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CRIMINAL LAW

A DUE PROCESS ANALYSIS OF JUDICIALLY-AUTHORIZED PRESUMPTIONS IN FEDERAL AGGRAVATED BANK ROBBERY CASES

JAMES F. PONSOLDT*

I. INTRODUCTION

Within the past fifteen years several broadly-focused articles have identified general constitutional limits, under the due process clause, on presumptions and inferences created by statute or applied by courts in trying criminal cases.¹ Recently, in *County Court of Ulster County, New York v. Allen*,² the Supreme Court affirmed the validity of the evidentiary devices of inferences and presumptions and labeled them "a staple of our adversary system of factfinding."³ This suggests that to unreasonably curtail the use of circumstantial evidence in the factfinding process would place an intolerable burden on prosecutors in their efforts to prove guilt beyond a reasonable doubt. Yet, notwithstanding the necessary evidentiary role for presumptions and inferences in the criminal justice process, the Court has acknowledged often-stated requirements of

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¹ See Allen, *The Restoration of In re Winship: A Comment on Burdens of Persuasion in Criminal Cases after Patterson v. New York*, 76 MICH. L. REV. 30 (1977) [hereinafter cited as Allen, *Restoration*]; Allen, Mullaney v. Wilbur, *The Supreme Court and the Substantive Law—an Examination of the Limits of Legitimate Intervention*, 55 TEX. L. REV. 269 (1977) [hereinafter cited as Allen, *Limits of Legitimate Intervention*]; Ashford & Risinger, *Presumptions, Assumptions and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165 (1969); Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325 (1979); Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187 (1979).

² 442 U.S. 140 (1979).

³ *Id.* at 156.

due process: persons accused of crimes must be presumed innocent and every element of a crime must be proven beyond a reasonable doubt.⁴

This article will analyze approaches taken by various federal circuits in reviewing a microcosm of our criminal justice system—aggravated bank robbery convictions—first, by identifying the substantive criminal law issues; second, by surveying established due process analysis; and, finally, by relating that analysis to prosecutions under the Federal Bank Robbery Act.⁵

The examination below of different judicial constructions of the aggravated offense subsection of the Federal Bank Robbery Act will reveal occasional circumvention of due process requirements through the application of permissive and conclusive presumptions.⁶ This Article will conclude, moreover, that the law interpreting this brief, relatively simple, and frequently litigated statute is substantially unsettled and that, in this particular area of criminal justice, the constitutionally-mandated separation between the executive and judicial branches may be eroding. If, as Chief Justice Burger recently warned, our system of justice may literally break down within 20 years,⁷ the breakdown could be initiated by such a publicly-supported erosion.

II. IDENTIFYING THE SUBSTANTIVE LAW QUESTIONS

Prompted by the increasing rate of "one of the most serious forms of crime committed by organized gangsters who operate habitually from one state to another," in 1934 Congress enacted the Federal Bank Rob-

⁴ See *County Court of Ulster County, New York v. Allen*, 442 U.S. 140 (1979); *Barnes v. United States*, 412 U.S. 837 (1973); *Leary v. United States*, 395 U.S. 6 (1969); *United States v. Gainey*, 380 U.S. 63 (1965); *United States v. Romano*, 382 U.S. 136 (1965).

⁵ 18 U.S.C. § 2113 (1976). The Act provides *inter alia*:

(a) Whoever, by force and violence, or by intimidation, takes or attempts to take, from the person or presence of another any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association . . . [s]hall be fined not more than \$5,000 or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding \$100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than \$5000 or imprisoned not more than ten years, or both.

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than \$10,000 or imprisoned not more than twenty-five years, or both.

⁶ See *United States v. Shelton*, 465 F.2d 361 (4th Cir. 1972); *United States v. Cooper*, 462 F.2d 1343 (5th Cir. 1972), *cert. denied*, 409 U.S. 1009 (1972); *United States v. Marshall*, 427 F.2d 434 (2d Cir. 1970); *Baker v. United States*, 412 F.2d 1069 (5th Cir. 1969), *cert. denied*, 396 U.S. 1018 (1969).

⁷ N.Y. Times, Nov. 19, 1982, at 15, col. 2.

bery Act.⁸ Section 2113(a) of the statute, which today exists in relevant part substantially unchanged, prohibits the taking "by force and violence, or by intimidation" of anything of value from a federally-insured bank or savings and loan association.⁹ This federal offense is punishable by a sentence of up to 20 years imprisonment.¹⁰ Furthermore, section 2113(d) of the Act provides that if, in the commission of such a bank robbery by force or intimidation, the perpetrator commits an assault or places the life of any person in jeopardy by the use of a dangerous weapon, the maximum penalty for the offense increases to a maximum of 25 years imprisonment.¹¹

In recent years, the Bank Robbery Act has been the subject of increased, if ambiguous, attention in the appellate courts. Indeed, the statute is one of the most frequently litigated sections in Title 18.¹² The Justice Department has routinely invoked both sections 2113(a) and 2113(d) of the Act to prosecute all persons connected with particular robberies for the "aggravated" offense.¹³ Courts have reinforced this practice by liberally construing both the elements of the offense in jury instructions and the requirements of proof and burden of persuasion to affirm the conviction, under section 2113(d) and 18 U.S.C. § 2,¹⁴ of persons who, for example, never entered the bank or persons who did not participate in the use of an objectively dangerous weapon.¹⁵

Until recently, few courts rigorously applied a due process analysis designed to determine whether particularly-favored jury instructions permit or mandate presumptions which conflict with the "presumption

⁸ 18 U.S.C. § 2113 (1970); *see*, H.R. REP. NO. 1461, 73d Cong., 2d Sess. (1934).

⁹ 18 U.S.C. § 2113(a).

¹⁰ *Id.*

¹¹ 18 U.S.C. § 2113(d).

¹² *See, e.g.*, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS Table 5.19 at 406-07 (Flanagan, Van Alstyne & Gottfredson eds. 1981). Of a total of 25,792 defendants prosecuted by the federal government for felonies during the year ending June 30, 1980, 1,329 were charged with bank robbery. *Id.*

¹³ *United States v. Marshall*, 427 F.2d 434 (2d Cir. 1970); *United States v. DePalma*, 414 F.2d 394 (9th Cir. 1969), *cert. denied*, 396 U.S. 1046 (1969); *Lewis v. United States*, 365 F.2d 672 (10th Cir.), *cert. denied*, 386 U.S. 945 (1966). The terms "aggravated" offense and "enhanced" penalty section often are used interchangeably with reference to 18 U.S.C. § 2113(d) and sometimes § 2113(e). *See, e.g.*, Note, *The Federal Bank Robbery Act—The Problem of Separately Punishable Offenses*, 18 WM. & MARY L. REV. 101, 113, 117 (1976).

¹⁴ 18 U.S.C. § 2 (1976), the federal aiding and abetting statute, is discussed in depth in the majority and dissenting opinions in *Bailey v. United States*, 416 F.2d 1110 (D.C. Cir. 1969).

¹⁵ *United States v. Marshall*, 427 F.2d 434 (2d Cir. 1970); *United States v. Lewis*, 365 F.2d 672 (10th Cir.), *cert. denied*, 386 U.S. 945 (1966); *Wagner v. United States*, 264 F.2d 524 (9th Cir. 1959). For further discussion, see *infra* notes 122-24 and accompanying text. *See also* Note, *The Inoperable Gun as a Dangerous Weapon Under Michigan's Felonious Assault Statute*, 1981 DET. C. L. REV. 909.

of innocence" standard,¹⁶ or whether the government's evidence relevant to the "lives in jeopardy" or "assault" element of section 2113(d) has met a due process "reasonable doubt" standard.¹⁷ In a somewhat unexpected recent development, however, several appellate courts reviewing aggravated bank robbery convictions have acknowledged the possibility that accused bank robbery participants are not being accorded due process of law as that principle has evolved in other criminal law contexts.¹⁸ The relatively few reversals of convictions can be understood, perhaps, as narrowly-focused applications of the basic observation by Justice Frankfurter that, "the history of liberty has largely been the history of observance of procedural safeguards."¹⁹

Several 1982 decisions illustrate open disagreement among courts regarding the proper application of section 2113(d).²⁰ This disagreement focuses primarily on two questions having traditional criminal law overtones: (1) whether an unarmed accomplice who plans or participates in a bank robbery can be presumed to have known that the principals literally would endanger lives during the robbery; and (2) whether a jury properly may presume from evidence that a potentially dangerous weapon or device displayed during a bank robbery was in fact capable of inflicting serious injury and, if so, whether such a presumption is rebuttable by evidence that the weapon was inoperable or otherwise not dangerous.

In *United States v. McCaskill*,²¹ the appellant, a "getaway" driver who remained outside the bank while his accomplices carried out the robbery, was convicted of violations of 18 U.S.C. § 2113(d) and 18 U.S.C. § 2. He admitted his participation in the robbery but sought a jury instruction stating that the government must prove not only that the defendant knew that a bank was to be robbed and that the defendant became associated with and participated in that crime, but also that the defendant knew that the criminals were armed and intended to use their weapons, and that he intended to aid them in that

¹⁶ See, e.g., *Taylor v. Kentucky*, 436 U.S. 478 (1978). But see *Kentucky v. Whorton*, 570 S.W.2d 627 (Ken. 1978), *rev'd per curiam*, 441 U.S. 786 (1979).

¹⁷ *Jackson v. Virginia*, 443 U.S. 307 (1979); *In re Winship*, 397 U.S. 358 (1970); see also *Nesson*, *supra* note 1, at 1212-13.

¹⁸ *United States v. McGaskill*, 676 F.2d 995 (4th Cir. 1982) (Ervin, J., dissenting); *United States v. Longoria*, 569 F.2d 422 (5th Cir. 1978); *United States v. Sanborn*, 563 F.2d 488 (1st Cir. 1977); *United States v. Short*, 493 F.2d 1170 (9th Cir.), *cert. denied*, 419 U.S. 1000 (1974); *United States v. Methvin*, 441 F.2d 584 (5th Cir. 1971).

¹⁹ *McNabb v. United States*, 318 U.S. 332, 347 (1943).

²⁰ Compare *United States v. McGaskill*, 676 F.2d 995 (4th Cir. 1982), with *United States v. Short*, 493 F.2d 1170 (9th Cir.), *cert. denied*, 419 U.S. 1000 (1974); see also *United States v. Bennett*, 675 F.2d 596 (4th Cir. 1982); *United States v. Crouthers*, 669 F.2d 635 (10th Cir. 1982).

²¹ 676 F.2d 995 (4th Cir. 1982).

respect. McCaskill based his appeal, first, on the trial court's failure to give such an instruction and, second, on the trial court's decision to give an alternative instruction authorizing a conviction for aiding in the aggravated offense based on evidence that appellant had generally associated himself with the bank robbery.²²

In effect, the appellant argued a common principle of criminal law: elements of a criminal offense as defined by a statute which contains enhanced penalty provisions may have multiple or variable *mens rea* requirements, and the state must prove each relevant *mens rea* element beyond a reasonable doubt.²³ While the aiding and abetting section requires proof of specific intent,²⁴ the aggravated offense subsection, 2113(d), requires additional proof that lives were placed in jeopardy.²⁵ Thus, it logically follows that proof of *mens rea* must focus on the aggravated offense section to sustain a conviction under that section of Title 18. If the appellant reasonably argued that the government had not introduced evidence sufficient to prove his specific intent to aid in placing lives in jeopardy, then he would be entitled to a jury instruction containing that theory.²⁶

Nevertheless, in a split decision the Fourth Circuit affirmed McCaskill's conviction. The majority relied heavily upon Federal Bureau of Investigation (F.B.I.) testimony that the appellant had confessed to having knowledge of his accomplice's possession of guns prior to the robbery. Thus the majority held that no legitimate jury question was presented concerning proof of appellant's *mens rea*.²⁷ Dissenting Judge Ervin disagreed with the majority's assumption that the government's proof of the appellant's knowledge concerning the use of weapons was unrefuted.²⁸ In Judge Ervin's view, the appellant's trial testimony conflicted with the F.B.I. testimony, thus creating a valid issue for jury determination and requiring a relevant instruction.²⁹ Of particular

²² *Id.* at 997.

²³ See generally Westerfield, *The Mens Rea Requirement of Accomplice Liability in American Criminal Law—Knowledge or Intent*, 51 MISS. L. REV. 155 (1981).

²⁴ 18 U.S.C. § 2 (1976) provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

²⁵ 18 U.S.C. § 2113(d) provides in pertinent part: "Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section . . . puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than \$10,000 or imprisoned not more than twenty-five years, or both."

²⁶ *United States v. Short*, 493 F.2d 1170 (9th Cir.), *cert. denied*, 419 U.S. 1000 (1974); *United States v. Bosch*, 505 F.2d 78 (5th Cir. 1974).

²⁷ 676 F.2d at 999.

²⁸ *Id.* at 1005 (Ervin, J., dissenting).

²⁹ *Id.* at 1004 (Ervin, J., dissenting).

interest is the assumption by both the majority and dissent that, for a conviction to be valid under section 2113(d), the jury had to find beyond a reasonable doubt that the defendant knowingly aided an armed, as opposed to unarmed, bank robbery. Thus, both the majority and dissent undermine the traditional instruction, which had been given by the trial court and challenged on appeal.³⁰

Recognition that the government must submit proof and that the trial court must adequately charge the jury regarding the aggravation element of the Federal Bank Robbery Act under traditional principles of accomplice liability leaves open the question of exactly what constitutes that aggravating element: what exactly did Congress mean by the "dangerous weapon" and "lives in jeopardy" terms used in section 2113(d)? Two recent decisions, *United States v. Bennett*³¹ and *United States v. Crouthers*,³² suggest that the Fourth and Tenth Circuits take a flexible view of the statute, looking beyond the apparently straightforward "objective" meaning of those terms to approve jury instructions and uphold convictions where the defendants appeared to have used intimidating weapons, but had not directly placed lives in jeopardy because their weapons were not actually capable of inflicting injury. In both cases, the defendants were convicted of violating section 2113(d) and appealed on the ground that the evidence was insufficient to convict. In each case, not only did the prosecutor fail to introduce evidence that weapons used in the course of the robbery could have inflicted injury, but, in addition, the defendant proved that the weapons were unloaded (and were not used or threatened to be used as a club or to physically assault).³³ Both the Fourth and Tenth Circuits, recognizing the existence of contrasting views, rejected the "objective" test³⁴ for determining whether a weapon was dangerous and whether lives were placed in jeopardy by the defendant's use of the weapon. These courts looked instead

³⁰ The instruction, identified as the accepted instruction in the Fourth Circuit, was as follows:

"The Court instructs you that in order to aid and abet another to commit a crime it is necessary that the accused, that is, the defendant in this case, willfully associated himself in some way with the criminal venture, that is, the bank robbery, and willfully participated in it as he would in something he wishes to bring about, that is to say that he willfully seeks by some act or omission of his own to make the criminal venture succeed and that an act is willfully done if done voluntarily and intentionally and with specific intent to do something the law forbids. . . ."

Id. at 997.

³¹ 675 F.2d 596 (4th Cir. 1982).

³² 669 F.2d 635 (10th Cir. 1982).

³³ *Bennett*, 675 F.2d at 598; *Crouthers*, 669 F.2d at 638.

³⁴ The objective test requires proof that the weapon involved was actually capable of inflicting injury, i.e., that the gun was loaded. *Bennett*, 675 F.2d at 599; *Crouthers*, 669 F.2d at 639.

at (1) the victim's subjective perception of the situation,³⁵ and (2) the potential consequences for the victim of intervention by police or others.³⁶ Both decisions affirmed the convictions without reference to parallel state law or the legislative history of the Bank Robbery Act, thus holding that the minimum necessary conduct violative of section 2113(a) was, without more, usually also violative of section 2113(d).

In *McCaskill* the appellate court thus effectively instructed the jury to presume from the fact that a defendant aided in a robbery the additional element that the defendant knowingly aided in placing lives in jeopardy during the robbery. In *Bennett* and *Crouthers*, the lower courts authorized a presumption that the use of apparently dangerous weapons during a robbery implies that the weapons actually were dangerous and literally placed lives in jeopardy; the courts then disregarded evidence that arguably would have rebutted that presumption. The following section of this Article will explore recognized limitations upon the use of similar presumptions.

III. CONSTITUTIONAL LIMITATIONS UPON THE USE OF PRESUMPTIONS

The terms inference and presumption are often used interchangeably. Their use has been defined as "a standardized practice, under which certain facts are held to call for uniform treatment with respect to their effect as proof of other facts."³⁷ Whether the proof of fact A gives rise to the inference or presumption of fact B is dependent upon fact A's probative value regarding the existence of fact B.³⁸ Presumptions generally are classified as permissive, mandatory, or conclusive.³⁹ Permissive presumptions permit, but do not compel, the factfinder to assume the

³⁵ *Crouthers*, 669 F.2d at 639.

³⁶ *Bennett*, 675 F.2d at 599.

³⁷ E. CLEARY, V. BALL, R. BARNHARDT, K. BROUN, G. DIX, E. GELLHORN, R. MEISNHOLDER, E.F. ROBERTS, & J.W. STRONG, *MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE* § 342, at 803 (2d ed. 1972) [hereinafter cited as *MCCORMICK ON EVIDENCE*]. It should be noted that in this quotation *MCCORMICK ON EVIDENCE* intended only to define the term presumption. In later discussing the evidentiary device implemented in cases such as *United States v. Gainey*, 380 U.S. 63 (1954), and *Turner v. United States*, 396 U.S. 398 (1970), the work labels the device as a permissible inference—a particular subcategory of presumptions. *MCCORMICK ON EVIDENCE* § 346, at 831.

In regard to the frequent synonymous use of the terms presumption and inference, note the majority opinion of *Ulster County v. Allen*, 442 U.S. 140, 156 (1979), where the terms inference and presumption are used without attempt to distinguish the two as unique evidentiary devices.

³⁸ See 9 J.H. WIGMORE, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* § 2491 (3rd ed. 1940).

³⁹ Note, *The Unconstitutionality of Statutory Criminal Presumptions*, 22 *STAN. L. REV.* 341, 342-43 (1970).

existence of the presumed fact upon proof of the underlying fact.⁴⁰ Mandatory presumptions require assumption of the presumed fact's existence following a finding of proof of the underlying fact, at least until evidence is offered to rebut that presumption.⁴¹ Conclusive presumptions foreclose argument on the presumed fact once the underlying fact is established.⁴²

For decades the Supreme Court has struggled to define the due process requirements imposed upon the use of presumptions in the evidentiary process.⁴³ A continuously recurring question concerns the strength of the probative link between the underlying and presumed facts. The Court has established more stringent standards for the testing of mandatory and conclusive presumptions because they have greater impact on the fact-finding process.⁴⁴ In *Ferry v. Ramsey*,⁴⁵ Justice Holmes set forth what is commonly known as the "greater-includes-the-lessor" test for the validity of presumptions.⁴⁶ The test holds that if a legislature could in conformity with due process eliminate a particular substantive element of a crime and thereby find guilt or impose criminal liability without proof of that element, then the State would be justified in presuming the given element and requiring the defendant to shoulder the burden of rebutting its existence.⁴⁷ Thus, the legislature's greater power to eliminate an element of a crime and nevertheless impose punishment included the lesser power to presume the existence of that element upon proof of some underlying element.⁴⁸

The Supreme Court rejected the "greater-includes-the-lessor" rule fifteen years later in *Tot v. United States*.⁴⁹ *Tot* involved a conviction under the Federal Firearms Act,⁵⁰ which prohibited individuals previously convicted of crimes of violence from receiving firearms or ammunition through interstate or foreign commerce.⁵¹ The Court struck down an accompanying statutory rule which deemed possession of a

⁴⁰ *Id.* at 343.

⁴¹ *Id.* at 342-43.

⁴² *Id.* at 342.

⁴³ See, e.g., *County Court of Ulster County, New York v. Allen*, 442 U.S. 140 (1979); *Barnes v. United States*, 412 U.S. 837 (1973); *United States v. Gainey*, 380 U.S. 63 (1965); *Western & Atlantic R.R. v. Henderson*, 279 U.S. 639 (1929); *Ferry v. Ramsey*, 277 U.S. 88 (1928); *Mobile, J. & K.C. R.R. v. Turnipseed*, 219 U.S. 35 (1910).

⁴⁴ *Ulster County*, 442 U.S. at 166-67.

⁴⁵ 277 U.S. 88 (1928).

⁴⁶ See *Jeffries & Stephan*, *supra* note 1, at 1336-37; see also *Allen, Restoration*, *supra* note 1.

⁴⁷ *Ferry*, 277 U.S. at 94.

⁴⁸ *Jeffries & Stephan*, *supra* note 1, at 1337.

⁴⁹ 319 U.S. 463, 473 (1943). But see *Allen, Limits of Legitimate Intervention*, *supra* note 1, at 286-90, contending that the "greater-includes-the-lessor" theory survives *Tot*; see also *Nesson*, *supra* note 1.

⁵⁰ 15 U.S.C. § 902 (1938) (repealed 1968; current version at 18 U.S.C. § 922(c)(1) (1976)).

⁵¹ *Tot*, 319 U.S. at 464.

firearm by a defendant to be presumptive evidence that the weapon was received through interstate or foreign commerce.⁵² While the Court did not explicitly overrule the holding of *Ferry v. Ramsey*,⁵³ it clearly applied another test to determine the constitutionality of presumptions: the requirement that a rational connection exist between the underlying fact and the presumed fact.⁵⁴ In rejecting the claim that a rational connection existed between the fact of possession of a weapon or ammunition and its reception through means of interstate or foreign commerce, the Court noted: "It is not too much to say that the presumptions created by the law are violent, and inconsistent with any argument drawn from experience."⁵⁵

The Court further refined *Tot*'s "rational-connection" standard in a series of cases initiated by *United States v. Gainey*.⁵⁶ Jackie Gainey was convicted under 26 U.S.C. § 5601⁵⁷ for illegal possession of a still and for carrying on a distilling operation without having given a bond.⁵⁸ The statute included a permissive presumption that evidence of unexplained presence at the site of an illegal still was a sufficient basis from which to conclude that a defendant was carrying on the business of distilling.⁵⁹ In concluding that the presumption satisfied the "rational-connection" test of *Tot*, Justice Stewart commented: "Legislative recognition of the implications of seclusion only confirms what the folklore teaches—that strangers to the illegal business rarely penetrate the curtain of secrecy."⁶⁰ In that same year, the Court, in *United States v. Romano*,⁶¹ held that unexplained presence at the site of a still would not sustain the presumption that the defendant was in possession of the still.⁶² In distinguishing the *Gainey* decision, Justice White noted that the possession of a still, unlike the general offense of carrying on the business of distilling, is a specific offense which does not necessarily follow from presence

⁵² *Id.* at 469-70.

⁵³ See Allen, *Limits of Legitimate Intervention*, *supra* note 1, at 286-90. But see Jeffries & Stephan, *supra* note 1, at 1337 n.28.

⁵⁴ *Tot*, 319 U.S. at 467. Actually the case represented a return to the "rational-connection" test which had been the rule before the *Ferry* decision. See, e.g., *Mobile, J. & K.C. R.R.*, 219 U.S. at 43.

⁵⁵ *Tot*, 319 U.S. at 468. The Court classified the presumption in *Tot* as mandatory in nature, evidenced by the fact that a government argument based on convenience (defendant has more ready access to evidence) was rejected as proper only in analyzing permissive inferences. *Id.* at 469; see also *Ulster County*, 442 U.S. at 157-59 n.16.

⁵⁶ 380 U.S. 63 (1965).

⁵⁷ 26 U.S.C. § 5601 (1976).

⁵⁸ *Gainey*, 380 U.S. at 63-64.

⁵⁹ 26 U.S.C. § 5601(b).

⁶⁰ *Gainey*, 380 U.S. at 67-68.

⁶¹ 382 U.S. 136 (1965).

⁶² *Id.* at 138.

at the site of a still.⁶³

Leary v. United States,⁶⁴ decided by the Supreme Court in 1969, applied an even more stringent standard for the constitutional examination of presumptions.⁶⁵ *Leary* was convicted under 21 U.S.C. § 176(a), which prohibits the transportation of illegally imported marihuana. The conviction was based upon the presumption that possession of marihuana would demonstrate the defendant's knowledge that it was illegally transported.⁶⁶ In reviewing its prior decisions on the issue of due process requirements for the use of presumptions, the Court concluded:

The upshot of *Tot*, *Gainey*, and *Romano* is, we think, that a criminal statutory presumption must be regarded as "irrational" or "arbitrary," and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.⁶⁷

In finding the presumption of knowledge of illegal transportation from possession constitutionally deficient, the Court explicitly reserved for later decision the question of whether criminal presumptions are also required to satisfy the criminal law "reasonable-doubt" standard, since the presumption in question failed to meet even the "more-likely-than-not" standard.⁶⁸

The inevitable intersection of the *Leary* "more-likely-than-not" rule for presumptions and the "reasonable-doubt" standard of proof required in a criminal proceeding occurred in *In re Winship*.⁶⁹ In reviewing earlier decisions on the issue of burden of persuasion in criminal cases, Justice Brennan for the majority concluded that proof beyond a reasonable doubt had long been held to be constitutionally mandated by the due process clause.⁷⁰ Although *Winship* appeared to be nothing

⁶³ *Id.* at 141. In *Ulster County*, the Court reviewed the *Gainey* and *Romano* decisions and emphasized that the characterization of presumption as permissive or mandatory is determined by the judge's jury instructions concerning the effect of the presumption. 442 U.S. at 160. Whereas the jury instructions in *Gainey* clearly pronounced that the jury was not required to accept the presumption, 380 U.S. at 69-70, the instructions in *Romano* that the defendant's presence at the still "shall be deemed sufficient evidence to authorize conviction," 382 U.S. at 138, had the effect of creating a mandatory presumption. *Ulster County*, 442 U.S. at 157-59 n.16.

⁶⁴ 395 U.S. 6 (1969).

⁶⁵ *Id.* at 36; see Jeffries & Stephan, *supra* note 1, at 1337.

⁶⁶ *Leary*, 395 U.S. at 30.

⁶⁷ *Id.* at 36. In *Ulster County*, the Court reviewed the *Leary* decision, noting that the presumption involved in *Leary* was a mandatory presumption. 442 U.S. at 159 n.17.

⁶⁸ *Leary*, 395 U.S. at 36 n.64.

⁶⁹ 397 U.S. 358 (1970). *Winship* held unconstitutional a New York statute specifying that juveniles charged with committing delinquent acts could be found guilty merely by a preponderance of the evidence, instead of by the stricter standard of beyond a reasonable doubt.

⁷⁰ *Id.* at 361-65. Justice Brennan traced the requirement of a higher standard of proof in

more than a restatement of the generally accepted requirements of burden of persuasion in criminal cases, its ramifications were to be seen as potentially revolutionary in nature with the decision of *Mullaney v. Wilbur*⁷¹ in 1975. Under the Maine statute, a defendant charged with murder had to establish that he or she acted in the heat of passion in order to reduce the homicide to manslaughter.⁷² Noting the clear trend of requiring the prosecution to bear the burden of proving the absence of provocation, the Court concluded that the "reasonable-doubt" standard of *Winship* constitutionally required that the state establish the absence of provocation.⁷³ Particularly significant was the Court's response to the State's contention that *Winship* was inapplicable because Maine's crime of felonious homicide did not include the absence of provocation as an essential element of the crime:⁷⁴

Moreover, if *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.⁷⁵

The clear import of *Mullaney* was that the requirements of *Winship*'s "reasonable-doubt" standard would extend to certain substantive elements of a crime, even if the states chose to eliminate those elements from their definition of a given crime.⁷⁶

Two years after *Mullaney*, the Court, in *Patterson v. New York*,⁷⁷ severely curtailed the apparently broad scope of the *Winship* doctrine as elaborated in *Mullaney*. Patterson was convicted of second-degree murder under a statute setting forth the elements of (1) "intent to cause the

criminal cases from ancient times, but noted that the specific terminology of proof beyond a reasonable doubt "seems to have occurred as late as 1798." *Id.* at 361.

⁷¹ 421 U.S. 684 (1975). For the immediate reaction of commentators to *Mullaney* and their conclusions that the decision would have a tremendous impact on the ability of the state to shift burdens of proof, see Osenbaugh, *The Constitutionality of Affirmative Defenses to Criminal Charges*, 29 ARK. L. REV. 429 (1976); Case Comment, *Unburdening the Criminal Defendant: Mullaney v. Wilbur and the Reasonable Doubt Standard*, 11 HARV. C.R.-C.L. L. REV. 390 (1976); Note, *Affirmative Defenses and Due Process: the Constitutionality of Placing a Burden of Persuasion on a Criminal Defendant*, 64 GEO. L.J. 871 (1976).

⁷² The Maine manslaughter statute involved, ME. REV. STAT. ANN, tit. 17, § 2551 (1964) (repealed 1975), read: "[W]hoever unlawfully kills a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought . . . shall be punished by a fine of not more than \$1000 or by imprisonment for not more than 20 years . . ."

⁷³ 421 U.S. at 698.

⁷⁴ *Id.* at 690.

⁷⁵ *Id.* at 698.

⁷⁶ See Tushnet, *Constitutional Limitations of Substantive Criminal Law: An Examination of the Meaning of Mullaney v. Wilbur*, 55 B.U.L. REV. 775 (1975) (*Mullaney* limits circumstances in which state can find guilt in the absence of *mens rea*).

⁷⁷ 432 U.S. 197 (1977).

death of another person;" and (2) "caus[ing] the death of such person or of a third person."⁷⁸ Since malice aforethought was not included as an element of the crime, the defendant contended that *Mullaney* required the state to bear the burden of proof on any fact determining the blameworthiness of an act or the severity of punishment to be imposed for its commission.⁷⁹ In rejecting this reading of *Mullaney*, Justice White for the majority countered that the Maine statute in *Mullaney*, as interpreted by that state's supreme court, had included malice aforethought as an essential element of the crime, thus it included proof of the absence of provocation by implication.⁸⁰ The New York statute at issue in *Patterson*, however, did not include malice aforethought as an element of homicide, therefore the state was not required to prove the absence of provocation.⁸¹ An accompanying footnote to the opinion particularly enlightens the Court's motivation for refusing to liberally construe the language of *Mullaney*:

There is some language in *Mullaney* that has been understood as perhaps construing the Due Process Clause to require the prosecution to prove beyond a reasonable doubt any fact affecting "the degree of criminal culpability . . ." It is said that such a rule would deprive legislatures of any discretion whatsoever in allocating the burden of proof, the practical effect of which might be to undermine legislative reform of our criminal justice system The Court did not intend *Mullaney* to have such far-reaching effect.⁸²

Justice Powell, who authored the *Mullaney* decision, dissented in *Patterson*, obviously persuaded that the Court's fine distinctions drained all vitality from the rationale of *Mullaney*.⁸³

Commentators are divided on the conceptual significance of the *Mullaney* and *Patterson* decisions. Some have advocated that the Court in *Winship* established procedural requirements to which legislatures must adhere in their drafting of criminal statutes.⁸⁴ Under this view the

⁷⁸ N.Y. PENAL LAW § 125.25 (McKinney 1975).

⁷⁹ *Patterson*, 432 U.S. at 214.

⁸⁰ *Id.* at 215.

⁸¹ *Id.*

⁸² *Id.* at 214-15 n.15.

⁸³ *Id.* at 216-32. Justice Powell argued:

This explanation of the *Mullaney* holding bears little resemblance to the basic rationale of that decision. But this is not the cause of greatest concern. The test the Court today establishes allows a legislature to shift, virtually at will, the burden of persuasion with respect to any factor in a criminal case, so long as it is careful not to mention the nonexistence of that factor in the statutory language that defines the crime. The sole requirement is that any references to the factor be confined to those sections that provide for an affirmative defense.

Id. at 222-23 (Powell, J., dissenting).

⁸⁴ See Underwood, *The Thumb on the Scale of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299 (1977); Case Comment, *Affirmative Criminal Defenses—The Reasonable Doubt Rule in the Aftermath of Patterson v. New York*, 39 OHIO ST. L.J. 393 (1978).

states are left virtually unrestricted in their definition of the substantive elements of a crime; once the elements are established, however, the state is prohibited from making an element nonexistent through a procedural shifting of the burden of persuasion to the defendant.⁸⁵ Others have interpreted *Winship* as imposing substantive restrictions on legislators in drafting criminal statutes; they reject the view that *Patterson* alleviated these substantive limitations in favor of a formalistic procedural approach.⁸⁶

The continuing vitality of the principle of *Winship*, regardless of

⁸⁵ Underwood, *supra* note 84, at 1317-30. Professor Underwood of Yale University presents a comprehensive defense of the procedural view of *Winship*. Among the justifications offered for the procedural interpretation are the frequent procedural checks implemented in the Constitution on the criminal justice process and an assertion that the requirement that the state bear the burden of proof on all elements of a crime prohibits inappropriate compromises in statutory drafting. No longer can legislatures resolve disagreements concerning the substantive elements to be included in a crime by including the elements, but shifting the burden of proving the absence of those elements to the defendant. Likewise, the procedural technique of shifting the burden of proof on an essential element could possibly deceive members of the public in their understanding of what conduct will give rise to guilt under any given offense. Underwood, *supra* note 84, at 1317-30.

⁸⁶ See Allen, *Restoration*, *supra* note 1; Jeffries & Stephan, *supra* note 1. In advocating the substantive interpretation of *Winship*, *Mullaney*, and *Patterson*, Jeffries and Stephan have placed greater weight on a section of the majority opinion in *Patterson* where Justice White stated:

We therefore will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. . . .

This view may seem to permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes. *But there are obviously constitutional limits beyond which the States may not go in this regard.*

432 U.S. at 210 (emphasis added) (quoted in part in Jeffries & Stephan, *supra* note 1, at 1364).

A predominant criticism of the procedural approach to *Mullaney* and *Patterson* is that its practical effect is to provide no significant protection to a defendant in a criminal action since the state reserves the "unconstrained discretion" in deciding what elements will be included in the definition of an offense:

Winship's insistence on the reasonable-doubt standard is thought to express a preference for letting the guilty go free rather than risking conviction of the innocent. This value choice, however, cannot be implemented by a purely procedural concern with burden of proof. Guilt and innocence are substantive concepts. Their content depends on the choice of facts determinative of liability.

Jeffries & Stephan, *supra* note 1, at 1347. Thus, the defendant in a criminal action would receive less protection because guilt would be found on the basis of fewer elements. *Id.* Similar arguments were present prior to *Mullaney* and *Patterson* as debate centered on the issue of whether the implementation of affirmative defenses, placing the burden of persuasion on a defendant, conflicted with the requirement of proof beyond a reasonable doubt. Compare Ashford & Risinger, *supra* note 1, with Christie & Pye, *Presumptions and Assumptions in the Criminal Law: Another View*, 1970 DUKE L.J. 919. The argument as it then existed held that if a state were compelled to bear the burden of persuasion on all affirmative defenses, the state would eliminate various affirmative defenses to given crimes. This would ultimately have the effect of leaving the accused with a lesser opportunity to demonstrate his innocence. Christie & Pye, *supra*, at 936-37.

whether it is perceived as a procedural or substantive limitation on states in their criminal administration, is evidenced by the recent Supreme Court decision of *Sandstrom v. Montana*.⁸⁷ David Sandstrom was charged with deliberate homicide under a Montana Statute.⁸⁸ Despite the defendant's vigorous assertion that he was guilty of a lesser offense because he did not murder the victim "purposely or knowingly," the trial judge nevertheless instructed the jury that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts."⁸⁹ In overturning Sandstrom's conviction, the Supreme Court found the judge's instructions constitutionally defective because the jury could have interpreted the instruction as requiring the defendant to prove absence of intent once the State established that the slaying had taken place.⁹⁰

The Supreme Court, in *Barnes v. United States*,⁹¹ indirectly addressed the question whether tension is created by the *Leary* standard that a presumed fact flows "more likely than not" from a proven fact and by the *Winship* principle that the prosecution must prove every element of a crime beyond a reasonable doubt. In *Barnes*, the Court was faced with a conviction for the possession of United States Treasury checks stolen from the mail.⁹² On the essential element of knowledge, the judge instructed the jury that the unexplained possession of stolen property was a fact from which they could infer, in the light of other circumstances, that the individual in possession knew the property to be stolen.⁹³ In assessing and upholding the validity of this presumption, Justice Powell cited the earlier decisions of *Leary* and *Turner v. United States*⁹⁴ and made

⁸⁷ 442 U.S. 510 (1979).

⁸⁸ *Id.* at 512. The statute involved was MONT. CODE ANN. § 45-5-102 (1978).

⁸⁹ *Sandstrom*, 442 U.S. at 512-13.

⁹⁰ *Id.* at 524; see generally Note, *Presumptive Intent Jury Instructions after Sandstrom*, 1980 WIS. L. REV. 366.

⁹¹ 412 U.S. 837 (1973).

⁹² *Id.* at 838.

⁹³ *Id.* at 839-40.

⁹⁴ 396 U.S. 398 (1970). In *Turner*, the Court upheld the statutory inference of "knowledge" of importation from the fact of possession of heroin because "'common sense' . . . tells us that those who traffic in heroin will inevitably become aware that the product they deal in is smuggled." *Turner*, 396 U.S. at 417. As Justice Brennan later observed, "The basis of that 'common sense' judgment was, of course, the indisputable fact that all or virtually all heroin in this country is necessarily smuggled." *Barnes*, 412 U.S. at 853 (Brennan, J., dissenting). In other words, in *Turner* the inference of knowledge followed directly from the underlying fact of possession, because persons dealing in heroin can be presumed to know the unambiguous fact of its foreign source.

On the other hand, the Court in *Turner* set aside a defendant's conviction for unlawful possession of cocaine, striking down the same statutory inference of knowledge of importation as applied to cocaine, because some cocaine is produced domestically and therefore, with respect to cocaine, the inference did not even meet the "more likely than not" test. 396 U.S. at 422-24. In effect, such a statutory inference regarding cocaine required the piling of infer-

this observation on the constitutional test to be applied to presumptions: "To the extent that the 'rational connection,' 'more likely than not,' and 'reasonable doubt' standards bear ambiguous relationships to one another, the ambiguity is traceable in large part to variations in language and focus rather than to differences of substance."⁹⁵ The Court in *Barnes* concluded that the permissive inference of knowledge that the checks were stolen from the mail, which arose from the unexplained possession, met the "reasonable-doubt" standard and therefore the less stringent "more-likely-than-not" standard as well.⁹⁶

Justice Douglas argued in a vigorous dissent that the possession of stolen checks does not permit an inference that the individual knew the checks were stolen, even when scrutinized under the "more-likely-than-not" standard.⁹⁷ Justice Brennan, in a separate dissent, protested that the Court's ruling directly contravened the *Winship* "reasonable-doubt" standard because the jury could have found knowledge solely on the basis of the inference, which clearly did not meet the standards previously established in *Turner*.⁹⁸

The *Barnes* decision thus left undecided the question whether the "reasonable-doubt" standard was constitutionally mandated in determining the validity of presumptions.⁹⁹ The Court may have definitively resolved the question in its most recent pronouncement on the issue of presumptions, *County Court of Ulster County, New York v. Allen*.¹⁰⁰ In upholding a New York statute providing that the presence of a firearm in an automobile is sufficient to support the inference of illegal possession by all persons then in the vehicle,¹⁰¹ the Court held that permissive inferences need not meet the "reasonable-doubt" standard for purposes of fulfilling due process.¹⁰² Concluding that permissive inferences need only meet the *Leary* "more-likely-than-not" standard, Justice Stevens noted that mandatory presumptions would not enjoy this lesser standard of probability.¹⁰³ The majority opinion prompted a dissent by Jus-

ence upon inference: first, that the cocaine actually was imported, whereas some cocaine is not imported, and second, that the defendant had knowledge of its source.

⁹⁵ *Barnes*, 412 U.S. at 843.

⁹⁶ *Id.* at 846-47.

⁹⁷ *Id.* at 852 (Douglas, J., dissenting).

⁹⁸ *Id.* at 853-54 (Brennan, J., dissenting).

⁹⁹ *Id.* at 843-48.

¹⁰⁰ 442 U.S. 140 (1979).

¹⁰¹ N.Y. PENAL LAW § 265.15(3) (McKinney 1967), cited in *Ulster County*, 442 U.S. at 142 n.1.

¹⁰² *Ulster County*, 442 U.S. at 166-67.

¹⁰³ *Id.* In justifying this distinction Justice Stevens wrote for the majority:

Respondents' argument [that the reasonable doubt standard should be applied to permissive presumptions] again overlooks the distinction between a permissive presumption on which the prosecution is entitled to rely as one not necessarily sufficient part of its proof and a mandatory presumption which the jury must accept even if it is the sole

tice Powell, joined by three other members of the Court, in which he strongly criticized the majority's method for assessing whether the presumed fact of possession "more-likely-than-not" flowed from the presence of the weapon in the automobile. He asserted that the majority erred in making the determination by considering additional evidence offered in the trial on the element of possession.¹⁰⁴ In the dissent's view, the court should have analyzed the probability of possession by viewing the principal fact alone, without references to accompanying circumstances, since the jury could have rejected all other evidence on the issue of possession and still found the element of possession solely on the basis of the permissible inference.¹⁰⁵ Nor did the dissenters condone the majority's distinction between mandatory presumptions, which effectively shift the burden of proof to the defendant, and permissive inferences, which merely allow the jury to find the principal fact.¹⁰⁶ No such distinction can be found in the Court's earlier pronouncements on the constitutional requirements of inferences and presumptions.¹⁰⁷

The validity of the Court's bifurcated approach to permissive and mandatory presumptions in *Ulster County* is certainly open to question on due process grounds.¹⁰⁸ While it views mandatory presumptions as shifting the burden of proof from the prosecution to the defendant insofar as the jury is required to find the presumed fact in the absence of evidence to the contrary, the Court perceives permissive inferences as not shifting the ultimate burden of proof since the jury remains free to reject the inference.¹⁰⁹ As one commentator has noted, the Court, in

evidence of an element of the offense. . . . There is no more reason to require a permissive statutory presumption to meet a reasonable-doubt standard before it may be permitted to play any part in a trial than there is to require that degree of probative force for other relevant evidence before it may be admitted.

Id.

¹⁰⁴ *Id.* at 168-77 (Powell, J., dissenting).

¹⁰⁵ *Id.* at 174-76.

¹⁰⁶ *Id.* at 170-71.

¹⁰⁷ *Id.* at 170 n.3. But see *Gainey*, 380 U.S. at 70, where the Court emphasized the fact that the jury remained free to reject the inference and find the defendant not guilty as one ground for upholding the presumption in question.

¹⁰⁸ See Note, 57 U. DET. J. URB. L. 389, 404-14 (1980). A separate and equally significant constitutional question arising from the use of inferences is that of whether permissive inferences infringe upon the defendant's fifth amendment right against self-incrimination. Inferences which permit the jury to infer certain elements of a crime in the absence of explanation to the contrary by the defendant arguably compel the defendant to testify in the absence of evidence sufficient to prove his guilt beyond a reasonable doubt. Justice Black noted this infringement in his extensive dissenting opinion in *Gainey*, 380 U.S. at 87-88 (Black, J., dissenting). For an extensive discussion of the fifth amendment issues raised by the use of permissive inferences meeting a "more-likely-than-not" standard, see Nesson, *supra* note 1, at 1208-15. For an analysis of the Court's failure to address this fifth amendment problem in *Ulster County*, see Note, *supra*, at 407.

¹⁰⁹ *Ulster County*, 442 U.S. at 166-67.

assessing the validity of permissive presumptions in *Romano* and *Leary*, applied a "two route" rule under which it is assumed that the presumption was the sole basis of the jury's decision, even in the face of additional evidence sufficient to meet the standard of "reasonable doubt."¹¹⁰ If the Court had rigidly applied this "two route" rule to the presumption present in *Ulster County*, perhaps it would have concluded that the "more-likely-than-not" standard would allow a defendant to be convicted on the basis of a preponderance of the evidence.¹¹¹ One commentator has further asserted that application of the "more-likely-than-not" standard may allow a case to go to a jury without the prosecution meeting the prerequisite that there be sufficient evidence on all elements to find guilt beyond a reasonable doubt.¹¹² Further criticism can be lev-

¹¹⁰ Note, *supra* note 108, at 410. The two route rule followed by the Supreme Court prior to the *Ulster County* decision was premised on the notion that if the jury by reason of its instructions could have found guilt on one of two alternative routes, and one of the routes was unconstitutional, then the conviction must be reversed. If a jury returns with a general verdict, then it is impossible to know whether the jury found guilt on the basis of an unconstitutional theory. See Nesson, *supra* note 1, at 1204-05.

Professor Nesson, in reviewing former Supreme Court decisions on the use of permissive inferences, notes that the Court in *Gainey* avoided application of the two route rule by concluding that the jury instructions there involved only charged that the jury consider presence at a still as one of many factors in determining guilt. *Id.* at 1205. Yet, in reality, the instruction included the additional conflicting charge that the jury could convict by unexplained presence at a distilling site. By disregarding the presence of this latter charge, the Court avoided application of the two route rule. *Id.* at 1205-06. In the later decision of *Romano*, the Court applied the two route rule to overturn a conviction for ownership of a still, inferred from presence, despite the fact there was sufficient evidence to support the conviction for ownership of the still. *Id.* at 1206. The two route rule was later restated in *Leary*. *Id.* at 1207-09.

¹¹¹ Note, *supra* note 108, at 410 (1980). Justice Stevens in the *Ulster County* majority opinion rejected the notion that the jury could have concluded that the defendants were in possession of the weapons simply on the basis of the presence of the weapons in the automobile. To use the permissive inference of possession, the jury necessarily had to accept the only evidence offered to prove the guns were present in the automobile. The evidence offered was testimony that the weapons were found in an open handbag, within plain view of the other occupants, and possibly within the grasp of all occupants. *Ulster County*, 442 U.S. at 163. This evidence also ensured that the fact of possession "more-likely-than-not" flowed from the fact of presence of the weapons in the automobile. Since the jury could only find the underlying fact of presence of the weapons in the automobile by accepting this evidence, it was impossible that the jury could have found possession by the naked fact of presence of the weapons in the automobile. The circumstances ensuring that the presumption flowed "more-likely-than-not" necessarily had to be accepted by the jury in drawing the inference. *Id.* at 166 n.28.

While this argument may be said to support the conclusion that the presumption met a "more-likely-than-not" standard, it still does not answer whether the defendants were convicted on a preponderance of the evidence. While the evidence in the earlier cases of *Gainey*, *Barnes*, and *Turner* clearly indicated that evidence supporting proof of guilt beyond a reasonable doubt was present, no such facts were present in the *Ulster County* record. Thus the possibility remains that the jury could have convicted the defendants in *Ulster County* on the basis of an inference that barely met a "more-likely-than-not" standard. Note, *supra* note 108, 410-11.

¹¹² See Note, *The Unconstitutionality of Statutory Criminal Presumptions*, 22 STAN. L. REV. 341,

elled at the Court's holding that the probability test for permissive inferences must be determined in the light of all evidence offered in the case on the presumed fact.¹¹³ If Justice Powell's contention that the jurors could have rejected all other evidence on the presumed fact and found the element of possession solely on the basis of the inference is valid, then the Court's circumstantial case-by-case approach is rendered wholly unacceptable.¹¹⁴

IV. PRESUMPTIONS AND THE FEDERAL BANK ROBBERY ACT

As suggested in the first section of this Article, one can see the practical applications of permissive, mandatory, and conclusive presumptions through an examination of additional cases arising under the Federal Bank Robbery Act.¹¹⁵ An initial question presented to courts in such cases is whether a simple assault—placing a victim in reasonable apprehension of harm regardless of whether one can actually inflict the harm—will support a conviction under the “assault” alternative of section 2113(d)'s aggravated offense provision. Although courts at one time construed the section to require only evidence of a victim's subjective belief of danger to prove assault, the present trend, notwithstanding *Bennett* and *Crouthers*, is to require evidence that the defendant actually inflicted injury upon the victim.¹¹⁶ This construction of the statute gives effect to each section of the Act, and thereby avoids making each viola-

349-50 (1970). That commentator cites the inference present in *Leary* as an example. If 80% of all marijuana in the United States were illegally imported, this would support a permissive presumption of illegal importation from possession under a “more-likely-than-not” test; yet, standing alone, it certainly should not permit a conviction requiring proof beyond a reasonable doubt. *Id.* at 350 n.56.

¹¹³ *Ulster County*, 442 U.S. at 163-64.

¹¹⁴ *But see* Nesson, *supra* note 1, at 1222-25. Convictions based on permissive inferences meeting only a “more-likely-than-not” standard can be prevented only if judges emphasize in jury instructions that the probative value of any given inference is contingent upon its circumstantial context. In describing what is meant by this notion of properly framing presumptions in their circumstantial context, Nesson offers the following:

An example would be an instruction which informed the jurors that evidence of Gainey's presence at the still was highly probative on the question whether he was operating the still and could, when considered together with other circumstantial evidence which the jurors might credit, warrant a finding of guilt beyond a reasonable doubt. Such formulations of permissive inferences would avoid any explicit authorization to draw a naked inference from predicate to conclusion, and yet would accomplish the legislature's objectives.

Id. at 1223. If such a rationale were applied to *Ulster County*, the decision would be wrong since the judge's instructions in the case appeared to encourage the jury to find possession based on the naked inference of presence of the weapons in the car, apart from other surrounding circumstances. *Ulster County*, 442 U.S. at 145. Yet the majority would counter that in drawing the inference, the jury by implication based it on surrounding circumstantial evidence of possession. *Id.* at 166 n.28.

¹¹⁵ 18 U.S.C. § 2113 (1976). For the text of the statute, see *supra* note 5.

¹¹⁶ *See* Note, *supra* note 13, at 117-18.

tion of section 2113(a) a violation of section 2113(d) also.¹¹⁷

Courts have thus established the premise that a violation of section 2113(d) requires proof of either the defendant's physical assault or of the defendant's objective capability to inflict deadly harm on a victim. A related issue inevitably has arisen in these cases regarding the type of evidence that will suffice to establish the essential element of actual ability to carry out a perceived threat.¹¹⁸ The federal circuit courts and district courts have adopted diverse views on this question.¹¹⁹ In a significant portion of cases arising under the Federal Bank Robbery Act, courts have considered the defendant's own conduct—firing a shot from a gun during a robbery—evidence of his or her ability to jeopardize life.¹²⁰ Under these circumstances, courts have justifiably concluded that the defendant had objective capability to endanger life.¹²¹

A more difficult situation frequently arises in cases where the only evidence demonstrating that the defendant had the actual capability to inflict injury on persons present at the bank robbery is that the defendant displayed a gun or some other ostensibly dangerous instrument.¹²² Defendants in these cases have often argued that an indictment for the aggravated offense could not stand in the absence of independent evidence demonstrating that the gun was loaded and operable.¹²³ Courts, for a variety of reasons, have rejected this argument and incorporated evidentiary theories which will allow conviction under section 2113(d)'s "in jeopardy" provision. A majority of courts have concluded that the mere use of a gun in a robbery creates the permissive inference that the

¹¹⁷ *Id.*

¹¹⁸ See *United States v. Beasley*, 438 F.2d 1279 (6th Cir. 1971), *cert. denied*, 404 U.S. 866, (1971); *United States v. Marshall*, 427 F.2d 434 (2d Cir. 1970); *United States v. Burger*, 419 F.2d 1293 (5th Cir. 1969); *United States v. Roach*, 321 F.2d 1 (3rd Cir. 1963). For a comprehensive listing of cases construing the enhanced penalty provision, see Annot., 32 A.L.R. FED. 279 (1977).

¹¹⁹ Compare *United States v. Marshall*, 427 F.2d 434 (2d Cir. 1970), and *Baker v. United States*, 412 F.2d 1069 (5th Cir.), *cert. denied*, 396 U.S. 1018 (1969) with *United States v. Cady*, 495 F.2d 742 (8th Cir. 1974), and *Bradley v. United States*, 447 F.2d 264 (8th Cir. 1971).

¹²⁰ See *United States v. Bamberger*, 460 F.2d 1277 (3rd Cir. 1972), *cert. denied*, 413 U.S. 919 (1972); *United States v. Cady*, 495 F.2d 742 (8th Cir. 1972); *United States v. Rizzo*, 409 F.2d 400 (7th Cir.), *cert. denied*, 396 U.S. 911 (1969); *United States v. Johnson*, 401 F.2d 746 (2d Cir. 1968).

¹²¹ See *United States v. Roach*, 321 F.2d 1 (3rd Cir. 1963); *United States v. Burger*, 419 F.2d 1293 (5th Cir. 1969); *United States v. Beasley*, 438 F.2d 1279 (6th Cir. 1971).

¹²² See *United States v. Cooper*, 462 F.2d 1343 (5th Cir. 1972), *cert. denied*, 409 U.S. 1009 (1972); *United States v. Marshall*, 427 F.2d 434 (2d Cir. 1970); *Thomas v. United States*, 418 F.2d 567 (5th Cir. 1969); *United States v. DePalma*, 414 F.2d 394 (9th Cir.), *cert. denied*, 396 U.S. 1046 (1969).

¹²³ See *United States v. Cady*, 495 F.2d 742 (8th Cir. 1974); *Baker v. United States*, 412 F.2d 1069 (5th Cir. 1969), *cert. denied*, 396 U.S. 1018 (1969); *Wheeler v. United States*, 317 F.2d 615 (8th Cir. 1963); *Wagner v. United States*, 264 F.2d 524 (9th Cir. 1959).

gun was loaded and operable.¹²⁴ The adoption of this permissive inference highlights the inherent tension between the *Winship* dictate that every element of a crime be proven beyond a reasonable doubt and the *Ulster County* "more-likely-than-not" standard for permissive presumptions. The majority rationale allows many cases to go to the jury on the question of guilt for the aggravated offense when the only evidence presented on the essential element of objective capability to inflict harm is the apparent use of a gun.¹²⁵ Where the court uses the permissive inference that the gun was loaded, a jury may conclude that an offense under the aggravated offense subsection had taken place even under a "more-likely-than-not" standard.¹²⁶ The response of the *Ulster County* Court would be that while the permissive inference must meet only a "more-likely-than-not" standard, the jury can find an aggravated offense only if the totality of the evidence proves beyond a reasonable doubt the essential element of actual capability to inflict harm.¹²⁷ Yet courts frequently have upheld convictions under section 2113(d) when the only evidence offered on the element of objective capability to inflict harm was proof that the defendant displayed a gun.¹²⁸ While proof that

¹²⁴ See *United States v. Marshall*, 427 F.2d 434 (2d Cir. 1970); *United States v. DePalma*, 414 F.2d 394 (9th Cir.), cert. denied, 396 U.S. 1046 (1969); *Lewis v. United States*, 365 F.2d 672 (10th Cir.), cert. denied, 386 U.S. 945 (1966).

It should be noted that many of the courts adhering to the permissive inference rationale found added support for the conclusion that the gun was loaded when the defendants pointed the gun or threatened to shoot someone, although a shot was never actually fired. See *United States v. Thomas*, 521 F.2d 76 (8th Cir. 1975); *United States v. Newkirk*, 481 F.2d 881 (4th Cir.), cert. denied, 414 U.S. 1145 (1973); *United States v. Shelton*, 465 F.2d 361 (4th Cir. 1972).

¹²⁵ See *supra* note 112 and accompanying text. This criticism could not be levelled as strongly against decisions where additional evidence that the gun was loaded is present in the form of threats to use the gun. See *supra* note 124.

¹²⁶ In briefly commenting on the interrelationship of the permissive inference and the prosecution's burden between proving guilt beyond a reasonable doubt, Justice Stevens noted in the *Ulster County* decision:

Because this permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the "beyond a reasonable doubt" standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference.

442 U.S. at 157.

¹²⁷ See *supra* note 111 and accompanying text. As Justice Stevens stated in rejecting a "reasonable-doubt" standard for permissive inferences:

There is no more reason to require a permissive statutory presumption to meet a reasonable-doubt standard before it may be permitted to play any part in a trial than there is to require that degree of probative force for other relevant evidence before it may be admitted. As long as it is clear that the presumption is not the sole and sufficient basis for a finding of guilt, it need only satisfy the test described in *Leary*.

Ulster County, 442 U.S. at 167.

¹²⁸ See generally *United States v. Marshall*, 427 F.2d 434 (2d Cir. 1970); *United States v. DePalma*, 414 F.2d 394 (9th Cir. 1969), cert. denied, 396 U.S. 1046 (1969); *United States v. Lewis*, 365 F.2d 672 (10th Cir.), cert. denied, 386 U.S. 945 (1966).

a gun was used may be said to "more likely than not" give rise to the presumption that the gun was loaded and operable, it is a very different matter to conclude that the gun was loaded and operable beyond a reasonable doubt given the frequent use of unloaded guns, toy guns or other seemingly dangerous—but in fact harmless—weapons in the robbery of banks and other institutions.¹²⁹ Thus, the permissive presumption in such instances circumvents the *Winship* "reasonable doubt" standard by allowing a jury to conclude that an aggravated offense has taken place based on a preponderance of the evidence on the essential element of objective capability to commit harm.

A second contravention of the *Winship* reasonable doubt standard arguably occurs, as noted above, through the use of the permissive inference in cases where defendants are charged with aiding and abetting an aggravated bank robbery. The Ninth Circuit Court of Appeals, in *United States v. Short*,¹³⁰ however, enunciated the somewhat controversial principle that proof must be made of the same elements necessary to convict a principal in order to punish an aider and abettor.¹³¹ Although other courts have similarly stated that a person charged with aiding and abetting a crime must have shared in the criminal intent of the principal,¹³² they have rarely reversed aggravated offense convictions on that ground. In stating what elements need be established to convict an individual for aiding and abetting the aggravated offense under the Federal Bank Robbery Act, those courts have concluded or assumed that the government must demonstrate that the aider and abettor knew that a dangerous weapon was to be used in the robbery.¹³³ As in *McCaskill*, however, the courts avoid reversals for other reasons.

On the other hand, some courts have adopted the permissive presumptions that use of a gun evidences that the gun was loaded, and that

¹²⁹ See *United States v. Cooper*, 462 F.2d 1343 (5th Cir.), *cert. denied*, 409 U.S. 1009 (1972) (use of a simulated bomb); *Martin v. State*, 133 Ga. App. 323, 211 S.E.2d 11 (1974) (hand in pocket simulating a gun); *People ex rel. Griffin v. Hunt*, 267 N.Y. 597, 196 N.E. 598 (1935); *State v. Luckey*, 69 Ohio Op. 2d 111, 322 N.E.2d 354 (1974) (use of a starter pistol); *Cooper v. State*, 201 Tenn. 149, 297 S.W.2d 75 (1956) (use of toy pistol); *Bartley v. State*, 151 Tex. Crim. 88, 205 S.W.2d 600 (1947) (hand in pocket simulating a gun). For a comprehensive listing of robberies involving harmless weapons, see Annot., 81 A.L.R. 3rd 995 (1977).

¹³⁰ 493 F.2d 1170 (9th Cir.), *cert. denied*, 419 U.S. 1000 (1974).

¹³¹ *Id.* at 1172.

¹³² See generally *United States v. Longoria*, 569 F.2d 422 (5th Cir. 1978); *United States v. Sanborn*, 563 F.2d 488 (1st Cir. 1977); *United States v. Smith*, 546 F.2d 1275 (5th Cir. 1977).

¹³³ *United States v. Longoria*, 569 F.2d 422 (5th Cir. 1978); *United States v. Sanborn*, 563 F.2d 488 (1st Cir. 1977); *United States v. Short*, 493 F.2d 1170 (9th Cir.), *cert. denied*, 419 U.S. 1000 (1974); *United States v. Methvin*, 441 F.2d 584 (5th Cir. 1971).

While holding that it was essential that the defendant charged with aiding and abetting have knowledge a weapon was to be used, the *Sanborn* court made the observation that "[a]n aider and abettor need not know every last detail of the substantive offense . . . but he must share in the principal's essential criminal intent." 563 F.2d at 491.

aiding in a robbery suggests knowledge that a gun will be used.¹³⁴ Arguably, these presumptions violate *Winship*'s principle that the prosecution must prove every element of the offense beyond a reasonable doubt.¹³⁵ For a weapon to qualify as dangerous, it is necessary to infer that the gun was loaded; to convict the aider and abettor, it should be further proved that he or she knew that the gun was loaded and operable.¹³⁶ Yet in requiring the aider and abettor only to possess knowledge that a gun will be used in the robbery, courts construing section 2113(d) have effectively eliminated the essential element that the aider know a dangerous weapon is to be used. Some courts applying the permissive inference rationale consider only loaded weapons capable of placing life in jeopardy. Thus they should find an aider and abettor to have actually shared in the principal's specific intent of placing life in jeopardy only when the aider and abettor knows that a gun is to be used, and that the weapon will be loaded.¹³⁷

¹³⁴ See *United States v. Bizzard*, 674 F.2d 1382 (11th Cir.), cert. denied, 103 S. Ct. 305 (1982); *United States v. Thomas*, 521 F.2d 76 (8th Cir. 1975); *United States v. Cady*, 495 F.2d 742 (8th Cir. 1974). In *Bizzard*, the aggravated offense section was invoked against an unarmed accomplice where the facts indicated that no shots had been fired by the armed co-conspirator. At issue was the sufficiency of the evidence regarding the aggravating element during the first trial, when raised on appeal from a second conviction after a reversal of the first conviction. The appellant had claimed prior to the retrial that, in view of the insufficiency of evidence during the first trial, the double jeopardy clause precluded reprosecution for the aggravated offense. During the first trial, the government had not shown that the co-conspirator's weapon was operable or that the appellant had knowledge concerning its use or dangerousness. The Eleventh Circuit rejected the evidentiary insufficiency contention without elaboration. *United States v. Bizzard*, 615 F.2d 1080 (5th Cir. 1980) (reversing first conviction), 493 F. Supp. 1084 (S.D. Ga. 1981) (denying pretrial motion to dismiss on double jeopardy grounds), 674 F.2d 1382 (11th Cir.), cert. denied, 103 S. Ct. 305 (1982) (affirming conviction upon retrial after reversal).

¹³⁵ See *supra* note 70 and accompanying text.

¹³⁶ Courts have consistently required proof only that the aider and abettor knew that a gun was to be used and have not required further proof that the aider and abettor knew the gun was loaded and operable. See *United States v. Longoria*, 569 F.2d 422 (8th Cir. 1978).

¹³⁷ If it is argued that the courts are inferring that the aider and abettor actually knew that a gun would be used in the robbery and then further inferring his or her knowledge that the gun was loaded, a separate problem potentially arises. The Supreme Court has forbidden, as violative of due process, convictions which are reached "by piling inference upon inference." *Ingram v. United States*, 360 U.S. 672, 680 (1959) (quoting *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943)). The proscription of an inference upon an inference does not preclude convictions based upon circumstantial evidence. *Holland v. United States*, 348 U.S. 121 (1954). Although some courts have ridiculed the prohibition of inference upon inference as an "empty perjurative," see *NLRB v. Camco*, 340 F.2d 803, 811 (5th Cir. 1965), other courts continue to recognize the vitality of the principle, as evidenced by the Eighth Circuit's decision in *United States v. Cobb*, 558 F.2d 486 (8th Cir. 1977). There a conviction under 28 U.S.C. § 2113(d) for bank robbery by jeopardizing life was vacated. The evidence presented on the issue of the use of a gun was that a teller saw "two dark holes that appeared to be hollow protruding from the newspaper held by the robber." *Id.* at 488. From this it was first inferred that a gun was wrapped in the newspaper and, secondly, it was inferred that the gun was loaded. In vacating the conviction for jeopardizing life the court noted: "We know of no

Perhaps in response to the constitutional argument noted above, a second position articulated by the Fifth Circuit Court of Appeals in *Baker v. United States*¹³⁸ construing section 2113(d) of the Federal Bank Robbery Act has gained support. The Fifth Circuit was faced with the familiar factual pattern in which a gun was used but never fired in the robbery of a bank.¹³⁹ The defendants argued that proof of an aggravated offense was inadequate since the prosecution did not establish that the gun was loaded and thus capable of endangering life.¹⁴⁰ In rejecting this argument, Judge Godbold for the majority held that a gun was "as a matter of law" a dangerous weapon which objectively endangered life even in the absence of proof that it was loaded.¹⁴¹ Judge Godbold reasoned:

The primary capacity of a gun to harm—by the discharge of a bullet from the muzzle—plus its apparent capacity to carry out that harm, combined with a highly charged atmosphere and the possibility of action by employees or others to prevent the robbery is a complex of circumstances in which the person on the scene is in jeopardy of harm which may occur in any one of various ways.¹⁴²

The Fifth Circuit and other circuit courts have continued to follow the *Baker* construction of the Federal Bank Robbery Act.¹⁴³

Several criticisms can be levelled at the *Baker* court's ruling that, as a matter of law, a gun used in a robbery endangers life. First, the decision arguably contravenes the Fifth Circuit rule that past Circuit decisions can only be overturned in *en banc* decisions.¹⁴⁴ In concluding that a gun is *per se* a dangerous weapon for purposes of the Federal Bank Robbery Act, the *Baker* panel was faced with the previous Fifth Circuit case of *Meyers v. United States*.¹⁴⁵ There the court held an indictment alleging that a pistol was used in a robbery insufficient to charge a violation of the aggravated offense of jeopardizing life, since there was no allegation that the gun was loaded.¹⁴⁶ The *Meyers* court concluded:

case, however, which has permitted the jury to convict under § 2113(d) on the mere inference that a partially concealed object was a loaded gun; this would unfairly compound inference upon inference." *Id.* at 489.

¹³⁸ 412 F.2d 1069 (5th Cir.), *cert. denied*, 396 U.S. 1018 (1969).

¹³⁹ *Id.* at 1070-71.

¹⁴⁰ *Id.* at 1071-72.

¹⁴¹ *Id.* at 1072.

¹⁴² *Id.*

¹⁴³ See *United States v. Parker*, 542 F.2d 932 (5th Cir. 1976); *United States v. Shelton*, 465 F.2d 361 (4th Cir. 1972); *United States v. Beasley*, 438 F.2d 1279 (6th Cir.), *cert. denied*, 404 U.S. 866 (1971); *United States v. Burger*, 419 F.2d 1293 (5th Cir. 1969); *Thomas v. United States*, 418 F.2d 567 (5th Cir. 1969).

¹⁴⁴ See *Miller v. San Sebastian Gold Mines, Inc.*, 540 F.2d 807 (5th Cir. 1976); *Davis v. Estelle*, 529 F.2d 437 (5th Cir. 1976).

¹⁴⁵ 116 F.2d 601 (5th Cir. 1940).

¹⁴⁶ *Id.* at 603.

The indictment mentions the use of a dangerous weapon, but does not say that any assault was made with it, or that anyone's life was put in jeopardy. The pistol may have been only exhibited and not pointed, it may indeed not have been loaded, for only putting in fear is alleged and not actually jeopardy or danger to the life of Jones.¹⁴⁷

The *Baker* decision distinguished *Meyers* on the ground that it "dealt only with the requirements for a sufficient indictment under the predecessor statute and not with what proof was necessary for conviction."¹⁴⁸ The distinction drawn is at best a slender reed. There appears to be no substantive distinction between the elements which must be alleged in an indictment and the elements which must thereafter be proven at trial. The courts in *Meyers* and *Baker* were performing the same task of defining what is meant by the statutory phrase "putting life in jeopardy." Their conclusions are in obvious conflict.

Second, the *Baker* rationale is objectionable because it derogates a fundamental principle of statutory construction. It is generally accepted that statutes should be construed to give effect to each section and phrase of a statute.¹⁴⁹ The practical effect of the *Baker* court's interpretation of the Federal Bank Robbery Act, however, is to leave little distinction between the underlying and aggravated offenses. Since an overwhelming number of bank robberies include the use of a gun, practically every robbery by fear or intimidation, which Congress sought to address in passing the Act, will now also be punishable as jeopardizing life. While it is true that the *Baker* court limited its holding to a statement that guns *per se* jeopardize life, the argument that "a highly charged atmosphere and the possibility of actions by employees" endangers life proves too much. Carried to the extreme, the argument causes most conceivable violations of sections 2113(a) or 2113(b) to offend section 2113(d) also.¹⁵⁰

¹⁴⁷ *Id.*

¹⁴⁸ *Baker*, 412 F.2d at 1072 n.4.

¹⁴⁹ A. SUTHERLAND, STATUTORY CONSTRUCTION § 46.06, at 63 (C. Sands 4th ed. 1973).

¹⁵⁰ *United States v. Cooper*, 462 F.2d 1343 (5th Cir.), *cert. denied*, 409 U.S. 1009 (1972) illustrates the expansion of the *Baker* decision beyond the stated holding that "a gun is a matter of law a dangerous weapon." *Baker*, 412 F.2d at 1072. Faced with a bank robbery performed with a simulated bomb, the *Cooper* court held that *Baker* was controlling on whether a conviction under section 2113(d) would stand. The court analogized the fake bomb to the unloaded gun—both have present the "apparent capacity to carry out harm," and create "a highly charged atmosphere." Thus, life was in fact jeopardized. *Cooper*, 462 F.2d at 1344-45. Such a rationale could readily support an aggravated offense conviction any time an individual committed the underlying offense of robbery by force, violence, or intimidation. Any time that a robber enters a bank and threatens harm to a teller, a highly charged atmosphere is created and other employees may be tempted to retaliate. Furthermore, even if the robber only threatened to strike a teller if they did not "hand over the money," it could be said that he manifested "a capacity to harm." Thus, section 2113(a) could, by extension of the *Baker* rationale, be merged into section 2113(d).

A third and somewhat remote criticism of the *Baker* construction is that it will have the adverse effect of encouraging would-be bank robbers who are knowledgeable about the law to use a loaded gun in the crime.¹⁵¹ When faced with the possibility of receiving the same punishment, regardless of whether a loaded or unloaded gun is used, an individual planning a robbery may be encouraged to carry a loaded weapon into the bank and thus provide a means of defense and retaliation in the event of "action by employees or others to prevent the robbery. . . ."¹⁵² The net effect could actually be to heighten the probability of serious injury or death for bank tellers or other victims of the robbery.¹⁵³

Fourth, on a more immediate level, in the case of a court accepting the permissible inference that use of a gun evidences that the gun is loaded, the *Baker per se* rule flies in the face of the *Winship* requirement that the prosecution prove every element beyond a reasonable doubt.¹⁵⁴ By proclaiming that as a matter of law a gun is a dangerous weapon which objectively places life in danger, the court in effect creates a conclusive presumption, thus closing all argument on the issue.¹⁵⁵ Even if the defendant were to introduce evidence to prove that the weapon used was not loaded or was inoperable, the irrebuttable presumption erected by the court would prohibit the conclusion that life was not jeopardized

¹⁵¹ For general discussions on the validity of the deterrence theory of criminal justice, see TAPPAN, CRIME, JUSTICE AND CORRECTION, 247-55 (1960); Ball, *The Deterrence Concept in Criminology and Law*, 46 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 347 (1955).

¹⁵² *Baker*, 412 F.2d at 1072.

¹⁵³ For a delineation of this "stepladder" theory of punishment as applied to robbery and armed robbery, see F. ZIMRING & G. HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL 204-07 (1973). For justification of heightened penalties based on the severity of crimes, see J. BENTHAM, 1 WORKS OF JEREMY BENTHAM 397 (1843).

¹⁵⁴ See *supra* note 70 and accompanying text. The Fifth Circuit continues to apply the *Winship* principle in other contexts, as evidenced by the recent decision of *Tyler v. Phelps*, 622 F.2d 172 (5th Cir. 1980), *aff'd on reh'g*, 643 F.2d 1095 (5th Cir. 1981), in which the jury was charged in the course of a murder case that "the defendant intended the natural and probable consequences of his acts." *Id.* at 175. In holding the charges unconstitutional because the ultimate burden of proof was shifted to the defendant, Judge Kravitch noted:

The jury charge, however, required the jury to infer malice aforethought from proof of an intentional and unlawful killing unless the defendant proved that he acted in the heat of passion on sudden provocation.

The Supreme Court held such a charge to be unconstitutional because it permits the jury to convict a defendant of murder even though it is *as likely as not* that he was guilty of manslaughter. 421 U.S. at 703, 95 S. Ct. at 1892 (emphasis in original). . . . Thus, Tyler could have been convicted of first degree murder even though it is *as likely as not* that he did not intend to kill or do great bodily harm to more than one person. This is an unacceptable possibility under the ruling of *Mullaney v. Wilber*.

Id. at 175-76 n.4.

¹⁵⁵ The Fifth Circuit affirmed this conclusion in *United States v. Cooper*, 462 F.2d 1343 (5th Cir.), *cert. denied*, 409 U.S. 1009 (1972), which held that a simulated bomb, like an unloaded gun, created a dangerous environment which objectively jeopardized life. *Id.* at 1344-45; see also *supra* note 153 and accompanying text.

by the defendant's "use of a dangerous weapon."¹⁵⁶ Mandatory or conclusive presumptions, according to the Supreme Court in *Ulster County*, are subject to the requirement of proof beyond a reasonable doubt.¹⁵⁷ The *Baker* presumption clearly does not reach that standard in view of the many robberies performed with unloaded guns and without the likely intervention of police or bank guards.¹⁵⁸ Thus, the logic of *Baker* does not merely shift the ultimate burden of persuasion regarding an essential element to the defendant, but actually removes the element altogether and bars the defendant from offering evidence which could preclude conviction for aggravated bank robbery.

In summary, the Supreme Court, through the cases of *Winship*, *Mullaney v. Wilbur*, *Patterson v. New York*, and *Sandstrom v. Montana*, has pronounced and reaffirmed the principle that the prosecution must bear the heavy burden of proving beyond a reasonable doubt every essential element of a crime. The obvious tension between this principle and the holding of *Ulster County Court v. Allen* that permissive inferences need only meet the "more-likely-than-not" standard is manifested in various cases arising under the Federal Bank Robbery Act. In these cases, courts have allowed inferences that the use of a gun suggests the gun is loaded and that aiding the robbery suggests knowledge that a dangerous weapon would be used.¹⁵⁹ The practical effect of these decisions is to permit the conviction of defendants for the aggravated offense of jeopardizing life on the basis of evidence falling short of the demands of a "reasonable-doubt" standard.

A practical explanation for the Supreme Court's seeming departure in *Patterson* from a broad outworking of the *Winship* principle was a desire to preserve legislatures' liberty to determine what elements should be included in statutory criminal offenses.¹⁶⁰ While it has been explained above that the construction of the Federal Bank Robbery Act in *Baker v. United States* actually creates an irrebuttable presumption that a gun objectively jeopardizes life, alternatively it could be stated that the *Baker* court merely construed the statute to eliminate a requirement that the gun be loaded and operable.¹⁶¹ A clear lesson flowing from the *Patterson* decision is that the determination of which elements should be included in the definition of an offense is predominately a task reserved for the legislative branch.¹⁶² Thus, if a legislature finds that in a case-

¹⁵⁶ See *supra* note 155.

¹⁵⁷ See *supra* note 103 and accompanying text.

¹⁵⁸ See *supra* note 129.

¹⁵⁹ See cases cited *supra* note 124.

¹⁶⁰ See *supra* text accompanying note 82.

¹⁶¹ This conclusion is premised on the assertion that prior to *Baker* the Fifth Circuit did require that the gun be loaded and operable. See *supra* text accompanying note 145.

¹⁶² This is evidenced by Justice White's statement in *Patterson* expressing the Court's desire

by-case application of a particular statute too onerous a burden has been placed on the state for proving a violation, the legislature is free to redraft the statute and eliminate certain burdensome elements of the offense within the broad requirements of due process and within the necessary, practical limitations of the political process.¹⁶³ If Congress determines that the use of a gun, loaded or unloaded, is sufficient to punish an accused for an aggravated bank robbery offense, it remains free to rewrite the Federal Bank Robbery Act and thereby declare that intention.

The most disappointing ramification of *Baker v. United States* is the judicial assumption of the task of redrafting the statute with total disregard for a basic canon of statutory construction.¹⁶⁴ Equally disconcerting is the fact that the court in this process is insulated from the constraints of the political process which would operate upon a legislature in its decision to reword the statute.¹⁶⁵ Furthermore, the court through its assumption of legislative powers arguably denies the defendant's due process right to have every element of the crime proved beyond a reasonable doubt.

Whether the Supreme Court will resolve the continuing conflict between the "reasonable-doubt" standard and the probability standard of "more-likely-than-not" as they are imposed upon permissive inferences remains to be seen. While the sanctioning of the permissive inference on a lower basis of probability serves as a convenient tool for developing evidence necessary for convictions, other values must also be recognized. The words of Justice Douglas in his dissent to *Barnes v. United States* remain relevant in this context:

The step we take today will be applauded by prosecutors, as it makes their way easy. But the Bill of Rights was designed to make the job of the prosecutor difficult. There is a presumption of innocence. Proof beyond a reasonable doubt is necessary. . . . These basic principles make the use of these easy presumptions dangerous.¹⁶⁶

that legislative attempts to reform criminal justice administration through statutory drafting not be hampered by judicial intervention. 432 U.S. 197, 214-15 n.15; see also *supra* text accompanying note 82.

¹⁶³ For an articulation of the substantive restraints of due process imposed on legislators in their determinations of elements to be included in an offense, see Jeffries & Stephan, *supra* note 1, at 1370-76.

¹⁶⁴ See *supra* note 151 and accompanying text.

¹⁶⁵ Professor Underwood, in her defense of the procedural interpretation of *Winship*, notes the restraints imposed upon legislatures through the political process in their drafting of criminal statutes. Underwood, *supra* note 84, at 1318-19. Courts in their construction of statutes are to a large extent sheltered from these political checks.

¹⁶⁶ 412 U.S. 837, 852 (1973) (Douglas, J., dissenting).

V. CONCLUSION

The operation of a society's criminal justice system can be seen as a barometer of the political freedom enjoyed by its citizens. Moreover, the criminal justice system may be validly measured by the separation maintained between the executive and judicial functions of government. If a breakdown were to occur in that system, as Chief Justice Burger warns,¹⁶⁷ it may first present itself as an increasing deference by the judiciary to the prosecutor. Because the United States prides itself on an independent judiciary and on a rule of law, limitations upon the state's power to criminalize and prosecute "bad" conduct, particularly those limitations embodied in the due process clauses of the fifth and fourteenth amendments, necessarily will be controversial. Judges are subject to the same tension between public opinion, often generated or expressed by the executive branch, and perceived requirements of the law.

Rarely is there an identifiable point in time marking the beginning of the jeopardy of political freedoms as might be indicated by courts relinquishing their role and deferring their independence to the needs and claims of the public prosecutor. The process is gradual, the political transition uncelebrated. Certainly, participants in bank robberies, one of the most common serious crimes, are unsympathetic and unlikely "victims of injustice." This Article's suggestion that the continued insistence by some judges in the Ninth and First Circuits that bank robbery "lookouts" and "wheelmen" not be convicted of placing lives in jeopardy without sufficient proof of their *mens rea*,¹⁶⁸ and the acknowledgment by the Eighth and Second Circuits that Congress legislated an enhanced penalty only when lives objectively are placed in danger,¹⁶⁹ represent the minority view. This suggestion signals in a microcosm of the justice system that the judiciary may be surrendering—or never has fully asserted—its independence and its authority.

¹⁶⁷ N.Y. Times, Nov. 19, 1982, at 5, Col. 2.

¹⁶⁸ *United States v. Sanborn*, 563 F.2d 488 (1st Cir. 1977); *United States v. Short*, 493 F.2d 1170 (9th Cir.), *cert. denied*, 419 U.S. 1000 (1974).

¹⁶⁹ *United States v. Cobb*, 558 F.2d 486 (8th Cir. 1977); *United States v. Marshall*, 427 F.2d 434 (2d Cir. 1970).