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ESSAY

THE RIGHT OF SILENCE, THE PRESUMPTION OF INNOCENCE, THE BURDEN OF PROOF, AND A MODEST PROPOSAL: A REPLY TO O'REILLY

BARTON L. INGRAHAM*

I. INTRODUCTION

In the Fall 1994 issue of this Journal appeared an article by Gregory O'Reilly¹ commenting upon a recent amendment of English criminal procedure which allows judges and juries to consider as evidence of guilt both a suspect's failure to answer police questions during interrogation and a defendant's failure to testify at his criminal trial in certain specified circumstances.² Joining English critics of this change in the law, O'Reilly, an American lawyer, argues that this amendment of English criminal procedure does the following: (1) it reverses a long history in English jurisprudence guaranteeing an accused person's right to silence in the face of a criminal accusation, (2) it degrades the presumption of innocence, the foundation principle of Anglo-American accusatorial criminal law, (3) it moves that accusatorial system of justice toward an inquisitorial system, (4) it does not achieve its desired objectives of increasing confessions and admissions during police investigations, the likelihood of obtaining convictions, and the consequent reduction of crime.

After reading O'Reilly's article, I was impelled to write this reply, not only because I objected to its exaggerated tone and its perpetua-

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¹ Gregory O'Reilly, *England Limits the Right to Silence and Moves Towards an Inquisitorial System of Justice*, 85 J. CRIM. L. & CRIMINOLOGY 402 (1994).

² The Criminal Justice and Public Order Act, pt. III, §§ 27-31 (Eng. 1995).

tion of certain myths about the English and American "accusatorial" system of justice versus the European "inquisitorial" system, but also because I believe that the time has come for Americans to begin to question their legal system—especially their criminal justice system—and the assumptions on which it is based. One of the most fundamental assumptions we must question is that the American doctrine of "the presumption of innocence" (which I will endeavor to define in the next section of this paper) is a doctrine which accords with a morality to which most Americans subscribe. From this doctrine emerge many ancillary doctrines, such as our notion as to who bears the burden of proof or production and which standard of proof should govern.³ The American doctrine of the accused person's "right of silence" and the almost absolute protection the doctrine offers to prevent adverse consequences from exercising this right are also derived in large part from the presumption of innocence. This Essay will argue that these ancillary doctrines, too, are morally questionable.

The moral position that American lawyers take in determining criminal responsibility—and in a similar manner, civil tort responsibility—is taught in law schools and becomes part of virtually every American lawyer's moral outlook. This moral stance, I believe, is alien to the average lay person's approach to the same issues and problems.⁴ It takes a considerable amount of sophisticated exegesis and constant repetition to convince the ordinary lay person of the rationality and morality of these viewpoints.⁵ However, these arguments, boiled

³ The distinction made here is the familiar one in evidence law between the burden of *persuasion* and the burden of *production*, both of which are confusingly included under the same rubric: burden of proof. See *infra* note 35.

⁴ The results of the 1993 Gallup Poll are indicative of the gap that exists between the lay public's approach to the issues covered in this paper and that of the legal profession. The Poll posed the following three questions to a randomly selected nationwide sample: (1) "Regardless of what the law says, a defendant in a criminal trial should be required to prove his or her innocence?"; (2) "It is better for society to let some guilty people go free than to risk convicting an innocent person?"; (3) "Do you believe the criminal justice system makes it too hard for the police and prosecutors to convict people accused of crimes, or not?" On the first two questions, the respondents were given the choices of strongly agreeing with the statement, somewhat agreeing with it, somewhat disagreeing, strongly disagreeing, or expressing no opinion; on the last question respondents were given the choices of saying "yes," "no," or "no opinion." The respondents on the first question split 64% (strongly or somewhat agreeing with the statement) to 32% (strongly or somewhat disagreeing). On the second question or statement, 41% of the respondents agreed (strongly or somewhat), while 56% strongly or somewhat disagreed. As for the third question, 70% agreed and only 27% answered in the negative. GALLUP POLL, PUBLIC OPINION, 1993, at 231-32 (1994). While I would not have answered these questions in the same way as the majority of the respondents, I cite these results to show that a majority of Americans probably do not share with lawyers the basic beliefs and principles underlying the operation of our criminal justice system.

⁵ Lawyers seem at times to take an almost perverse pleasure in uttering irrational pro-

down to their essence, often are little more than appeals to tradition ("This is the way we have always done things in this country"; "This way is hallowed in tradition, was instituted by our Founding Fathers in our Constitution"; etc.); by appeals to authority ("This way has been decreed by the Supreme Court of the United States"); or by bogus appeals to our xenophobia ("Our way stands in stark contrast to foreign methods of procedure and we all know what despots they are"). Perhaps the lay person's perception that many of these doctrines make no moral or practical sense is right and American lawyers are wrong. This possibility is one which this Essay asks the reader to consider seriously.

In an effort to commence this re-examination, this Essay prefaces specific criticisms of the O'Reilly piece by defining "the American doctrine of the presumption of innocence." Next, this Essay will define certain central concepts of the criminal law and moral responsibility for criminal acts ("accountability," "responsibility," "culpability," and "guilt"). These concepts reflect on the presumption of innocence and its ancillary doctrine of the "right to silence" and the burden and standards of proof, in order to allocate more fairly between prosecution and defense the burden of proof. Following this discussion, this Essay will present a proposal which would accomplish a more fair allocation. Although this proposal may fly in the face of existing constitutional law, I ask the reader to consider the possibility that existing law, insofar as it prohibits the implementation of a proposal such as the one I make here, might change in the future, as constitutional law has in the past. It is important to point out at the outset that this Essay is not

positions in justification of the rules they are asked to explain to an uncomprehending public. Bishop Tertullian said, when asked to explain and justify his belief in the Trinitarian Doctrine, "*Credo quia absurdum est.*" An example of such irrationality is the argument, sometimes made to justify procedural rules protecting accused persons, that the common man should accept these rules because he one day may be accused of a crime and he will greatly appreciate having them or conversely that he might be unjustly convicted without them. In 1987, the U.S. Department of Justice, Bureau of Justice Statistics, reported, "An estimated five-sixths of us will be victims of attempted or completed violent crimes during our lives. The risk is greater for males than females and for blacks than whites. Many of us will be victimized more than once." *Lifetime Likelihood of Victimization*, BJS Technical Report, 1987, quoted in U.S. DEP'T OF JUST. STAT., REPORT TO THE NATION ON CRIME AND JUSTICE 29 (2d ed. 1988). Compare this risk of injury with the estimated risk the average person faces of being falsely accused of a crime, prosecuted, and erroneously convicted. There are today approximately one million persons spending time in federal and state prisons and jails. Even if as many as five percent of them (50,000) were innocent and wrongly convicted, the risk of the average person suffering this injury in a population of more than 250 million is .0002, or about one in five thousand. Which risk is more rational for a person to avoid? The average citizen has a lot more to fear from his fellow citizen than he does from his government, and most people know that. Perhaps this is what accounts for the startling results of the Gallup Poll referred to in the preceding footnote.

a typical law journal critique that tries to convince the reader that existing law is consistent with the approach that the critic advocates, but instead presents a new path for the law. Thus, except for certain empirical statements made in the course of this Essay, there is little case authority I can adduce in support of what I advocate, nor should this be expected. If this Essay is to be criticized, it should be on factual, logical, moral, and policy grounds.

Finally, in the last section of this Essay, I return to the O'Reilly article to argue what I consider to be its deficiencies from an historical, comparative-legal, and logical perspective. In conclusion, this Essay hopes to have convinced the reader that nations like England, which are not bound by the constitutional straightjacket imposed on American jurisprudence since the early sixties, are free to alter their approach to the administration of criminal justice in ways that meet the needs of changing social circumstances. Whether these measures are effective in achieving their supposed utilitarian objectives is beside the point. The important consideration is that a nation should be free to do what is right and reasonable according to its ethical system for balancing equities and achieving justice in the administration of law. England has done that; and there is no reason why the United States should not be free to do the same and more.

II. DEFINITIONS

A. THE AMERICAN DOCTRINE REGARDING THE PRESUMPTION OF INNOCENCE

Undergirding O'Reilly's critique of the changes in English criminal procedure is the theme that it violates the "presumption of innocence" to require a suspect to respond to police questions in certain circumstances or to insist that a defendant respond to accusations by testifying at his trial, when that would have been the natural and appropriate thing to do if he were innocent of the charge, and in the absence of a defendant's testimony to permit the jury to draw adverse inferences of guilt from the defendant's failure to testify. If one looks at the matter from the perspective of the American doctrine, O'Reilly is undoubtedly correct in this assertion.⁶

The American doctrine regarding the presumption of innocence has come to embody the following procedural elements:

(1) The prosecution (the state) has the burden of proving all the essential elements, or ultimate facts, of the crime charged. These in-

⁶ See, e.g., *Griffin v. California*, 380 U.S. 609 (1965); *In re Winship*, 397 U.S. 358 (1970).

clude proof of the criminal act, the defendant's mens rea, that the harm, if any, mentioned in the definition of the crime, was proximately caused by defendant's criminal act, and the harm itself, by the standard of proof "beyond a reasonable doubt" [hereinafter BARD].

(2) The defendant, on the other hand, generally has no burden of proof, except perhaps the burden of creating reasonable doubt in the minds of the factfinder as to the strength of the state's case.⁷ The defendant may remain silent and offer no defense, relying wholly on the presumption of innocence to carry him to a verdict of acquittal if he is confident that the state has failed to meet its burden. There is no duty on his part to take the witness stand in order to explain ambiguous or apparently incriminating circumstances involving him. Of course, he may testify in his own behalf if so inclined, but if he fails to do so, the factfinder should not draw from that failure any adverse inference of guilt, and neither the judge nor the prosecutor may comment upon the fact.⁸

(3) The factfinder should withhold judgment at trial until all the evidence has been presented, and, unless the factfinder is convinced that the state has met its burden BARD, it should acquit. When the determination of fact has been left to a jury of lay persons, the trial judge may never direct the jury to return a verdict of guilt, no matter how strong the state's evidence or weak the defense. The same rule does not apply to the prosecution: as to it, the judge may direct a verdict of acquittal or dismiss the charges whenever the judge believes the prosecutor has failed to present a prima facie case or when, at the conclusion of the state's case-in-chief or at the end of the trial, he believes no reasonable jury could reach the conclusion that the state had proved all essential elements of the crime BARD.

(4) In general, the presumption of innocence applies only to criminal cases and not to civil cases,⁹ and

(5) The presumption of innocence, as set forth above, now binds all the states under the Due Process Clause of the Fourteenth Amendment, as well as the federal court system under the Fifth Amendment Due Process Clause. Furthermore, it applies to some civil cases, which are technically "civil," but which can be classified as "quasi-criminal," such as proceedings to determine the status of "delinquency" under

⁷ In rare instances the defendant carries the burden of proving certain affirmative defenses which do not amount to denials of some essential element of the state's proof (e.g., insanity and entrapment).

⁸ See *Griffin*, 380 U.S. 609 (1965).

⁹ The exceptions are "quasi-criminal" cases. See *In re Winship*, 397 U.S. 358 (1970) (juvenile delinquency); *Boyd v. United States*, 116 U.S. 616, 633-34 (1886) (civil forfeiture).

juvenile delinquency statutes.¹⁰

These attributes or gloss given to the phrase "presumption of innocence" in American law are peculiar to our nation and culture and are not shared in all particulars by other nations. They do not define the meaning of the phrase from an international perspective. There is virtually no nation today that does not claim to abide by the "presumption of innocence" in the administration of its criminal justice system, but to some the phrase means little more than that the state bears the burden of proving the allegations it has made against the defendant up to the level of some standard greater than a mere preponderance in favor of the state, and that doubts should be resolved in the defendant's favor.¹¹

Probably the one place where the greatest difference of opinion among nations exists involves the so-called "right to silence." This right to silence includes the right not to cooperate with the police in their investigation of a crime and the right not to give testimony at one's trial, whether or not given under oath. In general, nations where criminal procedures can be described as "accusatorial" in most of their features go very far in protecting and fostering this right. Criminal justice systems whose procedures are describable for the most part¹² as "inquisitorial" are more open to the idea that persons accused of crimes should be encouraged to offer evidence of their innocence to the police and cooperate with them in clarifying matters, at least where they are not compelled to incriminate themselves in the process. They see nothing wrong with allowing the jury to infer whatever they like from a defendant's refusal to offer a defense.¹³

The remainder of this Essay will criticize the American doctrine

¹⁰ See *Winship*, 397 U.S. at 358; *Boyd*, 116 U.S. at 633-34.

¹¹ B. L. INGRAHAM, *THE STRUCTURE OF CRIMINAL PROCEDURE* 6 (1987).

¹² It is important to realize that no criminal procedural system in the world today is either purely accusatorial or inquisitorial. All systems have elements of both, although some, like ours, predominate in one character (accusatorial), while others, such as Spain or France's, predominate in the other. Scholars on this side of the Atlantic frequently forget that the introduction of English accusatorial procedures into French criminal law was one of the major accomplishments of the French Revolution of 1789 and recognized by them as such. *Id.* at 30-32.

¹³ I have written previously in a comparative study of the criminal procedural laws of the United States, France, the former Soviet Union, and China the following with respect to the way lawyers in France view the right to silence:

[A]lthough the prosecution has the burden of proof and the accused is presumed innocent until proven guilty, under French law all evidence, including the demeanor and attitude of the accused, is subject to the free and unrestricted evaluation of the court. Therefore, not only the investigators but also the adjudicators are likely to draw adverse conclusions from a refusal to answer questions and are not prevented by law from doing so.

Id. at 79.

of the presumption of innocence and propose a different way of allocating burdens of proof, as well as suggesting different standards of proof in criminal trials or civil tort proceedings. Before proceeding, however, it is necessary to differentiate certain terms, used almost interchangeably these days in tort and criminal law—specifically, the terms “accountability,” “responsibility,” “culpability,” “guilt,” and “liability”—in order for the reader to understand the view of these fundamental concepts in morality and law, that inform these proposals for revisions in criminal and civil procedure and the law of evidence.

B. THE CONCEPTS OF “ACCOUNTABILITY,” “RESPONSIBILITY,”
“CULPABILITY,” AND “GUILT/LIABILITY” IN CRIMINAL AND CIVIL
TORT LAW

To the average lay person the allocation of proof in a civil tort or criminal trial makes no sense at all.¹⁴ Why should the state have to disprove beyond a reasonable doubt the validity of a criminal justification or excuse defense raised by the defendant, especially when he is in control of, or has the best knowledge of, the facts relative to that defense? For that matter, why should not a defendant be obliged to offer testimony or other evidence that he did not possess the mens rea required for the commission of the crime, especially when he is in a position to do so? Such evidence will not incriminate him. On the contrary, such evidence tends to exonerate him or, at least, mitigate the seriousness of the offense. A plea of not guilty or a general denial of all the allegations of the criminal charge or civil complaint is ambiguous because these denials can relate to any of the necessary elements of the crime or tort, not merely to those elements relating to the defendant’s state of mind at the time of commission of the crime or tort. Thus, a plea or pleading does not take the place of evidence on a particular issue in dispute.

It may occur to the average lay person that one may best arrive at fully informed decisions by hearing from the defendant, no matter who ultimately has the burden of persuasion as to any element of the crime or tort or allegation made in the complaint. It is difficult to explain to such a person—especially on the basis of a privilege against self-incrimination—why a criminal defendant is not expected to do this until and unless the state fully proves its case BARD.

The inability of lawyers to respond adequately to questions of this sort with commonsensical answers (as opposed to merely historical

¹⁴ Having spent more than twenty years of my professional life attempting to teach American criminal law to college students who have had no previous training in the law, I can testify to this fact.

ones) results from their failure to make morally sensitive distinctions among concepts which once had narrower moral and legal meanings but which today have blurred together into an amorphous single concept: namely, one that is subject to reproof, punishment, or compensation for one's actions harming public or private interests. The concepts that inform the presumption of innocence are: accountability, responsibility, culpability, liability, and guilt.

(1) *Accountability*: In modern times this expression means answerable in damages or punishment for one's actions.¹⁵ Formerly it was a term more closely attached to the intransitive verb, "to account for": i.e., "To render an account or relation of particulars; to answer in a responsible character; to give reasons; to explain"¹⁶ If a person is morally or legally accountable for his conduct, he owes a moral duty to answer questions relevant to that conduct to persons in authority—i.e., to persons who have the official task of conducting investigations into suspected misconduct—whenever a sufficient basis exists for conducting such an inquiry. This moral duty should be owed only to persons with the authority to conduct such investigations or to judge the conduct of others and to situations where there is a sufficient basis for suspicion (something less than probable cause but more than idle curiosity).¹⁷ Every citizen or resident guest of a community has a duty to give frank answers to relevant questions concerning a crime to police whenever they are suspected of involvement or have knowledge thereof, except in rare cases where there is a contrary and overriding moral duty.¹⁸

What should be done when an accused or uncharged witness fails or refuses to render an account of his conduct or of the suspected conduct of another? Those persons who fail in this duty never should be tortured, imprisoned (e.g., for contempt), or threatened with injury to themselves or loved ones, nor should they have their silence treated legally as if it were tantamount to a confession of guilt. But that they should be allowed to refuse to speak without any cost to themselves is just as unreasonable, and, in effect, is a repudiation of any duty to provide information relevant to a crime or tort. Why

¹⁵ BLACK'S LAW DICTIONARY 36 (4th ed. 1952); NEW WEBSTER ENCYCLOPEDIA DICTIONARY OF THE ENGLISH LANGUAGE 7 (1952).

¹⁶ THE NEW WEBSTER, *supra* note 15, at 7.

¹⁷ Perhaps an appropriate standard would be something similar to "reasonable suspicion," the standard that presently applies to temporary police stops of suspicious persons on the streets for questioning or nonintrusive searches. *Terry v. Ohio*, 392 U.S. 1 (1968).

¹⁸ These moral duties include certain confidential communications between members of a family based on a promise to keep communication private, and perhaps a few other situations, but certainly not all the situations protected from disclosure by the law for policy reasons.

should people not be permitted at least to infer from a suspect or accused's obdurate silence in the face of an accusation whatever inferences are reasonable under the circumstances?¹⁹ The adverse inference that many people draw from such silence is that the person accused is conscious of his guilt or fault, keeps his silence rather than talking and lying because he has something to conceal, and that which he attempts to conceal is probably his involvement in the tort or crime

¹⁹ In *Barnes v. United States*, 412 U.S. 837 (1973), the Supreme Court held that drawing an inference of guilty knowledge from the *unexplained* possession of stolen goods was an inference "running through a dozen centuries" in common law and was a reasonable inference to make under the circumstances. It did not, however, hold that drawing such an inference from a suspect's failure to explain to police his apparently guilty conduct was reasonable in *all* circumstances. In *United States v. Hale*, 422 U.S. 171, 176 (1975), the Court explained why, after *Griffin v. California*, 380 U.S. 609 (1965), and *Miranda v. Arizona*, 384 U.S. 436 (1966), it would be unreasonable to infer from a suspect's silence during interrogation that he was concealing his guilt:

In most circumstances silence is so ambiguous that it is often of little probative force. For example, silence is commonly thought to lack probative value on the question of whether a person has expressed tacit agreement or disagreement with contemporary statements of others Silence gains more probative weight when it persists in the face of accusation, since it is assumed in such circumstances that the accused would be more likely than not to dispute an untrue accusation. Failure to contest an assertion, however, is considered evidence of acquiescence only if it would have been natural under the circumstances to object to the assertion in question The situation of an arrestee is very different, for he is under no duty to speak and, in this case, has ordinarily been advised by government authorities only moments earlier that he has a right to remain silent, and that anything he does say can and will be used against him in court.

Hale, 422 U.S. at 176.

However, if neither *Griffin* nor *Miranda* were law, the situation would again be changed, and the reasonableness of the inference would be restored, according to the logic of the *Hale* decision.

Instead of *Miranda* warnings, the preliminary advice which police should give to an interrogee are: (1) whether he is under arrest and/or suspicion in a criminal investigation; (2) if he is, that he is entitled to the presence and advice of legal counsel before he answers any questions, and that one will be provided for him at state expense if he is too impoverished to retain his own; (3) that he may, if he wishes, waive that right and proceed to answer police questions; (4) that if at any time during the interrogation he feels that the questions are getting into areas that might incriminate him, he may either terminate the interview and ask for the presence of a lawyer or he may refuse to answer specific questions he objects to with a "no comment" answer and continue with the interrogation; and (5) if he is not under arrest, he may terminate the interview completely and leave the place of interrogation at any time. These warnings or advice by the interrogator would be far more efficacious in protecting an arrested person's self-incrimination rights than *Miranda* warnings. There is no need to advise the interrogee that anything he says in answering questions may be used against him in a court of law. A criminal suspect today would have to be incredibly naive or stupid not to know this already.

Nevertheless, the use of such warnings should still not prevent an adverse inference from being drawn from the interrogee's refusal to answer questions put to him since an innocent person would be cognizant of his civic duty to cooperate with investigators in clearing up the ambiguities which have led to his suspected involvement in the crime. Thus, it would be reasonable under the circumstances to infer that the questions that were not answered reflected a consciousness of guilt on the part of the interrogee, and it was for that reason that he refused to answer them.

of which he is accused or is suspected.²⁰

Of course, there are other reasons, consistent with innocence, why people sometimes maintain silence in the face of an accusation, as O'Reilly points out in his article.²¹ However, under the changed circumstances outlined in footnote 19, these situations would be sufficiently rare and exceptional as not to render the inference of guilt an unreasonable one; they would be possibilities, not probabilities. Moreover, it should be noted that the only penalty that the recent amendment of English law²² made was the reintroduction of a permissive adverse inference from the accused's silence—one that the jury can make but is not required to make. There will be instances where English juries will probably disregard the suggestion that this inference can be drawn, such as cases when the state's evidence of guilt is very weak and/or when the defendant's evidence is correspondingly strong. In such cases why should the defendant bother to take the witness stand? In any event, the adverse inference penalty is hardly one that *forces* the defendant to abandon his silence and take the witness stand in situations where he would not have done so before the change.

This proposition develops out of the empirical evidence that O'Reilly illogically produces in support of his argument that the reintroduction of the adverse inference into English law will have disastrous consequences for the accusatorial system of criminal procedure, and that it will "force" the defendant to surrender his precious right to silence. On the contrary, all of the empirical evidence before and after the change in the law, both in England and in Singapore, shows that there has been no significant change in the limited degree to which criminal suspects refuse to talk to police investigators or exercise their right not to testify at their trials. The final section of this Essay will expand on this subject, but it is now sufficient to point out that recreating a possible adverse inference from a defendant's refusal to explain to the police or to the trial court whatever defenses are available to him is hardly likely to produce any major change in the behavior of suspects or accused persons before or during trial. The reason for doing so is not utilitarian; it is to reinforce the moral duty of all persons to be accountable for their conduct.

(2) *Responsibility*: Although the term responsibility is most often given the meaning "the obligation to answer for an act done, and to

²⁰ This inference of guilt is considered sufficiently reasonable to justify the tacit admission exception to the hearsay rule in the law of evidence. 4 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 102-08 (James H. Chadbourne ed., 1972).

²¹ O'Reilly, *supra* note 1, at 450.

²² See *supra* note 2.

repair an injury it may have caused,"²³—in other words, answerable in law—it also carries with it the essential ingredient of causal responsibility.²⁴ We say that a responsible person is one who accepts blame for the consequences of his act when he could have avoided them—i.e., those harms that are causally related to his acts or failures to act. The idea that blame or legal responsibility can be imputed to a person or thing who had no part in causing it in some way is rare in our law, but not unknown.²⁵

Legal cause is a complex topic, which there is no need nor time to examine here. However, I want to distinguish between that which causes the motivation or intent for committing the act and that which causes the result or harm of the act—namely, the act itself. The former is largely a matter for subjective proof involving the state of mind of the actor; whereas the latter, the act itself and its consequences, is a matter of objective proof. The distinction is central to the thesis of this Essay and the proper allocation of the burden of proof production between the prosecution and the defense, as well as between the plaintiff and the defendant in a civil tort action. The proof of what caused the harm in the objective sense is as available to the prosecution as it is to the defense; in other words, it involves no exploration into the mind of the defendant, an area inaccessible to the prosecution except by supposition or inference.

Thus, proof of objective cause is properly part of the state's burden of production. Except when a defendant's motivation becomes relevant to the issue of identity, motivation should not be part of the state's case. It should be part of the defendant's burden to show that he lacked the motivation, intent, or lack of care necessary to commit the crime. In the absence of proof on the defendant's behalf, the factfinder should be permitted to infer from the defendant's acts and the circumstances that he intended the natural and probable consequences of the act, or, if negligence is the required mens rea and if the harm was one that does not ordinarily occur in the absence of negligence, that the state of mind was negligent.

(3) *Culpability*: The term culpability in law means moral as well

²³ BLACK'S LAW DICTIONARY, *supra* note 15, at 1476.

²⁴ When the term is applied to a person, as in the sentence "he was not responsible for his acts," the word still has a third meaning: that the person lacked the capacity to understand or appreciate the consequences of his acts in the context of existing law and morality. This meaning of responsibility raises issues of culpability, which will be discussed in the next subsection.

²⁵ Strict and vicarious liability, such as is imposed by the doctrine of *respondeat superior*, is more common in civil tort law than in criminal law. The explanation may be that the criminal law is concerned more with assessing moral blame and less with compensating injured persons for their injuries.

as legal blameworthiness. It can be used in a broad sense, in which it incorporates all the meanings discussed in this section; or it can be used in a narrower sense, in which it focuses on the mental state of the defendant and those excuse defenses which raise questions as to the defendant's intentions, purpose, knowledge, recklessness, or negligence.²⁶ There are two points I wish to make here: (1) American criminal and tort law pay insufficient attention to distinctions that can be made between excuse defenses, which involve the issue of "culpability" (in the narrow sense) and justification defenses, which arguably are not made in existing law; and (2) both fail to recognize the variable rather than the either-or nature of culpability in crime and in torts.

As to the first point, a legal justification is an exceptional circumstance in which the law permits a person to inflict harm on another or violate the law in some way. Under an objective theory of justification the defendant's action is justified in those exceptional circumstances, but only when they exist in fact and regardless of defendant's state of mind at the time.²⁷ Although the victim's state of mind may be relevant (as in determining whether, in fact, he was the aggressor or acting with aggressive intent), the defendant's state of mind is not—at least not with respect to this defense. The sole question is whether the victim was acting in a way, or created a situation, which would have justified anyone in injuring him in order to prevent the threat he created. Justification in this sense is a privileged situation when a person may act in a way which would otherwise be criminal. Culpability, or fault on the defendant's part, is not an issue.

If the factual basis of the defense does not exist and the defendant merely believes in good faith that it does exist, the defense becomes an excuse defense, and the issue becomes how reasonable and honest was the defendant's apprehension that harm to himself or to others was imminent unless he took preventative action which was necessary in the circumstances that existed. The question of the justification of the defendant's actions is thus an either-or question: either the defendant's actions were justified under the circumstances and the law, or they were not. It is not a question as to the degree to

²⁶ Excuse defenses which can raise questions as to the defendant's mental state at the time of the crime as to rebut, or at least mitigate, the intentionality, recklessness, or negligence of his conduct, are: immaturity, involuntary intoxication, insanity, diminished capacity, mistake of fact and of law, duress, and necessity (when not raised as a justification defense). To this list I would add a general excuse defense to a victim's provocation, where the victim's behavior is so enraging as to deprive the defendant of the capacity to control his emotions or think rationally so that he was unable to form the species of *mens rea* required for commission of the crime.

²⁷ 2 PAUL H. ROBINSON, CRIMINAL DEFENSES §§ 121-22 (1984).

which these facts and circumstances existed in the defendant's mind or the excuse for them, as is always true in questions of culpability in the narrow sense. Although justification is generally considered a defense to a criminal charge or civil complaint today, it should be part of the prosecutor/plaintiff's case to disprove it, once the issue has been raised in the defendant's plea or pleading, because it involves a simple issue of objective fact which the prosecutor/plaintiff is in as good a position to establish by evidence as is the defendant, and it does not involve the issue of a defendant's culpability.

As to the second point, American criminal law fails to take legal cognizance of the fact that culpability is a variable concept, which ranges all the way from none (0.0) to complete (1.0). Except in the law of homicide, there are few partial defenses in criminal law—*i.e.*, defenses in mitigation rather than in complete exoneration.²⁸ Affirmative excuse defenses²⁹ should be considered full or partial defenses, depending on the defendant's degree of culpability. Depending on the trier-of-fact's determination of that degree, it can recommend complete exoneration, partial exoneration, or full punishment according to the facts and circumstances of the case.³⁰ The same should be true when issues arise in cases involving multiple actors charged with a single harm. Here, too, questions are presented as to the degree of his participation and the extent of his culpability. To the lay mind it makes little sense to adjudge all actors in a crime equally responsible and culpable when their roles and activities in the crime differ.³¹

²⁸ For some reason Anglo-American criminal law recognizes few partial defenses in mitigation, preferring to leave mitigation to the consideration of special circumstances by the sentencing judge. But in civil cases, where the determination of the amount of the award is left to the determination of the trier of fact, facts and defenses in mitigation are often permitted. An exception in criminal cases is the law of homicide, where mitigating circumstances, such as the victims's provocation, the killer's negligence as opposed to malice, and the killer's diminished capacity as the result of mental disorder not amounting to legal insanity, are received in the guise of separate offenses to which the main charge of murder can be lowered by the trier of fact. This strikes me as an unnecessarily cumbersome way of avoiding in criminal cases what is obvious in civil tort law, that fault is a variable thing, ranging from a little to a lot, and that the sanction applied to it ought to reflect that fact.

²⁹ See *supra* note 26, for a listing of affirmative excuse defenses. Of course, this does not exhaust the list of affirmative defenses.

³⁰ I recognize that introducing excuse defenses in mitigation gives the jury a role in determining, to some extent, the sanction to be applied in the case. Later in this Essay I will recommend that, upon conviction, the jury recommend a sentence to the sentencing judge within the minimum and maximum allowed by law.

³¹ This is supported by studies conducted by psychologists. See, e.g., Robert S. Feldman & Fred P. Rosen, *Diffusion of Responsibility in Crime, Punishment, and Other Adversity*, in 2 *LAW AND HUMAN BEHAVIOR* 313 (1978). Ordinary people consider wrongdoers less responsible and/or less culpable for the final results of their and others' joint conduct than if the conduct was the result of their conduct alone, which, of course, is contrary to the general

Knowledge of facts relating to the defendant's state of mind and the excuse defenses mentioned above which require some evidence as to the defendant's state of mind are peculiarly within the possession of the defendant, even though inferences about them can be drawn from the circumstances of the crime or tort and the defendant's acts. Therefore, according to the general principle that the party to a legal dispute in the best position to offer evidence on any given subject should have the obligation of producing it in order to ensure accurate findings of fact by the trier-of-fact, the defendant should have the burden in both criminal and civil tort proceedings of producing evidence as to his state of mind and as to any excuse defenses which raise the issue of his culpability. This should be the case regardless of which party bears the ultimate burden of proof on any issue of disputed fact.³²

(4) *Guilt, Liability, and the Burden of Proof*: These terms, the first applied in criminal cases to final determinations that the prosecution has met its burden of proof and that conviction and punishment should follow, and the second, in civil cases, to signify that the plaintiff has met its burden and that an award should be granted to the plaintiff for the wrong done by the defendant, are essentially equivalent. Nevertheless, there are many traditional differences dividing criminal from civil cases in American and foreign legal systems. Among them are procedural differences, evidentiary differences, differences in kinds of sanctions, differences in rights defendants enjoy, in standards of proof, and so on. Two notable differences highlighted by the United States Supreme Court include: (1) the stigmatizing effect of a criminal conviction; and (2) the nature and severity of the sanctions applied in each.³³

The presumption of innocence prevails in criminal cases but not in civil cases. This presumption is bolstered by the much higher standard of proof, BARD, in criminal cases³⁴ than in civil cases. The stan-

rule in American law making all participants and accessories to a crime equally responsible and culpable. As the degree or extent of a joint offender's participation in a crime is often taken into consideration at the sentencing stage by the sentencing judge today and lighter or heavier sentences imposed accordingly, there seems to be no public policy reasons why a trial jury should not be permitted to consider the extent of the defendant's "casual responsibility" in multiple offender criminal trials for producing the end result in much the same way that juries do in civil tort cases under the burden of comparative negligence.

³² I am making a distinction here between a burden of *production* of evidence and a burden of *persuasion* as to that evidence. See EDMUND M. MORAN, 1 BASIC PROBLEMS OF EVIDENCE 18-20 (1954).

³³ In re Winship, 397 U.S. 358, 363-64 (1970).

³⁴ The U.S. Supreme Court has recently been struggling to agree upon a constitutionally acceptable definition of the standard beyond a reasonable doubt for use in jury instructions. Victor v. Nebraska 114 S. Ct. 1239 (1994); cf. Cage v. Louisiana, 498 U.S. 39 (1990).

dard of proof in civil cases is "by a preponderance of the evidence," [hereinafter BAPOTE], which means slightly stronger evidence in favor of the proponent than that in favor of the contestant; the greater weight of the evidence favors the party with the burden of proof. However, some civil cases require a somewhat higher standard: clear and convincing evidence, [hereinafter CACE], which means, "that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allega-

In *Victor*, the Court approved the California and Nebraska definitions of BARD. The California and Nebraska definitions approved were, respectively:

A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in the case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the State the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

Victor, 114 S. Ct. at 1244 (California) (emphasis removed).

"Reasonable doubt" is such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon. It is such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, to a moral certainty, of the guilt of the accused. At the same time, absolute or mathematical certainty is not required. You may be convinced of the truth of a fact beyond a reasonable doubt and yet be fully aware that you may possibly be mistaken. You may find an accused guilty upon the strong probabilities of the case, provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable. A reasonable doubt is an actual and substantial doubt arising from the evidence, or from the lack of evidence on the part of the state, as distinguished from a doubt arising from a mere possibility, from bare imagination, or from a fanciful conjecture.

Victor 114 S. Ct. at 1244 (Nebraska).

On the other hand, the Supreme Court only a few years ago disapproved on constitutional due process grounds the following Louisiana jury instructions on reasonable doubt in *Cage*:

If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice or conjecture. It must be such doubt as would give rise to a grave uncertainty, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. It is substantial doubt. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a certainty.

Cage, 498 U.S. at 40 (emphasis removed). See also Shelagh R. Kenney, Note, *Fifth Amendment—Upholding the Constitutional Merit of Misleading Reasonable Doubt Jury Instructions*, 85 J. CRIM. L. & CRIMINOLOGY 989 (1995).

Could any lay jury person comprehend in what way these jury instructions differ from one another and why the last is so bad that it violates the Constitution? These instructions only confirm the old adage that when you are dealing with a vague concept, the more you explain it, the more confusing it becomes.

tions sought to be established."³⁵ Whether these distinctions in gradation of standards of proof according to the nature or classification of the case make any sense or not in morality, in policy, or in practice will be the subject of the remaining discussion.

The most common rationalization given for the higher and stricter standards and rules in criminal cases is the greater severity of its sanctions (punishments) as well as its social consequences (stigma, disrepute). Another common rationalization is the greater need in criminal cases for protection of the individual against the massive forces and resources of the state.³⁶ Both of these may have been true in the past, but they are far less true today. More than 200 years ago in English common law, the only prescribed penalty for a felony was death by hanging, although many felons escaped this punishment by royal pardon and substitution of the penalty of transportation overseas to a penal colony for at least seven years. Also at English common law, the disparity between what the state could bring to bear against the average felony defendant and the defendant's resources was enormous. Few legal rights were recognized; there was no right to legal counsel for one's defense until well into the nineteenth century, and few exclusionary rules were available even if a defendant knew when to assert them. Most criminal trials were brief and *pro forma*. In civil trials, the defendant had the right to be represented through counsel, the right to a jury, except in equity cases, and, after imprisonment for debt was abolished, no greater penalties than a judgment for damages, costs, or some special remedy applied against him such as specific performance, rescission, injunction, waste, replevin, or ejectment from real property.

Today, on the other hand, the most common penalties suffered by misdemeanor and felony (including juvenile) defendants are fines and/or probation.³⁷ The death penalty, although authorized in thirty-eight of fifty states, is imposed and carried out so seldomly as to hardly count as a punishment. Long-term imprisonment is also rare, although it has become more frequent in the last few years.³⁸ Which

³⁵ *State v. Addington*, 588 S.W.2d 569, 570 (Tex. 1979).

³⁶ Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1308 (1977).

³⁷ In the mid-eighties there were 2.5 times the number of adult offenders serving their sentences on probation (1,870,132) than were serving them in state and federal jails and prisons (757,409). *Probation and Parole*, 1985, BJS BULLETIN (Jan. 1987); see also U.S. DEP'T OF JUST. STAT., REPORT TO THE NATION ON CRIME AND JUSTICE 102 (2d ed. 1988). It is very unlikely that this situation (about 70% of all offenders placed on probation) has changed much in the decade following publication of these statistics. See Todd R. Clear & Anthony A. Braga, *Community Corrections*, in CRIME 426 (James Q. Wilson & Joan Petersilia eds., 1995).

³⁸ In 1983 the average sentence of persons committed to prison for eight serious felo-

is more severe, a fine, probation, short-term incarceration or a civil damage award, the amount of which may be sufficiently high to destroy a business or strip one of one's earnings and savings, not only in the present but in the future as well? It is no longer clear. In short, the differences between civil and criminal sanctions today are not as dramatic as they were two hundred years ago in English common law when these different standards of proof were first formulated.³⁹

The supposed consequences of loss of reputation and social stigma from a criminal conviction have far less sting to them under the conditions of contemporary American life than they had in England more than two hundred years ago. Today, in the United States, loss of reputation and social standing counts for little among the vast majority of lower-class offenders, especially juveniles, and in the higher ranks of society, wealth, celebrity, and mobility often remove the stigma of a criminal conviction. In England, at common law, felons, if they were not executed, were often branded on the forehead, cheek, or hand with the brand of their crime so that they could be readily identified and avoided; often they were condemned to the status of virtual slavery in penal servitude. Here, again, we see vast differences between civil and criminal sanctions and the social consequences of conviction in the past which are not matched by anything similarly severe in the present.

With respect to the disparity in resources⁴⁰ available to the state versus those available to criminal defendants, here again there are less dramatic differences in the present than existed in England when under the influence of Enlightenment liberalism these standards of proof began to emerge. Today, all criminal defendants, except in rare circumstances, enjoy the right to be represented in criminal cases by legal counsel, often provided at state expense. These defenders are now provided with many more resources, including new procedural rights and devices, exclusionary rules, new substantive defenses, investigators and experts, sometimes provided free at state expense, discov-

nies—murder, rape, aggravated assault, robbery, burglary, larceny, forgery/fraud, and auto theft—was between 3.3 (minimum) and six years (maximum). *This, however, does not indicate how long these offenders actually served time in prison or jail which was, on the average, much less than these figures would indicate.* Thus, long-term imprisonment was, until recently and perhaps still, an anomaly in state and federal systems. *Prison Admissions and Releases*, BJS SPECIAL REPORT (1986); see also REPORT TO THE NATION ON CRIME AND JUSTICE, *supra* note 37, at 100.

³⁹ See Underwood, *supra* note 36, at 1302 n.9.

⁴⁰ By "resources" I mean not only the money necessary to finance an adequate prosecution or defense, but also investigative resources, such as police, private investigators, discovery mechanisms, grand juries, expert witnesses, legal counsel paid for by the state, and helpful new evidence rules, such as exclusionary rules. Whatever the law allows a lawyer to use to the benefit of a client is a resource.

ery instruments for finding out the state's evidence before trial, et cetera. These new "resources" have increased in civil cases as well, but not to the extent they have in criminal cases.⁴¹ Thus, with regard to resources, a greater balance exists today between civil and criminal cases than ever existed in the past, even as recently as fifty years ago.

All of the above argue for treating criminal and civil cases more alike procedurally than they traditionally have been, and they also argue against different standards of proof.

During the previous three decades social scientists interested in jury behavior in civil and criminal trials have looked into questions concerning standards of legal proof and the juror's ability to understand and apply them. These empirical studies have revealed the following:

(1) Civil and criminal juries instructed as to the definitions of BAPOTE, CACE, and BARD frequently fail to understand the differences between them or the threshold level of believability in terms of probability of guilt or liability which the party carrying the burden of proof must exceed in order to warrant a verdict for his side.⁴²

(2) Lay jurors in criminal cases frequently apply a lower subjective level of probability that the defendant is guilty than Blackstone's standard.⁴³ At the same time, in civil cases, lay jurors frequently re-

⁴¹ It should be kept in mind that civil litigation in England was, and still is to a large extent carried on between men and women of approximate equality in wealth and status.

⁴² A. Champaign & Stuart Nagel, *The Psychology of Judging*, in *THE PSYCHOLOGY OF THE COURTROOM* (Norbert L. Kerr & Robert M. Bray eds., 1982); Dorothy Kagehiro & W. Clark Stanton, *Legal vs. Quantified Definitions of Standards of Proof*, 9 *LAW & HUM. BEHAV.* 159 (1985); Alan Reifman et al., *Real Jurors' Understanding of the Law in Real Cases*, 16 *LAW & HUM. BEHAV.* 539, 546 (1992).

⁴³ Sir William Blackstone is often quoted as having said, "It is better that ten guilty persons escape than that one innocent one suffer." According to a decision theory formula first proposed by John Kaplan, *Decision Theory and the Fact Finding Process*, 20 *STAN. L. REV.* 1065 (1968), which compares the "disutilities" of acquitting guilty defendants (Dag) versus that of convicting innocent persons (Dci)

$$(a) P^* > \frac{1}{1 + \frac{Dag}{Dci}} \quad (b) P^* > \frac{1}{1 + \frac{1}{10}} = P^* > \frac{10}{11} = .91$$

the Blackstone ratio works out to a calculation that the subjective level of probability of guilt in the juror's mind must exceed 91% certainty. See Patricia G. Milanich, *Case/Comment: Decision Theory and Standards of Proof*, 5 *LAW & HUM. BEHAV.* 87, 88 (1981). Some studies have shown that jurors frequently apply a lower threshold level of probability than the Blackstone standard, which is sometimes equated with the level required by the BARD standard. See *United States v. Fatico*, 458 F. Supp. 388, 411 (E.D.N.Y. 1978); Rita James Simon & Linda Mahan, *Quantifying Burdens of Proof: A View from the Bench, the Jury and the Classroom*, 5 *LAW & SOC'Y REV.* 319 (1971); Stuart Nagel, *Bringing the Values of Jurors in Line with the Law*, 63 *JUDICATURE* 189 (1979); Francis C. Dane, *A Search for Reasonable Doubt: A Systematic Examination of Selected Quantification Approaches*, 9 *LAW & HUM. BEHAV.* 143, 143-46 (1985); Terry Connolly, *Decision Theory, Reasonable Doubt and the Utility of Erroneous Acquittals*, 11 *LAW & HUM. BEHAV.* 101, 102 (1987). It is possible that these efforts to quantify the

quire a higher subjective level of certainty or probability than the BAPOTE standard would imply (>50%). One study revealed modal responses for students and lay jurors varied between 70% and 75% and medians between 74% and 75% when they were asked to calculate their threshold of probability according to the Kaplan formula after they were asked to decide a hypothetical civil case according to the BAPOTE standard.⁴⁴

(3) Whatever standard is given to them, lay jurors tend to vary their subjective levels of probability according to:

(a) the facts presented by both sides in the case and their evaluation of the evidence;⁴⁵ a strong prosecution case countered by a weak defense will tend to lower the threshold of probability, whereas a strong prosecution case matched by a strong defense will tend to elevate it; and

(b) the seriousness of the crime or tort and its consequences to the losing party if the verdict goes against it.⁴⁶ In a criminal case the more serious the crime, the higher the subjective level of probability the jurors require before they are willing to return a verdict of guilty. In civil cases the verdict may go either way, depending on with which side the jury identifies and thinks will be able to best suffer a loss.

There have been no empirical studies to date which have measured jurors' subjective levels of probability as to the CACE standard, but one study polling judges found that, as to them, the degree of certainty required ranged from 67% to 75%,⁴⁷ and one court decision opined that this standard required better than a 70% level of cer-

subjective levels of probability of guilt that *individual* jurors actually apply to their decisions regarding guilt in criminal cases under the BARD standard do not mirror the actual jury deliberation and decision process, which is suggested by the findings of the studies in the following footnote and accompanying text. If each individual's subjective level varies widely from those of other jurors but there is a consensus view which represents a level of certainty approximately in the middle between the extremes, there will be a tendency of those jurors on the opposite extremes to gravitate toward the center in the spirit of compromise in order to arrive at a unanimous verdict. If that is the case, the verdict of the jurors *as a whole* will probably reflect this process and the *overall* level of probability will usually lie somewhere approximately midway between a low level of 55% and extremely high level of 99% or in the range of 75% to 85%. Thus, whichever view one takes of the jury decision process, the end result is approximately the same: although American juries do not require a high level of proof in criminal cases, they do not require the level of certainty suggested by the Blackstone ratio nor that favored by most judges, and it is unlikely that they ever will, no matter what is done to clarify what is meant by the BARD standard.

⁴⁴ Simon & Mahan, *supra*, note 43, at 325 and tbl. 7.

⁴⁵ Christie Visher, *Juror Decision Making, the Importance of Evidence*, 11 LAW & HUM. BEHAV. 1 (1987).

⁴⁶ Simon & Mahan, *supra*, note 43, at 325, and tbl. 10.

⁴⁷ C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?* 35 VAND. L. REV. 1293 (1982).

tainty.⁴⁸ The general opinion of most judges indicates it is a standard whose level of convincingness lies at some point roughly midway between BAPOTE and BARD.

In *Addington v. Texas*⁴⁹ the United States Supreme Court took up the question of which standard of proof, if any, was required under the Fourteenth Amendment Due Process Clause for a civil proceeding brought to involuntarily commit a mentally disabled person to a state mental institution for an indefinite term. The Court settled on the CACE standard. In that decision Chief Justice Burger, writing for a unanimous Court, made certain remarks suggesting an awareness of some of the empirical facts revealed in the aforementioned studies and a partial awareness of what their findings implied. Specifically, he noted that it did not make a great deal of difference as far as their "practical effect" was concerned which standard of proof was used.⁵⁰

Candor suggests that, to a degree, efforts to analyze what lay jurors understand concerning the differences among these three tests or the nuances of a judge's instructions on the law may well be largely an academic exercise; there are no directly relevant empirical studies.⁵¹ Indeed, the ultimate truth as to how standards of proof affect decision-making may well be unknowable, given that factfinding is a process shared by thousands of individuals throughout the country. We probably can assume no more than that the difference between a preponderance of the evidence and proof beyond a reasonable doubt is better understood than either of them in relation to the intermediate standard of clear and convincing evidence.⁵² Nonetheless, even if the particular standard-of-proof catchwords do not always make a great difference in a particular case, adopting a 'standard of proof is more than an empty semantic exercise' . . . [citing a Fourth Circuit Court of Appeals case] In cases involving individual rights, whether criminal or civil, 'the standard of proof [at a minimum] reflects the value society places on individual liberty'. . . .⁵³

We learn later in the opinion the meaning of this last sentence. Commenting on the fact that different states apply all three standards of proof to determinations of mental illness in laying the predicate for involuntary confinement for treatment in a state mental institution,

⁴⁸ *United States v. Fatico*, 458 F. Supp. 388, 405 (E.D.N.Y. 1978).

⁴⁹ 441 U.S. 418 (1979).

⁵⁰ *Id.* at 424-25.

⁵¹ Of course, there were "directly relevant empirical studies" in 1979—see some of these studies cited in note 43, *supra*. In *Addington* Chief Justice Burger stated ". . . but we have found no study comparing all three standards of proof to determine how juries, real or mock, apply them." *Addington v. Texas*, 441 U.S. 418, 424 n.3 (1979). Perhaps this was all he meant. I, too, have been unable to locate, even at this late date, any empirical studies comparing juries' actual thresholds of probability as to all three standards of proof.

⁵² There is no empirical basis for making this assumption.

⁵³ *Addington*, 441 U.S. at 426 (citations omitted).

but that only Texas and Mississippi permit the BAPOTE standard, Chief Justice Burger went on to say:

We attribute this not to any lack of concern in those states, but rather to a belief that the varying standards tend to produce comparable results. As we noted earlier, however, standards of proof are important for their symbolic meaning, as well as for their practical effect.⁵⁴

The symbolic meaning justification is the weakest kind of argument that the Court could have made, once it conceded that differences in standards of proof might make no practical difference in the way juries actually decide cases. Relying on symbolic differences between the standards does not reflect the value "society places on individual liberty," but only the value that judges do. (Or perhaps it would be more accurate to say the way judges think the value of individual liberty is best protected.) The empirical evidence cited above reflects how society—better represented by jurors than by judges—actually balances the false positive errors in decisionmaking (decisions convicting innocent defendants) versus false negative errors (decisions acquitting truly guilty defendants). Based upon the mean or modal levels they place upon all three standards of proof in both civil and criminal cases (which range from about 70% to 85%), the ratio of false negative to false positive errors they are willing to tolerate is closer to 3:1 or 4:1 than the 1.1:1, 2:1, and 10:1 that the judges seem to prefer in their standards BAPOTE, CACE, and BARD respectively. Thus, symbolic meaning boils down to the maintenance of a propagandistic "noble lie" and myth about the American justice system and the way people actually use it. The myth is that people in the United States are as willing as Blackstone to weigh the values of false positive errors and false negative errors quite as liberally in favor of accused persons, or that they are as willing as the law allows to decide for plaintiffs in the average civil case by a virtual flip of the coin. Neither is it true or likely to be true in the future, no matter what is done to cure the problem, and so it is highly disingenuous for the courts to continue to prop up this myth. All this argues for the application to all cases of a single standard of proof, one which conveys to the jury the message that they should feel very confident about the correctness of their verdict based on the evidence presented before they award a verdict in favor of the initiator of the law action. The CACE standard most adequately conveys this message.

⁵⁴ *Id.*

III. A PROPOSAL FOR REALLOCATING BURDENS AND STANDARDS OF PROOF IN CRIMINAL AND CIVIL TORT CASES

In this section this Essay will present a proposal for reallocating the burden of evidence production between the prosecution and defense—and, in civil cases, between plaintiffs and defendants—for which the preceding has been prolegomena, laying the groundwork and providing some arguments in justification. After laying out the proposal, this Essay will provide additional explanations and justifications for specific recommendations.

This proposal attempts to lighten the burden of prosecutors and plaintiffs in proving a *prima facie* case in criminal and civil tort cases, while imposing on the defendant the duty of producing evidence regarding the defendant's mental state at the time of the incident, *mens rea*, intent, recklessness, or negligence and regarding any excuse or affirmative defense he may have, once the prosecutor/plaintiff has made its *prima facie* case. It reduces the prosecutor/plaintiff's initial burden of production to proving that the criminal act was committed by the defendant or defendants, that the act caused the injury (if any) required by law and suffered by the state or victim, and that there was no justification rendering defendant's act privileged and non-actionable. Once this proof is made, the burden shifts to the defendant to prove his nonculpability (or to create a sufficient amount of doubt about his culpability) and/or the existence of a complete or partial excuse or affirmative defense.

This proposal would, admittedly, require the revision of the American presumption of innocence doctrine and the overruling of a whole series of Supreme Court cases, and therefore, it may strike the reader as a purely academic exercise. Perhaps it is, but the possibility exists that the public, increasingly frustrated over the operation and frequently bizarre results of our justice system and once made aware of the fact that there is a reasonable alternative that will not deprive them of their liberties, will be prepared in the future to force these changes. I shall also discuss how this proposal would impact on the Fifth Amendment privilege against self-incrimination and the derivative right of silence.

A. THE PROPOSAL

1. The prosecutor or plaintiff must initially establish a *prima facie* case as to the following elements of the crime or tort:

(a) commission of the criminal or tortious act by the defendant or by some other person for whose actions or inactions the defendant is legally responsible, or the omission of (failure to perform) legally

required acts;

(b) causation (that the act or failure to act⁵⁵ "caused" the prohibited harm or threatened to do so);

(c) the prohibited harm, if any, required by the definition of the crime or tort;

(d) the legal justification, claimed by the defendant in his plea or pleading,⁵⁶ did not exist under the circumstances and evidence of the case.

(2) Once the prosecutor/plaintiff has introduced sufficient evidence of the above to satisfy the trial judge that a prima facie case has been presented, the burden of going forward in producing the following evidence shifts to the defendant:

(a) that the defendant lacked the requisite mens rea, intent, knowledge, recklessness, or negligence; and/or

(b) all the necessary elements of whatever complete or partial excuse or affirmative defense the defendant has raised in his plea or pleading.

In the complete absence of any defense evidence, the trier of fact may draw an inference that no such evidence exists, that the mental element of the crime existed in fact, and that any excuse or affirmative defense raised is insupportable. Two things should be stressed: (1) the burden of proof—in the sense of the ultimate burden of persuasion as to all of the elements of the crime or tort—never shifts to the defendant under this proposal; at the end of the trial the fact-finder must be satisfied to the level of proof set forth in the following paragraph that the government or the plaintiff should prevail;⁵⁷ and

⁵⁵ I have some difficulty in conceiving of inaction in order to prevent the occurrence of an event as the cause of that event, in the sense of having produced it. Either a natural force or some other human or animal force "caused" it in the latter sense of the term. Thus, the fault of the person who failed in his legal duty to prevent the event from happening, although real, is always a shared responsibility in the causal sense, somewhat analogous to the situation where the actions of several persons combine to cause a single harm. Attribution theory suggests that in such cases the normal human reaction is to feel that the person who failed in his duty to prevent the harm from occurring is somewhat less than entirely responsible for what happened, although assuredly at fault and partially to blame; he is less blameworthy than if he had produced the harm alone by active misconduct. For this reason, I placed the word "cause" in quotation marks, and am suggesting that in both criminal and tort law failure to act should not be considered on the same level and footing as wrongful acts of commission.

⁵⁶ This may be required as a method of alerting the plaintiff and the prosecutor that legal justification (as an objective defense) will be an issue in the case. However, the fact that this issue has been introduced as a defense does not alter the prosecutor/plaintiff's burden to disprove its existence, applicability, or validity.

⁵⁷ If the inference arising from the defendant's failure to produce any evidence of his lack of the requisite mens rea is too weak in the opinion of the prosecutor/plaintiff to justify a verdict in his favor, he may want to introduce evidence of his own on these ele-

(2) that this shifting of the burden of production (going forward) does not necessitate the defendant's taking the witness stand in his own defense in order to avoid the adverse inference, provided there is other evidence through which he can prove his defenses.

(3) The standard of proof in both criminal and civil tort cases should be CACE on the part of the prosecutor/plaintiff as to all of the elements of the crime or tort; and it should be BAPOTE on the part of the defendant for those affirmative and excuse defenses which do not involve the issue of culpability, but rather some other policy goal (e.g., the defense of entrapment, which involves the policy goal of preventing outrageous police overreach).

(4) At the end of the trial, the fact finder must: (a) be persuaded to the degree indicated in the preceding paragraph that all of the elements of the crime or tort for which the defendant is on trial have been proven, regardless of which side bears the burden of production; (b) decide whether the criminal or tortious act was legally justified if such justification is claimed;⁵⁸ and, (c) decide whether an excuse or affirmative defense raised by the defendant has been proved to the level required. Where a defendant raises an excuse defense, either as a complete defense or a partial defense or both, the fact finder must also decide the degree of the defendant's culpability, whether his defense should be complete or partial, and the appropriate punishment

ments to bolster his case. Should the decision of the defendant to close without offering any evidence in defense surprise the prosecutor/plaintiff, the trial court should be liberal in allowing the latter to re-open their case in order to allow them to offer such evidence if they so desire.

⁵⁸ Where the justification defenses of self-defense, defense of others, and law enforcement privilege are raised in cases of assault/battery or homicide/wrongful death, the prosecutor/plaintiff's proof consists of the following:

(1) that the defendant was the aggressor (in the usual sense of that term) and, as such, not entitled to the defense of self-defense; or

(2) if the defendant was a third-party intervenor who was the first to employ force against one or more other persons involved in conflict, that the person or persons on whose behalf he intervened was (or were) not entitled to employ the same force in self-defense that the third-party intervenor employed in their defense, regardless of whether or not the third party intervenor was aware of that fact; or

(3) if the defendant was a law enforcement officer and was first to employ force in pursuit of his duties to enforce order, prevent crime or the escape of persons subject to arrest, that it was not necessary for him to use the force he did in order to accomplish any of these objectives; or

(4) that the force used by the defendant in self-defense was not necessary in fact to avert harm to himself or herself, or was disproportionate to the force employed by his or her adversary; or

(5) that the victim, insofar as he or she was employing counter force prior to being injured or killed, was acting in legitimate self-defense.

The state of mind or apprehension of the defendant at the time of inflicting injury or death on another is irrelevant to the issue of whether, under the objective facts as they existed at the time of the incident, the defendant enjoyed a justification or privilege to act as he did.

to recommend to the judge. In a civil tort case the fact finder not only decides the issue of liability but also sets the amount of the award, as is done at the present time.

B. COMMENTARY

The first element (1(a)) of this Proposal regarding the prosecutor/plaintiff's proof and *prima facie* case needs no comment; it is already an essential element in every criminal and tort case. The same is true as to the second element (1(b)), except for the observation made in footnote fifty-five and the following: who bears the burden of production for each criminal element in the case of anticipatory, preliminary, or inchoate crimes, such as attempt, solicitation, and conspiracy? What happens under this proposal when a defendant raises the defense of factual or legal impossibility to one of these crimes? With regard to the first question, the prosecutor has the initial burden of producing *prima facie* evidence that the preparatory acts were committed and that sufficient facts exist from which a reasonable inference could be drawn as to the nature of the criminal purpose which motivated the acts. The defendant's burden of production thereafter is to show (but not necessarily BAPOTE) that he lacked the necessary intent and/or criminal purpose or that there was some excuse for his preparatory activity. With regard to the second question, the defendant has the burden of raising and proving that what was attempted, solicited, or conspired to commit was actually impossible in fact or in law, and, in those states that require it, that the defendant was aware of that impossibility when he was engaged in the preliminary activities. The third element (1(c) Harm) also requires no comment because it does not change present law.

As to the fourth element (1(d) Justification), the state must prove that no facts existed at the time of the crime or tort to support a defense of legal justification under the objective doctrine of justification adopted here, regardless of whether the defendant believed them to exist or not. To use the Bernhard Goetz case as an illustrative example, the state would merely have to show that the four youths aboard the subway train advanced on Goetz without the purpose of doing him serious bodily injury; it would be irrelevant whether Goetz subjectively or reasonably believed that was their intention. On the other hand, if it was their intention to cause him serious bodily injury, it is just as irrelevant whether Goetz believed it honestly or reasonably, because in that case the legal justification for his use of deadly force was valid. The situation of mistaken belief in the use of violent force in self-defense is really no more than a mistake of fact defense dressed up as a justification defense. In this Proposal the justification defense is re-

garded as an excuse defense, and treated accordingly. Where the defense is truly a legal justification defense, the defendant should raise the issue in his plea or pleading, but thereafter, proving its non-existence or invalidity is part of the prosecutor or plaintiff's case. The reason for this allocation of burden is two fold. First, the defense is that the defendant's action was not wrongful, actionable or criminal, not that it was excusable, in whole or in part; the charge that an action is illegal is basically and fundamentally part of the proof of the party alleging a violation of law. Second, the non-existence of legal justification can be proved entirely by evidence external to the defendant's state of mind under the objective theory of justification, evidence which is equally available to the prosecutor/plaintiff and to the defendant.

The second and third paragraphs of this Proposal involve the most radical changes in present day procedures. The second paragraph proposes to shift the burden of production to the defendant in both criminal and civil tort cases to supply evidence and proof regarding any exonerating or mitigating facts which would remove the permissive "inference of guilt or of liability." This permissive inference is allowed when it is reasonable to infer the fact from the circumstances presented in the government or plaintiff's case and when the defendant fails to provide any evidence to support his defenses. This shifting of the burden of production is justified by the moral obligation of rendering an account (explanation) of one's actions when they are legitimately under suspicion, and it also fits with common sense expectations that when one is accused of a misdeed, one replies, explains, and attempts to exonerate oneself. It does not threaten the privilege against self-incrimination because the facts that are called for are exculpatory, not inculpatory.

It is necessary here to distinguish between the two types of defenses which the defendant may raise—those which raise issues of culpability and those which do not. There are different levels of proof required for each to rebut the government or the plaintiff's case. Those defenses which are essentially denials of the mental elements of the crime or tort or, at least, mitigate the seriousness and blameworthiness thereof—and this includes most of the excuse defenses—require only enough proof on defendant's part to render the government or the plaintiff's case less than clear and convincing or, if not that, to mitigate the seriousness thereof. As to those affirmative defenses not involving culpability issues for which the state has created a statutory burden of proof, which this Proposal has suggested should be BAPOTE, the defendant must adduce proof to this level, or have the defense rejected.

The second paragraph of the Proposal does not imply that a defendant who maintains his silence throughout the trial, or even one who refuses to submit any defense in reply to the accusation or complaint and thereby creates an inference of guilt or concession of fault, necessarily would be convicted or held liable on the basis of whatever the state or the plaintiff has presented. The Proposal makes clear in the second and fourth paragraphs that the burden of persuasion as to all the elements of the crime or tort lie ultimately with the state and the plaintiff, and that at the end of the trial the judge or jury (whichever is the fact finder) must assess the strength of all the evidence produced, including inferences, in determining whether these elements have been proved by the standard of proof set forth in paragraph three. The operation of this new procedure in practice would not be radically different from what actually takes place in many courtrooms today. Defense lawyers know that whatever the law may permit or require, one had better provide the factfinder with some exculpatory evidence when the government or the opposing party has presented a strong case, or suffer a probable loss.

Nevertheless, there are several important procedural changes raised by the second paragraph that may not be obvious from the wording of that paragraph. For example, the trial judge would be unable to dismiss the plaintiff's or prosecution's case-in-chief for their failure to submit evidence regarding the defendant's mens rea, intent, knowledge, recklessness, or negligence, or upon their failure to offer rebutting proof regarding the excuse or affirmative defenses that defendant has raised in his plea or pleading. However, it would still be possible for the judge to direct a verdict in favor of the defendant at the end of the trial, or to dismiss the case if there was insufficient evidence as to any necessary element of proof. Another procedural change would be more notice pleading; in other words, simple oral pleas of "guilty," "not guilty," "not guilty by reason of insanity," and special pleas such as "alibi" would have to be expanded to include a statement or designation of every defense, general denial, justification, excuse, or affirmative, upon which the defendant would rely at trial. Still another major difference from present day practice would be that defendants in both criminal and tort cases would almost be compelled to go forward with their part of the proof in most cases, and not merely in cases where their defense is an affirmative one in which they must satisfy their burden of persuasion. This important change ensures the greater revelation of relevant facts at American trials and attempts to get away from the kind of "hide-and-seek" and "catch-me-if-you-can" games that are played by American lawyers on both sides of the dispute.

Prosecutors in criminal cases and plaintiffs in civil tort cases should find this suggested procedure to their liking and beneficial to them in several ways. First, it simplifies their initial burden of production and casts on defendants the burden of explaining their own conduct and its motivation or subjective causes. It is true that plaintiffs in civil tort cases would be faced with a higher standard of proof than currently, but this disadvantage is largely offset by the requirement that defendants would supply evidence as to their non-intentional, non-reckless, or non-negligent behavior with respect to the plaintiff and others, whereas under present law they are not required to do this except in rare cases, such as in cases where the doctrine of *res ipsa loquitur* applies. Defendants in tort cases should benefit from the higher standard of proof that protects them from flip-of-the-coin verdicts and from rules similar to those that prevail in criminal cases that virtually preclude dismissal of their defenses prior to their submission to the jury.

The new single standard of proof in paragraph three of the Proposal, applicable to both criminal and civil tort cases, is justified by several considerations, most of which have already been adumbrated in the second section of this Essay. To recapitulate and summarize they are: (1) a closer concordance between rules of procedure and the way juries actually behave in determining guilt and liability in criminal and tort trials; (2) the steadily diminishing difference between criminal and civil tort cases in the severity of their sanctions, pretrial discovery, out-of-court settlement practices (negotiations among the opposing lawyers), the number of cases disposed of this way, rules of evidence, rights and resources available in each type of case, and so on; and (3) a recognition that most crimes actually involve injuries inflicted on private individuals and not injuries to public interests, except in a purely fictional way so as to preserve the intrusion of the state into a private conflict. The fiction that the private injury was in some way a breach "of the king's peace" and thus a matter of state or public concern was once necessary to justify the intrusion of royal officers into a private dispute and the infliction of royal sanctions in place of private vengeance, but this fiction is no longer necessary since the intrusion of the state in criminal matters is now taken for granted. And yet, it remains increasingly resented by crime victims who feel excluded from decisions affecting their interests made by public prosecutors, especially during a time when public institutions are doing such a poor job in protecting them from malefactors or in administering justice.

Undoubtedly, critics of this Proposal will argue that permitting a lower standard of proof than the BARD standard in criminal cases will

augment the risk of juries making false positive errors; it may be true that there will be some risk. However, we do not know this for certain, as the hypothesis has never been tested. It is arguable that the greater elucidation of the facts may lead to fewer false positive errors. One thing is certain—with the growth of more partial defenses under my Proposal, jury verdicts and recommended sentences will be more finely attuned to particular mitigating facts than are the present day sentencing structures, and juries will less often feel themselves in a bind between finding for the government under a charge which carries too harsh a sentence and acquitting the defendant to avoid that possibility.⁵⁹

The fourth paragraph of the Proposal makes it clear that shifting the burden of production of evidence to the defendant as to some subjective elements of the opponent's case and as to excuse and affirmative defenses does not alter the burden of persuasion. It does, however, make all culpability and responsibility defenses⁶⁰ in criminal law partial as well as complete defenses, leaving it to the jury to decide the extent of the defendant's culpability and the degree (or percentage) of his responsibility for causing a single harm in a multiple-offender crime or tort. It changes present day sentencing practices, at least to the extent of providing for an advisory verdict in criminal cases.

⁵⁹ Many state and federal judges across the country are dissatisfied with presently existing sentencing guidelines. One of their chief complaints is the lack of flexibility under the guidelines as they now stand and the paucity of sentencing factors they may take into account when scoring a convicted offender. See generally *Twenty Years of Sentencing Reform: A Symposium*, 78 JUDICATURE (Jan.-Feb. 1995). The guidelines are based on an abstract conception of equity in sentencing: when persons have committed the same type of crime with the same level of seriousness (usually scored according to its legal category and statutory punishment), and have a similar criminal history, they should receive similar sentences. The more common approach of juries, when making civil awards, for example, is to take many factors into consideration, including not only the particular and perhaps unique aspects of the case before them, but also characteristics of the parties to the dispute. From this perspective, no two cases are exactly alike and there will be a disparity in awards and in criminal sentences. There is also greater satisfaction in the community where the wrong was done and consequently a belief that justice has been done. When one considers that courts must both do justice and appear to do justice, the choice between abstract and real justice must be decided in favor of the latter.

⁶⁰ A "culpability" defense is one which seeks to mitigate or exonerate the wrongfulness or blameworthiness of the action by showing one of the following: the mental element required to commit the crime or tort was not present; the act was wholly or partially excused by the defendant's incapacity to understand or appreciate the objective circumstances; the defendant acted under duress (human or natural); the defendant received the victim's consent; provocation; deceit; or by some other circumstance. A "responsibility" defense is one which either denies any proximate causal connection between the defendant's actions and the final result (harm) or which attempts to mitigate defendant's responsibility for that final result by spreading it out among various causal forces jointly responsible for that result. See *supra* notes 31, 55.

IV. A REPLY TO O'REILLY

In Gregory O'Reilly's article, *England Limits the Right To Silence and Moves Toward an Inquisitorial System of Justice*,⁶¹ the author decries recent English legislation⁶² which allows judges and juries to draw an inference of guilt from four facts: (1) that the criminal suspect during interrogation did not tell the police a fact relied upon at his trial if, under the circumstances, he could have been expected to mention it;⁶³ (2) that the criminal suspect failed to respond to police questions about suspicious objects, substances, or other things found in his possession or at the place where he was arrested or about remarks he may have made when arrested;⁶⁴ (3) that he did not explain to the police why he was present at the place about the time when the offense for which he was arrested took place;⁶⁵ and (4) that the defendant has not testified in his own defense when the fact-finder concludes it would have been appropriate for him to have done so if he were innocent of the crime.⁶⁶ According to O'Reilly, these reforms deprive the defendant of his previously guaranteed right to silence by imposing a cost on the exercise of that right and are contrary to the presumption of innocence and the privilege against self-incrimination, which together form the backbone of the accusatorial system of justice. Ultimately, O'Reilly concludes that this represents a move towards an inquisitorial system of justice.⁶⁷ It is not the purpose in this final section of this Essay to contest the partial validity of some of these claims as it is to criticize the exaggerated, inconsistent, and quality of O'Reilly's assault on what the government of John Major has done in enacting these changes in English criminal procedure.

O'Reilly's critique pursues a variety of lines of attack. The first, an empirical one, seeks to show that several studies conducted in England and elsewhere⁶⁸ demonstrate that the legislation will not achieve its utilitarian objectives. These studies were based on the experience of police, prosecutors, and courts in two jurisdictions, Northern Ireland and Singapore, where similar reforms were earlier enacted and implemented. They were also based on the experience in England under the old rule, which disallowed any inference of guilt from the

⁶¹ See O'Reilly, *supra* note 1.

⁶² See *supra* note 2.

⁶³ O'Reilly, *supra* note 1, at 404.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 444.

⁶⁸ THE ROYAL COMMISSION ON CRIM. JUST. REP., 1993, Cmnd. 2263; ROGER LENG, THE ROYAL COMMISSION ON CRIMINAL JUSTICE, RESEARCH STUDY NO. 10 (1993); Meng Heong Yeo, *The Extent of Silence in Police Interviews: The Singapore Experience*, 1983 CRIM. L. REV. 89.

accused's failure to answer police questions during interrogation or failure to take the witness stand in his own defense. The goals of the recent English reform and of the previous reforms in Northern Ireland and Singapore, according to O'Reilly, were the following: (1) to increase the number of convictions by increasing the number of confessions, thereby reducing crime; (2) to increase volubility and cooperation in the investigation of criminal suspects; (3) to protect the prosecution from "ambush defenses" where defendants suddenly introduce at their trials facts which they concealed from the police during their interrogations; (4) to diminish the number of cases where police or prosecutors drop charges, or courts dismiss prosecutions, for lack of evidence owing to the suspect's/accused's failure to cooperate and divulge facts; and (5) to encourage suspect/defendants to offer explanations of their conduct. The empirical studies mentioned above reveal that none of the objectives have been achieved in the two jurisdictions where similar reforms were previously enacted and implemented, and studies conducted in England prior to the change in the law that provide no basis for believing that they will succeed in achieving these objectives in Great Britain either.⁶⁹

His second line of attack is historical. He reviews the development of a right to silence in England's accusatorial system of justice from about 1100 A.D. to roughly the end of the eighteenth century. He purports to show that England and America's system of "limited, democratic government" and "accusatorial criminal procedure"⁷⁰ are linked, and that America's peculiar version of the presumption of innocence and right of silence was won in England only after a long struggle with competing inquisitorial procedures in ecclesiastical and royal prerogative courts such as in the Star Chamber. This struggle is portrayed as one between the forces of good and the forces of evil, despotism, and tyranny. Most of this ancient history and, like a great amount of ancient history, is legendary and mythical—the kind of propaganda and mythology necessary to maintain and preserve existing ways of doing things. However, it omits an account of some rather important developments since the close of the eighteenth century that have somewhat more relevance to modern times. O'Reilly fails to mention in his account, for example, the introduction of accusatorial elements into European inquisitorial procedures following the French Revolution of 1789,⁷¹ and no account is given to those inquisitorial elements always in Anglo-American criminal procedure

⁶⁹ O'Reilly, *supra* note 1, at 430-44.

⁷⁰ *Id.* at 405, 451.

⁷¹ ADEMAR ESMEIN, A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE WITH SPECIAL REFERENCE TO FRANCE 402-606 (John Simpson trans., 1968).

and those more recently introduced.⁷² Thus, the historical attack is out of date, largely irrelevant, and flawed, and the way it contrasts two procedural systems as they actually exist today is both inaccurate and one-sided.

The third avenue of attack consists of O'Reilly making a series of unverified statements, often heard from American lawyers, which are either patently untrue or at least highly doubtful. Among these are the following:⁷³

(1) The new English law "shifts the burden of proof to the accused by making them talk to the police during interrogation . . ."⁷⁴

(2) "Under the new law, if the prosecution establishes a *prima facie* case—even if it falls short of proof beyond a reasonable doubt—the accused will have to testify."⁷⁵

(3) "Adverse inferences also undermine the presumption of innocence by forcing suspects to explain away their alleged involvement in a crime."⁷⁶

O'Reilly then argues that the change in English evidential law in recreating an adverse inference of guilt from the defendant's failure to explain his conduct at police interrogations or at his trial represents a move towards an inquisitorial system of criminal justice that does not recognize a presumption of innocence. This statement is false unless one restricts the meaning of that phrase within the limits of the American definition and doctrine.

First, the change in English evidence and procedure does not shift the burden of proving all the essential elements of the crime from the prosecution to the defendant. It does make the prosecutor's burden of proof somewhat easier to satisfy by supplying a permissive inference made by the jury in certain circumstances where previously there was none. At most, this gives the defendant the burden of going forward with evidence of his innocence when he has no other extrinsic evidence (other witnesses, physical, demonstrative, expert and sci-

⁷² To mention just a few: (1) the grand jury, (2) the preliminary hearing, (3) discovery in civil and criminal cases (equity courts have borrowed many inquisitorial procedures from the Continent), (4) compelling confessions through a variety of threats. *See infra* notes 89-91 and accompanying text. It is arguable under which system—Europe's inquisitorial system or the U.S.A.'s adversarial system—produces the most confessions, if you include within the term "confession" the judicial confession, i.e., the negotiated plea of guilty. In the United States over 90% of all criminal cases are resolved by negotiated pleas of guilty; less than 5% go to trial. In most European inquisitorial systems there is no plea bargaining; confessions alone are never sufficient without corroboration to avoid a trial, albeit it may be a brief one.

⁷³ *See* O'Reilly, *supra* note 1, at 445-46.

⁷⁴ *Id.*

⁷⁵ *Id.* at 446.

⁷⁶ *Id.*

entific) to offer in opposition to the state's case and when that case is strong enough to convict. The effect on the jury of the defendant's silence and refusal to take the witness stand will be variable, depending on the circumstances of the crime and the strength of the state's case. The jury is not compelled to draw the inference of guilt; the law does not create a presumption of guilt, which becomes conclusive on the failure of the defendant to offer rebuttal evidence.

Second, as any experienced defender who practiced before *Griffin v. California*⁷⁷ in a state which permitted such adverse inferences to be drawn and allowed prosecutorial comment on a defendant's failure to testify in his closing remarks to the jury will remember, the decision to keep the defendant off the witness stand was rarely motivated strongly by the threat that the prosecutor would draw the jury's attention to this failure or that the court would instruct the jury as to the inference that they could draw from it. Much more influential were the following considerations: (1) fear that the defendant would make a poor witness in his own behalf, that he would become rattled and confused on cross-examination and reveal prejudicial or incriminating information; (2) fear that a defendant would be caught in a contradiction in his testimony at trial from statements made at an earlier time and that his credibility would suffer to a much greater degree than it would if he were not to testify at all; and (3) fear that his credibility would be greatly damaged if his long record of prior convictions were revealed to the jury on cross-examination by the prosecutor, a possibility which could be avoided if he were not to testify at all. Thus, fear of the effect on the factfinder of defendant's remaining silent during his trial was far from being as "compelling" a factor as O'Reilly makes it out to be.⁷⁸

Third, O'Reilly's empirical evidence hardly supports his argument and tends to support the argument I have just made in the previous paragraph. Curiously, he seems blissfully unaware that the empirical studies he cites and their conclusions run headlong into his argument that the new English law will produce a major change in the burden of proof, presumption of innocence, and accusatorial system of justice in Great Britain. How can no change in an accused's volubility in the police station, the number of confessions extracted from him, decisions of police and prosecutors to drop charges, or the production of convictions, from the situation that prevailed before

⁷⁷ 380 U.S. 609 (1965).

⁷⁸ See *Griffin*, 380 U.S. at 617-23 (Potter, J., dissenting); see also Office of Legal Policy, Dep't of Justice, *Truth in Justice* Series, 22 U. MICH. J.L. REF. 1005 (1989) (arguing that the origin and historical understanding of the Fifth Amendment do not support a bar of an adverse inference based on a defendant's silence).

the reform went into effect, produce a major change thereafter? O'Reilly fails to perceive this contradiction in his argument, let alone deal with it.

As for the argument that the new English law represents a trend away from the accusatorial system toward the inquisitorial system in English criminal procedure, with all of the suggested horrible consequences attendant thereon,⁷⁹ there is no longer *confession pro confesso* in European criminal procedure and there has not been for over 250 years. European criminal procedure does not require defendants on trial to respond to the court or prosecutor's questions, although most do. Nor are they subjected to torture or even imprisonment for contempt for failure to do so. O'Reilly asserts that the move toward inquisitorial methods "undermines the system's protection of the individual from humiliation and abuse at the hands of government investigators."⁸⁰ Does it really? Ask your average criminal suspect with a long criminal history and many previous encounters with police who interrogate him. As far as police interrogation methods in civilized European inquisitorial countries are concerned, O'Reilly provides us with no evidence that their methods are any better or any worse than English and American methods in treating suspects humanely. The only examples he provides of American or English abuses resulting in false confessions are references to a recent English case which predated the change in English law, one from the United States which post-dated *Griffin*, and some cases from the southern part of the United States during the 1920s.⁸¹ No cases of European police interrogation brutality are cited. This is hardly impressive evidence that changes in an evidentiary rule permitting negative inferences of guilt to arise from the failure of criminal suspects to cooperate with the police during interrogations will lead to vicious police brutality during interrogations, such as that which allegedly goes on in the police interrogation rooms in European inquisitorial countries.

Would the awful effects O'Reilly predicts ensue from the minor procedural changes introduced in the English Criminal Justice and Public Order Act of 1994? As of now they have not resulted, and probably will not occur in the future. Nevertheless, could they occur as the consequences of procedural and evidentiary reforms of the kind that I have recommended in Section Three of this Essay?

As is true with the English reform, under this Proposal no change occur in the state's ultimate burden of persuasion in a criminal case,

⁷⁹ O'Reilly, *supra* note 1, at 444-51.

⁸⁰ *Id.* at 450.

⁸¹ *Id.* at 421 n.109.

despite a change in the burden of production.⁸² The adverse inference created by a defendant's failure to put on any evidence and the lower standard of proof, which may prove to be inconsequential in practice, may make the prosecutor's task somewhat easier, but it cannot be said that it totally removes a presumption of innocence or converts the justice system from accusatorial to inquisitorial.

It is appropriate at this point to observe that the American "adversary system" is not exactly synonymous with the term "accusatorial system of justice." One may have an accusatory system without all of the special features of the American "adversary" process.⁸³ The American adversary system is extraordinary in the extent to which it turns over progress of the case and its tactical manipulation to the lawyers representing the opposing parties. The judge, who might be better described as a referee, is extremely passive in this system. The adversary system has often been described as a game or contest,⁸⁴ whose only purpose is winning for one's client rather than elucidating the facts, clarifying the law, or doing justice. While few lawyers would dispute this—except, perhaps, the prosecutor, who professionally and ethically has the duty of seeing that justice is done⁸⁵—the moral excuse often given for this is that the "truth" is more often the byproduct of the adversarial process than it is of a procedure which is specifically designed to get at the truth.⁸⁶ If this were true, it would be very strange, for several reasons. First, the relativistic view of truth in which most law students are indoctrinated in law schools in the United States is a view of truth which is not a set of facts which exists "out there" but merely a version or scenario, which can be argued. Similarly, law does not have existence except in the fluctuating opinions of men. From these two philosophical perspectives comes the conclusion that whatever facts are established by a jury's verdict are the true facts, and that whatever a judge decides is the law is in fact the true law, at least

⁸² Unlike the change in the English reform, my proposal goes further in changing the standard of proof necessary for a conviction (CACE instead of BARD) and in removing the mens rea element as one of the essential parts of the prosecutor's initial burden of proof production, an element which may be supplied by inference from the context in which the act was done and a defendant's failure to offer any evidence to explain it.

⁸³ An extreme example is Islamic criminal procedure under the shari'a (law of the Qur'an), which was accusatorial in the sense of being an injured party-initiated system carried forward on the basis of the injured party's accusation and evidence. See SIR ABDUR RAHIM, *THE PRINCIPLES OF MUHAMMADAN JURISPRUDENCE* 286.

⁸⁴ I am reminded of a remark attributed to Mark Twain that American justice is a contest to see which side has the better lawyer. A bit cynical, perhaps, but right on the mark.

⁸⁵ See ABA STANDARDS RELATING TO THE ADMINISTRATION OF JUSTICE, Standard 3-1.1(c) (1979); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 (1983).

⁸⁶ Lon L. Fuller, *The Adversary System*, in *TALKS ON AMERICAN LAW* 39 (Harold J. Berman ed., 1961).

until some other higher judge or judges decide differently. Thus, winning a case for one's client becomes a way of validating the truth as the lawyer has argued it, and the quest for a victory becomes, in a sense, a quest for the "truth."

Second, the rules of evidence in an adversarial system of justice are a perfect tool for keeping facts out of sight and out of the courtroom so that the jury is not fully acquainted with all the facts in the case. For these reasons, it would be a marvel, indeed, if the adversarial system produced a better form of justice than a more inquisitorial one. It is possible in an accusatorial system of justice which is not guided by the game ethic (the winning-validates-all ethic), to achieve justice; it is virtually impossible to achieve it, except by accident, in America's present-day adversary system.⁸⁷

One final comment on the right to silence and its basis in the American constitutional privilege against self-incrimination. It is not as obvious to me, as it is apparently to O'Reilly, how encouraging a defendant to present evidence which exonerates him from guilt violates the privilege against self-incrimination. Presenting mitigating evidence would tend to incriminate one, but this situation does not differ substantially from today's practice of pleading guilty and then presenting to the court evidence in mitigation. Presenting both complete and partial defenses at the same time might be confusing to the jury, but it would certainly not be the first time that such was done in a criminal case without violating the Fifth Amendment privilege against self-incrimination.⁸⁸

A procedural system which was truly interested in preserving the values which the privilege against self-incrimination was meant to protect in the context of the police and prosecutorial practices tolerated today would render the following impermissible:

1. interrogators lying to suspects about co-actors in the crime turning on the suspect and placing the full blame on him in order to trick him into talking about the crime and, in the process, implicating not only his co-partner, but himself as well;⁸⁹
2. threats by prosecutors to file additional criminal charges (thereby greatly extending the time of imprisonment if the defendant is convicted) unless the accused enters into an acceptable plea bargain ar-

⁸⁷ See ANNE STRICK, *INJUSTICE FOR ALL* 106-17 (1977). The author quotes supporting statements from such legal stars as Roscoe Pound, Edmund Morgan, Thurman Arnold, and Fleming James, Jr.

⁸⁸ It is done all the time in murder cases in which the defense is permitted to offer contradictory defenses in order to reduce the level of the crime to some lesser degree of homicide, such as manslaughter. See also *Mathews v. United States*, 485 U.S. 58, 63-66 (1988).

⁸⁹ *Frazier v. Cupp*, 394 U.S. 731 (1969).

rangement favored by the prosecution;⁹⁰

3. threatening a witness with civil contempt if, having been offered only use immunity, he refuses to betray secrets which might involve him in another prosecution growing out of the same transaction or which might involve those to whom he owes a moral duty of confidentiality.⁹¹

Prohibiting these practices, legal at the present time and within the ethic of the adversary system of criminal justice, might go much further in protecting the spirit of the Fifth Amendment's right to silence than any alteration in the burden of producing exculpatory or mitigating evidence or changing the *Griffin* rule.

⁹⁰ This practice is often referred to as "loading on." See, e.g., *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (demonstrating this particular practice, its coercive uses and its acceptance by defenders of the adversarial system of justice).

⁹¹ *Kastigar v. United States*, 406 U.S. 441 (1972); *Matter of Grand Jury*, 524 F.2d 209, 228 (10th Cir. 1975); *In re Snoonian*, 502 F.2d 110 (1st Cir. 1974); *In re Grand Jury Proceeding*, 377 F. Supp. 954 (E.D. Pa. 1974) (grand jury witness cannot claim marital privilege from being the source of non-testimonial evidence (handwriting exemplars) against her husband). In *United States v. Doe*, 460 F.2d 328 (1st Cir. 1972), Samuel Popkin, a Harvard political science professor, refused to divulge his sources of information regarding the distribution of the Pentagon Papers among friends and colleagues in Massachusetts, even after being granted immunity; he did not claim any Fifth Amendment privilege but based his refusal on the First Amendment, the irrelevancy of the grand jury's questions to the scope of the inquiry, and an academic privilege to protect sources of information. None of these grounds were accepted by the Court.