

Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases

George P. Fletcher†

I. The Presumption of Innocence: Were it So

Good men everywhere praise the presumption of innocence.¹ And be they Frenchmen, Germans, or Americans, they agree on the demand of the presumption in practice. Both here and abroad, the state's invocation of criminal sanctions demands a high degree of proof that the accused has committed the offense charged. To express the requisite standard of proof, common lawyers speak of the prosecutor's duty to prove his case beyond a reasonable doubt.² And Continental lawyers invoke the maxim *in dubio pro reo*—a precept requiring triers of fact to acquit in cases of doubt.³

† Assistant Professor of Law, University of Washington. B.A. 1960, University of California; J.D. 1963, M.C.L. 1965, University of Chicago.

1. The presumption of innocence is a standard clause in international declarations and covenants on fundamental human rights. Universal Declaration of Human Rights, Dec. 10, 1948, art. 11(2), U.N. Doc. A/811, reprinted in 43 AM. J. INT'L L. 127 (Supp. 1949); European Convention on Human Rights, Nov. 4, 1950, art. 6(2), 213 U.N.T.S. 222, 228 (1955). In the United States, the presumption of innocence has found expression in a number of state statutes, e.g., CAL. PENAL CODE § 1096 (West 1956), N.Y. CODE OF CR. PROC. § 389 (McKinney 1958), and the Supreme Court once held that federal courts must instruct criminal juries that the presumption of innocence favors the accused. *Coffin v. United States*, 156 U.S. 432 (1895). *But cf.* *United States v. Agnew*, 165 U.S. 36 (1897); *United States v. Nimerick*, 118 F.2d 464 (2d Cir. 1941).

The footnotes below discuss the presumption of innocence in France and Germany; for a study of the presumption in the Soviet Union, see my paper, *The Presumption of Innocence in the Soviet Union*, to be published in the June 1968 issue of the *U.C.L.A. Law Review*.

2. The common law presumption of innocence emerged independently of the rule requiring proof beyond a reasonable doubt. The presumption first appears in private disputes, e.g., *Williams v. East India Co.*, 3 East 192, 102 Eng. Rep. 571 (K.B. 1802); *R. v. Hawkins*, 10 East 211, 103 Eng. Rep. 755 (1808), as a rationale for requiring the plaintiff to prove a negative proposition, e.g., as in *Williams*, that the defendant failed to warn plaintiff that he was transporting a combustible item on plaintiff's ship. The rule that the prosecutor had to prove his case beyond a reasonable doubt developed independently. See L. MACNALLY, *THE RULES OF EVIDENCE ON PLEAS OF THE CROWN* 398 (1811). In the 1850's, American judges began to equate the presumption with the rule on the prosecutor's burden of persuasion. *Patterson v. State*, 21 Ala. 571 (1852); *State v. Tibbetts*, 35 Maine 81 (1852). English and American commentators recognized the link in the decades following. 1 S. GREENLEAF, *A TREATISE ON THE LAW OF EVIDENCE* § 29 (2d ed. 1844) (the first edition, published in 1842, discussed the presumption of innocence (at 39) without relating it to the degree of proof required in criminal cases). J. STEPHEN, *A DIGEST OF THE LAW OF EVIDENCE*, art. 94 (1876), 1 P. TAYLOR, *TREATISE ON THE LAW OF EVIDENCE* 133 (1887).

3. The maxim is not mentioned in French or German legislation. The French derive the maxim directly from the presumption of innocence. 2 P. BOUZAT & J. PINATEL, *Traité de droit pénal et de criminologie* 913 (1963); J. Patain, *Le particularisme de la théorie des preuves en droit pénal*, in G. STEFANI, *QUELQUES ASPECTS DE L'AUTONOMIE DU DROIT*

Two Kinds of Legal Rules

The French speak of the *présomption d'innocence*;⁴ and the Germans of the *Unschuldsvermutung*.⁵ By duplicating existing rules on the prosecutorial burden of persuasion, these rubrics provide rhetorical affirmation of the long-standing Western concern that only the guilty should suffer under the criminal law.⁶ This concern prompted Hale to remark in the late 1600's that five guilty men should be acquitted before one innocent man is convicted.⁷ This kind of ratio, expressing toleration for acquitting the guilty, has become a stock figure of common law

PÉNAL 38-39 (1956). The Germans, who began to apply the maxim *in dubio pro reo* long before they recognized the presumption of innocence, have devised a number of legal rationales for the maxim. At least six are current:

- (1) The maxim derives from Section 261 of the Strafprozessordnung [StPO] (Code of Criminal Procedure), which provides that triers of fact should evaluate evidence freely, unrestrained by rules ranking competing kinds of evidence (*freie Beweiswürdigung*). See Seibert, *In dubio pro reo*, 4 DEUTSCHE RECHTS-ZEITSCHRIFT 557 (1949); 1 LOEWE-ROSENBERG, DIE STRAFPROZESSORDNUNG § 261, Comment 4, at 1067 (21st ed. 1963).
- (2) The maxim derives from StPO § 244 (2), which requires that courts, sitting as triers of fact, investigate all pertinent matters, including matters not put forward either by the prosecution or the defense. 2 E. SCHMIDT, LEHRKOMMENTAR ZUR STRAFPROZESSORDNUNG, § 244, Comments 10-12, at 669-70 (1957) ("the duty to investigate the facts entails the duty to determine the facts unequivocally").
- (3) The maxim derives from StPO § 267 (1), which requires that a judicial finding of guilt be supported by an opinion "setting forth the facts deemed proved." H. HENKEL, STRAFVERFAHRENSRECHT 405-06 (1953).
- (4) The maxim has the status of customary law. E. KERN, STRAFVERFAHRENSRECHT 64 (8th ed. 1967).
- (5) The maxim is a restatement of the principle that no man should be punished unless he is guilty—*nulla poena sine culpa*. W. STREE, IN DUBIO PRO REO 15-16 (1962).
- (6) The maxim is entailed by concept of a *Rechtsstaat*—a state based on law. D. MANN & U. MANN, *Die Anwendbarkeit des Grundsatzes "in dubio pro reo" auf Prozessvoraussetzungen*, 76 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 264, 272ff. (1964).
4. The French *présomption d'innocence* derives from Section 9 of the 1789 Declaration of the Rights of Man, which begins: *Tout homme étant présumé innocent jusqu'à ce qu'il ait été déclaré coupable*. . . (Because everyone is presumed innocent until proven guilty. . .). L. DUGUIT, H. MONNIER & R. BONNARD, LES CONSTITUTIONS DE LA FRANCE DEPUIS 1789, at 2 (7th ed. 1952). The entire 1789 Declaration has current status as *droit constitutionnel* by incorporation in the Preamble to the 1958 Constitution. P. CAMPBELL & B. CHAPMAN, THE CONSTITUTION OF THE FIFTH REPUBLIC 11 (2d ed. 1959).
5. The phrase *Unschuldsvermutung* (innocence-presumption) may be found in the literature prior to the Second World War, e.g., J. VARGHA, DAS STRAFPROZESSRECHT 33-34 (1885) (deriving the maxim *in dubio pro reo* from a presumption of innocence); A. VON FEUERBACH, LEHRBUCH DES PEINLICHEN RECHTS 397 (11th ed. 1832) (reference to a *rechtliche Vermutung der Unschuld* (a legal presumption of innocence)). Generally, however, pre-war German scholars rejected the *Unschuldsvermutung* as a misuse of legal terminology. K. MOSER, IN DUBIO PRO REO 77. Since 1952, the presumption of innocence established by art. 6(2) of the European Convention on Human Rights has had the status of domestic law in the German Republic. Ratifying law of August 7, 1952, [1952] Bundesgesetzblatt [BGBl.] II 685, 953. See Schorn, Comment, 1963 DEUTSCHE RICHTER ZEITUNG 359; Woesner, *Die Menschenrechtskonvention in der deutschen Strafrechtspraxis*, 1961 NEUE JURISTISCHE WOCHENSCHRIFT 1381.
6. Specifically, the presumption exhorts triers of fact not to acknowledge the high probability that a man is guilty if he is so regarded by the police and prosecution. See Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 12 (1964); 9 J. WIGMORE, EVIDENCE 406-09 (3d ed. 1940). See generally J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE 551-76 (1898).
7. M. HALE, PLEAS OF THE CROWN 289 (1694).

rhetoric; Blackstone raised the ratio to ten to one,⁸ and others of libertarian sentiment have favored twenty to one.⁹ Like the presumption of innocence, these ratios express a commitment to the dignity of the individual. Expressed in many media, the message of that commitment remains the same: the interests of the individual ought not readily yield to the supposed benefits of applying criminal sanctions.

If the commitment of Western legal systems to the principle that only the guilty should suffer criminal sanctions is expressed in a medley of rules, rubrics and metaphors, it is nonetheless a commitment that "doth protest too much." For all the rhetoric and the ratios of freed criminals to convicted innocents, we, and especially we in the United States, do not live fully attuned to our commitment; we do not invariably require acquittal in cases of doubt on critical issues in the criminal process. "But we do demand proof beyond a reasonable doubt," the faithful will insist. And it is true that we do—in some cases. It is always the case, both here and abroad, that the prosecutor must prove beyond a reasonable doubt that the accused fired a homicidal bullet or that the accused set the match to a barn consumed in flames. On these issues, we are indeed faithful to the policy of certainty in imposing criminal sanctions; any other approach—say the demand that the suspected murderer prove that it wasn't he who fatefully pulled the trigger—would trouble the conscience of Frenchmen and Californians alike.

Despite this occasional solidarity of fair treatment, there is a range of issues on which courts, both here and abroad, depart from the policy of giving the accused the benefit of the doubt. If, for example, the defendant claims that he killed in self-defense, he may be convicted in many prominent common law jurisdictions despite the jury's reasonable doubts whether he did in fact act in self-defense; indeed, in those courts the defendant must go so far as to prove his claim of self-defense by a preponderance of the evidence.¹⁰ Further, if he claims that he acted

8. 4 BLACKSTONE, COMMENTARIES *358; cf. L. ROSENBERG, DIE BEWEISLAST 92 (5th ed. 1965) (also favoring ten to one).

9. FORTESCUE, DE LAUDIBUS LEGUM ANGLIAE ch. 27 (in capital cases). Frederick the Great is said to have invoked the same ratio. 1 LOEWE-ROSENBERG, DIE STRAFPROZESSORDNUNG 623 (1963). See generally G. WILLIAMS, PROOF OF GUILT 151-58 (2d ed. 1955).

10. Brock v. State, 237 Ark. 73, 371 S.W.2d 539 (1963); Quillen v. State, 49 Del. 114, 110 A.2d 445 (1955); Luttrell v. Commonwealth, 250 Ky. 334, 63 S.W.2d 292 (1933); Perry v. State, 234 Md. 48, 197 A.2d 133 (1964); State v. Grainger, 223 N.C. 716, 28 S.E.2d 228 (1943); Szalkai v. State, 96 Ohio 36, 117 N.E. 12 (1917); State v. Reid, 3 Ohio App. 2d 215, 210 N.E.2d 142 (1965); Commonwealth v. Wilkes, 414 Pa. 246, 199 A.2d 411 (1964); State v. Morrison, 121 S.C. 11, 113 S.E. 304 (1922), criticized, 21 MICH. L. REV. 203 (1922); State v. Mellow, 107 A. 871 (R.I. 1919), noted in 33 HARV. L. REV. 609 (1920); Thomas v. State, 210 Tenn. 297, 358 S.W.2d 315 (1962); cf. Pompe, *La preuve en procédure pénale*, 1961 REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARÉ 269, 282-83 (Dutch author expressly favoring a rule requiring the defendant to bear the burden of persuasion on self-

Two Kinds of Legal Rules

under duress¹¹ or while intoxicated¹² or while suffering from insane delusions,¹³ he is called upon in many common law and civilian courts to persuade the judge or jury of his claim. In these and in several other instances, ubiquitous in the United States and in Western Europe, the defendant is not protected by our traditional, deep concern for shielding the innocent from criminal sanctions.

Thus there are two categories of issues. There are some that the prosecutor here and abroad must prove beyond a reasonable doubt, and others that are treated differently from court to court. The first category is typified by the fact of death in a homicide prosecution; and the second by the issues of self-defense and insanity. Though we can illustrate the two categories with examples, there seems to be no basis for distinguishing the two in principle. It is not that the prosecutor must only prove affirmative issues; for example, he uniformly bears the risk of residual doubt on the charge that the defendant failed to perform a duty to render aid to another.¹⁴ Historically, certain issues have become closely associated with the prosecutor's case, and these he must prove beyond a reasonable doubt. The core of the prosecutor's case consists of well-defined categories: (1) the occurrence of the social harm, *e.g.*, death, loss of property, the fact of loitering; (2) the defendant's

defense). *Accord*, 1 P. BOUZAT & J. PINATEL, *TRAITÉ DE DROIT PÉNAL ET DE CRIMINOLOGIE* 275 (1963); 2 *id.* 914 n.4; 2 G. STEFANI & G. LEVASSEUR, *DROIT PÉNAL GÉNÉRAL ET PROCÉDURE PÉNALE* 22 (2d ed. 1964).

11. The leading (and virtually only) common law case is *State v. Sappienza*, 84 Ohio 63, 95 N.E. 381 (1911); *Accord*, Judgment of December 29, 1949, [1950] *Semaine Juridique* [Sem. Jur.] II, No. 5614 (Cour de Cassation Criminelle [Cass. crim.], Fr.). *See also* OHIO JUDICIAL CONFERENCE, OHIO JURY INSTRUCTIONS § 9.60; N.Y. PENAL LAW §§ 25.00(2), 35.35 (McKinney 1967); 9 J. WIGMORE, *EVIDENCE* 417 n.4 (3d ed. 1940).

12. *E.g.*, *State v. Linzmeyer*, 248 Iowa 31, 79 N.W.2d 206 (1956); *State v. Quigley*, 135 Maine 435, 199 A. 269 (1938); *State v. Kelly*, 216 N.C. 627, 6 S.E.2d 533 (1940); *Commonwealth v. Chapman*, 359 Pa. 164, 58 A.2d 433 (1948).

13. For a survey of U.S. jurisdictions that is still current, see H. WEIFHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 212-72 (1954). The French courts are equivocal on the issue. 2 P. BOUZAT & J. PINATEL, *supra* note 10, at 914 n.4 (1963); *cf.* 2 G. STEFANI & G. LEVASSEUR, *supra* note 10, at 22.

14. Lord Halifax's Case, reported without date in F. BULLER, *INTRODUCTION TO LAW AT NISI PRIUS* 298 (1st ed. 1772) (defendant charged with having failed to deliver up the rolls of the auditor of the Exchequer; the court imposed the burden of persuasion on the prosecution with the rationale "a person should be presumed to execute his office until the contrary appears"); *cf.* *R. v. Hawkins*, 10 East 211, 103 Eng. Rep. 755 (K.B. 1808). Both Continental and common law scholars reject the relevance of the positive/negative distinction in allocating the burden of persuasion. Reinicke, Comment, 1949 *NEUE JURISTISCHE WOCHENSCHRIFT* 556; Geyer, *Der Beweis im Strafprozess*, at 211, in 1 F. VON HOLTZENDORFF, *HANDBUCH DES DEUTSCHEN STRAFPROZESSES* (2d ed. 1879); Patarin, *supra* note 3, at 23; MODEL PENAL CODE § 1.13, Comment at 110 (Tent. Draft No. 4, 1955); G. WILLIAMS, *CRIMINAL LAW* 876 (2d ed. 1961). Nonconsent is a negative factor that the prosecution must often prove. *See, e.g.*, BAR ASS'N OF THE DISTRICT OF COLUMBIA, JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, Instruction no. 111 (1956) (prosecution must prove that the use of another's automobile was not authorized by the owner); *cf.* the absence of necessity in abortion prosecutions, note 17 *infra*.

causal responsibility for the harm;¹⁵ and, under the present state of the law here and abroad, (3) the fact of the defendant's intent to inflict the social harm (or his negligent or reckless disregard of the risk of that harm).¹⁶ But beyond these crystallizations in the patterns of European and American courts, one has little guidance in determining whether an issue is one for the prosecution or one for the defense. Consider the issue of necessity to save the mother's life in an abortion prosecution.¹⁷ Or the issue that faced the court in *Morrison v. California*:¹⁸ the fact of citizenship in a prosecution for conspiracy to put an alien in possession of agricultural land. How does one determine whether these issues adhere to the prosecutor's or to the defendant's case, whether one side or the other should bear the risk of residual doubt on the facts? Can one devise a principle for determining the cluster of issues to be cast to the defendant's charge? It is yet to be done.

One guide to this cluster of issues is the common law concept of the "defense." The term itself is pregnant with responsibility for the defense. Surprisingly, it finds no counterpart in French and German terminology for classifying substantive criminal issues. It is in this area that common law and civilian jurisdictions express their individuality

15. A possible exception is the common law defense of alibi; that the issue is termed a "defense" is enough to make some courts say that the defendant bears the burden of proof on the issue. *E.g.*, *Porter v. State*, 200 Ga. 246, 36 S.E.2d 794 (1946); other courts refer to the defendant's burden of proof, yet the context makes it clear that the reference is to the burden of going forward. *Commonwealth v. Bonomo*, 396 Pa. 222, 151 A.2d 441 (1959); *State v. Withrow*, 142 W.Va. 522, 96 S.E.2d 913, 921 (1957); *cf.* *Halko v. State*, 54 Del. 180, 175 A.2d 42 (1961) (reversing for instruction that defendant had to prove alibi to "satisfaction" of jury).

16. *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462; 1 UNDERHILL, CRIMINAL EVIDENCE §§ 51, 54 (5th ed. P. Herrick 1956); *Patarin*, *supra* note 3, at 25; *Geyer*, *supra* note 14, at 212; 2 H. ZACHARIAE, HANDBUCH DES DEUTSCHEN STRAFPROZESSES 416 (1868). Requiring the accused to prevail on the issue of his intent to use burglary tools in his possession raises constitutional problems in Germany and in the United States. *Compare* *United States v. Benton*, 232 F.2d 341 (D.C. Cir. 1956) (declaring unconstitutional a provision requiring defendant "satisfactorily to account for the possession" of an implement that "reasonably may be employed in the commission of any crime") with Judgment of October 3, 1958, 1959 NEUE JURISTISCHE WOCHENSCHRIFT 1932 (Landgericht, Heidelberg) (declaring inapplicable StGB § 245a requiring persons convicted of certain offenses to prove that burglary tools found in their possession were not being held for criminal purposes). If the accused must prove the reasonableness of a mistake of fact as a defense, *e.g.*, *People v. Vogel*, 46 Cal. 2d 798, 299 P.2d 850 (1956), he in effect bears the burden of persuasion on the issue of negligence. *See* N. MORRIS & C. HOWARD, STUDIES IN CRIMINAL LAW 221-22 (1964).

17. Allocating the burden of persuasion on this issue has evoked considerable litigation. The courts generally hold that the state must disprove necessity beyond a reasonable doubt. *E.g.*, *Williams v. United States*, 138 F.2d 81 (D.C. Cir. 1943); *State v. Bates*, 52 Wash. 2d 207, 324 P.2d 810 (1958). *But cf.* *State v. Lee*, 69 Conn. 186, 37 A. 75 (1897) (upholding a conviction on an instruction that necessity was "a matter of defense, which the accused may establish if such be the fact").

18. 291 U.S. 82 (1934). This is one case holding the imposition of the burden of persuasion on the accused to be a violation of due process. *Cf.* *Leland v. Oregon*, 343 U.S. 790 (1952) (upholding the constitutionality of a statute requiring defendant to prove insanity beyond a reasonable doubt).

by casting some but not other issues to the defendant's charge. Each defense yields a different constellation of jurisdictions concurring that the defendant bears the burden of persuasion on that particular defense. On some defenses, such as self-defense, there is a division of authority in the common law world, and a corresponding taking of sides by French and German jurists.¹⁹ On one significant matter, namely on the claim of authorization to engage in regulated economic activity, the common law courts uniformly impose the burden of persuasion on the defendant.²⁰ Also, uniformly, at the opposite pole, Continental courts assign matters of authorization and license to the prosecution's charge.²¹ And there are other permutations. Until 1963, the German courts, out of step with common law and French courts, expected defendants to prove that the prosecution was barred by the statute of limitations.²² And today in Germany, but not in France, the accused must prove that his alleged offense is encompassed by a legislative declaration of amnesty.²³ Against this backdrop of inconsistencies, one

19. Compare cases and authorities cited note 10 *supra*, with MODEL PENAL CODE §§ 1.12(1), 1.13(9)(c) (Proposed Official Draft 1962) (burden on prosecution to disprove claims of excuse or justification beyond a reasonable doubt); Frank v. United States, 42 F.2d 623 (9th Cir. 1930) (burden on prosecution to disprove self-defense beyond a reasonable doubt); R. v. Lobell, [1957] 2 W.L.R. 524, 1 All E.R. 734 (same); W. STREE, *supra* note 3, at 19-21 and cases cited note 27 *infra*.

20. See p. 909 and notes 93-97 *infra*.

21. Though there are numerous provisions regulating the practice of the professions and use of titles, e.g., France: Statute on Physicians and Dentists, Decree of October 5, 1953 §§ 375-380, [1953] Journal Officiel de la République Française 8867, CODE PÉNAL (appendix) at 499-500 (64th ed. Dalloz 1966-67); Germany: Strafgesetzbuch [StGB] §§ 132 & 132a; the commentators do not regard the proof of license or authorization as a question different from the proof of other elements of the prosecution's case. The German commentators assume that the prosecution must prove that the accused knowingly acted without permission. SCHÖENKE-SCHRÖDER, STRAFGESETZBUCH § 132, at 725-26, comments 11 & 12 (13th ed. 1967); H. WELZEL, DAS DEUTSCHE STRAFRECHT 462 (9th ed. 1965).

22. The French prosecutor must establish *l'élément légal*, which includes the punishability of the offense under the statute of limitations. Judgment of December 16, 1964, [1965] Sem. Jur. II, No. 14086 (Cass. crim., Fr.); 2 G. VIDAL & J. MAGNOL, COURS DE DROIT CRIMINEL ET DE SCIENCE PÉNITENTIAIRE 1022 (9th ed. 1949). The concept of *l'élément légal* has no counterpart in German doctrine. Until the Judgment of February 19, 1963, 18 Entscheidungen des Bundesgerichtshofs in Strafsachen [BGHSt.] 274, the accused in a German court bore the burden of persuasion on the running of the statute of limitations. For a critique of the old law, see W. STREE, *supra* note 3, at 64-66. Cf. the resolution of the same question in common law courts, note 93 *infra*.

23. Proving the *l'élément légal* (note 22 *supra*) includes proving the nonapplicability of amnesty provisions. 2 G. STEFANI & G. LEVASSEUR, PROCÉDURE PÉNALE 22 (1966); Patarin, *supra* note 3, at 29-30 (accord without reference to *l'élément légal*). German courts require the accused to prove that his offense occurred during the period encompassed by an amnesty statute. Judgment of April 22, 1921, 56 Entscheidungen des Reichsgerichts in Strafsachen [RGSt.] 49 (this is the leading case; the rationale was that an amnesty provision is an extraordinary intervention in the processes of the criminal law). The rule of the case is endorsed in Schwartz, *Das Grundgesetz in der strafrechtlichen Praxis*, 1950 NEUE JURISTISCHE WOCHENSCHRIFT 124, 125, and criticized in W. STREE, *supra* note 3, at 68-73 (1962).

Issues under amnesty statutes pertaining to the accused's blameworthiness are subject to the rule *in dubio pro reo*. Judgment of July 6, 1954, [1954] JURISTISCHE RUNDSCHAU 351

could hardly argue that a single, compelling consideration explains the departures from the policy praised in the presumption of innocence.

II. Two Kinds of Legal Rules: The Thesis Stated

The jurisdictions under study range from those like Pennsylvania which impose on the defendant the burden of persuasion on all the common law defenses,²⁴ to those like the German Federal Republic which almost uniformly apply the principle of acquitting in cases of doubt.²⁵ The swing from one end of the spectrum to the other yields a medley of divergent positions and local idiosyncracies. To put this contemporary jumble in context, we should cast a glance back a hundred years or so to a period when a more uniform pattern marked the Western legal systems. In 19th century French, German and common law courts, the pattern—with few exceptions—was uniformly to impose the burden of persuasion on men relying on the matters that common lawyers call defenses to crime. On a number of issues, and particularly on self-defense and insanity, the 19th century Western courts demanded proof from the accused by a preponderance of the evidence.²⁶ The greater diversity today is an expression of movement toward greater protection of the innocent defendant. The movement has proceeded at varying rates, and each jurisdiction has moved inde-

(Bundesgerichtshof, Ger.); Judgment of November 29, 1957, 1958 NEUE JURISTISCHE WOCHENSCHRIFT 392 (Bundesgerichtshof, Ger.).

24. Commonwealth v. Wilkes, 414 Pa. 246, 199 A.2d 411 (1964) (self-defense); Commonwealth v. Updegrove, 413 Pa. 599, 198 A.2d 534 (1964) (insanity); Commonwealth v. Iacobino, 319 Pa. 65, 178 A. 823 (1935) (intoxication); Commonwealth v. Bitzer, 163 Pa. Super. 386, 62 A.2d 108 (Super. Ct. 1948) (license to render service as a public utility).

25. The general rule is widely acknowledged. See, e.g., 1 E. SCHMIDT, *supra* note 3, at 206-07; W. STREE, *supra* note 3, at 19-22. Exceptions include: (1) amnesty provisions, note 23 *supra*; (2) the claims of immunity by physicians who participated in Hitler's euthanasia program, see p. 926 *infra*; (3) StGB § 186 (defense of truth in prosecution for libel), Judgment of February 12, 1958, 11 BGHSt. 273, 274; (4) StGB § 182 (defense of the female's unchastity in prosecution for statutory rape), Judgment of April 24, 1951, 1951 NEUE JURISTISCHE WOCHENSCHRIFT 530 (Bundesgerichtshof, Ger.). It is widely thought that in prosecutions for receiving stolen property under StGB § 259, the statutory language requires the accused to prove that he did not know that property was stolen. *But cf.* Bockelman, *Der Nachweis des Hehlervorsatzes*, 1954 NEUE JURISTISCHE WOCHENSCHRIFT 1745.

26. E. BONNIER, TRAITÉ DES PREUVES 22 (5th ed. 1888); A. VON FEUERBACH, *supra* note 5, § 86, at 66 & § 90 (insanity), § 568, at 372 (self-defense); F. OPPENHOFF, STRAFGESTZBUCH FÜR DAS DEUTSCHE REICH § 51, at 140, Comment 9 (12th ed. 1891); F. WHARTON, CRIMINAL EVIDENCE 252-69 (9th ed. 1884); H. KELLEY, CRIMINAL LAW AND PRACTICE 131 (1876); S. RAJALJE, CRIMINAL PROCEDURE 344 (1889); see cases cited notes 60 & 92 *infra*. Some nineteenth century German writers and American judges perceived a distinction between self-defense and insanity; the latter, they said, was inconsistent with the defendant's criminal intent; thus one could expect the prosecution to establish the defendant's sanity beyond a reasonable doubt. J. GLASER, LEHRE VOM BEWEIS 90-93 (1883); 2 H. ZACHARIAE, *supra* note 16, at 416-17; Hopps v. People, 31 Ill. 385 (1863); People v. Garbutt, 17 Mich. 9 (1868); State v. Bartlett, 43 N.H. 224 (1861).

pendently. Among the principal Western European jurisdictions, the German courts of the late 19th century were the first to take steps toward overruling the rules and doctrines requiring defendants to produce preponderating evidence on self-defense and insanity.²⁷ Several decades later, the English courts began to overhaul the common law rule, dating back to fecund remarks by Blackstone and Foster, that the defendant must prove matters asserted in mitigation or justification of the crime charged.²⁸ And for the last two decades, French scholars have been locked in a doctrinal dispute that may lead to a more pervasive application of the principle *in dubio pro reo* in litigating criminal defenses.²⁹ On this side of the Atlantic, the movement toward protection of the innocent defendant has been sporadic with many state courts indifferent to trends in neighboring states. Some state courts, in their initial confrontation with the issue in the late 19th century, adopted burden-of-proof rules favorable to defendants relying on the claims of self-defense and insanity.³⁰ Others have since overruled earlier decisions to promote the same policy;³¹ but others—a significant number in all—still require the defendant to prove claims of self-defense and insanity by a preponderance of the evidence.³² Yet despite such diffident American states, the general trend in the Western world is one away from adjudicating criminal status on doubt-ridden findings of fact. The course of Western legal culture is not toward *sub rosa* nullification of the values praised in the presumption of innocence, but toward securing these values in practice.

That Western legal systems have evolved in unwitting harmony poses a challenge for the legal analyst. How does one explain a trend that cuts across national legal systems? Is it that the judges of the Continent and of the common law courts are becoming more solicitous of the defense's position in criminal cases? Or is it that some more fundamental change

27. Judgment of October 23, 1890, 21 RGSt. 131 (insanity); Judgment of November 13, 1885, 7 Rechtsprechung des Deutschen Reichsgerichts in Strafsachen 664 (self-defense).

28. *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462 (prosecution must prove beyond a reasonable doubt that the alleged killing was not accidental). On Blackstone and Foster, see p. 902 *infra*.

29. Arguing in favor of defensive burdens of persuasion are 2 G. STEFANI & G. LEVASSEUR, *supra* note 10, at 21-23; A. VITU, *PROCÉDURE PÉNALE* 185 (1957); H. DONNEDIEU DE VABRES, *TRAITÉ DE DROIT CRIMINEL ET DE LÉGISLATION PÉNALE COMPARÉE* 714 (3d ed. 1947). Those against are Patarin, *supra* note 3; 2 G. VIDAL & J. MAGNOL, *supra* note 22, at 1035.

30. *E.g.*, *State v. McCluer*, 5 Nev. 132 (1869); *Territory v. Lucero*, 8 N.M. 543, 46 Pac. 18 (1896).

31. *E.g.*, *People v. Bushton*, 80 Cal. 160, 22 P.2d 127 (1889), *overruling* *People v. Milgate*, 5 Cal. 127 (1855); *State v. Malone*, 327 Mo. 1217, 39 S.W.2d 786 (1931), *overruling* *State v. Roberts*, 294 Mo. 284, 242 S.W. 669 (1922); *State v. Wilcox*, 48 S.D. 289, 204 N.W. 369 (1925), *overruling* *State v. Yokum*, 11 S.D. 544, 79 N.W. 835 (1899).

32. See notes 10 and 13 *supra*.

of legal policy has wrought repercussions on the burden of persuasion in criminal cases? One might explicate a legal trend either by relating it to underlying social attitudes or by relating it to a more pervasive trend of the law. In this article, we shall follow the latter approach; we shall consider the trend toward the protection of innocent defendants as an expression of a fundamental reorientation of the criminal process.

In the course of a century, the orientation of the criminal process has shifted from the model set by private litigation to a model focusing on the justification for invoking criminal sanctions. In the mid-19th century, courts here and abroad viewed the problem of imperfect fact-finding in criminal trials precisely as they regarded the same problem in private legal disputes. Since that time the courts of the Western world have come to appreciate the uniqueness of the fact-finding process in criminal cases. The problem in criminal trials is not one of efficiently arriving at a fair settlement of a dispute, but of determining whether the state may justly condemn a man and deprive him of his liberty. The problem, in short, is to justify the use of the state's coercive powers. Concern for justifying the use of criminal sanctions is increasing; and that increasing concern explains the progressively more favorable position of defendants on the risk of residual doubt at trial.

A specific theory of justification has emerged from the burden-of-persuasion decisions of the last 100 years. That theory is that the state may justly punish only those individuals whose violation of the law is morally blameworthy. The focus of the principle is not on retribution as an aim of punishment, but rather on the justification for subjecting some individuals and not others to the sanctions and stigma of the criminal law. The distinction is essential, since many commentators tend to assume that the justification for punishment in general—that is, the legitimate purpose of imposing criminal sanctions³³—is the same as the justification for punishing any particular individual. On this assumption, penal confinement in a particular case would be justified by a showing that it serves the aims of rehabilitation, deterrence, or

33. Debate rages on the goals of the criminal process. See H. Hart, *The Aims of the Criminal Law*, 23 *LAW & CONTEMP. PROB.* 401 (1958); P. BRETT, *AN INQUIRY INTO CRIMINAL GUILT* 51-59 (1963); *FREEDOM AND RESPONSIBILITY* 500-27 (H. Morris ed. 1961). Properly construed, this is a debate about the goals of the sentencing process, not about the standards for determining who may be justly deprived of his liberty. The rehabilitative ideal, in particular, should be regarded neither as a justification for depriving a man of his liberty nor as a justification for extending the period of his confinement. F. ALLEN, *THE BORDERLAND OF CRIMINAL JUSTICE* 7 (1964); Morris, *Impediments to Penal Reform*, 33 *U. CHI. L. REV.* 627, 638-44 (1966). On the conflict between rehabilitation and other goals of the sentencing process, see Michael & Wechsler, *A Rationale of the Law of Homicide: II*, 37 *COLUM. L. REV.* 1261, 1318-25 (1937).

retribution. This assumption has been rejected by contemporary legal philosophers, who focus on the problem of justice in determining the distribution as well as the goals of criminal sanctions.³⁴ And far in advance of philosophic thought, the assumption was abandoned by the German courts and some common law courts when they turned to blameworthiness as the central inquiry in controversies concerning the prosecutor's duties of persuasion.

Judicial and scholarly concern for moral blameworthiness as a necessary condition for criminal sanctions is expressed in a number of ways. Nothing turns on the word "blameworthiness." One could as well speak of moral fault, culpability, moral guilt, personal guilt, or, simply, guilt. The word "guilt" is more frequently used by the courts; the words "blameworthiness" and "culpability" are used here to avoid an ambiguity in the word "guilt" that will become apparent later. All these words express the same concern, namely whether the defendant's violation of a proscription of the criminal law renders him properly subject to moral censure.³⁵ The relevance of that inquiry is obvious if the

34. Two caveats on blameworthiness:

A) To refer to blameworthiness as a necessary condition of liability is not to say the purpose or a purpose of the sentencing process is retribution. Unhappily, many authors regard a concern for blameworthiness in setting standards for liability as indicative of a retributive philosophy of punishment. H. SILVING, *THE CONSTITUENT ELEMENTS OF CRIME* 12 (1967); Dubin, *Mens Rea Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility*, 18 *STAN. L. REV.* 322, 337-39 (1966). Obviously, one can hold the view that blameworthiness is a necessary condition for individual susceptibility to penal confinement without thereby becoming committed to the view that punishment is self-justifying, *i.e.*, that penal confinement is just regardless of its social utility. See Rawls, *Two Concepts of Rules*, 64 *PHIL. REV.* 3 (1955).

B) One must distinguish between (1) the blameworthiness of doing a morally bad act, and (2) the blameworthiness of acting contrary to law. There is obviously a category of offenses, like traffic and possessory offenses, in which the act need not be morally bad, *e.g.*, one might possess a counterfeit die in violation of 18 U.S.C. § 488, without intending to use it for fraudulent purposes. Though the act would be morally neutral, the actor would be blameworthy if he knowingly violated the legal prohibition, or if he was culpably ignorant of the prohibition. This might not be true if the law is an unjust law. H. L. A. Hart has challenged the view that moral culpability is a fundamental requirement of criminal liability. Hart, *Legal Responsibility and Excuses*, in *DETERMINISM AND FREEDOM IN THE AGE OF MODERN SCIENCE* 101-05 (S. Hook ed. 1958). But Hart's challenge is directed solely to Jerome Hall's claim, J. HALL, *PRINCIPLES OF CRIMINAL LAW* 166-67 (1947), that blameworthiness in the first sense—committing an act that is morally wrong—is a fundamental requirement of criminal liability.

35. While courts speak of blameworthiness, scholars speak of dangerousness as the rationale for selecting some men and not others for the criminal process. See, *e.g.*, Michael & Wechsler, *A Rationale of the Law of Homicide: I*, 37 *COLUM. L. REV.* 701, 757-61 (1937). The two standards are not so far apart as they seem; the same criteria—an intentional violation, negligent disregard of the risk of harm—yield both judgments. Yet dangerousness cannot account for insanity, intoxication, and necessity as defenses to criminal conduct. In these cases, the actor is not blameworthy, but he might be dangerous, *e.g.*, a man who steals a loaf of bread to feed his starving family would steal again if his family should continue to starve. Michael and Wechsler could account for these defenses by saying that it is impossible to deter insane, intoxicated, and necessitated behavior. *Id.* 733-57. On the difficulties of this argument see note 36 *infra*.

purpose of punishment is retribution; it is less obvious, but equally relevant if, with Bentham, one takes the view that the purpose of punishment should be the general deterrence of criminal conduct. Men may not be sacrificed arbitrarily for the social good; there must be some reasons for selecting some and not others. It is the practice today to single out only those men who have violated the law and done so culpably; the best apparent reason for so fashioning a deterrent system of criminal sanctions is that this core of men—those who have violated the law and done so culpably—have the least standing to object to being imprisoned for the sake of the common good. If anyone should be subjected to the criminal process, it should be they.⁸⁶ Any extension of the criminal law beyond this core of blameworthy men poses problems of discriminatory treatment. To treat two men alike, one who has caused harm culpably and the other who has done so without culpability, is to ignore a morally significant distinction between them. Thus, from the point of view of general deterrence as the aim of the criminal law, the postulate that only the blameworthy should suffer under the criminal law becomes a standard for fairly and equally distributing the burdens of criminal sanctions.

The concern for justifying the use of criminal sanctions, then, explains the progressively more favorable position of criminal defendants with respect to the burden of persuasion. This is a significant claim for several reasons. First, it provides an account of the trend of Continental and Anglo-American case law on the burden of persuasion that transcends the procedural and institutional differences between

36. The faith dies hard that the purpose of general deterrence can account for the excusing conditions now recognized in the criminal law. Michael & Wechsler, *supra* note 35, at 736 (self-defense); Katz & Goldstein, *Abolish the "Insanity Defense"—Why Not?*, 72 YALE L.J. 853, 856-57 (1963) (self-defense). The implicit premise of this view is that the purpose of deterrence entails the impropriety of punishing those whose behavior is non-deterable. The argument was made by Bentham. J. BENTHAM, *PRINCIPLES OF MORALS AND LEGISLATION* 173 (1907). H. L. A. Hart has called this alleged entailment a "spectacular non-sequitur." H. L. A. Hart, *Prolegomenon to the Principles of Punishment*, 60 PROC. ARISTOTELEAN SOC. 1, 18 (n.s. 1959). The fallacy lies in assuming that punishment of someone who acted in self-defense would not be effective in deterring homicide in general.

H. L. A. Hart's major contribution to the theory of punishment is his distinction between the general justifying aim of sanctions and the principle of distribution of sanctions. *Id.* 8-12. Hart, however, shuns blameworthiness as a rationale for the distribution of penal confinement, *i.e.*, for determining who may be justly deprived of his liberty. Cf. his dispute with Jerome Hall, discussed in note 34 *supra*. Hart focuses on the maxim that the state may justly punish only those who have voluntarily violated the law. *Id.* 20-23. This maxim, and the argument he offers on its behalf, raise new questions on the justice of punishing negligent conduct. Wasserstrom, *H. L. A. Hart and the Doctrines of "Mens Rea" and Criminal Responsibility*, 35 U. CHI. L. REV. 92, 102-04 (1967). Hart assumes, improperly, that one can determine whether duress or insanity renders conduct involuntary without asking the more basic question whether the actor is to blame for his conduct. At least one distinguished writer fails to acknowledge the issue of justice in determining which men should suffer a loss of liberty in the interests of social control. B. WOOTTON, *CRIME AND THE CRIMINAL LAW* 32-57 (1963).

Two Kinds of Legal Rules

the two systems.³⁷ And secondly, it provides a perspective for assessing the widespread view that moral fault is a factor of declining moment in the evolution of Anglo-American criminal law. The view that moral fault is of declining relevance in the criminal law trades heavily on the role of strict liability offenses in common law jurisdictions.³⁸ True, public welfare violations, entailing monetary sanctions, may be with us to stay.³⁹ And the courts have sentenced men to be jailed, without a finding of fault, for committing the crimes of bigamy, statutory rape and selling opium.⁴⁰ But that is not enough to show that a general decline of moral culpability as a necessary condition for punishment has accompanied the rise of general deterrence and fall of retribution as

37. Continental writers explain the common law practice of defensive burdens of persuasion as an expression of the adversary system. A. GEYER, *LEHRBUCH DES STRAFFPROZESSRECHTS* 710-11 (1880); G. VIDAL & J. MAGNOL, *supra* note 22, at 1035 n.2. There is no correlation, however, between the type of trial—inquisitorial or adversarial—and the presence or absence of defensive burdens. The Prussian Criminal Ordinance of 1805 had several provisions imposing the burden of persuasion on the accused, yet it regulated an inquisitorial system. See pp. 899-900 & notes 58-59 *infra*; Küssner, *Über Beweislast und Präsumtionen im Preussischen Strafverfahren*, 3 *GOLTDAMMER'S ARCHIV FÜR PREUSSISCHES STRAFRECHT* 32-34 (1855). Also, the difference between French and German development on the burden of persuasion does not seem to be traceable to differences in the trial roles of the judge, the prosecutor, and defense counsel. See generally Pugh, *Administration of Criminal Justice in France: An Introductory Analysis*, 23 *LA. L. REV.* 1, 21-23 (1962); Jescheck, *Germany*, in *THE ACCUSED: A COMPARATIVE STUDY* 246-47 (J. Coultas ed. 1966).

38. Cf. W. FRIEDMAN, *LAW IN A CHANGING SOCIETY* 167-71 (1964); Sayre, *Public Welfare Offenses*, 33 *COLUM. L. REV.* 55, 67-70 (1933). Writers opposed to strict liability offenses frequently rest their case on the inefficacy rather than the injustice of punishing the blameless offender. MODEL PENAL CODE § 2.05, Comment (Tent. Draft No. 4, 1955) ("In the absence of minimal culpability, the law has neither a deterrent nor corrective nor an incapacitative function to perform."). Packer, *Mens Rea and the Supreme Court*, 1962 *SUPREME COURT REV.* 107, 109 ("[Punishment] is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, . . ."). However fallacious these arguments might be, see note 36 *supra*, they do serve to suppress value judgments on the injustice of punishing blameless men and thus they appeal to men who regard questions of utility as more objective than questions of morality.

39. The term stems from Sayre, *supra* note 38, who distinguishes between public welfare and traditional offenses primarily on the ground that the former entailed penalties less severe than imprisonment. *Id.* 72. The Model Penal Code distinguishes between crimes and violations; strict liability standards apply only in the latter category, where the maximum penalty is a fine. MODEL PENAL CODE § 2.05 (Proposed Official Draft 1962). Some writers have criticized strict liability standards even as a basis for imposing fines. J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 342-51 (2d ed. 1960); G. WILLIAMS, *CRIMINAL LAW* § 89 (2d ed. 1961). Strict liability offenses may be regarded as offenses in which the legislature has determined that the occurrence of the proscribed event is conclusive on the issue of blameworthiness. See Wasserstrom, *Strict Liability in the Criminal Law*, 12 *STAN. L. REV.* 731, 743 (1960). The problem, of course, is whether the legislature can constitutionally so intrude on the fact-finding function of the judiciary. See generally Comment, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 *YALE L.J.* 330 (1962).

40. *E.g.*, *United States v. Balint*, 258 U.S. 250 (1922) (indictment need not allege, and state need not prove knowledge that item sold was opium); *State v. Goonan*, 89 N.H. 528, 3 A.2d 105 (1938) (bigamy); *State v. Duncan*, 82 Mont. 170, 266 P. 400 (1923) (statutory rape). For additional cases on these and other offenses, see MODEL PENAL CODE § 2.05, Comment, at 141-45 (Tent. Draft No. 4, 1955); Sayre, *supra* note 38, at 84-88.

the moving force of the criminal law. Viewed in broad perspective, the use of strict liability standards in serious offenses may appear as but a passing aberration of the criminal law. As a contribution to a broader perspective on trends in the common law, we shall consider the role of moral culpability in allocating the burden of persuasion over the last hundred years. The ascendancy of moral guilt as a central factor in these decisions at least casts doubt on the view that moral considerations are on the wane in administering the criminal law.

The appropriate vehicle for studying the reorientation of the criminal process is the form of legal rule generated by the two competing models of the process. Each of these models—that patterned after private litigation and that focusing on the justification for using sanctions—has cast the rules of criminal liability into a characteristic form.

Oriented as they were toward private litigation, courts in the 19th century regarded rules of criminal liability as functional analogues to rules for settling private disputes. Characteristically, rules of private law are incomplete statements of the relevant substantive issues. They are rules that admit of exceptions. For example, one acquires a private legal duty to perform services if one has agreed for a fee to do so. The rule is well formed—it provides a theory of recovery—even though it fails to suggest the impact of impossibility of performance in determining the promisor's liability. Impossibility is a defense, an exception to the rule of liability. Similarly it is a well-formed rule of private law that a man is liable for harm that he negligently and proximately causes. This rule too admits of exceptions; if the plaintiff is contributorily negligent or if he assumed the risk, the rule is inapplicable.

In contrast, the emergent rules of criminal liability are rules that do not admit of exceptions. Unlike rules of private law, they encompass all relevant substantive issues; their function is to enumerate the necessary and sufficient substantive conditions for the justified use of criminal sanctions. When applied at trial, they generate only one question: are the conditions of criminal guilt satisfied? Defensive issues, like self-defense and insanity, are raised not as exceptions, but as denials of liability under the rule. These characteristics of the emergent rules of criminal liability suggest the term "comprehensive rules" to distinguish them from the incompletely stated rules customarily used in private litigation.

The difference between rules subject to exceptions and comprehensive rules is reflected in the structures they impose on the issues relevant to criminal liability. If rules of liability must be supplemented by exceptions, the concept of liability they express is unavoidably dualistic: some issues comprise the rules and other issues constitute

exceptions. Comprehensive rules, on the other hand, impose a unified structure on the issues related to the blameworthiness of the defendant's conduct. The virtue of this unified structure is that all substantive issues thus encompassed, be they affirmative or negative in form, be they inculpatory or exculpatory in effect, play the same functional role in determining the defendant's liability for crime. This functional parity derives from the one factor unifying the issues so structured: they all relate to the defendant's moral guilt in acting contrary to law.

Comprehensive rules of liability emerged in their most systematic form as a by-product of advances in German criminal theory in the late 19th century. Their crystallization was a consequence of scholarly concern for the structuring and categorization of the issues pertaining to criminal liability. As a parallel development to their emergence, the German criminal courts extended the principle of *in dubio pro reo* to all substantive issues bearing on criminal guilt. Thus, a full account of comprehensive rules and their bearing on the patterns of the case law must await our examination of these German developments at the turn of the century.

The parallel movement toward comprehensive rules of liability and toward acquitting criminal defendants in cases of doubt as to any substantive issue is less compelling as one turns to French and common law practices; for in these jurisdictions, the courts generally still require the defendant to prove one or more of the common defenses, *e.g.*, self-defense, insanity, license. Without a total shift in practice, one can hardly say the courts have adopted a new vision of rules of criminal liability. The most we can claim is that the pattern of French and common law decisions has moved toward the unified structure achieved by the German courts.

But this is getting ahead of the story. To provide an historical context for a study of comprehensive rules of liability, we need initially to document the pattern dominant in the 19th century and before, namely the pattern of assimilating burden-of-proof disputes in criminal cases to the model set by private litigation. We may then turn to the radical change in German practice at the close of the 19th century. To round out the comparative study, we shall consider the nascent patterns of change in French, English, and American courts. Finally, we shall consider some of the difficulties of applying comprehensive rules and, at the conclusion of our investigation, we shall explore in greater detail the philosophy underlying the view of the criminal law as a system of comprehensive rules expressing the necessary and sufficient conditions for justifying the use of criminal sanctions.

III. The Private Law Style

In the mid-19th century, in common law as well as in Continental courts, defendants almost uniformly bore the burden of persuasion on the array of issues common lawyers called defenses. Criminal defendants were subjected to a greater risk of conviction on issues such as self-defense and duress than on the supposedly more central questions of criminal liability such as the fact that the crime was committed. Common law courts persisted in this practice even though they had come to speak both of a presumption of innocence and of the especially stringent burden of persuasion borne by the prosecution in criminal cases; proof beyond a reasonable doubt was the emerging standard—but only on the issues of the prosecution's case. That the judges could stiffen the burden of persuasion on some issues but not on others was a consequence of their view of rules of criminal liability as indistinguishable from rules governing private disputes.

To document and evaluate the impact of the private-law style of thinking in the criminal process, we shall turn first to an examination of judicial practices on the burden of persuasion in private cases. After delineating the style and function of rule formulation and burden-of-persuasion allocations in adjudicating private disputes, we shall be in a position to analyze and to assess the influence of private law modes of thinking on the allocation of the burden of persuasion in criminal cases.

A. *Allocating the Burden of Persuasion in Private Legal Disputes*

By allocating the burden of persuasion in private cases, courts generate a set of stop-gap rules for adjudicating imperfectly clarified disputes. These stop-gap rules measurably modify the substantive rules of the dispute. If the defendant must prove contributory negligence, he loses much of the tactical value promised by that defense. If the debtor must prove an alleged payment of the debt, he is that much at a disadvantage. On these issues and others, Western courts and legislatures have imposed the burden of persuasion with a watchful eye to policy demands. The burden of persuasion has proved to be a subtle, low-visibility tool for adjusting the interests of competing classes of litigants. Yet on the run-of-the-mill issues in private litigation, the calls of policy are weak and of many voices. Our sense of justice helps us little in allocating the burden of persuasion on the issue of consent in cases of battery, yet the decision must be made in this kind of case as well as on issues at the forefront of the law's evolution.

Frequently reluctant to sort out the policy demands, Western jurists

have instead elaborated and relied upon an historically prestigious, seemingly logical guideline for allocating the burden of persuasion. As developed by the Romans, the logical standard is: *ei incumbit probatio qui dicit; non qui negat*.⁴¹ A corollary maxim provides a more straightforward rationale when the burden of persuasion is imposed upon the defendant: *reus excipiendo fit actor*.⁴²

Underlying these maxims is the assumption that legal issues follow a well-defined logical pattern. Expressed in the maxims from two different perspectives, the pattern is one of rule to exception. Relying upon a rule, a party comes forth as the proponent of the issue, and accordingly he must bear the burden of persuasion. In response to the asserted rule, the opposing party may do one of two things: he may challenge the facts rendering the rule applicable, or he may go outside the rule and argue that despite the rule's factual applicability an additional consideration avoids the rule's legal impact. Thus, if a plaintiff asserts that a debt is due and unpaid, the defendant may either challenge the existence of the debt or he may argue that despite the debt he is not liable—say, by reason of the statute of limitations. On the former move, the defendant retains the posture of challenging the factual applicability of the rule requiring debtors to pay their debts; as an opponent to the rule, he benefits from the plaintiff's bearing the burden of persuasion. On the alternative move, the defendant interposes an exception, namely the statute of limitations, to the rule of liability for one's debts. By bringing forth a reason for not applying the rule, he assumes the mantle of the proponent. By the logic of the Roman maxims, he must then persuade the trier-of-fact of the facts supporting this exception.

This logical scheme for relating issues as rules and exceptions confronts an immediate difficulty: how does one know whether a specific issue is part of the rule or an exception to the rule? If the rule on the statute of limitations were to read, "debtors must pay all debts enforceable under the statute of limitations," the defendant who asserted the applicability of the statute would be merely denying one fact necessary for applying the rule; by denying that the claim was "enforceable under the statute," he would have the posture of an opponent to the rule's factual applicability and would enjoy the better position on the burden of persuasion. By changing the wording of the rule, one can translate the statute of limitations from an exception into a premise for applying

41. PAUL, LIB. LXIX AD EDICTUM; JUSTINIAN, DIGEST 22.3.2.

42. ULPIAN, LIB. IV AD EDICTUM; JUSTINIAN, DIGEST 44.1.1.

the rule. To overcome this difficulty, one must have recourse to an authoritative formulation of the applicable legal rule. Only if the formulation of a rule is given can one specify whether an issue is an exception to the rule, rather than a premise for the rule's application.

The individuality of legal systems is expressed in their quest for authoritative formulations of the rules of liability. Civilian judges, working with law codified at its core, express the spirit of their system by relying on applicable code provisions to formulate issues. German scholars, for example, have worked out an elaborate scheme for determining whether according to the Code an issue is an element of the rule or an exception to it. If the issue appears in a subordinate clause introduced by phrases like "unless" or "so far as . . . not," the German courts will treat the issue as an exception to the rule of the main clause.⁴³ But not all issues appearing in subordinate clauses are treated as exceptions. The syntactical analysis is often refined: it is of controlling importance, for example, whether the word "not" appears at the beginning or near the end of the subordinate clause.⁴⁴ This casuistic reliance on the wording of the Code might be justified as a quest for legislative intent; but some German scholars doubt whether ascribing so much syntactical sensitivity to the drafters of the Code is warranted by the history of the drafting.⁴⁵ Warranted by history or not, the enthroned syntax of the German Civil Code does permit an authoritative classification of issues as elements or as exceptions to rules of decision.⁴⁶

In contrast to the approach of the civilians, common law jurists have sought to classify issues by interweaving the task of allocating the burden of persuasion at trial with the task of allocating the burden of

43. L. ROSENBERG, *supra* note 8, at 126-31; 1 ENNECCERUS-NIPPERDEY, ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS § 56, at 333 (15th ed. 1959).

44. If the "nicht" appears at the beginning of a subordinate clause, the clause is read as a negative premise of the plaintiff's claim, *e.g.*, Bürgerliches Gesetzbuch [BGB] § 477 (1); if it appears near the end, the clause is read as an exception, *e.g.*, § 151. 1 ENNECCERUS-NIPPERDEY, *supra* note 43, at 333; *cf.* the use of similar techniques by Anglo-American courts in determining the difference between the enacting clause and the provisos to statutory definitions of criminal offenses, note 94 *infra*.

45. 1 B. WINDSCHEID, LEHRBUCH DES PANDEKTENRECHTS 680 (9th ed. T. Kipp 1906).

46. Unlike the German *Bürgerliches Gesetzbuch*, the French *Code Civil* contains a general provision on the allocation of the burden of persuasion: C. Civ. § 1315 (he who asserts a duty or obligation must prove it; he who claims that a duty or obligation is extinguished must show it). In applying this provision and in allocating the burden of persuasion on other issues, French jurists seem not to have cultivated syntactical analysis as much as have German scholars. *E.g.*, IV RÉPERTOIRE DE DROIT CIVIL (ENCYCLOPÉDIE DALLOZ) (1954) *Preuve*, Comments 91-93, at 109. On the impact of presumptions on the burden of persuasion in Germany and France, see L. ROSENBERG, *supra* note 8, 198-225; R. DECOTTIGNIES, LES PRÉSUMPTIONS EN DROIT PRIVÉ (1950).

Two Kinds of Legal Rules

pleading prior to trial.⁴⁷ The structured common law system of pleading, with its rigid paths, was admirably suited to distinguishing rules from exceptions, denials from avoidance; to raise an issue in defense, the defendant had to choose either a plea in denial (general denial or specific traverse) or one of confession and avoidance.⁴⁸ On the former plea, he was the opponent on the facts; on the latter, he appeared as the proponent of a new issue—an exception to the rule advanced by the plaintiff. To administer this system of rigid defensive tracks, the common law courts were required to classify defensive issues as factual challenges or as exceptions to rules. Thus they had a basis for applying the Roman maxim that the proponent of an issue must prove it. Consider, for example, the 19th-century English case of *Christopherson v. Bare*,⁴⁹ where the plaintiff, suing in trespass for assault and battery, challenged the defendant's attempt to raise the issue of consent under a general denial to the declaration. On the theory that the concept of assault implied nonconsent, the court decided that consent could be argued as a factual denial of the allegation of assault and battery. With the classification of nonconsent as a premise for the plaintiff's case, the Roman principles find a foothold. The plaintiff must prove nonconsent, for it is part of the rule under which he seeks to recover. Relying on decisions structuring the system of pleading, courts could readily apply the Roman principle for allocating the burden of persuasion—even though a classification made for the purposes of pleading might lead to unwanted results on the burden of persuasion. Nonetheless, the intermingling of the two categories of decision facilitated the search for an authoritative classification of issues. As German scholars found an arbiter of burden-of-persuasion decisions in the syntax of their civil code, common law jurists found parallel answers by gearing the burden of persuasion to decisions on the relative scope of the defensive pleas.

Decisions on pleading at common law may often have been made with an eye to the implications for the burden of persuasion, but this was not always the case. The system occasionally produced pleading rules at odds with the judiciary's preferences on the burden of persuasion. The notable example is the issue of payment in an action on a

47. Nineteenth century writers uncritically accepted the principle that the burden of persuasion should depend on the burden of pleading. T. STARKIE, EVIDENCE 534 (9th ed. 1869); J. STEPHEN, DIGEST OF THE LAW OF EVIDENCE, Art. 93, at 152 (4th ed. 1877); J. MCKELVEY, EVIDENCE (1898). Contemporary writers find little value in the interweaving of the two burdens; the policy problems, they submit, are merely shifted from one area to another. F. JAMES, CIVIL PROCEDURE 256 (1965); C. CLARK, CODE PLEADING 610 (2d ed. 1947).

48. C. CLARK, *supra* note 47, at 575-76.

49. 11 Q.B. 473, 116 Eng. Rep. 554 (1848).

note. The allegation of nonpayment is required in the complaint; otherwise, it is said, the complaint would lack a well-defined theory of recovery.⁵⁰ Having reached this conclusion, the common law judiciary balked at the implication: that the creditor would have to prove nonpayment. To avoid this result and others, the courts developed a number of ad hoc devices to check the influence of pleading rules on the burden of persuasion. To spare the creditor from his burden, the courts argued the unfairness and inconvenience of expecting a party to prove a negative proposition;⁵¹ admittedly, it is easier for the debtor to provide proof of payment—a single incident—than for the creditor to exhaust a wide variety of circumstances under which the defendant might have made payment. But the persuasiveness of the argument that one cannot prove a negative proposition is unpredictable: it does not alleviate the plaintiff's burden to prove nonconsent in a battery case;⁵² nor does it excuse the obligee from proving nonperformance in other contract actions.⁵³ Another argument used to adjust the burden of persuasion is that the facts are "particularly within the knowledge" of one of the parties.⁵⁴ This argument also prevails only sporadically.⁵⁵ The unpredictability of the arguments used to counteract the influence of pleading rules has led common law scholars to despair of a coherent theory to explain the system's burden-of-persuasion practices.⁵⁶

This survey of the burden of persuasion in civilian and common law jurisdictions has sought to pinpoint the characteristic moves made by Western jurists in justifying allocations of the burden of persuasion in private cases. The starting place for analysis in both systems is the Roman principle that the proponent of an issue bears the burden of persuasion on the factual premises for applying the rule. One product of this classification is the differentiation in both systems between issues comprising the plaintiff's prima facie case for recovery and issues, called defenses or privileges, enabling the defendant to prevail even though the plaintiff proves his prima facie case. The two families of legal sys-

50. See Alden, *The Defense of Payment under Code Procedure*, 19 YALE L.J. 647 (1910) ("[T]he making of the contract does not of itself give rise to a right of action."); On the need to allege nonpayment in a code complaint, see cases cited, C. CLARK, *supra* note 47, at 286, nn. 30-31.

51. *Edmonds v. Edmonds*, 1 Ala. (n.s.) 401, 402 (1840); 2 B. JONES, EVIDENCE 882-83 (2d ed. J. Henderson 1926).

52. *Dicenzo v. Berg*, 340 Pa. 305, 16 A.2d 15 (1940).

53. 9 J. WIGMORE, EVIDENCE § 2486, at 274 (3d ed. 1940).

54. *Id.* 275; C. McCORMICK, EVIDENCE § 318, at 675 (1954) (stressing that relative access to evidence should at most affect the burden of going forward).

55. F. JAMES, CIVIL PROCEDURE 257 (1965); 9 J. WIGMORE, EVIDENCE § 2486, at 275 (3d ed. 1940).

56. See F. JAMES, CIVIL PROCEDURE 255 (1965); C. McCORMICK, EVIDENCE 675-76 (1954); 9 J. WIGMORE, EVIDENCE § 2486, at 278 (3d ed. 1940).

Two Kinds of Legal Rules

tems diverge in their techniques for classifying rules and exceptions—for separating the prima facie case from the defenses. Civilians rely primarily on the syntax of code provisions; common law jurists, primarily on decisions made in administering the pleading system. And, as we have noted, common law practice frequently deviates from the Roman principles on the strength of ad hoc arguments of convenience and fairness.

With this account of the function and style of burden-of-persuasion decisions in private cases, we may turn to some applications of our observations. The first point for documentation is that the private law style dominates the opinions of those courts, both here and abroad, that have demanded proof of criminal defenses by a preponderance of the evidence.

B. *The Burden of Persuasion in Criminal Cases: The Impact of the Private Law Style*

At the midpoint of the 19th century, the run of Western courts and scholars spoke of the burden of persuasion in criminal cases in an idiom borrowed from private litigation. They conceived of the criminal process as a dispute divisible into two kinds of issues: those belonging to the prosecution's case and those belonging to the defendant's case, each party bearing the duty to persuade on the issues of his case. To classify issues on one side or the other, the courts drew on the Roman principle that the defendant must prove exceptions to the rules of liability. Following this system, European and American courts were virtually of one mind that self-defense and insanity were issues on which the defendant bore the burden of persuasion.

The mid-19th century developments on the Continent centered around the contributions of three authors: two leading German criminalists, Mittermaier and Feuerbach, and the influential French scholar, Bonnier. Feuerbach, one of the highly-regarded German legal scholars of the modern era, fully embraced the division of criminal disputes into two kinds of issues, issues for the state and issues for the defense. As Feuerbach delineated the two categories of issues, *der Anschuldingungsbeweis* (the inculpatory case) included all issues that led to a conviction according to the criminal code, and *der Entschuldigungsbeweis* (the exculpatory case) included all issues that prevented the imposition of a criminal sanction.⁵⁷ This bifurcation of the criminal case bears

57. A. VON FEUERBACH, *supra* note 5, § 568, at 372, & § 570, at 373.

the imprint of the Roman principle that the defendant must prove exceptions to rules of liability: the inculpatory case is the rule laid down by the criminal code; the exculpatory case, the exceptions avoiding application of the sanction.⁵⁸

Feuerbach's account of German criminal procedure found ample support in the midcentury legislation of the independent German states. The Prussian Criminal Ordinance of 1805 is illustrative. Section 367 of the Ordinance provides that "one having the proof of the act against him is subject to the statutory punishment unless he proves that under the circumstances the act was not an offense." Also, to round out the parallel with the allocation of the burden of persuasion in private cases, Section 363 provides that the burden of persuasion falls on him who stands to gain from the proof of an issue, in short, on the proponent of the issue.⁵⁹ Under these principles, the judges of the time readily reached the conclusion that the defendant had the burden to exculpate himself on a wide array of issues, including self-defense and insanity.⁶⁰

Though Feuerbach and Mittermaier agreed that criminal disputes reduced to an inculpatory case for the state and an exculpatory case for the defense, they introduced a germ of discontent with the approach of the time. Conceding that the state had to prove the issues of its case to the point of certainty, they were reluctant to conclude that the defendant had to make out his case by the same degree of proof. But Continental private law knew no intermediary, objective standards of evidence like the common law's "preponderance of the evidence" and "clear and convincing evidence." There was no customary middle ground; the duty to prove meant the duty to persuade to the

58. The concepts of *Anschuldigungsbeweis* and *Entschuldigungsbeweis* were used by virtually all mid-nineteenth century writers. See Küssner, *supra* note 37, at 35. H. ZACHARIAE, HANDBUCH DES DEUTSCHEN STRAFPROZESSES 416-17 (1868); J. GLASER, LEHRE VOM BEWEIS 85 (1883).

59. These sections are discussed in Küssner, *supra* note 37, at 33ff. The *Preussische Criminalordnung* was enacted on December 11, 1805; its roots are in the *Carolini constitutio criminalis* of 1532, which also required the accused to persuade on defensive issues (e.g., § 141: self-defense). A. SCHOETENSACH, DER STRAFPROZESS DER CAROLINA 78-81 (1904).

60. On self-defense and insanity, see authorities cited note 26 *supra*. Two cases from the mid-nineteenth century illustrate the dominant techniques for allocating the burden of persuasion on borderline issues. In its judgment of November 4, 1853, the Prussian High Court reversed an acquittal of one *E* who was charged with statutory rape of a girl under the age of 14; the trial court had instructed the jury that it was up to the prosecution to prove that *E* knew the age of the girl; the High Court held that mistake of age was a defense, to be proven by the accused. [1854] *Justiz-Ministerial-Blatt für die Preussische Gesetzgebung* 5. The High Court reached the same conclusion on the defense of mistake of fact to a charge of assisting an illegal immigrant. Judgment of November 30, 1853, 2 *GOLTDAMMER'S ARCHIV FÜR PREUSSISCHES STRAFRECHT* 255 (1854).

point of certainty.⁶¹ To avoid the rigors of treating defensive criminal issues like defensive issues at private law, Feuerbach argued that the criminal defendant should prevail even if his proof is incomplete; it would suffice if he supported his exculpatory claim with a showing of probability.⁶²

Mittermaier came to the same conclusion, and in the process formulated an argument that was to have lasting influence in Continental criminal law. To mitigate the defensive burden that prevailed in private cases, Mittermaier challenged the applicability of the private law concept of "defense" (*Einrede*) in criminal theory. "The claim of self-defense," he argued, "is not to be treated as a defense (*Einrede*) but rather as a denial that the killing is a criminal act."⁶³ For the time, it was a remarkable claim—one that Mittermaier himself did not rigorously pursue; for if the claim of self-defense was merely a denial, and not an exception to the rule of liability, why should one expect even a showing of probability to support it? The state should bear the full risk of nonpersuasion as it does in other inculpatory issues contestable by the defendant's denial. Mittermaier was content to reduce the defendant's burden to providing a showing of probability. Nonetheless, his questioning of the place of the private law concept of "defense" in criminal cases was an insight that signaled the declining influence of private-law modes of thinking in criminal cases.

The translation of Mittermaier's treatise into French enhanced his influence abroad. Bonnier studied the treatise and relied on it in formulating his critique of the French law of evidence.⁶⁴ Following Feuerbach and Mittermaier, he accepted the basic applicability of the Roman principle that the defendant must prove exceptions to the rules of criminal liability;⁶⁵ and like his German predecessors, he contended that something less than full proof of the defensive issues should suffice. As he put it: *la probabilité du fait allégué doit suffire pour motiver son [i.e., the defendant's] acquittement.*⁶⁶ Even the standard used—that of probability, a standard as uncommon in French as in German law—mirrors the influence of Mittermaier's treatise.

61. Kunert, *Some Observations on the Origin and Structure of Evidence Rules Under the Common Law System and the Civil Law System of "Free Proof" in The German Code of Criminal Procedure*, 16 *BUFF. L. REV.* 122, 146 (1966).

62. A. VON FEUERBACH, *supra* note 57, § 571, at 374.

63. 2 C. MITTERMAIER, *DAS DEUTSCHE STRAFVERFAHREN* 365 (4th ed. 1845-46); *Cf.* J. GLASER, *LEHRE VOM BEWEIS* 90 (1883) (accepting concept of *Einrede* as applicable in criminal cases).

64. BONNIER, *TRAITÉ DES PREUVES* 22 (5th ed. 1888).

65. *Id.* 20-29, 80.

66. *Id.* 22; *cf. id.* 80 ("un grave degré de probabilité" required to support a defensive claim).

As Mittermaier and Feuerbach lent their scholarly seal to trends in Continental law, Foster and Blackstone did the same for the common law. And though the two systems evolved independently, their initial posture was the same. A century prior to Mittermaier's writing, Sir Michael Foster formulated a view of homicide legislation entailing the classification of issues as those of inculpation and those of exculpation, as matters for the prosecution and as matters for the defense. With minor revision, Foster's formulation became the law according to Blackstone and, in time, it became the unquestioned practice of the English courts. Foster and Blackstone articulated split rules of criminal liability by assigning specific issues to the defendant's case. According to Foster, the prisoner had "satisfactorily" to prove circumstances of "accident, necessity and infirmity."⁶⁷ And according to Blackstone, the defense's case included "circumstances of justification, excuse and alleviation."⁶⁸ Neither author offered a convincing account for his view of the law. Both relied on a single argument: that the law presumes all killings to be malicious "until the contrary appeareth upon evidence."⁶⁹ And together they could muster only a single case as authority for their reading of the common law: *The King v. Oneby*.⁷⁰

Oneby's Case came before the judges of the King's Bench on a special verdict stipulating that the defendant had killed a man in a fight over a game of cards. The facts stipulated in the verdict did not admit of the construction that Oneby killed under provocation. Nor did the verdict, specifying as it did that the defendant and his victim were alone when the stabbing occurred, support the conclusion that Oneby killed maliciously, *i.e.*, unprovoked by a sudden quarrel. That the verdict was silent on the issue worked to the defendant's detriment; the judges found him guilty of murder. Their rationale was straightforward: "[i]f A kills B and no sudden quarrel appears, it is murder; for it lies on the party indicted to prove the sudden quarrel."⁷¹

Foster, with Blackstone following suit, took the *Oneby* ruling to

67. M. FOSTER, CROWN LAW 255 (1762).

68. 4 BLACKSTONE, COMMENTARIES *201.

69. The presumption of malice derives from the phrase in *MacKally's Case*, 9 Co. Rep. 65b, 77 Eng. Rep. 828 (K.B. 1611), that "the law implies malice" in cases of killing without provocation. *Id.* at 67b, 77 Eng. Rep. at 833. The doctrine of implied malice enabled prosecutors to convict of murder on a showing of an intentional killing alone, see p. 905 *infra*. Hale changed the phrase to "the law presumes it to be malicious," 1 HALE, PLEAS OF THE CROWN 455 (1694); and that is basically the form that appears in M. FOSTER, CROWN LAW 255 (1762). Blackstone, however, changed the expression to "all homicide is presumed to be malicious," and thus coined a presumption of malice that appeared much more to be a presumption of fact. 4 BLACKSTONE, COMMENTARIES *201.

70. 2 Ld. Raym. 1485, 92 Eng. Rep. 465 (K.B. 1727).

71. *Id.* at 1497, 92 Eng. Rep. at 473.

stand for the general principle that a criminal defendant should bear the duty of persuasion on all issues that appear to be "defensive." This is the principle that came to dominate the thinking of English courts and of most American courts until the end of the 19th century; and it continues, though muted and qualified, to shape the decisions in a number of common law courts. Unhesitatingly, the English courts applied the Blackstonian reading of the common law in cases of self-defense⁷² and insanity.⁷³ It was not until 1935 in the renowned *Woolmington* case⁷⁴ that the English courts considered the rule afresh; and in that case the prosecution asserted the applicability of Blackstone's rule to the defense of accident in a homicide case—a defense on which no defendant in a major Western court of modern times had borne the burden of persuasion. Rejecting this extreme application of Blackstone's analysis, the House of Lords in its *Woolmington* decision took the first step toward a new policy of protecting criminal defendants in cases of doubt on "exculpatory" issues.⁷⁵

The Blackstonian model of rules of criminal liability began its march on American courts in 1845, when Chief Justice Shaw, writing for the Massachusetts' highest court in *Commonwealth v. York*,⁷⁶ devised a rationale for requiring instruction to the jury that the defendant must prove the defense of provocation by a preponderance of the evidence. With the painstaking care of a vineyardist, Shaw planted the roots of his holding in *Oneby's Case* and in even earlier construction of malice in homicide cases. The point that Shaw ignored entirely was that, while *Oneby* was a holding about the burden of a defendant to prove a claim in a trial on a special verdict, the Massachusetts procedure required the jury to return a general verdict as to guilt—a difference in procedure which, as we shall see, is not without its implications. Yet Shaw's opinion was masterful, and the *York* decision persuaded courts in most of the American states; echoes of Shaw's opinion was soon heard along the Eastern seaboard,⁷⁷ in the South,⁷⁸ and as far west as California.⁷⁹

72. *R. v. Smith*, 8 C. & P. 160, 173 Eng. Rep. 441 (N.P. 1837).

73. *M'Naghten's Case*, 10 Cl. & F. 200, 8 Eng. Rep. 718 (H.L. 1843).

74. *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462.

75. The House of Lords extended the *Woolmington* rule in *Mancini v. Director of Public Prosecutions*, [1942] A.C. 1 (provocation) and *Chan Kau v. The Queen*, [1955] A.C. 205 (self-defense).

76. 50 Mass. (9 Metc.) 93 (1845).

77. *State v. Schweitzer*, 57 Conn. 532, 18 A. 787 (1889); *People v. Schryver*, 42 N.Y. 1 (1870); *Silvus v. State*, 22 Ohio St. 90 (1873); *Commonwealth v. Drum*, 53 Pa. 9 (1853); *State v. Ballou*, 20 R.I. 607, 40 A. 861 (1898).

78. *State v. Willis*, 63 N.C. 26 (1868); *State v. Welsh*, 29 S.C. 4, 6 S.E. 894 (1888).

79. *People v. Milgate*, 5 Cal. 127 (1855); *State v. Yokum*, 11 S.D. 544, 79 N.W. 835 (1899).

With but few exceptions, the *York* precedent governed a half-century of American burden-of-proof decisions in provocation and self-defense cases.⁸⁰ And in a few states it reigns today unchallenged. In Delaware, for example, the *York* decision was invoked as recently as 1955 to support a holding that the defendant had to prove his claim of self-defense by a preponderance of the evidence.⁸¹

For all of its influence, the Blackstonian rule on the burden of persuasion contains serious flaws. It was born of a particular method of trial—the special verdict; but it came to be applied as a rule on the instructions to be given to juries with the responsibility for making ultimate determinations of guilt. As one passes from one system of trial to the other, one encounters a critical ambiguity in the phrase “burden of proof”—an ambiguity that remains in the background of cases like *Oneby*, where the court’s task is merely to construe gaps in the jury’s specification of the facts. As is well known today, the phrase “burden of proof” may refer either to the burden of persuasion (the risk that the jury will regard the issue neither as proven nor as disproven) or to the burden of going forward (the burden of producing “some evidence” in order to receive an instruction on the issue).⁸² The two prongs of the phrase refer to two different aspects of jury instructions. The burden of persuasion is expressed in the wording of the instructions; and the burden of going forward, in the decision whether to give the jury any instructions on the issue at all.⁸³ It is significant that the judges of the

80. See authorities cited note 26 *supra*.

81. *Quillen v. State*, 49 Del. 114, 110 A.2d 445 (1955).

(82.) Contemporary usage stems from Thayer, *The Burden of Proof*, 4 HARV. L. REV. 45 (1890); J. THAYER, EVIDENCE 353-89 (1898); cf. MCKELVEY, EVIDENCE 28-29 (1898) (distinguishing between the burden of proof and the burden of proceeding). German writers also distinguish between the duty to introduce evidence (*Beweisführungspflicht*, *formelle Beweislast*) and the risk of nonpersuasion (*materielle Beweislast*). The former duty is precluded in criminal cases by the duty of the trial judge actively to investigate and determine the facts of the case, StPO § 244(2). Nineteenth century writers regarded the *materielle Beweislast* as applicable in criminal cases. J. GLASER, LEHRE VOM BEWEIS 88 (1883); A. VON KRIES, LEHRBUCH DES DEUTSCHEN STRAFPROZESSRECHTS 341 (1892). Contemporary writers frown on the term because it suggests that the prosecutor “loses” if the accused is acquitted; the German prosecutor is duty-bound to be impartial. 1 E. SCHMIDT, LEHRKOMMENTAR ZUR STRAFPROZESSORDNUNG 205 (2d ed. 1964); cf. 1 LOEWE-ROSENBERG, DIE STRAFPROZESSORDNUNG 123 (21st ed. 1963).

83. Significant problems remain in determining (1) when it is fair to shift the burden of going forward to the defendant; and (2) how much evidence the defendant need offer to be entitled to a jury determination on a specific issue. Both problems are complicated by constitutional questions. If the defendant has a right to trial by jury, U.S. CONSR. amend. VI, that right arguably encompasses all matters related to the defendant’s culpability. Further, if the defendant must take the stand in order to secure an instruction on an issue, his not receiving the instruction in the event that he does not take the stand represents a detriment incurred for exercising his privilege against self-incrimination, U.S. CONSR. amend. V. See *Jackson v. United States*, 351 F.2d 821 (D.C. Cir. 1965) (acknowledging the constitutional issue).

As an analogue to the common law decision whether to grant a jury instruction on

Kings Bench in *Oneby's Case* had no need to distinguish between the two senses of the term "burden of proof," for their task in that case was neither to rule on the content of instructions nor to decide whether instructions ought to have been given. They had merely to render the appropriate legal characterization of the facts stipulated in the special verdict.

So far as the rationale of *Oneby's Case* is applicable in instances of general verdicts, the language of the opinion ("It lies on the party indicted to prove the sudden quarrel") may refer either to the burden of persuasion or to the burden of going forward. The problem, of course, is deciding to which of these burdens the language of the case should be deemed to refer. To apply *Oneby* to cases involving general verdicts, one must construe it with a view to its historical genesis. The holding that the defendant must "prove" the issue of provocation or sudden quarrel derives from a crystallization of decisions and commentary on the relationship between malice, as an element of murder, and the defense of provocation. The critical step in the conceptual evolution of malice is *MacKally's Case*. That early 17th century decision, as reported and interpreted by Coke, stands for the principle that the prosecution need not prove the element of malice to convict of murder.⁸⁴ The judges realized that malice does not lend itself to affirmative proof; by and large, the malicious killing is defined by reference to what it is not, not by what it is. As agreed by all, one type that was not malicious was a killing provoked by a sudden quarrel. Thus, to have a triable issue of malice, one had to have a triable claim that the defendant killed in the course of a sudden quarrel. *MacKally's Case*, holding that the prosecution need not prove malice, generated the language of *Oneby* that the defendant must prove the sudden quarrel. If limited to the concerns of *MacKally's Case*, the principle of *Oneby* is clear: it is up to the defendant, not the prosecution, to raise a triable issue of malice. This the defendant may do by going forward with "some evidence" on the issue of provocation by a sudden quarrel; therefore, in the context of a trial leading to a general verdict, the *Oneby* demand that the defendant "prove" the issue should mean no more than the defendant must go forward with evidence on that issue.

an issue, the civilian judge must decide whether to discuss an issue in his written evaluation of the evidence. A deficient opinion is a ground for reversal. *France*: C. PRO. PÉN. § 593; *Germany*: StPO § 338(7). *E.g.*, Judgment of December 23, 1897, [1897] Bulletin des Arrêts de la Cour de Cassation, Chambre Criminelle [Bull. Crim.], No. 400 (Cass. crim., Fr.) (opinion failed to discuss issue of duress); Judgment of December 9, 1964, [1st sem. 1965] Gazette du Palais Jur. 301 (Cass. crim., Fr.) (failure to discuss self-defense).

84. 9 Co. Rep. 65b, 77 Eng. Rep. 828 (1611).

For several reasons, Chief Justice Shaw failed to confront the ambiguity of the "burden of proof" in his *York* opinion. First, in the mid-19th century there was little, if any, sensitivity to the ambiguity;⁸⁵ and more importantly, Shaw's perception of the problem was impeded by his conflating the judge's role in cases of special verdicts, where the distinction between the two burdens is insignificant, with the jury's role in cases of general verdicts, where the distinction is critical. His language evidences his confusion:

Proof beyond reasonable doubt is necessary to establish a fact against the accused; but preponderating proof—proof sufficient to satisfy the jury of the fact—is sufficient to establish a fact in his favor. But it must go to this extent; otherwise, there is nothing on which the jury can found their beliefs and warrant them in considering the fact proved. It is not sufficient, therefore, to raise a doubt, even though it be a reasonable doubt of the fact of extenuation, simply because it is no proof of the fact. *And here again, we think the point may be illustrated by considering how the case would stand on a special verdict.*⁸⁶

It may be that in cases decided on special verdicts a fact alleged but not proved should be equivalent, as Shaw puts it elsewhere in the opinion, to a fact "not existing."⁸⁷ For in this type of case, the jury merely renders findings on a set of discrete factual claims; the jury must determine the facts one way or another before the judge may even begin to determine the guilt or innocence of the defendant. But in a case on a general verdict, the processes of fact-finding and of guilt-determination are inseparable; there is no institutional or logical reason why the jury cannot refuse to return a verdict of guilty upon the basis of a reasonable doubt as to the existence or nonexistence of any fact; that is, the jury need not find that there *was* provocation, as in a special verdict, but may refuse to find the defendant guilty if it entertains a reasonable doubt that the killing was without provocation. Shaw ignored this vital distinction between the special and the general verdict, and his error continues to affect the course of American law.

85. The Massachusetts court had acknowledged the distinction between the "weight of the evidence" and the burden of proof. *E.g.*, *Powers v. Russell*, 30 Mass. (13 Pick.) 69 (1832). For early efforts at clarifying the distinction between the two burdens, see note 82 *supra*. See generally Reaugh, *Presumptions and the Burden of Proof*, 36 ILL. L. REV. 703, 706-13 (1942). Confusion between the two burdens has issued frequently in the instruction that the defendant must prove his defense but that he should be acquitted if on all the evidence a reasonable doubt remains as to his guilt. *E.g.*, *People v. Knapp*, 71 Cal. 1, 11 P. 793 (1886); *State v. Jones*, 78 Mo. 278 (1883).

86. 50 Mass. (9 Metc.) at 116-17 (1845) (emphasis added).

87. *Id.* at 113.

That Blackstone's rule won wide acceptance in a procedural context different from its source⁸⁸ demonstrates the willingness of judges of the last century and before to demand that defendants prove their defenses by a preponderance of the evidence. The courts required little authority for their decisions; for the results seemed in keeping with an intuitively plausible way to structure criminal litigation. And the plausibility of that system traded on the assimilation of the criminal process to the model set by the litigation of private disputes. It seemed natural, in criminal as well as private cases, that certain issues should adhere to the defendant's case and that proof of these issues should be the responsibility of the defendant or his lawyer. The resulting division of the criminal case—into inculpatory and exculpatory issues—called forth incomplete rules of criminal liability: like the rules of private law, they were silent on the defensive issues. As a man would be liable in an action on the case for negligently and proximately causing harm to another (no mention of assumption of risk), so would he be liable criminally for intentionally and maliciously killing another human being (no mention of self-defense and insanity). One like the other, the rules of the time could be used only when supplemented by their exceptions.

Another indication of the judicial propensity to treat criminal liability as a matter of incomplete rules supplemented by exceptions is the reception accorded to the 1816 decision of the King's Bench in *The King v. Turner*.⁸⁹ The case came before the court on Turner's claim that he had been improperly convicted for possessing game in violation of the statute of 5 Anne; his argument was that for any number of reasons set forth in the statute, his possession of game might have been lawful and that the conviction was defective because the prosecution had failed to prove that these exculpatory conditions were absent. A clever argument it was, but Lord Ellenborough would have none of it. With the concurrence of the other judges, he held that the prosecution did not have to submit evidence to prove the absence of what he called "exceptions" to liability; on these issues, he reasoned, the defendant bore "the burden of proof." This was the rule in private cases, Lord Ellenborough conceded, and "there was no reason why the rule should not be applied to informations as well as actions."⁹⁰

88. Blackstone had in mind cases on a special verdict; 4 BLACKSTONE, COMMENTARIES *201. (The court should decide "how far they [the facts found by the jury] extend to take away or mitigate the guilt.").

89. 5 M. & S. 206, 105 Eng. Rep. 1026 (1816).

90. *Id.* at 210, 105 Eng. Rep. at 1028.

The decision in *Turner's Case* is interesting for a number of reasons. First, it bespeaks the judicial tendency to regard the tasks of allocating the burden of persuasion as identical in criminal and in private cases. Second, it illustrates the kind of judicial overreaching we have already noted in the common law's reception of the *Oneby* case. The court need not have come forth with a pronouncement on the defendant's "burden of proof," for the question put to the court did not pertain to resolution of an unclarified dispute. One confronts anew the problem posed in *Oneby's Case*: does the phrase "burden of proof" refer to the burden of persuasion or to the burden of going forward? The ambiguity should be resolved in the same way. Just as one cannot fairly expect the prosecutor to offer evidence on a vacuous issue like malice, one cannot expect him to go forward with evidence on all of the numerous statutory grounds for permissibly possessing pheasants and hares. Yet acknowledging the prosecutor's problems of proof does not compel the conclusion that the defendant must bear the burden of persuasion on the issue; his difficulties properly justify only a demand that the defendant go forward on the issue. Once the defendant has raised a triable issue under one of the statutory exceptions, one might reasonably expect the prosecutor to bear the risk that the jury in the end would be in equipoise on the issue.⁹¹

This reading of the *Turner* decision is plausible, but it hardly meshes with the case's reception in practice. The common law regarded *Turner* as it did *Oneby* as a welcome affirmation of the propriety of treating criminal defenses like private law defenses. The *Turner* case has generated a rare showing of solidarity among common law jurisdictions. On an array of statutory offenses, ranging from the unlawful possession of narcotics to the unlawful practice of medicine, common law courts demand that the defendant persuade the trier of fact of his license or authorization to engage in the regulated activity.⁹²

91. This analysis draws heavily on the work of the great James Bradley Thayer. See J. THAYER, EVIDENCE 359-64 (1898).

92. The consensus stems from the mid-nineteenth century. *State v. Crowell*, 25 Maine 171 (1845) (selling brandy without a license); *State v. McGlynn*, 34 N.H. 422 (1857) (keeping liquor for sale without a license); W. RUSSELL, CRIMES AND MISDEMEANORS 770 (7th Am. ed. 1909); P. TAYLOR, EVIDENCE 348-55 (8th Eng. ed. 1877) (containing copious citations to Victorian statutes requiring the defendant to prove lawful excuse or authorization); F. WHARTON, CRIMINAL EVIDENCE 242 (9th ed. 1884). The rule is accepted today as a matter of course. *Reed v. United States*, 210 A.2d 845 (D.C. Ct. App. 1965) (possession of narcotics without a prescription); *John v. Humphreys*, [1955] 1 All E.R. 793 (criminal prosecution for driving without a license); *R. v. Oliver*, [1943] 2 All E.R. 800 (selling sugar as wholesaler without a license); CALIFORNIA JURY INSTRUCTIONS, CRIMINAL, No. 451 (1958) (permit to sell securities); 9 J. WIGMORE, EVIDENCE § 2512, at 417 n.4 (3d ed. 1940). But cf. *People v. Zepeda*, 231 Cal. App. 2d 18, 41 Cal. Rptr. 571 (1964) (possession of narcotics; burden on state to prove lack of authorization).

Two Kinds of Legal Rules

In justifying the defendant's duty to persuade the trier of fact of statutory exceptions, common law judges proceed as though the problem were one at private law. They use the idiom of rules and exceptions; they think in the categories prescribed by the Roman maxim *reus excipiendo fit actor*. They interweave rules of pleading with rules on the burden of persuasion.⁹³ Thus, if the prosecution need not negate the statutory exception in the indictment, as is often the case in liquor and narcotic violations,⁹⁴ that is sufficient to prompt a ruling that the defendant must bear the burden of persuasion on the issue.⁹⁵ But if the prosecution must negate the exception in the indictment, as is the case in the prosecutions for the unlawful practice of medicine,⁹⁶ the courts invoke the kinds of arguments that are used to intercept the usual inference from the duty to plead in private cases. As the private defendant must prove the defense of payment, the criminal defendant must prove that he has a license to practice medicine.⁹⁷ In both settings

93. *E.g.*, in *R. v. Oliver*, [1943] 2 All E.R. 800, the court held that the defendant had to prove that he was licensed to sell sugar as a wholesaler; the opinion stresses a fact of pleading, namely that the prosecution need not have alleged that the defendant did not have a license. *Id.* at 802. *See also* F. WHARTON, *CRIMINAL EVIDENCE* 334 (9th ed. 1884) (arguing that the prosecution should have to disprove provocation as an element implicitly negated by the allegation of malice). As the prosecution must allege the time and place of the offense in the indictment, common law courts generally hold that it must establish venue and disprove the running of the statute of limitations. *People v. Cavanaugh*, 44 Cal. 2d 252, 282 P.2d 53 (1955) (territorial jurisdiction); *People v. James*, 59 Cal. App. 2d 121, 138 P.2d 30 (1943) (statute of limitations); *People v. Pollock*, 26 Cal. App. 2d 602, 80 P.2d 106 (1938) (venue); *State v. Turner*, 176 Pa. Super. 32, 107 A.2d 136 (1954) (state had to establish exception tolling statute of limitations). *Contra*, *Traxlor v. State*, 96 Okla. Crim. 231, 251 P.2d 815 (Crim. Ct. App. 1952) (defense must establish that the statute has run).

94. There are at least two theories on the need to negate issues like authorization and license in the indictment. One theory is that the issue must be negated if it is referred to in the enacting clause, rather than in a proviso, to the statute defining the offense. *State v. McGlynn*, 34 N.H. 422, 426 (1857); Comment, *The Pleading of Exceptions and Provisos in Statutes*, 8 AM. JURIST 233, 234 (1832). Another theory is that it must be negated if it is a "material part of the definition of the offense." *United States v. Cook*, 84 U.S. (17 Wall.) 168 (1872). *See generally* Annot., 153 A.L.R. 1218 (1944); *cf.* statutes providing that the prosecution need not negate specific matters of authorization in the indictment, Harrison Anti-Narcotics Act of Dec. 17, 1914, ch. 1, 38 Stat. 785; UNIFORM NARCOTIC ACT § 18; Indictment rules No. 5 (2), Indictments Act of 1915, 5 & 6 Geo. 5, ch. 90, sched. 1 (the latter statute providing that the indictment need not negate any statutory exception, exemption or qualification).

95. *Reed v. United States*, 210 A.2d 845 (D.C. Ct. App. 1965) (narcotics); *United States v. Holmes*, 187 F.2d 222 (7th Cir. 1951) (narcotics); *State v. Davis*, 214 N.C. 787, 1 S.E.2d 104 (1939).

96. The offense of unlawfully practicing medicine (or any other profession) is customarily defined with a phrase of the form "without a license" in the clause defining the offense (the enacting clause). *E.g.*, CAL. BUS. & PROF. CODE § 2142 (West 1962) ("without having . . . a valid, unrevoked certificate"); WEST. VA. CODE § 30-3-9 ("without first having been licensed for that purpose"). By the conventional rules, the prosecutor must then aver the lack of license in the indictment. *See note 94 supra*.

97. *People v. Boo Doo Hong*, 122 Cal. 606, 55 P. 402 (1898); *cf.* *Rossi v. United States*, 289 U.S. 89 (1933) (posting a bond to operate a still); *People v. Dean*, 131 Cal. App. 223, 21 P.2d 126 (D.C.A. 1933) (permit to sell securities); *Commonwealth v. Bitzer*, 163 Pa. Super. 386, 62 A.2d 108 (1948) (license to render service as a public utility).

the courts argue that the facts are within the defendant's knowledge, or the prosecution need not prove a negative, or convenience demands that the defendant persuade on the issue.⁹⁸ Of course, these arguments prevail in criminal cases as sporadically and unpredictably as they do in private cases.⁹⁹ But that the courts deploy them in criminal as well as in private cases demonstrates that the judges regard the problem in both settings as the same.

Thus, the case for the first claim of this article is made. Before the turn of the 20th century, jurists in both common law and Continental jurisdictions approached decisions on the burden of persuasion in criminal cases as they did in private disputes, and in doing so they devised rules of criminal liability that had the form of the rules used for settling private disputes. The judges perceived both kinds of rules as incomplete statements of the relevant substantive issues: they treated them as rules that admitted of exceptions.

Whether it was sound policy for 19th century judges to proceed in this way and for 20th century common law judges to continue the practice depends on whether it is right to treat the criminal process as though it were litigation akin to the settling of private disputes. To use rules of liability from private cases is to perceive the criminal process as though it were a process like private litigation. As we shall see in the conclusion of this paper, there are defects in that image of the criminal process. But to reach that conclusion, we must first examine the alternative kind of rule of criminal liability, namely comprehensive rules which neither require nor admit of exceptions. That examination prompts us to shift our focus to German judicial and scholarly developments at the end of the 19th century.

IV. Toward Comprehensive Rules of Liability

In the course of a half-century, the German courts achieved a remarkable reversal of the burden-of-proof practices characteristic of the West in the 1850's.¹⁰⁰ Despite the radical change of policy, they moved

98. See *People v. Dean*, 131 Cal. App. 228, 21 P.2d 126, 128 (1933); *People v. Boo Doo Hong*, 122 Cal. 606, 55 P. 402 (1898). On the arguments used to require defendant to disprove an allegation of the indictment, see *Rossi v. United States*, 289 U.S. 89 (1933); *Robert v. State*, 90 Tex. Crim. Rep. 133, 234 S.W. 89, 90 (Ct. Crim. App. 1921); B. JONES, EVIDENCE 497 (2d ed. J. Henderson 1926); W. RUSSELL, CRIMES AND MISDEMEANORS 769-71 (7th Am. ed. 1853).

99. See discussion and authorities cited note 14 *supra*.

100. The leading cases are the judgments of November 13, 1885, 7 *Rechtsprechung* 664 (Reichsgericht, Ger.); and of October 23, 1890, 21 *RGSt.* 131 (Reichsgericht, Ger.). In the first case, the court endorsed the view of a trial judge that both participants in a brawl

imperceptibly and, as one might think, without much debate on the matter. There was no *cause célèbre* such as those that often mark the strides of the common law. There was no insistent call for action from the prestigious academic community; from all that appears on the surface, the dramatic judicial advance toward protection of innocent defendants occurred independently of the cultural processes of the time.

Curiously, the German breakthrough corresponds to a parallel movement—also occurring in the 1880's and 1890's—in the Western American states and territories. Many of these American courts then faced the issue of the burden of persuasion on criminal defenses for the first time, and they emerged as the first group of common law courts to break from the Blackstonian rule on self-defense and provocation.¹⁰¹ The Western American and German courts, though cultures and continents apart, proceeded on the same straightforward analysis of the criminal process. They were both able to generate a view of the problem unhaunted by the private law orientations of Blackstone and Feuerbach. For the first time, American and German courts grasped the full force of the principle, acknowledged nominally by Blackstone and Feuerbach, that the state may punish a man for crime if, and only if, he is guilty of an offense. The difficulty with this proposition is, of course, that it verges on tautology. If guilt means legal guilt, the proposition reduces to the vapid claim that only those who are liable under the law are liable to criminal punishment. For the proposition to be significant, the concept of guilt must be independent of the positive legal order. In the late 19th century, the German courts and some common law courts emphasized the independence of the concept of guilt from positive law by affirming anew the moral content of criminal guilt.¹⁰² And in so doing they converted a long-standing truism of the law into a moral justification for imposing criminal sanctions.

Thrusting the issue of guilt, or blameworthiness, to the forefront

should be acquitted on the ground of self-defense if it appeared possible that either might have started it; however, the court did reverse the acquittal of one of the brawlers on the ground that the opinion of the trial judge did not adequately discuss the elements of self-defense. In the second case, the court affirmed an acquittal on the ground of insanity. According to the opinion of the trial judge, there was a "probability" of insanity. Apparently, the prosecution thought that this was not enough for an acquittal; the court held that a "possibility" of insanity was sufficient to acquit.

101. A. VON FEUERBACH, *supra* note 57, § 54, at 43-44, & § 616, at 397; 4 BLACKSTONE, COMMENTARIES *358, 360; *cf.* Shaw's opinion in *Commonwealth v. York*, 51 Mass. (9 Metc.) 93, 116 (1845) (arguing that the defendant's guilt consisted in voluntarily killing another, *i.e.*, that doubts on the issue of provocation were not tantamount to doubts on the defendant's guilt).

102. *See* cases cited notes 103-06 *infra* and the earlier cases on the insanity defenses, *e.g.*, *State v. Garbutt*, 17 Mich. 9 (1868); *Hopps v. People*, 31 Ill. 385 (1863).

of the criminal process enabled the courts to see the defensive issues with fresh perspective. If all substantive issues, both inculpatory and exculpatory, were threads in the fabric of guilt, then the differences among them appeared less significant. The distinction between whether harm had been done and whether the harm was justified by a claim of self-defense no longer appeared to be an adequate basis for bifurcating the rules of criminal liability. And accordingly the distinction no longer seemed a persuasive ground for allocating the burden of persuasion. Proceeding from the premise that the prosecutor had to prove the defendant's guilt, the courts of Germany and of some of less populous Western states (Wyoming,¹⁰³ Nevada¹⁰⁴ and New Mexico¹⁰⁵) readily came to the position that the prosecution had to disprove properly raised claims of self-defense and insanity.

The emergence of guilt as the focal point of criminal cases served to set off the criminal process from the litigation of private disputes. This function of the concept of guilt is illustrated by an 1894 decision of the German Supreme Court rejecting the extension to private disputes of the standards then emerging for allocating the burden of persuasion in criminal cases.¹⁰⁶ The case came to the Supreme Court as an appeal from the trial judge's finding for the defendant in a tort action for assault and battery. To justify his judgment, the trial judge wrote that "it appeared probable" that the defendant's striking the plaintiff with a staff was warranted as an act of self-defense. The trial judge had invoked the emerging rule for criminal cases that the prosecutor should bear the risk of doubt on the issue of self-defense. His mistake, the Supreme Court reasoned, lay in assuming that a rule devised for criminal cases should apply in private litigation. In the Court's view, the two processes were radically different. In a tort action, the claim of self-defense was not "merely a denial of the plaintiff's case" but the "setting up of a new matter." Thus, it fell to the defendant to prove the issue fully, not by a showing of probability, but to the complete satisfaction of the trier-of-fact. The reason for demanding more of a defendant in a private action than in a criminal prosecution is that no concept of the private legal order functions as does the concept of guilt in the criminal process: no concept used in settling private disputes converts the set of defensive issues into a fundamen-

103. *Trumble v. Territory*, 3 Wyo. 280, 21 P. 1081 (1889).

104. *State v. McCluer*, 5 Nev. 132 (1869).

105. *Territory v. Lucero*, 8 N.M. 543, 46 P. 18 (1896).

106. Judgment of May 8, 1894, 33 *Entscheidungen des Reichsgerichts in Zivilsachen* [RGZ] 352.

Two Kinds of Legal Rules

tally necessary condition of the defendant's liability. But while no concept of the private law renders the mere probability of self-defense inconsistent with the defendant's liability, the German Supreme Court perceived that the concept of guilt does serve this function in criminal cases:

[C]riminal sanctions should be used only against the guilty, a principle with which it would be inconsistent for a judge to hold a defendant guilty of intentional battery, even though it appeared probable or possible that the act was required by self-defense.¹⁰⁷

In addition to—or perhaps more properly as a corollary of—altering allocations of the burden of proof on specific issues, the newly perceived centrality of guilt in the criminal process also stimulated the German trend toward comprehensive rules of criminal liability. If the prosecution should be charged with proving the defendant's guilt, then the appropriate rules of liability should specify all the ingredients of guilt. And the ingredients of guilt, in turn, should be coextensive with the set of substantive issues bearing on guilt or innocence. Shortly after the innovations of the German courts in the late 19th century, the German scholars synthesized a long-developing theoretical structure for formulating rules of liability to encompass all the substantive issues that might arise at trial.¹⁰⁸ Conditions in the common law countries might have yielded a comparable development, but none occurred. And the need for comprehensive rules of criminal liability persists in common law practice. We continue to think of rules of criminal liability as another example of the species of rule common in private litigation.¹⁰⁹ By studying the emergence of comprehensive rules of criminal liability in German practice, we might better understand the role that such rules have to play.

The watershed of German criminal theory is Ernst Beling's work *Die Lehre vom Verbrechen*, published in 1906. The book's theoretical contributions are renowned for reasons having little to do with comprehensive rules of liability or the procedural rule of *in dubio pro reo*. Beling's major effort was an attempt to clarify that aspect of every

107. *Id.* at 353 (emphasis added).

108. See H. SCHWEIKERT, *DIE WANDLUNGEN DER TATBESTANDSLEHRE SEIT BELING* 7-13 (1957).

109. See, e.g., MODEL PENAL CODE §§ 2.02, 2.09 (Proposed Official Draft 1962) (a defensive claim of duress avoids rather than denies the prosecution's claim of "culpability"); Katz & Goldstein, *Abolish the "Insanity Defense"—Why Not?* 72 *YALE L.J.* 853, 865 (self-defense termed "an exception to criminal liability"); Comment, *Affirmative Defenses Under New York's New Penal Law*, 19 *SYRACUSE L. REV.* 44 (1967). See also Hart, *The Ascription of Responsibility and Rights*, 49 *PROC. ARISTOTELIAN SOC.* 171 (n.s. 1949).

criminal offense that might be defined without reference to value considerations. He believed that a hard core of every offense, the set of issues he called the *Tatbestand*, could be defined to be free of all condemnatory judgment.¹¹⁰ Thus, according to his theory, the *Tatbestand* of murder would consist of the human act causing death. An accidental killing would be enough, but that fact in itself would not be enough to condemn the actor.¹¹¹

For the purposes of this study, the relevant aspect of Beling's work is his categorization for the value-laden issues of criminal liability. This was the aspect of his work that facilitated the emergence of comprehensive rules of liability. According to his system, questions of value intrude upon the analysis of liability only after the judge as trier of fact determines that the facts meet the definitional demand of the *Tatbestand*. The issues requiring judgments of value fall into two categories: (1) issues suggesting the blameworthiness of the act causing harm (*Rechtswidrigkeit*); and (2) issues suggesting the blameworthiness of the actor (*Schuld*). The distinction between the blameworthiness of acts and of actors is critical to the structure Beling imposed on the substantive issues of criminal liability. It provides a systematic grouping for all the substantive defenses that might arise at trial. The grouping proceeds on the assumption that all defensive issues relate either to the question whether the act, objectively, is socially unacceptable, or to the question whether the actor, subjectively, is blameworthy. Examples of the first category of defense are self-defense and consent; and examples of the second category are duress and insanity. The two categories correspond roughly to the common law usage of the terms justification and excuse.

The tripartite structure of criminal liability that crystallized in Beling's work, namely *Tatbestand*, *Rechtswidrigkeit* and *Schuld*, pro-

110. It is hard to find a common law term corresponding to the German *Tatbestand*. The term "elements of the offense" is a conclusionary concept of variable content. Compare *Quillen v. State*, 49 Del. 114, 110 A.2d 445 (1955) (self-defense not an "element of the crime") with *Leonard v. People*, 149 Colo. 360, 369 P.2d 54 (1962) (self-defense considered one of the "essential elements necessary to constitute the crime charged"). The term "corpus delicti" is used to determine the admissibility of confessions and thus does not refer to the agency of the accused. *State v. Hassen*, 144 Cal. App. 2d 334, 301 P.2d 80 (1956). Glanville Williams' definition of *actus reus* as the "whole definition of the crime with the exception of the mental element" is perhaps the closest common law analogue to the German concept. G. WILLIAMS, *CRIMINAL LAW* 18 (2d ed. 1961); cf. the French concept of *l'élément matériel*, 2 P. BOUZAT & J. PINATEL, *TRAITÉ DE DROIT PÉNAL ET DE CRIMINOLOGIE* 914 (1963).

111. Beling's rigid bifurcation of factual and evaluative elements came under scrutiny as early as 1915. M. E. MAYER, *DER ALLGEMEINE TEIL DES DEUTSCHEN STRAFRECHTS* 182 ff. (1915). For a contemporary discussion of the problem, see K. H. KUNERT, *DIE NORMATIVEN MERKMALE DER STRAFRECHTLICHEN TATBESTÄENDE* (1958).

vides a schema for ordering all substantive issues relating to the defendant's guilt or innocence.¹¹² By asking a series of three questions—(1) Did the defendant bring about a result proscribed by the legislature? (2) Is the act socially unacceptable (unjustified)? and (3) Is the actor personally blameworthy (without excuse)?—the German judge progresses through a comprehensive, unified ordering of the issues of liability. And the conclusion of guilt requires an affirmative finding in all three categories of the inquiry. The three categories represent equal yokes of the state's burden to establish the defendant's susceptibility to punishment; and today, as a matter of course, the German prosecutor bears the risk of the trier's residual doubt on the substantive issues of all three categories.

All rules of criminal liability are read against this structure, and the structure is implicit in every rule stated. It is this characteristic of German law that gives the rules of liability their comprehensiveness; it is not that each rule of the criminal code refers expressly to the three categories of analysis. For it is well understood by all those who use the code that the rule is to be applied by reading it against the background of the tripartite structure of issues. In fact, this understanding among German jurists enables the draftsmen of criminal legislation to prune words from the statutory statement of rules. For example, Section 134(1) of the pending Draft Criminal Code provides cryptically: whoever kills another is guilty of *Totschlag*. The provision omits all reference to the defenses, to the unlawfulness of the killing, to the social unacceptability of the act and to the blameworthiness of the actor. It does not even mention the well-understood requirement that the killing be intentional. All of these ingredients of the offense are assumed. The statutory rule, read against the doctrinal tradition of the legal system, demands that the judge make specific findings in the three categories of issues related to the defendant's guilt.

It would be a mistake to think that the tripartite structure of German criminal theory corresponds to the common law requirements of *actus reus* and *mens rea* for criminal liability. At the most, these Latin phrases when used at all these days stipulate two of the minimal condi-

112. The tripartite division is fixed in German theory, even though the allocation of issues to the three categories has changed since the time of Beling. The primary shift was wrought by Welzel's *finale Handlungslehre*, according to which the factors of intention and unreasonable risk-taking are considered as elements of the *Tatbestand* instead of elements of *Schuld*; the category of *Schuld* is thus acknowledged to be an evaluative rather than a psychological inquiry. See H. WELZEL, *AKTUELLE STRAFRECHTSPROBLEME IM RAHMEN DER FINALEN HANDLUNGSLEHRE* (1953); H. WELZEL, *DAS DEUTSCHE STRAFRECHT* 29-42 (9th ed. 1965).

tions of criminal liability. No one should be guilty of crime, these rubrics tell us, unless he has committed an act and has a guilty mind (or at least an intent to do something). The terms *actus reus* and *mens rea* help us little in understanding the relationship between the putatively defensive issues, say self-defense and duress, and the other issues of criminal liability. Indeed, these Latin rubrics readily supported the 19th century pattern of separating the issues of criminal liability into rules and exceptions. The rules consist of the *actus reus* and the *mens rea* (e.g., as to murder, the *actus reus* is the act of killing, and the *mens rea* is the intention to kill), and the exceptions to these rules are all the remaining defensive issues.

One might question whether a tripartite systemization of substantive issues was either necessary or desirable. Could we not render our rules comprehensive, the skeptic might ask, simply by reading them against the full panoply of defenses and exceptions of the criminal law? Indeed, is that not in fact what we do now in administering the law of crimes in Anglo-American jurisdictions? It is true that common lawyers know the defenses of liability in much the same way the German lawyers are conversant with the structure of the issues bearing on the defendant's guilt, but there is an important difference. The point of the systemization of issues and of the resulting comprehensive rules of liability is not to enable lawyers to keep the issues in mind. It is not a mnemonic device to facilitate mastery of the law. Structuring the issues overcomes the image of exculpatory issues as exceptions to rules of liability. For example, as a result of being subsumed under the second stage of inquiry, namely whether the causing of harm is *rechtswidrig* (socially unacceptable), the defense of self-defense no longer appears as "new matter." Rather, very much like the fact that the defendant pulled the trigger, the claim of self-defense functions as a denial of one of the elements of the prosecutor's case. By ordering the defenses under affirmative inquiries, the German tripartite system converts exceptions into denials; it transforms issues appearing in the common law as "new matter" into unavoidable steps in the process of determining guilt.¹¹³

There is more to the comprehensive, structured view of criminal liability than conceptual neatness. The German tripartite structure stands for an analytic and moral claim about the relationship among the issues bearing on the defendant's criminal guilt. The claim is simply that all

113. This kind of reasoning has been instrumental in the strides of the common law. See *Hopps v. People*, 31 Ill. 385 (1863) (insanity seen as a denial of defendant's criminal intent); *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462 (a claim of accidental homicide treated as a denial of intentional homicide).

Two Kinds of Legal Rules

the substantive issues of liability are on an equal footing: for purposes of determining liability, there is no significant difference between causing harm, intending it, intending it in self-defense, and intending it under duress. That some of these issues may appear in the affirmative and some in the negative is irrelevant. The decisive point is that all bear on the defendant's guilt or innocence. If it is agreed that the prosecutor should bear the risk of residual doubt on one of these issues, then he should bear that risk on all of them.

In sum, the German tripartite structure builds on two related claims about criminal liability. The first premise is that all defenses bearing on guilt function as challenges to a comprehensive rule of liability; one need never characterize an issue as an exception. And the second premise is that with respect to the risk of residual doubt in trying the defendant's guilt, all issues bearing on his guilt should be treated alike.

No common lawyer has ever put forth such sweeping claims. Yet one can perceive traces of these views in at least some quarters of the contemporary trend away from Blackstone's rule on the burden of persuasion in criminal cases. In particular, in cases holding that the prosecutor bears the burden to disprove beyond a reasonable doubt a properly raised claim of insanity, one finds confrontation with the liturgy of rules and exceptions borrowed from private litigation. Notable among these decisions is the Supreme Court's ruling in *Davis v. United States*¹¹⁴ in 1895, which initiated the movement of the federal courts toward widespread application of the policy of acquitting defendants in cases of doubt on substantive issues. The language of the opinion evidences the Court's commitment to many of the points then emerging as central claims of German doctrine:

The plea of not guilty is unlike a special plea in a civil action which, admitting the case averred, seeks to establish substantive grounds of defense by a preponderance of evidence. It is not in confession and avoidance, for it is a plea that controverts the existence of every fact essential to constitute the crime charged. Upon that plea the accused may stand, shielded by the presumption of his innocence, until it appears that he is guilty; and his guilt cannot, in the very nature of things, be regarded as proved if the jury entertain a reasonable doubt from all the evidence whether he was legally capable of committing crime.¹¹⁵

The reasoning of the *Davis* opinion readily supports an extension

114. 160 U.S. 469 (1895).

115. *Id.* at 485-86.

of the holding to defenses like self-defense and provocation, for these too challenge facts "essential to constitute the crime charged." And in cases following *Davis*, the federal courts have come to demand that the prosecutor bear the risk of residual doubt on these defenses too.¹¹⁶ Of course, the defendant must still go forward and produce "some evidence" to support his claim of self-defense or insanity, but once the issue is properly raised, the proper instructions to the jury specify only the prosecutorial burden to disprove the defensive claim beyond a reasonable doubt.

The pattern of the federal courts is but one of two distinct patterns of reform that emerge from the common law trend toward comprehensive rules of liability. The difference between the two trends suggests a correlation between the prominence accorded the actor's moral culpability and the extent of reform of the Blackstonian rules on the burden of persuasion. The pattern exemplified by the federal courts is one of sweeping reform; the courts following this pattern begin with a ruling on the insanity defense, typically based on a perception of the all-encompassing significance of moral guilt in assessing criminal liability,¹¹⁷ and extend the holding by analogy to all of the other traditional defenses.¹¹⁸

The decisions of courts in California and England indicate another pattern of reform. Courts conforming to this pattern tend to be guarded in their revisions of the Blackstonian liturgy. Typically, they begin with a ruling that the prosecution must disprove claims of accident and provocation in homicide cases.¹¹⁹ They reason by analogy from their precedents on accident and provocation to parallel rulings on self-defense; but they fail to go further. They fail to make the analogical leap from self-defense and provocation to insanity.¹²⁰ In these juris-

116. *Johnson v. United States*, 291 F.2d 150 (8th Cir. 1961) (acknowledging rule as to coercion); *Frank v. United States*, 42 F.2d 623 (9th Cir. 1930) (self-defense).

117. *Johnson v. United States*, 291 F.2d 150 (8th Cir. 1961) (acknowledging rule that prosecution must disprove coercion beyond a reasonable doubt); *Frank v. United States*, 42 F.2d 623 (9th Cir. 1930) (relying on *Davis* to recast the rule on self-defense).

118. Jurisdictions conforming to this pattern include *Illinois*: *Hopps v. People*, 31 Ill. 385 (1863) (insanity), extended in *People v. Duncan*, 315 Ill. 106, 145 N.E. 810 (1924) (self-defense); *Michigan*: *People v. Garbutt*, 17 Mich. 9 (1868) (insanity), extended in *People v. Coughlin*, 65 Mich. 704 (1887); *New York*: *People v. McCann*, 16 N.Y. 53 (1857) (insanity), extended in *People v. Downs*, 123 N.Y. 558, 25 N.E. 938 (1890) (self-defense).

119. *E.g.*, *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462 (accident); *People v. Bushton*, 80 Cal. 160, 22 P. 127 (1889) (accident).

120. *Woolmington* was extended to self-defense in *R. v. Smith*, 8 C. & P. 160, 173 Eng. Rep. 441 (1837), but the English courts still expect the accused to persuade on the issue of insanity. *R. v. Smith*, 6 Crim. App. 19 (1910) (apparently the latest appellate ruling). Similarly in California, the courts extended the rule of *Bushton* to encompass self-defense, *People v. Toledo*, 85 Cal. App. 2d 570, 193 P.2d 953 (1948), but not insanity, *People v. Leong Fook*, 206 Cal. 64, 273 P. 779 (1928); *People v. Wolff*, 61 Cal. 2d 795, 394 P.2d 959 (1964).

dictions the decisions stimulating reform thus are frequently of limited generality. To hold that the prosecution must disprove a claim of accident, the courts may rely entirely on formal doctrinal moves. When the House of Lords refused in *Woolmington* to apply the Blackstonian rule to a defense of accident in a homicide case, the judges thought it sufficient to note that the prosecution must prove an intentional homicide and that the claim of accident negated the intentionality of the killing. Neither *Woolmington* nor its progeny confronted the general significance of moral guilt in burden-of-persuasion cases. And not having confronted that issue, the English courts have yet to perceive the inconsistency of imposing differential treatment on two defenses—self-defense and insanity—that are both related to the defendant's culpability in violating the law.

V. The Contours of Comprehensive Rules

The general course of Western criminal law is toward comprehensive rules of liability, yet it is a course marked by eddies of locally idiosyncratic rules. Most Western courts concur in the postulate that only the morally guilty should be sacrificed for the sake of social control; yet they might disagree about what circumstances render men morally guilty. And even if reason requires a conclusion that a particular matter, like insanity, is relevant to a determination of the defendant's guilt or blameworthiness, some courts might balk at the dictates of reason and consistency. These are two problems, then, that require further discussion. We turn first to the problems that courts have had in determining the contours of the concept of blameworthiness; and secondly, to the reasons why some courts which acknowledge the principle that only those who have culpably broken the law should suffer criminal sanctions may nonetheless refuse to accept the consequences of that principle in every particular.

A. *Claims That Exculpate the Defendant and Those That Do Not*

Most criminal defenses exculpate the defendant from charges of moral wrongdoing. If, like self-defense, the defense is a justification, it stands for the claim that the defendant's behavior was socially acceptable or even commendable. If, like duress, it is an excuse, it argues that though the defendant's conduct was unjustified he is personally blameless. To express our conclusion we say that acts under duress and necessity are involuntary. And that conclusion, coupled with the principle that men are not accountable for involuntary conduct, func-

tions to excuse men who have acted under duress or necessity from the charge of blameworthy conduct.

The insanity defense is not so readily classifiable as an exculpatory claim, but the reason for uncertainty here is less theoretical than institutional. It is clear from the criteria articulated in adjudicating the insanity defense that it rests squarely on the view that insane defendants cannot fairly be blamed for their acts. They are to be excused, the courts say, if they were not "responsible" at the time they committed the criminal act with which they are charged. This general criterion and the rhetoric which supports the insanity defense sound unmistakably in the idiom of blameworthiness.

Doubt arises only because as it functions today the insanity defense often does not serve to separate those subject to state sanctions from those who may remain free. It functions rather merely to determine whether the social response to the defendant's conduct (condition) is to be imprisonment or hospitalization. A jury finding of sanity leads to penal confinement; and of insanity, to custodial and therapeutic confinement. In at least twelve states, the commitment of those found insane is mandatory.¹²¹ In the remaining jurisdictions, the prosecution must make a nominal showing of the defendant's continuing dangerousness to secure commitment; yet in practice, as Goldstein reports, commitment in these jurisdictions too tends to be automatic.¹²²

The institutional problem derives from using one concept to answer two different questions. A jury finding of sanity is a reply to the question: is the accused sufficiently blameworthy to be justly subjected to penal confinement? But as it presently functions a finding of insanity answers the question: is the accused sufficiently dangerous to be justifiably committed? Thus, the findings of sanity and insanity speak to different issues; the ostensible link between them is the inference that a man insane at the time of his illegal deed is sufficiently dangerous at the time of the trial to be justifiably deprived of his liberty. The inference is hardly warranted in fact, yet it enjoys the appearance of respectability. One reason might be that in the absence of accepted standards governing the degree of dangerousness necessary to justify civil commitment, any threshold of danger seems tenable. And perhaps even an untenably low threshold is buttressed in the minds of some by the law's assumedly beneficial therapeutic purpose, which is fre-

121. For a list of the jurisdictions, see Comment, *Compulsory Commitment Following a Successful Insanity Defense*, 56 Nw. U.L. REV. 409, 411 n.8 (1961).

122. A. GOLDSTEIN, *THE INSANITY DEFENSE* 144-45 (1967). See also Katz & J. Goldstein, *Abolish the Insanity Defense—Why Not?* 72 YALE L.J. 853, 867-68 (1963).

quently used to justify civil commitment in all cases of mental illness.

If judges viewed the insanity defense solely as a means of selecting one of two alternate modes of confinement, they might understandably require the defendant to persuade on the issue. As a purely dispositional test, insanity is of course extrinsic to the analysis of the accused's culpability. Thus, if the use of the defense is seen as an effort by a culpable defendant to secure therapeutic confinement, one might require him to prove that his condition warrants hospitalization.¹²³

The trouble with this view of the insanity defense is that it is plausible only on the assumption that an insane man's blameworthiness justifies his confinement. But if he successfully raises such a defense, the courts all say the defendant is not culpable. If he is not culpable, the critical question is not how or where he should be confined, but on what ground he may be confined at all. A possible alternative to culpability as a justification for confinement is present dangerousness to others. But in civil commitment proceedings, to confine the dangerous, even under the vague standards of the existing law, the state bears the burden of showing that the accused is sufficiently dangerous to be committed. There is no reason to relieve it of that burden in the wake of an acquittal by reason of insanity, unless the burden could be carried merely by a showing of insanity at the time of the commission of an illegal act.

Thus the therapy needed for the schizophrenic insanity defense is the separation of its conflicting personalities: blameworthiness at the time of the act is one issue, and dangerousness at the time of trial is another. The two questions must be decided independently; the first by the jury in applying the test of sanity, the second by the court after a verdict of not guilty by reason of insanity. Whether it seeks penal or custodial confinement, the state must bear the burden of proving that it may justifiably deprive the defendant of his liberty. If the issues are so separated, the concept of insanity comes into focus: when not used improperly as a rationale for civil commitment, the issue of insanity appears as closely tied to the accused's blameworthiness as are the issues of self-defense and duress.

While issues such as self-defense, consent, necessity and duress are clearly tied to the defendant's culpability, there is an array of factual questions at trial, like those of venue and the statute of limitations, that are unrelated to the evaluation of his conduct. These are matters

123. See Louisell & Hazard, *Insanity as a Defense: The Bifurcated Trial*, 49 CALIF. L. REV. 805, 805-06 (1961).

on which the common law prosecutor must make allegations of fact in his indictment (the date and place of the alleged offense) and on which the jury must make findings of fact. Yet they are not circumstances that are relevant in deciding whether to blame the defendant for what he has done. Rather they are factual conditions for fairly and accurately trying the facts of the alleged offense. Today virtually all Western jurisdictions require the prosecutor to prove that the offense was committed within the period prescribed by the statute of limitations; but the reasons for the concurrence of views are as diverse as the styles of Continental and common law courts.¹²⁴

Between the poles of self-defense and the statute of limitations, one finds a few issues whose rationale and purpose have befuddled common law and Continental courts. The common law defense of entrapment, for example, is an institution of shifting rationale. If one stresses the requirement of the defense that police officers "implant in the mind of an innocent person the disposition to commit an offense,"¹²⁵ the issue appears as closely associated to the blameworthiness of the actor as the circumstance of duress. In one case the actor is seduced by the wiles of his temptor; in the other he is coerced by the threats of an overbearing will. In neither case is his action the expression of his own choice rather than that of another. This interpretation is supported by the unavailability of the defense to those "predisposed" to the commission of the offense,¹²⁶ for they, as persons not actually seduced by the circumstances, are as blameworthy as anyone else who has committed the proscribed act. This view of the defense prevails in the federal courts,¹²⁷ and thus, consistently with the demands of comprehensive rules, the trend among the federal circuits is to require the prosecution to bear the risk of residual doubt on a properly raised claim of entrapment.¹²⁸

124. Compare the discussion in note 22 *supra*, with that in note 93 *supra*.

125. *Sorrels v. United States*, 287 U.S. 435, 442 (1932) (initial Supreme Court construction of the doctrine).

126. *E.g.*, *Matysek v. United States*, 321 F.2d 246 (9th Cir. 1963), *cert. denied*, 376 U.S. 917 (1964); *Trent v. United States*, 284 F.2d 286 (D.C. Cir. 1960), *cert. denied*, 365 U.S. 889 (1961); MODEL PENAL CODE § 2.13(1)(b) (Proposed Official Draft 1962).

127. See *Sherman v. United States*, 356 U.S. 369 (1958); *Accardi v. United States*, 257 F.2d 163 (5th Cir. 1958), *cert. denied*, 358 U.S. 883 (1958); 45 TEXAS L. REV. 578 (1967); *But cf.* *Whiting v. United States*, 321 F.2d 72, *cert. denied*, 375 U.S. 884 (1963) (emphasis on "duty of police not to corrupt citizens").

128. *Johnson v. United States*, 317 F.2d 127 (D.C. Cir. 1963); *Notaro v. United States*, 363 F.2d 169 (9th Cir. 1966); *Kadis v. United States*, 373 F.2d 370 (1st Cir. 1967). JUDICIAL CONFERENCE ON THE SEVENTH FEDERAL CIRCUIT, JURY INSTRUCTIONS IN FEDERAL CRIMINAL CASES § 5.02, at 26 (1965). The Second Circuit has held to Judge Learned Hand's dictum in *United States v. Sherman*, 200 F.2d 880 (2d Cir. 1952), that the accused has the "burden" on the issue of inducement; the court is now inclined, however, to interpret

Critics of this view assimilate the defense to the various devices for controlling improper police behavior, such as the rule excluding unconstitutionally seized evidence.¹²⁹ The defense of entrapment is not available to those tempted to commit crimes by private parties; therefore, the critics argue, the purpose of the defense is clearly not to exculpate those led astray by the prompting of others. Besides, one might add, it is one thing to excuse men coerced by threats of violence and quite another to excuse those who merely succumb to temptation. Indeed, succumbing to temptation is a paradigm case of blameworthy conduct. If one excuses a girl who succumbs to an offer of prostitution, one should also excuse officials who are seduced by attractive bribes. Thus, entrapment may not be an excuse at all; properly construed it may be a device designed solely to discipline police behavior. This view finds its most vigorous expression in the Model Penal Code, which in commentary labels the defense "a complaint by the accused against the state for employing a certain kind of unsavory enforcement."¹³⁰ This characterization, taken together with the Roman maxim *ei incumbit probatio qui dicit*, readily supports casting the burden of persuasion on the issue to the defendant; if he is the plaintiff on the "complaint" of entrapment, then general principles require that he support his claim by at least a preponderance of the evidence. This indeed is the Code's position on the burden of persuasion in entrapment disputes.¹³¹

As the Model Penal Code is at odds with the present stance of the federal courts on the rationale of entrapment, so the German courts and scholars have clashed on the appropriate interpretation of the defense of voluntarily abandoning an attempt prior to consummation. Consider the case of one who pours gasoline on the floor of a warehouse and strikes a match with the intent to set the place ablaze; at the last minute he has a change of heart and puts the match out. His acts went far enough to constitute attempted arson. Yet Section 46 of the German Criminal Code would insulate him from punishment,¹³² and one

the "burden" as the burden of going forward, *United States v. Riley*, 363 F.2d 955 (2d Cir. 1966).

129. Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 *YALE L.J.* 1091, 1111 (1951); MODEL PENAL CODE § 2.10, Comment (Tent. Draft No. 9, 1959); Comment, *Due Process of Law and the Entrapment Defense*, 1964 *U. ILL. L.F.* 821; Note, *Entrapment: An Analysis of Disagreement*, 45 *B.U.L. REV.* 542 (1965).

130. MODEL PENAL CODE § 2.10, Comment, at 21 (Tent. Draft No. 9, 1959).

131. MODEL PENAL CODE § 2.13(2) (Proposed Official Draft 1962).

132. StGB § 46(1) provides: "An attempt shall not be punished if the actor abstains from the execution of the contemplated [criminal] act without being impeded in the execution of the act by factors independent of his will." See SCHÖENKE-SCHRÖEDER, *STRAFGESETZBUCH* § 46 (13th ed. 1967).

wonders why. What is the rationale for not punishing a man who, having done enough to be guilty of an attempt, abandons his criminal plan? Should we say that the attempt was culpable, but that the legal system waives its prerogative to punish in order to encourage other would-be arsonists to desist at the last moment? Or should we construe the abandonment as an indication that the defendant's intent to commit arson was never sufficiently firm to render him blameworthy of an attempt to commit the offense? Either description suffices to explain abandonment as a defense; yet on the first view, the defense is extrinsic to the determination of the defendant's personal guilt; on the second view, it is an essential part of that inquiry. The first rationale of the defense prevailed in German law until the late 1950's, when an opinion of the German Supreme Court, born of skepticism as to the likelihood of deflecting criminal plans with the promise of immunity, changed the focus of the defense's rationale to the culpability or personal guilt of the actor.¹³³ With this change in rationale the burden of persuasion on the issue has come to rest. Under the former view of the defense, the defendant had to prove a claim of voluntary abandonment by a preponderance of the evidence.¹³⁴ Today there is little room to debate the German prosecutor's responsibility for resolving doubts on the issue. As an issue related to the culpability of one who attempts an offense, the claim of voluntary renunciation falls, without challenge, within the scope of the maxim *in dubio pro reo*.¹³⁵

Relating an issue to the blameworthiness of the defendant's conduct is not, of course, a necessary condition for imposing the risk of residual doubt on the prosecution; the prosecution often bears that risk on matters like the statute of limitations that are unrelated to blameworthiness. Yet, as the history of entrapment in the United States and abandonment in Germany indicates, the rationale of a defensive issue is often a sufficient condition for imposing the burden of persuasion on the prosecution. Thus, perceiving the reason for the state's decision

133. Judgment of February 28, 1956, 9 BGHSt 48 (Bundesgericht, Ger.): "In most cases the actor attempting an offense does not think about the penal consequences. Often he will not even know, still less keep in mind, that he can escape punishment by abandoning his attempt. . . . It would be more accurate to formulate the rationale of StGB § 46(1) in this way: That an actor voluntarily abandons an attempt indicates that his criminal intent was not as firm as would have been required for execution of the offense." *Id.* 52. *But cf.* H. WELZEL, *DAS DEUTSCHE STRAFRECHT* 176 (9th ed. 1965) (maintaining the traditional view that the purpose of the rule is to induce men to desist from their attempted offenses).

134. J. GLASER, *LEHRE VOM BEWEIS* 94-95 (1883); A. VON KRIES, *supra* note 82, at §41.

135. Judgment of February 19, 1963, 18 BGHSt 274, 276 (Bundesgerichtshof, Ger.) (dictum that the application of *in dubio pro reo* was "self-evident" in cases under Section 46(1)).

under particular circumstances not to punish men who have attempted or caused harm becomes a matter of practical importance; knowing why we do not punish can affect the tactical position of the defendant at trial. If the rationale for a particular defensive issue is that under the circumstances the defendant is not to blame for his conduct, then by the dominant trend of Western law, the prosecution must disprove the factual claims of the defense precisely as it must prove that the defendant was the one who fired the homicidal bullet. If, on the other hand, the purpose of incorporating the issue into the set of conditions for punishing the defendant is to discipline police behavior or to deflect criminal plans with a promise of immunity, then common law and Continental courts might be receptive to the argument that the defendant should prove his "complaint" against the police or his "petition" for immunity.

It is tempting to resolve disputes over the rationale of borderline issues like entrapment and abandonment with an eye to the impact of competing rationales on the burden of persuasion. But this is not the plane on which the debates on these issues have actually taken place. To allocate the burden of persuasion on entrapment on the basis of the rationale for the defense, and then to rationalize the defense in terms of the preferred result on the burden of persuasion, would be to travel in a needless circle; one might as well avoid the journey and rule squarely on the burden of persuasion. The problem of construing the rationale for defensive issues is not one of determining what rationale we ought to adopt, but of fathoming the reasons why we do in fact permit the defenses we do. The task is not one of setting goals for legal action, but of clarifying the goals actually being pursued.

This is not to suggest, however, that political and practical criteria have never affected judicial allocations of the burden of persuasion. Indeed it is precisely the concern for these considerations that accounts for the tenacity of rules requiring the defendant to prove issues like self-defense and insanity by a preponderance of the evidence. To isolate these factors of politics and practicality, we shall turn to the arena in which they do in practice affect the allocation of the burden of persuasion.

B. *Politics and Practicality in Allocating the Burden of Persuasion*

As we have seen, the premise of a court's conclusion that the defendant must bear the burden of persuasion on a particular issue is frequently the classification of the issue as one extrinsic to the blameworthiness of the defendant's conduct. On some issues, that

classification reflects concern less for the explanation of the issue's relevance at trial, than for the practical impact of viewing the defense one way or the other. The diverse political and practical considerations that may so affect an allocation of the burden of persuasion coalesced in a series of dramatic 1949 decisions by the High Court for the British Zone in Germany,¹³⁶ in which the Court systematically reversed the acquittal of doctors who participated, directly and organizationally, in Hitler's "brave new" euthanasia program for the mentally ill. As a guide to the political factors that often influence allocation of the burden of persuasion, these cases merit detailed attention.

The doctors, accused of aiding and abetting criminal homicide, sought to justify their participation in the planned secret killings of hospital inmates; they argued that the deaths they were responsible for were justified by their efforts to save as many lives as they could under the circumstances. And in at least one case the defendant doctors presented evidence that they struck names from the lists of the fated and thereby sought to minimize the systematic killing. They had no choice but to soil their hands with Hitlerian evil, they argued, for if they had not done so other doctors would have intervened, with the same devastating consequences for an even greater number of hospital inmates. This utilitarian-sounding argument was cast in the form of an analogy to an abortion performed in order to spare the life of the mother. As the abortionist sacrifices the lesser value for the greater good, the doctors allegedly killed a few to save a greater number. If one should take the numerous factual premises of the claim as given, the plight of the doctors might engage the sympathy and even the respect of the utility-minded man. Apparently, the triers-of-fact—in one case a judge and in the other a jury composed of judges and laymen—were moved by the argument, for they acquitted the defendants on the grounds of extra-legal necessity, the defense hewn by the pre-war German courts to justify abortions necessitated by danger to the life of the mother.¹³⁷

The High Court reversed the acquittals on the ground that the defense of extra-legal necessity did not apply to the facts: the defense presupposed the sacrifice of a lesser value (like a fetus) to spare a higher interest (the life of the mother). In saving some of the doomed in-

136 Judgment of March 5, 1949, 1 *Entscheidungen des Obersten Gerichtshofs für die Britische Zone* 321; Judgment of July 23, 1949, 2 *Id.* 117.

137. See Judgment of March 11, 1927, 61 *RGSt.* 242 (Reichsgericht, Ger.); H. WELZEL, *supra* note 133, at 82-84.

mates, one could not be acting in the interest of a higher value; for, as the opinions argue, the existence of those sacrificed was of fully equal dignity with that of the inmates allegedly spared by the defendants' efforts. Since the values were of the same plane, sacrificing one for the sake of the other was not morally justifiable. On this view of the defense of extra-legal necessity, the courts reversed the acquittals and remanded for new trials.

The relevance of this snippet of legal history lies in the fact that the High Court did not go so far as to suggest that there was no defense on the facts. On the contrary, it proceeded to outline a new defense in German law that could have exempted the defendant doctors from punishment. The crucial fact, as the court viewed the case, was the Kafkaesque context in which the doctors backstepped into involvement with Hitler's secretive, but supposedly charitable scheme of killing the mentally ill. What the doctors did was blameworthy under the criminal law; but, the court reasoned, since they believed they were saving lives and since they acted in a context insulated from the long-standing values of Western civilization, they should be exempt from punishment even though they were blameworthy *if*—the court hastened to add—they could prove (and in German law that means proof beyond a reasonable doubt) the facts underlying their claims. The court was amenable to the defensive claims of the doctors, but by classifying the defense as extrinsic to the determination of guilt,¹³⁸ it enjoyed the flexibility of imposing the burden of persuasion either on the state or on the defense. By choosing the latter, it qualified the new defense by requiring the defendant to bear the risk of unsuccessful proof on his claim for personal exemption for punishment.

The analysis of the High Court for the British Zone evoked vigorous criticism from German academe. Two of the country's most prestigious professors, Hans Welzel and Eberhard Schmidt, chastened the court for improperly classifying the new defense as an issue extrinsic to the determination of the defendant's guilt.¹³⁹ The doctrinal queries of Welzel and Schmidt may be fully warranted, but they fail to confront a significant factor in the court's perception of the problem, namely the impact of the classification on the burden of persuasion. By classi-

138. Substantive issues extrinsic to blameworthiness are called *Strafausschliessungsgründe* in German law; diplomatic immunity is an example. H. WELZEL, *supra* note 133, at 53; Peters, *Zur Lehre von den persönlichen Strafausschliessungsgründen*, 1949 JURISTISCHE RUNDSCHAU 496.

139. Welzel, *Zum Notstandproblem*, 63 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 47 (1951); Schmidt, Comment, 1949 SÜDDEUTSCHE JURISTENZEITUNG 559; Welzel, Comment, 1949 MONATSSCHRIFT FÜR DEUTSCHES RECHT 373.

fyng the defense as it did, the court had the doctrinal freedom to apply or not to apply the principle of *in dubio pro reo* to the new defense.¹⁴⁰

Several characteristics of the doctors' claims in the 1949 euthanasia cases suggest analogies to developments in the common law. The court's recognition of the doctors' potential immunity to criminal sanctions represents the creation of a defense that was: (1) previously unknown in German law; (2) vaguely defined and subject to misuse; and (3) an issue in a politically tense, significant arena of judicial responsibility. The first two of these factors, individually and collectively, have come to play their part in common law decisions imposing the burden of persuasion on criminal defendants.

Newly-created defenses are often qualified by the demand that the defendant bear the burden of persuasion. Illustrative is the Model Penal Code's position on the defense of mistake of law—a defense newly fashioned for those relying on ostensibly competent but mistaken legal advice.¹⁴¹ The defense is among those that challenge the actor's moral culpability in breaking the law. If a man has acted reasonably in informing himself of his legal obligations, then surely he is not to blame for fortuitously contravening a rule of which he is excusably ignorant.¹⁴² The German courts view the defense of mistake of law as inconsistent with the defendant's culpability, and thus they routinely apply the maxim *in dubio pro reo* in disputes on the issues. The Model Penal Code, on the other hand, demands that the defendant prove a mistake of law by a preponderance of the evidence.¹⁴³

Is the position of the Model Penal Code justified as a matter of principle or is it simply a compromise designed to muster support for the new defense? The tone of the Code's official commentary on the defense is one of guarded approval; no justification is offered for imposing the burden of persuasion on the defendant.¹⁴⁴ This is as one would expect. The legislative instinct for compromise often results in qualified action; and imposing the burden of persuasion on the defendant is a subtle, inconspicuous way of qualifying a new defense. And the compromise seems harmless. The defendant has a greater tactical advantage than he had before (there is an additional issue on which he might be acquitted), so he should not be heard to complain

140. In his later work on the subject, Welzel acknowledges the implications of the doctrinal analysis on the burden of persuasion. Welzel, *supra* note 139, at 47, 55 (1951).

141. MODEL PENAL CODE § 2.04 (Proposed Official Draft 1962).

142. See Houlgate, *Ignorantia Juris: A Plea for Justice*, 78 ETHICS 32 (1967).

143. MODEL PENAL CODE § 2.04(4) (Proposed Official Draft 1962).

144. MODEL PENAL CODE § 2.04, Comment (Tent. Draft No. 4, 1955).

Two Kinds of Legal Rules

that the legislature or court is taking away in part that which they have bestowed on him. Yet a political compromise should be recognized for what it is. It is not a stand based on principle, on a perception of just policy. It is but a maneuver made for the sake of law reform.

The Model Penal Code's stand on the defense of mistake of law reflects another of the factors present in the case of the German euthanasists, namely the fear that guilty men might find shelter in the ambiguities and crevices of defensive issues. To guard against that prospect, courts insist upon persuasive proof that the defense applies. The fear that the law will be abused pervades common law thinking. It has left its deepest mark in areas like insanity and mistake, where proof of the issue has seemed to depend inordinately on the defendant's testimony. The common law judges reasoned that the defendant's psychological and mental processes are inaccessible to prosecutorial proof. Thus, they demanded and still do demand in a substantial number of jurisdictions that the defendant prove a claim of insanity by a preponderance of the evidence.¹⁴⁵ In the area of mistake, the common law judges went even further. They refused to recognize mistake of law as a defense; and they rejected consideration of mistakes of fact in cases ranging from statutory rape to possession of adulterated foodstuffs.¹⁴⁶ To avoid the risk of abuse, the common law judges destroyed the defenses they feared; sometimes partially, as by transferring the burden of persuasion to the defendant; and sometimes totally, as by supplanting the defense of mistake of fact by standards of strict liability.

Denying defenses to charges of culpable conduct whether totally or partially, increases the risk that morally innocent men will suffer criminal sanctions. Whether the fear of acquitting the guilty justifies that risk depends on the strength of the concern for justice to the individual. It depends, in short, on how earnestly one subscribes to the postulate that the morally guilty, and only they, may justly be punished under the criminal law. The trend of Western law, as revealed by the growing number of issues in an increasing number of jurisdictions on which the prosecutor bears the risk of residual doubt, expresses a general commitment to that postulate.

To urge the universal adoption of comprehensive rules of liability, one need not argue that courts should never defer to their fears that

145. See note 13 *supra*.

146. See note 40 *supra*.

particular defensive institutions might be misused by mendacious defendants. So far as courts are subject to these fears, they may respond to them by imposing on the defendant the burden of going forward on the issue; that is, as a condition of the defendant's right to an instruction to the jury on the issue, they can require him to raise a reasonable doubt on his behalf with regard to his claim. His unsupported, incredulous protestations of mistake need carry no more weight than an unsupported claim that he was insane or intoxicated at the time of the deed. After a man has kidnapped a boy and held him for ransom, it will not do—absent credible psychiatric testimony—for him to argue that he was mistaken either about what he was doing or about the legality of kidnapping. It is not clear why one should fear the wisdom of jurymen to cope with unfounded claims of insanity or of mistake; but if fear there be, the burden of going forward provides a sufficient institutional check against acquitting the guilty.¹⁴⁷

VI. Comprehensive Rules: The Underlying View

The Western trend toward comprehensive rules of liability finds expression in the German tripartite structure of guilt-related issues, in the centrality of the concept of guilt in the thinking of many American courts, and in the writing of contemporary French scholars urging parallel reforms in France. The trend toward comprehensive rules in criminal cases is more than a post hoc rationalization for burden-of-proof developments favorable to criminal defendants. Comprehensive rules stand for a specific view of the criminal process, a view that contrasts sharply with that underlying the model represented by the litigation of private disputes. Specifically, comprehensive rules stand for a process of fact-finding in which (a) the prosecutor represents the interests of the community and not those of specific groups of persons, and (b) the focus of the fact-finding process is the justification for invoking criminal sanctions, not on the adjustment of interests between competing classes of litigants. Each of these characteristics warrant review.

A. *The Prosecutor's Constituency*

In a private action for the collection of an unpaid debt, proof by the plaintiff that the debt was incurred imposes on the parties the

147. On the possible constitutional impediments of using the burden of going forward for this purpose, see note 83 *supra*.

roles of creditor and debtor. Allocation of the burden of persuasion on the issue of payment, then, functions to enhance the interests of either creditors or debtors as litigants. Can one say that the criminal prosecutor similarly represents the interests of a specific class of persons? One might regard the prosecutor as the representative either of the victims of the crime or of the class of persons threatened by the activity charged. The interests of these groups bear on the criminal process at the stage of sentencing (in the form, respectively, of the retributive and deterrent aims of punishment), and one may be tempted to think that they should play a part as well in adjusting the risks of fact-finding at trial. The argument that they should would run like this: in private cases one delineates classes of litigants with competing interests, *e.g.*, debtors and creditors, pedestrians and motorists; and one can do the same in many criminal disputes, *e.g.*, bank-robbers and banks, those causing harm and those suffering harm. As we invariably promote the welfare of one class of litigants or another in regulating the burden of persuasion in private cases, so we unavoidably do the same in criminal cases. It is a problem of policy that we cannot ignore; either we favor the prosecutor and the interests for which he stands, or we favor the defendant.

The argument turns on the premise that specific threshold issues might function in criminal cases as guidelines for delineating competing classes of litigants. As the creation of a debt is a threshold issue at private law, so one assumes that the intentional causing of harm could serve as a threshold issue in criminal cases. It is at this point in the argument that comprehensive rules, and the underlying view of the criminal process they represent, pose a challenge. Under comprehensive rules, all issues are of equal importance; there is no threshold issue short of the ultimate inquiry in the case: the personal guilt of the defendant for having unpermittedly caused harm. Thus, there could be only one significant classification of litigants in criminal cases: those who are guilty of crime and those who are not. But this is hardly a classification relevant to assigning risks in the process of determining guilt, for the classification presupposes the results of the inquiry, *i.e.*, the guilt of the defendant.

If one were to regard the criminal process primarily as a means for channeling private demands for vengeance,¹⁴⁸ one might wish to con-

148. This is said to be one of the functions of a primitive system of penal sanctions. O.W. HOLMES, JR., *THE COMMON LAW* 2-3 (1881); R. CHERRY, *THE GROWTH OF CRIMINAL LAW IN ANCIENT COMMUNITIES* 8-12 (1890).

sider the interests of the victims even at the stage of determining the defendant's guilt or innocence. The desire for vengeance may well be directed at one who faultlessly brings on social harm. In an unresolvable dispute as to whether the defendant started the fight in which he slew his opponent, one might reason that an acquittal would leave no recourse to the deceased's family but violent self-help. The victims would be willing to blame the defendant even if others had doubts as to who started the fight. Thus, with this concern predominant, one would readily support a policy of requiring the defendant to prove his claim of self-defense by a preponderance of the evidence. Such an allocation of the burden of persuasion would decrease the likelihood of acquittals in cases in which private parties, unnerved by the defendant's behavior, might resort to violence to "do justice" on their own terms.

Although comprehensive rules of liability apply independently of the rationale for imposing criminal sanctions, society may tend to acknowledge the need for such rules only after it has rejected the view that criminal punishment serves primarily as a surrogate for private vengeance. If actual guilt is the threshold condition of punishment, then one cannot fairly blame a man on proof of fewer than all issues relevant to his blameworthiness. It is irrelevant that the victims of the harm might have their own view of the facts or that they might be insensitive to the sophisticated reasons for excusing and justifying the causing of harm. If all issues of criminal liability are yokes in comprehensive rules, then one necessarily denies deference to less sophisticated private standards for blaming—standards focusing, say, only on intending and causing harm.

To summarize, then, the view that the prosecutor's constituency is a class of private individuals, either those harmed or those threatened by the type of crime, conflicts with the principle that the personal guilt of the defendant is the threshold inquiry of the process of criminal adjudication. Furthermore, a concern for private standards of blaming suggests the antiquated view that the function of criminal punishment is to channel private demands for vengeance.

It is conventionally held that at least for some purposes public prosecutors represent the interests of the entire community. Does that suggest that the interests of the community should bear on adjusting the risk of convictions at trial? True, criminal convictions further the common good; they deter socially harmful behavior and they provide for the confinement of potentially dangerous men. To further these interests, one need only adjust the risks of fact-finding at trial to in-

crease the rate of convictions. But that would directly increase the risk that innocent men would suffer criminal sanctions. The interests of the commonweal thus collide with those of innocent men, and accordingly with the legitimate interests of all defendants not yet convicted of crime. The way to resolve this conflict, however, is not to transfer to the defendant the burden of persuasion on some defensive issues. That would increase the rate of convictions—but at the cost of discriminating against defendants relying on those particular claims. The plane for resolving the conflict is the determination, generally, of the quantum of proof required for the prosecutor to sustain his case. Reducing the requisite quantum of proof would likewise increase the rate of convictions, but rather than discriminating against defendants relying on particular claims, an overall adjustment of the balance between the state and the accused would disadvantage all defendants equally. Should the prosecutor have to demonstrate guilt by proof beyond a reasonable doubt or merely by a preponderance of the evidence? The former standard, the standard consistently favored by legal systems here and abroad, expresses the supremacy of individual interests in the Western legal tradition. It does not deny that the prosecutor represents the concededly valid interests of society as a whole; rather, it recognizes that because society is in a sense arrayed as a whole against the individual defendant, there is a special risk of abuse and hence a justification for stringent protection of the defendant by a requirement that his guilt be proved to a near certainty.

B. *Justifying Criminal Sanctions*

The emergence of comprehensive rules of liability reflects a reorientation of the criminal process. In the course of a hundred years, the focus of the process has shifted from the superficial similarities of civil and criminal trials to a broader view of the criminal process. And from this broader perspective, the criminal process appears not as a conflict between litigants, but as a process for determining whether the state's officials may justly deprive an individual of his freedom. A Wyoming judge, writing in 1889, stated this view of the criminal process eloquently:

The doctrine that the burden never falls upon the accused does not arise *in favorem vitae*, or out of any pity or sympathy for the prisoner, but it arises out of the nature of what the sovereign power voluntarily undertakes to do before it will ask a conviction for crime at the hands of a jury.¹⁴⁹

149. *Trumble v. Territory*, 3 Wyo. 280, 284, 21 P. 1081-83 (1889) (Corn, J.).

And what does the sovereign power undertake to do before it will ask for a criminal conviction? At minimum, the state must come forth with a justification for condemning the accused as a criminal and depriving him of his liberty. In civil proceedings to commit persons of serious danger to the community, the justificatory rationale is utilitarian; it is the danger to the community that justifies a quarantine of its source. If dangerousness—or particular kinds of dangerousness—is a justification for confinement, then the class of persons subject to the sanction is self-defining. Only those who pose the requisite kind of danger to others are eligible, and the selection of committable individuals out of this class depends entirely on the quantum of proof (*i.e.*, the certainty of the danger) required for commitment. In the case of criminal sanctions, however, the ends to be served are not in themselves a sufficient justification. Even men of minimal or undetermined dangerousness suffer these sanctions. Their condemnation and punishment serve not only or not even primarily directly to protect society, but rather to reinforce community norms and thus indirectly to deter deviant behavior. But these purposes would be served by the punishment of vast numbers of persons—indeed of any person who brings about a result prohibited by the legislature. Since no one reared in the Western tradition would countenance such indiscriminate use of criminal sanctions, the crucial problem becomes the selection of the individuals who are to be sacrificed for the community's general welfare. Thus, if one accepts general deterrence as an aim of the criminal system, the question to be answered in individual criminal trials is which among the many individuals who might usefully serve that general aim may justly be punished to that end.

The minimal demand of Western legal systems is that the state may punish only those individuals who have acted contrary to legal commands. But this is merely the minimal demand of justice. Of all men who engage in prohibited behavior, some might act with good reasons and some might act involuntarily. To ignore claims of justification and excuse and to punish all violators alike would be to discriminate unfairly against men whose violation of the law is morally innocent. On the other hand, by proving that the defendant violated the law and did so culpably, the state places the accused in a category of men of equal moral liability to punishment. No one in the class of blameworthy offenders has standing to argue that he alone should be exempt from liability for what he has done. The only argument open to a blameworthy offender is a challenge to the penal system as

Two Kinds of Legal Rules

a whole.¹⁵⁰ On the assumption that the state justifiably punishes culpable offenders in the name of public order and social control, the prosecutor is able to justify the imposition of criminal sanctions in individual cases: he need only demonstrate that the individual accused has culpably violated the law. That much the state voluntarily undertakes to do before it will ask a jury for a conviction.

Both formally and substantively, comprehensive rules of liability stress the state's obligation to justify the imposition of criminal sanctions. Formally, comprehensive rules provide a justificatory rationale by stating the necessary and sufficient substantive conditions for imposing sanctions according to the law. Substantively, comprehensive rules reflect a specific justificatory rationale for imposing criminal sanctions; this they do by expressing the equal relevance of all issues related to the defendant's blameworthiness in violating the law.

Comprehensive rules provide a medium for viewing the criminal process in proper perspective. They serve to set the process off from the litigation of private disputes; they provide emphasis anew on the state's obligation to justify the use of criminal sanctions. Above all, they serve to minimize the risk that innocent men will suffer under the criminal law. These are the benefits of the historical trend toward comprehensive rules of liability.

150. *Caveat*: I reserve for more careful deliberation whether the state justly punishes a man who disobeys an unjust law with the expectation of suffering legal consequences.