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THE NEED TO ABOLISH DEFENSES TO CRIME: A MODEST PROPOSAL TO SOLVE THE PROBLEM OF BURDEN OF PERSUASION

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INTRODUCTION

Allocation of the burden of persuasion for defensive claims in criminal cases[1] has caused difficulty for courts. Case law reveals a considerable diversity of results. Until the nineteenth century, that burden, both in common law and Continental legal systems, rested on the accused. Over the past century the burden has increasingly been imposed on the state, although in many situations it has remained on the accused. By and large, courts and legislatures have not arrived at principled reasons for their positions.

Both the common law and Continental systems have developed rules on burden of persuasion in criminal cases by analogy to civil litigation. During the twentieth century, Continental law has

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1. "Defensive claim" is used in this article to indicate factors traditionally labelled justifications or excuses, mitigating circumstances, and exceptions or exemptions written into a statute. It will not be used to include factors of a jurisdictional or procedural nature that might be asserted in defense, such as venue, former jeopardy, or tolling of a limitations period. It will not be used to include entrapment, which on one view of entrapment relates to *mens rea* (whether authorities planted the idea), but on another relates to appropriateness of police conduct (desire to keep police from generating crime). Only the more commonly asserted defensive claims will be discussed. For a more complete listing, see 1 P.H. ROBINSON, CRIMINAL LAW DEFENSES xxi-xxv (1984).

developed a new theory of defensive claims as factors that negate criminal liability. This theory yields consistent and appropriate results concerning the burden of persuasion. The common law generally follows the civil litigation model. In common law jurisdictions, no theory has emerged to determine whether to impose the burden on the accused or on the prosecution.

This article argues that common law jurisdictions should approach the issue from the standpoint that defensive claims negate criminal liability, and that, as a result, the state should bear the burden of persuasion as part of its general burden of persuasion on the elements of offenses. An important step in this direction would be to eliminate altogether the concept of a "defense" to crime.

I. Burden of Persuasion in Common Law Countries

In England, the accused obtained in 1702 the right to bring witnesses into court and have them testify under oath.[2] A rule emerged by analogy with civil cases that the accused, as the party asserting a defense, must carry the burden of persuasion.[3] This rule was carried over in England's colonies.[4]

In the late nineteenth century, a number of courts in the United States began to require the state to disprove defensive claims.[5] In a case involving an insanity plea, the New York Court of Appeals imposed the burden of persuasion on the state, ruling that the state bears the burden of persuasion on all elements—including the sanity of the accused.[6]

The United States Supreme Court first faced the issue of burden of persuasion in federal court prosecutions in *Davis v. United*

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2. 1 Anne, stat. 2, ch. 9 (1702); T. Plucknett, A Concise History of the Common Law 436 (1956). On earlier moves in this direction, see 4 W. Blackstone, Commentaries on the Law of England 422-23 (1857) [hereinafter 4 W. Blackstone].

3. Regina v. Smith, 173 Eng. Rep. 441 (Nisi Prius 1837), 8 Carrington & Payne 160 (jury charge: accused "must satisfy the jury" that killing was in self-defense). *See also* J. Bentham, A Treatise of Judicial Evidence 2 (M. Dumont ed. 1825) (same considerations obtain in civil and criminal law as regards proof of facts).

4. *See, e.g.*, Commonwealth v. York, 50 Mass. (9 Met.) 93, 117 (1845)(in homicide case the burden of persuasion is on accused to show provocation by preponderance of evidence). *But see id.* at 123-34 (maintaining that if jury entertains reasonable doubt on provocation, they must acquit, and arguing that case law in England and United States supports that view) (Wilde, J., dissenting).

5. *See generally* cases discussed in Davis v. United States, 160 U.S. 469, 481-83, 488-92 (1895). *See also* Mullaney v. Wilbur, 421 U.S. 684, 694-96 (1975).

6. People v. McCann, 16 N.Y. 58, 65-66 (1857).

States.[7] The Court decided that the government bears the burden of persuasion to negate the defense of insanity.[8] *Davis* has been applied by federal courts to other defensive claims.[9] Some states similarly have imposed the burden of persuasion on the state for all defensive claims. Other states are selective, imposing the burden on the state for only certain defenses. Nearly all states require the state to negate the "justifications" of self-defense,[10] defense of another,[11] defense of property,[12] and defense of habitation,[13] and most require the state to negate necessity[14] and provocation.[15]

Many states impose the burden on the accused for defenses commonly characterized as "excuses"[16]—duress,[17] intoxication,[18] and insanity.[19] In the wake of the *Hinckley* case,[20] the United

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7. 160 U.S. 469 (1895).

8. *Id.* at 487-88.

9. Johnson v. United States, 291 F.2d 150, 155-56 (8th Cir. 1961) (coercion); Frank v. United States, 42 F.2d 623, 628-29 (9th Cir. 1930) (self-defense).

10. Martin v. Ohio, 480 U.S. 228, 236 (1987) (only Ohio and South Carolina impose burden of persuasion on accused). *But see* South Carolina Supreme Court cases imposing burden on state: State v. Bellamy, 293 S.C. 103, 359 S.E.2d 63 (1987); State v. Glover, 284 S.C. 152, 326 S.E.2d 150 (1985); State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984). *See also* 2 P.H. ROBINSON, *supra* note 1, § 132, at 99-100; Quigley, *Ohio's Unique Rule on Burden of Persuasion for Self-Defense: Unraveling the Legislative and Judicial Tangle*, 20 U. TOL. L. REV. 105 (1988); Annotation, *Homicide: Modern Status of Rules as to Burden and Quantum of Proof to Show Self-Defense*, 43 A.L.R. 3d 221, 226-27 (1972).

11. 2 P.H. ROBINSON, *supra* note 1, § 133, at 104.

12. *Id.* § 134, at 108-09.

13. *Id.* § 135, at 111-12.

14. *Id.* § 124(b), at 47. *But see* State v. Diana, 24 Wash. App. 908, 604 P.2d 1312 (1979); People v. Condley, 138 Cal. Rptr. 515, 519-20, 69 Cal. App. 3d 999, 1008-1009 (1977), *cert. denied*, 434 U.S. 988 (1977).

15. Wilbur v. Mullaney, 421 U.S. 684, 696 (1975).

16. The courts typically do not articulate a distinction between "justifications" and "excuses" for burden of persuasion purposes. The classification made in the text is the author's. Fletcher bemoans the lack of a distinction between justification and excuse in common law analysis. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 954-57 (1985). *See also* Quigley, *The Common Law's Theory of Criminal Liability: A Challenge from Across the Atlantic*, 11 WHITTIER L. REV. 479 (1989).

17. 22 C.J.S. *Criminal Law* § 52 (1989); 2 P.H. ROBINSON, *supra* note 1, § 177(a), at 350-51.

18. 22A C.J.S. *Criminal Law* § 693 (1989); 1 P.H. ROBINSON, *supra* note 1, § 176(b), at 340-41. When intoxication is deemed to negate an element, generally for "specific intent" offenses, the burden of persuasion is on the state. 1 P.H. ROBINSON, *supra* note 1, § 65(a), at 293-94.

19. Annotation, *Modern Status of Rules as to Burden and Sufficiency of Proof of Mental Irresponsibility in Criminal Case*, 17 A.L.R. 3d 146, 195 (1968).

20. United States v. Hinckley, 529 F. Supp. 520 (D.D.C. 1982); R. BONNIE & P. LOW, THE TRIAL OF JOHN W. HINCKLEY, JR. (1986); *Hinckley Acquittal Brings Moves to Change Insanity Defense*, N.Y. Times, June 24, 1982, at D21, col. 1 (proposals in various states to limit insanity defense).

States Congress changed the burden of persuasion on insanity for the federal courts, imposing it on the accused "by clear and convincing evidence."[21] A few states require the accused to bear the burden of persuasion on mistake of fact[22] and victim's consent.[23]

A possible reason for the difference in treatment between defenses deemed "excuses" and defenses deemed "justifications" is that justifications are looked upon more favorably than excuses.[24] With an excuse the conduct is merely tolerated,[25] but "in the case of 'justification' what is done is regarded as something which the law does not condemn, or even welcomes."[26] A justified act is viewed as being done of right, as where one repels an assailant.[27] The distinction breaks down, however, if a person acting under a justification defense misperceives the danger. One who reasonably believes another to be attacking is not "justified" in killing when there was in fact no attack. Rather, the actor is "excused" on grounds of misperception.[28] States do not distinguish between these two types of self-defense as regards the burden of persuasion; rather, they provide a single rule for burden of persuasion on self-defense regardless of whether the attack was actual or only apparent.

The distinction between justification and excuse regarding the burden of persuasion is further eroded by the fact that in certain situations excusing circumstances are deemed in common law jurisdictions as negating *mens rea*, with the burden of persuasion borne by the state to negate them.[29] This is the doctrine of "specific intent," under which intoxication and mental impairment (short of insanity) negate the *mens rea* required in certain of-

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21. Insanity Defense Reform Act of 1984, ch. 4, 98 Stat. 2057, § 20 (codified as amended at 18 U.S.C. § 17(b) (1988)). In federal prosecutions, the burden of persuasion remains on the government for defensive claims other than insanity.

22. *See, e.g.*, DEL. CODE ANN. tit. 11, § 304(a) (1987) (accused must prove affirmative defense) and DEL. CODE ANN. tit. 11, § 441(1) (1987) (mistake of fact is affirmative defense).

23. *See, e.g.*, DEL. CODE ANN. tit. 11, § 304(a) (1987) (accused must prove affirmative defense) and DEL. CODE ANN. tit. 11, § 451(2) (1987) (consent negating element is affirmative defense).

24. H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 119-20 (1968).

25. Fletcher, *Should Intolerable Prison Conditions Generate a Justification or an Excuse for Escape?*, 26 UCLA L. REV. 1355 (1979).

26. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 13 (1968) (citation omitted).

27. *See* Fletcher, *supra* note 25, at 1355.

28. Erwin v. State, 29 Ohio St. 186, 198-99 (1876). *Cf.* G. FLETCHER, *infra* note 45, § 10.5.

29. As will be argued below, this is an appropriate analysis and should be applied generally to defensive claims.

fenses—namely, the premeditation and deliberation required in first degree murder,[30] the intent required in larceny to deprive another of property,[31] the intent required in burglary upon entering a dwelling to "commit a felony therein,"[32] and the intent required in aggravated assault to kill, rob, or rape.[33] All these situations require what is recognized as a particularly complex variety of cogitation that can be negatived by intoxication or mental impairment. In larceny, the actor must actually believe he is depriving another, and if he does not for any reason so believe, he lacks the required *mens rea*, whether the reason be intoxication, mental impairment, mistake as to ownership, belief that the property is abandoned, or any other. In these situations the state is not relieved of its burden of establishing the "specific intent" element.[34]

Placing the burden of persuasion on the accused has repeatedly been challenged in the courts as a violation of due process of law. The United States Supreme Court has held that the state may not impose a burden of persuasion on an accused person to negate an element of an offense,[35] but may do so on factors relevant to guilt not included as elements.[36]

In England, the House of Lords broke from the traditional rule only in 1935, deciding that the state bears the burden of persuasion to negate provocation when asserted against a murder charge, and that the accused should be acquitted if reasonable doubt remains as to provocation.[37] The English courts have followed this approach for all defensive claims except insanity.[38]

Thus, in the English courts and in the United States federal courts, the state generally bears the burden of persuasion to negate

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30. People v. Gorshen, 51 Cal. 2d 716, 722-23, 336 P.2d 492, 495-96 (1959)(mental illness and intoxication held to negate premeditation and deliberation).

31. W. LaFave & A. Scott, Criminal Law 224 (2d ed. 1986).

32. *Id.*

33. *Id.*

34. People v. Gorshen, 51 Cal. 2d 716, 732-33, 336 P.2d 492, 499-500 (1959).

35. Mullaney v. Wilbur, 421 U.S. 684 (1975).

36. Martin v. Ohio, 480 U.S. 228 (1987); Patterson v. New York, 432 U.S. 197 (1977).

37. Mancini v. D.P.P., 1942 App. Cas. 1; Woolmington v. D.P.P., 1935 App. Cas. 462. Provocation was the defensive claim in both cases.

38. G. Williams, Criminal Law: The General Part 910 (1961); Bullard v. The Queen, 1957 App. Cas. 635, 639 (self-defense); Chan Kau v. The Queen, 1955 App. Cas. 206, 211 (self-defense). This approach is followed in other countries using English evidence law. *See* L. Hoffmann, South African Law of Evidence 61-62 (1963); 1 C. Lansdown, W. Hoal & A. Lansdown, Gardiner and Lansdown, South African Criminal Law and Procedure 455-70 (1957); A. Popple, Canadian Criminal Evidence 416-21 (1954).

defensive claims, except insanity, if such a claim involves an element of the offense. State courts vary in their approaches as to what constitutes an element. The different treatment of the states appears to hinge on those defenses which are excuses and those which are justifications. However, as noted above, this distinction does not support different allocations of the burden of persuasion.

II. Burden of Persuasion in Continental European Law

Historically, the accused bore a general burden of refuting a criminal charge in Continental European legal systems. In the system of procedure that developed on the Continent from the thirteenth century, known as the inquisitorial system,[39] the accused was obliged to prove innocence. The procedure was *in camera*, and torture was commonly used to elicit a confession.[40]

During the Enlightenment of the eighteenth century, the accused was relieved of the burden of proving innocence. However, as in England where the law obtained by analogy to civil litigation, the accused continued to bear the burden of persuasion on defensive claims.[41] For example, the accused bore the burden of persuasion on self-defense under the code of Emperor Charles V of 1532 (the "Carolina"),[42] the Ordinance of Louis XIV (1670),[43] the Swedish General Code of Laws of 1734,[44] and the Prussian Criminal Ordinance of 1805.[45]

With the French Revolution, public trials—held before juries in serious cases—were instituted to supplement the *in camera* ju-

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39. M.S. Strogovich, Uchenie o material'noi istine v ugolovnom protsesse [A Study on Material Truth in Criminal Procedure] 261 (1947).

40. A. Esmein, A History of Continental Criminal Procedure 155-61 (1913); 1 A. Morales, Derecho Procesal Penal 24 (1976).

41. Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 Yale L.J. 880, 899 (1968).

42. Die Peinliche Gerichtsordnung Kaiser Karl S. V. Constitutio Criminalis Carolina (1532), art. 141, *reprinted in* 1 J. Kohler, Die Carolina und Ihre Vorgängerinnen. Text, Erläuterung, Geschichte 72 (1900).

43. E. Bonnier, Traité théorique et pratique des preuves en droit civil et en droit criminel 23 (1888) (discussing L'ordannance de 1670 (tit. xxviii, arts. 1, 2)).

44. Waaben, *Criminal Responsibility and the Quantum of Proof*, in 9 Scandinavian Studies in Law 243, 252 (1965).

45. Criminal Ordinance art. 367 (Prussia 1805), *reprinted in* G. Fletcher, Rethinking Criminal Law § 7.2.2, at 524 (1978) ("[O]ne having the proof of the act against him is subject to the statutory punishment unless he proves that under the circumstances the act was not an offense.").

dicial inquisition.[46] At the trial, the accused was presumed innocent until the contrary was proved—a major innovation—and the accused was not required to prove innocence. The procedure established for these trials borrowed heavily from the *in camera* judicial inquisition. In such a proceeding, the trial judge is provided before trial with documents compiled by the judge who conducted the pre-trial inquisition[47] and, operating from knowledge of them, directs the trial. The trial judge establishes the order of proof-taking, and conducts the primary questioning of witnesses.[48] The accused is typically interrogated first.[49] The judge, as "second prosecutor,"[50] is actively involved in fact-finding.[51]

In such a system, burdens of persuasion are less clearly defined than in the English system, in which the state and the accused each present a case.[52] The terms "burden of production" and "burden of persuasion" have not entered the Continental legal lexicon.[53] Because of the judge's active role in eliciting information, there is disagreement as to whether the burden of persuasion rests with the prosecutor. One authority argues that "[s]ince the Ger-

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46. Stepan, *Possible Lessons from Continental Criminal Procedure*, in AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, THE ECONOMICS OF CRIME AND PUNISHMENT 181, 184-85 (1973).

47. M.L. IAKUB, DEMOKRATICHESKIE OSNOVY SOVETSKOGO UGOLOVNO-PROTSESSUAL'NOGO PRAVA [DEMOCRATIC FOUNDATIONS OF SOVIET CRIMINAL PROCEDURE LAW] 120 (1960); Herrmann, *The German Criminal Justice System: The Trial Phrase—Appellate and Review Proceedings*, in ASSOCIATION INTERNATIONALE DE DROIT PÉNAL, THE CRIMINAL JUSTICE SYSTEM OF THE FEDERAL REPUBLIC OF GERMANY 65, 70 (1981).

48. Herrmann, *supra* note 47, at 65-66; Stepan, *supra* note 46, at 190. *But see* CODE OF CRIMINAL PROCEDURE art. 321 (Belg. 1878) (31st ed. LES CODES, J. Servais & E. Mechelynck 1965); CODE OF CRIMINAL PROCEDURE art. 331 (Fr. 1960) (presiding judge sets order of witnesses); STATUTE ON CRIMINAL PROCEDURE art. 700 (Russia 1892) (witnesses called at request of accused are heard after witnesses called at request of prosecutor).

49. Stepan, *supra* note 46, at 190. *See also* CODE OF CRIMINAL PROCEDURE arts. 243-244 (Ger. 1879); ACT I OF 1973 ON CRIMINAL PROCEDURE art. 199(1) (Hung.); STATUTE ON CRIMINAL PROCEDURE arts. 680-684 (Russia 1892).

50. G. WILLIAMS, PROOF OF GUILT 31 (1963).

51. Bonnier, *supra* note 43, at 79.

52. Berman & Quigley, *Comment on the Presumption of Innocence under Soviet Law*, 15 UCLA L. REV. 1230, 1232 (1968). M.S. STROGOVICH, *supra* note 39, at 263 (noting that a corollary of the burden of persuasion requirement in English law is the fact that the court can order a directed verdict for the accused at the end of the prosecution case, a procedure not found in Continental law).

53. Berman & Quigley, *supra* note 52, at 1232; Herrmann, *supra* note 47, at 74. A distinction is made by some Soviet authors between *bremia dokazyvaniia* (burden of production) and *obiazannost' dokazyvaniia* (burden of persuasion), and by some French authors between *charge de l'allégation* (burden of production) and *charge de la preuve* (burden of persuasion). *See, e.g.*, Patarin, *Le particularisme de la théorie des preuves en droit pénal*, in G. STEFANI, QUELQUES ASPECTS DE L'AUTONOMIE DU DROIT PÉNAL 7, 31 (1956).

man trial judge has a legal duty to ascertain the facts and to search out the truth it would be wrong to speak of the burden of persuasion being on the prosecutor."[54] Others maintain that the burden is on the prosecutor alone, despite the court's activism in fact-finding.[55] One proponent of this view states that "the rule that the burden of proof rests on the prosecutor is combined with an active role for the court in investigation of the truth."[56] Proof burdens are less clear in "the inquisitorial system, whereas the adversary system, establishing a kind of closed field combat between the prosecutor and the accused, is much more like civil procedure."[57]

Continental courts did not take up the English practice of a judge instructing the jury on the law. Consequently, Continental courts do not clarify the burden of persuasion for the jury.[58] Triers of fact are asked to decide guilt or innocence simply by considering all the evidence.[59] In France, for example, an instruction is read to a jury before it retires, asking that they "seek out, in the sincerity of their conscience, what impression the evidence reported against the accused and the ground of his defense have made on their reason. The law asks them only the single question, which encompasses the full measure of their duties: 'Are you thoroughly convinced?' "[60]

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54. Herrmann, *supra* note 47, at 74. *Accord* V.D. ARSEN'EV, VOPROSY OBSHCHEI TEORII SUDEBNYKH DOKAZATEL'STV [ISSUES OF THE GENERAL THEORY OF EVIDENCE IN COURT] 59-60 (1964) (court has "basic obligation of proving," both investigating and evaluating, while prosecutor's proof obligation aids the court in the court's basic obligation); M.A. CHEL'TSOV, SOVETSKII UGOLOVNYI PROTSESS [SOVIET CRIMINAL PROCEDURE] 127 (1962); M.L. IAKUB, *supra* note 47, at 117-18; Patarin, *supra* note 53, at 21.

55. V.M. SAVITSKII, GOSUDARSTVENNOE OBVINENIE V SUDE [THE STATE ACCUSATION IN COURT] 169-85 (1971).

56. M.S. STROGOVICH, *supra* note 39, at 263.

57. E. BONNIER, *supra* note 43, at 22; Patarin, *supra* note 53, at 21 (The court's duty to seek incriminating evidence beyond that presented by prosecution "as a practical matter eases the [prosecution's] burden of proof.").

58. J. LANGBEIN, COMPARATIVE CRIMINAL PROCEDURE: GERMANY 79 (1977). French courts, for example, where self-defense has been raised at trial, do not pose to the jury a question about self-defense; the jury simply considers self-defense as relevant to the overall question of guilt. 1950 REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARÉ 304. In Brazilian practice, however, the judge separately poses the question of self-defense to the jury. *Id.*

59. *See* LAW ON CRIMINAL PROCEDURE art. 357 (Cuba 1983); ACT I OF 1973 ON CRIMINAL PROCEDURE art. 5(3) (Hung.); STATUTE ON CRIMINAL PROCEDURE art. 766 (Russia 1892); CODE OF CRIMINAL PROCEDURE art. 741 (Spain 1882) (LEY DE ENJUICIAMIENTO CRIMINAL, L. Lopez-Puigcerver 1959).

60. CODE OF CRIMINAL PROCEDURE art. 353 (Fr. 1960). A similar instruction is read to jurors under CODE OF CRIMINAL PROCEDURE art. 342 (Belg. 1878) (31st ed. LES CODES, J. Servais & E. Mechelynck 1965).

In the wake of the reforms emanating from the French Revolution, Continental law developed a rule that the accused bear the burden of persuasion on defensive claims, despite the less clear procedural roles of prosecution and defense. This rule was derived from civil litigation, which requires that the party asserting a proposition must prove it.[61] As in English law, the burden on the accused carried a lesser standard of proof (probability) than the standard to which the prosecution was held (certainty).[62]

Nonetheless, the burden on the accused under Continental procedure is lighter than in common law procedure. Imposition of the burden is less onerous for the accused in Continental procedure because of the different standard of certainty required for indictment. In common law procedure, indictment can be brought on the basis of probable cause, whereas in Continental procedure a higher degree of probability of guilt is required.[63] Moreover, in the Continental system, a pre-trial investigation is conducted that hears both inculpating and exculpating evidence;[64] in common law procedure, on the other hand, a grand jury investigation need assess only inculpating evidence and typically does not hear exculpating evidence. Thus, in common law procedure it is more likely that an accused person against whom evidence is weak will be required to stand trial and to shoulder a burden of persuasion as to defensive claims.

During the twentieth century, a significant trend in Continental procedure has occurred which precludes imposing the burden of persuasion on the accused.[65] German courts took the lead, having established by the turn of the century that the burden of persuasion on defensive claims rested on the state.[66] This rule became general in Scandinavia[67] as well as Japan, which drew heavily on

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61. Fletcher, *supra* note 41, at 886; Patarin, *supra* note 53, at 9-10, 21.

62. E. BONNIER, *supra* note 43, at 80.

63. Berman & Quigley, *supra* note 52, at 1236-37; V.Z. LUKASHEVICH, GARANTII PRAV OBVINIAEMOGO V SOVETSKOM UGOLOVNOM PROTSESSE [GUARANTEES OF THE RIGHTS OF THE ACCUSED IN SOVIET CRIMINAL PROCEDURE] 60 (1959)(investigator must come to "firm conclusion" as to guilt); Tadevosian, *K voprosu ob ustanovlenii material'noi istiny v sovetskom protsesse [To the Issue of Establishing Material Truth in Soviet Procedure]*, 6 SOVETSKOE GOSUDARSTVO I PRAVO [SOVIET STATE AND LAW] 65, 72 (1948) (investigator and procurator must be sure of guilt).

64. Stepan, *supra* note 46, at 187.

65. Damaska, *Evidential Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 549 (1973).

66. Fletcher, *supra* note 41, at 910-11.

67. Waaben, *supra* note 44, at 252 (The Swedish Criminal Code of 1864 omitted the

both common law and Continental law.[68]

Soviet law also forbids the court "to shift the burden of proof to the accused."[69] If the accused raises a defensive claim, he is not required to prove it.[70] "The court must verify this version and may not reject it without sufficient grounds."[71] Court practice imposes on the state the burden of persuasion to negate a defense,[72] and the USSR Supreme Court has resisted shifting the burden of proof on a defense claim to the accused.[73] For example, while common law jurisdictions treat provocation as a mitigating factor with respect to murder, under the Soviet codes a killing under provocation is an offense separate from murder.[74] The prosecutor charges the accused with provocation-killing rather than with murder,[75] and therefore the accused is not required to bear the burden of persuasion for provocation. The prosecutor must prove not only that the killing was intentional but that there was provocation. If

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language that had imposed the burden on the accused.); J. ANDENAES, THE GENERAL PART OF THE CRIMINAL LAW OF NORWAY 94-95 (1965).

68. S. DANDO, JAPANESE CRIMINAL PROCEDURE 191-92 (1965).

69. CODE OF CRIMINAL PROCEDURE art. 20 (RSFSR), in SOVIET CRIMINAL LAW AND PROCEDURE, THE RSFSR CODES (H. Berman & J. Spindler trans. 2d ed. 1972) [hereinafter RSFSR CODES]; FUNDAMENTALS OF CRIMINAL PROCEDURE art. 14 (USSR 1958). Many authorities deny that Soviet law is part of the Continental (civil law) system. For an argument that this view is incorrect, see Quigley, *Socialist Law and the Civil Law Tradition*, 37 AM. J. COMP. L. 781 (1989).

70. 1 TEORIIA DOKAZATEL'STV V SOVETSKOM UGOLOVNOM PROTSESSE: CHAST' OBSHCHAIA [THEORY OF EVIDENCE IN SOVIET CRIMINAL PROCEDURE: THE GENERAL PART] 473 (N.V. Zhogin ed. 1966).

71. V.K. LUKASHEVICH, *supra* note 63, at 69-70, citing Judgment of Oct. 20, 1951 (USSR Supreme Court), 6 SUDEBNAIA PRAKTIKA VERKHOVNOGO SUDA SSSR (COURT PRACTICE OF THE SUPREME COURT OF THE USSR) 17 (1952).

72. Larin, *O nedopustimosti perelozheniia obiazannosti dokazayvaniia na obviniaemogo* [*The Inappropriateness of Shifting the Burden of Proof to the Accused*], 3 SOVETSKOE GOSUDARSTVO I PRAVO [SOVIET STATE AND LAW] 122, 124-25 (1965)(case of self-defense; notes that some lower courts incorrectly imposed burden of persuasion on accused).

73. V.K. LUKASHEVICH, *supra* note 63, at 70. *But see* A. VYSHINSKII, TEORIIA SUDEBNYKH DOKAZATEL'STV V SOVETSKOM PRAVE [THEORY OF EVIDENCE AT TRIAL IN SOVIET LAW] 242-44 (2d ed. 1950) (with *caveat*, *id.* at 246, that court and prosecutor must help accused muster proof); Tadevosian, *supra* note 63, at 71 (burden of persuasion on accused, with *caveat* that if accused is unable to muster enough proof the court should assist). Vyshinsky's 1950 position is criticized in V.D. ARSEN'EV, *supra* note 54, at 67, 76-77; T. SZABÓ, UNIFICATION AND DIFFERENTIATION IN SOCIALIST CRIMINAL JUSTICE 156 (1978); Piontkovskii & Chkhikvadze, *Ukreplenie sotsialisticheskoi zakonnosti i nekotorye voprosy teorii sovetskogo ugolovnogo prava i protsessa* [*Strengthening Socialist Legality and Certain Issues of the Theory of Soviet Criminal Law and Procedure*], 4 SOVETSKOE GOSUDARSTVO I PRAVO [SOVIET STATE AND LAW] 26, 37 (1956).

74. RSFSR CODES, *supra* note 69, art. 104.

75. On substantive definitions of provocation killing in German, Soviet, and French law, see G. FLETCHER, *supra* note 45, at § 4.5.1.

the prosecutor fails in this proof, the accused must be acquitted of provocation-killing.

While most Continental countries require the state to negate all defensive claims, some Continental countries are less uniform. In France, some scholars maintain that justification and excuse negate elements of an offense and argue on that basis that the state must negate defenses.[76] Others maintain that the burden of persuasion should fall on the accused.[77] The Court of Cassation has stated that the state must establish the elements of an offense and the absence of all factors that could negate them.[78] There are court decisions imposing the burden of persuasion on the state for self-defense,[79] but on the accused for duress.[80] There are conflicting decisions regarding insanity.[81]

Italian court practice is similarly varied. In Italy,

> it is unsettled in both the doctrine and the case law as to whether the court must convict or acquit where there is doubt as to the existence of a justifying ground. According to the Court of Cassation, the accused bears the onus of fully proving the existence of a justifying ground, in the absence of which the court must convict. However, the prevalent approach taken by the courts of first instance, and sometimes accepted by Cassation, is that the accused does not bear the

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76. 2 C. LOPEZ-PUIGCERVER, CURSO DE DERECHO PROCESAL PENAL (1962) (noting split of opinion among scholars); 2 G. STEFANI & G. LEVASSEUR, DROIT PÉNAL GÉNÉRAL ET PROCÉDURE PÉNALE 21 (1964); Patarin, *supra* note 53, at 31.

77. 2 P. BOUZAT & J. PINATEL, TRAITÉ DE DROIT PÉNAL ET DE CRIMINOLOGIE 914 (1970); H. DONNEDIEU DE VABRES, TRAITÉ DE DROIT CRIMINEL ET DE LÉGISLATION PÉNALE COMPARÉE 714 (1947); 1 R. GARRAUD, TRAITÉ THÉORIQUE ET PRATIQUE DU DROIT PÉNAL FRANÇAIS 608 (rev. ed. 1928); 2 C. LOPEZ-PUIGCERVER, *supra* note 76, at 227 (burden on involuntariness of an act and on insanity should be borne by accused, since the contrary is the more frequent situation—an approach similar to common law presumption of sanity); 1 R. MERLE & A. VITU, TRAITÉ DE DROIT CRIMINEL 525 (3d ed. 1978); *but see id.* at 526 (burden of persuasion on state where defensive force used against a nighttime intruder in one's home, or defensive force used against a robber); 2 G. STEFANI & G. LEVASSEUR, *supra* note 76, at 21 (1964); POMPE, *La preuve en procédure pénale*, 1961 REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARÉ 269, 283.

78. 2 P. BOUZAT & J. PINATEL, *supra* note 77, at 914.

79. 2 G. STEFANI & G. LEVASSEUR, *supra* note 76, at 21, citing Judgment of Feb. 19, 1959, Cour de cass., Fr., 1959 Dalloz 161.

80. 2 G. STEFANI & G. LEVASSEUR, *supra* note 76, at 21 (citing as to duress Judgment of Dec. 29, 1949, Cour de cass., Fr., 1950 J.C.P. II 5614 note Magnol). Some cases put the burden on accused for necessity. Patarin, *supra* note 53, at 30.

81. 2 G. STEFANI & G. LEVASSEUR, *supra* note 76, at 21 (courts operate from a presumption of sanity that accused must overcome); 1951 REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARÉ 305 (imposing burden of persuasion on state).

> onus of conclusively proving the justifying ground because it is the court, according to the principle that it must ascertain the truth, that evaluates the results of the evidence to establish the existence of the exemption. Thus, where it is ascertained that the accused committed the alleged fact but the court remains in doubt as to a ground excluding punishability, it must concede the qualified acquittal of 'insufficiency of evidence.'[82]

In the future, international human rights law may affect the allocation of the burden of persuasion in Europe. As of yet, however, it has done so only marginally. Human rights standards require fair trial proceedings, including a presumption of innocence.[83] The European Convention for the Protection of Human Rights and Fundamental Freedoms,[84] to which most western European states adhere, is binding on participating nations and constitutes domestic law for many of them. The presumption of innocence norm presumably precludes imposing the proof of innocence on the accused,[85] but it is not clear whether this presumption precludes imposing the burden of persuasion on the accused for defensive claims. However, in adhering to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Malta filed a declaration with respect to Article 6(2) (presumption of innocence) which stated that it did not understand the article to "preclude any particular law from imposing upon any person charged under such law the burden of proving particular facts."[86]

The European Commission of Human Rights, which administers the Convention, has not squarely addressed this issue. The

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82. G. CERTOMA, THE ITALIAN LEGAL SYSTEM 277 (1985).

83. African Charter on Human and Peoples' Rights, June 27, 1981, art. 7(1)(b), *entered into force* Oct. 21, 1986, *reprinted in* 21 INT'L LEG. MAT. 58 (1982), *cited in* 7 HUMAN RIGHTS L. J. 404 (1986); American Convention on Human Rights, Nov. 22, 1969, art. 8(2), *entered into force* June 1978, Organization of American States, *Official Records OEA/SER.K/XVI/1.1*, Document 65, Rev. 1, Corr. 1, Jan. 7, 1970, *reprinted in* 9 INT'L LEG. MAT. 673 (1970); International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 14(2), *entered into force* March 23, 1976, 999 U.N.T.S. 171, *reprinted in* 6 INT'L LEG. MAT. 368 (1967); (European) Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 6(2), 213 U.N.T.S. 222, Europ. T.S. No. 5; Universal Declaration of Human Rights, G.A. Res. 217, art. 11(1) (1948).

84. (European) Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, Europ. T.S. No. 5.

85. M.S. STROGOVICH, *supra* note 39, at 260. *See, e.g.*, Patarin, *supra* note 53, at 14. "This presumption [of innocence] logically is reflected in an allocation of the burden of proof particularly favorable to the accused." *Id.*

86. F. JACOBS, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 113 (1975).

Commission was, however, presented with a complaint under Article 6(2) regarding a rebuttable statutory presumption. A man had been convicted in the United Kingdom of living off earnings of a prostitute under a statute which provided that "a man who lives with or is habitually in the company of a prostitute . . . shall be presumed to be knowingly living on the earnings of prostitution unless he proves the contrary."[87] The Commission found the presumption not to violate the presumption of innocence since it was "neither irrebuttable nor unreasonable."[88] The Commission stated, however, "that this form of provision could, if widely or unreasonably worded, have the same effect as a presumption of guilt."[89] Whether the Commission would require the prosecution to show some factual basis before an accused might be presumed not to have acted under a justification or excuse, and thus to have a burden of persuasion imposed on her or him, remains to be determined. At the very least, the presumption of innocence as understood in human rights law includes the concept *in dubio pro reo* (doubt favors the accused).[90]

Thus, some Continental countries firmly preclude the imposition of burdens of persuasion on the accused for defensive claims. England—and with it most of England's former colonies—has done so as well, except for the insanity defense. In contrast, the United States, which along with Germany led the move away from the traditional rule, varies considerably among jurisdictions and among defensive claims, as do some Continental countries.

III. Rationale for Allocating the Burden of Persuasion on Defensive Claims

The issue of the appropriate allocation of the burden of persuasion on defensive claims has rarely emerged from the realm of technical legal issues.[91] One instance in which it did occurred in the Soviet Union, where Stalin's attorney general Andrei Vyshinskii recommended, contrary to the then current case law, that the accused be required to prove any fact that would show innocence.

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87. X v. U.K. (decision of 19 July 1972), 42 Eur. Comm'n H.R. 135 (1973).

88. *Id.*

89. *Id.*

90. F. Jacobs, *supra* note 86, at 113; 2 C. López-Puigcerver, *supra* note 76, at 224; C. Roxin, Strafverfahrensrecht 79 (1983).

91. Fletcher, *supra* note 41, at 910-11 (issue did not draw great attention in Germany).

Vyshinskii relied on English law to support his position.[92] Several Soviet analysts criticized Vyshinskii's theory as one aimed at "increasing illegal repression."[93]

In the United States, public interest in the issue arose with respect to insanity following John Hinckley's plea of insanity after his attempted assassination of President Ronald Reagan. At that time, procedural rules favorable to the accused came under attack as part of a trend towards greater severity in criminal sanctions.[94]

The rule that an accused bear the burden of persuasion with respect to defensive claims developed by analogy to civil law, both on the Continent and in England. Roman law placed the burden of persuasion upon the party advancing an assertion; a similar rule prevailed in England.[95] In the late nineteenth century, British legal scholars challenged the importation of this rule from civil law to criminal law on the ground that different considerations arise in a criminal case. It was suggested that burdens of persuasion should be analyzed on the basis of the elements of offenses.[96]

This latter approach was taken by a number of the highest state courts in the United States in the late nineteenth century. The New York Court of Appeals, for example, held that when insanity is asserted,

> it still remains with the prosecution to show the existence of those requisites or elements which constitute the crime; and of these the intention or *malus animus* of the prisoner is the principal. . . . [I]f there be any doubt about the will, the faculty of the prisoner to discern between right and wrong, why should he be deprived of the benefit of it, when both the act and the will are necessary to make out the crime?[97]

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92. A. VYSHINSKII, *supra* note 73, at 242-44. Vyshinskii was using the English law prior to Woolmington v. D.P.P., 1935 App. Cas. 462, on which see *supra* text accompanying note 37.

93. Larin, *supra* note 72, at 123. *See also* Fletcher, *The Presumption of Innocence in the Soviet Union*, 15 UCLA L. REV. 1203, 1216-22 (1968)(viewing contention over presumption of innocence—with burden of proof as a sub-issue—as reflecting a struggle between the courts and the prosecuting authorities); Ginsburgs, *The Political Undercurrents of the Legal Dialogue*, 15 UCLA L. REV. 1226 (1968) (viewing that contention as reflecting an effort by the legal profession to improve the status of the accused).

94. Quigley, *The Function of the Criminal Sanction in Socialist Law: Implications for the United States*, 12 LEGAL STUDIES FORUM 175 (1988).

95. Fletcher, *supra* note 41, at 894-910.

96. D. HUSAK, PHILOSOPHY OF CRIMINAL LAW 206 (1987).

97. People v. McCann, 16 N.Y. 58, 65-67 (1857).

Citing the New York Court of Appeals, the United States Supreme Court in *Davis v. United States*[98] repudiated the civil law approach, stating:

> The plea of not guilty is unlike a special plea in a civil action, which, admitting the case averred, seeks to establish substantive grounds of defence by a preponderance of evidence. It is not in confession and avoidance, for it is a plea that controverts the existence of every fact essential to constitute the crime charged. Upon that plea the accused may stand, shielded by the presumption of his innocence, until it appears that he is guilty; and his guilt cannot in the very nature of things be regarded as proved, if the jury entertain a reasonable doubt from all the evidence whether he was legally capable of committing crime.[99]

The Court stated that insanity negates malice, the *mens rea* required for murder. "One who takes human life," wrote Justice Harlan for a unanimous court,

> cannot be said to be actuated by malice aforethought, or to have deliberately intended to take life, or to have a 'wicked, depraved, and malignant heart,' or a heart 'regardless of society duty and fatally bent on mischief,' unless at the time he had sufficient mind to comprehend the criminality or the right and wrong of such an act.[100]

Therefore, the Court placed the burden of persuasion on the state.[101]

German legal scholars developed a theory consistent with both

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98. Davis v. United States, 160 U.S. 469 (1895).

99. *Id.* at 485-86.

100. *Id.* at 485.

101. The *Davis* Court stated that:

> Giving to the prosecution, where the defence is insanity, the benefit in the way of proof of the presumption in favor of sanity, the vital question from the time a plea of not guilty is entered until the return of the verdict, is whether upon all the evidence, by whatever side adduced, guilt is established beyond reasonable doubt. If the whole evidence, including that supplied by the presumption of sanity, does not exclude beyond reasonable doubt the hypothesis of insanity, of which some proof is adduced, the accused is entitled to an acquittal of the specific offence charged. His guilt cannot be said to have been proved beyond a reasonable doubt—his will and his acts cannot be held to have joined in perpetrating the murder charged—if the jury, upon all the evidence, have a reasonable doubt whether he was legally capable of committing crime, or (which is the same thing) whether he wilfully, deliberately, unlawfully, and of malice aforethought took the life of the deceased.

Id. at 487-88.

the emerging German case law and the language of *Davis* to explain why the state must bear the burden of persuasion to negate defensive claims. These scholars argued that criminal liability consists of three elements: *Tatbestand* (the statutory definition of the offense), *Rechtswidrigkeit* (unlawfulness of the act), and *Schuld* (blameworthiness of the actor).[102] Under this view, all three elements must be established by the state for a conviction.[103] *Rechtswidrigkeit* encompassed justifications, while *Schuld* encompassed excuses; the two concepts thus included all defenses. Even though justification and excuse were separated from the statutory definition, the state was deemed to bear the burden of persuasion to negate them.

This unitary concept of criminal liability is reflected in the wording of Continental code provisions on defensive claims. The 1871 German Penal Code's chapter on exclusions from liability, for instance, is not headed "defenses" but "Grounds Excluding or Mitigating Punishment."[104] In the 1960 German Penal Code provisions on each such ground, the phraseology begins with "No act constitutes an offense if . . . ."[105] The 1975 German Penal Code refers to "one who . . . does not act unlawfully (*Rechtswidrig*)" in defining justifications,[106] and "one who . . . acts without blameworthiness (*Schuld*)" in defining excuses.[107] Other Continental codes contain similar language in the provisions on defensive claims. The USSR Code of Criminal Procedure provides that "an act is not a crime if . . . ."[108] The French penal code uses "it is not a crime if . . . ."[109] Italy's penal code uses "one who has . . . is not punishable."[110]

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102. J. HALL, LAW, SOCIAL SCIENCE AND CRIMINAL THEORY 168-73 (1982); Eser, *Justification and Excuse*, 24 AM. J. COMP. L. 621 (1976); Fletcher, *supra* note 41, at 914; Hall, *Comment on Justification and Excuse*, 24 AM. J. COMP. L. 638, 642 (1976) (reading *Tatbestand* to include *mens rea*, as generally accepted by German scholars).

103. Fletcher, *supra* note 41, at 915.

104. PENAL CODE (Ger. 1871).

105. STRAFPROZEBORDNUNG art. 52 (duress), art. 53 (defense of self or another), art. 54 (necessity) (W. Ger. 1960).

106. PENAL CODE art. 32 (self-defense), art. 34 (justified case of necessity) (W. Ger. 1975).

107. *Id.* art. 35 (excusable case of necessity).

108. RSFSR CODES, *supra* note 69, art. 13 (necessary defense), art. 14 (necessity). On the development of necessary defense in Soviet law, *see* Butler, *Necessary Defense, Judge-Made Law, and Soviet Man*, in LAW AFTER REVOLUTION: ESSAYS ON SOCIALIST LAW IN HONOR OF HAROLD J. BERMAN 99-130 (1988).

109. PENAL CODE art. 327 (governmental authority), art. 328 (legitimate defense) (Fr. 1832). *See* identical formulation in PENAL CODE art. 23 (governmental authority, legitimate defense, necessity) (Braz.).

110. PENAL CODE art. 52 (legitimate defense), art. 53 (public official using force to carry

These formulations all reflect the theory that a defensive claim negates elements of the offense. By contrast, the American Law Institute's Model Penal Code (MPC) defines defenses by stating that given conduct is "justifiable,"[111] and common law courts typically conceive defensive claims in the same manner.[112]

Like the Continental theorists and the United States Supreme Court in *Davis*, the House of Lords viewed defensive claims as negating offense elements when it abandoned the rule that had imposed the burden of persuasion for defensive claims on the accused. In its discussion of self-defense, the House of Lords declared that

> the onus remains throughout upon the prosecution to establish that the accused is guilty of the crime of murder and the onus is never upon the accused to establish this defence any more than it is for him to establish provocation or any other defence apart from that of insanity.[113]

The exception for insanity is instructive. The reason the English (and other Commonwealth) courts require the accused to prove insanity is that they consider an accused who kills while insane as having the *mens rea* required for murder; insanity excuses the accused for not having understood that it is wrong to kill.[114] Other defensive claims, however, are deemed to negate *mens rea*. The House of Lords view is reflected notably in the writings of H.L.A. Hart. Hart states that

> the individual is not liable to punishment if at the time of his doing what would otherwise be a punishable act he was unconscious, mistaken about the physical consequences of his bodily movements or the nature or qualities of the thing or

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out public duty), art. 54 (necessity) (Italy), in THE ITALIAN PENAL CODE (E. Wise & A. Maitlin trans. 1978).

111. MODEL PENAL CODE § 3.01(1) (Proposed Official Draft 1962).

112. *See* the curious formulation in HAW. REV. STAT. § 701-115 (1985), which defines a defense as "a fact or set of facts which negatives penal liability" but then provides that for those defenses denominated "affirmative" the burden of persuasion is on the accused.

113. Chan Kau v. The Queen, 1955 App. Cas. 206, 211 (self-defense). *See also* Bullard v. The Queen, 1957 App. Cas. 635, 639 (self-defense).

114. G. WILLIAMS, *supra* note 38, at 516-19. The courts focus on this second prong of the *M'Naghten* two-prong test for insanity. The first prong is that the accused did not understand the nature of the act, *i.e.*, did not understand that he was killing a human being. M'Naghten's Case, 8 Eng. Rep. 718 (1843). As Williams points out, this circumstance negates *mens rea*, and it is inappropriate therefore to impose the burden of persuasion on the accused. G. WILLIAMS, *supra* note 38, at 516-19.

> persons affected by them, or, in some cases, if he was subjected to threats or other gross forms of coercion or was the victim of certain types of mental disease.[115]

The Model Penal Code does not follow the theory of criminal liability reflected in the German theory, the *Davis* case, or the House of Lords case law. The MPC distinguishes between inculpatory and exculpatory factors.[116] It provides, regarding "a fact that is not an element of an offense,"[117] that "the burden of proving the fact is on the prosecution or defendant, depending on whose interest or contention will be furthered if the finding should be made."[118]

Moreover, the MPC states that "[n]o person may be convicted of an offense unless each element of such offense is proved beyond a reasonable doubt. In the absence of such proof, the innocence of the defendant is assumed."[119] But this safeguard, it states, "does not . . . require the disproof of an affirmative defense unless and until there is evidence supporting such defense."[120] Nor does it "apply to any defense which the Code or another statute plainly requires the defendant to prove by a preponderance of evidence."[121]

The MPC qualifies "defense" with the unfortunate adjective "affirmative."[122] This qualifier evokes the private law approach of confession and avoidance, and suggests that a defense is to be proved "affirmatively" by the party forwarding it.[123] A few state

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115. H.L.A. Hart, *Legal Responsibility and Excuses*, in H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 28 (1968). Hart indicates that this is not an exhaustive list of excusing conditions.

116. H. PACKER, *supra* note 24, at 105-07. Packer deems the dispute between the two approaches to definition of crimes and defenses "academic, in the worst sense of the word." *Id.* at 107.

117. MODEL PENAL CODE § 1.12(4) (Proposed Official Draft 1962).

118. *Id.* § 1.12(4)(a).

119. *Id.* § 1.12(1).

120. *Id.* § 1.12(2)(a).

121. *Id.* § 1.12(2)(b). Another Model Penal Code provision suggests, to the contrary, that the state must disprove a defensive claim. Section 1.13(9)(c) states that an absence of justification is an element of an offense, which should mean that the state must negate an asserted justification under the state's obligation to prove all elements. This provision has had little impact on state codes.

122. MODEL PENAL CODE § 3.01(1) (Proposed Official Draft 1962).

123. *See, e.g.*, Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 HARV. L. REV. 321, 327 (1980). *But cf.* Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1303 (1977)(noting that usage is not standardized).

codes have adopted the term "affirmative defense," which had not been used previously. These states distinguish "affirmative defenses," which place the burden of persuasion on the accused, from other "defenses," which place the burden of persuasion on the state.[124]

The MPC also uses *mens rea* terms that suggest that defenses are separate from the elements of offenses. It uses only four terms—purposely, knowingly, recklessly, and negligently—instead of the terms developed at common law—maliciously, wilfully, and unlawfully. Though archaic and imprecise, the latter terms imply both the unlawfulness of the act and the blameworthiness of the actor, and therefore they can readily be construed to be negated by defensive claims.[125] By contrast, the MPC's more clinical *mens rea* terms do not readily suggest that they could be negated by defensive claims. For example, under the MPC, one who kills in self-defense or under provocation may nonetheless kill purposely.[126]

Clearly, the choice of terminology from the MPC or common law is not dispositive. In fact, some jurisdictions which use MPC terminology place the burden of persuasion for defenses on the state. However, courts that use the Code's *mens rea* terminology can more easily conclude that defensive claims are unrelated to the elements.[127]

V. Defensive Claims and Elements of Offenses

Having abandoned the civil litigation model, the English and Continental courts generally place the burden of persuasion regarding defensive claims on the state. The rationale for this burden allocation is that such claims negate elements of the offense charged. In the United States, however, some defensive claims ne-

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124. *See, e.g.*, Haw. Rev. Stat. § 701-115(2) (1985), *construed in* State v. McNulty, 60 Haw. 259, 588 P.2d 438 (1978); *see also* N.Y. Penal Law § 25.00 (McKinney 1987). Some states, however, while denominating certain defenses "affirmative," place the burden of persuasion on the state. *See, e.g.*, Colo. Rev. Stat. § 18-1-407 (1986), *construed in* People v. Strock, 42 Colo. App. 404, 600 P.2d 91 (1979).

125. The English courts did not so read them until 1935. *See supra* text accompanying note 37. On the confusion of the terms used at common law, see Karlen, *Mens Rea: A New Analysis*, 9 U. Tol. L. Rev. 191, 209-11 (1978).

126. Model Penal Code § 3.04 (Proposed Official Draft 1962).

127. *See, e.g.*, Martin v. Ohio, 480 U.S. 228 (1987) (Ohio courts found that self-defense did not negate "purpose," the *mens rea* for murder under Ohio statute); Patterson v. New York, 432 U.S. 197 (1977) (New York courts found that provocation did not negate "purpose," the *mens rea* required for murder under New York statute).

gate elements of an offense, while others are deemed to be separate from the elements. The United States Supreme Court approved this disparate treatment of defenses in three cases that raised the issue whether due process was violated by a state's placing the burden of persuasion on the accused with respect to a defensive claim.[128] The Court stated that placing the burden of persuasion for a defensive claim on the accused violates due process if the claim involves an element of the offense but not if the claim involves a factor separate from the elements of the offense.[129] The Court deferred to state law as to which defensive claims negate elements of offenses.[130] Had United States courts followed *Davis*[131] or developed a theory like the one followed in Germany, this distinction would not have arisen because all defensive claims would have been viewed as negating elements.

Modeling defensive claims on civil litigation is inconsistent with the concept of criminal liability. As one authority has noted, "[i]f a defensive claim . . . negates criminal guilt, then shifting the burden of persuasion with respect to it onto the defendant simply means he has to prove his innocence."[132] The criminal justice system seeks to punish those whose conduct violates given norms. A person who kills in self-defense, for example, has not violated those norms and therefore has not actually committed that which the penal code prohibits. Such a person is not admitting the allegations and asserting exculpating extrinsic matter. Rather, such a person is denying having done that which the statute prohibits.

A. Defensive Claims and Mens Rea

There is no distinction in principle between an assertion of self-defense and an assertion of lack of *mens rea* based on any other reason, such as an assertion that the act was accidental; the accused may not be forced to bear the burden of persuasion to prove a killing accidental. In both scenarios, the accused denies having killed with the *mens rea* required for murder.

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128. Martin v. Ohio, 480 U.S. 228 (1987); Patterson v. New York, 432 U.S. 197 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975).

129. *See Martin*, 480 U.S. at 233; *Patterson*, 432 U.S. at 206-07; *Mullaney*, 421 U.S. at 696-702.

130. *See Martin*, 480 U.S. at 235; *Patterson*, 432 U.S. at 207-08; *Mullaney*, 421 U.S. at 690-91.

131. 160 U.S. 469 (1895).

132. Damaska, *supra* note 65, at 549.

In England, killing both accidentally ("by misadventure") and in self-defense developed along similar lines.[133] By a statute of Edward I, a person killing by misadventure or in self-defense was to be spared by the King, "if it please[d] him."[134] Accordingly, a jury would be asked to determine whether the homicide occurred by misadventure or in self-defense before the case was submitted to the King. The issue put to the jury was whether the killing was in self-defense and "not by felony or of malice aforethought."[135] Thus, a self-defensive killing was viewed as one committed without malice aforethought. Over time a jury's finding that a killing was in self-defense was considered an acquittal.[136]

Other defenses developed according to the same rationale. An act otherwise criminal that was committed under duress was considered to be done without a guilty mind.[137] Intoxication also came to be considered as negating a guilty mind,[138] as did mistake of fact.[139] Some courts, like the United States Supreme Court in *Davis*,[140] have suggested that insanity negates *mens rea*.[141] In *United States v. Currens*,[142] the United States Court of Appeals for the Third Circuit elaborated on this view.

> The concept of *mens rea*, guilty mind, is based on the assumption that a person has a capacity to control his behavior and to choose between alternative courses of conduct. . . . [W]here there is a reasonable doubt as to whether a particular person possesses capacity of choice and control, . . . there is a reasonable doubt as to whether he possessed the necessary guilty mind.[143]

Prior to *M'Naghten*,[144] English courts held that insanity ne-

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133. F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 484-85 (1911); 4 W. BLACKSTONE, *supra* note 2, at 209.

134. Statute of Gloucester, 6 Edw. I, ch. 9 (1278), *cited in* Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 980 n.19 (1932).

135. Sayre, *supra* note 131, at 996.

136. *Id.*

137. *Id.* at 1011. Duress was held not to be a defense to murder, an exception difficult to defend on principle.

138. *Id.* at 1013.

139. *Id.* at 1015-16.

140. 160 U.S. 469 (1895).

141. *See supra* note 97 and accompanying text.

142. United States v. Currens, 290 F.2d 751 (3d Cir. 1961).

143. *Id.* at 773.

144. 8 Eng. Rep. 718 (H.L. 1843).

gated *mens rea*.[145] They did not continue to do so after *M'Naghten* out of an unwillingness to expand their concept of *mens rea*. The first prong of the *M'Naghten* standard—lack of understanding of the nature of the act—clearly negates *mens rea*. But *mens rea* is not, in the view of the English courts, negated by the mental condition involved in the new and broader standard in the second prong—inability to understand the difference between right and wrong.

The Model Penal Code view that defensive claims are separate from the elements is shared by Herbert Packer, who maintained that insanity was unrelated to *mens rea*. According to Packer, to assert that insanity negates *mens rea* "is to confuse the idea of culpability, which is implicated in the insanity defense, with technical culpability requirements, which are not."[146] This view impedes the development of a coherent theory of criminal liability and facilitates imposition of burdens of persuasion on the accused.

The rationale that defenses negate *mens rea* remains influential regarding those defenses for which the state is deemed to bear the burden of persuasion. In one case, the Washington Supreme Court decided after construing legislation on *mens rea* that the burden of persuasion for self-defense rested on the state. The Washington statute at issue made intentional killing murder[147] and defined "intent" as an act done "with the objective or purpose to accomplish a result which constitutes a crime."[148] The court observed that this definition of "intent" requires that the killing be done "unlawfully." Finding that a killing in self-defense was a 'lawful' act under Washington law, the court ruled that self-defense effectively "negates the element of 'unlawfulness' contained within Washington's statutory definition of criminal intent."[149] The court added that "unlawfulness—including the absence of self-defense—is an essential ingredient of the crime charged. Since proof of self-defense negates the element of intent in first degree murder, requiring an accused to prove self-defense places on him or her the burden of proving absence of an unlawful criminal

145. Goldstein & Katz, *Abolish the "Insanity Defense"—Why Not?*, 72 Yale L.J. 853, 863 (1963).

146. H. PACKER, *supra* note 24, at 135.

147. WASH. REV. CODE ANN. §§ 9A.32.030(1)(a), 9A.32.050(1)(a) (1976).

148. *Id.* § 9A.08.010(1)(a) (1975).

149. State v. McCullum, 98 Wash. 2d 484, 495, 656 P.2d 1064, 1071 (1983). *See also* Note, *Self-Defense and the State's Burden of Proof under the Due Process Clause: State v. McCullum*, 20 WILLAMETTE L. REV. 179 (1984).

intent."[150]

B. Defensive Claims and Actus Reus

In addition to negating *mens rea*, defenses commonly labeled "excuse" may also negate the *actus reus* element of a crime. One aspect of *actus reus* is that an act must be voluntary.[151]

In a case involving a charge of nonsupport of a child, an Indiana court faced the issue of whether the accused should bear the burden of persuasion on the statutory defense of inability to pay.[152] The court decided that the elements of nonsupport were failing to provide support knowingly or intentionally, but that inability to pay was not an element. Accordingly, the court placed the burden of proving inability to pay on the accused.[153]

The court's reasoning errs in principle and reflects the negative consequences of the lack of a unitary theory of criminal liability in common law courts. A person unable to support children "knows" that she or he is failing to pay support and arguably fails "intentionally." However, an additional requirement of criminal liability is the voluntariness of the accused's act.[154] One unable to pay does not "voluntarily" fail to pay. Liability for omissions exists only where the actor has the ability to perform the act required by the statute.[155] The court should have found that inability to pay negated the *actus reus* of the offense.

In another case, the Indiana Supreme Court decided that insanity does not negate the *mens rea* required for murder, on the theory that the *mens rea* for murder in Indiana is "knowingly" whereas insanity as defined in Indiana includes inability to control behavior. The court stated:

> Even though the defendant may have the knowledge of what he is doing, he may be found not guilty if he, in fact, suffers from mental derangement to the extent of possessing an irre-

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150. *McCullum*, 98 Wash. 2d at 496, 656 P.2d at 1072.

151. P. BRETT, AN INQUIRY INTO CRIMINAL GUILT 180-83 (1963). *Cf.* MODEL PENAL CODE § 2.01 (Proposed Official Draft 1962). The term *actus reus* is of twentieth century origin in the common law literature. J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 222-23 (1960).

152. IND. CODE ANN. § 35-46-1-5(d) (Burns 1985).

153. Davis v. State, 481 N.E.2d 434, 436 (Ind. App. 1985), *noted in* INDIANA STATE BAR ASSN., 29 RES GESTAE 204 (1985).

154. IND. CODE ANN. § 35-41-2-1 (Burns 1985).

155. W. LAFAVE & A. SCOTT, *supra* note 31, at 208-09.

> sistible impulse. Thus, although 'knowingly' is an element necessary in the perpetration of a murder, the presence of that element does not negate the defense of insanity.[156]

This reasoning suffers from the same error that occurred in the child support case: Just as a person unable to provide support does not fail to pay voluntarily, a person unable to control his or her behavior as a result of insanity does not kill voluntarily. The essence of the defense is that the accused acted as the result of volitional impairment.[157] Thus, the defense negates the *actus reus* of murder.[158]

The involuntariness of an act, however, has been construed in closely related situations to negate the *actus reus* of an offense. A person who kills while unable to control bodily actions as the result of physical trauma,[159] epileptic seizure,[160] or because he or she is asleep or under hypnosis,[161] is not deemed to act voluntarily. Some have suggested that a practical concern has kept the courts from deciding that insanity negates *mens rea* or *actus reus*, pointing out that if the accused were simply acquitted, rather than acquitted for insanity, there would be no procedure for compulsory confinement in a mental institution.[162] Yet, this consideration hardly justifies the consequence—that an accused asserting insanity must prove innocence.

Actus reus may also be negated by the defense of duress. Specifically, a person acting under duress does not act voluntarily.[163] As the Supreme Judicial Court of Massachusetts noted, "if the effect of duress . . . is to reduce the person to a state of involuntariness or automatism . . . then duress may be seen as removing the very basis of criminal culpability."[164] The court accordingly ruled

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156. Ward v. State, 438 N.E.2d 750, 753 (1982).

157. H. PACKER, *supra* note 24, at 132-33.

158. *See* Goldstein & Katz, *supra* note 145, at 868 (suggesting that *mens rea* and voluntariness of act may not be adequate to single out those who ought not to be held criminally responsible). Packer states that the volitional impairment with insanity is less substantial than with epileptic seizure. H. PACKER, *supra* note 24, at 133.

159. People v. Newton, 8 Cal. App. 3d 359, 87 Cal. Rptr. 394 (1970) (accused in shock as result of gunshot wound to the stomach).

160. H. PACKER, *supra* note 24, at 133.

161. MODEL PENAL CODE §§ 2.01(2)(b), (c) (Proposed Official Draft 1962).

162. Goldstein & Katz, *supra* note 145, at 868.

163. R. MERLE & A. VITU, *supra* note 77, at 705.

164. Commonwealth v. Robinson, 382 Mass. 189, 203-04, 415 N.E.2d 805, 814 (1981) (citations omitted).

that the state bear the burden of persuasion for duress.[165] This is consistent with the common law rule that the coercer in a duress situation is liable as a principal for the act committed by the coerced person. The reason for this rule is that the coerced person's act is deemed involuntary.[166]

Actus reus is also implicated in statutory exemptions from liability. For example, a statute on distribution of narcotics may exempt pharmacists or physicians who distribute narcotics under specified circumstances, or the statute may make it an offense to practice medicine without a license. A consideration often suggested to warrant imposing a burden of persuasion on the accused with respect to statutory exemptions from liability is that such matters are typically better known to the accused than to the state. Common law jurisdictions typically impose this burden of persuasion on the accused, at least where the exception is not included in the statutory definition of the offense.[167] The Model Penal Code follows this approach, stating that the burden of persuasion will rest on the accused if "it involves a matter of excuse or justification peculiarly within the knowledge of the defendant on which he can fairly be required to adduce supporting evidence."[168] If, however, the state does not prohibit distribution of narcotics by a pharmacist (under defined circumstances), then it makes little sense to impose the burden of persuasion on the pharmacist. This imposition of the burden on the accused unfairly requires the accused to negate *actus reus*.[169]

V. Policy Factors in Allocating the Burden of Persuasion

Three principles of criminal law require that the accused not bear the burden of persuasion on defensive claims. These principles, discussed in turn below, are the presumption of innocence, *in dubio pro reo*, and the policy against allowing improper convictions.

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165. *Id.* at 206, 415 N.E.2d at 816.

166. W. LaFave & A. Scott, *supra* note 31, at 570.

167. 22A C.J.S. *Criminal Law* § 687 (1989).

168. Model Penal Code § 1.12(3)(c) (Proposed Official Draft 1962).

169. M.S. Strogovich, *supra* note 39, at 266 (statute prohibiting practicing medicine without a license); Larin, *supra* note 72, at 123.

A. Presumption of Innocence

Imposing a burden of persuasion on the accused with respect to any matter relevant to guilt is tantamount to requiring the accused to prove innocence. While every citizen runs the risk of being charged with crime, to require a citizen to prove the absence of circumstances deemed by law to be relevant to liability is an unnecessary imposition.[170]

B. In Dubio Pro Reo

The placement of a burden of persuasion on the accused violates the principle expressed in the maxim *in dubio pro reo*—namely, guilt must be proven beyond a reasonable doubt, and in case of doubt the accused must be acquitted.[171] The United States Supreme Court stated that if a murder defendant bears the burden to persuade regarding provocation, then

> a defendant can be given a life sentence when the evidence indicates that it is *as likely as not* that he deserves a significantly lesser sentence. This is an intolerable result in a society where . . . it is far worse to sentence one guilty only of manslaughter as a murderer than to sentence a murderer for the lesser crime of manslaughter.[172]

C. Improper Convictions

The placement of a burden of persuasion on an accused creates significant practical problems for that person. For an impecunious accused, the obligation is one that may be impossible to shoulder. It may, for instance, require the accused to hire investigators or expert witnesses.[173] The accused, however, may be incarcerated and therefore unable to assist in evidence-gathering, and even if at liberty the accused may be unable to do so for a variety

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170. P. BRETT, *supra* note 151, at 119 ("[T]o cast this risk [of non-persuasion] on the defendant was plainly unfair.").

171. 2 P. BOUZAT & J. PINATEL *supra* note 77, at 913; C. LOPEZ-PUIGCERVER, *supra* note 76, at 226; V.Z. LUKASHEVICH, *supra* note 63, at 70.

172. Mullaney v. Wilbur, 421 U.S. 684, 703-04 (1975).

173. 1 TEORIIA DOKAZATEL'STV V SOVETSKOM UGOLOVNOM PROTSESSE: CHAST' OBSHCHAIA [THEORY OF EVIDENCE IN SOVIET CRIMINAL PROCEDURE: THE GENERAL PART] 474 (N.V. Zhogin ed. 1966); A. LARIN, *supra* note 72, at 123 ("Since expenses for presenting evidence in bourgeois procedure are generally borne by the parties, an impecunious accused is helpless.")

of reasons.[174] Placing the burden of persuasion on the accused thus yields unjust convictions.[175]

VI. Burden of Production

Even those jurisdictions that impose the burden of persuasion on the state for defensive claims first require the accused to produce evidence on the issue before the judge instructs the jury on it.[176] Case law is often unclear on the quantum of evidence required. A standard followed in some jurisdictions requires the accused to raise a reasonable doubt as to overall guilt.[177] While this is less onerous than carrying the burden to persuade by a preponderance of the evidence, it is nonetheless a burden of persuasion. Some courts have said that to require the accused to raise a reasonable doubt as to guilt conflicts with the rule that the prosecution bear the burden of persuasion. As one court noted, "if the burden is on the state to prove the defendant's guilt beyond a reasonable doubt, the defendant cannot under any other rule be required to establish his innocence or a reasonable doubt as to his guilt."[178]

A better approach, followed by a majority of jurisdictions, requires the accused simply to present "slight evidence" or "some" evidence,[179] or, as some courts state, "more than a scintilla of evidence."[180] Even this approach imposes a burden of persuasion,[181] although in many cases this standard is not difficult to meet. An accused seeking to put self-defense in issue, for example, might testify to having killed in self-defense. There might be good reasons, however, why counsel would not want the accused to testify, such as to keep out of trial information regarding prior convictions that could be delved into on cross-examination to challenge

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174. V.Z. Lukashevich, *supra* note 63, at 61; M.S. Strogovich, *supra* note 39, at 273; Patarin, *supra* note 53, at 30-31 ("[T]he accused does not have means of investigation and fact-finding as good as those of the prosecution, especially when . . . his pre-trial detention has been ordered.").

175. V.Z. Lukashevich, *supra* note 63, at 60.

176. G. Williams, *supra* note 50, at 185.

177. *See, e.g.*, Leonard v. People, 149 Colo. 360, 372, 369 P.2d 54, 61 (1962).

178. Dorak v. State, 109 N.E. 771, 772 (Ind. 1915).

179. Kadis v. United States, 373 F.2d 370, 374 (1st Cir. 1967); Howard v. United States, 232 F.2d 274, 276 (5th Cir. 1956); Zemina v. Solem, 438 F. Supp. 455 (D.S.D. 1977), *aff'd.*, 573 F.2d 1027 (8th Cir. 1978).

180. United States v. Wolffs, 594 F.2d 77, 80 (5th Cir. 1979).

181. Allen, *supra* note 123, at 328; McNaughton, *Burden of Production of Evidence: A Function of a Burden of Persuasion*, 68 Harv. L. Rev. 1382, 1390-91 (1955).

credibility.

Although the concept of burden of production has not been refined in Continental law, the quantum of proof required to raise a defensive claim is low. The French Court of Cassation has stated that where the accused claims insanity, the court is required to arrange for psychiatric examination, even though the accused has presented no evidence of insanity.[182] Soviet courts require no evidence from the accused regarding an asserted defense: "If the factor to which the accused refers has significance for the case, the prosecutor must investigate it and acknowledge or refute it, and the court must look into it, regardless of whether the accused was able to present evidence to support the existence of the factor."[183]

While Continental courts generally require no evidence in support of a defensive claim, judges from those courts are often reluctant to take up an asserted defense absent some evidence. In German courts, it is often not sufficient for the accused simply to raise a defense. The accused may be required to establish a prima facie case in order to show that the defense is not totally unfounded. "Otherwise allegations the accused has made up to protect himself against a conviction could involve the judge in unending efforts to gather evidence that either proved or disproved them."[184]

If nothing more were required of the accused than the bare assertion of a defensive claim, the defense could assert every possible defensive claim and require the state to negate them. For this reason, something more should be required; however, the quantum of proof required should be kept low in order to prevent the accused from having to prove his or her innocence.

In common law systems, presumptions are frequently used which have the effect of imposing a burden of production on the accused. For example, a person found possessing items commonly used for burglary is presumed to possess them for a burglarious purpose, and the trier of fact may find guilt if the accused presents

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182. Judgment of Dec. 9, 1949, Cour. de cass., Fr., *noted in* 1951 REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARÉ 305. *See also* Patarin, *supra* note 53, at 31 (referring to burden of production as *charge de l'allégation* (burden of allegation)).

183. V.D. ARSEN'EV, *supra* note 54, at 68 (in Soviet procedure accused "not obliged even to mention his sources of evidence" but state investigator and court are obliged to investigate the issue); M.S. STROGOVICH, *supra* note 39, at 270 (noting that Vyshinskii disagrees with this view).

184. Herrmann, *supra* note 47, at 75.

no evidence of an explanation inconsistent with guilt.[185] Similarly, a theft defendant found in possession of recently stolen goods is presumed to have stolen them, and the trier of fact may freely find guilt absent any evidence presented by the accused which explains a possession inconsistent with guilt. However, the burden of persuasion in both situations is on the state.[186] By contrast, the occupants of an automobile where a firearm is found are each presumed to be in possession of the firearm (again meaning that the accused may be required to bear a burden of production on the issue of possession), though the burden of persuasion on that issue rests on the state.[187] Continental law, on the other hand, does not permit presumptions that shift the burden of production. One scholar criticizes these presumptions as giving police an opportunity to plant evidence.[188]

VII. Possible Objections to Imposing the Burden of Persuasion on the State

A rule that would preclude imposition on the accused of the burden of persuasion for defensive claims is subject to three objections—that it inhibits the formulation of new defenses, that it requires the state to prove a negative, and that it creates undue hardship for the prosecution. Each of these objections, however, fails to withstand scrutiny.

A. New Defenses

One such objection is that legislatures would be reluctant to add new defenses[189] unless the accused were required to bear the burden of persuasion.[190] Thus, the drafters of the Model Penal Code, who sought to encourage state legislatures to treat mistake of law as an exculpating circumstance (*e.g.*, reliance on a statute, court decision, administrative order, or interpretation by a public officer), provided that the accused should bear the burden of per-

185. G. Williams, *supra* note 50, at 897-98.

186. *Id.* at 877-78; J. Turner, Kenny's Outlines of Criminal Law 461-62, 477-78 (19th ed. 1966).

187. County Court of Ulster County v. Allen, 442 U.S. 140 (1979).

188. Larin, *supra* note 72, at 123.

189. Underwood, *supra* note 123, at 1312-30.

190. 1 P.H. Robinson, *supra* note 1, § 34(b), at 144; Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 Yale L.J. 1325, 1355-56 (1979).

suasion where mistake of law is a defense.[191] The issue of "old" and "new" defenses was addressed by Justice Powell in his dissent in *Patterson v. New York*,[192] where he stated that "[t]he Due Process Clause requires that the prosecutor bear the burden of persuasion beyond a reasonable doubt only if the factor at issue . . . makes the difference between guilt and innocence . . . in the Anglo-American legal tradition."[193]

The distinction between old and new defenses has been criticized as arbitrary.[194] Moreover, the distinction has been used to justify a general rule that would place the burden of persuasion for defensive claims on the accused. It has been observed that "[a]dding a new defense means that the defendant has tactical advantages that he did not have before. It would seem that the legislature should have the prerogative of granting the defendant 'half a loaf' by coupling the new defense with an unfavorable position on the burden of persuasion."[195] Yet, "[p]lacing the burden of proof for all substantive defenses on the prosecution might actually reduce the number of defenses recognized as valid, and thus penalize the 'innocent.' "[196]

The statutory rape laws in some United States jurisdictions have introduced mistake as to age of the victim as a ground for exculpation and have imposed the burden of persuasion on the accused.[197] The fact that introduction of the defense provided the accused with a new advantage is claimed to justify the imposition of this burden on the accused.[198] However, mistake as to age of the victim in statutory rape cases in reality negates the *mens rea* of the offense unless, as in some jurisdictions, no *mens rea* is required as to age of the victim.[199] That being the case, an assertion by the accused of lack of knowledge of the victim's age is a denial of the existence of *mens rea*. Some courts have reached that conclusion

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191. MODEL PENAL CODE § 2.04(4) (Proposed Official Draft 1962).

192. 432 U.S. 197 (1977).

193. *Id.* at 227 (1977) (Powell, J., dissenting).

194. Jeffries & Stephan, *supra* note 190, at 1362-63. *See also*, Note, *The Constitutionality of Affirmative Defenses after Patterson v. New York*, 78 COLUM. L. REV. 655, 666-67 (1978).

195. G. FLETCHER, *supra* note 45, § 7.3.3, at 546.

196. D. HUSAK, *supra* note 96, at 210. Husak sets forth the statement in the text as a position with which he does not necessarily agree.

197. Jeffries & Stephan, *supra* note 190, at 1355.

198. *Id.* at 1355-56.

199. Regina v. Prince, L.R. 2 Cr.-Cas. Res. 154 (1875).

without the benefit of a statute.[200]

Imposing burdens of persuasion for defensive claims on the accused cannot properly be justified by concern over the addition of new defenses. Since defensive claims negate elements of a crime, accused persons should not be required to bear the burden of persuasion. Shifting the burden of persuasion should not, moreover, be used as a substitute for arriving at the appropriate definition of a given crime. Such a shifting serves to favor unfairly the accused who through luck or access to resources is better able to muster proof.[201]

B. Proving a Negative

Another objection to placing the burden to negate defensive claims on the state is that it requires the state to prove a negative—*e.g.*, that the accused did *not* kill in self-defense, that the accused was *not* insane, or that the accused did *not* kill under provocation.[202] This objection ignores, however, the fact that in many contexts the state must prove a negative in a criminal proceeding—that the victim of a kidnap, rape, or larceny did not consent, or that the accused failed to provide sustenance to a child, to file an income tax return, or to register for conscription.[203] Moreover, it is not necessarily more difficult to negate rather than prove a defense.[204] There is no reason to assume, for example, that to prove that the accused was sane is more difficult than to prove that the accused was insane.[205] The United States Supreme Court dismissed the contention that to negate provocation is inordinately difficult, reasoning that "the same may be said of the requirement of proof beyond a reasonable doubt of many controverted facts in a criminal trial."[206]

C. Hardship for the Prosecution

The third objection to imposing the burden of persuasion for

200. *See* State v. Guest, 583 P.2d 836 (Alaska 1978); People v. Hernandez, 61 Cal. 2d 529, 393 P.2d 673 (1964).

201. Underwood, *supra* note 123, at 1322.

202. Mullaney v. Wilbur, 421 U.S. 684, 701 (1975).

203. For more examples, see Patarin, *supra* note 53, at 23.

204. E. BONNIER, *supra* note 43, at 24.

205. Saunders, *The Mythic Difficulty in Proving a Negative*, 15 SETON HALL L. REV. 276, 277-78 (1985).

206. *Mullaney*, 421 U.S. at 701.

defensive claims on the state is that such an imposition may create undue difficulty for the prosecution. For example, access to information regarding a defensive claim may not be readily accessible to the prosecution, and it is often difficult for the state to prove *mens rea*. This objection also fails to recognize that this is often the case in criminal trials. Nevertheless, the prosecution is assisted in the common law systems by a variety of presumptions that impose a burden of production on the accused.[207]

VIII. Differences in Continental and Common Law Approaches

There are four major differences in the analytical approach to defensive claims taken by the common law and Continental systems. First, in the Continental countries the issue has not been analyzed in isolation, but in conjunction with presumptions that shift a burden of production to the accused. Continental theorists do not distinguish between the two situations. Those who oppose placing burdens on the accused condemn imposition of burdens in both contexts—placement on the accused of either the burden of persuasion or the burden of production for defensive claims is seen as violative of the presumption of innocence. In the common law countries, courts and scholars have only rarely proposed that the two situations be treated similarly.[208]

Second, while many common law courts distinguish among defensive claims in allocating the burden of persuasion, the Continental courts—with a few exceptions[209]—take a rigidly uniform approach.[210]

A third difference between the two systems is that common law countries draw a sharp distinction between the burden of production and the burden of persuasion.[211] While the latter is viewed as a significant detriment to the accused, the former is not. Under Continental analysis, the imposition of the burden of production on the accused is viewed as quite onerous.

Fourth, and most important, common law jurisdictions have not yet developed a unitary theory of criminal liability which, like

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207. Sandstrom v. Montana, 442 U.S. 510 (1979).
208. Allen, *supra* note 123, at 321-68.
209. *See supra* text accompanying notes 76-81.
210. 2 G. Stefani & G. Levasseur, *supra* note 76, at 21.
211. Thayer, *The Burden of Proof*, 4 Harv. L. Rev. 45, 65-69 (1890).

the Continental theory, characterizes defensive claims as negating elements of offenses. The Continental approach effectively divests the term "defense" of any significant meaning. Under this approach, the accused does not truly assert a defensive claim but rather asserts non-liability.

The German three-prong analysis of criminal liability does not necessarily need to be adopted by common law systems. The common law analysis, using the concepts *actus reus* and *mens rea*, can be employed to reach a similar result. *Actus reus* describes the physical act component, and *mens rea* describes the mental component. *Mens rea* can easily be read, as the United States Supreme Court did in *Davis*,[212] to include an absence of justification or excuse. If this were done, *Patterson*[213] would lose its significance, for there would no longer be defensive claims that do not negate an element of the offense.

CONCLUSION

If common law courts were uniformly to view defensive claims as factors negating *mens rea* and *actus reus*, there would be no need to distinguish between justifications and excuses in allocating the burden of persuasion. Courts would, in the author's view, correctly perceive all defensive claims as negating elements of the prosecution's case.

If common law courts adopted this view, the need for the concept of a "defense" would disappear. Continental codes do not use this concept, negating instead the elements of a crime.[214] Eliminating the concept "defense" would terminate the civil litigation approach to criminal law defenses. This tie has perpetuated the view that defenses are matters for which the accused should bear the burden of persuasion. The very term "defense" suggests that the matter is to be proved by the accused. Far better is the term used by H.L.A. Hart— "excusing conditions."[215] While Hart's term suffers from ambiguity due to the traditional distinction between "justification" and "excuse," it implies that these factors divest the conduct of criminal qualities.

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212. 160 U.S. 469 (1895).
213. Patterson v. New York, 432 U.S. 197 (1977).
214. *See supra* text accompanying notes 102-110.
215. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 28 (1968).

Eliminating the concept of defense would not necessarily remove the burdens of persuasion from the accused for defensive claims. Italy and France view defensive claims as negating elements of offenses, but equivocate on the burden of persuasion. However, Germany, which developed this theory of criminality, is opposed to placing the burden of persuasion for defensive claims on the accused.

The question of burden of persuasion on defensive claims should be approached in a principled fashion, working from the relation of defenses to the elements of crimes. The question should not be handled piecemeal, with the burden on the state for some defenses and on the accused for others.

In both the common law and Continental systems, legislators should squarely face the issue of the burden of persuasion. They should require the state to negate a defensive claim. Such a result is both equitable and consistent with the proper rationale underlying defensive claims. The concept of a defense to a crime needlessly suggests that factors negating liability are separate from the definition of the offense. One step towards solving the problem of burden of persuasion would be to eliminate altogether the concept of a defense.