

THE CANADIAN BAR REVIEW

LA REVUE DU BARREAU CANADIEN

Vol. 67

March 1988 mars

No. 1

THE PRESUMPTION OF INNOCENCE: A NEW ERA

Richard Mahoney*
Dunedin, New Zealand

In jurisdictions where there is no constitutional guarantee of the presumption of innocence, this axiom of the criminal law can be disregarded at the whim of the legislature or the courts. In Canada, however, where the right of the accused persons to be presumed innocent until proven guilty has been entrenched by section 11(d) of the Charter of Rights and Freedoms, any infringement of the presumptions must pass the stringent test of justification set forth in section 1 of the Charter. This article looks at the scope of the presumption of innocence and highlights some major areas of Canadian criminal law where breaches of the presumption occur despite the lack of any justification for such breaches, either on broad principles or under the strictures set forth by the Supreme Court of Canada in R. v. Oakes.

Dans les pays où le système juridique ne garantit pas par sa constitution la présomption d'innocence, le corps législatif ou les tribunaux peuvent, à leur gré, ne pas tenir compte de cet axiome de droit criminel. Au Canada, cependant, où le droit de l'accusé d'être présumé innocent tant qu'il n'est pas déclaré coupable est enchâssé dans l'article 11(d) de la Charte des droits et libertés, toute infraction à cette présomption doit se justifier en suivant les strictes règles de justification de l'article 1 de la Charte. Dans cet article, l'auteur considère la portée de la présomption d'innocence et souligne quelques-uns des principaux domaines du droit criminel canadien où il y a infraction de la présomption malgré le manque de justification de ces infractions, qu'il s'agisse de principes généraux ou des règles établies par la Cour suprême du Canada dans l'arrêt R. v. Oakes.

*Richard Mahoney, of the Faculty of Law, University of Otago, Dunedin, New Zealand.

Delphidius (Prosecutor): O, illustrious Caesar! if it is sufficient to deny, what hereafter will become of the guilty?

Julian: If it suffices to accuse, what will become of the innocent?***

Introduction

Just what does it mean to be presumed innocent until proven guilty? This question will have to be answered now that Canadians have been guaranteed the benefit of the presumption of innocence in a Charter of Rights and Freedoms¹ that is obviously going to be interpreted in a manner far different than the process of disdainful emasculation which typified the judicial view of our Bill of Rights.² At present, Canadian courts are grappling with the effect of the presumption of innocence on the numerous federal and provincial statutory provisions and judge-made rules which purport to place on an accused who wishes to avoid conviction a burden to prove or disprove some fact (*a legal burden*), or at least to point to some evidence at trial which is sufficient to raise a reasonable doubt as to the existence of some fact (*an evidential burden*).³ The responses have varied greatly and, in my view, correct and consistent conclusions can only be reached in this field when the courts are willing to grasp the nettle and investigate the meaning of "innocence" and the structural framework of the presumption of innocence in section 11(d) of the Charter. This article offers my thoughts on this investigation and a look at the ramifications of my conclusions.

These conclusions, summarized briefly, are that the presumption of innocence is offended: (1) where a legal burden is placed on the accused; (2) where an evidential burden is thrown on the accused to call into question one of the essential elements of the crime charged before that essential element has been, at that stage, *apparently* proven beyond a reasonable doubt by Crown evidence. In such cases, the Crown must attempt to meet the requirements set forth in *R. v. Oakes*⁴ to uphold such a Charter breach under section 1.

***This anecdote is referred to in *Coffin v. United States*, 156 U.S. 432, at p. 454 (1895).

¹ Constitution Act, 1982, Part I, s. 11(d) (hereafter the Charter).

² R.S.C. 1970, Appendix III, s. 2(f). *R. v. Oakes*, [1986] 1 S.C.R. 109, (1986), 26 D.L.R. (4th) 200, traces the jurisprudence surrounding the presumption of innocence under the Bill of Rights.

³ The terms "primary burden", or simply, "burden of proof" are used by different commentators the way I have utilized "the legal burden". Likewise, "secondary burden", "evidentiary burden", "the burden of production", or the "burden of going forward" are terms used synonymously with "the evidential burden". Each writer has his or her own particular definition for those terms, and I do not feel required to involve myself in dealing with the various nuances identified by individual commentators.

⁴ *Supra*, footnote 2. *Oakes* placed the burden on the Crown of justifying a Charter breach but merely required the Crown to discharge that burden on the balance of probabilities (*supra*, footnote 2, at pp. 136-137 (S.C.R.), 225-226 (D.L.R.)).

It is, however, in keeping with the presumption of innocence that an evidential burden be cast upon the accused who wishes to call into question a fact comprising one of the essential elements of the crime charged when such fact has, at this stage, been *apparently* proven beyond a reasonable doubt by Crown evidence. It is likewise acceptable that the accused bear an evidential burden when he or she wishes to assert what I call a "true" defence.⁵ Although the meaning of this term will be discussed later, a simple definition is any defence which aims for an acquittal of the accused or, at least, a reduction in the crime charged to a lesser included offence, by a means *other than* questioning the existence of one of the essential elements of the crime charged. A true defence accepts the existence of all the essential elements of the crime charged, *actus reus* and *mens rea*, yet nevertheless seeks exoneration through some excuse or justification. The plea of possession of a pharmacist's license in a drug trafficking trial is an easy example.

In the discussion which follows I propose first to go back to basics and consider the nature of a true defence as well as concerns that have been raised as to whether or not the apparent distinction between true defences and defences which merely question the existence of the essential elements of an offence can claim any real validity. A further seminal matter which must be looked at is the very meaning of "innocent" in the presumption of innocence. I then pass to a discussion of the structural framework of this presumption as it appears in section 11(d) of the Charter. After reviewing some U.S. authorities touching on these points, I undertake an evaluation of some of the leading Canadian authorities where, in my view, a proper application of the Charter's guarantee of the presumption of innocence has not been widely evident to date. These areas are:

- 1) Presumptions of Evidence
- 2) Three common categories of true defences, namely:

⁵ Instead of the term "true defence" I would rather have used the American label of "affirmative defence" which I feel better reflects the idea I wish to convey. The problem with a simple adoption of the term "affirmative defence" is that it is defined in the influential A.L.I. Model Penal Code (1962 draft, 1985 ed.) s. 1.12(3) in a way different from the way in which I use the term "true defence". The approach of the Model Penal Code is the more current one, as is illustrated by the dissenting judgment of Powell J. in *Martin v. Ohio*, 94 L. Ed. (2d) 267, at pp. 276-277 (1987). The confusion in America over the meaning of the term affirmative defence has caused me to shy away from its use.

It is also true that my use of the term true defences glosses over many distinctions that could be made within the realm of defences (*infra*, footnote 7) and includes some matters which are not normally classified in the same breath as other matters of justification or excuse (for example, lack of age—seen as an "exemption" by the Law Reform Commission of Canada, Report No. 30: Recodifying the Criminal Law, Vol. 1 (1986), ch. 3, p. 29); see, too, P.H. Robinson, *Criminal Law Defenses: A Systematic Analysis* (1982), 82 Col. L. Rev. 199; E.M. Morgan, *The Defence of Necessity* (1983), (2), 42 U.T.F. L. Rev. 165.

- (i) Offences drafted as having been committed "without lawful justification or excuse, the proof of which lies upon [the accused]"
- (ii) Legislative and common law provisions which assign to the accused the burden of proving that a particular "exception, exemption, proviso, excuse or qualification" operates in favour of the accused.
- (iii) The dual defences of due diligence or reasonable mistake of fact in the realm of "strict liability offences" as defined by *R. v. Sault Ste. Marie*,⁶ which places a legal burden on the accused to establish these defences.

I conclude with a brief opinion on the relevance here of the all important section 1 of the Charter.

I. *True Defences and the Offence-Defence Dichotomy*

A. *True Defences*

In the introduction I have defined true defences as those which aim at an acquittal or a reduction in the crime charged by a means other than an attack on the existence of one of the essential elements of the crime. In this, true defences differ from the other broad class of defences, those which simply call into question the Crown's proof of *actus reus* or *mens rea*. The distinction is not often alluded to in our criminal law, yet it seems to be intuitively recognized by courts dealing with the Charter guarantee of the presumption of innocence. I likewise consider the distinction to be of some relevance and thus an investigation of it is worthwhile at this stage. In this there is, however, a certain irony. The courts have given very little thought to the nature of true defences, but have nonetheless regularly concluded that their structure carries a weighty constitutional significance, and where a legal burden is imposed on an accused to establish a true defence, this is valid under the Charter. I will conclude that the peculiarity of true defences is only of minor relevance, and reject out of hand the proposition that true defences provide a springboard for any legal burden on an accused.⁷

⁶ [1978] 2 S.C.R. 1299, (1978), 85 D.L.R. (3d) 161.

⁷ The distinction between the two types of defences discussed here does not exactly parallel that between matters of excuse and justification, though the analogy is close. Excuses seek to exonerate the accused because of the court's compassionate view of the accused's state of mind. Justifications allege that in the particular circumstances, the act was not illegal. Thus most true defences could be seen as justifications and most of the other type of defences as excuses. But if Wilson J. is correct in *Perka v. R.*, [1984] 2 S.C.R. 232, (1984), 42 C.R. (3d) 113, that mistake of fact is a justification, this would be an example of an excuse that is a true defence. The distinction between excuses and justifications sprang into prominence in Canada because of *Perka*. Despite *Perka*, however, and the writings of such influential theorists as G. Fletcher, Rethinking Criminal

The distinction between true defences and those other defences which attack the existence of the essential elements of the offence may be illustrated by a few examples of the latter type of defence. A classic illustration is afforded by mistake of fact. Though regularly acknowledged as a defence, an accused alleging a mistake of fact is simply attempting to raise a reasonable doubt as to the existence of the essential element of *mens rea* which might otherwise appear to have been proven by the Crown through logical inferences drawn from acts proven to have been committed by the accused. That *mens rea* can be proven by inference from proof of the *actus reus* is not surprising, and is a common occurrence when there is no confession or express statement by the accused as to his or her intention or knowledge. Thus, if an accused is shown to have walked up to the victim, pointed a gun at the victim and pulled the trigger, thereby causing the victim's death, it will not be difficult for the Crown to rely on the process of inference as proving the required guilty intent beyond a reasonable doubt. If the accused wishes to avoid conviction by means of the defence of mistake of fact, there will be an evidential onus on the accused to raise a reasonable doubt as to his or her mistaken belief that the gun was, for example, a harmless toy. Mistake of fact, then, is a defence which places an evidential onus on the accused, despite the fact that the only issue is the existence or lack thereof of one of the essential elements of the crime, which we know must be proven by the Crown beyond a reasonable doubt. The workings of mistake of fact are well summarized by Dickson J. in *Pappajohn v. R.*⁸ as follows:

Mistake of fact is more accurately seen as a negation of guilty intention than as the affirmation of a positive defence . . . Mistake is a defence, though, in the sense that it is raised as an issue by the accused.

A similar analysis can be applied to any defence of the category I am now discussing, those which seek only to question the existence of an essential element of the crime, which the Crown must prove. Alibi is commonly viewed as a classic defence, yet it is really just a denial that

Law (1978), I can only agree with D. Stuart, Canadian Criminal Law (1982), pp. 378-380, and others, (e.g. J. Hall, Comment on Justification and Excuse (1976), 24 Am. J. of Com. Law 638) that today the distinction simply does not hold any *practical* application in the criminal law. For counsel and the accused the issue remains: will there be an acquittal or a conviction? But see, however, the recent discussion by the High Court of Australia in *Zecevic v. D.P.P.* (1987), 61 Aus. L.J.R. 375, at p. 379, which looks to the historical distinction between excusable and justifiable homicide in order to conclude that a mistake as to circumstances amounting to the true defence of self-defence must be reasonable. This view is not shared elsewhere: *R. v. Fisher*, [1987] Crim. L.R. 334 (C.A.); *Beckford v. R.*, [1987] 3 W.L.R. 611 (P.C.). See, too, *infra*, footnote 224.

⁸ [1980] 2 S.C.R. 120, at p. 148, (1980), 111 D.L.R. (3d) 1, at p. 14. Although Dickson J. was dissenting on whether or not the accused had satisfied the evidential burden, his views on mistake of fact were adopted by the majority. Dickson J.'s words were foreshadowed by Laskin C.J.C. (dissenting) in *R. v. Kondeus*, [1976] 2 S.C.R. 272, at p. 278, (1975), 61 D.L.R. (3d) 145, at p. 150. For further comments on mistake of fact see *infra*, footnote 224.

the accused was at the scene of the crime and committed the *actus reus*. Though the matter has been questioned,⁹ it seems clear that there is an evidential onus on the accused who wishes to argue an alibi in the face of apparently conclusive Crown evidence which would place the accused at the scene.¹⁰ A similar attack on the *actus reus* was made in *Perka v. R.*¹¹ through the defence of necessity. Dickson J., for the majority of the Supreme Court, analysed this defence as attacking the existence of the essential element of voluntariness, a component of the *actus reus* which the Crown must prove and had apparently proven in *Perka* by virtue of common sense inferences from undisputed facts.¹² Dickson J. discussed the defence of necessity as follows:¹³

Although necessity is spoken of as a defence, in the sense that it is raised by the accused, the Crown always bears the burden of proving a voluntary act.

A similar view has been expressed by Dickson J. when dealing with automatism,¹⁴ a defence which again calls into question the mental element required for conviction.

These views are shared by others and as a final example in this look at those defences which seek merely to call into question the existence of one of the essential elements of an offence, reference may be made to *R. v. MacKinlay*¹⁵ which dealt with the defence of drunkenness, a defence questioning the existence of the *mens rea* of specific intent. Martin J.A. stated:¹⁶

Although intoxication is commonly described as a "defence", intoxication when operative merely negates the specific intent essential to constitute the offence and consequentially it is not a defence *in the strict sense*.

While any attack on the apparently proven essential elements of the crime may not be, to use the words of Martin J.A. "a defence in the strict sense", such attacks are nonetheless universally referred to as defences and there can be no need to descend into a semantical controversy as long as their real nature is kept in mind.

⁹ G. Williams, *The Theory of Excuses*, [1982] Crim. L.R. 732, at p. 734, n.12.

¹⁰ P.K. McWilliams, *Canadian Criminal Evidence* (2nd ed., 1984), pp. 799-801. This work also sets out the proposal in the Draft Evidence Act, Senate Bill S-33, as to the obligation on an accused to raise the defence of alibi well before trial.

¹¹ *Supra*, footnote 7.

¹² The marijuana was imported into Canada. Ordinary human experience would lead to the conclusion that, without some uncommon factor (here the storm at sea), this importation was voluntarily undertaken.

¹³ *Supra*, footnote 7, at pp. 257 (S.C.R.), 21 (D.L.R.).

¹⁴ *Rabey v. R.*, [1980] 2 S.C.R. 513, at p. 545, (1980), 54 C.C.C. (2d) 1, at p. 26.

¹⁵ (1986), 53 C.R. (3d) 105 (Ont. C.A.).

¹⁶ *Ibid.*, at pp. 116-117. (Emphasis added).

As to true defences, little more need be said than is inherent in their definition as claims for exoneration despite the admitted existence of all the essential elements of the crime. Presumably these are the defences "in the strict sense" to which Martin J.A. made reference in *MacKinlay*. I have already given the example of a pharmacist's license as a true defence to a drug trafficking charge. Self-defence is another obvious example, as the accused relying on this defence in an assault trial will agree that he or she struck an intentional blow, yet argue that there should be an acquittal nonetheless. Similarly, in an assault trial an accused policeman may rely on the true defence of lawful authority in effecting an arrest. So too provocation is a true defence to murder because "[i]t is unnecessary to invoke the defence of provocation until all the elements of murder have been proved".¹⁷

Though usually it will be clear whether or not a given defence can properly be categorized as "true", there are inevitable problem areas, such as duress,¹⁸ where different views have been taken regarding the role played by the defence—does it question the existence of the elements of the offence, or are they admitted in the plea for exoneration by the excuse or justification? But for present purposes the issue is not so much one of delving into the difficulties of categorization, but rather the effect once such categorization has occurred. The effects are quite surprising! In the case of *some* true defences there is no suggestion that any onus higher than an evidential onus is placed on an accused who wishes to rely on such a defence (for instance, self-defence,¹⁹ provocation²⁰). What brings the distinction between the two types of defences into the spotlight, however, is the disturbing tendency, which will be exemplified later, for courts and legislatures to feel free to place a full legal burden of proof on an accused seeking to rely on many of the true defences, and subsequently for courts to uphold the validity of such legal burdens, despite the Charter guarantee of the presumption of inno-

¹⁷ *R. v. Campbell* (1977), 38 C.C.C. (2d) 6, at p. 15 (Ont. C.A.) (per Martin J.A.).

¹⁸ Stuart, *op. cit.*, footnote 7, pp. 376-378. The House of Lords share Stuart's view; *R. v. Howe*, [1987] 2 W.L.R. 568, at pp. 576 (per Lord Hailsham), 583 (per Lord Bridge). See too the judgment of Matas J.A. in *R. v. Bergstrom* (1980), 13 C.R. (3d) 342, at p. 357 (Man. C.A.), where he adopts the following words from G. Williams, *Criminal Law, The General Part* (2nd ed., 1961), p. 762, para. 247:

. . . although it is convenient to call duress a "defence", this does not mean that the ultimate (persuasive) burden of proving it is on the accused. . . But the accused must raise the defence by sufficient evidence to go to the jury; in other words, the evidential burden. . . is on him.

Although these words reflect the style of Dickson C.J.C. in the passages referred to earlier, Matas J.A. here seems merely concerned with the issue of burden of proof and is not inferentially saying that duress is something other than a true defence. A true defence can often (and should at most, I argue) carry with it an evidential burden, only, on the accused.

¹⁹ A.W. Mewitt and M.M. Manning, *Criminal Law* (2nd ed., 1985), pp. 397-399.

cence. I will argue that the mere categorization of a defence as true does not provide any justification for circumventing or disregarding the presumption of innocence. Although I intend to back up my conclusions by a look at the meaning of "innocence" and the structuring of the presumption of innocence, a worthwhile investigation can first be undertaken as to whether there is any validity at all in the distinction I have outlined between the two types of defences. If, as has been claimed, there is really no difference between a true defence and an attack on one of the essential elements of a crime, then there must be an underlying flaw in any theory that seizes on the apparent distinction as a means of disregarding the presumption of innocence.

B. *The Dichotomy Between the Elements of the Offence and True Defences*

Others have already shown²¹ that there are historical reasons, to do with the intricacies of pleadings, that have given birth to the undeniable present dichotomy between the essential elements of an offence, all of which the Crown must prove beyond a reasonable doubt, and true defences which, depending on the particular defence, the accused must either prove to exist or at least put in issue by raising a reasonable doubt as to their possible existence. As criminal law as we know it today began to separate itself from the law of tort, the well-established system of civil pleadings was heavily drawn upon as a formative structure. Thus if the accused sought to raise a matter of defence in answer to an otherwise complete case for the Crown, this "plea"²² was treated as the confession and avoidance in civil procedure. Although historical investigation has shown that "to the judges of the late nineteenth century, pleading and proof were unrelated questions",²³ it was inevitable that the example of pleadings in civil matters, with the maxim that he who alleges must prove, would spawn the early view that the accused bore the legal

²⁰ *Linney v. R.*, [1978] 1 S.C.R. 646, (1977), 73 D.L.R. (3d) 4.

²¹ G.P. Fletcher, Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases (1967-68), 77 Yale L.J. 880; J.C. Levy, Reverse Onus Clauses in the Canadian Criminal Law—An Overview (1970), 35 Sask. L.R. 40; A.A.G. Zuckerman, The Third Exception to the Woolmington Rule (1976), 92 Law Q. Rev. 402; R. Cross and C. Tapper, Evidence (6th ed., 1985), Ch. III; D. Finley, The Presumption of Innocence and Guilt: Why *Carroll* should prevail over *Oakes* (1984), 39 C.R. (3d) 115; R.B. Dworkin, Easy Cases, Bad Law, and Burdens of Proof (1972), 25 Vand. L.R. 1151.

²² Of course all this just points out the sterility of the civil pleading analogy today, when the usual "plea" of a criminal defendant is simply guilty, or not guilty: G. Williams, Offences and Defences (1982), 2 Legal Studies 233, at p. 234. The only true relevance of the pleading analogy is found in the requirements as to what allegations need be set forth by the Crown in the indictment and which matters may be left out, as purely matters of defence.

²³ Zuckermann, *loc. cit.*, footnote 21, at p. 405.

burden of proving the existence of any defence. *Woolmington v. D.P.P.*²⁴ reversed this trend somewhat, but only, as subsequently interpreted, to the extent of imposing a mere evidential burden on an accused who wished to raise a reasonable doubt as to the existence of one of the essential elements of the crime which the Crown had apparently already proven beyond a reasonable doubt.

Although *Woolmington* remains the classic affirmation of the presumption of innocence in English law, the famous "golden thread" pronouncement of Viscount Sankey specifically placed "statutory exceptions"²⁵ outside the scope of the presumption. I will look later at some Canadian examples of such statutory exceptions and propose that under a Charter regime there is simply no room for their continued existence. Further, despite calls that the principles in *Woolmington* be extended to require an evidential onus only on an accused who wishes to rely on a true defence,²⁶ such a proposal has not yet been heeded by courts or legislatures. Such complaints against the increasingly numerous occasions in which a full legal burden is placed on an accused claiming a true defence may be a matter of frustration in a country such as England where rights are not guaranteed. In the case of Canada, however, it is my position that the Charter has effectively already forced this next step in the historical development of the presumption of innocence.

As the history of the dichotomy between the elements of the offence and true defences hardly provides a sufficient sole justification for its continued existence, the issue remains, is there any coherent theoretical basis? While the orthodox view of the structure of our criminal law makes it easy to see why self-defence is a true defence, could we not simply alter our definition of assault so that it becomes defined as the intentional infliction of force to the person of another *not undertaken in self-defence*? If this were done then the lack of self-defence would be a matter for the Crown to prove beyond a reasonable doubt, as one of the essential elements of the offence. The question, then, is whether there is any deep-seated theoretical distinction here that would prevent us from arbitrarily assigning a given issue as an essential element of the offence, or a true defence?

Clearly when analysis focuses on the purely statutory context, as it appears Canadian criminal law is destined to do,²⁷ any distinction between the elements of an offence and true defences is one purely of the choice

²⁴ [1935] A.C. 462 (H.L.). Once again adopted by the Supreme Court of Canada in *Fleming v. R.* (1986), 26 D.L.R. (4th) 641, at pp. 659-660.

²⁵ *Ibid.*, at p. 481.

²⁶ Editorial, Public Order and the Principles of English Criminal Law, [1987] Crim. L.Rev. 153; R. Cross, *The Golden Thread of the English Criminal Law: The Burden of Proof* (Rede Lecture, 1976).

²⁷ If the recommendations of the Law Reform Commission of Canada are accepted as set out in the proposed new Criminal Code, Report No. 30, *op. cit.*, footnote 5, Ch. 3.

of legislative drafting.²⁸ Thus an offence could be drafted as a prohibition of an act committed, specifically, without justification or excuse or, with equal ease, simply as the prohibition of an act, with the matter of justification or excuse left to be dealt with in separate clauses under the general rubric of defences. This latter option is the one chosen by the Law Reform Commission of Canada in its recently released Draft Criminal Code. The Commission adopted this approach "in accordance with criminal law tradition"²⁹ although previously recognizing³⁰ that it would be equally valid to adopt an alternate approach. Similarly the English Law Commission Report of 1985, *Codification of the Criminal Law*,³¹ adopts the approach of separation of the essential elements of an offence from all matters of defence, despite a recognition that even in the case of true defences the choice could have been made to treat as an element of each offence "every exception admitted by the definition of that offence".³² The wording of the statute, then, dictates whether a possible exonerating factor is a true defence, or whether its negation is one of the elements of the offence.

This recognition by the reformers of the role played by legislative drafting has led some commentators to conclude³³ that there is no inherent theoretical distinction at all between the essential elements of an offence and a true defence. For instance, Glanville Williams has concluded that any attempts at justifying the distinction are doomed, as it is one:³⁴

. . . depending largely upon the accidents of language, the convenience of legal drafting, or the unreasoning force of tradition.

George Fletcher, on the other hand, has made a valiant attempt at supporting what he feels is a viable demarcation between what he terms the "definitional" elements of an offence, which combine to result in a valid conclusion of criminality,³⁵ and matters of justification or excuse.³⁶ In

²⁸ J.C. Jeffries and P.B. Stephen, *Defenses, Presumptions, and Burden of Proof in the Criminal Law* (1978-79), 88 Yale L.J. 1325, at pp. 1331-1332:

The trouble, of course, is that the distinction is essentially arbitrary. . . . A legislative decision to treat a particular matter as an element of an offense or as a defense to liability may depend simply on convenience or ease of phrasing.

²⁹ *Op. cit.*, footnote 5, p. 25.

³⁰ Law Reform Commission of Canada, Working Paper 29, *Criminal Law, The General Part: Liability and Defences* (1982), p. 20.

³¹ P. 55. The alternate approach was rejected by the Commission as having "very unhappy drafting consequences".

³² *Ibid.*

³³ Finlay, *loc. cit.*, footnote 21, at pp. 126-131; A.T.H. Smith, *Rethinking the Defence of Mistake* (1982), 2 Ox. J. Leg. Stud. 429.

³⁴ *Loc. cit.*, footnote 22, at p. 256.

³⁵ Fletcher, *op. cit.*, footnote 7, pp. 552-555.

³⁶ "The [prohibitory] norm must contain a sufficient number of elements to state a coherent moral imperative. This is another way of saying that the norm must be so defined that its violation is incriminating": *ibid.*, p. 568.

other words, the Crown must prove sufficient facts to establish that the accused did an act that can be termed inherently culpable, but once that point is reached, it is then up to the accused to seek justification or excuse for his or her action.³⁷ The concern of the legal philosopher such as Fletcher becomes, then, promulgating appropriate guidelines of culpability, justification, and excuse. Whether these views can withstand analysis is, perhaps, open to question.³⁸ But Fletcher's work does provide valuable insights in this area, one being a recognition that in the case of a particular offence, the search for the essential or definitional elements which must be proven by the Crown is never a static process. If the issue is not clear by statutory interpretation, the court will be constantly redefining the minimum requirements for proof of guilt. There are obvious policy choices at work here, and the answers change over time. This is well illustrated by Fletcher's example of abortion.³⁹ As social mores change, what was originally seen as a novel "true" defence, grudgingly afforded the accused, may become so well recognized as to result, over time, in its negation slipping into the definitional elements of the offence.

Certainly there will be difficulties in determining, for individual crimes, what are the essential elements of the offence. Certainly too, there are strong arguments that can be made that there is simply no theoretical basis by which the essential elements of an offence can inherently be separated from true defences. Yet to my mind, despite the strength of the criticisms that can be made here, it is nevertheless clear that our current concepts as to the operation of the criminal law require that a distinction be drawn between the essential elements of the crime, which the Crown must prove, and matters of true defence as to which the accused must satisfy at least an evidential burden. Without the distinction it would be impossible to conclude that an indictment set forth sufficiently an offence known to the law or that the Crown had introduced enough evidence to avoid a directed verdict (for an acquittal) unless the indictment and the Crown evidence anticipated and conclusively negated any and all theoretically possible defences to the charge. Such a state of affairs would be intolerable and thus it is essential to be able to define in advance what are the precise matters which the Crown must allege and prove in order to establish what the Supreme Court has termed "a case to meet".⁴⁰ In doing so the Crown need not allude to

³⁷ *Ibid.*, pp. 552 *et seq.*

³⁸ Smith, *loc. cit.*, footnote 33; Williams, *loc. cit.*, footnote 22.

³⁹ *Op. cit.*, footnote 7, pp. 545-552, 568.

⁴⁰ This phrase, from E. Ratushny, *The Role of the Accused in the Criminal Process*, in W.S. Tarnapolsky and G.-A. Beaudoin (eds.), *The Canadian Charter of Rights and Freedoms* (1982), pp. 358-359, was adopted by the Supreme Court in *Dubois v. R.*, [1985] 2 S.C.R. 350, at pp. 357-358, (1985), 23 D.L.R. (4th) 503, at p. 522. Williams, *loc. cit.*, footnote 22, at pp. 234-235, appears to recognize that his attack on the offence-defence dichotomy proves too much, for he points out that the distinction has a continuing role in allocating an evidential burden to the accused.

any matter of true defence. From the drafting of the indictment to the point of a motion for a directed verdict, then, the distinction between what are the essential elements of an offence and what are matters of true defence has a crucial role to play. Yet thereafter, only confusion will be engendered by further reference to the distinction.

Once the Crown has constructed its "case to meet" the accused, hoping for an acquittal, must go on to meet it by some defence of either of the two sorts previously discussed. As soon as we enter this stage there can be no legitimate purpose served by differentiating between a defence questioning the existence of an essential element of the crime, and a true defence. This is not so because of a possible lack of any coherent theoretical underpinning for the offence-defence dichotomy. If that conundrum of criminal law theory is a worry, it is a concern which arises only at the earlier stage of delineating the minimum requirements of a Crown "case to meet".⁴¹ Rather, the irrelevance of subsequently distinguishing between the two forms of defence results because, as will be seen when we investigate the structure of section 11(d) of the Charter, the treatment afforded either form of defence should be the same. In both cases the burden on the accused, being the crucial issue for the presumption of innocence, should be an evidential burden only.

We will see, however, that American criminal law theory continues to distinguish between the elements of an offence and true defences (and hence between the two types of defences I have discussed) not merely for the legitimate purpose of determining when the accused is faced with a case to meet, but also as a solution in deciding on the constitutional validity of differing burdens of proof on the accused. In those instances where a legal burden has been placed on an accused who wishes to rely on a true defence, American courts have held that such a burden of proof is in keeping with the United States constitutional guarantee of the presumption of innocence. I will shortly undertake an overview of the American authorities in this area. It will illustrate the problems encountered when the boundary between the elements of an offence and matters of true defence ("the offence-defence dichotomy") is foolishly⁴² utilized to justify a legal burden on the accused in the face of the presumption of innocence. The questionable theoretical foundation for the offence-defence dichotomy should concern any Canadian court consid-

⁴¹ The American Model Penal Code, *supra*, footnote 5, s. 1.13(9) circumvents the definitional problem by defining the "elements of the offence" as including the negation of an excuse or justification, yet concurrently allocating the burden of proof on these issues by separate, considered rules s. 1.12.

⁴² Fletcher's ideas do raise one possible issue with regard to the presumption of innocence that has not, to my knowledge, yet been seized upon. Most commentators have, as I have mentioned, *supra*, footnote 26, begun with the assumption that placing an evidential burden on the accused is acceptable despite the presumption of innocence. Yet we will see, *infra*, in the discussion of *Re Boyle and the Queen* (1983), 5 C.C.C.

ering adopting an approach similar to that of the Americans in this area.⁴³ Further, an investigation into the meaning of innocence and structure of the presumption of innocence as it is set forth in the Charter, to which I now turn, will show that there are other fundamental reasons why this American approach should be rejected.

II. The Meaning of Innocence

I see no need to expostulate upon the history or importance of the presumption of innocence in our law, as these matters have already been dealt with by competent commentators.⁴⁴ I wish rather to focus on the issue of what we mean when we say that the accused is presumed *innocent*. I suspect that most courts, faced with an argument based upon section 11(d) of the Charter, have simply not put their minds to the issue.⁴⁵ At any rate the unstated view of many courts at present appears to be that the term "innocent" here means "wrongly accused of having committed all the elements of the offence", that is, not having per-

(3d) 193 (Ont. C.A.), the presumption of innocence can be breached when a mere evidential burden is placed on an accused to call into question an essential element of the crime before such element has been first apparently proven by the Crown. That is perhaps not surprising but, using Fletcher's point, what if the legislature suddenly redrafted an offence long known to the criminal law so that the Crown no longer had to concern itself with proving a traditionally essential element of the crime, such as *mens rea*, until the accused had satisfied an evidential burden as to the possible non-existence of that element? This is in a sense what occurred in *Mullaney v. Wilbur*, 44 L. Ed. (2d) 508 (1975), and *Patterson v. New York*, 53 L. Ed. (2d) 281 (1977), except that there a full legal burden was placed on the accused, and the issue was thus more clearly crystallized. But where an accused is, by Parliamentary decree, suddenly affixed with even an evidential burden on an issue that is somehow properly seen as inherently a part of the culpability of the offence in question, could the accused argue an infringement of the presumption of innocence? The argument would be that the accused, presumed innocent, should not have to raise even a reasonable doubt as to the existence of a fact that is inherently one of the components of culpability for the offence until that fact has been preliminarily proven by the Crown. I think that such an argument is on shaky grounds in looking to s. 11(d) of the Charter and, if accepted at all, would be better fashioned under s. 7. It will be alluded to again briefly in the subsequent discussion of *R. v. Burge* (1986), 55 C.R. (3d) 131 (B.C.C.A.).

⁴³ See R.M. Gordon, *Affirmative Defenses, and Due Process: The Constitutionality of Placing a Burden of Persuasion on a Criminal Defendant* (1975-76), 64 *Georgetown L.J.* 871, at p. 885:

... the separation of elements and defenses to justify placing a burden of persuasion on a defendant rests on outmoded views of *mens rea*, historical confusion concerning the differing interests of civil and criminal defendants, and the uncritical acceptance of the theory of common law presumptions. Moreover, the separation does not accord with the modern view that society should impose criminal sanctions only on morally reprehensible defendants.

⁴⁴ *Oakes* has affirmed the importance of the presumption and its revitalization under the Charter. *Dubois v. R.*, *supra*, footnote 40, explores the relationship between the presumption and the Charter guarantee of the right against self incrimination, s. 11(c).

⁴⁵ The issue is explored by Finlay, *loc. cit.*, footnote 21, at p. 131, looking at the nature of "guilt".

formed the *actus reus* with the relevant *mens rea*. But the majority view of courts to date is that the meaning of "innocent" here will not be extended to mean, additionally, "and having no true defence to the charge".

Surely, though, an accused who wishes to rely on a true defence and who is shouldered with a legal burden on this issue is being forced to prove his or her innocence. Such a legal burden on the accused to establish a true defence is, then, undeniably contrary to the presumption of innocence. If the accused is presumed innocent, there should be no need to prove it! That is precisely what is meant when we say that innocence is *presumed*. The crucial point in this proposition is that an accused who has a true defence is just as "innocent" as an accused who has not been shown to have committed all the essential elements of the crime charged. Courts that hold that the presumption of innocence has no relevance when the issue is proof by the accused of a true defence, must base such a conclusion on the idea that what the accused is doing in such a case is something *other than* proving his or her innocence.

But any degree of analysis will show that such an approach is hopelessly flawed. There is simply no relevant legal⁴⁶ or moral distinction between a verdict of not guilty by reason of the lack of proof of an essential element of the offence and a similar verdict based on a true defence. *Legally*, the accused who is acquitted on either basis is free and not subject to further prosecution for the same offence. While it may be that occasionally the particular reason for an acquittal could become relevant in later proceedings,⁴⁷ such relevance will not be determined on the ground of whether the Crown could not prove the elements of the offence or the accused could prove a true defence. Thus, although an acquittal on a charge of receiving stolen goods on the basis of lack of proof of *mens rea* might be relevant on the trial of a subsequent charge of receiving a different stolen article,⁴⁸ a similar case for relevance might be made if the first acquittal had resulted from the true defence of, say, entrapment. Usually, of course, the particular reason for an acquittal has no subsequent legal effect or relevance, but in any case, even when it

⁴⁶ Jeffries and Stephen, *loc. cit.*, footnote 28, at p. 1332, make the telling point:

Traditionally, the only functional difference between a "crime" and a "defence" has been precisely the issue under consideration—allocation of the burden of proof.

I am of course leaving aside the thorny issue of a verdict of not guilty by reason of insanity. In such a case there can be serious consequences for the accused: Criminal Code, R.S.C. 1970, c. C-34, s. 542(2).

⁴⁷ On a subsequent criminal trial the accused will not be subject to cross-examination on his or her testimony at the prior proceedings: *R. v. Mannion*, [1986] 2 S.C.R. 272, [1986] 6 W.W.R. 525, nor will the accused's prior testimony be admissible as Crown evidence: *Dubois v. R.*, *supra*, footnote 40.

⁴⁸ *R. v. Waldman* (1934), 24 Cr. App. R. 204. See too *Maxwell v. D.P.P.*, [1935] A.C. 309, at pp. 320-321 (H.L.); *Koufis v. R.*, [1941] S.C.R. 481, (1941), 76 C.C.C. 161; *R. v. Spreckley and Cootes* (1958), 123 C.C.C. 344 (B.C.C.A.).

does, nothing turns on the distinction between the two types of acquittals here discussed.

It might be thought that there is, nonetheless, some sort of *moral* distinction between an acquittal founded on the Crown's inability to prove all the essential elements of the offence, and one resting on a true defence. If such a moral difference could be discovered, then there could be the beginnings at least of some justification for treating an accused acquitted by virtue of a true defence as less *truly* innocent than an accused acquitted because one of the essential elements of the crime had not been proven. The argument would be as follows: An accused relying on true defence is not really asserting true moral innocence and is thus outside the sphere of operation of the Charter's guarantee of the presumption of innocence. The Charter presumes innocence in a moral sense, not a purely legal sense. An accused seeking to rely on a true defence is not seeking to establish true moral innocence, and thus cannot use the Charter to complain when faced with a legal burden to establish such a defence.

But really, the only force from such an argument is superficial, focusing as it does on the fact that an accused offering a true defence inevitably accepts that he or she has intentionally committed an apparently prohibited act. Upon a closer analysis the argument breaks down. A preliminary attack arises from the truism that the Crown must prove all the elements of the offence beyond a reasonable doubt. In the case of many acquittals based on the failure of the Crown to prove the essential elements of the crime, there may be very real suspicions remaining that in fact the accused *did* commit the crime. Doubts about the Crown case will result in a verdict of not guilty but this is by no means a necessary moral vindication of the accused. The verdict of not guilty does not necessarily correspond to a positive finding of innocence.⁴⁹

There is, however, a more fundamental flaw in any argument seeking to uphold a moral difference between an acquittal based on the Crown's failure to prove the essential elements of the crime or, for argument's sake, the actual non-existence of some such essential element, and an acquittal based on a true defence. Certainly some acquittals are more "complete" in a moral sense than others. An accused found not guilty after the evidence clearly indicates that he or she was nowhere near the scene of the crime is sure to be viewed in a more favourable light than an accused acquitted due to voluntary intoxication. A scale could be constructed, ranging from "complete moral vindication" down to "legal vindication only, no moral vindication whatsoever", into which each

⁴⁹ V.T. Bugliosi, *Not Guilty and Innocent—The Problem Children of Reasonable Doubt* (1983), 4 Miss. Coll. L. Rev. 47. This is a result of what Wilson J. has termed "the boundary between legal and scientific truth"; *Fleming v. R.*, *supra*, footnote 24, at p. 660. Cf. R. Williams, *A Judgement of Innocence: The Effect of an Acquittal in Australian Law* (1987), 61 Aus. L.J. 134.

and every known defence could be slotted. Where each defence was placed on such a scale would vary slightly according to personal point of view. What I hope to make clear, though, is that the distinction between the two types of acquittals under discussion provides no correlation whatsoever to degrees of blameworthiness in moral terms. Some acquittals based on the lack of an essential element of the crime are moral vindications, and some are not. Exactly the same can be said of true defences. A few simple examples will illustrate. In the realm of acquittals due to the failure of the Crown to prove an essential element, a successful defence of alibi (which questions the existence of *actus reus*) or one of reasonable mistake of fact⁵⁰ (which questions *mens rea*) may lead to a conclusion of moral innocence while defences of unreasonable mistake of fact⁵¹ and voluntary intoxication (both of which question *mens rea*) do not. Some true defences, such as lawful authority (police powers of arrest) or self-defence, are a moral vindication while others, such as lack of legal age,⁵² are not.

From a moral point of view, then, there appears to be no valid distinction between the two types of acquittals discussed. While there are clearly "degrees of innocence" in moral terms, the dichotomy between acquittals based on the lack of proof of an essential element on the one hand, and true defences on the other provides no assistance in assigning gradations of culpability to any particular defence.

Some, recognizing this truth, may nonetheless seek for other criteria by which individual defences could be assessed in moral terms, with a view to supporting the constitutionality of a full legal burden on an accused who relies upon a defence that would result in no moral vindication. Though this process has not yet been undertaken, it would not be surprising if it was in the future, once the sterility or at least problematic nature of the offence-defence dichotomy is accepted. It may be pertinent here to note that even if some appropriate guidelines could be fashioned by legal philosophers by which the claim to "innocence" of individual defences could be judged, there would still be no logical justification for disregarding the presumption of innocence in the case of an accused who wished to rely on a defence that would result in merely a legal, but not a moral acquittal. For various policy reasons, the courts and legislatures have seen fit to recognize certain defences which result legally in a finding of not guilty, but do not entail a moral vindication. Once a part of the law, however, there is no room for interpreting such

⁵⁰ As will be seen, *infra*, footnote 224, I do not accept the requirement of reasonableness in the defence of mistake of fact, but I include it here merely to avoid the moral issue of negligence.

⁵¹ *Pappajohn v. R.*, *supra*, footnote 3. For argument's sake I am assuming that an accused who makes a negligent mistake of fact is not morally innocent. I realize this premise could be questioned.

⁵² Criminal Code, *supra*, footnote 46, s. 12.

defences, regardless of how distasteful they may be, otherwise than in accordance with the presumption of innocence as guaranteed in the Charter. Where the issue of such a defence is raised in an appropriate case, section 11(d) of the Charter should ensure that the existence of that defence was presumed in the accused's favour, with no legal burden of proof being forced on the accused. In a regime governed by the presumption of innocence it really does not make sense that an accused should have to work harder and actually establish the existence of a morally bankrupt defence than would be the case if he or she wished to rely on a defence bringing with it a moral vindication. Logic would lead to the conclusion that, if anything, the position should be reversed, and an accused who wishes to emerge from court wholly exonerated in every sense should face the steepest uphill battle. If the law seeks somehow to punish the accused who wishes to rely on a distasteful defence, that is best taken care of at the preliminary stage of determining the defence's availability and operation, rather than tinkering with the burden of proof. This is, of course, the general course already chosen before the Charter, which should not be altered now. The best illustration is provided by what may be viewed as the most morally bankrupt of defences, voluntary intoxication. Though some may claim the sixth sense of being able to differentiate a crime of specific intent (where the defence operates) from one of general intent (where it does not), the distinction seems more clearly to be a policy reaction based on the distasteful nature of this defence. Usually the defence of voluntary intoxication results in a conviction, but for a lesser included offence of general intent rather than the specific intent offence charged.⁵³ While all this may be acceptable, even before the Charter it was clear that the burden on an accused wishing to rely on the defence of voluntary intoxication was an evidential burden only.⁵⁴ Defences with shaky moral underpinnings can be limited in their scope with no infringement of the presumption of innocence.

The moral foundation, or lack thereof, of a defence would seem, therefore, to be no valid means by which a distinction could be drawn so as to allow some accused persons to be presumed innocent while others are forced to prove it. Even if there is some hesitation in accepting this proposition, I hope to have demonstrated that in any event there should be no difference in the operation of the presumption of innocence based on the distinction between defences questioning the existence of an element of an offence and true defences, because this distinction holds no key to any moral differentiation in any event. Though it may be difficult to agree wholeheartedly with the view that "the fact is that the public will always interpret an acquittal as vindication of the deed",⁵⁵ there is no doubt that the public, in its ignorance or common sense, puts no stress at all on whether an acquittal is due to a true defence or the

⁵³ *Leary v. R.*, [1978] 1 S.C.R. 29, (1977), 74 D.L.R. (3d) 103.

⁵⁴ *Malanik v. R.*, [1952] 2 S.C.R. 335, (1952), 103 C.C.C. 1.

⁵⁵ Fletcher, *op. cit.*, footnote 7, p. 825.

lack of proof of an essential element of the crime. It is simply not a valid test on any scale of "innocence"⁵⁶ and with no other legal difference, innocence in both cases should be presumed. Courts which continue to utilize the distinction as the sole basis for disregarding section 11(d) of the Charter, and upholding the often imposed requirement of proof of a true defence are in error, for:

Why we are less concerned with protecting the liberty and good name of one "innocent" than we are about another "innocent"?⁵⁷

III. *The Structure of Section 11(d) of the Charter*

A. *Life, Purgatory, Rebirth*

The relevant portion of section 11(d) of the Charter states: "Any person charged with an offence has the right to be presumed innocent until proven guilty according to law. . . ." Essential to an understanding of this constitutional guarantee is a recognition of the consistent approach of the Supreme Court⁵⁸ to restate the presumption of innocence as requiring that the Crown prove the accused's guilt beyond a reasonable doubt.⁵⁹ But two contrasting views are possible from this seemingly innocuous and well worn restatement.

The first is that once the Crown case has reached the stage of proof of all the essential elements of the offence, then from that point on, regardless of the impact of later evidence in the trial, the force of the presumption of innocence is spent, and it need not thereafter be alluded to. As section 11(d) tells us that the right to be presumed innocent only lasts *until* the accused is proven guilty, then it is arguable that even though the initial proof of guilt by the Crown may later be weakened or utterly destroyed, still the crucial stage of preliminary *apparent* proof of guilt has been reached, and there is thereafter no hope for recovery of the consequentially defunct presumption of innocence. The result of this approach is that once guilt has been proven by the Crown on the prelim-

⁵⁶ G. Williams, *loc. cit.*, footnote 22, at p. 234:

If a person comes within an exception to an offence, or has a good defence to it, he is innocent of the offence.

⁵⁷ M. Mandell, *The Presumption of Innocence and the Canadian Bill of Rights* (1972), 10 Osg. H.L.J. 450, at p. 481.

⁵⁸ *R. v. Appleby*, [1972] S.C.R. 303, at p. 317, (1971), 3 C.C.C. (2d) 354, at p. 365 (per Laskin J.); *Fleming v. R.*, *supra*, footnote 24, at p. 86; *R. v. Oakes*, *supra*, footnote 2, at pp. 121 (S.C.R.), 214 (D.L.R.), which added the requirement that "... criminal prosecutions must be carried out in accordance with lawful procedures and fairness". The ramifications of this latter requirement are tantalizing, but are not explored here. Perhaps this could lead to a fresh look at instances where defences are limited, or ordinary *mens rea* is redefined: for example, *R. v. Bezanson* (1983), 8 C.C.C. (3d) 493 (N.S.C.A.).

⁵⁹ *Dubois v. R.*, *supra*, footnote 40, adds the further factor that in proving guilt, the Crown cannot rely on the accused's silence. This is discussed, *infra*, at pp. 23-24.

inary basis referred to, there can be no objection to the subsequent imposition on the accused of a legal burden to prove his or her innocence.

I reject such an approach and argue for a second, more flexible interpretation of section 11(d) of the Charter. The view I reject is willfully blind to the actual workings of a criminal trial. Apparent proof of guilt can be reached at a very early stage in a trial. This, of course, is inevitable, if only because the Crown presents its case first. Proof beyond a reasonable doubt on an apparent basis, that is, on a basis open to subsequent attack and destruction, could conceivably result from the evidence in chief of the first Crown witness, before the process of cross-examination had begun. To hold that the presumption of innocence lasts only until this preliminary stage of proof of guilt is reached is to take simply too narrow and cynical a view of the presumption. Guilt or innocence of the accused is only finally concluded in a criminal trial at the close of both the Crown and defence case. Until that final stage is reached, the presumption of innocence still has a role to play.⁶⁰

True, once guilt has been apparently proven by the Crown on a preliminary basis the presumption of innocence is, for the moment, in limbo. As guilt has been proven by the apparent existence of all of the elements of the offence, innocence is no longer presumed, and there is, for the first time, an onus (evidential) on the accused to attack that preliminary Crown case of guilt, or raise by evidence the issue of a true defence. This onus on the accused can be satisfied through cross examination of a Crown witness, or by direct defence evidence. Even *Woolmington*⁶¹ agreed that an accused who wishes to attack a Crown case of apparently proven guilt must do so on the basis of material in evidence, and this requirement in no way contravenes the presumption of innocence as it is laid out in section 11(d) of the Charter. If there was not such an evidential burden on the accused who is faced with a preliminary Crown case of apparently proven guilt, the unworkable result would

⁶⁰ There is some oblique support for this proposition in the pre-Charter decision of *Appleby*, *supra*, footnote 58, which is admittedly a decision that does not otherwise support the argument I propose. Though, of course, *Appleby* is just history now after its treatment by *Oakes*, of interest is Laskin J.'s statement, at pp. 317 (S.C.R.), 365 (C.C.C.):

The "right" to be presumed innocent. . . is, in popular terms, a way of expressing the fact that the Crown has the ultimate burden of establishing guilt; if there is any reasonable doubt *at the conclusion of the case* on any element of the offence charged, an accused person must be acquitted. (Emphasis added).

This is also reflected in *Woolmington v. D.P.P.*, *supra*, footnote 24, at pp. 481-482, being the seminal statement of the presumption by the House of Lords. See too *Dubois v. R.*, *supra*, footnote 40, at pp. 357 (S.C.R.), 522 (D.L.R.), where Lamer J. adopts the following statement from Ratushny, *op. cit.*, footnote 40, p. 359:

However, even where 'a case to meet' has been presented, the burden of proof remains upon the Crown *to the end*. (Emphasis added).

⁶¹ *Supra*, footnote 24, at p. 482. See too *Mancini v. D.P.P.*, [1942] A.C. 1 (H.L.); *Sweet v. Parsley*, [1970] A.C. 132, at p. 164 (H.L.) (per Lord Diplock); *Pappajohn v. R.*, *supra*, footnote 3.

be that the Crown would have to attempt to negate all theoretically conceivable true defences or defence attacks on the essential elements of the offence despite the lack of any evidence at all tending to support such attack or defence.⁶² Yet once the accused in such a situation satisfies the evidential burden and raises a reasonable doubt as to the existence of one of the essential elements of the offence, or as to the possible existence of a true defence then, necessarily, the Crown case can no longer be said to prove guilt *beyond* a reasonable doubt. At this stage in the trial nothing should prevent the revitalization of the presumption of innocence, which arises phoenix-like to once more require Crown proof of guilt beyond a reasonable doubt.

I have again purposely included true defences in this discussion on an equal footing with defences that question the existence of an essential element of the offence because this view of the structuring of section 11(d) of the Charter applies with equal force to both types of defence. Although *Oakes* dealt only with the case of a legal burden on the accused to disprove one of the essential elements (the intention to traffick) of the crime charged, the principles it espoused should be equally applicable to the area of a legal burden on an accused to prove a true defence. In restating the presumption of innocence in *Oakes*,⁶³ Dickson C.J.C. spoke of the necessity for the Crown to prove *guilt* beyond a reasonable doubt. An accused who can successfully rely on a true defence is *not guilty*. There can never be, consistent with the presumption of innocence, a full legal burden on an accused to prove a true defence. Once a reasonable doubt has been raised on that issue it is, by definition, impossible for the Crown to have proven *guilt* beyond a reasonable doubt.

Satisfaction by the accused of an evidential burden can occur at different stages in a trial. If the accused raises a reasonable doubt during the cross-examination of a Crown witness, it may be that later Crown evidence will serve once again to close the gap and prove guilt. If, however, the accused succeeds in raising the reasonable doubt during the course of defence evidence, the Crown's hopes for a conviction are doomed unless cross-examination of the defence witnesses destroys the reasonable doubt raised, or the Crown is successful in an application to introduce rebuttal evidence. But at least this analysis shows that it is *never* in keeping with the presumption of innocence to place a legal burden on the accused to prove or disprove *any* fact.⁶⁴ The most that can

⁶² See Jeffries and Stephan, *loc. cit.*, footnote 28, at p. 1334:

... placing the. . . [evidential burden]. . . on the defendant is an economical way to screen out issues extraneous to the case at hand and thus to promote efficient litigation.

⁶³ *Supra*, footnote 2, at pp. 121 (S.C.R.), 214 (D.L.R.).

⁶⁴ Others support this conclusion: B.M. Sheldrick, *Shifting Burdens and Required Inferences; The Constitutionality of Reverse Onus Clauses* (1986), 44 U.T.F.L. Rev. 179, at p. 197, n. 73; see too the works cited, *supra*, footnote 26.

be required of an accused is satisfaction of an evidential burden, for once a reasonable doubt has been raised, the presumption of innocence is in full force. Innocence is presumed and need not be proven!

B. *Presumptions of Evidence*

To this point I have been concerned with the offence-defence dichotomy, but to complete the groundwork for the conclusions set forth in the Introduction, and for the coming review of the case law, a word must now be said about presumptions of evidence, which highlight another aspect of the structure of section 11(d) of the Charter. Though unstated in the Charter's guarantee of the presumption of innocence, I suggest that there are two pertinent restrictions on the method by which the Crown is entitled to prove all the essential elements of the crime.

First, these must be proven only *by evidence* or by the inferences which flow beyond reasonable doubt from other facts proven by evidence. In other words a statutory provision or common law rule which permits or requires the trier of fact to conclude the existence of one of the essential elements of the offence despite the lack of compelling evidence or inference from evidence on the point, contravenes the presumption of innocence. The restatement in *Oakes*⁶⁵ of the presumption of innocence is that the Crown must *prove* guilt beyond a reasonable doubt, and *Oakes* has affirmed that the Crown cannot claim to have achieved that result if a link in the chain of proof is provided not by evidence or normal inferences therefrom, but by a mere statutory decree.⁶⁶ Although *Oakes* was concerned with a "reverse onus" clause,⁶⁷ which baldly placed a legal burden on the accused to disprove one of the essential elements of the crime (the intention to traffick) once another essential element (possession) had been proven by the Crown, Dickson C.J.C. chose to analyse the statutory provision in question as if it was expressly framed as a mandatory, rebuttable presumption of evidence. Such a process is a valid one and highlights the importance here of what I have termed presumptions of evidence (to distinguish them from a "presumption" such as the presumption of innocence) which *Oakes* and other decisions⁶⁸ have shown are central to a consideration of section 11(d) of

⁶⁵ *Supra*, footnote 2, at pp. 121 (S.C.R.), 214 (D.L.R.).

⁶⁶ *Oakes* goes on, of course, to hold that such a breach of the presumption of innocence may be justified in some circumstances under section 1 of the Charter.

⁶⁷ Narcotic Control Act, R.S.C. 1970, c-N-1, s. 8.

⁶⁸ *Re Boyle and the Queen*, *supra*, footnote 42, deals with mandatory presumptions casting an evidential burden (only) on the accused. *R. v. Van Den Elzen* (1983), 10 C.C.C. (3d) 532 (B.C.C.A.), and *R. v. Wyatt* (1987), *Lawyers Weekly*, vol. 6, #4, p. 10, reach different conclusions regarding permissive presumptions constructed by statute. *R. v. Russell* (1983), 4 C.C.C. (3d) 460 (N.S. App. Div.) deals with the common law permissive presumption known as the doctrine of recent possession (as to which see R. Beaudry, *The Doctrine of Recent Possession: A Black Box "Presumption"* (1987), 29 *Crim. L. Q.*, 453, which reached the writer while this article was in press). *R. v. Somers*

the Charter. Although there are some criticisms which could be made of Dickson C.J.C.'s outline of the workings of these presumptions,⁶⁹ I will adopt his terminology and not restate his discussion as to their operation, which is orthodox.⁷⁰

The point about presumptions of evidence is that they provide shortcuts for the Crown, allowing (in the case of a permissive presumption) or requiring (in the case of a mandatory presumption), the trier of fact to find the existence of a fact making up an essential element of the offence, in disdainful disregard of the lack of proof of such fact by evidence or compelling inference from other facts proven by evidence. Usually they operate so as to enable or require proof of the essential element of *mens rea*, which might not otherwise have been so easy for the Crown to prove. Though the operation of presumptions may be clear, their potential for infringement on the presumption of innocence may not be so obvious. But scrutiny will expose the problem. Section 11(d) of the Charter requires that the accused be pronounced innocent until *proven* guilty, and it is only the most cynical interpretation of the presumption of innocence that would allow for a conclusion of *proof* of guilt merely because a presumption operates to dictate or permit such a finding of guilt in the face of otherwise insufficient evidence on the issue.

There may be, however, an occasion where a presumption is so structured that the presumed fact could be inferred in any event beyond a reasonable doubt from the proved existence of the basic fact. Though certainly here there is less ground for complaint based on a breach of the presumption of innocence, criticism has still been launched because no pre-ordained presumption can anticipate the myriad of future fact situa-

(1984), 16 C.C.C. 357 (3d) (Man. Q.B.) applies this jurisprudence to the "practical" evidential onus on an accused that arises during any criminal trial when the Crown's evidence is sufficiently strong to warrant a conviction unless the accused does something to whittle down the strength of the Crown case. The reasoning in this case is confused.

⁶⁹ *Supra*, footnote 2, at pp. 116 (S.C.R.), 210 (D.L.R.), Dickson C.J.C. poses three ways in which a presumption may be rebutted. One must strain mightily to discover any difference between the first two:

1. The accused may be required merely to raise a reasonable doubt as to the existence of the presumed fact.
2. The accused may have an evidentiary burden to adduce sufficient evidence to bring into question the truth of the presumed fact.

Also, his definition of presumptions of law and presumptions of fact could have been simplified by simply pointing out that presumptions of law are mandatory presumptions (which he had already defined) and presumptions of fact are permissive.

⁷⁰ See too the discussion by Martin J.A. in *Re Boyle*, *supra*, footnote 42; B. Ziff, *The Presumption of Innocence and "Evidence to the Contrary": A Commentary on Re Boyle and the Queen* (1984), 22 U.W. Ont. L. Rev. 129, which also contains a categorization of numerous specific statutory presumptions; Sheldrick, *loc. cit.*, footnote 64; Finlay, *loc. cit.*, footnote 21; Beaudry, *loc. cit.*, footnote 68.

tion in which it may be called to operate.⁷¹ Despite a logical connection beyond reasonable doubt between the presumed and basic facts, the only possible *raison d'être* of even such a presumption is to bring about a conviction when one might not otherwise have been forthcoming due to the lack of evidence in a particular case. There have thus been calls for the abolition of all presumptions of evidence.⁷² Our subsequent review of the American authorities⁷³ will illustrate how they have, alongside their cavalier treatment of the presumption of innocence in the realm of true defences, nonetheless been prepared to examine critically and curtail the scope of operation of presumptions of evidence. For when within the confines of the obligation on the prosecution to prove all the elements of the offence, which is the home ground of these presumptions of evidence, American jurisprudence jealously guards the constitutionally guaranteed presumption of innocence, and provides some useful lessons for interpretation of section 11(d) of our Charter.

The second restriction on the method by which the Crown is entitled to prove the essential elements of the crime, is that there can be in this process no reliance by the Crown on the fact of the accused's lack of response to the Crown evidence *before* such evidence has reached the stage of what I have referred to⁷⁴ as apparent proof of guilt beyond reasonable doubt. I have already⁷⁵ tried to make it clear that once the Crown has proven guilt on such an apparent basis, the accused is doomed unless he or she satisfies an evidential burden on a matter of defence, but here I am speaking of the accused's failure to respond *before* the Crown has reached the stage of apparent proof of guilt. For if the Crown can use the accused's lack of response itself as one of the building blocks in constructing a case to meet, there will be obviously a great pressure placed upon the accused to become involved in proving, or at least raising the issue of his or her innocence well before guilt has been proven. Such pressure upon the accused would contravene the presumption of innocence because, once again, section 11(d) of the Charter presumes innocence right up until guilt has been proven, even if only apparently proven. Until that stage is reached, no call of any sort can be made upon the accused to prove, or even raise the issue of innocence, because

⁷¹ Sheldrick, *loc. cit.*, footnote 64, at p. 196:

In one situation, the basic fact might prove the existence of the presumed fact beyond a reasonable doubt; in a slightly different situation, however, this might not be true. Since no two cases are precisely the same, the task of assessing the inferential value of evidence is better left to the trier of fact.

⁷² Finlay, *loc. cit.*, footnote 21, at p. 136.

⁷³ Particularly *Francis v. Franklin*, 85 L. Ed. (2d) 344 (1985).

⁷⁴ *Supra*, at p. 18.

⁷⁵ *Supra*, at p. 19.

that is presumed. This is the message from *Dubois v. R.*⁷⁶ when Lamer J. stated:

Section 11(d) imposes upon the Crown the burden of proving the accused's guilt beyond a reasonable doubt as well as that of making out the case against the accused before he or she need respond. . .

This second restriction on the mode of proof available to the Crown once again focuses the spotlight on presumptions of evidence in our look at the presumption of innocence. The presumptions of the sort that concern us here are inevitably rebuttable, as explained by *Oakes*,⁷⁷ whether by the accused satisfying a legal or merely an evidential burden as to the non-existence of the presumed fact. Yet the mere fact that the accused is allowed an opportunity to rebut a presumption does not avoid the inevitable conflict between presumptions of this sort and the presumption of innocence. The problem is, rather, highlighted. I have already argued that in any event presumptions breach section 11(d) of the Charter because they allow the Crown to circumvent the requirement of *proof* of guilt by evidence or inferences flowing from evidence. The fact that they can be rebutted simply alters the focus onto the problem that the accused is being pressured to respond to a Crown case *that has not yet reached the stage of proof of guilt*. This, according to *Dubois*, is not permitted. As section 11(d) of the Charter presumes innocence until guilt has been proven, there can be no valid call upon the accused to prove or even raise the issue of innocence merely because the basic fact of a presumption has been proven, for that is not even *apparent* proof of guilt.

With these basic matters clarified, the stage is set for a look at some of the leading decisions in the specific areas of concern referred to in the Introduction. First a look at the United States jurisprudence.

IV. *The United States Position*

In *Oakes* our Supreme Court, faced with the necessity of interpreting section 11(d) of the Charter, rejected the Canadian approach under the Bill of Rights, and adopted much of the United States jurisprudence on the presumption of innocence. As future Canadian decisions come to be decided, there is little doubt that further reference will be made to the American judgments in this area and so there need be little apology for a brief overview at this point.

The United States Constitution, unlike the Charter of Rights and Freedoms, does not explicitly refer to the presumption of innocence, yet the concept has been implied as part of the Due Process guarantee of the

⁷⁶ *Supra*, footnote 40, at pp. 357 (S.C.R.), 521-522 (D.L.R.). (Emphasis added). Lamer J. relied heavily on the views of Professor Ratushny, *op. cit.*, footnote 40. See too Sheldrick, *loc. cit.*, footnote 64, at pp. 199-201.

⁷⁷ *Supra*, footnote 2, at pp. 116 (S.C.R.), 210 (D.L.R.). Irrebuttable presumptions are, of course, really just convoluted ways of stating an undeniable proposition of law. If such were to state categorically that an essential element was proven, with no room for contradiction by the accused, there would be no difficulty in seeing the infringement of the presumption of innocence, *cf.* Criminal Code, *supra*, footnote 46, s. 180(2).

fifth and fourteenth amendments to the Constitution.⁷⁸ The basic premise, as expressed in *Re Winship*,⁷⁹ is that the accused can only be convicted on proof by the state of *every fact necessary to constitute the crime* with which he or she is charged. This formulation of the Due Process guarantee differs from the current Canadian restatement of the presumption of innocence. The *Winship* formulation, focusing on proof of the matters I have italicized, raises the spectre of the offence-defence dichotomy and all the problems that it entails. In other words, to satisfy *Winship* the prosecution need not disprove true defences. I hope to have shown that the Canadian formulation of the presumption of innocence, which requires Crown proof of *guilt* as opposed merely to proof of the essential elements of the crime, necessitates negation by the Crown of a true defence once the accused has satisfied an evidential burden on that issue. This difference in the American and Canadian approach to the presumption of innocence is crucial and must be kept in mind when the United States authorities are reviewed. Crucial too is the lack in the United States Constitution of any "escape valve" similar to section 1 of the Charter. Despite these differences, however, there are lessons to be learned from the United States treatment of the presumption of innocence. Investigation can be conveniently split between, first, the treatment of presumptions of evidence, which illustrates how closely the American courts have safeguarded the right of an accused person to have the prosecution prove by evidence, as opposed to decree, all the elements of a crime and, second, the treatment of true defences, which illustrates how a misguided reliance on the distinction between the two types of defences needlessly raises the intractable problems of the offence-defence dichotomy.

A. The United States Treatment of Presumptions of Evidence

The United States authorities draw a crucial distinction between mandatory and permissive presumptions.⁸⁰ The United States Supreme Court in *County Court of Ulster County v. Allen*⁸¹ decided that in order for the State to rely on a mandatory presumption as proof of one of the essential elements of the crime, the connection between the proven basic fact and the presumed fact must be one beyond reasonable doubt. Although this might seem the extreme limit of possible restrictions on mandatory presumptions, as a presumption valid under this test would seem to require only that which common sense reasoning would conclude in any event, the United States authorities have gone even further. In *Francis v.*

⁷⁸ *Oakes, ibid.*, at pp. 129 (S.C.R.), 220 (D.L.R.).

⁷⁹ 25 L. Ed. (2d) 368 (1970).

⁸⁰ In general, see: C. Collier, *The Improper Use of Presumptions in Recent Criminal Law Adjudication* (1985-86), 38 Stan. L.Rev. 423; C.R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity* (1978-79), 92 Harv. L.Rev. 1187.

⁸¹ 60 L. Ed. (2d) 777, at p. 798 (1979).

Franklin,⁸² decided before *Oakes* yet not mentioned in the judgment of Dickson C.J.C., the United States Supreme Court held that in general *all* mandatory presumptions violate Due Process, regardless of the strength of the logical connection between the basic and presumed facts. *Francis* concerned a mandatory presumption rebuttable by the accused satisfying a legal burden and proving the non-existence of the presumed fact.⁸³ The decision to strike down such a presumption was based on the abhorrence of any suggestion that the accused could be called upon to *disprove* any essential element of the crime. The only door left open in *Francis* was that perhaps a mandatory presumption which cast only an evidential burden, as opposed to a legal burden, onto the accused might survive a Due Process enquiry.⁸⁴ Presumably even if such were the case there would, according to *Ulster County*, still need to be a connection beyond reasonable doubt between the basic and presumed facts.

After *Ulster County*, in United States law it is only in the realm of permissive presumptions that a "rational connection" between the basic and presumed facts provides the test for constitutional validity. Yet *Oakes* glossed over the distinction drawn in America between mandatory and permissive presumptions and seized upon the rational connection test as the key to upholding mandatory presumptions under the Charter through justification under section 1. This might have been acceptable if it was done because of a tacit acknowledgment that both mandatory and permissive presumptions are to be treated as having the same effect upon the presumption of innocence. Indeed, it has been claimed that despite their difference in theory, in practice a jury will utilize a permissive presumption as if it were mandatory.⁸⁵ So, too, I have already argued⁸⁶ that even a permissive presumption can impinge upon the presumption of innocence. But there is no reason to think that *Oakes* was intending to treat mandatory and permissive presumptions similarly. Certainly the weight of Canadian authority has been to the effect that permissive presumptions do not offend the presumption of innocence, and do not require justification under Section 1 of the Charter.⁸⁷ It is my view that given the nature of the steps outlined in *Oakes* for justification under section 1

⁸² 85 L. Ed. (2d) 344 (1985).

⁸³ This is how the court (*ibid.*, at p. 350) interpreted the direction by the trial judge that:

... the acts of a person of sound mind and discretion are presumed to be the product of a person's will, but the presumption may be rebutted.

⁸⁴ *Ibid.*, at p. 353, n. 3. United States law distinguishes between different sorts of evidential burdens and, on the authority of *Ulster County*, *supra*, footnote 81, at p. 792, n. 16, such a distinction may eventually make a difference to the decision on this point. There appears to be no differing degrees of evidential burdens recognized in Canada: *R. v. Proudlock*, [1979] 1 S.C.R. 525, (1978), 91 D.L.R. (3d) 449.

⁸⁵ Collier, *loc. cit.*, footnote 80.

⁸⁶ *Supra*, at pp. 22-24.

⁸⁷ *Supra*, footnote 68.

of the Charter of a breach of the presumption of innocence, the "rational connection" test will eventually end up as the central focus in this process of justification.⁸⁸ Thus, following *Oakes*, we are applying to mandatory presumptions, which are generally forbidden by American law, the rational connection test for validity which the Americans have reserved for permissive presumptions, the latter being, to date, subject to little Charter scrutiny at all by Canadian courts!

United States constitutional litigation has subjected permissive presumptions to close scrutiny. The Supreme Court has not gone to the extent of holding that such presumptions always offend the presumption of innocence as subsumed in the Due Process guarantee. That the test chosen for validity should be a rational connection (only) between the basic and presumed fact is in itself a little surprising because it envisions "proof" of an essential element of the crime (the presumed fact) even though ordinary reasoning would not lead to the conclusion of the existence of that essential element beyond reasonable doubt. This problem, which I find insurmountable, has at least been faced by the United States Supreme Court. Its acceptance of the rational connection test for permissive presumptions is based on an interpretation of these presumptions which forms the basis for their different treatment from that afforded to mandatory presumptions. Permissive presumptions are simply an acceptable, as opposed to an enforced, line of reasoning which is merely pointed out to the jury. Each item of evidence need not be proven beyond reasonable doubt before it can be accepted and relied upon along with other evidence in reaching the conclusion that an element of the offence has been proven beyond reasonable doubt.⁸⁹

There is no more reason to require a permissive statutory presumption to meet a reasonable-doubt standard before it may be permitted to play any part in a trial than there is to require that degree of probative force for other relevant evidence before it may be admitted.⁹⁰

A permissive presumption, then, is to be treated as just another item of evidence and the focus in an enquiry as to constitutional validity, once the rational connection hurdle has been surmounted, is simply to ensure that no artificial weight has been given to the presumption, and that the presumption has not been treated as "the sole and sufficient basis for a finding of guilt".⁹¹ Such an investigation will involve a review

⁸⁸ *Oakes*, *supra*, footnote 2, at pp. 138-139 (S.C.R.), 227 (D.L.R.) outlines the steps. The first step, that of a sufficiently important objective of the law in question to warrant an override of section 11(d) will, I would think, almost always be found. That leads right into the next step, the rational connection test.

⁸⁹ *Cf. R. v. Bouvier* (1984), 11 C.C.C. (3d) 257, at p. 275 (Ont. C.A.); *aff'd*, [1985] 2 S.C.R. 485, (1985), 22 C.C.C. (3d) 576.

⁹⁰ *Ulster County*, *supra*, footnote 81, at p. 798.

⁹¹ *Ibid.*

of the whole of the evidence in a particular case,⁹² which need not be undertaken in an attack on the validity of a mandatory presumption, for the latter inherently carries the potential of a determination of guilt irrespective of the nature of all the other evidence. Although there are problems with such an approach, as pointed out by the dissent in *Ulster County*, the majority approach exhibits a concerned look at the problems presented by presumptions that may be instructive for Charter interpretation. The United States cases show clearly that once within the realm of proof of an essential element of the offence, the presumption of innocence will not be lightly infringed.

B. *The United States Distinction Between Defences — The Offence-Defence Dichotomy*

Though the United States authorities on presumptions of evidence may provide a model for a more consistent treatment of the requirement that the Crown prove by evidence all of the essential elements of the offence, the main lesson for us to learn from the narrow *Winship*⁹³ formulation of the presumption of innocence is how not to proceed. As *Winship* requires *only* proof by the State of the essential elements of the crime, it is axiomatic that the burden of proving true defences can validly be imposed on the accused. There is no problem, of course, unless a *legal* burden is actually placed on the accused to prove a true defence, and there are numerous examples in United States law of true defences that do not require proof by the accused and, consistent with my approach to the presumption of innocence, impose only an evidential burden on the accused to raise the issue of a true defence.⁹⁴ Concurrently, however, there exist many examples where state legislatures or judicial pronouncements have required the accused to prove fully the existence of such a defence, and it is here that the issue of the presumption of innocence is raised.

Take for example *Leland v. Oregon*.⁹⁵ There the Supreme Court upheld an Oregon statute which required an accused to prove insanity

⁹² That this is so becomes clear from the attempted reconciliation by the majority in *Ulster County*, *ibid.*, at p. 793, n. 16, of *United States v. Gainey*, 13 L. Ed. (2d) 658 (1965), and *United States v. Romano*, 15 L. Ed. (2d) 210 (1965).

⁹³ *Supra*, footnote 83.

⁹⁴ *Mullaney v. Wilbur*, *supra*, footnote 42, discussed *infra*, is instructive. Self-defence is a classic true defence. Yet the Supreme Court in *Mullaney* made it clear that there was (in Maine at least) an evidential onus only on an accused to raise this issue (at p. 521, n.30). See too *Hankerson v. North Carolina*, 53 L. Ed. (2d) 306 (1977). The Supreme Court has recently upheld the validity of a *statutorily* imposed legal burden on an accused to prove self-defence, because it is a true defence: *Martin v. Ohio*, *supra*, footnote 5.

⁹⁵ 343 U.S. 790 (1952); later *aff'd* in *Rivera v. Delaware*, 50 L. Ed. (2d) 160 (1976).

beyond a reasonable doubt!⁹⁶ This surprising provision was constitutionally acceptable because insanity was characterized as a true defence,⁹⁷ thereby falling outside the Due Process guarantee. Similar conclusions have been reached for other true defences, always on the basis that as such defences seek to excuse or justify the admitted elements of an offence, they stand unprotected by the *Winship* formulation of Due Process.⁹⁸ But such an approach is so dogmatic and sterile that it has inevitably been subject to criticism. Given the elusive nature of the distinction between the two forms of defence and the lack of any correlation between this distinction and any relevant moral or other legal distinction, discerning United States observers have come to deprecate as the litmus test for constitutional validity the simple criterion of whether the legislative draftsman or judicial creator of a defence has framed it as "true" or simply structured its negation as one of the elements of the offence.

The issue came to the fore when *Mullaney v. Wilbur*⁹⁹ reached the Supreme Court in 1975. The case involved a Maine statute which defined murder as a killing "with malice aforethought". The statute concurrently required the accused to *prove* that he or she acted "in the heat of passion, on sudden provocation" in order to have the murder charge reduced to a conviction for manslaughter. The Supreme Court held that this burden of proof on the accused was unconstitutional. One view of these legislative provisions, adopted¹⁰⁰ in later decisions in order to circumvent the ramifications of *Mullaney*, is simply that the defence which the accused was forced to prove was not a true defence at all, but rather went to question malice, one of the essential elements of the crime. On

⁹⁶ In *R. v. Shelley*, [1981] 2 S.C.R. 196, at p. 200, (1981), 59 C.C.C. (2d) 292 (S.C.C.), at p. 295, Laskin C.J.C. citing no authority, stated that it would be "clearly incompatible" with the Bill of Rights guarantee of the presumption of innocence for a statute to place such a burden on the accused, while agreeing that in many circumstances it was permissible to place a burden on the accused to prove a fact on the balance of probabilities. *R. v. Godfrey* (1984), 11 C.C.C. 233 (3d) (Man. C.A.) upholds the burden on the accused to prove insanity.

⁹⁷ Certainly it can be questioned if insanity can be *properly* categorized as a true defence, as it clearly was in *Leland*.

⁹⁸ See Finlay, *loc. cit.*, footnote 21, at p. 118, n.9. Once again one could quarrel with the categorization of certain defences as true. Thus *Chandler v. State*, 198 S.E. (2d) 289 (Ga. S.C., 1973), concluded that accident was a true defence. This is an example, alluded to earlier, *supra*, footnote 5, of a court using the term "affirmative defence" much in the way I have used "true defence". But the defence of accident was here categorized as true (or "affirmative") on the basis that a true defence is one which admits (only) the *actus rea* (and not, additionally, *mens rea*). This confuses matters and is certainly not the way I have used the definition and *Chandler* could never withstand scrutiny after *Mullaney v. Wilbur*, *supra*, footnote 42: see *State v. Hankerson*, 220 S.E. (2d) 575, at p. 591 (N. Car. S.C., 1975); rev'd on other grounds, *sub. nom. Hankerson v. N. Carolina*, *supra*, footnote 94.

⁹⁹ *Supra*, footnote 42.

¹⁰⁰ See *Patterson v. New York*, *supra*, footnote 42, discussed *infra*.

this view there is nothing remarkable about *Mullaney*, because it had long been accepted that Due Process prohibits a legal burden on the accused to establish this sort of defence, as opposed to a true defence where such a burden on the accused was hitherto acceptable. Thus no legal burden could be placed on the accused consistent with Due Process. But the analysis in *Mullaney* did not proceed along these lines. The court accepted¹⁰¹ that the inclusion of "malice aforethought" in the legislative definition of murder was essentially superfluous, adding nothing to the central requirements of an intentional and unlawful¹⁰² killing. Malice, then, was not in any real sense an essential element of the crime and the defence raised was therefore not seen as questioning the existence of one of the elements of murder. The approach of Powell J. for the majority in *Mullaney* was rather to treat the defence of acting in the heat of passion, on sudden provocation, as having been drafted as a true defence.¹⁰³ The issue then arose whether there were any limits on the legislature's power to impose a legal burden on the accused as long as the issue in question could be categorized as a true defence. *Mullaney* held that there were indeed some limits.

By a review of the history of the law of homicide, Powell J. was able to conclude that the presence or absence of the heat of passion on sudden provocation has been "the single most important factor in determining the degree of culpability attaching to an unlawful homicide".¹⁰⁴ Despite the early common law rule which did require the accused to disprove this fact, the more recent trend has been to require the prosecution to bear the burden of proof. Powell J. concluded that in this context Due Process required the prosecution to disprove this defence, despite the legislative technique of drafting it as essentially a true defence.

The judgment of Powell J. in *Mullaney* is a highwater mark in this field. He specifically rejected¹⁰⁵ the proposition that the discussion should be influenced by the difficulties the state would face in proving a negative (lack of malice) or that the issue was one peculiarly within the knowledge of the accused. What is so refreshing about the judgment is its express regard¹⁰⁶ to substance over form and its willingness to face the issue of the presumption of innocence on policy grounds rather than an abdication to the whim of legislative drafting.

¹⁰¹ *Ibid.*, at p. 515, following the view of the Maine Supreme Court in *State v. Lafferty*, 309 A. (2d) 647, at p. 664 (1973).

¹⁰² That is, a killing neither justified nor excused. See *supra*, footnote 94 and *Mullaney*, *supra*, footnote 42, at p. 515.

¹⁰³ That this is so becomes clear from the dissent of Powell J. in *Patterson v. New York*, *supra*, footnote 42, discussed *infra*. See in particular *Patterson*, at p. 300, n.7.

¹⁰⁴ *Mullaney v. Wilbur*, *supra*, footnote 42, at p. 518.

¹⁰⁵ *Ibid.*, at p. 521.

¹⁰⁶ *Ibid.*, at pp. 519-520.

Yet although *Mullaney* is instructive, it is not completely revolutionary. Despite the interpretation placed on *Mullaney* by later decisions,¹⁰⁷ the judgment is based on the assumption that when an issue can, unlike the "defence" of acting in the heat of passion on sudden provocation, be *legitimately* framed as a true defence, there can be no complaint if a full legal burden is placed on the accused to prove such a defence. The *Winship*¹⁰⁸ principle that Due Process requires only that the state prove all the elements of the offence was not altered by *Mullaney*. What *Mullaney* achieved was, along the lines advocated by Fletcher,¹⁰⁹ a recognition that some issues are inherently essential elements of the crime, which *Winship* requires to be proven by the prosecution, and no amount of legislative tinkering can alter this aspect of Due Process.¹¹⁰ As we have seen,¹¹¹ there are very real difficulties in arriving at a coherent set of criteria to aid in the determination of what are the unalterable essential elements inherent in any particular crime. The *Mullaney* approach brought these difficulties into a sudden focus and when the scope of the issue became clear, the Supreme Court beat a hasty retreat. Commencing with *Patterson v. New York*,¹¹² decided two years after *Mullaney*, Due Process analysis in this field in America has abdicated the search for a structured delineation between the intrinsic elements of the offence which the state must prove, and true defences, which the accused can be forced to prove, and has left that decision up to legislative drafting.

Patterson dealt with a New York statute requiring a person accused of murder to *prove* that he or she acted under "extreme emotional disturbance" if the charge was to be reduced to manslaughter. The majority of the Supreme Court in *Patterson* recognized that the defence they were dealing with was "a considerably expanded version of the common-law defence of heat of passion on sudden provocation",¹¹³ with which *Mullaney* was concerned. Despite this obvious parallel, the Supreme Court in *Patterson* upheld the validity of the statute in question, relying specifically on the approach of *Leland v. Oregon*¹¹⁴ and employing the narrow *Winship* formulation of the Due Process guarantee as if it were the final solution to the whole issue. As the defence in *Patterson* was structured as "true", there could be no objection to a legal burden on

¹⁰⁷ Jeffries and Stephan, *loc. cit.*, footnote 28, at p. 1340, n.40, list the authorities which regarded *Mullaney* as condemning the idea of placing a legal burden on the accused to prove any true defence.

¹⁰⁸ *Supra*, footnote 79.

¹⁰⁹ *Supra*, at pp. 10-11.

¹¹⁰ *Mullaney* does allow for the possibility that an evidential burden can be placed on an accused on an issue, such as the heat of passion, that is in substance one of the elements of the offence: *supra*, footnote 42, at p. 521, n.28. So, too, *Simopolous v. Virginia*, 76 L. Ed. (2d) 755, at p. 760 (1983).

¹¹¹ *Supra*, at pp. 9-10.

¹¹² *Supra*, footnote 42.

¹¹³ *Ibid.*, at p. 287.

¹¹⁴ *Supra*, footnote 95.

the accused to prove the existence of such defence. Clearly the court wished to return to the halcyon days before *Mullaney*, and leave to the legislature the "more subtle balancing of society's interests against those of the accused".¹¹⁵ Of course, in adopting the approach taken in *Patterson*, the court was in fact engaging in a balancing exercise of its own and there is little doubt where sentiments lay, as White J. for the majority boldly stated:¹¹⁶

Due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.

He also recognized that the approach adopted was open to the criticism we have seen regarding the artificiality of a legislative determination of the offence-defence dichotomy, for he admitted that his majority judgment.¹¹⁷

... may seem to permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crime now defined in their statutes.

Although he went on to suggest that there are some limits on legislative practices, the stricture proposed, against a statutory declaration of presumptive guilt, hardly meets the point.¹¹⁸

The dissent of Powell J. in *Patterson* was scathing. He was obviously upset that the approach he advocated in *Mullaney* was being cut short.¹¹⁹

What *Winship* and *Mullaney* had sought to teach about the limits a free society places on its procedures to safeguard the liberty of its citizens becomes a rather simplistic lesson in statutory draftsmanship.

He proposed a two-fold test to limit the occasions when the legislature could shift the burden of proof to the accused. This restriction on the legislature arose if the issue involved "makes a substantial difference in punishment and stigma"¹²⁰ and has long held that level of importance in the Anglo-American legal tradition. Powell J. saw the defence of extreme emotional disturbance as a direct descendant of the "heat of passion" factor considered in *Mullaney*, and thus the cases were indistinguishable for constitutional purposes.

¹¹⁵ *Supra*, footnote 42, at p. 292.

¹¹⁶ *Ibid.*, at p. 291.

¹¹⁷ *Ibid.*, at p. 292. See too *Engles v. Isaac*, 71 L. Ed. (2d) 783, at p. 795 (1983), per O'Connor J.:

Our opinions suggest that the prosecution's constitutional duty to negate affirmative defences may depend, at least in part, on the manner in which the State defines the charged crime.

This is an example, alluded to earlier, *supra*, footnote 5, of the uncertainty as to which of the meanings of the term "affirmative defence" is being utilized here.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*, at p. 301.

¹²⁰ *Ibid.*, at p. 302.

Powell J.'s test for a principled delineation of the offence-defence dichotomy may be open to criticism of the sort facing the similar attempt by Fletcher,¹²¹ but at least it evidences a concern for the basic issues of policy involved in the allocation of the burden of proof. Powell J.'s approach would see the end of the constitutional validity of legal burdens on an accused in the case of many defences structured as "true". Yet he did not go to the length, which I advocate, of denying the possibility of compliance with Due Process of any legal burdens on an accused in the realm of true defences. For Powell J., if his two-fold test was not met, then nothing stood in the way of forcing an accused to prove the existence of a true defence. An example he chose is a New York statute which mitigates the penalty for an armed robber if he or she can prove that the gun employed was unloaded.¹²² As such a defence had no historical counterpart, it did not pass muster under Powell J.'s test and thus it was acceptable that an accused bear the burden of proof, as in the case of any "new ameliorative affirmative defence".¹²³

The controversy spawned by *Mullaney* continues to this day,¹²⁴ with the Supreme Court sharply divided. There may be occasions when the extensive United States experience with the offence-defence dichotomy will be of assistance to Canadian interpretation of the Charter. Yet in the area discussed in this article, the point to note is that the whole controversy never need be part of an examination of the effect of the presumption of innocence on the burden of proof.¹²⁵ The American problems arise because of the narrow *Winship* formulation¹²⁶ of the presumption of innocence as encompassed in Due Process, as well as reliance on the fact, as pointed out in *Patterson*,¹²⁷ that at the time of the Fifth and Fourteenth amendments to the United States Constitution, which guarantee Due Process, the common law threw a legal burden on the accused of proving "all . . . circumstances of justification, excuse or alleviation". Hence the relevance in America of the distinction between defences which attack the elements of the offence, and true defences. But in Canada the Charter guarantee of the presumption of innocence has become effective

¹²¹ *Supra*, footnote 36.

¹²² *Ibid.*, at p. 304, n.14.

¹²³ *Ibid.* Powell J. gave further examples, including mistake as to the age of the victim in a case of "statutory rape" and due diligence for a corporation charged with an offence.

¹²⁴ See *Engles v. Isaacs*, *supra*, footnote 111; *McMillan v. Pennsylvania*, 91 L. Ed. (2d) 67 (1986); *Martin v. Ohio*, *supra*, footnote 5. The latter case is instructive because of the dissent of Powell J. where he suggests that the majority have gone beyond *Patterson* and upheld a legal burden on the accused on an issue (self-defence) which may actually go to negate one of the elements of the offence, here "prior calculation and design" in murder.

¹²⁵ *Supra*, p. 12.

¹²⁶ *Supra*, the text at footnote 93.

¹²⁷ *Supra*, footnote 42, at p. 287.

after *Woolmington* and after the common law has moved away from routinely placing legal burdens on the accused, regardless of the nature of the defence in question.¹²⁸ More important, in Canada section 11(d) of the Charter requires proof of *guilt* beyond reasonable doubt, and proof of guilt necessitates negation of even true defences once the issue of their existence has been raised by the accused. As this is precisely the same requirement for defences which seek to question the existence of one of the elements of the crime, there is thus no need to distinguish between the two forms of defence in this particular area. As we will see in the review of Canadian Charter jurisprudence however, the type of approach prevalent in America is gaining some ground here. The confusion and controversy evident in the United States authorities should serve as sufficient warning that if we can avoid similar problems, we should. By refusing to distinguish between the two forms of defences for the purpose of allocating a burden of proof and by refusing to impose a burden higher than an evidential burden on any accused wishing to raise an issue of defence, the whole problem can be avoided, in keeping with the guaranteed presumption of innocence.

V. *The Canadian Approach after the Charter*

A. *Presumptions of Evidence*

The wide variety of presumptions encountered in our criminal law means that there are large areas here still relatively unexplored since the Charter. *Oakes* has set forth with some clarity the approach to be taken with mandatory presumptions rebuttable only by the accused satisfying a full *legal* burden of proof. I have previously questioned¹²⁹ the integrity of *Oakes* utilizing the "rational connection" test, fashioned in the American treatment of permissive presumptions, as the crucial factor for Charter section 1 validity of mandatory presumptions. The Ontario Court of Appeal judgment in *R. v. Boyle*¹³⁰ is the leading treatment of a mandatory presumption casting an *evidential* burden (only) on the accused. The approach in *Boyle* as to the relationship between sections 11(d) and 1 of the Charter, and the role of the rational connection test, will have to be altered after *Oakes*. It might be argued that even the basic message of *Boyle* will be nullified after *Oakes*, as there is a passage in Dickson C.J.C.'s judgment in *Oakes* which could be interpreted as concluding that a presumption rebuttable by the satisfaction by the accused of a mere evidential onus does not breach the presumption of innocence because the "ultimate legal burden to prove guilt beyond a reasonable doubt

¹²⁸ *Supra*, p. 9.

¹²⁹ *Supra*, at p. 20. Finlay, *loc. cit.*, footnote 21, at p. 135, notes that the Ontario Court of Appeal fell into the same error when *Oakes* was before them.

¹³⁰ *Supra*, footnote 42. See Ziff, *loc. cit.*, footnote 70. *Boyle* was followed in *R. v. T.* (1985), 18 C.C.C. (3d) 125 (N.S.C.A.).

remains with the Crown. . .'.¹³¹ To my mind, however, the conclusion set forth in *Boyle* that this common form of presumption can contravene section 11(d) of the Charter is (almost) correct and becomes unassailable if it is altered to read that such a presumption will *always* breach the presumption of innocence, though there may yet be found a justification under section 1 of the Charter.

The court's reasoning in *Boyle*,¹³² slightly restated to match the terms of my prior general discussion on section 11(d) of the Charter, is that although an evidential burden can, in keeping with the presumption of innocence, be placed on an accused to raise an issue of defence¹³³ to a Crown case of apparently proven guilt, no evidential burden can be properly placed on an accused to question the existence of one of the essential elements of the offence *before* its existence has been apparently proven beyond a reasonable doubt by evidence or inference from evidence introduced by the Crown. If the accused is to be presumed innocent until proven guilty, then there can be no requirement that he or she do anything, including satisfaction of an evidential burden, until a case of apparent guilt has been proven by the Crown. Where *Boyle* falls down, of course, is in failing to follow this logic through to a consistent conclusion. *Boyle* held that there would be no breach of section 11(d) of the Charter as long as the connection between the proven basic fact and the presumed fact of the presumption scrutinized was "reasonable"—a connection on the balance of probabilities.¹³⁴ What *Boyles* could not admit is that even if there were such a connection, the presumption of innocence would still be breached because a finding of one of the essential elements of the crime, the presumed fact, would be mandatory even though it had only been "proven" on the balance of probabilities, and not beyond reasonable doubt.

Perhaps after *Oakes* the type of presumption dealt with in *Boyle* will be seen to breach section 11(d) of the Charter, yet the problem with the "rational connection", or balance of probabilities test, for the link between the basic and presumed fact will remain because of the central role this test assumes under the *Oakes* guidelines for justification under section 1 of a Charter breach. What may lead to the validation of many of the *Boyle* type of presumptions, as opposed to the *Oakes* type, is the fact that these mandatory presumptions which cast only an evidential, as opposed to a legal, burden onto the accused will pass more readily that step of the *Oakes* test for section 1 justification subsequent to the "rational connection" test. This subsequent step is that the means in question,

¹³¹ *Supra*, footnote 2, at p. 117 (S.C.R.), 210 (D.L.R.). Sheldrick, *loc. cit.*, footnote 64, at p. 197, appears to read *Oakes* in this manner. This interpretation of *Oakes* was taken in *R. v. J.S.* (1987), 30 C.C.C. (3d) 230 (Ont. Pro. Ct.).

¹³² *Supra*, footnote 42, at pp. 201-202, 209-212.

¹³³ The examples chosen by Martin J.A., *ibid.*, at p. 209, include defences of both types I have previously discussed.

¹³⁴ *Ibid.*, at pp. 210-212.

even if rationally connected to the objective sought to be realized, must impair "as little as possible" the right or freedom in question.¹³⁵ I suspect that after *Oakes*, most mandatory presumptions casting a mere evidential burden on the accused will be upheld under section 1 of the Charter despite the clear breach of the presumption of innocence. The rational connection is usually not difficult to find and it will then be easy for the Crown to argue that the presumption of innocence has been infringed "as little as possible" because an evidential, as opposed to a legal burden, has been thrown onto the accused. Yet why such a breach of the presumption of innocence should be sanctioned in a "free and democratic society", being the operative words in section 1 of the Charter, remains a bit of mystery. Crown support of a *Boyle* type of presumption could always be met with the proposition that a less severe infringement of the presumption of innocence could have resulted had a *permissive*, as opposed to a mandatory, presumption been the means employed.¹³⁶ At least, a permissive presumption only allows, but does not *require* a breach of the presumption of innocence.¹³⁷

Passing to these permissive presumptions, the weakest form of decreed proof, the point I wish to make, which is certainly not accepted by the majority of Charter decisions to date,¹³⁸ is that the potential here for a breach of the presumption of innocence is similar to that presented by a mandatory presumption. Just because the trier of fact need not infer the existence of the presumed fact which is one of the essential elements of the crime, does not lessen the breach of the presumption of innocence every time such a permissible conclusion is, in fact, reached. Hence the United States concern with permissive presumptions, which has been outlined earlier. In the area of permissive presumptions the connection between the basic and presumed facts should be one beyond reasonable doubt. Even though the United States authorities have not gone this far, at least they have recognized that the validity of a permissive presumption will depend not simply on the strength of the connection but also on the method in which the jury is directed to use the presumption along with other evidence in individual cases.¹³⁹ There seems no reason why we should not draw on these ideas.

¹³⁵ *Oakes, supra*, footnote 2, at pp. 139 (S.C.R.), 227 (D.L.R.).

¹³⁶ This is really the basis for the current lack of complaint against the constitutionality of permissive presumption.

¹³⁷ Consideration might also be given to the United States idea, *supra*, pp. 26-27, that if all mandatory presumptions are not unconstitutional, then at least the connection between the basic and presumed facts must be one beyond reasonable doubt.

¹³⁸ *R. v. Russell, supra*, footnote 68; *R. v. Van Den Elzen, ibid.*; *R. v. Pye* (1984), 11 C.C.C. (3d) 64 (N.S.C.A.); *R.L. Crain Inc. v. Couture* (1983), 10 C.C.C. (3d) 119 (Sask. Q.B.). The only case to the contrary of which I am aware is *R. v. Wyatt, supra*, footnote 68. See too *Beaudry, loc. cit.*, footnote 68.

¹³⁹ *Supra*, footnote 92.

B. True Defences

(1) "Without Reasonable Excuse, the Proof of Which Lies upon Him."

In addition to the numerous mandatory presumptions casting a legal burden on the accused, there are many additional instances where a statute, and in particular the Criminal Code, will baldly force the accused to prove a true defence, or disprove the existence of one of the elements of the offence.¹⁴⁰ There is no valid reason why the *Oakes* approach should not apply here, as that case itself illustrates how a reverse onus clause such as section 8 of the Narcotics Control Act¹⁴¹ can be reframed and dealt with as a mandatory presumption, rebuttable only by the accused satisfying a legal burden.¹⁴² Though some of these reverse onus clauses are simple legislative statements to that effect¹⁴³ the most common occasion occurs in the Criminal Code by use of the framework specifying that an offence is committed when the accused commits an act "without lawful excuse, the proof of which lies upon him".¹⁴⁴ Parallel clauses such as "without lawful justification or excuse, the proof of which lies upon him",¹⁴⁵ "without lawful authority, the proof of which lies upon him",¹⁴⁶ or "without lawful authority or excuse, the proof of which lies upon him",¹⁴⁷ are also present in the Criminal Code. This surprising variety of phraseology may seem to have some ultimate purpose, but I can only shudder at the prospect of "excuse" being distinguished from "justification" or "authority", not only because of the daunting task, alluded to earlier,¹⁴⁸ of ever coherently distinguishing these

¹⁴⁰ For example, Criminal Code, *supra*, footnote 46, s. 16(4), the presumption of sanity; s. 106.7(1), proof of firearms permits, *etc.*; s. 159(3), defence of public good in an obscenity trial; s. 267(1), defence for proprietor of a newspaper publishing a defamatory libel; s. 273, truth as a defence in a charge of defamatory libel; s. 281.2(3)(a), truth as a defence to a charge of promoting hatred against an identifiable group; s. 341(2), *bona fides* in acquisition or sale of shares; s. 378(2), defence of lack of knowledge of certain factors in a charge of purchasing military stores; s. 386(2), proof of "legal justification or excuse and colour of right" to Code Part IX offences; s. 254(4), invalid prior marriage in a bigamy trial.

¹⁴¹ *Supra*, footnote 67.

¹⁴² This could be done even in the case of a true defence, such as that of truth as a defence to a charge of promoting hatred against an identifiable group, Criminal Code s. 281.2(3)(a). Restructured in the manner of the restructuring by *Oakes* of s. 8 of the Narcotic Control Act, truth would be specified as a defence, yet once it is shown that the accused, by communicating statements publicly, wilfully promoted hatred against any identifiable group, then, in the absence of proof to the contrary by the accused, the statement communicated shall be presumed false.

¹⁴³ *Supra*, footnote 140.

¹⁴⁴ For some of these occasions, see Criminal Code, *supra*, footnote 46, ss. 58(3); 80; 102(3); 106.5(2); 133; 197(2); 287.1(1); 307(1); 309(1); 310; 334(1)(b); 412.

¹⁴⁵ See for example, Criminal Code, *ibid.*, ss. 408, 409, 410, 416, 417.

¹⁴⁶ See for example, Criminal Code, *ibid.*, ss. 375, 377.

¹⁴⁷ See for example Criminal Code, *ibid.*, ss. 327, 363.

¹⁴⁸ *Supra*, footnote 7.

concepts, but also because of the convoluted mess we would wind up with even if the task could ever be performed. Thus, if the standard clause of "without lawful excuse, the proof of which lies upon him" were employed, would this mean that if the defence the accused sought to rely on was a matter of justification, as opposed to excuse, the statute did not intend to place a legal burden on him or her? This is a rock better left unturned and, in any event, these clauses in all their variation should be a thing of the past in the era of a guaranteed presumption of innocence.

To date, however, the majority approach of Charter jurisprudence has been to uphold the validity of this form of reverse onus clause.¹⁴⁹ The leading case is that of the Ontario Court of Appeal in *R. v. Holmes*,¹⁵⁰ in which the offence involved was that of possessing without lawful excuse, the proof of which lies upon the accused, housebreaking tools. What is important about the case for our purposes¹⁵¹ is the way in which Lacourcière J.A. for the court became enmeshed in the offence-defence dichotomy and unconsciously adopted the United States approach to the presumption of innocence which I have previously criticized. For Lacourcière J.A. the Crown bore the normal burden of proof on the essential elements of the offence, which had been properly defined by prior authority.¹⁵² But once these essential elements had been established, any exonerating factor which the accused sought thereafter to rely on had to be fully proven by the accused. Lacourcière J.A. lumped together any and all such exonerating factors, treating them universally as excuses which the accused must prove, regardless of whether they questioned guilty intent (as with the innocent possession of such tools by a plumber) or sought an acquittal in spite of the existence of intent (as in the case of compulsion). By such bootstraps logic any possible plea for exoneration becomes a true defence, and one which Parliament can validly force the accused to establish. For Lacourcière J.A., when a defence is a true defence, it "does not create a reverse onus",¹⁵³ and is therefore not contrary to section 11(d) of the Charter. This statement is an ominous illustration of the confusion engendered by the offence-defence dichotomy in this area.

A more recent case in this area is *R. v. Burge*,¹⁵⁴ a decision of the British Columbia Court of Appeal. *Burge* dealt with charges of posses-

¹⁴⁹ Don Stuart, Annotation to *R. v. Holmes* (1983), 32 C.R. (3d) 322, at p. 324 (Ont. C.A.). See too *R. v. Tassou* (1984), 16 C.C.C. (3d) 567 (Alta. Prov. Ct.); *R. v. Burany* (1985), 23 C.C.C. (3d) 373 (Ont. D. Ct.).

¹⁵⁰ *Ibid.*

¹⁵¹ The case has been critized on a number of other points not dealt with here; see Stuart, *ibid.* The judgment will inevitably have to be reconsidered in light of *Oakes*.

¹⁵² *R. v. Kozak* (1975), 20 C.C.C. (2d) 175, at pp. 179-180 (Ont. C.A.).

¹⁵³ *R. v. Holmes*, *supra*, footnote 149, at p. 330.

¹⁵⁴ *Supra*, footnote 42.

sing and uttering counterfeit money, both of which activities the Criminal Code¹⁵⁵ prohibits unless the accused proves a lawful justification or excuse. The judgment of Carrothers J.A. is open to numerous interpretations, all of which are subject to criticism.¹⁵⁶ One discernible train of thought¹⁵⁷ is that *mens rea*, knowledge by the accused of the counterfeit nature of the money in question, is not an essential ingredient of the offence, but rather the lack of *mens rea* is a true defence, to be proven by the accused as a matter of "lawful justification or excuse". To see suddenly lack of *mens rea* as a matter of excuse or justification, to be proven by the accused, is an astonishing conclusion and the central error from which all others spring. Though no one seems too clear on just what is encompassed by the phrase "without lawful excuse" or its many variations,¹⁵⁸ it is a radical departure from basic criminal law theory to hold that these words can *implicitly* alter the burden of proof on the issue of *mens rea*, normally a classic essential element in a "true criminal offence". However, once Carrothers J.A. is able to categorize the issue of *mens rea* in this way, he is able to conclude that there has been no breach of the Charter, because "the accused is not being required . . . to disprove . . . an important element of the offences in question. He is required merely to displace a presumption".¹⁵⁹ This statement alone should convey the pitfalls of attempting to use the distinction between the two forms of defence I have been referring to, as somehow justifying a legal burden on the accused to prove his or her innocence despite section 11(d) of the Charter.

¹⁵⁵ *Supra*, footnote 46, ss. 408, 410.

¹⁵⁶ See the dissenting judgment of Hutcheon J.A.; T.A. Cromwell, annotation to *R. v. Burge*, *supra*, footnote 42. Although Carrothers J.A. acknowledges *Oakes* in the Supreme Court, his application of *Oakes* seems to rest primarily on the judgment in that case of the Ontario Court of Appeal.

¹⁵⁷ See the treatment by Carrothers J.A. of *R. v. Caccamo* (1973), 11 C.C.C. (2d) 249 (Ont. C.A.); *supra*, footnote 42, at p. 136. See too the concluding paragraph, *ibid.*, p. 137. There is no doubt that another interpretation of the judgment of Carrothers J.A. is that *mens rea* was still an element of the offences, but its existence was presumed, and thus the defence of no *mens rea* did go merely to attack the existence of one of the elements of the offence, and was not therefore a true defence.

¹⁵⁸ See Stuart, *loc. cit.*, footnote 149, at p. 324. Of interest are the words of Laskin J. in *Brownridge v. R.*, [1972] S.C.R. 926, at p. 950, (1972), 7 C.C.C. (2d) 417, at p. 434:

. . . I regard the phrase "without reasonable excuse" as adding a defence or a bar to successful prosecution which would not be available without these words, but not as encompassing defences or bars that would exist without them.

There is no doubt that to some degree the source of the problem with *Burge* must be the Supreme Court of Canada's prior cryptic treatment of the offence of possession of counterfeit money in *Robinson v. R.*, [1974] S.C.R. 573, (1973), 34 D.L.R. (3d) 1. Other cases too have concluded that lack of *mens rea* is a matter of "lawful excuse"; see *R. v. Woolland*, [1935] 3 W.W.R. 220 (Man. Co. Ct.). Cf. *R. v. Metro News Ltd.* (1986), 32 D.L.R. (4th) 321, at pp. 345-349 (Ont. C.A.), where the court recognized a category of true criminal offences in which the Crown need not prove *mens rea*, but the accused can successfully defend by raising a reasonable doubt (only) as to his or her reasonable mistake of fact.

¹⁵⁹ *Supra*, footnote 42.

The type of reverse onus clause just discussed expressly places the onus on the accused. Alongside such clauses co-exist numerous statutory provisions employing similar wording, yet which are silent as to who bears the burden of proof. The formulation once again varies greatly, but follows the framework of a prohibition "without lawful excuse",¹⁶⁰ "without reasonable excuse",¹⁶¹ "without reasonable cause",¹⁶² "without lawful justification or excuse",¹⁶³ or "without lawful authority".¹⁶⁴ Typically, there seems to be no rhyme or reason to the variations in wording here. More pertinently, there seems no discoverable policy choice behind the decision sometimes to add expressly to these words, just discussed, the requirement that the accused prove the existence of the excuse or justification. The seemingly incomprehensible legislative choices have reached the extent of different provisions in the subsections of the same Criminal Code section as to the express allotment of a burden of proof to the accused.¹⁶⁵

Despite this lack of coherence, the express provision of a burden on the accused to prove an excuse or justification can be very significant. The whole matter is quite intricate. The rule for *proceedings by indictment* has been that without express provision for a legal burden on the accused, the Crown has to negate the existence of any lawful excuse or justification.¹⁶⁶ In *summary conviction proceedings*, however, the matter appears to be different. Section 730(2) of the Criminal Code or the appropriate provincial counterpart, throws onto the accused in *summary conviction proceedings* the legal burden of proving "that an exception, exemption, proviso, excuse or qualification" operates in the accused's favour. Despite some authority to the contrary, these blanket reverse onus provisions are currently applied to force the accused to prove the existence of lawful excuses, justifications and the like *even though* noth-

¹⁶⁰ For example, Criminal Code, *supra*, footnote 46, ss. 78, 84, 86, 106.5(3), 115, 116(1), 170, 178, 185(2)(a), 193(2)(6), 238(5), 330(3), 332(a).

¹⁶¹ For example, *ibid.*, ss. 118(b), 402(1)(e).

¹⁶² For example, *ibid.*, s. 393.

¹⁶³ For example, *ibid.*, ss. 159(2), 262(1), 305(1).

¹⁶⁴ For example, *ibid.*, ss. 381(1), 382, 247(2), 249(1), 334(2).

¹⁶⁵ For example, *ibid.*, s. 106.5(2) requires the accused who defaces a firearms certificate to prove a lawful excuse, while s. 106.5(3) does not expressly provide that the accused who fails to comply with a permit condition must prove a lawful excuse.

¹⁶⁶ *R. v. Cameron*, [1966] 4 C.C.C. 273 (Ont. C.A.); leave to appeal to S.C.C. refused, [1967] 2 C.C.C. 195 n. Aylesworth J.A. did say, *ibid.*, at pp. 286-287, that "little proof will often suffice" and may be "drawn by inference from other proven facts". He may indeed be reaching the same conclusion as MacKay J.A. who holds that in such case there is still an evidential burden on the accused to raise the issue of a lawful excuse: *ibid.* at p. 290. See McWilliams, *op. cit.*, footnote 10, pp. 754-755.

ing else expressly places the legal burden on the accused!¹⁶⁷ If this surprising approach is universally adopted, then, in summary conviction proceedings the fact that Parliament has not expressly placed upon the accused the burden of proving that the prohibited act was committed with a "lawful excuse or justification" will be irrelevant. Because of section 730(2) of the Code, any such "excuse or justification" would be seen as an "exception, exemption, proviso, excuse or qualification" for the accused to prove. This would result in a large increase in the instances in which the accused is being asked to prove his or her innocence in the face of section 11(d) of the Charter.¹⁶⁸ My argument, of course, is that this cannot continue.

(2) *The burden of proving the existence of an Exception, Exemption, Proviso, Excuse or Qualification*

In many instances the statutory enactment of an offence will provide an apparent means of exoneration from the otherwise blanket prohibition, yet give no express indication of who bears the burden on this issue of possible exoneration. Such instances, of course, highlight the one area of real practical effect of the offence-defence dichotomy: what issues are for the Crown to prove in order to avoid a directed verdict for acquittal? Some examples here will aid discussion. An instance that has never concerned anyone is the defence of age. Section 12 of the Criminal Code states that no one shall be convicted of a criminal offence in respect of an act or omission on the accused's part while the accused was under twelve years of age. It is surely not one of the essential elements of every criminal offence charged that the accused be shown to be twelve years of age or older. Lack of age must, then, be a true defence and one for which the accused must bear at least an evidential burden. The issue here, forgetting for a moment about the presumption of innocence, is whether any argument could be made that the accused who raises the issue of lack of age must go further and prove this defence.

¹⁶⁷ As to the Criminal Code, the authorities are outlined in *R. v. Gray* (1987), 30 C.C.C. (3d) 234 (B.C. Co. Ct.); cf. J.C. Smith, Commentary on *Hirst & Agu v. Chief Constable of W. Yorkshire*, [1987] Crim. L. Rev. 330. As to provincial offences, see Offences Act, R.S.B.C. 1979, c. 305, s. 88(2); see *R. v. Park Hotel (Sudbury) Ltd.*, [1966] 4 C.C.C. 158 (B.C. Co. Ct.).

For contrary authority, see *R. v. Uridge*, [1937] 3 W.W.R. 467 (Alta. D. Ct.); *R. v. Allan*, [1972] 3 W.W.R. 79 (B.C.S.C.). These cases would have to be reassessed after *R. v. Côté*, [1978] 1 S.C.R. 8, at p. 16, (1977), 33 C.C.C. (2d) 353, at p. 359.

I have found no case which applies this reasoning to a matter of justification and this may be of some importance, as "justification" is not mentioned in s. 730(2). But unless the dangerous practice of distinguishing between an excuse and a justification is going to be embarked on (*supra*, footnote 7), there is probably no issue here, particularly because the statutory provisions I deal with always mention justification in tandem with excuse: *supra*, footnotes 145 and 163.

¹⁶⁸ Stuart, *op. cit.*, footnote 7, p. 38, refers to s. 730(2) as "the fortunately neglected general section 730(2)". I would not agree with his conclusion of neglect.

Though the general rule¹⁶⁹ clearly is that any such reversal of the onus of proof must be specifically expressed by statute, and section 12 contains no words imposing a legal burden on the accused, there are a growing number of instances where such a burden is blatantly placed on the shoulders of the accused despite the lack of statutory direction to that effect.¹⁷⁰ Though the reader may feel confident that the issue of lack of age is to be treated in an orthodox fashion, imposing on the accused an evidential burden only, a further example may show that the issue here is not all that elementary. Take, for instance, the offence of publishing a defamatory libel. Section 265 of the Criminal Code makes it an indictable offence to publish a defamatory libel, and it would seem that knowledge that the libel is false is not an element of the offence.¹⁷¹ The ensuing Code sections go on, however, to set forth many apparent exonerations. Section 273 states:

No person shall be deemed to publish a defamatory libel by reason only that he publishes defamatory matter that, on reasonable grounds, *he believes is true*, and that is relevant to any subject of public interest, the public discussion of which is for the public benefit.

Who is to prove or disprove these matters? If the offence was a summary conviction matter, *which of course it is not*, and if the issues dealt with in section 273 can be classified as matters of "exception, exemption, proviso, excuse or qualification", then section 730(2) would cast the legal burden of proof onto the accused. But defamatory libel is an indictable offence and there is no counterpart to section 730(2) governing proceedings by indictment. However, a recent House of Lords decision, *R. v. Hunt*,¹⁷² has opened the door for an argument that an esoteric common law doctrine operates for all offences in the same manner as section 730(2) operates expressly for summary conviction offences.

(a) *Summary Conviction Offences—Criminal Code Section 730(2)*

The first issue that must be addressed is what exactly is a matter of "exception, exemption, proviso, excuse or qualification" that will bring section 730(2) of the Criminal Code (or one of its provincial counter-

¹⁶⁹ In *Fleming v. R.*, *supra*, footnote 24, at p. 660, in which the Charter was not an issue, Wilson J. (for the court) stated:

... *R. v. Appleby* ... maintained that an enactment which reverses the onus of proof must do so expressly. Indeed, the *Bill of Rights* itself. . . if nothing else requires express words in order to "abrogate, abridge or infringe" any of the rights and freedoms in s. 2.

¹⁷⁰ For example newly created *non-statutory* defences such as due diligence for strict liability offences, per *R. v. Sault Ste. Marie*, *supra*, footnote 6, discussed *infra*; the defence of officially induced error: *R. v. Cancoil Thermal Corp.* (1986), 52 C.R. (3d) 188 (Ont. C.A.); entrapment: *R. v. Mack* (1985), 49 C.R. (3d) 169 (B.C.C.A.), leave to appeal to the Supreme Court of Canada granted, *ibid.* We have already seen, *supra*, at p. 41, how s. 730(2) has had the effect of placing a legal burden on the accused in summary conviction matters by being "read into" those Code sections that envision a "lawful excuse or justification, etc." operating in the accused's favour.

¹⁷¹ S. 264 creates a separate offence, with a higher penalty, for publishing a libel known to be false.

¹⁷² [1987] A.C. 352, [1987] 1 All E.R. 1 (H.L.).

parts) into play and cast the legal burden onto the accused to prove the existence of such matters of exoneration. It appears to be clear that the type of defences sought to be encompassed by the wording of section 730(2) does not include common law defences.¹⁷³ Excluding common law defences from the operation of Code section 730(2) or the other provincial and federal¹⁷⁴ blanket statutory provisions of like import does not solve all problems of categorization. Even in the case of an apparent exoneration specifically set forth in a statute, three choices appear to be open.

The *lack* of such exonerating factor could be seen as an essential element of the offence, to be proven beyond a reasonable doubt by the Crown whether or not the accused has satisfied an evidential burden on the issue.¹⁷⁵ The second possibility is that the exonerating factor might be seen as imposing an evidential burden on the accused, yet not fitting within the description of an "exception, exemption, *etc.*", which is the third choice, and which would require that the accused satisfy a legal burden. An example of this second possibility, which would require that the accused satisfy a mere evidential burden is, perhaps, that of lack of age as set forth earlier. It is certainly the correct option when the statutory ground of exoneration is merely a restatement of a ground recognized at common law, such as Criminal Code section 34 which deals with self defence.¹⁷⁶ Indeed, in summary conviction matters where section 730(2) or its equivalent are operative, the sole occasion when a mere evidential burden is cast on the accused to raise the issue of a statutory ground of exoneration appears to be precisely when the provision in question is a reworking of a recognized common law defence. Lack of age, after all, was a recognized defence at common law.¹⁷⁷ Beyond this in summary conviction proceedings the choice appears to be the stark one between either a legal burden on the Crown or one on the accused, with no easy guidelines, as we will see shortly in the discussion of *R. v. Hunt*.¹⁷⁸

¹⁷³ *Perka v. R.*, *supra*, footnote 7, at pp. 258 (S.C.R.), 138 (C.R.), per Dickson J. Another restriction is that the exception, *etc.*, must be created by a statute of the same legislative authority which has created the offence: *R. v. Edmonton Brewing and Malt-ing Co.*, [1923] 2 W.W.R. 1107, at pp. 1117-1118 (Alta. C.A.), per Beck J.A.

¹⁷⁴ For example, Narcotic Control Act, *supra*, footnote 67, s. 7; Food and Drug Act, R.S.C. 1970, c. F-27, s. 44(1).

¹⁷⁵ This is in fact the eventual ruling in *R. v. Hunt*, *supra*, footnote 172, which will be discussed *infra*. See too *R. v. Trawick* (1972), 8 C.C.C. (2d) 471 (Alta. T.D.); *R. v. Makarenko* (1945), 83 C.C.C. 328 (Alta. App. Div.); *R. v. Walchuk*, [1938] 1 W.W.R. 208 (Sask. K.B.).

¹⁷⁶ Mewitt and Manning, *op. cit.*, footnote 19.

¹⁷⁷ *Marsh v. Loader* (1863), 14 C.B. (N.S.) 535, 143 E.R. 555 (C.P.).

¹⁷⁸ *Infra*, p.45 et seq. Of course, the legal burden on the Crown in criminal law is generally proof beyond reasonable doubt, and on the accused it is proof of the balance of probabilities. Exceptions to this standard on the Crown include proof of Charter s. 1 justification: *Oakes*, *supra*, footnote 2, at pp. 137 S.C.R.), 226 (D.L.R.), and Crown proof of the accused's insanity: *R. v. Simpson* (1977), 35 C.C.C. (2d) 337 (Ont. C.A.).

Once, however, a ground of exoneration is characterized as a matter of "exception, exemption, *etc.*", a legal burden is then placed clearly on the accused and the issue of the Charter is immediately raised. To date Canadian courts have generally upheld the operation of provisions like section 730(2), despite the presumption of innocence.¹⁷⁹ The leading authority comes once again from the Ontario Court of Appeal. *R. v. Lee's Poultry*¹⁸⁰ dealt with the Ontario provincial summary conviction equivalent of section 730(2),¹⁸¹ and the particular offence involved was that of operating a meat processing plant, other than "an establishment", without a licence.¹⁸² The existence of a licence was clearly "an authorization, exception, exemption or qualification", thereby requiring that the accused prove the existence of the licence. Yet a concurrent issue was whether or not the accused's plant was "other than an establishment". Though this issue also might have been seen as an "exception or exemption, *etc.*" Brooke J.A. saw it rather as one of the essential elements of the offence and therefore not caught by the blanket reverse onus clause. This is always an inescapable conclusion when the boundaries of the offence-defence dichotomy must be delineated.¹⁸³ As the prosecution had introduced no evidence to *negate* the possibility that the accused's plant was in fact "an establishment", an acquittal was entered.

Lee's Poultry is of most interest regarding the constitutional validity of the reverse onus clause which clearly did operate on the issue of a licence. Possession of a licence is a classic example of a true defence, and the lack of a licence will not be seen as one of the elements of the offence for the Crown to prove beyond reasonable doubt.¹⁸⁴ In *Lee's Poultry* Brooke J.A. upheld the provincial blanket reverse onus clause on the basis that it was "reasonable", the test propounded by *Oakes*¹⁸⁵ in the Ontario Court of Appeal. Inevitably, *Lee's Poultry* will have to be re-examined in light of the *Oakes* judgment in the Supreme Court. But the case still has a present relevance. In the judgment in *Lee's Poultry*

¹⁷⁹ *R. v. Schwartz* (1983), 10 C.C.C. (3d) 34 (Man. C.A.), upheld s. 106.7(1) of the Criminal Code, which throws the burden onto the accused of proving that he or she has, *inter alia*, a firearms acquisition certificate. The same conclusion was reached by the Nova Scotia Court of Appeal in *R. v. Conrad* (1983), 8 C.C.C. (3d) 482. The offence-defence dichotomy was the basis for the judgment.

¹⁸⁰ (1985), 43 C.R. (3d) 289 (Ont. C.A.).

¹⁸¹ Provincial Offences Act, R.S.O. 1980, c. 402, s. 48(3):

The burden of proving that an authorization exception, exemption or qualification prescribed by law operates in favour of the defendant is on the defendant. . .

¹⁸² If the plant was "an establishment" then it would come under federal licencing jurisdiction, and hence this strange terminology; *R. v. Lees Poultry*, *supra*, footnote 180, at p. 292.

¹⁸³ *Supra*, at pp. 11-12.

¹⁸⁴ See *R. v. Staviss* (1943), 79 C.C.C. 105 (N.S. App. Div.); *R. v. Edwards*, [1975] Q.B. 27, [1974] 2 All E.R. 1085 (C.A.).

¹⁸⁵ (1983), 145 D.L.R. (3d) 123 (Ont. C.A.).

there is a surprising suggestion, which has gained some academic support,¹⁸⁶ that the *Oakes* approach may be only tangentially applicable to the type of reverse onus clause dealt with in *Lee's Poultry*. In *Oakes* both the Court of Appeal and the Supreme Court dealt with the section in question, section 8 of the Narcotic Control Act,¹⁸⁷ as if it set forth a presumption. In *Lee's Poultry*¹⁸⁸ Brooke J.A. distinguished *Oakes* for this reason:

Unlike the section in question in *R. v. Oakes*, s. 48(3) does not purport to create a presumption but rather to express in statute form an exception to a general rule of pleading and proof. . . The exception provided for does not depend upon presumption.

But this is surely a specious ground upon which to distinguish *Oakes*. Section 8 of the Narcotic Control Act does *not* follow the typical formulation of a presumption and simply does not expressly purport to presume one fact once a basic fact is proven. Rather, once the accused is found in possession of a narcotic, he or she must then bear the burden of proving the lack of possession for the purpose of trafficking. What Martin J.A. in the Court of Appeal, and Dickson C.J.C. in the Supreme Court in *Oakes* were able to see is that such a reverse onus clause can conveniently be reframed as a presumption, and this assisted in dealing with United States constitutional jurisprudence and Canadian Bill of Rights authorities. The reverse onus clause dealt with in *Lee's Poultry* might just as easily have been rephrased as a presumption, that upon proof of the accused operating a plant (basic fact) the lack of a licence was presumed, in the absence of proof by the accused to the contrary. The approach would allow the full application of *Oakes* and would surely lead to the conclusion that the provincial blanket reverse onus clause dealt with in *Lee's Poultry*, like section 730(2) of the Code, contravened the presumption of innocence. Because of the lack of any rational connection between the basic fact of operation of a plant, and the presumed lack of a licence, there would seem to be little room for justification under section 1 of the Charter of the reverse onus clause as it operated in *Lee's Poultry*,¹⁸⁹ or indeed in most cases of its operation.

(b) *Indictable Offences—The Universal Common Law Equivalent of Section 730(2)*

If *R. v. Hunt*¹⁹⁰ is followed in Canada, it will have the effect of making the previous discussion respecting the reverse onus in summary

¹⁸⁶ Don Stuart, *Oakes is not Enough* (1985), 43 C.R. (3d) 315, at p. 316. Cf. *R. v. Gray*, *supra*, footnote 167.

¹⁸⁷ *Supra*, footnote 67.

¹⁸⁸ *Supra*, footnote 180, at p. 294.

¹⁸⁹ This was the basis for the decision of Webb Co. Ct. J. appealed from, *ibid.*, at p. 294, which I support. For a look at *Lee's Poultry* after *Oakes*, see *Re R and K and D* (1986), 22 C.R.R. 292 (Ont. Prov. Ct.).

¹⁹⁰ *Supra*, footnote 172. See A.A.S. Zuckermann, No Third Exception to the Woolmington Rule (1987), 103 Law Q. Rev. 170. I do not agree with some of his analysis of *Hunt*. See too, P. Healy, Proof and Policy: No Golden Threads, [1987] Crim. L. Rev. 353.

conviction matters applicable equally to indictable offences, despite the lack of a statutory blanket reverse onus clause for these more serious offences along the lines of section 730(2). *Hunt* held that there is a common law procedural rule of pleading and proof that is applicable to all offences which would throw onto the accused the burden of proving that an exception, exemption, *etc.*, operates in the accused's favour. The statutory provisions¹⁹¹ in *Hunt* were somewhat complex, but the case can be summarized by stating that the accused was charged with *the indictable offence* of possession of morphine, and it was proven that he did possess morphine, mixed with caffeine and atropine. There was no evidence of the proportion of morphine in the mixture. The statutory provision creating the offence set out the prohibition of possession of morphine, but recognized that it was "subject to any regulations" made under the Act, and the pertinent regulation stated that the offence creating section "shall not have effect in relation to" a preparation of morphine where the morphine made up no more than a specified proportion of the preparation. The accused argued (successfully) that the Crown had to prove, as one of the elements of the offence, that the proportion of morphine in the mixture possessed by the accused, was equal to or higher than the minimum proportion as set out in the regulation. As the Crown had offered no evidence on this essential element of the offence, the accused had no case to meet. The Crown on the other hand argued that the issue of the proportion of morphine in the mixture was an exception to the general prohibition against possessing morphine, and thus by virtue of the common law procedural rule to the same effect as the English statutory provision relating to summary conviction matters, the Crown need not deal with the issue, as the accused had to prove he was entitled to the benefit of this exception.

In siding with the accused's interpretation, the Law Lords in *Hunt* provide some useful insights into possible indicators to assist in drawing the dividing line between the elements of the offence, and issues of true defence. If the "matter of possible exoneration", to use a purposely innocuous phrase, appears in the clause creating the offence rather than in some subsequent proviso, this points more to the negation of this matter being intended to be one of the elements of the offence.¹⁹² Of chief importance appears to be the ease or difficulty that would be encountered by the Crown or accused bearing the burden on the matter in question.¹⁹³ This latter factor, which will inevitably be seized upon in future cases, is a bit troubling. All of the common law defences, which almost invariably place only an evidential burden on the accused,¹⁹⁴ could be seen as issues upon which the accused has the most intimate knowl-

¹⁹¹ Misuse of Drugs Act 1971, s. 5.

¹⁹² *Supra*, footnote 172, at pp. 374 (A.C.), 10 (All E.R.).

¹⁹³ *Ibid.*, at pp. 374 (A.C.), 11 (All E.R.), per Lord Griffiths; 383-384 (A.C.), 17-18 (All E.R.), per Lord Ackner.

¹⁹⁴ Excepting insanity and a few other matters, *supra*, footnote 170.

edge, and thus could most easily bear the burden of proof. But as this factor has not been enough to raise the burden from evidential to legal on an accused wishing to assert such common law defences, it is questionable why it should assume so crucial a role in the statutory framework where the legislature has not been clear on the point. The one stage in a trial where the essential elements of an offence must be differentiated from true defences is the stage with which *Hunt* was concerned—whether the Crown case could survive a motion for a directed verdict.¹⁹⁵ The case, then, presented a legitimate framework within which to search for criteria distinguishing the elements of an offence from true defences of the particular variety of “exceptions, exemptions, etc.” Yet to conclude that a matter of exoneration can be categorized as a defence simply because the accused can more easily prove it, seems a cynical abdication by the House of Lords of any hope for principle in the search for a distinction between the elements of an offence and true defences. Such cynicism may be justified because of the lack of any real logic in the offence-defence dichotomy. But even if their Lordships cannot be criticized for their practical reliance upon the ease with which the Crown or the accused may deal with a particular issue in a trial as the key to the offence-defence dichotomy, there is surely something wrong with the conclusion reached that whenever an issue can, on this basis, be categorized as a true defence of “exception, exemption, etc.”, the burden on the accused is a full legal burden. Lord Griffiths, though recognizing academic opinion supporting the upper limit of an evidential burden on the accused,¹⁹⁶ nonetheless held that for such a “fundamental change” in criminal law theory only Parliament, not the House of Lords, is the proper authority to petition. What an astonishing sentiment in view of the fact that what *Hunt* itself was affirming was a rule of procedure “hammered out on the anvil of pleading”,¹⁹⁷ fashioned by the common law, which Lord Griffiths expressly recognized “adapts itself and evolves to meet the changing patterns and needs of society”.¹⁹⁸ There was really no reason that this same common law could not declare that an evidential, as opposed to a legal burden, rested on an accused to raise the issue of this sort of true defence.

What the Law Lords advocate in *Hunt* is that when faced with a statute that is not clear in delineating a matter of exoneration as an essential element of the offence or a true defence, a proper way to proceed is: “We cannot tell what Parliament intended. But because it would be easier for you, the accused, to prove you are entitled to the benefit of this matter of exoneration, we will label it an exception and make you prove it”. The approach I advocate, and which I have attempted to

¹⁹⁵ *Supra*, pp. 11-12.

¹⁹⁶ *Supra*, footnote 172, at pp. 376 (A.C.), 11-12 (All E.R.).

¹⁹⁷ *R. v. Edwards*, *supra*, footnote 184, at pp. 39-40 (Q.B.), 1095 (All E.R.).

¹⁹⁸ *Supra*, footnote 172, at pp. 372 (A.C.), 9 (All E.R.).

show is dictated by section 11(d) of the Charter is: "We cannot tell what Parliament intended. But because we feel that at this stage a sufficient *prima facie* case of guilt has been made out against you, the accused, it is fair to call upon you to raise a reasonable doubt as to the existence in your favour of the matter of exoneration." I cannot see why a free and democratic society should require more.

Hunt, if followed in Canada, would have a serious effect on the presumption of innocence. There are numerous statutory provisions applicable to indictable offences, which could clearly be categorized as exceptions, exemptions, *etc.*,¹⁹⁹ and numerous other provisions of which the opening example relating to defamatory libel is one, which may be uncertain, but which definitely could, on a *Hunt* analysis, be so categorized,²⁰⁰ because of the ease with which the accused might bear the burden of proof. If these instances are seen as "exceptions, exemptions, *etc.* ", then *Hunt* would seek to place the burden of proof of such issues on the accused. The *Hunt* key to categorization would also affect summary conviction matters by perhaps classifying as "exceptions, exemptions, *etc.* " many matters not so viewed at present.²⁰¹

Despite strong indications that *Hunt* may be adopted by Canadian courts,²⁰² or embarked upon independently by legislation,²⁰³ such an approach would be neither warranted nor desirable in view of section 11(d) of the Charter.²⁰⁴ The House of Lords in *Hunt* recognized that the

¹⁹⁹ See for example Criminal Code, *supra*, footnote 46, ss. 178.11(2), 188, 190.

²⁰⁰ For example, *ibid.*, ss. 387(7), 254(2), 268-274, 276-279, 281.2(3)(b-d), 347(2).

²⁰¹ One arguable further effect of *Hunt* would be to overturn *R. v. Cameron*, *supra*, footnote 166, and hold that whenever the statute prohibited an act "without lawful excuse" then, as such an excuse is within the common law rule expounded by *Hunt*, the burden of proof of the excuse falls upon the accused, despite the lack of an express statutory direction to that effect. In other words, the effect here for indictable offences will be the same as that already achieved for summary conviction matters by s. 730(2); see *supra*, footnote 167, and accompanying text.

²⁰² The forerunner of *Hunt* was *R. v. Edwards*, *supra*, footnote 184. *Edwards* has been followed in Canada, and this tendency may well continue with regard to *Hunt*. See *R. v. Lee's Poultry*, *supra*, footnote 180; *R. v. Grisdale* (1982), 15 Man. R. (2d) 382 (Man. Co. Ct.); *R. v. Mudford and Schott* (1982), 40 O.R. (2d) 626 (Ont. Co. Ct.); *R. v. McKenzie* (1983), 44 N.B.R. (2d) 402 (N.B.Q.B.); *R. v. Brunelle* (1978), 44 C.C.C. (2d) 508 (Ont. H.C.); *R. v. Medicine Hat Greenhouses Ltd.*, [1980] 2 W.W.R. 596 (Alta. Prov. Ct.); see the discussion in P.K. McWilliams, *Canadian Criminal Evidence*, Supplement (1986), p. 135. I do not agree with his conclusions.

²⁰³ The Draft Evidence Act, *supra*, footnote 3, s. 12(1) is in terms similar to s. 730(2), yet applies to all offences (indictable and summary). Section 12(2) goes on to state that the provision "does not apply to the defence of provocation in relation to murder or to any defence of general application provided by law". See McWilliams, *op. cit.*, footnote 10, p. 660.

²⁰⁴ If Wilson J. is correct in *Fleming v. R.*, *supra*, footnote 169, that a statutory reversal of an *onus of proof* onto the accused must be express, then there can be no room for *Hunt*. It is of interest to note that in England the Law Commission, *Codification of Criminal Law*, #143 (1985), criticized *R. v. Edwards*, *supra*, footnote 184, and codified the doctrine in such a way that "leaves it open to the courts to determine its limits, or, if thought appropriate, overrule it".

wide ranging reverse onus they were endorsing infringed the presumption of innocence, and were thus at pains to bring it within the "statutory exceptions" admitted by *Woolmington*.²⁰⁵ Once Canadian courts recognize that any occasion where the accused is called upon to prove the existence of an "exception, exemption, etc. ", breaches section 11(d) of the Charter,²⁰⁶ the only issue remaining is whether the Crown can justify such a breach in terms of section 1. There seems no reason why *Oakes* should not govern here as well, and regardless of other concerns, it is unlikely if many of these general reverse onus provisions could pass the rational connection test fashioned by *Oakes*. Returning to our defamatory libel example, it could hardly be said that once the publication of a defamatory libel is proven, it is more probable than not that it was published without a reasonable belief as to its truth and not on a subject of public benefit. If the reader balks at the reframing of this sort of reverse onus clause as a presumption, allowing an *Oakes* analysis, then even on general terms it is difficult to see why a free and democratic society requires such a large inroad into the presumption of innocence when an evidential onus on the accused to raise this sort of true defence is a viable alternative. Why should an accused alleging innocence by reason of, say, a licence, be treated so differently from an accused who alleges self defence, drunkenness or provocation? The question is rhetorical.

(3) *Due Diligence and Reasonable Mistake of Fact: R. v. Sault Ste. Marie*

*R. v. Sault Ste. Marie*²⁰⁷ established, for the newly fashioned "strict liability" category of so called "public welfare offences", the dual defences of due diligence and reasonable mistake of fact. As *men rea* is not an essential element of these strict liability offences, due diligence and reasonable mistake of fact here are properly categorized as true defences because they are not performing the function of calling into question the existence of an essential element of the offence. These defences were recognized in *Sault Ste. Marie*, "to avoid the strictures of absolute liability"²⁰⁸ and thus can legitimately be seen as a bonus for accused persons. In placing the onus of proving these defences fully on the accused

²⁰⁵ *Supra*, footnote 172, at pp. 368-374 (A.C.), 6-10 (All E.R.), per Lord Griffiths, 379-380 (A.C.), 14-15 (All E.R.), per Lord Ackner.

²⁰⁶ Williams, *loc. cit.*, footnote 22, p. 236:

If a person comes within an exception to an offence, or has a good defence to it, he is innocent of the offence. Therefore it is anomalous that the burden of proving innocence in these respects should rest on him.

²⁰⁷ *Supra*, footnote 6. For a gloss on *Sault Ste Marie*, adding a fourth category of offences, see *R. v. Metro News Ltd.*, *supra*, footnote 158.

²⁰⁸ *Strasser v. Roberge*, [1979] 2 S.C.R. 953, at p. 991, (1979), 103 D.L.R. (3d) 193, at p. 203, per Dickson J. (dissenting).

the Supreme Court relied on very shaky authority,²⁰⁹ but was exemplifying the undeniable trend to impose a legal burden on the accused as the trade off for the benefit of a newly recognized defence.²¹⁰

The extent of the infringement of the presumption of innocence caused by the legal burden on the accused to show due diligence or reasonable mistake of fact is vast because of the ubiquity of public welfare offences,²¹¹ most of which will be categorized as strict as opposed to absolute liability offences after *Sault Ste. Marie*.²¹² But, of course, *Sault Ste. Marie* was decided before the Charter was a reality. At the time Dickson J. was delivering the judgment in *Sault Ste. Marie* the Bill of Rights guarantee of the presumption of innocence had all but been emasculated by the Supreme Court.²¹³ Whatever power *Woolmington* held, it did not concern Dickson J. for he restricted its operation to true criminal offences, as opposed to public welfare offences which were the focus of *Sault Ste. Marie*. But this is surely a cavalier way around *Woolmington*'s affirmation of the presumption of innocence. I know of no authority for the proposition that, absent statutory inroads, basic principles of criminal procedure and safeguards for the accused such as the benefit of the presumption of innocence do not apply equally to all prosecutions for offences of any type or degree. In any event, the validity of the legal burden placed on the accused to prove the true defences of due diligence or reasonable mistake of fact clearly requires reassessment after the Charter.

²⁰⁹ Dickson J. in *Sault Ste. Marie* looked to Australia for support, yet the Australian position is not at all clear. See the discussion in *R. v. McKenzie*, [1983] N.Z.L.R. 78, at pp. 92-93 (N.Z.C.A.), per McMullin J.; *He Kaw Teh v. R.* (1985), 60 A.L.R. 449, at pp. 455-457, (Aust. H.C.), per Gibb J. Dickson J. also made reference to New Zealand authorities, but the whole point of *R. v. Strawbridge*, [1970] N.Z.L.R. 909 (N.Z.C.A.) was to alter the legal burden of *R. v. Ewart*, [1906] N.Z.L.R. 709 (N.Z.C.A.) to an evidential burden only, after *Woolmington*. Dickson J. also relies on the judgment of Lord Diplock in *Sweet v. Parsley*, [1970] A.C. 132 (H.L.), but it is clear that Lord Diplock was advocating an evidential burden only on the accused, in keeping with *Woolmington*. Lord Diplock's views have recently been adopted by the House of Lords: *Westminster City Council v. Croyalgrange*, [1986] 1 W.L.R. 674.

²¹⁰ The matter is a central concern in *Patterson v. New York*, *supra*, footnote 42, and is discussed by Fletcher, *op. cit.*, footnote 7. Exactly the same forces are at work in the defences of officially induced error and entrapment, *supra*, footnote 170, which also in imposing a legal burden on the accused infringe the presumption of innocence.

²¹¹ See Law Reform Commission of Canada, *Our Criminal Law* (1976), pp. 11-12, which sets out that there are over 20,000 "regulatory offences" in Canada and 20,000 provincial offences. After *Strasser v. Roberge*, *supra*, footnote 208, it is unlikely that many provincial offences will be categorized as "true criminal offences", that is they will be "public welfare offences".

²¹² *Supra*, footnote 6, at p. 1326 (S.C.R.), 181-182 (D.L.R.).

²¹³ See the review in *Oakes*, *supra*, footnote 2, of the Bill of Rights jurisprudence in this area.

Most courts that have considered the point have concluded that Charter rights in general,²¹⁴ and the presumption of innocence in particular,²¹⁵ apply equally to public welfare offences as to true criminal offences. Yet there has been to date no considered look at the obvious infringement of the presumption of innocence occurring by reason of the legal burden placed on the accused to prove due diligence or reasonable mistake of fact in strict liability offences. Those courts and commentators²¹⁶ who have looked at the issue have been cursory in their treatment. The main authority, such as it is, for dismissing the argument that the burden of proof placed on an accused in cases of strict liability conflicts with section 11(d) of the charter appears to be the following dictum of Jones J.A. in his dissenting judgment in *R. v. Maidment*:²¹⁷

While the burden of proof imposed in *Sault Ste. Marie* may conflict with s. 11(d) of the *Canadian Charter of Rights and Freedoms* in the case of strict liability offences it can be justified under s. 1 of the Charter. The Supreme Court of Canada considered it a reasonable limit before the Charter and I see no reason to hold otherwise at this point.

Now this statement is important for its recognition of the inevitable breach of the presumption of innocence by the reverse onus for strict liability offences. Moreover, it is also important as an illustration of the dangerous potential that section 1 of the Charter holds to erode rights and freedoms otherwise guaranteed by the Charter. But it is open to two

²¹⁴ *R. v. St. John News Co. Ltd.* (1984), 157 A.P.R. 301, at pp. 317-318 (N.B.Q.B.): *Sault Ste. Marie* doctrine is subject to Charter; *R. v. Westfair Foods Ltd.* (1985), 16 D.L.R. (4th) 668 (Sask. Q.B.): statutory infringements on the right to avail oneself of the defence of due diligence are contrary to s. 7 of the Charter; *Reference Re sec. 94(2) Motor Vehicle Act B.C.*, [1985] 2 S.C.R. 486, at pp. 517-518, (1985), 23 C.C.C. (3d) 289, at p. 313, rejects the notion that s. 7 of the Charter applies differently to public welfare offences.

There are instances where the apparent statutory effect of absolute liability has been "read down" to strict liability in order to preserve the validity of the statutory provision after the Charter, yet with no concern over the burden of proof thereby placed on the accused who wishes to rely on due diligence or reasonable mistake of fact: *R. v. Cancoil Thermal Corp.*, *supra*, footnote 170.

²¹⁵ *R. v. Alston* (1985), 22 C.C.C. (3d) 563 (B.C.C.A.): public welfare legislation is subject to s. 11(d) of the Charter; *R. v. Prentice* (1985), 6 C.R.D. 775-40-02: the defence of due diligence meets the requirements of s. 11(d) of the Charter (per *Oakes* in the Court of Appeal); *R. v. Burt* (1985), 21 C.C.C. (3d) 138, at p. 142 (Sask. Q.B.): strict liability may yet offend the Charter; *R. v. Maidment* (1984), 10 C.C.C. (3d) 512, at p. 521 (N.S. App. Div.), per Jones J. (dissenting): strict liability may conflict with s. 11(d), but it will be justified under s. 1.

²¹⁶ The issue is recognized by L. Tremblay, Section 7 of the Charter: Substantive Due Process? (1984), 18 U.B.C.L.Rev. 201, at p. 245 n. 226; Don Stuart, Presuming Innocence: Why Compromise? (1983), 32 C.R. (3d) 334. To McWilliams, *op. cit.*, footnote 10, p. 664, the issue is simple. He concludes briefly with respect to the reverse onus in cases of strict liability: "It is apparent that such a burden is one which is rationally consistent with the presumption of innocence." But why is this so?

²¹⁷ *Supra*, footnote 215, at pp. 520-521.

objections. First, it fails to require the Crown to justify the Charter infringement and instead appears to be calling on the accused to convince the court that the breach of the presumption of innocence cannot be legitimized under section 1. While *Oakes* has since told us that the burden on the Crown under section 1 to justify a Charter breach is only to convince the court on the balance of probabilities,²¹⁸ it is nonetheless important that the burden on the Crown be recognized and insisted upon. Second, Jones J.A. assumes that because the Supreme Court in *Sault Ste. Marie* in 1978 was willing to create a reverse onus clause, this somehow means the infringement of the presumption of innocence thereby created will be justified after the Charter has come into operation. Charter litigation has undeniably illustrated how laws presumably considered at one point by the creating body to have been acceptable are unable to withstand the subsequent redefinition by the Charter of what can be justified in Canadian society.

The other case worth mentioning, and which may tend to support a differing point of view than that expressed by Jones J.A. in *Maidment*, is the British Columbia Court of Appeal decision in *R. v. Alston*.²¹⁹ The charge was driving while under licence suspension, contrary to the provincial Motor Vehicle Act.²²⁰ By virtue of that Act, upon admission into evidence of a certificate from the Superintendent of Motor Vehicles setting out the fact of suspension, the accused's knowledge of the suspension was presumed, unless he or she proved lack of knowledge. The court, categorizing these provisions as creating a "modified form of strict liability",²²¹ found that the presumption did not meet the tests for validity set out by the Ontario Court of Appeal in *Oakes*, the latter case not having yet reached the Supreme Court. Now *Alston*, of course, dealt with a *statutory* onus placed upon the accused to prove effectively his or her mistake of fact, as opposed to the *court imposed* onus to prove the true defences in strict liability offences with which we are now dealing. Yet *Alston* is helpful because the offence that was involved, driving under suspension, was categorized as a public welfare offence and the court concluded after referring to *Sault Ste. Marie*:²²²

It was contended that the provisions of s.11(d) of the Charter were not intended to have application to public welfare legislation. No authority was cited to support that proposition and in my view, such a restriction ought not to be applied to the provisions of s.11(d) of the Charter.

There really appears no reason why a similar approach should not be taken to the reverse onus, in public welfare strict liability offences, imposed on the accused to prove due diligence or reasonable mistake of fact. As these are true defences, there ought to be an evidential burden on the accused, but any higher burden would breach the presumption of innocence.

²¹⁸ *Supra*, footnote 178.

²¹⁹ *Supra*, footnote 215.

²²⁰ R.S.B.C. 1979, c. 288, s. 88.

²²¹ *Supra*, footnote 215, at p. 565.

²²² *Ibid.*, at p. 567.

V. Justification under Section 1, and Conclusion

My conclusions have been itemized in the Introduction to this article and are, it is hoped, clear by now. I wish to finish with a few words on the desirability of an evidential burden as the highest burden placed on an accused, and the relevance of section 1 of the Charter.

A. At Most an Evidential Burden

Focusing on just one aspect of my overall conclusions, the evidential burden, my submission is that if this was seen as the highest burden which might be imposed on an accused, the most consistent solution to some difficult problems would be realized, and this in keeping with a vibrant guarantee of the presumption of innocence.

We have seen the problems in mapping the boundaries of the offence-defence dichotomy. These problems will always be with us, because the essential elements of every offence must be defined in order to know when the Crown can withstand a motion for a directed verdict of acquittal. But if the greatest burden that can be placed on an accused is evidential, then the problems inherent in the offence-defence dichotomy will be minimized. Once the Crown has produced a case to meet, the accused will have to raise a reasonable doubt as to his or her innocence, by virtue of the possible existence of a defence, whether that defence attacks the apparent existence of one of the essential elements of the offence, or is a true defence, resting on some other excuse or justification. But there will be no need to fall into the United States trap of distinguishing between the two forms of defence because the burden on the accused in both cases is the same.

Refusing to sanction any legal burden on an accused will solve related problems that are seldom considered, yet which exist whenever the possibility remains of a burden on the accused higher than evidential. For instance we have seen through *Pappajohn v. R.*²²³ that for true criminal offences, as opposed to strict liability public welfare offences,²²⁴ a mistake of fact defence generally seeks simply to call into question the

²²³ *Supra*, the text at footnote 8.

²²⁴ The conclusion of Dickson J. in *Sault Ste. Marie*, *supra*, footnote 6, that the mistake of fact in strict liability public welfare offences must be reasonable is also surprising in view of his subsequent views on this issue in true criminal offences in *Pappajohn v. R.*, *supra*, footnote 3. See too *R. v. Bulmer*, [1987] 4 W.W.R. 557 (S.C.C.). Despite *Pappajohn*, however, the idea persists even in Canada that there is still scope for the common law defence of "reasonable mistake of fact": *R. v. Moreau* (1986), 26 C.C.C. (3d) 359, at p. 374 (Ont. C.A.). Certainly reasonableness of belief will be required when the statute says so (e.g. self-defence: *Reilly v. R.*, [1984] 2 S.C.R. 396) but this requirement has also been added when the statute is not explicit: *R. v. Metro News Ltd.*, *supra*, footnote 158; *R. v. Hansford* (1987), 75 A.R. 86 (Alta. C.A.). See too the recent decision of the High Court of Australia in *Zecevic v. D.P.P.*, *supra*, footnote 7. Despite *He Kaw Teh v. R.*, *supra*, footnote 209, Australia clings to the defence of "reasonable mistake of fact".

existence of *mens rea*, one of the essential ingredients of the offence, and there is only an evidential burden imposed on the accused to raise this defence. What about the case, however, of a mistake as to the existence of a fact which, if it had existed, would not have gone to question the existence of an element of the offence, but rather would have established a true defence? If the possibility is admitted of a constitutionally valid legal burden on an accused then there will be a temptation, which has already been yielded to despite the Charter,²²⁵ of imposing a full legal burden on the accused to prove a mistake of fact when the mistake goes to a true defence. But this is a needless step into confusion. The burden on the accused asserting a mistake of fact which, if true, would result in his or her innocence should be the same in all cases, evidential only. The point always to remember is that whenever an accused person is forced to prove his or her innocence, then this inevitably allows for the possibility of a conviction despite the existence of a reasonable doubt. An accused may be able to raise a reasonable doubt, yet not be able to reach the stage of proof of innocence on the balance of probabilities. The continued possibility of a conviction in the face of a reasonable doubt as to guilt is the legacy of any existing legal burden on an accused, and it should simply be eradicated in a country governed by the presumption of innocence.

2. Section 1 Justification

My circumscribed purpose in this article was to explore the structure and scope of the Charter guarantee to the presumption of innocence. It is not my objective here to deal at any length with the effect of section 1 of the Charter. This is not to deny its obvious relevance. For looming over all my previous submissions is the undeniable possibility that a court prepared to recognize that a breach of the presumption of innocence has occurred, may nonetheless go on to justify that breach as acceptable in a free and democratic society.

In view of the protean qualities of section 1, I would indeed not be surprised if it is used to legitimize many of the existing breaches of the

²²⁵ *R. v. Roche* (1985), 20 C.C.C. (3d) 523 (Ont. C.A.). The case involved a charge of sexual assault, Criminal Code, *supra*, footnote 46, s. 246.1(1). The accused argued consent, but was met with s. 246.1(2) which denies the defence of consent where the complainant is under fourteen (the case here) unless the accused is less than three years older than the complainant (not the case here). The accused honestly believed the complainant was older than fourteen. Brooke J.A., for the court, held that the age of the complainant was not an element of the offence: *ibid.*, at p. 532. I feel he was in error in doing so because s. 244 defines assault, generally, as an application of force *without consent*. The one time that lack of consent is *not* an element of the offence, then, is when the complainant is under fourteen, as in *Roche*. As there was clearly consent here, the age of the complainant assumed a crucial relevance — there would have been no offence unless she was under fourteen. Her age, then, was an element of the offence charged. In any event, Brooke J.A. goes on to place the onus of establishing the mistake on the shoulders of the accused: *ibid.*, at p. 533. In doing so, and in requiring that the mistake be reasonable, *ibid.*, at p. 532, he is falling back on the common law formulation of the mistake of fact defence that was long since rejected in *Beaver v. The Queen*, [1957] S.C.R. 531, (1957), 118 C.C.C. 129.

presumption of innocence. That, I suggest, would be unwarranted, however the section is interpreted. Once the breaches of section 11(d) that I have discussed are recognized for what they are, they should have a small survival rate. This should be so even if general principles, on which I would rather rely, give way to a doctrinaire application of the *Oakes* steps for justification of a Charter breach. There are in fact many parts of the *Oakes* test upon which the foregoing breaches of the presumption of innocence should founder.²²⁶ I wish only to highlight one, that has not yet been closely focused on since *Oakes*. That is the broader reaches of the "rational connection" test which transcends the now familiar *internal* aspects of that test.²²⁷ Though very little has yet been made of this *overall* rational connection test established by *Oakes*, its essence is not hard to grasp, and its ramifications are weighty.

In *Oakes* itself Dickson C.J.C. posed this *overall* rational connection requirement in terms of the specific provision considered as follows: "... is the reverse onus clause in s.8 [of the Narcotic Control Act] rationally related to the objective of curbing drug trafficking?"²²⁸ Of course, Dickson C.J.C. never answered this question in *Oakes*, because he found that section 8 could not pass the *internal* rational connection test. Had an answer been required, however, I suggest that the section would additionally have failed to meet this *overall* rational connection test. Although the serious problem of drug trafficking may well necessitate a curb on a citizen's right to grow, manufacture or sell narcotics, the desired objective of ending the drug trade cannot logically impel a limitation on the procedural safeguards afforded an accused at trial. Drug trafficking will not be lessened by forcing persons rightly or wrongly accused of this crime to prove their innocence or raise issues of defence before a case to meet has been constructed against them by the Crown.

²²⁶ As I have said, *supra*, at p. 59, I suspect that on most occasions the first part of the test, sufficient importance of the objectives served by the law infringing the Charter right, will be met. But many classic presumptions will fall on the next stage, the internal "rational connection" test. Also, as long as the other forms of reverse onus clauses are, just as in *Oakes*, reframed as presumptions, most of these reverse onus clauses will not survive the rational connection test. After all, just because someone commits an apparently prohibited act does not raise a probability that there was no lawful excuse or justification, *etc.*, nor that the person could not bring himself or herself within an exception, exemption, *etc.*, or had not exercised due diligence, *etc.* A bald reverse onus provision was analyzed per *Oakes* in *R. v. Giles* (1987), 45 M.V.R. 92 (N.S. Prov. Ct.). If this is not accepted then, nonetheless, reverse onus clauses throwing a legal burden on the accused will fall at the next stage of the "proportionality" test—the means employed (the reverse onus clause) should impair "as little as possible" the right to be presumed innocent. The avenue of an evidential burden on an accused is always open and thus a legal burden impairs too greatly the presumption of innocence. See *R. v. Frank* (1986), 20 C.R.R. 179 (Ont. D. Ct.).

²²⁷ *Supra*, footnote 2, at pp. 141 (S.C.R.), 229 (D.L.R.). The *internal* (the phrase is Dickson C.J.C.'s) aspects of the rational connection test examines the probability of the presumed fact existing once the basic fact is proven.

²²⁸ *Ibid.*

This analysis, particularized in terms of *Oakes*, should point to the unconstitutionality of all the breaches of the presumption of innocence I have previously discussed. To generalize, there is really no rational connection between the objectives of any penal statute, whether it be the safety of our highways, the purity of our water or the control of fire-arms, and an inroad on the presumption of innocence of someone merely *accused* of such an offence. Any connection is emotional, but not logical!

Really we have arrived at the central issue here, upon which the ultimate decision will be made as to whether or not the presumption of innocence will be afforded true constitutional status, or interpreted out of existence. That issue is whether we feel that the costs of a consistently applied presumption of innocence are too great. My conclusion on this issue has been made clear throughout this article. There is nothing in the operation of our criminal law which requires any legal burdens on accused persons, nor which requires an answer of any sort from an accused until a case of apparent guilt has been constructed by the Crown. It has been a long process by which our law has come to require the Crown first to make out a case to meet before the accused be called upon to answer, and by which the traditional common law defences to the most serious of offences have placed only an evidential burden on the accused to raise a reasonable doubt. These procedural matters have become axiomatic, and have served to strike a workable balance between the coherent operation of a criminal trial and the rights of the individual. The entrenchment of the presumption of innocence in the Charter should now see a consistent application of these principles throughout the whole of the criminal justice system, regardless of whether the defence raised is novel or the offence alleged not serious. Nothing in the lessons learned from the day to day operation of the standard common law defences which operate within the confines of an evidential burden on the accused, should lead us to believe that there will be hidden costs. The benefits will be a lack of confusion and a system that is firm in the integrity granted to what is, on any analysis, the very foundation of our accusatorial criminal justice system—the presumption of innocence.