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RATIONALITY AND ACCURACY IN THE CRIMINAL PROCESS: A DISCORDANT NOTE ON THE HARMONIZING OF THE JUSTICES' VIEWS ON BURDENS OF PERSUASION IN CRIMINAL CASES

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There is presently ongoing an extensive debate concerning the scope and implications of the constitutional requirement of proof beyond reasonable doubt in criminal cases. In a remarkably short period of time the debate has generated a literature sufficiently vast so that complete citation is precluded simply for lack of space.[1] Much more importantly, a review of randomly selected criminal cases indicates that ambiguity concerning the implications of the requirement of proof beyond reasonable doubt may be generating as much litigation as any other constellation of issues in the criminal process. Indeed, these two phenomena are intimately related. One of the attractions of this area for scholars is precisely the ambiguity that generates litigation.

The primary source of the ambiguity is by now an oft-told tale in no need of elaboration here. In brief, the ambiguity is the direct result of the United States Supreme Court having constitutionalized the requirement of proof beyond reasonable doubt without providing any but the most trivial explicit criteria for its application.[2] The result has been

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[1] *See, e.g.*, authorities cited in Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 HARV. L. REV. 321 (1980).

[2] *Compare* Mullaney v. Wilbur, 421 U.S. 684 (1975) (lack of provocation is an essential element of first-degree murder) *and In re* Winship, 397 U.S. 358 (1970) (due process requires proof beyond reasonable doubt of every essential element) *with* Patterson v. New York, 432 U.S. 197 (1977) (absence of extreme emotional disturbances is *not* a necessary element of

that the lower courts have been set adrift by a rather curious set of commands. They are to apply the reasonable doubt standard to criminal cases[3] in distinguishing on constitutional grounds the "elements" of offenses from permissible "defenses." Only with respect to the latter may the defendant be required to bear the burden of persuasion.[4] The Court, however, has failed to provide any comprehensible guidelines by which elements are to be distinguished from defenses.[5]

The difficulties afflicting burden of proof analysis have also spilled over to jury instructions that attempt to provide guidance to the jury deliberations process. These instructions may affect the requirement of proof beyond reasonable doubt by increasing the ease with which the prosecution can establish its case. Thus, they too must now be analyzed from the perspective of the ill-defined requirement of proof beyond reasonable doubt. The Supreme Court, however, has been no more helpful in providing guidance here than it has been with respect to affirmative defenses.[6] The result has predictably generated a host of incompatible lower court decisions which, in one sense, are nothing but an exceedingly accurate reflection of the incompatible Supreme Court decisions that gave them birth.[7]

Interestingly enough, most of the difficulties surrounding the reasonable doubt requirement stem from a single source—the failure of the Supreme Court to articulate the means by which "elements" are distinguished from "defenses" for the purpose of requiring proof beyond reasonable doubt. Roughly speaking, four different views have arisen in the literature to fill that gap. One view is that whenever the state distinguishes crimes or sentences based on an articulated factor, that factor must be proven beyond reasonable doubt by the prosecution.[8] The second view is that the prosecution must prove beyond reasonable doubt those facts necessary to justify the sentence that the defendant is either

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murder) *and* Rivera v. Delaware, 429 U.S. 877 (1976) (dismissed for want of jurisdiction); *see also* Allen, *supra* note 1; Jeffries & Stephan, *Defenses, Presumptions and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325 (1979); Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299 (1977).

[3] *See, e.g.*, *Winship*, 397 U.S. at 364.

[4] *Patterson*, 432 U.S. at 207-11; *Rivera*, 429 U.S. at 878-80 (Brennan, J., dissenting).

[5] *Compare* Mullaney v. Wilbur, 421 U.S. 684 (1975) (lack of provocation is an essential element of first-degree murder) *with* Patterson v. New York, 432 U.S. 197 (1977) (absence of extreme emotional disturbance is *not* a necessary element of murder); *see also* Allen & DeGrazia, *The Constitutional Requirement of Proof Beyond Reasonable Doubt in Criminal Cases: A Comment Upon Incipient Chaos in the Lower Courts*, 20 AM. CRIM. L. REV. 1 (1982).

[6] *See* Ulster County Court v. Allen, 442 U.S. 140, 154-63 (1979); Sandstrom v. Montana, 442 U.S. 510, 514-27 (1979).

[7] *See* Allen & DeGrazia, *supra* note 5, at 16-30.

[8] Underwood, *supra* note 2, at 1338-48.

exposed to or receives.[9] The third view would require the prosecution to prove the basic elements of the traditional Anglo-American form of criminality.[10] Recently, Professor Stephen Saltzburg has proposed a fourth view that is based upon a literal interpretation of certain explicit passages in the Court's opinions. Decrying those theorists who have attempted to limit the requirement of proof beyond reasonable doubt either to the sentencing issue or to the proof of the basic elements of the standard form of criminality, Professor Saltzburg has argued that stigmatization is as much a concern as liberty, and thus the state must prove beyond a reasonable doubt any fact that will affect the stigmatization of the defendant.[11]

The first three views have been adequately dissected and compared in the extant literature.[12] Apart from Professor Saltzburg's article, however, the view resting on stigmatization as an independent concern has only been discussed in passing, and indeed it has been dismissed rather peremptorily.[13] Yet, when a respected scholar resuscitates and advances an idea that has been discarded prior to significant development, a reconsideration is certainly called for, and the primary purpose of this writing is to probe the sense of Professor Saltzburg's suggestion. That, however, will also permit an elaboration of aspects of the complex analytical structure upon which constitutional burden of proof requirements rest.

To accomplish these purposes, I will first examine Professor Saltzburg's criticisms of the reliance of other theorists on the second and, to a lesser extent, the third views expressed above—that the constitutional requirement of proof beyond reasonable doubt should be tied to the sentencing possibilities, or, alternatively, that it should be made to refer to the traditional form of Anglo-American criminality. Next, in light of that discussion, I will address Professor Saltzburg's proposal. Finally, I will discuss briefly Professor Saltzburg's treatment of instructions on inferences and presumptions in criminal cases.[14]

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9 Allen, Mullaney v. Wilbur, *The Supreme Court, and the Substantive Criminal Law—An Examination of the Limits of Legitimate Intervention*, 55 TEX. L. REV. 269 (1977); Jeffries & Stephan, *supra* note 2, at 1333-38.

10 Jeffries & Stephan, *supra* note 2, at 1356 (causation, mens rea and voluntary act form the basis of common law liability).

11 Saltzburg, *Burdens of Persuasion in Criminal Cases: Harmonizing the Views of the Justices*, 20 AM. CRIM. L. REV. 393, 406-09, 421 (1983).

12 *See, e.g.*, Allen, *supra* note 1; Jeffries & Stephan, *supra* note 2; Nesson, *Rationality, Presumptions and Judicial Comment: A Response to Professor Allen*, 94 HARV. L. REV. 1574 (1981); *see also* Underwood, *supra* note 2.

13 Allen, *supra* note 9, at 281-82.

14 I will not discuss the first view of the scope of the reasonable doubt standard independently, for Professor Saltzburg's argument eventually reduces to that view. *See infra* p. 1416.

I. PROFESSOR SALTZBURG'S CRITICISMS

Professor Saltzburg criticizes the view that the prosecution should be required to prove beyond reasonable doubt those facts necessary to justify the sentence permitted or imposed upon conviction[15] by reiterating Professor Underwood's contention that, if the state may limit the scope of the reasonable doubt standard, it may similarly limit other procedural protections, such as the right to counsel.[16] Indeed, Professor Saltzburg goes so far as to assert that: "Although the most vigorous proponents of the approach try to minimize this possibility, they cannot deny that it is a logical extension of their analysis."[17] Professor Saltzburg is correct that his criticism entails an extension of the view that the states need not disprove beyond reasonable doubt those facts that are not constitutionally mandated, but he misses the mark in asserting that this is a "logical" extension. It may or it may not be, depending upon the logical antecedents to the conclusion, and it is here that Professor Saltzburg's argument goes astray.

Professor Saltzburg understands the argument tying burden of proof analysis to sentencing options as essentially resting on the premise that if a certain fact or "defense" is not constitutionally mandated, if it is in his words "gratuitous,"[18] then "the government may do what it wants with issues that it adds but that the Constitution does not require."[19] That, however, is not the correct antecedent. Rather, the correct antecedent starts from the proposition that the constitutional value at risk should be correlated with a procedure designed to protect or further that value. In criminal cases, the argument proceeds, the primary constitutional value at risk is one's liberty.[20] In order to maximize that constitutional value within the context of a criminal justice system that must be permitted to continue to function, the prosecution is required to meet a high but not impossible burden of persuasion. Doing so, the theory goes, will have the effect of allocating errors in favor of freedom. By raising the burden of persuasion, fewer innocent people will be convicted, although it is also true that fewer guilty people will be convicted. In short, raising the burden of persuasion is designed to change the matrix of errors by skewing it in favor of convicting fewer guilty people in order to convict fewer innocent ones.

If, however, the constitutional interest being protected is liberty, is

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15 For the view that it should be the sentence imposed, see Allen, *supra* note 9, at 295-301. For doubts about that view, see Jeffries & Stephan, *supra* note 2, at 1376-79. I will ignore this issue for the remainder of this paper, and henceforth simply refer to "the relevant sentence."

16 Saltzburg, *supra* note 11, at 398-401 (citing Underwood, *supra* note 2, at 1325-30).

17 Saltzburg, *supra* note 11, at 400-01.

18 *Id.* at 400.

19 *Id.* at 399.

20 Allen, *supra* note 9, at 278-81.

there any limit to the interest? It is difficult to see how the answer could be no. Assume a state statute defines murder as an intentional killing, requiring only intent, a voluntary act, and causation to be proven, and provides for a sentence of twenty years upon conviction. Assume further that the statute is constitutional. One of the implications of this scheme is that even if a defendant is provoked into killing, he is guilty of murder and may be punished by a sentence of twenty years. Compare the first hypothetical statute with another state's statute that defines murder in the same fashion, but with one exception—that the defendant is permitted to prove he was provoked, and if he succeeds the punishment is reduced to ten years.

Now, if the statute of the first state is constitutional, and if constitutional burden of proof requirements are designed to protect liberty interests, then how can the statute of the second state not be constitutional? By hypothesis, the first statute protects whatever constitutional interest in liberty defendants have, and the second merely ameliorates the rigors of the first. It is difficult to see how an amelioration of a constitutional statutory scheme can be seen to affect the interests of the group of persons whose condition has been ameliorated in an unconstitutional manner.

The question then becomes, how does one know that the first statutory scheme is constitutional? It is here that reliance has been placed on the idea of proportionality implicit in the eighth amendment.[21] Proportionality can be seen as indicating the extent of the constitutional interest in liberty that constitutional burden of proof requirements are designed to protect by skewing errors in favor of acquittals.[22] Thus, proponents of this view conclude that the state must prove beyond reasonable doubt those facts necessary to justify the relevant sentence. Beyond that, the state should be free to allocate burdens of persuasion to defendants, should it choose to do so.

Thus, the argument is not that states may do what they please with gratuitous defenses; rather, the argument is an effort to relate the constitutional value at stake to a procedure designed to protect that value.[23] Accordingly, Professor Saltzburg is simply mistaken to argue that one unseemly implication of the "gratuitous defense" theory is that the state may condition such a defense any way it likes, including, for example, forbidding the right to counsel. By now it should be clear that this would be true only if the right to counsel was designed solely to protect constitutional liberty interests. Since it is not, its parameters are tested

21 *Id.* at 295-301.

22 *See Winship*, 397 U.S. at 372 (Harlan, J., concurring).

23 Indeed, proof beyond reasonable doubt conceivably could be employed to protect values other than wrongful deprivations of liberty.

by criteria other than whether the relevant fact or defense is constitutionally required.[24]

Professor Saltzburg would apparently object to this disposition of the right to counsel analogy by arguing, with authority I find persuasive,[25] that the right to counsel is designed to further "rationality." He then proceeds, however, to argue that "the goal of this rationality is accuracy in results."[26] Moreover, he asserts that "the degree of accuracy required is intimately connected to the question of who bears the burden of proof in a criminal case."[27] Therefore he concludes that the two procedural devices protect the same basic interest, and what follows for one follows for the other.[28] Unfortunately, much of this argument is premised upon a fundamental error, for it confuses "accuracy" with "rationality," and it further fails to recognize that burdens of persuasion do not necessarily protect either. Specifying the nature of these errors is essential to advancing understanding of this general area. To do so will require first that the relationships among the right to counsel, burdens of persuasion, and rationality be considered. Next, the relationships among the right to counsel, burdens of persuasion, and liberty must be addressed.

"Accuracy" is a measure of the correlation of the outcome of a process with reality or some other process. We can know something is accurate only if we can compare it to a known quantity. Since we do not know who is factually guilty and who is not, we cannot compare the outcome of trials to reality in any rigorous fashion. "Rationality," by contrast, is a measure of the correlation of a particular process or aggregate outcome with the process or outcome that we think would be provided by well-informed, disinterested decisionmakers.[29] "Accuracy," in other words, is a measure of decisionmaking in conditions of certainty where reality is known, whereas "rationality" is primarily a measure of decisionmaking in conditions of uncertainty where reality is unknown.[30] Decisionmaking in the criminal justice system is decisionmaking in uncertainty. We can assess its rationality even though we cannot generally

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24 Professor Saltzburg's failure to address the logical parameters of the "greater-includes-the-lesser" argument also explains his mistaken reliance on analogies he draws from other areas of constitutional law. *See* Saltzburg, *supra* note 11, at 399-400, 402-03.

25 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, 45 n.60 (1977).

26 Saltzburg, *supra* note 11, at 400 n.45.

27 *Id.*

28 *Id.*

29 One must employ some aggregation because single outcomes might coincide fortuitously with what an ideal decisionmaker would conclude. The larger the number of events, the less likely it is that the correlation is a result of chance.

30 "Rationality" can also be judged in conditions of certainty, although there is not much point in doing so.

measure its accuracy. Thus, the system is structured to pursue rationality even though it expresses accuracy as an ideal, as indeed it should.

In part, the criminal justice system pursues rationality by providing counsel. Counsel is designed, in this context, to aid the cogent presentation of the evidence, thus permiting a disinterested fact-finder to assess the evidence in light of both its strengths and weaknesses, and in light of other evidence adduced. Moreover, this dynamic occurs regardless of the relevant burden of persuasion. We desire fact-finders in criminal cases to apply whatever burden of persuasion is given to them in a disinterested fashion after they have been well-informed by the trial process. If, for example, ideal fact-finders would, we think, assign a certain probability to a certain outcome, we would say that an imperfect decisionmaker that tended to reach that same result acted rationally. Similarly, if an ideal fact-finder would not be swayed by a certain bit of evidence, we would say that an imperfect decisionmaker that was not swayed by that evidence acted rationally. The right to counsel is designed to move decisionmaking in an imperfect world toward the model of the ideal decisionmaker, facilitating a disinterested evaluation of the evidence. After the evidence is evaluated, the fact-finder applies the rule of decision the relevant burden of persuasion provides. Again, we would say that an imperfect fact-finder that applied the rule of decision as would a perfectly disinterested fact-finder has acted rationally. In this context, the primary function of the right to counsel is to advance the ultimate rationality of the criminal justice process rather than its ultimate accuracy, as Professor Saltzburg asserts.[31]

To be sure, this argument could be viewed as a cavil, inasmuch as the reason we pursue rationality is that it is a surrogate for accuracy, and it is true that we employ on occasion the metaphor of accuracy to test rationality.[32] Thus, the differences between accuracy and rationality may begin to blur.[33] Nevertheless, accuracy is a metaphor rather than a reality in this context, no matter how strongly we wish to the contrary. Accordingly, meticulous analysis should not be disrupted by mistaken reliance on a metaphor as though it were reality rather than an aspiration. Moreover, the importance of meticulous thinking in this area is evident by comparing the right to counsel with burdens of proof, as Professor Saltzburg invites us to do. Burdens of proof do not necessarily advance either the rationality or the accuracy of the criminal process. Rather, burdens of proof serve to allocate errors once a fact-finder has, one hopes rationally, assessed the strength of the evidence. The

31 It should be obvious that this occurs through the clash of adversarial perspectives.

32 *See, e.g., Winship*, 397 U.S. at 363-64.

33 Indeed, their primary difference is that the idea of rationality reflects the unverifiability of accuracy.

allocation of errors resulting from modifying burdens of persuasion, however, may or may not advance the "accuracy" or "rationality" of decisionmaking in any particular set of cases.

There are two subsets of cases that go to trial—those in which the defendants are factually guilty, and those in which the defendants are factually innocent. Contemporary theory of burdens of proof proceeds upon the assumption that juries assess the case against defendants in rough probabilistic terms, although assessment is surely more implicit than explicit.[34] Thus, juries may assign a range of probabilities from virtually .0 to virtually 1.0 to the cases in each subset, depending upon the jury's evaluation of the strength of the evidence adduced. For example, there will be some number of cases in each subset where the jury determines there is a .1 chance of guilt, others where there is a .6 chance of guilt, others where there is a .99 chance of guilt, and so on. The role of counsel in this dynamic is to assist the jury to make those determinations from the perspective of a well-informed, disinterested fact-finder. How well counsel does that job will determine, in part, how "rational" the system is.

The role of burdens of persuasion, however, is much different. It is to provide the fact-finder with a rule of decision that, given the jury's assessment of the evidence, specifies which outcome is correct. Thus, if the preponderance level is applied, the jury presumably would convict all those individuals for whom the probability of guilt was assessed to be higher than .5. This would include, of course, the factually innocent as well as the guilty. Raising the burden of persuasion to beyond reasonable doubt presumably would result in the jury convicting only those individuals for whom it has assessed the probability of guilt to be extremely high—in the example given above only those in the .99 category should be convicted—but again every person in that category, whether factually guilty or innocent, will be convicted. Also, by raising the level to beyond reasonable doubt, those individuals at the .6 level will now all be acquitted, some of whom again will be innocent but some of whom will be guilty.

Thus, the effect of raising the standard is simply to change the matrix of errors. With a preponderance standard, there will be innocent people wrongly convicted—each innocent person for whom the jury assesses the probability to be greater than .5. There will be compensating

[34] For reasons which I hope to articulate in the near future, I think this "assumption" is radically misleading. For an argument in this general direction, see L.J. COHEN, THE PROBABLE AND THE PROVABLE 89-91 (1977). As suggested in the text, jurors probably do not think in explicitly probabilistic terms even if their decisionmaking model employs intuitive probabilistic assessments. For purposes of simplicity, I will ignore this point throughout the rest of the Article since it has no effect on the analysis.

"correct" results—each guilty person for whom the jury assesses the probability to be between .5 and beyond reasonable doubt. Raising the standard merely changes the errors around. By requiring proof beyond reasonable doubt, we will secure more "correct" acquittals but at the expense of erroneous acquittals of guilty people. Thus, given certain assumptions about the distribution of probability assessments in the two subsets, the effect of modifying burdens of persuasion is to modify the matrix of errors;[35] it is not necessarily to affect either the "rationality" or "the ultimate accuracy of the process" in the manner Professor Saltzburg suggests.[36]

Indeed, one cannot even be sure that raising the standard of persuasion will ensure greater accuracy in guilty verdicts, for that depends on the precise allocation of probabilities over the two subsets identified above. It is conceivable, although intuitively implausible, that juries would assign probabilities exceeding proof beyond reasonable doubt to more cases in the factually innocent subset than in the factually guilty subset. If that occurred, requiring proof beyond reasonable doubt could generate a greater proportion of wrongful convictions than would a lower burden of proof, although again that would depend upon the matrix of probability assignments at the lower level of persuasion.[37] To be sure, this may be intuitively implausible, but the necessary reliance on intuition reinforces the fact that we are not relying on the ultimate "accuracy" of the criminal process in any of this analysis. We are attempting to make the process rational and to affect the distribution of errors that occur, but we are not doing so through employment of the unknowable standard of "accuracy." In these efforts, the primary function of counsel is to promote rationality, and the primary function of burdens of persuasion is to allocate errors.

One final point is in order. One could object that I have not extended my argument far enough. More particularly, the point would be that I have not addressed the purpose behind having rationality as a value of the criminal justice system. Moreover, the objection might proceed, it appears clear that we desire rationality in part because individual liberty is at risk, and we wish to reduce the likelihood of irrational deprivations of the primary value of personal freedom. One means of doing so is to reduce the number of "irrational" convictions by requiring

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35 To my knowledge, this point was first made in the literature in Allen, *supra* note 25, at 47 n.65. The most thorough development of the idea is in unpublished manuscripts by Richard S. Bell of the University of Akron C. Blake McDowell Law Center.

36 Saltzburg, *supra* note 11, at 400 n.45.

37 The failure to address the point discussed in the text is the crucial limitation of what has become the standard work cited in this area. *See generally* Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065 (1968).

the right to counsel. Thus, the objection would continue, the right to counsel may be dependent upon rationality, yet rationality is dependent upon liberty. Therefore, the right to counsel is only one step removed from liberty, and the right to counsel and burdens of persuasion may be seen as protecting the same fundamental interest. This objection differs from the previous argument in that the primary focus there was the assertion that burdens of persuasion enhance rationality, whereas here the assertion that the right to counsel protects liberty must be addressed. As demonstrated, the former argument is simply logically wrong. That is not necessarily true here.

Let me begin by conceding that the objection could have merit. Whether it does depends upon the analytical structure from which we reason about rights and obligations. Thus, to answer this objection requires that we explicitly address the nature of reasoning about rights. In particular, we must explicate certain assumptions about the criminal process.

The deductive reasoning process that dominates Professor Saltzburg's work, and this Article as well, requires the specification of assumptions and rules of reasoning from which propositions are derived. In large measure, my disagreement with Professor Saltzburg here rests upon the fact that I begin with an assumption different than his. I assume that the right to counsel is designed primarily to affect the primary value of rationality and, further, that rationality is for the most part a value independent of other values, such as maximizing freedom. Put another way, my argument entails the proposition that we value rationality in its own right.[38] As already discussed, my argument also entails the proposition that burdens of persuasion are the means by which we express our commitment to, and attempt to protect, another primary right—that of freedom. Thus, in my logical structure the values of rationality and freedom are independent, which obviously permits them to be developed without any necessary correlation between them.

Professor Saltzburg, however, does not see it that way. Apparently to him there is a unity to the dominant values of rationality, expressed mistakenly in the language of accuracy, and liberty. It follows that burdens of persuasion and the right to counsel serve the same master, and they should serve it in similar ways. From this position he argues that, if the requirement of proof beyond reasonable doubt may be limited to the essential elements of an offense, so too may the right to counsel and other procedural protections.

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[38] To be sure, rationality may result in the "protection" of liberty by converting what would have been an "irrational" conviction into a "rational" acquittal, but the reverse might just as frequently occur.

If one accepts Professor Saltzburg's assumption, the rest of his argument follows. If one accepts my assumption, then my argument follows. How, then, does one choose? As a logical matter, one cannot say that an assumption is "right" or "wrong"; it merely is. There are, however, other avenues of inquiry. First, one can analyze the problem as a matter of constitutional law and ask which assumption accords better with our understanding of constitutional history. To the extent that the pre-*Winship* constitutional decisions distinguished between rationality and liberty as I am using those terms, they favored my reading.[39] Second, one can analyze the two independent logical structures and appraise their respective consequences. That task has been thoroughly accomplished in the extant literature, which has established that the implications of Professor Saltzburg's implicit logical structure are much less felicitous than the alternative.[40]

Thus, so far as presently can be determined, burdens of persuasion should be viewed as serving quite different purposes than does the right to counsel,[41] and Professor Saltzburg's parade of horribles remains as unconvincing as Professor Underwood's was before him. Professor Saltzburg's failure to address directly the precise implications of the argument resting on the proportionality thesis, however, may be a result of an extraneous factor. At least one theorist—me—who has advanced that view also has advanced an analytically incompatible one that would require the prosecution to prove the common law form of criminality.[42] This latter view is incompatible with the former for the same reason that Professor Saltzburg's criticism is off the mark. What is missing is a reason for requiring the state to prove the common law form of criminality, and there are only three possible responses that I can see, none of which is very enlightening. The first is that the various elements of the common law form are morally relevant to culpability, and thus to the appropriateness of a specified level of punishment.[43] Although this is analytically satisfactory, it collapses into the proportionality argument. The second is that history and traditional practice should inform due process adjudication,[44] a view which may possess some cogency but

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39 *See* Allen, *supra* note 25, at 45 n.60.

40 *See* Jeffries & Stephan, *supra* note 2, at 1344-56.

41 Obviously, I have not covered all the policies served by the right to counsel, or by any other procedural protections, but I hope the argument is clear nevertheless.

42 Allen & DeGrazia, *supra* note 5, at 6-7. Ms. DeGrazia was not to blame for the incident.

43 Allen, *supra* note 1, at 343-44 n.83.

44 *See, e.g.*, *Winship*, 397 U.S. at 361-63.

which suffers from a disturbing indefiniteness if pressed too far or put to too many uses.[45]

The last response is that some external standard is needed to determine which facts must be proven beyond reasonable doubt.[46] Since the Supreme Court had appeared to eviscerate the proportionality requirement of the eighth amendment, the common law form of criminality was considered as a potential substitute.[47] If this is the primary reason for advancing the common law form of criminality approach, however, the argument obviously fails to connect a constitutional value to procedural devices designed to secure that value and is thus essentially arbitrary. Having relied on the argument, reluctantly but nevertheless explicitly, I appreciate this opportunity to express again my uneasiness about it. Moreover, the Supreme Court appears to have reversed its path and given new life to this aspect of the eighth amendment.[48] Thus, reliance on the common law form of criminality can now be relegated to its appropriate role of bolstering the analysis having its referent in proportionality.

II. PROFESSOR SALTZBURG'S PROPOSAL

Curiously enough, at one point Professor Saltzburg appears to recognize the validity of the argument that I have just constructed,[49] and thus that the bulk of his argument is somewhat misdirected. He apparently makes this implicit concession in order to introduce his proposal, which on its face would tie the constitutional burden of proof requirements not just to the defendant's interest in liberty, but in addition to the interest in being free from unwarranted stigmatization.[50] This proposal not only has intuitive appeal but also superficial plausibility. It certainly seems to be morally wrong to stigmatize people as criminals when they have not engaged in prohibited acts, and that feeling is apparently sufficiently widespread and deeply felt to justify embracing it as a constitutional value.

However, Professor Saltzburg's task is not just to convince us that

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45 Eighth amendment proportionality theory suffers from indefiniteness as well, but of a sort easier to resolve by judicial decision. *See* Allen, *supra* note 25, at 33-34 n.20.

46 This is another oft-told tale. *See, e.g.*, Jeffries & Stephan, *supra* note 2, at 1328-33.

47 *See, e.g.*, Hutto v. Davis, 454 U.S. 370, 371-73 (1982) (per curiam) (the Court upheld a forty-year sentence for possession with intent to distribute and for distribution of marijuana); Rummell v. Estelle, 445 U.S. 263, 285 (1980) (in affirming a conviction under a recidivist statute, the Supreme Court indicated that the length of a prison term could not violate the eighth amendment).

48 *See* Solem v. Helm, 103 S. Ct. 3001 (1983) (recidivist sentence of life imprisonment without possibility of parole for altering a $100 "no account" check is prohibited by the eighth amendment).

49 Saltzburg, *supra* note 11, at 405.

50 *Id.*

stigmatization is an important concern in a civilized country. He must also convince us that the process of stigmatization occurs in such a way as to support his assertion that stigmatization may usefully be employed to determine the scope of the requirement of proof beyond reasonable doubt. It is here that his argument fails. To be sure, the argument does find some support in the language of *Winship*[51] and *Mullaney*,[52] but it just as clearly overlooks the doctrinal implications of later cases.[53] More important than rhetorical support, or the lack thereof, Professor Saltzburg's proposal has certain inherent difficulties: (1) it seriously lacks focus; (2) properly understood, it collapses into the same generic kind of argument as the "gratuitous defense" argument; and (3) in an apparent attempt to avoid some of these difficulties, the proposal undergoes a radical change as Professor Saltzburg develops it, changing into a creature with no obvious constitutional referent.

A. LACK OF FOCUS

Although Professor Saltzburg relies heavily on stigmatization, nowhere does he describe what he means by the term. This makes appraising his proposal extremely difficult, for there are many different processes of stigmatization to which he could be referring[54] and which process he has in mind makes a difference. Take, for instance, just two of the many possibilities, although these two are probably the most important variants of "stigmatization" for our purposes. One process of stigmatization involves the effect of social labeling on the self-perception of the individual labeled and derivatively the effect on the subsequent behavior of the individual.[55] Another process, though, involves the effect of the labeling process on the rest of society.[56] While these two processes are related, there is no evidence to suggest that they are in a direct one-to-one relationship.[57] Thus, what might increase "stigmatiza-

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51 *Winship*, 397 U.S. at 363.

52 Mullaney v. Wilbur, 421 U.S. 684, 700 (1977).

53 *See* Allen, *supra* note 25, at 41-42. Justice Powell's dissent in *Patterson* relied heavily on stigmatization; thus, the issue was before the Court in *Patterson* but apparently disregarded. Consequently, it is a bit difficult to understand why Professor Saltzburg asserts that the Court essentially embraced this proposal. Saltzburg, *supra* note 11, at 408. He cites *Mullaney* as support for that assertion but does not discuss *Patterson* at that point in his argument.

54 *See, e.g.*, E. GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 1-19 (1963); S. SHOHAM & G. RAHAV, THE MARK OF CAIN: THE STIGMA THEORY OF CRIME AND SOCIAL DEVIANCE 11-25 (1982).

55 S. SHOHAM & G. RAHAV, *supra* note 54, at 130-35; *see also* J. GENET, THE SCREENS 38 (1962).

56 S. SHOHAM & G. RAHAV, *supra* note 54, at 86-102.

57 There is no evidence except in the trivial sense that the public reaction may reduce a person's options, thus directing his subsequent behavior towards the now fewer remaining options.

tion" through one of these processes might not do so through another. Accordingly, to determine whether or not proof of a fact "stigmatizes" a person and thus must be proved beyond reasonable doubt, one must know what is meant by the term. Professor Saltzburg's proposal provides no answer to that inquiry.

Indeed, the problems press even deeper. The stigmatization proposal not only fails to provide clear antecedents, but it also confuses stigmatization with the analytically independent concept of culpability. This problem permeates Professor Saltzburg's argument, and it is captured in the following passage:

> [W]here a jurisdiction draws traditional distinctions between or among degrees of offenses, and the distinctions represent judgments about culpability which would be likely to increase or decrease the stigma associated with a conviction, the prosecution must prove the greater offense. . . . The Constitution and its due process clause afford several different kinds of protections, of which the proof beyond a reasonable doubt requirement is only one. Whenever the government seeks to impose a criminal sanction that suggests a certain level of culpability within a scheme that sets forth a range of offenses, the government must demonstrate that particular level of culpability according to a standard that assures a justification for any punishment and stigmatization. Other constitutional protections that do not involve distinctions based on the severity of offenses, therefore, do not require proof beyond a reasonable doubt.[58]

"Culpability," at least as that term normally is used in relation to the criminal law, refers to moral wrongdoing. Moral wrongdoing, in turn, is a function of the shared views of society, or a specified subset thereof,[59] and is not synonymous with stigmatization. For example, in certain respects a sex offender may be stigmatized more than a murderer, although most of us would probably say that a murderer is more culpable than a molester.[60] Thus, "severity of the offense," while perhaps informative of stigmatization, does not appear to be dispositive. "Culpability" and "stigmatization" are, in short, different ideas in need of independent analysis, an analysis not provided by Professor Saltzburg.[61]

One response to this objection might be that whatever "culpabil-

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[58] Saltzburg, *supra* note 11, at 408-09 (footnote omitted).

[59] This is a somewhat oversimplified view, but adequate for the present purpose.

[60] For example, it is common lore, although I know of no rigorous studies of the issue, that child molesters are the individuals in penitentiaries most abused by other inmates. With respect to ratings of criminality, see the rating tables in Blumstein & Cohen, *Sentencing of Convicted Offenders: An Analysis of the Publics' View*, 14 LAW & SOC'Y 223 (1980); McCleary & Gray, *Effects of Legal Education and Work Experience on Perceptions of Crime Seriousness*, 28 SOC. PROBS. 276 (1981).

[61] At times, Professor Saltzburg appears to employ the word "culpable" and its derivatives to refer to a process of statutory criminalization: "[A] lawmaking body often would be

ity" or "stigmatization" mean, whenever either is at risk in any of their manifestations, the triggering fact must be proven beyond reasonable doubt. Let me emphasize that Professor Saltzburg does not make this argument, and wisely so, for it would amount to intellectual abdication. One cannot premise derivative rules on an unspecified entity. Curiously enough, though, this argument has another defect that emphasizes yet another problem in what Professor Saltzburg does argue. Even if proof beyond reasonable doubt of every fact that had an effect on culpability or stigmatization were required, one would still need a means of determining the relevant facts. Similarly, under Professor Saltzburg's proposal, one still needs a method of determining which facts are within it, and Professor Saltzburg's response to this point emphasizes the problems associated with his failure to specify the meaning of stigmatization and culpability.

The crucial determinant, in Professor Saltzburg's view, appears to be the action of the legislature. To repeat his language, "[W]here a jurisdiction draws traditional distinctions between or among degrees of offenses, and the distinctions represent judgments about culpability which would be likely to increase or decrease the stigma associated with a conviction, the prosecution must prove the greater offense."[62] In essence, he asserts that legislatively determined degrees of criminality determine the culpability of a offense, and that culpability in turn determines the stigmatization involved.[63] Suffice it to say that while legislative actions may indicate social views of culpability and stigmatization and may exert some influence on those views, there is no evidence to support the proposition that the three interact in the manner implied by Professor Saltzburg.[64]

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free to impose duties of various sorts and to declare that any failure to meet these duties amounts to culpability." Saltzburg, *supra* note 11, at 404.

62 *Id.* at 408-09.

63 *See, e.g., id.* at 414. "To brand the defendant . . . the government [must] prove the brand beyond a reasonable doubt, in order to justify the stigma it sought to attach."

64 *See, e.g.*, Vidmar & Miller, *Socialpsychological Processes Underlying Attitudes Toward Legal Punishment*, 14 LAW & SOC'Y 565, 586-87 (1980) (the level of harm done relates to the assignment of responsibility, though studies have shown that "the perceived intention of the offender is a prime mediator of punishment reactions"). In a study on stigma in the marketplace, researchers found that "the individual accused but acquitted of assault has almost as much trouble finding even an unskilled job as the one who was not only accused of the same offense, but also convicted." Schwartz & Skolnick, *Two Studies of Legal Stigma*, 10 SOC. PROBS. 133, 136 (1962). In a study on college students' perceptions of seriousness of various crimes, the researcher concluded that "perceivers assess the seriousness of criminal events in ways that make unimportant inferences of whether the offender intended to act." Reidel, *Perceived Circumstances, Inferences of Intent and Judgments of Offense Seriousness*, 65 J. CRIM. L. & CRIMINOLOGY 201, 208 (1975). A study on the effects of legal education and experience found that legal bureaucrats form perceptions from a wider variety of dimensions than do nonlegal bureaucrats and that "legal mitigating factors (premeditation and negligence) are

Indeed, the best evidence that we have indicates that although there are various processes of stigmatization, they do not occur in the incremental fashion necessitated by Professor Saltzburg's argument. Although his argument requires that fine gradations be drawn as a function of stigmatization, distinctions so fine as to encompass all of the legislative gradations of offenses, that just does not appear to happen.[65] Thus, Professor Saltzburg's assertion that society might view one convicted of first-degree murder as different from one convicted of second-degree murder[66] might be right, but he cites no evidence that the assertion is correct. Even if that assertion is correct, he still has the burden of showing that every other statutory distinction generates a similar difference in stigmatization. I know of no evidence that he could rely on, and he cites none.

In a word, then, Professor Saltzburg's proposal is too ambiguous to provide meaningful guidance,[67] and to the extent it is clear, it seems to be in error. It has other problems as well.

B. THE COLLAPSE OF THE STIGMATIZATION PROPOSAL INTO A VARIANT OF THE "GRATUITOUS DEFENSE" ARGUMENT

Professor Saltzburg's proposal, notwithstanding its fatal ambiguity, is designed to be an alternative to requiring the prosecution to prove those facts necessary to make the relevant sentence proportional. By that theory, any other facts that are "gratuitous" in the sense that the state may provide or withhold them at its pleasure may be made into affirmative defenses. Remarkably, when the deficiencies of the stigmatization proposal are controlled for, the proposal collapses into a variant of the gratuitous defense, or the "greater-includes-the-lesser," approach.

Once it is determined which process of stigmatization is the constitutionally relevant one, judgments can be made about which facts trigger the relevant process. We might find, for example, that the public fails to distinguish between larceny in the second degree[68] and larceny

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weighed seriously by our attorneys but not by our nonattorneys." McCleary & Gray, *supra* note 60, at 285.

65 *See supra* note 64.

66 Saltzburg, *supra* note 11, at 408.

67 Perhaps Professor Saltzburg only meant that when legislative judgments in fact reflect social judgments of culpability or capture some aspect of stigmatization, then the prosecution must prove the relevant fact. If this is what he meant, he did not say so. There is an omission in his argument that suggests he did not have this in mind. If this were his argument, it should also follow that facts reflecting social judgments of culpability or that affect stigmatization that the legislature has *not* placed in the definition of various crimes are constitutionally required to be established by the prosecution anyway. Professor Saltzburg did not address this point.

68 *See, e.g.*, N.Y. PENAL LAW § 155.35 (McKinney 1975).

in the third,[69] or between unlawfully using slugs in the second degree[70] and unlawfully using slugs in the first degree,[71] or between many of the vast gradations of offenses that characterize modern penal codes.[72] In such cases, applying the stigmatization proposal as correctly understood would permit the legislature to require defendants to establish the fact that lowers the degree of the offense. If there is no difference in stigmatization, then stigmatization cannot be what distinguishes one legislative classification from another for purposes of proof beyond reasonable doubt.

But, what if there is a difference in the relevant stigmatizing process? Here the argument parallels that which was constructed to provide limits to the federal interest in protecting freedom. Assume a state may constitutionally convict as a grand larcenist anyone who steals money or goods worth more than $100. Assume that this is true even though the popular view is that those who steal towards the lower end are less dangerous and more trustworthy than those who steal vast sums. Nonetheless, if a state may convict as grand larcenists all those who steal goods or money worth more than $100, then whatever constitutional interest in being free from unwarranted stigma a person possesses is satisfied by that statute.

What comes next is obvious, of course. If a statute that treats all grand larcenists generically satisfies defendants' interests in being free from unwarranted stigma, a statute that permits defendants to mitigate convictions of grand larceny in the first degree to grand larceny in the second by showing that the relevant amount is, say, between $100 and $500, respects whatever interests in being free from unwarranted stigmatization defendants possess. As with liberty, it is difficult to see how an amelioration of a constitutionally satisfactory statutory scheme can be seen to violate the rights of the group whose position is ameliorated.[73] Thus, properly analyzed, the stigmatization proposal parallels an individual's interest in liberty, and the argument collapses into a variant of the "gratuitous defense" theory.[74]

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69 N.Y. PENAL LAW § 155.30.

70 N.Y. PENAL LAW § 170.55.

71 N.Y. PENAL LAW § 170.60.

72 *See generally* Allen, *Retribution in a Modern Penal Law: The Principle of Aggravated Harm*, 125 BUFFALO L. REV. 1 (1975).

73 *See supra* text accompanying notes 18-24.

74 Given the inability to measure stigmatization in any rigorous fashion, this point normally would only matter where a conviction is not likely to be followed by a sentence of any consequence. It is only then that stigmatization would be a serious candidate for separate inquiry. *See* Allen, *supra* note 25, at 41-42.

C. THE TRANSFORMATION OF THE STIGMATIZATION PROPOSAL INTO AN "ELEMENTS" TEST

At first reading, one of the most curious aspects of Professor Saltzburg's proposal is the complete absence of any reliance on the sociological or psychological literature on stigmatization. The reason for its absence, though, emerges on a careful reading. The proposal really has nothing to do with stigmatization at all. All the talk of stigmatization is simply the means by which Professor Saltzburg asserts that the state must prove which degree of which particular offense the defendant committed.[75] That this is so is clear from his own example:

> Assume that a state adopts a statute that declares that any killing—whether negligent, reckless, malicious, or malicious and premeditated—is murder punishable by five years' to life imprisonment. The statute probably could withstand a facial constitutional attack, even if a sentence in a particular case might be cruel and unusual. As long as there are no lesser offenses, all killers would be classified the same way. Such a statute would homogenize all killings, something that is not done in American law. It would prevent the state from signifying by label that one offense was more blameworthy than another and from identifying one offender as having committed a crime different in kind or degree from that of another offender.[76]

If the stigmatization proposal were in fact premised upon an empirical process of stigmatization, this hypothetical statute most clearly could *not* "withstand a facial constitutional attack." Indeed, as Professor Saltzburg says just two pages later, "It is worse to be a first-degree murderer than a second-degree murderer . . . [Moreover,] [e]ven a lay person probably could make a fair guess as to the difference between first degree murder and an unintentional but reckless killing."[77] Indeed, a lay person probably could, but that appears to be irrelevant under this proposal. Thus, the talk of stigmatization is simply a curious way of arguing for the requirement that affirmative defenses be eliminated.

At its heart, then, Professor Saltzburg's proposal is quite similar to Professor Underwood's argument that the state should be required to prove all distinctions among offenses. The objections to this view have been adequately developed in the literature.[78] Apart from Professor Saltzburg's effort, the proponents of this view have never rigorously replied to the objections. To be sure, that does not amount to a concession, but to date the proponents of this approach have advanced no arguments resting on accepted constitutional values for their views that embellish upon Professor Underwood's contributions in this area. To

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[75] *See* Saltzburg, *supra* note 11, at 406, 408-09, 411.

[76] *Id.* at 406 (footnote omitted).

[77] *Id.* at 408.

[78] *See, e.g.*, Allen, *supra* note 9, at 282-95; Jeffries & Stephan, *supra* note 2, at 1357-59.

give Professor Saltzburg his due, he does add one new factor.[79] He repeatedly asserts that he is concerned with "traditional" distinctions among offenses. Unfortunately, once again he fails in defining his terms, and one is left to wonder what is and what is not a "traditional" distinction. One is also left to wonder why it makes a difference whether a distinction is traditional or otherwise, and again no clue is produced.[80]

In the end, Professor Saltzburg seems to be constructing a scheme that would require the prosecutor to bear the burden of persuasion on every fact legislatively articulated as relevant to a crime.[81] As thoroughly developed in the literature, such a theory has no obvious constitutional referent, and Professor Saltzburg does not supply one.[82] Indeed, Professor Saltzburg's entire argument is inadequately developed as a result of its failure to address the underlying analytical issues and to give meaning to crucial terms.[83] Moreover, once the analysis proceeds beyond the language employed to the actual idea apparently being advanced, the proposal appears to lack any grounding in accepted constitutional values.[84] These problems also infect his discussion of

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79 It may rest on Justice Powell's dissent in Patterson v. New York, 432 U.S. 197, 226-27 (1977).

80 *See* Allen, *supra* note 25, at 33-34 n.20.

81 Having ostensibly constructed an argument for his view of the necessary scope of the requirement of proof beyond reasonable doubt, Professor Saltzburg fails to give a single example of a standard affirmative defense that survives his test, although he does assert that certain matters normally viewed as procedural rather than substantive would do so. Saltzburg, *supra* note 11, at 408-09.

82 His position also seems to be internally inconsistent. He argues that legislative action determines culpability and thus stigmatization, but he also argues that the state cannot call "assault" by the name of "rape" because that would result in the "wrong" stigmatization. It seems to me that he has to decide whether legislative action has an electrifying effect or not. If it does, then distinguishing offenses would have an impact on stigmatization, but it should also mean that the legislature's definition of a word, for example "rape," should have a similarly electrifying effect so that the populace would learn the definition of the word.

83 Perhaps one final example is in order. Professor Saltzburg recognizes one problem in his scheme resulting from its collapse into the simple assertion that statutory classifications must be respected. That problem is that such a theory does not seem to prohibit a state from having a generic statute and making important distinctions at the sentencing stage. To handle this, Professor Saltzburg asserts: "If, during sentencing, the state attempted to increase the penalty automatically upon finding certain aggravating circumstances, . . . the proof beyond a reasonable doubt requirement might possibly be imposed with respect to those circumstances." Saltzburg, *supra* note 11, at 406. However, he also realizes that some sentencing factors may not be related to "culpability," and these apparently could be employed without invoking the requirement of proof beyond reasonable doubt. *Id.* at 406-07. If so, what would prohibit a state from taking those legitimate sentencing factors and constructing two separate "crimes"? That seems to be allowed by this aspect of Professor Saltzburg's argument, but not by those portions mandating that the prosecution always prove the relevant degree of the crime. Accordingly, precisely what Professor Saltzburg is proposing is somewhat ambiguous.

84 The difficulties presented by Professor Saltzburg's approach are also reflected in his treatment of *Mullaney* and *Patterson*. He attempts to construct a reconciliation of the cases by arguing that the Court may have seen the New York statute litigated in *Patterson* "as an

instructions on presumptions and inferences.

III. PRESUMPTIONS AND INFERENCES IN THE CRIMINAL PROCESS

Professor Saltzburg applies his proposal to the area of presumptions and inferences, and he draws from that exercise certain propositions:

1. "[J]ury instructions must not shift the burden of persuasion from the state to the defendant."[85]
2. "[W]here the prosecution bears the burden of persuasion, a trial judge may not encourage the jury to make logical jumps not supported by the evidence."[86]
3. "[A] trial judge may not, even with legislative support, tell a jury that it may or should make a finding not supported by evidence."[87]
4. And, as a corollary of the above, "[T]he government may not prove guilt by having a judge tell a jury that something has been proved when it has not."[88]

The first "rule" protects the reasonable doubt standard, according to Professor Saltzburg, and the last three are designed to ensure that the decisions of the criminal process are "rational rather than arbitrary."[89]

Although I will shortly criticize aspects of this portion of Professor Saltzburg's argument, I do not wish to do so without first remarking that there is much of good sense here. In particular, Professor Saltzburg correctly sees those instructions on inferences and presumptions that do not allocate burdens of proof as comments on the evidence, which in turn means that the crucial question is the effect of such instructions on the deliberative process of the jury. Professor Saltzburg's advocacy of

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insanity-type claim," and consequently that the state could place the burden of proving the relevant fact on the defendant, as it can with insanity. Saltzburg, *supra* note 11, at 410 & n.91. The trouble, though, is that according to Professor Saltzburg, "Insanity was in many ways an additional stigma. . . . A finding of insanity resulted in treatment for a condition but really did not remove the stigma resulting from the proof of act and mens rea." *Id.* at 410. If these points are valid, one would think that insanity would be an *a fortiori* case, rather than one where the burden of persuasion could be placed on the defendant. The only reason offered for a decision to the contrary is: "In light of the concern about the role of the defense in a system of criminal justice, the Supreme Court may have wanted to keep it in a category by itself." *Id.* This seems to me an inadequate response to an *a fortiori* case, and it emphasizes the rather ad hoc nature of portions of Professor Saltzburg's contribution. The ad hoc quality results, in turn, from the failure to specify adequately the relevant analytical structures. And, of course, all of this overlooks the fact that the statutes involved in *Patterson* and *Mullaney* were functional equivalents, although Professor Saltzburg does concede that *Patterson* is not fully explained by his argument.

85 Saltzburg, *supra* note 11, at 412-13.

86 *Id.* at 415.

87 *Id.* at 416.

88 *Id.* at 419.

89 *Id.* at 412-13, 415-16, 418.

that proposition is a welcome addition to the growing recognition that sense can be made of this area only by careful analysis that hues closely to the dynamic of the judge-jury-evidence interaction.[90]

There are, however, a few less praiseworthy points in Professor Saltzburg's proposal. His first rule, for example, is true only in a tautological sense. If burdens of persuasion may be placed on defendants, there is no reason why it should matter whether the placement occurs as a function of the legislative process or of the common law process. Consequently, if affirmative defenses are permissible, there is nothing as a matter of federal constitutional law to prohibit the judiciary from fashioning affirmative defenses, thus "shifting the burden of persuasion to defendants," so long as it is done uniformly in the state so as not to engender equal protection problems. Accordingly, Professor Saltzburg's first proposition should read, tautologically, "Jury instructions must not shift the burden of persuasion from the state to the defendant where it is impermissible to do so." Whether or where it is impermissible to do so, in turn, is a function of the scope of the requirement of proof beyond reasonable doubt. Thus, this first proposition is essentially superfluous.

Professor Saltzburg's three rules designed to ensure "rational rather than arbitrary" decisionmaking are equally problematic, but for a different reason. In essence, Professor Saltzburg's reliance on rationality is once again misplaced, resulting in a quite strained application of the idea of rationality. Given the strong intuitive appeal of "rationality," a somewhat detailed defense of my assertion is in order. That will require first that the underlying dynamic of instructions of presumptions and inferences be understood.

As Professor Saltzburg notes, instructions on presumptions and inferences that do not explicitly shift burdens of proof are comments on the evidence.[91] Comments on the evidence, however, do influence the relative burden of persuasion of the parties, and it is this point that Professor Saltzburg's proposal fails to accommodate adequately.[92] Consider a disinterested, well-informed jury that hears evidence E of element X and concludes that there is a .8 chance of X being true. Assume further that the jurors understand that "proof beyond reasonable doubt" requires them to be convinced to more than a .9 certainty. Under these assumptions, the jury would acquit. Now, assume that the judge injects into the process an instruction that "fact E is highly probative of fact X and that E is legally sufficient upon which to base a finding of X." As-

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90 *See, e.g.*, Nesson, *supra* note 12, at 1587-90.

91 Again, this is a bit oversimplified, but adequate for the present task. For the complete elaboration, see Allen, *supra* note 1, at 332-39.

92 He does note this point. Saltzburg, *supra* note 11, at 414 n.114.

sume further that now the jury appraises the likelihood of X at .96, and thus renders a conviction.

The only difference between these two hypothetical cases is the jury instruction and its effect, yet in one case there would be an acquittal and in the other a conviction. The reason for this is that the instruction has altered the jury's deliberative process in such a way that evidence that is inadequate without the instruction becomes adequate with it. The instruction does not change the nature of the evidence; rather, it has the effect of altering the jury's perception of the evidence. That, however, is functionally equivalent to altering the burden of persuasion that the jury is to apply—with the instruction evidence E is sufficient, but without the instruction it is not. Thus, comments on the evidence can be usefully analyzed as affecting the relative burdens of persuasion born by the parties, even though the formal burden of persuasion does not change.

We may now analyze Professor Saltzburg's reliance on rationality as the justification for the three rules he constructs concerning instructions on presumptions and inferences. Each of them asserts that the trial judge may not encourage the jury to draw an inference that is not established by the evidence. Suppose, for example, that a jury would have found that there is a .55 chance that the defendant did not act in self-defense based on evidence P, but because the judge instructed the jury that P is highly probative of the absence of self-defense, the jury actually concluded that there was a .96 chance of not acting in self-defense and thus convicted the defendant. Professor Saltzburg would call this an example of irrational decisionmaking, but it is not.[93] There is no functional difference between the dynamic hypothesized and one in which self-defense is made an affirmative defense. In essence, the instruction on the inference has lowered the state's burden of persuasion on the absence of self-defense and commensurately raised the defendant's burden to show self-defense. In order to obtain an acquittal, the defendant would have to proffer further evidence of self-defense. This is in no way "irrational"; rather, it is merely a curious way of constructing an affirmative defense.

What, then, are the crucial issues? They are, first, whether the relevant factual concern—here self-defense—constitutionally may be made an affirmative defense, and second, the effect of the instruction. Thus, such instructions should not be allowed if they reduce the prosecution's burden of persuasion below that of proof beyond reasonable doubt on a

[93] The appearance of irrationality is an inadequate constitutional justification for a distinction. Allen, *More on Constitutional Process-of-Proof Problems in Criminal Cases*, 94 HARV. L. REV. 1795, 1802 (1981).

fact with respect to which the prosecution constitutionally must bear the burden of persuasion. The identity of those facts, of course, is once again determined by the scope of the reasonable doubt standard. If, however, the relevant fact may be made into an affirmative defense, it is no more "irrational" to do it by jury instructions on the inferential relationships among facts than to do it in the standard fashion. Thus, Professor Saltzburg's reliance on rationality is once more misplaced.

There is, however, another basis for objecting to instructions of the sort hypothesized. As mentioned above, there are two crucial issues. The first is the nature of the relevant fact, and the second is the effect of the instructions on the jury. The former is relevant in the manner just articulated, but the latter is relevant in a different fashion. My hypothetical assumes we know the effect of the instructions, but of course we may not. Furthermore, such an instruction must be given in every case and have a similar effect, a highly unlikely state of affairs, or equal protection problems are generated. Thus, the real problem is that these instructions may inject caprice and randomness into jury deliberations, and this should be sufficient to forbid them.[94] However, carefully crafted comments on the evidence, uniformly given, may avoid the problem.[95] Thus, it matters whether one analyzes the problem from Professor Saltzburg's intuitively appealing but analytically unsupportable perspective, or from the alternative perspective proferred here.[96]

The dynamic of jury instructions and their effect is, in short, much more complicated than Professor Saltzburg's proposal suggests. It requires that constitutionally mandated elements be specified and that no jury instructions be given with respect to those elements that move the jury away from the position of a well-informed, disinterested fact-finder. On issues that are not constitutionally mandated, the concerns become those of equal treatment, not "rationality," as Professor Saltzburg argues.

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94 *See* Allen, *supra* note 1, at 335-38.

95 *See* Nesson, *supra* note 12, at 1589-90.

96 One final problem is worth mentioning. Professor Saltzburg argues that only those instructions that are supported by the evidence can be given, but he fails to say what it means for an instruction to be supported by the evidence. Saltzburg, *supra* note 11, at 416. Moreover, in the same paragraph he asserts that "[a]ny instruction, even an accurate one, is invalid if it tends to impose a persuasion burden on the defendant when the issue is one that the government is required to prove." *Id.* But, how can an "accurate" instruction undercut proof beyond reasonable doubt? "Accuracy" here must have its referent in the effect of the instruction on the jury, and it seemingly would entail moving the jury towards the ideal of a well-informed, disinterested fact-finder. It is hard to see how such an effect undercuts the requirement of proof beyond reasonable doubt.

IV. ACCURACY AND RATIONALITY REVISITED

It is, indeed, an awesome matter to condemn another as a criminal offender to be exposed to the rigors of the criminal sanction. It is to the credit of our civilization that almost continually for a century we have striven to increase the fairness and impartiality of the process. In one sense, the contemporary dispute concerning the nature of the constitutional requirement of proof beyond reasonable doubt is another manifestation of that concern for fairness and impartiality.

That dispute has taken us, though, into a new realm—that of the jury's deliberative process. In pursuing the values of fairness and impartiality in this new realm, care must be taken to accommodate the nuances of the setting. Rationality can be pursued as a surrogate for accuracy, and much of the criminal process is structured with that in mind. The matrix of errors probably can be affected by allocations of burdens of persuasion that reflect fundamental values. These are, however, different matters, and our concerns for "rational" decisionmaking and "accuracy" should not blind us to that fact.

Indeed, the present chaotic state of the general area of burdens of persuasion in criminal cases is attributable more to the lack of careful analysis than to any other single factor. From one perspective, this is not surprising. We are dealing with a relatively new area, and one that rests upon extraordinarily rich and complex analytical bases. In such a case, disagreements emanating from differing views of the emerging analytical structures as well as from differing values are to be expected, as a comparison of the views developed here with those of Professor Saltzburg may demonstrate. In my stream of criticism, however, I wish to reiterate that Professor Saltzburg's work also contains much wisdom. I have discussed only my major disagreements with him because statements of agreement provide little data. By contrast, the elaboration of my disagreements hopefully will serve to advance the dialogue in this area.