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I Ain't Got No Body: The Moral Uncertainty of Bodiless Murder Jurisprudence in New York After People v. Bierenbaum

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COMMENT

I AIN'T GOT NO BODY: THE MORAL UNCERTAINTY OF BODILESS MURDER JURISPRUDENCE IN NEW YORK AFTER *PEOPLE V. BIERENBAUM*

*Francis Paul Greene**

"[M]urder is always a mistake. One should never do anything that one cannot talk about after dinner."[1]

"Murder will out; we see that every day."[2]

INTRODUCTION

On July 5, 1998, Manhattan socialite and former ballerina, Ms. Irene Silverman, disappeared.[3] The same day, police stopped a mother and son grifter team, Sante and Kenneth Kimes, a few blocks away from Ms. Silverman's apartment on an unrelated theft and forgery warrant from Utah.[4] After searching the Kimeses and their car, police found loaded handguns, a stun-gun, plastic handcuffs and $30,000 in cash.[5] They also found tape-recordings of Ms. Silverman's phone conversations—ostensibly taken from wiretaps—and a forged deed which purported to transfer ownership of Ms. Silverman's multi-million dollar Manhattan townhouse to the Kimeses.[6] A few months later, despite the fact that Ms. Silverman's body had not been found

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1. Oscar Wilde, *The Picture of Dorian Gray*, *in* The Complete Oscar Wilde 154 (1891).

2. Geoffrey Chaucer, The Canterbury Tales, The Nun's Priest's Tale 144 (Simon & Schuster Inc. 1971).

3. People v. Kimes, N.Y. L.J., Jan. 18, 2000, at 31 (Sup. Ct. Jan. 18, 2000).

4. *Id.*

5. Bryan Robinson, *Mother and Son 'Grifters' Convicted*, *at* http://abcnews.go.com/sections/us/DailyNews/Kimes000515.html (last visited Mar. 12, 2003).

6. *Id.*

and several investigations discovered no physical evidence of a crime, the Kimeses were charged with murder.[7] Jury selection for their trial began in 1999, and the pair was convicted on May 18, 2000.[8]

Despite its "screen value," the Kimes/Silverman case[9] also involved a unique jurisprudential question: can a person be convicted of murder where there is no body, no forensic evidence and no admission of guilt? A guilty verdict in a murder trial based entirely on circumstantial evidence had been an accepted part of the common law since the 1792 case of *The King v. Hindmarsh*,[10] and of New York jurisprudence since at least *People v. Lipsky* in 1982.[11]

Nevertheless, the prosecution of murder in absence of a body or any other direct evidence was rare. Indeed, the Kimeses' guilty verdict for murder was the first obtained in New York without a body, a confession, or any physical evidence of a crime whatsoever.[12] The Kimeses' verdict would not remain unique for long. Less than a year after the Kimeses were arrested, investigators re-opened a fifteen-year-old missing persons case and Dr. Robert Bierenbaum, a plastic surgeon and amateur pilot, was charged with the murder of his wife who had gone missing without a trace.[13] The prosecution claimed that Bierenbaum killed his wife in their Upper East Side apartment and then dumped her body into the ocean from a private rented plane.[14] As was true in the Kimes affair, the Bierenbaum case attracted significant media coverage and was featured prominently on the small screen, rating in turn its own "Law & Order" episode.[15] Like the Kimses, Bierenbaum was also convicted, receiving in his case a sentence of twenty years to life for the murder of his wife.[16]

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7. *See* David Rohde, *Mother and Son Arraigned In Woman's Disappearance*, N.Y. Times, Jan. 5, 1999, at B3.

8. *See* Robinson, *supra* note 5.

9. It was the subject of a CourtTV "Mugshots" episode (entitled *Sante and Kenneth Kimes: Murderous Mother, Deadly Son*) and a Lifetime Network made-for-TV movie starring Mary Tyler Moore as Sante Kimes (entitled *Like Mother, Like Son: The Strange Story of Sante and Kenny Kimes*). *See CourtTV OnAir*, *at* http://www.courttv.com/onair/shows/mugshots/episodes/kimes.html (last visited Mar. 13, 2003); *E! Online – Movie Facts – Like Mother, Like Son: The Strange Story of Sante and Kenny Kimes (2001)*, *at* http://www.eonline.com/Facts/Movies/0,69,82834,00.html (last visited Feb. 28, 2003).

10. *See* 168 Eng. Rep. 387 (1792).

11. *See* 443 N.E.2d 925 (N.Y. 1982). Note that both *Hindmarsh* and *Lipsky* involved other types of evidence (eyewitnesses in *Hindmarsh* and a confession in *Lipsky*), not present in the Kimeses' case.

12. *See* Michael A. Riccardi, *Murder Trial Against Plastic Surgeon Begins Without Body, Circumstantial Evidence Relied On*, N.Y. L.J., Oct. 3, 2000, at 1.

13. *See id.*

14. *Id.*

15. *Law & Order: The Good Doctor* (NBC television broadcast, Nov. 25, 2001); *see Casebook—G*, *at* http://wolfstories2.tripod.com/id72.html (last visited Feb. 28, 2003).

16. *See* Christine Dorsey, *Bierenbaum Sentencing: Former LV Doctor Gets 20-to-life*, *available at* http://www.lvrj.com/lvrj_home/2000/Nov-30-Thu2000/news/14932332.

This Comment investigates the jurisprudence of murder in the absence of a body (termed *bodiless murder* for expediency) in New York as well as crises created therein by the Appellate Division's decision in *People v. Bierenbaum*.[17] Although by all appearances a settled area of the law since *Hindmarsh* and *Lipsky*, bodiless murder trials function as a lightning rod for difficult issues from other jurisprudential areas, including questions of circumstantial evidence, character evidence, and the establishment of *corpus delicti*.

Part I.A provides a general outline of bodiless murder jurisprudence. It begins by tracing the development of the bodiless murder law from its beginnings in eighteenth-century England through the present.[18] It outlines the influential rule laid down by Lord Matthew Hale,[19] which urged caution in bodiless murder cases, and the way in which the Hale rule has been applied in both English and American case and statutory law.[20] Part I.A then goes on to examine the notion of *corpus delicti* as well as the conceptually distinct *corpus delicti rule*[21]—a doctrine which has accompanied most discussions of Lord Hale's rule, but which must be distinguished from the present discussion, since it applies only to a specific subcategory of bodiless murder cases, i.e. those in which defendants admit their guilt. The final section of Part I.A brings this distinction to the fore, inasmuch as it focuses on the unique issues raised by bodiless murder cases based entirely on circumstantial evidence where defendants do not confess.[22]

In Part I.B, the discussion turns to the moral certainty instruction traditionally given in all cases built entirely on circumstantial evidence. It begins by examining the two-part process inherent to the use of circumstantial evidence, and then provides a brief history of the court's penchant for caution in cases in which no direct evidence of a crime is available.[23] Part I.B then goes on to examine the way in which the moral certainty instruction functions more like a procedural safeguard than a discrete standard of proof.[24] Part I.B also examines recent developments in the moral certainty instruction, including the way in which both case law and revisions of the Criminal Jury Instructions have ostensibly weakened it.[25] The final section of Part I.B. shows, however, how the current permutation of the moral

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html (last visited Feb. 23, 2003).

17. 748 N.Y.S.2d 563 (App. Div. 2002).
18. *See infra* Part I.A.1.
19. *See infra* Part I.A.1.a.
20. *See infra* Part I.A.1.b.
21. *See infra* Part I.A.2.
22. *See infra* Part I.A.3.
23. *See infra* Part I.B.1.
24. *See infra* Part I.B.2.
25. *See infra* Part I.B.3.

certainty instruction continues to provide an important bulwark against haste and impermissible reasoning in circumstantial cases.[26]

Part II investigates the way in which each of these cases considered the Hale/*Hindmarsh* rule and balanced the need to punish with the danger of false conviction. As will become apparent, the current dismissal of the Hale/*Hindmarsh* rule has created an atmosphere in which a court may accept previously suspect categories of evidence (consciousness-of-guilt evidence as well as opportunity and motive when presented alone) as sufficient to support a guilty verdict.

Part II.A investigates the Court of Appeals' strict interpretation of the Hale rule (minus its *Hindmarsh* exception) in *Ruloff v. People*.[27] Part II.B follows the court in its return to a broader interpretation of the Hale/*Hindmarsh* rule in *Lipsky*.[28] Part II.C charts the Appellate Division's path from the middle ground of *Lipsky* to the permissiveness of *Bierenbaum*, which circumvents the Hale/*Hindmarsh* rule and summarily rejects the long tradition of caution in bodiless murder cases.[29]

Part III.A focuses on the aftereffects of *Bierenbaum*. Part III.A.1 discusses the implications of *Bierenbaum* for bodiless murder cases, inasmuch as it makes the faulty math of 0 + 0 = 1 a valid precedent.[30] Part III.A.2 explores the import of *Bierenbaum* as an evidentiary precedent generally, especially in cases involving domestic violence.[31] In such cases, *Bierenbaum* has created a presumption of guilt based on character evidence which is both impermissible and nearly impossible to overcome. Part III.B outlines remedies available to the Court of Appeals, which could mitigate the damage *Bierenbaum*, and its underlying logic, can cause. Part III.B.1 focuses on the specific action required by the Court of Appeals to make any such remedy effective and Part III.B.2 presents two exemplary responses to the problem of bodiless murder from other jurisdictions.[32]

I. BODILESS MURDER AND THE MORAL CERTAINTY STANDARD

Bodiless murder cannot be examined in a vacuum. Indeed, as suggested above, it is less a legal phenomenon per se, than a kind of focal point for the discussion of other troublesome areas of criminal law. This part provides a contextual background for the discussion of the New York jurisprudence of bodiless murder in a two step process. It begins by outlining the development of bodiless murder

26. *See infra* Part I.B.4.
27. 18 N.Y. 179 (1858); *see infra* Part II.A.
28. *See infra* Part II.B.
29. *See infra* Part II.C.
30. *See infra* Part III.A.1.
31. *See infra* Part III.A.2.
32. *See infra* Parts III.B.1-B.2.

jurisprudence from its beginnings in eighteenth-century England to the present day in New York.[33] It then provides a brief history of the related moral certainty instruction given to New York juries in cases based entirely on circumstantial evidence.[34]

A. *Bodiless Murder: A Brief History*

Murder is a tricky business. In addition to causing the death of the victim, the act of wrongfully killing another human being can create circumstances that tend to erase any trace of a crime. Murderers may, for instance, push their victims into vats of molten steel, dispose of their bodies in acid or fit them with proverbial concrete galoshes. Whatever the circumstances, whenever the victim's body disappears in the course of a murder, the courts face the challenge of not only deciding on innocence or guilt, but also determining whether the very substance of the crime—a wrongful killing—ever happened in the first place.[35]

1. The Beginnings of Bodiless Murder Jurisprudence

In the long history of capital punishment, murder has always come first on the list of those crimes punishable by death.[36] Given that history, a special risk has accompanied bodiless murder cases: that the state may execute a "murderer," only to have the "victim" later reappear, very much alive.[37] In the eighteenth century—an age in which it was much easier for a person to disappear without a trace, and much more difficult for someone who had been spirited away to make contact with those at home—this risk was a subject of real concern, not just script-fodder for melodramas.[38]

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33. *See infra* Part I.A.

34. *See infra* Part I.B.

35. *See generally* Rollin M. Perkins, *The Corpus Delicti of Murder*, 48 Va. L. Rev. 173 (1962).

36. *See* Stuart Banner, The Death Penalty: An American History 5, 6, 8 (2002) (listing murder as foremost among the capital crimes in the American colonies); Brian P. Block & John Hostettler, Hanging in the Balance: A History of the Abolition of Capital Punishment in Britain vii, 18 (1997) (describing murder as one of the perennial capital crimes); The Death Penalty in America: Current Controversies 36-38 (Hugo Adam Bedau ed., 1997) (listing murder as first among capital crimes listed in many states that engaged in capital punishment); V.A.C. Gatrell, The Hanging Tree: Execution and the English People 1770-1868, at 10, 100-01 (1994) (describing the tradition of public hanging for murder in England as compared to the tendency toward private executions in the United States). On the religious underpinnings of capital punishment for murder, see Davison M. Douglas, *God and the Executioner: The Influence of Western Religion on the Death Penalty*, 9 Wm. & Mary Bill Rts. J. 137, 142-45 (2000).

37. *See* Perkins, *supra* note 35, at 173-76.

38. On the way in which television has tweaked the "returning murder victim" scenario to its own ends, see *Urban Legends Reference Pages: Legal Affairs (I Ain't Got No Body)*, *at* http://www.snopes.com/legal/nobody.htm (last visited Mar. 12, 2003).

a. *The Hale Doctrine*

Two bodiless murder cases from the eighteenth century led to a reticence on the part of some early commentators to support convictions for murder in the absence of any trace of a corpse.[39] In one of the earliest recorded cases, an uncle was found guilty of killing his niece after she disappeared.[40] Witnesses testified that the niece had begged her uncle not to kill her when he had once punished her previously.[41] The court demanded that the uncle produce his niece, but instead he presented them with an imposter.[42] After the discovery of this subterfuge and his subsequent conviction, the uncle was executed, only to have the niece return when she came of age to claim her rights in probate.[43] In a second case, a man who helped kidnap another man was executed for murder.[44] The "victim," however, returned safe and sound, having been detained after the kidnapping.[45]

These cases appear in Lord Matthew Hale's *Pleas of the Crown*, where they provide support for his oft-quoted axiom, "I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least the body found."[46] Courts have often misread this statement to stand for the proposition that Hale was against any murder conviction in the absence of a corpse.[47] To stress the importance of the phrase, "unless the fact were proved to be done" to his axiom, Lord Hale presented a discussion of another bodiless murder case, *The King v. Hindmarsh*.[48]

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39. *See* 2 Hale, Pleas of the Crown 290 (1678).
40. *See id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*; *see, e.g.*, People v. Lipsky, 445 N.Y.S.2d 660, 663 (App. Div. 1981); Commonwealth v. Connors, 48 Pa. D. & C.3d 461, 465 (Pa. Com. Pl. 1987); McDuff v. State, 939 S.W.2d 607, 623 (Tex. Crim. App. 1997); State v. Weldon, 314 P.2d 353, 354 (Utah 1957); Epperly v. Commonwealth, 294 S.E.2d 882, 890 (Va. 1982). Lord Matthew Hale (1609-1676) was Lord Chief Justice of England from 1671 until 1676, when he resigned due to ill health. His *History of the Pleas of the Crown* has become a seminal work in the jurisprudence of common-law criminal offenses. *See Sir Matthew Hale (1609-1676) English Jurist, 17th Century*, *at* http://www.law.upenn.edu/bll/medallion/hale/hale.htm (last visited Mar. 12, 2003).
47. *See, e.g.*, Ruloff v. People, 18 N.Y. 179, 187 (1858) (truncating Lord Hale's axiom down to its second alternative, i.e. that one never "convict any person of murder or manslaughter, till at least the body be found dead"); *Epperly*, 294 S.E.2d at 890.
48. 168 Eng. Rep. 387 (1792). Since *Hindmarsh* is cited in Hale's *Pleas of the Crown*, and Lord Hale died in 1676, it is clear that the *Hindmarsh* case was not decided in 1792. Unfortunately, English Reports does not give the date of the original *Hindmarsh* decision.

b. Hindmarsh *and Its Progeny*

In *Hindmarsh*, a ship's hand was convicted of murdering his captain and throwing the body overboard.[49] Evidence at the trial included testimony from an eyewitness who saw Hindmarsh throw the captain into the water, a bloody plank and bloodstains on Hindmarsh's clothes.[50] The defense argued that without a dead body, the prosecution could not prove its *corpus delicti*, or body of the crime.[51] Even if the ship's hand had struck the captain and heaved him overboard, without some trace of the corpse, no direct proof existed that the captain was dead. The defense contended that the captain could have been rescued by other ships shown to have been in the area at the time.[52] In response, the court admitted the general rule of law that without proof of death, no murder conviction could stand.[53] Although the captain was almost surely dead, all the court had before it was circumstantial evidence that he had been killed—at least by drowning. Hindmarsh, however, faced two charges: one for murder by beating and one for murder by drowning. The court was therefore able to obviate the difficult question of whether a murder conviction could stand on circumstantial evidence alone by charging the jury that if it found that Hindmarsh had killed the captain before his body hit the water, it could convict.[54] The jury weighed the question accordingly and found Hindmarsh guilty.[55]

Many courts have since read *Hindmarsh* to stand for the proposition that circumstantial evidence of murder can overwhelm the usual necessity of a dead body, or parts thereof.[56] In this sense, *Hindmarsh*, or at least its application, is less of an exception to Hale's rule than an example of its first condition for a murder conviction, i.e., that none should stand "unless the fact were proved to be done."[57] As a result, what *Hindmarsh*, or at least its progeny, now stands for is that

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49. *See id.* at 387-88.

50. *See id.* at 388.

51. *See id.* For a discussion of the notion of *corpus delicti* and the way it has been misunderstood in murder cases, see *infra* notes 65-76 and accompanying text.

52. *See Hindmarsh*, 168 Eng. Rep. at 388. To support its argument, the defense cited a case in which two parents had thrown their infant child into the harbor at Liverpool and were charged with murdering her. Justice Gould directed an acquittal because there was no proof that the child was killed and because it was possible that the tide had carried it away to safety. *Id.*

53. *See id.*

54. *See id.* at 387-88. Note that in *Hindmarsh*, there was eyewitness testimony that Hindmarsh had beaten the captain and thrown him overboard. *Id.* at 388.

55. *See id.* at 388.

56. *See* United States v. Elmore, 31 M.J. 678, 683 (N.M.C.M.R. 1990); People v. Williams, 373 N.W.2d 567, 571 (Mich. 1985); State v. Hansen, 989 P.2d 338, 344 (Mont. 1999); People v. Lipsky, 445 N.Y.S.2d 660, 664 (App. Div. 1981); State v. Nicely, 529 N.E.2d 1236, 1239 (Ohio 1988).

57. *See* Hale, *supra* note 39.

in exceptional cases, the *corpus delicti* of murder may be proven through circumstantial evidence.[58]

The policy arguments both for and against the *Hindmarsh* exception are strong. Supporting the reliance upon circumstantial evidence in cases such as *Hindmarsh* is the notion that any absolute bar on murder convictions where no body is found would 1) reward murderers who were especially good at disposing of their victims' corpses, and 2) condone and perhaps even encourage murder in situations in which it is easier to dispose of a corpse, for instance on the high seas.[59] An authority of no less stature than Blackstone rejected the *Hindmarsh* exception, stating an equally compelling truism that "it is better that ten guilty persons escape, than that one innocent suffer."[60]

For a time, Blackstone's truism, underscored by the above examples of overly hasty executions, won out, leading several states to write a restrictive version of Hale's rule into their statutory codes.[61] Indeed, Texas had such a "no body—no conviction" rule until (and arguably after) 1974.[62] New York had a similar rule, requiring direct evidence of death or of violence sufficient to cause death for a conviction of murder.[63] Where they were enacted, however, legislatures began to repeal these statutes in the second half of the twentieth century, succumbing to growing support for a modernized version of the *Hindmarsh* policy argument.[64]

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58. *See supra* note 56.

59. *See Williams*, 373 N.W.2d at 571; *see also* United States v. Gibert, 25 F. Cas. 1287, 1290 (C.C. Mass. 1834) ("In the cases of murders committed on the high seas, the body is rarely if ever found; and a more complete encouragement and protection for the worst offences of this sort could not be invented, than a rule of this strictness."); People v. Manson, 139 Cal. Rptr. 275, 298 (Cal. Ct. App. 1977) ("The fact that a murderer may successfully dispose of the body of the victim does not entitle him to an acquittal. That is one form of success for which society has no reward."); State v. Zarinsky, 362 A.2d 611, 621 (N.J. Super. Ct. App. Div. 1976) ("Surely, the successful concealment or destruction of the victim's body should not preclude prosecution of his or her killer where proof of guilt can be established beyond a reasonable doubt.").

60. 4 William Blackstone, Commentaries on the Laws of England *358.

61. *See, e.g.*, N.Y. Penal Law § 1041 (1919); Tex. Pen. Code art. 1204 (Vernon 1961) (providing that "[n]o person shall be convicted of any grade of homicide unless the body of the deceased, or portions of it, are found and sufficiently identified to establish the fact of the death of the person charged to have been killed").

62. Even after the Texas legislature declined to include the requirement that a body be found for a murder conviction to stand in its 1974 revision of its Penal Code, courts in Texas still applied the old Article 1204 rule. *See, e.g.*, Harris v. State, 738 S.W.2d 207 (Tex. Crim. App. 1987), *cert. denied*, 484 U.S. 872 (1987); Penry v. State, 691 S.W.2d 636 (Tex. Crim. App. 1985), *cert. denied*, 474 U.S. 1073 (1986). In *Fisher v. State*, the Texas Criminal Court of Appeals officially put an end to the practice when it pointed out that decisions after the 1974 demise of Article 1204 were erroneously based on a decision dealing with pre-1974 law. *See* Fisher v. State, 851 S.W.2d 298, 303 (Tex. Crim. App. 1993).

63. *See* N.Y. Penal Law § 1041.

64. All state jurisdictions now allow for a murder conviction for murder without a

2. *Corpus Delicti* and the *Corpus Delicti Rule*

At the center of the Hale/*Hindmarsh* discussion is the notion of *corpus delicti*. Despite the widespread misconception that the term *corpus delicti* refers to a dead body, Black's Law Dictionary tells us that it refers instead to the "body of the crime,"[65] or the set of circumstances that defines any single criminal act. Although no more related to murder than to any other crime, controversy surrounding *corpus delicti* arises most often in murder cases without a body.[66] Indeed, proof of *corpus delicti* is tantamount to proof of what has been called *actus reus*, or "[t]he wrongful deed that comprises the physical components of a crime."[67] Wigmore states that:

> [I]t is clear that an analysis of every crime, with reference to this element of it, reveals three component parts, *first*, the *occurrence* of the specific kind of injury or loss (as, in homicide, a person deceased . . .); *secondly*, somebody's criminality . . . as the source of the loss,—these two together involving the commission of a crime by *somebody*; and *thirdly*, the accused's *identity* as the doer of the crime.[68]

Since it is a threshold requirement for the prosecution, *corpus delicti* must usually be proven beyond a reasonable doubt.[69] This is

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body. States that have dealt with the issue in their case law include Alabama, Arkansas, California, Illinois, Indiana, Kansas, Kentucky, Maine, Maryland, Michigan, Mississippi, Missouri, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Utah, Virginia and Washington. For a survey of the case law through 1991, see *Virgin Islands v. Harris*, 938 F.2d 401, 415-18 (3d Cir. 1991).

65. Black's Law Dictionary 346 (7th ed. 1999).

66. "The phrase 'corpus delicti' does not mean dead body, but body of the crime, and every offense has its corpus delicti. Its practical importance, however, has been very largely limited to the homicide cases." Rollin M. Perkins & Roland N. Boyce, Criminal Law 140 (3d ed. 1982) (internal citations omitted).

67. Black's Law Dictionary 37 (7th ed. 1999); *see also Id.* at 346 (equating *corpus delicti* with *actus reus* or "the fact of transgression"); Perkins, *supra* note 35, at 195 (arguing that the *corpus delicti* and the *actus reus* of murder are one and the same).

68. 7 Wigmore, Evidence § 866 (Chadbourne rev. 1978).

69. For the proposition that the prosecution need prove all the elements of a crime charged beyond a reasonable doubt, see Wayne R. LaFave, Criminal Law § 1.4(a) (3d ed. 2000). In general, it is more efficacious to think of *corpus delicti* as a bundle of elements making up an offense. Certainly this bundle includes the physical, *actus reus*, elements: in relation to murder these would be 1) the death of a person and 2) caused by the act of another. However, inasmuch as *corpus delicti* can include the element of wrongfulness, it also can incorporate some of the elements usually subsumed under the category of *mens rea*. In relation to criminal homicide, as defined by the Model Penal Code, this would be the knowing, reckless or negligent act of a person which causes the death of another. *See* Model Penal Code § 210.1 (Proposed Official Draft 1962). Such definitions conflict with the work of Perkins and others who equate *corpus delicti* with *actus reus* without further qualification. *Compare* LaFave, *supra*, § 1.4(b), *with* Black's Law Dictionary 346 (7th ed. 1999), *and* Perkins, *supra* note 35, at 195. LaFave also mentions that occasionally the *corpus delicti* of murder is said to include only the first of Wigmore's three elements, i.e.,

not the case, however, in a bodiless murder trial where the prosecution attempts to introduce an extra-judicial confession by the defendant into evidence.[70]

In such a trial, the prosecution has to satisfy what is known as the *corpus delicti rule*.[71] Confessions can be notoriously unreliable and extra-judicial confessions doubly so.[72] Indeed, courts, legislatures and commentators alike have expressed deep suspicion regarding their reliability.[73] According to the *corpus delicti rule*, an extra-judicial confession to a crime cannot be admitted without proof *aliunde*, i.e. other admissible proof that the crime was committed.[74] Since the *corpus delicti rule* is usually one of admissibility and not of proof, the burden of proof facing the prosecution when presenting proof *aliunde* to corroborate an extra-judicial confession depends on the burden for evidentiary determinations in the respective jurisdiction.[75]

Because of the prevalence of confessions in such cases, most of the jurisprudence on bodiless murder involves the *corpus delicti rule*.[76] Indeed, the unique risk inherent in bodiless murder cases—as identified by Hale—has been underscored most when extra-judicial confessions have led to false convictions. A trial for murder in absence of a body is already an exercise in conjecture and belief, one, however, that common-law courts have long found necessary.[77]

"the *occurrence* of the specific kind of injury or loss (as, in homicide, a person deceased . . .)." *See* LaFave, *supra*, § 1.4(b) (citing Wigmore, *supra* note 68, § 2072 and *State v. Ruth*, 435 A.2d 3 (Conn. 1980)).

70. *See* LaFave, *supra* note 69, § 1.4(b); Perkins, *supra* note 35, at 177-78.

71. *See* Perkins, *supra* note 35, at 177-78.

72. *See* 4 Blackstone, Commentaries on the Laws of England *357-58 (stating that confessions are "the weakest and most suspicious of all testimony"). *See generally* Peter Brooks, Troubling Confessions (U. Chicago P. 2000).

73. In New York, see, for instance., N.Y. Crim. Proc. Law § 60.50 (McKinney 2002) ("A person may not be convicted of any offense solely upon evidence of a confession or admission made by him without additional proof that the offense charged has been committed."); People v. Sweeney, 106 N.E. 913, 918 (N.Y. 1914); People v. Bennett, 37 N.Y. 117, 133 (N.Y. 1867); *see also* Joel Cohen & Michelle L. Pahmer, *Corroborating a Defendant's Incriminating Statement*, N.Y. L.J., Aug. 4, 2000, at 1; Daniel J. Capra, *Declaration Against Penal Interest and Corroborating Circumstances*, N.Y. L.J., July 14, 2000, at 3.

74. *See* State v. Lucas, 152 A.2d 50, 57 (N.J. 1959) (arguing that proof *aliunde* of a confession in a murder case should consist only of Wigmore's first element of *corpus delicti*, i.e., the death of a person). *See generally* Note, *Proof of the Corpus Delicti Aliunde the Defendant's Confession*, 103 U. Pa. L. Rev. 638 (1955).

75. For more on the burden of proof in evidentiary offerings in New York, see Edith L. Fisch, Fisch on New York Evidence § 1089 (2d ed. 2003).

76. In New York, for instance, there is only one published appellate decision involving a bodiless murder with no confession or admission whatsoever. *See* People v. Bierenbaum, 748 N.Y.S.2d 563 (App. Div. 2002). *People v. Lipsky* is often cited for the proposition that in New York no body is necessary for establishment of the *corpus delicti* of murder, but even in *Lipsky* and the case it overrules, *Ruloff v. People*, the prosecution presented out of court written statements as admissions. *See* People v. Lipsky, 443 N.E.2d 925, 928 (N.Y. 1982); Ruloff v. People, 18 N.Y. 179, 180 (1858).

77. *See generally* Virgin Islands v. Harris, 938 F.2d 401, 415-18 (3d Cir. 1991)

Where a conviction with such a shaky foundation is itself based on a very shaky piece of evidence, i.e. an extra-judicial confession, courts now proceed with caution.

Perrys' Case is a prime example of the need for such caution.[78] Not only was *Perrys' Case* another in the line of cases in which the murder "victim" returned safe and sound, it also involved an extra-judicial confession.[79] John Perry, a servant, was sent to search for his master, Harrison, after the latter went missing during the collection of certain rents.[80] Perry disappeared but was soon found, along with some broken and bloody articles that had belonged to Harrison.[81] Harrison's body was never found, but Perry gave several inconsistent stories regarding the murder with which he had been charged.[82] At first, he denied all guilt but later came up with a story inculpating both his brother and mother in a botched robbery-turned-murder.[83] On the basis of Perry's confession, all three were hanged, only to have Harrison return some time later with a story of having been robbed, taken by force to Turkey and forced into slavery.[84]

On this side of the Atlantic, similar cases have a provenance dating back at least to 1819.[85] Whatever the history of these cases, the *corpus delicti rule* has become entrenched as a tool to combat the dire consequences that can occur when a defendant is convicted for a crime that never occurred, based solely on his or her confession.[86] New York has incorporated this rule into the New York Criminal Procedure Law § 60.50, which prohibits convictions for any offense based on evidence of confession alone.[87] Because this Comment focuses exclusively on the controversies surrounding murder cases in absence of any direct evidence whatsoever, including either confessions or admissions, the *corpus delicti rule* is only of importance inasmuch as it must be distinguished from the present discussion.

(providing an extensive survey of the case law jurisprudence of bodiless murder through 1991); Perkins, *supra* note 35 (outlining the history of bodiless murder in eighteenth-century England and the United States).

78. 14 How. St. Tr. 1312 (1661).

79. For a discussion of *Perrys' Case* and how it fits into the jurisprudence of the *corpus deliciti* of murder, see Perkins *supra* note 35, at 174.

80. *See id.* at 174.

81. *See id.*

82. *See id.*

83. *See id.*

84. *See id.*

85. *See id.* at 175 (discussing the *Boorn* case which also involved a confession, an execution and a "victim" turning up safe and sound).

86. On recent manifestations of the *corpus delicti rule*, including the "trustworthiness doctrine," which admits uncorroborated confessions if they possess circumstantial guaranties of reliability, see Virgin Islands v. Harris, 938 F.2d 401, 409-10 (3d Cir. 1991).

87. N.Y. Crim. Proc. Law § 60.50 (McKinney 2002).

3. Bodiless Murder Cases Based Entirely on Circumstantial Evidence

As already stated, bodiless murder cases based entirely on circumstantial evidence are few and far between.[88] In New York, most bodiless murder cases have involved either some physical evidence of foul play—such as bone fragments or blood[89]—a confession or other inculpatory statements,[90] or testimony from an eyewitness either to the killing itself or to an incriminating violent incident prior to or following the alleged killing.[91] Considering the difficulties, especially in our ever more interconnected and crowded living environment, of 1) killing another human being in secret, 2) disposing of the body in secret, 3) erasing, in secret, any trace of a crime having been committed, and 4) keeping one's mouth shut, it is no wonder that such cases are rare.[92] The kind of physical evidence listed above—i.e. bone fragments or blood—is still circumstantial in nature. The presentation at trial of an article of the defendant's clothing stained with the alleged victim's blood or of the alleged victim's bone fragments found in the defendant's house still only provide an inference that the victim is dead. Given the strong and often damning nature of such evidence, however, it is necessary for the scope of this Comment to bracket and exclude such evidence from the discussion as if it were direct evidence of a crime.[93]

When a bodiless murder trial is based entirely on circumstantial evidence, a certain set of risks and challenges arise. Yet these risks and challenges are present in any criminal trial based entirely on circumstantial evidence. As was the case with *corpus delicti*, murder, especially bodiless murder, has served as a kind of lightning rod for the concerns surrounding circumstantial evidence. In New York, courts have reacted to these concerns by developing, and

88. *See supra* note 76 and accompanying text.

89. *See, e.g.*, People v. Seifert, 548 N.Y.S.2d 971, 977 (App. Div. 1989) (bone fragments and blood "linked [defendant] to the scene [of the crime] by a continuous chain of physical evidence").

90. *See, e.g.*, People v. Zarif, 737 N.Y.S.2d 339, 340-41 (App. Div. 2002) (involving a confession); People v. Applegate, 576 N.Y.S.2d 583, 584 (App. Div. 1991) (involving an out of court admission); People v. Curro, 556 N.Y.S.2d 364, 365-66 (App. Div. 1990) (involving an admission).

91. *See, e.g.*, People v. Konigsberg, 529 N.Y.S.2d 195, 197-98 (App. Div. 1988) (involving eyewitness testimony regarding, *inter alia*, defendant digging a grave); *see also* McDuff v. State, 939 S.W.2d 607, 612 (Tex. Crim. App. 1997) (involving eyewitness testimony from an accomplice); The King v. Hindmarsh, 168 Eng. Rep. 387, 387-88 (1792) (where a crewmember testified to having seen Hindmarsh heave the captain's body overboard).

92. On the impetus toward confession after Freud, see Brooks, *supra* note 72, at 113-43.

93. *See, e.g.*, *Siefert*, 548 N.Y.S.2d 971 (providing an example of the damning role such forensics can play in underscoring the reasonableness and moral underpinnings of a guilty verdict for murder in absence of a body).

subsequently dismantling, what has come to be known as the moral certainty standard.

B. *The Moral Certainty Standard in New York*

New York courts have long recognized that a unique danger inheres in criminal cases built entirely on circumstantial evidence.[94] While not discounting its weight,[95] New York courts agree that circumstantial evidence is often more probative than direct evidence.[96] Where a wholly circumstantial case is presented to a jury, however, it is the very two step process of circumstantial evidence that produces the aforementioned danger of impermissible inferences.

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94. *See* People v. Sexton, 80 N.E. 396, 396-97 (N.Y. 1907) (requiring "so strong a chain of evidence as to exclude beyond a reasonable doubt every hypothesis save that of [the defendant's] guilt," in a case built entirely on circumstantial evidence); People v. Fitzgerald, 50 N.E. 846, 847 (N.Y. 1898) (applying the moral certainty standard to a case built entirely on circumstantial evidence); People v. Johnson, 35 N.E. 604 (N.Y. 1893) (upholding a conviction for first degree murder where the evidence, although wholly circumstantial in nature, allowed no other rational conclusion but guilt); People v. Bennett, 49 N.Y. 137, 144 (1872) (applying the moral certainty standard in a case before the Court of Appeals for the first time in New York); People v. Davis, 19 N.Y.S. 781 (Gen. Term 1892) (upholding a conviction based entirely on circumstantial evidence because the judge adequately apprised jury of the extra deliberation required in such a case); People v. Bodine, 1 Edm. Sel. Cas. 36 (N.Y. Sup. Ct. 1845) (applying the moral certainty standard in a case for arson and theft); *see also* People v. Bretagna, 83 N.E.2d 537 (N.Y. 1949) (allowing the denial of a circumstantial evidence charge where direct evidence was present); CJI2d [NY] Circumstantial Evidence–Entire Case (2001) (emphasizing the inferential leap inherent to circumstantial evidence and outlining permissible and impermissible inferences); CJI 9.05 Circumstantial Evidence: Entire Case (1991) (outlining the moral certainty standard to be applied in cases based solely on circumstantial evidence); *cf.* Holland v. Hayman, 45 How. Pr. 16 (N.Y. Sup. Ct. 1872) (applying the rule later taken up in the CJI that all circumstantial facts proven have to be consistent with guilt and inconsistent with innocence in a civil trial).

95. *See* People v. Neufeld, 58 N.E. 786, 788 (N.Y. 1900) (finding the trial court not in error for announcing that circumstantial evidence was as good as direct evidence); People *ex rel.* Voelpel v. Warden of City Prison, 75 N.Y.S. 1114, 1115 (Sup. Ct. 1902) (declaring the proposition that circumstantial evidence is "a high form of evidence" to be well founded); *Davis*, 19 N.Y.S. at 783 (stating that convictions can rest on either circumstantial or direct evidence).

96. *See* People v. Geraci, 649 N.E.2d 817, 823 (N.Y. 1995) ("Circumstantial evidence is not a disfavored form of proof and, in fact, may be stronger than direct evidence . . . ."); People v. Cleague, 239 N.E.2d 617, 619 (N.Y. 1968) (stating that "[t]he myth of innate superiority of direct testimonial evidence was exploded long ago") (citation omitted); *Neufeld*, 58 N.E. at 788 (intimating that more incorrect verdicts result from direct evidence than from circumstantial evidence); People v. Harris, 33 N.E. 65, 67 (N.Y. 1893) ("[C]ircumstantial evidence may be often more satisfactory, and a safer form of evidence, for it must rest upon facts which, to prove the truth of the charge made, must collectively tend to establish the guilt of the accused."); People v. Gallo, 431 N.Y.S.2d 1009, 1012 (App. Div. 1980) ("Circumstantial evidence is frequently more reliable and stronger than direct proof by eyewitness testimony.").

1. The Two Step Process of Circumstantial Evidence and the Development of the Moral Certainty Standard

One reason circumstantial evidence is admissible at all—other than the fact that it can be both reliable and probative—is because courts trust that juries are able to make certain necessary inferential leaps.[97] With direct evidence (eyewitness accounts, photographs or videotapes of a crime in progress, corroborated confessions), a jury only must decide on the credibility of the witness or media through which the evidence is presented.[98] By definition, direct evidence is proof—usually testimonial in nature—which, if true, directly establishes a fact at issue.[99] With circumstantial evidence, a jury must make a leap of logic and infer the existence of a fact at issue, connecting a circumstantial fact to a directly incriminating fact.[100] Courts trust juries with this task because those very inferential leaps are part of our everyday lives.[101] If one leaves a child alone in a room with a chocolate bar, only to return and find the chocolate missing and the child strangely sated, one would be reasonable in inferring that the child ate the chocolate bar. The danger in criminal trials based entirely on circumstantial evidence, however, is that when a jury is forced to make one such inference after another, the possibility that an impermissible inference may slip in increases.[102]

For instance, in the scenario above, one could assume that the child ate the chocolate, but no evidence would exist to support an inference regarding whether she thought she was allowed to eat the bar, how fast she ate it, which end of the bar she bit into first, whether she enjoyed it or not (although this could most likely be assumed from general experience) or whether she ate the chocolate bar in an effort to peeve its owner. In relation to these facts, these impermissible inferences may seem trivial, but in the context of a criminal trial, they could mean the difference between guilt and innocence, inasmuch as

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97. *See* People v. Fernandez, 35 N.Y. 48, 62-63 (1866) (outlining the common sense aspect of circumstantial evidence); Louis R. Frumer et. al, 2-5 Bender's New York Evidence-CPLR § 5.01 (2002). *But see Cleague* 239 N.E.2d at 619 (addressing the danger posed by the "subjective inferential links" that can slip into a chain of circumstantial evidence).

98. *See* Dennis D. Prater et. al, Evidence: The Objection Method 116 (2d ed. 2002) (underscoring that with direct evidence "[n]o inferences are required between the proof itself and the ultimate fact to be established.").

99. *See* Black's Law Dictionary 577 (7th ed. 1999); William C. Donnino, New York Court of Appeals on Criminal Law § 20:7 (2d ed. 2002); 31A C.J.S. *Evidence* § 3 (2002).

100. This is outlined in the CJI2d [NY] Circumstantial Evidence—Entire Case (2001). *See also* Fisch, *supra* note 75, § 161.

101. *See Fernandez*, 35 N.Y. at 62-63 (presenting a colorful hypothetical which demonstrates the often overwhelming probative value of circumstantial evidence).

102. *See Cleague*, 239 N.E.2d at 619.

such inferences relate to important factors like intent, consciousness of guilt, *modus operandi* and malice.[103]

In response to this danger, New York courts have adopted the resilient, yet elusive, moral certainty standard.[104] According to that standard, in cases built wholly on circumstantial evidence, a jury must not only find guilt beyond a reasonable doubt, it must also find that the government's case excludes "'to a moral certainty' every hypothesis but guilt."[105] This language appears in the Criminal Jury Instructions ("CJI"), formerly promulgated by the New York State Office of Court Administration.[106] In 2001, the revised CJI2d removed the words "moral certainty" from the appropriate instruction—yet the moral certainty standard lives on in both spirit and in name on all levels of the New York judiciary.[107]

In practice, the moral certainty standard consists of three steps, the final one being the above-mentioned exclusion of any reasonable hypothesis of innocence before a guilty verdict can obtain.[108] Before a jury can get to this last step, however, it must first go through the initial two steps, inquiring: 1) whether every inference drawn from the web of circumstantial evidence is itself valid and based on direct evidence (it is impermissible to draw an inference based on an inference proved by circumstantial evidence), and 2) whether each circumstantial fact is itself "consistent with guilt and inconsistent with innocence."[109] If either of these inquiries fails, a guilty verdict cannot obtain. Indeed, the first of these two inquiries comes into play whenever a jury makes a decision based on circumstantial evidence, even when direct evidence is present.[110] This inquiry is simply another way of stating that circumstantial facts point to a limited set of

103. For the New York common law analog to Fed. R. Evid. 404 (b) (which allows for the admissions of circumstantial evidence of prior bad acts to prove motive, intent, knowledge, etc.), see *People v. Molineux*, 61 N.E. 286 (N.Y. 1901).

104. *Cf.* People v. Bennett, 49 N.Y. 137, 144-45 (1872) (applying the moral certainty standard in a case before the Court of Appeals for the first time in New York).

105. *See* People v. Wachowicz, 239 N.E.2d 620, 622 (N.Y. 1968); *see also* People v. Razezicz, 99 N.E. 557, 565 (N.Y. 1912); *Bennett*, 49 N.Y. at 145; People v. Harris, 33 N.E. 65, 67 (N.Y. 1893) (stating that where circumstantial evidence excludes every hypothesis but guilt, there is "no substantial reason" why a jury should not convict).

106. CJI 9.05 Circumstantial Evidence: Entire Case (1991).

107. *See, e.g.*, People v. Cruz, 754 N.E.2d 1112 (N.Y. 2001) (mem.) (making reference to the moral certainty charge in a memorandum decision); People v. Cabey, 649 N.E.2d 1164, 1166 (N.Y. 1995); People v. Eastman, 648 N.E.2d 459, 467 (N.Y. 1995) (suggesting that moral certainty could indeed be more "certain" than "beyond a reasonable doubt"); People v. Wong, 619 N.E.2d 377, 381 (N.Y. 1993); People v. Daddona, 615 N.E.2d 1014, 1015 (N.Y. 1993) (mem.); People v. Francis, 591 N.E.2d 1168, 1169 (N.Y. 1992) (mem.); People v. Mattiace, 568 N.E.2d 1189, 1191 (N.Y. 1990) (applying the appropriate standard of appellate review, yet equating it to the moral certainty standard).

108. *See supra* note 105.

109. CJI 9.05 Circumstantial Evidence: Entire Case (1991).

110. *See* Frumer et al., *supra* note 97, § 5.03.

permissible inferences.[111] They do not, themselves, provide proof of other facts, such as intent, consciousness of guilt, *modus operandi*, or malice in our chocolate bar hypothetical.[112] The second inquiry, however, provides a level of deliberation not routinely present in other criminal trials.

Where circumstantial evidence appears alongside direct evidence, it may support a guilty verdict even though it may also be subject to a reasonable explanation consistent with innocence.[113] In such a case, a jury bases its decision not only on circumstantial inferences, but also on the credibility of direct evidence; therefore, alternate explanations for incriminating circumstantial facts go to the question of weight.[114] In the wholly circumstantial case, New York courts have been reluctant to apply such a standard because of the likelihood that, somewhere in the chain of inferences a jury must forge, an impermissible link or an inference based on an inference will be inserted.[115]

2. The Procedural Nature of the Moral Certainty Standard

Indeed, the second, "consistent with guilt" inquiry outlined by the CJI reflects the overall structure of the moral certainty standard. The only difference between the two is that the moral certainty standard contemplates the case as a whole, requiring an acquittal when any reasonable, global explanation which is inconsistent with guilt exists for all of the circumstantial facts presented.[116] In contrast, the "consistent with guilt" inquiry of the CJI attacks the problem of impermissible inferences from a micro-level, scrutinizing each circumstantial fact in relation to the inference or inferences that can be reasonably drawn from it.

For this reason, the moral certainty standard is more of a procedural safeguard than a substantive standard of proof.[117] It assures that juries proceed with all due lack of haste when faced with an imbricated series of circumstantial inferences lacking direct evidentiary support. In fact, the CJI makes clear that the moral certainty standard does not increase the prosecution's burden of proof

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111. *See id.*

112. *See id.*

113. This is evidenced by the inapplicability of the circumstantial evidence charge, and subsequently the moral certainty standard in cases where direct and circumstantial evidence are both present. *See, e.g.*, People v. Guidice, 634 N.E.2d 951, 953 (N.Y. 1994).

114. *See id.*

115. *See supra* note 94.

116. *See* CJI 9.05 Circumstantial Evidence: Entire Case (1991).

117. Although courts in New York continue to refer to the moral certainty standard as a standard of proof, the Court of Appeals made clear in *People v. Barnes* that the moral certainty charge does not increase the burden of proof on prosecutors beyond "beyond a reasonable doubt." *See* 406 N.E.2d 1071, 1074 (N.Y. 1980).

beyond the familiar, "reasonable doubt" standard.[118] The moral certainty standard merely impresses upon jurors the special dangers they face when forced to determine criminal culpability on circumstantial evidence alone.

Some courts hold a lingering impression, despite active dissuasion by the United States Supreme Court, that the moral certainty standard is somehow a higher inquiry than the constitutional standard of "beyond a reasonable doubt."[119] This debate, however, only arises in cases (circumstantial or otherwise) where the words "moral certainty" or their equivalent are used to replace the phrase "beyond a reasonable doubt" in a normal jury charge on burden of proof.[120] Such a practice was rejected by the Court in *Victor v. Nebraska*.[121] In New York, it is unclear whether one, uniform understanding of the moral certainty standard, especially as a procedural safeguard rather than a heightened standard of proof, exists.[122]

Case law evinces the fact that the moral certainty safeguard is procedural in nature.[123] Failure to give a jury the moral certainty instruction—or, it would appear, its redacted version found in the CJI2d—has been held to be reversible error, unless the evidence taken as a whole weighs overwhelmingly in the prosecution's favor.[124] The moral certainty instruction, however, is only available in cases based entirely on circumstantial evidence.[125] Where there is direct evidence present, the instruction is not available.[126]

Although universally called a standard of proof, the phrase "moral certainty," or its equivalent as found in CJI2d, functions to impress upon the jury the special burden placed on them in their deliberations.[127] In *People v. Barnes*, a defendant argued unsuccessfully that the moral certainty standard raised the bar for the prosecution in the presentation of its case.[128] The Court of Appeals

118. *See id.*
119. *See, e.g.*, Cage v. Louisiana, 498 U.S. 39 (1990).
120. *See id.* at 39-40.
121. *See* 511 U.S. 1, 5-6 (1994) (stating that an emphasis on moral certainty rather than evidentiary certainty in a jury charge could be ambiguous and misleading).
122. *See supra* note 117; *see also* People v. Mattiace, 568 N.E.2d 1189, 1191 (N.Y. 1990); People v. Borrero, 259 N.E.2d 902, 905 (N.Y. 1970) (noting the confusion surrounding moral certainty). This kind of uncertainty surrounding the meaning of moral certainty has led to a growing rejection of the term. *See, e.g.*, People v. Brigham, 599 P.2d 100, 106 (Cal. 1979) (Mosk, J. concurring); Barbara J. Shapiro, *"To a Moral Certainty": Theories of Knowledge and Anglo-American Juries 1600-1850*, 38 Hastings L.J. 153, 153-54 (1986).
123. *See, e.g.*, People v. Barnes, 406 N.E.2d 1071, 1074 (N.Y. 1980) (stressing the procedural importance of proper deliberation in cases based entirely on circumstantial evidence).
124. *See, e.g.*, People v. Griffin, 504 N.Y.S.2d 433 (App. Div. 1986) (mem.).
125. *See* People v. Daddona, 615 N.E.2d 1014, 1015 (N.Y. 1993) (mem.).
126. *See id.*
127. 34 N.Y. Jur. 2d *Criminal Law* § 2418.
128. People v. Barnes, 406 N.E.2d at 1071.

rejected this argument for Barnes specifically—since his conviction was based on a mix of direct and circumstantial evidence—and for circumstantial cases in general. Analogizing such cases to a puzzle without all of its pieces, the court acknowledged that although the jury's task was "complex," the moral certainty instruction provided it with a guide as to how it could fit together the pieces it did have.[129] The standard does not create a higher standard of proof, but rather it "draws attention to the rigorous function which must be undertaken by the finder of fact when presented with a case of purely circumstantial evidence."[130]

3. The Erosion of Moral Certainty

Despite the value New York courts have found in alerting fact-finders to the special pitfalls of cases built entirely on circumstantial evidence, a recent trend has eroded the moral certainty safeguard.[131] As previously mentioned, courts have long found that when the evidence weighs overwhelmingly in the prosecution's favor, failure to give the moral certainty instruction and charge the jury with the appropriate level of deliberativeness is not reversible error.[132] Furthermore, in *People v. Sanchez*, the Court of Appeals held that the words "moral certainty" were not indispensable to a circumstantial evidence jury charge.[133] All that was necessary, according to the court, was that it "appear that the inference of guilt is the only one that can fairly and reasonably be drawn from the facts, and that the evidence excludes beyond a reasonable doubt every reasonable hypothesis of innocence."[134]

Because of *Sanchez* and other similar holdings, the CJI for cases built entirely upon circumstantial evidence was redacted to omit the phrase "moral certainty."[135] The new instruction reads,

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129. *Id.* at 1074.

130. *Id.*

131. *Compare* CJI 9.05 Circumstantial Evidence: Entire Case (1991), *with* People v. Sanchez, 463 N.E.2d 1228 (N.Y. 1984) (mem.), *and* CJI2d [NY] Circumstantial Evidence—Entire Case (2001).

132. *See* People v. Brian, 644 N.E.2d 1345, 1346 (N.Y. 1994) (mem.) (holding that the rejection of a circumstantial evidence charge by the trial court was harmless error); People v. Sandven, 731 N.Y.S.2d 12, 13 (App. Div. 2001) (suggesting that where evidence of guilt is overwhelming, failure to deliver a circumstantial evidence charge can be harmless error); People v. Van Wallendael, 688 N.Y.2d 166, 167 (App. Div. 1999) ("The court's failure to give the full circumstantial evidence charge requested by the defendant was harmless error, given the overwhelming evidence of the defendant's guilt.").

133. *Sanchez*, 463 N.E.2d at 1228-29.

134. *Id.* at 1229.

135. For cases in line with *Sanchez*, see *People v. Gonzalez*, 426 N.E.2d 474 (N.Y. 1981) and *People v. Ford*, 488 N.E.2d 458 (N.Y. 1985). The new criminal jury instruction for circumstantial cases can be found at CJI2d [NY] Circumstantial Evidence–Entire Case (2001).

> Before you may draw an inference of guilt, . . . that inference must be the only one that can fairly and reasonably be drawn from the facts, it must be consistent with the proven facts, and it must flow naturally, reasonably, and logically from them.
>
> Again, it must appear that the inference of guilt is the only one that can fairly and reasonably be drawn from the facts, and that the evidence excludes beyond a reasonable doubt every reasonable hypothesis of innocence.[136]

From the wording of the CJI2d, it is clear that the standard of proof in wholly circumstantial cases has not changed.[137] The jury must still find "beyond a reasonable doubt" that the defendant is guilty, or else acquit.[138] Indeed, although the quoted passage appears to charge the jury with an extra level of inquiry, the steps it prescribes are one and the same with those a jury must take in any criminal case in order to conscientiously apply the "beyond a reasonable doubt" standard.[139] Courts in New York (and elsewhere) have made this clear when they have attempted to define the meaning of "beyond a reasonable doubt."[140]

4. The Survival of Moral Certainty

If moral certainty is not an evidentiary standard on its own,[141] the words "moral certainty" can confuse a jury[142] and the words "moral certainty" are not even necessary to properly charge a jury in a wholly circumstantial case,[143] the question arises as to why New York courts still rely on an, albeit watered-down, moral certainty safeguard. The structure of the CJI2d charge and the dicta from *Barnes* identifying the procedural nature of the safeguard provide the answer.[144]

Courts rely on the moral certainty safeguard to impress upon fact-finders (both juries *and* judges as intimated by *Barnes*) the dangers inherent to wholly circumstantial cases.[145] The CJI2d does not create

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136. CJI2d [NY] Circumstantial Evidence–Entire Case (2001).

137. *See id.*

138. *Id.*

139. Indeed, in New York, as in many jurisdictions, courts have long used the words "moral certainty" to help jurors grasp the meaning of "beyond a reasonable doubt." *See generally* Shapiro, *supra* note 122.

140. *See, e.g.*, People v. Mattiace, 568 N.E.2d 1189 (N.Y. 1990); People v. Allah, 522 N.E.2d 1029 (N.Y. 1988) (mem.); People v. Lewis, 479 N.E.2d 802 (N.Y. 1985) (mem.).

141. *See supra* note 117.

142. *See* Victor v. Nebraska, 511 U.S. 1, 6-9 (1994).

143. *See* People v. Sanchez, 463 N.E.2d 1228, 1229 (N.Y. 1984).

144. Since the court found that Barnes' conviction was based on a mix of circumstantial and direct evidence, its comments on the nature of the moral certainty safeguard were secondary to the issue at hand and, therefore, dicta.

145. *See* People v. Barnes 406 N.E.2d 1071, 1074 (N.Y. 1985) (referring to the "complex and problematical reasoning process" required in wholly circumstantial cases). On the pitfalls of circumstantial cases in general, see supra note 94.

a new standard; it takes the time to articulate the same familiar standard of "beyond a reasonable doubt" twice, albeit in differing formulations.[146] The moral certainty safeguard ensures that a finder of fact proceed slowly and, most of all deliberately, in piecing together the set of inferences that may or may not point to guilt.[147] As the *Barnes* court stated, cases built entirely on circumstantial evidence resemble a puzzle that needs to be pieced together one piece at a time.[148] If the finder of fact has every piece but one, it must acquit—even if it knows the outlines of that missing piece, what it should look like, and exactly where it fits in. To return a guilty verdict when one piece is missing would be to draw an inference from an inference, a practice forbidden in all cases, even those based, either wholly or in part, on direct evidence.[149]

Circumstantial evidence requires a two step inquiry—questioning 1) whether the evidence itself, evidence of a circumstantial fact, is credible, and 2) whether the inference that can be drawn from that fact is consistent with guilt and inconsistent with innocence. One could therefore expect that appellate review of such cases would exhibit a similar structure.[150] By all outward appearances, that is not the case.[151] If one delves deeper into the way in which the Appellate Division reviews such cases, however, it becomes clear that the moral certainty safeguard has a substantial effect on the way in which appellate courts deal with wholly circumstantial cases.

a. *Intermediate Appellate Review*

In New York, an intermediate appellate court can review evidence presented in criminal cases in two ways—for sufficiency[152] or for weight.[153] When an intermediate appellate court reviews evidence for its sufficiency, it rules on a matter of law and shows no deference to the decision below.[154] When it reviews evidence for its weight, it exercises the special fact-finding power given it under the New York Criminal Procedure Law.[155] This power provides a check on the fact-

146. CJI2d [NY] Circumstantial Evidence—Entire Case (2001).

147. *See Barnes*, 406 N.E.2d at 1074.

148. *Id.*

149. *See* Frumer et al., *supra* note 97, § 5.01.

150. Many appellate courts in New York have indeed applied a moral certainty standard on appeal, only to be rebuked by the Court of Appeals. *See, e.g.*, People v. Rossey, 678 N.E.2d 473 (N.Y. 1997) (mem.); People v. Norman, 650 N.E.2d 1303, 1309 (N.Y. 1995); People v. Cabey, 649 N.E.2d 1164, 1166 (N.Y. 1995).

151. *See supra* note 150.

152. N.Y. Crim. Proc. Law § 470.15(4)(b) (McKinney 2002).

153. N.Y. Crim. Proc. Law § 470.15(5) (McKinney 2002). When the Appellate Division reviews verdicts in this manner, it has been described as sitting as a "thirteenth juror." *See* Tibbs v. Florida, 457 U.S. 31, 42 (1982).

154. *See* N.Y. Crim. Proc. Law § 470.15(4)(b) (McKinney 2002).

155. *See* N.Y. Crim. Proc. Law § 470.15(3)(b) (McKinney 2002); *see also supra* note

finding power of the lower courts, but appellate courts apply it with some degree of deference.[156]

The inquiry into legal sufficiency results in significant deference to findings of fact.[157] If the prosecution has presented at least some evidence on every element of the crime that any reasonable juror could have found probative of guilt beyond a reasonable doubt, then the appellate court will find that the verdict in question was based on legally sufficient evidence.[158] This level of review is analogous to the requirements 1) that a Grand Jury indictment state a *prima facie* case (often referred to as the *prima facie case rule*) and 2) that a trial judge cannot let a guilty verdict stand if the prosecution fails to allege and present evidence on every element of the crime charged.[159] Since its scope is restricted to whether the prosecution has presented some admissible evidence on every element upon which a reasonable juror could have found the defendant guilty, the challenge of legally insufficient evidence acts as a check on prosecutorial misconduct or mistake.[160] In a sense, such a determination has little if anything to do with the process of fact-finding, so long as there are no substantial gaps in the evidentiary foundation upon which the fact-finder bases its decision.[161]

In New York, the inquiry into whether a verdict is against the weight of the evidence is unique to the intermediate appellate courts.[162] On questions of weight, however, such appellate courts usually show wide deference to finders of fact on the trial level, since those finders of fact are most able to assess the credibility of witnesses and exhibits first hand.[163] All the appellate court has to go on is a

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153.

156. *See* People v. Bleakley, 508 N.E.2d 672, 675 (N.Y. 1987) ("Empowered with this unique factual review, intermediate appellate courts have been careful not to substitute themselves for the jury. Great deference is accorded to the fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor.").

157. *See* People v. Williams, 644 N.E.2d 1367 (N.Y. 1994) ("A court reviewing legal sufficiency of the trial evidence must instead determine whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the fact finder on the basis of the evidence at trial, viewed in the light most favorable to the People.").

158. *See* Donnino, *supra* note 99, § 20:7.

159. The *prima facie case rule* is a product of the way the standard for "legally sufficient evidence" (given in N.Y. Crim. Proc. Law § 70.10(1)) is applied in N.Y. Crim. Proc. Law § 190.65 (outlining when a Grand Jury can hand down an indictment). Its similarity to the test a judge must apply when presented with a motion to dismiss was recognized by *People v. Powell*, 397 N.Y.S.2d 187, 188 (App. Div. 1977).

160. Since a prosecutor is bound by the same laws of criminal procedure as are Grand Juries, the presentation of a case which does not meet the *prima facie* case must either issue from misconduct or mistake.

161. Indeed, these gaps would have to be so substantial as to negate an essential element in the government's *prima facie* case. *See generally supra* note 160.

162. *See* N.Y. Crim. Proc. Law § 470.15(5) (McKinney 2002).

163. *See supra* note 156.

cold, paper record, with none of the indicia of credibility, or lack thereof, normally present in open court.[164]

One limit to this deference is where a finder of fact bases its determination of guilt on impermissible inferences.[165] A finder of fact may have firsthand knowledge regarding credibility, but it has no claim to be able to reason more soundly than an appellate panel.[166] Indeed, as is shown by the CJI2d instructions and in the reasoning outlined in *Barnes*, the entire judiciary is concerned with the risk that a finder of fact, especially in a circumstantial case, could allow impermissible inferences of guilt to influence its decision.[167] In this context, the only thing the fact-finder in a trial court can do better than the appellate court is decide which permissible inferences to draw, for it still may omit certain circumstantial facts from its deliberations on the grounds that they were not credible.[168]

The difficulty in placing a check on the reasoning of a finder of fact centers on discerning which inferences were drawn because the supporting evidence was credible and which inferences were drawn impermissibly, i.e. based on no evidence, or based on another inference. Because all it has before it is the cold record, an appellate court cannot make such a determination.[169] It must assume that the finder of fact was correct in its credibility determinations, unless the evidence is so completely ambiguous that some impermissible inference must have slipped in, or some lower standard of proof must have been applied.[170]

Ambiguity arises where the defense is able to submit a reasonable explanation for the circumstantial facts which created the inference of guilt in the first place.[171] Credibility no longer plays a role when such an explanation is offered: such an explanation is not evidence per se, unless the defendant testifies that his or her actions were in accord with the explanation.[172] In such a case, the defendant's credibility

164. *See* People v. Branch, 634 N.E.2d 966, 969 (N.Y. 1994). *But see* People v. Roman, 629 N.Y.S.2d 744, 744 (App. Div. 1995) (mem.) (finding a witness' testimony "patently suspect" upon viewing the "cold record").

165. *See generally* Frumer et al., *supra* note 97.

166. Thus the issue of legal sufficiency is deemed a question of law and wholly under the purview of the appellate court. *See* N.Y. Crim. Proc. Law § 470.15(4)(b) (McKinney 2002).

167. *See* People v. Barnes, 406 N.E.2d 1071, 1074 (N.Y. 1980); CJI2d [NY] Circumstantial Evidence—Entire Case (2001).

168. *See* People v. Kennedy, 391 N.E.2d 288, 293 (N.Y. 1979) ("[I]t is the function of the jury to sift through the conflicting evidence, direct or circumstantial, and to determine whether the defendant's guilt has been proven beyond a reasonable doubt."); *see also* Donnino, *supra* note 99, § 20:7.

169. *See supra* note 164.

170. *See supra* note 164.

171. Indeed, it does not matter where the reasonable explanation comes from. If a juror finds that a reasonable explanation exists which is inconsistent with guilt, he or she must acquit. *See* CJI2d [NY] Circumstantial Evidence–Entire Case (2001).

172. Once the defendant takes the stand, his or her credibility comes into question.

becomes a question of weight and could lead the finder of fact to dismiss the defendant's testimony entirely.[173] Where the defense uses each circumstantial fact proven beyond a reasonable doubt to paint a logically coherent picture of the defendant's actions that is inconsistent with guilt, however, credibility is not an issue.[174] If, for instance, the defense—or any juror, for that matter—can connect those dots which the prosecution uses to create an inference of guilt in a way which reasonably creates an inference of innocence, a verdict of guilty would be against the weight of the evidence and require reversal by the Appellate Division.[175]

b. *De Facto Application of the Moral Certainty Safeguard on the Intermediate Appellate Level*

Hence, when an intermediate appellate court reviews such a verdict, it must show no deference to the reasoning of the fact-finder below.[176] If there is a single inferential gap (as in the puzzle analogy used above and in *Barnes*), or an inference based upon conjecture, the court must find that the verdict in question is invalid.[177] In this way, although not explicitly stated as such, intermediate appellate courts apply the moral certainty safeguard when reviewing guilty verdicts from circumstantial cases to determine whether they are against the weight of the evidence. In determining legal sufficiency, the appellate court looks at 1) whether evidence was presented on every element of the crime charged and 2) whether any reasonable juror, applying that evidence, could have found the defendant guilty beyond a reasonable doubt. In contrast, when an intermediate appellate court makes a weight determination, it inspects the soundness of the fact-finder's reasoning. It checks to see if any impermissible leaps of logic were made or if the fact-finder impermissibly disregarded a reasonable explanation of the same evidence it used to determine guilt.[178]

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173. *See* Fisch, *supra* note 75, § 446.

174. When a defense attorney presents a rational explanation of the prosecution's facts consistent with innocence, she is not presenting evidence as such, but rather showing the kind of "logical gap" against which the court warned in *People v. Cleague*, 239 N.E.2d 617, 619 (N.Y. 1968).

175. Since sufficiency is a question of law and deals only with whether credible evidence was presented on every element of the crime(s) charged, any other determination that the evidence presented did not support a guilty verdict would be on the weight.

176. Deference extends to the fact-finder below only inasmuch as the fact-finder's reasoning was based on permissible inferences.

177. *See* People v. Barnes, 406 N.E.2d 1071, 1074 (N.Y. 1980).

178. One further test omitted above is whether the circumstantial facts presented are all inconsistent with guilt. If a fact inconsistent with guilt is proven beyond a reasonable doubt, the global inference of guilt is invalid.

In this way, although ushered into the wings after *Sanchez*, New York courts continue to rely on the moral certainty safeguard.[179] In application, very few appellate courts pierce the veil of deference shown to trial court fact-finders and overturn guilty verdicts on the grounds that an impermissible inference was made or that the fact-finder disregarded a reasonable explanation either proffered by the defense or clearly visible from the facts themselves.[180] However, the moral certainty safeguard continues to provide an important bulwark at the trial level against one of the dangers unique to circumstantial cases (including, of course, bodiless murder cases), a danger which has helped shape the course of New York criminal jurisprudence from its very beginnings.[181]

II. THE PENDULUM SWING IN NEW YORK BODILESS MURDER JURISPRUDENCE—*RULOFF*, *LIPSKY*, AND *BIERENBAUM*

As outlined in Part I, Lord Hale established the long-standing common-law rule regarding bodiless murder along with its *Hindmarsh* exception—that a conviction for murder should not stand unless 1) the body be found or direct evidence be available as to the death of the victim or 2) circumstances are so extenuating (as was the case in *Hindmarsh*) that death may be proven by circumstantial evidence alone.[182] In the United States, for a time, legislatures truncated this two-part rule so as to admit of no exception whatsoever, as evidenced by the "no body—no conviction" statutes that remained on the books in some states until 1974.[183] As these statutes began to be repealed, or, in many cases, simply fade away, courts began handing down decisions more in line with Hale's old rule, *Hindmarsh* exception intact. The pendulum that had initially swung away from Hale and *Hindmarsh* had swung back. In New York, however, that pendulum has recently overshot its mark, swinging indeed so far beyond Hale and *Hindmarsh* as to disregard altogether their respective calls for deliberateness of decision in bodiless murder cases. Three cases punctuate the three points on this pendulum swing in New York: *Ruloff v. People*,[184] *People v. Lipsky*,[185] and the recent decision from the Appellate Division, *People v. Bierenbaum*.[186]

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179. *See supra* note 107 and accompanying text.

180. One example where a New York court did overturn a guilty verdict on just such grounds was *People v. Bearden*, 49 N.E.2d 785 (N.Y. 1943).

181. *Cf.* Shapiro, *supra* note 122, at 193 (stressing that the words moral certainty themselves and their extensive legal history play a vital role in the way juries understand the phrase "beyond a reasonable doubt").

182. *See supra* Part I.A.1, 2.

183. *See supra* notes 61-62 and accompanying text.

184. 18 N.Y. 179 (1858).

185. 443 N.E.2d 925 (N.Y. 1982).

186. 748 N.Y.S.2d 563 (App. Div. 2002).

A. *Strict Interpretation of the Hale/*Hindmarsh *Rule*—Ruloff v. People

In England, courts initially interpreted the Hale/*Hindmarsh* rule strictly,[187] thus perforce reading narrowly the *Hindmarsh* exception to Hale's reluctance to convict in a case of bodiless murder.[188] Indeed, *Hindmarsh* became a unique exception, rather than one from which others could be extrapolated.[189] In the United States, however, courts were becoming more and more open to the idea that circumstantial evidence could be used to prove all elements of a crime, including *corpus delicti*.[190] In relation to murder in New York, this trend came to an end in the case of *Ruloff v. People*,[191] which established the "no body—no conviction" rule that would later become part of the state's penal code.[192]

The openness to proving *corpus delicti* with circumstantial evidence in the United States depended heavily on the fact that 1) cases built entirely on circumstantial evidence were still subject to the common law moral certainty safeguard and 2) modern courts afforded defendants with the opportunity to call witnesses and present significant evidence in their defense, perhaps lessening the need for such strict protection as the English interpretation of Lord Hale's rule provided.[193] The case *United States v. Gibert* is a prime example of this openness.[194]

Gibert was a piracy case.[195] In his decision, however, Justice Joseph Story, riding circuit in Massachusetts, spent much of his time discussing the use of circumstantial evidence to support a conviction for murder.[196] He did this, ostensibly, because of the way in which

187. For a digest of English reception of the Hale/*Hindmarsh* rule, see *Ruloff*, 18 N.Y. at 187-91. *But see* 2 Sir William Russell, A Treatise on Crimes and Misdemeanors (photo. reprint 1979) (1865) (stating that Lord Hale's "rule, it seems, must be taken with some qualifications; and circumstances may be sufficiently strong to show the fact of the murder, though the body has never been found").

188. *See Ruloff*, 18 N.Y. at 187-91.

189. *See id.*

190. *See, e.g., id.* at 191-92 (presenting a discussion of early American cases evincing an openness to circumstantial evidence as the basis for *corpus delicti*); *see also*, 3 Simon Greenleaf, A Treatise on the Law of Evidence § 30 (15th ed. 1892) (containing a verbatim passage from the 1858 edition); William Wills, An Essay on the Principles of Circumstantial Evidence 200-16 (Alfred Wills ed., Fred B. Rothman & Co. 1981) (1860); *id.* at 207-08 ("[T]o require the discovery of the body in all cases would be unreasonable and lead to absurdity and injustice, and it is indeed frequently rendered impossible by the act of the offender himself.").

191. 18 N.Y. 179 (1858).

192. For a history of the "no body—no conviction" rule in the various New York Penal Laws, see *People v. Lipsky*, 443 N.E.2d 925, 930 (N.Y. 1982).

193. On the moral certainty safeguard in relation to a case for murder, see *People v. Bodine*, 1 Edm. Sel. Cas. 36 (N.Y. Sup. Ct. 1845). For a brief discussion of the differences between the court system in Lord Hale's time and that present in New York in 1858, see *Ruloff*, 18 N.Y. at 186.

194. United States v. Gibert, 25 F. Cas. 1287 (C.C. Mass. 1834) (No. 15,204).

195. *See id.*

196. *See, e.g., id.* at 1290.

piracy and murder on the high seas functioned, at the time, as part and parcel of the same offense.[197] The Crimes Act of 1790 prohibited both crimes and declared that they would be punishable by death.[198] Since piracy was a capital offense, courts felt the need to proceed as deliberately as possible where a significant part, if not the entirety, of the prosecution's case depended on circumstantial evidence.

In regard to the danger of relying on circumstantial evidence in capital cases, Story wrote that previous cases on the subject established that there could be no global ban on the prosecution of murder without a body. Using the example of murder on the high seas, he reasoned that in such cases, "the body is rarely if ever found; and a more complete encouragement and protection for the worst offences of this sort could not be invented, than a rule of this strictness. It would amount to a universal condonation of all murders committed on the high seas."[199] In his opinion, Story evinced the then growing strength of an American version of the *Hindmarsh* argument, which postulated that 1) circumstantial evidence can be just as probative and reliable, if not more so, than direct evidence and 2) allowing a murderer to escape prosecution because he or she was especially good at disposing of the victim's body would be an unacceptable miscarriage of justice.[200] In New York, at least, this trend was short-lived, as evinced by the landmark case, *Ruloff v. People*.[201]

Ruloff involved a murder in which no body had been found and where the prosecution had made no effort at trial to produce direct evidence of the death of the victim, or of an act, committed by the defendant, which would have been sufficiently violent to cause the death of the victim.[202] The defendant had been charged with the murder of his infant daughter when she and his wife went missing without a trace.[203] The mother and child were last seen alive on the evening of January 24, 1845, by a neighbor.[204] The next day, Ruloff borrowed a wagon from another neighbor and enlisted that neighbor's help in loading into it a heavy box.[205] Ruloff drove off with the wagon and box, returning the next day with both.[206] He gave several false exculpatory stories as to the whereabouts of his wife and child.[207] In

197. *See* Act of Apr. 30, 1790, ch. IX § 8, 1 Stat. 112 (An Act for the Punishment of certain Crimes against the United States); *see also* Samuel Pyeatt Menefee, *"Yo Heave Ho!": Updating America's Piracy Laws*, 21 Cal. W. Int'l L.J. 151, 153-54 (1990).
198. 1 Stat. 112.
199. *Gibert*, 25 F. Cas. at 1290.
200. *See supra* note 190.
201. 18 N.Y. 179 (1858)
202. *Id.*
203. *Id.* at 180.
204. *Id.*
205. *Id.*
206. *Id.* at 180-81.
207. *Id.* at 181.

his home, he had articles, such as a ring, that others had seen in the possession of his wife on the 24th.[208] He later fled to Chicago under an assumed name, and told others there that his wife and child had died on the Illinois River some six weeks before.[209] In Chicago, authorities gained possession of a box containing books, papers, and clothing that had belonged to Mrs. Ruloff, as well as what appeared to be a lock of her hair attached to a note, upon which the words "Oh, that dreadful hour!" were written.[210]

Ruloff moved at the opening of the trial to have the case dismissed for lack of *corpus delicti*.[211] The judge declined to rule on the question until the prosecution had presented its case, at which time Ruloff renewed the motion.[212] Justice Mason then conducted a detailed analysis of the issue, citing William Wills for the proposition that a victim's death "may be [legally] inferred from such strong and unequivocal circumstances [of presumption] as render it morally certain, and leave no ground for reasonable doubt."[213] Justice Mason then left to the jury the question of whether the prosecution had proven *corpus delicti* of the crime to a moral certainty, whereupon the jury convicted Ruloff.[214]

On appeal, the Court of Appeals considered Mason's reasoning and rejected it.[215] Relying heavily on early English sources, and rejecting the trend established in *Gibert* and elsewhere, Judge Johnson found no compelling argument that the *Hindmarsh* exception to Lord Hale's rule should be extended.[216] Strangely enough, both the ruling below by Justice Mason and the decision that overturned it in the Court of Appeals stand for the proposition that Lord Hale's rule, complete with its *Hindmarsh* exception, was good law.[217] Nevertheless the rule left in place after *Ruloff*, which read the *Hindmarsh* exception narrowly, is entirely different from the rule set out in *Gibert* and, arguably the New York case, *People v. Bodine*.[218] As would happen in

208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.* at 180.
212. *Id.* at 180-81.
213. *Id.* at 183. The text quoted in *Ruloff* does not include the words "legally" and "of presumption" present in the 1860 edition. *See* Wills, *supra* note 190, at 208.
214. *Ruloff*, 18 N.Y. at 183-84.
215. *Id.* at 184-99.
216. *Id.* at 188-91, 193.
217. *Compare id.* at 181-83 (presenting a near identical paraphrase of the facts of *Hindmarsh*, as well as quoting Wills, who relies on *Hindmarsh* for his conclusions), *with id.* at 179 (stating in the syllabus that Lord Hale's rule was affirmed), *and id.* at 199 (stating that "no judicial authority warrant[s] the departure" from Lord Hale's rule).
218. *See, e.g.*, United States v. Gibert, 25 F. Cas. 1287, 1290 (C.C. Mass. 1834) (No 15,204); People v. Bodine, 1 Edm. Sel. Cas. 36, 43 (N.Y. Sup. Ct. 1845) (stating that it was a "strange delusion" on the part of a juror who stated he would not convict for murder on circumstantial evidence alone).

other jurisdictions, this restrictive reading of the *Hindmarsh* exception was later codified into the New York Penal Laws of 1882 and 1909. The New York version of the "no body—no conviction" rule faded away in 1965 when the assembly failed to include it in its revision of the Penal Law. The first case to come before the Court of Appeals after the 1965 *de facto* rescission of the *Ruloff* rule was *People v. Lipsky* in 1982.[219]

B. *The Swing Back Toward* Gibert—People v. Lipsky

Although technically a bodiless murder case, *Lipsky* also involved other, direct evidence of a crime, namely a confession by the defendant to a social worker and a cryptic admission in the form of a poem.[220] In relation to *Ruloff*, however, *Lipsky* stands for the proposition that in New York, the *corpus delicti* of murder may be proven by circumstantial evidence alone.[221] The question of *corpus delicti* in relation to other, direct evidence of a crime arose in *Lipsky* because of the *corpus delicti rule*.[222] Since Lipsky had confessed to his crime, the common law *corpus delicti rule* (codified in New York Criminal Procedure Law § 60.50) required that his confession be corroborated before it be admitted against him.[223]

In *Lipsky*, the defendant, an accounting student in Rochester, was charged with killing and disposing of the body of part-time prostitute, Ms. Mary Robinson.[224] Ms. Robinson went missing on the night of June 9, 1976, and was never heard from again.[225] Soon thereafter, Lipsky, who seemed "upset and emotionally overwrought," left town for Arizona in order to work at his parents' motel.[226] While he prepared for his departure, several items belonging to Mary Robinson were found in Lipsky's apartment, but no arrest was made.[227] By 1978, Lipsky was in Provo, Utah, where he had married.[228] There, during a

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219. 443 N.E.2d 925 (N.Y. 1982). Indeed, *Lipsky* may have been a case where the victim's body was never found, but it did, like *Ruloff* in some respects, involve a confession to a social worker and a cryptic admission in the form of a poem. Note that confessions or admissions are usually considered direct evidence of a crime. *See, e.g.*, Fisch, *supra* note 75, § 853. In New York, if they take the form of false exculpatory stories, however, they are usually found insufficient to prove guilt if no other direct evidence can corroborate the *corpus delicti*. *See, e.g.*, People v. Moses, 472 N.E.2d 4, 9 (N.Y. 1984) (stating that consciousness-of-guilt evidence, even in the form of a false alibi, could not even satisfy the relatively low standard for accomplice corroboration); *see also Lipsky*, 443 N.E.2d at 928 (quoting the poem penned by Lipsky and used against him at trial).

220. *See Lipsky*, 443 N.E.2d at 928-29.

221. *Id.* at 929-30.

222. *See supra* Part I.A.2.

223. *Lipsky*, 443 N.E.2d at 926.

224. *Id.* at 927-28.

225. *Id.* at 927.

226. *Id.*

227. *Id.* at 927-28.

228. *Id.* at 928.

psychological evaluation predicated on an arrest for aggravated assault, Lipsky confessed to a psychiatric social worker that he had killed Ms. Robinson.[229] Authorities in Rochester were notified and Lipsky was extradited back to New York.[230] At trial, the prosecution confronted him not only with his confession to the social worker, but also with a cryptic poem, penned by Lipsky, which tended to admit guilt.[231]

Because of the need for corroboration under the *corpus delicti rule* and New York Criminal Procedure Law § 60.50, the *Lipsky* court began with an analysis of *Ruloff*.[232] The court quickly distinguished the requirement that *corpus delicti* be proved in every criminal case from the aforementioned *corpus delicti rule*. The court also explained that where a confession is present and corroborated, no other indicia of guilt is required.[233] In a preliminary section which is essentially dicta, it elaborated on the state of the *corpus delicti* requirement after the lapse of the *Ruloff* rule in 1965.[234]

The court derided the *Ruloff* rule as "a door of escape to that brutal courage which can mangle and burn the lifeless body."[235] The court also noted the way in which the rule "has been widely criticized as one which rewards the professional or meticulous killer."[236] Because of the *Ruloff* rule's conspicuous absence in the Penal Law revision of 1965, and because similar rules remained on the books in "but a small minority of jurisdictions," the court found the question of whether the *Ruloff* rule was still good law to be axiomatic.[237] It stated that "the *Ruloff* rule is so clearly out of harmony with the general rule that the *corpus delicti* may be established by circumstantial evidence that we have no hesitancy in overruling it."[238]

Thus the dicta in *Lipsky* marks a pendulum swing back to the more expansive reading of the Hale/*Hindmarsh* rule as evinced in cases such as *Gibert*, and in commentators such as Wills, Greenleaf, Russel and Starkie.[239] This expansion of the Hale/*Hindmarsh* rule was,

229. *Id.*
230. *Id.*
231. *Id.*
232. *Id.* at 929.
233. *Id.* at 930.
234. *Id.* at 929-30.
235. *Id.* at 930 (quoting People v. Palmer, 109 N.Y. 110, 112 (1888)).
236. *Id.*
237. *Id.*
238. *Id.* The appropriate section of the first codification of the *Ruloff* rule read, "No person can be convicted of murder or manslaughter unless the death of the person alleged to have been killed and the fact of killing by the defendant, as alleged, are each established as independent facts; the former by direct proof and the latter beyond a reasonable doubt." *Id.* at 930 n.2 (quoting L. 1882, c. 384, § 181).
239. *See, e.g.*, United States v. Gibert, 25 F. Cas. 1287, 1290 (C.C. Mass. 1834) (No 15,204); Ruloff v. People, 18 N.Y. 179, 194-95 (1858) (containing an overview of Starkie's view on bodiless murder); Greenleaf, *supra* note 190; Russell, *supra* note 187; Wills, *supra* note 190.

however, bounded by the moral certainty safeguard, which itself was still indispensable to cases built entirely on circumstantial evidence, at least until the ruling of *People v. Sanchez*.[240] Despite this expansion in *Lipsky*, trials for murder in absence of a body or any other direct evidence of a crime remained few.[241] Indeed, until very recently there were no cases on record in which there was no body, no direct evidence and no other more damning circumstantial evidence, such as blood or bone fragments.[242] In the recent decision of *People v. Bierenbaum*,[243] the Appellate Division has cast aside a long tradition of caution in reviewing such cases and deemed it appropriate to extend *Lipsky* and the Hale/*Hindmarsh* rule beyond all traditional bounds.

C. *Heaving the Hale/*Hindmarsh *Rule Overboard*—People v. Bierenbaum

In the highly publicized case of *People v. Bierenbaum*, a plastic surgeon, Dr. Robert Bierenbaum, was convicted of killing his wife, dismembering her body and then transporting it from their Manhattan apartment to a private airfield in New Jersey.[244] The jury found that Bierenbaum then loaded the corpse into a small, single engine plane, flew out over the Atlantic Ocean and dumped the body into the water without a trace.[245]

Bierenbaum and his wife, Mrs. Gail Katz Bierenbaum, had a troubled marriage.[246] They quarreled often, and in 1983, a year after they were married, the doctor allegedly attacked his wife, choking her until she was unconscious.[247] By all accounts, Gail Katz Bierenbaum

240. 463 N.E.2d 1228 (N.Y. 1984). *Compare* CJI 9.05 Circumstantial Evidence: Entire Case (1991), *with* CJI2d [NY] Circumstantial Evidence–Entire Case (2001), *and Sanchez*, 463 N.E.2d at 1229 (stating that the words "moral certainty" were no longer indispensable to a circumstantial evidence charge).

241. For bodiless murder cases in which either other physical evidence (such as blood or bone fragments), confessions or admissions played a role since *Lipsky*, see *People v. Zarif*, 737 N.Y.S.2d 339, 340 (App. Div. 2002) (involving a confession); *People v. Curro*, 556 N.Y.S.2d 364 (App. Div. 1990) (involving an admission); *People v. Siefert*, 548 N.Y.S.2d 971, 973 (App. Div. 1989) (involving blood, fiber and bone-fragment evidence); *People v. Gurney*, 493 N.Y.S.2d 957 (N.Y. Crim. Ct. 1985) (involving a confession). Indeed, *Siefert* seems to be the only case which fits into the paradigm of this Comment, i.e., a bodiless murder case with no direct evidence, including confessions or admissions. In *Siefert*, however, the overwhelmingly damning nature of the physical evidence present renders the case more akin to other direct evidence cases. *See* 548 N.Y.S.2d at 976-77.

242. *See, e.g.*, *Siefert*, 548 N.Y.S.2d at 976-77.

243. 748 N.Y.S.2d 563 (App. Div. 2002).

244. *Id.* at 567.

245. *Id.*

246. *Id.* at 575 (describing the Bierenbaum's marriage as "an emotional battleground").

247. *Id.* at 568.

was looking for a way out of the relationship.[248] She had begun apartment hunting and had told her friends that she was ready to leave her husband.[249] If he did not agree to the divorce, she had planned to use a *Tarasoff* letter[250] she had received from Bierenbaum's psychotherapist, which said he thought Bierenbaum posed an imminent threat to her safety because of threats and other statements made in therapy.[251] On July 7, 1985, the very day she had planned to confront her husband, Mrs. Bierenbaum went missing and was never seen or heard from again.[252] Police quickly centered their investigation on Bierenbaum, questioning him and searching his apartment, but they were unable to come up with enough evidence to support an indictment.[253] Fifteen years later, by which time Bierenbaum had remarried and set up a plastic surgery practice in North Dakota, authorities arrested the doctor and charged him with murder.[254]

At trial, Bierenbaum asserted that the circumstantial evidence used against him was insufficient to support a charge of murder.[255] From the beginning he had offered several exculpatory stories, such as how his wife had left the apartment that day to go sunbathing in Central Park, how she had a drug habit and had probably run off with her drug-dealer friends, or how she had been unfaithful to him and that she had probably left him for her lover.[256] Eventually, for reasons not apparent from the decision, Bierenbaum conceded that his wife died on the day she was last seen, July 7, 1985.[257] He still contended, however, that given the complete lack of physical evidence that a crime had occurred (including the fact that police had neither recovered his wife's body nor found any trace of foul play in his

248. *Id.* at 575.

249. *Id.*

250. As a general rule, ever since *Tarasoff v. Regents of University of California*, 551 P.2d 334 (Cal. 1976), psychotherapists owe a duty of care to third parties who might be harmed by the violent actions of their patients when the therapist knows the patient poses a serious threat of such violence and he or she finds the threat credible. *See id.* at 340. Therapists can fulfill this duty of care by issuing a communication warning the third party of the threat. *See id.* As a result, such communications are often called *Tarasoff* letters.

251. *Bierenbaum*, 748 N.Y.S.2d at 575 (indicating that she planned to disclose an alleged Medicare fraud scheme that implicated both her husband and her father in-law).

252. *Id.* at 568.

253. *Id.* at 569-71.

254. Katherine E. Finkelstein, *Surgeon Convicted of Murdering Wife*, N.Y. Times, Oct. 25, 2000, at B3.

255. Bierenbaum also presented an eyewitness whose testimony contradicted the rather tight timeline relied upon by the prosecution. *See* Riccardi, *supra* note 12. Regarding the eyewitness testimony, see *Bierenbaum*, 748 N.Y.S.2d at 580.

256. Other alternate stories included a quip that she was probably on a shopping spree at Bloomingdale's. *See Bierenbaum*, 748 N.Y.S.2d at 570.

257. *Id.* at 567.

apartment), a jury would be legally unable to find him guilty beyond a reasonable doubt.[258]

In order to bridge the gap of physical evidence in its case, the prosecution brought in expert testimony which explained to the jury how Bierenbaum had been able to cover his tracks.[259] They also presented a flight log, kept by Bierenbaum, an amateur pilot, that indicated he had rented a small, single-engine plane from an airfield in New Jersey on the afternoon of July 7, 1985, and took off without logging a flight plan.[260] He landed shortly thereafter and eventually returned home.[261] According to the prosecution, in the short time between the point at which Gail Katz Bierenbaum was last seen alive and the point at which the doctor arrived at the New Jersey airfield, Bierenbaum had killed her, stuffed her small-framed body (either dismembered or intact) into a duffel bag and drove approximately twenty-five miles to get the plane. Once at the airfield, Bierenbaum loaded his wife's body onto the plane, took off toward the Atlantic Ocean, dumped her body in the ocean once he was relatively far out, and then returned.[262] In support of these allegations, the prosecution presented videotaped reenactment evidence, showing how a man of Bierenbaum's build could load a 110-pound body into a plane and successfully maintain control while flying eighty-five miles out over the sea and dumping the body overboard.[263]

On appeal, Bierenbaum raised several evidentiary challenges, including 1) that the evidence presented against him was legally insufficient 2) that the guilty verdict reached by the jury was against the weight of the evidence and 3) that character evidence of the prior attack on his wife was impermissibly used as propensity evidence.[264] For the purposes of this discussion and the appellate decision, the first of these challenges is of the least importance. As outlined in Part I.B of this Comment, the standard for legal sufficiency is low and rarely left unmet. On appeal, a court must find that there was no "'valid line of reasoning and permissible inferences [that] could lead a rational person to the conclusion [of guilt] on the basis of the evidence at trial,

258. Note that Bierenbaum's lawyers did not focus on the fact that a body had not been produced. That was the strategy unsuccessfully relied upon by the defense in the Kimes trial. *See* Riccardi, *supra* note 12.

259. *Bierenbaum*, 748 N.Y.S.2d at 573.

260. *Id.* at 572-73.

261. The flight lasted just under two hours. After landing, Bierenbaum went to his sister's home in Montclair, New Jersey, to celebrate his nephew's birthday. *Id.* at 568-69.

262. *See, e.g.*, *id.* at 588 (presenting a description of the videotape used by the prosecution to prove their theory of how Bierenbaum disposed of his wife's body).

263. *Id.* On the prejudicial nature of the demonstrative evidence in the *Bierenbaum* trial, see Abraham Abramovsky, *Part 2: No Body, Weapons, Forensics: Have Courts Gone Too Far?*, N.Y. L.J., Jan. 8, 2003, at 3.

264. *Bierenbaum*, 748 N.Y.S.2d at 567.

viewed in the light most favorable to the People.'"[265] This is a permissive standard and amounts to a restatement of the *prima facie case rule*.[266]

It was in its analysis of weight and the admissibility of character evidence that the court in *Bierenbaum* made its most radical moves. In relation to weight, the court manufactured a new standard for the sufficiency of both consciousness-of-guilt evidence and evidence of motive and opportunity. Previously in New York, both of these categories had been insufficient on their own, or even in concert, to support a finding of guilt.[267]

1. The *Bierenbaum* Weight Analysis

As Professor Abraham Abramovsky suggested in an article on the *Bierenbaum* decision, the court added up 0 + 0 and ended up with 1, meaning it took two previously insufficient forms of evidence and found them sufficient in concert.[268] In his opinion, Justice Marlow of the Appellate Division, First Department, placed the most weight on the consciousness-of-guilt evidence presented against Bierenbaum.[269] Relying on *People v. Cintron*,[270] the court found that the overabundance of other circumstantial evidence against Bierenbaum allowed it to ascribe at least a "moderate degree of probative force" to the consciousness-of-guilt evidence.[271]

To this "moderate degree of probative force," Justice Marlow added the tenuous elements of motive and opportunity to find the verdict below not to be against the weight of the evidence.[272] It is true that the prosecution can always use motive and opportunity in its case

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265. *Id.* at 579 (quoting People v. Williams, 644 N.E.2d 1367 (N.Y. 1994)).

266. *See supra* Part I.B (defining the *prima facie case rule*, which requires the prosecution to present at least some admissible evidence on every element of the crime charged in order for a guilty verdict to properly obtain).

267. *See* People v. Bennett, 593 N.E.2d 279, 283 (N.Y. 1992) ("Consciousness of guilt evidence has consistently been viewed as weak because the connection between the conduct and a guilty mind often is tenuous. Even innocent persons, fearing wrongful conviction, may flee or lie to extricate themselves from situations that look damning." (citations omitted)); People v. Moses, 472 N.E.2d 4, 5 (N.Y. 1984) (noting that consciousness-of-guilt evidence, even in the form of a false alibi, was insufficient to satisfy the much lower standard for accomplice corroboration). *See generally* Abraham Abramovsky, *Part I: No Body, Weapon or Forensics: Have Courts Gone Too Far?*, N.Y. L.J., Nov. 29, 2002, at 3.

268. *See* Abramovsky, *supra* note 267.

269. 748 N.Y.S.2d at 573-80. This included, *inter alia*, a false alibi for the period between 4:30 and 6:30 p.m. on July 7, 1985 (when Bierenbaum was flying his rented Cessna), false exculpatory stories (including the quip that his wife was probably on a Bloomingdale's shopping spree), and Bierenbaum's dating habits soon after his wife's disappearance. *Id.*

270. 740 N.E.2d 217 (N.Y. 2000).

271. *Bierenbaum*, 748 N.Y.S.2d at 579 (quoting People v. Benzinger, 324 N.E.2d 334, 337 (N.Y. 1974)).

272. *Id.* at 579.

in chief and they can be legally sufficient to support a guilty verdict where a criminal act, i.e., the *corpus delicti* of the crime charged, has already been established.[273] Conversely, if the prosecution has not established such an act, as in the case where a person confesses to a crime that has not yet been discovered, motive and opportunity alone cannot supply the missing *corpus delicti*.[274]

In its review of the case made against Bierenbaum, the Appellate Division elided its *Cintron* analysis with its analysis of *corpus delicti*, i.e., it found reasons why the probative force of both consciousness-of-guilt evidence and motive and opportunity should be increased before the *corpus delicti* of the crime had been established. While Bierenbaum conceded to the occurrence of his wife's death on July 7, 1985, the *corpus delicti* of murder consists of not only the death of the victim, but the intentional criminal agency of another person in causing that death.

Without independent evidence tending to prove that the murder occurred in such a way that implicates the defendant, no *Cintron* fortification of consciousness-of-guilt evidence, with or without the addition of motive and opportunity, should occur. In *Bierenbaum*, the prosecution bridged this evidentiary gap with its expert testimony and reenactment evidence.[275] These devices only served to strengthen the impermissible inference that Bierenbaum's inconsistent statements, coupled with his motive and opportunity, established the fact that the crime itself was perpetrated, not just that it was perpetrated by Bierenbaum. This kind of bootstrapping has created an evidentiary loophole that flies in the face of the caution urged not only by the Hale/*Hindmarsh* rule and its application in *Lipsky*, but also by the long history of the moral certainty safeguard in New York.[276]

2. The *Bierenbaum* Analysis of Character Evidence

The loophole opened by the *Bierenbaum* weight analysis is only widened when considered in conjunction with the Appellate Division's analysis of the admissibility of character evidence.[277] The Court of Appeals has long found character evidence inadmissible when offered by the prosecution to show action in conformity therewith.[278] The danger that a jury may convict a defendant based upon his or her past acts, and not the acts in question, has led the Court to construct a near complete bar to such evidence, which can

273. *See generally* LaFave, *supra* note 69, § 3.6.
274. *See, e.g.*, People v. Moses, 472 N.E.2d 4, 9 (N.Y. 1984).
275. *Bierenbaum*, 748 N.Y.S.2d at 573.
276. *See, e.g.*, *supra* Parts I.A, I.B, II.B.
277. *See Bierenbaum*, 748 N.Y.S.2d at 585-88.
278. *See, e.g.*, People v. Zackowitz, 172 N.E. 466, 468 (N.Y. 1930) ("Inflexibly the law has set its face against the endeavor to fasten guilt upon [a defendant] by proof of character or experience predisposing to an act of crime.").

often be highly probative. As an exception to the bar, character evidence can be admitted to prove motive, identity or intent.[279]

In *Bierenbaum*, accounts of the doctor's 1983 choking attack on his wife were admitted, ostensibly, to prove 1) that he could have intentionally done physical harm to his wife and 2) that he (and arguably no one else) had a propensity for directing his anger at his wife. Although these inferences are permissible and, in cases of domestic violence, of special importance to the prosecution, they still do not clear the *corpus delicti* hurdle. As noted above, considering the importance of evidence of motive (including intent) and opportunity (which is the basic element of identity) without first establishing the body of the crime puts the cart before the horse and bootstraps a previously insufficient body of evidence into the realm of legal sufficiency. As Part III of this Comment explores, this analysis used by the Appellate Division in *Bierenbaum* not only swings the pendulum of bodiless murder jurisprudence in New York beyond its resting point at *Lipsky*, it also holds significant import for other cases in which the body of the crime is difficult to establish.

III. CLOSING THE *BIERENBAUM* LOOPHOLE

This part explores in detail the dangers created by the *Bierenbaum* decision and suggests ways in which the Court of Appeals can remedy them. It also demonstrates that New York law already provides for a stable middle ground for bodiless murder jurisprudence—one which would avoid the evidentiary loopholes opened by *Bierenbaum* and the deleterious effect they could have on the public trust in law enforcement.

A. *The Aftereffects of* Bierenbaum

In relation to murder, the bootstrapping loophole opened by *Bierenbaum* creates several unique dangers: 1) that the number of bodiless murder cases prosecuted in New York will skyrocket, 2) that in cases where past acts of domestic violence are involved, there will be a presumption of guilt based on character evidence, 3) that consciousness-of-guilt evidence coupled with evidence of motive and opportunity will become a kind of "smoking gun" in bodiless murder cases and 4) that trust in law enforcement will decline because the wider scope of its reach will make its actions appear arbitrary. In relation to all cases in which *corpus delicti* is in question, the *Bierenbaum* decision creates the danger that the exception to the bar on the use of character evidence by the prosecution in its case in chief will swallow the rule, allowing fact-finders to convict on the basis of prior bad acts. In response to these dangers, the Court of Appeals

279. *See* Fisch, *supra* note 75, §§ 210-11.

should seek to limit the effects of *Bierenbaum*, and return to the protections offered by the Hale/*Hindmarsh* rule and the moral certainty safeguard in cases based entirely on circumstantial evidence.

1. The Effect of *Bierenbaum* on Bodiless Murder Cases

The difficulty of limiting the prosecution of any bodiless murder case arises from the facts that 1) the defendants involved are often unsavory and, at least from appearances, almost surely guilty, and 2) the Hale/*Hindmarsh* rule appears insignificant. After all, as history has shown us, true bodiless murder cases are few and far between, a scarcity increased by the overcrowded, over-surveilled and overly confession-oriented society in which we now live. It can therefore be unclear why we should be especially careful with these unsavory defendants of which the Court of Appeals was so wary in *Lipsky*.[280] *Bierenbaum* provides the answer to this question when it borrows from other types of cases, i.e., using the character evidence exception from domestic violence jurisprudence, to construct its decision.[281] As this Comment has attempted to make clear, cases of bodiless murder are less of an important area of the law in and of themselves as they are a kind of lightning rod to which other important issues, such as *corpus delicti* and the danger in cases built entirely on circumstantial evidence, are inextricably drawn.[282] As such, the *Bierenbaum* decision will have repercussions not only in the arena of bodiless murder jurisprudence, but also in other, less obvious areas.

In relation to bodiless murder, the first such repercussion is the fact that the very number of truly bodiless murder cases, which has, understandably, remained low ever since the development of the Hale/*Hindmarsh* doctrine, will be likely to increase dramatically. Even though the sample is small, recent experience in New York is telling. Argued by many to be the first of their kind in New York, the Kimes and Bierenbaum prosecutions began within a year of each other. Although the Kimes prosecution followed rather promptly on the heels of the disappearance and suspected murder of Irene Silverman, the *Bierenbaum* action re-opened an investigation that had laid dormant for fifteen years. In August of 2002, another murder prosecution began in absence of a body—this time regarding the disappearance of Quinnipiac Law School student Samiya Haqiqi, who went missing on November 12, 1999, and has not been heard from since. Based on the testimony of an informant, her ex-boyfriend and

280. That is, the sort that possess "[the] brutal courage [to] mangle and burn [a] lifeless body." People v. Lipsky, 443 N.E.2d 925, 930 (N.Y. 1982) (quoting People v. Palmer, 16 N.E. 529, 530 (N.Y. 1888)).

281. *See supra* Part II.C.2.

282. *See supra* Parts I.A.2, I.B.

his brother were charged with killing Ms. Haqiqi and disposing of her body.[283]

Given the new breadth of the state's prosecutorial reach and the evidence of recent experience, it is reasonable to assume that what was once rarely, if ever, prosecuted will become more commonplace. This, in itself, is not a negative development. Indeed, if the increased prosecution for murder in absence of a body lands more actual killers behind bars, such a development would be a clear example of an absolute social good. Because of their complete reliance upon circumstantial evidence, however, bodiless murder cases bring with them a level of speculation and uncertainty that can make a rise in the prosecution for murder in absence of a body (or any other direct evidence of a crime) a troubling event.

For instance, in a missing persons case in which there has been a history of domestic violence, there will now be a presumption of guilt that will be difficult to overcome. Even more troubling is the fact that a party with a history of domestic violence can offer little to rebut such a presumption. The appalling nature of domestic violence as well as the tendency toward recidivism make this presumption of guilt, however impermissible, all the more reasonable.[284] In such a case, not even an alibi will help: the effectiveness of an alibi turns on its credibility, whereas circumstantial evidence of motive, intent or identity turns only on its reasonableness. In addition, alibis are only useful when the exact date and time of an alleged offense is known. As other cases, especially those involving child abuse, have shown, time and date of an alleged offense need not be averred specifically where time and date of an offense are by nature unclear.[285] Therefore, since the prosecution must always speculate on time of death in a bodiless murder case, it can choose to cast its net sufficiently wide so

283. Note that this case, involving corroboration of alleged admissions, involves the *corpus delicti rule* and is not, as this Comment has defined them, a bodiless murder case built entirely on circumstantial evidence. *See* Sean Gardiner, *Following the Trail: Boyfriend Charged in Student's Slaying*, N.Y. Newsday, Aug. 3, 2002, at A3.

284. On the tendency toward recidivism in abusive households, see Mary Lystad et al., *Domestic Violence*, *in* Family Violence: A Clinical and Legal Guide 141 (Sandra J. Kaplan ed., 1996). *See also* Do Arrests and Restraining Orders Work? 1-2 (Eve S. & Carl G. Buzawa eds., 1996) ("About one in five females victimized by her spouse or former spouse reported that, in the past 6 months, she had been the victim of a series of three or more assaults . . . ."); Donald G. Dutton, The Batterer 176 (BasicBooks 1995) ("[I]n our interviews with [battered] partners . . . we found that for each arrest, there had been 30 attacks."); Albert R. Roberts, *Duration and Severity of Woman Battering*, *in* Handbook of Domestic Violence Intervention Strategies 68 (Albert R. Roberts ed., 2002) (describing the rate of "chronic abuse" among a sample population of battered women).

285. *See, e.g.*, People v. Morris, 461 N.E.2d 1256, 1257 (N.Y. 1984) (holding sufficient an indictment that alleged that incidents of child sexual abuse occurred "during the month of November 1980").

as to negate the effectiveness of nearly any alibi, no matter how ironclad.[286]

Also, where consciousness-of-guilt evidence and evidence of motive and identity (the "0 + 0" of the *Bierenbaum* equation) are present, there will be a significant lack of impetus for law enforcement to search for corroborating forensics. The *Bierenbaum* logic that summarily concludes murder when 1) a person disappears, and 2) character evidence points ineluctably to one suspect, provides law enforcement, especially in times of reduced funding and higher demand, with a smoking gun. This smoking gun makes forensics, which can be not only expensive and time-consuming, but also subject to strong rebuttal by expert testimony in court, less attractive in such a situation. Given, however, that physical evidence has provided the moral and legal underpinnings for several bodiless murder cases in New York (such as *Lipsky* and *Siefert*), the continued need for forensics is clear.

Lastly, in relation to bodiless murder per se, as both the reach of law enforcement and the frequency of murder charges in missing persons cases increase, the actions of both law enforcement and prosecuting attorneys will begin, in the public's eyes, to appear arbitrary. Rarely does a person go missing where evidence cannot be assembled to show that someone, somewhere 1) showed a suspicious lack of affect in response to the disappearance, and 2) had the motive and opportunity to have killed that person. If a successful prosecution can be mounted against Bierenbaum, however, after the investigation lay cold for fifteen years, the question arises as to why cases such as the disappearance of Kristine Kupka, who went missing after allegedly going to meet her ex-boyfriend, Darshanand Persaud, on October 24, 1998, should remain unprosecuted.[287] In the face of a media barrage, Persaud has remained tight-lipped. Added to this lack of public response, evidence exists that Persaud had motive, since he had allegedly impregnated Kupka while married to another woman.[288] Evidence also exists that the two quarreled because of the pregnancy and that Kupka feared that Persaud might harm her.[289] Lastly, and perhaps most damningly, Persaud was the person with whom Kupka was last seen alive. Although there is no direct or physical evidence that Kupka was murdered or even dead, the *Bierenbaum* decision not only makes a murder charge reasonable, it mandates one. If prosecutors fail to bring such a charge in the Kupka disappearance, or

286. This would have been necessary in *Bierenbaum*, had the defense not conceded that Gail Katz Bierenbaum died on July 7, 1985—the date she was last seen.

287. *See* Joseph P. Fried, *Following Up*, N.Y. Times, Mar. 17, 2002, at 39.

288. *See id.*; *see also What Happened to Kristine Kupka?*, *at* http://www.kristinekupka.com (last visited Mar. 27, 2003).

289. *See What Happened to Kristine Kupka?*, *at* http://www.kristinekupka.com (last visited Mar. 27, 2003).

in the many other similar missing persons cases, public trust in the actions of law enforcement could decline accordingly.[290]

2. The Effect of *Bierenbaum* as an Evidentiary Precedent Generally

As shown in Part II.C, the math of *Bierenbaum* is doubly faulty. Not only does it, as Professor Abramovsky suggests, combine previously insufficient types of evidence to add up to sufficiency for a finding of guilt (0 + 0 = 1), it allows such evidence to also bootstrap in the very existence of a crime, its *corpus delicti* (adding 0 + 0, or consciousness of guilt and motive and opportunity, to equal 2, or *corpus delicti* and guilt). In this way, *Bierenbaum* completely undermines the already weakened prohibition of the use of character evidence in a prosecution's case in chief. The resulting danger that a defendant could be convicted—not for the crime charged, but for previous bad acts—is exemplified in *Bierenbaum*. Of course, whenever character evidence of previous acts of domestic violence is admitted, it is usually accompanied by the limiting instruction that it only be used for the permissible ends of establishing motive, intent or identity and not for the impermissible end of presuming guilt.[291] In such a case, however, evidence of previous acts of domestic violence can be so appalling that it becomes prejudicial. Limiting instructions themselves are often exercises in legal fiction.[292] A juror cannot unhear evidence he or she has heard, nor completely restrict character evidence to its permissible ends.[293] When that evidence is especially prejudicial, as it was in *Bierenbaum*, it should be excluded.[294] But *Bierenbaum* ignores the tenuous fiction of limiting instructions and argues instead that where such evidence is of greatest effect, it should do two jobs at once. It should not only establish guilt, but also bootstrap in the very occurrence of the crime in question.

290. The alternate side of this danger is that such cases will be effectively tried in the media. *Bierenbaum*, *Kimes* and the Kupka disappearance were all highly publicized and the alleged wrongdoers, including Persaud, were vilified in the press. As recent experience has shown, especially in disappearance cases such as that involving Chandra Levy or JonBenet Ramsey, the media can quickly turn anyone with either motive or opportunity into a public villain. Where, as is the case now, a Bierenbaum is convicted but someone like Persaud never even charged, the risk is high that public trust in law enforcement will be significantly undermined.

291. *See* Fisch, *supra* note 75, § 16. An attorney must usually motion for such a limiting instruction but a court must apply one *sua sponte* where "failure to so advise the jury would deprive the [defendant] of a fair trial." *Id.*

292. On the boundaries of this fiction and the confusion limiting instructions can cause, see *Old Chief v. United States*, 519 U.S. 172, 176 n.2 (1997).

293. On the balancing test required in the admission of evidence subject to a limiting instruction, see McCormick on Evidence § 59 (5th ed. 1999).

294. *See, e.g., id.*

B. *Remedies*

In response to the dangers outlined above, either the Court of Appeals or the New York legislature must act to close the *Bierenbaum* loophole. Since any statute putting barriers in the way of a prosecution for murder would be difficult, if not impossible, to pass in the current political climate, the onus falls on the Court of Appeals. In taking on this task, however, the court would still have to confront 1) the unsavory nature of most defendants in bodiless murder cases, especially where domestic violence is involved, as well as 2) the *Lipsky/Palmer* policy argument that those who are especially good at disposing of their victims should not receive the windfall of immunity from prosecution. Both the import *Bierenbaum* has for the future of bodiless murder jurisprudence and its general evidentiary repercussions make some sort of response a necessity.

1. The Response Required by the Court of Appeals

The pressure facing the Court of Appeals with the current state of the law is not new. Indeed, it was the very danger of a miscarriage of justice in bodiless murder cases which led to Lord Hale's call for deliberation and, correlatively, to the development of the moral certainty safeguard in wholly circumstantial cases. With that safeguard effectively dismantled[295] and the door to the prosecution of bodiless murder left wide open after *Bierenbaum*,[296] the risk of injustice is great. The policy arguments that moved Lord Hale, i.e., that the danger of a false conviction outweighed the need to bring a murderer to justice, are as applicable now as they were in the seventeenth century. The dangers of a nigh insurmountable presumption of guilt or of the complete erosion of the ban on character evidence in the prosecution's case in chief arguably outweigh the utility in bringing a very small subclass of suspected murders to justice.

Other mechanisms exist, such as increased use of forensic investigation and the lower standard of proof for the corroborations of confessions or admissions, to help ensure that the number of actual murderers who escape justice when the bodies of their victims cannot be found is as low as possible. Although odds are that despite its deficiencies, the *Bierenbaum* decision will survive further appeal, the Court of Appeals could choose to follow the long-held tradition in bodiless murder cases of setting out guidelines for future decisions in dicta.

Even if the Court of Appeals hears and affirms *Bierenbaum*, the court should restrict its holding to the facts. It should identify that

295. *See supra* Part I.B.
296. *See supra* Part II.C.

both consciousness-of-guilt evidence and evidence of motive and opportunity are still insufficient to prove guilt in New York. It should also state that absent other proof of a crime, they are not, in themselves, sufficient to show that such a crime occurred. Lastly, the court should insist that special attention be given to the prejudicial nature of character evidence when 1) it is especially damning and 2) it is used to cover up a lack of or defect in the prosecution's proof of *corpus delicti*.

The court should also stress the importance of deliberation in all cases based entirely on circumstantial evidence, not just those involving bodiless murder. Even though the moral certainty safeguard was ostensibly weakened in *People v. Sanchez* and the subsequent revision of the Criminal Jury Instructions ("CJI2d"), lower courts still rely widely on its wisdom. The Court of Appeals could take the opportunity in any appeal involving a bodiless murder case (and there are sure to be many after *Bierenbaum*) to reiterate that circumstantial evidence points to a limited set of permissible inferences and that where a case against a defendant is entirely circumstantial, the danger is high that an impermissible inference will slip into a jury's decision-making process. By doing so, the Court will be able to maintain the liberal application of the Hale/*Hindmarsh* rule effected by *Lipsky*, while reducing the risk that especially damning circumstantial evidence (such as the character evidence outlined above) becomes prejudicial.

The reasoning that supports these proposed remedies is an old one, present in Lord Hale's recognition that any reticence toward prosecuting murder in the absence of a body should be tempered by the common sense of *Hindmarsh*. It has also played a long and important role in New York jurisprudence, as evinced by early commentators such as Wills, Greenleaf, Russell and Starkie,[297] the development of the moral certainty safeguard, and the important dicta in *Lipsky*. It should not be discarded simply for the argument, however compelling, that no murderer should escape justice.

2. Examples from Other Jurisdictions

Because truly bodiless murder cases (absent not only a body, but also a confession or any physical trace of a crime) are so rare, it is not surprising that no other U.S. court has dealt extensively with the unique issues raised in *Bierenbaum*. Despite this paucity of precedent, two jurisdictions, California and Michigan, do provide us with examples of the kind of action the Court of Appeals could take when faced with a bodiless murder case. In California, the landmark case *People v. Scott* and its progeny suggest that moral certainty still

297. *See* Ruloff v. People, 18 N.Y. 179, 194-95 (1858) (containing an overview of Starkie's view on bodiless murder); *supra* notes 187, 190.

has an important role to play in such cases.[298] In Michigan, the case of *People v. Fisher*[299] explicitly rejected the same 0 + 0 = 1 math relied upon in *Bierenbaum*. Perhaps by examining these two cases, the Court of Appeals can come to some middle ground—balancing its compelling interest in punishing murderers for their crimes with the need for caution in cases built entirely upon circumstantial evidence.

In *Scott*, a jury convicted a man for the murder of his wife, even though her body was never found.[300] To bolster its case, the prosecution relied on personal items owned by the victim, such as dentures and eyeglasses, which police found buried in a lot adjoining the Scott's property and which the victim would have needed had she disappeared of her own accord.[301] The prosecution also submitted evidence that strongly suggested that Mr. Scott knew his wife was dead.[302]

Scott is generally regarded as the first case in the United States that upheld a conviction for murder in absence of a body, forensics or any direct evidence whatsoever.[303] Yet in fashioning its decision, the *Scott* court included a discussion on the dangers inherent to cases, especially those involving homicide, built entirely on circumstantial evidence. On this point, *Scott* quoted a New Zealand case, *Rex v. Horry*, which stated:

> There may be other facts so incriminating and so incapable of any reasonable explanation as to be incompatible with any hypothesis other than murder. It is in accord both with principle and with authority that the fact of death should be provable by such circumstances as render it morally certain and leave no ground for reasonable doubt—that the circumstantial evidence should be so cogent and compelling as to convince a jury that upon no rational hypothesis other than murder can the facts be accounted for . . . . [I]t was competent for the jury to infer the fact of death from the whole of the evidence as a matter of moral certainty leaving no ground for reasonable doubt.[304]

By relying on *Horry*, *Scott* incorporated the moral certainty safeguard into the jurisprudence of bodiless murder in California. The cases which followed *Scott*, whether or not they make specific reference to moral certainty, were all bound by its logic and its call for

298. *See, e.g.*, People v. Scott, 1 Cal. Rptr. 600 (Cal. Dist. Ct. App. 1960). *Scott*'s progeny include *People v. Martinez*, 2002 WL 749398 (Cal. Ct. App. Apr. 29, 2002); *Matthews v. Superior Court*, 247 Cal. Rptr. 226 (Cal. Ct. App. 1988); *People v. Manson*, 139 Cal. Rptr. 275 (Cal. Ct. App. 1977); and *People v. Bolinski*, 67 Cal. Rptr. 347 (Cal. Ct. App. 1968).

299. 483 N.W.2d 452 (Mich. Ct. App. 1992).

300. *Scott*, 1 Cal. Rptr. at 603.

301. *Id.* at 608.

302. *See id.* at 623.

303. *See id.* at 603 ("The case in hand is without precedent in this country.").

304. *Id.* at 621-22 (quoting Rex v. Horry, [1952] N.Z.L.R. 111).

caution. In *Scott*, of course, the defendant was found guilty, yet the California Supreme Court was still able to voice its concern and stress its reliance on the moral certainty safeguard. Any appeal to *Bierenbaum* could well do the same.

In *Fisher*, the Michigan Court of Appeals examined a fact pattern similar to that in *Bierenbaum*, but it reached an entirely different result. Nine years after his wife went missing, the defendant, Jerry Wayne Fisher, was charged with murdering her and disposing of her body.[305] Police were unable to find any trace of Ms. Fisher's body, or evidence that any crime had been committed.[306] The Fishers, like the Bierenbaums, had a history of marital strife.[307] Mr. Fisher had also, like Bierenbaum, been accused of beating his wife.[308] At trial, Fisher was, again like Bierenbaum, confronted with inconsistent statements, lies he told regarding his wife's disappearance, and evidence tending to show motive, opportunity and the fact that he knew the victim was dead.[309]

Although he had been charged with murder, the trial court found Mr. Fisher guilty of the lesser included charge of involuntary manslaughter. On appeal, the Michigan Court of Appeals dismissed the case for insufficient evidence. In its decision, the court stressed the due process requirement that all elements of a crime be proven beyond a reasonable doubt. It also made clear that "[m]otive and opportunity, while relevant, are not elements of any crime."[310] Lastly, it stressed the danger inherent in using character evidence to prove motive, intent or identity. Although such usage is generally accepted, it brings with it the danger that 1) prior bad acts will be used as impermissible propensity evidence and 2) the protective barrier of a limiting instruction will not hold.

Based on previous New York decisions, the Court of Appeals should be able to find some middle ground between *Scott* and *Fisher*. *Lipsky* is an example of that middle ground. There, the court was able to find a defendant guilty (albeit with the help of a confession) using a broad, interpretive version of the Hale/*Hindmarsh* rule.[311] The court could maintain the advances it made in *Lipsky*, yet avoid the dangers of *Bierenbaum*, if it tempers its *Lipsky* reasoning with 1) the cautiousness encouraged by the moral certainty safeguard and 2) the recognition that, although relevant, neither motive, opportunity nor character evidence can, alone or in concert, bootstrap the *corpus delicti* of the crime charged.

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305. People v. Fisher, 483 N.W.2d 452 (Mich. Ct. App. 1992).
306. *See id.* at 453.
307. *See id.* at 452-53.
308. *See id.*
309. *See id.* at 454.
310. *Id.*
311. *See supra* Part II.B.

If it did so, the Court of Appeals would be able to strike that elusive balance that courts have failed to achieve in over two centuries of bodiless murder jurisprudence. It could satisfy both the need to punish murderers, no matter how good they are at disposing of their victims' bodies, and the need to safeguard other areas of the law, such as the rules of evidence and notions of due process, from dangerous erosion. The law supporting this balance is already on the books in New York. The onus now falls on the Court of Appeals to recognize the dangers created by the *Bierenbaum* decision and fashion its response accordingly.

CONCLUSION

For something that happens so infrequently, a bodiless murder trial can be of great precedential import. As this Comment has endeavored to show, a variety of complex legal issues converge in bodiless murder cases. Therefore, as the jurisprudence of bodiless murder develops, it has a palpable effect on criminal law as a whole. As outlined in Part I, the history of the cautious Hale/*Hindmarsh* rule has intertwined itself with the two step process of circumstantial evidence and the moral certainty safeguard. In New York, however, courts have applied the Hale/*Hindmarsh* rule in a varied manner. As Part II shows, this variance resembles a pendulum swing, first (in *Ruloff*) moving away from the broad, policy driven interpretivism applied by Justice Story in *Gibert*, then back to the center in *Lipsky*, and then, most recently, discarding the Hale/*Hindmarsh* rule altogether in *Bierenbaum*.

This final rejection of the Hale/*Hindmarsh* rule has created dangers that reach well beyond the boundaries of bodiless murder jurisprudence. As Part III shows, *Bierenbaum* not only allows a court to bootstrap a guilty verdict based on previously insufficient forms of evidence, it also creates a presumption of guilt, based on character evidence, in domestic violence cases where an abused partner goes missing. Given the often gruesome facts surrounding bodiless murder cases, it is difficult to inspire enthusiasm for any change which would make it more difficult to convict for murder when no direct evidence of a crime exists. Yet, when one weighs the issues surrounding the prosecution of bodiless murder in the balance, they evince a continuing need for both caution and, most of all, thoughtful deliberation.