslaughter as grading categories within the crime of felonious homicide, rather than as separate offenses.[175] The *Mullaney* Court quite properly rejected this idea.[176] Even under Maine law, substantial differences in punishment and stigma flowed from the classification of a homicide as murder or manslaughter. Whatever federal constitutional guarantees may bear on that determination, their applicability should not turn on formal characterization by state law. Otherwise, constitutional mandates would be subject to evasion by legislative labeling.

The same objection can be made to the Supreme Court's purported distinction between *Mullaney* and *Patterson*. Maine gave the absence of provocation the name of "malice" and included "malice" in the definition of murder;[177] New York simply recognized extreme emotional disturbances as an affirmative defense to murder.[178] Obviously, this is a distinction without a difference. Both Maine and New York required that the defendant bear the burden of proving provocation by a preponderance of the evidence in order to reduce murder to manslaughter. The constitutionality of that scheme should not depend on the state-law characterization, and any rule so fashioned could be easily evaded. Finally, as we have argued at length, neither the Maine nor the New York formulation is constitutionally flawed simply because it involves a shift in the burden of proof.

In our view, the correct analysis of *Mullaney* and *Patterson* turns on none of these factors. The constitutional focus should be not on what the state invited the accused to prove by way of mitigation but on what state law required the government to prove in order to establish liability in the first instance. *Winship* should be taken to require proof beyond a reasonable doubt of a constitutionally adequate basis for the punishment authorized. In both *Mullaney* and *Patterson* the maximum penalty was life imprisonment. The question therefore becomes whether a sanction of this severity is grossly disproportionate to the conduct and culpability proved by the state. Absent proof of a constitutionally adequate basis for punishment of this magnitude, provision

175. Brief for Petitioner at 9-11, 16-20.
176. 421 U.S. at 690, 698-99.
177. *See* ME. REV. STAT. ANN. tit. 17, § 2651 (1964).
178. 432 U.S. at 198-99.

of a burden-shifting defense cannot cure the defect. But if an adequate basis is proved, its adequacy is not impaired by legislative adoption of the more generous scheme of an affirmative defense. The issue, in short, is not whether the state has proved with requisite certainty whatever facts it chooses to regard as relevant. The issue, rather, is whether the state has proved beyond a reasonable doubt a just basis for punishment.

Applying this analysis to the problem raised by *Mullaney* and *Patterson* reveals just how straightforward the inquiry can be. The issue in both cases is whether what the government proved beyond a reasonable doubt is adequate to sustain a life sentence. Under New York law, the required showing was clear. The *Patterson* statute required proof beyond a reasonable doubt that the actor caused the death of another and that he did so intentionally.[179] Only then would the affirmative defense of emotional disturbance come into play. Maine law was less clear, but it seems to have required at least a showing of reckless homicide.[180] In the *Patterson* situation, therefore, the question is whether life imprisonment may be imposed for intentional, though provoked, homicide. In *Mullaney* the required constitutional judgment is whether a sentence of life imprisonment is "grossly disproportionate and excessive"[181] punishment for reckless homicide. Consideration of that question would be informed by comparison with the penalties imposed by Maine and New York for offenses of comparable gravity and by a survey of the punishments authorized by other jurisdictions for intentional or reckless homicide committed in a sudden heat of passion. If under this evaluation, life imprisonment for heat-of-passion homicide were deemed unconstitutionally excessive, the scheme would not be saved by inviting the accused to establish mitigation, for *Winship* would require that a minimum basis for imposing that punishment be proved beyond a reasonable doubt. If, on the other hand, proof of intentional or reckless homicide, whether or not provoked, were thought adequate

179. N.Y. PENAL LAW § 125.25(1) (McKinney 1975).

180. Examination of Maine law makes it clear that the minimum culpability required for the offense of felonious homicide is recklessness. State v. Lafferty, 309 A.2d 647, 670-72 (Me. 1973) (Wernick, J., concurring). Moreover, this was also the understanding of Maine law that figured in the Supreme Court's decision in *Mullaney v. Wilbur:*

> The Maine law of homicide, as it bears on this case, can be stated succinctly: Absent justification or excuse, *all intentional or criminally reckless killings are felonious homicides.* Felonious homicide is punished as murder—*i.e.*, by life imprisonment—unless the defendant proves by a fair preponderance of the evidence that it was committed in the heat of passion on sudden provocation . . . .

421 U.S. at 691-92 (emphasis supplied).

181. Coker v. Georgia, 433 U.S. 584, 591-92 (1977).

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.

b. *Felony Murder*

The error in treating the burden of proof as a question divorced from the substance of the law is further revealed by comparing *Mullaney* and *Patterson* with the traditional constitutional tolerance of felony murder.[182] In both *Mullaney* and *Patterson,* the state proved beyond a reasonable doubt both the act of causing death of another and the actor's conscious fault with respect to that consequence. Felony murder imposes similar sanctions without proof of comparable culpability: the doctrine punishes as murder any homicide committed during the course of a felony without proof of any mental attitude with respect to death of another. The homicide, as distinct from the underlying felony, is a strict liability offense.

It may be generally true that the person found guilty of felony murder could have been convicted of murder without resort to that doctrine,[183] but in terms of what the prosecution has proved beyond a reasonable doubt, felony murder raises the prospect that the most serious sanctions known to law might be imposed for accidental homicide. *Winship* requires that the gravity of a crime be evaluated on the basis of proof beyond a reasonable doubt, and on that basis the constitutionality of felony murder must be deemed a serious question.

Consideration of this question suggests alternative lines of analysis. The categorical approach would adhere to the conceptual characterization of felony murder as a strict liability offense. Under this view, the homicide and the underlying felony would be regarded as separate and distinct offenses. The underlying felony would be effectively cancelled out by the punishment authorized for that crime. The homicide would be dealt with independently, and any additional penalty would therefore stand or fall on its own basis. Because the felony-murder rule requires no proof of culpability with respect to the homicide, it would be condemned as an impermissible imposition of penal liability without proof of fault. It would therefore be held unconstitutional, either as an unjustified invasion of that substantive

182. For a general description of the law of felony murder, see W. LAFAVE & A. SCOTT, *supra* note 13, at 545-61; R. PERKINS, *supra* note 91, at 37-45. For a comment on the traditional constitutional tolerance of this doctrine, see Packer, *Mens Rea, supra* note 142.

183. Or, at least, so it appears on the basis of appellate summaries of the evidence.

liberty guaranteed by the due process clause or as a cruel and unusual punishment violative of the Eighth Amendment. This line of analysis necessarily would condemn every application of the felony-murder rule, for no matter how heinous the underlying offense, the additional penalty imposed for homicide would lack any independent basis in the proved blameworthiness of the accused.

As a statement of normative principle, this categorical assessment of the felony-murder rule has received an impressive array of scholarly support.[184] As a dictate of constitutional law, however, it has yet to achieve widespread acceptance. The judicial refusal to endorse this view may be due in part to a certain sense of its unreality. After all, the violent rapist who kills his victim can hardly be thought innocent, even though he may be convicted without proof of a homicidal state of mind. Nor is it easy to classify as blameless the armed robber whose gunshot kills a bystander, just because the prosecution did not prove culpability with respect to the death.

An alternative way of analyzing felony murder would cast the homicide as an adjunct of the underlying crime. Under this view, the felony murder and the underlying felony would be treated as a package.[185] The doctrine could not, therefore, be said to impose liability without fault, for the prosecution would have to prove the actor's culpability with respect to the felony. The issue, then, would not be whether liability had been properly premised on proof of conduct and culpability. It would be, rather, whether the aggregation of penalties thus authorized so far exceeded any proved blame-

184. *See, e.g.*, MODEL PENAL CODE § 210.2, Comment, at 33-39 (Tent. Draft No. 9, 1959); Packer, *Mens Rea*, *supra* note 142.

185. In some jurisdictions felony murder and the underlying felony not only should but must be regarded as a single package. Under existing double jeopardy doctrine, separate punishments cannot be imposed for two crimes when proof of all the elements of one is necessary in order to make out the elements of the other. Brown v. Ohio, 432 U.S. 161 (1977); Blockburger v. United States, 284 U.S. 299 (1932). Jurisdictions differ as to whether the underlying felony is regarded as an element of felony murder, or only as a means of proving the "malice aforethought" which is an element of all murder crimes. *Compare* Harris v. Oklahoma, 433 U.S. 682 (1977) *and* United States v. Greene, 489 F.2d 1145, 1158 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 977 (1974) *and* Harvey v. Henderson, 384 F. Supp. 145 (W.D. La. 1974), *aff'd*, 510 F.2d 382 (5th Cir. 1975) *and* Newton v. State, 280 Md. 260, 373 A.2d 262 (1977) *and* State v. Cooper, 13 N.J.L. 36 (Sup. Ct. 1833) *and* State v. Woods, 286 N.C. 612, 213 S.E.2d 214 (1975), *modified and remanded*, 428 U.S. 903 (1976) *and* State v. Carlson, 5 Wis. 2d 595, 93 N.W.2d 354 (1958) (cases in which underlying felony is element of felony murder) *with* Whalen v. United States, 379 A.2d 1152 (D.C. 1977), *cert. granted*, 47 U.S.L.W. 3683 (1979) (No. 78-5471) *and* State v. Adams, 335 So. 2d 801 (Fla. 1976) (per curiam) *and* State v. Chambers, 524 S.W.2d 826 (Mo. 1975), *cert. denied*, 423 U.S. 1058 (1976). At least in those jurisdictions where the underlying felony and felony murder merge under double jeopardy, the punishment for felony murder becomes significant only to the extent that it exceeds the maximum permissible punishment for the underlying felony.

worthiness of the accused as to constitute grossly disproportionate and excessive punishment. The constitutional judgment, in other words, would concern the principle of proportionality rather than the essential ingredients of crime definition.

This analysis would not condemn every application of the felony-murder rule. Instead, the question of proportionality would vary with the nature and gravity of the underlying offense. Thus, punishment for felony murder might be upheld when the underlying crime was armed robbery or forcible rape, but disallowed for homicide occurring in the course of some less grievous offense. An example of a less grievous offense is the hornbook chestnut about the bartender who commits a statutory felony by selling one drink too many to an inebriated customer.[186] If the drunk were to fall asleep on the way home and die of exposure, the traditional felony-murder doctrine would make the bartender guilty of murder. Yet this would be patent injustice. Even without categorical disapproval of the felony-murder doctrine, murder sanctions should be precluded as grossly disproportionate to any established blameworthiness.

Normatively, the choice between these two lines of analysis is not free from doubt. The categorical insistence on an independent basis for punishing the homicide seems conceptually more straightforward and to that extent more persuasive. Moreover, blanket rejection of felony murder would not impair effective law enforcement. In the cases in which the doctrine is actually invoked, the evidence generally suggests that the prosecution could have proved culpability with respect to homicide had such proof been required.[187] The practical consequence of categorically disallowing felony murder would be to preclude the occasional prosecutorial misuse of an unjustifiably harsh doctrine. Requiring proof of culpability with respect to death of another would bring the law of homicide into conformity with the principle implicit in *Winship*—namely, that criminal punishment must be based not on that which is likely but only on that which is proved beyond a reasonable doubt.

On the other hand, we find even greater merit in a more selective reliance on the principle of proportionality. A focus on the aggregation of punishments for the homicide and the underlying felony identifies more precisely the extreme case in which the legislative

186. *See* People v. Pavlic, 227 Mich. 562, 199 N.W. 373 (1924).

187. *See* note 183 *supra*. Although the felony-murder rule as applied rarely if ever results in the conviction for murder of a person who, absent this doctrine, would have been guilty of no homicide offense, the rule may have a significant impact on the grading of an offense that otherwise would be manslaughter or negligent homicide.

authority to define crimes should be curtailed; this approach thus is more deferential to legislative decisionmaking. Moreover, the proportionality analysis would also bring constitutional doctrine more nearly into alignment with dominant practice. Although some version of the felony-murder rule continues almost everywhere,[188] its ancient rigor is nowhere in force. Virtually every American jurisdiction, either by statute or decision, has curtailed the doctrine's sweep. Most commonly, the rule is confined to homicides occurring during the course of enumerated felonies[189] or during felonies generically described as inherently dangerous to human life.[190] In either event, the effect is to exclude from the reach of the felony-murder doctrine most of the egregious situations suggested by the rule's formal statement. It is important to note, however, that although this kind of limitation reduces the scope of the felony-murder rule, it does not resolve its essential unfairness. There remains a potential for gross injustice in the doctrine's application to a particular case. The proportionality principle stands as an important safeguard against that possibility.

The point of all this is not to dwell on the merits of felony murder, but to suggest once again the lack of congruence between a rigid procedural insistence on proof beyond a reasonable doubt and any

188. Alone among American jurisdictions, Ohio early abandoned the felony-murder rule. The common law doctrine was eliminated in the first instance by judicial construction of a misprinted statute. *See* Robbins v. State, 8 Ohio St. 131 (1857). The legislature subsequently adopted that interpretation. Revised Statutes of Ohio § 6808 (Derby 1879) (now OHIO REV. CODE ANN. §§ 2903.01(B), .02 (Page 1972)). *See generally* Comment, *The Felony Murder Rule in Ohio*, 17 OHIO ST. L.J. 130 (1956). A close relation of the felony-murder rule, however, still exists in Ohio under the label of imputed intent. One who joins with others in the commission of violent crime is presumed to acquiesce in whatever reasonably may be viewed as necessary to accomplish the criminal objective. Thus, under certain circumstances, all participants in an armed robbery may be presumed to have intended an unplanned but foreseeable killing committed incident to the robbery attempt. *See, e.g.*, State v. Lockett, 49 Ohio St. 2d 48, 358 N.E.2d 1062 (1976), *rev'd on other grounds*, 438 U.S. 586 (1978).

Two additional states in recent years have abolished the felony-murder rule. HAWAII REV. STAT. § 707-701 note (1976); KY. REV. STAT. § 507.020 (1975). One state has replaced the traditional formulation of the doctrine with a rebuttable presumption of the culpability required for murder. N.H. REV. STAT. ANN. § 630:1-b(I)(b) (Supp. 1973). Finally, Delaware has substantially qualified the force of the felony-murder rule by a unique reformulation that effectively reduces the doctrine to a grading device. DEL. CODE ANN. tit. 11, §§ 635(a)(2), 636(a)(2) (1974).

Every other American jurisdiction retains the felony-murder rule, although it is generally subject to qualifications.

189. *See, e.g.*, ALA. CODE § 13A-6-2 (Supp. 1977); ME. REV. STAT. ANN. tit. 17-A, § 203 (Supp. 1976); N.Y. PENAL LAW § 125.25 (McKinney 1975). *But see* GA. CODE ANN. § 26-1101 (1978); TEX. PENAL CODE ANN. § 19.02(a)(3) (Vernon 1974).

190. *E.g.*, People v. Philips, 64 Cal. 2d 574, 582-84, 414 P.2d 353, 360-61, 51 Cal. Rptr. 225, 232-33 (1966); People v. Williams, 63 Cal. 2d 452, 457-58, 406 P.2d 647, 649-51, 47 Cal. Rptr. 7, 9-11 (1965).

meaningful conception of fairness to the accused. The *Mullaney* decision found fault with the Maine law of homicide because it allowed conviction for murder without requiring the state to disprove beyond a reasonable doubt that the actor killed in a sudden heat of passion based on adequate provocation. There, at least, the government had been required to show the actor's recklessness with respect to the homicide. If this scheme is constitutionally objectionable, how much more outrageous is a law that declares the defendant guilty of murder without proof of *any* culpability, even negligence, with respect to the risk of taking life?

The ultimate irony is the widespread recent use of burden-shifting defenses to ameliorate the traditional harshness of the felony-murder rule. At least eight states have moved to soften this much-criticized rule by providing as an affirmative defense a showing that death of another was not a reasonably foreseeable consequence of the actor's conduct.[191] This roundabout way of requiring negligence with the burden of proof on the accused may well be inadequate to resolve the problem of felony murder, but it does represent a step in the right direction. The purely procedural interpretation of *Winship* would reject this device not for substantive inadequacy but for failure to maintain an empty and pointless procedural regularity. Worse than being pointless, this kind of reasoning may well force those legislatures that have adopted ameliorative defenses to reconsider their position. They could undertake to prove mental culpability beyond a reasonable doubt and thereby eliminate the felony-murder doctrine, or they could revert to the traditional posture of unrelieved strict liability. In light of the continuing legislative acceptance of felony murder in the face of at least fifty years of sustained academic and judicial hostility, it is highly unlikely that a constitutional disallowance of legislative compromise would prompt widespread legislative abolition of felony murder. A far more likely result would be an end to legislative reform and a reversion of the penal law to an older and harsher rule of liability.

2. *Presumptions*

As has been noted, *Winship* implicates the constitutionality of presumptions as well as that of affirmative defenses. An affirmative defense departs from the reasonable-doubt standard by allowing liability to be based in part on the defendant's inability to prove exculpation.

191. These jurisdictions include Alaska, Arkansas, Connecticut, Maine, New York, North Dakota, Oregon, and Washington. *See* Appendix, p. 1401 *infra*.

A presumption creates a similar exception to the usual standard of proof by encouraging one fact to be inferred from another.[192] A rigidly procedural interpretation of *Winship* would condemn both devices as unconstitutional evasions of the government's responsibility to prove beyond a reasonable doubt every fact material to the imposition of penal liability.

Shifting the focus from defenses to presumptions does not resolve the essential illogic of the procedural interpretation of *Winship*. The core problem in either context is the absence of any intelligible justification, either in constitutional theory or in public policy, for coercing legislatures to make substantively extreme choices in the definition and grading of crimes. As applied to presumptions, the procedural interpretation of *Winship* would forbid an inference of one fact from proof of another, even in the face of unquestioned legislative authority to make the proved fact an independently sufficient basis of liability. In every case in which the constitutional objection to a presumption hinged on its departure from the reasonable-doubt standard rather than on the substantive inadequacy of the facts proved, the supposed defect could be cured simply by making the law more onerous. Thus, for example, forbidding a presumption of fact *X* from proof of fact *Y* would induce the government *either* to prove *X* beyond a reasonable doubt *or* to make *Y* an independently sufficient basis of liability. The net effect of the latter solution would be to withdraw a previously recognized exculpation based on the defendant's ability to disprove *X*.

A rigidly procedural opposition to any departure from the reasonable-doubt standard would require at least that the presumed fact follow from the proved fact beyond a reasonable doubt. This formulation would retain the name "presumption," but rob the device of practical significance by demanding an inference of such certainty that no express authorization for it would be needed. To date, no Supreme Court decision has unambiguously adopted this position, though some certainly point in that direction.[193] The test that seems

192. *See* pp. 1335-37 *supra*. Our discussion here is directed to the situation in which state law requires that a presumption instruction be given to the jury, regardless of the facts of the particular case. Obviously there will be trials in which the evidence supporting the inference to be drawn will be so persuasive that any additional prompting procured by the instruction must be regarded as inconsequential. In such cases, the validity of the presumption will be regarded as irrelevant because whatever error it might embody can be regarded as harmless. *See* Harrington v. California, 395 U.S. 250 (1969); Chapman v. California, 386 U.S. 18 (1967). Our concern is with presumptions that affect the outcome of jury verdicts by encouraging the jury to resolve particular issues against a defendant in spite of the state's failure to provide evidence on the point that is persuasive beyond a reasonable doubt.

193. *See* p. 1337 *supra*.

to hold sway, as stated in *Tot*[194] and refined in *Leary*,[195] requires instead that the presumption be characterized by a "rational connection" such that "it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."[196]

Although the "rational connection" standard is less demanding than that which would be suggested by a rigorously procedural interpretation of *Winship*, the difference is one of degree rather than of kind. The *Tot-Leary* approach to the constitutionality of presumptions is conceptually consistent with the *Mullaney* condemnation of affirmative defenses. Both approaches would focus on procedural formality without reference to substantive impact. Both would disallow legislative crime definition for reasons not related to the legitimate scope of legislative authority over the issue in question or to the government's proof of a constitutionally adequate basis for punishment. Both would force the legislature to the incongruous choice of proving either more or less, and both would therefore raise the specter of retrogressive rules of penal liability adopted by reluctant legislatures in order to comply with a supposedly constitutional command of fairness to criminal defendants.

Interestingly, although constitutional hostility to presumptions is consistent with the procedural interpretation of *Winship* and is often urged on that basis, it is also defended on grounds quite unrelated to the concerns of that decision. In the words of Justice Harlan, the commitment to proof beyond a reasonable doubt is "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."[197] We have dealt at length with the error of treating innocence as an exclusively procedural concept, and that argument need not be repeated here. On occasion, however, the constitutional disfavor of presumptions is explained not as an attempt, albeit misguided, to protect the innocent, but rather as an incentive to legislative candor.[198] The idea, apparently, is that presumptions, and perhaps even affirmative defenses, are used to mask the content of the law and thus to shield harsh legislation from the scrutiny of a concerned

194. Tot v. United States, 319 U.S. 463 (1943).
195. Leary v. United States, 395 U.S. 6 (1969).
196. *Id.* at 36.
197. *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).
198. *See, e.g.*, Ashford & Risinger, *supra* note 14, at 177-78. There have also been intimations, at least, of reliance on this rationale in some judicial considerations of presumptions. *See, e.g.*, United States v. Romano, 383 U.S. 136, 144 (1965).

public.[199] The evil at issue in this argument, however, is not the enactment of substantively unacceptable legislation, for disallowing presumptions would not prevent that result. Rather, the problem here envisioned is the rendition of permissible legislative choice in an impermissibly "disguised form."[200] The ultimate fear is thus that the supposed obscurantism of presumptions and affirmative defenses will inhibit the effective functioning of the political process.[201]

This line of reasoning is elaborated here not because of any intrinsic merit but because of its surprising currency in the secondary literature.[202] In fact, the argument fails on at least two grounds. First, it begins with a descriptive inaccuracy. There is nothing necessarily obscure or confusing about the use of presumptions in the definition of crime. Take, for example, the federal kidnapping statute. It reads, in pertinent part, as follows:

> Section 1201. Kidnapping
>
> (a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by a parent thereof, when:
>
> (1) the person is willfully transported in interstate or foreign commerce;
>
> . . . .
>
> shall be punished by imprisonment for any term of years or for life.
>
> (b) With respect to subsection (a)(1), above, the failure to release the victim within twenty-four hours after he shall have been unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted or carried away shall create a rebuttable presumption that such person has been transported in interstate or foreign commerce.[203]

It is hard to discover in this formulation of the crime any scheme to disguise its content. It punishes kidnapping when there is interstate transportation of the kidnapped person, and it allows the trier of fact to infer such transportation from the actor's failure to release the victim within twenty-four hours of the kidnapping. To be

199. Even in the case of presumptions, this argument is not well-founded, but to extend the point to affirmative defenses adds an entirely new dimension of implausibility. *See* pp. 1350-51 *supra*. Even so, some commentators seem to embrace the view that defining a crime to include an affirmative defense is somehow inherently deceptive and should for that reason be condemned as unconstitutional. *See* Ashford & Risinger, *supra* note 14, at 186-87; Underwood, *supra* note 15, at 1323-25.

200. *See* Patterson v. New York, 432 U.S. 197, 228 n.13 (1977) (Powell, J., dissenting).

201. *See id.*; Ashford & Risinger, *supra* note 14, at 177-78.

202. *See* notes 198-201 *supra* (citing sources).

203. 18 U.S.C. § 1201 (1976).

sure, one could misconstrue the statute if he read only the first subsection. That possibility seems a strange ground for constitutional complaint, yet it is the only apparent basis for regarding presumptions as inherently deceptive. The alleged tendency of a presumption to mask the substance of the law seems to consist of nothing more than the fact that it qualifies language appearing elsewhere in the statute. In other words, a presumption is confusing because it modifies a general statement by subsequent elaboration. There is certainly nothing unusual in this mode of expression and no apparent reason to suppose that it creates any special barrier to understanding. It is true that failure to take a presumption into account will result in an erroneous interpretation based on the unqualified import of other language, but the same is true of any statutory provision that is not entirely redundant and pointless.

The second problem with the characterization of presumptions as inherently obfuscatory is the inexplicable selectivity of that accusation. An assertion of constitutional infirmity based on lack of clarity necessarily implies an assumption of relative clarity elsewhere. That assumption is patently false. The statute books are full of provisions that are prolix, inconsistent, and obscure. Moreover, even a statute seemingly clear on its face may be transformed by judicial construction to mean something quite different.[204] Additionally, there is inevitable uncertainty in the reduction of any general rule of liability to a specific case. Even with the most diligent research, it is sometimes impossible to resolve uncertainty short of litigation. Finally, everyday awkwardness in the use of language, the continuing accretion of judicial gloss, and the irreducible indeterminacy of general statement are often compounded by legislative resort to the archaic phrasings of the common law. The not infrequent result is the definition of crime in terms that, at least to the layman, must be utterly inaccessible. What, for example, is the uninitiated reader to make of a law that defines murder as an unlawful killing under circumstances manifesting "an abandoned and malignant heart?"[205] Worse, perhaps, is the statute that

204. A good example is the general federal conspiracy statute. *Id.* § 371. In addition to punishing conspiracy to commit any substantive offense, it also proscribes conspiracy "to defraud the United States." A reasonable reader might well suppose that this language would reach only conspiracy to cheat the government financially. In fact, the courts have held repeatedly that no pecuniary loss need be inflicted or contemplated. Instead, the statute has been interpreted to reach "any conspiracy for the purpose of impairing, or obstructing, or defeating the lawful function of any department of Government." Haas v. Henkle, 216 U.S. 462, 478 (1910); *accord*, Hammerschmidt v. United States, 265 U.S. 182, 188 (1924).

205. CAL. PENAL CODE § 187(a) (West Supp. 1979) defines murder as "the unlawful killing of a human being . . . with malice aforethought." CAL. PENAL CODE § 188 (West

punishes "murder" without bothering to define it at all.[206] The condemnation of presumptions as devices of deception not only mischaracterizes their impact on understanding; it also ignores the prevalence of opaque and elliptical expression elsewhere in the penal law.

In sum, the notion that presumptions are used to mask the substance of the law is a flimsy speculation that simply cannot withstand scrutiny, much less sustain a rule of constitutional adjudication. Even more implausible is the attempt to generate a similar objection to the use of affirmative defenses.[207] In either case, the argument has

1970) then defines "malice" to exist "when the circumstances attending the killing show an abandoned and malignant heart." The same phrasing was used in Georgia until that law was superseded by recent codification. GA. CODE ANN. § 26-1004 (1933) (repealed 1968). Other statutes punish murder as "the unlawful killing of another human being with malice aforethought" without any further elaboration of that critical term. *E.g.*, 18 U.S.C. § 1111 (1976).

206. Perhaps the most notable example of this tradition is 1794 Pennsylvania legislation that initiated the degree structure for homicide. That statute specified that some murder would be murder in the first degree and that "all other kinds of murder shall be deemed murder in the second degree." Nowhere was the crime itself defined. 1794 Pa. Laws ch. 257, §§ 1, 2. This formulation was copied in a great many American states during the next century. *See* Wechsler & Michael, *supra* note 35, at 703-07. The current Pennsylvania statute has changed the defining characteristics of the degree structure, but continues to punish the crime of "murder" without statutory definition. 18 PA. CONS. STAT. ANN. § 2502 (Purdon 1973 & Supp. 1977).

Although death-penalty litigation has resulted in widespread revision of murder statutes, it remains common in this country to punish "manslaughter" without specifying the content of that term. *See, e.g.*, ALASKA STAT. § 11.15.040 (1970); D.C. CODE ANN. § 22-2405 (1973); MD. ANN. CODE art. 27, § 387 (1976); MASS. ANN. LAWS ch. 265, § 13 (Michie/Law. Co-op 1978); MICH. COMP. LAWS ANN. § 750.321 (West 1968); MISS. CODE ANN. §§ 97-3-25, -47 (1973); N.C. GEN. STAT. § 14-18 (1969 & Supp. 1975); R.I. GEN. LAWS § 11-23-3 (1969); VT. STAT. ANN. tit. 13, § 2304 (1974); VA. CODE §§ 18.2-35, -36 (1975); W. VA. CODE §§ 61-2-4, -5 (1977).

207. *See* pp. 1350-51 *supra*. The extension to affirmative defenses of the contention that presumptions should be disallowed because of their supposed deceptiveness may have originated from too quick a reading of Ashford and Risinger. *See* Ashford & Risinger, *supra* note 14, at 186-93. Their argument has been sufficiently influential to warrant rebuttal, but it is also sufficiently circumlocutory to defy easy summary.

Ashford and Risinger begin by rejecting the notion that the constitutionality of a presumption should depend on the scope of legislative authority to impose the punishment authorized on the basis of the facts proved. *Id.* at 177-78. They assert that the greater-power-includes-the-lesser argument is defective in that it fails to take account of the supposed tendency of legislatures to use presumptions to avoid "the political checks guaranteed by representative government." *Id.* at 178. In other words, presumptions are bad because they are deceptive. In the next section of their article, Ashford and Risinger proceed to extend their criticism to "assumptions," a term they define to include affirmative defenses. *Id.* at 186-93. The point too easily overlooked is that Ashford and Risinger do not oppose defenses on the same ground. In fact, they recognize, as any reasonable person must, that whatever one's opinion of the alleged deceptiveness of presumptions, there is simply no basis for regarding specification of an affirmative defense as inherently misleading or obfuscatory. *Id.* at 187.

The trouble is that, having recognized that their asserted reason for rejecting the greater-power-includes-the-lesser argument in the context of presumptions is in no way applicable to affirmative defenses, Ashford and Risinger attempt to meet the point with a flagrantly wrong argument of a different sort. Specifically, they slide into an irrelevant

the look of a makeweight. It is adduced to support a position based chiefly on the view that there is something intrinsically wrong with deviation from proof beyond a reasonable doubt. Ultimately, the only serious challenge to the constitutionality of burden-shifting defenses and presumptions comes from the procedural interpretation of *Winship* and from the conceptually consistent standard of a "rational connection" between proved and presumed facts.

The following case studies of presumptions illustrate both the irrationality of the "rational connection" test of their constitutionality and a corollary diversion of judicial attention from the underlying concerns of substantive fairness. Specifically, the first example depicts the silliness to which courts have been led in applying the *Tot-Leary* approach, while the second illustrates the resulting inattention to substantial claims of substantive injustice in the penal law.

a. *Presumption of Facts Giving Rise to Federal Jurisdiction*

The federal kidnapping statute[208] punishes kidnapping as a federal crime whenever any of four jurisdictional bases exists. One such basis is the fact that the kidnap victim was "willfully transported in interstate or foreign commerce," and the statute creates a rebuttable presumption of such transportation from proof of failure to release the victim within twenty-four hours of the kidnapping. The result is that kidnapping is a federal crime whenever the actor fails to release the victim within twenty-four hours unless the defendant can disprove interstate or foreign transportation.

In *United States v. Moore*[209] the Second Circuit held this scheme unconstitutional. The court began by recognizing the *Tot-Leary* approach as controlling the constitutionality of presumptions.[210] The

parade of horribles: "[D]oes it not follow [from allowing affirmative defenses] that 'non-murder' is a perfectly proper affirmative defense to the crime of possession of a firearm?" *Id.* at 188. The short answer to this question is "no." Whether the defense is constitutionally permissible depends on whether the legislature may constitutionally impose murder sanctions for possession of a firearm. That is a question of the scope of legislative authority over the substance of the law, and its answer one way or the other does not depend on the general permissibility of affirmative defenses. The evil here envisioned is grossly disproportionate punishment. That problem does not flow from the use of an affirmative defense; nor would it be prevented by a doctrine disallowing that device. Rephrased in generic rather than particular terms, Ashford and Risinger essentially ask: If the greater power (to punish *X*) includes the lesser power (to punish *X* unless defendant can show not-*Y*), does it not follow that the greater power is without limit? If constitutional procedural protections—and traditional substantive boundaries of the criminal law—mean anything, the answer is obviously in the negative.

208. 18 U.S.C. § 1201 (1976); *see* p. 1390 *supra* (quoting statute).

209. 571 F.2d 76 (2d Cir. 1978).

210. *Tot* requires a "rational connection between the fact proved and the ultimate fact presumed." 319 U.S. at 467. *Leary* adds that such connection will not be found

Moore court examined the kidnapping statute and found that it flunked this test: "We simply cannot say with substantial assurance that for purposes of proving the transportation of a kidnapping victim in interstate or foreign commerce such transportation is more likely than not to have occurred whenever the victim is not released within 24 hours of his disappearance."[211]

As an application of settled doctrine, the *Moore* decision is impeccable. In any other frame of reference, it is simply bizarre. The case involved no colorable claim of unfairness or overreaching. The investigation proceeded in textbook fashion, and the evidence of guilt was overwhelming. The jury found beyond a reasonable doubt that the defendants had committed a kidnapping for ransom. Moreover, there was practical incentive to prosecute for that offense, because the failure ever to locate the victim's body created an evidentiary obstacle to conviction for murder.

Given these facts, it is more than a little surprising to discover that the Constitution bars punishment for kidnapping.[212] The reason, we are told, is that the connection between the proved and presumed facts is insufficiently intimate. The trouble is that there is no reason for that to matter. The only constitutional issue raised by this case is the extent of federal authority to punish as a federal offense any kidnapping in which the victim is not released within twenty-four hours.[213] The critical fact is that the *Moore* court effectively found the kidnapping statute beyond the reach of federal jurisdiction under the commerce clause without devoting to that question even a moment's consideration. There is no evidence in the *Moore* opinion that the court would have answered the question the same way if they had thought about it. The reason for this misdirection, of course, is that the "rational connection" test of *Tot* and *Leary* makes the scope of legislative authority over the substance of the law utterly irrelevant to the statute's constitutionality. Instead,

"unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." 395 U.S. at 36.

211. 571 F.2d at 86-87 (footnote omitted).

212. For reasons not relevant to the instant discussion, the *Moore* court upheld the defendants' conviction for conspiracy to commit kidnapping under 18 U.S.C. § 1201(c) (1976). Because the defendants had been sentenced to 10 years for the conspiracy offense and to the statutory maximum of life imprisonment for the substantive offense, the net effect of the *Moore* decision was to reduce the defendants' sentences from life to 10 years. *See* 571 F.2d at 89-90.

213. *See, e.g.*, Perez v. United States, 402 U.S. 146 (1971). *See generally* Stern, *The Commerce Clause Revisited—The Federalization of Intrastate Crime*, 15 ARIZ. L. REV. 271 (1973) (cases permit Congress to regulate local acts, lacking connection with interstate commerce but difficult to distinguish from acts related to interstate commerce).

that issue is made to turn on the closeness of an entirely formal relationship between proved and presumed facts. The result is that a law is declared unconstitutional for a reason that can most charitably be described as aesthetic.

b. *Presumptions Based on Presence at an Illegal Still*

The traditional approach to presumptions tends not only to exalt empty formalities but also to divert judicial attention from the underlying claims of substantive injustice. The point is made by comparing *United States v. Gainey*[214] with *United States v. Romano*.[215] Both cases arose under the federal statute covering illegal production of alcoholic beverages.[216] That law defined a number of related offenses, each of which was punishable by a $10,000 fine or five years' imprisonment or both. Additionally, the statute specified presumptions applicable to several of these offenses. These presumptions allowed the trier of fact to infer a violation of the designated provision from the defendant's presence at the site of an illegal still or related activity, "unless the defendant explains such presence to the satisfaction of the jury."[217] In both cases, the Court evaluated the constitutionality of the presumption under the *Tot* requirement of a "rational connection" between proved and presumed facts.[218] Despite these similarities, the Court regarded the cases as "markedly different."[219] In *Gainey* the Court held that presence at a still could support an inference that the defendant had been engaged in carrying on the business of a distiller without having given the required bond.[220] In *Romano* the Court held that presence at a still could not support an inference that the defendant had been in possession of it.[221]

214. 380 U.S. 63 (1965).
215. 382 U.S. 136 (1965).
216. 26 U.S.C. § 5601 (1970) (amended 1976).
217. *Id.* § 5601(b)(1), (4).
218. *See* 382 U.S. at 139; 380 U.S. at 66-67.
219. 382 U.S. at 140.
220. 380 U.S. at 65-68. Specifically, the Court in *Gainey* upheld the presumption stated in subsection (b)(2) of the statute:

> Whenever on trial for violation of subsection (a)(4) [failure or refusal of a distiller or rectifier to give bond] the defendant is shown to have been at the site or place where, and at the time when, the business of a distiller or rectifier was so engaged in or carried on, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or the court when tried without jury).

26 U.S.C. § 5601(b)(2) (1970) (amended 1976).
221. 382 U.S. at 138. Specifically, the Court in *Romano* invalidated the presumption stated in subsection (b)(1) of the statute:

> Whenever on trial for violation of subsection (a)(1) [possession or control of an un-

Assuming for the sake of argument that one connection may be thought more "rational" than the other, there is no reason to regard that as the relevant inquiry. The statute's significance does not lie in a postulated relationship between proved facts and authorized punishment. The two provisions imposed identical penalties based on proof of identical facts. There is no relevant distinction between them and certainly no theoretical basis for regarding one but not the other as a valid exercise of legislative power.

In our view, however, the chief objection to *Gainey* and *Romano* is not inconsistency. The difference in outcomes may reflect nothing more than a developing judicial uncertainty as to what Congress intended.[222] The more serious defect is that neither case addresses the underlying claim of substantive injustice. The critical issue in both cases is whether the Constitution permits felony conviction to be based on nothing more than presence at a still. Presence at a still might have a number of entirely innocent explanations. It might be occasioned by a hunter's chance encounter, by a farmer's investigation of trespassers, or by noncriminal association with a bootlegger. It is true that the statute involved in these cases invited the accused to give such an exculpatory explanation if he had one. But if *Winship* means anything, it surely must stand for the inadequacy of such an opportunity. Criminal conviction must be based on proof beyond a reasonable doubt. The only fact proved beyond a reasonable doubt was presence at a still. The constitutionality of the authorized punishment must be judged on that basis.[223]

The reason that this claim was never discussed is not that the Court is insensitive to considerations of substantive injustice. Instead, the problem is that the traditional approach to the constitutionality of presumptions forces substantive fairness into the background. The search for a "rational connection" implies that the important issue is formal conformity between proved and presumed

registered still] the defendant is shown to have been at the site or place where and at the time when, a still or distilling apparatus was set up without having been registered, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or the court when tried without jury).

26 U.S.C. § 5601(b)(1) (1970) (amended 1976).

222. *See* 382 U.S. at 144 (footnote omitted) ("It may be, of course, that Congress has the power to make presence at an illegal still a punishable crime, but we find no clear indication that it intended to so exercise this power.") This explanation for *Romano* does not, however, suggest why the identical legislative history did not produce a similar conclusion in *Gainey*.

223. *Cf.* Allen v. County Court of Ulster, 568 F.2d 998 (2d Cir. 1977), *cert. granted*, 439 U.S. 815 (1978) (No. 78-1554) (rejecting presumption of possession of gun from gun's presence in automobile occupied by defendants).

facts rather than substantive adequacy of an established basis for punishment. The consequence is a twofold confusion. On the one hand, the traditional test leads to invalidation of some statutes that present no colorable case of unfairness or overreaching. The result is the kind of pointless and unjustified exercise of judicial review exemplified by the *Moore* decision. On the other hand, the "rational connection" approach tends to suggest that some exceedingly bad laws are constitutionally permissible. Although there can never be a blanket guarantee against harsh legislation, surely it is appropriate to consider whether the government has satisfied minimal conditions of substantive injustice in dealing with the individual accused. The traditional approach to the constitutionality of presumptions diverts attention from this inquiry and obscures its significance. The result, both in the context of presumptions as well as in the procedural approach to affirmative defenses, is a focus on formality rather than on substance and a corresponding failure to honor the promise of *In re Winship*.

Conclusion

The progression from *Mullaney* to *Patterson* gives cause for optimism about the evolution of constitutional doctrine governing burden of proof. In *Mullaney* the Court confronted an unfamiliar question in an extremely unusual context. In *Patterson* the Court revealed an admirable willingness to reconsider earlier conclusions in light of subsequent research and reflection. Most importantly, both the majority and the dissent in *Patterson* showed a sensitive appreciation of the potentialities of legislative reform and a determination not to thwart that process by a rigid and pointless rule of procedural formality. While it is true that the Court has not yet achieved any durable resolution of this problem, it is also clear that it has recognized the critical relation between burden of proof and the substantive law. This article has been an attempt to consolidate that understanding and to point the way toward a more meaningful implementation of the principle of *In re Winship*.

Appendix

The following chart identifies state statutory provisions that shift the burden of persuasion to the defendant. Where appropriate, the chart notes the comparable sections of the Model Penal Code.

An asterisk indicates those sections of the Model Penal Code that shift the burden of persuasion to the defendant.

Crime to Which Applicable	Defense	Jurisdictions Shifting Burden of Persuasion	Model Penal Code
all offenses	former prosecution	Ark. Stat. Ann. §§ 41-106 to -108, -110(4) (1977)	§§ 1.08-.10
all offenses	mistake of fact	Del. Code Ann. tit. 11, §§ 304, 441 (1974 & Supp. 1978) N.D. Cent. Code §§ 12.1-01-03(3), -05-08 (1976)	§ 2.04(1)
all offenses	reliance on official misstatement of law	Ark. Stat. Ann. §§ 41-110(4), -206(3) (1977) Me. Rev. Stat. Ann. tit. 17-A, §§ 5(3), 52(4) (Supp. 1978) N.H. Rev. Stat. Ann. § 5A:626:3 II (1974) L.1978, ch. 95, 1978 N.J. Sess. Law Serv. 298 (West) (to be codified at N.J. Stat. Ann. § 2C: 2-4.c(2)) [hereinafter cited to forthcoming code]. N.D. Cent. Code §§ 12.1-01-03(3), -05-09 (1976) Tex. Penal Code Ann. tit. 1, § 2.04, tit. 2, § 8.03(b) (Vernon 1974)	§ 2.04(3)*
complicity generally	withdrawal	Alaska Stat. §§ 11.16.120(a)(1), .81.900(b)(1) (1978) Ark. Stat. Ann. §§ 41-110(4), -305(2) (1977) Mo. Rev. Stat. §§ 556.056, 562. 041.2(3), .041.3 (1978) N.J. Stat. Ann. § 2C:2-6.e(3) (forthcoming West 1979) N.Y. Penal Law §§ 25.00(2), 40.10(2) (McKinney 1975)	§ 2.06(6)(c)
complicity of corporate agent	due diligence to prevent crime	N.J. Stat. Ann., § 2C:2-7.c (forthcoming West 1979) 18 Pa. Cons. Stat. Ann. § 307(d) (Purdon 1973) Tex. Penal Code Ann. tit. 1, § 2.04, tit. 2, § 7.24(a) (Vernon 1974)	§ 2.07(5)*
all offenses	intoxication	Ark. Stat. Ann. §§ 41-110(4), -207 (1977)	§ 2.08

Crime to Which Applicable	Defense	Jurisdictions Shifting Burden of Persuasion	Model Penal Code
all offenses	coercion or duress	Alaska Stat. §§ 11.81.440, .900(b)(1) (1978) Ark. Stat. Ann. §§ 41-110(4), -208 (1977) Del. Code Ann. tit. 11, §§ 304, 431 (1974 & Supp. 1978) Ga. Code §§ 26-906, -907 (1978) Mo. Rev. Stat. §§ 556.056, 562. 071 (1978) N.Y. Penal Law §§ 25.00(2), 40.00 (McKinney 1975) Tex. Penal Code Ann. tit. 1, § 2.04, tit. 2, § 8.05 (Vernon 1974)	§ 2.09
all offenses	victim's consent	Del. Code Ann. tit. 11, §§ 304, 451, 452 (1974 & Supp. 1978)	§ 2.11
all offenses	entrapment	Alaska Stat. §§ 11.81.450, .900 (b)(1) (1978) Ark. Stat. Ann. §§ 41-110(4), -209 (1977) Del. Code Ann. tit. 11, §§ 304, 432 (1974 & Supp. 1978) Ga. Code §§ 26-905, -907 (1978) Hawaii Rev. Stat. §§ 701-115(2) (b), 702-237 (1976) N.J. Stat. Ann. § 2C:2-12(b) (forthcoming West 1979) N.Y. Penal Law §§ 25.00(2), 40.05 (McKinney 1975) N.D. Cent. Code §§ 12.1-01-03(3), -05-11 (1976) 18 Pa. Cons. Stat. Ann. § 313(b) (Purdon 1973)	§ 2.13[a]
all offenses	justification generally	Ga. Code §§ 26-901 to -902, -907 (1978) Mo. Rev. Stat. §§ 556.056, 563. 026.3 (1978)	§§ 3.01, .02
all offenses	defense of self or property	Ga. Code §§ 26-02 to -904, 907 (1978)	§§ 3.04, .06
all offenses	mental disease or defect	Ark. Stat. Ann. §§ 41-110(4), -601 (1977) Del. Code Ann. tit. 11, §§ 304, 401-402 (1974 & Supp. 1978) Ky. Rev. Stat. §§ 500.070(3), 504.020 (1975 & Supp. 1978) N.J. Stat. Ann. § 2C:4-3.a (forthcoming West 1979) Or. Rev. Stat. §§ 161.055(2), .305 (1977)	§ 4.03

Crime to Which Applicable	Defense	Jurisdictions Shifting Burden of Persuasion	Model Penal Code
		Tex. Penal Code Ann. tit. 1, § 2.04, tit. 2, § 8.01(a) (Vernon 1974)	
		Wash. Rev. Code § 9A.12.010 (1977)	
attempt	renunciation	Alaska Stat. §§ 11.31.100(c), .81.900(b)(1) (1978)	§ 5.01(4)
		Ark. Stat. Ann. §§ 41-110(4), -704 (1977)	
		Conn. Gen. Stat. §§ 53a-12(b), -49(c) (1977)	
		Del. Code Ann. tit. 11, §§ 304, 541(b) (1974 & Supp. 1978)	
		Ga. Code § 26-1003 (1978)	
		Hawaii Rev. Stat. §§ 701-115 (2)(b), 705-530(1) (1976)	
		Me. Rev. Stat. Ann. tit. 17-A, §§ 5(3), 154.2.A (Supp. 1978)	
		N.H. Rev. Stat. Ann. § 5A:629:1 III (1974)	
		N.J. Stat. Ann. § 2C:5-1(d) (forthcoming West 1979)	
		N.Y. Penal Law §§ 25.00(2), 40.101(3) (McKinney 1975)	
		N.D. Cent. Code §§ 12.1-01-03(3), -06-05.3a (1976)	
		Or. Rev. Stat. §§ 161.055(2), .430 (1977)	
		Tex. Penal Code Ann. tit. 1, § 2.04, tit. 4, § 15.04(a) (Vernon 1974)	
solicitation	renunciation	Alaska Stat. §§ 11.31.110(b)(2), .81.900(b)(1) (1978)	§ 5.02(3)
		Ark. Stat. Ann. §§ 41-110(4), -710 (1977)	
		Del. Code Ann. tit. 11, §§ 304, 541(a) (1974 & Supp. 1978)	
		Hawaii Rev. Stat. §§ 701-115 (2)(b), 705-530(2) (1976)	
		Me. Rev. Stat. Ann. tit. 17-A, §§ 5(3), 154.2.B (Supp. 1978)	
		N.H. Rev. Stat. Ann. § 5A.629:2 II (1974)	
		N.Y. Penal Law §§ 25.00(2), 40.10(4) (McKinney 1975)	
		N.D. Cent. Code §§ 12.1-01 -03(3), -06-05.3b (1976)	
		Or. Rev. Stat. §§ 161.055(2), .440 (1977)	

Crime to Which Applicable	Defense	Jurisdictions Shifting Burden of Persuasion	Model Penal Code
		Tex. Penal Code Ann. tit. 1, § 2.04, tit. 4, § 15.04(b) (Vernon 1974)	
conspiracy	renunciation	Ark. Stat. Ann. §§ 41-110(4), -710 (1977)	§ 5.03(6)
		Conn. Gen. Stat. §§ 53a-12(b), -48(b) (1977)	
		Del. Code Ann. tit. 11, §§ 304, 541(a) (1974 & Supp. 1978)	
		Hawaii Rev. Stat. §§ 701-115 (2)(b), 705-530(3) (1976)	
		Me. Rev. Stat. Ann. tit. 17-A, §§ 5(3), 144.2.B (Supp. 1978)	
		Neb. Rev. Stat. § 28-203 (Supp. 1978)	
		N.H. Rev. Stat. Ann. § 5A:629:3 III (1974)	
		N.D. Cent. Code §§ 12.1-01-03(3), -06-05.3b (1976)	
		Or. Rev. Stat. §§ 161.055(2), .460 (1977)	
		Tex. Penal Code Ann. tit. 1, § 2.04, tit. 4, § 15.04(b) (Vernon 1974)	
attempt	action inherently unlikely to succeed	Ark. Stat. Ann. §§ 41-110(4), -715 (1977)	
carrying concealed weapon	lawful purpose	Alaska Stat. §§ 11.61.220(b)(d), .81.900(b)(1) (1978)	§ 5.06(2)
		Neb. Rev. Stat. § 28-1202(2) (Supp. 1978)	
felony murder	death unforeseeable	Alaska Stat. §§ 11.41.115(b), .81.900(b)(1) (1978)	*Cf.* § 210.2(1)(b) (Model Penal Code modifying felony-murder rule to permit rebuttable presumption of recklessness)
		Ark. Stat. Ann. §§ 41-110(4), -1502(2) (1977)	
		Conn. Gen. Stat. §§ 53a-12(b), -54(c) (1977)	
		Me. Rev. Stat. Ann. tit. 17-A, §§ 5(3), 202.2 (Supp. 1978)	
		N.Y. Penal Law §§ 25.00(2), 125.25(3)(d) (McKinney 1975)	
		N.D. Cent. Code §§ 12.1-01-03(3), -16-01.3 (1976)	
		Or. Rev. Stat. §§ 161.055(2), .115(3) (1977)	
		Wash. Rev. Code §§ 9A.32.030 (1)(c), .050(1)(b) (1977)	

Crime to Which Applicable	Defense	Jurisdictions Shifting Burden of Persuasion	Model Penal Code
murder	extreme emotional disturbance	CONN. GEN. STAT. §§ 53a-12(b), -54(a)(1), -55(2)(a) (1977) DEL. CODE ANN. tit. 11, §§ 303, 641 (1974 & Supp. 1978) N.Y. PENAL LAW §§ 25.00(2), 125.25(1)(a) (McKinney 1975)	§ 210.3(1)(b) (defining manslaughter)
murder	unreasonable but good-faith belief in justification	ALASKA STAT. §§ 11.41.115(d), .81.900(b)(1) (1978)	*Cf.* § 2.04 (ignorance or mistake as defense)
negligent homicide	death unforeseeable	ARK. STAT. ANN. §§ 41-110(4), -1504(2) (1977)	
battery	injury unforeseeable	ARK. STAT. ANN. §§ 41-110(4), -1601(2) (1977)	
kidnapping	close relation of victim	ALASKA STAT. §§ 11.41.300(b)(1), .81.900(b)(1) (1978) TEX. PENAL CODE ANN. tit. 1, § 2.04, tit. 5, § 20.02(b)(2) (Vernon 1974) WASH. REV. CODE § 9A.40.030(2) (1977)	
kidnapping	voluntary release without harm	ALASKA STAT. §§ 11.41.300(d), .81.900(b)(1) (1978)	*See* § 212.1 (defining second-degree kidnapping)
false imprisonment	close relative of victim	TEX. PENAL CODE ANN. tit. 1, § 2.04, tit. 5, § 20.02(b)(2) (Vernon 1974)	
resisting arrest	nonuniformed peace officer, identity undisclosed while making arrest	NEB. REV. STAT. § 28-904(2) (Supp. 1978)	
coercion or extortion by threat	reasonable belief in truth of accusation	CONN. GEN. STAT. §§ 53a-12(b), -192(b) (1977) DEL. CODE ANN. tit. 11, §§ 304, 847 (1974 & Supp. 1978) GA. CODE § 26.1804(c) (1978) HAWAII REV. STAT. §§ 701-115 (2)(b), 708-834(4) (1976) KY. REV. STAT. §§ 500.070(3), 509.080 (1975 & Supp. 1978) NEB. REV. STAT. § 28-513(2) (Supp. 1978)	§ 212.5(1)

Crime to Which Applicable	Defense	Jurisdictions Shifting Burden of Persuasion	Model Penal Code
		N.Y. Penal Law §§ 25.00(2), 135.75, 155.15(2) (McKinney 1975) N.D. Cent. Code §§ 12.1-01-03(3), -17-06.2 (1976)	
rape	spouse of victim	Alaska Stat. §§ 11.41.445(a), .81.900(b)(1) (1978) Me. Rev. Stat. Ann. tit. 17-A, §§ 5(3), 253.4 (Supp. 1978)	§ 213.1
statutory rape	proximity in age to victim's age	Tex. Penal Code Ann. tit. 1, § 2.04, tit. 5, § 21.10(c) (Vernon 1974)	
rape	reasonable mistake as to capacity of victim to consent	Ark. Stat. Ann. §§ 41-110(4), -1802(4) (1977) Conn. Gen. Stat. §§ 53a-12(b), -67(a) (1977) Ky. Rev. Stat. §§ 500.070(3), 510.030 (1975 & Supp. 1978) N.Y. Penal Law §§ 25.00(2), 130.10 (McKinney 1975) Or. Rev. Stat. §§ 161.055(2), 163.325(3) (1977) Wash. Rev. Code § 9.79.160(1) (1977)	*Cf.* § 213.4(2) (guilt if knowledge of incapacity to appraise conduct)
statutory rape	reasonable mistake as to age of victim	Alaska Stat. §§ 11.41.445(b), .81.900(b)(1) (1978) Ark. Stat. Ann. §§ 41-110(4), -1802(3) (1977) Ky. Rev. Stat. §§ 500.070(3), 510.030 (1975 & Supp. 1978) Minn. Stat. §§ 609.344(b), .345(b) (Supp. 1979) Mo. Rev. Stat. §§ 556.056, 566.020.3 (1978) N.D. Cent. Code §§ 12.1-01-03(3), -20-01(b) (1976) Or. Rev. Stat. §§ 161.055(2), 163.325(2) (1977) 18 Pa. Cons. Stat. Ann. § 3102 (Purdon 1975) Wash. Rev. Code § 9.79.160(2) (1977)	§ 213.6(1) (defense except where criminality of conduct depends on child's being below age 10)
statutory rape	previous prolonged cohabitation	Conn. Gen. Stat. §§ 53a-12(b), -67(b) (1977) Me. Rev. Stat. Ann. tit. 17-A, §§ 5(3), 252.2 (Supp. 1978)	§ 213.6(2)
statutory rape	promiscuity of victim	Hawaii Rev. Stat. §§ 701-115 (2)(b), 707-737(3) (1976)	§ 213.6(3)

Crime to Which Applicable	Defense	Jurisdictions Shifting Burden of Persuasion	Model Penal Code
arson	lawful purpose or control over property without foreseeable harm to other property or persons	Alaska Stat. §§ 11.46.410(b), .81.900(b)(1) (1978) Del. Code Ann. tit. 11, §§ 304, 801(b), 802(b) (1974 & Supp 1978) Neb. Rev. Stat. § 28-503(2) (Supp. 1978) N.Y. Penal Law §§ 25.00(2), 150.05(2) (McKinney 1975) Wash. Rev. Code § 9A.48.060 (1977)	*See* § 220.1(1)(b) (defendant's conduct did not recklessly endanger other persons or property besides his own)
criminal mischief	lawful purpose	Del. Code Ann. tit. 11, §§ 304, 811(a)(3) (1974 & Supp. 1978)	
burglary	building abandoned	Conn. Gen. Stat. §§ 53a-12(b), -104 (1977)	
burglary and criminal trespass	emergency use of premises	Alaska Stat. §§ 11.46.340, .81.900(b)(1) (1978)	
criminal trespass	reasonable belief in right to be on property	Conn. Gen. Stat. §§ 53a-12(b), -110 (1977) Neb. Rev. Stat. § 28-522 (Supp. 1978)	
armed robbery	weapon incapable of inflicting harm	Conn. Gen. Stat. §§ 53a-12(b), -134(a)(4) (1977) N.Y. Penal Law §§ 25.00(2), 160.15(4) (McKinney 1975)	
theft generally	claim of right	Ga. Code § 26-1810 (1978) Me. Rev. Stat. Ann. tit. 17-A, §§ 5(3), 361.1 (Supp. 1978) N.Y. Penal Law §§ 25.00(2), 155.15(1) (McKinney 1975)	
theft of leased property	lawful detainer and return	Ark. Stat. Ann. §§ 41-110(4), -2209(9) (1977)	
auto theft	reasonable belief that owner would have authorized use	Hawaii Rev. Stat. §§ 701-115 (2)(b), 708-836(3) (1976) Neb. Rev. Stat. § 28-516(3) (Supp. 1978)	§ 223.9
passing bad checks	no personal interest and done on superior's order	Del. Code Ann. tit. 11, §§ 304, 902 (1974 & Supp. 1978) N.Y. Penal Law §§ 25.00(2), 190.15(2) (McKinney 1975)	
unauthorized use of credit card	purpose and ability to meet obligation of owner	Del. Code Ann. tit. 11, §§ 304, 905 (1974 & Supp. 1978) N.H. Rev. Stat. Ann. § 5A: 638:4 III (1974)	§ 224.6

Crime to Which Applicable	Defense	Jurisdictions Shifting Burden of Persuasion	Model Penal Code
		18 Pa. Cons. Stat. Ann. § 4106(b) (Purdon 1975) *Cf.* Me. Rev. Stat. Ann. tit. 17-A, §§ 5(3), 905.2 (Supp. 1978) (good-faith belief in right to use); N.Y. Penal Law §§ 25.00(2), 190.15(1) (McKinney 1975) (maker of bad check can defend if makes full satisfaction within 10 days after dishonor by drawee)	
deceptive business practices	conduct not knowing or reckless	N.H. Rev. Stat. Ann. § 5A: 638:6 II (1974) N.J. Stat. Ann. § 2C:21-7.g (forthcoming West 1979) N.Y. Penal Law §§ 25.00(2), 190.20 (McKinney 1975) 18 Pa. Cons. Stat. Ann. § 4107(b) (Purdon 1975)	§ 224.7*
bigamy	reasonable belief in freedom to remarry	Ark. Stat. Ann. §§ 41-110(4), -2402(2) (1977) Conn. Gen. Stat. §§ 53a-12(b), -190(b) (1977) Ga. Code §§ 26-2007, -2008 (1978) Neb. Rev. Stat. § 28-701(1) (Supp. 1978)	§ 230.1
endangering child by withholding medical care	religious belief	N.Y. Penal Law §§ 25.00(2), 260.15 (McKinney 1975)	
criminal nonsupport	financial inability	Tex. Penal Code Ann. tit. 1, § 2.04, tit. 6, § 25.05(f) (Vernon 1974)	*See* § 230.5 (misdemeanor if defendant can provide)
perjury	timely retraction	Alaska Stat. §§ 11.56.235, .81.900(b)(1) (1978) Del. Code Ann. tit. 11, §§ 304, 1231 (1974 & Supp. 1978) Me. Rev. Stat. Ann. tit. 17-A, §§ 5(3), 451.3, 452.2 (Supp. 1978) N.Y. Penal Law §§ 25.00(2), 210.25 (McKinney 1975)	§ 241.1(4)
resisting arrest	policeman out of uniform and unidentified	Neb. Rev. Stat. § 28-904(2) (Supp. 1978)	

CRIME TO WHICH APPLICABLE	DEFENSE	JURISDICTIONS SHIFTING BURDEN OF PERSUASION	MODEL PENAL CODE
criminal assistance	person assisted was close relative	ARK. STAT. ANN. §§ 41-110(4), -2805(2) (1977) WASH. REV. CODE §§ 9A.76. 070(2)(a), .080(2)(a) (1977)	
compounding	reasonable belief that restitution due	DEL. CODE ANN. tit. 11, §§ 304, 1247 (1974 & Supp. 1978) HAWAII REV. STAT. §§ 701-115 (2)(b), 710-1013(2) (1976) ME. REV. STAT. ANN. tit. 17-A, §§ 5(3), 754.3 (Supp. 1978) NEB. REV. STAT. § 28.301(2) (Supp. 1978) N.H. REV. STAT. ANN. § 5A: 642:5 III (1974) N.Y. PENAL LAW §§ 25.00(2), 215.45(2) (McKinney 1975) N.D. CENT. CODE §§ 12.1-01-03(3), -09-01.3.b (1976) WASH. REV. CODE § 9A.76. 100(2) (1977)	§ 242.5
bail jumping	reasons beyond one's control	KY. REV. STAT. §§ 500.070(3), 520.070(2) (1975 & Supp. 1978) ME. REV. STAT. ANN. tit. 17-A, §§ 5(3), 17.4 (Supp. 1978) N.J. STAT. ANN. § 2C:29-7 (forthcoming West 1979) N.Y. PENAL LAW §§ 25.00(2), 215.59 (McKinney 1975) WASH. REV. CODE § 9A.76.170 (1977)	*See* § 242.8 (permitting "lawful excuse")
cruelty to animals	scientific research on pest control	ME. REV. STAT. ANN. tit. 17-A, §§ 5(3), 510.3 (Supp. 1978)	
obscenity	redeeming social purpose	ARK. STAT. ANN. §§ 41-110(4), -3506(3) (1977) GA. CODE § 26-2101(e) (1978) N.Y. PENAL LAW §§ 25.00(2), 235.15(1) (McKinney 1975) OR. REV. STAT. §§ 161.005(2), 167.095 (1977) TEX. PENAL CODE ANN. tit. 1, § 2.04, tit. 9, §§ 43.23(b), .25(b) (Vernon 1974)	*See* § 251.4
distribution of obscenity to minor	reasonable mistake as to age	CONN. GEN. STAT. §§ 53a-12(b), -19a(c) (1977) N.J. STAT. ANN. § 2C:34-3e(1) (forthcoming West 1979) OR. REV. STAT. §§ 161.055(2), 167.085(4) (1977)	

Crime to Which Applicable	Defense	Jurisdictions Shifting Burden of Persuasion	Model Penal Code
distribution of obscenity to minor	no financial interest in or control over materials	N.J. Stat. Ann. § 2C:34-3e(2) (forthcoming West 1979)	
illegal possession of weapon	kept as curiosity	Tex. Penal Code Ann. tit. 1, § 2.04, tit. 10, § 46.06(d) (Vernon 1974)	
possession of weapon by felon	discharge of conviction or passage of time	Alaska Stat. §§ 11.61.200(b), .81.900(b)(1) (1978)	
possession of weapon by felon	sale pursuant to federal law	Alaska Stat. §§ 11.61.200(c), .81.900(b)(1) (1978)	
distribution of firearm to minor	permission of parent	Tex. Penal Code Ann. tit. 1, § 2.04, tit. 10, § 46.07(c) (Vernon 1974)	
drug offenses	licensed by law	Or. Rev. Stat. §§ 161.055(2), 167.242 (1977)	
gambling	social gambling	Alaska Stat. §§ 11.66.200(b), .250, .260(b), .81.900(b)(1) (1978) Hawaii Rev. Stat. §§ 701-115 (2)(b), 712-1231(b) (1976) Neb. Rev. Stat. § 28-1112 (Supp. 1978) Tex. Penal Code Ann. tit. 1, § 2.04, tit. 10, §§ 47.04(b), (c), .06(c), .07(b) (Vernon 1974)	
gambling	no intent to gamble	Neb. Rev. Stat. § 28-1108 (Supp. 1978)	
obstruction of highways	reasonable effort to remove obstruction	Alaska Stat. §§ 11.61.150(b), .81.900(b)(1) (1978)	