See also Dutile, The Burden of Proof in Criminal Cases: A Comment on the *Mullaney-Patterson* Doctrine, 55 Notre Dame Law. 380 (1980); McLane, The Burden of Proof in Criminal Cases: *Mullaney* and *Patterson* Compared, 15 Crim. L. Bull. 346 (1979); Angel, Substantive Due Process and the Criminal Law, 9 Loy. Chi. L.J. 61, 93-111 (1977); Ashford & Risinger, Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview, 79 Yale L.J. 165 (1969); Comment, The Constitutionality of Affirmative Defenses after Patterson v. New York, 78 Colum. L. Rev. 655 (1978).

b. Presumptions

LEARY v. UNITED STATES

Supreme Court of the United States
395 U.S. 6 (1969)

MR. JUSTICE HARLAN delivered the opinion of the Court.

This case presents constitutional questions arising out of the conviction of the petitioner, Dr. Timothy Leary, for violation of two federal statutes governing traffic in marihuana.

. . . On December 20, 1965, petitioner left New York by automobile, intending a vacation trip to Yucatan, Mexico. He was accompanied by his daughter and son, both teenagers, and two other persons. On December 22, 1965, the party drove across the International Bridge between the United States and Mexico at Laredo, Texas. They stopped at the Mexican customs station and, after apparently being denied entry, drove back across the bridge. They halted at the American secondary inspection area, explained the situation to a customs inspector, and stated that they had nothing from Mexico to declare. The inspector asked them to alight, examined the interior of the car, and saw what appeared to be marihuana seeds on the floor. The inspector then received permission to search the car and passengers. Small amounts of marihuana were found on the car floor and in the glove compartment. A personal search of petitioner's daughter revealed a silver snuff box containing semi-refined marihuana and three partially smoked marihuana cigarettes. . . .

Leary was convicted on a charge of that he had knowingly transported and facilitated the transportation and concealment of marihuana which had been illegally imported or brought into the United States, with knowledge that it had been illegally imported or brought in, . . . in violation of [21 U.S.C.] §176a. . . .

Insofar as here relevant, §176a imposes criminal punishment upon every person who: . . .

> receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law. . . .

A subsequent paragraph establishes the presumption now under scrutiny:

> Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury. . . .

By what criteria is the constitutionality of the §176a presumption to be judged?

Early decisions of this Court set forth a number of different standards by which to measure the validity of statutory presumptions. However, in Tot v. United States, 319 U.S. 463 (1943), the Court . . . held that the "controlling" test for determining the validity of a statutory presumption was "that there be a rational connection between the facts proved and the fact presumed." The Court stated: ". . . [W]here the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts."

The *Tot* Court reduced to the status of a "corollary" another test which had some support in prior decisions: whether it was more convenient for the defendant or for the Government to supply proof of the ultimate fact which the presumption permitted to be inferred. The Court stated that "[t]he argument from convenience is admissible only where the inference is a permissible one. . . ." The Court rejected entirely another suggested test with some backing in the case law, according to which the presumption should be sustained if Congress might legitimately have made it a crime to commit the basic act from which the presumption allowed an inference to be drawn. The *Tot* Court stated simply that "for whatever reason" Congress had not chosen to make the basic act a crime. . . .

The upshot of *Tot* . . . is, we think, that a criminal statutory presumption must be regarded as "irrational" or "arbitrary," and hence unconstitutional, 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.[64] And in the judicial assessment the congressional determination favoring the particular presumption must, of course, weigh heavily.

How does the §176a presumption fare under these standards?

So far as here relevant, the presumption, quoted *supra*, authorizes the jury to infer from a defendant's possession of marihuana two necessary elements of the crime: (1) that the marihuana was imported or brought into the United States illegally; and (2) that the defendant knew of the unlawful importation or bringing in. . . . For reasons that follow, we hold unconstitutional that part of the presumption which relates to a defendant's knowledge of illegal importation. Consequently, we do not reach the question of the validity of the "illegal importation" inference. . . .

[T]o determine the constitutionality of the "knowledge" inference, one must have direct or circumstantial data regarding the beliefs of marihuana users generally about the source of the drug they consume. . . . Written material inserted in the record of the Senate hearings included [a statement] of an experienced federal customs agent . . . to the effect that high-quality marihuana was being grown near the Texas cities of Laredo and Brownsville. A written report of the Ohio Attorney General recited that marihuana "may grow unnoticed along

64. Since we find that the §176a presumption is unconstitutional under this standard, we need not reach the question whether a criminal presumption which passes muster when so judged must also satisfy the criminal "reasonable doubt" standard if proof of the crime charged or an essential element thereof depends upon its use. . . .

roadsides and vacant lots in many parts of the country," and a Philadelphia Police Academy bulletin stated that: "Plenty of [marihuana] is found growing in this city." . . . [Nevertheless] the materials which we have examined point quite strongly to the conclusion that most domestically consumed marihuana is still of foreign origin . . . [But] it by no means follows that a majority of marihuana possessors "know" that their marihuana was illegally imported. . . .

Once it is established that a significant percentage of domestically consumed marihuana may not have been imported at all, then it can no longer be postulated, without proof, that possessors will be even roughly aware of the proportion actually imported. We conclude that in order to sustain the inference of knowledge we must find on the basis of the available materials that a majority of marihuana possessors either are cognizant of the apparently high rate of importation or otherwise have become aware that *their* marihuana was grown abroad. . . .

With respect to packaging, there is evidence that Mexican marihuana is commonly compressed into distinctive "bricks" and then wrapped in characteristically Mexican paper. Yet even if it is assumed that most Mexican marihuana bears such distinguishing marks when first brought into this country, there is no indication that they normally are still present when it reaches the consumer. . . .

With respect to taste, the Senate hearing record contains the statement of a federal customs agent that: "A good marihuana smoker can probably tell good marihuana from bad." As has been seen, there is a preponderance of opinion to the effect that Mexican marihuana is more potent than domestic. One authority states that purchasers of marihuana commonly sample the product before making a "buy." However, the agent quoted above also asserted that some "good" marihuana was grown in Texas. And the account of the sampling custom further states that tasting is merely a ritual since "[u]sually the intoxication will not differ much from one cigarette to another. . . ." Once again, we simply are unable to estimate what proportion of marihuana possessors are capable of "placing" the marihuana in their possession by its taste, much less what proportion actually have done so by the time they are arrested.

We conclude that the "knowledge" aspect of the §176a presumption cannot be upheld. . . .

Reversed and remanded.

[The concurring opinions of the CHIEF JUSTICE and JUSTICES BLACK and STEWART are omitted.]

NOTES AND QUESTIONS

1. The terminology of presumptions. The term *presumption* is used in different and often inconsistent ways. McCormick writes (Evidence §342, at 802-803 (2d ed. 1972)): "One ventures the assertion that 'presumption' is the slipperiest member of the family of legal terms, except its first cousin, 'burden of proof.' One author has listed no less than eight senses in which the term has been used by the courts." To add further variety, courts may refer to *mandatory, permissive, conclusive,* and *rebuttable* presumptions, as well as use terms like *inference* or even *assumption.* To understand the significance of a presumption, one cannot simply resort to a dictionary but must focus on the precise effect of the presumption at trial. Some presumptions concern an inference of fact to be drawn from some other fact in evidence, but such common presumptions as the *presumption of innocence* and the *presumption of sanity* do not function in this evidentiary sense at all. We shall call them *misnamed presumptions.* The inferences of fact drawn from some other fact in evidence are the *true* presumptions subject to the constitutional principles discussed in *Leary.* As we indicate below, however, the presumptions within this category are not all of a piece; inferences of varying force may be drawn and hence the governing constitutional principles may themselves vary.

(*a*) *Misnamed presumptions.* It is commonly said that a defendant in a criminal case is "presumed innocent until proven guilty." Is this because there is some "rational connection," a "more-often-than-not" relationship between being charged as defendant and being innocent? Obviously not: The vast majority of criminal defendants are ultimately found guilty, and indeed the filing of an indictment requires a formal finding of probable guilt. The presumption of innocence does not concern the drawing of rational inferences from facts in evidence but rather is simply a traditional way of stating that the prosecution bears the burden of proving guilt beyond a reasonable doubt.

Some of the important misnamed presumptions are unfavorable to the defendant. It is common, for example, to state that defendants are "presumed sane" unless some evidence of insanity is introduced or to say that an intentional killing is "presumed to be unlawful," unless the defendant produces evidence of some justification. What is normally meant is that the defendant has the burden of production (and possibly the burden of persuasion) on the issues of insanity or justification. As we have seen earlier in this chapter, in Section B4a, pages 67-82 supra, there are constitutional limitations applicable here, very weak ones for burdens of production and stronger ones governing the burden of persuasion. But the applicable tests in any event are not those discussed in *Leary.* It could be that intentional killings are often, even half the time, committed in self-defense: A true presumption — an evidentiary inference of no self-defense — would surely be unconstitutional, but a presumption that serves only to allocate the burden of production almost surely is constitutional.

(*b*) *True presumptions.* True presumptions deal with inferences drawn from a fact actually proved (the *basic fact*) to some other critical fact (the *presumed fact*). Typically the presumed fact is one on which the prosecution bears the burden of persuasion. The presumption serves, however, to make this burden somewhat easier to carry.

Note that a presumption may ease the prosecution's burden in several distinct ways. For example, a presumption might allow the jury to draw the inference from basic to presumed fact, or instead the presumption might *require* the jury to draw the inference. The former are often called *permissive* presumptions or permissive inferences; the latter are often called *mandatory* presumptions. Presumptions may also differ in the extent to which they remain effective after the defense offers rebuttal evidence to negate the presumed fact.[51] At one extreme a presumption requiring an inference to be drawn might remain in effect no matter how much evidence was offered to refute the presumed fact. A pre-

51. Note that the defense also may offer evidence to challenge the existence of the basic fact. Since the presumption cannot come into play until the trier of fact is satisfied that the *basic* fact exists, refuting the basic fact will always render the presumption inoperative.

sumption of this kind is often called a *conclusive presumption:* In effect it is not a presumption at all because it establishes a substantive rule rendering the basic fact determinative and the presumed fact legally irrelevant. (Do you see why?) At the other extreme, the effect of a presumption might be entirely eliminated once the defense produces a rather small quantum of evidence. A presumption of this kind has precisely the same effect as a rule allocating the burden of production (do you see why?), and once that production burden is satisfied, the so-called presumption has no impact at all on the burden of persuasion.

Other presumptions retain some force even after rebuttal evidence is introduced, but the range of possible variations is wide. State law might provide that upon proof of a basic fact the jury will be required to find the presumed fact, unless the defendant introduces in rebuttal "slight" evidence or "some" evidence or "substantial" evidence. For situations in which the jury is not *required* to find the presumed fact, it may be instructed that it is *permitted* to do so, and the jury also might be informed (with varying degrees of emphasis) about the legislature's or judge's view that the basic fact sometimes (or often or usually) is sufficient to warrant finding the presumed fact. For the sake of convenience we will divide the true presumptions into two major categories: First are the *mandatory-but-rebuttable presumptions.* Here the jury will be told that upon proof of the basic fact, it *must* find the presumed fact, unless a given quantum of rebuttal evidence is forthcoming. There will be variations in the amount of rebuttal evidence required to satisfy this condition.

Second, we have *permissive inferences.* Here the jury will be told that upon proof of the basic fact it *may* (but is not required) to find the presumed fact. Thus, the jury may reject the presumed fact even if no rebuttal is offered, and it may find the presumed fact even if extensive rebuttal is offered. There will be variations in the degree to which the jury is encouraged to find the presumed fact. The cases in this section are concerned with the question whether different constitutional standards should govern permissive, as distinguished from mandatory-but-rebuttable presumptions, and with the question of what those standards should be.

2. *The constitutional concerns raised by presumptions.* Because a presumption (whether permissive or mandatory-but-rebuttable) can ease the prosecutor's burden of proof, use of this device naturally raises concerns about diluting or evading the constitutional requirement of proof beyond a reasonable doubt. Are concerns of that kind central to the Court's decision in *Leary*? Observe that the reasonable-doubt concept is never relied on in the Court's analysis and that *Winship* was yet to be decided at the time of *Leary.* In the background of judicial sensitivity to presumptions are a variety of broader concerns. Thus, a portion of the *Tot* opinion quoted in *Leary* bases the objection in part on a perception of legislative interference with the rules of procedure governing courts (see page 83 supra), and the Court has held that an irrational presumption is unconstitutional even in a civil case.[52] The notion here seems to be that an irrational presumption intrudes on the factfinding process and thus violates separation of powers

52. Western & Atl. R.R. v. Henderson, 279 U.S. 639 (1929). See also Mobile J. & K.C.R.R. v. Turnipseed, 219 U.S. 35 (1910).

principles.[53] In addition, in criminal cases at least three other constitutional rights are implicated:

(*a*) *The right to jury trial.* To the extent that presumptions influence or even direct the course of jury decisionmaking (and especially when they do so "irrationally"), they may interfere with the right under the Sixth Amendment to have a jury find the facts. We explore the dimensions of this right in Section B5 of this chapter, pages 94-108 infra.

(*b*) *The right to confront adverse witnesses.* To the extent that a presumption draws its validity either from specialized research or from intuitive judgments debated in the legislature but not made explicit in court, the defendant is in effect denied the opportunity to confront and cross-examine his accusers with respect to the presumed fact.

(*c*) *The privilege against self-incrimination.* A presumption creates a strong inducement for the defense to offer rebuttal evidence. Sometimes this rebuttal evidence can be provided through witnesses other than the defendant, but in practice the kind of evidence required (in *Leary*, for example, the evidence of defendant's personal knowledge about the origin of the marijuana) is most unlikely to be available from any witness other than the defendant himself. The presumption thus tends to put pressure on the defendant to testify.[54] The very existence of the privilege against self-incrimination goes far toward explaining the need for presumptions (especially those bearing on knowledge and intent) at the same time that it raises concern about their legitimacy.

Combined with all of the above interests is the special concern in criminal cases to insure respect for the requirement of proof beyond a reasonable doubt. To the extent that a presumption is rational (more likely than not to be true), the other concerns are largely and perhaps wholly satisfied, but the reasonable-doubt concern persists, does it not? If a presumption is no better than rational, is the presumed fact supported by anything more than a preponderance of the evidence (out-of-court "evidence" at that)? If not (and if the presumed fact is an element of the offense), how can such a presumption be reconciled with the dictates of *Winship* and *Mullaney*?

3. *Questions about* Leary. (*a*) *The facts.* Suppose that federal drug authorities succeed in publicizing the relative scarcity of domestically grown marijuana so that nearly all users become aware of the foreign source of the drug. Could the government then invoke the §176a presumption? Or suppose that marijuana from a particular foreign source (Colombia, for example) had a distinctive taste recognizable by all users? Could the government then invoke the §176a presumption at least in prosecutions involving marijuana from that source? In such a case, the defendant is very likely (if he has tasted the drug) to know of its

53. See generally Crowell v. Benson, 285 U.S. 22, 56-57, 63-64 (1932). In its specific application in the field of administrative law, the principle illustrated by *Crowell* has, however, undergone considerable evolution. See K. Davis, Administrative Law §29.08, at 539-549 (3d ed. 1972); L. Jaffe, Judicial Control of Administrative Action 87-94 (1965).

54. Of course, not all pressure amounts to compulsion within the meaning of the privilege. But doesn't a presumption like that in *Leary* generate at least as much pressure as did the comment on the defendant's silence held impermissible in Griffin v. California, pages 53-56 supra? If so, should such a presumption be held to violate the privilege against self-incrimination even when it satisfies a more-likely-than-not standard? Or should the rationality of the inference drawn have some bearing on the fairness of the resulting pressure to testify?

source. But if he can raise a reasonable doubt on this question, he should be entitled to an acquittal, should he not? Section 176a requires a defendant to show much more than this, does it not? In other words, doesn't §176a conflict with *Winship even if* the presumption itself satisfies a reasonable-doubt test? If the answer is yes, then the Court's detailed analysis of taste, packaging, and so on was completely unnecessary. But given the Court's approach, a strong presumption structured like §176a might be upheld if it passes the reasonable-doubt test. How can use of that kind of presumption ever be reconciled with *Winship* and *Mullaney*?

(*b*) *Does the greater power include the lesser?* There is little doubt that Congress could punish possession of illegally imported marijuana without regard to the defendant's knowledge of the importation. See, e.g., United States v. Dotterweich, 320 U.S. 277 (1943), page 1029 infra. Accordingly, the argument goes, a statute using a presumption (however tenuous) to infer knowledge cannot possibly be worse for the defendant than a statute that eliminates the knowledge requirement altogether. In *Leary* the Court dismisses this argument with the simple statement that Congress did choose to make knowledge relevant. Is this an adequate answer? Consider Jeffries & Stephan, page 78 supra, at 1389:

> 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.

The ramifications of this greater-includes-the-lesser analysis with respect to affirmative defenses are explored at pages 77-81 supra. In the context of presumptions, the analysis raises additional questions. Should a court uphold a wholly irrational presumption (one that is rarely if ever true), whenever the defense in question is constitutionally "gratuitous"? What if the legislature itself thought (or might have thought) that the presumption was rational, but a court's careful focus on the factual relationship suggests that the legislature's premise was false? What if, instead, the legislature makes clear that it does not *care* whether the presumption is rational or not? If there is something about the concept of the judicial function, about the concept of case-by-case adjudication of guilt, that renders such a presumption offensive — even when it relates to a substantive defense that the legislature remains free to abolish completely?

4. Developments following Leary. For many years after the *Leary* decision, the Court continued to leave unresolved the question reserved in footnote 64 of the opinion (see page 83 supra) — whether a valid presumption must not only satisfy the more-likely-than-not standard but also the beyond-a-reasonable-doubt test. But cases reaching the Court also indicated that the choice of a standard might be less important than the way the standard was applied. See, e.g., Turner v. United States, 396 U.S. 398 (1970)(holding that a presumption that the possessor of cocaine knows of its illegal importation could not pass the more-likely-than not test, but that a similar presumption relating to heroin was valid even under the reasonable-doubt standard); Barnes v. United States, 412 U.S. 837 (1973)(upholding under the reasonable-doubt test an instruction that "[p]ossession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which [the jury may infer] . . . that the person in possession knew the property had been stolen").

COUNTY COURT OF ULSTER COUNTY v. ALLEN

Supreme Court of the United States
442 U.S. 140 (1979)

[Four persons, three adult males and a 16-year-old girl, riding in a Chevrolet were stopped for speeding on the New York Thruway. Two large-caliber handguns were seen through the window of the car by the investigating police officer. The weapons were in an open handbag on either the front floor or the front seat of the car on the passenger side where the girl was sitting, and she admitted that the handbag was hers. All four people in the car were charged with illegal possession of the handguns, and at trial the judge instructed the jurors that upon proof of the presence of a firearm in an automobile, they were entitled to infer illegal possession by all persons then occupying the vehicle. All four defendants were convicted.

[After the convictions were affirmed by the state courts, the defendants initiated federal postconviction proceedings, and the United States Supreme Court granted review. In a complex opinion drawing several important distinctions, the Supreme Court resolved the issue left open in *Leary* and then upheld the convictions. The Court said that in testing a mandatory presumption — one that the jury was *required* to accept in the absence of defense rebuttal — two principles were to be followed: (1) the rationality of the presumption would be examined over the general run of possible situations, without regard to the facts of the particular case and (2) the presumption would pass muster only if, over that generality of cases, it held true beyond a reasonable doubt.

[In contrast, the Court held that in testing a permissive presumption — one that the jury was free to reject even in the absence of defense rebuttal — the principles to be applied were that (1) the rationality of the presumption would be examined in light of the facts of the particular case and (2) the presumption would pass muster if it was "more likely that not" to hold true in the particular case.

[Excerpts from the principal opinions follow.]

MR. JUSTICE STEVENS delivered the opinion of the Court. . . .

. . . Because [a] permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the "beyond a reasonable doubt" standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference. For only in that situation is there any risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational factfinder to make an erroneous factual determination.

A mandatory presumption is a far more troublesome evidentiary device. For it may affect not only the strength of the "no reasonable doubt" burden but also the placement of that burden; it tells the trier that he or they *must* find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts. . . . To the extent that the trier of fact is forced to abide by the presumption, and may not reject it based on an independent evaluation of the particular facts presented by the State, the analysis of the presumption's constitutional validity is logically divorced from those facts and based on the presumption's accuracy in the run of cases.[17]

The trial judge's instructions [in this case] make it clear that the presumption was merely a part of the prosecution's case, that it gave rise to a permissive inference available only in certain circumstances, rather than a mandatory conclusion of possession, and that it could be ignored by the jury even if there was no affirmative proof offered by defendants in rebuttal. . . . In short, the instructions plainly directed the jury to consider all the circumstances tending to support or contradict the inference that all four occupants of the car had possession of the two loaded handguns and to decide the matter for itself without regard to how much evidence the defendants introduced. . . .

As applied to the facts of this case, the presumption of possession is entirely rational. [R]espondents were not "hitch-hikers or other casual passengers," and the guns were neither "a few inches in length" or "out of [respondents'] sight." . . . The argument against possession by any of the respondents was predicated solely on the fact that the guns were in Jane Doe's pocketbook. But several circumstances . . . made it highly improbable that she was the sole custodian of those weapons.

. . . As a 16-year-old girl in the company of three adult men she was the least likely of the four to be carrying one, let alone two, heavy handguns. It is far more probable that she relied on the pocket-knife found in her brassiere for any necessary self-protection. Under these circumstances, it was not unreasonable for her counsel to argue and for the jury to infer that when the car was halted for speeding, the other passengers in the car anticipated the risk of search and attempted to conceal their weapons in a pocketbook in the front seat. The inference is surely more likely than the notion that these weapons were the sole property of the 16-year-old girl.

. . . The application of the statutory presumption in this case therefore comports with the standard laid down in Tot v. United States, 319 U.S. 463, 467, and restated in Leary v. United States, supra. For there is a "rational connection" between the basic facts that the prosecution proved and the ultimate fact presumed, and the latter is "more likely than not to flow from" the former.

17. . . . [T]his point is illustrated by Leary v. United States, supra. . . . [The statute involved there included] a mandatory presumption: "possession shall be deemed sufficient evidence to authorize conviction [for importation] unless the defendant explains his possession to the satisfaction of the jury." Leary admitted possession of the marihuana and claimed that he had carried it from New York to Mexico and then back.

Justice Harlan for the Court noted that under one theory of the case, the jury could have found direct proof of all the necessary elements of the offense without recourse to the presumption. But he deemed that insufficient reason to affirm the conviction because under another theory the jury might have found knowledge of importation on the basis of either direct evidence or the presumption, and there was accordingly no certainty that the jury had not relied on the presumption. The Court therefore found it necessary to test the presumption against the Due Process Clause. . . . Despite the fact that the defendant was well educated and had recently traveled to a country that is a major exporter of marihuana to this country, the Court found the presumption of knowledge of importation from possession irrational. It did so not because Dr. Leary was unlikely to know the source of the marihuana but instead because "a majority of possessors" were unlikely to have such knowledge. . . .

Respondents argue, however, that the validity of the New York presumption must be judged by a "reasonable doubt" test rather than the "more likely than not" standard employed in *Leary*. Under the more stringent test, it is argued that a statutory presumption must be rejected unless the evidence necessary to invoke the inference is sufficient for a rational jury to find the inferred fact beyond a reasonable doubt. Respondents' argument again overlooks the distinction between a permissive presumption on which the prosecution is entitled to rely as one not-necessarily-sufficient part of its proof and a mandatory presumption which the jury must accept even if it is the sole evidence of an element of the offense.

In the latter situation, since the prosecution bears the burden of establishing guilt, it may not rest its case entirely on a presumption unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt. But in the former situation, the prosecution may rely on all of the evidence in the record to meet the reasonable doubt standard. There is no more reason to require a permissive statutory presumption to meet a reasonable doubt standard before it may be permitted to play any part in a trial than there is to require that degree of probative force for other relevant evidence before it may be admitted. As long as it is clear that the presumption is not the sole and sufficient basis for a finding of guilt, it need only satisfy the test described in *Leary*. . . .

MR. JUSTICE POWELL, with whom MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL join dissenting. . . .

. . . [T]here are countless situations in which individuals are invited as guests into vehicles the contents of which they know nothing about, much less have control over. . . . Because the specific factual inference recommended to the jury in this case is not one that is supported by the general experience of our society, I cannot say that the presumption charged is "more likely than not" to be true. Accordingly, respondents' due process rights were violated by the presumption's use.

As I understand it, the Court today does not contend that in general those who are present in automobiles are more likely than not to possess any gun contained within their vehicles. It argues, however, that the nature of the presumption here involved requires that we look, not only to the immediate facts upon which the jury was encouraged to base its inference, but to the other facts "proved" by the prosecution as well. The Court suggests that this is the proper approach when reviewing what it calls "permissive" presumptions because the jury was urged "to consider all the circumstances tending to support or contradict the inference." . . . But the jury was told that it could conclude that respondents possessed the weapons found therein from proof of the mere fact of respondents' presence in the automobile. For all we know, the jury rejected all of the prosecution's evidence concerning the location and origin of the guns, and based its conclusion that respondents possessed the weapons solely upon its belief that respondents had been present in the automobile. For purposes of reviewing the constitutionality of the presumption at issue here, we must assume that this was the case. . . .

. . . Under the Court's analysis, whenever it is determined that an inference is "permissive," the only question is whether, in light of all of the evidence adduced at trial, the inference recommended to the jury is a reasonable one. The Court has never suggested that the inquiry into the rational basis of a permissible inference may be circumvented in this manner. Quite the contrary, the Court has required that the "evidence *necessary to invoke the inference* [be] sufficient for a rational juror to find the inferred fact. . . ." Barnes v. United States, 412 U.S. 843 (1973) (emphasis supplied). Under the presumption charged in this case, the only evidence necessary to invoke the inference was the presence of the weapons in the automobile with respondents — an inference that is plainly irrational.

. . . [T]he Court in effect . . . construct[s] a rule that permits the use of any inference — no matter how irrational in itself — provided that otherwise there is sufficient evidence in the record to support a finding of guilt. Applying this novel analysis to the present case, the Court upholds the use of a presumption that it makes no effort to defend in isolation. . . . I dissent.

NOTES

1. Sandstrom v. Montana, 442 U.S. 510 (1979), involved a prosecution for "deliberate homicide." Under Montana law one element of the offense was an intent to kill. The defendant admitted the act of killing but introduced evidence suggesting that the act was not intentional. The jury was instructed that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts." On appeal from the conviction, the prosecution contended that the quoted language (which was not otherwise explained to the jury) established either a permissive inference or at most only a mandatory presumption rebuttable by "some" evidence and that under either interpretation the presumption satisfied applicable standards. The Supreme Court unanimously reversed. The Court held that the jurors might have understood the instruction either as establishing a conclusive presumption (that is, that intent was deemed to be established regardless of the defendant's proof) or as shifting the burden of persuasion (that is, requiring the defendant to prove the lack of intent by at least a preponderance of the evidence). In either event the presumption violated *Winship*, page 64 supra, and *Mullaney*, page 68 supra, because state law specifically made intent an element of the offense. The Court accordingly did not reach the question whether the instruction would pass muster, if coupled with language clearly rendering its effect permissive or mandatory-but-rebuttable.

2. Does the Court in the *Ulster County* case persuasively explain its choice of a standard for testing permissive presumptions? For that matter, does the Court persuasively explain why permissive presumptions differ significantly, and not merely in degree, from mandatory presumptions? For that matter, has the Court persuasively explained why the various presumptions differ significantly, and not merely in degree, from shifts in the burdens of production and persuasion? Consider the following comment.

Allen, Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices, 94 Harv. L. Rev. 321, 338 (1980), id. at 330-331, 335-337, 362: [T]he superficially distinct evidentiary devices employed in criminal trials — affirmative defenses, placement of burdens of production and the concomitant possibility of a directed verdict on an issue, judicial comment on the evidence, and instructions on presumptions and inferences — are actually very similar. Their primary unifying trait is that they all modify the evidentiary relationship of the parties at trial by manipulating burdens of persuasion. . . .

Moreover, these devices cannot be distinguished on the basis of the magnitude of their effect on the burden of persuasion, for that effect unmistakably varies within each category. . . .

. . . [T]he Supreme Court has upheld the power of the trial judge to express his views on the weight of the evidence, although there have been occasional cases where the trial judge has gone too far.[a] The conventional view of the purpose of such comment, as stated by the Supreme Court, is "to assist [the jury] in arriving at a just conclusion." [57] . . . By commenting on the weight of the evidence as he sees it, the judge attempts to guide the jurors toward a more rational verdict by bringing to their attention implications that may otherwise have eluded them.

. . . Whereas explicit judicial comment attempts to inform the jury of the factors that may be relevant to its decision, and why they may be relevant, presumptive instructions merely inform the jury of a permissible outcome. Judges make little or no effort to explain to the jury why a particular result might be appropriate. Consequently, presumptive instructions may tend to promote irrational decisionmaking, even though they may also enhance the probability of a more accurate result. . . .

Similarly, irrationality is fostered by instructions that allow but do not require an inference to be drawn. . . . Knowing only that it may, but need not, draw an inference, the jury will make a decision that "can only be arbitrary, no matter which way it finds." [58] The problem is exacerbated by the restrictions imposed on judicial comment by many states and by the lack of satisfactory legislative history in many states that authorize these instructions by statute. . . . The resulting dilemma was aptly stated by one trial court:

> [A]ssuming in the instant case that defendant introduced no evidence at trial, the jury would be told of the statutory presumption and that it could find the existence of the presumed fact from proof of the basic fact if it choose [sic] to do so. . . . Should the jury request clarification or illumination from the court as to how and why it should make this choice, this court would be hard-pressed to provide any.[58]

. . . The rational relationship test surely was an effort by the Court to ameliorate these difficulties, but that test cannot remove the enhanced risk of arbitrary decisionmaking by a jury instructed on an inference or a presumption. Regardless of how "rational" an inference may be in a particular case, the jury's decision

a. In the United States, judicial comment on the evidence has generally been questioned not so much in terms of the reasonable-doubt rule but primarily in terms of its potential for interference with the right to jury trial. The problem is explored at page 100 and footnote a infra. — Eds.

57. Vicksburg & M.R.R. v. Putman, 118 U.S. 545, 553 (1886). . . .

57. [Note, The Unconstitutionality of Statutory Criminal Presumptions, 22 Stan. L. Rev. 341, 351 (1970).]

58. People v. Thomas, 95 Misc. 2d 289, 291, 407 N.Y.S.2d 812, 814 (Crim. Ct. N.Y. 1978) (citation omitted).

must be arbitrary if all it knows is that it "may but need not" draw the inference. Accordingly, the Court should simply require that these instructions be unmasked. If guidance is to be given to the jury, it should be done directly and in a manner that furthers rather than detracts from the values secured by the right to a jury trial. In short, the Court should require that these instructions be given in the form of accurate comment on the evidence.

3. For further analysis of these problems, see Nesson, Reasonable Doubt and Permissive Inferences: The Value of Complexity, 92 Harv. L. Rev. 1187 (1979).

5. *The Role of the Jury*

DUNCAN v. LOUISIANA

Supreme Court of the United States
391 U.S. 145 (1968)

MR. JUSTICE WHITE delivered the opinion of the Court.

Appellant, Gary Duncan, was convicted of simple battery in the Twenty-fifth Judicial District Court of Louisiana. Under Louisiana law simple battery is a misdemeanor, punishable by two years' imprisonment and a $300 fine. Appellant sought trial by jury, but because the Louisiana Constitution grants jury trials only in cases in which capital punishment or imprisonment at hard labor may be imposed, the trial judge denied the request. Appellant was convicted and sentenced to serve 60 days in the parish prison and pay a fine of $150. Appellant sought review in the Supreme Court of Louisiana, asserting that the denial of jury trial violated rights guaranteed to him by the United States Constitution. The Supreme Court [of Louisiana denied review.] We noted probable jurisdiction. . . .

. . . While driving on Highway 23 in Plaquemines Parish on October 18, 1966, [appellant] saw two younger cousins engaged in a conversation by the side of the road with four white boys. Knowing his cousins, Negroes who had recently transferred to a formerly all-white high school, had reported the occurrence of racial incidents at the school, Duncan stopped the car, got out, and approached the six boys. . . . The testimony was in dispute on many points, but the witnesses agreed that appellant and the white boys spoke to each other, that appellant encouraged his cousins to break off the encounter and enter his car, and that appellant was about to enter the car himself for the purpose of driving away with his cousins. The whites testified that just before getting in the car appellant slapped Herman Landry, one of the white boys, on the elbow. The Negroes testified that appellant had not slapped Landry, but had merely touched him. The trial judge concluded that the State had proved beyond a reasonable doubt that Duncan had committed simple battery, and found him guilty.

. . . Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which — were they to be tried in a federal court — would come within the Sixth Amendment's guarantee. Since we consider the appeal before us to be such a case, we hold that the Constitution was violated when appellant's demand for jury trial was refused.

The history of trial by jury in criminal cases has been frequently told. It is sufficient for present purposes to say that by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta. Its preservation and proper operation as a protection against arbitrary rule were among the major objectives of the revolutionary settlement which was expressed in the Declaration and Bill of Rights of 1689. . . .

The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power — a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. . . . The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States. . . .

We are aware of the long debate, especially in this century, among those who write about the administration of justice, as to the wisdom of permitting untrained laymen to determine the facts in civil and criminal proceedings. . . . [M]ost of the controversy has centered on the jury in civil cases. . . . [A]t the heart of the dispute have been express or implicit assertions that juries are incapable of adequately understanding evidence or determining issues of fact and that they are . . . little better than a roll of dice. Yet, the most recent and exhaustive study of the jury in criminal cases concluded that juries do understand the evidence and come to sound conclusions in most of the cases presented to them and that when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed.[26]

The State of Louisiana urges that holding that the Fourteenth Amendment assures a right to jury trial will cast doubt on the integrity of every trial conducted without a jury. . . . We would not assert, however, that every criminal trial — or any particular trial — held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury. Thus we hold no constitutional doubts about the practices, common in both federal and state courts, of accepting waivers of jury trial and prosecuting petty crimes with-

26. Kalven & Zeisel, [The American Jury (1966)].

tion has resulted in uncertainties similar to those created by efforts to limit the felony-murder rule. Is it sufficient that a misdemeanor involve some kind of behavior which is usually dangerous to life or limb, or must the particular instance of such behavior be dangerous to some serious degree? And if the former, is it also sufficient that the legislature has regarded behavior, such, for example, as driving an automobile at a speed in excess of a statutory limit, as generally dangerous and has therefore forbidden it, or is this legislative judgment open to re-examination by court and jury? And if the latter, is the degree of danger required the same or less than, and the state of mind required the same or different from, what would be required if the behavior were not a misdemeanor? Finally, does the answer to any of these questions vary with the technique employed to limit the rule by a particular court? These are issues which have not received definitive consideration in the cases, and remain for the most part unresolved."

The Model Penal Code does not include a counterpart to the misdemeanor-manslaughter rule. It is reported in ALI, Model Penal Code and Commentaries, § 210.3, p. 71 (1980), that 22 recently enacted codes and nine recently drafted proposals have agreed with the Model Code and abolished the rule in its entirety. Eleven recently revised codes and one proposal, on the other hand, have retained some form of the rule, and there are a number of jurisdictions that have not recently revised their penal codes and that still retain some version of the common-law rule. Is the Model Code solution the right one? Can you think of reasons why the Model Code recommendation with respect to misdemeanor manslaughter has been more sympathetically received in recent code revisions than the recommendation with respect to felony murder? Does strict liability become more defensible or less defensible as the penalty is increased?

Chapter VII

PROOF, PROPORTIONALITY, AND CRIMINALIZATION

SECTION 1: PROOF BEYOND A REASONABLE DOUBT

INTRODUCTORY NOTE ON *IN RE WINSHIP*

Proof beyond a reasonable doubt has long been thought fundamental to the American system of criminal justice. Only in 1970, however, did the Supreme Court make this standard a constitutional requirement. The issue arose under a New York statute that permitted adjudication of juvenile delinquency on a preponderance of the evidence. The Court declared that scheme unconstitutional in In re Winship, 397 U.S. 358 (1970). The opinion held first, that criminal conviction had to be based on proof beyond a reasonable doubt, and second, that the same standard applied to delinquency proceedings. The Court's conclusion was made unmistakably plain: "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."

At first glance, this requirement was scarcely revolutionary. By the time of *Winship*, every American jurisdiction required that conviction of an adult be based on proof beyond a reasonable doubt. Aside from extending that standard to delinquency proceedings, therefore, *Winship* seemed to have little impact. It merely confirmed the status quo.

The issue lurking in *Winship*, however, was the scope of the reasonable-doubt requirement. What, exactly, would be included by the phrase "every fact necessary to constitute the crime . . . charged?" Should it cover only those facts formally made elements of the crime by the definition of the offense? Or should it also include facts technically extrinsic to the definition of the offense, e.g., a fact relevant only to a defense but nonetheless determinative of guilt or innocence? Or should the constitutional requirement of proof beyond a reasonable doubt perhaps be limited to those facts constitutionally necessary to constitute the crime charged? If so, what facts are constitutionally necessary?

These and other possible interpretations surfaced in the years following *Winship*. By the end of the decade, a constitutional pronouncement that originally had seemed largely symbolic in character had become the subject of intense and on-going debate. The essential

problem is how to mesh a judicially enforced requirement of proof beyond a reasonable doubt with the tradition of legislative control over the substance of the penal law. The Supreme Court's efforts to resolve this issue are recounted in the cases that follow.

SUBSECTION A: MITIGATIONS AND DEFENSES

MULLANEY v. WILBUR

Supreme Court of the United States, 1975.
421 U.S. 684.

MR. JUSTICE POWELL delivered the opinion of the Court.

The State of Maine requires a defendant charged with murder to prove that he acted "in the heat of passion on sudden provocation" in order to reduce the homicide to manslaughter. We must decide whether this rule comports with the due-process requirement, as defined in In re Winship, 397 U.S. 358 (1970), that the prosecution prove beyond a reasonable doubt every fact necessary to constitute the crime charged.

I

In June 1966 a jury found respondent Stillman E. Wilbur, Jr., guilty of murder. The case against him rested on his own pretrial statement and on circumstantial evidence showing that he fatally assaulted Claude Hebert in the latter's hotel room. Respondent's statement, introduced by the prosecution, claimed that he had attacked Hebert in a frenzy provoked by Hebert's homosexual advance. The defense offered no evidence, but argued that the homicide was not unlawful since respondent lacked criminal intent. Alternatively, Wilbur's counsel asserted that at most the homicide was manslaughter rather than murder, since it occurred in the heat of passion provoked by the homosexual assault.

The trial court instructed the jury that Maine law recognizes two kinds of homicide, murder and manslaughter, and that these offenses are not subdivided into different degrees. The common elements of both are that the homicide be unlawful—i.e., neither justifiable nor excusable—and that it be intentional.[2] The prosecution is required to prove these elements by proof beyond a reasonable doubt, and only if they are so proved is the jury to consider the distinction between murder and manslaughter.

In view of the evidence the trial court drew particular attention to the difference between murder and manslaughter. After reading the

[2] The court elaborated that an intentional homicide required the jury to find "either that the defendant intended death, or that he intended an act which was calculated and should have been understood by [a] person of reason to be one likely to do great bodily harm and that death resulted."

statutory definitions of both offenses,[3] the court charged that "malice aforethought is an essential and indispensable element of the crime of murder," without which the homicide would be manslaughter. The jury was further instructed, however, that if the prosecution established that the homicide was both intentional and unlawful, malice aforethought was to be conclusively implied unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation. The court emphasized that "malice aforethought and heat of passion on sudden provocation are two inconsistent things"; thus, by proving the latter the defendant would negate the former and reduce the homicide from murder to manslaughter. The court then concluded its charge with elaborate definitions of "heat of passion" and "sudden provocation."

After retiring to consider its verdict, the jury twice returned to request further instruction. It first sought reinstruction on the doctrine of implied malice aforethought, and later on the definition of "heat of passion." Shortly after the second reinstruction, the jury found respondent guilty of murder.

Respondent appealed to the Maine Supreme Judicial Court, arguing that he had been denied due process because he was required to negate the element of malice aforethought by proving that he had acted in the heat of passion on sudden provocation. . . .

[The state court affirmed the conviction. There ensued a rather complicated series of proceedings resulting in a decision by the United States Court of Appeals for the First Circuit upholding Wilbur's constitutional contention. The First Circuit ordered that he be either released or retried. The state authorities then sought certiorari to review that judgment, and the Supreme Court granted that petition. After describing these proceedings, the Court resolved in Part II of its opinion a dispute about Maine law. It then undertook in Part III of its opinion to analyze Wilbur's federal constitutional claim.]

III

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, in which case it is punished as manslaughter. . . . The issue is whether the Maine rule requir-

[3] The Maine murder statute, 17 Me.Rev.Stat.Ann. § 2651, provides:

"Whoever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life."

The manslaughter statute, 17 Me.Rev.Stat.Ann. § 2551, in relevant part provides:

"Whoever unlawfully kills a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought . . . shall be punished by a fine of not more than $1,000 or by imprisonment for not more than 20 years. . . ."

ing the defendant to prove that he acted in the heat of passion on sudden provocation accords with due process.

A

Our analysis may be illuminated if this issue is placed in historical context. At early common law only those homicides committed in the enforcement of justice were considered justifiable; all others were deemed unlawful and were punished by death. Gradually, however, the severity of the common-law punishment for homicide abated. Between the 13th and 16th centuries the class of justifiable homicides expanded to include, for example, accidental homicides and those committed in self-defense. Concurrently, the widespread use of capital punishment was ameliorated further by extension of the ecclesiastic jurisdiction. Almost any person able to read was eligible for "benefit of clergy," a procedural device that effected a transfer from the secular to the ecclesiastic jurisdiction. And under ecclesiastic law a person who committed an unlawful homicide was not executed; instead he received a one-year sentence, had his thumb branded and was required to forfeit his goods. At the turn of the 16th century, English rulers, concerned with the accretion of ecclesiastic jurisdiction at the expense of the secular, enacted a series of statutes eliminating the benefit of clergy in all cases of "murder of malice prepensed." Unlawful homicides that were committed without such malice were designated "manslaughter," and their perpetrators remained eligible for the benefit of clergy.

Even after ecclesiastic jurisdiction was eliminated for all secular offenses the distinction between murder and manslaughter persisted. It was said that "manslaughter, when voluntary, arises from the sudden heat of the passions, murder, from the wickedness of the heart." 4 W. Blackstone, Commentaries *190. Malice aforethought was designated as the element that distinguished the two crimes, but it was recognized that such malice could be implied by law as well as proved by evidence. Absent proof that an unlawful homicide resulted from "sudden and sufficiently violent provocation," the homicide was "presumed to be malicious." In view of this presumption, the early English authorities held that once the prosecution proved that the accused had committed the homicide, it was "incumbent upon the prisoner to make out, to the satisfaction of the court and jury all . . . circumstances of justification, excuse, or alleviation." Thus, at common law the burden of proving heat of passion on sudden provocation appears to have rested on the defendant.

In this country the concept of malice aforethought took on two distinct meanings: In some jurisdictions it came to signify a substantive element of intent, requiring the prosecution to prove that the defendant intended to kill or to inflict great bodily harm; in other jurisdictions it remained a policy presumption, indicating only that absent proof to the contrary a homicide was presumed not to have occurred in the heat of passion. In a landmark case, Commonwealth v. York, 50 Mass. (9 Met.) 93 (1845), Chief Justice Shaw of the Massachusetts Supreme Judicial Court held that the defendant was required to negate malice aforethought by proving by a preponderance of the evidence that he acted in the heat of passion. Initially, *York* was adopted in Maine as well as several other jurisdictions. In 1895, however, in the context of deciding a question of federal criminal procedure, this Court explicitly considered and unanimously rejected the general approach articulated in *York*. Davis v. United States, 160 U.S. 469 (1895). And, in the past half century, the large majority of states have abandoned *York* and now require the prosecution to prove the absence of the heat of passion on sudden provocation beyond a reasonable doubt.

This historical review establishes two important points. First, the fact at issue here—the presence or absence of the heat of passion on sudden provocation—has been, almost from the inception of the common law of homicide, the single most important factor in determining the degree of culpability attaching to an unlawful homicide. And, second, the clear trend has been toward requiring the prosecution to bear the ultimate burden of proving this fact.

B

Petitioners, the warden of the Maine Prison and the state of Maine, argue that despite these considerations *Winship* should not be extended to the present case. They note that as a formal matter the absence of the heat of passion on sudden provocation is not a "fact necessary to constitute the *crime*" of felonious homicide in Maine. This distinction is relevant, according to petitioners, because in *Winship* the facts at issue were essential to establish criminality in the first instance, whereas the fact in question here does not come into play until the jury already has determined that the defendant is guilty and may be punished at least for manslaughter. In this situation, petitioners maintain, the defendant's critical interests in liberty and reputation are no longer of paramount concern since, irrespective of the presence or absence of the heat of passion on sudden provocation, he is likely to lose his liberty and certain to be stigmatized. In short, petitioners would limit *Winship* to those facts which, if not proved, would wholly exonerate the defendant.

This analysis fails to recognize that the criminal law of Maine, like that of other jurisdictions, is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability. Maine has chosen to distinguish those who kill in the heat of passion from those who kill in the absence of this factor. Because the former are less "blameworth[y]," they are subject to substantially less severe penalties. By drawing this distinction, while refusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turns, Maine denigrates the interests found critical in *Winship*.

The safeguards of due process are not rendered unavailing 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 difference in 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 or innocence for many lesser crimes.

Moreover, if *Winship* were limited to those facts that constitute a crime as defined by state law, a state could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment. An extreme example of this approach can be fashioned from the law challenged in this case. Maine divides the single generic offenses of felonious homicide into three distinct punishment categories—murder, voluntary manslaughter, and involuntary manslaughter. Only the first two of these categories require that the homicidal act either be intentional or the result of criminally reckless conduct. But under Maine law these facts of intent are not general elements of the crime of felonious homicide. Instead, they bear only on the appropriate punishment category. Thus, if petitioners' argument were accepted, Maine could impose a life sentence for any felonious homicide—even those that traditionally might be considered involuntary manslaughter—unless the *defendant* was able to prove that his act was neither intentional nor criminally reckless.[24]

Winship is concerned with substance rather than this kind of formalism. The rationale of that case requires an analysis that looks to the "operation and effect of the law as applied and enforced by the state," and to the interests of both the state and the defendant as affected by the allocation of the burden of proof.

In *Winship* the Court emphasized the societal interests in the reliability of jury verdicts:

> "The requirement of proof beyond a reasonable doubt has [a] vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. . . .
>
> "Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."

The interests are implicated to a greater degree in this case than they were in *Winship* itself. Petitioner there faced an 18-month sentence, with a maximum possible extension of an additional four and one-half

[24] Many states impose different statutory sentences on different degrees of assault. If *Winship* were limited to a state's definition of the elements of a crime, these states could define all assaults as a single offense and then require the defendant to disprove the elements of aggravation—e.g., intent to kill or intent to rob. . . .

years, whereas respondent here faces a differential in sentencing ranging from a nominal fine to a mandatory life sentence. Both the stigma to the defendant and the community's confidence in the administration of the criminal law are also of greater consequence in this case, since the adjudication of delinquency involved in *Winship* was "benevolent" in intention, seeking to provide "a generously conceived program of compassionate treatment."

Not only are the interests underlying *Winship* implicated to a greater degree in this case, but in one respect the protection afforded those interests is less here. In *Winship* the ultimate burden of persuasion remained with the prosecution, although the standard had been reduced to proof by a fair preponderance of the evidence. In this case, by contrast, the state has affirmatively shifted the burden of proof to the defendant. The result, in a case such as this one where the defendant is required to prove the critical fact in dispute, is to increase further the likelihood of an erroneous murder conviction. . . .

C

It has been suggested that because of the difficulties in negating an argument that the homicide was committed in the heat of passion the burden of proving this fact should rest on the defendant. No doubt this is often a heavy burden for the prosecution to satisfy. The same may be said of the requirement of proof beyond a reasonable doubt of many controverted facts in a criminal trial. But this is the traditional burden which our system of criminal justice deems essential.

Indeed, the Maine Supreme Judicial Court itself acknowledged that most states require the prosecution to prove the absence of passion beyond a reasonable doubt.[25] Moreover, the difficulty of meeting such an exacting burden is mitigated in Maine where the fact at issue is largely an "objective, rather than a subjective, behavioral criterion." In this respect, proving that the defendant did not act in the heat of passion on sudden provocation is similar to proving any other element of intent; it may be established by adducing evidence of the factual circumstances surrounding the commission of the homicide. And although intent is typically considered a fact peculiarly within the knowledge of the defendant, this does not, as this Court has long recognized, justify shifting the burden to him.

Nor is the requirement of proving a negative unique in our system of criminal jurisprudence. Maine itself requires the prosecution to prove the absence of self-defense beyond a reasonable doubt. Satisfying this burden imposes an obligation that, in all practical effect, is identical to the burden involved in negating the heat of passion on sudden provocation. Thus, we discern no unique hardship on the prosecution that would justify requiring the defendant to carry the burden of proving a fact so critical to criminal culpability.

[25] Many states do require the defendant to show that there is "some evidence" indicating that he acted in the heat of passion before requiring the prosecution to negate this element by proving the absence of passion beyond a reasonable doubt. Nothing in this opinion is intended to affect that requirement.

IV

Maine law requires a defendant to establish by a preponderance of the evidence that he acted in the heat of passion on sudden provocation in order to reduce murder to manslaughter. Under this burden of proof a defendant can be given a life sentence when the evidence indicates that it is *as likely as not* that he deserves a significantly lesser sentence. This is an intolerable result in a society where, to paraphrase Mr. Justice Harlan, it is far worse to sentence one guilty only of manslaughter as a murderer than to sentence a murderer for the lesser crime of manslaughter. In re Winship, 397 U.S. at 372 (concurring opinion). We therefore hold that the due-process clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case. Accordingly, the judgment below is

Affirmed.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, concurring. . . .

I agree with the Court that In re Winship, 397 U.S. 358 (1970), does require that the prosecution prove beyond a reasonable doubt every element which constitutes the crime charged against a defendant. I see no inconsistency between that holding and the holding of Leland v. Oregon, 343 U.S. 790 (1953). In the latter case this Court held that there was no constitutional requirement that the state shoulder the burden of proving the sanity of the defendant.[a]

The Court noted in *Leland* that the issue of insanity as a defense to a criminal charge was considered by the jury only after it had found that all elements of the offense, including the mens rea, if any, required by state law, had been proved beyond a reasonable doubt. Although as the state court's instructions in *Leland* recognized, evidence relevant to insanity as defined by state law may also be relevant to whether the required mens rea was present, the existence or non-existence of legal insanity bears no necessary relationship to the existence or non-existence of the required mental elements of the crime. For this reason, Oregon's placement of the burden of proof of insanity on Leland, unlike Maine's redefinition of homicide, in the instant case, did not effect an unconstitutional shift in the state's traditional burden of proof beyond a reasonable doubt of all necessary elements of the offense. Both the Court's opinion and the concurring opinion of Mr. Justice Harlan in *In re Winship* stress the importance 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." Having once met that rigorous burden of proof that, for example, in a case such as this, the defendant not only killed a fellow human being, but did it with malice aforethought, the state could quite consistently with such a constitutional principle conclude that a defendant who sought to establish the defense of insanity, and thereby

[a] The Oregon statute at issue in *Leland* required the defendant to prove insanity beyond a reasonable doubt. [Footnote by eds.]

escape any punishment whatever for a heinous crime, should bear the laboring oar on such an issue.

PATTERSON v. NEW YORK

Supreme Court of the United States. 1977.
432 U.S. 197.

MR. JUSTICE WHITE delivered the opinion of the Court.

The question here is the constitutionality under the 14th amendment's due-process clause of burdening the defendant in a New York state murder trial with proving the affirmative defense[b] of extreme emotional disturbance as defined by New York law.

I

After a brief and unstable marriage, the appellant, Gordon Patterson, Jr., became estranged from his wife, Roberta. Roberta resumed an association with John Northrup, a neighbor to whom she had been engaged prior to her marriage to appellant. On December 27, 1970, Patterson borrowed a rifle from an acquaintance and went to the residence of his father-in-law. There, he observed his wife through a window in a state of semi-undress in the presence of John Northrup. He entered the house and killed Northrup by shooting him twice in the head.

Patterson was charged with second-degree murder. In New York there are two elements of the crime: (i) "intent to cause the death of another person"; and (ii) "caus[ing] the death of such person or of a third person." N.Y. Penal Law § 125.25. Malice aforethought is not an element of the crime. In addition, the state permits a person accused of murder to raise an affirmative defense that he "acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse."[c]

New York also recognizes the crime of manslaughter. A person is guilty of manslaughter if he intentionally kills another person "under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance." Appellant confessed before trial to killing Northrup, but at trial he raised the defense of extreme emotional disturbance.

[b] "Affirmative defense" is used here to indicate a defense that shifts to the defendant both the burden of production (which means that the issue will be resolved against him if it is not raised by the evidence) and the burden of persuasion (which means that the issue will be resolved against him if, after considering the evidence, the trier of fact remains uncertain whether the required standard of proof has been met). An "affirmative defense" is thus distinguished from an ordinary "defense," which shifts to the defendant only the burden of production. This usage is increasingly widespread, but not uniform. See, e.g., MPC § 1.12, which uses the term "affirmative defense" even where there is no shift in the burden of persuasion. [Footnote by eds.]

[c] The New York homicide provisions are reprinted in Appendix B at pages 8–9, infra. [Footnote by eds.]

The jury was instructed as to the elements of the crime of murder. Focusing on the element of intent, the trial court charged:

> "Before you, considering all of the evidence, can convict this defendant or anyone of murder, you must believe and decide that the People have established beyond a reasonable doubt that he intended, in firing the gun, to kill either the victim himself or some other human being. . . .
>
> "Always remember that you must not expect or require the defendant to prove to your satisfaction that his acts were done without the intent to kill. Whatever proof he may have attempted, however far he may have gone in an effort to convince you of his innocence or guiltlessness, he is not obliged, he is not obligated to prove anything. It is always the People's burden to prove his guilt, and to prove that he intended to kill in this instance beyond a reasonable doubt."

The jury was further instructed, consistently with New York law, that the defendant had the burden of proving his affirmative defense by a preponderance of the evidence. The jury was told that if it found beyond a reasonable doubt that appellant had intentionally killed Northrup but that appellant had demonstrated by a preponderance of the evidence that he had acted under the influence of extreme emotional disturbance, it had to find appellant guilty of manslaughter instead of murder.

The jury found appellant guilty of murder. Judgment was entered on the verdict, and the appellate division affirmed. While appeal to the New York Court of Appeals was pending, this Court decided Mullaney v. Wilbur, 421 U.S. 684 (1975) . . . . In the court of appeals appellant urged that New York's murder statute is functionally equivalent to the one struck down in *Mullaney* and that therefore his conviction should be reversed.

The Court of Appeals rejected appellant's argument, holding that the New York murder statute is consistent with due process. The court distinguished *Mullaney* on the ground that the New York statute involved no shifting of the burden to the defendant to disprove any fact essential to the offense charged since the New York affirmative defense of extreme emotional disturbance bears no direct relationship to any element of murder. This appeal ensued. . . . We affirm.

II

It goes without saying that preventing and dealing with crime is much more the business of the states than it is of the federal government, and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual states. Among other things, it is normally "within the power of the state to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion," and its decision in this regard is not subject to proscription under the due process clause unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Speiser v. Randall, 357 U.S. 513 (1958).

In determining whether New York's allocation to the defendant of proving the mitigating circumstances of severe emotional disturbance is consistent with due process, it is therefore relevant to note that this defense is a considerably expanded version of the common-law defense of heat of passion on sudden provocation and that at common law the burden of proving the latter, as well as other affirmative defenses—indeed, "all . . . circumstances of justification, excuse or alleviation"—rested on the defendant. This was the rule when the fifth amendment was adopted, and it was the American rule when the 14th amendment was ratified. . . .

III

We cannot conclude that Patterson's conviction under the New York law deprived him of due process of law. The crime of murder is defined by the statute, which represents a recent revision of the state criminal code, as causing the death of another person with intent to do so. The death, the intent to kill, and causation are the facts that the state is required to prove beyond a reasonable doubt if a person is to be convicted of murder. No further facts are either presumed or inferred in order to constitute the crime. The statute does provide an affirmative defense—that the defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation—which, if proved by a preponderance of the evidence, would reduce the crime to manslaughter, an offense defined in a separate section of the statute. It is plain enough that if the intentional killing is shown, the state intends to deal with the defendant as a murderer unless he demonstrates the mitigating circumstances.

Here, the jury was instructed in accordance with the statute, and the guilty verdict confirms that the state successfully carried its burden of proving the facts of the crime beyond a reasonable doubt. Nothing in the evidence, including any evidence that might have been offered with respect to Patterson's mental state at the time of the crime, raised a reasonable doubt about his guilt as a murderer; and clearly the evidence failed to convince the jury that Patterson's affirmative defense had been made out. It seems to us that the state satisfied the mandate of *Winship* that it prove beyond a reasonable doubt "every fact necessary to constitute the crime with which [Patterson was] charged."

In convicting Patterson under its murder statute, New York did no more than Leland v. Oregon, 343 U.S. 790 (1952), . . . permitted it to do without violating the due-process clause. Under [that precedent] once the facts constituting a crime are established beyond a reasonable doubt, based on all the evidence including the evidence of the defendant's mental state, the state may refuse to sustain the affirmative defense of insanity unless demonstrated by a preponderance of the evidence.

The New York law on extreme emotional disturbance follows this pattern. This affirmative defense, which the court of appeals described

as permitting "the defendant to show that his actions were caused by a mental infirmity not arising to the level of insanity, and that he is less culpable for having committed them," does not serve to negative any facts of the crime which the state is to prove in order to convict of murder. It constitutes a separate issue on which the defendant is required to carry the burden of persuasion; and unless we are to overturn *Leland* . . ., New York has not violated the due-process clause, and Patterson's conviction must be sustained.

We are unwilling to reconsider *Leland*. . . . But even if we were to hold that a state must prove sanity to convict once that fact is put in issue, it would not necessarily follow that a state must prove beyond a reasonable doubt every fact, the existence or non-existence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree of culpability or the severity of the punishment. Here, in revising its criminal code, New York provided the affirmative defense of extreme emotional disturbance, a substantially expanded version of the older heat-of-passion concept; but it was willing to do so only if the facts making out the defense were established by the defendant with sufficient certainty. The state was itself unwilling to undertake to establish the absence of those facts beyond a reasonable doubt, perhaps fearing that proof would be too difficult and that too many persons deserving treatment as murderers would escape that punishment if the evidence need merely raise a reasonable doubt about the defendant's emotional state. It has been said that the new criminal code of New York contains some 25 affirmative defenses which exculpate or mitigate but which must be established by the defendant to be operative.[10] The due-process clause, as we see it, does not put New York to the choice of abandoning those defenses or undertaking to disprove their existence in order to convict of a crime which otherwise is within its constitutional powers to sanction by substantial punishment.

The requirement of proof beyond a reasonable doubt in a criminal case 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." The social cost of placing the burden on the prosecution to prove guilt beyond a reasonable doubt is thus an increased risk that the guilty will go free. While it is clear that our society has willingly chosen to bear a substantial burden in order to protect the innocent, it is equally clear that the risk it must bear is not without limits; and Mr. Justice Harlan's aphorism provides little guidance for determining

[10] The State of New York is not alone in this result:

"Since the Model Penal Code was completed in 1962, some 22 states have codified and reformed their criminal laws. At least 12 of these jurisdictions have used the concept of an 'affirmative defense' and have defined that phrase to require that the defendant prove the existence of an 'affirmative defense' by a preponderance of the evidence. Additionally, at least six proposed state codes and each of the four successive versions of a revised federal code use the same procedural device. Finally, many jurisdictions that do not generally employ this concept of 'affirmative defense' nevertheless shift the burden of proof to the defendant on particular issues."

Low & Jeffries, DICTA: Constitutionalizing the Criminal Law?, 29 Va. Law Weekly, No. 18, p. 1 (1977) (footnotes omitted).

what those limits are. Due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person. Punishment of those found guilty by a jury, for example, is not forbidden merely because there is a remote possibility in some instances that an innocent person might go to jail.

It is said that the common-law rule [requiring the accused to prove heat of passion based on sudden provocation] permits a state to punish one as a murderer when it is as likely as not that he acted in the heat of passion or under severe emotional distress and when, if he did, he is guilty only of manslaughter. But this has always been the case in those jurisdictions adhering to the traditional rule. It is also very likely true that fewer convictions of murder would occur if New York were required to negative the affirmative defense at issue here. But in each instance of a murder conviction under the present law, New York will have proved beyond a reasonable doubt that the defendant has intentionally killed another person, an act which it is not disputed the state may constitutionally criminalize and punish. If the state nevertheless chooses to recognize a factor that mitigates the degree of criminality or punishment, we think the state may assure itself that the fact has been established with reasonable certainty. To recognize at all a mitigating circumstance does not require the state to prove its non-existence in each case in which the fact is put in issue, if in its judgment this would be too cumbersome, too expensive, and too inaccurate.[11]

We thus decline to adopt as a constitutional imperative, operative countrywide, that a state must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of the accused. Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch. We therefore will not disturb the balance struck in previous cases holding that the due-process clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. Proof of the non-existence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here.

[11] The drafters of the Model Penal Code would, as a matter of policy, place the burden of proving the non-existence of most affirmative defenses, including the defense involved in this case, on the prosecution once the defendant has come forward with some evidence that the defense is present. The drafters recognize the need for flexibility, however, and would, in "some exceptional situations," place the burden of persuasion on the accused.

"Characteristically these are situations where the defense does not obtain at all under existing law and the Code seeks to introduce a mitigation. Resistance to the mitigation, based upon the prosecution's difficulty in obtaining evidence, ought to be lowered if the burden of persuasion is imposed on the defendant. Where that difficulty appears genuine and there is something to be said against allowing the defense at all, we consider it defensible to shift the burden in this way."

ALI, Model Penal Code § 1.13, Comment, p. 113 (Tent. Draft No. 4, 1955). Other writers have recognized the need for flexibility in allocating the burden of proof in order to enhance the potential for liberal legislative reform.

This view may seem to permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crime, now defined in their statutes. But there are obviously constitutional limits beyond which the states may not go in this regard. "[I]t is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime." McFarland v. American Sugar Rfg. Co., 241 U.S. 79, 86 (1916). The legislature cannot "validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt." Tot v. United States, 319 U.S. 463, 469 (1943).

Long before *Winship*, the universal rule in this country was that the prosecution must prove guilt beyond a reasonable doubt. At the same time, the long-accepted rule was that it was constitutionally permissible to provide that various affirmative defenses were to be proved by the defendant. This did not lead to such abuses or to such widespread redefinition of crime and reduction of the prosecutor's burden that a new constitutional rule was required.[12] This was not the problem to which *Winship* was addressed. Nor does the fact that a majority of the states have now assumed the burden of disproving affirmative defenses—for whatever reasons—mean that those states that strike a different balance are in violation of the Constitution.

IV

It is urged that *Mullaney* necessarily invalidates Patterson's conviction. . . .

Mullaney's holding, it is argued, is that the state may not permit the blameworthiness of an act or the severity of punishment authorized for its commission to depend on the presence or absence of an identified fact without assuming the burden of proving the presence or absence of that fact, as the case may be, beyond a reasonable doubt.[13] In our view, the *Mullaney* holding should not be so broadly read. The concurrence of two justices in *Mullaney* was necessarily contrary to such a reading. . . .

[12] Whenever due-process guarantees are dependent upon the law as defined by the legislative branches, some consideration must be given to the possibility that legislative discretion may be abused to the detriment of the individual. The applicability of the reasonable-doubt standard, however, has always been dependent on how a state defines the offense that is charged in any given case; yet there has been no great rush by the states to shift the burden of disproving traditional elements of the criminal offenses to the accused.

[13] There is some language in *Mullaney* that has been understood as perhaps construing the due-process clause to require the prosecution to prove beyond a reasonable doubt any fact affecting "the degree of criminal culpability." It is said that such a rule would deprive legislatures of any discretion whatsoever in allocating the burden of proof, the practical effect of which might be to undermine legislative reform of our criminal justice system. Carried to its logical extreme, such a reading of *Mullaney* might also, for example, discourage Congress from enacting pending legislation to change the felony-murder rule by permitting the accused to prove by a preponderance of the evidence the affirmative defense that the homicide committed was neither a necessary nor a reasonably foreseeable consequence of the underlying felony. The Court did not intend *Mullaney* to have such far-reaching effect.

Mullaney surely held that a state must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense. This is true even though the state's practice, as in Maine, had been traditionally to the contrary. Such shifting of the burden of persuasion with respect to a fact which the state deems so important that it must be either proved or presumed is impermissible under the due process clause.

It was unnecessary to go further in *Mullaney*. The Maine Supreme Judicial Court made it clear that . . . a killing became murder in Maine when it resulted from a deliberate, cruel act committed by one person against another, "suddenly without any, or without a considerable provocation." . . . [M]alice, in the sense of the absence of provocation, was part of the definition of that crime. Yet malice, i.e., lack of provocation, was presumed and could be rebutted by the defendant only by proving by a preponderance of the evidence that he acted with heat of passion upon sudden provocation. In *Mullaney* we held that however traditional this mode of proceeding might have been, it is contrary to the due process clause as construed in *Winship*.

As we have explained, nothing was presumed or implied against Patterson; and his conviction is not invalid under any of our prior cases. The judgment of the New York Court of Appeals is affirmed.

MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE POWELL, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

In the name of preserving legislative flexibility, the Court today drains *In re Winship* of much of its vitality. Legislatures do require broad discretion in the drafting of criminal laws, but the Court surrenders to the legislative branch a significant part of its responsibility to protect the presumption of innocence.

I

An understanding of the import of today's decision requires a comparison of the statutes at issue here with the statutes and practices of Maine struck down by a unanimous Court just two years ago in Mullaney v. Wilbur, 421 U.S. 684 (1975).

A

Maine's homicide laws embodied the common-law distinctions along with the colorful common-law language. Murder was defined as the unlawful killing of a human being "with malice aforethought, either express or implied." Manslaughter was a killing "in the heat of passion, on sudden provocation, without express or implied malice aforethought." . . .

New York's present homicide laws had their genesis in lingering dissatisfaction with certain aspects of the common-law framework that

this Court confronted in *Mullaney*. Critics charged that the archaic language tended to obscure the factors of real importance in the jury's decision. Also, only a limited range of aggravations would lead to mitigation under the common-law formula, usually only those resulting from direct provocation by the victim himself. It was thought that actors whose emotions were stirred by other forms of outrageous conduct, even conduct by someone other than the ultimate victim, also should be punished as manslaughterers rather than murderers. Moreover, the common-law formula was generally applied with strict objectivity. Only provocations that might cause the hypothetical reasonable man to lose control could be considered. And even provocations of that sort were inadequate to reduce the crime to manslaughter if enough time had passed for the reasonable man's passions to cool, regardless of whether the actor's own thermometer had registered any decline.

The American Law Institute took the lead in moving to remedy these difficulties. As part of its commendable undertaking to prepare a Model Penal Code, it endeavored to bring modern insights to bear on the law of homicide. The result was a proposal to replace "heat of passion" with the moderately broader concept of "extreme mental or emotional disturbance." . . .

At about this time the New York legislature undertook the preparation of a new criminal code, and the Revised Penal Law of 1967 was the ultimate result. The new code adopted virtually word for word the ALI formula for distinguishing murder from manslaughter. Under current New York law . . . the last traces of confusing archaic language have been removed. There is no mention of malice aforethought, no attempt to give a name to the state of mind that exists when extreme emotional disturbance is not present. . . .

B

Mullaney held invalid Maine's requirement that the defendant prove heat of passion. The Court today, without disavowing the unanimous holding of *Mullaney*, approves New York's requirement that the defendant prove extreme emotional disturbance. The Court manages to run a constitutional boundary line through the barely visible space that separates Maine's law from New York's. It does so on the basis of distinctions in language that are formalistic rather than substantive.

This result is achieved by a narrowly literal parsing of the holding in *Winship*: "[T]he 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." The only "facts" necessary to constitute a crime are said to be those that appear on the face of the statute as a part of the definition of the crime. Maine's statute was invalid, the Court reasons, because it "defined murder as the unlawful killing of a human being 'with malice aforethought, either express or implied.'" "'[M]alice,'" the Court reiterates, "in the sense of the absence of provocation, was part of the definition of that crime." *Winship* was violated only because this "fact"—malice—was "presumed" unless the defendant persuaded the jury otherwise by showing that he acted in the heat of passion. New York, in form presuming no affirmative "fact" against Patterson, and blessed with a statute drafted in the leaner language of the 20th century, escapes constitutional scrutiny unscathed even though the effect on the defendant of New York's placement of the burden of persuasion is exactly the same as Maine's.

This explanation of the *Mullaney* holding bears little resemblance to the basic rationale of that decision. But this is not the cause of greatest concern. 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 non-existence of that factor in the statutory language that defines the crime. The sole requirement is that any references to the factor be confined to those sections that provide for an affirmative defense.

Perhaps the Court's interpretation of *Winship* is consistent with the letter of the holding in that case. But little of the spirit survives. Indeed, the Court scarcely could distinguish this case from *Mullaney* without closing its eyes to the constitutional values for which *Winship* stands. As Mr. Justice Harlan observed in *Winship*, "a standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of actual conclusions for a particular type of adjudication." Explaining *Mullaney*, the Court says today, in effect, that society demands full confidence before a Maine factfinder determines that heat of passion is missing—a demand so insistent that this Court invoked the Constitution to enforce it over the contrary decision by the state. But we are told that society is willing to tolerate far less confidence in New York's factual determination of precisely the same functional issue. One must ask what possibly could explain this difference in societal demands. According to the Court, it is because Maine happened to attach a name—"malice aforethought"—to the absence of heat of passion, whereas New York refrained from giving a name to the absence of extreme emotional disturbance.

With all respect, this type of constitutional adjudication is indefensibly formalistic. A limited but significant check on possible abuses in the criminal law now becomes an exercise in arid formalities. What *Winship* and *Mullaney* had sought to teach about the limits a free society places on its procedures to safeguard the liberty of its citizens becomes a rather simplistic lesson in statutory draftsmanship. Nothing in the Court's opinion prevents a legislature from applying this new learning to many of the classical elements of the crimes it punishes.[8] It would be preferable, if the Court has found reason to reject the rationale of *Winship* and *Mullaney*, simply and straightforwardly to overrule those precedents.

[8] For example, a state statute could pass muster under the only solid standard that appears in the Court's opinion if it defined 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. The state, in other words, could be relieved altogether of responsibility for proving *anything* regarding the defendant's state of mind, provided only that the face of the statute meets the Court's drafting formulas. . . .

The Court understandably manifests some uneasiness that its formalistic approach will give legislatures too much latitude in shifting the burden of persuasion. And so it issues a warning that "there are obviously constitutional limits beyond which the states may not go in this regard." The Court thereby concedes that legislative abuses may occur and that they must be curbed by the judicial branch. But if the state is careful to conform to the drafting formulas articulated today, the constitutional limits are anything but "obvious." This decision simply leaves us without a conceptual framework for distinguishing abuses from legitimate legislative adjustments of the burden of persuasion in criminal cases.

II

It is unnecessary for the Court to retreat to a formalistic test for applying *Winship*. Careful attention to the *Mullaney* decision reveals the principles that should control in this and like cases. *Winship* held that the prosecution must bear the burden of proving beyond a reasonable doubt " 'the existence of every fact necessary to constitute the crime charged.' " In *Mullaney* we concluded that heat of passion was one of the "facts" described in *Winship*—that is, a factor as to which the prosecution must bear the burden of persuasion beyond a reasonable doubt. We reached that result only after making two careful inquiries. First, we noted that the presence or absence of heat of passion made a substantial difference in punishment of the offender and in the stigma associated with the conviction. Second, we reviewed the history, in England and this country, of the factor at issue. Central to the holding in *Mullaney* was our conclusion that heat of passion "has been, almost from the inception of the common law of homicide, the single most important factor in determining the degree of culpability attaching to an unlawful homicide."

Implicit in these two inquiries are the principles that should govern this case. 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 also must 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. But to permit a shift in the burden of persuasion when both branches of this test are satisfied would invite the undermining of the presumption of innocence, "that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.' "

I hardly need add that New York's provisions allocating the burden of persuasion as to "extreme emotional disturbance" are unconstitutional when judged by these standards. "[E]xtreme emotional disturbance" is . . . the direct descendant of the "heat of passion" factor

considered at length in *Mullaney*. I recognize, of course, that the differences between Maine and New York law are not unimportant to the defendant; there is a somewhat broader opportunity for mitigation. But none of those distinctions is relevant here. The presence or absence of extreme emotional disturbance makes a critical difference in punishment and stigma, and throughout our history the resolution of this issue of fact, although expressed in somewhat different terms, has distinguished manslaughter from murder.

III

The Court beats its retreat from *Winship* apparently because of a concern that otherwise the federal judiciary will intrude too far into the substantive choices concerning the content of a state's criminal law. The concern is legitimate, but misplaced. *Winship* and *Mullaney* are no more than what they purport to be: decisions addressing the procedural requirements that states must meet to comply with due process. They are not outposts for policing the substantive boundaries of the criminal law.

The *Winship/Mullaney* test identifies those factors of such importance, historically, in determining punishment and stigma that the Constitution forbids shifting to the defendant the burden of persuasion when such a factor is at issue. *Winship* and *Mullaney* specify only the procedure that is required when a state elects to use such a factor as part of its substantive criminal law. They do not say that the state must elect to use it. For example, where a state has chosen to retain the traditional distinction between murder and manslaughter, as have New York and Maine, the burden of persuasion must remain on the prosecution with respect to the distinguishing factor, in view of its decisive historical importance. But nothing in *Mullaney* or *Winship* precludes a state from abolishing the distinction between murder and manslaughter and treating all unjustifiable homicide as murder.[13] In this significant respect, neither *Winship* nor *Mullaney* eliminates the substantive flexibility that should remain in legislative hands.

Moreover, it is unlikely that more than a few factors—although important ones—for which a shift in the burden of persuasion seriously would be considered will come within the *Mullaney* holding. With some exceptions, then, the state has the authority "to recognize a factor that mitigates the degree of criminality or punishment" without having "to prove its non-existence in each case in which the fact is put in

[13] Perhaps under other principles of due-process jurisprudence, certain factors are so fundamental that a state could not, as a substantive matter, refrain from recognizing them so long as it chooses to punish given conduct as a crime. . . . But substantive limits were not at issue in *Winship* or *Mullaney*, and they are not at issue here.

Even if there are no constitutional limits preventing the state, for example, from treating all homicides as murders punishable equally regardless of mitigating factors like heat of passion or extreme emotional disturbance, the *Winship/Mullaney* rule still plays an important role. The state is then obliged to make its choices concerning the substantive content of its criminal laws with full awareness of the consequences, unable to mask substantive policy choices by shifts in the burden of persuasion. The political check on potentially harsh legislative action is then more likely to operate.

issue." New ameliorative affirmative defenses, about which the Court expresses concern, generally remain undisturbed by the holdings in *Winship* and *Mullaney*—and need not be disturbed by a sound holding reversing Patterson's conviction.

Furthermore, as we indicated in *Mullaney*, even as to those factors upon which the prosecution must bear the burden of persuasion, the state retains an important procedural device to avoid jury confusion and prevent the prosecution from being unduly hampered. The state normally may shift to the defendant the burden of production, that is, the burden of going forward with sufficient evidence "to justify [a reasonable] doubt upon the issue." If the defendant's evidence does not cross this threshold, the issue—be it malice, extreme emotional disturbance, self-defense, or whatever—will not be submitted to the jury.

. . . .

To be sure, there will be many instances when the *Winship/Mullaney* test as I perceive it will be more difficult to apply than the Court's formula. Where I see the need for a careful and discriminating review of history, the Court finds a brightline standard that can be applied with a quick glance at the face of the statute. But this facile test invites tinkering with the procedural safeguards of the presumption of innocence, an invitation to disregard the principles of *Winship* that I would not extend.

NOTES ON BURDEN OF PROOF FOR MITIGATIONS AND DEFENSES

1. **The Distinction Between *Mullaney* and *Patterson*.** Note that the *Patterson* majority purported to distinguish rather than to overrule *Mullaney*. Presumably, that means that *Mullaney* is still good law for certain situations. What are those situations? What is the dividing line between the continuing authority of *Mullaney* and the superseding rule of *Patterson*? Is the effort to distinguish them, as Mr. Justice Powell charged, "indefensibly formalistic?" Can you think of a rationale for *Mullaney* that does not apply with equal force to *Patterson*? If not, why do you suppose the Supreme Court tried to distinguish the two cases rather than to apply the same approach to both?

2. **The Procedural Interpretation of *Winship*.** If you conclude that *Mullaney* and *Patterson* are inconsistent, it necessarily follows that at least one of them is wrong. The question is which one. This issue has divided both courts and commentators and sparked a continuing controversy over the legitimate reach of *In re Winship*. For a time, at least, the prevailing reaction was that *Mullaney* was right and *Patterson* wrong. This position is founded on what may be called the procedural interpretation of *Winship*. Under this view, the constitutional commitment to proof beyond a reasonable doubt should extend to every fact determinative of criminal liability. The prosecution would be required to prove beyond a reasonable doubt not only every element of the offense charged but also the absence of justification, excuse, or

other grounds of defense or mitigation. This is termed the procedural interpretation of *Winship* because it sees the reasonable-doubt standard as a procedural requirement to be enforced without regard to the scope of legislative control over the substance of the penal law. In other words, the value of requiring proof beyond a reasonable doubt is thought to be entirely independent of the substantive issue of what must be proved.

The most articulate exponent of this view is Professor Barbara Underwood. In her article, The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases, 86 Yale L.J. 1299 (1977), she postulates two distinct purposes for requiring proof beyond a reasonable doubt: "First, the rule is meant to affect the outcome of individual cases, reducing the likelihood of an erroneous conviction. Second, the rule is meant to symbolize for society the great significance of a criminal conviction." The first function is, therefore, to reduce the chance of criminal conviction "by putting a thumb on the defendant's side of the scales of justice." This imbalance is designed to reflect what Mr. Justice Harlan termed "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." Underwood's second function for the reasonable-doubt requirement is "to single out criminal conviction as peculiarly serious among the adjudications made by courts" and thus to make a public affirmation of the "shared moral purpose" of protecting individual liberty.

In Professor Underwood's view, these considerations support an insistence on proof beyond a reasonable doubt even in the face of undoubted legislative authority over what must be proved. She denies that legislative power to eliminate altogether a ground of defense or mitigation should entail the lesser power to shift to the defendant the burden of establishing its existence. In her view, the fact that a defense is gratuitous—i.e., may be granted or withheld at the legislature's option—provides no basis for treating it as an exception to the reasonable-doubt requirement.

The result of this approach would be to force legislatures to extreme choices. Thus, under the procedural interpretation of *Winship*, a legislature could choose to require that the prosecution disprove a defense beyond a reasonable doubt, *or* it could choose to eliminate the defense entirely. But it could not adopt the compromise solution of recognizing the defense and requiring the defendant to establish its existence. In the following passage, Professor Underwood confronts these implications of her argument and explains why she regards the compromise solution as constitutionally inappropriate:*

> "Broad application of the requirement of proof beyond a reasonable doubt operates to foreclose certain kinds of compromise in the formulation of criminal law policy. In general, compromise is a desirable and indeed essential part of the law-making process. If this reading of the constitutional require-

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ment [i.e., the procedural interpretation of *Winship*] seemed to foreclose sensible legislative options for no good reason, that would count heavily for a different and more felicitous reading. But the kind of compromise prohibited by the reasonable-doubt rule is less satisfactory than other forms of compromise that remain available, and therefore its loss is no ground for concern.

. . . .

"A substantive disagreement about whether to recognize a defense amounts to a disagreement about whether the person with the proposed defense is less suitable than other offenders for specified criminal sanctions. By shifting the burden of persuasion to the defendant, a legislature limits the defense to those for whom the evidence is most abundant. That group, however, is not necessarily the least culpable, least harmful, or least deterrable. For there is no reason to think that the continuum of culpability, harm, or deterrability bears any relationship to the continuum of available evidence. The person for whom the evidence is strongest may not be the person whose claim, if believed, has the strongest relationship to the policies behind the defense. A disagreement about the proper scope of the substantive criminal law can be compromised by an intermediate definition of the facts that constitute crimes and defenses. Tinkering with the reasonable-doubt rule, which determines when to believe a defendant's version of the facts, requires an explanation in terms of the purposes of that rule. But those purposes are no less relevant to factfinding when a controversial gratuitous defense is at issue than they are to the determination of any other fact in a criminal case. Indeed, any controversy over the defense may enhance the threat to the values the reasonable-doubt rule was designed to protect.

". . . A legislature uncertain about the merits of a proposed defense might reasonably wish to change its assessment of the relative costs of errors. 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. . . ."[a]

Are you persuaded? Should the New York law on "extreme emotional disturbance" have been invalidated on the authority of *Mullaney*? Even if the shift in the burden of persuasion was an essential part of a legislative compromise to secure enactment of a broader formulation of the rule of provocation? Is there a tension between the requirement of

[a] Professor Underwood's defense of her position is far more elaborate than can be reflected here. In addition to the excerpts printed in the text, other aspects of her argument may be found in 86 Yale L.J. at 1316–20 and 1322–29. Rebuttal of these points is attempted in Jeffries & Stephan, Defenses, Presumptions, and Burden of Proof in the Criminal Law, 88 Yale L.J. 1325, 1348–52 (1979).

proof beyond a reasonable doubt and efficient deterrence? To the extent that weaker evidentiary support for a claimed defense or mitigation must be recognized as exculpatory, is the social-control function of the criminal law undermined? Is this a legitimate legislative concern? One that should be foreclosed by constitutional imperatives?

3. **Criticisms of the Procedural Approach.** The procedural interpretation of *Winship* has been attacked on a number of grounds. Representative criticisms are made in Jeffries & Stephan, Defenses, Presumptions, and Burden of Proof in the Criminal Law, 88 Yale L.J. 1325 (1979).[b] In their opinion, the rationales for the reasonable-doubt requirement demand that *something* be proved beyond a reasonable doubt, but "do not establish that *every* fact relevant to the imposition or grade of penal liability be subject to that standard." They focus squarely on the gratuitous defense. In their view, the constitutional insistence on proof beyond a reasonable doubt "no longer makes sense" when applied to a gratuitous defense. "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 government could cure the purported unconstitutionality *either* by proving more *or* by proving less, as it saw fit. "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."

In addition to the theoretical criticism stated above, Jeffries and Stephan also attempt a practical evaluation of the procedural interpretation of *Winship*. The following excerpt describes their views and the basis for them: *

"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. They assume that forcing legislatures to choose between proving more and proving less would

[b] See also the very able articles on this subject by Professor Ronald J. Allen. Allen, The Restoration of *In re Winship*: A Comment on Burdens of Persuasion in Criminal Cases After *Patterson* v. *New York*, 76 Mich.L.Rev. 30 (1977), and 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 (1977).

* The excerpts below are printed by permission of the authors, The Yale Law Journal Company, and Fred B. Rothman & Company from The Yale Law Journal, Vol. 88, pp. 1353–56.

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. These are the jurisdictions that in modern times have had an occasion to confront the issues here under discussion. Eight of these states provide no statutory guidance on this point, and six more expressly require that the prosecution bear the burden of proof beyond a reasonable doubt for every fact needed to obtain conviction. However, 19 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. Thirteen states recognize an affirmative defense of renunciation for the crime of attempt. Nine permit reasonable mistake as to age as an affirmative defense to statutory rape. Eight create an affirmative defense to liability for felony murder, and six exonerate the accused if he can show reasonable reliance on an official misstatement of law. 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, and none is a traditional feature of American statutes. A plausible conclusion is that shifting the burden of proof is often politically necessary to secure legislative reform. It seems quite possible, therefore, that disallowance of this procedural device would work to inhibit reform and induce retrogression in the penal law."

Are you persuaded? Would you agree with the implication of this argument that *Mullaney* is the case that should have come out the other way? Even though there was no indication that the shift in the burden of persuasion involved in *Mullaney* had anything to do with political compromise or legislative reform?

4. **An Alternative Reformulation of *Mullaney*: The *Patterson* Dissent.** The *Patterson* majority undertook to reinterpret *Mullaney* in order to avoid it. Interestingly, the author of that opinion undertook to reinterpret *Mullaney* in order to save it. Mr. Justice Powell's *Patterson* dissent does not take *Mullaney* at face value, but instead finds implicit in that decision two limiting criteria. First, "[t]he due-process clause requires that the prosecution bear the burden of persuasion beyond a reasonable doubt only if the factor at issue makes a substantial difference in punishment and stigma." Second, "[i]t must also be shown that in the Anglo-American legal tradition the factor in question historically has held that level of importance." Only where both conditions are met would burden-shifting be disallowed. But, as Mr. Justice Powell was at pains to point out, these criteria would not limit legislative authority over substance. Even where both criteria were met (and burden-shifting consequently forbidden), the legislature would remain free to eliminate altogether the mitigating or exculpatory effect of the fact in issue.

What do you think of this approach? It has the advantage, does it not, of reducing the risk of thwarting legislative reform? Few, if any, of the "benevolent innovations" described above would be barred by Powell's revised formulation. Yet he plainly would disallow the law in *Patterson*, which not only shifted to defendants the burden of persuasion but also broadened significantly the substantive criteria of mitigation. Should the loss of this kind of legislative opportunity be cause for concern?

One might also ask why the "Anglo-American legal tradition" should play so decisive a role in constitutional adjudication. Is there necessarily virtue in antiquity? Should the constitutionality of modern legislation depend on its consistency with the common law? And if history is to be decisive in limiting shifts in the burden of persuasion, why should it not also be decisive in limiting legislative power over the substance of the law? If the historic importance of provocation in the law of homicide precludes the legislature from shifting the burden of persuasion, why does it not also prevent the legislature from taking the much greater step of eliminating provocation altogether? Is not Justice Powell's reinterpretation of *Mullaney* subject to much the same criticism as the rigidly procedural approach that he abandoned? Or do you see something different in his scheme?

5. **Burden of Proof and Substantive Justice.** It seems clear that the underlying concern in much of the debate over burden of proof is not procedural regularity but substantive justice. This concern surfaces in the "horror stories" used to describe what a legislature might do if burden-shifting were allowed. Recall, for example, the *Patterson* footnote where Justice Powell 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." By this device, says Justice Powell, the prosecution "could be relieved altogether of responsibility for proving *anything* regarding the defendant's state of mind . . . ." Professor Underwood advances a similar concern over the rubric of "the slippery slope." What if, she asks, the legislature were to replace the entire range of homicide and assault offenses with the single crime of "personal attack?" Unless burden-shifting were disallowed, she continues, the legislature could authorize major penalties "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." In both of these hypotheticals, serious punishment would be authorized on proof beyond a reasonable doubt of no more than trivial wrongdoing. The result would be the use of burden-shifting defenses to impose criminal penalties far out of proportion to any proven misconduct by the accused.

Do you follow this argument? Is it clear that the danger posed by these hypotheticals has any necessary connection with shifting the burden of proof? Consider the response of Jeffries & Stephan:

> "The trouble [with this argument] 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 . . . 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. . . . 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. 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."

The excerpt from Jeffries and Stephan also suggests their alternative construction of *In re Winship*. In their view, the constitutional insistence on proof beyond a reasonable doubt should extend only to facts constitutionally required to be proved. "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." The state could shift to the defendant the burden of persuasion for any additional or gratuitous factor which it chose to take into account. The focus would be not on what the government invited the defendant to prove by way of mitigation or excuse, but rather on what the prosecution had to prove beyond a reasonable doubt in order to establish liability in the first instance. For Jeffries and Stephan, therefore, the question in both *Mullaney* and *Patterson* would be whether the facts required to be proved beyond a reasonable doubt established a constitutionally adequate basis for imposing the authorized maximum of life imprisonment. If so, "nothing would bar the state from going beyond the constitutional minimum to allow mitigation when the defendant can prove his claim to it." If not, the state would be required to establish a constitutionally adequate basis for life imprisonment by disproving heat of passion or extreme emotional disturbance beyond a reasonable doubt.[c]

It should be emphasized that no one disputes the applicability of the reasonable-doubt requirement within the sphere of constitutionally required facts. Professor Underwood, no less than Jeffries and Stephan, supports the insistence on proof beyond a reasonable doubt of facts constitutionally required for conviction or punishment. The dispute is limited to whether other facts—facts that the state may choose to recognize as exculpatory or mitigating or not, as it pleases—should also be subject to a constitutionally imposed standard of proof. In light of the several aspects of this problem developed in the notes above, what do you think is the best solution?

SUBSECTION B: PRESUMPTIONS

SANDSTROM v. MONTANA

Supreme Court of the United States, 1979.
442 U.S. 510.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question presented is whether, in a case in which intent is an element of the crime charged, the jury instruction "the law presumes that a person intends the ordinary consequences of his voluntary acts,"

[c] Of course, specifying a constitutionally adequate basis for criminal punishment is no easy task. As Jeffries and Stephan confess, "the existence of constitutional constraints on the substantive criminal law is largely terra incognita." Their view, advanced only "to suggest a direction of analysis," is that the constitutional focus should be on three factors: (i) the requirement of an act; (ii) the requirement of culpability; and (iii) the requirement of rough proportionality between the penalty authorized and the wrong done. With respect to the first factor, see *Robinson* v. *California* and the accompanying materials at pages 158–83, supra. With respect to the second, see the materials on strict liability, especially *Lambert* v. *California*, at pages 308–13, supra. On the issue of proportionality, see *Solem* v. *Helm* and the accompanying materials at pages 1028–53, infra.

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violates the 14th amendment's requirement that the state prove every element of a criminal offense beyond a reasonable doubt.

I

On November 22, 1976, 18-year-old David Sandstrom confessed to the slaying of Annie Jessen. Based upon the confession and corroborating evidence, petitioner was charged on December 2 with "deliberate homicide," Rev. Code Mont. § 45-5-102, in that he "purposely or knowingly caused the death of Annie Jessen."[1] At trial, Sandstrom's attorney informed the jury that, although his client admitted killing Jessen, he did not do so "purposely or knowingly," and was therefore not guilty of "deliberate homicide" but of a lesser crime. The basic support for this contention was the testimony of two court-appointed mental health experts, each of whom described for the jury petitioner's mental state at the time of the incident. Sandstrom's attorney argued that this testimony demonstrated that petitioner, due to a personality disorder aggravated by alcohol consumption, did not kill Annie Jessen "purposely or knowingly."

The prosecution requested the trial judge to instruct the jury that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts." Petitioner's counsel objected, arguing that "the instruction has the effect of shifting the burden of proof on the issue of" purpose or knowledge to the defense, and that "that is impermissible under the federal Constitution, due process of law." He offered to provide a number of federal decisions in support of the objection, including this Court's holding in Mullaney v. Wilbur, 421 U.S. 684 (1975), but was told by the judge: "You can give those to the Supreme Court. The objection is overruled." The instruction was delivered, the jury found petitioner guilty of deliberate homicide, and petitioner was sentenced to 100 years in prison.

Sandstrom appealed to the Supreme Court of Montana, again contending that the instruction shifted to the defendant the burden of disproving an element of the crime charged, in violation of *Mullaney* v. *Wilbur*, supra, In re Winship, 397 U.S. 358 (1970), and Patterson v. New York, 432 U.S. 197 (1977). The Montana court conceded that these cases did prohibit shifting the burden of proof to the defendant by means of a presumption, but held that these cases "do not prohibit allocation of *some* burden of proof to a defendant under certain circumstances." Since in the court's view "[d]efendant's sole burden . . . was to produce *some* evidence that he did not intend the ordinary consequences of his voluntary acts, not to disprove that he acted

[1] The statute provides:

"45-5-101. Criminal homicide

"(1) A person commits the offense of criminal homicide if he purposely, knowingly, or negligently causes the death of another human being.

"(2) Criminal homicide is deliberate homicide, mitigated deliberate homicide, or negligent homicide.

"45-5-102. Deliberate homicide.

"(1) Except as provided in 45-5-103(1), criminal homicide constitutes deliberate homicide if:

(a) it is committed purposely or knowingly. . . ."

'purposely' or 'knowingly,' . . . the instruction does not violate due process standards as defined by the United States or Montana Constitution. . . ." [Emphasis added].

Both federal and state courts have held, under a variety of rationales, that the giving of an instruction similar to that challenged here is fatal to the validity of a criminal conviction. We granted certiorari to decide the important question of the instruction's constitutionality. We reverse.

II

The threshold inquiry in ascertaining the constitutional analysis applicable to this kind of jury instruction is to determine the nature of the presumption it describes. That determination requires careful attention to the words actually spoken to the jury, for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction.

Respondent argues, first, that the instruction merely described a permissive inference—that is, it allowed but did not require the jury to draw conclusions about defendant's intent from his actions—and that such inferences are constitutional. These arguments need not detain us long, for even respondent admits that "it's possible" that the jury believed they were required to apply the presumption. Sandstrom's jurors were told that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts." They were not told that they had a choice, or that they might infer that conclusion; they were told only that the law presumed it. It is clear that a reasonable juror could easily have viewed such an instruction as mandatory.

In the alternative, respondent urges that, even if viewed as a mandatory presumption rather than as a permissive inference, the presumption did not conclusively establish intent but rather could be rebutted. On this view, the instruction required the jury, if satisfied as to the facts which trigger the presumption, to find intent *unless* the defendant offered evidence to the contrary. Moreover, according to the state, all the defendant had to do to rebut the presumption was produce "some" contrary evidence; he did not have to "prove" that he lacked the required mental state. Thus, "[a]t most, it placed a *burden of production* on the petitioner," but "did not shift to petitioner the *burden of persuasion* with respect to any element of the offense. . . ." [Emphasis added.] Again, respondent contends that presumptions with this limited effect pass constitutional muster.

We need not review respondent's constitutional argument on this point either, however, for we reject this characterization of the presumption as well. Respondent concedes there is a "risk" that the jury, once having found petitioner's act voluntary, would interpret the instruction as automatically directing a finding of intent. Moreover, the state also concedes that numerous courts "have differed as to the effect of the presumption when given as a jury instruction without further explanation as to its use by the jury," and that some have found it to shift more than the burden of production, and even to have conclusive

effect. Nonetheless, the state contends that the only authoritative reading of the effect of the presumption resides in the Supreme Court of Montana. And the state argues that by holding that "[d]efendant's sole burden . . . was to produce *some* evidence that he did not intend the ordinary consequences of his voluntary acts, not to disprove that he acted 'purposely' or 'knowingly,'" (emphasis added), the Montana Supreme Court decisively established that the presumption at most affected only the burden of going forward with evidence of intent—that is, the burden of production.

The Supreme Court of Montana is, of course, the final authority on the legal weight to be given a presumption under Montana law, but it is not the final authority on the interpretation which a jury could have given the instruction. If Montana intended its presumption to have only the effect described by its Supreme Court, then we are convinced that a reasonable juror could well have been misled by the instruction given, and could have believed that the presumption was not limited to requiring the defendant to satisfy only a burden of production. Petitioner's jury was told that "the law *presumes* that a person intends the ordinary consequences of his voluntary acts." They were not told that the presumption could be rebutted, as the Montana Supreme Court held, by the defendant's simple presentation of "some" evidence; nor even that it could be rebutted at all. Given the common definition of "presume" as "to suppose to be true without proof," and given the lack of qualifying instructions as to the legal effect of the presumption, we cannot discount the possibility that the jury may have interpreted the instruction in either of two more stringent ways.

First, a reasonable jury could well have interpreted the presumption as "conclusive," that is, not technically as a presumption at all, but rather as an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption. Alternatively, the jury may have interpreted the instruction as a direction to find intent upon proof of the defendant's voluntary actions (and their "ordinary" consequences), unless *the defendant* proved the contrary by some quantum of proof which may well have been considerably greater than "some" evidence—thus effectively shifting the burden of persuasion on the element of intent. Numerous federal and state courts have warned that instructions of the type given here can be interpreted in just these ways. And although the Montana Supreme Court held to the contrary in this case, Montana's own Rules of Evidence expressly state that the presumption at issue here may be overcome only "by a preponderance of evidence contrary to the presumption." Montana Rule of Evidence 301(b)(2).[6] Such a requirement shifts not only the burden of production, but also the ultimate burden of persuasion on the issue of intent.[7]

We do not reject the possibility that some jurors may have interpreted the challenged instruction as permissive, or, if mandatory, as requiring only that the defendant come forward with "some" evidence in rebuttal. However, the fact that a reasonable juror could have given the presumption conclusive or persuasion-shifting effect means that we cannot discount the possibility that Sandstrom's jurors actually did proceed upon one or the other of these latter interpretations. And that means that unless these kinds of presumptions are constitutional, the instruction cannot be adjudged valid.[8] It is the line of cases urged by the petitioner, and exemplified by In re Winship, 397 U.S. 358 (1970), that provides the appropriate mode of constitutional analysis for these kinds of presumptions.

III

In *Winship*, the Court stated:

> "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." [Emphasis added.]

Accord, *Patterson* v. *New York*, supra. The petitioner here was charged with and convicted of deliberate homicide, committed purposely or knowingly . . . . It is clear that under Montana law, whether the crime was committed purposely or knowingly is a fact necessary to constitute the crime of deliberate homicide. Indeed, it was the lone element of the offense at issue in Sandstrom's trial, as he confessed to causing the death of the victim, told the jury that knowledge and purpose were the only questions he was controverting, and introduced evidence solely on those points. Moreover, it is conceded that proof of defendant's "intent" would be sufficient to establish this element. Thus, the question before this Court is whether the challenged jury instruction had the effect of relieving the state of the burden of proof

[6] Rev. Code Mont. § 26-1-602 states.

"'[D]isputable presumptions' . . . may be controverted by other evidence. The following are of that kind: . . .

3. that a person intends the ordinary consequence of his voluntary act."

Montana Rule of Evidence 301 provides:

"(b)(2) All presumptions, other than conclusive presumptions, are disputable presumptions and may be controverted. *A disputable presumption may be overcome by a preponderance of evidence contrary to the presumption. Unless the presumption is overcome, the trier of fact must find the assumed fact in accordance with the presumption.*" [Emphasis added.]

We do not, of course, cite this Rule of Evidence to dispute the Montana Supreme Court's interpretation of its own law. It merely serves as evidence that a reasonable man—here, apparently, the drafter of Montana's own Rules of Evidence—could interpret the presumption at issue in this case as shifting to the defendant the burden of proving his innocence by a preponderance of the evidence.

[7] The potential for these interpretations of the presumption was not removed by the other instructions given at the trial. It is true that the jury was instructed generally that the accused was presumed innocent until proved guilty, and that the state had the burden of proving beyond a reasonable doubt that the defendant caused the death of the deceased purposely or knowingly. But this is not rhetorically inconsistent with a conclusive or burden-shifting presumption. The jury could have interpreted the two sets of instructions as indicating that the presumption was a means by which proof beyond a reasonable doubt as to intent could be satisfied. For example, if the presumption were viewed as conclusive, the jury could have believed that although intent must be proved beyond a reasonable doubt, proof of the voluntary slaying and its ordinary consequences constituted proof of intent beyond a reasonable doubt. . . .

[8] Given our ultimate result in this case, we do not need to consider what kind of constitutional analysis would be appropriate for other kinds of presumptions.

enunciated in *Winship* on the critical question of petitioner's state of mind. We conclude that under either of the two possible interpretations of the instruction set out above, precisely that effect would result, and that the instruction therefore represents constitutional error.

We consider first the validity of a conclusive presumption. This Court has considered such a presumption on at least two prior occasions. In Morissette v. United States, 342 U.S. 246 (1952),[a] the defendant was charged with willful and knowing theft of government property. Although his attorney argued that for his client to be found guilty, "the taking must have been with felonious intent," the trial judge ruled that "[t]hat is presumed by his own act." After first concluding that intent was in fact an element of the crime charged, and after declaring that "[w]here intent of the accused is an ingredient of the crime charged, its existence is . . . a jury issue," *Morissette* held:

> "*It follows that the trial court may not withdraw or prejudge the issue by instruction that the law raises a presumption of intent from an act.* It often is tempting to cast in terms of a 'presumption' a conclusion which a court thinks probable from given facts. . . . [But we] think presumptive intent has no place in this case. *A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense.* A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. In either case, *this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime.*" [Emphasis added.]

Just last term in United States v. United States Gypsum Co., 438 U.S. 422 (1978),[b] we reaffirmed the holding of *Morissette*. In that case defendants, who were charged with criminal violations of the Sherman Act, challenged the following jury instruction:

> "The law presumes that a person intends the necessary and natural consequences of his acts. Therefore, if the effect of the exchanges of pricing information was to raise, fix, maintain, and stabilize prices, then the parties to them are presumed, as a matter of law, to have intended that result."

[a] *Morissette* concerned the interpretation of a federal statute punishing one who "embezzles, steals, purloins, or knowingly converts to his use" any property of the United States. The opinion is famous for a long discourse on the role of *mens rea* in the criminal law and for its refusal to construe the statute to impose strict liability in the context of a traditional, as distinct from regulatory or public welfare, offense. Excerpts on these points appear at pages 197–200 and 355–57, supra. The reference in text is to a portion of the *Morissette* opinion, not included in the excerpts reprinted elsewhere in this book, finding that the trial court could not presume intent to steal government property from the fact of taking. [Footnote by eds.]

[b] *United States Gypsum Co.* concerned the interpretation of the criminal provisions of the Sherman Anti-trust Act. The Court held that intent was a necessary element of the criminal offenses defined by that statute, even though it would not be required for the analogous civil violations. The reference in text is to a portion of the opinion disapproving a presumption of criminal intent from anti-competitive impact. [Footnote by eds.]

After again determining that the offense included the element of intent, we held:

> "[A] defendant's state of mind or intent is an element of a criminal anti-trust offense which . . . cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent from proof of an effect on prices. . . ."

As in *Morissette* and *United States Gypsum Co.*, a conclusive presumption in this case would "conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime," and would "invade [the] factfinding function" which in a criminal case the law assigns solely to the jury. The instruction announced to David Sandstrom's jury may well have had exactly these consequences. Upon finding proof of one element of the crime (causing death), and of facts insufficient to establish the second (the voluntariness and "ordinary consequences" of defendant's action), Sandstrom's jurors could reasonably have concluded that they were directed to find against defendant on the element of intent. The state was thus not forced to prove "beyond a reasonable doubt . . . every fact necessary to constitute the crime . . . charged," and defendant was deprived of his constitutional rights as explicated in *Winship*.

A presumption which, although not conclusive, had the effect of shifting the burden of persuasion to the defendant, would have suffered from similar infirmities. If Sandstrom's jury interpreted the presumption in that manner, it could have concluded that upon proof by the state of the slaying, and of additional facts not themselves establishing the element of intent, the burden was shifted to the defendant to prove that he lacked the requisite mental state. Such a presumption was found constitutionally deficient in Mullaney v. Wilbur, 421 U.S. 684 (1975). In *Mullaney* the charge was murder, which under Maine law required proof not only of intent but of malice. The trial court charged the jury that "'malice aforethought is an essential and indispensable element of the crime of murder.'" However, it also instructed that if the prosecution established that the homicide was both intentional and unlawful, malice aforethought was to be implied unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation. As we recounted just two terms ago in *Patterson* v. *New York*, supra, "[t]his Court . . . unanimously agreed with the Court of Appeals that Wilbur's due process rights had been invaded by the presumption casting upon him the burden of proving by a preponderance of the evidence that he had acted in the heat of passion upon sudden provocation." And *Patterson* reaffirmed that "a state must prove every ingredient of an offense beyond a reasonable doubt, and . . . may not shift the burden of proof to the defendant" by means of such a presumption.

Because David Sandstrom's jury may have interpreted the judge's instruction as constituting either a burden-shifting presumption like that in *Mullaney*, or a conclusive presumption like that in *Morissette* and *United States Gypsum Co.*, and because either interpretation would have deprived defendant of his right to the due process of law, we hold the instruction given in this case unconstitutional. . . .

[The concurring opinion of Mr. Justice Rehnquist, with whom the Chief Justice joined, is omitted.]

NOTES ON BURDEN OF PROOF AND PRESUMPTIONS

1. **Introduction.** A presumption arises when the existence of one fact is "presumed" from proof of another. Unfortunately, this description covers a variety of evidentiary relationships, and, as noted by one authority, "the language used with reference to presumptions is exasperatingly indiscriminate." G. Lilly, An Introduction to the Law of Evidence 49 (1978). The *Sandstrom* Court's classification of conclusive presumptions, rebuttable presumptions, and permissive inferences provides a useful basis for discussion and analysis, but the reader should be aware that this usage is not uniformly adopted. Moreover, as the facts of *Sandstrom* illustrate, courts often identify "presumptions" without further specifying their procedural consequences. For these reasons it is important that any use of the label "presumption" be approached with caution and that care be taken to determine precisely what the term is used to designate. For an excellent survey, see G. Lilly, An Introduction to the Law of Evidence 48–62 (1978).

2. **Conclusive Presumptions.** The *Sandstrom* Court was concerned that the jury might have construed the instruction on intending the ordinary consequences of one's voluntary acts as creating a conclusive or mandatory presumption. Perhaps it might have been so understood, but in fact the true conclusive presumption is extremely rare in the criminal law. The effect of this device is, of course, simply to redefine the substantive law. If fact *A* is *conclusively* presumed from proof of fact *B*, *B* becomes sufficient, and *A* is rendered unnecessary and irrelevant. Thus, on the facts of *Sandstrom*, a conclusive presumption would have redefined the crime of murder to require not a subjective intent to kill, but an objective determination that death of another was an "ordinary consequence" of the defendant's voluntary acts.*

The *Sandstrom* Court declared that this construction would be unconstitutional. Do you see why? Do *Morissette* and *United States Gypsum Co.* support the Court's holding? Would a conclusive presumption of intent from proof of the ordinary consequences of one's voluntary acts "conflict with the overriding presumption of innocence"? Would it "invade the factfinding function" of the jury? Does the

* Cf. *Director of Public Prosecutions* v. *Smith*, page 204, supra, and the notes on this issue, pages 209–211, supra

answer to these questions depend on whether Montana would have constitutional authority to base liability for the crime of "deliberate homicide" on proof of negligence? Do you understand *Sandstrom* to stand for the proposition that it would be unconstitutional to impose sanctions typically associated with murder on proof of merely negligent homicide? If not, what exactly is the discussion of conclusive presumptions designed to forbid?

3. **Rebuttable Presumptions.** A second possibility considered in *Sandstrom* is that the jury might have construed the instruction as creating a rebuttable or burden-shifting presumption. Under this interpretation, proof that death of another was an "ordinary consequence" of the defendant's voluntary acts would shift to him the obligation to disprove that he killed purposely or knowingly. The *Sandstrom* Court concluded that this kind of presumption would be constitutionally invalid under *Mullaney*. Is that conclusion sound? Does it depend on whether the state could constitutionally have imprisoned the defendant for 100 years merely on proof that he killed another by voluntary acts the ordinary consequence of which was death?

A different way to approach this issue is to ask whether the following hypothetical statute would be unconstitutional under the authority of *Sandstrom*:

> "Section 101. Criminal homicide.
>
> "(1) A person commits the offense of criminal homicide if he causes the death of another human being by voluntary acts the ordinary consequence of which is death of another.
>
> "(2) Criminal homicide is aggravated criminal homicide [carrying a maximum term of life imprisonment] or simple criminal homicide carrying a maximum term of imprisonment for five years.
>
> "(3) It is an affirmative defense to aggravated criminal homicide, but not to simple criminal homicide, that the actor did not kill purposely or knowingly."

Do you understand *Sandstrom* to stand for the invalidity of such a statute? If not, can the state of Montana achieve substantively the same result deemed unconstitutional by the Supreme Court simply by rephrasing its law to avoid use of the language of presumption? Is the message of *Sandstrom* merely to excise an offending vocabulary, or are there substantive rationales to support the decision? If an "affirmative defense" must be established by the defendant by a preponderance of the evidence, is Subsection (3) of the hypothetical statute unconstitutional?

4. **Shift in the Burden of Production.** Another possibility raised by the state's argument in *Sandstrom* is that a presumption might be construed to shift to the defendant only the burden of production. So construed, the presumption would not affect the prosecution's obligation to persuade the trier of fact beyond a reasonable doubt, but would place on the defendant the obligation to see that a particular issue is raised by the evidence. This is the functional description of a defense,

and most devices that shift to the defendant only the burden of production are called defenses. An example is self-defense. If the defendant wishes to claim self-defense, he bears the burden of raising the issue by producing some evidence to support his claim. If that burden of production is met, the prosecution must disprove self-defense beyond a reasonable doubt, and the jury is instructed accordingly. If the burden of production is not met, the issue of self-defense is simply not raised, and the jury is given no instruction on the subject. Whether many such devices would be labeled presumptions seems doubtful, but in any event, *Mullaney* and *Patterson* make clear that a device that shifts to the defendant only the burden of production is constitutionally permissible.

5. **Permissive Inferences.** The final possibility considered by the *Sandstrom* Court is that the trial judge's instruction only stated a permissive inference. Under this view, the jury would have been allowed, but not required, to consider the ordinary consequences of the defendant's voluntary acts in determining whether he killed purposely or knowingly, but would have been instructed to make the ultimate finding of purpose or knowledge beyond a reasonable doubt. Apparently, this sort of evidentiary device is constitutional, and presumably, there would have been no defect in the *Sandstrom* conviction if the trial court had explicitly couched the instruction in these terms. Is the basis for this conclusion clear? Do you see why the Supreme Court attaches so much importance to the explicit differentiation of presumptions and permissive inferences? Would you expect juries to make the distinction with equal care?

Professor Ronald Allen has argued that presumptions (of whatever sort) and permissive inferences are not so clearly different and that in fact both have a lot in common with other devices such as defenses, affirmative defenses, and comments on the evidence. Allen's conclusion is that all these devices should be constitutionally permissible so long as they are not used to undermine the state's obligation to prove beyond a reasonable doubt a constitutionally sufficient basis to support the punishment authorized. See Allen, Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices, 94 Harv.L.Rev. 321 (1980). Professor Charles Nesson, on the other hand, shares Allen's view that these various evidentiary devices are not readily distinguishable, but believes that they should generally be condemned as unconstitutional. See Nesson, Reasonable Doubt and Permissive Inferences: The Value of Complexity, 92 Harv.L.Rev. 1187 (1979). Both Allen and Nesson have written in rebuttal of the other's view. See Nesson, Rationality, Presumptions, and Judicial Comment: A Response to Professor Allen, 94 Harv.L.Rev. 1574 (1981), and Allen, More on Constitutional Process-of-Proof Problems in Criminal Cases, 94 Harv.L.Rev. 1795 (1981).

6. **Defenses, Presumptions, and Legislative Candor.** An argument occasionally advanced in the context of affirmative defenses, and more forcefully pressed in the context of presumptions, is that such devices should be declared unconstitutional in order to induce legislative candor. The contention is that legislatures use presumptions to disadvantage defendants in ways that the people would find unacceptable if they understood the legislative action. If presumptions are outlawed, the argument continues, the legislative intention will be forced out in the open and thus made amenable to popular control through the political process.

This argument was first developed in Ashford & Risinger, Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview, 79 Yale L.J. 165, 177–78 (1969). Their discussion was based on a hypothetical suggesting the following three statutes:

> (i) "It shall be a crime for an individual to be present in a house where he knows narcotics are illegally kept."
>
> (ii) "It shall be a crime for an individual to be present in a house where narcotics are illegally kept, whether or not he knows that the narcotics are so kept."
>
> (iii) "It shall be a crime for an individual to be present in a house where he knows narcotics are illegally kept, but such knowledge may be presumed from the fact that the defendant was present in a house where narcotics were so kept."

In the first hypothetical statute, the legislature has made liability turn on three factors: presence of the individual, presence of narcotics in the house, and the defendant's knowledge. In the second statute, only two factors are made relevant to liability: presence of the individual and presence of narcotics in the house. In the view of Ashford and Risinger, the third statute is designed to look like the first but work like the second. The risk, therefore, is that the legislature might use a presumption to undermine the political process:

> "If the legislature nominally recognizes knowledge as germane (as it did in the first statute) and further, as the type of germane issue to be proved by the state, and then arranges its processes so that most of those who lack knowledge are still sent to jail (as though the second statute had been passed), then those individuals are punished for a crime which has never undergone the political checks guaranteed by representative government. This, we believe, is a violation of due process."

Are you persuaded by this argument? Do you agree that the use of presumptions renders penal statutes obscure and inaccessible? Is that a reason for declaring such statutes unconstitutional? If so, should criminal statutes be declared unconstitutional whenever they use (or rely on the courts to use) obscure language? Arguably, this proposition might require that the entire mens-rea structure of the common law be declared unconstitutional. Would you expect, for example, that the political electorate would understand the meaning of "malice aforethought" or could successfully differentiate "specific" from "general" intent? Should the legislature be prohibited from using such formulations on the ground that the general public might not understand them? If not, what basis exists for invalidating presumptions for the

reason suggested by Ashford & Risinger? Are presumptions fundamentally different?

SECTION 2: PROPORTIONALITY

SUBSECTION A: PROPORTIONALITY AND CAPITAL PUNISHMENT

COKER v. GEORGIA

Supreme Court of the United States, 1977.
433 U.S. 584.

MR. JUSTICE WHITE announced the judgment of the Court and filed an opinion in which MR. JUSTICE STEWART, MR. JUSTICE BLACKMUN, and MR. JUSTICE STEVENS, joined.

. . . Petitioner Coker was convicted of rape and sentenced to death. Both the conviction and the sentence were affirmed by the Georgia Supreme Court. Coker was granted a writ of certiorari limited to the single claim, rejected by the Georgia court, that the punishment of death for rape violates the eighth amendment, which proscribes "cruel and unusual punishments" and which must be observed by the states as well as the federal government. Robinson v. California, 370 U.S. 660 (1962).

I

While serving various sentences for murder, rape, kidnapping, and aggravated assault, petitioner escaped from the Ware Correctional Institution near Waycross, Ga., on September 2, 1974. At approximately 11 o'clock that night, petitioner entered the house of Allen and Elnita Carver through an unlocked kitchen door. Threatening the couple with a "board," he tied up Mr. Carver in the bathroom, obtained a knife from the kitchen, and took Mr. Carver's money and the keys to the family car. Brandishing the knife and saying "you know what's going to happen to you if you try anything, don't you," Coker then raped Mrs. Carver. Soon thereafter, petitioner drove away in the Carver car, taking Mrs. Carver with him. Mr. Carver, freeing himself, notified the police; and not long thereafter petitioner was apprehended. Mrs. Carver was unharmed.

Petitioner was [tried on charges of] escape, armed robbery, motor vehicle theft, kidnapping, and rape. . . . The jury returned a verdict of guilty, rejecting his general plea of insanity. A sentencing hearing was then conducted in accordance with the procedures dealt with at length in Gregg v. Georgia, 428 U.S. 153 (1976) . . . . The jury's verdict on the rape count was death by electrocution. . . .

II

[The Court's prior capital punishment decisions] make unnecessary the recanvassing of certain critical aspects of the controversy about the constitutionality of capital punishment. It is now settled that the death penalty is not invariably cruel and unusual punishment within the meaning of the eighth amendment; it is not inherently barbaric or an unacceptable mode of punishment for crime; neither is it always disproportionate to the crime for which it is imposed. . . .

In sustaining the imposition of the death penalty, however, the Court [has] firmly embraced the holdings and dicta from prior cases, to the effect that the eighth amendment bars not only those punishments that are "barbaric" but also those that are "excessive" in relation to the crime committed. Under *Gregg v. Georgia*, supra, a punishment is "excessive" and unconstitutional if it (i) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (ii) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground. Furthermore, these eighth amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent. To this end, attention must be given to the public attitudes concerning a particular sentence—history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions are to be consulted. In *Gregg*, after giving due regard to such sources, the Court's judgment was that the death penalty for deliberate murder was neither the purposeless imposition of severe punishment nor a punishment grossly disproportionate to the crime. But the Court reserved the question of the constitutionality of the death penalty when imposed for other crimes.

III

That question, with respect to rape of an adult woman, is now before us. We have concluded that a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the eighth amendment as cruel and unusual punishment.[4]

A

As advised by recent cases, we seek guidance in history and from the objective evidence of the country's present judgment concerning the acceptability of death as a penalty for rape of an adult woman. At no time in the last 50 years have a majority of the states authorized death

[4] Because the death sentence is a disproportionate punishment for rape, it is cruel and unusual punishment within the meaning of the eighth amendment even though it may measurably serve the legitimate ends of punishment and therefore is not invalid for its failure to do so. We observe that in the light of the legislative decisions in almost all of the states and in most of the countries around the world, it would be difficult to support a claim that the death penalty for rape is an indispensable part of the states' criminal justice system.