Withdrawal From Conspiracy: A Constitutional Allocation of Evidentiary Burdens

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NOTES

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A CONSTITUTIONAL ALLOCATION OF
EVIDENTIARY BURDENS

INTRODUCTION

Conspiracy, that "elastic, sprawling and pervasive offense,"\(^1\) sprawls so wide that the traditional defense to it, withdrawal, usually results in only partial exoneration for the defendant. The defense is only complete when coupled with the statute of limitations,\(^2\) or when withdrawal occurs prior to the overt act that completes the conspiracy.\(^3\) The stated policy behind the law's recognition of withdrawal is to encourage conspirators to weaken the criminal combination by lessening its numbers,\(^4\) for in numbers is the primary danger of conspiracy: concerted action leading to division of labor,\(^5\) efficient organization\(^6\) and the decreased probability of a "change of heart."\(^7\) According to the proponents of the group danger rationale, all these factors make the commission of both the object offense and any related crimes more likely.\(^8\)

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5. W. LaFave & A. Scott, supra note 4, § 61, at 460; see Note, The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants, 62 Harv. L. Rev. 276, 283-84 (1948) [hereinafter cited as Conspiracy Dilemma].
6. Conspiracy Dilemma, supra note 5, at 283-84.
8. See Callanan v. United States, 364 U.S. 587, 593-94 (1961); Krulewitch v. United States, 336 U.S. 440, 448-49 (1949) (Jackson, J., concurring); United States v. Rabinowich, 238 U.S. 78, 88 (1915); United States v. Greer, 467 F.2d 1064, 1071 (7th Cir. 1973); State v. Westbrook, 79 Ariz. 116, 119, 285 P.2d 161, 163 (1954); P. Marcus, Prosecution and Defense of Criminal Conspiracy Cases § 1.04[3], at 1-21 to 1-25 (1978); Developments, supra note 4, at 924. The group danger rationale is not universally accepted. See Goldstein, Conspiracy to Defraud the United States, 68 Yale L.J. 405, 414 (1959) ("Though these assumed dangers from conspiracy have a romantically individualistic ring, they have never been verified empirically."); Johnson, The Unnecessary Crime of Conspiracy, 61 Calif. L. Rev. 1137, 1139 (1973)
The withdrawal defense affords conspirators the opportunity to reduce the impact of group danger by limiting their liability for crimes committed by co-conspirators in furtherance of the conspiracy subsequent to the withdrawal.\(^9\) Otherwise, under the Pinkerton rule, all co-conspirators would be bound regardless of their knowledge or participation in those crimes.\(^{10}\)

The withdrawal defense traditionally has been treated as an affirmative defense, and the burden of proving withdrawal has generally

\(^9\) United States v. Read, 658 F.2d 1225, 1232 (7th Cir. 1981); W. LaFave & A. Scott, \textit{supra} note 4, § 62, at 487; \textit{see} United States v. Hickey, 360 F.2d 127, 140 (7th Cir.) (when conspirator enters agreement, he adopts previous acts of co-conspirators), \textit{cert. denied}, 385 U.S. 928 (1966).

\(^{10}\) Pinkerton v. United States, 328 U.S. 640, 647 (1946) ("The criminal intent to do the act is established by the formation of the conspiracy. Each conspirator instigated the commission of the crime . . . . If [the overt act] can be supplied by the act of one conspirator, we fail to see why the same or other acts in furtherance of the conspiracy are likewise not attributable to the others for the purpose of holding them responsible for the substantive offense."). Although the Model Penal Code disapproves of the rule, and replaces it with normal complicity standards, Model Penal Code § 2.06 (Proposed Official Draft 1962), many states still retain it. \textit{See} State v. Garcia, 117 Ariz. 67, 69, 570 P.2d 1080, 1082 (1977); State v. Logner, 297 N.C. 539, 545, 256 S.E.2d 166, 170 (1979); Commonwealth v. Sullivan, 472 Pa. 129, 159-60, 371 A.2d 468, 482 (1977); Note, \textit{Conspiracy: Statutory Reform Since the Model Penal Code,} 75 Colum. L. Rev. 1122, 1149-53 (1975) [hereinafter cited as \textit{Statutory Reform}]; \textit{cf.} United States v. Donner, 497 F.2d 184, 192-93 (7th Cir.) (noting the "continuing viability" of the Pinkerton rule in federal conspiracy law), \textit{cert. denied}, 419 U.S. 1047 (1974).

Another possible source for the withdrawal defense is the overt act requirement: If an overt act is required for the prosecution of conspiracy, a defendant who withdraws before that act is committed may not be punished as a member of the conspiracy. \textit{E.g.}, United States v. Heckman, 479 F.2d 726, 729 (3d Cir. 1973); United States v. Beck, 118 F.2d 178, 184 (7th Cir.), \textit{cert. denied}, 313 U.S. 587 (1941); \textit{see Developments, supra} note 4, at 957. This is still the only method of successfully withdrawing in some states. \textit{E.g.}, Ga. Code Ann. § 26-3202 (Supp. 1982); Kan. Stat. Ann. § 21-3302 (1981); \textit{see} Sak v. State, 129 Ga. App. 301, 302, 199 S.E.2d 628, 629 (1973) (affirming defendant's conviction for conspiracy on grounds that he withdrew after overt act); State v. Daugherty, 221 Kan. 612, 619, 562 P.2d 42, 47 (1977) (citing Kansas statute which provides for this method only); State v. Baynes, 279 Minn. 423, 425-27, 157 N.W.2d 371, 373 (1968) (holding that every overt act renews agreement and that liability may be avoided by withdrawing before overt act). Withdrawal is almost useless in this context, since an overt act requirement may be satisfied by an extremely insignificant act. Thus it is very easy for the prosecution to prove and very likely to have occurred before withdrawal. P. Marcus, \textit{supra} note 8, § 2.08[3], at 2-41; Johnson, \textit{supra} note 8, at 1142-43; \textit{see} Braverman v. United States, 317 U.S. 49, 53 (1942) (overt act need not be a crime); \textit{Statutory Reform, supra,} at 1173-74. This seems to be the reason for extending the defense to situations in which the particular jurisdiction has no overt act requirement, or when the defendant withdraws after the overt act is committed. \textit{Developments, supra} note 4, at 957.
been on the defendant. This Note goes beyond the ostensible purpose of the defense to show that withdrawal is not merely an escape valve, but rather the logical negation of an element of conspiracy, namely, membership. The burden of proving withdrawal, therefore, must not be placed upon the defendant. After a discussion of the operation and requirements of withdrawal, this Note proceeds to analyze constitu-

11. E.g., United States v. Diaz, 662 F.2d 713, 716 (11th Cir. 1981); United States v. Bradhsby, 628 F.2d 901, 905 (5th Cir. 1980); United States v. Borelli, 336 F.2d 376, 388 (2d Cir. 1964), cert. denied, 379 U.S. 960 (1965). For a full discussion of the burden of proof on the withdrawal defense, see infra pt. II.

An affirmative defense is one that places the burden of proof (usually by a preponderance of the evidence) on the defendant. See infra note 36 and accompanying text. The Model Penal Code puts the burden on the prosecution, except when specifically provided otherwise. Model Penal Code § 1.12 (Proposed Official Draft 1962).

12. The Model Penal Code has introduced another defense to conspiracy, renunciation, which requires the defendant to have "thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose." Model Penal Code § 5.03(6) (Proposed Official Draft 1962). Withdrawal and renunciation are not, as is often asserted, the same. See W. LaFave & A. Scott, supra note 4, § 62, at 487-88; P. Marcus, supra note 8, § 2.07, at 2-30 n.8. One difference is immediately apparent: In renunciation, the defendant must "thwart the success" of the conspiracy. See, e.g., Walker v. Commonwealth, 561 S.W.2d 656, 658 (Ky. 1977) ("sudden loss of fortitude at the final moment of truth" is not enough); People v. Ozarowski, 38 N.Y.2d 481, 492, 344 N.E.2d 370, 376, 381 N.Y.S.2d 438, 444 (1976) (defendant who "wandered off" in search of a candy store during object crime did not renounce). Another important difference is that renunciation is a complete defense, relieving liability for all prior involvement in the conspiracy. Note, Criminal Attempt, Conspiracy, and Solicitation Under the Criminal Code Reform Bill of 1978, 47 Geo. Wash. L. Rev. 550, 560 n.90 (1979) [hereinafter cited as Reform Bill]. Unlike withdrawal, renunciation does not start the running of the statute of limitations. Statutory Reform, supra note 10, at 1168.


Whether withdrawal is available in those states that have adopted the statutory renunciation defense is unclear. It probably should be, as it does negate the element of membership in a conspiracy. See infra text accompanying notes 120-26. The Model Penal Code does provide for both, Model Penal Code §§ 5.03(6), 5.03(7)(c) (Proposed Official Draft 1962), and at least one analysis of the proposed federal criminal code discusses both defenses, but does not make it clear whether the adoption of renunciation precludes withdrawal. See Statutory Reform, supra note 10, at 1175 ("Probably most legislatures, rightly or not, have regarded the law of withdrawal as reasonably well established and not in need of codification.").
tional aspects of affirmative defenses in general, and applies this analysis to United States v. Read,13 a recent Seventh Circuit decision which shattered tradition by putting the burden of disproving withdrawal on the prosecution. The Note concludes by examining the viability of putting only the burden of production on the defendant: What hardships will the prosecution suffer, how much evidence must the defendant produce to meet his burden, and how can the constitutional problems related to burden of production, particularly the denial of the privilege against self-incrimination, be avoided?

I. WITHDRAWAL GENERALLY

A. Operation

By itself, withdrawal operates as a partial defense. It will not relieve the defendant of liability for the conspiracy, or for crimes committed in furtherance of the conspiracy prior to the withdrawal, but it will exonerate him from subsequent crimes.14 Withdrawal may operate as a complete defense in two situations: 1) when it occurs before an overt act is committed;15 or 2) when coupled with the statute of limitations.16 As to the latter,17 withdrawal starts the running of the statute as to the withdrawing defendant—he may not be convicted for conspiracy if the statute has run.18

13. 658 F.2d 1225 (7th Cir. 1981).
14. Id. at 1232; W. LaFave & A. Scott, supra note 4, § 62, at 486; Rotenberg, Withdrawal as a Defense to Relational Crimes, 1962 Wis. L. Rev. 596, 604. Because conspiracy does not merge with the object crime (unlike attempt), a defendant may be charged with and punished for both. Callanan v. United States, 364 U.S. 587, 593 (1961).
15. See supra note 10.
17. When coupled with the statute of limitations, withdrawal becomes a complete defense owing to the rule that in a conspiracy case, the prosecution must prove that each defendant was a member at some point during the relevant statutory period prior to indictment. Grunewald v. United States, 353 U.S. 391, 396 (1957); United States v. Read, 658 F.2d 1225, 1232 (7th Cir. 1981); United States v. Borelli, 336 F.2d 376, 385 (2d Cir. 1964), cert. denied, 379 U.S. 960 (1965); Ware v. United States, 154 F. 577, 580 (8th Cir.), cert. denied, 207 U.S. 588 (1907).
B. How Withdrawal Is Effected

An early formulation of the requirements for an effective withdrawal was expressed by the Supreme Court in *Hyde v. United States*:\textsuperscript{19}

It requires affirmative action, but certainly that is no hardship. Having joined in an unlawful scheme, having constituted agents for its performance, scheme and agency to be continuous until full fruition be secured, until he does some act to disavow or defeat the purpose he is in no situation to claim the delay of the law. As the offense has not been terminated or accomplished he is still offending. . . . As he has started evil forces he must withdraw his support from them or incur the guilt of their continuance.\textsuperscript{20}

Currently, the basic requirement for withdrawal is timely notification to the co-conspirators or to the police.\textsuperscript{21} At least one commentator contends that notification alone is inadequate in that "[i]t is seriously doubted that the withdrawer can remove from the minds of his co-conspirators a germ which he helped plant and nourish."\textsuperscript{22} In addition, the United States Court of Appeals for the Tenth Circuit has held

\textsuperscript{19} 225 U.S. 347 (1912).

\textsuperscript{20} Id. at 369-70. The facts of *Hyde* clearly illustrate this principle: Defendant had entered into a land sale fraud scheme, and later voluntarily informed a government agent of the plot. Thus, in *Hyde*, this voluntary confession to a government agent would have constituted an effective withdrawal but for the fact that the defendant committed further overt acts after his disclosure. He therefore did not withdraw. Id. at 370-72.


\textsuperscript{22} Rotenberg, supra note 14, at 604-05. Rotenberg further suggests that withdrawal should be effected by notifying and assisting police in the arrest of co-conspirators. Id. at 605.
that, in special situations, the defendant must not only notify all the co-conspirators, but also convince them not to continue with the plan.\(^2\) This result has been criticized as too stringent, and unjust in that it "mak[es] the defendant's liability contingent upon the acts of others."\(^2\)

The Supreme Court, in an antitrust setting, set out a modern and broader, more flexible standard in *United States v. United States Gypsum Co.*\(^2\) Citing *Hyde*, the Court held that withdrawal was established by "[a]ffirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators."\(^2\) This standard is less confining than the more specific notification requirements of the traditional approach. In fact, the *Gypsum* Court found that a jury instruction defining withdrawal in the traditional, limited language was erroneous.\(^2\)

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\(^2\) Eldredge v. United States, 62 F.2d 449, 451-52 (10th Cir. 1932). In *Eldredge*, the defendants were indicted for conspiring to embezzle funds from a bank, and conspiring to make false entries in the bank's books to conceal the embezzlement. One defendant claimed that he had withdrawn more than three years before indictment, and that his prosecution was thus barred by the statute of limitations. To support his claim, the defendant presented evidence that he notified his co-conspirators that he would no longer participate in the embezzlement. The court stated that such notification was enough to effect a withdrawal from the embezzlement aspect of the conspiracy, but that because the conspiracy also included concealment by making false entries, withdrawal could only be effected by persuading the others not to continue falsifying the books. *Id.* at 450-52.

\(^2\) Developments, supra note 4, at 958-59; see Note, Conspiracy—Application of Federal Statute of Limitations, 29 N.Y.U. L. Rev. 1470, 1473-74 (1954). But see W. LaFave & A. Scott, supra note 4, § 62, at 486-87 & n.187 (Eldredge result justified because of "unique facts"—defendant knew others would continue to conceal embezzlement after his withdrawal).

Eldredge was the earliest formulation of the "time bomb" theory: "A declared intent to withdraw from a conspiracy to dynamite a building is not enough, if the fuse has been set; he must step on the fuse." 62 F.2d at 451. This theory was approved without citation in *United States v. Borelli*, 336 F.2d 376, 388 n.8 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965), but rejected in *United States v. Lowell*, 649 F.2d 950, 959-60 & n.13 (3d Cir. 1981).


27. 438 U.S. at 463-65 (1978). The defendants in *Gypsum* were charged with a price-fixing conspiracy under § 1 of the Sherman Act, 15 U.S.C. § 1 (1976). They successfully argued that the jury instruction was erroneous because it precluded consideration of their resumption of competitive behavior as withdrawal. 438 U.S. at 463-65 (1978).

Despite the inherent flexibility of the Gypsum standard,\(^28\) it does not give defendants carte blanche to withdraw by sitting back and doing nothing. “Mere cessation of activity” is not enough to effect a true withdrawal;\(^29\) neither are “hibernation,”\(^30\) “turnover [in] personnel,”\(^31\) “laying low” to avoid the police,\(^32\) or non-participation in the object crime.\(^33\) Yet these descriptions of what withdrawal is not all reaffirm Hyde’s “some act to disavow or defeat the purpose” requirement.\(^34\) As will be seen later, this same language has long served a dual purpose—as the substantive definition of the defense, just discussed, and as a procedural mandate to put the burden of proving withdrawal on the defendant.\(^35\)

\(^{28}\) See United States v. Jimenez, 622 F.2d 753, 755 (5th Cir. 1980) (“withdrawal from a conspiracy may be demonstrated in a variety of ways” (quoting United States v. Richardson, 596 F.2d 157, 163 n.10 (6th Cir. 1979))).


\(^{31}\) Id.


\(^{34}\) 225 U.S. at 369.

\(^{35}\) See infra pt. II.
II. Withdrawal: Whose Burden?

A. The Constitutional Standard

Historically, the burden of proving affirmative defenses has been on the defendant. At least three justifications for this have been raised. The first is that defenses traditionally have been considered matters separate from the elements of a crime. The prosecution must prove these elements beyond a reasonable doubt; defenses, however, are a matter of exception, not negation. Two ancient Roman maxims underlie this theory: *ei incumbit probatio qui dicit, non qui negat* (loosely, "the burden of proof is upon the one who asserts, not the one who denies") and *reus excipiendo fit actor* (literally, "the defendant, by excepting, becomes the plaintiff," meaning that defendant bears the burden of proving his exceptions, just as plaintiff must prove his own claims). It was therefore long unquestioned that the burden of proving self-defense or insanity or any other "exception" to criminal liability should be on the defendant.
“Comparative convenience” is a second justification for placing the burden of proof on the defendant. The defendant, it is said, is usually in a better position to know and provide evidence concerning the circumstances of his defense, particularly a state-of-mind defense such as insanity. The Model Penal Code supports this rationale, but only in exceptional circumstances.

The “fair compromise” or “gratuitous defense” rationale is the third justification, used mainly to make the defendant prove new statutory defenses such as mistake of law. Gratuitous defenses are those that do not directly negate that which the prosecution must prove. Thus, such defenses may arguably be eliminated by the legislature. The legislature graciously allows the defense, and in return the defendant must prove it by a preponderance of the evidence. Again, this rationale is primarily applied to new defenses; its basis is political. As one commentator has pointed out:

[I]f the legislature has the power to make a fact irrelevant to guilt, then the legislature must also have the power to choose its own rules for proving that fact. In particular, when the law provides a defense that turns on proof of such a fact, that defense may be characterized as gratuitous, and therefore exempt from the requirement of proof by the government beyond a reasonable doubt.

41. Morrison v. California, 291 U.S. 82, 88-89 (1934); Osenbaugh, supra note 36, at 436-37. But it stands to reason that the defendant will always know more about his involvement in the crime, so that comparative convenience is an overbroad justification. See Tot v. United States, 319 U.S. 463, 469 (1943).

42. Model Penal Code § 1.13 comment, at 113 (Tent. Draft No. 4, 1955) (giving example of due diligence to exculpate corporation).

43. Model Penal Code § 2.04 (Proposed Official Draft 1962); Fletcher, supra note 37, at 928.

44. Underwood, supra note 38, at 1314-15. Alibi has never been considered a gratuitous defense, because it negates all the elements of a crime; the defendant is contending that he was not even present at the crime. Affirmative Defenses, supra note 36, at 886; see Adkins v. Bordenkircher, 674 F.2d 279, 282 (4th Cir. 1982); Smith v. Smith, 454 F.2d 572, 578 (5th Cir. 1971), cert. denied, 409 U.S. 885 (1972); Stump v. Bennett, 398 F.2d 111, 115-16 (8th Cir.) (en banc), cert. denied, 393 U.S. 1001 (1968); State v. Grady, 276 Md. 178, 183-84, 345 A.2d 436, 438-39 (1975).

45. Osenbaugh, supra note 36, at 459-60.

46. At least two commentators condemn political manipulation of the burden of proof:

The legislative instinct for compromise often results in qualified action; and imposing the burden of persuasion on the defendant is a subtle, inconspicuous way of qualifying a new defense. And the compromise seems harmless. The defendant has a greater tactical advantage than he had before (there is an additional issue on which he might be acquitted), so he should not be heard to complain that the legislature or court is taking away in part that which they have bestowed on him. Yet a political compromise should be recognized for what it is. It is not a stand based on principle, on a perception of just policy. It is but a maneuver made for the sake of law reform.

Fletcher, supra note 37, at 928-29; see Osenbaugh, supra note 36, at 459.

47. Underwood, supra note 38, at 1312-13.
The gratuitous defense rationale is thus nothing more than a politicized version of the separate issue theory. Instead of relying on ancient civil-law maxims, it finds its raison d'être in a somewhat skewed concept of compromise, whereby the legislature provides a defense but in return requires the defendant to prove it.

Selective application of these three theories has justified shifting the burden of proof to the defendant on just about any defense. Early on, however, common-law courts began to realize the unfairness and illogic of forcing the defendant to bear the risk of non-persuasion on certain defenses. The landmark case in this respect was Davis v. United States, in which the Supreme Court placed the burden of disproving insanity in federal cases on the prosecution. In Davis, the trial court had instructed the jury that the law "presumes every man is sane, and the burden of showing it is not true is upon the party who asserts it." The Supreme Court reviewed the similar holdings of prior insanity-defense cases and rejected the rule:

[T]he crime of murder necessarily involves the possession by the accused of such mental capacity as will render him criminally responsible for his acts.

. . . .

Upon whom then must rest the burden of proving that the accused, whose life it is sought to take under the forms of law, belongs to a class capable of committing crime? On principle, it must rest upon those who affirm that he has committed the crime for which he is indicted. . . . [T]o hold that such presumption [of sanity] must absolutely control the jury until it is overthrown or impaired by evidence sufficient to establish the fact of insanity beyond all reasonable doubt or to the reasonable satisfaction of the jury, is in effect to require him to establish his innocence, by proving that he is not guilty of the crime charged.

Unfortunately the Davis Court did not employ constitutional analysis in its opinion. Its sole basis was the reasonable doubt rule, which,
although fundamental and time-honored, is not considered to be mandated by the Constitution.\(^5\)

This failure of the Davis Court to recognize expressly the reasonable doubt rule as a constitutional guarantee left the states free to impose the burden of proof of certain defenses on defendants. Thus, in Leland v. Oregon,\(^5\)\(^7\) the Court upheld an Oregon statute requiring the defendant to prove insanity beyond a reasonable doubt. The Court cited Davis, stating that “[t]he decision [in Davis] obviously establishes no constitutional doctrine, but only the rule to be followed in federal courts. As such, the rule is not in question here.”\(^5\)\(^8\) The Court went on to say that it was “reluctant to interfere with Oregon’s determination of its policy with respect to the burden of proof on the issue of sanity since we cannot say that policy violates generally accepted concepts of basic standards of justice.”\(^5\)\(^9\) Mr. Justice Frankfurter, in a sharp dissent, called the reasonable doubt rule “a requirement and a safeguard of due process.”\(^6\)\(^0\)

Justice Frankfurter’s dissent paved the way for a monumental about-face by the Court. In re Winship\(^6\)\(^1\) was a juvenile proceeding case in which the narrow question presented was whether the reasonable doubt rule applied to such a proceeding. The Court concluded that it did, and firmly announced: “Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”\(^6\)\(^2\)

Five years later the Court put Winship to work. In Mullaney v. Wilbur,\(^6\)\(^3\) it held that a state may not, under the principles enunciated in Winship, put the burden of proving a defense on the defendant if that defense negates “the critical fact in dispute.”\(^6\)\(^4\) Mullaney involved a Maine statute that defined murder as killing with “malice aforethought,” and which defined manslaughter as killing “in the heat of

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56. Id. at 487-88; see Leland v. Oregon, 343 U.S. 790, 797 (1952).
57. 343 U.S. 790 (1952).
58. Id. at 797. The aftermath of the “not guilty by reason of insanity” verdict in the trial of John W. Hinckley, Jr. for the attempted assassination of President Ronald Reagan has led to a proposal by Senator Strom Thurmond that the burden of proving insanity be on the defendant, a proposal which would eradicate even Davis’ federal rule. See S. 2902, 97th Cong., 2d Sess. § 16(b) (1982).
59. 343 U.S. at 799.
60. Id. at 803 (Frankfurter, J., dissenting).
62. Id. at 364.
64. Id. at 699-701.
passion, on sudden provocation." The defendant was required to prove provocation by a preponderance of the evidence in order to reduce the charge from murder to manslaughter. "Malice aforethought" therefore became a rebuttable presumption.

In rejecting the Maine scheme, the Court focused on the concept of blameworthiness and proportionality: The difference in punishment for murder and manslaughter is significant and directly related to the degree of blameworthiness. That provocation is not a complete defense, ruled the Court, has no bearing on whether it should be proven by the prosecution or the defense; what is critical is its nature as a negation of the essential element of malice. The presence of that element bears directly on the severity of punishment. The Mullaney Court was also concerned that states might attempt to redefine crimes to avoid the Winship rule by making certain elements bear on the extent of punishment rather than on culpability itself: "Winship is concerned with substance rather than this kind of formalism." Moreover, the Court rejected the comparative convenience rationale as applied to the provocation defense, finding that disproving it places "no unique hardship" on the prosecution.

Mullaney could be read as condemning as unconstitutional all affirmative defenses. Indeed, that is a fair reading of the case, because any time a defendant is forced to bear the risk of non-persuasion on a fact relevant to guilt, the chances of erroneous conviction increase. The presumption of innocence notwithstanding, many a jury will entertain the notion that he who is hauled into court must be there for a reason. The reasonable doubt rule thus lends practical force to the presumption of innocence; the jury is charged not to convict if it has a reasonable doubt about the defendant's guilt. The logical extension of the prosecution's burden to include the disproving of any defense that tends to negate particular elements of a crime keeps the due process schema intact.

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67. 421 U.S. at 697-98.
68. Id. at 696-98.
69. Id. at 698-99.
70. Id. at 702 ("[P]roving . . . provocation is similar to proving any other element of intent; it may be established by adducing evidence of the factual circumstances surrounding the commission of the homicide. And although intent is typically considered a fact peculiarly within the knowledge of the defendant, this does not, as the Court has long recognized, justify shifting the burden to him.").
71. See, e.g., Jeffries & Stephan, Defenses, Presumptions, and Burden of Proof in the Criminal Law, 88 Yale L.J. 1325, 1339-40 & n.40 (1979); Constitutionality, supra note 65, at 656 & n.8, 659.
72. 421 U.S. at 701.
Davis was distinguished in Leland, Leland repudiated in Mullaney via Winship, and Mullaney, in yet another volte-face by the Court, was "distinguished" in Patterson v. New York.\textsuperscript{73} Patterson involved New York's murder and manslaughter statutes. "Extreme emotional disturbance" (the equivalent of provocation) is characterized as an affirmative defense to murder, but the statute goes on to provide that "[n]othing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter."\textsuperscript{74} The manslaughter statute then defines that crime as an intentional killing carried out "under the influence of extreme emotional disturbance."\textsuperscript{75}

The trial court in Patterson had instructed the jury that as to the murder charge, the defendant had the burden of proving the affirmative defense of extreme emotional disturbance by a preponderance of the evidence.\textsuperscript{76} Clearly this was another Mullaney—same crime, same defense, same burden of proof. But the Mullaney scare had set in: Were all affirmative defenses unconstitutional?\textsuperscript{77} How far could federal courts interfere with state criminal law policy?\textsuperscript{78} Would the states merely eliminate defenses if they could not put the burden on the defendant?\textsuperscript{79} Would state-law reform be stifled because the legislature could not offset new and possibly controversial defenses with a burden shift?\textsuperscript{80} These were the spoken and unspoken concerns of the Patterson Court,\textsuperscript{81} and so to restrain the sprawling consequences of Mullaney,

\begin{itemize}
\item \textsuperscript{73} 432 U.S. 197 (1977).
\item \textsuperscript{74} N.Y. Penal Law § 125.25 (McKinney 1975).
\item \textsuperscript{75} Id. § 125.20(2).
\item \textsuperscript{76} 432 U.S. at 200.
\item \textsuperscript{77} See supra note 71 and accompanying text.
\item \textsuperscript{78} See Allen, Mullaney v. Wilbur, the Supreme Court, and the Substantive Criminal Law—An Examination of the Limits of Legitimate Intervention, 55 Tex. L. Rev. 269, 275-76 (1977) ("[T]he elimination of affirmative defenses . . . would entail an intervention by the federal judiciary into the substantive criminal law of the states more massive than the present Court seems likely to permit.") [hereinafter cited as Allen I].
\item \textsuperscript{79} Allen, The Restoration of In re Winship: A Comment on Burdens of Persuasion in Criminal Cases after Patterson v. New York, 76 Mich. L. Rev. 30, 50 (1977) (discussing the political compromise test as a response to this fear) [hereinafter cited as Allen II].
\item \textsuperscript{80} Constitutionality, supra note 65, at 671 ("States may be willing to attempt reform only if they are allowed to cushion the impact of new defenses by shifting the burden of persuasion.").
\item \textsuperscript{81} The Patterson Court justified its conclusion thus: The Due Process Clause, as we see it, does not put New York to the choice of abandoning those defenses or undertaking to disprove their existence in order to convict of a crime which otherwise is within its constitutional powers to sanction by substantial punishment. . . . To recognize at all a mitigating circumstance does not require the State to prove its nonexistence in each case in which the fact is put in issue, if in its judgment this would be too cumbersome, too expensive, and too inaccurate.
\end{itemize}

432 U.S. at 207-09; see Constitutionality, supra note 65, at 661-62.
the Court "distinguished" it and upheld the New York law.\textsuperscript{82} In \textit{Mullaney}, the Court explained, malice was presumed; nothing was presumed against the defendant in \textit{Patterson}.\textsuperscript{83}

This strained reasoning does exactly what the \textit{Mullaney} Court sought to prevent: It focuses on the form of the statute rather than the substance. Was \textit{Patterson} then a repudiation of \textit{Mullaney}? On its face, \textit{Patterson} actually approved \textit{Mullaney}, but refused to give it broad application.\textsuperscript{84} Furthermore, on the same day the \textit{Patterson} decision was handed down, the Court decided \textit{Hankerson v. North Carolina},\textsuperscript{85} a self-defense case that held that \textit{Mullaney} must be applied retroactively, because "the major purpose of the constitutional standard of proof beyond a reasonable doubt . . . was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function."\textsuperscript{86} \textit{Mullaney} is no spent force, but certainly not the force it could have been.

Most courts consider \textit{Winship}, \textit{Mullaney} and \textit{Patterson} an inseparable trio which, notwithstanding the inconsistencies of the latter two, stand for the proposition that a defense that negates an element of the crime must be disproven by the prosecution beyond a reasonable doubt.\textsuperscript{87} One such court was the Seventh Circuit, which, applying \textit{Winship}, \textit{Mullaney} and \textit{Patterson} in \textit{United States v. Read},\textsuperscript{88} held that withdrawal negates the membership element of conspiracy and therefore must be disproven by the prosecution.\textsuperscript{89} \textit{Read} has important implications for conspiracy prosecutions and for defenses in general.

\begin{itemize}
\item \textsuperscript{82} 432 U.S. at 215-16. \textit{Patterson} revived the separate issue theory. Once death, intent and causation are shown, the state has satisfied its burden and the defendant must then prove his mitigating circumstances. \textit{Id.} at 205-06.
\item \textsuperscript{83} \textit{Id.} at 215-16.
\item \textsuperscript{84} \textit{Id.} at 214-15. One commentator, however, states quite plainly that \textit{Patterson} overruled \textit{Mullaney}, appearances to the contrary notwithstanding. Allen II, \textit{supra} note 79, at 53-54.
\item \textsuperscript{85} 432 U.S. 233 (1977).
\item \textsuperscript{86} \textit{Id.} at 241 (quoting Ivan V. v. City of New York, 407 U.S. 203, 204-05 (1972), which applied \textit{Winship} retroactively to juvenile proceedings).
\item \textsuperscript{87} Guthrie v. Warden, 683 F.2d 820, 824-26 (4th Cir. 1982) (intoxication, heat of passion, self-defense); Adkins v. Bordenkircher, 674 F.2d 279, 282 (4th Cir. 1982) (alibi); Tennon v. Ricketts, 642 F.2d 161, 164 (5th Cir. 1981) (self-defense); Holloway v. McElroy, 632 F.2d 605, 620-24 (5th Cir. 1980) (same), \textit{cert. denied}, 451 U.S. 1028 (1981); State v. Rice, 379 A.2d 140, 145 (Me. 1977) (involuntary intoxication); \textit{In re John Doe}, 390 A.2d 920, 926 (R.I. 1978) (self defense); \textit{see} Long v. Brewer, 667 F.2d 742, 746-47 (8th Cir. 1982) (relying on \textit{Patterson} to put the burden of proof on the defendant for intoxication). The \textit{Long} court admitted difficulty reconciling \textit{Mullaney} and \textit{Patterson}, but quoted Holmes: "The life of the law has not been logic; it has been experience." \textit{Id.} at 747 (quoting O.W. Holmes, \textit{The Common Law} 1 (1881)).
\item \textsuperscript{88} 658 F.2d 1225 (7th Cir. 1981).
\item \textsuperscript{89} \textit{Id.} at 1233.
\end{itemize}
particularly those that do not obviously negate an element of the crime.

B. Withdrawal: Shifting the Burden to the Prosecution

In Read, a defendant who was indicted for federal mail and securities fraud conspiracy claimed that he withdrew from the conspiracy more than five years before his indictment, and that therefore his prosecution was barred by the statute of limitations. The trial judge instructed the jury on the Gypsum requirements of withdrawal, but did not instruct that the government bears the burden of disproving withdrawal beyond a reasonable doubt. The trial court thus imposed on the defendant the burden of proof.

The Seventh Circuit construed the federal conspiracy statute as requiring proof of three elements: the existence of the conspiracy, an overt act and membership of the defendant. The prosecution must further prove that membership existed at some point during the five years preceding the indictment; if not, conviction is barred by the statute of limitations. Because withdrawal negates the essential element of membership during the statutory period, under Winship, Mullaney and Patterson, the prosecution must disprove it.

The Read court acknowledged the nearly unanimous view that the burden of proving withdrawal is on the defendant, a proposition which found its roots in Hyde v. United States. Before Hyde, however, courts had held that the government had to prove membership during the statutory period: “Put another way, the government had to prove that each defendant had not withdrawn prior to the running of the statute of limitations.” Hyde did not change this, but merely set a substantive standard (“some act to disavow or defeat the pur-

90. Id. at 1231. The federal statute of limitations is five years. 18 U.S.C. § 3282 (1976).
91. 658 F.2d at 1231. See supra text accompanying notes 25-26.
93. 658 F.2d at 1232.
94. Id. (citing Grunewald v. United States, 353 U.S. 391, 396 (1957); United States v. Borelli, 336 F.2d 376, 389 (2d Cir. 1964), cert. denied, 379 U.S. 960 (1965)).
95. 658 F.2d at 1232-33.
96. 225 U.S. 347, 369 (1912). The “some act to disavow or defeat the purpose” language in Hyde has been interpreted by most courts to put the burden of proving withdrawal on defendant. E.g., United States v. Bradby, 628 F.2d 901, 905 (5th Cir. 1980); United States v. Jimenez, 622 F.2d 753, 757-58 (5th Cir. 1980); United States v. Krasn, 614 F.2d 1229, 1236 (9th Cir. 1980).
97. Ware v. United States, 154 F. 577, 579 (8th Cir.), cert. denied, 207 U.S. 588 (1907).
pose") for the defense, and required the defendant to come forward with evidence to disprove his membership. Save for two early decisions, however, all courts since Hyde have construed this language to mandate the placing of the burden of proof on the defendant, an interpretation that the Read court found erroneous. It explained that the "some act" requirement of Hyde puts merely the burden of production, not persuasion, on the defendant.

Indeed, there is nothing in Hyde to suggest that the burden of proof was on the defendant. The term "burden of proof" does not appear in the opinion. Again, what Hyde was really concerned with was a substantive standard for withdrawal, which would naturally require a burden of production to show defendant's compliance with the standard.

The defendants in Hyde contended that the statute of limitations begins to run from the last overt act, and that the government must prove each defendant's "conscious participation" in the conspiracy throughout the statutory period. The Court noted, however, that in a continuous conspiracy, one which contemplates a series of acts over a number of years, any conspiratorial act should trigger the statute of limitations, and subsequent "conscious participation" is deemed irrel-

99. 225 U.S. at 369.
100. Mansfield v. United States, 76 F.2d 224, 229-30 (8th Cir.), cert. denied, 296 U.S. 601 (1935); Buhler v. United States, 33 F.2d 382, 385 (9th Cir. 1929). See infra pt. III.
102. 658 F.2d at 1333-36.
103. 225 U.S. at 368.
relevant. Thus, the running of the statute should not depend on a single defendant's conscious participation at one fixed time. This rule does not take away the power to withdraw; it only means that a defendant must have taken an affirmative step to withdraw. He cannot withdraw merely by ceasing to be active in the conspiracy. The Court did not repudiate, or even discuss, the prior law, which specifically put the burden of proving membership at some point in the statutory period on the prosecution.

Read leaves open the question of whether withdrawal as a partial defense—when not combined with the statute of limitations—is subject to the same analysis. Withdrawal does negate the element of membership for statute of limitations purposes. It remains to be demonstrated, however, that withdrawal also negates membership for the purposes of determining liability for subsequent crimes committed by co-conspirators in furtherance of the conspiracy.

C. Beyond Read

Given its history, the withdrawal defense is not easy to conceptualize as the negation of an element of a crime. Arguably, its status as a "policy" defense precludes the idea that it has anything to do with culpability. The concept of culpability is fundamental to criminal law. This is not a statement of the obvious, for it is often overlooked when questions of defenses and burden of proof arise. The purpose of a criminal trial is to determine whether the defendant is properly subject to punishment—whether his act is blameworthy. As one commentator stated: "Men may not be sacrificed arbitrarily for the social good; there must be some reasons for selecting some and not others."

104. Id. at 369.
105. Id.
108. See Jeffries & Stephan, supra note 71, at 1347 ("The trouble lies in trying to define justice in exclusively procedural terms. [The] preference for letting the guilty go free rather than risking conviction of the innocent . . . cannot be implemented by a purely procedural concern with burden of proof. Guilt and innocence are substantive concepts. . . . A constitutional policy to minimize the risk of convicting the 'innocent' must be grounded in a constitutional conception of what may constitute 'guilt.'").
109. Fletcher, supra note 37, at 888.
110. Id. at 890; see Leland v. Oregon, 343 U.S. 790, 803 (1952) (Frankfurter, J., dissenting); Jeffries & Stephan, supra note 71, at 1371-72.
Primary among these reasons is moral blameworthiness, and it is reflected in the elements of the crime. The prosecution must prove such elements—must prove blameworthiness—beyond a reasonable doubt. It logically follows that if a defense negates an element, thereby negating blameworthiness, the prosecution must disprove it. The prosecution cannot possibly meet its burden if it does not do so.

But, the argument goes, if a defense is based on policy, or hinges upon a procedural device such as the statute of limitations, it is unrelated to blameworthiness and therefore is not a negation of an element. This could be said of the withdrawal defense, for the defendant, having joined the conspiracy, is already culpable. If he seeks to escape liability via the statute of limitations, he has not raised an issue relevant to guilt or innocence in the abstract sense of those terms; the statute of limitations is a housekeeping device, a matter of procedure, a ‘technicality.’ If he is trying to limit his liability for his co-conspirators’ crimes through a withdrawal defense, he is again already culpable, although within a policy of gratuitous partial forgiveness, and is eligible for a reward for weakening the criminal combination.

This view of the withdrawal defense turns it into a separate issue, or even a gratuitous defense, thus requiring the defendant to shoulder the burden of proof. But it is an incorrect and unjust view. Distinguishing between blameworthiness in the abstract and guilt, therefore punishment, in practice, makes no sense. In other words, it should make no difference that the statute of limitations is merely a procedural device that makes withdrawal a complete defense. Nor does it matter that withdrawal itself is merely a policy defense. Policy and procedure may be unrelated to abstract blameworthiness, but they

111. The existence of strict liability crimes, such as statutory rape, indicates that moral blameworthiness is not always a justification for punishment. Such crimes, however, are generally limited to regulatory or public welfare offenses, in which the state has a compelling interest (e.g., the protection of children), and generally carry lesser penalties. Jeffries & Stephan, supra note 71, at 1373-76; see, e.g., N.Y. Penal Law §§ 70.00(2)(e), 130.25 (McKinney 1975) (statutory rape a class E felony with a maximum sentence of four years imprisonment).

112. Osenbaugh, supra note 36, at 459-60, 467. Fletcher rejects the notion that a policy defense is unrelated to blameworthiness, Fletcher, supra note 37, at 928, but accepts the argument as it applies to the statute of limitations. Id. at 921-22.

113. Osenbaugh, supra note 36, at 467. The burden of proving that the statute has not run is on the prosecution. Fletcher, supra note 37, at 922.

114. Cf. Constitutionality, supra note 65, at 678 (discussing the conceptually similar defense of abandonment of an attempt).

115. See supra text accompanying notes 37-40 & 43-49.

116. See Mullaney v. Wilbur, 421 U.S. 684, 697-98 (1975) ("[T]he criminal law . . . is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability. . . . Because [those who kill in the heat of passion] are less 'blameworth[y],,' . . . they are subject to substantially less severe penalties.".).
can, in practice, mean the difference between punishment and freedom. Accordingly, they become elements of the crime. If the policy behind the withdrawal defense is to reward defendants who weaken the group by allowing them to limit their guilt, then that policy is related to blameworthiness: The defendant is no longer blameworthy for the crimes of his confederates committed after his withdrawal. He can be punished for them only if he was still a conspirator when they were committed. Similarly, he cannot be punished if the statute has run; he must have been a member of the conspiracy during the statutory period. The elements of conspiracy are not just those related to blameworthiness, but also those related to the ability to punish. Blameworthiness and punishment are inseparable.

The argument remains that if the state were forced to bear the burden on certain defenses, it would do better to eliminate them altogether, either explicitly or by redefining the elements of the crime. In such event, the statute of limitations would begin to run only when

117. See Rotenberg, supra note 14, at 599-602 (discussing withdrawal from inchoate crimes in light of theories of punishment: “If the offender withdrew because he realized that what he was doing was wrong . . . then punishment based on reformation or deterrence is superfluous.”).

118. See Wechsler, Jones & Korn, supra note 18, at 1017 (“As a general matter, the policy behind statutes of limitation dictates that they should begin to run when an individual’s criminal conduct ends. If the crime is conspiracy, this conduct theoretically ends when he ceases to agree in the purpose [of the conspiracy].”).

119. This is a fundamental criminal law concept which is more often assumed than explicitly stated. See J. Andanaes, Punishment and Deterrence 164 (1974) (“[C]riminal law is greatly concerned with punishing only the really blameworthy. The law requires a voluntary act, a guilty mind, and a responsible person. If these requirements are not met, punishment is not considered proper.”); M. Foucault, Discipline and Punish 89-90 (1977) (likening crime to a breach of the social contract, which justifies punishment in order to defend society); Fletcher, supra note 37, at 888 (stating that the task in criminal trials is to determine whether the use of the state’s “coercive powers” is justified, and that blameworthiness is the key concern in that determination).

One work discusses the felony-murder rule, which punishes as murder any homicide committed in the course of the felony without proof of specific intent:

Because the felony-murder rule requires no proof of culpability with respect to the homicide, it would be condemned as an impermissible imposition of penal liability without proof of fault. It would therefore be held unconstitutional, either as an unjustified invasion of that substantive liberty guaranteed by the due process clause or as a cruel and unusual punishment violative of the Eighth Amendment. This line of analysis necessarily would condemn every application of the felony-murder rule, for no matter how heinous the underlying offense, the additional penalty imposed for homicide would lack any independent basis in the proved blameworthiness of the accused.

Jeffries & Stephan, supra note 71, at 1383-84.

120. See Jeffries & Stephan, supra note 71, at 1347.
the entire conspiracy terminated,121 or when the last overt act was committed.122 Every defendant would be charged with every crime committed by co-conspirators in furtherance of the conspiracy.

The answer to this argument lies in the rationale for conspiracy itself. A criminal agreement is punishable because of the particular danger posed when two or more people join forces to commit a crime.123 Yet this does not support subjecting a defendant to cumulative punishment if he has in good faith ceased to aid the group. Thus, no justification exists for holding him liable for crimes committed subsequent to withdrawal. Withdrawal is therefore a logically necessary defense.

When withdrawal is coupled with the statute of limitations, different reasoning applies, but the same result should obtain. The prosecution has always had to prove the defendant's membership during the statutory period.124 Even if the defense of withdrawal were eliminated it would strain logic to claim that the defendant was still a member if he had in fact repudiated the enterprise. Withdrawal in this situation even more clearly negates membership.

The question of proportionality also comes into play here, at least for withdrawal as a partial defense. The substantive rule imposing criminal liability for all crimes committed by co-conspirators in the furtherance of a single underlying offense itself presents the question whether the cumulative punishment goes too far beyond the proven blameworthiness of the defendant.125 Given that the conspiracy itself is a sufficient basis for that punishment, the rule makes crimes committed by co-conspirators strict liability offenses which require no independent mens rea or actus reus. If withdrawal is eliminated as a defense, there would be no relief even for a defendant who attempts to prevent, by withdrawing, the very crimes for which he is deemed responsible. Such a result is intolerable given that the Pinkerton rule is already overbroad.126 These are several good reasons why withdrawal should not in fairness be eliminated, when, because it cannot shift the burden of proof to defendant, a legislature has it in mind to do so.

121. See W. LaFave & A. Scott, supra note 4, § 62, at 482-83.
123. See supra text accompanying notes 4-8.
126. See Pinkerton v. United States, 328 U.S. 640, 647 (1946); Statutory Reform, supra note 10, at 1150; Developments, supra note 4, at 993-1000; Note, Vicarious Liability for Criminal Offenses of Co-Conspirators, 56 Yale L.J. 371, 378 (1947) ("In the final analysis the Pinkerton decision extends the wide limits of the conspiracy doctrine to the breaking-point and opens the door to possible new abuses by overzealous public prosecutors.").
One of the Mullaney Court's concerns about burden-shifting defenses was that the chance of an erroneous conviction is increased when a defendant is forced to bear the burden of proof on an issue negating part of the prosecution's case. This is particularly true of the withdrawal defense. The following example is illustrative: A, B and C agree to rob a bank. After A buys the gun and definite plans are drawn up, he has a change of heart and decides that in good conscience he cannot go through with the scheme. He tells this to B and C, and after unsuccessfully trying to convince them to abandon the conspiracy, he leaves, taking the gun with him in the hope that this will hinder their efforts. B and C nevertheless go ahead with the plan, rob the bank, and in the process kill a teller. B and C are arrested and charged with conspiracy, robbery and murder. During their interrogation they implicate A, taking revenge. A is arrested and charged with all three crimes. At trial, B and C refuse to take the stand on fifth amendment grounds. A knows that the evidence against him for conspiracy is overwhelming, and so he decides to testify, admitting his participation but claiming that his withdrawal exonerates him from the robbery and murder charges. His own testimony is the only evidence he has, because of B and C's unwillingness to testify. The court instructs the jury as to the elements and consequences of withdrawal, and further charges that in order to acquit A of the substantive offenses on the basis of an effective withdrawal, the jury must be "satisfied" (the preponderance standard) that A did indeed withdraw. The jury is also told that nonparticipation in the object crime is not, by itself, enough to constitute withdrawal.

The jury may of course be "satisfied" by A's testimony, and acquit him; but it may also convict him on his own slim evidence. But if the

127. 421 U.S. at 701. The Mullaney Court quoted Speiser v. Randall, 357 U.S. 513, 525-26 (1958): "[W]here one party has at stake an interest of transcending value—as a criminal defendant his liberty—[t]he margin of error is reduced as to him by the process of placing on the [prosecution] the burden . . . of persuading the factfinder at the conclusion of the trial." The Winship Court also quoted Speiser. In re Winship, 397 U.S. 358, 364 (1970). The fear of erroneous convictions finds its origin in the maxim that it is better to acquit five guilty men than to convict one innocent man. M. Hale, Pleas of the Crown 289 (1694), cited in Fletcher, supra note 37, at 881 n.7; see Ashford & Risinger, Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview, 79 Yale L.J. 165, 186 (1969) ("The governmental interest in acquitting the innocent cannot be subordinated to its interest in convicting the guilty.").

It should be noted that the withdrawal defense comports with Patterson's "presumption" requirement, see supra text accompanying note 83, because a conspiracy is presumed to continue as to each defendant until the contrary is shown. Hyde v. United States, 225 U.S. 347, 369 (1912); United States v. Stromberg, 268 F.2d 256, 263 (2d Cir.), cert. denied, 361 U.S. 863 (1959); Marino v. United States, 91 F.2d 691, 695 (9th Cir. 1937), cert. denied, 302 U.S. 764 (1938).
jury is charged that A must only raise a reasonable doubt as to withdrawal, and that the prosecution must disprove A's claim beyond a reasonable doubt, the chance that A will be convicted wrongly is reduced considerably, if not eliminated altogether.

It is all very well to speak of "compromise" when arguing that shifting the burden to the defendant on withdrawal is proper, but so many procedural advantages adhere to the prosecution in a conspiracy trial that the burden shift is doubly unfair. Conviction for conspiracy is facilitated by a co-conspirator hearsay exception, joint trials, broad venue rules and generous use of circumstantial evidence. Defendants in conspiracy trials are already at a great disadvantage. How much further may the scales be tipped in favor of the prosecution?

III. THE BURDEN OF PRODUCTION: A WORKING CONSTITUTIONAL STANDARD

Part of the Mullaney rationale for putting the burden of disproving a defense on the prosecution was that the burden posed "no unique hardship" for the prosecution. Disproof of the defense can be accomplished through evidence of the circumstances of the crime. Concededly, however, it would be an insurmountable hardship to require the prosecution to disprove the existence of every possible defense to the crime. The defendant, therefore, in order to raise the issue, must at least bear the burden of producing evidence of his particular defense.

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128. This is a burden of production standard, see infra pt. III, which is much lower than the preponderance standard for the burden of proof. Ashford & Risinger, supra note 127, at 174.

129. Fed. R. Evid. 801(d)(2)(E); N.Y. Code of Evid. § 803(b)(5) (N.Y.S. Law Revision Comm'n Proposed 1982); see W. LaFave & A. Scott, supra note 4, § 61, at 457.


131. Venue may be proper wherever any overt act was committed, which could violate the sixth amendment's mandate that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. amend. VI; W. LaFave & A. Scott, supra note 4, § 61, at 456.

132. W. LaFave & A. Scott, supra note 4, § 61, at 457-58.


As to the withdrawal defense, *Read* explicitly interpreted *Hyde's* "some act" requirement as putting the burden of *production* on the defendant\(^\text{135}\) and held that to be the proper standard.\(^\text{136}\) But the inquiry must not end there. Neither *Read* nor *Hyde* specifies exactly how much evidence the defendant must produce.\(^\text{137}\) In addition, constitutional problems inhere in compelling a defendant to come forward with evidence.

### A. General Standards

The burden of production is a threshold requirement for getting an issue to the jury.\(^\text{138}\) The judge determines whether the burden has been met. If it has not, he will not instruct the jury on the issue, and the opposing party need not present evidence negating it.\(^\text{139}\)

Three standards exist for the amount of evidence necessary to meet the defendant's burden of production: 1) "any evidence"; 2) "more than a scintilla" of evidence; and 3) evidence that raises a reasonable doubt about the element of the crime to be negated.\(^\text{140}\) For example, in *Zemina v. Solem*,\(^\text{141}\) the court applied the "any evidence" standard to the issue of self-defense, stating that "a defendant has a right to have his theory presented in the instructions 'even when the supporting evidence is weak or of doubtful credibility.'"\(^\text{142}\)

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\(^2\) 658 F.2d at 1233; see *id.* at 1236 n.8 ("The import of our decision is that the showing is only one of production, not persuasion.").

\(^3\) *Id.* at 1236.

\(^4\) *Id.* at 1234 ("*Hyde* said nothing explicit about the amount of evidence the defendant must offer" (emphasis in original)).


\(^6\) Allen III, *supra* note 138, at 329 (pointing out that this is the equivalent of directing a verdict on the issue).

\(^7\) *Id.* at 328-29.


behind this is that "[i]t is not for the trial judge to assess the credibility of witnesses, to resolve conflicts in testimony or to weigh the evidence as these are jury functions." 143

The "more than a scintilla" standard is not significantly higher than "any evidence." In United States v. Timberlake, 144 an entrapment case, the court held that the defendant must produce "more than a scintilla" of evidence, but that such evidence could be weak, inconsistent or even insufficiently probative, as the question of credibility is one for the jury. 145 Similarly, in United States v. Wolffs, 146 another entrapment case, the court stated that the defendant had to produce "more than a scintilla" of evidence, and that a court should view the testimony in the light most favorable to the defendant in deciding whether the burden has been met. 147 The Wolffs court suggested also that the prosecution's own evidence may itself satisfy the defendant's burden. 148

Credibility, then, is not a major concern of those courts that employ the "any evidence" or "more than a scintilla" standards. As long as something somewhere suggests that the issue exists, the defendant can, if he requests, get an instruction on it.

On the other hand, the "raise a reasonable doubt" standard, the highest of the three 149 and the most commonly employed, 150 does necessitate a preliminary inquiry into credibility. The judge determines whether the jury could find that the defendant's evidence raises a reasonable doubt, not just any doubt. 151 In State v. Rice, 152 the Maine Supreme Court relied on Mullaney and Winship to put the burden of disproving involuntary intoxication on the prosecution, and held that defendant must produce enough evidence to generate the issue by raising a reasonable doubt. 153 The "raise a reasonable doubt"
standard seems the most logical of the three, as it is the obverse of the prosecution's burden.\textsuperscript{154} The Supreme Court may have implicitly answered the question as to which standard is proper in \textit{United States v. Bailey}.\textsuperscript{155} In \textit{Bailey}, the defendant raised the defense of duress to a charge of escape from federal custody. The Court held that the two essential elements of a duress defense in the prison escape context are: 1) justification for the initial escape, and 2) a good faith effort to return to custody as soon as the duress loses its coercive force.\textsuperscript{156} To enable the court to give the jury an instruction on this defense, the defendant must come forward with evidence of both these elements.\textsuperscript{157}

The defendants in \textit{Bailey} testified to receiving beatings and threats in their prison cellblock. This evidence was apparently enough to justify their initial escape. As to their efforts to return to custody, however, they made vague statements about the attempts of their "people" to contact the FBI, and that these "people" had in turn told them the FBI would kill them. Based on this evidence, the district court refused to instruct the jury on duress, ruling that the defendants' explanation did not justify their failure to surrender.\textsuperscript{158} In upholding

\begin{itemize}
\item The "raise a reasonable doubt" standard, much more so than the two lower standards, presents the danger of the equivalent of a directed verdict. W. LaFave & A. Scott, \textit{supra} note 4, § 8, at 53; Allen III, \textit{supra} note 138, at 329; Underwood, \textit{supra} note 38, at 1335; Note, \textit{The Evolving Use of Presumptions in the Criminal Law}: Sandstrom v. Montana, 41 Ohio St. L.J. 1145, 1156 (1980) [hereinafter cited as \textit{Presumptions}]. The heavier the burden, the less likely it is that a defendant will meet it; if the burden of production is not met, the jury will never hear the issue. The right to a jury trial may thereby be violated. See U.S. Const. amend. VI; Ashford & Risinger, \textit{supra} note 127, at 175 n.21; \textit{Presumptions, supra}, at 1156.

This constitutional problem with the burden of production has never been adequately fleshed out by the courts. The burden of production invariably rests on a presumption. \textit{See id.} at 1155. For example, the elements of conspiracy are agreement, overt act and individual membership. \textit{See United States v. Read}, 658 F.2d 1225, 1232 (7th Cir. 1981). In addition, the conspiracy presumptively continues as to each member, unless rebutted by evidence of withdrawal. Hyde v. United States, 225 U.S. 347, 369 (1912). Assuming that only the burden of production rests on the defendant, if he fails to meet his burden, the presumption holds, the jury never hears about withdrawal, and a verdict, in effect, has been directed on the element of continued membership. \textit{See Allen III, supra} note 138, at 329.

Thus far, however, no such presumption has been stricken as unconstitutional. Jeffries & Stephan, \textit{supra} note 71, at 1334 n.14; \textit{Presumptions, supra}, at 1155. Indeed, commentators see such presumptions as "an economical way to screen out issues extraneous to the case at hand. . . . Accordingly, there appears to be a consensus that shifting the burden of production is a permissible housekeeping device." Jeffries & Stephan, \textit{supra} note 71, at 1334; \textit{see Underwood, supra} note 38, at 1335-36.

\item 154. The "raise a reasonable doubt" standard, much more so than the two lower standards, presents the danger of the equivalent of a directed verdict. W. LaFave & A. Scott, \textit{supra} note 4, § 8, at 53; Allen III, \textit{supra} note 138, at 329; Underwood, \textit{supra} note 38, at 1335; Note, \textit{The Evolving Use of Presumptions in the Criminal Law}: Sandstrom v. Montana, 41 Ohio St. L.J. 1145, 1156 (1980) [hereinafter cited as \textit{Presumptions}]. The heavier the burden, the less likely it is that a defendant will meet it; if the burden of production is not met, the jury will never hear the issue. The right to a jury trial may thereby be violated. See U.S. Const. amend. VI; Ashford & Risinger, \textit{supra} note 127, at 175 n.21; \textit{Presumptions, supra}, at 1156.

This constitutional problem with the burden of production has never been adequately fleshed out by the courts. The burden of production invariably rests on a presumption. \textit{See id.} at 1155. For example, the elements of conspiracy are agreement, overt act and individual membership. \textit{See United States v. Read}, 658 F.2d 1225, 1232 (7th Cir. 1981). In addition, the conspiracy presumptively continues as to each member, unless rebutted by evidence of withdrawal. Hyde v. United States, 225 U.S. 347, 369 (1912). Assuming that only the burden of production rests on the defendant, if he fails to meet his burden, the presumption holds, the jury never hears about withdrawal, and a verdict, in effect, has been directed on the element of continued membership. \textit{See Allen III, supra} note 138, at 329.

Thus far, however, no such presumption has been stricken as unconstitutional. Jeffries & Stephan, \textit{supra} note 71, at 1334 n.14; \textit{Presumptions, supra}, at 1155. Indeed, commentators see such presumptions as "an economical way to screen out issues extraneous to the case at hand. . . . Accordingly, there appears to be a consensus that shifting the burden of production is a permissible housekeeping device." Jeffries & Stephan, \textit{supra} note 71, at 1334; \textit{see Underwood, supra} note 38, at 1335-36.

\item 155. 444 U.S. 394 (1980).
\item 156. \textit{Id.} at 412-13.
\item 157. \textit{Id.}
\item 158. \textit{Id.} at 399-400.
their convictions, the Supreme Court stated: "Vague and necessarily self-serving statements of defendants or witnesses as to future good intentions or ambiguous conduct simply do not support a finding of this element of the defense."¹⁵⁹

This is certainly not the "any evidence" or "more than a scintilla" standard. The Bailey Court required a threshold amount of credibility for the satisfaction of the burden of production. Not only must the defendant present evidence on all the elements of his defense, but also his evidence must be more than "vague and self-serving."¹⁶⁰ The Court seemed quite concerned about "the need to husband the resources necessary for [a jury trial] by limiting evidence in a trial to that directed at the elements of the crime or at affirmative defenses."¹⁶¹ The Court asserted that the high standard would not usurp the jury's role as the arbiter of credibility, and stated that if the defendant's evidence of one element of a defense is "insufficient to sustain it even if believed, the trial court and jury need not be burdened" with evidence of the other elements.¹⁶² Thus, Bailey implies strongly that nothing less than the "raise a reasonable doubt" standard is acceptable.

B. Withdrawal: How Much Evidence?

Hyde and Read place on the defendant the burden of production on the issue of withdrawal. But neither case provides guidance as to which of the three standards is proper. One early case, however, cited in Read, does suggest a standard. In Mansfield v. United States,¹⁶³ the trial court had instructed the jury that in order to find that the defendant had made an effective withdrawal, "there must be a doubt as to whether or not he remained in [the conspiracy]."¹⁶⁴ The Eighth Circuit upheld this instruction:

The instruction given by the court, when considered as a whole, falls fairly within the law as announced by the Supreme Court [in Hyde]. There must be definite proof of withdrawal, some affirmative step must be taken. . . . The instruction, in substance, required the jury to find some evidence that would create a doubt in their minds as to whether or not the appellants remained in the scheme. . . . It does not relieve the government of the burden of establishing their guilt beyond a reasonable doubt.¹⁶⁵

¹⁵⁹. Id. at 415 (footnote omitted).
¹⁶⁰. Id. at 416.
¹⁶¹. Id.
¹⁶². Id.
¹⁶³. 76 F.2d 224 (8th Cir.), cert. denied, 296 U.S. 601 (1935).
¹⁶⁴. Id. at 229.
¹⁶⁵. Id. at 229-30 (emphasis added).
The defendant in Mansfield used his bond and mortgage company to perpetrate a stock fraud on the public. The only evidence he offered was that he "withdrew" by moving his office to a new building. It seems that this less-than-probative evidence was sufficient to meet the burden of production, as the instruction was given, but apparently, in light of the conviction, the prosecution's evidence that the defendant had actively engaged in stock fraud until he was indicted, removed any doubt that the defendant's evidence may have generated. The Mansfield court adopted the "raise a reasonable doubt" standard, but not in a very stringent form. Given Bailey, this is the standard to be followed. A defendant in a conspiracy case would thus have to produce evidence bearing on all the elements of withdrawal: activity inconsistent with the conspiracy (including communication to co-conspirators or police), good faith and abandonment of the plot. Moreover, such evidence must be sufficiently credible to raise a reasonable doubt.

C. A Special Constitutional Concern

In the context of the withdrawal defense, one important constitutional objection generally arises in requiring the defendant to meet the burden of production—the inevitable infringement of the privilege against self-incrimination. This could occur with any defense; often a defendant's only evidence is his own testimony. But it is a particularly serious problem with the withdrawal defense.

Let us suppose again a conspiracy to rob a bank among A, B and C. A makes an effective withdrawal; B and C rob the bank and kill a teller. All three are indicted for conspiracy, robbery and murder. At

166. Id. at 230.
167. Id.
168. See Buhler v. United States, 33 F. 2d 382, 385 (9th Cir. 1929) (court placed the burden of disproving the defense on the prosecution, but did not discuss the production burden).
170. In the context of withdrawal as a complete defense—either when coupled with the statute of limitations or when effected before the first overt act—the problem of self-incrimination does not arise. The defendant in either of those situations disclaims all guilt, whereas if he claims withdrawal as a partial defense, he admits guilt to the conspiracy charge.
171. See Turner v. United States, 396 U.S. 398, 432-33 (1970) (Black, J., dissenting); United States v. Cainey, 380 U.S. 63, 87-88 (1965) (Black, J., dissenting); Ashford & Risinger, supra note 127, at 176-77. But see Jeffries & Stephan, supra note 71, at 1334 n.15 (noting that the Supreme Court has "consistently rejected this position").
trial B and C do not take the stand, invoking their fifth amendment rights. A’s only evidence of withdrawal, then, is his own testimony that he informed B and C of his withdrawal, and his non-participation in the substantive crimes, which by itself is not enough to establish withdrawal. 172

A is faced with a Hobson’s choice; He can choose not to testify and hope to be acquitted of all three charges, or he can take the stand, admit his participation in the conspiracy (making conviction on that charge certain) and claim withdrawal. He is damned either way if the evidence of his original participation is strong. He is especially damned if he says nothing, because once his original involvement is established, his guilt on the substantive charges is presumed. 173

The situation is different for either withdrawal coupled with the statute of limitations or withdrawal effected prior to the overt act; the defendant in those cases takes the stand to exonerate himself com-

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172. This hypothetical postulates the worst situation for a conspiracy defendant who wants to claim withdrawal. Naturally, if the defendant effects his withdrawal by informing the police, he is assured additional testimony. It is submitted, however, that this method of withdrawal would not be particularly popular—most defendants would surely rather slip away quietly than implicate their confederates, endangering themselves in the process. See United States v. United States Gypsum Co., 438 U.S. 422, 464 (1978) (communication to co-conspirators or law enforcement officials “impractical”).

173. One way to solve the special problem posed by withdrawal as a partial defense would be, of course, to strike down the presumption that membership is continuous. Its validity has never been questioned, except by the court in Read in so far as it shifts the ultimate burden of proof to the defendant. United States v. Read, 658 F.2d 1225, 1232-33 (7th Cir. 1981). The presumption of continuing membership in a conspiracy is distinguishable from the conclusive presumption that a person intends the consequences of his acts, which was struck down in Sandstrom v. Montana, 442 U.S. 510 (1979). See Ranney, Presumptions in Criminal Cases: A New Look at an Old Problem, 41 Mont. L. Rev. 21, 27-28 (1980). See generally Presumptions, supra note 154, at 1145-63 (discussing Sandstrom in depth). This is because liability for co-conspirators’ crimes is not so much predicated on the presumption that membership in a conspiracy is continuous as it is on the original agreement, a crime in itself. If such membership, however, is an essential element which must be proven beyond a reasonable doubt in order for the state to constitutionally punish the defendant for co-conspirators’ crimes, the presumption itself is unconstitutional. See supra text accompanying notes 116-19.

Barring the applicability of Sandstrom, one could argue that the membership presumption does not meet the “more likely than not” test established in Tot v. United States, 319 U.S. 463 (1943) and Leary v. United States, 395 U.S. 6 (1969). Tot struck down a presumption that a person in possession of a firearm had received it in interstate commerce, 319 U.S. at 466-72, and Leary struck down a presumption that a person in possession of illegally imported marijuana had knowledge of the illegal importation. 395 U.S. at 29-54. This argument may be difficult to sustain for conspiracy, in view of the fact that courts have long and universally held that a conspiracy by its nature is continuous. Hyde v. United States, 225 U.S. 347, 369 (1912); United States v. Kissel, 218 U.S. 601, 607 (1910).
pletely. Conviction is by no means certain because while admitting to the conspiracy, the defendant claims that his entire prosecution is barred by the statute.

One procedural solution, although unusual, could solve the special problem posed by withdrawal as a partial defense. Going back to the hypothetical posed earlier, A, with the burden of production, was caught in a dilemma. He could either not raise the withdrawal defense to which he was entitled and hope for an unlikely acquittal, or he could take the stand and incriminate himself as to the conspiracy, but at least meet his burden of producing evidence that negates his membership at the time the substantive offenses were committed. One procedural expedient could be separate trials: The defendant could remain silent during the first trial on the conspiracy and substantive charges. If he is acquitted, nothing more needs to be done. If he is convicted, he should be entitled to another trial on the substantive charges alone, at which he could assert his withdrawal defense.

The immediate objection to this arrangement is that it would take too much time and expense to have another trial and impanel another jury. That objection leads to a related and even more efficient procedure: bifurcation.

Bifurcation requires one trial in two parts. The jury would hear all evidence bearing on the conspiracy and substantive charges, but the

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174. See Fed. R. Crim. P. 2 ("These rules . . . shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.").

175. The devices of separate trials and bifurcation have long been used in civil law, particularly to separate the issues of liability and damages. See Weinstein, Routine Bifurcation of Jury Negligence Trials: An Example of the Questionable Use of Rule Making Power, 14 Vand. L. Rev. 831, 852-53 (1961) (approving of split trials in special cases); Zeisel & Callahan, Split Trials and Time Saving: A Statistical Analysis, 76 Harv. L. Rev. 1606, 1624 (1963) (concluding that separation of issues will save about 18% of the court's trial time); Committee on State Courts of Superior Jurisdiction, Separate Trials of the Issues of Liability and Damages in Personal Injury Actions, 20 Rec. A.B. City N.Y. 659, 665-66 (1965) (approving split trials but not recommending their routine use).

The Federal Rules of Criminal Procedure provide that if a defendant is prejudiced by joinder of offenses, the court "may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires." Fed. R. Crim. P. 14. In United States v. Bennett, 460 F.2d 872 (D.C. Cir. 1972), the court granted bifurcation of the insanity defense and the merits of a sexual assault case. The defendant in Bennett claimed insanity, and, in the alternative, also denied committing the crime. The defendant asserted that the admission of his psychiatrist's testimony concerning his admission of guilt during a psychiatric examination violated his privilege against self-incrimination. The court noted that the testimony was intended to bear only on the insanity issue, but that the jury considered it in their determination of the merits. The defendant was thereby prejudiced, and the court remanded for a bifurcated trial. Id. at 878-81; see Parman v. United States, 399 F.2d 559, 561 (D.C. Cir.) (bifurcation within the "broad discretion" of trial judge), cert. denied, 393 U.S. 858 (1968).
defendant claiming withdrawal would testify only before the judge, not only admitting to the conspiracy but also meeting the burden of production on the withdrawal defense. In the jury's eyes, the defendant was exercising his fifth amendment right; the judge would instruct them accordingly. The judge would then instruct the jury as to conspiracy, the Pinkerton rule, and the prosecution's burden to prove the agreement, the overt act and individual membership beyond a reasonable doubt. No instruction would be given on withdrawal. If the defendant is acquitted the trial would end. If he is convicted, the judge would ask the jury to stay, explaining why the defense was not raised earlier and asking them to hear and decide upon the same evidence he heard. Of course, the prosecution would have already prepared its rebuttal; no new evidence need be presented on the conspiracy charge itself, because the jury is now being asked to determine guilt of the substantive charges only. Time is thereby saved, and the defendant has not been forced to confess to conspiracy.

This second step will take place only if the judge has decided that the evidence presented met the defendant's burden of production. If it did not, the second step is unnecessary. Of course, the latter is more likely to happen under the "raise a reasonable doubt" standard than under the others.

Conclusion

Whither withdrawal now? So far, Read is the only modern case putting the burden of disproving withdrawal on the prosecution, thereby creating an upheaval in the Seventh Circuit the effects of which have not yet been felt elsewhere. When they are, the procedural devices of shifting the burden of production and bifurcating the trial will provide a well-balanced, efficient working standard to keep intact all of the due process safeguards essential to the protection of the innocent.

Linda Cantoni

176. See Bruno v. United States, 308 U.S. 287, 292-93 (1939) (defendant has right to instruction on privilege against self-incrimination).
177. See supra note 154.