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REGULATING THE QUALITY OF EVIDENCE IN CRIMINAL TRIALS: A COMMENTARY ON MASSACHUSETTS RULE 25

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REGULATING THE QUALITY OF EVIDENCE IN CRIMINAL TRIALS: A COMMENTARY ON MASSACHUSETTS RULE 25

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INTRODUCTION

In 1978, the Supreme Court ruled that the practice of assessing the sufficiency of the evidence is constitutionally required as a concomitant of the *Winship* principle[1] and the presumption of innocence.[2] It is a presupposition of the *Winship* principle that no person may be constitutionally convicted except upon sufficient proof of guilt—evidence sufficient to convince a reasonable trier of fact beyond a reasonable doubt of the existence of every element of the charge.[3] Until *Jackson v. Virginia*,[4] the concern for the enforcement

1. The term "*Winship* principle" as used in this article refers to the due process principle which protects defendants in criminal proceedings from conviction except by proof beyond a reasonable doubt of each essential element of the crime charged. *In re* Winship, 397 U.S. 358, 364 (1970).

2. *See generally* Jackson v. Virginia, 443 U.S. 307, 315 (1978) (citing *In re* Winship, 397 U.S. 358, 363 (1970)).

3. *Id.* at 316.

4. 443 U.S. 307 (1978).

of this constitutional requirement focused on jury instructions that accurately described the *Winship* principle. The *Winship* principle had not been viewed as necessarily involving a correlative standard of evidentiary sufficiency. The only evidentiary requirement regarded as essential to fundamental fairness was the "no evidence" rule of *Thompson v. Louisville*,[5] which served as a safeguard against completely arbitrary convictions by requiring that some relevant evidence underlie each element of the crime.[6] The due process clause was not viewed as requiring state courts to assess evidentiary sufficiency. Therefore it neither imposed a minimum legal standard of sufficiency nor any strictures on whatever sufficiency assessment process a state might choose to provide.

The ruling in *Jackson* departed sharply from the view that the *Winship* principle should be so limited. The Court recognized that to enforce a burden of persuasion[7] it is necessary to enforce a burden of

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5. 362 U.S. 199 (1960).

6. The holding of *Thompson* as refined through a series of holdings ending with Vachon v. New Hampshire, 414 U.S. 478 (1974), was that "a conviction based upon a record wholly devoid of any relevant evidence of a crucial element of the offense charged" is arbitrary and violates due process. *Jackson*, 443 U.S. at 314.

Following *Winship*, the Court's consideration of other burden of persuasion issues in criminal litigation, Lego v. Twomey, 404 U.S. 477, 486-87 (1972), and the relation between the *Winship* principle and the rule of jury unanimity, Johnson v. Louisiana, 406 U.S. 356, 360-63 (1972), led it to intimate that the *Winship* principle may make evidentiary sufficiency a due process issue. *See also* Freeman v. Zahradnick, 429 U.S. 1111 (1977) (Stewart, J., dissenting from denial of certiorari).

Indeed, the disputes within the Court over the proper scope and application of the *Thompson* principle suggested that the "no evidence" rule necessarily involved the courts in assessing sufficiency at some level. *See, e.g.*, Vachon v. New Hampshire, 414 U.S. 478, 480 (1974) (Rehnquist, J., dissenting); *see also* Speigner v. Jago, 603 F.2d 1208, 1212-13 (6th Cir. 1978) (Weick, J., dissenting).

7. As used in this article, the term "burden of persuasion" refers to the responsibility imposed on a party to prove a particular issue to a specified level of certainty. The specified level of certainty is the "standard of persuasion", e.g., beyond a reasonable doubt. The party to whom the burden of persuasion is assigned bears a corresponding risk of nonpersuasion—that is, losing on the issue if he or she fails to persuade the fact finder to the specified level of certainty.

Each party has a burden of persuasion on each issue being litigated; these burdens are reciprocal. When one party has the burden of persuasion beyond a reasonable doubt the opposing party necessarily has a burden of persuasion to establish a reasonable doubt.

The term "burden of production" refers to the responsibility of producing evidence on a particular issue. The failure to produce evidence leads to loss on that issue. Thus the assignment of a burden of persuasion on an issue entails imposition of a risk of loss from nonproduction. As with the burden of persuasion, the standard of persuasion provides a necessary reference point for determining whether the evidence produced is sufficient to satisfy the party's burden of persuasion. For example, this article deals primarily with the prosecution's burden of producing evidence sufficient to establish the defend-

production, and the only way to enforce a burden of production is to measure the sufficiency of the evidence produced against the standard of persuasion that the party having the burden of persuasion is required to meet.[8] The Court's view that the burden of proof beyond a reasonable doubt is necessarily incorporated by the presumption of innocence[9] established the constitutional necessity of assessing the sufficiency of the prosecution's evidence and doing so against a standard which "gives concrete substance" to the *Winship* principle.[10]

The trial judge's task in reviewing the sufficiency of the prosecution's evidence is to insure that that evidence provides a reasonable basis upon which a jury might reasonably convict the defendant of the crime charged. The judge must apply the required constitutional standard: whether the evidence being assessed is such that a reasonable juror might find that each essential element of the crime charged has been established beyond a reasonable doubt. In this manner, the judge safeguards the *Winship* principle by insuring that if the jury's verdict is guilty it will not necessarily be unreasonable.[11]

The Court in *Jackson*, however, did not consider the problems of administering the sufficiency of the sufficiency assessment process at the trial level.[12] The Court's entire discussion of the sufficiency assessment was cast in terms of state appellate and federal habeas corpus review,[13] which, of course, corresponds to the procedural con-

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ant's guilt beyond a reasonable doubt. *See* Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 HARV. L. REV. 321, 326-39 (1980); McNaughton, *Burden of Production of Evidence: A Function of a Burden of Persuasion*, 68 HARV. L. REV. 1382 (1955).

8. 443 U.S. at 318-20.

9. J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 558 (1898).

10. 443 U.S. at 315 (citing *In re* Winship, 397 U.S. 358, 363 (1970)).

11. The *Jackson* standard does not by itself guarantee that a verdict must be reasonable. The judge will find the prosecution's evidence sufficient if a reasonable conviction on the evidence is possible; the standard does not authorize the judge to insist that the evidence be so strong that an unreasonable conviction could not result. The interstitial protection needed to safeguard against unreasonable judgments on sufficient evidence is provided by proper jury instructions. *See* Curley v. United States, 160 F.2d 227, 232-33 (D.C. Cir. 1947).

12. The sufficiency assessment process, however, like the process of proof which it parallels, is very complex and is administered by internal rules which are designed to separate the roles and responsibilities of the judge and jury in the fact-finding process. While these rules vary with the jurisdiction, in their general import they instruct the judge to give the evidence the most favorable interpretation available to the prosecution and to refrain from usurping the jury's fact-finding function. The obvious purpose of the new standard is to impose a constitutionally required level of restraint on the jury's fact-finding discretion.

13. 443 U.S. at 313-24.

text in which the issue had been presented. The Supreme Court apparently assumed that the sufficiency process already utilized in the various state court systems could vindicate the Court's new constitutional concerns by simply substituting the newly articulated standard of legal sufficiency for the state's customary standards.[14]

Shortly after *Jackson* was decided, the new Rules of Criminal Procedure went into effect in Massachusetts and the supreme judicial court determined that the Massachusetts standard of sufficiency, as it was currently articulated and administered, required no modification to comply with the Supreme Court's new mandate.[15] Not surprisingly, the supreme judicial court did not consider whether the usual rules governing the sufficiency process were similarly compatible with the principle of *Jackson.*

Part Two of this article is addressed to that question. It surveys the procedures codified in Rule 25 of the Massachusetts Rules of Criminal Procedure[16] and then examines the manner in which the

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14. The Court no doubt strengthened this impression by incorporating the familiar "prosecution's best case rule" into its statement of the sufficiency standard to be applied at the habeas corpus level. 443 U.S. at 319 n.12. In the context of habeas corpus litigation, this rule serves the "federalism" policy of insuring deference to the factual determinations of the state courts, and it presupposes that conviction has occurred. *Id.*

The tension and conflict between the *Jackson* standard of sufficiency and the traditional administrative rules of the sufficiency assessment process documented in Part I of this article were forseeable. The Supreme Court acknowledged that its new standard "impinges on jury discretion." 443 U.S. at 319. The chief purpose of the traditional rules of the assessment process is to preserve jury discretion. *See* Curley v. United States, 160 F.2d 229, 232-33 (D.C. Cir.), *cert. denied,* 331 U.S. 837 (1947). The conflict between them is a constitutional problem which will surface frequently in state courts.

15. Commonwealth v. Latimore, 378 Mass. 671, 676-79, 393 N.E.2d 370, 373-75 (1979).

16. MASS. R. CRIM. P. 25 reads:

(a) Entry by Court. The judge on motion of a defendant or on his own motion shall enter a finding of not guilty of the offense charged in an indictment or complaint or any part thereof after the evidence on either side is closed if the evidence is insufficient as a matter of law to sustain a conviction on the charge. If a defendant's motion for a required finding of not guilty is made at the close of the Commonwealth's evidence, it shall be ruled upon at that time. If the motion is denied or allowed only in part by the judge, the defendant may offer evidence in his defense without having reserved that right.

(b) Jury Trials.

(1) *Reservation of Decision on Motion.* If a motion for a required finding of not guilty is made at the close of all the evidence, the judge may reserve decision on the motion, submit the case to the jury, and decide the motion before the jury returns a verdict, after the jury returns a verdict of guilty, or after the jury is discharged without having returned a verdict.

(2) *Motion After Discharge of Jury.* If the motion is denied and the case is submitted to the jury, the motion may be renewed within five days after the jury is discharged and may include in the alternative a motion for a new trial. If a

sufficiency assessment process is affected by related practices that regulate the manner in which evidential issues are raised, joined and focused. It then examines the sufficiency assessment process step-by-step, including the manner in which that process is affected by commonly used proof-facilitating devices. This examination demonstrates that the effectiveness of a sufficiency assessment process in vindicating the *Jackson* principle is compromised by both the administrative rules that govern the process and by proof-facilitating devices that are usually scrutinized for the constitutional impact only as to the effect upon the jury's decisional process.

This article concludes that the "prosecution's best case" rule and the rule prohibiting a trial judge from considering issues of credibility and relative weight of the evidence in assessing the prosecution's evidence are chiefly responsible for the shortcomings in the sufficiency assessment process as it is currently administered in Massachusetts. These rules do not permit the judge to protect the defendant from unreasonable jury judgments in areas in which the most difficult and decisive disputes in the trial are commonly presented: judgments involving evidentiary weight, credibility and inference questions. Moreover, these rules may interact with the practice of requiring the defendant to raise an elemental defense issue by producing evidence (either in addition to, or as an alternative to pleading the issue) thereby relieving the prosecution of the onus of producing evidence sufficient to meet its burden of persuasion to disprove the issue. By this practice, the defendant is required to defend before the presumption of innocence has been completely dispelled. The defendant may also lose the opportunity to have a favorable,

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verdict of guilty is returned, the judge may on motion set aside the verdict and order a new trial, or order the entry of a finding of not guilty, or order the entry of a finding of guilty of any offense included in the offense charged in the indictment or complaint.

(c) Appeal.

(1) *Right of Appeal Where Motion for Relief under Subdivision (b) Is Allowed After a Jury Verdict of Guilty.* The Commonwealth shall have the right to appeal to the appropriate appellate court a decision of a judge granting relief under the provisions of subdivisions (b)(1) and (2) of this rule on a motion for required finding of not guilty after the jury has returned a verdict of guilty or on an order for the entry of a finding of guilt of any offense included in the offense charged in the indictment or complaint.

(2) *Costs upon Appeal.* If an appeal is taken by the Commonwealth, the appellate court, upon the written motion of the defendant supported by affidavit, may determine and approve the payment to the defendant of his costs of appeal together with reasonable attorney's fees, if any, to be paid on the order of the trial court upon the entry of the rescript.

Id.

final sufficiency determination made before being required to submit to the risk of an unreasonable conviction if the judge reserves ruling on the matter until after the jury has returned a verdict. Similarly, the use of presumptions, inferences and other proof-facilitating devices to satisfy the prosecution's burden of production on an issue, operating singly or in combination, may exempt the prosecution's evidence from the sufficiency assessment on that issue.

The use of these practices, rules and devices often compromises the effectiveness of the sufficiency assessment process on key issues, leaving open and sometimes promoting the possibility that the jury's decision on such an issue will not be reasonably founded on evidence presented to it. Thus, the *Jackson* principle seems to demand that the customary sufficiency assessment process be revised in order to make it compatible with the new constitutional standard of sufficiency. Part Two proposes specific modifications in the structure of the process and its administrative rules designed to make it more compatible with the *Jackson* principles and legal standard of sufficiency.

The provisions of Rule 25 also establish a postconviction mechanism and review authority which is designed to serve as a safeguard against unjust convictions. The second sentence of Rule 25(b)(2) authorizes the judge to review the evidence and either revise the verdict or order a new trial if it appears that justice has not been served.[17] Moreover, when exercising this authority the judge is permitted to weigh the evidence and otherwise review the jury's exercise of its fact-finding discretion.[18] It is possible, then, to view Rule 25 as providing two complementary mechanisms designed to equip the trial judge with a mechanism to regulate the quality of the evidence, to safeguard against the injustice of an unfounded conviction and to avoid the reproach that justice may not have been done.

Part Three considers the trial judge's post conviction authority to revise a jury's guilty verdict. The history and purposes of the supreme judicial court's analogous statutory powers under Massachusetts General Laws, Chapter 278, Section 33E are examined.[19] A proposed system of standards is presented in this article for determining when it is appropriate to exercise this authority and what form of relief will best serve the ends of justice. Finally, it is pro-

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17. *Id.* 25(b)(2).

18. *See id.*

19. MASS. GEN. LAWS ANN. ch. 278, § 33E (West 1981). These statutory powers are hereinafter referred to as the section 33E powers.

posed that this verdict-revising authority be used as a vehicle for supplementing the sufficiency assessment process in order to cure the shortcomings and inconsistencies in the sufficiency assessment process which are discussed in Part Two.

I. RULE 25 PROCEDURES

Rule 25 of the new Massachusetts Rules of Criminal Procedure establishes five points in the trial process at which the adequacy of the evidence of guilt may be placed in issue.[20] In addition to establishing procedures under which an accused's claim for requiring findings of not guilty are to be evaluated, the rule enlarges upon and transfers to trial judges a very broad discretionary authority under which they may evaluate the justice of a jury's guilty verdict by considering, among other factors, the weight of the evidence.[21] The rule itself addresses only points of procedure.[22] The standards to be employed in making the various decisions Rule 25 authorizes must be derived from other sources.

This section surveys and explores the procedural applications of Rule 25 and the variations in extent of authority as well as standards of decision that are employed at various points in the process. This section also inquires whether discernible patterns can be identified in the types of factual and legal issues that can be raised under Rule 25. A brief discussion of the sufficiency assessment process will set the stage.

A. *The Process of Assessing the Sufficiency of the Evidence*

In practice, the sufficiency judgment frequently cannot be isolated from other issues. Pretrial disputes over such matters as the sufficiency or multiplicity of the charging papers, the constitutionality of the prosecution or the admissibility of evidence may resurface

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20. *See supra* note 16. The phrase "adequacy of the evidence" will be used in this paper generically to include the concepts of legal sufficiency defined in Jackson v. Virginia, 443 U.S. 307, 318-19 (1979), and Commonwealth v. Latimore, 378 Mass. 671, 676-79, 393 N.E.2d 370, 373-75 (1979), and of satisfactory weight "consonant with justice." Commonwealth v. Keough, 385 Mass. 314, 320, 431 N.E.2d 915, 919 (1982); Commonwealth v. Gaulden, 1981 Mass. Adv. Sh. 1123, 1136-38, 420 N.E.2d 905, 912-13; *cf.* Commonwealth v. Woods, 382 Mass. 1, 7, 413 N.E.2d 1099, 1103 (1980); Commonwealth v. McCarthy, 375 Mass. 409, 416, 378 N.E.2d 429, 432-33 (1978). Depending on when the issue is raised, the evidence evaluated may be limited to the prosecution's evidence or it may include all of the evidence. See, Commonwealth v. Kelley, infra note 29.

21. *See supra* note 16. This power was formerly exercised only by the supreme judicial court.

22. *Id.*

in view of the prosecution's evidence. Other similar issues such as variances between the charge and the evidence or the adequacy of the prosecution's efforts to "connect up" evidence admitted *de bene* may have to be resolved as a preliminary step to determining the sufficiency of the evidence. Disputes may surface over the proper definition of statutory terms. The injection of "affirmative defenses" through pleadings or evidence may lead to disputes about which issues the defendant is entitled to challenge on sufficiency grounds. The prosecution's partial or complete reliance on presumptions or inferences to satisfy its burden of production may raise thorny disputes on constitutional due process issues.[23]

In this section each of these issues is mentioned in the sequence in which it is likely to arise: preliminary "clean up" issues, definition of statutory terms, allocation of the burden of production and identification of the issues on which the defendant is entitled to a sufficiency determination, and assessment of the permissible impact of presumption. The presupposition of this scheme of organization is that typically the judge will structure the sufficiency assessment by first surveying the elements of the charge, then surveying the evidence being considered, applying the "prosecutions best case role" and the remoteness limitation on inferences to clarify the facts, and then applying the rational fact finder and reasonable doubt standards to reach a conclusion.

The logical first step in evaluating a sufficiency claim is to survey the elements of the offense charged, at least to the extent the evidence directed to the proof of certain element is disputed.[24] It is important for several reasons that the reference sources for this inquiry include both the charging document—indictment or complaint—and statutory or case law definitions of the nominal offense.[25]

For one, the indictment must state a triable offense and establish the jurisdiction of the court over the offense stated. If the indictment fails to allege facts constituting each essential element of the

23. The fact that these disputes will arise while the trial is in process makes it even more important for counsel and the judge to try to identify them in advance.

24. *See* Jackson v. Virginia, 443 U.S. 307 (1978); Commonwealth v. Cooper, 264 Mass. 368, 371-72, 162 N.E. 729, 731-32 (1928).

25. It is the substance of the allegations in the charging document rather than the statutory definition of the offense it refers to that determines the charge to be tried. Commonwealth v. Lovett, 374 Mass. 394, 396, 372 N.E.2d 282, 283 (1978). Generally, an offense must be tried as charged. Commonwealth v. Hobbs, 385 Mass. 863, 434 N.E.2d 633 (1982).

offense it is subject to dismissal at any time.[26] Challenges to the jurisdiction of the court may be founded on statutory limitations of the court's authority to try only specified offenses[27] or specified defendants,[28] or on statute of limitations grounds. The courts are generally in agreement that such defects in the charging document do not form the basis for a double jeopardy bar to retrial.[29] Even so, such claims are generally best raised as early as possible to avoid subjecting the defendant to the functional equivalent of double jeopardy in the form of a trial which must be repeated if a valid judgment is to be obtained.

In contrast, a directed verdict may result when the prosecution's evidence varies materially from the offense charged in the indictment.[30] This possibility arises from the fact that a statute may define more than one offense and from the fact that the drafter of a charging document may allege an offense which does not suit the prosecution's evidence as it develops at trial.[31]

Simlarly, in most cases the constitutionality of a prosecution under a statute thought to be vague or overbroad is initially a pretrial issue. But even where a claim that the statute is unconstitutional on its face fails, presentation of the case may establish grounds for challenging the impact of the statute as applied to the defendant.[32]

The motion for a required finding of not guilty at the close of the prosecution's case may also mark the occasion for reconsidera-

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26. Commonwealth v. Burns, 8 Mass. App. 194, 392 N.E.2d 865 (1979).

27. *E.g.*, MASS. GEN. LAWS ANN. ch. 218, § 26 (West 1983) (limiting jurisdiction of district courts); *see* Commonwealth v. Lovett, 374 Mass. 394, 372 N.E.2d 782 (1978).

28. *E.g.*, MASS. GEN. LAWS ANN. ch. 119, §§ 52-63 (West 1978) (defining jurisdiction of juvenile courts); *see* Commonwealth v. Chase, 348 Mass. 100, 105, 202 N.E.2d 300, 303 (1964).

29. Serfass v. United States, 420 U.S. 377, 381 (1975); Commonwealth v. Lovett, 374 Mass. 394, 397, 372 N.E.2d 782, 784 (1978); Commonwealth v. Chase, 348 Mass. 100, 104, 202 N.E.2d 300, 302 (1964). *But see* Culberson v. Wainwright, 453 F.2d 1219, 1220 (5th Cir. 1971), *cert. denied* 407 U.S. 914 (1972); Robinson v. Neil, 366 F. Supp. 924, 928-29 (E.D. Tenn. 1973).

30. A variation is material when it substantively alters the grand jury's accusation so as to prove an offense different from that alleged in the indictment (the latter embraces, of course, lesser included offenses). Commonwealth v. Hobbs, 385 Mass. 863, 866, 434 N.E.2d 633, 635 (1983); Commonwealth v. Almeida, 381 Mass. 420, 424, 409 N.E.2d 776, 778 (1978). A variation which is not material in the sense of proving a different offense may nevertheless be prejudicial. *See* Commonwealth v. Ohanian, 373 Mass. 839, 841, 370 N.W.2d 695, 697 (1978). The remedy is new trial.

31. Commonwealth v. Almeida, 9 Mass. App. 813, 398 N.E.2d 504 (1980). *See also* Presnell v. Georgia, 439 U.S. 14 (1978); Cole v. Arkansas, 338 U.S. 345 (1948).

32. *See, e.g.*, DeJonge v. Oregon, 299 U.S. 353 (1937).

tion of important contested ruling on the admissibility of evidence. It is particularly important, of course, that the trial judge consider at this point whether the prosecution has "connected up" all evidence admitted *de bene*, such as hearsay statements of persons alleged to have been the defendant's co-conspirators.[33] Evidence which has not been satisfactorily connected should be stricken and not considered in evaluating the sufficiency of the prosecution's evidence. Similarly, events following a trail judge's initial decison to admit testimony (or following the direct examination of a witness whose competency is not in dispute) may establish grounds for a motion to strike testimony or evidence.[34] All such exclusionary issues should be considered and decided before the sufficiency evaluation is made.

Other problems with the statement of the offense in the indictment may arise at this point either because they were overlooked by counsel before trial, or because the prosecution's evidence revealed the problem for the first time or brought it into sharper focus. In a variety of situations questions may arise concerning the number of offenses established by the prosecution's proof. A defendant charged with participating in multiple, closely-related conspiracies should frame a challenge to the prosecution's definition of the proper "units of prosecution" in terms of sufficiency of the evidence.[35] One benefit of dealing with problems of duplicity and multiplicity in indictments at the directed verdict stage is the double jeopardy impact of the ruling.

B. *Motions for Required Finding of Not Guilty*

Although the opportunity to move for a required finding of not guilty does not arise until the close of the prosecution's case-in-chief,[36] counsel for both parties must consider sufficiency issues and arguments before trial. In district court trials, uniform jury instruc-

33. P. LIACOS, HANDBOOK OF MASSACHUSETTS EVIDENCE 442 (5th Ed. 1980).

34. *See* Klein v. Harris, 667 F.2d 274 (2d Cir. 1981); Commonwealth v. Funches, 379 Mass. 283, 397 N.E.2d 1097 (1979).

35. *See* Sanabria v. United States, 437 U.S. 40, 54 (1978) (judgment of acquittal entered at close of government's evidence on indictment erroneously interpreted by trial judge bars retrial on related charge found to have been included in multiplications indictment).

36. Unlike some jurisdictions, Massachusetts does not permit defense counsel to move for a required finding of not guilty on the basis of the prosecutor's opening statement. Commonwealth v. Brattman, 10 Mass. App. Ct. 579, 580, 410 N.E.2d 720, 722 (1980). *But see* Commonwealth v. Clark, 393 Mass. 361, — N.E.2d — (1984) (sufficiency of contemplated evidence may be assessed where affidavits or stipulations place prosecutions entire case before the court). *Compare* Brooks v. United States, 396 A.2d 200, 206-07 (D.C. Cir. 1978).

tions provide useful guidance to the elementary issues of proof in a case.[37] While uniform instructions are not available in Massachusetts superior courts, it may be possible to determine in advance a particular judge's standard instructions. In either court, the charging papers identify the elements which the prosecution's evidence must establish.[38]

1. Required Finding of Not Guilty After the Evidence on Either Side is Closed

Rule 25(a) requires that the trial judge enter a finding of not guilty after the evidence on either side is closed if the evidence at the time the matter is considered is insufficient as a matter of law to sustain a conviction.[39] The use of the mandatory "shall" makes the remedy—a finding of not guilty—nondiscretionary when insufficiency appears.[40] Absent a defense motion, however, the sufficiency assessment is discretionary; the judge may, but is not required to, consider the sufficiency of the evidence *sua sponte*.[41]

The second sentence of Rule 25(a) provides that if the defendant moves for a required finding of not guilty at the close of the

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37. ADMINISTRATIVE OFFICE OF THE DISTRICT COURT, DEP'T. OF THE TRIAL COURT, MODEL JURY INSTRUCTIONS FOR CRIMINAL OFFENSES TRIED IN THE DISTRICT COURT DEPARTMENT (1980).

38. It is preferable to prepare a written motion for a required finding of not guilty in advance and when possible to prepare a brief written memorandum in support. Some revision of the motion may be necessary to include unanticipated evidentiary developments in the prosecution's case-in-chief; the judge may be willing to grant a mid-day or overnight continuance to permit counsel to present more exact claims. *See* Commonwealth v. DeVincent, 358 Mass. 592, 597, 266 N.E.2d 314, 317 (1971) (supreme judicial court refused to consider on appeal an insufficiency theory not presented to the trial court). The motion should be presented at the close of the prosecution's evidence, at the close of the defendant's evidence, and at the close of the prosecution's rebuttal, if any. The motion should be renewed post-trial if it has been reserved and then denied. *See supra* note 16.

The defendant's right to present evidence is not compromised by a motion for a required finding of not guilty, so there is nothing to be lost in making an unsuccessful motion. Moreover, so long as it is made before a guilty verdict is returned, a finding of not guilty bars both appellate review and retrial on double jeopardy principles. *See* United States v. Martin Linen Supply Co., 430 U.S. 564, 575-76 (1977) (directed verdict after jury deadlocked and mistrial declared barred appeal and retrial).

39. *See supra* note 16.

40. In Commonwealth v. Cote, 15 Mass. App. Ct. 229, 238-42, 444 N.E.2d 1282, 1288-90, *appeal denied*, 388 Mass. 1104, 448 N.E.2d 766 (1983), the appeals court ruled that this provision does not abridge the trial judge's discretion to permit the prosecution to reopen its case to cure insufficiency. *See also* Commonwealth v. Ierardi, 17 Mass. App. Ct. 297, 303, 457 N.E.2d 1127, 1129 (1983), *appeal denied*, 391 Mass. 1102, 459 N.E.2d 826 (1984).

41. *See supra* note 16.

Commonwealth's evidence, it shall be ruled upon at that time.[42]

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42. *Id.* In Commonwealth v. Keough, 385 Mass. 314, 431 N.E.2d 915 (1982), the defendant moved for a required finding of not guilty at the close of the prosecution's case. The trial judge allowed the motion as to the charge of first degree murder, took the balance of the motion under advisement and then denied it "during the course of trial." *Id.* at 315, 431 N.E.2d at 916. This procedure was improper, but the supreme judicial court merely described it without comment, possibly because the defendant did not make a claim of error on appeal on this point. The plain language of the rule requires a ruling on the entire motion before the trial may proceed. *See* MASS. R. CRIM. P. 25(a); *see supra* note 16. This requirement had earlier been imposed by the supreme judicial court in Commonwealth v. Kelley, 370 Mass. 147, 150 n.1, 346 N.E.2d 368, 370 n.1 (1976). The Reporter's Notes to the rule state that the rule adopted the *Kelley* requirement. MASS. R. CRIM. P. 25 Reporter's Notes; *see also* Commonwealth v. Blow, 370 Mass. 401, 407 n.4, 348 N.E.2d 794, 798 n.4 (1976).

The court in *Kelley* suggested that "as a practical matter it makes no difference . . . whether the defendant's rights are assessed at the earlier time when he filed his motions or the later time [at the close of all the evidence] since the Commonwealth's position as to proof clearly did not improve with the presentation of the defendant's case." 370 Mass. at 150 n.1, 346 N.E.2d at 370 n.1. There are two serious objections to accepting this approach as a general practice. First, it ignores a basic due process right guaranteed the defendant. Through the operation of the presumption of innocence and the burden of production imposed on the prosecution by that presumption, the defendant is protected from being required to make a defense until the prosecution has met its burden to produce evidence sufficient to convict him. *See* Taylor v. Kentucky, 436 U.S. 478, 483 n.12 (1978); Williams v. Florida, 399 U.S. 78, 108 (1970) (Black, J., dissenting). Second, as a practical matter it is not generally true that the Commonwealth's position as to proof will not improve during the defendant's case. *See* Commonwealth v. Blow, 370 Mass. 401, 408, 348 N.E.2d 794, 799 (1976) (testimony of the defense witnesses provided compelling support to the prosecution's case.). Nor can the trial judge reasonably expect to be able to accurately determine, without the aid of a verbatim transcript, whether the defense evidence enhanced the Commonwealth's case. The trial judge is simply not in the position to make this assessment the way an appellate court can. The requirement of the rules that the sufficiency determination be made before further proceedings are held should be scrupulously followed.

The appeals court has taken the view that the "no-reservation" provision of Rule 25(a) does not abridge the trial judge's discretion to permit the prosecution to reopen its case and introduce evidence needed to meet its burden of production where inadvertence or "some other compelling circumstances" justify the reopening, and the defendant will not suffer substantial prejudice. Commonwealth v. Cote, 15 Mass. App. Ct. 229, 241-43, 444 N.E.2d 1282, 1290-91 (1983). The trial judge had not ruled on the defendant's motion. The court found that the prosecution's mistake of law that the defendant had the burden of production on the elemental issue in question (nonconsent) justified the reopening and that the defendant had not been subjected to double jeopardy, presumably because the motion had not been granted. *Id.* at 241, 444 N.E.2d at 1290. It was error, the court found, to require the defendant to present his defense before the prosecution completed its case and the defendant's motion was ruled. The error was considered harmless because the defendant defended on a claim of ignorance rather than consent. *Id.* at 243 n.11, 444 N.E.2d at 1291 n.11. The best procedure, the court advised, is to require the prosecution to complete its case, rule on the motion and then permit the defendant to go forward. *Id.* The appeals court eroded the protections of Rule 25(a) and the presumption of innocence further in Commonwealth v. Ierardi, 17 Mass. App. Ct. 297, 303, 457 N.E.2d 1127, 1131 (1983) where it ruled that the trial judge acted permissibly in permitting the prosecution to reopen its case after having rested without offering

This second sentence renders explicit what the "reservation of decision" provisions in other jurisdictions merely imply.[43] When no defense motion is made at this juncture, Rule 25(b)(1) authorizes the judge to reserve ruling on the sufficiency issue and submit the case to the jury.[44] In contrast, because it must be ruled upon before the trial can proceed, the defense motion made at this point invokes a "no reservation" rule which secures important, practical, and constitutionally guaranteed interests of the defendant. The defendant's practical interest is in taking advantage of bringing the proceedings to a final conclusion without being required to defend the charges or run the risk of conviction that attends the submission of the case to the jury. The constitutional protection of these interests is derived from established due process and double jeopardy principles.

In *Jackson v. Virginia*,[45] the Supreme Court held that a defendant is protected by due process principles from being convicted except upon evidence that persuades a jury that each element of the crime has been established beyond a reasonable doubt.[46] It is the trial judge's duty to insure that, as far as possible, this burden and standard of proof are "given concrete substance."[47] The Court's view of the "concrete substance" of the *Winship* principle is essentially that developed by Professor J. Thayer in his *Preliminary Treatise on Evidence*.[48] Professor Thayer reasoned that the prosecution's burden of proof beyond a reasonable doubt formula was a compound of the presumption of innocence and a standard of persuasion which together emphasize the weight of evidence and strength of persuasion necessary to make out proof in a criminal case:

> [T]he rule includes two things: First, the presumption; and second, a supplementary proposition as to the weight of evidence which is required to overcome it; the whole doctrine when drawn out being, first, that a person who is charged with crime must be *proved* guilty; that, according to the ordinary rule of procedure

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evidence on an essential element. The defendant had moved under Rule 25(a) and the judge had allowed the motion (the opinion does not say whether a finding of not guilty had been entered). The appeals court ruled that the defendant's double jeopardy rights were not violated. *Id.* at 303, 457 N.E.2d at 1131.

43. *See, e.g.*, FED. R. CRIM. P. 29(a); UNIFORM R. CRIM. P. 522 (1975). *Contra* ABA STANDARDS RELATING TO TRIAL BY JURY § 4.5(6) comment at 108-09 (Approved Draft 1968) (generally the same as the reservation of decision provisions).

44. *See supra* note 16.

45. 443 U.S. 307 (1979).

46. *Id.* at 319.

47. *Id.* at 315.

48. *See* J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW, 551-76 app. (1898).

> and of legal reasoning, *presumitur pro reo*, i.e., *neganti*, so that the accused stands innocent until he is proved guilty; and, second, that this proof of guilt must displace all reasonable doubt.[49]

The *Winship* formula thus expresses both a rule of procedure and a standard of persuasion for overcoming the presumption of innocence.

A necessary corollary to *Winship* is that the prosecution is not entitled to have its case decided by a jury; it must earn its audience with that body by producing evidence sufficient to overcome the presumption of innocence.[50] The constitutional office of the judge in determining the sufficiency of the evidence in a jury trial is to insure that a case is not submitted to the jury if the evidence cannot meet the *Winship* standard.[51] Thus, one of the due process rights accorded an accused by the presumption of innocence is the right not to defend unless the prosecution has presented a *prima facie* case. This right was articulated in *Taylor v. Kentucky*.[52]

> It is now generally recognized that the "presumption of innocence" is an inaccurate, shorthand description of the right of the accused to "remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion; i.e., to say in this case, as in any other, that the opponent of a claim or charge is presumed not to be guilty is to say in another form that the proponent of the claim or charge must evidence it."[53]

In short, the presumption of innocence requires the prosecution to produce evidence sufficient to establish the accused's guilt beyond a reasonable doubt.[54] Until this has been done—that is, until the prosecution has presented a *prima facie* case—the defendant may not be required to defend.

The initial assessment of sufficiency may result in a finding of

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49. *Id.* at 558.

50. Taylor v. Kentucky, 436 U.S. 478, 484-85 (1978); *cf.* Curley v. United States, 160 F.2d 229, 233 (D.C. Cir. 1947).

51. *Jackson*, 443 U.S. at 317-18; United States v. Gainey, 380 U.S. 63, 68 (1965).

52. 436 U.S. 478 (1978).

53. *Id.* at 484 n.12 (quoting 9 J. WIGMORE, EVIDENCE 407 (3d ed. 1940)). *See also*, Commonwealth v. Preston, 393 Mass. 318, 321 n.2, — N.E.2d — n.2 (1984) (The purpose of the rule is to protect a defendant's right to insist that the Commonwealth prove every element of the crime charged before he decides to rest.)

54. J. THAYER, *supra* note 9, at 560-63; *see also* Commonwealth v. Madieros, 255 Mass. 304, 315-16, 151 N.E. 297, 300 (1926). For a definition of the term "prima facie" case and a discussion of the prosecution's burden of persuasion, see Commonwealth v. Pauley, 368 Mass. 286, 331 N.E.2d 901 (1975).

not guilty on all or part of the charge. While such a finding is not appealable by the prosecution,[55] the defendant may appeal a decision to permit further proceedings on the remaining charge if the trial results in a conviction.[56] Before making the motion for a required finding of not guilty, the defendant need not reserve the right to present a defense and the evidence presented by the defendant may not be considered by an appellate court reviewing the correctness of the initial sufficiency ruling.[57] In short, the defendant's right to an acquittal if the evidence at this point is insufficient as a matter of law is fixed and the defendant's position on this issue cannot deteriorate thereafter, even on appeal.

The defendant's right to some of these considerable benefits of Rule 25(a) may depend upon defense counsel's having made a timely motion for a required finding of not guilty at the close of the prosecution's case. While such a motion may be filed later, the judge need not rule upon it before submitting the case to the jury; when the ruling is made, it will be on the state of the evidence at the time the motion was made.[58] If a ruling favorable to the defendant is made before a verdict is returned it is not appealable; if a verdict preceeds the ruling, the prosecution may appeal.[59] Thus, the failure to move at the close of the prosecution's case deprives the defendant of the valuable right to have sufficiency determined at that time on the prosecution's evidence alone thereby possibly bringing the matter to a final close.[60] Defense counsel, therefore, should file a written mo-

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55. Sanabria v. United States, 437 U.S. 54, 64 (1978); Fong Foo v. United States, 369 U.S. 141, 143 (1962).

56. *See* Commonwealth v. Kelley, 370 Mass. 147, 149-50 & n.1, 346 N.E.2d 368, 370 & n.1 (1976); Commonwealth v. Blow, 370 Mass. 401, 407 n.4, 348 N.E.2d 794, 798 n.4 (1976).

57. *See* cases cited *supra* note 50.

58. Commonwealth v. Kelley, 370 Mass. 147, 149-50 & n.1, 346 N.E.2d 368, 370 & n.1 (1976).

59. MASS. R. CRIM. P. 25(c)(1); *see* Commonwealth v. Therrien, 383 Mass. 543, 535, 420 N.E.2d 897, 900-01 (1981); *see also* United States v. Martin Linen Supply Co., 430 U.S. 564, 573-74 (1977).

60. The failure to make this motion would almost certainly constitute ineffective assistance of counsel if the evidence at that point was in fact insufficient, particularly if the shortcoming was subsequently cured. *But see* Commonwealth v. Funches, 379 Mass. 283, 296-97, 397 N.E.2d 1097, 1104 (1979) (counsel's failure to appeal denial of motion for directed verdict created substantial likelihood of miscarriage of justice where prosecution's evidence was insufficient; defendant therefore entitled to acquittal). *Compare* Commonwealth v. Woods, 382 Mass. 1, 7, 10, 413 N.E.2d 1099, 1103, 1104 (1980) (appellate counsel raised sufficiency issue as weight of the evidence issue by appealing denial of motion for new trial rather than denial of motion for directed verdict; court intimated that evidence was insufficient, granted new trial rather than acquittal); Commonwealth v. DeVincent, 358 Mass. 592, 596-97, 266 N.E.2d 315, 316-17 (1971) (court will not address

tion for a required finding of not guilty as provided in Rule 25(a) in every case in which a serious claim of insufficiency can be made regarding any issue that the prosecution must prove to convict.

2. Required Finding of Not Guilty at the Close of All the Evidence

Depending upon whether the defendant presents evidence and if so, whether the prosecution presents rebuttal evidence, the "close of all the evidence" may arrive at any time after the prosecution's case-in-chief has been completed. The sufficiency of the evidence may be raised at this point by the judge *sua sponte* or on the defendant's motion, whether or not the issue was raised or considered at the close of the prosecution's evidence. At this juncture, the judge may rule immediately or, in his or her discretion, reserve ruling and submit the case to the jury. The judge may rule on the reserved motion at virtually any time thereafter before the jury returns a verdict, after it is discharged without returning a verdict or after it returns a guilty verdict.

In providing that the judge "on his own motion shall enter a finding of not guilty . . . after the evidence on either side is closed if the evidence is insufficient as a matter of law," Rule 25(a) suggests that the judge should make the determination again at the close of the defendant's case whether or not the defendant requests it.[61] The defendant is entitled to move for a required finding of not guilty after presenting his or her evidence even if no motion was made at the close of the prosecution's case.[62] Without addressing the point directly, the rule also suggests that the judge's ruling upon a defendant's motion for a required finding of not guilty, made at the close of the defendant's evidence, may be reserved and the case submitted to the jury.[63] This suggestion arises from the fact that in many cases a motion made at this point constitutes a motion at the close of all the evidence. Rule 25(b)(1) expressly permits the judge to reserve ruling on such a motion.[64]

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theory of insufficiency on appeal which differs from theory of insufficiency asserted in trial court).

61. MASS. R. CRIM. P. 25(a). The judge's obligation to insure that a case is not presented to a jury on insufficient evidence rests on a responsibility that serves a greater purpose than the protection of an individual defendant's rights; it is an indispensible component of a fair trial in the adversary system of adjudication. *See Jackson*, 443 U.S. at 316.

62. MASS. R. CRIM. P. 25(a).

63. *See id.*

64. *Id.* 25(c)(1); *see supra* note 16.

The defendant's position is usually weakened in several respects at the close of all the evidence. Because the standard applied to the judgment remains the same as applied at the close of the prosecution's case, the judge will view all the evidence in terms most favorable to the prosecution. If a sufficiency judgment was made at the close of the prosecution's case, the defendant's position cannot deteriorate in the eyes of the judge; that is, an incorrect ruling cannot be cured by virtue of the fact that the defendant's evidence may have filled in gaps in the prosecution's case.[65] If a sufficiency judgment was not made at the close of the prosecution's case, the sufficiency judgment at the close of all the evidence will be made upon the view of all the evidence and the defendant's evidence may have strengthened the prosecution's case so as to meet the sufficiency standard.[66] Thus, the defendant whose counsel delays moving for a required finding of not guilty until all the evidence is closed loses the valuable right to have a sufficiency determination made on the strength of the prosecution's evidence alone and foregoes the opportunity to avoid having to present a defense to the charge being tried.

A second major danger to the defendant at this stage arises when the trial judge reserves ruling on the sufficiency motion and submits the case to the jury. The defendant loses a measure of double jeopardy protection because the prosecution may appeal a favorable sufficiency ruling made after the jury's guilty verdict.[67] If a motion for a required finding of not guilty is granted before a jury verdict, the prosecution cannot appeal.[68] By foregoing the right to

65. Commonwealth v. Kelley, 370 Mass. 147, 149-50, 346 N.E.2d 368, 370 (1976); Commonwealth v. Blow, 370 Mass. 401, 408, 348 N.E.2d 794, 799 (1976). This principle is, obviously, one governing appellate review since it describes a situation unlikely to occur at trial. *But see* Sanabria v. United States, 437 U.S. 54, 77-78 (1978); Commonwealth v. Corridori, 11 Mass. App. Ct. 469, 470-71, 417 N.E.2d 969, 970-71 (1981).

66. *See* Commonwealth v. Blow, 370 Mass. 401, 408, 348 N.E.2d 794, 799 (1976). The prosecution's case may, at least in theory, have deteriorated since it closed its case, and the court should determine whether that has occurred. Commonwealth v. Basch, 386 Mass. 620, 622 n.2, 437 N.E.2d 200, 203 n.2 (1982); Commonwealth v. Amazeen, 375 Mass. 73, 83, 375 N.E.2d 693, 700 (1978); Commonwealth v. Kelley, 370 Mass. 147, 150 n.1, 346 N.E.2d 368, 370 n.1 (1976). This might occur where the defendant has effectively injected an affirmative defense other than lack of criminal responsibility into the case and the prosecution has not countered with sufficient rebuttal evidence to disprove the issue beyond a reasonable doubt.

67. *See* MASS. R. CRIM. P. 25(a)(1); United States v. Wilson, 420 U.S. 332, 352-53 (1975); Commonwealth v. Therrien, 383 Mass. 529, 531, 420 N.E.2d 897, 898 (1981). If the appellate court disagrees with the trial judge it can reinstate the guilty verdict. *Therrien*, 383 Mass. at 532, 420 N.E.2d at 899.

68. Burks v. United States, 437 U.S. 1, 11 (1978); *see* Commonwealth v. Therrien, 383 Mass. 529, 535-36, 420 N.E.2d 897, 901 (1981); Commonwealth v. Anthes, 71 Mass.

move for a required finding of not guilty at the close of the prosecution's case, then, a defendant may have lost the opportunity to obtain an acquittal from the trial judge that is final.

The question of what factors should guide the judge's discretionary decision to reserve ruling on the sufficiency of the evidence at the close of all the evidence involves several important considerations. Because the question is, in effect, whether to submit the case to the jury, the decision ought to be carefully weighed. Both the United States Supreme Court and the Massachusetts Supreme Judicial Court have suggested that it is preferable to reserve ruling and submit the case to the jury when the question of sufficiency appears close.[69] If the jury acquits, the issue is moot. If there is a conviction, the judge may allow the motion without depriving the prosecution of an opportunity to appeal.[70] The principal flaw in this approach is the risk it creates that the protective functions of the sufficiency determination will be defeated or diluted. The defendant's interest in the pre-verdict sufficiency determination includes finality, which is secured by the double jeopardy prohibition. Where the defendant has been unable to secure a Rule 25(a) determination because of the operation of a proof-facilitating device,[71] the practice of reserving the ruling on the motion may deprive the defendant of the opportunity to secure a pre-verdict sufficiency determination.[72] Finally, the pre-verdict determination conserves judicial resources by insuring that unwarranted prosecutions are terminated as early as possible. The judge should consider these factors when deciding whether to reserve ruling on a motion made at the close of all the evidence.

If the trial judge does reserve ruling on the motion as provided for in Rule 25(b)(1), the finality of a ruling favorable to the defendant will probably depend in large part upon precisely when it is made, although the law on this point is not settled. At any time before a jury verdict is returned, entry of a required finding of not

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(5 Gray) 185, 207-08 (1855); Commonwealth v. Cummings, 57 Mass. (3 Cush.) 212, 214 (1849); *see also* Sanabria v. United States, 437 U.S. 54, 69 (1978); Fong Foo v. United States, 369 U.S. 141, 143 (1961).

69. United States v. Wilson, 420 U.S. 332, 352-53 (1975); Commonwealth v. Therrien, 383 Mass. 529, 531, 420 N.E.2d 897, 898 (1981).

70. *See* cases cited *supra* notes 55-56.

71. *See infra* notes 178-220 and accompanying text.

72. *See* MASS. R. CRIM. P. 25(b)(1); Commonwealth v. Kelley, 370 Mass. 147, 149-51, 346 N.E.2d 368, 370-71 (1976). The "no-reservation" policy emphasizes and secures the importance of this opportunity.

guilty is final and not reviewable on appeal.[73] If the jury is discharged without having returned a verdict, the judge is empowered nevertheless to enter a required finding of not guilty. This ruling, too, is an unreviewable acquittal.[74] After the jury returns a guilty verdict, the judge still, pursuant to Rule 25(b)(1), may enter a required finding of not guilty on the basis of the insufficiency of the evidence.[75] Defense counsel should be sure to secure an express ruling on a reserved motion, if possible before a verdict is returned, but at least before judgment is entered because this ruling will be appealable.[76]

If a motion based on insufficiency is made and denied at the close of all the evidence, and the case is submitted to the jury, the motion may be renewed within five days after the jury is discharged and may include an alternative motion for a new trial.[77] This is the equivalent of a request for a judgment *non obstante verdicto* and the ruling upon it is not precisely the same as a ruling on a reserved motion. Read literally, the first sentence of Rule 25(b)(2) does not authorize the renewal of a reserved motion nor does it authorize the alternative relief of a new trial to a defendant whose reserved motion has been denied.[78] The trial judge's ruling on a *reserved* motion con-

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73. United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977); Commonwealth v. Therrien, 383 Mass. 529, 535-36, 420 N.E.2d 897, 901 (1981).

74. United States v. Martin Linen Supply Co., 430 U.S. 564, 575 (1977).

75. MASS. R. CRIM. P. 25(b)(1); *see supra* note 16. This ruling is distinct from one made pursuant to Rule 25(b)(2). *See supra* notes 61-68 and accompanying text.

76. Commonwealth v. Therrien, 383 Mass. 529, 531, 420 N.E.2d 897, 898 (1981).

77. MASS. R. CRIM. P. 25(b)(2).

78. *Id.*; *see supra* note 16. That is not to say that the courts will interpret Rule 25 so literally. In Commonwealth v. Keough, 385 Mass. 314, 431 N.E.2d 915 (1982), the judge had reserved and then denied the defendant's Rule 25(b)(1) motion made at the close of all the evidence. The defendant later moved pursuant to Rule 25(b)(2) for a required finding of not guilty and pursuant to Rule 30(b) for a new trial. Still later he moved pursuant to Rule 25(b)(2) for a new trial and a reduced verdict. The supreme judicial court in its opinion drew a clear distinction between Rule 25(b)(1) and 25(b)(2) (first sentence) motions on one hand and 25(b)(2) (second sentence) motions on the other. Although the point was not discussed, the court appeared to take the view that Rule 25(b)(1) relief was available to the defendant. *Id.* at 317-18, 431 N.E.2d at 917. The court's view of Rules 30(b) and 25(b)(2) (second sentence) motions for new trial narrows the importance of this distinction to the continued availability of "sufficiency" relief where the Rule 25(b)(1) motion has been reserved and denied after the jury is discharged, as in *Keough.* If no verdict was returned and a mistrial was declared, the judge acting under 25(b)(2) (first sentence) can enter an unreviewable finding of not guilty. *See* United States v. Martin Linen Supply Co., 430 U.S. 564, 575 (1977). The second sentence does not authorize this form of relief regardless of whether a verdict was entered. A defendant whose motion is reserved and denied after a mistrial is declared cannot renew it under the first sentence of 25(b)(2) and so can obtain no further trial court review of the sufficiency of the evidence.

stitutes the last occasion authorized by Rule 25 for considering the *sufficiency* of the Commonwealth's case. If the defendant's motion at the close of all the evidence is denied rather than reserved, Rule 25(b)(2) allows the motion to be renewed, thus affording the defendant one further opportunity to contest the sufficiency issue.[79]

In some cases, the grounds for asserting the insufficiency of the prosecution's evidence may crystallize for the first time after the jury has been instructed. This occurred in *Commonwealth v. Sherry*,[80] a case in which three co-defendants were each charged with three counts of rape. The Commonwealth submitted evidence sufficient to show that each had raped the victim once and that each rape was accomplished with the aid of the other two defendants. The prosecution did not request, and the trial judge did not give, instructions regarding the liability of accessories before the fact, so the verdicts convicting each defendant of three charges could not stand on this ground.[81] Arguably, each of the defendants could have moved for required findings of not guilty on two of the rape indictments against him after the instructions had been given, but the remedy of required findings of not guilty was not available until after the verdicts had been returned.[82]

3. Appellate Review

A convicted defendant's right to appellate review of an insufficiency claim is dependent upon having properly presented the issue to the trial judge.[83] The defendant who has moved at the close of the prosecution's case is entitled to appellate review of that evidence standing alone.[84] The sufficiency ruling is reviewed as one that is a question of law and thus, in effect, is reviewed *de novo*. The failure

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79. The defendant may also request a new trial. The supreme judicial court suggests this be sought by separate motion. Commonwealth v. Keough, 385 Mass. 314, 317, 431 N.E.2d 915, 917 (1982).

80. 386 Mass. 682, 699-700, 437 N.E.2d 224, 234 (1982).

81. *Id.* at 700 n.9, 437 N.E.2d at 234 n.9.

82. *Id.* Until that time, supplemental instructions could have remedied the problem.

83. Commonwealth v. DeVincent, 358 Mass. 592, 597, 266 N.E.2d 314, 316-17 (1971) (supreme judicial court refused to consider a theory of insufficiency not presented to trial judge, although general claim of insufficiency had been presented). The defendant need not have refiled or renewed the motion at any later point in the trial. Commonwealth v. DeBrosky, 363 Mass. 718, 725, 297 N.E.2d 496, 501-02 (1973); 30A MASS. PRACTICE § 1916 (K. Smith 2d ed. 1983).

84. Commonwealth v. Latimore, 378 Mass. 676, 677-78, 393 N.E.2d 370, 374 (1979). The same standard of sufficiency is applied at trial and on appeal. Commonwealth v. Nickerson, 388 Mass. 246, 251-52, 446 N.E.2d 68, 72 (1983).

to raise the issue at trial constitutes a procedural default that deprives the defendant of appellate review under this standard as a matter of right. Notice will be taken of the claim, either by collateral attack or on direct appeal, only if necessary to prevent "a substantial risk of a miscarriage of justice."[85] The supreme judicial court has not been consistent in the form of relief granted under the "miscarriage of justice" standard: It ordered an acquittal on direct review in one case[86] and a new trial on collateral review in another.[87]

From 1974 through 1980, the supreme judicial court made its sufficiency review on the state of the evidence as it would have been had the trial judge correctly ruled on the evidentiary issues raised by the defendant.[88] That is, if the court concluded that the trial court had incorrectly admitted prosecution evidence, the appellate court disregarded that evidence in reviewing the sufficiency of the evidence.[89] If the court concluded the trial court had incorrectly admitted prosecution evidence, it disregarded that evidence in reviewing the trial judge's sufficiency determination.[90] In 1981, the court began modifying that approach to permit retrial if the court found the evidence insufficient by virtue of an appellate evidentiary ruling, unless it found that the prosecution would be unable to present sufficient admissible evidence if afforded another trial.[91]

C. *Relief from Unjust Verdicts*

The remaining provisions of Rule 25 empower the trial judge to exercise an authority which, until the enactment of the rules, had been reserved to the supreme judicial court as part of its exclusive appellate jurisdiction to review convictions in first degree murder cases.[92] Under the rules, if the jury returns a guilty verdict, the trial

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85. Commonwealth v. Woods, 382 Mass. 1, 2, 413 N.E.2d 1099, 1100 (1980) (appellate review of motion for new trial); Commonwealth v. Funches, 379 Mass. 283, 294 n.14, 397 N.E.2d 1097, 1103 n.14 (1979) (direct appeal); Commonwealth v. Freeman, 352 Mass. 556, 564, 227 N.E.2d 3, 9 (1967).

86. Commonwealth v. Funches, 379 Mass. 283, 297, 397 N.E.2d 1097, 1104 (1979).

87. Commonwealth v. Woods, 382 Mass. 1, 11, 413 N.E.2d 1099, 1105 (1980).

88. Commonwealth v. Funches, 379 Mass. 283, 296-97 N.E.2d 1097, 1104 (1979); Commonwealth v. Silva, 366 Mass. 402, 410-11, 318 N.E.2d 895, 901 (1974). The Supreme Court has reserved ruling on whether the Double Jeopardy Clause requires this approach. Green v. Massey, 437 U.S. 19, 26 (1978).

89. *See* cases cited *supra* note 88.

90. *Id.*

91. Commonwealth v. Brouillet, 389 Mass. 605, 608-09, 451 N.E.2d 128, 130 (1983) (retrial permitted).

92. Between 1962 and 1979 the supreme judicial court exercised exclusive appellate jurisdiction over all cases in which the indictment charged first degree murder. In

judge is empowered to set the verdict aside on motion and to grant any one of three forms of relief: a new trial; an acquittal (finding of not guilty); or a finding of guilty of "any offense included in the offense charged in the indictment or complaint."[93] The defendant need not have made any challenge to the sufficiency of the evidence as a prerequisite to seeking the relief.[94] In *Commonwealth v. Gaulden*[95] and two subsequent cases,[96] the supreme judicial court commented briefly upon the scope of two aspects of this unusual remedial power of the trial courts, the manner in which it should be invoked by defendants and exercised by trial judges, and the nature of the appellate review to be conducted of decisions made in reliance on it.[97]

In *Gaulden* and *Commonwealth v. Keough*[98] the trial judges had reduced the juries' second degree murder verdicts to manslaughter and resentenced the defendants.[99] The prosecution's evidence in each case was determined to have been sufficient to support the jury's verdict.[100] In *Gaulden*, the prosecution argued that because the evidence was sufficient, the trial judge could do no more than grant a new trial. The prosecution's procedural argument was that because the rule tied the judge's post-verdict powers to an initial mo-

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1979 the legislature restricted the scope of this jurisdiction to convictions for first degree murder. *See* MASS. GEN. LAWS ANN. ch. 278, § 33E (West 1981); Commonwealth v. Davis, 380 Mass. 1, 12-13, 401 N.E.2d 811, 818-19 (1980).

93. MASS. R. CRIM. P. 25(b)(2) (second sentence); *see* MASS. GEN. LAWS ANN. ch. 278, § 11 (West 1981).

94. *See* Commonwealth v. Gaulden, 383 Mass. 543, 552, 420 N.E.2d 905, 911 n.6 (1981). *But see* Commonwealth v. Sherry, 386 Mass. 682, 687, 437 N.E.2d 224, 234 (1982).

95. 383 Mass. 543, 420 N.E.2d 905 (1981).

96. Commonwealth v. Sherry, 386 Mass. 682, 437 N.E.2d 234 (1982); Commonwealth v. Keough, 385 Mass. 314, 431 N.E.2d 915 (1982).

97. *Gaulden*, 383 Mass. at 555-56, 420 N.E.2d at 912-13; Commonwealth v. Keough, 385 Mass. 314, 316-21, 431 N.E.2d 915, 917-20 (1982).

98. 385 Mass. 314, 431 N.E.2d 915 (1982).

99. *Gaulden*, 383 Mass. at 544, 420 N.E.2d at 913; *Keough*, 385 Mass. at 316, 431 N.E.2d at 917.

MASS. GEN. LAWS ANN. ch. 265, § 2 (West 1970), mandates the imposition of a life sentence on one convicted of second degree murder. The convict is eligible for parole after serving 15 years of this sentence. *Id.* ch. 127, § 133A (West 1974 & Supp. 1983-1984). Section 13 authorizes a sentence of 20 years for a manslaughter conviction. *Id.* ch. 265, § 13 (West 1970). Generally, the convict so sentenced will be eligible for parole after serving two-thirds of this sentence. *Id.* ch. 127, § 133 (West Supp. 1983-1984). The Parole Board occasionally exercises its discretion to grant parole after one-third or more of the sentence has been served. *See* MASS. BD. OF PAROLE POLICY, PROCEDURES AND GUIDELINES 10-14 (1978).

100. *Gaulden*, 383 Mass. at 544, 420 N.E.2d at 913; *Keough*, 385 Mass. at 319, 431 N.E.2d at 919.

tion for a required finding of not guilty, a reduced verdict could be ordered only when the evidence was insufficient to support the jury's verdict.[101] The court rejected both the argument and its procedural premise.[102] Conceding that Massachusetts General Laws ch. 278, § 11 could be read to support the prosecution argument, the court distinguished the authority granted to the trial court in the first sentence of Rule 25(b)(2) from that authority granted in the second sentence. The former, to the court, was invoked by a renewed motion for a required finding of not guilty but the latter—the power to set the verdict aside—was not.[103]

Drawing upon the Reporter's Notes to Rule 25 and the legislature's modification of Massachusetts General Laws ch. 278 § 33E, the court found that the 1979 rule and statutory revisions had effected a significant redistribution of authority to grant post-conviction relief from a jury's verdict from the supreme judicial court to the trial judges.[104] Section 33E had previously authorized the supreme judicial court to conduct a plenary review of the justice of jury verdicts in cases tried on first degree murder indictments resulting in either first or second degree verdicts. This authority was narrowed by the 1979 amendment which made the review applicable only where first degree murder verdicts were returned.[105] Rule 25(b)(2) (second sentence) authorized trial judges to exercise a similar power to enter a finding of guilty on any lesser included offense in all cases.[106] The supreme judicial court has exercised its section 33E authority in cases in which the evidence was sufficient to support the verdict, when the court concluded that justice required the entry of a lesser verdict.[107] The trial judge is to exercise the Rule 25(b)(2) (second sentence) authority to reduce a verdict similarly and so is

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101. *Gaulden*, 383 Mass. at 552, 420 N.E.2d at 910-11.

102. *Id.* at 554-55, 420 N.E.2d at 912.

103. *Id.* at 553-54, 420 N.E.2d at 911.

104. *Id.*

105. *Id.*

106. *Id.*

107. Both the reporter's notes and the court's discussion in *Gaulden* indicate that this grant of authority to trial judges is to be exercised both in the interest of distributive justice for individual defendants and the interest of judicial economy. *See* MASS. R. CRIM. P. 25 reporters notes at 503; *Gaulden*, 383 Mass. at 555-56, 420 N.E.2d at 912-13. In granting relief where the evidence is not legally sufficient, a judge will avoid the need for a new trial. *Gaulden*, 383 Mass. at 554-55 n.8, 420 N.E.2d at 912 n.8. In granting a reduced verdict where the evidence is sufficient, an appeal of the conviction may be avoided, although it is clear that such an appeal is still possible. The existence of this authority also opens up post-trial plea bargaining possibilities. *See id.* at 552 n.5, 420 N.E.2d at 910 n.5.

free to grant relief under this provision even when the evidence is legally sufficient.[108]

Some of the discussion in *Gaulden* regarding the trial judges' new powers suggests that these new powers might be exercised a little more liberally than the supreme judicial court has exercised its section 33E authority to modify verdicts.[109] Because it considers the weight rather than sufficiency of the evidence, the supreme judicial court has not been bound by the formal strictures that govern the sufficiency determination—the rational factfinder and the prosecution's best case rules. The trial court, in exercising its relief-from-verdict powers, also considers the weight of the evidence and is free to make credibility judgments based upon its opportunity to hear and observe the witnesses. The supreme judicial court's ability to determine credibility is limited because its review is upon a written record. Institutional constraints aside, the trial judge considering a motion for relief from a verdict is in as good a position to judge credibility, weigh evidence and draw inferences as is the jury.[110] In exercising this power the trial judge should have in mind the dual objectives of individual justice and uniformity of treatment for similarly blameworthy conduct.[111]

The appellate court's role in this scheme is to regulate the trial court's exercise of discretion in the interest of uniformity. In *Gaulden*, the court ruled that the Commonwealth could appeal an order granting a verdict reduction, commenting only that it perceived no distinction between such an appeal and the prosecutorial appeal of a trial judge's order to enter a required finding of not guilty on a reserved motion under Rule 25(b)(1).[112] The court stated explicitly that it would not engage in a *de novo* review of a request for a verdict reduction but would consider only whether the trial court abused its discretion or committed an error of law.[113] To facil-

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108. *Gaulden*, 383 Mass. at 553, 420 N.E.2d at 911.

109. *See id.* at 553-54, 420 N.E.2d at 913.

110. *See id.*

111. *Id.* at 555-56, 420 N.E.2d at 913.

112. *Id.* at 550, 420 N.E.2d at 909. In Commonwealth v. Therrien, 383 Mass. 529, 420 N.E.2d 897 (1981), the court ruled that such an appeal did not violate double jeopardy principles. *Id.* at 531-32, 420 N.E.2d at 898 (relying on United States v. Wilson, 420 U.S. 332, 352-53 (1975); and Jenkins v. United States, 420 U.S. 358, 365 (1975)).

113. *Gaulden*, 383 Mass. at 557, 420 N.E.2d at 913. The standard of review for abuse of discretion is whether a conscientious judge could reasonably have acted as the judge whose ruling is being reviewed acted. The court affirmed the trial judge's action in *Gaulden*, stating "we accept the reasonableness of the judge's decision to order the entry of a finding of guilty of manslaughter." *Id.* at 558, 420 N.E.2d at 914.

Review of the trial judge's decision on a Rule 25(b)(2) reduction of verdict motion is

itate this review, the trial judge must state the reasons for his or her action in terms consistent with the supreme judicial court's exercise of its section 33E powers.

II. The Legal Standard of Sufficiency

A premise of the Supreme Court's ruling in *Jackson v. Virginia*[114] is that the *Winship* principle and the presumption of innocence cannot be adequately enforced through jury instructions alone.[115] The Constitution imposes the further duty upon the trial judge to assess the prosecution's evidence to insure that it is sufficient to establish "the essential elements of the crime" beyond a reasonable doubt.[116] The task of identifying the "essential elements" of the crime charged is the task of identifying the factual issues. The presumption of innocence requires the prosecution to satisfy a burden of production or suffer a required finding of not guilty on such issues. The logical first step in the sufficiency assessment, then, is to identify the "essential elements" of the crime charged. Within broad due process limits, the power to define crimes is reserved to the states. This includes the power to eliminate issues relevant to guilt from the definition of the offense, designate them as "affirmative" defenses, and assign to the defendant the burden of production and/or the burden of persuasion on them.[117] In Massachusetts, the burdens of production and persuasion on "affirmative" defenses are commonly divided between the parties, with the burden of production assigned to the defendant and the burden of persuasion assigned to the prosecution, regardless of whether the claim contests an essential element of the crime charged.[118] Because the burden of persua-

distinct from the supreme judicial court's obligation under section 33E to review a murder conviction under that statute. The trial judge's decision to reduce such a verdict, if affirmed on appeal, removes the case from the supreme judicial court's section 33E review. *Id.* at 558 n.11, 420 N.E.2d at 914 n.11. If the trial judge denied relief; that ruling would likewise be reviewed for an abuse of discretion in all cases. If the case was also subject to section 33E review, the supreme judicial court would independently determine whether to reduce the verdict or grant a new trial. *Id.* at 557 n.10, 420 N.E.2d at 913 n.10.

114. 443 U.S. 307 (1979).

115. *See id.* at 318. An excellent presumption of innocence jury instruction is found in Commonwealth v. Drayton, 386 Mass. 39, 45-47, 434 N.E.2d 997, 1003 (1983).

116. *In re* Winship, 397 U.S. 358, 364 (1970).

117. *Jackson*, 443 U.S. at 318-19; Patterson v. New York, 432 U.S. 197, 210 (1977).

118. *See, e.g.*, Commonwealth v. Rodriguez, 370 Mass. 684, 687-89, 352 N.E.2d 203, 205-06 (1976) (defendant has burden of producing sufficient evidence to put claim of self-defense in issue; prosecution then has burden of disproving self-defense beyond a reasonable doubt because claim of self-defense contests essential element of unlawfulness of killing); Commonwealth v. Jones, 372 Mass. 403, 406-09, 361 N.E.2d 1308, 1311-13

sion remains with the prosecution on all defense claims, there are, properly speaking, no "affirmative" defenses in Massachusetts.[119] The impact upon the defendant's due process protections of assigning the burden of production to him or her is, however, functionally similar to that of an affirmative defense. Accordingly, because the constitutionality of assigning the burden of production to the defendant depends upon whether the issue could be treated legitimately as an affirmative defense, the due process limitations on this practice will be addressed in both contexts. First, however, it is necessary to establish how, under state law, the essential elements of a crime are identified.

A. *Identifying the Essential Elements of the Crime Charged*

Under Massachusetts law, the essential elements of the crime consist of "every material fact or ingredient, which the law requires in order to constitute the offense."[120] Ordinarily the task of indentifying these essential elements is relatively simple. From the applicable statute, as modified by judicial interpretation, one identifies the conduct (act or omission, together with *mens rea*, if any), attendant circumstances or result of such conduct that is described in the definition of the offense, or which negates an excuse or justification for the forbidden conduct; or negates a statute of limitations defense; or establishes jurisdiction.[121] However, case law and statute may require different treatment of some defensive issues which could otherwise be considered elemental.

For example, Massachusets General Laws chapter 278, section 7 provides:

> A defendant in a criminal prosecution, relying upon a license, appointment, admission to practice as an attorney at law, shall prove the same; and, until so proved, the presumption shall be that he is

(1977) (claim of license to carry firearm is an affirmative defense and absent sufficient evidence of possession of license by defendant, neither prosecution nor jury need address issue; once issue of license raised by evidence, prosecution must prove absence of license beyond reasonable doubt even though absence of license is not an essential element of the crime).

119. An affirmative defense is an issue upon which the defendant bears the burden of persuasion. The Model Penal Code endorses the Massachusetts practice of defining as affirmative defenses those issues on which the defendant has the burden of production and the prosecution the burden of persuasion. Allen, *supra* note 7, at 27; W. LAFAVE & A. SCOTT, CRIMINAL LAW 152 (1972); MODEL PENAL CODE § 1.12(2)(3) (Proposed Official Draft 1962).

120. Commonwealth v. McKie, 67 Mass. (1 Gray) 61, 62 (1854).

121. MASS. ANN. LAWS ch. 278, § 7 (Michie/Law. Co-op. 1980).

not so authorized.[122]

The effect of this statute must be independently accounted for because it may work to change what appears to be an element of an offense into an affirmative defense.[123] For example in *Commonwealth v. Jones*,[124] the supreme judicial court affirmed its earlier holding that the absence of a license was not an element of the offense of unlawfully carrying a firearm, despite the terms of the statute which provided for the punishment of one who "except as provided by law, carries on his person . . . a firearm . . ." or coming within the scope of exempted persons or uses.[125] Under the Model Penal Code approach, the possession of a license is a justification for the otherwise prohibited conduct of knowingly carrying a firearm. Accordingly, the absence of a firearm would be an essential element of the offense, but for the effect of chapter 278 section 7. Before considering the due process limitations on designating as "affirmative defenses" such issues that are relevant to guilt or degree of guilt, it is appropriate to consider whether—and if so, when—the burden of producing evidence may be assigned to a defendant on a defense claim which contests an essential element of the crime.

B. *The Presumption of Innocence and the Burden of Production on Elemental Issues*

The necessity of limiting the power to shift to the defendant the burden of production on an elemental issue was recognized by the supreme judicial court as early as 1854, when the court ruled in *Commonwealth v. McKie*[126] that the presumption of innocence, together with "the form of the issue" (the use of a general denial to join the issues in a criminal case) "necessarily imposes on the government the burden of showing affirmatively the existence of every material fact or ingredient, which the law requires in order to constitute an offense."[127] The defendant in *McKie* was charged with assault and battery and defended on the ground of justification.[128]

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122. *Id.*

123. Redefinition of an offense to effect a reallocation of the burden of persuasion on an issue was approved in Patterson v. New York, 432 U.S. 197, 210 (1977).

124. 372 Mass. 403, 361 N.E.2d 1308 (1977).

125. *Id.* at 405-06, 361 N.E.2d at 1310 (quoting MASS. GEN. LAWS ANN. ch. 269, § 10(a) (West 1975)).

126. 67 Mass. (1 Gray) 61 (1854).

127. *Id.* at 62.

128. Although the adequacy of this justification was not contested in the trial court, the supreme judicial court clearly stated that it did not constitute a recognized

The trial judge had instructed the jury that if the prosecution had proved beyond a reasonable doubt that McKie had struck the victim, the burden was then on McKie to prove his justification.[129] The supreme judicial court reversed, noting that, under Massachusetts law, "assault and battery consists in the unlawful and unjustified use of force and violence upon the person of another, however slight."[130] Thus, one of the essential elements of assault and battery is the defendant's unjustifiable, unlawful intent and if the evidence "fails to show the act to have been unjustifiable, or leaves the question in doubt, the criminal act is not proved, and the party charged is entitled to an acquittal."[131]

The court's ruling on this point is simply an early application, as a matter of state law, of the familiar *Winship* principle that the prosecution bears the burden of persuasion on each essential element of the crime.[132] The court continued, however, to consider the impact of the presumption of innocence and the burden of persuasion on the prosecution's burden of production: so long as the contested issues relate "solely to the original transaction constituting the alleged criminal act, and forming part of the *res gestae*," the prosecution's evidence must negate any defense which contests an essential element of the crime.[133] On a charge of assault and battery, for example, the prosecution's evidence must be sufficient to support a conclusion that the physical contact was not accidental.[134] This evi-

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defense. Because the adequacy of the defense was not material to the issue raised, the court addressed the merits anyway. *Id.* at 62.

129. *Id.*

130. *Id.* at 63.

131. *Id.*

132. *See In re* Winship, 397 U.S. 358, 364 (1970).

133. *McKie*, 67 Mass. (1 Gray) at 64.

134. *Id.* at 64.

> If therefore the evidence fails to show the act to have been unjustifiable, or leaves that question in doubt, the criminal act is not proved, and the party charged is entitled to an acquittal. To illustrate this; it is clearly settled, that when an injury to the person is accidental, and the party defendant is without fault, it will not amount to an assault and battery . . . . Now in a case of this sort, if the evidence offered by the government leaves it doubtful whether the injury was the result of accident or design, there can be no question of the right of the defendant to an acquittal, because it is left doubtful whether any criminal act was committed. But can the government, in such a case, on proving simply the injury to the person, rest their case, and call on the defendant to assume the burden of proof and satisfy the jury that it was accidental, or else submit to a conviction? If so, then a criminal charge can always be shown by providing part of a transaction, and the burden of proof can be shifted upon the defendant, by a careful management of the case on the part of the government, so as to withhold that part of the proof which may bear in his favor.

dence must be presented in the case-in-chief, or the prosecution has not satisfied its burden of production.[135] In contrast, the burden of proof (production and persuasion) on a defensive claim, which depends upon proof of facts separate and independent of the alleged criminal transaction, may be imposed on the defendant.[136]

The *McKie* principle, that the defendant may not be required to assume the burden of producing evidence of a defensive claim which contests an essential element of the crime charged, is a necessary corollary to the *Jackson* requirement that the prosecution produce sufficient evidence to prove each essential element of the crime. As the *McKie* opinion implies, imposing a burden of production upon the defendant imposes a burden of persuasion upon him or her as well.[137] Although the standard of persuasion—the level of certainty which the proponent must meet to satisfy the burden—is lower, the assignment of a burden of production may be decisive on the issue for which the burden was imposed. Imposing the burden of production upon the defendant shifts, from the prosecution to the defendant, the duty to present evidence and persuade the judge that that evidence is sufficient to support a favorable decision by the jury on

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Id.

135. *Id.*

> Suppose a case, where all the testimony comes from the side of the prosecution. The defendant has a right to say that upon the proof, so introduced, no case is made against him, because there is left in doubt one of the essential elements of the offense charged, namely, the wrongful, unjustifiable, unlawful intent. The same rule must apply where the evidence comes from both sides, but relates solely to the original transaction constituting the alleged criminal act, and forming part of the res gesta.

Id. at 64.

136. *Id.* at 65.

> There may be cases, where a defendant relies on some distinct, substantive ground of defence [sic] to a criminal charge, not necessarily connected with the transaction on which the indictment is founded, (such as insanity, for instance,) in which the burden of proof is shifted upon the defendant. But in cases like the present, (and we do not intend to express an opinion beyond the precise case before us,) where the defendant sets up no separate independent fact in answer to a criminal charge, but confines his defence [sic] to the original transaction charged as criminal, with its accompanying circumstances, the burden of proof does not change, but remains upon the government to satisfy the jury that the act was unjustifiable and unlawful.

Id.

137. Imposing a burden of production on the defendant need not entail a shift in the burden of persuasion. The practice in Massachusetts is to impose the burden of persuasion on the prosecution even on issues which constitutionally could be left to the defendant to prove, such as license and criminal responsibility. *See* Commonwealth v. Jones, 372 Mass. 403, 406, 361 N.E.2d 1308, 1311 (1977); Commonwealth v. Kostka, 370 Mass. 516, 532, 350 N.E.2d 444, 455 (1976).

that issue. On this issue, under Massachusetts procedure, the defendant is thereby deprived of the right to a sufficiency assessment based solely on the prosecution's evidence, before the case is submitted to a jury. Consequently, the defendant is also deprived of the opportunity to win an unappealable insufficiency ruling on that issue.[138] If the judge determines that the defendant has not satisfied the burden of production on a particular issue, the judge will not instruct the jury on that issue in effect, directing a verdict against the defendant. The prosecution will be relieved of its constitutional duty to disprove the claim to the jury's satisfaction beyond a reasonable doubt.[139]

The practice of imposing on the defendant a burden of producing evidence on a defensive issue which contests an essential element of the crime will frequently be inconsistent with the rulings and rationales of *McKie* and *Jackson.* This is, nonetheless, the current Massachusetts practice.[140] The Supreme Court's earlier comments on this issue are consistent with an interpretation of *Jackson* which would prohibit shifting the burden of producing evidence on an elemental defense unless the evidence presented by the prosecution in its case-in-chief would support a finding by the factfinder that the issue (e.g., self-defense) has been disproved beyond a reasonable doubt.

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138. The only opportunity afforded the defendant by Rule 25 to have the sufficiency of the prosecution's evidence assessed standing alone is that provided at the close of the prosecution's case under Rule 25(a). If the burden of production is on the defendant, the "prosecution's best case" rule will foreclose consideration of the defendant's evidence on that issue even if the defendant succeeded in satisfying the burden of production through cross-examination. If the defendant satisfies the burden of production and the prosecution presents rebuttal evidence, the sufficiency issue will be determined on all the evidence, but the defendant's evidence will be considered in the light most favorable to the prosecution. *See* Commonwealth v. Latimore, 378 Mass. 671, 676-78, 393 N.E.2d 370, 373-75 (1979).

Similarly, on the defendant's motion, the judge is required to assess the sufficiency of the prosecution's evidence at the close of its case-in-chief before the case can proceed. MASS. R. CRIM. P. 25(a). On a motion at any later point in the process, the judge has the discretion to reserve ruling until after the jury returns a verdict. *Id.* 25(b)(1). A required finding of not guilty entered before a verdict is final; such a ruling after a verdict is appealable. Commonwealth v. Therrien, 383 Mass. 529, 532-33, 420 N.E.2d 897, 899-900 (1981).

139. The foregoing analysis of the effect of shifting the burden of production to the defendant draws heavily on Allen, *supra* note 7, and McNaughton, *supra* note 7.

140. *See, e.g.*, Lannon v. Commonwealth, 379 Mass. 786, 790-91, 400 N.E.2d 862, 865 (1980); Commonwealth v. Rodriguez, 370 Mass. 684, 687-88, 352 N.E.2d 203, 205-06 (1976) (self-defense); Commonwealth v. Leaster, 362 Mass. 407, 416-17, 287 N.E.2d 122, 128 (1972) (alibi).

The Court's dictum in *Mullaney v. Wilbur*[141] is not to the contrary. The Court stated that its holding that the *Winship* principle did not permit the state to shift the burden of *persuasion* to the defendant on an elemental defense was not intended to affect the common practice of assigning the defendant a burden of production on such issues.[142] The Court also acknowledged that its earlier decisions had established the proposition that procedural devices that shifted the burden of production to the defendant must satisfy certain procedural safeguards.[143] In one of those earlier decisions, *Barnes v. United States*,[144] the Court acknowledged that the prosecution must first produce sufficient evidence to establish a "rational connection" between its evidence and the fact upon which the defendant would be required to produce evidence.[145] That "rational connection" was satisfied in *Barnes* because the prosecution's evidence was sufficient to prove the issue beyond a reasonable doubt.[146]

In the other early case, *Turner v. United States*,[147] the Court refused to approve a shift in the burden of production to the defendant on the elemental issue when the government's evidence at the time of the shift was not sufficient to convict on that issue.[148]

> The difficulties with the suggested approach are obvious: if the Government proves only possession and if possession is itself insufficient evidence of either importation or knowledge, but the statute nevertheless permits conviction where the defendant chooses not to explain, the Government is clearly relieved of its obligation to prove its case, unaided by the defendant, and the defendant is made to understand that if he fails to explain he can be convicted on less than sufficient evidence to constitute a prima facie case.[149]

Barnes and *Turner* teach that there is a necessary prerequisite to using a procedural and evidentiary device which indirectly gives the defendant the burden of producing evidence on an elementary issue:

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141. 421 U.S. 684 (1975).

142. *Id.* at 701 n.38.

143. *Mullaney*, 421 U.S. at 702 n.31; *see* Barnes v. United States, 412 U.S. 837, 846 n.11 (1973); Turner v. United States, 396 U.S. 398, 406 n.6 (1970).

144. 412 U.S. 837 (1973).

145. *Id.* at 843.

146. *Id.* at 845.

147. 396 U.S. 398 (1970).

148. *Id.* at 423.

149. 396 U.S. at 408 n.8 (citing Tot v. United States, 319 U.S. 463, 469 (1943)). The Court noted that it had ruled similarly in Leary v. United States, 395 U.S. 6, 33-34 (1969).

the prosecution's evidence must be "rationally connected" to the element to be proved. The holdings of *McKie* and *Jackson* support the proposition that this rational connection must be strong enough to support a conviction without artificial assistance. Similarly, the burden of production on an elemental issue also cannot be *directly* assigned to the defendant until the prosecution has satisfied its constitutional burden of production as to that element. The principle of *Jackson v. Virginia*[150] imposes the same limitation.[151]

The practice of imposing the burden of production on a defendant who wishes to defend upon grounds that negate an essential element of the prosecution's case does not serve any legitimate purpose that would not be served by another readily available device. The principal purposes of imposing this burden upon the defendant are twofold: to notify the prosecution that the issue is being contested, and to relieve the prosecution of the onus of proving unknown negatives. To the extent the practice is used to assess the sufficiency of the defendant's evidence, the due process principle of *Jackson* is offended by any standard more demanding than that which questions whether the evidence might raise a reasonable doubt on some element of the defense.[152] The notice and issue-narrowing functions served by the practice of imposing defensive burdens of production on an elemental issue can be served by slightly enlarging the scope of the notice requirements of Rule 14(b)(2) to include all affirmative defenses.[153] In the case in which the defendant has notified the prosecution that an elemental issue will be contested by a claim of justification or excuse, there usually will be no reason why the prosecution should not be required to offer its evidence on that issue as part of its

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150. 443 U.S. 307 (1979); *see supra* notes 4-9 and accompanying text.

151. The supreme judicial court's ruling in Commonwealth v. Pauley, 368 Mass. 286, 292-99, 331 N.E.2d 901, 905 (1975), is based on reasoning consistent with this conclusion, but its finding that the evidence in that case satisfied the standards articulated is dubious in the extreme. *See id.* at 288-89, 292 n.7, 331 N.E.2d at 903-04, 905 n.7.

152. This is a logical application of the principle that a burden of production is a function of the corresponding burden of persuasion. Allen, *supra* note 7, at 329; McNaughton, *supra* note 7, at 1390.

The allocation of the burden of producing evidence is best understood as in allocation of the risk of non-persuasion of the judge. McNaughton, *supra*, at 1383-84; J.THAYER, *supra* note 9, at 355 (1898); *see also*, Bailey v. United States, 444 U.S. 339, 415 (1980). When the prosecution's burden of persuasion on an issue is beyond a reasonable doubt the defendant's burden of persuasion is to raise a reasonable doubt. If the defendant's evidence is sufficient to do so, he or she is entitled to have the jury hear it and decide the issue because the jury could reasonably acquit.

153. MASS. R. CRIM. P. 14(b)(2) provides that notice be given of the intent to assert the following "defenses": insanity, license, alibi.

case-in-chief.[154] This practice will facilitate a more orderly and effective sufficiency assessment by increasing the likelihood that the issues will have been joined on a factual level rather than simply on the more abstract "elemental" level.[155] Such an approach will make it more likely that the court will be able to determine whether the prosecution's evidence furnishes a rational factual basis upon which the defendant might be convicted. Finally, this practice would eliminate the possibility that the defendant would have the burden of production on an issue that might lead the jury to infer that the defendant also bears a burden of persuasion greater than of establishing a reasonable doubt on that issue.[156] These relatively minor changes in the proof process are necessary to render the sufficiency assessment process capable of fully protecting the due process protections guaranteed criminal defendants through the presumption of innocence and the *Winship* principle.

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154. In Commonwealth v. Gould, 380 Mass. 672, 677 n.7, 405 N.E.2d 927, 903 n.7 (1980), the supreme judicial court noted that "as a matter of discretion" the trial judge, on the defendant's motion, required the prosecution to present affirmative evidence of criminal responsibility in its case-in-chief after the defendant had complied with the notice requirement of Rule 14(b)(2).

Generally, evidence raising an issue of self-defense or accident may be introduced by either party. The defense may unavoidably inject the issue through the victim's testimony, Commonwealth v. Domaingue, 8 Mass. App. 228, 234-35, 392 N.E.2d 1207, 1211-12 (1979), or pretrial statements of the defendant, Commonwealth v. Dilone, 385 Mass. 281, 283, 431 N.E.2d 576, 578 (1982); Commonwealth v. Fluker, 377 Mass. 123, 127, 385 N.E.2d 256, 259 (1979); Commonwealth v. Houston, 332 Mass. 687, 689-90, 127 N.E.2d 294, 295 (1955). The defendant may testify to the facts, Lannon v. Commonwealth, 379 Mass. 786, 787, 400 N.E.2d 862, 863 (1980); Connolly v. Commonwealth, 377 Mass. 527, 528-29, 387 N.E.2d 519, 521 (1979); Commonwealth v. Collins, 374 Mass. 596, 598, 373 N.E.2d 969, 971 (1978); Commonwealth v. Stokes, 374 Mass. 583, 586-87, 374 N.E.2d 87, 90-91 (1978); Commonwealth v. Rodriguez, 370 Mass. 684, 686, 352 N.E.2d 203, 204 (1976); Commonwealth v. Martin, 369 Mass. 640, 643, 341 N.E.2d 885, 888 (1976); Commonwealth v. Lacasse, 365 Mass. 271, 272, 310 N.E.2d 605, 606 (1974), or eyewitness testimony may provide the evidence, Commonwealth v. Lowe, 15 Mass. App. 262, 263, 444 N.E.2d 1314, 1316 (1983); *Rodrigues*, 370 Mass. at 686, 352 N.E.2d at 204; *Martin*, 369 Mass. at 643, 341 N.E.2d at 888; *Houston*, 332 Mass. at 687, 127 N.E.2d at 295.

155. In *Jackson*, the Court retreated from its articulation of the *Winship* principle in terms of the "facts necessary to constitute the crime" to the "essential elements of the crime." *Compare In re* Winship, 397 U.S. 358, 364 (1970) *with Jackson*, 443 U.S. at 316. This shift in emphasis may have been necessary in Patterson v. New York, 432 U.S. 197 (1977), to facilitate the resolution of jury instruction issues which arose from the decision in Mullaney v. Wilbur, 421 U.S. 684 (1978). In the sufficiency context, consequence of stating the legal standard in terms of elements rather than facts is that the impetus to assess the issues factually is deflected and the judge's scrutiny of the prosecution's case will not be as exacting as it should be.

156. The possibility of this type of confusion entering the case by the manner in which the issue is injected and presented is most acute in self-defense cases because of the difficulty of instructing the jury on the elaborate criteria and structure of this issue without creating the impression that the defendant bears the burden of persuasion.

C. *The Burden of Production and Sufficiency of the Evidence on Affirmative Defense Issues*

In Massachusetts, an affirmative defense practice is a claim that raises issues not generated by the charge; that is, a claim recognized in law as exculpatory but raising matters that are not placed in issue by any element of the crime. In the absence of evidence sufficient to put the matter in contest, it will not be an issue in the case.[157] The sufficiency assessment on such an issue stands on different constitutional footing than it does when an elemental issue is addressed. By definition, the presumption of innocence is not implicated because due process principles would not be offended by a conviction that does not include consideration of the issue. But the sufficiency process also protects the integrity of the burden of persuasion by insuring that the jury has sufficient evidence to support a finding on the issue beyond a reasonable doubt. Due process requires that jury decisions on affirmative defense issues rest upon sufficient evidence and not on speculation, bias or other non-evidentiary bases.[158] The sufficiency process is an essential guardian of this policy. In addition, the no-reservation policy of Rule 25(a)—which applies only to the assessment made at the close of the prosecution's case-in-chief—secures an important double jeopardy protection: It guarantees a final decision favorable to the defendant when made at that point. Two questions arise with regard to affirmative defenses, then: what due process principles limit the state's authority to treat an issue relevant to guilt or punishment as an affirmative defense; and how should the process of assessing the sufficiency of the prosecution's evidence on these issues be structured?

Both the United States Supreme Court and the Massachusetts Supreme Judicial Court have held that *Morrison v. California (Morrison II)*[159] articulates the due process limitations on the state's

157. *Cf.* Patterson v. New York, 432 U.S. 197, 206-07 (1977) (An "affirmative defense . . . does not serve to negative any facts of the crime which the State is to prove in order to convict of murder. It constitutes a separate issue on which the defendant is required to carry the burden of persuasion . . . ."); *see also* Allen, *supra* note 7, at 327. As noted earlier, Massachusetts law imposes only a burden of production on the defendant; the prosecution is required to disprove properly raised affirmative defenses beyond a reasonable doubt. Commonwealth v. Jones, 372 Mass. 403, 406, 361 N.E.2d 1308, 1311 (1977).

158. *See Jackson*, 443 U.S. at 315-20; Commonwealth v. Mutina, 366 Mass. 810, 816, 822-23, 323 N.E.2d 294, 297-98, 301-02 (1975). The fact that the prosecution must prove an issue beyond a reasonable doubt does not by itself make that issue an essential element of the crime. Engle v. Isaac, 456 U.S. 107, 120 & n.20 (1982).

159. 291 U.S. 82 (1934) (hereinafter cited as *Morrison II*).

power to reallocate burdens of persuasion (and therefore production) by treating factors relevant to guilt as affirmative defenses.[160] *Morrison II* condemned the use of a statutory presumption in prosecutions under a California law which prohibited the use of real property within the state by one who was both a non-citizen and ineligible by race for United States citizenship.[161] The statute required the state to charge the defendant with being an ineligible non-citizen but permitted the jury to convict upon proof that the defendant was a land-user.[162] The defendant was required to prove his eligibility or citizenship to the jury's satisfaction.[163] Writing for the Court, Justice Cardozo contrasted this statutory scheme to the one approved the previous term in *Morrison v. California* (*Morrison I*).[164] The statute in *Morrison I* created a similar presumption of ineligibility and non-citizenship but was triggered upon proof by the prosecution that the defendant was a land-user and a member of an ineligible race. That is, the defendant was required to prove that he or she was exempt from the general prohibition.[165]

Because the Supreme Court in both *Morrison* cases was dealing with the permissibility of shifting the burden of production to the defendant upon elemental issues, its classic statement of the limits of reason and fairness that regulate the practice must be read with the *Winship* principle in mind as a qualifier.[166] The burden of production on an issue considered determinative of guilt or degree of guilt may be assigned to the defendant only when the elements upon

160. *Id.* at 88-89. *See* Patterson v. New York, 432 U.S. 197, 203 n.9 (1977); Commonwealth v. Jones, 372 Mass. 403, 408, 361 N.E.2d 1308, 1312 (1977); *see also* Rossi v. United States, 289 U.S. 89, 91-92 (1933); United States v. Chodar, 479 F.2d 661, 663 (1st Cir. 1973), *cert. denied*, 414 U.S. 912 (1973) (state is not required to allocate to itself the burden of producing evidence that would tend to disprove an affirmative defense not established by the defendant).

As late as 1950, the *Morrison II* doctrine was applied to burden of persuasion issues. *See* Fleischman v. United States, 339 U.S. 349, 361-62 (1950); *see also id.* at 376-77 (Black, J., dissenting) (relying in part on Tot v. United States, 319 U.S. 463 (1943)). After *Winship* and *Mullaney*, of course, *Morrison II* cannot be applied to elemental burden of persuasion issues.

161. 291 U.S. at 96.

162. *Id.* at 84.

163. *Id.* at 84, 88. This statute clearly illustrates the manner in which a statutory presumption or inference shifts to the defendant the burden of producing evidence on the issue it addressed. See Commonwealth v. Pauley, 368 Mass. 286, 292-99, 331 N.E.2d 901, 905-09 (1975), for an exposition on the supreme judicial court's views on this issue.

164. 288 U.S. 591 (1933) (hereinafter cited as *Morrison I*).

165. *See Morrison II*, 291 U.S. at 84.

166. The Court, however, approved the *Morrison II* principles without qualification in Patterson v. New York, 432 U.S. 197, 203 n.9 (1977).

which the prosecution bears the *Winship* burden of proof "make it just for the defendant to be required to repel what has been proved with excuse or explanation . . . ."[167] This test is most clearly met in cases like *Commonwealth v. Jones*[168] where the statute created a general prohibition subject to authorized exceptions.[169] Under such statutes, the *Morrison II* is most likely to be met: either the defendant enjoys an advantage over the prosecution in possession of, or access to, the information[170] needed to prove the issue or shifting the burden will aid the prosecution without subjecting the defendant to hardship or oppression.[171] The likelihood of such a problem arising in Massachusetts, on any matter outside the reach of Massachusetts General Laws, ch. 278, § 7 is remote, given this jurisdiction's policy of requiring the prosecution to assume the burden of persuasion beyond a reasonable doubt to disprove matters of justification, mitigation and excuse.[172] Because only the burden of production is shifted on affirmative defenses, the possibility that a defendant will be seriously disadvantaged by the rule is likely to appear only in cases in which he or she must testify in order to place that matter in issue.

The effect on the sufficiency assessment of assigning the burden of production to the defendant is not entirely clear. Rule 25(a) requires the trial judge to determine whether the evidence, under consideration at the time a motion for a required finding of not guilty is made, "is insufficient as a matter of law to sustain a conviction on the charge."[173] The standards of legal sufficiency in *Jackson* and *Commonwealth v. Latimore*[174] are articulated in terms of "the essential elements of the crime."[175] Arguably, if the scope of the required sufficiency assessment is limited to elemental issues, a defendant is not entitled to the assessment on any issue that is legitimately char-

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167. *Morrison II*, 291 U.S. at 88-89.

168. 372 Mass. 403, 361 N.E.2d 1308 (1977).

169. *Id.* at 405-07, 361 N.E.2d at 1310-11. This test generally validates the application of MASS. GEN. LAWS ANN. ch. 278, § 7 (West 1981).

170. This is not so where the privilege against self-incrimination would be compromised. Barnes v. United States, 412 U.S. 837, 846-47 (1973); Commonwealth v. Pauley, 368 Mass. 286, 297-98, 331 N.E.2d 901, 908 (1975).

171. In this respect it is relevant to consider that the *Morrison* principles applied to the practice of shifting the entire burden of proof, both production and persuasion, to the defendant. The fact that the prosecution has the burden of persuasion might be relevant to whether it is unfair to assign the defendant the burden of production.

172. *See, e.g.*, Commonwealth v. Thurber, 383 Mass. 328, 331, 418 N.E.2d 1253, 1256 (1981) (defense of necessity to charge of prison escape).

173. MASS. R. CRIM. P. 25(a).

174. 378 Mass. 671, 393 N.E.2d 370 (1979).

175. *Jackson*, 443 U.S. at 319; *Latimore*, 378 Mass. at 676-77, 393 N.E.2d at 374.

acterized as an affirmative defense. That literal reading of *Jackson* and *Latimore*, however, is inimical to the underlying rationale of each case, which is to insure that jury verdicts are reasonably supported by persuasive evidence.[176] The practice of assuring the sufficiency of the evidence also serves to safeguard the integrity of the beyond a reasonable doubt standard of persuasion. Finally, the sufficiency judgment plays an indispensable role in securing important double jeopardy interests for defendants.[177] Although the reasons for allowing the defendant to satisfy the burden of production on an affirmative defense by pleading it under Rule 14(b) are not as compelling as they are in the case of elemental issues, such a practice would promote consistency and eliminate unneeded complications in the sufficiency assessment process.

D. *The Use of Proof-Facilitating Devices to Satisfy the Prosecution's Burdens of Production and Persuasion*

Statutory and common law devices called presumptions, *prima facie* cases and inferences are commonly used in Massachusetts to facilitate the proof of difficult issues by clarifying or declaring the relationships commonly perceived to exist between proven facts and legal conclusions. These devices are ordinarily introduced into the proof process through the judge's instructions to the jury[178] and consist of a predicate (the facts which trigger the presumption or inference, or establish the *prima facie* case) and a conclusion.[179] The

176. This concern has long been considered integral to the mission of the Massachusetts courts to see that justice is done. *See* Commonwealth v. Sherry, 386 Mass. 682, 687, 437 N.E.2d 224, 227 (1982); Commonwealth v. Bearse, 358 Mass. 481, 488, 265 N.E.2d 496, 499 (1970); Commonwealth v. Mutina, 366 Mass. 810, 812, 323 N.E.2d 294, 295 (1975).

177. *See, e.g.*, United States v. Martin Linen Supply Co., 430 U.S. 564, 572 (1977).

178. While all three of these devices are nominally used in Massachusetts criminal cases, after Sandstrom v. Montana, 442 U.S. 510 (1979), and Ulster County Court v. Allen, 442 U.S. 140 (1979), each has been modified to eliminate any mandatory effect it might have on the fact-finder's reasoning process and none is given artificial evidential value. P. LIACOS, HANDBOOK OF MASSACHUSETTS EVIDENCE 53-59 (5th ed. 1981). Presumptions such as that created by MASS. GEN. LAWS ANN. ch. 278, § 7 (West 1981), which assign the initial burden of production to the defendant, are not applied to elemental issues. *But see* Commonwealth v. Jones, 362 Mass. 83, 89, 283 N.E.2d 840, 845 (1972).

In short, such devices must leave the fact-finding process to the jury, which may draw inferences from the evidence as suggested by the device used, provided the jury is satisfied of the existence of the inferred fact beyond a reasonable doubt. P. LIACOS, *supra*, at 59.

179. An example of an inference which does not directly address an essential element of a crime is found in Commonwealth v. Niziolek, 380 Mass. 513, 404 N.E.2d 643 (1980). There, the court stated:

object of the device is to delineate an acceptable path by which the jury may find that an important fact, usually but not necessarily an essential element of proof, has been established.

The impact of such proof-facilitating devices on the sufficiency assessment process may be direct or indirect, but, in any event, will shift the burden of production of evidence to the defendant on the issue in question. This in turn will deprive the defendant of the one mandatory review—guaranteed by the "no-reservation" provision of Rule 25(a)—of the sufficiency of the prosecution's evidence on the facts relevant to that issue. The sufficiency assessment on this issue will be deflected from specific factual issues to the more general elemental issues and the prosecution will be afforded the strategic advantage of being permitted to present its primary case on the issue as rebuttal to the defendant's evidence. In effect, this shift in the burden of production creates the appearance, jury instructions to the contrary notwithstanding, that the defendant bears the burden of persuasion on that issue.

The burden-shifting effect of the use of a presumption or rule of *prima facie* evidence is illustrated by the facts in the case of *Commonwealth v. Pauley*.[180] Pauley was charged with being the driver of a motor vehicle who used the Callahan Tunnel and deposited a copper slug in a meter at the end of the tunnel, with intent to evade payment of the toll. By stipulation, only the identity of the driver was contested. The prosecution's evidence was that the complaining officer had heard the meter signal a false deposit and noted the license plate number of the car. He had only a momentary side and rear view of the operator whom, he observed, had shoulder length hair and wore glasses. No arrest was made; the charge was brought on a complaint against Pauley, to whom the car was registered. At the bench trial, Pauley appeared with short hair and without glasses; he presented no evidence. The following provision was invoked to establish that Pauley was the operator of the car: "If a vehicle is

> Now, as to the matter of a witness by the name of Raymond Bednarz, a potential witness in this case not appearing and testifying. You may draw a negative inference adverse to the defendant from the defendant's failure to call Raymond Bednarz as a witness for the defense. You are not compelled to do so. You may and that is for you to say, and by that I mean it's an inference that if Raymond Bednarz did testify, then he would testify adversely to the defendant.

Id. at 523-24, 404 N.E.2d at 649. A serious flaw in this particular instruction was the trial judge's failure to tell the jury that the inference must be based on predicate facts, and to identify what those must be. That is, the jury should have been told: "If you find X then you may conclude Y."

180. 368 Mass. 286, 331 N.E.2d 901 (1975).

operated within tunnel property in violation of any provision of these rules and regulations and the identity of the operator of such vehicle cannot be determined, the person in whose name such vehicle is registered shall be deemed prima facie responsible for such violation."[181]

The supreme judicial court construed this device as authorizing, but not requiring, the factfinder to infer from the fact that Pauley was the registered owner—"nothing else appearing"—that he was responsible for the violation.[182] *A fortiorari*, the evidence that Pauley was the registered owner would have been legally sufficient to require denial of a motion for a required finding of not guilty made at the close of the prosecution's evidence.[183] The burden of producing evidence that he was not the operator was thereby shifted to Pauley.

The effect of a formal common law or statutory inference is similar. The facts of *Commonwealth v. Johnson*[184] illustrate how the common law inference permitting the jury in a homicide case to infer malice solely from the fact that the defendant used a deadly weapon to cause the decedent's death operates like an affirmative defense designation, relieving the prosecution of its burden of producing actual evidence of malice and deflects the inquiry from the facts to the abstract elements of the offense.

Several preliminary points must be made. First, under Massachusetts law, a homicide is punishable as murder or manslaughter only if it is unlawful.[185] Malice distinguishes murder from manslaughter in an unlawful homicide.[186] Ordinarily the jury will decide whether a killing was malicious, and therefore murder, by considering the circumstances to determine what they disclose about the killer's frame of mind; for example, whether the circumstances show that the fatal blow was purposefully and wrongfully inflicted or

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181. *Id.* at 289, 331 N.E.2d at 903-04.

182. *Id.* at 291, 331 N.E.2d at 905.

183. The evidence that the officer's description of the driver did not match the defendant's appearance was considered only to establish the first predicate needed to trigger the prima facie evidence device: that the identity of the operator cannot be determined. *Id.* at 289, 231 N.E.2d at 903. In short, when the prosecution did not have sufficient evidence of this essential element, the device made proof of another fact—registration—sufficient unless the defendant produced evidence that he was not the operator. As Professor Allen observes, another effect of this kind of device (presumptions work similarly) is to artificially increase the weight of the prosecution's evidence. Allen, *supra* note 7, at 322.

184. 3 Mass. App. Ct. 226, 326 N.E.2d 355 (1975).

185. Commonwealth v. Rodriguez, 370 Mass. 684, 688, 352 N.E.2d 203, 206 (1976).

186. Commonwealth v. Hodge, 380 Mass. 858, 865, 406 N.E.2d 1015, 1020 (1980).

rather the result of chance or human frailty.[187] If the defendant claims that the killing occurred in circumstances that show sudden combat, the prosecution must prove beyond a reasonable doubt that they did not.[188] Second, the presumption of innocence and the "no reservation" provision of Rule 25(a) combine to provide a defendant a fundamental set of protections against a conviction on insufficient evidence. The "presumption of innocence" is a term used to describe the defendant's fundamental due process right to

> remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion; i.e., to say in this case, as in any other, that the opponent of a claim or charge is presumed not to be guilty is to say in another form that the proponent of the claim or charge must evidence it.[189]

The defendant thus is entitled not to be required to defend until the prosecution has satisfied its burden of production. This right is secured by the requirement of Rule 25(a) that the trial judge rule on a motion for a required finding of not guilty made at the close of the prosecution's case before proceeding further.

The facts of *Johnson* illustrate the purposes of these protections and how the use of inferences can jeopardize their effectiveness. The prosecution's case-in-chief consisted primarily of a transcribed statement taken by the police from the defendant shortly after the victim was killed. In the statement, Johnson admitted killing the victim, but claimed he did so in self defense. Johnson explained that the victim had attacked and stabbed him with a knife. Johnson then stabbed the victim, using either the victim's weapon or one handed to him by bystanders. The other evidence offered by the prosecution was consistent with this account and to some degree corroborated it (a police officer testified they found Johnson by following a trail of blood from his wounded hand).[190] The trial judge denied of the defendant's motion for a directed verdict on the murder charge, but the

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187. "Manslaughter under circumstances of sudden combat is not committed as the result of a deliberated act, but is homicide in the heat of blood, a perturbation of mind palliating the intent to inflict injury." *Id.*

188. An intentional killing in self-defense is not unlawful; such a killing in sudden combat is unlawful, but not malicious, and therefore constitutes manslaughter rather than murder. *Compare* Commonwealth v. Rodriguez, 370 Mass. 684, 689, 352 N.E.2d 203, 206 (1976), *with* Commonwealth v. Hodge, 380 Mass. 858, 865, 406 N.E.2d 1015, 1020 (1980).

189. Taylor v. Kentucky, 436 U.S. 478, 484 n.12 (1978) (quoting H. WIGMORE, EVIDENCE § 2511 (3rd Ed. 1940)). *Accord* J. THAYER, *supra* note 7, at 552.

190. 3 Mass. App. Ct. at 227, 326 N.E.2d at 356.

appeals court reversed.[191]

The appeals court viewed the issue as being unprecedented in Massachusetts: whether the defendant is entitled to a directed verdict where the evidence adduced to establish the predicate for the inference of malice[192] shows the intentional killing to have been without malice.[193] The court reasoned that the only evidence adduced by the prosecution demonstrated that the killing occurred in circumstances which showed at least a sudden fight in which the decedent was the aggressor and in which the defendant's intention to kill was formed "in the heat of sudden combat."[194] Ordinarily, of course, the jury would be free to accept or reject whatever parts of the defendant's statements they chose, but in this case the appeals court saw no basis (such as inconsistency or implausibility) upon which the jury might reasonably have accepted the portion of the transcribed statement which discriminated rationally between the incriminating and mitigating portions of the statement. In these circumstances, the court ruled, the prosecution failed to meet its burden of production on the issue of malice; it made out no more than manslaughter.[195]

A preferable basis for the appeals court's ruling might be that

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191. *Id.* at 233, 326 N.E.2d at 360. This ruling was not appealed to the Massachusetts Supreme Judicial Court.

192. Malice may ordinarily be inferred from the intentional use of a deadly weapon. Commonwealth v. Jones, 366 Mass. 805, 809, 323 N.E.2d 726, 729 (1975). "[R]educed to its lowest terms, malice in murder means knowledge of such circumstances that according to common experience there is a plain and strong likelihood that death will follow the contemplated act, coupled perhaps with an implied negation of any excuse or justification." Commonwealth v. Chance, 174 Mass. 245, 252, 54 N.E. 551, 554 (1899).

193. *Johnson*, 3 Mass. App. Ct. at 232, 326 N.E.2d at 359-60.

194. *Id.* at 233, 326 N.E.2d at 360.

195. *Id.* The court also commented that Johnson's statement did not make out a claim of self defense because it did not show that Johnson had no avenue of escape or that he availed himself of all proper means to avoid combat or that he used no more force than necessary to defend himself. *Id.*

This ruling demonstrates the effect of imposing on the defendant the burden of producing evidence of an elemental exculpatory issue. Under the rule of Commonwealth v. McKie, 67 Mass. (1 Gray) 61 (1854), if the prosecution's evidence left the issue in doubt, it failed to prove the unlawfulness of the killing. *See id.* at 64. The statement itself was sufficient to put the prosecution on notice that self-defense might be an issue. The prosecution's evidence was that Johnson had been attacked by an armed man. It offered no evidence that he had a safe avenue of retreat, was able to avoid the fight or could have defended himself without killing the decedent. By offering sufficient evidence to prove any one of these propositions beyond a reasonable doubt the prosecution could have satisfied its burden of production on the issue of unlawfulness.

It is interesting to note that Johnson was confined in a mental institution from the date of his arrest until the day of trial, and that the prosecution failed to produce one

the prosecution's evidence did not reasonably support an inference that the killing was malicious.[196] Where the inference is directed to an essential element of the crime, it cannot be employed to satisfy the prosecution's burden of persuasion unless the facts upon which it is based (the predicate) provide sufficient evidence to support a jury's conclusion that the inferred fact has been established beyond a reasonable doubt.[197] An inference of malice, based solely on the defendant's intentional use of a deadly weapon to cause death, cannot rationally be drawn from the *Johnson* facts.

Malice is demonstrated by circumstances that reasonably support an inference that the defendant was aware that his actions were likely to kill and was acting without excuse, justification or mitigation. The circumstances of the *Johnson* killing presented by the prosecution could be parsed, and facts isolated to support a conceivable predicate from which malice might reasonably be inferred. For example, that Johnson had started the fatal encounter or had vengefully killed the victim after disarming him. From what the opinions reveal about the record, and what both the appeals court and supreme judicial court accepted as given, the prosecution's substantive evidence was the defendant's written confession.[198] There was no factual basis disclosed upon which the jury could discriminate and sort out those parts of the statements it wished to believe or disbelieve. On the facts known to the jury, the two actual inferences suggested above are speculative, based on surmise. The prosecution's case must be judged on the *res gestae*[199] and if the issue of unlawfulness or malice is "left in doubt," the evidence is insufficient.[200] The jury may not be instructed that it might rely on the inference alone to convict; it must be instructed to consider all the

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witness to the stabbing, although numerous bystanders were present when the police arrived. 3 Mass. App. at 227 n.1, 326 N.E.2d at 356 n.1.

196. In the course of explicitly repudiating the appeals court's ruling, in *Johnson*, the supreme judicial court stated: "Evidence of an intentional killing by the defendant, absent any evidence of justification, is *sufficient* to permit the jury to infer that it was a killing with malice—i.e., murder in the second degree." Commonwealth v. McInerney, 373 Mass. 136, 146, 365 N.E.2d 815, 821 (1977) (emphasis added).

197. In United States v. Gainey, 380 U.S. 63 (1965), the Court held that statutes which make proof of specified facts sufficient evidence to authorize a conviction "authorize but do not require the trial judge to submit the case to the jury when the Government relies on [the predicate facts] alone, authorize but do not require an instruction to the jury based on the statute, and authorize but do not require the jury to convict based on [the predicate facts] alone." Turner v. United States, 396 U.S. 398, 406 n.6 (1970); Commonwealth v. Pauley, 368 Mass. 286, 293-94 n.10, 331 N.E.2d 901, 906 n.10 (1975).

198. *Johnson*, 3 Mass. App. Ct. at 228, 326 N.E.2d at 357.

199. *McKie*, 67 Mass. (1 Gray) at 63.

200. In Sandstrom v. Montana, 442 U.S. 510 (1979), the Supreme Court observed

circumstances surrounding the killing in determining whether the defendant acted maliciously.[201] Such narrowly-drawn inferences are likely to promote irrationality in decision-making;[202] they are inimical to the constitutional office of the sufficiency assessment which is to help insure that convictions will be rationally supported by evidence.[203]

Similarly, the effect of the malice inference was to shift the focus of the sufficiency of the evidence from a factual level to an abstract "elemental" level. The factual shortcomings of the prosecution's case were ignored through resort to an abstract proposition which was anchored to an isolated fact considered out of context. The defendant was thus required to defend even though the sufficiency of the prosecution's *evidence* was never actually scrutinized.[204]

The *Winship* principle requires that the trial judge instruct the jury that the inferences it draws be reasonably supported by the evidence.[205] In most situations, one or more reasonable inferences will be available from the evidence. Unless such a basis is presented (and that is part of the prosecution's burden of production), the prosecution's evidence is insufficient to support a conviction.[206]

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that juries cannot be instructed that it is permissible to infer intent from an isolated fact. *Id.* at 523.

201. *See* Commonwealth v. Fancy, 349 Mass. 196, 200-01, 207 N.E.2d 276, 280 (1965) (where the prosecution's evidence leaves the jury with no basis other than speculation for choosing between equally supported inferences of guilt or innocence, the prosecution has not proven its case supports this conclusion).

202. *See* Allen, *supra* note 7, at 332-36.

203. *Jackson*, 443 U.S. at 317-18.

204. There were a number of witnesses to the killing in *Johnson*. The defendant in his statement gave the police the names and addresses of witnesses who, he said, would corroborate his account of the event. The record indicated that the police had talked to some of the people who were at the scene when they arrived. The prosecution produced documentary evidence of one of these witnesses at trial, which occurred almost precisely one year after the killing. A police officer indicated no others could be found. 3 Mass. App. Ct. at 227 n.1, 326 N.E.2d at 356 n.1.

The defendant testified at trial that he had not made the statements attributed to him and asserted that he had not killed the decedent. He claimed he had been cut breaking up a fight between the decedent and two other men. He had, however, developed such severe psychiatric problems shortly after his arrest that he was hospitalized for a competency evaluation. 3 Mass. App. Ct. at 227 n.2, 326 N.E.2d at 356 n.2. While his bizarre testimony may account for the jury's verdict, it is irrelevant to the issue of the sufficiency of the prosecution's evidence of murder.

205. *In re* Winship, 397 U.S. 358, 364 (1970).

206. Both Massachusetts courts which discussed *Johnson* viewed the issue as one of credibility. The appeals court found that there was no reasonable basis on which the jury could believe the part of Johnson's confession that he killed the victim and disbelieve his account of the circumstances in which it had occurred. 3 Mass. App. Ct. at 233, 326 N.E.2d at 360. Therefore the prosecution had failed to prove malice. The court's sugges-

E. *The Use of Proof-facilitating Devices to Satisfy the Prosecution's Burden of Persuasion on Affirmative Defenses*

The practice of imposing a burden of production on the party having the burden of persuasion protects the presumption of innocence by insuring that the prosecution's case rests on evidence. A burden of production gives the standard of persuasion "concrete meaning" when it requires that the weight of the prosecution's evidence be sufficient to rationally satisfy that standard. A standard of persuasion which is not accompanied by a burden of production will be reduced in practice to a meaningless, unenforceable form of words. The Massachusetts experience with its efforts to moderate the "beyond a reasonable doubt" standard of persuasion in insanity cases by dispensing with a corresponding burden of production offers a clear demonstration of the unworkability of any scheme which ignores this necessary relationship.

Long before *Winship* was decided it had been the Massachusetts practice to dilute the prosecution's burden of persuasion on the issue of insanity by giving it the benefit of a presumption of sanity. This practice was challenged as being inconsistent with *Winship* in *Commonwealth v. Kostka*,[207] the defense arguing that the prosecution

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tion that self defense was disproved, however, indicates that it imposed a burden of production—the risk of nonproduction—on the defendant on both issues. *See id.* Because the prosecution's evidence established the predicate for the mitigating factor of sudden combat, the prosecution had to offer sufficient evidence to disprove that possibility beyond a reasonable doubt. Because the prosecution's evidence did not offer evidence to place each criterion of the self defense claim in issue, the prosecution did not have to offer sufficient evidence to disprove self-defense.

In rejecting the appeals court's reasoning on the credibility issue in *Johnson* the supreme judicial court stated flatly "the jury have the sole power to believe or disbelieve any or all such evidence (as Johnson's confession)." Commonwealth v. McInerney, 373 Mass. 136, 145, 365 N.E.2d 815, 821 (1975). This apparent rejection of the idea that the jury's credibility judgments must have a rational factual basis is inconsistent with the *Jackson* principle that the courts must insure that some reasonable factual basis is presented for the conclusions (inferences) the prosecution asks the jury to draw in order to convict. *See Jackson*, 443 U.S. at 319.

207. Commonwealth v. Kostka, 370 Mass. 516, 536-37, 350 N.E.2d 444, 458 (1976). The defense had presented the testimony of two experts (psychiatrists); one testified that the defendant was insane at the time the crimes were committed. The prosecution presented no countervailing expert opinion, relying instead on cross-examination of the defense experts, the testimony of witnesses depicting the defendant's conduct before, during and after the killing as deliberate and planned, and the presumption of sanity. *Id.* at 522-23, 350 N.E.2d at 449. The court ruled that, with the evidence in this posture, it was exclusively the jury's province to decide what relative weight to give the expert's testimony against the circumstances shown by the prosecution. *Id.* at 538-39, 350 N.E.2d at 459; *see also* Commonwealth v. Walker, 370 Mass. 548, 577-83, 350 N.E.2d 678, 698-700 (1976).

constitutionally could not rely, in whole or in part, upon the "presumption of sanity" to satisfy its burden of proving sanity beyond a reasonable doubt. The defense argument was that the due process principles derived from *Winship* prohibited the prosecution from relying upon any presumption or inference to meet its burden of persuasion unless it could be said with a reasonable degree of assurance that the fact inferred (sanity) flowed logically from the facts upon which it was based.[208] The supreme judicial court responded that such a requirement was imposed only when the inference or presumption was utilized to assist the prosecution in proving an element of any given crime;[209] the issue did not bear "any necessary relationship to the existence or nonexistence of the required mental elements" of any offense in Massachusetts law.[210] Rather, insanity is an affirmative defense which must be pleaded.[211] Even when pleaded it does not become an issue until some evidence of lack of criminal responsibility is adduced.[212]

208. Commonwealth v. Kostka, 370 Mass. 516, 526, 350 N.E.2d 444, 451 (1976). The defense relied on Barnes v. United States, 412 U.S. 837 (1973); Turner v. United States, 396 U.S. 398 (1970); and Leary v. United States, 395 U.S. 6 (1969). *Kostka*, 370 Mass. at 533, 350 N.E.2d at 455. In each case the Supreme Court held that the inferred fact must "more likely than not" flow from the predicate facts and implied that the required relationship might be beyond a reasonable doubt. *Barnes*, 412 U.S. at 843; *Turner*, 396 U.S. at 405; *Leary*, 395 U.S. at 36. In *Leary* the inference failed the more likely than not standard. 395 U.S. at 52-513. In *Barnes* and *Turner* the predicate facts alone were sufficient to support the inferred conclusion beyond a reasonable doubt. *Barnes*, 412 U.S. at 845; *Turner*, 396 U.S. at 417. Hence the issue of which standard was minimally required was left open. The supreme judicial court's interpretation of the due process requirements of these cases is set out in Commonwealth v. Pauley, 368 Mass. 286, 331 N.E.2d 901 (1975).

209. Commonwealth v. Kostka, 370 Mass. 516, 532, 350 N.E.2d 444, 455 (1976). This position is consistent with the Supreme Court's ruling on the *Winship* limitation on the designation of affirmative defenses in Patterson v. New York, 432 U.S. 197 (1977), and with its discussion in Engle v. Isaac, 456 U.S. 107 (1982), regarding states' freedom to assume the burden of persuasion on an issue without necessarily making it an element of the offense by operation of due process law.

210. Commonwealth v. Kostka, 370 Mass. 516, 533, 350 N.E.2d 444, 455 (1976). After Patterson v. New York, 432 U.S. 197 (1977), and Engle v. Isaac, 456 U.S. 107 (1982), it may be that the question of whether a particular relevant circumstance must be considered an element of the crime charged is not its logical relevance to an established element but: (1) whether the state legislature intended that it be elemental; and (2) whether that legislative judgment is reasonable in *Morrison II* terms. *See supra* notes 157-65 and accompanying text.

211. MASS. R. CRIM. P. 14(b)(2).

212. Rule 14(b)(2) imposes the pleading requirement. *Id.* The supreme judicial court has not determined how much evidence the defendant must produce to activate the issue, though it has noted that such evidence may be introduced during the prosecution's case in chief and that, in the majority of jurisdictions in which criminal responsibility is considered a "*Winship* fact" the defendant must raise a reasonable doubt on the issue in

The presumption of sanity, employed in Massachusetts has procedural qualities and is given an evidentiary impact which collectively prevent effective sufficiency review of the issue.[213] Procedurally, the presumption withholds the issue from controversy in cases in which it is not raised; that is, it places a burden to produce evidence of insanity on the defendant. In addition, where the issue has been raised, the presumption gives evidentiary weight to what is most accurately described as an assumption or premise, " 'the fact that a great majority of [people] are [criminally responsible]' " and a possible inference which might be drawn from that premise: " 'the probability [is] that any particular [person] is [criminally responsible].' "[214] The presumption is not weighed as evidence itself; however, "facts" that are not in evidence are nonetheless considered to be before the jury: "the jury's 'common experience that most people . . . are sane.' "[215] The supreme judicial court has held that the presumption alone affords a sufficient basis for submitting the issue to

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order to overcome the presumption of criminal responsibility (at which point the presumption disappears from the case and the issue is decided on evidence). Commonwealth v. Kostka, 370 Mass. 516, 527 n.7, 528 n.11, 350 N.E.2d 444, 452 n.7, 453 n.11 (1976).

Under the procedure described in Commonwealth v. Gould, 380 Mass. 672, 677 n.7, 405 N.E.2d 927, 930 n.7 (1980), the trial judge may discretionarily require the prosecution to assume its burden of persuasion in its case-in-chief where the issue of sanity has been pleaded.

213. The supreme judicial court has reasoned that, although the term "presumption" is used for convenience to describe the unique procedural-evidentiary device employed in structuring criminal responsibility in Massachusetts, it is not a true presumption but a hybrid one because it "shares but is not limited to, the characteristics of both presumptions and inferences." Commonwealth v. Kostka, 370 Mass. 516, 530-31, 350 N.E.2d 444, 454 (1976). Many devices called presumptions both operate procedurally (burden-allocating) and have an evidential impact, to the extent they rest on proof of facts offered in evidence. *See*, Allan, *supra* note 7, at 325-26; Jeffries & Stephan, 88 YALE L.J. 1325, 1335-38 (1979); *see also* Ulster County Court v. Allen, 442 U.S. 140 (1979).

A distinguishing, but not unique, feature of the device used in Massachusetts is the nature of its foundation, which is described as factual but is not evidential; that is, it need not consist of evidence presented to the jury from which the inference of criminal responsibility is drawn. *Kostka*, 370 Mass. at 530-31, 350 N.E.2d at 454.

214. Commonwealth v. Kostka, 370 Mass. 516, 530-31, 350 N.E.2d 444, 454 (1976) (quoting Commonwealth v. Clark, 292 Mass. 409, 415, 198 N.E. 641, 645 (1935)).

215. *Id.* (quoting United States v. Dube, 520 F.2d 250, 255 (1st Cir. 1975)). Then Judge Burger described the presumptive device utilized in the District of Columbia Court of Appeals in similar terms:

> The presumption of sanity, whatever may be its evidentiary value and weight, does not banish from the case, as [defendant] would have it. That presumption is grounded on the premise that the generality of mankind is made up of persons within the range of 'normal,' rational beings and can be said to be accountable or responsible for their conduct; this premise is rooted in centuries of experience, has not been undermined by contemporary medical knowledge, and

the jury.[216] Thus, the presumption eliminates the power of a trial judge to evaluate the sufficiency of the evidence of criminal responsibility.

In rejecting a defendant's due process challenge to the constitutionality of this presumption, the court gave three "fundamentally sound reasons" justifying the practice: First, the presumption protects the jury's factfinding discretion to decide the credibility of expert testimony on the subject and to determine the weight, if any, to give such testimony; second, because the facts underlying the presumption are within the jury's common sense and knowledge, it would be inappropriate and artificial to forbid the jurors to rely, at least in part, upon their common experience; and third, the requirement that the prosecution prove criminal responsibility beyond a reasonable doubt provides an adequate safeguard against erroneous convictions.[217] It is evident that one consequence of this practice is to render the Rule 25 sufficiency evaluation superfluous on all sanity fact issues; correspondingly, any judicial concern regarding the per-

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> justifies the continuance of the presumption after introduction of evidence of insanity.

Keys v. United States, 346 F.2d 824, 826 (D.C. Cir.), *cert. denied*, 382 U.S. 869 (1965).

216. Commonwealth v. Kostka, 370 Mass. 516, 536, 350 N.E.2d 444, 457-58 (1976); Commonwealth v. Smith, 357 Mass. 168, 179, 258 N.E.2d 13, 20 (1970); Commonwealth v. Clark, 292 Mass. 409, 415, 198 N.E. 641, 645 (1935).

217. Commonwealth v. Kostka, 370 Mass. 516, 535-36, 350 N.E.2d 444, 457-58 (1976).

Although an in-depth critique of this practice is not within the scope of this article, it is pertinent to note that the first and third of these reasons run directly counter to the *Winship*-based constitutional policies of *Jackson* and the second, as expressed, is based on a non sequitur.

The first is faulty because it is inconsistent with the due process requirement that a jury decide *Winship* fact issues exclusively on evidence presented to them. The jurors' common knowledge and experience, which they can properly rely on in judging credibility, making weight determinations and drawing inferences, are not evidence and cannot constitutionally be given evidentiary force. *Jackson*, 443 U.S. at 316. The third reason is directly repudiated in *Jackson*, in which the Court offered as a justification for its higher standard of sufficiency the danger that juries, even when properly instructed on the *Winship* burden of proof, may nevertheless convict on insufficient evidence. *Id.* at 317.

Finally, the second reason is faulty in two respects. First, it simply does not logically follow that abandonment of the evidential impact of the presumption would prevent jurors from drawing on their common knowledge and experience. It would confine use of these resources to their proper sphere, to be used as decisional tools rather than evidence. It is the office of the sufficiency of evidence evaluation to enforce such limitations on the jury's fact-finding discretion. *Id.* at 319. The propositions on which the presumption is based could be made the subject of proof through evidence, *e.g.*, by expert testimony. In fact, the need to rely on the presumption arises in cases in which the prosecution, inexplicably, has not produced expert testimony on the criminal responsibility issue. See Commonwealth v. Guiliana, 390 Mass. 464, 457 N.E.2d 275 (1983); Commonwealth v. Robinson, 14 Mass. App. Ct. 591, 441 N.E.2d 553 (1982).

suasive force of the prosecution's actual evidence of criminal responsibility must be treated as a weight of the evidence issue under the provisions of Rule 25(b)(2) (second sentence).[218]

The current Massachusetts practice for litigating the issue of sanity, then, is to impose a beyond a reasonable doubt burden of persuasion on the prosecution while relieving that party of any responsibility to present evidence on the issue. With this arrangement, the burden of persuasion is reduced to a form of words conveyed to the jury in instructions.

The Supreme Judicial Court has grappled with but not yet accurately perceived this problem in reviewing several first degree murder convictions in which the presumption of sanity apparently carried the day for the prosecution.[219] In these cases the prosecution presented neither expert evidence nor circumstantial evidence such as apparently rational, discriminating conduct by the defendant at or near the time of the crime. Juries nevertheless found the defendants criminally responsible beyond a reasonable doubt. Such clear evidence of extra-legal decision making by the jury has troubled the Court sufficiently to persuade it of the necessity of a new trial in each such case, but has not shaken the Court's commitment to the presumption of sanity. Indeed, the Court has not discussed the problem in terms of whether enforcing a burden of production is indispensible to enforcing a burden of persuasion. In fact, the Massachusetts presumption of sanity not only dispenses with the prosecution's burden to produce evidence, it virtually invites a conviction based on no evidence at all. If the beyond a reasonable doubt standard can be met without evidence its effect on jury decisions will depend entirely on the jury's inclination and ability to honor it.

Thus, regardless of whether the initial burden of producing evidence is imposed, the prosecution must be held to a standard of evidentiary sufficiency if the burden of persuasion is expected to play a realistic part in assuring jury verdicts are rationally supported by evidence. While the problem may be particularly acute in the sanity issue because jurors may resist the idea of such a defense and because of the unusual features of the presumption of sanity, the principle holds true for all instances where the prosecution is permitted to rely upon one or more proof-facilitating devices to satisfy its burden of disproving an affirmative defense. Any failure to insure that

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218. *See infra* text accompanying notes 484-97.

219. Commonwealth v. Kostka, 370 Mass. 516, 350 N.E.2d 444 (1976); Commonwealth v. Guiliana, 390 Mass. 464, 457 N.E.2d 275 (1983).

the prosecution produce evidence sufficient to satisfy its burden of persuasion will work to increase the risk of irrationality in the verdict.

In sum, it is both practical and a wise policy to require that the prosecution be required to produce, in its case-in-chief, evidence sufficient to satisfy its burden of persuasion on each issue in litigation, whether or not the issue is "elemental." The prosecution's interest in not being required to prove irrelevant negatives is satisfied by requiring the defendant to plead the claim sufficiently in advance of trial to permit the prosecution to meet it. This practice further secures the defendant's important interest in having the sufficiency of the prosecution's case evaluated exclusively on the prosecution's evidence, and simultaneously assists the trial judge by simplifying the tasks of applying the rational fact-finder and prosecution's best case rules. Similarly, the defendant's fundamental interest in not being required to defend inadequately founded charges is better secured by this practice and the policy of fixing the defendant's double jeopardy position at the close of the prosecution's case is facilitated. This practice is equally felicitous when applied to non-elemental issues that the prosecution must prove beyond a reasonable doubt.[220] The logical contradiction of severing the burden of production from the burden of persuasion is avoided and the defendant's interests, secured by this practice, are functionally, if not constitutionally, indistinguishable from those associated with elemental issues. The cost of this practice would be negligible.

F. *Evaluating the Evidence: the Trial Judge's Dilemma*

Having resolved preliminary issues affecting the scope of the charge and the evidence, defined critical statutory terms and identified the issues—both elemental and affirmative—upon which the sufficiency of the prosecution's evidence must be assessed, the trial judge then must evaluate the potential persuasive force of the body of evidence under consideration. The question is whether the evidence and the inferences permitted to be drawn therefrom (provided they are not too remote according to the usual course of events) are of sufficient force to bring minds of ordinary intelligence and sagacity to the persuasion of guilt beyond a reasonable doubt.[221] The con-

220. This is illustrated by the trial court's practice in Commonwealth v. Gould, 380 Mass. 672, 405 N.E.2d 927 (1980).

221. Commonwealth v. Latimore, 378 Mass. 671, 676-77, 393 N.E.2d 370, 374 (1979) (quoting Commonwealth v. Cooper, 264 Mass. 368, 373, 162 N.E. 729, 731 (1928); and Commonwealth v. Clark, 378 Mass. 392, 403-04, 393 N.E.2d 296, 303 (1979)).

stitutional duty to assess the sufficiency of the prosecution's evidence may press the conscientious trial judge against certain pre-*Winship* limitations imposed upon judges for the purpose of preventing them from infringing upon the jury's fact-finding prerogatives.[222] The traditional approach has been to distinguish between the activity of assessing the sufficiency of evidence on the one hand and weighing evidence on the other. On this view, the task of assessing the sufficiency of the evidence requires nothing more than an *evaluation* of the potential persuasive force of the evidence, while *weighing* the evidence involves judging credibility, drawing justifiable inferences and comparing the relative force of conflicting evidence.[223] The judge may assess sufficiency but may not weigh evidence in deciding a motion for a required finding of not guilty. The rationale of *Jackson,* however, is that it is the trial judge's constitutional function in assessing evidentiary sufficiency to insure that a case is not submitted to a jury unless the evidence presents facts upon which a jury might reasonably find guilt, even if the jury's factfinding prerogatives are limited in the process.[224] Implicitly, on a motion for a required finding of not guilty, the judge must insure that the evidence presents some reasonable basis for making the credibility and weight judgments and drawing the inferences necessary to a finding of guilt.

Such a motion invokes fundamental constitutional rights which it is the trial judge's duty to assiduously protect: the right to not be required to defend unfounded charges[225] and the right not to be arbitrarily convicted.[226] To discharge this duty the judge must undertake the difficult task of reviewing the prosecution's evidence and testing its logical strength in the mind of the hypothetical reasonable juror without assuming, to an unwarranted degree, the jury's fact-finding role of deciding what evidence to accept as true, what relative weight to give to conflicting sources of information or what inferences to draw from the evidence presented.

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222. *See* Commonwealth v. Cooper, 264 Mass. 368, 373, 162 N.E. 729, 731 (1928) (" 'we cannot consider any question of the weight of the evidence' ") (quoting Commonwealth v. Asherowski, 196 Mass. 342, 348, 82 N.E. 13, 15 (1907)); *see also* Curley v. United States, 160 F.2d 229, 232-33 (D.C. Cir. 1947).

223. *Jackson,* 443 U.S. at 319; Commonwealth v. Latimore, 378 Mass. 671, 676-77, 393 N.E.2d 370, 374 (1979).

224. 443 U.S. at 319. The Court acknowledged that every sufficiency assessment will limit the jury's fact-finding discretion to some degree. *Id.* at 319 n.13; *see also* Curley v. United States, 160 F.2d 229, 232 (D.C. Cir. 1947) (It is the function of the judge to deny the jury any opportunity to operate beyond its province.).

225. *See* Taylor v. Kentucky, 436 U.S. 478, 483 n.12 (1978); United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73 (1977).

226. *Jackson,* 443 U.S. at 313-14.

To assist the judge in restraining his or her critical judgment at this stage the law instructs the judge to interpret the evidence in terms most favorable to the prosecution's case; the "prosecution's best case" rule. While the interest nominally protected by this form of judicial restraint is the jury's fact-finding discretion, the actual interest affected, in adversarial terms, is the prosecution's opportunity to have the case submitted to the jury and to persuade the jury to convict.[227] The structural rules to be applied by the trial judge in this setting, then, reflect a resolution of two conflicting interests. To protect the defendant's right to terminate unwarranted proceedings at the earliest point possible, the judge must determine whether the prosecution's evidence is sufficient to persuade a reasonable factfinder that every element of the offense has been established beyond a reasonable doubt. To protect the prosecution's interest in having an opportunity to persuade the jury, the judge is required to view the evidence in terms most favorable to the prosecution. It is clear that these two rules—each supposedly describing the same boundary (distribution of fact-finding responsibility between judge and jury) from opposing perspectives—will not always be congruent. Moreover, because of the nature of the directed verdict inquiry, the sufficiency issue frequently raises other difficult issues of fact and law, many of which add to the difficulty of adhering to these role-defining rules.

Another set of problems which the trial judge must face in evaluating a motion for a required finding of not guilty during trial is that both the standard of decision and the structure of the inquiry have been fashioned by appellate courts and generally, are not sensitive to important differences in the trial judge's position and perspective. Appellate courts enjoy the benefits of knowing what the jury's decision was, having the assistance of transcripts of testimony and written arguments by counsel and having ample time to reflect and make a carefully-reasoned decision. The trial judge, in contrast, must rule at the close of the prosecution's case if the defendant moves at that time. Acquittal by the jury is still a possibility, in most cases a transcript of testimony has not been prepared, and because the decision cannot be postponed and the need for continuity and dispatch in the trial process are fairly pressing, the trial judge generally feels pressured to act upon the motion quickly. These considerations suggest the need for appellate court development of a

227. This interest is entitled to no independent protection; the prosecution's case must stand or fall on its merits.

standards of decision and mode of procedure designed to serve the needs of the trial judge.

The standard of decision should allow the trial judge to be less circumspect with regard to the jury's fact-finding discretion. The appellate standard of review incorporates the principle of deference to the jury's verdict in two ways. The evidence is viewed in its light most favorable to the government and in addition, the "rational fact finder" standard instructs the court to determine whether a hypothetical fact-finder, acting reasonably, could have found each element of the offense beyond a reasonable doubt. Each of these requirements, in effect, creates a presumption that the jury's guilty verdict is valid.[228] A trial judge, determining whether to submit a case to the jury, need not be so deferential. The task is not the relatively simple one of determining whether the jury has acted outside the proper scope of its authority. The trial judge must determine instead whether a properly-instructed jury might reasonably conclude that the evidence, permissibly interpreted, establishes each element of the offense beyond a reasonable doubt. The task of forecasting how a jury might permissibly reason, without the benefit of being able to reconstruct the line of reasoning probably followed in light of the verdict, cannot be accomplished without giving some consideration to the weight of the evidence.[229]

Moreover, the justification for deference before the case is submitted to the jury is less compelling than it is in the case in which the jury has found the defendant guilty. Courts have found the government's interest in protecting a conviction sufficiently strong to allow the prosecution to seek appellate review of a later decision that sets aside or reduces the verdict.[230] The prosecution's interest in having its case submitted to a jury, however, is not comparable. The government's interest, for example, is not considered sufficiently strong to permit appeal of a directed verdict improperly granted in the defendant's favor, even if founded upon an erroneous legal ruling.[231]

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228. *See* Comment, *The* Jackson v. Virginia *Standard for Sufficiency of the Evidence*, 65 IOWA L. REV. 799, 807 (1979). This standard is virtually identical, both in substance and in effect, to the standard employed by Massachusetts appellate courts in reviewing the exercise of discretionary authority by trial judges.

229. *Id.* Even reviewing courts applying the pre-*Jackson* "no evidence" standard occasionally acknowledged the necessity of weighing evidence. *See, e.g.*, Speigner v. Jago, 603 F.2d 1208, 1210-12 (6th Cir. 1979). *Compare* Cunha v. Brewer, 511 F.2d 894, 898 (8th Cir. 1975). The same necessity persists under the *Jackson* standard.

230. *E.g.*, United States v. Wilson, 420 U.S. 332, 344, 353 (1975); *see* Commonwealth v. Keough, 385 Mass. 314, 315 n.1, 431 N.E.2d 915, 916 n.1 (1982).

231. Sanabria v. United States, 437 U.S. 54, 78 (1978); United States v. Martin

To the extent the rule of deference protects the jury's verdict from a judge's inclination to second-guess the fact-finder, it is inapplicable to the trial judge's pre-submission sufficiency determination. In other words, the prosecution is not entitled to an opportunity to persuade the jury unless it produces sufficient evidence to reasonably support a conviction.

The trial judge, having heard and observed the demeanor of the witnesses, is in a better position than an appellate judge to judge credibility and weight issues.[232] The judge will have had considerable experience in exercising this critical judgment in bench trials and in addition will have made preliminary findings of fact on issues such as witness competency, admissibility of evidence and the permissibility of relying on some types of inferences. Additionally, the judge will have expertise in interacting with the jury on fact-finding issues by means of instructions, particularly those describing permitted methods of reasoning, which frequently constitute indirect comments on credibility and weight of the evidence.[233]

Finally, the general nature of most jury verdicts lends a genuine air of mystery and potential irrationality which further inhibits appellate judges by lending strength to the suggestion that any disagreement the appellate court might have with the jury's verdict must necessarily be the product of second-guessing. This is strengthened by the common failure of appellate courts to draw an explicit distinction, in practice, between the trial judge's initial judgment (which is reviewed only if adverse to the defendant), the trial judge's review of sufficiency after a guilty verdict, appellate review of the correctness of either of these rulings by the trial judge and appellate review of the reasonableness of the jury's verdict.

These considerations, it is submitted, suggest the need for and usefulness of such distinctions, and for development of a standard of decision applicable to sufficiency determinations by trial judges before submitting a case to a jury. Such a standard must acknowledge the necessity and desirability of allowing the judge greater lee-

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Linen Supply Co., 436 U.S. 564, 576 (1977); Fong Foo v. United States, 369 U.S. 141, 143 (1962).

232. This superiority in the trial judge's position compared to the appellate court's is acknowledged and forms part of the basis for extending the section 33E powers found in Rule 25(b)(2) (second sentence) to trial judges. *See, e.g.*, Commonwealth v. Keough, 385 Mass. 314, 317-18, 431 N.E.2d 915, 918 (1982). Consideration of whether to permit the trial judge to act on these observations in determining sufficiency questions should turn solely on notions of the proper allocation of responsibility between trial judge and jury.

233. Allen, *supra* note 7, at 332-39.

way to critically evaluate the quality of the prosecution's case than is permitted in reviewing the reasonableness of a jury's verdict.[234]

Trial judges must and do consider issues of credibility, weigh conflicting testimony and evaluate the reasonableness of inferences in assessing the sufficiency of the prosecution's evidence. To the extent the legal rules regulating the sufficiency assessment process instruct judges to refrain from making these types of critical judgments, they should be modified. The principle of *Jackson v. Virginia*[235] requires that the judge restrict the jury's fact-finding discretion to the realm of reasonable judgments by insuring that the jury is presented with sufficient evidence to provide them with a basis for exercising their discretion reasonably.[236] This protection can be afforded simply by recognizing that judges routinely assess evidence in this fashion when making sufficiency assessments and in other contexts, as will be demonstrated below. To formalize these practices as a required part of the sufficiency assessment process, courts need simply to modify the "prosecution's best case" rule as follows:

> In assessing the sufficiency of the prosecution's evidence the court shall view the evidence in the light most favorable to the prosecution where it appears that the inferences, weight of the evidence and credibility judgments needed to reach a finding of guilt are reasonably supported by evidence.

This modification would not significantly alter the present division of fact-finding responsibility between judge and jury except as to credibility judgments: Numerous judicial duties presently require judges to screen evidence which restricts the jury's discretion to draw inferences and weigh evidence. Consider the role of the trial judge in the pre-indictment bind over hearing. The judge's task is to

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234. The Honorable Mel Greenberg, a Massachusetts trial judge, has suggested in a recent article that the distinction between weight and sufficiency has little impact in practice:

> Some judges assigned to the jury session will always have a different prescriptive vision of whether the bench trial judge acted properly on the weight and sufficiency of the evidence presented at the bench trial. These matters are rarely capable of exact quantification. Sufficiency of evidence review then will always depend, to some extent, on who is assigned to the jury session. . . . In cases where specific elements of the offenses will be lacking in proof, the task is relatively simple. In reviewing matters where the decision hinges on credibility, circumstantial evidence, and inferences as factors which enter into the judgmental process, it is more difficult to attain uniformity.

Greenberg, *Double Jeopardy and Trial DeNovo: The Dilemma in the State's District Courts*, 68 MASS. L. REV. 50, 59 (1983).

235. 443 U.S. 307 (1979).

236. *See supra* notes 7-14 and accompanying text.

screen out unwarranted prosecutions by determining whether the Commonwealth has presented sufficient admissible evidence to establish probable cause to believe that the offense was committed by the defendant. In some cases, it is appropriate for the judge to assess the credibility of the prosecution's evidence and to weigh the defendant's evidence against the prosecution's. The probable cause standard to be employed is whether the evidence is sufficient to support a verdict.[237]

Later, in the course of a trial, the judge will make a variety of rulings based on an assessment of the weight of particular evidence. It is common for judges, in instructing a jury, to suggest possible inferences, identify commonly-accepted considerations in making credibility judgments, and comment on the evidence, thus influencing the jury's exercise of its exclusive fact-finding discretion.[238]

Moreover, to determine whether such instructions are consistent with *Winship*-based principles, the judge must weigh the predicate evidence.[239] In determining whether a proposed proof-facilitating device can be allowed to assist the prosecution in satisfying its burden of production, the judge, to observe due process limitations, must assess the weight of the predicate evidence.[240]

In carrying out their responsibility of determining the admissibility of evidence, trial judges routinely assess the potential or actual weight of evidence.[241] The judge routinely determines the relevancy of proffered evidence. Relevant evidence is generally admissible; to be relevant, evidence must be both probative and material. The evidence must have some tendency in logic, common sense or experi-

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237. Myers v. Commonwealth, 363 Mass. 843, 298 N.E.2d 819 (1973).

238. Sometimes the judge's decision whether to give such instructions requires a preliminary assessment of the evidence of guilt. For example, in Commonwealth v. Niziolek, 380 Mass. 513, 404 N.E.2d 643 (1980) the court ruled that a trial judge may instruct the jury that it may consider the defendant's failure to present an available witness and infer that the witness, if presented, would have testified adversely to the defense. *Id.* at 523, 404 N.E.2d at 649. The judge must first determine whether "the evidence against [the defendant] is so strong that, if innocent, he would be expected to call [the missing witness]." *Id.* at 519-20, 404 N.E.2d at 647. Thus the judge must determine the probable guilt of the defendant in determining whether to give the instruction. Clearly this determination will include credibility and weight judgments; in *Niziolek* the defendant and the prosecution's key witness had directly contradicted each other's testimony regarding an agreement the defendant allegedly made with the missing witness. *Id.* at 516-17, 404 N.E.2d at 645-46.

239. "Predicate evidence" is the evidence offered as the foundation for triggering a presumption, an inference or establishing a "prima facie case."

240. *See generally* Allen, *supra* note 7, at 348-54.

241. *See generally* P. LIACOS, HANDBOOK ON MASSACHUSETTS EVIDENCE 407-11 (5th Ed. 1981).

ence, to make the existence some fact of consequence to the case more or less probable than it would be without the evidence.[242] That is, evidence is probative if, taken alone or in connection with other evidence, it tends to help establish or refute the proposition for which it is offered as proof. If this relationship cannot be established, the evidence is too "remote" to be considered relevant.[243] It is necessary, but not sufficient, that evidence be probative to be relevant; it must also be material. Evidence is material when it tends to establish or refute any fact that is of consequence to the determination of the case.[244] Determinations of materiality may involve comparative judgments balancing the degree to which evidence is probative against the likelihood that the evidence will cause confusion, unfair surprise or lead to the creation of collateral disputes.[245]

These judgments involve assessing the weight of the particular evidence in that its logical impact on an issue in the case must be evaluated, either with or without reference to its relation to other evidence. The trial judge's responsibility of assessing the weight of evidence is clearer when the danger appears that relevant evidence might affect the jury's judgment in an improper manner. In this circumstance, the inquiry is whether the evidence is more prejudicial than probative. The decision turns upon whether, in the trial judge's discretion, the jury is so likely to be improperly influenced by the evidence that its probative value is outweighed by this danger.[246] Thus, a trial judge's relevancy determinations involve a blend of assessments of probative worth, materiality and the discretionary application of safeguards based upon a weighing of the evidence in the context in which it is offered. These judgments are no different in

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242. FED. R. EVID. 401; PROPOSED MASS R. EVID. 401. Similar statements to this effect are found in Green v. Richmond, 369 Mass. 47, 59, 337 N.E.2d 691, 699 (1975); and Commonwealth v. Fillippini, 1 Mass. App. Ct. 606, 611, 304 N.E.2d 581, 584-85 (1973).

243. Commonwealth v. Haley, 363 Mass. 513, 523, 296 N.E.2d 207, 213 (1973); Commonwealth v. Machado, 339 Mass. 713, 715, 162 N.E.2d 71, 73 (1959); Commonwealth v. Burke, 339 Mass. 521, 533-34, 159 N.E.2d 856, 864 (1959).

244. *See* C. MCCORMICK, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 434 (2d ed. 1972).

245. *Id.* at 438-39.

246. *E.g.*, Commonwealth v. Cruz, 373 Mass. 676, 692, 369 N.E.2d 996, 1006 (1977); Commonwealth v. D'Agostino, 344 Mass. 276, 279, 182 N.E.2d 133, 135, *cert. denied*, 371 U.S. 852 (1962). This concern also arises when the pseudo-scientific nature of the prosecution's proffered evidence creates a risk that the jury might give it undeserved weight. A similar concern underlies the constitutional requirement that identification evidence developed by unnecessarily suggestive means must be excluded if it creates a substantial likelihood of misidentification. *See* Neil v. Biggers, 409 U.S. 188 (1972).

kind from those that must be made as a practical matter in the course of assessing the sufficiency of the evidence.

1. The Judge Must Determine the Permissibility of Suggested Inferences

The trial judge's decision whether to give a particular instruction is based upon an assessment of the evidence. This assessment is indistinguishable from a sufficiency determination.[247] In making a sufficiency determination, the judge is required to survey possible inferences and determine whether they are sufficiently supported by the prosecution's evidence so as to permit the jury to rely upon them in deciding the issue of guilt. The question is whether a possible inference is "forbidden by some special rule of law, or is declared unwarranted because too remote according to the ordinary course of events."[248] The nature of the trial judge's assessment of the evidence for this purpose is worth consideration. On one hand, examination of the terminology used to describe the nature of the inquiry demonstrates the discretionary and necessarily *ad hoc* quality of it. On the other hand, examination of the assessment process will demonstrate the extent to which this responsibility casts the trial judge in the role of preliminary fact-finder.

A variety of terms have been used to describe the threshold quality that an inference must have if it is to aid the prosecution in satisfying its burden of production. In addition to Justice Holmes' description of an appropriate inference as one that is not "too remote,"[249] the following are common and appear to be regarded as synonymous: "possible and reasonable,"[250] "probable but not neces-

247. Commonwealth v. Matchett, 386 Mass. 492, 499-501, 436 N.E.2d 400, 405-06 (1982).

248. Commonwealth v. Ashernowski, 196 Mass. 342, 347, 82 N.E. 13, 14 (1907) (quoting Holmes, J. in Commonwealth v. Dougherty, 137 Mass. 245, 247 (1884)); *see also* Commonwealth v. Latimore, 378 Mass. 671, 676, 393 N.E.2d 370, 373-74 (1979). Unwarranted inferences to be guarded against include those which might be drawn from prosecutorial reference to, or use of, material or facts not actually offered in evidence. *See, e.g.*, Commonwealth v. Amado, 387 Mass. 179, 187 n.8, 439 N.E.2d 257, 262 n.8 (1982) (repeated use of document never offered in evidence to "refresh" recollection of witness); Commonwealth v. Bearse, 358 Mass. 481, 487, 265 N.E.2d 496, 499 (1970) (unsubstantiated claim made in opening statement); *see also* Douglas v. Alabama, 380 U.S. 415, 416-17 (1965) (facts similar to *Amado*).

249. Commonwealth v. Ashernowski, 196 Mass. 342, 347, 82 N.E. 13, 14 (1907).

250. Commonwealth v. Earltop, 372 Mass. 199, 201, 361 N.E.2d 220, 221 (1977); *see* Commonwealth v. Wilborne, 382 Mass. 241, 244-45, 415 N.E.2d 192, 195-96 (1981).

sary or compelling,"[251] reasonable, warranted,[252] and "relevant."[253] "Remoteness" commonly is used as a criterion of admissibility to describe an element of relevance. It is used to assess the need to exclude relevant evidence because of a danger of unwarranted emphasis by the jury.[254] It is not necessary to distinguish between the relevancy of an inference and its sufficiency unless the inference is being used as the sole evidence available to establish the prosecution's case on an essential element of the crime. In such circumstances, the need to assess the extent to which the evidence supports conflicting inferences may force the judge to weigh the relative persuasive force of the possible inferences in view of the available evidence.

Consider the dispute in *Commonwealth v. Howard*[255] over whether the evidence was sufficient to support an inference that the

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251. *E.g.*, Commonwealth v. Young, 382 Mass. 448, 463, 416 N.E.2d 944, 953 (1981).

252. *E.g.*, Commonwealth v. Aguiar, 370 Mass. 490, 500, 350 N.E.2d 436, 443 (1976).

253. *E.g.*, Commonwealth v. Wilborne, 382 Mass. 241, 244-45, 415 N.E.2d 192, 195-96 (1981).

254. In Commonwealth v. Burke, 339 Mass. 521, 159 N.E.2d 856 (1959), evidence had been admitted that the defendant had been engaged in an extramarital affair which had been discovered and thwarted by the defendant's wife (the murder victim) seven months before the killing. *Id.* at 533-34, 159 N.E.2d at 864. Conceding that the evidence supported an inference of hostility on the defendant's part toward his wife, the court noted that it also tended to prove other crimes (presumably adultery and/or fornication) and ruled that it was inadmissible as being too remote in time. *Id.* at 534, 159 N.E.2d at 864.

The danger of overemphasis is more acute where the reasonableness of single-factor inferences are involved. The commonly used inference permitting the jury to find that one who possesses recently stolen goods knew the goods were stolen, presents an especially acute problem of remoteness because of its great potential for distortion. This potential is found in its implied suggestion that knowledge of the stolen character of the goods can be inferred from a single fact rather than from an assessment of all of the circumstances under which the property was received. It is exacerbated by the tenuous relevance of the single predicate fact: the length of the interval between the theft and the time of receipt. Although it articulated extremely loose standards, the supreme judicial court in Commonwealth v. Sandler, 368 Mass. 729, 335 N.E.2d 903 (1975), ruled that the remoteness of this inference was, at the extremes, an issue for the trial judge to decide and, between those extremes, an issue for the jury to decide. *Id.* at 744, 335 N.E.2d at 913. As to property stolen 13 months before the defendant received it, the trial judge had directed the jury that it was not recently stolen and could not be considered as a basis for the inference of knowledge. *Id.* at 742, 335 N.E.2d at 912. The court's suggestion that, as to very short intervals, the trial judge might permissibly have directed the jury that it must consider the property to have been recently stolen, *id.* at 742, 744, 335 N.E.2d at 913, obviously raises due process issues which were not carefully considered. *See* United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73 (1977); Commonwealth v. Anthes, 71 Mass. (5 Gray) 185, 302-03 (1855).

255. 386 Mass. 607, 436 N.E.2d 1211 (1982).

defendant was armed when he robbed the victim.[256] The only evidence available on this elemental issue was presented by the prosecution. The defendant approached the victim with his hand in his pocket, saying: "Walk straight, look down and don't try anything foolish or I'll pull the trigger."[257] The police arrived while the robbery was in progress; the defendant was unarmed when arrested and no gun was found in the vicinity. The victim did not see a weapon.[258]

The defendant's statement to the victim implying that he was armed might support an inference that he was actually armed, but the fact that he was not armed when arrested in the course of the robbery suggests an inference to the contrary. During the robbery, the defendant had taken the victim into an apartment building (where he took her purse) and then into an alley, where he required her to empty her pockets (he was arrested in or near the alley; the victim was still with him).[259] There had been some opportunity for the defendant to dispose of a weapon, if he had one.[260] Thus the following chain of "possible" inferences might be constructed: the defendant implied that he was armed, acted as if he was armed and may have had some opportunity to dispose of a weapon.[261] The reasonableness of inferring beyond a reasonable doubt that the defendant was armed without considering and weighing the other possible inferences is questionable. The defendant's statement to the victim could have been a bluff and the inference that it was a bluff is reinforced by the facts that (1) the victim did not see a weapon; (2) the defendant was unarmed when arrested at the scene; and (3) an immediate search of the vicinity for a weapon was fruitless.[262] The "prosecution's best case"[263] rule might lead a trial judge to conclude that he is required to consider the prosecution's proposed inference in isolation, and determine whether the inference is not too remote

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256. The court in *Howard* suggested that because the statutory range of potential sentences for unarmed robbery is the same as for armed robbery, the defendant's interest in this issue was "largely academic." *Id.* at 608-09 n.2, 436 N.E.2d at 1212 n.2. Sentencing guidelines indicate, however, that the sentence for unarmed robbery is likely to be substantially less harsh than for armed robbery. *See* Massachusetts Superior Court Department Sentencing Guidelines, (May 15, 1980-Nov. 15, 1980) (unpublished). Similarly, the parole board views the offenses differently.

257. 386 Mass. at 607, 436 N.E.2d at 1211.

258. *Id.* at 609, 436 N.E.2d at 1212.

259. *Id.*

260. *Id.* at 619, 436 N.E.2d at 1217 (Nolan, J., dissenting).

261. *Id.*

262. *Id.* at 612-13, 436 N.E.2d at 1214 (O'Connor, J., concurring).

263. *See supra* note 227 and accompanying text.

in the ordinary course of events. The actual reasonableness of the prosecution's suggested inference cannot be judged fairly out of context, that is, without considering each step in the suggested reasoning process.[264] The defendant's statement and conduct during the robbery without more, would not support beyond a reasonable doubt a conclusion that he was actually armed because he was not armed when arrested. The strongest inference based on this evidence is that the defendant was not armed at any time during the robbery. The additional evidence of an opportunity to dispose of the weapon could be construed as further support for the "armed" inference but this is equally consistent with the "unarmed" inference.[265] The evidence that the victim did not see a weapon is, at best, neutral. The final state of the evidence, assessed in this step-by-step manner, does not reasonably support, beyond a reasonable doubt, the inference that the defendant was armed.

The process of assessing the permissibility of the prosecution's suggested infrences, then, necessarily requires the judge to weigh ambiguous evidence—evidence which supports conflicting, incriminating and exculpatory inferences. The inquiry is whether the evidence provides a reasonable basis upon which the jury could prefer the incriminating inference. This approach provides a basis for resolving the conflict recently aired in *Commonwealth v. Nelson*,[266] a conflict between two apparently irreconcilable sets of evaluative principles to be applied in evaluating ambiguous evidence.[267] The *Nelson* majority applied principles which allowed the evidence to be sufficient if it permits a guilty inference even if it does not require that inference.[268] In dissent, Chief Justice Hennessey argued that two additional principles should be applied: First, if the evidence leaves the question of guilt to "conjecture or surmise" and does not provide a "solid foundation in established fact" for the guilty inference, it is insufficient; and second, if the evidence "tends equally to sustain either of two inconsistent propositions, neither of them can

264. The process followed in assessing the sufficiency of the evidence in Commonwealth v. Aguiar, 370 Mass. 490, 491-500, 350 N.E.2d 436, 438-43 (1976), illustrates this step-by-step approach.

265. From this Justice O'Connor argues that the evidence of opportunity was not relevant to the prosecution's proposed inference. 386 Mass. at 613, 436 N.E.2d at 1214 (O'Connor, J., concurring).

266. 370 Mass. 192, 346 N.E.2d 839 (1976).

267. *See id.* at 201-03, 346 N.E.2d at 845-46; *id.* at 206-08, 346 N.E.2d at 847-49 (Hennessey, C.J., dissenting).

268. *Id.* at 203, 436 N.E.2d at 845.

be said to have been established by legitimate proof."[269]

A quick reconsideration of the *Howard* facts demonstrates that Justice Hennessey's principles are applicable when the evidence offers no reasonable basis for selecting the incriminating inference over the exculpatory one. In *Howard*, the inference that the defendant had actually had and disposed of a weapon only could be based on conjecture and surmise; nothing in the evidence supported that conclusion as a probability. There was no "solid foundation in established fact" for that conclusion. Because the prosecution's evidence (at best) tended to sustain either inference equally neither was established by legitimate proof. Thus the practice of weighing conflicting inferences based upon ambiguous evidence to determine whether the prosecution's suggested inference is permissible, and its evidence accordingly sufficient, is one firmly established in Massachusetts practice.

2. The Judge Must Determine Whether Necessary Credibility Judgments are Reasonably Supported by Evidence

Credibility judgments are the aspect of fact-finding most unequivocally reserved as the jury's exclusive province.[270] Yet the principle of *Jackson v. Virginia*[271]—that it is the trial judge's constitutional duty to insure that a case is not submitted to the jury unless the prosecution has presented reasonable evidentiary basis to support each essential element of the crime[272]—logically applies to credibility issues. The case in which the prosecution's evidence does not provide a reasonable basis for making a credibility judgment needed to support a finding of guilt will be rare. In most cases, the reasonable basis for discrimination will appear simply from the fact that the evidence to be evaluated has been presented through witness testimony. The jury's opportunity to observe and listen to the witness will furnish a reasonable basis for its credibility judgments.

The exceptional case will be similar to *Commonwealth v. Johnson*[273] in which the key evidence of guilt presented by the prosecution was the defendant's written confession and the needed

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269. *Id.* at 206, 436 N.E.2d at 847 (Hennessey, C.J., dissenting).

270. *See* Commonwealth v. McInerney, 373 Mass. 136, 145-47, 365 N.E.2d 815, 821 (1977) ("the jury have the sole power to believe or disbelieve any or all such evidence").

271. 443 U.S. 307 (1977).

272. *Id.* at 315-16.

273. 3 Mass. App. Ct. 226, 326 N.E.2d 355 (1975).

incriminating inferences could be drawn only if the jury chose to believe the incriminating portions of the statement and disbelieve the exculpatory portions.[274] The prosecution presented no evidence which the jury could use as a basis for reasonably discriminating between the defendant's admission that he had killed the victim with a knife and his assertion that the victim had first attacked him with the knife.[275] If no reasonable evidentiary basis for the jury's credibility judgments is discernible from the prosecution's evidence, then the defendant is exposed to the risk of either being arbitrarily convicted or of being required to provide the essential credibility evidence in his or her own case.[276]

A more difficult case is presented when the defendant's evidence casts such serious doubt on the credibility of the prosecution's testimonial evidence on an essential element of the crime that the prosecution's evidence cannot reasonably be believed. Ordinarily, no sufficiency issue is presented because the operation of prosecution's best case rule and the exclusive fact-finding prerogative of the jury combine to shield the problem from the judge's scrutiny in the sufficiency process. Nevertheless, the supreme judicial court has indicated that such a situation may present a sufficiency of the evidence issue.

When a defense includes an alibi, the prosecution's best case rule presents difficult obstacles to an effective assessment of the sufficiency of the prosecution's identification evidence, particularly when the evidence consists principally of solely or eyewitness identification. The chief difficulties are illustrated by the recent case of *Com-*

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274. *Id.* at 232, 326 N.E.2d at 359.

275. *Id.* at 232-33, 326 N.E.2d at 360. The appeals court ruled that there was no basis, even internal inconsistency or implausibility, on which the jury might have relied to reasonably believe one part of the transcribed statement and disbelieve the remainder. *Id.* at 233, 326 N.E.2d at 360.

In Commonwealth v. McInerney, 373 Mass. 136, 365 N.E.2d 815 (1977), the supreme judicial court explicitly repudiated the appeals court's reasoning on this point, asserting in effect that a jury's credibility judgments need not be reasonable, or, to the same effect, cannot be regulated to assure reasonableness. *Id.* at 142, 365 N.E.2d at 819; *see supra* notes 184-206 and accompanying text.

276. In *Johnson* the defendant testified at trial that he had not made the statements attributed to him and asserted that he had not killed the decedent. He claimed he had been cut breaking up a fight between the decedent and two other men. He had, however, developed such severe psychiatric problems shortly after his arrest that he was hospitalized for a competency evaluation. 3 Mass. App. Ct. at 227-28, 365 N.E.2d at 356-57. While his bizarre testimony may account for the jury's verdict, it is irrelevant to the issue of the sufficiency of the evidence at the close of the prosecution's case. *See* Commonwealth v. Blow, 370 Mass. 401, 408, 348 N.E.2d 794, 799 (1976).

monwealth v. Woods,[277] in which the supreme judicial court intimated that it might relax or modify the usual restrictions imposed upon the trial judge's view of the evidence in such cases.[278] The *Woods* case is worth discussing in some detail because it demonstrates a number of points regarding the influence of preliminary proceedings on the sufficiency assessment in addition to demonstrating why the trial judge must have the discretion to consider weight and credibility in assessing sufficiency.

The defendant was charged with a rape which had occurred, according to the indictment, in Boston near a MBTA station at 7:00 A.M. on September 23, 1975.[279] The first effort to try the case ended in a mistrial on the prosecutor's opening statement; the trial resulting in defendant Woods' conviction occurred in October, 1978. In response to the prosecution's pretrial demand for disclosure of alibi,[280] the defense gave notice of its intent to show, through the record keeper of the Suffolk County House of Correction at Deer Island, that the defendant had been imprisoned continuously there between December 19, 1974, and October 9, 1975, serving a sentence.[281] Institutional records indicated that Woods had been furloughed several times for short periods in September 1975 but had been continuously confined from 10:30 A.M. on September 19 through 3:30 P.M. on September 26, 1975. He had been in Boston on a furlough from noon on September 18 until 10:30 A.M. September 19 and had returned to Deer Island on the latter date via the MBTA

277. 382 Mass. 1, 413 N.E.2d 1099 (1980).

278. *See id.* at 7, 413 N.E.2d at 1103. But see Commonwealth v. Amado, 387 Mass. 179, 181 n.1, 439 N.E.2d 257, 258 n.1 (1983), where the court stated that alibi evidence is not to be considered in assessing the sufficiency of the evidence either at the close of the prosecution's case or at the close of all the evidence.

279. 382 Mass. at 2, 413 N.E.2d at 1100. The indictments were returned in June, 1977. The victim had been unable to identify her assailant until she saw the defendant's photograph in a two-page spread she was examining after having reported a burglary of her apartment in March, 1977. *Id.* at 6 n.7, 413 N.E.2d at 1102 n.7.

The time of 7 A.M. is from the victim's trial testimony rather than the indictment, which specified the date only. The early morning hour of the rape was never in doubt. Considerable circumstantial evidence supported the grand jury's specification of September 23 as the correct date. *See id.* at 2-3, 413 N.E.2d at 1100-01. In addition, the victim's contemporaneous reports to her roommates and parents and testimony at her probable cause hearing and before the grand jury all pointed to that date. Finally, her belated reports to a hospital on October 1, 1975 and to the police on November 8, 1975 identified September 23 as the date of the rape. *Id.* at 4, 413 N.E.2d at 1101.

280. The trial occurred before July 1, 1979, the effective date of the Massachusetts Rules of Criminal Procedure. Rule 14(b)(1) would have required disclosure of the alibi and its evidentiary basis had the trial occurred after the rules took effect. *See* MASS. R. CRIM. P. 14(b)(1).

281. *Woods*, 382 Mass. at 5, 413 N.E.2d at 1102.

train system.[282]

At the outset of the first trial, the prosecution was permitted, over objection, to amend the indictment to allege that the rape occurred "on or about" rather than "on" September 23, 1975.[283] In the second trial, the victim identified Woods in the courtroom as her assailant and testified that the rape had occurred "in the latter part of September."[284] In short, the prosecution's case-in-chief consisted of a dubious identification bolstered by the inferences it could muster by exploiting the ambiguity of the amended accusation and the uncertainties in its own witnesses' recollections.[285] As the supreme judicial court noted, the prosecution's case created the distinct impression that it had been fashioned to fit the only possible opening in the defendant's otherwise unimpeachable alibi evidence.[286]

Although the supreme judicial court treated *Woods* as a special case justifying remedial action to "avoid the reproach that justice may have miscarried," the lower courts had treated the case as routine.[287] The trial judge denied the defendant's motions for required findings of not guilty at the close of all the evidence and for a new trial, commenting that the case was tried to a jury on fact issues upon which the trial judge could not substitute his own judgment—the trial was fair and justice was done.[288] The appeals court summarily affirmed the conviction in a rescrip opinion.[289] The supreme judicial court hinted that it would have found the evidence insufficient and reversed the trial judge's decision to submit the case to the jury, had

282. *Id.*

283. *Id.* at 10, 413 N.E.2d at 1104-05.

284. *Id.* at 2, 413 N.E.2d at 1100. The victim had initially described the rapist to the police (November 8, 1975) "as black, young, under six feet tall, of medium build, wearing short Afro-style hair." *Id.* at 3, 413 N.E.2d at 1101. In June 1977, having made an initial photographic identification that March, she chanced to see Woods alone behind an enclosure in the court room as she waited to testify at the probable cause hearing. No lineup or other comparative identification procedure was conducted. *Id.* at 4, 7, 413 N.E.2d at 1101, 1103.

285. The victim had identified the date as September 23, a Tuesday (as September 23 was; September 19 was a Friday) and as the day after a holiday. Neither September 18 nor 22 was a holiday. The only Monday holidays in September 1975 were the 1st (Labor Day) and the 15th (Yom Kippur). *Id.* at 4, 413 N.E.2d at 1102. Jail records showed that Woods was released on a furlough at 10:10 A.M. on September 2 and incarcerated on September 16. *Id.* at 5, 413 N.E.2d at 1102.

286. *Id.* at 6 n.7, 413 N.E.2d at 1102 n.7.

287. *Id.* at 8-10, 413 N.E.2d at 1103-04.

288. Commonwealth v. Woods, 9 Mass. App. Ct. 815, 816, 397 N.E.2d 1302, 1302 (1980).

289. Commonwealth v. Woods, 10 Mass. App. Ct. 836, 406 N.E.2d 1054 (1980).

the defendant pressed this claim on appeal.[290]

The trial judge had grounded his sufficiency ruling on the victim's testimony.[291] Acknowledging this, the court intimated that the sufficiency of the prosecution's identification evidence presented a close question.[292] But the prosecution's evidence in its case-in-chief, interpreted in its most favorable light, was clearly sufficient to support a finding that Woods was the rapist, with the only doubts at this point arising from the victim's credibility, an issue reserved for the jury.[293] Whether the evidence tending to show that the rape occurred September 19 was sufficient to prove that the crime was committed "on or about September 23" addresses the weight of the evidence, and is similarly shielded from judicial scrutiny.[294] Because the precise date and time of the offense become material only in light of the defendant's alibi evidence, a judge has no occasion to consider the feebleness of the evidence on this point at the close of the prosecution's case. At the close of the defense evidence, all doubts about the evidence fall under the rubric of credibility and weight and must

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290. *See* 382 Mass. at 7, 413 N.E.2d at 1103.

291. *Id.* This testimony was not uncorroborated except on the point of identification. She had made contemporaneous reports of the rape to her roommates and parents. *Id.* at 3, 413 N.E.2d at 1101. Her in-court identification of the defendant was unequivocal. *Id.* at 7, 413 N.E.2d at 1103. If believed, her testimony offered sufficient support for the conviction. *See* Tibbs v. Florida, 457 U.S. 31, 38 (1982).

292. *See* 382 Mass. at 10-11, 413 N.E.2d at 1105.

> The judge denied directed verdicts at the close of all the evidence, resting the denial on the testimony of the victim. On this appeal, the defendant has preferred not to press his exception to the ruling. However, "to sustain the denial of a directed verdict, it is not enough for the appellate court to find that there was some record evidence, however slight, to support each essential element of the offense; it must find that there was enough evidence that could have satisfied a rational trier of fact of each such element beyond a reasonable doubt" . . . including here the proposition that it was this defendant who was the assailant. In this aspect the denial of the direct verdict motions could not be accounted an easy decision.

Id. at 7, 413 N.E.2d at 1103.

293. Commonwealth v. Latimore, 378 Mass. 671, 677, 393 N.E.2d 370, 373-74 (1979).

294. Ordinarily, an indictment must be proved as charged. But variations are permitted between indictment and proof so long as the variation is neither material (e.g., changes the offense charged or otherwise alters the work of the grand jury) nor prejudicial to the defendant. Commonwealth v. Ohanian, 373 Mass. 839, 843, 370 N.E.2d 695, 697 (1977). In an alibi case, a variation in date and time might be considered prejudicial to the defense. The court did not address this issue in *Woods*. The permissibility of an amendment is governed by essentially the same considerations as govern the permissibility of a variation. *See* Commonwealth v. Hobbs, 385 Mass. 863, 869-70, 434 N.E.2d 633, 639 (1982).

be left to the jury.[295]

The need to permit the trial judge to assess the credibility and weight of the prosecution's identification evidence in determining its sufficiency appears clearly in the *Woods* case. The supreme judicial court's comments regarding sufficiency intimate that there is room for such an assessment in the requirement that the trial judge " 'find that there is enough evidence that could have satisfied a reasonable trier of fact . . . beyond a reasonable doubt.' "[296] The suggestion that the victim's identification was not sufficiently firm or positive to satisfy that standard is based on an assessment of the weight—and perhaps credibility—of that witness' testimony. The strength of Woods' alibi and the direct quote from *People v. McGee*[297] indicate that the assessment includes weighing the identification evidence against the alibi evidence. Such a judgment is clearly inconsistent with the pre-*Jackson* restrictions but is consistent with the proposal advanced here that it is the trial judge's responsibility to insure that the evidence presents a reasonable basis for the weight and credibility judgments needed to infer guilt.[298]

The *Woods* procedural facts also highlight the manner in which pretrial proceedings will often directly affect the trial judge's ability to effectively assess sufficiency at a factual level. Clearly the practice of requiring the defense to plead defensive claims before trial creates a need for judges to be alert to the possibility that the prosecution's evidence will be manipulated to meet the contours of the defendant's

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295. The rule of Commonwealth v. Kelley, 370 Mass. 147, 346 N.E.2d 368 (1976), requires reconsideration of the prosecution's case on the defendant's motion at the close of all the evidence to determine whether the prosecution's case has deteriorated. *Id.* at 150 n.1, 346 N.E.2d at 370 n.1. While it might be interpreted as applying to elemental defensive issues on which the defense has met its burden of production, the defendant's evidence cannot cause the prosecution's position to deteriorate simply by contradicting the prosecution's evidence.

To the author's knowledge, this rule has not been applied in a reported Massachusetts case. Unless it abrogates the "prosecution's best case" rules after the defendant's evidence is presented, however, any "deterioration" must be internal to the prosecution's case. For example, key evidence might have been stricken in the interim. *Cf.* Commonwealth v. Funches, 379 Mass. 283, 294-97, 397 N.E.2d 1097, 1102-04 (1979) (testimony of prosecution witness who invoked privilege against self-incrimination, preventing effective cross-examination, should have been stricken; without that witness' testimony, directed verdict appropriate).

296. 382 Mass. at 7, 413 N.E.2d at 1103 (quoting People v. McGee, 21 Ill. 2d 440, 445, 173 N.E.2d 434, 436-37 (1961)).

297. 21 Ill. 2d 440, 445, 173 N.E.2d 434, 436-37 (1961).

298. The supreme judicial court's ruling in Commonwealth v. Amado, 387 Mass. 179, 439 N.E.2d 257 (1982), makes it clear that its discussion of the sufficiency of the *Woods* identification has not yet been translated into active principle.

position.[299] The case also demonstrates that judges ought to consider, in ruling on motions for bills of particulars and amendments to indictments, whether the proposed action will assist or undermine their task of assessing the sufficiency of the evidence. In general, the more narrowly focused and directly contested the factual issues are, the simpler the sufficiency assessment will be.

The essential teaching of *Jackson* is that an effective assessment of the sufficiency of the prosecution's evidence is a step of fundamental importance in insuring the fairness and established balance of the adversary trial.[300] The judge's basic responsibility is to insure that a case is not submitted to a jury unless the evidence presents a reasonable basis for finding guilt.[301] The foregoing survey of the sufficiency assessment process, as it is administered in Massachusetts, demonstrates the need for and feasibility of several basic modifications in this process. The pre-*Jackson* requirements that the trial judge invariably view the evidence in the light most favorable to the prosecution is inimical to the *Jackson* requirements of reasonableness, particularly when applied to elemental defensive issues. Similarly, the practice of prohibiting the trial judge from making 1) those weight and credibility judgments necessary to insure that the evidence reasonably supports guilty inferences and 2) other weight and credibility judgments needed reserved to the jury in order to convict thwarts the *Jackson* principle by leaving the jury free to make unsupported judgments in those areas.

The proposed modifications would bring the Massachusetts' sufficiency assessment process in line with constitutional principle without significantly altering the actual division of fact-finding responsibility between judge and jury. The constitutional policy of making the jury the primary fact-finders in a criminal case is designed to protect the accused from the danger of arbitrary or oppressive prosecution and conviction.[302] The trial judge cannot direct a verdict of guilty or unilaterally enter a judgment of conviction in a jury trial, even when the evidence is overwhelming.[303] But while the trial judge cannot infringe upon the jury's fact-finding discretion to

299. Indications of this kind of prosecutorial misconduct can legitimately be considered relevant to the credibility of the witness and the weight of the witness' testimony.

300. *See* 443 U.S. at 307.

301. *Id.* at 317-24.

302. *E.g.*, Johnson v. Louisiana, 406 U.S. 356, 373-74 (Powell, J., concurring) (1972); Commonwealth v. Anthes, 71 Mass. (5 Gray) 185, 207-10 (1855).

303. *E.g.*, United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73 (1977).

the defendant's disadvantage,[304] that limitation does not extend to actions favorable to the defendant, even if erroneous.[305] The policy of making the jury the primary fact finders, then, should not be used to justify submitting to it cases which might result in unjust convictions.

Present Massachusetts practice regularly involves trial judges in determining the permissibility of possible inferences and assessing the possible or likely impact of evidence on a jury. Through jury instructions, judges commonly influence jurors' views of credibility, weight and likely inferential relationships between evidence and legal conclusions. The proposed modification of the judge's view of the evidence, then, would alter the sufficiency process slightly but would have little impact on the actual division of fact-finding responsibility between judge and jury in Massachusetts.

III. WEIGHING EVIDENCE IN THE INTERESTS OF JUSTICE

When the new Massachusetts Rules of Criminal Procedure went into effect on July 1, 1979, the trial judges of the district and superior court departments were granted an extraordinary and somewhat mysterious authority to correct jury verdicts of guilty in criminal cases. The power is extraordinary—both because its scope is unprecedented and because it authorizes a specialized kind of decisionmaking that is not easily confined to the usual systemic restraints of standard and procedure. It is a power which can be applied to any criminal case tried to a jury and is so flexible that it lends itself to ameliorate any element of unwarranted harshness in the application of the criminal law to a case.

This remarkable power is contained in a single sentence of Rule 25(b)(2); everything else to be known about it must be derived from the study of related or analogous provisions. Its place in the system's repertoire of post-conviction remedies has not yet been clearly established, but it is possible to begin to characterize this power and locate it within this context. Rule 25(b)(2) (second sentence) provides:

> If a verdict of guilty is returned, the judge may on motion set aside

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304. This limitation often receives less than full attention where jury instructions regarding inferences and presumptions are involved. Allen, *supra* note 7, at 326-39. *But see* Cool v. United States, 409 U.S. 100 (1972) (instruction as to credibility of defense witness unfairly reduced the prosecution's burden of proof).

305. Sanabria v. United States, 437 U.S. 54, 75-78 (1978); United States v. Martin Linen Supply Co., 430 U.S. 564, 568-76 (1977); Fong Foo v. United States, 369 U.S. 141, 142-43 (1962). The application of the *Winship* standard is not exclusively the province of the jury. *Jackson*, 443 U.S. at 317 n.10; MASS. R. CRIM. P. 25.

> the verdict and order a new trial, or order the entry of a finding of not guilty, or order the entry of a finding of guilty of any offense included in the offense charged in the indictment or complaint.[306]

There are no accompanying provisions that state the grounds upon which relief may be granted, set out the criteria by which it can be determined that acceptable grounds have been adequately established, or define standards by which the appropriate form of relief can be determined.

A. *The Purposes and History of the Power to Revise Jury Verdicts*

Evidence of the function and purpose of this grant of authority in Rule 25 can be discerned from its context—it is found in the rule of procedure governing the trial court's duty to regulate the jury's fact-finding discretion and it constitutes a form of post-conviction remedy additional to that provided for in Rule 30.[307] Additionally, it is similar to the supreme judicial court's section 33E powers.[308]

1. Purposes

The Reporter's Notes to Rule 25 state that the purpose of the second sentence of Rule 25(b)(2) is to extend to trial courts the duty and power to reduce verdicts vested in the supreme judicial court by section 33E.[309] Section 33E in its present form requires the court, in all homicide cases resulting in a first degree murder conviction, to review the law and the facts broadly to determine whether the jury's verdict represents a miscarriage of justice. If the court finds that there has been a miscarriage of justice, the provision empowers it to grant a new trial or reduce the jury's verdict by ordering entry of a finding of guilty of any lesser included offense.[310] Although trial courts may look to the supreme judicial court's exercise of its section

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306. MASS. R. CRIM. P. 25(b)(2).

307. *See* MASS. R. CRIM. P. 30. MASS. GEN. LAWS ANN. ch. 278, § 11 (West 1981) provides:

> If a motion for a directed verdict of not guilty is denied and the case is submitted to the jury and a verdict of guilty is returned, the judge may on a renewed motion for a directed verdict of not guilty pursuant to the Massachusetts Rules of Criminal Procedure set aside the verdict and order a new trial, or order the entry of a finding of guilty of any offense included in the offense charged in the indictment or complaint.

308. *See* MASS. GEN. LAWS ANN. ch. 278, § 33E (West 1981); *see infra* text accompanying notes 309-10.

309. MASS. R. CRIM. P. 25(a) reporter's note at 502.

310. MASS. GEN. LAWS ANN. ch. 278, § 33E (West 1981). By virtue of the supreme judicial court's interpretation of MASS. GEN. LAWS ANN. ch. 263, § 6 (West 1970), in Commonwealth v. O'Brien, 371 Mass. 605, 607, 358 N.E.2d 786, 787 (1976), all first de-

33E powers for guidance, section 33E and Rule 25(b)(2) are far from congruent and the guidance provided by the supreme judicial court is not always clearly expressed. The supreme judicial court itself has not been guided by any but the most general standards; it has viewed its section 33E powers as discretionary. An observation the court recently made about its power to review unpreserved errors of law could just as easily be made regarding its power to review jury convictions of first degree murder:

> Discretionary decisions by individual judges inevitably produce variations in result in substantially similar factual situations. Statements explanatory of such decisions may serve "no sharp analytical purpose." At least one Justice of this court has found it difficult to rationalize our decisions. . . . Although we have sometimes engaged in the dangerous practice of comparing discretionary decisions, we have recognized that "§ 33E review is not simply a process of "color matching.' "[311]

Thus, despite the availability of a body of murder cases in which analogous powers have been exercised, a number of fundamental questions remain regarding the nature and extent of the trial court's new Rule 25(b)(2) (second sentence) powers:

a. On what basis may the power be exercised?

The supreme judicial court's section 33E power to reduce a verdict has been exercised based upon the supreme judicial court's view in a particular case of the "weight of the evidence."[312] Its power to

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gree murder indictments must be tried by a jury. Accordingly, section 33E, like Rule 25(b)(2) (second sentence), applies only to jury verdicts.

This function was first codified in 1939. Before that the power to grant a new trial was considered to be within the court's inherent powers. Commonwealth v. Greene, 17 Mass. (1 Pick.) 417, 429 (1822). In 1939 it was enlarged to permit review of the facts as well as the law. This expansion was attributable at least in part to dissatisfaction generated by the nature of the appellate review given the cases of Sacco and Vanzetti. Commonwealth v. Brown, 376 Mass. 156, 168, 380 N.E.2d 113, 120 (1978); *see* Commonwealth v. Sacco, 261 Mass. 12, 158 N.E. 167 (1927) (convictions in 1921, review completed 1927, executions carried out 1927).

Until 1962 the only remedy authorized by section 33E was a new trial. In that year the court was further authorized to reduce the jury's verdict. *See* Commonwealth v. Baker, 346 Mass. 107, 109, 190 N.E.2d 555, 557 (1963). Between 1962 and 1979 the court reviewed 230 cases, presumably all of the first and second degree verdicts returned in the Commonwealth during that period. It reduced the verdict in thirteen of those cases. *See* Commonwealth v. Gaulden, 383 Mass. at 555 n.9, 420 N.E.2d 905, 912 n.9 (1981). It granted new trials in an undetermined number of others. *Id.*

311. Commonwealth v. Grace, 381 Mass. 753, 759, 412 N.E.2d 354, 357-58 (1980) (citations omitted).

312. *E.g.*, Commonwealth v. Bricus, 317 Mass. 403, 58 N.E.2d 241 (1944).

grant a new trial has been exercised on both "weight of the evidence" grounds and on the ground that an irremediable trial error created a "substantial likelihood that a miscarriage of justice" occurred.[313] The court has never had the authority to order entry of a finding of not guilty in the face of a jury verdict, as trial judges now do. The trial judges' power is unprecedented and there are no authoritative standards or guidelines to govern its exercise.

b. What function or functions is the power intended to serve?

In all cases the trial judge is required to screen the evidence before requiring the defendant to defend by evaluating the legal sufficiency of the prosecution's evidence before submitting a case to the jury for a decision.[314] The effectiveness of this "quality control" function is limited by the requirement referred to in this discussion as the "prosecution's best case" rule: The judge must interpret the evidence in every respect in the light most favorable to the prosecution. The effectiveness is further limited, and in some cases eliminated, by the operation of a number of procedural and evidentiary devices that result in shifting the burden of producing evidence on a given issue to the defendant (affirmative defenses) or that facilitate proof of the prosecution's case through the use of inferences and presumptions. The use of imprecisely defined terms to express essential elements of an offense, or the vagueness in the indictment on such issues as the time, place and manner in which the offense occurred, also impair the effectiveness of sufficiency evaluations designed to protect defendants from the mischief of having to defend unfounded charges.

The location of this power within the structure of Rule 25 and the uses to which the supreme judicial court has put its section 33E verdict reduction powers, suggest that this is a primary function of the trial court's newly acquired "quality control" authority. Unlike the Rule 30 power to grant a new trial, Rule 25 is to be invoked and exercised *before* an appeal, by addressing largely nonappealable problems and, secondarily, to eliminate the need or impetus for an appeal. The power is intended to be used or at least should be used principally to complete the trial court's ability to discharge its duty in regulating the scope of the jury's fact-finding discretion. Rule 25

313. *See* Commonwealth v. Mahnke, 368 Mass. 662, 335 N.E.2d 660 (1975).

314. Because the Rule 25(b)(2) (second sentence) power is limited in its application to jury cases, the factfinder, for purposes of most of this paper, will be a jury. Where it is not, the general term will be used.

embodies a recognition that, as properly instructed juries may nevertheless convict on insufficient evidence, such juries may also—because of the influence of the devices mentioned above—return verdicts that are so against the weight of the evidence as to suggest that either the judgment of guilt or the assessment of the degree of guilt may have been based upon or has been decisively influenced by nonevidentiary considerations. The strongest indication of such a problem is, of course, a case in which the legal sufficiency of the prosecution's case has not been thoroughly evaluated, is marginal, or has been artificially enhanced by the effect of one or more of the aforementioned procedural devices.

c. On what basis should the appropriate remedy be selected?

The example of the supreme judicial court's exercise of section 33E power is not fully instructive on how an appropriate remedy may be selected in an exercise of Rule 25 power. The court has never exercised the full range of remedial powers under section 33E that is now available to trial judges under Rule 25(b)(2) (second sentence). A narrow interpretation of the grounds upon which a trial judge may exercise these powers would eliminate unpreserved, reversible trial error as a basis, and further limit the trial courts to grant relief based upon an assessment of the weight of the evidence. Although it is not central to the inquiry of this paper, it is suggested that the latter remedy is appropriate only when, in the court's view, the weight of the evidence leads it to conclude that important, available, relevant evidence favorable to the defendant, has not been presented to the jury.[315]

The supreme judicial court's discretionary authority to reduce verdicts based upon its view that the weight of the evidence has produced ample basis for establishing standards, but several characteristics of cases in which the court has exercised its power suggest that care should be exercised not to demand of these cases more than they can provide.[316] While their homogeneity—all of the section 33E reduced verdict cases are homicide cases—makes them an ideal reference for degree of guilt issues, most of the cases shed little light

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315. Under MASS. R. CRIM. P. 30, such evidence would warrant granting a new trial only if it were "newly discovered." *See* Commonwealth v. Dascalakis, 246 Mass. 12, 25, 140 N.E. 470, 475 (1923). Rule 25(b)(2) (second sentence) is not limited by such qualifications. *Cf.* Commonwealth v. Daniels, 366 Mass. 601, 607, 321 N.E.2d 822, 827 (1975).

316. *See, e.g.*, Commonwealth v. Grace, 381 Mass. 753, 412 N.E.2d 354 (1980).

on how a judge should deal with cases in which guilt is the only issue and the weight of the evidence is inadequate to support the verdict.

The section 33E cases involving reduction of verdicts will be analyzed first to discover the method used by the court to assess the weight of the evidence. Second, the cases will be analyzed to discover patterns in the methods used and the elements of the offense in question.

The section 33E cases fit roughly into three categories. In the first, the court's view of the weight of the evidence does not involve any significant revision of the factual findings implied by the jury's verdict, but the verdict is found by the court to be disproportionate to those verdicts rendered in similar factual cases.[317] In the second, the court's view of the weight of the evidence involves substantial revisions of the factual findings implied by the jury's verdict, and while the evidence is still legally sufficient to support the verdict, the verdict is considered to be disproportionate to the facts; it is too harsh on the revised facts, for example.[318] Each of these two categories account for roughly forty percent of the verdict reduction cases. In the third category, the court's view of the weight of the evidence involves a revision of the jury's implied findings and leads the court to the conclusion that the weight of the evidence is insufficient to support the verdict.[319]

In most cases, the court's primary conclusion that the verdict is not supported by the weight of the evidence is accompanied by a secondary conclusion that the court's view of the evidence supports a verdict of guilty of some lesser included offense.[320] That is, the inadequacy found is limited to that evidence addressed to a particular element that defines the distinction, for example, between murder and manslaughter (malice aforethought). In such a case, the murder verdict would be revised to a manslaughter verdict. In some cases, however, the court's view of the weight of the evidence has led it to grant a new trial rather than to reduce the verdict.[321] For example, in insanity cases in which the prosecution relies solely on the "presumption of sanity" to get its case to the jury, the court has found the jury's guilty verdict to be against the weight of the evidence and or-

317. The evidence is, by hypothesis, legally sufficient in this class of cases. *See, e.g.*, Commonwealth v. Baker, 346 Mass. 107, 190 N.E.2d 555 (1963).

318. *See, e.g.*, Commonwealth v. Vanderpool, 367 Mass. 743, 328 N.E.2d 833 (1975).

319. *See, e.g.*, Commonwealth v. Jones 366 Mass. 805, 323 N.E.2d 726 (1975).

320. *See, e.g.*, Commonwealth v. Williams 364 Mass. 145, 301 N.E.2d 683 (1973).

321. *See, e.g.*, Commonwealth v. Bearse, 358 Mass. 481, 265 N.E.2d 496 (1969).

dered a new trial.[322] Another example is a second degree murder case which involved a defense of accident where the court found no basis in the evidence for a verdict greater than involuntary manslaughter (recklessness) and ordered a new trial on that charge only. In effect the court ordered findings of not guilty on the greater charges.[323] The proposition will be developed that these types of cases may provide a basis for developing at least rudimentary guidelines for the exercise of the trial court's unique Rule 25 power to order a finding of not guilty based upon its view of the weight of the evidence.

The second sentence of Rule 25(b)(2) grants the trial court the authority to provide relief from a jury's guilty verdict by setting the verdict aside and granting a new trial, ordering a finding of not guilty, or ordering a finding of guilty on any lesser offense included in the charge.[324] The rule does not provide guidance for the court in determining when it is appropriate to exercise this authority or in determining an appropriate form of relief.[325] With regard to the trial judge's relationship to the jury, Rule 25(b)(2) (second sentence) extends the authority and duty of the judge to review the jury's verdict in view of the weight of the evidence and to determine whether the jury's verdict was based on a careful consideration of the evidence and not the product of bias, misapprehension or prejudice.[326] In addition, the trial judge has a broader power to consider whether a verdict otherwise may represent a miscarriage of justice and whether a lesser degree of guilt would be more consonant with justice than

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322. Commonwealth v. Mutina, 366 Mass. 810, 323 N.E.2d 294 (1975).

323. Commonwealth v. Bearse, 358 Mass. 481, 265 N.E.2d 496 (1969).

324. *See* MASS. R. CRIM. P. 25(b)(2).

325. The rule is not entirely inscrutable, however, because it is similar to that of two familiar remedial powers found elsewhere in the system: the trial court's statutory power to grant a new trial under MASS. GEN. LAWS ANN. ch. 278, § 29 (West 1981), which is now codified in MASS. R. CRIM. P. 30(b); and the supreme judicial court's authority to conduct a plenary review of the law and facts in capital cases to insure that injustice has not been done, MASS. GEN. LAWS ANN. ch. 278, § 33E (West 1981).

In Commonwealth v. McCarthy, 375 Mass. 409, 414-15, 378 N.E.2d 429, 432 (1978), the court noted the limited remedial powers of the trial court under section 29. In Commonwealth v. Gaulden, 383 Mass. 543, 554, 420 N.E.2d 905, 911 (1981), and Commonwealth v. Keough, 385 Mass. 314, 316, 431 N.E.2d 915, 917 (1982) the court ruled that the Rule 25(b)(2) (second sentence) powers of the trial court to reduce a verdict are the equivalent of the court's section 33E power to reduce a verdict and are to be exercised similarly.

326. *See* Commonwealth v. Gricus, 317 Mass. 403, 406, 58 N.E.2d 241, 243-44 (1944) (describing the nature of the supreme judicial court's review of the facts under section 33E, which in turn is derived from the section 29 powers of the trial judge).

that rendered by the jury.[327] This assessment of the jury's verdict, however, is not confined to the narrower limits imposed upon the trial court when it evaluates the sufficiency of the evidence under the preceding provisions of Rule 25. Although the power to reduce the verdict is to be used sparingly, a determination that the verdict was supported by sufficient evidence is not decisive.[328]

It is the purpose of this section to demonstrate that the provisions of Rule 25(b)(2) (second sentence) that authorize the trial court to reduce the jury's verdict or acquit the defendant are designed and suited to provide a mechanism for determining the adequacy of the evidence in two types of cases: those in which the evidence is sufficient to require submission to the jury but the verdict returned appears to the judge to be disproportionate to the weight of the evidence or the result otherwise works an injustice, and those in which the "prosecution's best case" rule or other procedural or evidentiary device prevents any meaningful assessment of evidentiary sufficiency. The provisions of Rule 25(b)(2) (second sentence) may also provide a mechanism for review of trial errors and fundamental defects in the trial process, a proposition which will be addressed only briefly.

The rule does not on its own terms identify the grounds upon

327. See Commonwealth v. Mahnke, 368 Mass. 662, 700-01, 335 N.E.2d 660, 683 (1975), for a description of this additional, broader discretionary authority. The supreme judicial court held in Commonwealth v. Gaulden, 383 Mass. 543, 420 N.E.2d 905 (1981); Commonwealth v. Keough, 385 Mass. 314, 431 N.E.2d 915 (1982), that the trial judge had authority to reduce the second degree murder convictions to manslaughter convictions in each case, despite the sufficiency of the evidence to support the murder verdicts. *Gaulden*, 383 Mass. at 554-55, 420 N.E.2d at 912; *Keough* 385 Mass. at 319, 320, 431 N.E.2d at 918-20.

Insufficiency, however, appears at times to be an important factor in the court's decision. *See* Commonwealth v. Cadwell, 374 Mass. 308, 316-18, 372 N.E.2d 246, 251-52 (1978); Commonwealth v. Bearse, 358 Mass. 481, 485-88, 265 N.E.2d 496, 498-99 (1970).

In a number of recent cases the court, in enumerating its reasons for not revising the verdict, has pointed out that the evidence supporting it was legally sufficient. *See, e.g.*, Commonwealth v. Weichell, 390 Mass. 62, 79, 453 N.E.2d 1038, 1048 (1983); Commonwealth v. Parker, 389 Mass. 27, 33, 449 N.E.2d 316, 319 (1983); Commonwealth v. Nickerson, 388 Mass. 246, 251-54, 446 N.E.2d 68, 72-73 (1983); Commonwealth v. Prendergast, 385 Mass. 625, 635-38, 433 N.E.2d 438, 444-46 (1982). In general the sufficiency of the evidence will have been established and the court's attention will be addressed instead to the weight of the evidence, a broader subject of inquiry. But this distinction is not rigidly maintained and a suggestion of marginal sufficiency or even insufficiency appear to underlie the court's decision in some section 33E cases. *See* Commonwealth v. Cadwell, 374 Mass. 308, 372 N.E.2d 246 (1974); Commonwealth v. Bearse, 358 Mass. 481, 265 N.E.2d 496 (1970); *see also* Commonwealth v. Sherry, 386 Mass. 682, 437 N.E.2d 224 (1982) (Rule 25(b)(2) (second sentence) ruling).

328. Commonwealth v. Keough, 385 Mass. 314, 431 N.E.2d 915 (1982).

which the trial court may base its remedial action. The Reporter's Notes are ambiguous on this point.[329] That is, the notes address only the power to reduce the verdict but state that the effect of the rule is to extend to the trial courts a post-verdict power—"a power in all cases much like that which had previously been reserved to the Supreme Judicial Court in capital cases under . . . [section] 33E (as amended)."[330]

The court's authority under section 33E is not limited to the power to reduce verdicts.[331] Section 33E empowers the court to review claims that errors of law were committed but were not presented to the trial court or otherwise preserved or presented for appellate review according to the usual course of procedure.[332] The court has reviewed a variety of claims under the aegis of this provision, most prominently those claims addressed to jury instructions dealing with the essential elements of the offense, issues of defense or mitigation, or a central aspect of the fact-finding process such as the allocation or definition of the burden of proof, or serious misconduct by the prosecution during the trial.[333]

There are strong reasons to support the view that the trial court has a similar authority under Rule 25(b)(2) (second sentence). Much the same authority is available under Rule 30(b), but Rule 30(b) is designed for post-appellate use.[334] One of the purposes of Rule 25(b)(2) however, is to allow trial judges to eliminate the need for an

329. MASS. R. CRIM. P. 25(b)(2) reporter's note. The supreme judicial court has treated the reporter's notes on this rule as a persuasive but not decisive expression of its purpose and scope. *See* Commonwealth v. Gaulden, 383 Mass. 543, 554-55, 420 N.E.2d 905, 912 (1981); Commonwealth v. Keough, 385 Mass. 314, 316-18, 431 N.E.2d 915, 917-18 (1982).

330. MASS. R. CRIM. P. 25(b)(2) reporter's note at 435.

331. Section 33E provides in pertinent part:

> In a capital case as hereinafter defined the entry in the supreme judicial court shall transfer to that court the whole case for its consideration of the law and the evidence. Upon such consideration the court may, if satisfied that the verdict was against the law or the weight of the evidence, or because of newly discovered evidence, or for any other reason that justice may require (a) order a new trial or (b) direct the entry of a verdict of a lesser degree of guilt, and remand the case to the superior court for the imposition of sentence.

MASS. GEN. LAWS ANN. ch. 278, § 33E (West 1981).

332. *Id.*

333. Commonwealth v. Collins, 386 Mass. 1, 11-13, 434 N.E.2d 964, 971-72 (1982); Commonwealth v. Palmer, 386 Mass. 35, 37-38, 434 N.E.2d 983, 984-85 (1982); Commonwealth v. Smith, 381 Mass. 141, 143-46, 407 N.E.2d 1291, 1292-94 (1980); Commonwealth v. Grace, 381 Mass. 753, 756-58, 412 N.E.2d 354, 358-59 (1980).

334. *See* MASS. R. CRIM. P. 30(b) reporter's notes at 328; Commonwealth v. Preston, 393 Mass. 318, 321 n.2, — N.E.2d — n.2 (1984).

appeal.[335] It would be both efficient and consistent with general practice in Massachusetts to afford trial courts the opportunity to address and, if appropriate, to correct fundamental defects in the trial process which would otherwise be addressed only on appeal.[336] The cases indicate that the supreme judicial court tends, at times, to exercise its various forms of authority under section 33E collectively, or at least without taking care to specify the precise basis upon which it was acting.[337] These considerations suggest that the trial court is au-

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335. Commonwealth v. Gaulden, 383 Mass. 543, 554 n.8, 420 N.E.2d 905, 912 n.8 (1981).

336. Such issues can be raised in a post-conviction collateral attack by means of a motion for new trial. Commonwealth v. Cook, 380 Mass. 314, 320-21, 403 N.E.2d 363, 367-68 (1980) ("If the original trial was 'infected with prejudicial constitutional error,' the trial judge has no discretion to deny the motion" for new trial under Rule 30(b).); Earl v. Commonwealth, 356 Mass. 181, 184, 248 N.E.2d 498, 500 (1969).

The court's comment in Commonwealth v. Grace, 381 Mass. 753, 758, 412 N.E.2d 354, 357 (1980), that the 1939 amendment to section 33E gave it "a discretionary authority broader than that of the trial judge" could not have been addressed to the power to consider errors of law, which was not affected by that amendment. Also, in light of *Gaulden* and *Keough* it could not have been addressed to the power to reduce a verdict. At most, it can be interpreted as a suggestion that the trial court cannot act under Rule 25(b)(2) (second sentence) "for any other reason that justice may require" as the supreme judicial court can. MASS. GEN. LAWS ANN. ch. 278, § 33E (West 1981). It may have been nothing more than a poorly considered remark.

337. This is not surprising in view of the equitable and broadly discretionary nature of the authority the court exercises, and in view of the fact that, until the advent of Rule 25(b)(2) (second sentence), there was little reason for the court to focus on the precedental impact of a particular decision.

See, e.g., Commonwealth v. Kinney, 361 Mass. 709, 282 N.E.2d 409 (1972) (reducing second degree murder verdict to manslaughter where judge failed to give manslaughter instructions); Commonwealth v. White, 353 Mass. 409, 232 N.E.2d 335 (1967) (reducing first degree murder verdict to second degree where trial judge failed to give instructions clearly distinguishing basis of finding one rather than the other), *cert. denied*, 391 U.S. 968 (1968).

In *Kinney* the trial judge had not instructed the jury on involuntary manslaughter although the issue was raised by the evidence. 361 Mass. at 712, 282 N.E.2d at 411. The court considered manslaughter to be the appropriate verdict but evidently believed it unlikely that a jury would reach that result in a second trial because of the inflammatory nature of the circumstances: the defendant, an adult male, had been confronted and attacked by a group of some twenty angry women and children; he claimed to be in fear for his life and to have fired five warning shots, supposedly into the air. Two persons were struck and killed by four of the bullets fired. *Id.* at 710, 282 N.E.2d at 410.

In *White* the defendant had been convicted of first degree murder, evidently on a felony murder theory, for a killing resulting from his efforts either to burglarize a restaurant or rob its owner. The burglary-murder would have been second degree; the robbery-murder first, but the trial judge's instructions did not correctly define either underlying felony. The weight of the evidence suggested the defendant's purpose had been burglary and the court ordered entry of a verdict of second degree murder "to prevent a possible miscarriage of justice." 353 Mass. at 426, 232 N.E.2d at 346.

thorized by Rule 25(b)(2) (second sentence) to act on grounds as broad as those more specifically enumerated in section 33E.

2. History

The history of the development and use of the supreme judicial court's section 33E powers and the trial court's section 29 powers to grant a new trial cast some light on the extraordinarily broad and equitable nature of the trial court's Rule 25(b)(2) (second sentence) power. The trial judge's authority and duty to grant relief from unjust convictions precedes any explicit legislative grant of authority and, in some respects, may be derived from the due process guarantees of Article 12 of the Declaration of Rights.[338] The judge's role in the exercise of this authority is, like the role assumed in evaluating evidentiary sufficiency, supervisory vis-a-vis the jury. In contrast to the court's authority to determine sufficiency of the evidence, however, it is guided by discretion rather than by an articulated legal standard.[339] Before the enactment of Rule 25, the only remedy the trial judge could give was to grant a new trial.[340] The authority to grant a new trial could be exercised either on the basis of trial errors "when a decisive or pertinent point affecting substantive rights has not been raised by exception at the trial (in order to prevent a miscarriage of justice)"[341] or when, in the trial judge's judgment, the verdict was " 'so greatly against the weight of the evidence as to induce in his mind the strong belief that it was not due to a careful consideration of the evidence, but that it was the product of bias, misapprehension or prejudice.' "[342] Such a verdict, if allowed to

338. The trial court's responsibility and authority in this respect were acknowledged in Commonwealth v. Anthes, 71 Mass. (5 Gray) 185, 229-31 (1855); and Commonwealth v. Green, 17 Mass. 514, 550 (1822), where the court suggested that the judge's supervisory relationship to the jury is concommitant to the Article 12 guarantee of a jury trial.

339. *See Gaulden*, 383 Mass. at 545, 420 N.E.2d at 913 (citing Commonwealth v. McCarthy, 375 Mass. 409, 414-15, 378 N.E.2d 429, 432-33 (1978)).

340. *See* Commonwealth v. McCarthy, 375 Mass. 409, 414 n.5, 378 N.E.2d 429, 432 n.5 (1978). This was also true of the supreme judicial court's remedial powers under section 33E and its predecessors until 1962, when the statute was amended to permit the court to revise the verdict as well. *See* Commonwealth v. Baker, 346 Mass. 107, 108-09, 190 N.E.2d 555, 557 (1963). The court has never had the power to enter a finding of not guilty under section 33E, however.

341. Commonwealth v. Dascalakis, 246 Mass. 12, 25, 140 N.E. 470, 476 (1923); *cf.* Commonwealth v. Green, 17 Mass. (1 Pick.) 515, 549-50 (1822) (claim of newly discovered evidence reviewed with view toward protection of the innocent).

342. Commonwealth v. Gricus, 317 Mass. 403, 406, 58 N.E.2d 241, 243 (1944) (quoting Scannel v. Boston Elevated Ry., 208 Mass. 513, 514, 94 N.E. 696, 696 (1911) (standard for grant of new trial on weight of evidence grounds in civil cases)).

stand, would result in a miscarriage of justice. It is not enough that the trial judge had a reasonable doubt examining the case as a juror, because the issue is not whether the judge agrees with the verdict but whether the judge believes that the jury actually confined itself to deciding the case on the evidence.[343] Until 1939 the supreme judicial court was not clearly empowered to act on grounds other than errors of law in the exercise of its section 33E authority, but the statute was explicitly broadened by amendment that year to open the facts of a case to the court's consideration.[344] Five years later the court ruled that, as to the weight of the evidence, the statute conferred "the power and the duty exercised by a trial judge upon a motion for a new trial,"[345] and "that the question of whether a verdict is contrary to the weight of the evidence is, upon analysis, one of fact, although commonly spoken of as one of discretion."[346]

In sum, after 1939, section 33E authorized the supreme judicial court (in capital cases) to grant a new trial on any one of four grounds: (1) that the verdict was against the law; (2) that the verdict was against the weight of the evidence; (3) that there existed newly discovered evidence; or (4) for any other reason that justice may require. The trial judge had comparable authority in all cases, at least as to the first three grounds. The supreme judicial court's remedial

343. *See* Commonwealth v. Gricus, 317 Mass. 403, 406-07, 58 N.E.2d 241, 243 (1944).

344. 1939 Mass. Acts 341 (current version at MASS. GEN. LAWS ANN. ch. 278, § 33E (West 1981)). The amended statute provided that the appeal of a capital case to the supreme judicial court "shall transfer to that Court the whole case for its consideration of the law and the evidence" and authorized the court to "order a new trial if satisfied that the verdict was against the law or the weight of the evidence, or because of newly discovered evidence, or for any other reason that justice may require." Commonwealth v. Gricus, 317 Mass. 403, 406, 58 N.E.2d 241, 243 (1944).

Until 1939 only the trial court could grant a new trial. The revision transferring this authority to the supreme judicial court was an effort to streamline the appeals and post-conviction review process. The court had been confined to reviewing questions of law on direct appeal and reviewing denials of motions for a new trial for abuse of discretion. Commonewalth v. Sacco, 259 Mass. 128, 134-42, 156 N.E. 57, 58-61, *cert. denied*, 275 U.S. 574 (1927); JUDICIAL COUNCIL OF MASS., THIRD REP., PUB. DOC. NO. 144, at 37-43 (1927), *reprinted in* 13 MASS. L.Q. 1, 37-43 (Nov. 1927); JUDICIAL COUNCIL OF MASS., THIRTEENTH REP., PUB. DOC. NO. 144, at 28-30 (1937), *reprinted in* 23 MASS. L.Q. 1, 28-30 (Nov. 1937); JUDICIAL COUNCIL OF MASS., FOURTEENTH REP., PUB. DOC. NO. 144, at 14-167 (1938), *reprinted in* 24 MASS. L.Q. 1, 14-167 (Nov. 1938); JUDICIAL COUNCIL OF MASS., FIFTEENTH REP., PUB. DOC. NO. 144, at 8-9 (1939), *reprinted in* 25 MASS. L.Q. 1, 8-9 (Dec. 1939); *see* Commonwealth v. Brown, 376 Mass. 156, 166-69, 390 N.E.2d 113, 119-20 (1978); Rosenthal, *Reversible Error in Homicide Cases in Massachusetts 1927-1949*, 34 MASS. L.Q. 45 (Oct. 1949).

345. Commonwealth v. Gricus, 317 Mass. 403, 406, 58 N.E.2d 241, 243 (1944).

346. *Id.* at 405, 58 N.E.2d at 243.

authority was enlarged in 1962 by legislative amendment to permit it to direct the entry of a lesser degree of guilt and remand the case to the trial court for resentencing.[347] After 1962, then, section 33E functioned as a "safety valve" by conferring upon the supreme judicial court the extraordinary power in capital cases to review all aspects of a case regardless of whether a proper claim of error had been made.[348] The trial court's remedial powers on a motion for new trial were not correspondingly enlarged at that time.[349] Those remedial powers were enlarged in new Rule 25 to include the power to reduce the jury's verdict and further to authorize a finding of not guilty.[350]

B. *Considerations Developed by the Supreme Judicial Court under Section 33E*

Whether Rule 25 transfers the full set of "safety valve" powers found in section 33E to the trial court in all non-capital criminal cases is not clear. It clearly does confer upon the trial judge the duty and authority to review the weight of the evidence.[351] The proper exercise of this extended supervisory responsibility over the jury's fact-finding function requires the trial judge to consider two questions: first, under what circumstances should it be concluded that the verdict is against the weight of the evidence and second, in such circumstances according to what criteria should the trial judge select the appropriate form of relief?

It is suggested that in at least two sets of circumstances the trial judge should grant relief on consideration of the weight of the evidence. These two situations overlap substantially, if not completely,

347. MASS. GEN. LAWS ANN. ch. 278, § 33E (West 1981).

348. *See* Commonwealth v. Brown, 376 Mass. 156, 168, 380 N.E.2d 113, 120 (1978).

349. Commonwealth v. Mahnke, 368 Mass. 662, 701, 335 N.E.2d 660, 683 (1975), *cert. denied*, 425 U.S. 959 (1976); Commonwealth v. Jones, 366 Mass. 805, 809-10, 323 N.E.2d 726, 729 (1975); Commonwealth v. Baker, 346 Mass. 107, 109, 190 N.E.2d 555, 557 (1963).

350. The trial judge's remedial options are thus broader than those available to the supreme judicial court under section 33E. The scope of the trial judge's discretionary authority is comparable to that of the court. *Gaulden*, 383 Mass. at 554-55, 420 N.E.2d at 912. The suggestion to the contrary in Commonwealth v. Grace, 381 Mass. 753, 758, 412 N.E.2d 354, 357 (1980), apparently refers to the state of affairs as it was before Rule 25 was promulgated.

351. The "evidence" includes all information available concerning the case and is not limited to evidence presented to the jury. It may be appropriate to hold an evidentiary hearing on a motion for relief from a verdict where the claim depends to any extent on information outside the trial record. *See, e.g.*, Commonwealth v. King, 374 Mass. 501, 373 N.E.2d 208 (1979).

with regard to whether relief should be granted. The distinction between them, however, is relevant and should be observed in determining what form of relief is appropriate. As has been demonstrated earlier in this paper, the limiting effect of the "prosecution's best case" rule on the sufficiency of the evidence inquiry, and of the use of long-standing procedural/evidentiary devices-("prima facie evidence" rules, presumptions, inferences and "affirmative defenses") drastically impairs or eliminates the protective function of the provisions of Rule 25(a), (b)(1) and (b)(2)(first sentence) in some cases, especially if more than one of these devices is employed. The alibi case of *Commonwealth v. Woods*[352] and the homicide case of *Commonwealth v. Johnson*[353] were discussed as examples,[354] and it was demonstrated that the presumption of sanity severely impaired the protective functions of Rule 25(a) in all cases which involved the issue of criminal responsibility.[355] These cases must receive careful attention under Rule 25(b)(2)(second sentence). They are included in the larger, more general class of cases in which the evidence has been determined to be legally sufficient but inadequate to satisfy the court's sense of justice. The best sample of this general class of cases consists of fourteen cases in which the supreme judicial court has reduced verdicts based upon weight of the evidence grounds[356] and three reported cases in which the supreme judicial court has affirmed trial court decisions granting relief on this basis.[357]

The question becomes in what kinds of cases a trial court, following the supreme judicial court's example, will grant some form of relief on the basis of the weight of the evidence.[358] While the court has not developed a definable standard to be applied in determining

352. 382 Mass. 1, 413 N.E.2d 1099 (1980).

353. 3 Mass. App. Ct. 226, 326 N.E.2d 355 (1973). The supreme judicial court expressed disapproval of *Johnson* in Commonwealth v. McInerny, 373 Mass. 136, 145-46, 365 N.E.2d 815, 820-21 (1977).

354. *See supra* notes 179-206, 277-305 and accompanying text.

355. *See supra* notes 207-220 and accompanying text.

356. *See supra* note 317.

357. *See supra* notes 337-38.

358. The court in *Gaulden* reports that its survey of the 230 cases in which it considered the weight of the evidence "explicitly or by necessary implication", it granted relief in thirteen. 383 Mass. at 555 n.9, 420 N.E.2d at 912 n.9. These figures do not provide much guidance to trial courts for several reasons. First, the court was required by section 33E to consider the weight of the evidence in all 230 cases, whether the issue was raised by the defendant or not. *See* Commonwealth v. Davis, 380 Mass. 1, 401 N.E.2d 811 (1980) (appellate counsel for both parties failed to address section 33E issues in briefs, not an isolated occurrence; court reviewed law and facts nonetheless). Trial judges do not have this obligation; a defense motion is the predicate to Rule 25(b)(2) (second sentence) review and, presumably, such motions will be made selectively. *See*

whether to reduce a verdict, the court did, in *Gaulden*, mention some of the considerations it found to be pertinent in particular cases.[359]

The considerations discussed in *Gaulden* included both the kinds of information that the court has relied upon as well as some of the circumstances in which the court has found it appropriate to act.[360] The court's discussion in *Gaulden* suggests, and an examination of the section 33E and Rule 25(b)(2)(second sentence) cases confirms, that the power is discretionary. The task of deriving guidance from these cases, then, is not a quest for a set of rules that can be applied depending upon the defendant's ability to satisfy one or more clearly defined standards. Rather, the quest is to survey the cases in an effort to identify the patterns in defendants' conduct, in mitigating circumstances and in shortcomings in proof of culpability that has prompted the court to conclude that justice may not have been done. Toward this end, it is necessary to examine the underlying facts and, frequently, the proof presented at trial in considerable detail. The trial court is required to state reasons for its exercise of its Rule 25(b)(2) authority in terms of the considerations that prompted the supreme judicial court to exercise its section 33E powers; trial counsel must be prepared to approach the court in these terms as well.[361]

1. Information Relied Upon by the Court

It is necessary to be aware of the kind of information upon

MASS. R. CRIM. P. 25(b)(2). A higher incidence of granting relief by trial judges would not necessarily reflect more lenient standards.

Second, the qualifier "or by necessary implication" suggests that the review was more or less cursory in some cases. *See* 383 Mass. at 555 n.9, 420 N.E.2d at 912 n.9. In many homicide cases, no doubt the justice of the result seems apparent on the face of things. Trial judges, being faced with a wider range of offenses, can expect to face a greater concentration of difficult factual claims such as that presented in *Woods*, and Commonwealth v. Gordon, 13 Mass. App. Ct. 1085, 435 N.E.2d 1053 (1982)(positive victim identification pitted against convincing alibi defenses, accompanied by apparent manipulation of evidence by prosecutor or police).

359. 383 Mass. at 554-56, 420 N.E.2d at 912-13.

360. *Id.* at 554-56, 420 N.E.2d at 912.

361. "Where we have reduced a verdict, we have stated the reasons for our actions." *Id.* at 556, 420 N.E.2d at 912. Presumably, the trial court's statement of reasons will serve to facilitate appellate review, whereas the supreme judicial court's statements of reasons will serve a guidance function.

The court's own statements of its reason for granting relief have not always been enlightening. *See, e.g.*, Commonwealth v. Pisa, 372 Mass. 590, 597-98, 363 N.E.2d 245, 249 (1977), *cert. denied*, 434 U.S. 869 (1977); Commonwealth v. Rego, 360 Mass. 385, 396, 274 N.E.2d 795, 800 (1971); Commonwealth v. White, 353 Mass. 409, 425, 232 N.E.2d 335, 345 (1967), *cert. denied*, 391 U.S. 968 (1968).

which the court has permitted itself to rely. First, the court has not limited itself to consideration of the evidence presented to the jury. In *Commonwealth v. Mahnke*,[362] for example, the court relied heavily upon a coerced statement made by the defendant and properly suppressed at trial, noting that section 33E "requires us to consider the *whole case broadly* to determine whether there was any miscarriage of justice".[363] The court has considered a variety of "character" factors, including the defendant's age, lack of serious criminal record, military service, marital status, number of children and relationship to the victim.[364] Additionally, the court has also considered background information in the form of published studies not presented by either party.[365] Further, in considering "character" factors, the court has occasionally inferred, from the absence of evidence in the record, that the defendant had no earlier criminal convictions.[366] The court has also considered the outcome of co-defendant's cases and the possibly inflammatory impact of the characteristics of the victim and/or the circumstances in which the killing occurred.[367] In a few cases, the court mentioned the sentencing consequences of a

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362. 368 Mass. 662, 335 N.E.2d 660 (1975), *cert. denied*, 425 U.S. 959 (1976).

363. *Id.* at 702 n.47, 335 N.E.2d at 684 n.47 (quoting Commonwealth v. Cox, 327 Mass. 609, 614, 100 N.E.2d 14, 17 (1951)); *see also* Commonwealth v. Daniels, 366 Mass. 601, 607-09, 321 N.E.2d 822, 827-29 (1975)(evidence presented to judge at hearing on pretrial motion should have been presented to jury).

364. *See* Commonwealth v. Seit, 373 Mass. 83, 95, 364 N.E.2d 1243, 1251 (1977) (court noted that defendant was "not a hoodlum or gangster").

365. Commonwealth v. Cadwell, 374 Mass. 308, 316, 372 N.E.2d 246, 251 (1978).

366. Commonwealth v. Vanderpool, 367 Mass. 743, 750-51, 328 N.E.2d 833, 837-38 (1975); Commonwealth v. Jones, 366 Mass. 805, 808, 323 N.E.2d 726, 729 (1975); *see also* Commonwealth v. Keough, 385 Mass. 314, 321, 431 N.E.2d 915, 919 (1982).

367. *See* Commonwealth v. Tavares, 385 Mass. 140, 159, 430 N.E.2d 1198, 1209-10, *cert. denied*, 457 U.S. 1137 (1982); Commonwealth v. Cadwell, 374 Mass. 308, 311, 372 N.E.2d 246, 249 (1978); Commonwealth v. Vanderpool, 367 Mass. 743, 749-51, 328 N.E.2d 833, 837-38 (1975); Commonwealth v. Williams, 364 Mass. 145, 151-52, 301 N.E.2d 683, 688 (1973). While an inconsistency in verdicts by juries in separate trials is not sufficient to justify relief, the fact that a co-participant is allowed to plead guilty to a lower offense in exchange for testimony has some impact. *See Cadwell*, 374 Mass. at 311, 372 N.E.2d at 249 (woman friend, mother of four-year-old victim of child abuse); *Vanderpool*, 367 Mass. at 750, 328 N.E.2d at 837 (gang member who shot victim, ostensibly at defendant's command, pleaded guilty to second degree murder).

The inflammatory impact of the circumstances of the killing were discussed in *Cadwell*, 374 Mass. at 315-16, 372 N.E.2d at 251-52 (defendant delivered fatal blows to child abused by defendant and child's mother); Commonwealth v. Mahnke, 368 Mass. 662, 335 N.E.2d 660 (1975) (defendant killed and hid body of pregnant girlfriend; was harrassed, kidnapped and gave confession to vigilante group consisting of victim's family and friends), *cert. denied*, 425 U.S. 959 (1976); Commonwealth v. Kinney, 361 Mass. 709, 282 N.E.2d 409 (1972) (defendant, shooting in panic, killed woman and child); Commonwealth v. Bearse, 358 Mass. 481, 265 N.E.2d 496 (1970) ("deadbeat" defendant shot and killed 16-year-old son under questionable circumstances).

reduction of the verdict.[368] The victim's character and reputation are also taken into account when the defendant has claimed self-defense or provocation.[369] Most importantly, however, the court has taken the liberty of relying upon the defendant's account of the facts in a variety of circumstances: where the defendant's account was basically consistent with the accounts of the prosecution's witnesses, but more detailed or complete;[370] where the defendant's facts were inconsistent with the inferences apparently drawn by the jury but not contradicted by direct evidence presented by the prosecution;[371] and where the defendant's account was only partially rebutted by the prosecution's evidence and the unrebutted portion supported a theory of excessive force in self-defense or other imperfect claim of exculpation.[372]

2. Three Methods of Assessing the Weight of the Evidence

The supreme judicial court has developed three distinct methods of developing the version of facts it is willing to rely upon in assessing the weight of the evidence. In one set of cases, the court has accepted the prosecution's version of the events and found it to

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368. Commonwealth v. Tavares, 385 Mass. 140, 159, 430 N.E.2d 1198, 1210, *cert. denied*, 457 U.S. 1137 (1982); Commonwealth v. King, 374 Mass. 501, 508, 373 N.E.2d 208, 212 (1978); Commonwealth v. Mahnke, 368 Mass. 662, 335 N.E.2d 660, 685 (1975), *cert. denied*, 425 U.S. 959 (1976); Commonwealth v. Williams, 364 Mass. 145, 151, 301 N.E.2d 683, 688 (1973). In every homicide case, of course, a reduction in the jury's verdict creates at least an opportunity for the superior court to impose a more lenient sentence. The reduction of a first degree murder verdict to second degree makes the defendant eligible for parole after 15 years, the reduction of a murder conviction to manslaughter eliminates the mandatory life sentence and in addition makes probation and a suspended sentence a possible disposition.

369. Commonwealth v. Seit, 373 Mass. 83, 95, 364 N.E.2d 1243, 1251 (1977); Commonwealth v. Jones, 366 Mass. 804, 808, 323 N.E.2d 726, 729 (1975).

370. Commonwealth v. Baker, 346 Mass. 107, 112-15, 190 N.E.2d 555, 558-60 (1963).

371. *Mahnke*, 368 Mass. at 701, 335 N.E.2d at 683-84; *cf.* Commonwealth v. Keough, 385 Mass. 314, 320, 431 N.E.2d 915, 919 (1982). (Rule 25 relief upheld, reliance upon defendant's account approved).

372. Commonwealth v. Seit, 373 Mass. 83, 94-95, 364 N.E.2d 1243, 1250-51 (1977) (no third-party witness to defendant's having shot victim in front and back of head, claim of self-defense "deserves consideration" where government did not rebut defendant's theory that impact of first shot caused victim to turn, causing second shot to strike back of head, defendant could be held to have used excessive force in self-defense or to have acted from a "transport of passion upon provocation," or upon "sudden combat"—all manslaughter verdicts); Commonwealth v. Jones, 366 Mass. 805, 808-09, 323 N.E.2d 726, 729 (1975) (use of knife in defense of attack by victim armed with straight razor, razor found in victim's pocket; defendant "reasonably apprehensive that victim might use the razor which defendant knew the victim possessed").

be sufficient but unsatisfactory, given the crime charged.[373] In a second set of cases, the court has established a paradigm of the offense which is less exact than its formal definition and, utilizing either the prosecution's version or a mixed version of the events, found the evidence to be sufficient but unsatisfactory.[374] In the third set the court has, using the paradigm approach, found the evidence to be insufficient. Under each of these approaches it has concluded that relief should be granted.[375]

a. *Sufficient But Unsatisfactory Evidence*

Taking a broad view of the case, the court has focused upon the adequacy of the prosecution's proof of the elements which distinguish degrees of culpability in homicides. Except for two cases, the court has gone no further than reducing the jury's verdict by more than one "degree" of culpability. In *Commonwealth v. Baker*,[376] the court conceded that sufficient evidence of malice aforethought and deliberate premeditation had been presented to support the jury's first degree murder verdict, but found the evidence too weak on both points in the face of the uncontradicted evidence that the unarmed victim and, perhaps one or all of his companions, had been advancing on the defendant, who shot the victim twice.[377] The court ordered entry of a manslaughter verdict in the belief that "justice will be more nearly achieved."[378] In *Commonwealth v. Bearse*,[379] the court found no evidence to support any theory of murder liability in the prosecution's evidence and ordered a retrial, to be limited to the lesser included offense of involuntary manslaughter.[380] Between these extremes of uncontradicted evidence and no evidence lie the majority of cases in which the evidence, while conflicting, is legally sufficient to support the verdict. In some, such as *Commonwealth v. Dalton*,[381] sparse evidence was rendered unsatisfactory by the absence of bolstering evidence, such as that which would establish a motive for the killing.[382] The evidence demonstrated that an appar-

373. *See infra* notes 376-96 and accompanying text.
374. *See infra* notes 397-462 and accompanying text.
375. *See infra* notes 463-77 and accompanying text.
376. 346 Mass. 107, 190 N.E.2d 555 (1963).
377. *Id.* at 118, 190 N.E.2d at 562.
378. *Id.* at 119, 190 N.E.2d at 562.
379. 358 Mass. 481, 265 N.E.2d 496 (1970).
380. *Id.* at 487-88, 265 N.E.2d at 500.
381. 385 Mass. 190, 431 N.E.2d 203 (1982).
382. *Id.* at 197, 431 N.E.2d at 209. One disquieting feature of the *Dalton* case is the possibility that the verdict was reduced in part in lieu of ordering further proceedings

ently intentional killing was committed by the defendant but did not lend itself to any explanation of the reason.[383] In other cases, the court acknowledged that the conflicting evidence made the issue of malice a close question.[384] The decision to grant relief in these circumstances may depend upon one of several factors. The following cases illustrate the interplay of these factors.

In *Commonwealth v. Jones*,[385] the defendant was the smaller of two intoxicated men involved in a "violent quarrel . . . undoubtedly the result of too much drinking."[386] The defendant's claim that he stabbed the victim while defending himself from the latter's attack with a straight razor was evidently rejected by the jury based, in all likelihood, on the evidence that the victim died with his razor in his pocket.[387] Despite the fact that the jury was fully instructed on manslaughter,[388] the court concluded that the defendant reasonably believed that the victim might use the razor.[389] Significantly, the court dealt directly with the inference of malice which may arise from the use of a deadly weapon in a killing: "We believe, however, that justice will be more nearly achieved by concluding that the intention . . . [to attack with a knife] was formed in the heat of sudden affray

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which might have resolved some of the doubts in the case. The defendant had moved for a new trial and unsuccessfully requested, *inter alia*, appointment of a medical expert to investigate whether he acted in the throes of an epileptic seizure. The court affirmed this discretionary trial court ruling, noting the absence of any evidence in the record that Dalton suffered an epileptic seizure during the shooting. *Id.* at 195, 431 N.E.2d at 207-08. In reducing the verdict, however, the court noted in partial explanation that Dalton "was on medication for the treatment of epilepsy . . . [n]o motive for this killing has surfaced." *Id.* at 197, 431 N.E.2d at 209. The first objection to this implied accommodation, if that is what occurred, is that in some jurisdictions the fact that a person acted in the throes of a seizure is considered to be either completely or partially exculpatory. *See* People v. Grant, 46 Ill. App. 3d 125, 130, 360 N.E.2d 809, 814 (1977), *rev'd*, People v. Grant, 71 Ill. 2d 551, 377 N.E.2d 4 (1978). The court in *Dalton* seemed to concede that such a circumstance would at least negate the element of malice. *See* 385 Mass. at 193, 431 N.E.2d at 207. The second objection is that the development of substantive rules through case law is impaired when such issues are resolved "equitably." *Compare* Commonwealth v. Kinney, 361 Mass. 709, 712-13, 282 N.E.2d 409, 411-12 (1972); Commonwealth v. Rego, 360 Mass. 395, 397, 274 N.E.2d 795, 802 (1971); Commonwealth v. Ransom, 358 Mass. 580, 584, 266 N.E.2d 304, 306 (1970); Commonwealth v. Baker, 346 Mass. 107, 119, 190 N.E.2d 555, 563 (1963) (assignments of error regarding motion for partial directed verdict, complaints about jury instructions not considered in light of reduction of verdict).

383. *See Dalton*, 385 Mass. at 197, 431 N.E.2d at 209.

384. *See infra* notes 465-77 and accompanying text.

385. 366 Mass. 805, 323 N.E.2d 726 (1975).

386. *Id.* at 808, 323 N.E.2d at 729.

387. *See id.* at 806, 807, 323 N.E.2d at 727, 728.

388. *Id.* at 808 n.1, 323 N.E.2d at 728 n.1.

389. *Id.* at 808-09, 323 N.E.2d at 728.

or combat . . . thus negating the necessary element of malice . . . ."[390] This was a case, then, in which the evidence was sharply contested and fairly evenly balanced as between manslaughter and murder; the impact of the "presumption of malice"[391] might have had a decisive impact on the jury's judgment.

The evidence in *Commonwealth v. King*[392] was, in contrast, contested only with regard to interpretation: the question of what mens rea inferences might be drawn from the evidence. The killing resulted from a brawl in which both participants were grossly intoxicated.[393] The fact that the defendant was unquestionably the aggressor apparently explains why the court's discussion did not explore the possibility that the killing was manslaughter;[394] as in *Jones*, the presumption of malice permitted from the intentional use of a deadly weapon satisfied the sufficiency standard as to that element. The court justified its reduction of the verdict to second degree murder by reference to three factors—the weakness of the prosecution's evidence, the strong evidence of gross intoxication, and the absence of jury instructions on a potentially key mitigating factor.[395] The evidence as a whole was uncontradicted and sufficient but unsatis-

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390. *Id.* at 809, 323 N.E.2d at 729 (citations omitted); *see also*, Commonwealth v. Ransom, 358 Mass. 580, 583, 266 N.E.2d 304, 306 (1970) (conflicting evidence precluded identification of aggressor in scuffle between parties intoxicated by drugs and alcohol; court found that defendant acted in heat of sudden affray and killing done in heat of passion; second degree murder verdict reduced to manslaughter).

391. This presumption has been renamed and its mandatory thrust has been eliminated in light of Mullaney v. Wilbur, 421 U.S. 684 (1975).

392. 374 Mass. 501, 373 N.E.2d 208 (1978).

393. *Id.* at 505, 373 N.E.2d at 210. The victim's post-mortem blood alcohol level was measured at 0.33%. The defendant and the Commonwealth's adult witnesses were also visibly intoxicated at the scene. *Id.* at 504-05, 373 N.E.2d at 210.

394. In its only reference to the element of malice necessary to a murder verdict, the court stated somewhat cryptically:

> The knife wounds themselves look like the consequences of an untoward, foolish introduction of a dangerous weapon in a fight not otherwise at a lethal pitch . . . but if malice is suggested, it is not the deliberated or purposeful malice of an assassin. The defendant's unsworn statement at trial seems a layman's assertion that despite the knife he did not intend to inflict mortal injury.

Id. at 507, 373 N.E.2d at 211-12 (citations omitted).

395. *Id.* at 506-08, 373 N.E.2d at 211-12. The prosecution's evidence (the defendant presented none) was presented through witnesses who were so inarticulate that the court noted the difficulty of constructing a "connected story" from it: "The facts emerge spottily, with some gaps and inconsistencies." *Id.* at 502, 373 N.E.2d at 209. From the facts presented the court found that "[d]eliberate premeditation is . . . a dubious conclusion . . . even if the element of drunkenness is ignored." *Id.* at 507, 373 N.E.2d at 212. That element was abundantly present, but was ignored in the jury instructions, which did not inform the jury of the possible relevance of intoxication to the capacity to deliberately premeditate. *Id.* at 507-08, 373 N.E.2d at 212.

factory because of the paucity of credibile witnesses and the prosecution's failure to present a complete, connected account of the killing.[396]

b. *The Paradigm Approach: Relaxed Legal Standards*

Another type of case involving legally sufficient but unsatisfactory evidence appears when the fact pattern does not fit the court's paradigm of the offense for which the defendant was convicted. Of the fourteen reported cases, those in this group fit most clearly the "disproportionate verdict" ground identified in *Gaulden* as the primary basis for granting the section 33E remedy of a reduced verdict.[397] Three of the court's decisions reviewing first degree murder convictions illustrate the different aspects of disproportionality which have prompted the court to act.

The earliest case was *Commonwealth v. Williams*,[398] the case of a young prostitute who, with another, robbed and killed a handicapped customer. The evidence supported a first degree murder verdict on any one of the three separate grounds found in Massachusetts law: felony-murder involving the capital felony of robbery, participation in a deliberately premeditated killing, and participation in a killing accomplished with extreme atrocity and cruelty. The court, noting that the defendant's accomplice had been convicted of manslaughter in a separate trial, concluded that the weight of the evidence demonstrated second degree murder.[399] In the court's view, the robbery and killings occurred spontaneously in the wake of the struggle which ensued when the larceny attempt went awry.[400]

396. Compare the treatment of an even sketchier account by the appeals court, which was limited to considering the sufficiency of the evidence, in Commonwealth v. Johnson, 3 Mass. App. Ct. 226, 231-33, 326 N.E.2d 355, 359-60 (1975).

397. 383 Mass. at 555 n.9, 420 N.E.2d at 912-13 n.9.

398. 364 Mass. 145, 301 N.E.2d 683 (1973). The victim, who had hired a motel room for the three, evidently caught the women trying to steal from him and responded violently. They bound, gagged, and strangled him "and there was some evidence that other extreme violence had been inflicted on him." *Id.* at 146-47, 301 N.E.2d at 685. A gold ring was taken from him and sold later that day by Williams for $30. *Id.*

399. *Id.* at 151, 301 N.E.2d at 687-88.

400. *Id.* at 152, 301 N.E.2d at 688.

> Inferences are warranted that at some instant in the rapid happenings the defendant's intent veered from larceny to robbery, and that for a fleeting period of time she intended to kill the victim. Nevertheless, in our view, her criminal involvement was not of the nature that judges and juries, in weighing evidence, ordinarily equate with murder in the first degree.

Id.

A similar conclusion was drawn in *Commonwealth v. Cadwell*,[401] but through a slightly different analysis. One morning a child died after the defendant punished him for his difficulties in eating a doughnut. The pathologist's opinion was that the child was killed by "multiple blunt force injuries to the head."[402] The court found that the first degree murder verdict rested on sufficient evidence to show either deliberate premeditation or killing by extreme atrocity and cruelty.[403] It regarded the case, however, as one involving the "battered-child syndrome" in which the typical abuser "tends to suffer from emotional pressures which are not directly related to the child himself, [and therefore] focuses his general feelings of frustration and anger on the one child [the victim here had a sister with Down's Syndrome, who was evidently not abused] and expresses his emotions through an immature and *uncontrolled* display of physical abuse of the child."[404] Viewing the case from this perspective, the court found evidence of deliberate premeditation unsatisfactory.[405]

The alternative basis for the first degree verdict—extreme atrocity and cruelty—was dealt with similarly. The factual basis was surely present and less easily disposed of because it did not depend upon any proof of the defendant's mental state, provided the killing was intentional.[406] The court, noting the pathologist's opinion that

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401. 374 Mass. 308, 372 N.E.2d 246 (1978).

402. *Id.* at 310, 372 N.E.2d at 248. There was evidence that the child's mother also beat him at least occasionally. *Id.* at 310 & n.1, 372 N.E.2d at 248 & n.1. The victim was four years old, a slow learner, and undernourished, weighing only twenty-five pounds. The defendant lived with the victim's mother and was apparently responsible for disciplining the victim. His method of punishment was to beat the child, and at the time of his death the child was bruised over much of his body. *Id.*

403. *Id.* at 316, 372 N.E.2d at 251-52.

404. *Id.* at 317, 372 N.E.2d at 252 (emphasis in original) (quoting, People v. Steger, 16 Cal.3d 539, 549 n.4, 546 P.2d 665, 671 n.4, 128 Cal. Rptr. 161, 167 n.4 (1976) (quoting Note, *The Battered Child: Logic in Search of Law*, 8 SAN DIEGO L. REV. 364, 375 (1971))).

405. 374 Mass. at 316-17, 372 N.E.2d at 252.

> Deliberate premeditation in the sense of the statute can perhaps be pieced out of the evidence, but that conclusion is much harder to reach on the proofs here than in the run of convictions involving that element. On the whole record, the surest surmise is that the lethal blows were struck by the defendant in an access (sic) of anger and frustration. There is an irreducible doubt in all the circumstances whether the defendant consciously formed a purpose that morning to do the child mortal injury; but if the defendant did, it is still probable that the resolve lasted for only "a fleeting period of time," as we said of the interval of premeditation in . . . *Williams* where we applied § 33E to reduce a murder verdict to the second degree.

Id. The court then noted parenthetically: "In the present case we need not go so far as to negate all premeditation in order to apply § 33E." *Id.*

406. "Our cases have usually looked to the consciousness and degree of suffering

earlier beatings had not contributed to the child's death, found that the case was "much less persuasive of extreme cruelty than is commonly found in convictions on that basis."[407]

The degree of flexibility the court has permitted itself in arriving at a new version of the facts in order to act under section 33E is illustrated by its decision in *Commonwealth v. Vanderpool*.[408] The prosecution had presented sufficient evidence to prove a pattern of activity: There was an altercation in a bar between the victim and the defendant and other members of a "club," the Outlaw Renegades; some time later, the defendant and a man named Torres, who was armed and by his own account "high on acid," found the victim in another bar and confronted him; the defendant and victim exchanged blows and Torres shot the victim at the urging of the defendant.[409] The defendant's testimony was that at the time of the killing he was no longer a member of the club, but was in disfavor with its present members and had interceded in the first altercation between the victim and other members of the club. The second encounter with the victim had occurred by chance. The defendant had approached the victim, who argued with him, and Torres had approached and shot the victim without any urging and to the defendant's surprise.[410]

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of the victim, the disproportion between the means actually needed to inflict death and those employed, the instrumentalities employed and the extent of physical injury." Commonwealth v. Satterfield, 362 Mass. 78, 81-82, 284 N.E.2d 216, 218 (1972); Commonwealth v. Connolly, 356 Mass. 617, 628, 255 N.E.2d 191, 198, *cert. denied*, 400 U.S. 843 (1970).

407. 374 Mass. at 318, 372 N.E.2d at 252. "[A] jury might piece a guilty verdict [on that basis] out of the testimony." *Id.*

The implication was that the victim's suffering on the day of his death did not provide satisfactory evidence of extreme atrocity and cruelty but that evidence of a slow death caused by accumulated injuries over a period of days or weeks would have overcome the court's reservations. *See id.* at 318, 372 N.E.2d at 252-53.

408. 367 Mass. 743, 328 N.E.2d 833 (1975).

409. The evidence was undisputed that all involved were intoxicated by alcohol and possibly other drugs. *Id.* at 749, 328 N.E.2d at 837.

Similar fact patterns occurred in Commonwealth v. Nordstrom, 364 Mass. 310, 303 N.E.2d 711 (1973); and Commonwealth v. Pratt, 360 Mass. 708, 277 N.E.2d 517 (1972) (both first degree verdicts, not reduced); and in Commonwealth v. Rooney, 365 Mass. 484, 313 N.E.2d 105 (1974); and Commonwealth v. Deeran, 364 Mass. 193, 302 N.E.2d 912 (1973) (both second degree murder verdicts); *see also* Commonwealth v. Jones, 366 Mass. 805, 808, 323 N.E.2d 726, 729 (1975) and cases cited therein. Relief was denied in *Pratt, Nordstrom, Deeran* and *Rooney* because the evidence was that there had been an initial encounter, followed by a "cooling-off" period during which the defendant left the scene and armed himself, and then returned and killed the victim. *See Jones*, 366 Mass. at 808, 323 N.E.2d at 727.

410. 367 Mass. at 744-45, 328 N.E.2d at 834-35.

The court reduced the verdict on appeal.[411] Relying upon the defendant's version of his purpose in approaching the victim, it found no period of reflection and premeditation.[412] The court also, apparently accepted Torres' testimony that he shot the victim on the defendant's instructions. The court noted that Torres—obviously the central witness against the defendant—had not been tried, at the time he testified, for his role in the killing and later had been permitted to plead guilty to second degree murder.[413] The prosecution's evidence of premeditation was quite strong, if believed, but the court acted upon a version of the facts which comprised selected portions of each party's evidence, and acted much as a jury might act.[414] The account as constructed apparently accepted the defendant's claim that his second approach to the victim was to reconcile their dispute, but also apparently accepted the prosecution's claim that the defendant instigated the shooting: an intentional killing is a necessary ingredient of second degree murder. On this version, the court found that "the defendant's criminal involvement was not of the nature that judges and juries, in weighing evidence ordinarily equate with murder in the first degree."[415] The court's reconstruction established

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411. *Id.* at 751, 328 N.E.2d at 838.

412. *Id.* at 750, 328 N.E.2d at 837-38.

413. *Id.* at 750, 328 N.E.2d at 838. The court also noted that Vanderpool was 22, married with two children, and suffering from Vietnam war disabilities. *Id.*

414. The jury could have found that Torres had armed himself on the defendant's instructions and accompanied the defendant to the second bar, where the defendant accosted the victim, determined that the victim intended to press criminal charges based on the earlier altercation, stated: "We'll get you." He then punched the victim, and yelled: "Shoot him, Tony, shoot him, Tony," whereupon Torres shot and killed the victim. Torres' testimony to this effect was, except for the final statement attributed to the defendant, essentially corroborated by the testimony of eyewitnesses to the shooting. *Id.* at 744-45, 328 N.E.2d at 834-35. Torres' explanation of his role was that he was drunk and "high on acid." *Id.*

415. *Id.* at 751, 328 N.E.2d at 838 (quoting Commonwealth v. Williams, 364 Mass. at 152, 301 N.E.2d at 688). *Compare* Commonwealth v. Tavares, 385 Mass. 140, 159, 430 N.E.2d 1198, 1210 (defendant admitted killing, contested persuasiveness of evidence of extreme atrocity and cruelty), *cert. denied*, 457 U.S. 1137 (1982).

In one other case section 33E relief was granted on the *Williams* rationale. The defendant, in Commonwealth v. Pisa, 372 Mass. 590, 363 N.E.2d 245, *cert. denied*, 434 U.S. 869 (1977), had been convicted of first-degree murder. His codefendant's subsequent second degree murder conviction by a different jury had been affirmed in 1973. *Id.* at 592 n.1, 363 N.E.2d at 247 n.1; *see* Commonwealth v. White, 363 Mass. 682, 296 N.E.2d 822 (1973). The court based its reduction in *Pisa* on the ground that the evidence of first degree murder was "much less persuasive" than that of second degree murder. 372 Mass. at 598, 363 N.E.2d at 251. It is not possible to discern from either opinion what the basis of Pisa's defense was, what the basis for his section 33E request was or, for that matter, where the weakness in the prosecution's first-degree murder, either by deliberate premeditation or capital felony-murder, lay.

a clear case of second degree murder: an intentional, malicious killing without deliberate premeditation.

This paradigm approach is reflected in the supreme judicial court's approving review in the first two cases in which it considered the propriety of trial court orders reducing murder verdicts to manslaughter under Rule 25. The court in *Gaulden* and *Keough* indicated that, where the trial court concludes that the verdict is against the weight of the evidence (even if sufficient to support it), the appropriate form of relief is an order for entry of a verdict reduced to a level of culpability that has clearly been established.[416] This situation will arise most commonly in section 33E decisions where an evaluation of the pertinent considerations (the relative strength, consistency and credibility of the prosecution and defense evidence, the treatment of the co-participants, the presence of mitigating factors such as the prior relationship of defendant and victim, the tenor of their earlier contacts, the role played by intoxicants or other responsibility-impairing influences, and the defendant's character[417]) leads to the conclusion that the case in question does not fit the court's generally undefined paradigm of the offense for which the defendant was convicted.[418] The court's paradigm of an offense is usually closely related to, but less inclusive than, that literally described by the statutory elements. That is, the court's paradigm of first degree murder by extreme atrocity and cruelty does not include all cases in which a rational fact-finder, properly instructed and presented with legally sufficient evidence, might find that circumstance established

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416. *See Keough*, 385 Mass. at 319-21, 431 N.E.2d at 918-20; *Gaulden*, 383 Mass. at 554-55, 420 N.E.2d at 912-13. It is clear from the terms of Rule 25(b)(2) (second sentence) and from analysis of the supreme judicial court's rulings that this form of relief is available only in cases in which the offense charged includes a lesser offense. In a case in which no lesser offense is included in the charge, the weight of the evidence analysis will leave the trial court to choose between ordering either a finding of not guilty or a new trial.

417. These ordinarily deserve consideration only if not properly presented through instructions for the jury's assessment. *Compare* Commonwealth v. King, 374 Mass. 501, 508, 373 N.E.2d 208, 212 (1978); and Commonwealth v. Vanderpool, 367 Mass. 743, 745-46, 328 N.E.2d 833, 837 (1975); *with* Commonwealth v. Maldonado, 389 Mass. 626, 633, 451 N.E.2d 1146, 1150 (1983); and Commonwealth v. Podlaski, 377 Mass. 339, 350, 385 N.E.2d 1379, 1387 (1979).

Character evidence is most readily available in cases in which the defendant has testified, but it may be added to the record on appeal as in *King*, 374 Mass. at 508 n.6, 373 N.E.2d at 212 n.6. In the trial court, such information can be presented in documents or testimony in support of the motion for relief. Arguably, this is not a factor in the paradigm of the offense, but is a factor in a paradigm of the offender.

418. *See Gaulden*, 383 Mass. at 555-56, 420 N.E.2d at 912-13.

beyond a reasonable doubt.[419] The paradigm in general will consist of the type of "criminal involvement . . . that judges and juries, in weighing evidence, ordinarily equate with [the offense in question],"[420] based on the trial judge's experience and judgment. The court has declined to use this paradigm approach to modify the law, for example, by recognizing defensive claims that are not otherwise available.[421] Accordingly, the paradigm will not include factors that are not relevant in Massachusetts law.

Application of the paradigm to a particular case frequently involves some revision of the jury's implied findings as was the case in *Commonwealth v. Vanderpool*.[422] In *Cadwell*, for instance, the court noted that only the blows administered to the victim on the date of his death should have been considered in deciding whether the killing in that case was done with extreme atrocity and cruelty, based on the pathologist's testimony.[423] The jury may have considered (and properly could have considered, exercising its prerogative to ignore even the uncontradicted opinion of an expert) the suffering inflicted in the course of earlier beatings in making its extreme atrocity and cruelty finding.[424] It was necessary for the court first to establish a

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419. *See, e.g.*, Commonwealth v. Tavares, 385 Mass. 140, 152, 430 N.E.2d 1198, 1203, *cert. denied*, 457 U.S. 1137 (1982), Commonwealth v. Cadwell; 374 Mass. 308, 318, 372 N.E.2d 246, 253 (1978). The court's action in *Tavares* might be interpreted as being based on the judgment that the effect of the joint venture doctrine attributing the atrocious and cruel conduct of Tavares' co-participants to him was undesirably harsh. In *Cadwell*, the effect, if not the purpose, of the court's action was to ameliorate the imputation of a mens rea element easily satisfied by formal legal standards, strictly applied (deliberate premeditation). *See, e.g.*, Commonwealth v. King, 374 Mass. 501, 373 N.E.2d 308 (1978); Commonwealth v. Jones, 366 Mass. 805, 323 N.E.2d 726 (1975).

420. *Gaulden*, 383 Mass. at 555, 420 N.E.2d at 913; Commonwealth v. Vanderpool, 367 Mass. 743, 751, 328 N.E.2d 833, 838 (1975); *Williams*, 364 Mass. at 151-52, 301 N.E.2d at 688.

421. In Commonwealth v. Schnopps, 390 Mass. 722, 726, 459 N.E.2d 98, 101 (1983), the court rejected the argument that the facts supported a finding of manslaughter because the killing was committed under the influence of an extreme mental or emotional disturbance for which there is reasonable explanation or excuse. Such a killing is manslaughter under MODEL PENAL CODE § 210.3(1)(b) (Official Draft 1980), and in, for example, New York. Patterson v. New York, 432 U.S. 197, 199 (1977). It is not recognized in Massachusetts law.

422. 367 Mass. 743, 749-51, 328 N.E.2d 883, 837-38 (1975). In Commonwealth v. Therrien, 383 Mass. 537 n.6, 420 N.E.2d 897, 901 n.6 (1981), the court suggested that in some cases the submission of special verdict interrogatories to the jury as provided for by Rule 27 might clarify whether an appropriate basis for a reduced verdict is present. Defense counsel might be wary of the tendency of such structuring devices to encourage findings of guilt. *See* United States v. Spock, 416 F.2d 165, 181-83 (1st Cir. 1969).

423. 374 Mass. at 318, 372 N.E.2d at 252.

424. It seems noteworthy that the definitional vagueness of this element gives the jury a great deal of fact-finding latitude in such cases. Similarly, the doctrine permitting

narrower factual basis than the jury evidently acted upon before applying its paradigm. This was, of course, an appropriate step in the exercise of its section 33E powers on its view of the weight of the evidence.

Even without revising the jury's implicit findings, the court has found legally sufficient evidence to be of inadequate weight so as to fit the court's paradigm of an offense, for a variety of reasons. The prosecution's evidence may fail to satisfy the court because of its lack of coherence as in *King*.[425] Similarly, in *Commonwealth v. Dalton*,[426] there was little factual dispute; the evidence established the possibility that the defendant had "reflected on his resolution to kill" but was "by no means overwhelming."[427] In these cases, the reference to a paradigm is less direct but the nature of the knife wounds in *King* and the absence of evidence of motive in *Dalton* receive prominent mention in the court's statement of its reasons for granting relief.[428]

Where the prosecution's case does not measure up to the court's paradigm, based on the court's revised findings the verdict is, then, disproportionate: i.e., it is "markedly inconsistent with verdicts returned in similar cases."[429] Such a finding has served to justify a reduced verdict in those cases in which defective jury instructions have either incorrectly presented the possibility of a lesser verdict to the jury or have removed that possibility altogether. Ordinarily, the proper form of section 33E relief in defective-instructions cases is a new trial.[430] The rationale for the distinction between a new trial and a reduced verdict as the appropriate form of relief is well founded and the distinction is clearly drawn in *Commonwealth v. Kendrick*[431]: "[O]ur concern has not been with the propriety of the

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the jury to find deliberate premeditation to have occurred during the most minute time period creates broad fact-finding latitude. *See* Commonwealth v. McInerney, 373 Mass. 136, 148, 365 N.E.2d 815, 822 (1977).

425. 374 Mass. at 506-07, 373 N.E.2d at 211-12; *see supra* notes 392-96 and accompanying text.

426. 385 Mass. 190, 431 N.E.2d 203 (1982); *see supra* notes 381-83 and accompanying text.

427. *Id.* at 196, 431 N.E.2d at 208.

428. As in all cases in which Section 33E relief has been granted, additional factors were considered, particularly the role of intoxication, the failure to fully instruct the jury and favorable character evidence. *King*, 374 Mass. at 507-08 & n.6, 373 N.E.2d 212 & n.6.

429. *Gaulden*, 383 Mass. at 556, 420 N.E.2d at 913. The following cases most clearly fall into this category: *Keough, Gaulden*, and *Cadwell.* The court has consistently placed *Vanderpool* in this category, but that classification is questionable.

430. Commonwealth v. Kendrick, 351 Mass. 203, 218 N.E.2d 408 (1966).

431. 351 Mass. 203, 218 N.E.2d 408 (1966).

verdict returned by the jury but with the impropriety of withdrawing from their consideration another verdict which, although they might not have reached it, was nevertheless open to them on the evidence."[432] Where, however, the evidence of the greater offense is inadequate to satisfy the court's paradigm, there is no need for a new trial unless some other shortcoming prevented consideration of a legitimate theory that might have led to an acquittal or reduced the verdict even further.[433]

This was the approach taken in *Commonwealth v. King*[434] and *Commonwealth v. Kinney*.[435] In *King*, the verdict was first degree murder. There was pervasive evidence that all adults involved in the incident, including the witnesses to the killing, had been drinking heavily. The jury was not instructed to consider the possible impact of intoxication on the defendant's capacity to deliberately premeditate.[436] The court reduced the verdict rather than granting a new trial because the evidence was inadequate to satisfy its paradigm of deliberately premeditated murder.[437] Similarly, in *Kinne*, the trial court failed to instruct the jury on the possible verdict of involuntary manslaughter. The court found that, on the weight of the evidence, the defendant had not been the aggressor and had acted out of confusion and fear rather than anger when he killed the victims.[438] On these facts, a finding of malice could not be made and the court concluded that justice would be more nearly achieved by not giving the prosecution an opportunity to submit its second degree murder case to another jury.[439] Thus, even where trial errors are found that would ordinarily justify granting a new trial under section 33E, the proper course is to consider the weight of the evidence and reduce

432. *Id.* at 213, 218 N.E.2d at 415; *accord* Commonwealth v. McCauley, 355 Mass. 554, 561-62, 246 N.E.2d 425, 429 (1969).

433. *Cf.* Commonwealth v. Bearse, 358 Mass. 481, 265 N.E.2d 496 (1970).

434. 374 Mass. 501, 373 N.E.2d 208 (1978).

435. 361 Mass. 709, 282 N.E.2d 409 (1972).

436. 374 Mass. at 502-05, 373 N.E.2d at 209-11.

437. *Id.* at 507-08, 373 N.E.2d at 212.

438. 361 Mass. at 712-13, 282 N.E.2d at 411-12.

439. *Id.* at 712-13, 282 N.E.2d at 412. The issue was put explicitly in these terms. *See* Commonwealth v. Coleman, 366 Mass. 703, 713, 322 N.E.2d 407, 412 (1975). The suggestion that, on the weight of the evidence, the prosecution's evidence was insufficient to support a second degree murder verdict distinguishes this case from the paradigmatic disproportionality cases discussed above. This third class of cases is discussed in the preceding section. *See supra* notes 376-96 and accompanying text. Had the case been remanded for a trial on proper instructions and the same evidence been presented, a verdict of second degree murder could have been supported by sufficient evidence.

the verdict where the only just result of a second trial on the same evidence would be a finding of guilty on the lesser offense.

In two felony-murder cases, the court has reduced verdicts in response to defects in jury instructions that would justify no more than a new trial.[440] Each involved first degree murder convictions probably reached on felony-murder grounds, although in each case the court recognized that sufficient evidence of deliberate premeditation had been presented,[441] and legally sufficient evidence of extreme atrocity and cruelty was present in one.[442] The first, *Commonwealth v. White*,[443] involved a defendant who, while attempting either a breaking and entering of a restaurant or a robbery of its proprietor, killed the proprietor in a shoot-out.[444] According to Massachusetts felony-murder doctrine, if the killing occurred during a robbery, it was first degree murder; if it occurred in the course of a breaking and entering, it was second degree murder.[445] The jury instructions did not define either offense, leaving the jury to distinguish between the two according to their own understanding. During their deliberations the jury requested clarifying instructions on second degree murder.[446]

According to *Kendrick*, decided the previous year, a new trial was the proper remedy for this trial defect.[447] The *White* court, however, reduced the verdict to second degree murder "to prevent a possible miscarriage of justice," noting both the "very real possibility" that the jury had been misled and notice the sentencing consequences of one verdict as opposed to the other.[448]

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440. Commonwealth v. Rego, 360 Mass. 385, 274 N.E.2d 795 (1971); Commonwealth v. White, 353 Mass. 409, 232 N.E.2d 335 (1967).

441. Commonwealth v. Rego, 360 Mass. 385, 391, 274 N.E.2d 795, 799 (1971); Commonwealth v. White, 353 Mass. 409, 421, 232 N.E.2d 335, 343 (1967).

442. Commonwealth v. Rego, 360 Mass. 385, 394, 274 N.E.2d 795, 801 (1971).

443. 353 Mass. 409, 232 N.E.2d 335 (1967).

444. The evidence of White's purpose came in the testimony of two acquaintances to whom he had described the crime when they visited him together in jail before trial. According to one, White's purpose was robbery, according to the other it was larceny. There was evidence of a deliberate premeditation which the court described as "slight": he went armed, intending to steal. *Id.* at 425, 232 N.E.2d at 346. The suggestion that these facts evidence deliberate premeditation is at best questionable.

445. Robbery is a capital felony (punishable by life imprisonment or, at the time, by death). MASS. GEN. LAWS ANN. ch. 265, § 17 (West 1970). Breaking and entering a business establishment (as opposed to a dwelling) is not a capital felony. *Id.* ch. 266, § 16.

446. 353 Mass. at 425, 232 N.E.2d at 345-46.

447. 351 Mass. at 213, 218 N.E.2d at 415.

448. 353 Mass. at 425-26, 232 N.E.2d at 346.

The decision four years later in *Commonwealth v. Rego*[449] involved strikingly similar circumstances.[450] The evidence of first degree murder by deliberate premeditation was stronger and there was also evidence of extreme atrocity and cruelty in the manner of the killing.[451] The same ambiguity in the evidence of the basis for a felony murder conviction, however, was present and the jury instructions were similarly defective. Citing *White*, the court reduced the verdict to second degree murder, again noting the sentencing consequences of its action, and stating that the only issue in a new trial would be whether the defendant committed first or second degree murder: "We conclude that justice will best be served if guilty verdicts of second degree murder are now entered."[452]

Arguably, *Rego* can be reconciled with *Williams*, decided two years later. There the court reduced the felony murder conviction to second degree murder because the court viewed the defendant's actions as spontaneous.[453] In *Rego* the thrust of the evidence was that the defendants were stealing surreptitiously, were taken by surprise and responded spontaneously and violently. The intent to kill probably arose spontaneously, immediately before it was acted out, and the robbery may have followed the killing rather than being the purpose behind it.[454] The defendant in *White*, however, went armed to the scene of the crime and engaged in a shoot-out with the owner.[455] It would be an unusual paradigm of felony murder which did not embrace this conduct. The basis for the court's choice of relief in these cases could be efficiency—a judgment that the matter in dispute did not warrant expending the resources necessary to conduct a retrial.

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449. 360 Mass. 385, 274 N.E.2d 795 (1971).

450. The case for first degree murder on deliberate premeditation or extreme atrocity and cruelty grounds was substantially stronger in this case. The victim was a night watchman who surprised the defendant and his two accomplices as they stole coins from coin operated machines in a warehouse they had broken into. The watchman was severely beaten and died from blows to the head, and there was evidence that money was taken from his person. *Id.* at 387-88, 274 N.E.2d at 797-98.

451. *Id.* at 388, 274 N.E.2d at 797.

452. *Id.* at 396-97, 274 N.E.2d at 802. The defendant was a young man but no other evidence of mitigating circumstances was discussed. Although neither defendant was charged with robbery and each was convicted of breaking and entering, the court explicitly disavowed this fact as warranting relief in *Rego*. *Id.* at 396, 274 N.E.2d at 802.

453. 364 Mass. at 152, 301 N.E.2d at 688; *see supra* notes 398-400 and accompanying text.

454. 360 Mass. at 387-88, 274 N.E.2d at 797-98. *Compare Williams*, 364 Mass. at 152, 301 N.E.2d at 688; *see supra* notes 398-400 and accompanying text.

455. *See* 353 Mass. at 425, 232 N.E.2d at 346.

The court's most recent verdict revision under section 33E both confirms the foregoing analysis and cautions against the temptation to view the categories proposed here as being clearly defined or having firm boundaries. In *Commonwealth v. Bellamy*,[456] the court reduced a first degree felony-murder conviction to second degree to hedge against the possibility that the jury might have been misled by joint venture instructions which were apparently correct when given.[457] Bellamy was tried for felony-murder for his involvement in the killing of a variety store proprietor which occurred, by all accounts, during the course of an unarmed robbery.[458] The jury had been told it could convict Bellamy of first degree murder if Bellamy killed the victim in the course of either an armed or unarmed robbery, or if his accomplice had killed the victim and Bellamy had not dissociated himself from the robbery before the killing.[459]

Any theory upon which the first degree felony murder verdict could be sustained required a jury finding that Bellamy either acted with conscious disregard for the risk to human life created by his and his accomplice's conduct or that Bellamy knew Bimbo was armed

456. 391 Mass. 511, 461 N.E.2d 1215 (1984).

457. In the 1975 trial, the jury was instructed that it could convict Bellamy on a joint venture (common enterprise) theory if it found that his cohort in the robbery had killed the victim unless it found "Bellamy dissociated himself from the robbery prior to the killing." *Id.* at 513-15, 461 N.E.2d at 1217-18.

458. The prosecution's account relied heavily on Bellamy's purported confession to the mother of his daughter. According to the mother's account, Bellamy picked up a knife from the counter and stabbed the clerk when the latter tried to hit him with a crowbar during an unarmed robbery Bellamy and his cohort "Bimbo" were attempting. *Id.* at 512-13, 461 N.E.2d at 1216-17.

Bellamy testified that he went to the store with Bimbo, who unexpectedly reached into the open cash drawer. The victim swung the crowbar at Bimbo, whereupon Bellamy left the store and went to Bimbo's car nearby. Bimbo came running out shortly, presumable after stabbing the victim. *Id.* at 513, 461 N.E.2d at 1217.

459. *Id.* Defense counsel objected to the joint venture instruction but not to the felony murder instruction.

In the interim between Bellamy's conviction and the ruling on his appeal, the supreme judicial court had refined the felony murder rules to require a finding that the defendant acted with conscious disregard of the risk to human life created by his conduct where the underlying felony was not inherently dangerous as with unarmed robbery. Commonwealth v. Matchett, 386 Mass. 492, 508, 436 N.E.2d 400, 410 (1982) (extortion); Commonwealth v. Moran, 387 Mass. 644, 651, 442 N.E.2d 399, 403 (1982) (unarmed robbery). It had also refined the rules of joint venture responsibility in such circumstances to require a finding that an unarmed accomplice knew that the armed accomplice had a weapon and was going to or was likely to use it. Commonwealth v. Watson, 388 Mass. 536, 544, 447 N.E.2d 1182, 1187-88 (1983). The court found that Bellamy was entitled to the retroactive benefit of these new legal principles. 391 Mass. at 515, 461 N.E.2d at 1218. Recall that a Rule 25(b)(2) (second sentence) motion can be filed at anytime, and there is no procedural prequisite other than a jury verdict. *See supra* note 16.

and likely to use his weapon, or both.[460] The evidence presented by both parties indicated that neither proposition was likely; rather, it indicated that the killing was an unplanned, spontaneous reaction to an unanticipated situation and that the killer armed himself by simply grabbing an available weapon. The instructions permitted the jury to convict Bellamy without making either of the presently required findings.

On these facts the court could have concluded, as it had in *Williams, King* and *Vanderpool*, that the killing was not of the type that judges and juries, in weighing evidence, ordinarily equate with first degree felony murder. There was little evidence that the felony was armed robbery, that the robbers acted with conscious disregard of a risk to human life created by their conduct or that, if Bimbo was armed, Bellamy knew it. Rather than act on this basis, however, the court ruled that the jury might have been misled into thinking that it could convict Bellamy of first degree felony murder if Bimbo killed the victim, whether or not Bellamy knew he was armed.[461] As in *White*, this is a case in which the court's articulated rationale would ordinarily call for a new trial. As in *Rego*, the additional deficiency in the weight of the evidence justified revising the verdict instead to the highest degree clearly supported by the evidence.[462]

C. Insufficient Evidence on Revised Findings

The foregoing survey of the court's section 33E reduced verdict cases reveals one additional ground for relief, akin to, but distinct from the *Williams* form of disproportionality. This ground appears in cases in which the court's findings, based on its weighing of the evidence, render the prosecution's case inadequate.[463] These cases

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460. The jury might have found that Bellamy used the knife to commit armed robbery and killed the victim while doing so but the evidence as presented in the court's discussion was not sufficient to support such a finding. The knife was used in the store's operation and was kept near the cash register. The armed robbery indictment was not tried. 391 Mass. at 512, 416 N.E.2d at 1216 & n.2.

461. *Id.* at 515, 461 N.E.2d at 1218.

462. A second degree felony murder verdict, on the theory that the robbery was unarmed and the killing was spontaneous, intentional and malicious, was clearly supported by sufficient evidence.

463. Of course, the evidence in these cases has been found to be legally sufficient to support the verdict. The court's view of the case after weighing the evidence is, essentially, that, as revised, the evidence is not sufficient. The term "inadequate" is applied to such findings to clarify this distinction in the nature of the judgment which leads to the finding. Where a court's assessment of the evidence is limited to considering the range of possible judgments which the evidence might reasonably support, its conclusion that the evidence is inadequate is a finding of legal insufficiency. This finding constitutes an ac-

differ from the paradigmatic "disproportionality" cases in which the evidentiary basis for the greater verdict is sufficient but not satisfactory to the court's sense of justice.[464] *Commonwealth v. Mahnke*[465] and *Commonwealth v. Jones*[466] are examples of this category of cases.

In *Jones*, the court began with the view that the legal sufficiency of the prosecution's evidence to support the second degree murder verdict presented a "very close" question.[467] Noting that the jury had been fully and accurately instructed upon the possibility of a manslaughter verdict based upon the use of unreasonable defensive force, acts committed in the heat of passion, provocation or sudden affray, the court found that the jury could reasonably have concluded that the defendant, aware that the victim was very intoxicated and did not have razor in hand, killed in retaliation for the blow inflicted.[468] The court's conclusion, based upon an assessment of the "great weight of the evidence" was that the defendant was reasonably apprehensive that the victim might use the razor which Jones knew he had; on this view, the killing was not carried out with malice aforethought.[469] On the facts established by the court's assessment of the weight of the evidence, a finding of malice was not supported by sufficient evidence. The second degree verdict was reduced to manslaughter.[470]

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quittal which is, by operation of federal double jeopardy principles, final. A similar conclusion based on a court's assessment of the weight of the evidence is not an acquittal in federal constitutional terms. *See* Tibbs v. Florida, 457 U.S. 31, 42 (1982). To honor this distinction the latter judgment is treated in this paper as a finding of inadequacy. Of course, whether such a finding should be treated under state law as an acquittal barring retrial is not controlled by the holding in *Tibbs*.

464. *See supra* notes 376-96 and accompanying text.

465. 368 Mass. 662, 335 N.E.2d 660 (1975).

466. 366 Mass. 805, 323 N.E.2d 726 (1975).

467. *Id.* at 807-08, 323 N.E.2d at 728. In fact, the court implied that it considered the alternative conclusions of "whether there was malice in the defendant's attack on the victim so as rationally to support a verdict of murder or, in the alternative, whether justice requires the entry of a verdict of manslaughter pursuant to section 33E" as equivalent. *Id.* At the time, the difference in terms of relief was probably between a new trial and a reduced verdict. After Hudson v. Louisiana, 450 U.S. 40 (1981), and Greene v. Massey, 437 U.S. 19 (1978), of course, a finding of insufficient evidence by an appellate court or a trial court requires entry of a finding of not guilty on the charge. *See Hudson*, 450 U.S. at 43; *Greene*, 437 U.S. at 24.

The undisputed evidence showed that Jones had been assaulted and knocked down by the deceased, who had a "reputation for his knife and his fight" and was much larger than the defendant. Jones stabbed him with a fishing knife he routinely carried, claiming that the deceased had attacked him with a razor. The razor, however, was found in the deceased's pocket. 366 Mass. at 806, 323 N.E.2d at 727.

468. 366 Mass. at 808, 323 N.E.2d at 728.

469. *Id.* at 808-09, 323 N.E.2d at 729.

470. *Id.* at 810, 323 N.E.2d at 730.

The basis for reducing the verdict in *Mahnke* was reached by a similar process. The defendant was convicted of second degree murder, having admitted killing his fiancee, who he believed was pregnant by another man. There was little direct evidence other than the defendant's testimony regarding the circumstances of the killing.[471] The court acted by using the account given by the defendant under questioning by a vigilante group which had kidnapped him and held him in seclusion until he admitted the killing. By this account, the victim had slapped him during an argument and he had responded by striking her, causing her to fall and strike her head on a curb, which killed her.[472] The court reduced the verdict to manslaughter, finding that "this version of the events will not support a finding of malice aforethought. The defendant never formed a specific intention to kill the victim. . . . Nor could death reasonably be expected to follow the defendant's blow."[473] In such a case the verdict is disproportionate, not in comparison to the usual judgment of judges and juries in similar cases, but in terms of the relation of the facts found by the court on weighing the evidence to the formal requirements of the elements of the offense. That is, on the weight of the evidence, the defendant's guilt of the greater offense has not been established. The court has reduced verdicts in both types of cases, even those in which fundamental trial errors have occurred which would otherwise require a new trial.[474]

The supreme judicial court has also been called upon to exercise its section 33E powers in cases in which the weight of the evidence justified a finding of not guilty.[475] In such cases, the court was constrained to devise other forms of relief because it lacked the authority to order an acquittal.[476] The trial courts do have such authority[477] but, because this power is *sui generis*, have little precedent to guide them in exercising it.

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471. 368 Mass. at 701, 335 N.E.2d at 683. This and similar problems are a common feature in the section 33E reduction of verdict cases. The paucity, spottiness or largely circumstantial nature of the prosecution's evidence—either on specific issues or overall—is mentioned in a number of cases. *See e.g.*, *Dalton*, 385 Mass. at 196, 431 N.E.2d at 208; *King*, 374 Mass. at 506, 373 N.E.2d at 211; *Cadwell*, 374 Mass. at 315, 372 N.E.2d at 251; *Vanderpool*, 367 Mass. at 749, 328 N.E.2d at 837; *Mahnke*, 368 Mass. at 700, 335 N.E.2d at 683; *Williams*, 364 Mass. at 150, 301 N.E.2d at 687.

472. 368 Mass. at 702, 335 N.E.2d at 684.

473. *Id.*

474. *See King*, 374 Mass. at 508, 373 N.E.2d at 212.

475. *See, e.g.*, Mutina, 366 Mass. 810, 323 N.E.2d 294 (1975).

476. *See, e.g.*, Bearse, 358 Mass. 481, 265 N.E.2d 496 (1969).

477. *See* MASS. R. CRIM. P. 25(b)(2).

C. *Weighing the Evidence To Resolve Unaddressed Sufficieny Issues*

It has been demonstrated earlier that in some cases, the sufficiency determination conducted pursuant to Rule 25(a) and 25(b)(1) will result in cases being submitted to the jury on marginal evidence, on artificially enhanced evidence or on evidence which has not been assessed for sufficiency.[478] Where conviction results, the trial court's assessment of the case in terms of the weight of the evidence should provide an essential protection against the injustice of an unwarranted conviction or the imposition of an unduly harsh penalty.[479] In some cases, however, a reduced verdict is simply not an appropriate remedy, and the court should order either a new trial or enter a finding of not guilty. The purposes of this section are to demonstrate how the court, freed from the constraints of the sufficiency assessment rules, has acted where the shortcomings in the sufficiency assessment process appear to have failed to prevent execution of irrational jury judgments and to suggest some criteria by which the appropriate remedy can be selected on a principled basis.

The supreme judicial court's section 33E verdict-revision decisions indicate that it has been most sensitive to weight of the evidence problems where the prosecution's case is legally sufficient but marginal, and there is evidence indicating that the jury's decision may not be a "true verdict";[480] that is, it may have been influenced by or based on non-evidentiary considerations. It is a primary function of the sufficiency assessment process to insure that a jury not be allowed to decide any case in which there is no rational evidentiary support for a guilty verdict. As we have seen, a court considering the weight of the evidence is authorized to and must go further to consider whether the balance of the evidence of guilt (particularly degree of guilt) is proportional to the verdict. The following discussion

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478. In addition to the cases discussed in Part II, *supra*, Commonwealth v. Sherry, 386 Mass. 682, 699-700, 437 N.E.2d 224, 234 (1982) demonstrates that sufficiency issues may arise at a point in the process at which no established procedure affords an opportunity to raise the issue. The supreme judicial court treated this as a weight of the evidence problem. The only problem with this treatment is that it might impose a higher burden of persuasion on the defendant to obtain relief.

479. The supreme judicial court's section 33E decisions reducing verdicts in homicide cases clearly illustrate the usefulness of this power to avoid the imposition of mandatory sentences of imprisonment where such a penalty would be undesirably harsh and a lesser offense which does not carry a mandatory penalty is included in the offense charged. Such cases might arise, for example, in cases involving the charge of unlawfully carrying a firearm or of trafficking in a controlled substance.

480. Commonwealth v. Mutina, 366 Mass. 810, 822, 323 N.E.2d 294, 301 (1975).

will consider how the court has dealt with cases in which it appears that the sufficiency assessment process has not effectively served its purpose, and what indications of improper external influence have prompted the court to take remedial action.

The weight of the evidence problems created by the presumption of sanity demonstrate to what extent that device (and to a lesser extent, other such proof-facilitating devices) creates the possibility of irrationality in the decision making process; why the burden of proof beyond a reasonable doubt is ineffectual as a protective device when it is not backed by a duty to produce legally sufficient evidence; and how the verdict revising authority of section 33E has been used to supplant the sufficiency assessment mechanism. The court's section 33E treatment of the "accidental homicide" issue in *Commonwealth v. Bearse*[481] demonstrates how the verdict-revising authority should be used to deal with sufficiency problems which may be masked by the use of narrowly based common law inferences to satisfy the prosecution's burden of production. The court's treatment of the identification-alibi issue in *Commonwealth v. Woods*[482] demonstrates how a weight of the evidence assessment should be used to protect against apparently irrational credibility and weight judgments by a jury.[483] In each case, apparent shortcomings in the sufficiency process, together with indications that the jury was influenced by something other than evidence in reaching its verdict, led the court to order new trials.

The evidentiary effect given the presumption of sanity in Massachusetts works in every case to require the trial judge to submit the case to the jury even if the prosecution offers no evidence on that issue.[484] This practice has been characterized by the court as an integral part of its general policy of granting broad fact-finding discretion to the jury on the issue.[485] The policy includes encouraging

481. 358 Mass 481, 265 N.E.2d 496 (1969).

482. 382 Mass. 1, 413 N.E.2d 1099 (1980).

483. *See supra* notes 262-84 and accompanying text.

484. Commonwealth v. Guiliana, 390 Mass. 464, 468 n.7, 457 N.E.2d 275, 278 n.7 (1984); Commonwealth v. Kostka, 370 Mass. 516, 532-33, 350 N.E.2d 444, 455-56 (1976); Commonwealth v. Mutina, 366 Mass. 810, 323 N.E.2d 294 (1975); Commonwealth v. Smith, 357 Mass. 168, 178-81, 258 N.E.2d 13, 19-21 (1970).

485. Commonwealth v. Louraine, 390 Mass. 28, 35, 453 N.E.2d 437, 442-43 (1983). The other primary components of this policy are (1) broad standards of relevancy; (2) use of the Model Penal Code's definition of criminal responsibility, *see id.* at 34, 37 n.11, 453 N.E.2d at 442, 444 n.11; and (3) imposing the burden of proof beyond a reasonable doubt on the prosecution once the issue is injected into the case. *See Kostka*, 370 Mass. at 527, 350 N.E.2d at 452.

each party to present a broad array of evidence.[486] Neither side need present expert opinion testimony, but the prosecution in particular has been urged to do so when its evidence is otherwise marginal.[487] Because the presumption of innocence permits the jury to infer sanity from its own knowledge and experience, not in the particular case but in human conduct in general, the prosecution can satisfy its burden of persuasion beyond a reasonable doubt without producing a scintilla of evidence of sanity.[488] In *Commonwealth v. Mutina*,[489] the court, faced with just such a conviction, treated it as a weight of the evidence problem; however, the case presented a serious problem of evidentiary sufficiency if sanity is regarded as an essential element of the conviction.[490] The court exercised its section 33E "safety valve" powers to reverse the conviction, without clearly indicating whether it was employing a sufficiency or weight of the evidence standard.[491]

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486. The defendant's demeanor in the courtroom, for example, is recognized as providing such an important source of information as to entitle him or her to appear before the jury without medication, even if (s)he does not testify. Commonwealth v. Louraine, 390 Mass. 28, 35, 453 N.E.2d 437, 442 (1983).

487. *Id.* at 36-37 & n.9, 437 N.E.2d at 443 & n.9.

488. Arguably, neither the presumption of innocence nor the *Winship* principle imposes a burden of producing evidence of sanity on the prosecution because it is not an elemental issue. But the integrity of the beyond a reasonable doubt standard is left exclusively to the stewardship of the jury when the prosecution is allowed to satisfy its burden of persuasion without producing any evidence. In addition, the right to have the trial judge assess the sufficiency of the evidence may be inherent in the right to a jury trial. *See* United States v. Gainey, 380 U.S. 63, 73 (1965).

489. 366 Mass. 810, 323 N.E.2d 294 (1975).

490. The defendant had shot and killed a woman who had tried to end their romantic relationship. The killing was carried out in an apparently irrational manner. *Id.* at 812-13, 323 N.E.2d at 296.

The defendant's evidence at trial included proof of a long history of mental illness manifested in bizarre speech and behavior, physical ailments and periods of hospitalization. Two psychiatrists gave their opinions that he lacked criminal responsibility. *Id.* at 813-14, 323 N.E.2d at 296. The prosecution presented no evidence of criminal responsibility other than the circumstances of the killing. It relied on its cross-examination of the psychiatrists and the "presumption of sanity." *Id.* at 815, 323 N.E.2d at 297.

An increasing tendency to exploit the presumption of sanity was noted in Commonwealth v. Louraine, 390 Mass. 28, 35-36, 453 N.E.2d 437, 442-43 (1983). This prosecutorial practice may eventually lead the courts to conclude that the device imposes intolerable costs on the system.

491. 366 Mass. at 812-17, 323 N.E.2d at 295-98. The court did not discuss in its opinion whether the defendant had challenged the sufficiency of the prosecution's evidence. Had the issue been raised, however, the ruling required by Massachusetts law had been clearly stated as recently as 1970: a trial judge is not permitted to direct a verdict of not guilty by reason of insanity in any criminal case tried by a jury. This rule is traceable to Commonwealth v. Clark, 292 Mass. 409, 415, 198 N.E.2d 641, 645 (1935), and was reaffirmed before *Mutina* in Commonwealth v. Smith, 357 Mass. 168, 178-81, 258 N.E.2d 13, 19-21 (1970). The court did recognize the questionable validity of allowing the presumption alone to carry the prosecution's burden. 366 Mass. at 815 n.2, 323 N.E.2d at

The court's statement of its reasons for granting the defendant relief under its section 33E authority, however, makes it clear that the prosecution's evidence of sanity was not legally sufficient to justify submitting the case to the jury. Although it characterized its decision at one point as being based on the "weight of the evidence," the court's statements of its view of the case are much stronger. It recognized that the case had been submitted to the jury despite "the absence of any affirmative evidence of the defendant's sanity"[492] and in the face of "overwhelming persuasive evidence that the defendant was insane at the time of the killing."[493] The imbalance in the evidence on the issue of criminal responsibility was so overwhelming that the court concluded that the verdict "was not a true verdict."[494] The court, therefore, set aside the verdict and ordered that the defendant be retried. Recognizing that the jury had been placed in an untenable position, the court held that in future trials involving the issue of criminal responsibility, the jury may be told—at the defendant's request or at the jury's—that the consequence of a verdict of not guilty by reason of insanity does not result in the automatic release of the defendant.[495]

In dissent, Justice Quirico argued that this effort to encourage the jury to render a "true verdict" itself compromised another aspect of the fundamental division of responsibility between judge and jury according to which the judge alone exercises the court's sentencing

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297 n.2. Apparently because it granted section 33E relief, the court found it unnecessary to address the constitutional validity of denying the trial judge the power to evaluate the sufficiency of the evidence on this issue.

492. *Mutina*, 366 Mass. at 816, 323 N.E.2d at 298.

493. *Id.* at 822, 323 N.E.2d at 301. Perhaps it is this type of development that the court referred to in Commonwealth v. Kelley, 370 Mass. 147, 346 N.E.2d 368 (1976), when it said: "It is possible, also, that the Commonwealth's position as to proof might deteriorate between the time that [it] rested and the close of all the evidence. In that event, the defendant's rights would, of course, on renewal of his motions, be reappraised in consideration of all the evidence." *Id.* at 150 n.1, 346 N.E.2d at 370 n.1. Application of this rule to criminal responsibility, however, is foreclosed by the current working of the "presumption of sanity."

494. 366 Mass. at 822, 323 N.E.2d at 301.

> Implicit in the jury's verdict was a determination that the Commonwealth had proven the defendant's sanity beyond a reasonable doubt. On the record before us, we have found no rational justification or basis for such a finding, except the jury's understandable concern for the need to confine an insane and still dangerous killer for the protection of society. . . . The evidence heard by them and the law given to them clearly played little part in their final verdict. . . .

Id. at 822-23, 323 N.E.2d at 301-02.

495. *Id.* at 823 n.12, 323 N.E.2d at 302 n.12.

powers.[496] Neither majority nor dissent acknowledged the fact that the source of this mischief was the "presumption of sanity," which may (and did in this case) function to allow the jury to act outside its province. The improper influence perceived to be at work in *Mutina* was the jury's ignorance of the sentencing consequences of a finding of not guilty by reason of insanity and its (presumed) fear that such a verdict would not incapacitate the defendant.[497]

Another recognized potential improper influence is the specter of voluntary abuse of consciousness-altering drugs.[498] A third closely-related source is improper prosecutorial argument designed to take advantage of the drug specter.[499] The likelihood that such external influences will sway the jury is greatest when the prosecution's evidence of sanity is weakest.

The court has responded by employing a weight of the evidence standard which evokes the spirit of *Jackson v. Virginia* without the customary sufficiency of the evidence restrictions. The weight of the evidence inquiry is whether the issue of sanity was presented "fully and fairly" to the jury; that is, whether the prosecution's evidence "adequately rebutted" the defendant's evidence of insanity.[500] Although in *Commonwealth v. Lunde*,[501] the court discussed the legal sufficiency and weight of the evidence very much as if they raised identical issues of assessment,[502] its ruling in *Commonwealth v.*

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496. *Id.* at 824-25, 323 N.E.2d at 302-03 (Quirico, J., dissenting).

497. 366 Mass. at 822, 323 N.E.2d at 301.

498. The difficulty of distinguishing drug-induced behavior, psychotic behavior attributable to mental illness but triggered by drug (including alcohol) consumption and psychotic behavior unrelated to drugs is mentioned in the medical evidence in several recent cases and has been noted by the court. *See* Commonwealth v. Guiliana, 390 Mass. 464, 469-71, 457 N.E.2d 275, 278-79 (1984); Commonwealth v. Louraine, 390 Mass. 28, 39-40, 453 N.E.2d 437, 445 (1983); Commonwealth v. Shelley, 381 Mass. 340, 345, 350 n.6, 409 N.E.2d 732, 736, 738 n.6 (1980); Commonwealth v. Sheehan, 376 Mass. 765, 770, 383 N.E.2d 1115, 1119 (1978).

499. In Commonwealth v. Guiliana, 390 Mass. 464, 457 N.E.2d 275 (1984), for example, the prosecution argued that the killing was solely the result of the voluntary use of drugs. It presented no evidence that the defendant had taken drugs shortly before the killing and no expert opinion testimony to support its theory. The medical records provided some basis for such a theory. The court commented that "that conclusion is difficult to reach in view of the Bridgewater report as a whole and the testimony at trial." *Id.* at 469-70, 457 N.E.2d at 278-79.

500. Commonwealth v. Lunde, 390 Mass. 42, 49, 453 N.E.2d 446, 450-51 (1983). Typically, the defense will present expert opinion testimony of lack of criminal responsibility, but need not do so to meet its burden of production, particularly where evidence of a history of mental illness and treatment is presented, *e.g.*, through hospital records. *See* Commonwealth v. Louraine, 390 Mass. 28, 453 N.E.2d 437 (1983).

501. 390 Mass. 42, 453 N.E.2d 446 (1983).

502. *Id.* at 47-48, 453 N.E.2d at 449-50. The court rejected the defendant's suffi-

Guiliana[503] makes it clear that the adequacy of the prosecution's sanity evidence is an issue of weight.[504] Where the defendant's evidence includes expert opinion testimony, the prosecution may satisfy the court's weight of the evidence standards by relying upon circumstantial evidence of rational, controlled conduct. But where the defense evidence is strong, and the prosecution fails to present medical expert testimony to support its theory of sanity, the court can infer that none was available and consider that factor in assessing the weight of the evidence.[505] Unless a strong circumstantial case for an inference of sanity has been made, the prosecution's evidence is inadequate.[506]

These cases confirm that it is necessary and appropriate to assess the weight of the prosecution's evidence of sanity as a substitute for the sufficiency assessment, which is never undertaken on this issue. The focus should be upon whether the prosecution's evidence "adequately rebuts" the defendant's evidence; that is, whether a reasonable evidentiary basis for conviction has been presented to the jury. At this point, the presumption of sanity should not be given any evidentiary weight. The purpose of this assessment is to insure that some alternative to an irrational (*Mutina*) conviction is available to the jury; a major effect of the presumption is to create the possibility that the jury will convict without evidence and defeat the purpose mockery of the beyond a reasonable doubt burden of persuasion.[507]

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ciency claim based on the argument that the prosecution's position had "deteriorated" in the course of the defense case. The prosecution had offered no expert testimony in its rebuttal case, choosing to concede the mental illness issue and argue that the defendant could nevertheless substantially conform his conduct to the requirements of the law. The defendant argued that, in face of the evidence of his 20 year history of mental illness and the unrebutted opinion testimony of three experts, the prosecution's evidence was insufficient. The court responded that the prosecution's evidence that Lunde was oriented as to time, place and persons and that he behaved calmly and rationally before and after the killing "adequately rebutted" the defense evidence. 390 Mass. at 49, 453 N.E.2d at 450 (quoting Commonwealth v. Cole, 380 Mass. 30, 37-38, 402 N.E.2d 55, 60 (1980)).

The court referred to the same state of the evidence in rejecting Lunde's weight of the evidence claim. *Id.*

503. 390 Mass. 464, 457 N.E.2d 275 (1984).

504. *See id.* at 469-71, 457 N.E.2d at 278-79.

505. *Id.* at 470-71, 457 N.E.2d at 279 (quoting *Kostka*, 370 Mass. at 540, 350 N.E.2d at 460 (Hennessey, C.J., dissenting in part)).

506. In *Giuliana* a circumstantial case "might have been pieced together" by selectively reading "internally inconsistent, conflicting medical records which were contradicted by the testimony at trial." 390 Mass. at 470 & n.9, 457 N.E.2d at 279 & n.9. The sufficiency of such evidence in the face of the defense case would present a problem similar to that presented in Commonwealth v. Woods, 382 Mass. 1, 413 N.E.2d 1099 (1980).

507. The court's ruling in *Giuliana* makes it clear that evidence of improper outside

Commonly utilized inferences or similar proof-facilitating devices may also create a risk that the jury will be improperly influenced by non-evidentiary considerations. As with the presumption of sanity, an inference drawn from an artificially limited factual basis may permit a jury to reach a verdict on less than adequate evidence. The common law "presumption of malice"[508] had that impact in *Commonwealth v. Bearse*,[509] prompting the court to exercise its verdict revising powers in the interest of justice.

The defendant in *Bearse* had shot his sixteen year-old son Ricky at close range with a rifle he owned. In a pretrial statement to police, he said the rifle "discharged accidentally. His wife, who had been in a room above that in which the shooting occurred, reported that she heard her son say "Don't do it, Dad" a second or two before she heard the shot. The prosecution's theory was that this statement supported inferences that the shooting was intentional and malicious (the verdict was second degree murder).[510]

Bearse's assignments of error on appeal included the denial of his motions for directed verdicts on so much of the indictment as charged first and second degree murder.[511] The court found "no reversible error" in any one of his claims, but did not discuss them in detail "[i]n view of [its] ultimate conclusion."[512] It granted section 33E relief because it could not fairly conclude that the jury, "unaffected by considerations other than the evidence, were satisfied beyond a reasonable doubt that Ricky made the statement" and "could infer beyond a reasonable doubt from the fact of the statement that Ricky was prompted to make it because he saw that his father was intent upon shooting him."[513] The court set the verdict aside and remanded the case "to stand for trial on so much of the indictment as charges involuntary manslaughter."[514]

The formal inference of malice from the intentional use of a deadly weapon, together with the trial judge's disability on the credi-

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influence is not a prerequisite to relief where the verdict is otherwise against the weight of the evidence. *See* 390 Mass. at 471, 457 N.E.2d at 279.

508. After Sandstrom v. Montana, 442 U.S. 510 (1979), the term "presumption" is no longer favored and has been replaced by the term "inference." While inferences must be "permissive" when presented to the jury via instructions, in either form the device has the effect of diluting the prosecution's burden of production.

509. 358 Mass. 481, 265 N.E.2d 496 (1970).

510. *Id.* at 486, 265 N.E.2d at 499.

511. Appellant's Brief at 8-9, *Bearse*.

512. 358 Mass. at 485, 265 N.E.2d at 498.

513. *Id.* at 487, 265 N.E.2d at 499.

514. *Id.* at 488, 265 N.E.2d at 500.

bility and weight issues, worked to ease the prosecution's evidence past, rather than through, the sufficiency assessment. To prove either voluntary manslaughter or murder, the prosecution had to establish an intentional shooting; to prove murder, it would also have to prove malice. If the killing were shown to have been intentional, sufficient evidence of malice could be inferred solely from the use of a deadly weapon to bring it about.[515] The key issue, then, was whether the evidence that Ricky said, seconds before he was shot, "Don't do it, Dad," would support an inference beyond a reasonable doubt that the killing was intentional and malicious.

Whether Ricky uttered those words was a question of Mrs. Bearse's credibility which for sufficiency purposes must be taken for granted.[516] Assuming the statement was made and was subject to conflicting interpretations, the question of whether it would be taken as evidence that Ricky perceived that the defendant intended to shoot him is likewise an issue falling exclusively within the jury's fact-finding discretion.[517] If it is conceded that the inference is a possible one, it stands as sufficient evidence unless considered to be "too remote according to the usual course of events."[518] The most logical interpretation of the court's action in *Bearse*, particularly in light of its explicit ruling that it found no reversible error among the defendant's assignments of error for appeal, is that it viewed the inference as being sufficient, if barely so.[519] Its later rejection of that inference is couched in terms suggestive of a weight of the evidence evaluation; the court further concluded that the jury's verdict was probably influenced by the prosecutor when he told the jury that he would prove the defendant remarked, shortly before the shooting (no such evidence was offered): "I'm going to kill that kid."[520]

In Part Two it was argued that a trial judge may not constitutionally give conclusive effect to such an inference in assessing the sufficiency of the evidence. If that is done, however, and the infer-

515. *See* Commonwealth v. Kendrick, 351 Mass. 203, 209-10, 218 N.E.2d 408, 413 (1966).

516. *Cf.* Commonwealth v. Cooper, 264 Mass. 368, 373, 162 N.E. 729, 731 (1928).

517. Commonwealth v. Amazeen, 375 Mass. 73, 81, 375 N.E.2d 693, 699 (1978); Commonwealth v. Bonomi, 335 Mass. 327, 355-56, 140 N.E.2d 140, 160 (1957).

518. Commonwealth v. Cooper, 264 Mass. 368, 373, 162 N.E. 729, 731 (1928).

519. This was a pre-*Jackson v. Virginia* ruling. It seems unlikely that, given the ambiguity of the declaration and lack of evidence to provide a basis for choosing what inference to draw from it, this evidence would be considered sufficient under present standards.

520. 358 Mass. at 487, 265 N.E.2d at 499. The possibility that the jury's verdict was based on considerations outside the evidence is, of course, one of the central concerns of the court in considering whether to exercise its section 33E power.

ence also is suggested to the jury in an instruction, any remaining interest the jury may have in evidence on this issue may have to be satisfied by considering stricken evidence or improper argument. As the *Bearse* decision indicates, the trial court should ignore the formal inferences and be alert to indications that extraneous information has influenced the jury in assessing the weight of the evidence.

Finally, it is essential to recognize that trial judges will face claims under Rule 25(b)(2) (second sentence) that are essentially sufficiency claims, necessarily involving weight of the evidence issues. The most common is likely to be identification-alibi cases. In some jurisdictions these types of cases, which involve "elemental defenses," are treated as belonging to a special category of sufficiency cases to which the "prosecution's best case" rule does not apply.[521] This is because even where no other procedural device is employed, designation of an issue as an "affirmative defense" may eliminate effective sufficiency evaluation.

The "alibi" defense offers an illuminating illustration because it is likely to be asserted in cases involving either equivocal eyewitness identification or marginal circumstantial evidence that the defendant was a perpetrator of the crime. Massachusetts procedure is designed to produce a direct confrontation between the evidence of the opposing parties on this issue. Rule 14(b) of the Rules of Criminal Procedure requires the defendant, in response to a pretrial demand by the prosecution, to both plead the issue and disclose to the prosecution the names and addresses of the witnesses who will be called to establish the defense.[522] The prosecution must then respond by disclosing its rebuttal witnesses.[523]

One purpose of Rule 14(b) is to focus the dispute on a reasonably precise date, time and place so that the prosecution's evidence tending to show that the defendant perpetrated the crime and the defendant's evidence of alibi are focused.[524] That is, the proof of one should specifically negate the possibility that the other might also be true.[525] To the extent that Rule 14(b) succeeds in bringing about the

521. *See, e.g.*, United States v. Bush, 416 F.2d 823, 825-26 (D.C. Cir. 1969); Farrar v. United States, 275 F.2d 868, 869-70 (D.C. Cir. 1959); People v. Gardner, 35 Ill. 2d 564, 571-73, 221 N.E.2d 232, 235-37 (1966); People v. McGee, 21 Ill. 2d 440, 444-45, 173 N.E.2d 434, 436-37 (1961). *Compare* Commonwealth v. Woods, 382 Mass. 1, 7-9, 413 N.E.2d 1099, 1103-04 (1980).

522. MASS. R. CRIM. P. 14(b)(1)(A).

523. *Id.* 14(b)(1)(B).

524. MASS. R. CRIM. P. 14(b) reporters notes at 307.

525. Thus, the prosecution is required, as a foundation for its motion, to state the time, date and place at which the alleged offense was committed. The defendant's re-

direct joinder of the factual issues of time, date and place, the procedural device of designating "alibi" as a "defense" serves little purpose in terms of the original rationale upon which it rests. That is, it leaves little room for the possibility that the prosecution will be called upon to prove a negative of unknown dimension.

Even when the prosecution's evidence that the defendant perpetrated the crime rests on the testimony of one who claims to have been an eyewitness, the task of determining the sufficiency of such evidence may be very difficult. It is now widely recognized that juries are likely to be misled in judging what weight to give this kind of evidence, which is among the least reliable of the types of direct evidence commonly used in criminal litigation.[526] Nevertheless, the supreme judicial court has applied a lenient standard in determining the sufficiency of eyewitness identification evidence.[527] When one or more eyewitnesses identifies the defendant in court and places him or her at the scene of the crime near the time it occurred, that evidence will justify submitting the case to the jury in the face of an alibi defense, even where the identifying witness' testimony is "confusing and uncertain."[528] Even where a witness was unable to make an in-court identification and stated that the defendant was not the person who robbed him, the court has found the testimony of a police officer that the person in a photograph selected by the witness in an out-of-court identification procedure was the defendant to be both admissible as substantive evidence and sufficient by itself to support a finding beyond a reasonable doubt that the defendant was

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sponse must similarly state the specific place or places at which the defendant claims to have been at the time of the alleged offense. MASS. R. CRIM. P. 14(b)(1)(A).

While there is no explicit link established between this provision and those governing amendment of the indictment and requiring a bill of particulars, the failure to acknowledge the relationship between these procedures can defeat this crucial "issue-joining" purpose of Rule 14. The result is clearly illustrated in Commonwealth v. Woods, 382 Mass. 1, 413 N.E.2d 1099 (1980), an alibi case in which the prosecution was inexplicably permitted to amend the indictment to allow it to show that the offense occurred on a different date than originally alleged. Consequently, as the court noted, the prosecution's case depended in that crucial respect on the vagueness of its own evidence. *Id.* at 6 & n.7, 413 N.E.2d at 1102 & n.7. *See supra* text accompanying notes 277-95 for a detailed discussion of the *Woods* case.

526. E.F. LOFTUS, EYEWITNESS TESTIMONY 19 (1979).

527. *See* Commonwealth v. Clifford, 374 Mass. 293, 372 N.E.2d 1267 (1978); Commonwealth v. Vitello, 376 Mass. 426, 381 N.E.2d 582 (1978).

528. Commonwealth v. Clifford, 374 Mass. 293, 297, 372 N.E.2d 1267, 1271 (1978) ("The defendant contends that his alibi defense is as plausible as the confusing and uncertain testimony of the Commonwealth's two principal witnesses. . . . But it was for the jury and not the judge to determine whether the defendant's explanations should be believed.").

the robber.[529]

The supreme judicial court's assessment of the evidence in *Commonwealth v. Woods*[530] illustrates how the weight of the evidence should be assessed in such cases. The court should be sensitive to the possibility that the "prosecution's best case" rule has worked to present a case to the jury in which it is necessary for the jury to make an arbitrary judgment to convict. Similarly, the court should consider whether any prejudicial external influence has affected the jury's consideration of the evidence. On this point, *Woods* suggests yet another source of concern: the contrivance of evidence by the prosecution in response to the defendant's defensive pleading.[531]

Finally, in some cases, a sufficiency claim may have to be entertained for the first time as a weight of the evidence claim. For example, in *Commonwealth v. Sherry*,[532] the prosecution presented legally sufficient evidence to convict each of three defendants of having raped the victim individually as well as having acted as joint venturers. The prosecution did not ask for, and the judge did not give, joint venture instructions. Accordingly, when the jury convicted

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529. Commonwealth v. Vitello, 376 Mass. 426, 458-61, 381 N.E.2d 582, 600-01 (1978). The witness had testified that he was certain of his photographic identification when he made it. *Id.* at 458, 381 N.E.2d at 600. But, where the evidence does not clearly establish that the witness actually identified the defendant's photograph in the out-of-court session, it is not sufficient to support such a finding. Commonwealth v. Amado, 387 Mass. 179, 187, 439 N.E.2d 257, 261 (1982). The fineness of this distinction is captured in the court's characterization of *Vitello* as evidenced in a later case:

> Neither Johnson nor any of the three police officers who were present at this interview testified that Johnson had identified the photograph of the defendant as that of the assailant. The testimony of these witnesses tended to prove only that Johnson picked the defendant's photograph, gave a description of the assailant, gave the name of the assailant as "Bugsy," and "associated" the name of Bugsy with the photograph he had selected. . . . The missing fact, i.e., that Johnson had identified a photograph of the defendant as depicting the assailant, could not properly be inferred from this testimony beyond a reasonable doubt. Certainly a defendant can not be convicted on the basis of nothing more than inferences suggested by the sequence in which the questions were put to the witnesses.

Id. The court considered the defendant's alibi evidence to be irrelevant to the sufficiency issue. *Id.* at 181 n.1, 439 N.E.2d at 258 n.1.

530. 382 Mass. 1, 7-9, 413 N.E.2d 1099, 1113-14 (1981). Although this case involved a ruling on a motion for a new trial, the court discussed the sufficiency of the evidence and applied the standard of whether there was a serious risk that a miscarriage of justice had occurred. *Id.* It therefore represents an appropriate example of how the trial court's verdict revision authority should be exercised on its view of the weight of the evidence.

531. *Id.* at 6 n.7, 413 N.E.2d at 1102 n.7; *see also* Tibbs v. Florida, 457 U.S. 31, 42-45 (1982).

532. 386 Mass. 682, 437 N.E.2d 224 (1982).

each defendant of all three charges, it appeared for the first time that the evidence was legally insufficient to support two of the three verdicts as to each defendant.[533] In this situation the weight of the evidence assessment also serves the function of the constitutionally required sufficiency assessment.

D. *Selection of Remedies: New Trial, Reduced Verdict or Acquittal*

The trial court's choice of remedies must acknowledge federal constitutional double jeapordy principles which require acquittal where the court concludes that the conviction rests upon evidence that is either legally insufficient or totally lacking on any essential element.[534] Where the court decides to exercise its authority based on the weight of the evidence, double jeopardy principles do not restrict the judg'e choice of remedies.[535] This dichotomy suggests that it is appropriate for the court, when it exercises its authority to weigh the evidence, to distinguish those cases in which the sufficiency of the evidence has actually been assessed in the usual course of the proceedings from those in which the actual sufficiency of the evidence is being assessed under the rubric of considering its weight. Any finding actually grounded on insufficiency should be given the effect of an acquittal.[536]

The supreme judicial court's standards and methods for determining whether to act to grant a new trial or reduce a verdict under section 33E, for the most part, can be adopted directly by trial judges seeking guidance in the exercise of their Rule 25(b)(2) (second sentence) powers. Two points regarding flexibility and discretion should be noted. The general principle that flaws or mistakes in the

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533. *Id.* at 699-700, 437 N.E.2d at 234. On the theories presented to the jury there was no evidence that each defendant was a principal in any more than one rape. *Id.* The proper remedy was required findings of not guilty as to each of these two. *Id.* at 700, 437 N.E.2d at 234-35.

534. Hudson v. Louisiana, 450 U.S. 40, 43-44 (1981) (legally insufficient); Thompson v. Louisville, 362 U.S. 199, 204-05 (1960) (no evidence). "Acquittal" in this sense includes a reduced verdict where that reduction is based on a finding that the prosecution's evidence was legally insufficient as to the greater degree of guilt.

535. Tibbs v. Florida, 457 U.S. 31, 42-45 (1982). Given the constitutional impact of the weight versus sufficiency distinction it is important to honor the distinction scrupulously. Where, for example, the court conducts a weight of the evidence assessment and grants relief on a finding that an element of the offense is unsupported by any evidence, the remedy must be an acquittal. *Cf.* Commonwealth v. Sherry, 386 Mass. 682, 699-700, 437 N.E.2d 224, 227 (1982). *See Tibbs*, 457 U.S. at 40-41.

536. *See* Commonwealth v. Guiliana, 390 Mass. 464, 469, 457 N.E.2d 275, 278 (1984); Commonwealth v. Mutina, 366 Mass. 810, 822-23, 323 N.E.2d 294, 301-02 (1975).

trial process should be remedied only by a new trial, and inadequacies in the evidence remedied only by a reduced verdict is subject to two exceptions. The first exception is that where the two problems (a mistake and inadequate evidence) appear together, a reduced verdict may be an appropriate remedy.[537] The second exception is that where the defendant's case has been so inadequately presented; that is, where available evidence on a critical issue has not been presented and no tactical or strategic justification appears, a new trial can be granted in the interests of justice.[538]

Overall, the supreme judicial court's exercise of its section 33E authority has been marked by considerations of expediency and fairness in the pursuit of the proportional justice of a particular case. The court has reduced the jury's verdict in cases involving degree of guilt issues where the prosecution's evidence, viewed as the jury's verdict implies, was legally sufficient, but not adequate, because the case presented on those facts did not satisfy the court's paradigm of the offense.[539] The court also has reduced the verdict after revising the jury's implied findings according to the court's view of the weight of the evidence, when the court's revised findings similarly did not fit its paradigm.[540] Additionally, it has reduced the verdict when its revised findings led the court to conclude that, as revised, the facts were insufficient to support the verdict.[541] Finally, in *Commonwealth v. Bearse*,[542] the court combined its verdict reduction and new trial

537. *See* Commonwealth v. Bellamy, 391 Mass. 511, 516, 461 N.E.2d 1215, 1218 (1984); Commonwealth v. Rego, 360 Mass. 385, 394, 274 N.E.2d 795, 801 (1971); Commonwealth v. White, 353 Mass. 409, 426, 232 N.E.2d 335, 346 (1967).

538. Commonwealth v. Daniels, 366 Mass. 601, 607, 321 N.E.2d 822, 827 (1975). The court found two shortcomings in the presentation which it felt required a new trial: first, the jury had not been informed that Daniels had spent at least half his life in an institution, nor that his IQ was 53, nor that he was regarded medically as being mildly to moderately "retarded;" and second, no evidence—expert opinion or fact—was presented in either the motion to suppress or the trial to aid the judge and jury in evaluating the impact that custodial interrogation might have had on Daniels' ability to act voluntarily in the circumstances under which he was questioned. The shortcomings in the adjudication process required a new trial because "a substantial injustice may have been done." *Id.* at 608-09, 321 N.E.2d at 827-28.

539. *See, e.g.*, Commonwealth v. Dalton, 385 Mass. 190, 431 N.E.2d 203 (1982); Commonwealth v. King, 374 Mass. 501, 373 N.E.2d 208 (1978); Commonwealth v. Pisa, 372 Mass. 590, 363 N.E.2d 245, *cert. denied*, 434 U.S. 869 (1977); Commonwealth v. Kinney, 361 Mass. 709, 282 N.E.2d 409 (1972); Commonwealth v. Rego, 360 Mass. 385, 274 N.E.2d 795 (1971); Commonwealth v. White, 353 Mass. 409, 232 N.E.2d 335 (1967), *cert. denied*, 391 U.S. 968 (1968).

540. *See, e.g.*, *Vanderpool*, 367 Mass. 743, 328 N.E.2d 833 (1975).

541. *See, e.g.*, Jones, 366 Mass. 805, 323 N.E.2d 726 (1975).

542. 358 Mass. 481, 265 N.E.2d 496 (1970).

powers to overcome institutional limitations to ensure that its sense of justice would be satisfied in that case.

The court in *Bearse* ordered a new trial of the defendant's second degree murder conviction but limited the new trial to only that part of the indictment that charged involuntary manslaughter.[543] In effect, it acquitted the defendant of second degree murder and voluntary manslaughter. While the court's disposition of this case might at first blush appear to have involved an unwarranted exercise of its section 33E powers, a closer look at the evidence and the law prevailing at that time supports its correctness and demonstrates its ingenuity. The criticism of unwarranted exercise of power might be founded upon the argument that the basis of the court's order was that the prosecution's evidence on the critical elements of intent and malice were legally insufficient. If that were the case, the proper course of action would have been to reverse the trial judge's order denying the defendant's motion for a directed verdict on second degree murder, an issue which had been properly presented for appellate review.[544] Two considerations appear to underlie the court's decision to act upon section 33E grounds. First, the defendant's challenges to the sufficiency of the evidence at trial did not extend to the voluntary manslaughter charge.[545] Second, by acting pursuant to section 33E the court was able to exercise a form of control over the post-appellate proceedings, a control it could not achieve by exercising its ordinary appellate review powers. If it found the evidence to be legally insufficient, the proper remedy under Massachusetts law, as it then stood, was a new trial.[546] Nor could the court instruct the prosecutor to proceed only on so much of the indictment as charged involuntary manslaughter.[547] The remedy ordered a hybrid exercise of the court's reduction of verdict and new trial powers.

IV. CONCLUSION

Rule 25 of the Massachusetts Rules of Criminal Procedure

543. *Id.* at 488, 265 N.E.2d at 500.

544. This motion was made and denied at the close of the prosecution's evidence, the ruling was excepted to and assigned as error for appeal. It did not address the voluntary manslaughter issue. Summary of Record at 2-3, 5-6, *Bearse.*

545. *See* 358 Mass. at 488, 265 N.E.2d at 500.

546. It was not until 1978 that the Supreme Court ruled that double jeopardy principles prevent retrial following appellate reversal on insufficient evidence. *See* Greene v. Massey, 437 U.S. 19, 24 (1978).

547. The courts in Massachusetts cannot order the prosecutor to dismiss or file an indictment or part of it unless it suffers from some defect in law. *See generally* A. GOLDSTEIN, THE PASSIVE JUDICIARY (1981).

equips the trial judge to meet the demanding, ongoing challenge of overseeing the process of proof in criminal trials to ensure that no defendant is convicted upon evidence which does not provide some reasonable factual basis for the judgments essential to a finding of guilt. To the extent that this task involves the judge in evaluating the legal sufficiency of the prosecution's evidence, it is a federal constitutional duty. The new federal due process standard promulgated in *Jackson v. Virginia*[548] requires the judge to assess the legal sufficiency of the evidence to determine whether the evidence might support the conclusion of a reasonable factfinder that each essential element of the crime charged has been proved beyond a reasonable doubt.[549] This constitutional imperative is founded upon a recognition that the presumption of innocence imposes a burden of production on the prosecution and that enforcement of this burden of production is essential to maintaining the integrity of the *Winship* burden of persuasion.[550] To effectively serve this purpose, the standard of proof and the burden of production must be satisfied before the defendant may be required to respond to the prosecution's evidence by either defending or submitting to the jury.[551]

This newly articulated level of constitutional protections alters the division of fact-finding responsibility between judge and jury. It requires the judge to ensure that the prosecution's evidence provides a reasonable basis for the choice of inferences, as well as for the weight of the evidence and credibility judgments the jury must make to convict. Customary rules governing the sufficiency assessment process prohibit the trial judge from inquiring into the reasonableness of such judgments. Other rules and practices used to facilitate the process of proof often operate, singly or in combination, to dilute or defeat the trial judge's ability to use the customary sufficiency process to effectively vindicate the *Jackson* principles.[552]

One way to reconcile the old process to the new principles is to modify the customary rules that define the division of fact-finding responsibility between judge and jury and to limit the use of practices and proof-facilitating devices which relieve the prosecution of

548. 443 U.S. 307 (1979).

549. *Id.* at 324.

550. *Id.* at 323-24.

551. *Id.* at 324.

552. Examples of these other rules and practices include designation of issues as affirmative defenses, assignment of the burden of production on elemental issues to the defendant, and the application of proof-facilitating devices to the sufficiency determination.

its burden of producing evidence in the manner suggested by this article. The overall division of fact-finding responsibility between judge and jury would change little and no unfamiliar responsibilities would be imposed upon the judge. Any new restraints imposed on the jury's fact-finding discretion would tend to protect the accused and thus would pose no constitutional problems.

An alternative to modifying the operating rules of the present sufficiency assessment process would be to extend that process by utilizing the trial judge's postconviction authority as a supplementary device. Rule 25(b)(2) (second sentence) grants to trial judges the discretion to exercise an equitable power to revise jury verdicts in the interests of justice. This power is akin to the supreme judicial court's section 33E equitable verdict revision authority and is to be exercised similarly. The supreme judicial court has exercised its section 33E authority in ways that, in effect, have remedied evidentiary inadequacies similar to those that may result from the incongruities between the new *Jackson* standard or rationale and the customary rules and practices of the sufficiency assessment and general process of proof.

The trial judge's equitable authority under Rule 25(b)(2) (second sentence) is meant to extend beyond the function of supplementing the sufficiency assessment process. This authority grants the judge the power and responsibility to review the evidence and the issues in a case broadly, without regard to procedural technicalities and to take corrective action when it appears that justice may not have been done.[553] The trial judge is to exercise this authority in the manner and according to the standards developed by the supreme judicial court in the exercise of its section 33E powers.

In discharging its section 33E responsibilities, the supreme judicial court has ordered a new trial when shortcomings in fundamental aspects of the process of proof cast doubt on the integrity or accuracy of the verdict. It has reduced guilty verdicts when the verdict appeared to be disproportionate to the evidence evaluated on the weight of the evidence. The court has employed three identifiable approaches in assessing the proportionality of a verdict to the evidence. One approach is to assess the evidence, accepting the prosecution's best version of the events. When this view of the evidence

553. When it appears that there is a substantial risk that a miscarriage of justice may have occurred, the trial judge may order a new trial, order entry of a verdict of guilty on any lesser included offense or order entry of a finding of not guilty. MASS. R. CRIM. P. 25.

presents an account which is incomplete or unsatisfactory in some major aspect (such as in failing to supply a motive, or where the evidence on a key issue is only technically sufficient), the court has reduced the verdict. A second approach is to assess the weight of the evidence, utilizing a version of events extracted from all that is known about the case, against a paradigm of the offense that is somewhat less extensive than the formal definition of the offense. When the evidence, though legally sufficient, falls short on this account, the verdict has been considered disproportionate and reduced. Finally, the court has reduced verdicts when, on its version of events as measured against a paradigm of the offense, the evidence is insufficient to support the verdict.

Overall, the court has combined its concerns of basic fairness with a degree of expediency to achieve a rough sense of proportionality that addresses two relationships: that between the evidence and the verdict in a given case and that between the case before the court and the court's paradigm of the offense indicated by the verdict. In its choice of remedies, the court has similarly combined an approximate sense of fairness with expediency, particularly where judicial resources may be conserved.

Recent developments in federal double jeopardy doctrine restrict the court's alternatives by requiring entry of an acquittal whenever a court determines that the evidence was legally insufficient to support a conviction. The court's choice of remedies should be made with considerations of finality in mind. If the weight assessing authority of the trial courts is to be used to supplement the sufficiency assessment process, remedies that are the functional equivalent of a required finding of not guilty should be given conclusive effect.

In sum, the trial judge's task of regulating the quality of the evidence in criminal cases is as complex as the process of proof itself and often requires the judge to carefully balance conflicting policies and rules. The judge's overriding concern must be to ensure that the principle of *Jackson v. Virginia* is fully vindicated in the trial court, preferably through the sufficiency assessment process. Rule 25 empowers the judge to do whatever is necessary to discharge this constitutional obligation and to go beyond the due process minimum to ensure that injustice is not done in the trial court.