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THE UNIVERSITY
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**Reconciling Reverse Burdens of Proof with the
Presumption of Innocence: A New Approach**

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Presented for the Degree of Doctor of Philosophy

The University of Edinburgh

2021

In Memoriam

For my grandfather, James Walter Gillen
February 26, 1935 – January 4, 2020

Abstract / Lay Summary

Modern liberal democracies pride themselves on protecting certain fundamental rights for individuals. In the context of the criminal law, perhaps the most prominent is the right of accused persons to be presumed innocent until proven guilty of criminal wrongdoing. However, similarly prominent is the phenomenon of imposing a burden of proof on the accused, the effect of which is to require them to prove their innocence. This thesis explores the relationship between these two features of the criminal law and examines how it is possible to reconcile the presumption of innocence (PoI) with ‘reverse’ burdens of proof.

In particular, the thesis sets out to answer the following question: under what circumstances, if any, will it be coherent with the PoI to impose a reverse burden of proof on the accused in a criminal trial? In response, the thesis ultimately argues that reverse burdens and the PoI cannot be reconciled where the reverse burden amounts to a requirement to prove innocence. This is because, properly understood, the PoI requires proof guilt beyond a reasonable doubt. This, in turn, is understood in terms of the allocation of risk of failing to persuade the factfinder of a certain fact. Specifically, the thesis contends that the PoI prohibits the allocation of this ‘risk of non-persuasion’ to the accused, meaning that the accused must not be required to prove that they are innocent. This is a unique interpretation of the PoI in the context of reverse burdens. The thesis therefore concludes that the only reverse burdens which can be reconciled with the PoI are those which do not require the accused to prove their innocence, a set of defences known as ‘non-exculpatory defences’. Otherwise, the PoI prohibits reverse burdens.

In reaching this conclusion, the thesis proceeds in three main parts. The first expands on and contextualises the problem which reverse burdens pose in terms of PoI compatibility. The chapters comprising this first part of the thesis offer a critical account of the prevailing approaches to analysing reverse burdens in several common law jurisdictions. The thesis then identifies a distinction which has often gone unacknowledged in these conventional accounts of reverse burden compatibility. This is the distinction between the PoI as a trial rule (the ‘thin’ PoI) compared to the PoI as a general norm of the criminal law (the ‘thick’ PoI).

Departing from the tradition of choosing either the thick or thin PoI as the only correct version of the PoI, the thesis argues that both must be relevant to a holistic assessment of how to allocate the burden of proof in a way which is coherent with the PoI. The second part of the thesis fleshes this idea out and develops an account of the thick PoI as entailing a prohibition on requiring the accused to prove any fact which bears on their responsibility for the offence in question. In these chapters, the thesis explains why this understanding should be preferred to three alternative approaches to connecting the PoI and reverse burdens. These alternatives are: i) ignoring the thick PoI and characterising the PoI as nothing more than a trial rule; ii) assessing each reverse burden on an *ad hoc* basis, by reference to a requirement of proportionality; and iii) flatly banning any persuasive burden on the accused. Ultimately, it is argued that each of these is flawed for a different reason.

Finally, the third part of the thesis examines the ramifications of adopting this new understanding of reverse burdens for the structure of the modern criminal law in systems such as England and Wales or the United States. The chapters forming this third part offer a new way forward,

whereby burdens on the accused are generally not full persuasive burdens, and where criminal offences are drafted more carefully with the burden of proof in mind. This charts a path for a criminal law which more fully respects the rights of individuals.

Acknowledgments

Though any PhD thesis is necessarily a highly individual project, no PhD would be possible through one person's efforts alone. This PhD is no exception, and there are numerous people who I wish to acknowledge and thank for their help along the way. First, I want to thank my supervisors, Gerry Maher and Chloë Kennedy for their insight, advice, and guidance over the past four years. Gerry and Chloë helped me navigate the strange, and at times fraught, world of PhD life, and always pushed me to be better and to do my best work, and for that I am extremely grateful.

Next, I'd like to acknowledge all of the other academics over the years who have volunteered their time to read, discuss, and give feedback on my work. At the stage of developing this idea into a PhD proposal, I was particularly fortunate to have the invaluable input of Paul Roberts, Victor Tadros, and Liz Campbell. Since moving to Edinburgh, I have also had an unbelievable amount of support with my work from Andrew Cornford, Antony Duff, Lindsay Farmer, JP Fassnidge, and numerous other academics in the world of Scottish criminal law - I am grateful to each and every one of them for the time they have taken to invest in me and my research.

I would also like to acknowledge my mother, Karen, and my brother, Ben, for the total confidence they place (and have always placed) in me, and the support they have given me, particularly in difficult times when the PhD seemed like it would never be finished. Even from 5,000 miles away their support and belief in me was a powerful force that kept me moving forward. The same goes for my grandparents, Connie and Jim Gillen, who always believed in and supported me. This thesis is dedicated to my grandfather's memory. Huge thanks also go to Maja Spener and Scott Sturgeon, who provided just as much moral and practical support, and especially good advice, from not quite as many miles away.

Finally, there is nothing I can say that can fully capture how thankful I am to my wife, Lizzie Allen, for her love, support, and devotion over the past four years. Through thick and thin, Lizzie always stuck by me and kept me grounded, listening to me and helping me work through some of the most difficult parts of PhD life. I owe her more than an acknowledgment in a PhD thesis can ever amount to, but I hope this will be a start.

Declaration

I declare that this thesis has been composed solely by myself and that it has not been submitted, in whole or in part, in any previous application for a degree. Except where stated otherwise by reference or acknowledgment, the work presented here is entirely my own.

This thesis contains three chapters which reproduce, in amended form, work from an article that has been previously published in a peer-reviewed publication. The chapters and the article are:

Chapter 1 - *The 'Problem' of Reverse Burdens of Proof*

Chapter 3 - *Existing Approaches to Reverse Burdens in Legal Scholarship*

Chapter 4 - *Distinguishing 'Thick' and 'Thin' Conceptions of the Presumption of Innocence*

Some of the substantive content and general argument of these chapters was originally published as:

Jackson Allen, 'Rethinking the relationship between reverse burdens of proof and the presumption of innocence', (2021) 25 (2) *International Journal of Evidence and Proof*, 115. This article is open-access and I retain the copyright. No permission is needed to reproduce it.

Jackson L Allen

23 August 2021

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Chapter 1: The ‘Problem’ of Reverse Burdens of Proof¹

1.1 - Overview

Modern systems of criminal law pride themselves on their adherence to, and respect for, certain fundamental rights for those accused of crimes. One right in particular has garnered near universal recognition in legal systems across the world: the presumption of innocence (PoI). In the realm of the common law, the PoI is often equated with the proposition that it is for the prosecution to prove the guilt of the accused, to the standard required by law, otherwise the accused is entitled to be acquitted. Though no common law jurisdiction would deny their commitment to the PoI, there is nevertheless a phenomenon which appears to threaten the primacy of the PoI.

This is the phenomenon of imposing a persuasive burden on the accused in a criminal trial, requiring them to prove something or else lose on that issue, and therefore face conviction. The proliferation of these ‘reverse’ burdens of proof has been a serious concern for scholars and other commentators for many years. However, as will be explored below, the contention of this thesis is that extant approaches to reconciling the PoI and reverse burdens are defective in one of several ways. Namely, existing approaches fail to appreciate the importance of the PoI as a general principle, and therefore incorrectly conclude that it is a rule which permits of exceptions. Reverse burdens are then cast as one such exception, with much of the literature focusing on how to determine when a reverse burden can be justified *qua* exception to the PoI. This thesis rejects this type of thinking, in favour of a new approach. The novelty and significance of this approach are detailed below in section 1.4.c. Before these can be fully appreciated, however, the parameters and scope of the enquiry must first be precisely specified.

The main research question which this thesis answers is best stated as follows: when, if ever, will it be coherent with the requirements of the PoI to impose a reverse burden on the accused?² The answer offered, and the central claim which will be defended throughout the thesis, is that any system of criminal law which wants to uphold the PoI must never impose a reverse burden on the accused with respect to any fact bearing on whether or not they are guilty. This follows from adopting an understanding of the PoI which recognises its role as both a trial rule allocating the burden of proof to the prosecution *and* a general norm of the criminal law. These two ways of understanding the PoI will be referred to as the ‘thin’ and ‘thick’ versions of the PoI, respectively.² The primary justification for the thesis’s central claim is thus that the thick PoI prohibits any requirement on the accused to prove their innocence, meaning reverse burdens which relate to the guilt or innocence of the accused can never be justified. This is a finding which is very much at odds with the prevailing approaches in England and Wales and the United States (US), and also differs from the views of many key theorists in this field.

¹ The material in this chapter draws upon an article which I have previously published on this same topic. See, Jackson Allen, ‘Rethinking the relationship between reverse burdens and the presumption of innocence’ (2021) 25(2) International Journal of Evidence and Proof, 115-134. For reference, a copy of this article will be submitted as an appendix to this thesis.

² This terminology is explained in greater detail in section 1.3 below.

Before these substantive arguments can be advanced, much groundwork must first be laid. The role of this chapter is therefore a preliminary one, and its function is to give detailed answers to several key questions. First, what exactly will the thesis set out to do? Second, why is it important to take a fresh look at reconciling reverse burdens and the PoI? And third, how will this thesis achieve its stated objectives in a way which makes a significant and original contribution to this area of law? The remainder of Chapter 1 is aimed squarely at answering these questions. To this end, the chapter is divided into five further sections. Sections 1.2 and 1.3 provide a necessary overview of the key terminology which will be employed throughout the thesis, and explain which jurisdictions will feature in the thesis, and what literature will be relied upon. Section 1.4 will then answer the question of what exactly the thesis will set out to do and provide a full explanation of why reverse burdens are problematic in terms of the PoI. Section 1.5 will follow by setting out the methodology which the thesis will employ, highlighting the originality of its approach. Finally, section 1.6 will conclude Chapter 1 and give a sketch of what will follow in Chapters 2 through 7.

1.2 - Key Sources and Literature

The key source materials of the thesis will be appellate level judgments and scholarly writing from two prominent English-speaking jurisdictions: the US and England & Wales. This section will proceed by first explaining the choice of jurisdictions in greater detail, and by specifying certain other source materials which will feature in a more limited way. Specifically, these other sources are a selection of cases from Canada and the European Court of Human Rights (ECtHR). Once the rationale for choosing these jurisdictions has been explained, the specific materials which will be relied upon from each jurisdiction will be identified, and some brief comments as to their role in the thesis will be given.

1.2.a - Choice of Jurisdictions

There are two reasons which inform the choice of the US and England & Wales as the primary jurisdictions to provide source materials for the thesis. The first is principled, the second pragmatic. First, at the level of principle, the restriction of the thesis's scope broadly to the realm of the common law, and specifically to the two jurisdictions chosen here, is justifiable because it provides the context within which the research is intelligible and significant. As with any legal research project, investigating how we reconcile reverse burdens with the PoI requires a certain degree of context if its significance is to be appreciated. In the case of this thesis, even brief reflection on the subject matter demonstrates that the issue of reverse burden compatibility with the PoI is a distinctly common law problem.

Indeed, the very 'problem' which the research seeks to solve cannot even be understood as such without understanding the concept of a burden of proof and its significance in the archetypal common law adversarial trial. This is because, although non-adversarial trials will still involve a burden and standard of proof, there is no issue of one party or another bearing the burden. Therefore, the problem of reverse burdens is most readily demonstrated in the context of adversarial systems, which rely mostly on the parties to a case to bear the burden of proving or disproving certain facts. Without the notion of a burden of proof, and without the principle that it ought generally to be on the prosecution, rather than the accused, the core of the thesis could not be understood. As a result, my decision to centre the research around common law legal systems and scholarship generally should be thought of as a reflection of the context from which the research derives its significance.

At this point, it could be objected that as the thesis is not primarily doctrinal in character, and as it seeks to provide answers at a level of generality (rather than for one specific jurisdiction), there is no justification to restrict the scope of the research to common law systems. Furthermore, this objection might be put even more forcefully, as a claim that focussing primarily on just two common law jurisdictions is indefensibly parochial, especially when considering a legal principle as fundamental and universal as the presumption of innocence. In answer this objection, I would begin by noting that I am acutely aware that previous research in this area has been sharply criticised for being ‘confined by the intellectual straitjacket of orthodox common law concepts’ and thinking.³ However, I doubt whether this criticism has much bite when it comes to my thesis. In fact, as argued above, I believe that centring the research around common law cases and scholarship is a necessity if the research is to succeed in its goals. Moreover, though adherence (or purported adherence) to some sort of PoI does appear to be nearly universal in legal systems the world over, the notion of burdens of proof is still very much a common law issue.⁴ As such, it seems entirely right and principled to make common law jurisdictions the primary source of literature and legal texts drawn upon in the thesis.

The case in favour of focussing primarily on sources from common law jurisdictions *in general* has been established. What remains, then, is to justify the choice to focus *specifically* on the legal systems of the US and England & Wales. At this point, the second, pragmatic reason for the choice of jurisdictions becomes relevant. Specifically, the two jurisdictions chosen represent those whose approaches to reverse burden compatibility have evolved over time, with abundant critique from scholars and judges along the way. US and English law therefore represent ideal systems to focus on in addressing my research question. Importantly, texts from these jurisdictions are the *primary* focus of the thesis, but not the exclusive focus of it. This means that cases and texts from other jurisdictions need not be excluded simply because they do not emanate from English or American law. Indeed, Canadian jurisprudence will play a small, but important role in the thesis. In any case, the fact remains that from a pragmatic standpoint there are strong reasons to make the US and England & Wales the primary focus of my enquiry.

A further observation merits brief mention here, in order to reinforce the pragmatic choice of focussing on these two jurisdictions. Namely, it must be emphasised that the research is not intended to be an exercise in comparative legal analysis with respect to reverse burden compatibility. There is, of course, a huge variety of common law jurisdictions, with an equal variety of approaches to reconciling the PoI and reverse burdens.⁵ However, the objective of my thesis is not to canvass as wide a variety of approaches as possible and compare them to one another. Though such a wide survey might be interesting to conduct, the ambitions of my thesis are different from those which would motivate such a comparative study. Rather than looking to existing approaches and choosing a ‘winner’, this thesis is more normative in character, using particular approaches as indicative sources of deeper principles. What is important, then, is not picking a ‘winning’ jurisdiction, but rather identifying some ‘winning’ values and principles of broader application.

Having now explained why the focus of the thesis will be on literature and sources from the US and England & Wales, it remains to go into greater depth about which sources from each

³ Paul Roberts, ‘Loss of Innocence in Common Law Presumptions’ (2014) 8 *Criminal Law and Philosophy* 317, 318.

⁴ The PoI is explicitly protected in several international human rights treaties. For example, see the United Nations’ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 11(1).

⁵ In addition to the US and England & Wales, the jurisdictions which can broadly be called common law systems are the usual suspects of Ireland, Scotland (hybrid system), Australia, New Zealand, and Canada, but also the systems of countries such as India, Kenya, Hong Kong, South Africa, Singapore, and Belize, to name a few.

jurisdiction will be used, and what role they will play in the thesis. sections 1.2.b and 1.2.c do this, taking the two main jurisdictions in turn, and identifying some other sources from additional legal systems which will also feature in the thesis.

1.2.b - The role of US law and scholarship

The US legal system and American legal commentators have been dealing with the subjects of burdens of proof and the PoI for over a century. The modern debate began with the landmark US Supreme Court ruling in *Coffin v United States*, which reaffirmed the status of the PoI as an ‘axiomatic and elementary’ principle lying ‘at the foundation of the administration of our criminal law’.⁶ Since then, the content of the PoI and its relationship with reverse burdens has been litigated several times in the cases of *Winship*, *Mullaney v Wilbur*, and *Patterson v New York*.⁷ Meanwhile, legal scholars in the US have been writing about burdens of proof and presumptions against the accused since at least the time of the *Coffin* judgment, right up to the present.⁸ These two sources, US Supreme Court case law and academic scholarship, will feature prominently in the thesis.

The judgments of the cases named above (*Coffin*, *Winship*, *Mullaney*, and *Patterson*, hereafter ‘the American cases’) will be used by the thesis in two main ways. First, the American cases provide a textbook case of relying solely on what I call the ‘thin’ PoI to adjudicate reverse burden compatibility. The modern authority of *Winship* holds that under US law a reverse burden on an affirmative defence will never violate the PoI as guaranteed under the Fourteenth Amendment to the US Constitution (right to due process of law).⁹ The subsequent case of *Patterson* confirmed that this means that any fact classified as a defence under the relevant state law (as criminal law is primarily a matter for the various states under US law) there would be no violation of the PoI.¹⁰ This makes the US approach, explained by reference to the American cases, a key part of the thesis’s development of the distinction between the thick and thin PoI, by demonstrating what a thin PoI approach looks like. This will also be of use later in the thesis, when justifying a role for the formal offence/defence distinction in allocating the burden of proof.¹¹ Thus the first use of the American case law will be as an example of one prevalent approach to reverse burden compatibility.

The second use of the American cases in my thesis relates not to the legal doctrines invoked in the judgments, but rather to the principles espoused and the reasoning adopted. Returning to the theme of the normative character of my thesis, the American cases will also be used a source of relevant norms, helping to inform the content of what I call the thick PoI. For example, Justice Harlan in *Winship* is at pains to rationalise the case’s outcome in terms of the preference for false acquittals.¹² His description of the preference for false acquittals as a ‘fundamental value

⁶ *Coffin v US* 156 US 432 (1895) 453.

⁷ *In re Winship* 397 US 358 (1970); *Mullaney v Wilbur* 421 US 684 (1975); *Patterson v New York* 432 US 197 (1977).

⁸ James Bradley Thayer, ‘The Burden of Proof’ (1890) 4 Harvard Law Review 45; John Henry Wigmore, *Evidence in Trials at Common Law*, vol 9 (Third edition, revised., Boston : Little, Brown 1961); RJ Allen, ‘Burdens of Proof’ (2014) 13 Law, Probability and Risk 195.

⁹ *In re Winship* (n 7) 364. Justice Brennan is unequivocal about this, stating: ‘Lest there be any doubt...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.’ (emphasis added).

¹⁰ *Patterson v New York* (n 7) s III.

¹¹ More will be said about this below in section 1.3 where I discuss the concept of the offence/defence distinction and its importance in the thesis.

¹² *In re Winship* (n 6) 372–374 (Justice Harlan, concurring).

determination of [American] society' is therefore of interest for the present purposes because it invokes not a doctrine of American law so much as a more basic norm of fairness. I will therefore draw upon instances in the American cases such as Justice Harlan's appeal to the preference for false acquittals as sources of norms which will ultimately constitute the thick PoI that I appeal to in the thesis. This is of central importance to the thesis, as the conclusions I reach are rooted in the thick PoI, which is itself rooted in principles such as the ones found in the American cases.

Turning now to American scholarly writing, I will also make use of scholarship around burdens of proof and the PoI, both as a complement to my use of American case law, but also for its own substantive content. This will be similar to the second way of using case law, mining it for norms and principles, as described above. There are several American theorists whose work is particularly relevant to my thesis, the most prominent being Paul Robinson, George Fletcher, Richard Lippke, and Ronald Allen.¹³ Robinson's work on defences will be central to my discussion of the offence/defence distinction, as he presents one of the most impressive attempts at classifying defences ever attempted.¹⁴

Lippke's monograph on the PoI will serve a more general purpose, which is to help lay the foundation for my development of the thick/thin distinction. Lippke's text devotes considerable time and detail to both an examination of competing interpretations of the PoI among scholars,¹⁵ and to how the PoI can apply in different ways at different stages of the criminal process.¹⁶ The former will be most relevant to my examination of some competing interpretations of the PoI, which I undertake in Chapter 3. The latter will then demonstrate that there is nothing controversial about making the analytical distinction I make between thick and thin interpretations of the PoI. Finally, Allen's numerous articles relating to the American reverse burden cases will be relied on both to help explain these cases, but also for the critique they provide.¹⁷

On the whole, the role of American case law and scholarship within my thesis should now be clear. The cases will be used as an example of how reverse burden compatibility might be determined solely by reference to the thin PoI. The American case law will also serve as a source of norms and principles which will help to flesh out my conception of the thick PoI, which then sets up the analytical framework I use to evaluate different rationales for imposing a reverse burden. Scholarly books and articles from the US will fulfil a similar role, with their more specific uses being noted above. This general approach to using case law and scholarly writing will be

¹³ Paul H Robinson, 'Criminal Law Defenses: A Systematic Analysis' (1982) 82 *Columbia Law Review* 199; George P Fletcher, 'Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases' (1968) 77 *Yale Law Journal* 880; George P Fletcher, 'The Right Deed for the Wrong Reason: A Reply to Mr Robinson' (1975) 23 *UCLA Law Review* 394; R Lippke, *Taming the Presumption of Innocence* (OUP 2016); RJ Allen, 'Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices' (1980) 94 *Harvard Law Review* 321; RJ Allen, 'Mullaney v Wilbur, the Supreme Court, and the Substantive Criminal Law - An Examination of the Limits of Legitimate Intervention' (1977) 55 *Texas Law Review* 269; Ronald J Allen, 'Rationality and Accuracy in the Criminal Process: A Discordant Note on the Harmonizing of the Justices' Views on Burdens of Persuasion in Criminal Cases' (1983) 74 *The Journal of Criminal Law and Criminology* (1973-) 1147; Allen, 'Burdens of Proof' (n 8).

¹⁴ Robinson (n 13).

¹⁵ Lippke (n 13) chs 1-2.

¹⁶ *ibid* 4-9.

¹⁷ Allen, 'Mullaney v Wilbur, the Supreme Court, and the Substantive Criminal Law - An Examination of the Limits of Legitimate Intervention' (n 13); Allen, 'Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices' (n 12); Allen, 'Rationality and Accuracy in the Criminal Process' (n 13); Ronald J Allen, 'Foreword: Evidence, Inference, Rules, and Judgment in Constitutional Adjudication: The Intriguing Case of *Walton v. Arizona*' (1991) 81 *The Journal of Criminal Law and Criminology* (1973-) 727.

repeated with respect to the remaining jurisdictions which will feature in the thesis, and it is to the next of these that I now turn.

1.2.c - The role of English and Welsh law and scholarship

As above, there will be two main ways in which case law and scholarly writing from England & Wales are used. First, case law from English law will be a source of examples of how reverse burdens and the PoI can be reconciled. The list of cases from this jurisdiction that I will rely on is extensive, but includes at least the following cases: *Woolmington*, *Edwards*, *Hunt*, *Kebilene*, *Lambert*, *Johnstone*, *Attorney General's Ref. (No. 1 of 2004)*, *Sheldrake*, *Williams*, *MK*, *EuroWines C&C*.¹⁸ Again, this body of case law ('the English cases') will be used to provide examples of different ways that have been attempted in the past to address the issue of reverse burden compatibility. For example, *Woolmington* provides the canonical statement of what I call the thin PoI, which is the trial rule requiring the burden of proof to be on the prosecution in criminal cases.¹⁹ Analysis of the English cases will also entail a critical dimension, where I will critique the prevailing approach as espoused in the recent authority of *Sheldrake*. The second use, as with the American cases, is to treat the English cases as sources of norms and principles.

Scholarly books and articles written about the English cases (or English criminal law generally) will also be of central importance to the thesis. Several works from this jurisdiction play key roles in the argument of the thesis, and it is worth taking each of the main sources in turn to briefly explain what these roles will be. The key authors whose work features prominently in the thesis are Antony Duff, Victor Tadros, Paul Roberts, and Federico Picinali.²⁰ Duff's writing will be instrumental to my development of the concept of the thick PoI, with a specific emphasis on the overarching quality of this norm and how it conditions many different aspects of the legal and political system. Tadros' articles on his version of the PoI will be of use as an example of a typical 'substantive' reading of the PoI, but also as a means of developing the thick/thin distinction. Specifically, his theory will be pitted against that of Paul Roberts to show that a general appeal to the PoI could ground both of their theories, even though the two contradict each other. Roberts' writing will therefore be used in a similar way to Tadros', but also as a demonstration of the

¹⁸ *Woolmington v DPP* [1935] AC 462 (House of Lords); *R v Edwards* [1975] QB 27 (Court of Appeal); *R v Hunt* [1987] AC 352 (HL); *R v DPP Ex p Kebilene* [2000] 2 AC 326 (HL); *R v Lambert (Steven)* [2002] 2 AC 545 (HL); *R v Johnstone* [2003] 1 WLR 1736 (HL); *Attorney General's Reference (No 1 of 2004)* [2004] EWCA Crim 1025; *DPP v Sheldrake* [2005] 1 AC 264 (House of Lords); *R v Williams (Orette)* [2012] EWCA Crim 2162 (CA); *R v MK and Persida Gega* [2018] EWCA Crim 667 (CA); *Euro Wines (C&C) Ltd v Revenue and Customs Commissioners* [2018] EWCA Civ 46 (CA).

¹⁹ *Woolmington v DPP* (n 19) 483 (Sankey LC).

²⁰ Antony Duff, 'Strict Liability, Legal Presumptions, and the Presumption of Innocence.' in AP Simester (ed), *Appraising Strict Liability* (OUP 2005); RA Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford: Hart 2007); RA Duff, 'Presuming Innocence' in Lucia Zedner and Julian Roberts, *Principles and Values in Criminal Law and Criminal Justice* (OUP 2012); RA Duff, 'Who Must Presume Whom to Be Innocent of What' (2013) 42 *Netherlands Journal of Legal Philosophy* 170; Victor Tadros and Stephen Tierney, 'The Presumption of Innocence and the Human Rights Act' (2004) 67 *The Modern Law Review* 402; Victor Tadros, 'Rethinking the Presumption of Innocence' (2007) 1 *Criminal Law and Philosophy* 193; Victor Tadros, 'The Ideal of the Presumption of Innocence' (2014) 8 *Criminal Law and Philosophy* 449; Paul Roberts, 'Taking the Burden of Proof Seriously' [1995] *Criminal Law Review* 783; Paul Roberts, 'The Presumption of Innocence Brought Home? *Kebilene* Deconstructed' (2002) 118 *Law Quarterly Review* 41; Paul Roberts, 'Drug Dealing and the Presumption of Innocence: The Human Rights Act (Almost) Bites' (2002) 6 *The International Journal of Evidence & Proof* 17; Paul Roberts, 'Strict Liability and the Presumption of Innocence: An Exposé of Functionalist Assumptions' in AP Simester (ed), *Appraising Strict Liability* (OUP 2005); Roberts, 'Loss of Innocence in Common Law Presumptions' (n 3); Federico Picinali, 'Innocence and Burdens of Proof in English Criminal Law' (2014) 13 *Law, Probability and Risk* 243; Federico Picinali, 'The Denial of Procedural Safeguards in Trials for Regulatory Offences: A Justification' (2017) 11 *Criminal Law and Philosophy* 681.

pitfalls of an approach based solely on the thin PoI (namely, it allows too much to turn on the formal offence/defence distinction). Finally, Picinali's work will also be of use in complementing my discussion of the problems with Roberts' theory – as they have similar views.

In general, different aspects of the existing literature on the PoI and reverse burdens will be foregrounded at different points in the thesis. But, on the whole, the theme of my use of English law scholarship will be that none of these theorists has quite got it right, even if there are aspects of their theories which I adopt. This will help me both to demonstrate the originality of my approach, but also to position my research as a solution to the problem with existing approaches. As will be explored further in section 1.4, I characterise this problem as a failure to attend to the thick/thin distinction, and then proceed to devise a way of approaching reverse burden compatibility which *does* take account of the distinction.

1.2.d - The ECHR, Canada, and Other Sources

Beyond the sources and literature already covered above, the thesis will also draw on legal materials from outside of the US and English & Welsh systems. Specifically, there will be sporadic reference to cases from the ECHR, such as *Salabiaku v France*, *Engel v Netherlands*, and *Poletan v Macedonia*.²¹ *Salabiaku* and *Poletan* will be analysed for their treatment of reverse burdens, with the former featuring more prominently owing to how instrumental it has been in shaping the post-Human Rights Act era of English cases. However, my view is that these cases have little to offer by way of principle, owing to their minimal substantive content. For example, *Salabiaku* held only that Article 6 of the ECHR does not prohibit states from presuming facts against the accused (such presumptions are functionally equivalent to reverse burdens).²² The only additional guidance furnished by the judgment is that the rights of the defence must be maintained – a phrase so vague as to be of essentially no use. Similarly, the court in *Poletan* held that Article 6 does prevent the 'shifting' of the burden of proof onto the accused.²³ However, this notion of shifting appears to refer to a wholesale shift of the persuasive burden, i.e. of creating an offence whose elements are presumed against the accused.²⁴ Again, this does very little beyond restating the *Woolmington* rule, albeit in much vaguer terms. Nevertheless, the ECHR jurisprudence has still been instrumental in the development of the modern English cases, so some discussion of them will be appropriate.

In addition to ECHR case law, there will also be a limited role for Canadian cases in the thesis. Specifically, the judgments of the Supreme Court of Canada (SCC) in *Vaillancourt* and *Whyte* are pivotal in the discussion of what I label 'absolute prohibitions', that is, rationales which absolutely prohibit the imposition of a reverse burden.²⁵ The SCC judgments are used as examples of absolute prohibitions, and the reasoning of the SCC in both cases is instrumental to understanding the logic behind these prohibitions. Though this role is quite small, it is nevertheless important to the thesis, as absolute prohibitions on reverse burdens have many proponents, both in reform bodies and academia. However, one of the contributions of my thesis is to show why such well-meaning suggestions are not in fact desirable. This task is made much easier by reference to the Canadian cases, which provide helpful real-world examples to refer to.

In sum, there is a wide variety of sources which will be drawn upon in my thesis. This section has

²¹ *Salabiaku v France* (1991) 13 EHRR 379.

²² *ibid.*

²³ *Poletan v Macedonia* (2017) 65 EHRR 25.

²⁴ *ibid.*

²⁵ *R v Vaillancourt* [1987] 2 SCR 636; *R v Whyte* [1988] 2 SCR 3.

given an overview of what they are, and how they will be used. As will now be clear, the sources are mostly judgments and scholarly books and articles from common law jurisdictions, particularly those of the US and England & Wales. The literature from these jurisdictions will be used both as a source of examples of the 'reverse burden problem' and of norms and principles which inform, or should inform, the approach to reverse burden compatibility. This gives the research a normative angle, with the doctrines of the specific jurisdictions having some importance but not being the sole focus. The benefit of this decision, in turn, is that it gives the research broader appeal and application. Rather than seeking a description of existing practice in one legal system (i.e. purely doctrinal work) or a comparison of existing practices in many legal systems (i.e. comparative analysis), the research instead makes an appeal to the values of the PoI. As a result, anyone committed to the values I identify will have good reason to adhere to the conclusions I reach in my thesis, regardless of which specific legal system they find themselves in.

1.3 - Key Terminology

The previous section has gone into some detail about the specific sources which will be relied upon in the thesis. However, there are also a number of concepts in this area of law which have contested or unclear meanings. Despite this lack of consensus, reference to these concepts is essential for the construction of my thesis's argument. This section therefore aims to provide brief summaries of what I take certain key concepts to mean in the context of my thesis. The remainder of this section therefore examines the following terms/concepts and explains what is meant when they are used in the thesis:

- ◆ Burden of persuasion / persuasive burden / probative burden / legal burden
- ◆ Burden of production / evidential burden
- ◆ Reverse burden / Reverse onus clause
- ◆ Presumption of Innocence (PoI)
- ◆ Thin PoI
- ◆ Thick PoI
- ◆ Elements of an offence
- ◆ Affirmative defences

Where multiple terms for the same concept are in standard use, such as with the different types of burdens of proof, I explain which term I prefer and why.

1.3.a - Persuasive, evidential, and reverse burdens

The first concept which must be understood is the notion of a persuasive burden, sometimes also referred to as a legal burden, or burden of persuasion. As used here, the term persuasive burden refers to a requirement to satisfy the factfinder that a given fact is true or else lose on this issue.²⁶ This can be contrasted with the evidential burden, which requires only that the accused adduce evidence in support of some fact, so that the jury can then consider it.²⁷ Either of these

²⁶ This definition is not particularly contentious and is paraphrased from Ashford and Risinger's helpful (and too often overlooked) summary of the three different types of burdens which can be placed on a party in an adversarial trial. See Harold A Ashford and D Michael Risinger, 'Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview' (1969) 79 *The Yale Law Journal* 165, 171-172.

²⁷ Again, this is not contentious and is paraphrased from Ashford and Risinger *ibid*. It is also of note that the evidence which an accused must 'adduce' can in fact come from the prosecution's case and need not be introduced by the

types of burdens may apply to the accused in a criminal trial, but the focus of my thesis is on persuasive burdens because only they have the effect of allocating ‘the risk of non-persuasion’²⁸ to the accused. In other words, only a persuasive burden requires the accused to prove something, or else face conviction. This is the reason that imposing a persuasive burden on the accused is seen as being so problematic with respect to the PoI: such reverse persuasive burdens allow for conviction in spite of reasonable doubt as to guilt.²⁹ As such, the focus of my thesis is reverse persuasive burdens.

Moving on to the different terms which may be used to refer to the two burdens named above, it becomes clear that an initial hurdle in disentangling these terms is that some scholars use the term ‘burdens of proof’ to refer to both persuasive and evidential burdens.³⁰ Sometimes this is even extended to the so-called ‘tactical’ burden and to the burden of pleading,³¹ only serving to further muddy the waters in an area of law with ‘notoriously elaborate, inconsistently deployed’ terminology.³² Notably, however, others take the opposite tack, arguing the evidential burdens are not burdens of *proof* at all, and therefore should not be lumped in with persuasive burdens³³.

In my thesis, I prefer the labels of ‘persuasive’ and ‘evidential’ burden and use these in favour of the terms ‘probative burden / burden of persuasion / legal burden’ and ‘burden of production’. I have chosen persuasive and evidential burden as the preferred terminology because I believe they are the clearest, and pithiest expressions of what each distinct burden entails. They are less clunky and more exact, as they refer to what specifically each burden requires: *persuasion* of the factfinder, or the production or identification of specific *evidence*. I will not use the plural term ‘burdens of proof’ as a generic reference to different burdens on the accused because, in my view, only a persuasive burden is properly a burden of proof. I take this view because it is only on discharging a persuasive burden with respect to some fact that it can be said to be proved. By contrast, the discharge of an evidential burden proves nothing, though it may aid the discharge of a persuasive burden. Nevertheless, I may refer to ‘burdens’ on the accused when discussing both persuasive and evidential burdens together, since both can properly be said to be burdensome. A reference to ‘the burden of proof’ by contrast, should be read as meaning the persuasive burden.

Closely related to the concepts of a persuasive burden or evidential burden is the concept of a reverse burden. In the literature, there is again some variance both in the terminology used and in the meaning implied. First, there is the differing terminology of ‘reverse burden’, ‘reverse

defence: *R v Hunt* (n 18) 356.

²⁸ Wigmore (n 8) para 2487.

²⁹ As Hamer puts it, ‘The potential incompatibility is clear...a reverse persuasive burden requires the defendant to prove his innocence on the balance of probabilities.’: David Hamer, ‘The Presumption of Innocence and Reverse Burdens: A Balancing Act’ (2007) 66 Cambridge LJ 142, 142.

³⁰ For example, see Allen, who refers to an evidential burden of proof: RJ Allen, ‘Burdens of Proof, Uncertainty and Ambiguity in Modern Legal Discourse’ (1994) 17 Harvard Journal of Law and Public Policy 627, 636–637.

³¹ For example, all four burdens are discussed together in a leading textbook on the Scots law of evidence – fortunately the author makes clear that not all are burdens of proof. A tactical burden of proof is not a burden at all, but more of a term of art to refer to which party has a (tactical) need to produce more compelling evidence at a given point in the trial. A burden of pleading is, as the name implies, simply a formal requirement to raise a certain issue in a plea. See E Keane and F Davidson (eds), *Raitt on Evidence: Principles, policy and practice* (3rd edn, W Green 2018).

³² Roberts, ‘Taking the Burden of Proof Seriously’ (n 20) fn 8.

³³ For example, in *Jayasena*, Lord Devlin states that ‘Their Lordships do not understand what is meant by the phrase “evidential burden of proof”... it is doubtless permissible to describe [an evidential burden] as a *burden* but it is confusing to call it a burden of *proof*.’ See *Jayasena v The Queen* [1970] 1 AC 624 (Lord Devlin) (emphasis added).

onus', and 'reverse onus clause'.³⁴ Out of these I have chosen 'reverse burden' as it seems to be a more generally accessible, 'plain English' phrase, compared to using the word 'onus' or invoking the idea of a 'clause'. The second factor to consider, then, is the question of what it means for something to be a reverse burden. When scholars write about reverse onuses, they typically do so in reference to a statutory provision which allocates a persuasive burden to the accused.³⁵ The term reverse burden is less commonly used, but I choose to adopt it anyway, to mean any persuasive burden – statutory or otherwise – imposed on the accused. I leave open whether or not an evidential burden could amount to a reverse burden, but unlike others in this field I would not rule this out.³⁶ However, as mentioned above, the focus of my thesis is on reverse persuasive burdens, and so any use of the term reverse burden should be taken to refer to a persuasive burden on the accused.

1.3.b - The Presumption of Innocence: Thick and Thin

In scholarship on reverse burdens and the PoI, there exist already two prominent ways of categorising different conceptions of the PoI. For reasons which will shortly be made clear, I eschew both of the existing means of categorising the PoI in my thesis. The first approach is to categorise different ways of understanding the PoI as either 'procedural' or 'substantive'.³⁷ On this account, the former understanding of the PoI is that it is purely 'procedural in character' and 'concerns only the proof of facts at trial'.³⁸ Alternatively, the latter type of PoI is more robust and turns on a substantive theory of punishment: anything that leads to the conviction of someone for conduct that ought not to be punished is a violation of the PoI on this account.³⁹ As such, a substantive PoI entails broad normative claims which are centred on some thicker notion of what conduct is and is not justly criminalizable.⁴⁰ Crucially, as Picinali has observed, one simply cannot know whether the imposition of a reverse burden breaches the PoI, without first knowing whether the PoI is substantive or procedural.⁴¹ This claim is important and will be revisited shortly.

A second approach, which is sometimes used alongside or instead of the procedural/substantive labels, is to speak of the PoI being either 'narrow' or 'wide'.⁴² Depending on how these terms are used, they sometimes correspond to roughly the same distinction as 'procedural' and

³⁴ Roberts speaks of provisions that 'reverse the burden of proof', though he is adamant that 'the burden of proof never shifts...': Roberts, 'Taking the Burden of Proof Seriously' (n 20) 789,783. Meanwhile, Dennis speaks both of reverse onuses and reverse onus clauses: Ian Dennis, 'Reverse Onuses and the Presumption of Innocence: In Search of Principle' [2005] *Criminal Law Review* 901. Ashworth does the same: Ashworth, 'Four Threats to the Presumption of Innocence' (2006) 10 *International Journal of Evidence and Proof* 241.

³⁵ For example, Ashworth does this throughout his article on 'Four Threats to the Presumption of Innocence'; see Ashworth (n 34).

³⁶ Cf. the report of the Criminal Law Revision Committee (CLRC), which proposes evidential burdens as the only PoI-compatible option: Criminal Law Revision Committee, 'Eleventh Report: Evidence (General)' (Cmnd 4991 1972) paras 238-240.

³⁷ Picinali, 'Innocence and Burdens of Proof in English Criminal Law' (n 21) 244-248; Andrew Stumer, *The Presumption of Innocence: Evidential and Human Rights Perspectives* (Hart Publishing 2010) ch 3; Lippke (n 13) 20-21.

³⁸ Lippke (n 13) 20; Picinali, 'Innocence and Burdens of Proof in English Criminal Law' (n 21) 245.

³⁹ For an example of such a view, see Tadros and Tierney (n 20). For a more a general critique and summary, see Picinali, 'Innocence and Burdens of Proof in English Criminal Law' (n 20) 245-248.

⁴⁰ A prime example of a 'substantivist' interpretation of the PoI can be found in Tadros and Tierney (n 20).

⁴¹ Picinali, 'Innocence and Burdens of Proof in English Criminal Law' (n 20) 244-245.

⁴² For examples of authors who prefer the terminology of wide vs narrow, see: Duff, 'Who Must Presume Whom to Be Innocent of What' (n 20); Lindsay Farmer, 'Innocence, the Burden of Proof and Fairness in the Criminal Trial: Revisiting *Woolmington v DPP* (1935)' in J Jackson and S Summers (eds), *Obstacles to Fairness in Criminal Proceedings* (Hart Publishing 2018) s 4; Ashworth (n 34).

‘substantive’. On a narrow account of the PoI, the presumption is ‘more procedural’, and concerned ‘primarily with the duties of state actors during the trial and pre-trial process’.⁴³ By contrast, a wide PoI would be a substantive principle with ‘implications for the definition of criminal wrongs’.⁴⁴ As is obvious from this brief discussion, there appears to be considerable overlap between the two approaches (procedural/substantive or narrow/wide). Yet the existence of these two, largely parallel, sets of labels, has in my view brought little additional clarity to debates about the rationale and scope for the PoI, or to the contemporary discussions on the use of reverse burdens.

In fact, one consequence of the increasingly jargon-filled debate about the PoI and its limits has been a profound sense of confusion when discussing the application of the PoI to reverse burdens. To see this confusion in action, one need only revisit Picinali’s claim that whether or not a reverse burden is PoI compatible cannot be known without first committing to either a substantive or proceduralist interpretation of the PoI.⁴⁵ Picinali reaches this conclusion by reference to a hypothetical example, and it is worth reproducing in full here:

David is charged with possessing an imitation firearm that is readily convertible into a firearm ‘so designed or adapted that two or more missiles can be successively discharged without repeated pressure on the trigger’. The offence is constructed by combining section 5(1)(a) of the Firearms Act 1968 with sections 1(1) and 1(2) of the Firearms Act 1982...

However, section 1(5) of the 1982 Act states that ‘it shall be a defence for the accused to show that he did not know and had no reason to suspect that the imitation firearm was so constructed or adapted as to be readily convertible into a firearm’...

Does the provision amount to a violation of the presumption of innocence?⁴⁶

After setting up this hypothetical, Picinali moves on to claim that there is no settled answer to this question, ‘the answer being a function of how the presumption of innocence is understood’.⁴⁷ Yet this seems to miss the point. If the answer is a function of the PoI, and the PoI is either procedural or substantive, then we must commit to one or the other understanding in the abstract before any progress on reverse burdens can be made.

This leaves us in the unenviable position of choosing to understand the PoI solely as a trial rule about usual allocation of the burden of proof (procedural or narrow PoI) or as a catholic theory of punishment, criminalization, and citizenship (substantive or wide PoI). But it is not obvious why it must be one or the other, nor is it clear how one could plausibly endorse either conception of the PoI without some recognition of the other. It is perhaps telling in this respect that even the most ardent advocate of a minimalist, purely procedural PoI, Paul Roberts, also states that ‘properly conceived...the presumption of innocence is a complex doctrine of political morality, from which *Woolmington* [and] other important procedural rules and principles are derived’.⁴⁸ This reveals the truth of the matter, which is that the choice presented by Picinali rests on a false dichotomy.

⁴³ Farmer (n 42) 69.

⁴⁴ See Farmer *ibid* 68 citing Douglas N Husak, *Overcriminalization: The Limits of the Criminal Law* (OUP 2008) 92-103.

⁴⁵ Picinali, ‘Innocence and Burdens of Proof in English Criminal Law’ (n 20) 244-245.

⁴⁶ *ibid* (footnotes omitted).

⁴⁷ *ibid* 245.

⁴⁸ Roberts, ‘Loss of Innocence in Common Law Presumptions’ (n 3) 318.

In truth, the relevant distinction is not between a wide, narrow, procedural, or substantive PoI, but simply between what I call the ‘thick’ or ‘thin’ conceptions of the PoI. It is these labels that I will use in my thesis, and the distinction will be important to my overall argument.⁴⁹ Moreover, I argue that the distinction is relevant only in the analytical sense and is not a binary choice from which a set of conclusions about reverse burdens must follow. Rather, both the thick *and* thin conception of the PoI are relevant to reverse burdens.

On my account, the *thin* conception of the PoI is embodied by the *Woolmington* rule: it is a trial rule, allocating the burden of proof with respect to every element of the offence to the prosecution. Thin accounts of the PoI have three main characteristics: i) a minimal content, ii) a narrow scope of application (i.e. to the trial, with some pre-trial implications), and iii) utilising a ‘bright-line’ rule for the allocation of the burden of proof. The *Woolmington* rule is therefore a prime example of the thin PoI. It has minimal content, simply allocating the persuasive burden to the prosecution with respect to the elements of the offence. It applies only to the trial. And it utilises a bright line test, in the sense that the only exceptions to the rule are statutory exceptions and the insanity defence.⁵⁰

In contrast to the thin PoI, the *thick* conception of the PoI is much more than just a trial rule. The thick PoI, on my account, is a set of principles which reflect a society’s general commitment to treat each individual as legally materially innocent of any (criminal) wrongdoing. This terminology of material innocence is borrowed from Lippke and means that the state must presume that individuals are ‘without reproach’ and therefore treat them ‘as citizens in good standing’ with respect to the criminal law.⁵¹ The thick PoI can be distinguished from the *thin* PoI with respect to each of the three characteristics examined above. Thus, the thick PoI has: i) extensive substantive content; ii) potentially far-reaching normative consequences for the whole criminal process; and iii) many exceptions in a variety of circumstances.

In my view, both these thick and thin senses of the PoI are relevant to understanding how reverse burdens can be used in a PoI-compatible way. As such, a general reference to ‘the PoI’ in my thesis will be used to refer to both thick and thin, with the respective labels being used to differentiate the two conceptions of the PoI explained above when necessary. I am conscious that this simply risks adding more jargon to an already jargon-laden area of law. But I believe that the terminology of thick and thin is clearer than existing labels, and, importantly, comes without the baggage of the ‘substantive vs procedural’ or ‘wide vs narrow’ debates. For these reasons, I eschew the existing terminology in favour of the ‘thick’ and ‘thin’ notions of the PoI.

1.3.c - Distinguishing Offence and Defence

The final pair of concepts to be unpacked in this section is the elements of an offence as compared to defences. This distinction, referred to here as the ‘offence/defence distinction’, has long attracted the attention of many commentators.⁵² There are at least three different ways in

⁴⁹ This will be explored in much more detail in Chapter 4.

⁵⁰ *Woolmington v DPP* (n 19).

⁵¹ Lippke (n 12) 14.

⁵² Some of the most prominent treatments of the subject are: Glanville Williams, ‘Offences and Defences’ (1982) 2 *Legal Studies* 233; J Gardner, ‘In Defence of Defences’, *Offences and Defences - Selected Essays in the Philosophy of Criminal Law* (OUP 2007); Robinson (n 12); Luis Duarte d’Almeida, *Allowing for Exceptions: A Theory of Defences and Defeasibility in Law* (First edition, Oxford: Oxford University Press 2015).

which one can draw the offence/defence distinction. First, it could be drawn formally, that is, by reference to whether or not something is labelled as an element of an offence or a defence.⁵³ Second, one could eschew such formal labels and instead draw the offence/defence distinction by reference to some substantive criterion (or criteria) for what counts as an element of an offence or a defence.⁵⁴ Finally, a third way of distinguishing offence from defence is to classify facts based on whether or not they must be proved in order to secure a conviction. This is the ‘proof-based’ account of the distinction offered by Duarte d’Almeida, which effectively classes facts which must be proved as elements of the offence, and those which must not be proved as defences.⁵⁵

In the thesis, my preferred usage of the term will be to refer to the formal offence/defence distinction. I prefer the formal distinction to either the substantive or proof-based versions of the offence/defence distinction mainly for its clarity. The formal distinction makes it easy to identify which facts constitute elements of an offence and which pertain to defences, because these labels are provided by the lawmaker. This allows for greater precision when discussing the impact of the distinction on the compatibility of a reverse burden, or when discussing criminal liability more generally.

Admittedly, the formal offence/defence distinction is not without its drawbacks. The main criticism is that its formalism makes it ultimately arbitrary – as any fact can, with a little legislative ingenuity, be classified as an element of an offence or a defence. I would also concede that substantive interpretations of the offence/defence distinction are able to avoid the criticism of arbitrariness. However, they face equally damning problems, without the benefit of the clarity brought by the formal distinction. Chief among these problems is that once the formal labels of offence and defence are abandoned, it becomes difficult to distinguish offence from defence without resorting to over-inclusive and potentially vague criteria such as moral blameworthiness or culpability.⁵⁶ Moreover, as is discussed at length in Chapter 5 below, any version of the offence/defence distinction has seriously unattractive consequences if it alone determines when the accused can justifiably be allocated a persuasive burden. As the method advocated in my thesis does not do this, I argue that there is considerably less bite in the criticism that the distinction is too arbitrary.

It should be noted that I also prefer the formal offence/defence distinction to the proof-based account. This is because, although it avoids both of the above problems, the proof-based distinction offers no solution of its own. This is because, although the proof-based account is a viable means of drawing the offence/defence distinction with relative clarity, it is still silent on which party should bear the burden of proof and why. The utility of this distinction for assessing whether or not a reverse burden coheres with the PoI is therefore nil. This offers no answer to the question which underpins the whole issue of reverse burden compatibility, which is: how *should* we decide which party must prove certain facts at trial? For these reasons, reference to the elements of an offence or to a defence in my thesis should be read as referring to the formal offence/defence distinction.

⁵³ This view prevails in the US, see *In re Winship* and *Patterson v New York* (n 7). It is also endorsed by ‘proceduralists’ such as Picinali (n 19).

⁵⁴ This interpretation briefly found favour with the US Supreme Court in the case of *Wilbur* but has not really been followed since then. See *Mullaney v Wilbur* (n 7); Allen, ‘Mullaney v Wilbur, the Supreme Court, and the Substantive Criminal Law - An Examination of the Limits of Legitimate Intervention’ (n 13); Robinson (n 13); *DPP v Sheldrake* (n 19); *R v DPP Ex p. Kebilene* (n 19); Roberts, ‘The Presumption of Innocence Brought Home? Kebilene Deconstructed’ (n 20).

⁵⁵ Luis Duarte d’Almeida, *Allowing for Exceptions* (n 53) chs 3, 4 and 8.

⁵⁶ The latter criterion was endorsed by the US Supreme Court in the *Wilbur* court’s rejection of formalism. See *Mullaney v Wilbur* (n 7) 697–699.

1.4 - The 'Problem' of Reverse Burdens

With the sources of the thesis specified, and the meaning of some key terminology now established, this section will specify what exactly is problematic about reverse burdens of proof in terms of the PoI. As will be shown, the essence of the problem is that reverse burdens appear to cut against the letter and spirit of the PoI. Though commentators differ in their evaluations of *how* problematic reverse burdens are, all can agree that they pose a threat to the PoI in some way. There are two principal ways of characterising this threat which emerge as trends in the literature.

1.4.a - Specifying the Problem

First, reverse burdens are sometimes thought to violate the PoI because they dilute the standard of proof, by allowing the accused to be convicted despite reasonable doubt as to their guilt.³⁷ I call this the 'standard of proof problem'. Reverse burdens raise this problem because they require the accused to prove some fact on the balance of probabilities, or else lose on that issue. This creates the possibility that the accused, in trying to discharge the reverse burden, could adduce evidence sufficient to create a reasonable doubt, but still falling short of proof on the balance of probabilities. In this situation, the reverse burden would operate so that the accused would lose and face conviction, in spite of reasonable doubt as to their guilt. This way of thinking about the problem of reverse burdens is therefore concerned with how they undermine the protection normally offered to the accused by virtue of the requirement that the prosecution prove guilt to the very high standard of 'beyond reasonable doubt'.

The second characterisation of the reverse burden problem focuses on what Wigmore called the 'risk of non-persuasion'.³⁸ On this view, the core of what makes reverse burdens objectionable is that they put the risk of failing to persuade the trier of fact onto the accused, rather than the prosecution. I call this the 'non-persuasion problem'. Sometimes expressed as 'shifting' the burden of proof, this line of argument is centred on the allocation of risk to the accused, in contravention of the PoI.³⁹ This objection, it should be noted, appears to hold irrespective of the standard of proof imposed by a reverse burden. Whereas the concerns raised by the standard of proof problem could be solved by lowering the standard of proof for all reverse burdens, so that the accused need only create a reasonable doubt as to their guilt, the non-persuasion problem remains as long as the law allocates some risk of non-persuasion to the accused. The non-persuasion problem therefore appears to run deeper than the standard of proof problem.

The view offered by this thesis is that these two problems are related, and both pertain to a more fundamental issue: reverse burdens offend our notion of what it means to presume someone's innocence, because they require the accused to prove their innocence. This requires their active participation in the trial, as the accused is made to bear the risk of failing to convince the jury of their innocence (the non-persuasion problem) and must act in order to discharge their burden

³⁷ This is the rationale of the Canadian Supreme Court in *Whyte* (n 25) and is also espoused by scholars like Hamer (n 29).

³⁸ This phrase was coined by Wigmore (n 8) para 2487 to refer to the risk of failing to persuade the fact-finder on a relevant issue, and therefore risk facing an adverse ruling from a judge.

³⁹ Paul Roberts refers to the notion of the burden of proof ever 'shifting' as 'fallacious', observing that there is always an overarching duty on the prosecution to prove guilt: Roberts 'Drug Dealing and the Presumption of Innocence' (n 20) 32. Nevertheless, this overlooks the fact that if the accused fails to discharge a reverse burden they will be convicted, suggesting that there is a meaningful sense in which the risk *does* shift, even if an overarching legal duty remains with the prosecution.

of proof (the standard of proof problem). Though the content and scope of the PoI are fiercely debated, one point of consensus is that the absolute minimum that the presumption must entail is a rule allocating the burden of proof - and therefore the risk of non-persuasion - to the prosecution.⁶⁰

Reverse burdens therefore present a clear problem in terms of the PoI. Whether conceived of in terms of the standard of proof, or the risk of non-persuasion, reverse burdens embody the antithesis of the presumption of innocence; they are effectively a presumption of guilt. Nevertheless, reverse burdens abound in the criminal law of jurisdictions like England and Wales.⁶¹ This raises the question of how a legal system can plausibly claim to respect the PoI, whilst simultaneously allowing presumptions of guilt to flourish in its criminal law. This is the ‘problem’ of reverse burdens – though they are a fixture of the modern criminal law, they are also apparently incompatible with one of its most fundamental rights, the PoI. The concern of this thesis should therefore be understood as a fresh attempt to solve this reverse burden problem. Section 1.4.d below sets out how I propose to do this, but before doing so it will be wise to consider how other commentators have tried to address the problem of reverse burdens and why a new approach is still necessary.

1.4.b - The Importance of Methodology: Three Different Approaches to Reverse Burdens

Many have tried before to reconcile reverse burdens with the PoI. A full account of these previous attempts will be undertaken in the next chapter, but for present purposes it is sufficient to observe that other approaches have followed one of two methodologies, neither of which will be adopted in this thesis. Instead, a third approach will be offered.

The first, and by far the most prevalent in English legal scholarship, is the approach of seeking ‘compatibility’ with the PoI on a case-by-case basis.⁶² I refer to this as the ‘ad hoc’ approach because, rather than furnishing any general principles, this method involves taking an ad hoc approach to any given reverse burden. This is consistent with the conception of the PoI which prevails under the ECHR and in the European Court of Human Rights’ (ECtHR) case law interpreting the PoI in Article 6(2) of the Convention. Under this approach, the objective is to justify individual reverse burdens *qua* derogations from a fundamental right, namely the PoI. The ECtHR has consistently held that this approach is consistent with the PoI as embodied in the ECHR, so long as the use of the reverse burden in question is a necessary and proportionate response to a legitimate aim of the state.⁶³ This type of thinking, and the language of ‘compatibility’ between the PoI and reverse burdens, have both been adopted by English courts in their most recent reverse burden cases.⁶⁴ The ultimate example of this is the judgment of the House of Lords in *Sheldrake*, where it was held that the compatibility of a reverse burden must ultimately be assessed on its own facts.⁶⁵ This is the epitome of the ad hoc approach: any reverse burden is *prima facie* compatible with the PoI, so long as the right justification can be found.

⁶⁰ Even Picinali’s ‘deflated’ PoI requires this. See, Picinali (n 2).

⁶¹ According to the only empirical study conducted on this issue, roughly 45 per cent of indictable offences in England and Wales entail either reverse burdens or strict liability. This study is now 25 years old, but there is no reason to think that this trend has reversed. See Andrew Ashworth and Meredith Blake, ‘The Presumption of Innocence in English Criminal Law’ [1996] *Criminal Law Review* 306, 309.

⁶² This is Stumer’s (n 37) approach, and the language of compatibility also pervades the ECtHR cases of *Salabiaku* (n 21), *Pollan* (n 24), and the post-Human Rights Act cases in England and Wales such as *Lambert* (n 18) and *Sheldrake* (n 18).

⁶³ See *Salabiaku* (n 21) and *Pollan* (n 24)

⁶⁴ See *Lambert*, *Johnstone*, and *Sheldrake* (n 18).

⁶⁵ *Sheldrake* (n 18) 297 (Lord Bingham).

In this thesis, the ad hoc approach will not be followed. Put simply, this is because the central question which this research sets out to answer cannot be answered by reference to some notion of compatibility with the PoI. In fact, the ad hoc approach, typified in *Sheldrake* and replicated in subsequent cases, furnishes no useful guidance as to how to allocate the burden of proof in a way which is consistent with the PoI.⁶⁶ Instead, it offers a flexible, but vague, method for rationalising the imposition of a reverse burden *ex post facto*, so as to render a specific reverse burden compatible. As has been noted, and criticised, by commentators, this leads to uncertainty and gives the law an undesirable air of randomness.⁶⁷ Such potential arbitrariness is surely a damning criticism when it comes to reverse burdens, given that they contravene a right as fundamental and sacred as the PoI. If such a right is to be balanced away on a case-by-case basis, then at the very least the law ought to be clear about how and when this can occur. And yet, in the leading English authorities on reverse burdens there is no clarity to be found. On the contrary, the authorities appear to contradict each other, leading some to ask whether ‘the search for principle should be abandoned’.⁶⁸ Overall, then, the methodology and language of seeking compatibility on an ad hoc basis has little to recommend it and will not be adopted here.

A second method may appear to be on more solid ground than the ad hoc approach. This is the approach taken by scholars such as Picinali, Roberts, and Schwikkard, and adopted in the leading US authority on reverse burdens and the PoI.⁶⁹ I call this the ‘offence/defence distinction’ method, as it entails conceptualising (or reconceptualising) the PoI so that it extends to certain types of fact but not others, thereby shaping the contours of the PoI so that many reverse burdens are simply beyond its protection. The dividing line used by the scholars named above and by the US court in *Winship* is the distinction between facts constituting the elements of an offence, which are protected by the PoI, and facts which form a separate defence, which are not. Though there is some disagreement about how this line should be drawn, the underlying method is the same: certain types of fact are categorically excluded from the PoI’s protection.

This method has some benefits which ought to be recognised. It is conceptually clear and legally certain in a way which the ad hoc approach is not. The extent of the PoI is relatively straightforward, as it is linked to the offence/defence distinction, and its protection is absolute where it applies and non-existent where it does not. This at least has the merit of avoiding the randomness and uncertainty which were identified as problems with the compatibility approach. However, the offence/defence distinction method has flaws of its own, making it equally unsuitable as a methodology for the task of this thesis.

The main problem with this method lies in its categorical exclusion of defences from the protection of the PoI. Given that the task of this thesis is to ascertain how reverse burdens can be used in a way which coheres with the PoI, the prospect of excluding a whole host of burdens from consideration, not for any substantive reason, but simply because they are attached to facts which are labelled ‘defences’, is indefensible. Moreover, it simply raises the question of how we should distinguish between offence and defence, making it the sole determinant of whether or not a reverse burden can be imposed. This creates a circularity, where the extent of the PoI’s protection is determined by whether something is an element of an offence or a defence, but

⁶⁶ Andrew Ashworth ‘Case Comment: *Sheldrake v DPP* [2004] UKHL 43’ [2005] *Criminal Law Review* 215, 219.

⁶⁷ Dennis likened the process to a ‘forensic lottery’, *Dennis* (n 34) 927 and Hamer refers to the process as relying on a ‘smorgasbord of independent and sometimes conflicting factors’, *Hamer* (n 29) 146.

⁶⁸ *Dennis* (n 34) 904.

⁶⁹ See, for example, PJ Schwikkard, ‘The Presumption of Innocence: What is it?’ (1998) 11 *South Africa Journal of Criminal Justice* 396; Roberts (n 20); Picinali (n 20); and *Winship* (n 7).

where its label as part of the offence or a defence requires consideration of whether or not the PoI's protection should apply. In light of this, the offence/defence distinction method will also be rejected.

With two prevalent approaches to reconciling reverse burdens and the PoI being dismissed, it is now possible to specify what an appropriate methodology would be, and how it would avoid the problems raised with the first two methods. I call this third approach, which will be adopted for the purposes of this thesis, the 'coherence approach'. The main pitfalls of the existing approaches to reconciling reverse burdens with the PoI were a lack of clarity and high degree of uncertainty (the ad hoc approach) and an over reliance on an essentially formal offence/defence distinction (the offence/defence distinction method). What is needed, then, is a methodology which maintains the conceptual clarity of the PoI, does not lead to arbitrariness or uncertainty, and does not place undue reliance on the offence/defence distinction. The coherence approach satisfies all of these requirements.

Under the coherence approach, the relationship between reverse burdens and the PoI is premised on the notion that for a legal system to employ reverse burdens but also respect the PoI, there must be some type of coherence between the two. This is not compatibility in the sense employed above, which refers to an individual reverse burden being a justified derogation from a general rule that the prosecution must prove guilt beyond reasonable doubt. Rather, coherence in this context refers to a holistic assessment of the relationship between the PoI and the allocation of the burden of proof. The search for coherence is therefore a search for some principle or set of principles which can provide clear guidance on the conditions under which the accused can be allocated the burden of proof, in a system which still respects the PoI. This is why the overarching research question of the thesis refers to coherence with the PoI – the goal is to find a principled explanation for how reverse burdens in general can be reconciled with the PoI.

The coherence approach employed by this thesis will be built on a careful analysis of the PoI and the allocation of the burden of proof. Specifically, the thesis will arrive at an answer to its overarching research question by examining a number of sub-questions, namely:

1. When considering the allocation of the burden of proof, what is the relevant sense of the phrase 'presumption of innocence'?
2. What is the fundamental objection to imposing a persuasive burden on the accused, in terms of the PoI?
3. How would the criminal law function if reverse burdens were abolished?

These questions are aimed at unpacking the larger issue of coherence with the PoI, and to get the widest possible view of the issues.

Question 1 calls for a detailed account of what is meant by the phrase 'presumption of innocence', as this will be central to the present enquiry. Note that this is not the same as Picinali's approach, critiqued in summary above and in detail in Chapter 2, because it will not entail a commitment to one version of the PoI as the definitive version, to be preferred to all others in any circumstance. Rather, it is an acknowledgment of the importance of conceptual clarity, and an opportunity to see the bigger picture when it comes to reverse burdens and the PoI.⁷⁰ Question

⁷⁰ This is perhaps all that Picinali meant to say in his passage quoted above, see text at (n 46). Nevertheless, there are

2 then cuts to the heart of the tension between reverse burdens and the PoI. As mentioned briefly above, this will be characterised in terms of how reverse burdens function as presumptions of guilt, requiring the accused to prove their innocence because they have been saddled with the risk of non-persuasion. This will entail a deeper examination of the relationship between burdens of proof, risk, and what it means to presume innocence. Finally, Question 3 considers a hypothetical situation of a legal system without reverse burdens. This will help to resolve any lingering worries that reverse burdens are somehow essential to the workings of the criminal law, in a way that overrides concerns about their incoherence with the PoI.

This approach has a number of advantages compared to the other two methods described previously. Chief among these is the fact that the search for coherence is able to transcend local doctrinal interpretations of the PoI, operating instead at the level of principle. This means that the findings of the thesis will not be confined to any one jurisdiction, but rather can be followed by anyone who adheres to the underlying values of the PoI which will serve as the focus of Chapters 4 - 6. Another related benefit is that the approach adopted here will not attempt to specify a full theory of the PoI as a precondition to analysing reverse burdens, as others have done.⁷¹ This tendency to stage a ‘tournament’ of rival conceptions of the PoI in search of an overall winner, before then moving on to apply the requirements of this ‘winning’ version of the PoI to reverse burdens, is misguided and probably to blame for much of the confusion and disagreement in the literature on reverse burdens.⁷² Instead, my approach will be centred on reverse burdens themselves, and the most relevant aspects of the PoI will be selected on the basis of their relevance to the issue of how to allocate the burden of proof. Again, this means that the conclusions of the thesis will not be conditional on accepting that I have found the definitively correct version of the PoI. This helps extend the reach of the thesis and means that its conclusions can be extrapolated beyond the immediate jurisdictions on which I focus.

1.4.c - Original Contribution

The previous sections have given some indication of how the goals of this thesis, and the methods applied to achieve those goals, differ sharply from existing work on the subject of reverse burdens and the PoI. Nevertheless, it is still appropriate to make the original contribution to the literature of this thesis explicit. The key original contribution of this thesis is its novel conception of the PoI, one which follows from the identification of an analytical distinction between two different senses of the phrase ‘presumption of innocence’. This thick/thin distinction, discussed above in section 1.3.b and below in Chapter 3, is a novel way of thinking about the PoI, in that it rejects the supposedly binary choice between the PoI as a trial rule and the PoI as a general principle.⁷³ Thus, I do not claim that the PoI must be understood as either thick *or* thin, but rather than *both* senses are important and should be considered. This represents a break from the tradition of categorising different forms of the PoI as either ‘wide’ or ‘narrow’, or ‘substantive’ or ‘procedural’ and then reaching certain conclusions from that first methodological decision. Moreover, this new perspective means that I can offer a fresh look at the issue of reverse burdens, adopting an analytical approach which has not been used before.

I then go on to apply this method in my analysis, characterising the thin PoI as a trial rule which

issues with his analysis of reverse burdens. I discuss these and explain how I avoid similar problems in Chapter 2.

⁷¹ Stumer (n 37) is an example of an author whose writing appears to offer such a theory of the PoI.

⁷² My approach is best characterised as one of methodological pluralism, which will be discussed at greater length in Chapter 4. See Paul Roberts, ‘Presumptuous or pluralistic presumptions of innocence? Methodological diagnosis towards conceptual reinvigoration’ (2020) *Synthese* 2 <<https://doi.org/10.1007/s11229-020-02606-2>> accessed 20 August 2021.

⁷³ I first introduced this concept in an article, which forms part of the basis of this chapter. See Allen (n 1).

requires the prosecution to prove every formal element of an offence beyond reasonable doubt in order to secure a conviction. This provides a basic level of protection to the accused but does not exhaust the meaning of the PoI by itself. Rather, the PoI is also relevant as a general principle, which I call the thick PoI. This principle, as I argue in the thesis, entails a prohibition on any requirement that makes the accused prove that they are innocent. The question of whether the accused is being required to prove their innocence, in turn, is understood by reference to the concept of the ‘risk of non-persuasion’.⁷⁴

In simplest terms, the risk of non-persuasion refers to the idea that one party or another in a trial must always bear the risk of failing to persuade the factfinder of their case. As such, burdens of proof can be thought of as tools for allocating this risk, and therefore expressing a preference for which party ought to have something to prove. The thesis argues that this concept underlies the PoI as a general principle and takes the novel step of applying this line of thinking to reverse burdens of proof in particular. The ultimate conclusion, and the core of my original contribution, is therefore that the PoI prohibits making the accused bear the risk of failing to persuade the factfinder that they are innocent. This is because if the accused bears the risk then they are effectively proving their innocence, which cannot be the case if their innocence is already presumed. As such, I make the case that any reverse burden which amounts to a requirement on the accused to prove their innocence is prohibited by the thick PoI.

The understanding of the PoI above, including the rejection of the binary choice which is so often found in the literature on reverse burdens, and the conclusion which I reach, are therefore an original contribution to the literature. The characterisation of the thick PoI in particular has never been applied in this way to the issue of reverse burdens. I explore the significance of this and sketch out some options for how the law can be reformed in light of my findings in Chapters 7 and 8.

1.5 - Conclusion

To summarise, this chapter has set out to lay the foundations upon which the remainder of the thesis will be built. With the key terms now defined, and the parameters of the enquiry now stipulated, it remains to give an abbreviated account of the core argument which will be presented in the coming chapters, and to explain how the rest of the thesis will be structured.

1.5.a - The PoI as a Prohibition on a Requirement Proving Innocence

Recall that the overarching research question which this thesis sets out to answer is as follows: when, if ever, will it be coherent with the requirements of the PoI to impose a reverse burden on the accused? The next seven chapters of this thesis will provide an answer to this question, but it will be helpful to provide a brief answer to the question here. In short, the answer to this research question is that, in this context, the PoI is best understood as a prohibition on requiring the accused to prove their innocence. This means that it will never be coherent with the PoI to impose a reverse burden if this has the effect of making the accused prove their innocence. Proof of innocence, in turn, is to be understood as allocating the risk of non-persuasion with respect to guilt or innocence to the accused. Put simply, if a reverse burden bears directly on whether or not the accused is guilty of the offence in question, then it violates the PoI on my account.

The conclusion of this thesis is reached by an argument which proceeds in several steps, starting

⁷⁴ John Henry Wigmore, *Evidence in Trials at Common Law*, vol 9 (Third edition, revised., Boston : Little, Brown 1961, para 2485.

by situating the research question in its wider context. Here, this means enquiring into what is meant by the phrase ‘presumption of innocence’ in this context, as this will be crucial to understanding how reverse burdens can ever cohere with the PoI. The first step in the thesis’s argument will therefore be to examine competing conceptions of the PoI, in order to select the one which is most apt for the task at hand. As will be explored in greater detail in Chapter 4 below, this will not be a search for the ‘best’ version of the PoI in general, but rather will be rooted in a commitment to methodological pluralism. Thus, the thesis will not claim to offer a definitive understanding of the PoI which must be preferred to all others, always and everywhere. Rather, it will present an understanding of the PoI which is most relevant to the central question of how to allocate the burden of proof.

The elaboration of what the PoI entails with respect to the allocation of the burden of proof will begin with a survey of existing approaches offered by other scholars and by the courts of England and Wales and the US. The thesis will then identify a distinction between two broadly different notions of the PoI, which will be referred to as ‘thick’ and ‘thin’. I will argue that recognising this distinction is a crucial first step in deciding which interpretation of the PoI should be applied when answering the main research question of the thesis. The key conclusion which will be drawn here is that both the thick and thin versions of the PoI are relevant when deciding when a reverse burden will be coherent with the PoI in general. As a result, I will argue that there are two aspects to PoI coherence: thick and thin. Thin PoI coherence is very straightforward: the accused cannot be made to prove any (formal) element of an offence. But this is only half of the picture.

Unlike thin PoI coherence, the question of what the thick PoI requires with respect to the allocation of the burden of proof is notably more complicated. The argument which this thesis will offer is that the thick PoI, as a general norm presuming the accused innocent of criminal wrongdoing, must entail a prohibition on making the accused prove their innocence. I reach this conclusion by considering several possibilities for connecting the thick PoI to reverse burdens, finding a prohibition on proving innocence to be the most plausible and compelling. The thick PoI, as I will argue, entails a commitment on the part of the state to treat its citizens as innocent of criminal wrongdoing. This makes it incomprehensible to ask a citizen to prove that they are, in fact, innocent, in a criminal trial – one need not prove what is already presumed.

The focus of the argument will then shift to what it means to require the accused to ‘prove their innocence’. Here, the thesis will focus on the concept of the risk of non-persuasion, meaning the risk of failing to discharge a burden of proof. In a criminal trial, this risk is extremely asymmetrical, in that a failure by the accused to discharge a reverse burden could lead to their imprisonment or even execution, depending on what jurisdiction they are in. This risk is the key to understanding why most reverse burdens will not be coherent with the PoI: if the accused is presumed innocent then it is unjustifiable to saddle them with this risk, especially when the stakes are so high. Thus, the imposition of a reverse burden which allocates this risk to the accused is incoherent with the PoI. This will be the core argument of the thesis.

1.5.b - Overview of Thesis Structure

In order to fully flesh out the argument presented in the preceding section, this thesis will proceed in seven further chapters.

Chapter 2 begins by examining and critiquing existing attempts to address the issue of how reverse burdens can be employed in a way which is coherent with the PoI. This entails a broad-ranging review of case law from the jurisdictions under examination in the thesis. The purpose of this

initial substantive chapter is to set the scene for the remainder of the thesis, demonstrating the problems with existing approaches which must be avoided. Ultimately, Chapter 2 concludes that existing approaches in the courts are unsatisfactory, especially due to their failure to identify general principles for reconciling reverse burdens and the PoI. Chapter 3 then extends the examination and critique of existing approaches to reverse burdens to legal scholarship, evaluating a selection of different academic approaches and ultimately finding them to be defective as well.

Chapter 4 follows with a detailed consideration of what type of methodology is best suited to avoiding the problems present in previous attempts to reconcile reverse burdens and the PoI. This chapter identifies and explains the significance of distinguishing between two different senses of the PoI: thick and thin. Chapter 4 argues that existing analyses of reverse burdens and the PoI have failed to adequately attend to this ‘thick/thin’ distinction. Instead, previous commentators have opted to choose *either* the thick or thin PoI as *the* PoI, before then moving on to assess the question of how to employ reverse burdens. In Chapter 4, I argue that this is a mistake, and that both senses of the PoI are relevant to the overarching task of this thesis.

In Chapter 5, the thick/thin distinction leads to a deeper discussion of what exactly the thick PoI entails, and what impact this has on the allocation of the burden of proof. In this chapter, I unpack several possibilities for how the thick PoI can be connected to reverse burdens, rejecting three alternatives in favour of an absolute prohibition on making the accused prove their innocence. This chapter evaluates the three alternatives by reference to a set of success criteria which, I argue, need to be fulfilled in order for a thick PoI approach to reverse burdens to succeed. Namely, any thick PoI framework will need to take account of the thick/thin distinction, maintain the normative force of the PoI, and resolve the fundamental tension between the PoI and reverse burdens.

Chapter 6 turns to consider what exactly it means to make the accused prove their innocence. As mentioned above, the key question will be whether or not the accused is allocated the risk of failing to persuade the jury of their innocence. Where this risk is placed on the accused, the PoI is violated. Chapter 6 fleshes out the reasoning for this, giving a fuller account of how the thick PoI operates to prohibit reverse burdens which allocate the risk of non-persuasion to the accused. In the end, Chapter 6 concludes that this way of understanding the thick PoI and its requirements for the allocation of the burden of proof is superior to the alternatives identified in the previous chapter when evaluated against the same success criteria.

With the core arguments of the thesis explained, Chapter 7 looks forward to consider what implications follow from committing to the proposed relationship between the PoI and reverse burdens. This chapter will revisit some key cases and explain how they would be decided differently under my approach. Chapter 7 also offers some suggestions for what the criminal law would look like without reverse burdens, highlighting the advantages of such a system while also acknowledging what difficulties it might present. Some possible remedies to these difficulties are then proposed. Finally, Chapter 8 offers concluding remarks. In this final chapter, I return to the stated goals of the thesis and show how they have been fulfilled. Chapter 8 then concludes by offering the potential future use of the thesis and flags up topics which are ripe for further investigation.

Chapter 2: Existing Approaches to Reverse Burdens in the Courts

2.1 – Overview

This chapter examines and critiques previous approaches to reconciling reverse burdens and the PoI in the two jurisdictions under consideration in this thesis: England and Wales and the US. This is an issue which has garnered serious attention, both in the courts and among legal scholars. It is therefore a necessary first step for the thesis to engage with these previous efforts, in order to understand what has been tried before. The chapter will not, however, be purely descriptive. On the contrary, its aim is to demonstrate that all of the prior approaches in the literature are in some way defective. Moreover, the principal defect shared by all of these approaches is that none is sufficiently attentive to the importance of the distinction between thick and thin conceptions of the PoI, or to the importance of taking account of both the thick and thin PoI's requirements with respect to allocating the burden of proof. This will become clear in the course of the chapter's examination of the individual approaches below.

For ease of reference, the chapter is divided into five further sections. Section 2.2 traces the history of reverse burdens in modern English criminal law, with a focus on case law which has been generated since the Human Rights Act (HRA) 1998 came into force. Section 2.3 then does the same, but with respect to US law. In this section, the focus is on several decisions of the US Supreme Court: *In re Winship*; *Mullaney v Wilbur*, and *Patterson v New York*.¹ Section 2.4 gives a brief explanation of a third alternative approach to reverse burdens and the PoI, that of Canadian law. As the Canadian approach differs sharply from the US and English case law, Section 2.4 explores the significance of this difference and assess the possibility of adopting the Canadian approach to remedy the problems encountered in the other two jurisdictions. Finally, Section 2.5 concludes and offers a broad critique of the approaches surveyed in Chapter 2.

2.2 – Reverse Burdens under English Law

2.2.a – *Woolmington* and Pre-Human Rights Act Case Law

For centuries, the prevailing practice in the courts of England and Wales was such that if the Crown could prove that the accused had caused the death of another person, this was presumed to be murder unless the accused could prove otherwise. This contestable claim was at the centre of the first modern authority on the scope of the PoI and its relationship to the burden of proof under English Law, the case of *Woolmington v DPP*.² In *Woolmington*, the House of Lords had to consider whether the above description of the law with respect to murder was in fact correct, and whether this was compatible with the PoI. In a decision hailed as a landmark and a 'noble deed',³ the House of Lords held that the PoI required the prosecution to prove the guilt of the

¹ *In re Winship* 397 U.S. 358 (1970); *Mullaney v Wilbur* 421 U.S. 684 (1975); *Patterson v New York* 432 U.S. 197 (1977).

² [1935] AC 462.

³ J.C. Smith, 'The Presumption of Innocence' (1987) 38 Northern Ireland Legal Quarterly 223, 224.

accused beyond a reasonable doubt, and that accordingly the prosecution could not secure conviction for murder simply by proving that the accused had killed another.⁴

This case is an important starting point for understanding the approach of English law to reverse burdens and the PoI. This sub-section will examine the impact of *Woolmington*, along with two key judgments which followed, and which shaped the law on reverse burdens in the period before the HRA 1998 came into force: *Edwards* and *Hunt*.⁵ Ultimately, it will be demonstrated that these cases rely on a relatively thin conception of the PoI, and do not give sufficient regard to the thick PoI. Though *Woolmington* will be shown to espouse the principles of the thick PoI, following the trajectory of the law in *Edwards* and *Hunt* will demonstrate that English law has not lived up to its own lofty rhetoric.

The appeal in *Woolmington* required the House of Lords to confront a series of cases and references to authoritative legal textbooks which suggested that, on a charge of murder, it was for the accused to convince the jury that they lacked malice once the prosecution had proved that the accused killed someone.⁶ These authorities, including cases such as *Greenacre*,⁷ and influential works such as those of Sir Michael Foster, *Archbold*, and *Halsbury's Laws of England*,⁸ appeared to suggest that the persuasive burden was indeed on the accused in such cases. Nevertheless, Viscount Sankey LC, in his now famous speech, declared that these authorities, to the extent that they espoused such a view, were incorrect, and that the better view was that the PoI required the Crown to prove both that the accused killed another and did so with malice, in order to secure a conviction for murder.⁹ Thus, Viscount Sankey held that the PoI was a 'golden thread' running 'throughout the web of English Criminal Law' and that 'no attempt to whittle it down can be entertained'.¹⁰

Although by modern standards this seems unremarkable, at the time it was received as a major change in the law. Indeed, though Viscount Sankey framed the judgment as one in which previous authorities were being misinterpreted and needed to be correctly explained, it has since become clear that *Woolmington* did in fact change the law.¹¹ For present purposes, the significance of *Woolmington* is that it established the modern approach to reconciling reverse burdens and the PoI in English law. This approach conceives of the PoI as a rule which requires that the prosecution 'prove the prisoner's guilt' and if 'at the end of, and on the whole of the case there is reasonable doubt...the prisoner is entitled to an acquittal'.¹² This rule is, however, qualified by two exceptions: the insanity defence and 'any statutory exception'.¹³ As will become clear below, this latter exception would end up justifying the imposition of virtually every reverse burden in modern English law.¹⁴ Indeed, brief reflection reveals how paradoxical Viscount

⁴ *Woolmington* (n 2) 481-483.

⁵ *R v Edwards* [1975] QB 27 (CA); *R v Hunt* [1987] AC 352; [1987] 1 All ER 1 (HL).

⁶ These authorities are examined one by one in the judgment of Viscount Sankey LC, see *Woolmington* (n 2) 477-483.

⁷ *R v Greenacre* (1837) 8 C&P 35.

⁸ Foster's Crown Law (1762); *Archbold's Criminal Pleading and Evidence* (33rd edition, 1954); *Halsbury's Laws* (2nd edition, 1933).

⁹ *Woolmington* (n 2) 481-482 (Lord Sankey).

¹⁰ *ibid.*

¹¹ This is noted by Lord Devlin in *Jayasena v R* [1970] 1 All ER 219, 222 and discussed in more depth in JC Smith, 'The Presumption of Innocence' (n 3) 224-227.

¹² *Woolmington* (n 2) 481.

¹³ *ibid.*

¹⁴ A catalogue of the reverse burdens in English law as of 1996 can be found in Andrew Ashworth and Meredith Blake, 'The Presumption of Innocence in English Criminal Law' [1996] *Criminal Law Review* 306. The only common law reverse burden still in existence is the insanity defence found in *M'Naghten* 8 ER 718 (HL).

Sankey's position actually was.

The contradiction within Viscount Sankey's pronouncement in *Woolmington* becomes clear when one considers that one of the bedrock principles of English law is that Parliament is supreme and can pass any law, on anything, anywhere, at any time.¹⁵ This form of legislative supremacy, coupled with a broad exception carved out of the PoI in *Woolmington* for 'any statutory exception', essentially opened the door for Parliament to hollow out the PoI's protections through legislation whenever it saw fit.¹⁶ It is unlikely that Viscount Sankey, writing in the 1930s, foresaw the proliferation of reverse burdens which would come later in the 20th century, alongside the emergence of the regulatory state and the increasing tendency of English criminal law to be placed on a statutory footing. Nevertheless, the logic of *Woolmington*, and the recognition of an unchecked ability to legislate out of the PoI's protections, enabled reverse burdens to be imposed without appearing to contradict the PoI. It should be noted that this situation is a direct result of the judgment being couched in terms of the thin PoI. By understanding the PoI only as a trial rule, and by allowing even that trial rule to be disregarded by legislation, the *Woolmington* judgment paved the way for the very whittling down of the PoI which Viscount Sankey so eloquently defended.

An early sign of this phenomenon can be found in a subsequent reverse burden case, heard by the Court of Appeal in 1975. In *R v Edwards*, the court had to consider whether a reverse burden found in the Licensing Act 1964 violated the accused's PoI.¹⁷ The provision in question, s 160(1)(a) of the 1964 Act, prohibited the sale of 'intoxicating liquor' by any person not holding an appropriate licence. The accused in *Edwards* had turned his basement into an underground pub, staying open to serve beer after licensed pubs were required by law to close.¹⁸ When police discovered this, he was charged under s 160(1)(a), as it was alleged that he did not hold a licence. At trial, it was directed that Mr Edwards bore the burden of proving that he did hold a licence, otherwise he was to be convicted because of the reverse burden which was said to be implied in s 160(1)(a).¹⁹ On appeal, Edwards argued that this violated the PoI, as understood in *Woolmington*, and that the prosecution should have been required to prove that he did *not* hold the relevant licence in order to secure conviction.²⁰ A bench of three judges in the Court of Appeal unanimously disagreed, and held that the proper construction of the 1964 Act imposed a persuasive burden on the accused to prove that he held a licence.²¹

The reasoning of the Court of Appeal in *Edwards* demonstrates how the exception recognised in *Woolmington* provided fertile ground for the subsequent dilution of the PoI's protection against imposing a persuasive burden on the accused. The court's reasoning can be summarised as follows: a long line of 18th and 19th century cases demonstrated that a rule had evolved requiring the accused to *plead* certain defences, where statute prohibited the doing of a certain thing without a licence or qualification.²² Over time, this evolved into a requirement for the accused to

¹⁵ As Dicey famously put it in AV Dicey, *The Law of The Constitution* (1885) 39-40: 'The principle of Parliamentary sovereignty means...that Parliament...has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.'

¹⁶ *Woolmington* (n 2) 481.

¹⁷ *Edwards* (n 5).

¹⁸ *ibid* 31.

¹⁹ *ibid*.

²⁰ *ibid*.

²¹ *ibid* 40.

²² *ibid* 39-40.

prove these defences, so long as the ‘true construction’ of the statute was that of a general prohibition, combined with certain exceptions.²³ According to the court in *Edwards*, this had to be recognised as an exception to the PoI, one which was ‘hammered out on the anvil of pleading’.²⁴ What is most notable about this case is not so much its conclusion, but its reasoning.

The ratio of *Edwards*, being restricted to a relatively narrow category of cases involving the production of a licence, was not by itself particularly consequential. However, the same cannot be said of the reasoning the court followed to arrive at their conclusion. Though the court justified their conclusion by reference to a long line of precedent, it must be appreciated that this type of reasoning, and this exercise in justifying away the protection of the PoI, was possible only because of the recognition of statutory exceptions to the PoI in *Woolmington*. The very method they applied, then, would not have been open to the Court of Appeal, were it not for the prior authority of *Woolmington* creating the space for exceptions to be carved out of the PoI by statute. This is not to say that the court could not have reached the same conclusion through some other route; it may be that they could have.

The crucial point is that this exercise in justifying an exception to the PoI, and therefore allowing a reverse burden to stand whilst claiming continued adherence to the PoI, was enabled by *Woolmington*. In turn, the recognition of such a broad category of exceptions to the PoI in *Woolmington* can be attributed to Viscount Sankey’s judgment relying on only the thinnest conception of the PoI. Had the House of Lords considered that the PoI could be more than just a trial rule, but also a general norm, it would have been obvious that recognising an unlimited power for Parliament to impose reverse burdens would be in direct conflict to the PoI. The key lesson, then, is that failure to recognise the thick/thin distinction, and to attend to its consequences, allowed reverse burdens to continue being imposed, in spite of the strong rhetoric of *Woolmington*.

The trend established in *Edwards* would soon come to be seen as the thin end of the wedge, as several years later another reverse burden case reached the House of Lords in *Hunt*.²⁵ In *Hunt*, the relevant provision was s 5(1) of the Misuse of Drugs Act 1971 (MDA), which made it a criminal offence for anyone to possess a controlled drug, subject to regulations made under the Act by ministers. The relevant regulations then provided a list of what were considered ‘controlled drugs’ for the purposes of the 1971 Act.²⁶ However, these regulations also created exceptions to the offence in s 5(1), meaning that possession of certain substances which would otherwise be ‘controlled’ could be made lawful if it fell under one of the exceptions in the regulations.²⁷ One exception, which the defendant in *Hunt* sought to rely on, was for possession of ‘any preparation of medicinal opium or of morphine containing...not more than 0.2 per cent of morphine’.²⁸

At trial, the defendant was charged under s 5(1) of the MDA 1971 after being found in possession of a powder which was confirmed to contain morphine. However, Hunt made a submission of no case to answer, on the basis that the prosecution had not proved that the morphine in his possession was of the relevant concentration required by the regulations. This submission was rejected by the trial judge.²⁹ Subsequently, the rejection of Hunt’s submission was upheld in the

²³ *ibid* 40.

²⁴ *ibid* 39-40.

²⁵ *R v Hunt* (n 5).

²⁶ See, the Misuse of Drugs Regulations 1973 (S. I. 1973 No. 797), Schedule 1.

²⁷ Misuse of Drugs Regulations 1973 (S.I. 1973 No. 797), r. 4(1).

²⁸ *ibid*, Sch. 1, para. 3.

²⁹ *R v Hunt* [1986] QB 125 (CA), 129-130.

Court of Appeal, on the basis that the accused bore the persuasive burden to show that he fell within the exception to 5(1) and that he would not have been able to discharge this burden anyway.³⁰ It therefore fell to the House of Lords to decide where the burden of proving the concentration of the morphine should ultimately lie: on the prosecution, or on the accused?

For the court in *Hunt*, the issue surrounding the burden of proof was treated as one of statutory construction. The approach taken by the House of Lords in this case was therefore to look to the mischief at which the Act was aimed and the ease with which one party or the other could discharge the persuasive burden in order to determine where the burden of proof should lie.³¹ Lord Griffiths – with whom Lord Keith, Lord Mackay and Lord Ackner agreed – therefore held that: ‘Parliament can never lightly be taken to have intended to impose an onerous duty on a defendant to prove his innocence...and a court should be very slow to draw any such inference from the language of a statute’.³² From this starting point, the court in *Hunt* concluded that the burden must have remained with the prosecution to prove the concentration of morphine, and therefore allowed the appeal.³³ Again, the reasoning employed in *Hunt* is problematic.

For present purposes, the most problematic aspect of the judgment in *Hunt* was its endorsement of the existence of the so-called ‘third exception’ to *Woolmington*: statutory reverse burdens which are not expressly made, but are rather *implied* by judges interpreting a statute.³⁴ This is made explicit by Lord Griffiths, who did not interpret *Woolmington* as ‘lay[ing] down a rule that the burden of proving a statutory defence if the statute specifically so provided’.³⁵ For the avoidance of doubt, Lord Griffiths then stated that ‘a statute can, on its true construction, place a burden of proof on the defendant although it does not do so expressly’.³⁶ This represents a further inroad on the PoI, beyond the one already created by Viscount Sankey in *Woolmington*. Following *Hunt*, it was now open to courts to read reverse burdens into statutes which made no express provision for the allocation of the burden of proof whatsoever.

It is apt to observe that, as with the decision in *Edwards*, this aspect of the *Hunt* decision is best seen as a natural extension of the exception first recognised in *Woolmington*. After all, if Parliament can legislate so as to explicitly allocate the persuasive burden to the accused, it becomes at least plausible to think that a reverse burden could also be imposed by necessary implication. This type of thinking is therefore yet another consequence of the *Woolmington* judgment and its reliance on an understanding of the PoI as nothing more than a trial rule. As with that case, and that of *Edwards*, the result would have been markedly different if the judges had considered a thicker notion of the presumption of innocence and its requirements. What is clear, then, is that ignoring the thick/thin distinction (or simply failing to consider the thick PoI at all) has helped to facilitate the piecemeal dilution of the PoI under English law.

As is now clear, the pre-HRA case law on reverse burdens and the PoI shows the dangers of gradually allowing a fundamental right to be whittled away. Although Viscount Sankey in *Woolmington* obviously intended to bolster the PoI, the paradoxical result of his recognition of statutory exceptions was that it started a trend of recognising an increasingly broad assortment of exceptions. It might be thought that this is an unfair, even revisionist, criticism of the

³⁰ *Hunt* (CA) *ibid.*

³¹ *Hunt* (HL) (n 5) 374 (Lord Griffiths); 386 (Lord Ackner).

³² *ibid* 374.

³³ *ibid* 377-378 (Lord Griffiths); 378 (Lord Mackay); 384-386 (Lord Ackner); 365 (Lord Templeman).

³⁴ The terminology of a third exception comes from Adrian Zuckerman, ‘The third exception to the rule in *Woolmington*’ (1976) 92 *Law Quarterly Review* 402.

³⁵ *Hunt* (HL) (n 5) 374 (Lord Griffiths).

³⁶ *ibid.*

Woolmington judgment. Following this line of argument, Viscount Sankey's recognition of statutory exceptions might appear to be nothing more than a pragmatic concession to the reality of Parliamentary sovereignty, rather than a tacit endorsement of statutory reverse burdens.

While it may be the case that Viscount Sankey could not envision just how frequently reverse burdens would come to be used, this argument would still miss a crucial point: in *Woolmington*, it was open to the House of Lords to clarify the content and scope of the PoI and set a precedent for its modern interpretation. By focusing on an interpretation of the PoI as nothing more than a trial rule, and one which was not even absolute in nature, but rather could be overridden by statute, Viscount Sankey's judgment set the tone for another ninety years of reverse burden case law. Unfortunately, the tone set was that the PoI was a right which was admitted exceptions, so long as the right justification should be found. As will be shown in the next sub-section, the spirit of this (flawed) approach to the PoI continues to exert an influence on English law even today.

2.2.b – The Post-Human Rights Act Case Law

This sub-section examines five recently decided cases which concerned the compatibility of reverse burdens with the presumption of innocence as enshrined in Art. 6(2) ECHR. The first two cases, *Kebilene*³⁷ and *Lambert*,³⁸ were decided on the basis that the 1998 Act did not apply. However, they are included in this analysis because some guidance can be found in *obiter* remarks on the subject of reverse burden compatibility. The other three cases to be analysed are the decisions of the House of Lords in *Johnstone*³⁹ and *Sheldrake*,⁴⁰ and the judgment of the Court of Appeal in *Attorney General's Reference (No. 1 of 2004)*.⁴¹ These authorities were decided after the 1998 Act was in force and as such should provide a helpful indication of how the law has developed in recent years. Overall, the objective of analysing these five cases will be to critically examine the law on reverse burdens and the PoI.

R v DPP, Ex p. Kebilene

This case concerned a judicial review application of the decision of the Director of Public Prosecutions (DPP) to consent to the prosecution of Sofiane Kebilene under s. 16A of the Prevention of Terrorism (Temporary Provisions) Act 1989, as amended.⁴² The offence in question was that of possessing 'any article in circumstances giving rise to a reasonable suspicion' that the article was being kept for the 'commission, preparation or instigation of acts of terrorism'.⁴³ However, s. 16A(3) provided a defence if the accused could prove that they did not possess the article in question for a terrorist purpose. Furthermore, s. 16A(4) of the 1989 Act created a presumption of possession in certain circumstances, unless the accused could disprove this on the balance of probabilities. Both ss. 16A (3) and (4) require the accused to prove their innocence or else be convicted of the offence in s. 16A(1), making them typical reverse burden defences. Initially, the trial judge had ruled that s. 16A was in conflict with the presumption of innocence under Article 6(2) ECHR.⁴⁴ However, Article 6(2) had not yet been incorporated into domestic law – because the HRA 1998 was not yet fully in force – and so the DPP took the

³⁷ *R v DPP, ex p. Kebilene and others* [2000] 2 AC 326 (HL).

³⁸ *R v Lambert (Steven)* [2002] 2 AC 545 (HL).

³⁹ *R v Johnstone* [2003] 1 WLR 1736.

⁴⁰ *Sheldrake v DPP; Attorney General's Reference (No. 4 of 2002)* [2004] UKHL 43, [2005] 1 AC 264.

⁴¹ [2004] EWCA Crim 1025, [2004] 1 WLR 2111.

⁴² *Kebilene* (n 37) 362 (Lord Steyn).

⁴³ Prevention of Terrorism (Temporary Provisions) Act 1989, s. 16A(1).

⁴⁴ *Kebilene* (n 37) (Divisional Court) 334.

decision to continue to consent to the prosecution.⁴⁵ It was at this point that counsel for Mr Kebilene sought judicial review of the DPP's decision.

Ultimately, the compatibility of the reverse burdens was not part of the *ratio* of this case.⁴⁶ Nevertheless, Lord Hope addressed the subject of compatibility in some depth. As such, his speech will now be examined.⁴⁷ Lord Hope's comments on the compatibility of s. 16A in this case are instructive as to what the early post-HRA approach to assessing reverse burdens under English law was. Moreover, as will be shown, Lord Hope's thinking in *Kebilene*, which would set the tone for future reverse burden cases, also continues in the trend of the pre-HRA cases examined above by widening the range of potential statutory exceptions to the PoI.

Lord Hope discussed the issue of reverse burden compatibility at some length, though he ultimately declined to rule definitively on the compatibility of the specific provision in question.⁴⁸ As a starting point, Lord Hope chose to analyse the jurisprudence of the European Court of Human Rights with respect to Article 6(2), beginning with the case of *Salabiaku v France*.⁴⁹ In *Salabiaku*, as Lord Hope explains, the ultimate finding of the Strasbourg court was that reverse burdens do not violate Article 6(2) *per se*.⁵⁰ Rather, the position under European law is that 'a fair balance must be struck' between the general public interest in law enforcement and protecting the rights of individuals accused of crimes.⁵¹ Following this approach, a reverse burden would be upheld as compatible with Article 6(2) if it struck a fair balance between these two interests.

In order to determine whether or not a fair balance has been struck in a given case, Lord Hope adopted a formula proposed to him by counsel in *Kebilene*.⁵² According to this formula, three questions had to be answered:

- (1) [W]hat does the prosecution have to prove in order to transfer the onus to the defence?
- (2) what is the burden on the accused—does it relate to something which is likely to be difficult for him to prove, or does it relate to something which is likely to be within his knowledge or (I would add) to which he readily has access?
- (3) what is the nature of the threat faced by society which the provision is designed to combat?⁵³

This approach is essentially an analysis of the proportionality of a reverse burden. Questions (1) and (2) seem to relate to the relative ease of proof for the prosecution and defence. In this case, Lord Hope held that the prosecution would have to prove beyond a reasonable doubt that the accused possessed an article 'in circumstances giving rise to a reasonable suspicion that it was...for a purpose connected with terrorism'.⁵⁴ According to Lord Hope, this should not be thought of as a mere formality for the prosecution.⁵⁵ With respect to the burden on the accused, his Lordship held that this would depend heavily on the facts of a particular case.⁵⁶ However, Lord Hope seemed to see no reason why it would necessarily impose 'an unreasonable burden' on

⁴⁵ *ibid.*

⁴⁶ On the facts, the apparent ratio of the case was that the DPP's decision whether or not to consent to prosecution was not amenable to judicial review in the first place, see Paul Roberts, 'The Presumption of Innocence Brought Home? *Kebilene* Deconstructed' (2002) 118 *Law Quarterly Review* 41 (hereafter '*Kebilene* Deconstructed').

⁴⁷ *Kebilene* (n 37) 374-88 (Lord Hope).

⁴⁸ *ibid* 387-88 (Lord Hope).

⁴⁹ *ibid* 384 (Lord Hope), citing *Salabiaku v France* (1991) 13 EHRR 379.

⁵⁰ *ibid* 384-85 (Lord Hope), citing *Salabiaku* (n 52) 388.

⁵¹ *ibid* 384 (Lord Hope).

⁵² *ibid* 386 (Lord Hope).

⁵³ *ibid.*

⁵⁴ *ibid* 387 (Lord Hope).

⁵⁵ *ibid.*

⁵⁶ *ibid.*

the accused to explain how their possession of the articles in question did not give rise to a reasonable suspicion of a terrorist purpose.⁵⁷

This reasoning is reminiscent of the court in *R v Edwards*, rationalising the imposition of a reverse burden on the grounds of ease of proof for the defendant. Lord Hope's first two questions, however, betray a critical error. Namely, Lord Hope condones imposing a reverse burden on the accused so long as it is easy to discharge, ignoring the fact that this ought to be irrelevant. If the accused is presumed innocent, it should make no difference whether or not it would be easy for them to prove it: the essence of presuming innocence is that the accused does not *have* to prove it. This approach therefore begins a descent down a very slippery slope of increasingly diluting the PoI simply on the basis that it is (supposedly) easy for the accused to discharge their burden to avoid conviction.⁵⁸

Finally, answering Question (3), Lord Hope noted that '[s]ociety has a strong interest in preventing acts of terrorism before they are perpetrated' and that '[s]ection 16A is designed to achieve that end'.⁵⁹ However, as mentioned above, Lord Hope ultimately elected to leave open the 'difficult question' of 'whether or not the balance between the needs of society and the presumption of innocence has been struck in the right place'.⁶⁰ For now, it will suffice to observe that the decision to frame the issue in this way was problematic.

As other commentators have correctly noted, incorporating offence seriousness into an assessment of whether or not it is fair to impose a reverse burden is tantamount to placing a thumb on the scales in favour of the prosecution.⁶¹ This is because the seriousness of any threat to society posed by the behaviour in question has already been taken into account – this follows from the very fact that an offence has been created in the first place. To then use the seriousness of an alleged offence against the accused when deciding whether or not impose a reverse burden is therefore a serious injustice. Nevertheless, as will be seen, Lord Hope's advocacy of this approach set the tone for future decisions on reverse burdens. Despite its problems, both the general approach of assessing proportionality and the reliance on factors like ease of proof and offence seriousness continue to be part of English criminal law long after *Kebilene*. With this in mind, it is apt to consider some later reverse burden cases, to see how this line of thinking has developed over time.

R v Lambert

The case of *R v Lambert (Steven)*⁶² is another early post-HRA authority on the compatibility of reverse onuses that went to trial before the 1998 Act was fully in force. As such, it is useful for determining how the courts have approached this issue, even if it is not strictly binding. Steven Lambert (L) appealed to the House of Lords against his conviction for possession of cocaine, with intent to supply, contrary to section 5 of the Misuse of Drugs Act 1971.⁶³ At trial, L had raised a statutory defence under section 28(3)(b)(i) of the 1971 Act, claiming 'he did not believe

⁵⁷ *ibid.*

⁵⁸ The problematic nature of presuming that anything within the accused's own knowledge will necessarily be easier for them to prove was helpfully explained by Roberts in Paul Roberts 'Loss of Innocence in Common Law Presumptions' (2014) 8 *Criminal Law and Philosophy* 317, 321.

⁵⁹ *ibid.*

⁶⁰ *ibid.*

⁶¹ Roberts 'Loss of Innocence in Common Law Presumptions' (n 58) 321.

⁶² *R v Lambert* [2002] 2 AC 545 (HL).

⁶³ *ibid* 559.

or suspect or have reason to suspect that the bag which he carried' contained cocaine.⁶⁴ The trial judge directed the jury that L had to prove this defence on the balance of probabilities.⁶⁵ In the House of Lords, L argued that this reverse onus was a breach of his presumption of innocence under Article 6(2) of the Convention.⁶⁶ Thus their Lordships had to consider the extent to which a statutory reverse burden could be considered compatible with the presumption of innocence. As Roberts points out, the *ratio* of *Lambert* was that the HRA was not retroactively effective.⁶⁷ However, I will proceed along the same lines as Roberts, assuming that the speeches of Lord Steyn and Lord Hope with regard to the burden of proof had force of law.⁶⁸ The issue of retroactivity will not be discussed further.

Lord Hope's speech in *Lambert* gave a detailed account of the effect of Article 6(2) on the presumption of innocence under English law. For policy reasons regarding the practicalities of proof, Lord Hope rejected the argument that it was for the Crown to prove that L knew that the bag contained cocaine.⁶⁹ His Lordship then considered whether the burden on L should be a burden of proof or should be read down as merely an evidential burden.⁷⁰ It is important to note that Lord Hope found that an orthodox analysis of where to allocate the burden of proof would have clearly placed it on the accused.⁷¹ However, the effect of the HRA was to add another step to this process. As such, Lord Hope stated that if a statute was found to impose a probative burden on the accused, it was then necessary to determine whether or not this was compatible with the accused's presumption of innocence under Article 6(2).⁷²

Endorsing the principle from the decision of the European Court of Human Rights in *Salabiaku v France*,⁷³ Lord Hope stated that the test for compatibility was 'whether the [reverse burden] pursues a legitimate aim and whether it satisfies the principle of proportionality'.⁷⁴ By considering proportionality, this test thus requires a balancing of the interests of the public at large against 'the fundamental rights of the individual'.⁷⁵ If the reverse burden fails to satisfy this test it will be read down as a burden of production. As in his Lordship's judgment in *Kebilene*, this made the issue of whether or not to impose a reverse burden essentially one of proportionality, where the various factors which bear on whether or not it is fair to make the accused prove their innocence in the circumstances are weighed against one another. Continuing the trend of assessing reverse burdens based on whether or not they could be justified as exceptions to the PoI, Lord Hope ultimately held that L's defence entail an evidential burden only.⁷⁶ However, his Lordship dismissed the appeal on the grounds that had the jury been properly instructed, the outcome would have been the same.⁷⁷ The use of proportionality analysis therefore became firmly entrenched in *Lambert*.

⁶⁴ *ibid* 560.

⁶⁵ *ibid*.

⁶⁶ *ibid*.

⁶⁷ Paul Roberts, 'Drug Dealing and the Presumption of Innocence: The Human Rights Act (Almost) Bites' (2002) 6 *The International Journal of Evidence & Proof* 17.

⁶⁸ *ibid* 22.

⁶⁹ *Lambert* (n 62) 583.

⁷⁰ *ibid*.

⁷¹ The language of section 28(2) of the Misuse of Drugs Act 1971 is unequivocal: 'it shall be a defence *for the accused to prove...*' (emphasis added).

⁷² *Lambert* (n 62) 583-84.

⁷³ (n 21).

⁷⁴ *Lambert* (n 62) 588.

⁷⁵ *ibid*.

⁷⁶ *ibid* 590.

⁷⁷ *ibid* 596.

Lord Steyn's speech was couched in similar terms to that of Lord Hope.⁷⁸ Notably, Lord Steyn was sharply critical of the increasing number of haphazardly created reverse burdens.⁷⁹ On this, his Lordship commented, 'It is a fact that the legislature has frequently and in an arbitrary and indiscriminate manner made inroads on the basic presumption of innocence'.⁸⁰ Lord Steyn also characterises the test for whether or not a reverse burden violates the accused's Convention rights similarly to Lord Hope.⁸¹ To this end, Lord Steyn states that although 'limited inroads on the presumption of innocence may be justified', an onus-reversing statute 'requires justification and must not be greater than is necessary'.⁸² His Lordship also makes reference to the principle of proportionality.⁸³ In Lord Steyn's view, it was disproportionate to make L prove his innocence on the balance of probabilities, and thus section 28 should be read down as imposing merely an evidential burden, though Lord Steyn too dismissed the appeal.⁸⁴

Having considered these two *dicta* from *Lambert*, it should now be clear that any reverse burden which imposes a probative burden on the defendant will only avoid being 'read down' if it is proportionate and necessary for a legitimate aim. The conditions under which a reverse burden will be considered proportionate and necessary, however, are far from clear. Indeed, this approach does not seem to lend itself to any general principles, rather treating the issue as one of overall fairness in the circumstances. It should be noted that this appears to be some distance from anything resembling a presumption of innocence. On the contrary, it appears to be a test for whether or not to uphold a presumption of guilt. Nevertheless, this line of thinking would continue to persist in English law. As such, it now remains to consider how the post-HRA case law on the burden of proof subsequently developed.

R v Johnstone

In *R v Johnstone*,⁸⁵ the defendant Robert Johnstone (J) had been charged with a criminal offence under section 92 of the Trade Marks Act (TMA) 1994.⁸⁶ J was indicted under sections 92(1)(b) and (c) of the TMA 1994, which criminalised the possession of goods bearing a registered trade mark with a view to their sale.⁸⁷ The goods in question were 'bootleg' Bon Jovi CDs, which J had mistakenly sent to someone in the post, resulting in J being caught with over 500 similar CDs.⁸⁸ At trial, J relied on section 92(5) of the 1994 Act, which provides that '[i]t is a defence for a person charged...under this section to show that he believed on reasonable grounds that the use of [this] sign...was not an infringement of the registered trade mark'.⁸⁹ On appeal to the House of Lords, the Crown challenged the finding of the Court of Appeal that this statutory defence imposed only an evidential burden on the accused.⁹⁰ This case, decided soon after *Lambert*, therefore presented the House of Lords with an opportunity to review their earlier decision and clarify this area of law. However, as will be shown, the result was quite the opposite.

⁷⁸ *ibid* 564 (Lord Steyn).

⁷⁹ *ibid* 569.

⁸⁰ *ibid*.

⁸¹ *ibid* 570.

⁸² *ibid*.

⁸³ *ibid*.

⁸⁴ *ibid* 575.

⁸⁵ *R v Johnstone* [2003] 1 WLR 1736 (HL).

⁸⁶ *ibid* 1739.

⁸⁷ *ibid* 1743.

⁸⁸ *ibid* 1738-39.

⁸⁹ *ibid*.

⁹⁰ *ibid* 1748-49.

In *Johnstone*, Lord Nicholls addressed the issues surrounding the burden of proof.⁹¹ As Lord Nicholls' analysis on this issue was endorsed by all of the other Law Lords in this case, it therefore deserves careful examination here.⁹² The starting point for Lord Nicholls was that section 92(5) should allocate the full burden of proof to the accused unless this was incompatible with Article 6(2).⁹³ Lord Nicholls held that Parliament must have intended section 92(5) to impose a probative burden because the provision 'sets out facts a defendant must establish if he is to avoid conviction'.⁹⁴ Thus his Lordship accepted that section 92(5) was an infringement of Article 6(2) and proceeded to examine whether or not this could be justified.⁹⁵ In doing so, Lord Nicholls applied the proportionality test from *Lambert*,⁹⁶ but chose to expand on the nature of balancing the overall public interest against the fundamental rights of the accused. To this end, Lord Nicholls stated that '[o]ne is seeking to balance incommensurables'.⁹⁷ His Lordship also recalled the paradox that 'the more serious the crime and the greater the public interest in securing conviction, the more important the constitutional protection of the accused becomes'.⁹⁸ This might suggest a tipping of the scales back in favour of the accused through greater caution on the part of judges when allocating the burden of proof to the accused. Yet if such a tipping of the scales has occurred, it did not occur in *Johnstone*.

Instead, Lord Nicholls stated that 'there must be a compelling reason why it is fair and reasonable' to allocate the burden of proof to the accused.⁹⁹ In this vein, his Lordship held that the relevant factors for determining what was 'fair and reasonable' included: the seriousness of the punishment for conviction, the 'extent and nature of factual matters to be proved by the accused', and the extent to which such facts are 'readily provable' by the accused 'as matters within his own knowledge'.¹⁰⁰ This test devised by Lord Nicholls thus seems to build on *Lambert*, helping to explain when a reverse onus provision will be proportionate (and thus justified) or not. Rather than a return to the basic principle of *Woolmington*, though, this seems to have simply added to a growing list of factors which, in one way or another, justify allocating a probative burden to the accused.

On this point, Dennis has observed that 'analysis of the case law shows considerable disagreement and inconsistency about the use of one or more of six relevant factors' relating to proportionality.¹⁰¹ This led Dennis to describe the process as 'a forensic lottery'.¹⁰² As such, *Johnstone* did more harm than good for the law relating to the burden of proof. By departing from *Lambert*, without overruling it, and introducing more factors which could be relevant to the proportionality of a reverse burden, this case muddied the waters of this area of law considerably. This diminishment of legal certainty is, of course, lamentable, being harmful to the accused and undermining the PoI. Moreover, the decision only served to widen the circumstances under which the accused might be made to prove their innocence, simply by reference to the notion that it is considered proportionate in the circumstances.

⁹¹ *ibid* 1748.

⁹² *ibid* 1751 (Lord Hope, Lord Hutton, and Lord Rodger); 1762 (Lord Walker).

⁹³ *ibid* 1749.

⁹⁴ *ibid*.

⁹⁵ *ibid*.

⁹⁶ *ibid* 1750.

⁹⁷ *ibid* 1750.

⁹⁸ *ibid* 1749, citing Sachs J in *State v Coetzee* [1997] 2 LRC 597, 677 at para. 220.

⁹⁹ *Johnstone* (n 85) 1749.

¹⁰⁰ *ibid* 1750.

¹⁰¹ Ian Dennis, 'Reverse Onuses and the Presumption of Innocence: In Search of Principle' [2005] Criminal Law Review 901, 927.

¹⁰² *ibid*.

Lord Nicholls found that it was justifiable to allocate the probative burden to J in this case.¹⁰³ This was so because of the ‘importance and difficulty of combating counterfeiting’ and the ‘comparative ease’ with which an accused could prove the defence.¹⁰⁴ Hamer comments that, on one analysis, this decision is ‘hard to understand’.¹⁰⁵ The overall thrust of Hamer’s argument is that reversing the onus in *Johnstone* can be justified because the offence is viewed as being less serious, and thus the importance of ‘operating an efficient regulatory scheme’ with respect to trade marks can be given more weight.¹⁰⁶ It is difficult to accept this argument.

As Hamer points out, the offence in *Johnstone* carried a punishment of ‘up to 10 years imprisonment...with the possibility of an unlimited fine, and confiscation and deprivation orders’.¹⁰⁷ This can hardly be considered a non-serious punishment. Moreover, as Sachs J provided in *State v Coetzee*:

The perniciousness of the offence is one of the givens...not a new element to be put into the scales as part of a justificatory balancing exercise. If this were so...nothing would be left of the presumption of innocence, save, perhaps, for its relic status as a doughty defender of rights in the most trivial of cases.¹⁰⁸

This argument clearly holds water. If the seriousness of an offence had a bearing on the degree to which the accused was likely to be allocated the burden of proof, then the presumption of innocence would amount to nothing in practice. In this vein, Roberts refers to this as an ‘illegitimate double weighting’ of the public interest in controlling crime against the rights of the accused.¹⁰⁹ As with Lord Hope’s reasoning in *Kebilene* and *Lambert*, this double weighting is unjustifiable. Again, however, this type of reasoning became further entrenched in *Johnstone*. As will be seen, it has continued in more recent cases.

Beyond *Johnstone* and *Lambert*

After the decisions in *Lambert* and *Johnstone*, the Court of Appeal attempted to clarify the principles from these two cases and distil them into one coherent set of guidelines for lower courts to follow. Thus in *Attorney General’s Reference (No. 1 of 2004)*,¹¹⁰ the Court of Appeal sat as an enlarged panel of five. In this case, Lord Woolf CJ stated that ‘the time has now come...to attempt to pull together the authorities so as to identify the relevant principles’.¹¹¹ In their analysis, the Court of Appeal recommended *Johnstone* as the new authority on when to uphold the imposition of a probative burden on an accused.¹¹² Soon after the Court of Appeal’s decision, the case of *Sheldrake*,¹¹³ was heard by the House of Lords.

Sheldrake was concerned with two offences, both of which, ‘conventionally interpreted, impose a legal or persuasive burden on a defendant’.¹¹⁴ The first was the offence of being drunk and in charge of a motor vehicle, contrary to section 5(1)(b) of the Road Traffic Act 1988.¹¹⁵ The second

¹⁰³ *Johnstone* (n 85) 1751.

¹⁰⁴ *ibid*.

¹⁰⁵ David Hamer, ‘The Presumption of Innocence and Reverse Burdens: A Balancing Act’ (2007) 66 Cambridge LJ 142, 155.

¹⁰⁶ *ibid*.

¹⁰⁷ *ibid* 150.

¹⁰⁸ *Coetzee* (n 98) 677-78, para. 220.

¹⁰⁹ Roberts, ‘Loss of Innocence in Common Law Presumptions’ (n 58) 321.

¹¹⁰ [2004] EWCA Crim 1025, [2004] 1 WLR 2111.

¹¹¹ *ibid* [10].

¹¹² This recommendation, and all of the Court of Appeal’s general recommendations can be found at *ibid* [52].

¹¹³ *DPP v Sheldrake* [2005] 1 AC 264 (HL).

¹¹⁴ *ibid* 289 (Lord Bingham).

¹¹⁵ *ibid* 305.

offence, referred to the House of Lords by the Attorney General, was that of belonging, or professing to belong to a proscribed organisation, contrary to section 11(1) of the Terrorism Act 2000.¹¹⁶ Lord Bingham's reasoning, which was also endorsed by Lord Steyn and Lord Phillips MR, will now be analysed.¹¹⁷ Rejecting the guidance of the Court of Appeal in *A-G's Reference (No. 1 of 2004)*, Lord Bingham held that the 'justifiability and fairness' of a given reverse burden must 'be judged in the particular context of each case'.¹¹⁸ Furthermore, his Lordship made it clear that, contrary to the Court of Appeal's guidance, *Johnstone* in no way overruled *Lambert* and that both were 'binding on all lower courts for what they decide'.¹¹⁹ Ultimately, the House of Lords allowed the DPP's appeal, holding that sections 5(1)(b) and 5(2) of the 1988 Act justifiably imposed a legal burden on the defence.¹²⁰ With respect to the second offence, their Lordships held that section 11(1) of the 2000 Act should be read down as imposing a merely evidential burden.¹²¹

Ashworth has criticised the decision in *Sheldrake* for giving 'no clear guidance on how to interpret statutes that impose a burden of proof on the defendant'.¹²² To this end, he notes that *Sheldrake* appears to provide three factors for determining whether or not to read down an onus-reversing provision as merely an evidential burden.¹²³ Namely, these are 'maximum penalty, the danger of convicting the innocent, and the ease of proof'.¹²⁴ On Ashworth's account, however, all of these factors are problematic.¹²⁵ Noting that a 10-year maximum sentence was seen as disproportionate with regard to the terrorism offence in *Sheldrake*,¹²⁶ Ashworth observes that the same penalty was 'not a major obstacle to the reverse onus upheld in *Johnstone*'.¹²⁷ Ashworth goes on to note that the second factor, the danger of convicting the innocent, 'requires far greater refinement' if it is to be of any use to lower courts.¹²⁸ Finally, Ashworth laments Lord Bingham's acceptance of the third factor, because it contravenes one 'cornerstone of the decision in *Lambert*', which is that ease of proof is not a sufficient reason to outweigh the presumption of innocence.¹²⁹ Overall, the logic of Ashworth's criticism seems irresistible. None of the factors in *Sheldrake* appears to furnish an intelligible rule for lower courts. Thus, the decision in *Sheldrake* has only served to further muddy the waters in this area of the law.

With respect to determining the PoI-compatibility of reverse burdens, *Sheldrake* essentially advocates an *ad hoc* approach, determining each case on its particular circumstances. Whilst there may be some merit to this approach, it does not provide a general rule by which an accused could anticipate whether or not they would have to prove their innocence. As such, perhaps the most that can now be said is that if a reverse burden infringes on an accused's Article 6(2) rights, then it may or may not be read down to an evidential burden depending on the circumstances of the particular case. It seems that much will turn on the three factors given above, but how the three will be weighed against one another is an open question. Indeed, Dennis observed that 'if courts are free to...assign weight to different factors as they think fit, then almost inevitably the

¹¹⁶ *ibid* 310.

¹¹⁷ *ibid* 314 (Lord Steyn; Lord Phillips).

¹¹⁸ *ibid* 304.

¹¹⁹ *ibid*.

¹²⁰ *ibid* 310 (Lord Bingham).

¹²¹ *ibid* 314 (Lord Bingham).

¹²² Andrew Ashworth, 'Case Comment: *Sheldrake v DPP* [2004] UKHL 43' [2005] *Criminal Law Review* 215, 219.

¹²³ *ibid*.

¹²⁴ *ibid*.

¹²⁵ *ibid*.

¹²⁶ *ibid*.

¹²⁷ *ibid*.

¹²⁸ *ibid*.

¹²⁹ *ibid* 220.

result will be uncertainty and inconsistency'.¹³⁰ Subsequent case law confirms this. In *R v Chagot Ltd*,¹³¹ the House of Lords upheld a reverse burden with respect to a regulatory offence which carried a maximum penalty of two years' imprisonment. However in *DPP v Wright*,¹³² the court read down a reverse burden as imposing only an evidential burden, despite the maximum penalty only being a fine of £5,000. The search for a general principle, then, continues to be fruitless. Indeed, the logic of *Sheldrake* virtually guarantees that the search is a futile one.

The present state of English law shows little signs of departing from *Sheldrake*'s general fairness approach. On the contrary, even more recent decisions continue to cite *Sheldrake* with approval, imposing reverse burdens in a variety of circumstances.¹³³ New criminal and quasi-criminal legislation continues to make use of reverse burdens, with the PoI seeming to pose no real obstacle.¹³⁴ On the whole, this is not a particularly surprising outcome. In the early 20th century, the judgment in *Woolmington* represented the thin end of the wedge for allowing reverse burdens to proliferate. As time went on, this has evolved into the PoI being little more than a requirement for proportionality in the imposition of reverse burdens, without addressing the fundamental tension between the PoI and reverse burdens. With the examination of English law now complete, the next consideration is the position of US law. As will be shown, US law has not followed English law in this respect. Though this may seem welcome, given the criticism of English law above, there are nevertheless problems in the general fairness approach which must be flagged up and addressed.

2.3 – Reverse Burdens under US Law

The US first grappled with the issue of how to reconcile reverse burdens of proof with the PoI in the case of *Coffin*, decided in 1890.¹³⁵ In *Coffin*, the Supreme Court reaffirmed the principle that the PoI requires that the accused be acquitted unless the prosecution can overcome the presumption by offering proof beyond a reasonable doubt that the accused is guilty.¹³⁶ More recently, the US Supreme Court revisited this issue in a series of three judgments, all of which were handed down in the 1970s.¹³⁷ This section will focus on these more modern cases, with a view to explaining the current approach to allocating the persuasive burden under US law.

As will be shown, the authorities in US law subscribe to a view of the PoI which characterises the presumption solely as a trial rule, requiring the prosecution to prove certain facts and not others. In spite of this, there is some conflict between the authorities, though all are technically good law. This conflict, which will be explored in section 2.3.b below, centres on how the offence/defence distinction should be drawn. Ultimately, the view which has prevailed is that the PoI prohibits reverse burdens on any element of an offence, but permits reverse burdens on defences, and that the offence/defence distinction refers simply to the labels used by legislatures when drafting criminal laws.

¹³⁰ Dennis (n 101) 919.

¹³¹ [2008] UKHL 73, [2009] 1 WLR 1.

¹³² [2009] 3 All ER 726, [2009] EWHC 105 (Admin).

¹³³ For example, see *Euro Wines (C&C) Ltd v Revenue and Customs Commissioners* [2018] EWCA Civ 46 (CA).

¹³⁴ For example, the new quasi-criminal 'Unexplained Wealth Order' created by s 1 of the Criminal Finances Act 2017 requires only reasonable suspicion that an asset has been obtained through illegitimate means, whereupon the accused can be forced to prove that it was obtained legitimately or else have the asset in question stripped from them. See s 362A of the Proceeds of Crime Act 2002, as amended.

¹³⁵ *Coffin v US* (1895) 156 U.S. 432.

¹³⁶ *ibid* 453-457.

¹³⁷ See (n 1) above.

What will become clear in the course of section 2.3 is that the approach taken in US law rests on a very thin conception of the PoI, but that there is a clear desire, as evidenced in the *Wilbur* judgment, to move beyond this and rely on a thicker PoI. As a result, the case of US law should be taken as a prime example of the perils of paying insufficient attention to the thick/thin distinction, and to ignoring the thick PoI when considering how the burden of proof ought to be allocated in criminal trials.

2.3.a – The Orthodox View: *In re Winship*

75 years after the decision in *Coffin*, the US Supreme Court heard an appeal in what would become a landmark case in establishing the meaning of the PoI under US law. The case of *In re Winship* concerned a case from the state of New York, where a 12 year old boy, Samuel Winship, was convicted in a juvenile court for the theft of \$112 from a woman's pocketbook.¹³⁸ Under the relevant provision of the New York state law, the standard of proof imposed on the hearing of was 'by a preponderance of the evidence', equivalent to the standard of 'on the balance of probabilities'.¹³⁹ During Winship's trial, the judge expressly indicated that he was not convinced beyond a reasonable doubt that the defendant was guilty, but was bound by the relevant state law to impose a lower standard of proof, and therefore to convict.¹⁴⁰

In hearing a challenge to the constitutionality of the New York State law which lowered the standard of proof, the judges of the Supreme Court were therefore presented with an opportunity to comment explicitly on the relationship between the PoI and the process of proof at trial. The justices took up this opportunity, with Justice Brennan providing the most detailed comments on the requirements of the PoI.¹⁴¹ The conclusion reached by Justice Brennan, and endorsed by the rest of the majority, was that the Fourteenth Amendment to the US Constitution, which guarantees the right to due process of law and the PoI under US law, specifically requires proof beyond a reasonable doubt of all the elements of an offence. As Justice Brennan put it: 'Lest there remain any doubt...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.'¹⁴²

This was a significant moment for US law. The quotation from Justice Brennan established constitutional protection for the beyond reasonable doubt standard, and for the requirement that the prosecution bear the burden of proof, but only for 'every fact necessary to constitute the crime' in question.¹⁴³ As a result, the door was opened for reverse burdens on so-called affirmative defences, because, on one view, such defences are not facts necessary to constitute a crime.¹⁴⁴ This set the tone for the modern American approach to reverse burdens. As criminal law in the US is primarily a matter for individual states, the decision in *Winship*, intended to strengthen the protections of the Fourteenth Amendment by extending its protections to the standard of proof under state laws, in fact ended up paving the way for states to impose more reverse burdens. This established the position which remains good law in the US today: a reverse burden will only be unconstitutional if it is attached to an element of the offence in question. Reverse burden defences, by contrast, will never fall foul of the PoI.

¹³⁸ *Winship* (n 1) 360.

¹³⁹ *ibid.*

¹⁴⁰ *ibid* 369-370. The trial judge relied upon the New York Family Court Act §744(b).

¹⁴¹ *ibid* 361-365.

¹⁴² *ibid* 364.

¹⁴³ *ibid* (emphasis added).

¹⁴⁴ This view was challenged in *Wilbur*, discussed in the next sub-section.

The decision in *Winship* is an example of reasoning based firmly on the PoI as a trial rule, that is to say, the thin PoI. According to Justice Brennan, the rationale for both the reasonable doubt standard and the allocation of the burden of proof to the prosecution is found in a desire to minimise wrongful convictions, so as to avoid diminishing the ‘moral force of the criminal law’.¹⁴⁵ On this view, the PoI is a means to an end which helps to ensure that erroneous outcomes in the criminal process benefit the accused, meaning that when someone actually is convicted there can be a high degree of public confidence in their guilt. This, in turn, bolsters the credibility of the criminal law and its institutions, and maintains public support for the system. Though there is no doubt value in minimising conviction of the innocent, this view is also very reductive. It ignores, for example, the role of the PoI as a general principle of the law, conditioning the state’s interactions with its citizens in a variety of pre- and post-trial measures, such as investigation, arrest, bail, and so on. It therefore reduces the value of the PoI to nothing more than a procedural device for lowering the rate of wrongful convictions.

The *Winship* judgment falls victim to an error which pervades this area of law. Namely, by relying only on the thin PoI, the decision in this case presents no guidance on how to allocate the burden of proof in a way which is coherent with the PoI. Instead, the Supreme Court opted to make the offence/defence distinction the sole determining factor in whether or not a reverse burden can be imposed. The issue with such reasoning is that there is no reason to think that this distinction tracks anything of substance, and, as will be discussed in sections 2.3.b and 2.3.c, substantive readings of the offence/defence distinction have been rejected by the Supreme Court in subsequent case law. The best view of the *Winship* rule, then, is that the PoI is a trial rule which protects the accused from having to prove any fact which is labelled as a formal element of an offence. Affirmative defences, by contrast, are unprotected, simply by virtue of their formal designation as defences. To place so much importance on a distinction which is unprincipled at best, and utterly arbitrary at worst, is a serious error. Moreover, it is an error which follows from the Supreme Court’s failure to recognise and consider the significance of the distinction between thick and thin conceptions of the PoI.

When deciding the appeal in *Winship*, it was open to the US Supreme Court to consider the extent to which the right to due process under the Fourteenth Amendment conditioned the allocation of the burden of proof. In other decisions adjudicating the limits of this right, the Supreme Court had held that it had a substantive core, with implications not just for the form of the law, but also its substance. For example, the court had elsewhere interpreted the due process clause as requiring the right to pre-trial access to a lawyer, precluding the admissibility of confessions obtained through coercion, and prohibiting ‘double jeopardy’.¹⁴⁶ As such, it was open to the court in *Winship* to read stronger substantive implications into the PoI, or at least avoid such a reliance on a purely formal and thin interpretation of the presumption with respect to reverse burdens. Recognition of the thick/thin distinction would have facilitated this, giving the court the language to express the difference between the PoI as a trial rule, and the PoI as a general norm. Had this been the case, it would have been straightforward to hold that the thick PoI, the general norm of the criminal law, had some implications for how the burden of proof should be allocated. Instead, the court regrettably remained committed to the view that the PoI is nothing more than a trial rule, and that its protections are conditional on the semantics of legislative drafting.¹⁴⁷

¹⁴⁵ *Winship* (n 1) 364.

¹⁴⁶ See *Gideon v Wainwright* 372 U.S. 335 (1963), *Brown v Mississippi* 297 U.S. 278 (1936), and *Benton v Maryland* 395 U.S. 784 (1969), respectively.

¹⁴⁷ There may have been non-legal considerations which informed the court’s approach in this case. Namely, by the

2.3.b – The Outlier: *Mullaney v Wilbur*

Not long after *Winship*, the US Supreme Court had the opportunity to revisit the issue of reverse burdens and the PoI when it heard an appeal regarding the burden of proof under the criminal law of the state of Maine in *Wilbur*.¹⁴⁸ In *Wilbur*, the statute in question was the state law on homicide. Under this law, any intentional and unlawful killing had to be considered murder, unless the accused could prove by a preponderance of the evidence that they acted ‘in the heat of passion on sudden provocation’.¹⁴⁹ If the accused could discharge this reverse burden defence, the conviction would be reduced to one of manslaughter.¹⁵⁰

Following the decision in *Winship*, the defendant in *Wilbur* appealed against his conviction for murder, arguing that the Maine statute was unconstitutional as it imposed a reverse burden with respect to the defence of provocation.¹⁵¹ The rationale, according to the Maine Supreme Judicial Court, was that murder and manslaughter constituted ‘different degrees of the single generic offence of felonious homicide’.¹⁵² In common to both offences was that the defendant had killed another person intentionally and unlawfully, with the presence of ‘malice aforethought’, i.e. premeditation, the distinguishing factor between murder and manslaughter.¹⁵³ As such, once the prosecution had proved that the accused killed someone intentionally and unlawfully, the state could rely on a presumption of malice aforethought, leading to a conviction for murder, unless the accused could ‘negate’ the presence of malice aforethought by proving provocation.¹⁵⁴ By contrast, the appellant argued that such a reverse burden defence effectively required him to disprove an element of the offence of murder, contrary to *Winship* and in violation of the PoI.¹⁵⁵

The question which fell to be considered in *Wilbur* was therefore whether or not malice aforethought was a ‘fact necessary to constitute the crime charged’, as the *Winship* rule would only preclude imposing a reverse burden if this was the case. Ultimately, the court decided that the Maine statute violated the PoI as expressed in *Winship* and held that requiring the accused to prove a defence, or else face conviction for the greater offence of murder, was

1970s the substantive reading of the 14th Amendment had fallen out of fashion, due to concerns about the separation of powers between the courts, and the federal and state governments. For more, see Marina Angel, ‘Substantive Due Process and the Criminal Law’ (1977) 9(1) *Loyola University of Chicago Law Journal* 61, 66-68.

¹⁴⁸ *Wilbur* (n 1).

¹⁴⁹ *Wilbur* (n 1) 685-687.

¹⁵⁰ Under Maine state law, murder was punishable by life imprisonment, whereas manslaughter carried a maximum sentence of 20 years.

The Maine murder statute, Me.Rev.Stat.Ann., Tit. 17, § 2651 (1964), provides:

“Whoever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life.”

The manslaughter statute, Me.Rev.Stat.Ann., Tit. 17, § 2551 (1964), in relevant part provides:

“Whoever unlawfully kills a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought . . . shall be punished by a fine of not more than \$1,000 or by imprisonment for not more than 20 years. . . .” . See *Wilbur* (n 1) 686, fn 3.

¹⁵¹ *ibid* 684-685.

¹⁵² *ibid* 688, citing *State v Wilbur*, 278 A.2d 139 (1971) (US Court of Appeals).

¹⁵³ *ibid* 687.

¹⁵⁴ *ibid*.

¹⁵⁵ *ibid* 684.

unconstitutional.¹⁵⁶ This is a surprising outcome and merits further consideration.

The first, and perhaps most significant, observation to be made about the judgment in *Wilbur* is that it utterly rejects the kind of formalism which seemed to be implicit in *Winship*. Rejecting the state of Maine's submission that the Supreme Court ought to defer to its state's definition of the crime of felonious homicide, the court held that '*Winship* is concerned with substance, rather than this kind of formalism'.¹⁵⁷ The court reasoned that, if the formal labels of offence and defence (as determined by each state legislature) were to dictate whether or not the protections of *Winship* applied, the result would completely 'undermine the interests that decision sought to protect without effecting any substantive change in its law'.¹⁵⁸ This reliance on formalism and deference to state legislatures was therefore roundly rejected in *Wilbur*.

The significance of this point relates directly to the criticism of *Winship* made in the previous sub-section. Though *Winship* appeared to refer to a purely formal offence/defence distinction, the court in *Wilbur* departed from this, preferring to inject at least some substantive meaning into the distinction. Finding malice aforethought to be an element of the offence for the purposes of the PoI, despite the state legislature and the state's highest court stating that it was not so, represents a serious expansion of the PoI's protections. Moreover, this more expansive reading of the PoI appears to be very similar to the kind of substantive due process rights discussed above in section 2.3.a. This suggests that the court was aware of the drawbacks of a purely formal interpretation of the offence/defence distinction, given that *Winship* makes this distinction determinative of whether or not a reverse burden can be imposed. This hints at a desire to draw on a thicker understanding of the PoI, but, again, there is no discussion of the PoI as a general norm or principle; it is still understood only as a trial rule.

Though the *Wilbur* judgment certainly offers more robust protection for the accused and the PoI, it nevertheless remains problematic. A particular drawback of the approach in *Wilbur* is that the court refrains from recognising that the PoI ought to generally preclude imposing a reverse burden on any issue which effectively makes the accused prove their innocence. Though their reasoning suggests they may have some sympathy for such a view, the court still declined to endorse this, viewing the PoI as only a trial rule. Indeed, a closer reading of *Wilbur* reveals that a crucial consideration in the judgment was the fact that the Maine legislature had introduced malice aforethought as the factor distinguishing murder from manslaughter. As such, the Supreme Court argued that the state must bear the burden of proving malice aforethought beyond a reasonable doubt, because this had a bearing on the 'criminal culpability' of the accused.¹⁵⁹ This is close to recognising that the PoI is much more than a trial rule, but still stops short of such a full-throated endorsement of a thicker notion of the PoI.

The problem with the *Wilbur* court's approach is that it is not obvious how its conclusions follow from an application of the PoI as understood in *Winship*. Though it is surely correct to hold that if the state wants to attach importance to something like malice aforethought it must bear the burden of proving it, it is not clear how the relatively narrow holding in *Winship* supports such a view. Justice Rehnquist, writing for the unanimous court in *Wilbur*, states that the increased stigma and heavier punishment, combined with the increased risk in wrongful convictions which accompanies reverse burdens, dictate against interpreting the PoI as prohibiting reverse burdens only on the formal elements of an offence. But one could easily reply that the requirements of

¹⁵⁶ *ibid* 704.

¹⁵⁷ *ibid* 699.

¹⁵⁸ *ibid* 698.

¹⁵⁹ *ibid*.

federalism (meaning states are the primary arbiters of the criminal law) and the value of the separation of powers (meaning that legislative definitions of an offence should be respected) militate *in favour* of such a restrictive reading of *Winship*. Justice Rehnquist's reasoning cannot explain why these values are more important if the PoI is simply a trial rule.

The missing step in Justice Rehnquist's argument is a reference to what I call the thick PoI. Once the meaning of the PoI is understood as comprising not only a trial rule, but also a general norm of the criminal law, it becomes much more obvious why the factors Justice Rehnquist cites should prevail over considerations of federalism and the separation of powers. Specifically, the need to protect the accused from being wrongfully stigmatised, convicted, and punished, flows from the thick PoI – the general norm which requires the state to presume the innocence of its citizens, and protects individuals from having to prove that they are innocent.

This deeper principle, concerned with the fundamental rights of the accused, is clearly weightier than a simple trial rule such as that expressed in *Winship*. What this demonstrates is that the thick/thin distinction matters in any analysis of how to reconcile reverse burdens with the PoI. In the case of *Wilbur*, recognition of the distinction would have put the decision on firmer ground. And though it may be argued that Justice Rehnquist was, in fact, referring to a thicker notion of the PoI, the criticism still stands that this should have been made explicit. Indeed, as will be shown in the next sub-section, the expansive reading of the PoI relied upon in *Wilbur* would survive for less than two years before falling out of favour.

2.3.c – Orthodoxy Reaffirmed: *Patterson v New York*

In 1977, the US Supreme Court heard an appeal from the state of New York, where the appellant challenged his conviction for murder, in light of the decision in *Wilbur*.¹⁶⁰ In *Patterson*, the appellant had been convicted for murder under New York state law, which defined murder as comprising two elements: intent to kill and causation of death.¹⁶¹ Under New York law, there was an affirmative defence of 'extreme emotional disturbance' available to the appellant; however, this defence required him to prove extreme emotional disturbance by a preponderance of the evidence.¹⁶² In *Patterson*, the appellant had tried and failed to discharge this reverse burden, and was therefore convicted of murder. Patterson submitted that, in light of the judgment in *Wilbur*, the reverse burden defence was incompatible with the PoI, and therefore unconstitutional.¹⁶³

The Supreme Court dismissed this appeal, distinguishing *Wilbur*, and expressly rejecting the argument that *Wilbur* required the state to prove any fact which was relevant to blameworthiness or the imposition of punishment.¹⁶⁴ Instead, the court emphasised that the right to due process required 'only the most basic procedural safeguards'¹⁶⁵, and therefore the only relevant question was whether the New York statute required the accused to disprove an element of the offence.¹⁶⁶ This was held to be the distinguishing factor between *Wilbur* and *Patterson*: in the former, malice aforethought was presumed against the accused, and the defence of provocation served to rebut this presumption, whereas in the latter the defence of extreme emotional disturbance did not

¹⁶⁰ *Patterson v New York* (n 1).

¹⁶¹ *ibid* 198.

¹⁶² *ibid*.

¹⁶³ *ibid* 200-201.

¹⁶⁴ *ibid* 214-215.

¹⁶⁵ *ibid* 210.

¹⁶⁶ *ibid* 206-207.

negate either of the two elements of murder under New York law.¹⁶⁷ Thus, the court concluded that only in the case of *Wilbur* was the reverse burden an infringement of the PoI under US law.

Coming just two years after *Wilbur*, this judgment represents an abrupt *volte-face* for the US Supreme Court. It is evident that the court thought it necessary to give a thorough explanation for its seemingly contradictory decision to strike down the state law in Maine in *Wilbur* but affirm the constitutionality of the reverse burden in *Patterson*. This is clear from the lengthy justification offered for the diverging outcomes. However, the court's reasoning has serious flaws. Moreover, as will become clear, the outcome in *Patterson*, which has shaped US law ever since, could have been avoided if the court had paid sufficient attention to the thick/thin distinction, and to a thicker understanding of the PoI under US law.

The first error in this judgment is that it is overly deferential to state legislatures, at the expense of individual rights. Indeed, at the heart of the court's decision in *Patterson* is the notion of deference to state legislatures. As Justice White stated:

It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government...and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States.¹⁶⁸

Taking this as a starting point, the test applied by the Supreme Court was that set out in the earlier case of *Speiser v Randall*, which provided that a provision of state law would not violate the due process clause of the US Constitution unless it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental'.¹⁶⁹ Setting the bar so high may have been an inevitable consequence of US law's federal structure. Yet, if the PoI does not rank among the most fundamental and sacred legal traditions of the United States, it is difficult to imagine what *would* qualify for the protection of the right to due process. Perhaps anticipating this criticism, Justice White provides a history of different states' approaches to issues of procedure and allocating the burden of proof, noting that the Supreme Court has not historically intervened in such cases.¹⁷⁰ Nevertheless, it is no defence of the status quo to rely on a privilege state power over individual rights simply because it is traditional.

The second error of the *Patterson* court is more fundamental. In simplest terms, the problem with this judgment is that it rests on an extremely thin conception of the PoI. Following the reasoning in *Patterson*, one might conclude that the PoI is nothing more than a requirement for the state to prove the elements of an offence beyond a reasonable doubt. Given that, on the view expressed in *Patterson*, these elements will include only those facts which the legislature decides to designate as elements of an offence, the requirements of the PoI are therefore very minimal.

On this account, the PoI becomes 'an exercise in arid formalities', concerned only with the formal labels attached to certain facts.¹⁷¹ As Justice Powell, dissenting from the majority, wrote, though this approach might leave the letter of *Winship* and *Wilbur* intact, 'little of the spirit survives'.¹⁷² This comment recognises the same error to which I am referring: whether

¹⁶⁷ *ibid* 207.

¹⁶⁸ *ibid* 201 (citations omitted).

¹⁶⁹ *Speiser v Randall* 357 U.S. 513, 523.

¹⁷⁰ *Patterson* (n 1) 202-205.

¹⁷¹ *ibid* 224 (Justice Powell, dissenting).

¹⁷² *ibid* 223. It is worth noting that the *Patterson* court declined to overrule either *Winship* or *Wilbur*.

characterised as a thicker conception of the PoI, or as the ‘spirit’ of the PoI, the fact remains that something crucial is missing from the judgment in *Patterson*. This is the fundamental problem with this case: by reducing the PoI to nothing more than a formalistic trial rule, the court in *Patterson* ignores the deeper problem, which is that reverse burdens offend something essential about the general norm that everyone is presumed innocent until proven guilty. This general norm, which I refer to as the thick PoI, must be a consideration in reconciling reverse burdens and the PoI. To ignore the thick/thin distinction, reduce the PoI to only a trial rule, and refuse to contemplate how reverse burdens fit with the thick PoI was a judicial error of the highest order.

In spite of this, *Patterson*, *Wilbur*, and *Winship* all remain good law. Yet the *Patterson* interpretation of the PoI appears to have found the most favour, especially with more conservative commentators.¹⁷³ All of this could have been avoided, if the court had simply directed their minds to the thick/thin distinction, and to the thick PoI’s requirements with respect to allocating the burden of proof.

2.4 – Reverse Burdens under Canadian Law

Having established the position of US and English law with respect to reverse burdens, this section will briefly explain the prevailing approach to reverse burdens in Canadian law following the case of *Whyte*.¹⁷⁴ The logic of Dickson CJ in *Whyte* is appealing in its simplicity: the only factor relevant to whether or not a reverse burden is compatible with the PoI is whether it allows for the accused to be convicted despite reasonable doubt as to their guilt.¹⁷⁵ Unfortunately, the simplicity of the Canadian approach masks a basic error in understanding the operation of the threshold consideration imposed on reverse burdens by the thin PoI. As this section’s analysis of the Canadian approach will show, on any reading of *Whyte* the approach incorrectly characterises the thin PoI by interpreting it too expansively. As a result of this error, the Canadian approach will ultimately be rejected.¹⁷⁶

As stated above, the rule in *Whyte* is fairly straightforward: if a reverse burden allows for the accused to be convicted in spite of reasonable doubt as to their guilt it breaches the PoI. Though the court in *Whyte* then goes on to consider whether or not this breach is ‘salvaged’ by s 1 of the Canadian Charter of Rights and Freedoms, I do not discuss this further here because this is a general test of constitutionality under Canadian law, rather than part of the assessment of reverse burden compatibility.¹⁷⁷ Some brief reflection on this approach, then, leads to the realisation that virtually every reverse burden will be judged incompatible under this rationale. It bears emphasising here that placing a persuasive burden on the accused necessarily creates the possibility that they can adduce evidence that is sufficient to raise a reasonable doubt, but still falls short of the standard necessary to discharge their burden of proof. As such, the rationale in *Whyte* amounts to an absolute ban on reverse burdens, justified by reference to the (thin) PoI.

Under the Canadian approach there is one situation in which a reverse burden supposedly will not fall foul of the PoI. Before going further, it is worth examining this exception in order to

¹⁷³ For example, see RJ Allen, ‘Mullaney v Wilbur, the Supreme Court, and the Substantive Criminal Law – An Examination of the Limits of Legitimate Intervention’ (1977) 55 Texas Law Review 269.

¹⁷⁴ *R v Whyte* [1988] 2 S.C.R. 3.

¹⁷⁵ *ibid* 18.

¹⁷⁶ This is discussed in greater detail in Chapter 5, section 5.4.

¹⁷⁷ Section 1 of the Charter saves any provision which otherwise infringes a fundamental right, provided the measure can be shown to be ‘sufficiently important to permit overriding the constitutionally protected right or freedom’ and is ‘reasonable and demonstrably justified’, per Dickson CJ in *Whyte* (n 176) 20. For a fuller explanation of this test and its application to the facts of *Whyte*, see *ibid* 20–27.

determine what impact it has on the general rule of the Canadian approach. The exception provided by the court in *Whyte* applies only to a situation in which failure to discharge a reverse burden ‘leads inexorably to the conclusion’ that an essential element of the offence is made out.¹⁷⁸ According to Dickson CJ, this is simply a way of restating the proposition that ‘a statutory presumption infringes the presumption of innocence if it requires the trier of fact to convict in spite of a reasonable doubt’.¹⁷⁹ A statute imposing a reverse burden can therefore avoid incompatibility if, on proof of the other elements of the offence ‘it would be unreasonable for the trier of fact not to be satisfied beyond reasonable doubt’ that the essential elements required for guilt are all made out.¹⁸⁰ There is something suspect about this reasoning, however, and I now turn to examine it in some detail.

To begin with, the test in *Whyte* is an odd way of describing the conditions for PoI compatibility. Essentially the approach seems to boil down to a simple two-pronged test. First, a court must ask whether the reverse burden allows for conviction in spite of reasonable doubt – as mentioned above, the answer to this question will virtually always be yes. The court would then move to the second prong of the test, which provides a means of rehabilitating the reverse burden’s PoI compatibility. By the court’s reasoning in *Whyte*, a statutory provision which satisfies the exception in this second prong of the test is PoI-compatible, precisely because it helps to prove that an essential element of the offence is made out, therefore leaving no reasonable doubt to the accused’s guilt. The most telling part of the judgment, which confirms that this is the court’s thinking, is Dickson CJ’s reference to the earlier Canadian authority of *Vaillancourt*.¹⁸¹

In the relevant passage from *Vaillancourt*, the court was tasked with considering the PoI-compatibility of a presumption against the accused with respect to intent in the crime of murder. There, the defendant was appealing against a conviction for second degree murder under the Canadian version of the felony-murder rule.¹⁸² This rule provided that if the accused caused death in the course of committing another offence (here, robbery) and the offence had been committed with a weapon, they were to be found guilty of murder. The accused in *Vaillancourt* challenged this rule, saying it was incompatible with the PoI because it allowed for his conviction in the absence of an essential element of the offence of murder – namely, intent to kill.¹⁸³ The court agreed with this submission, and held that the rule was incompatible because it eliminated consideration by the jury of whether or not the accused acted with intent to kill, despite intent to kill being an essential element of the crime of murder under Canadian law.¹⁸⁴

The only way the incompatibility of this rule could have been avoided, according to Lamer J in *Vaillancourt*, was if what the prosecution had to prove could leave no reasonable doubt that the essential elements of the offence were made out.¹⁸⁵ But on the facts in *Vaillancourt* this requirement was clearly not met, as possessing a weapon and participating in a robbery which led to the death of the victim did not prove beyond a reasonable doubt that the accused had acted with intent. The requisite connection between the proof of the substituted elements (causing death and possessing a weapon) and the essential element (intent to kill) was simply not

¹⁷⁸ *ibid* 19 (Dickson CJ).

¹⁷⁹ *ibid*.

¹⁸⁰ *ibid*.

¹⁸¹ *R v Vaillancourt* [1987] 2 SCR 636 (Supreme Court of Canada).

¹⁸² The rule was set out in the Canadian *Criminal Code*, RSC 1985, c C-46, s 213(d) at the time; it has since been repealed.

¹⁸³ *R v Vaillancourt* (n 181) 642–643. Intent to kill was (and remains) an element of the crime of murder under the Canadian criminal code, see *Criminal Code* (n 23) s 229.

¹⁸⁴ *Vaillancourt* *ibid* 657.

¹⁸⁵ *ibid* 656 (Lamer J).

established. Reasoning by analogy, Dickson CJ extended this same logic to reverse burdens in *Whyte* when creating the exception to his otherwise flat ban on reverse burdens.¹⁸⁶

Perhaps the extension of the ratio of *Vaillancourt* to the issue of reverse burden compatibility seems intuitively correct, especially given that presumptions and burdens of proof are commonly understood as being intimately related.¹⁸⁷ But if the only time a reverse burden will be PoI-compatible is when it ‘leads inexorably’ to the conclusion that an essential element of the offence is made out, then one must ask when a reverse burden can *ever* have this relationship to an essential element of an offence. Admittedly, there are some circumstances where failure to discharge a reverse burden may tend to *suggest* that an accused is guilty. Indeed, this type of intuition links the ratio of *Vaillancourt* to that of *Wilbur*, as discussed above: both take proof of something other than intent (participation in a felony, or the act of unlawful killing, respectively) as proof of intent.

But the threshold set in *Whyte* is clearly much higher than mere suggestion: failure to discharge the burden must render it unreasonable for the jury not to find that the accused has been proven guilty beyond reasonable doubt. What soon becomes clear is that the only time this can occur is when the reverse burden pertains to the logical inverse of an element of the offence. However, a problem with such a reverse burden is immediately apparent: it breaches the thin PoI. Specifically, a reverse burden on the inverse of an offence breaches the threshold consideration of the thin PoI because it requires the accused to disprove an element of the offence. An example will help flesh out the significance of this point.

Take the definition of theft, which, under English law, is defined as a dishonest appropriation of property belonging to another, with intention to permanently deprive.¹⁸⁸ These elements must be proved by the prosecution beyond a reasonable doubt if someone is to be convicted of theft under English law. Imagine, however, that Parliament decides to add a defence to theft and to make this defence subject to a reverse burden. Parliament calls this defence ‘the honesty defence’ and provides that ‘it shall be a defence for the defendant to prove that the property in question was taken honestly’. As a matter of logic, one cannot prove honesty without disproving dishonesty, and vice versa.

The effect of Parliament’s fictional honesty defence, in requiring the accused to *prove* the opposite of an element of the offence of theft, then, is tantamount to making them *disprove* that element. Yet, as was established above, the thin PoI prohibits imposing a persuasive burden on the accused with respect to any element of an offence. This prohibition is grasped more easily when represented in symbolic logic, where (D) stands for dishonesty and (H) for honesty. As honesty is the negation of dishonesty, and vice versa, we can start with two straightforward identities: $[D = \sim H]$ and $[H = \sim D]$. If D is an element of the offence, then the prosecution must prove D beyond a reasonable doubt. A corollary of this is that the prosecution must *disprove* the negation of D, i.e. they must prove $\sim(\sim D)$. Yet, the hypothetical defence here requires the accused to prove H, and $H = \sim D$. Therefore, the reverse burden effectively requires the accused to disprove an element of the offence, which is precluded by the thin PoI.¹⁸⁹

¹⁸⁶ *R v Whyte* (n 174) 18-19 (Dickson CJ).

¹⁸⁷ On this relationship, see Harold A Ashford and D Michael Risinger, ‘Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview’ (1969) 79 *The Yale Law Journal* 165.

¹⁸⁸ Theft Act 1968, s 1.

¹⁸⁹ For more on this formal requirement, see Federico Picinali, ‘Innocence and Burdens of Proof in English Criminal Law’ (2014) 13 *Law, Probability and Risk* 243, 254.

Returning to the Canadian approach, it is clear that something has gone wrong. Despite its best intentions, the Supreme Court of Canada has come to the puzzling conclusion that any reverse burden which breaches the PoI by allowing conviction in spite of reasonable doubt, can only be made compatible if it breaches the PoI by making the accused disprove an element of the offence. Yet, upon trying to untangle the reasoning of the Canadian approach it becomes clear that the whole thing unravels. In light of the critique I have offered of the Canadian approach, anyone committed to this rationale must accept one of the following propositions: either i) the accused *can* be made to disprove an element of an offence, or ii) the decision in *Whyte* is wrong, and the PoI in fact bans reverse burdens absolutely because they allow conviction in spite of reasonable doubt.

2.5 – Conclusion

This chapter has critically examined a variety of different approaches to reconciling reverse burdens with the PoI, by courts in England and Wales, the US, and Canada. Having reviewed the treatment of reverse burdens in key cases in each jurisdiction, it is appropriate to summarise the respective approaches as follows.

In England and Wales, the approach is to consider reverse burdens as derogations from the PoI, with the most pressing question being whether an individual reverse burden is justified in the circumstances. As was shown above, this trend began with *Woolmington* and has evolved over time, culminating in *Sheldrake*, which explicitly endorsed a completely *ad hoc* approach to assessing reverse burdens. This approach was criticised above for failing to take any account of the thick PoI, relying only a thin understanding of the PoI, where the presumption is nothing more than a trial rule. Moreover, this problem is compounded in English law because of its expansive understanding of what constitutes a justifiable exception to this thin trial rule. As a result, the approach under English law is flawed, and is best understood as an example of what happens when the thick/thin distinction, and the thick PoI, are ignored.

In the US, the approach is even more straightforward than under English law. Following the case of *Winship*, as reaffirmed in *Patterson*, the only factor which determines whether or not a given reverse burden breaches the PoI is whether the reverse burden is attached to an element of an offence or to a separate defence. This distinction is understood in US law as being purely formal, meaning that there is not necessarily any substantive difference between elements of offences and defences. As such, this approach was criticised for holding the protections of the PoI hostage to such an arbitrary distinction. Again, the US approach was shown to be flawed, not only for its reliance on formalism, but because it too ignores the thick/thin distinction and the thick PoI. Though there is some mention of deeper principles in US case law on reverse burdens, the thinking of courts in the US is nevertheless confined to a minimalist understanding of the PoI as a trial rule applying to the formal elements of an offence only. As such, the US approach is also not a desirable model to follow.

Finally, this chapter examined Canadian law's approach to reconciling reverse burdens and the PoI. Under this absolutist approach, Canadian law was found to virtually ban reverse burdens because they allow for the accused's conviction in spite of reasonable doubt as to guilt. Although this method was praised for avoiding the formalism of US law and the *ad hoc* dilution of the PoI found in English law, it was still argued that the Canadian approach did not reach its conclusions for the right reasons. Specifically, by relying on the standard of proof to justify a ban on reverse burdens the Canadian approach has still failed to engage with the core of the thick PoI, which

relates to which party must prove guilt or innocence, rather than to what standard is required. Thus the Canadian approach will not be adopted for the purposes of this thesis, although it does at least represent an improvement on English and US law.

With the relevant position of each of the three legal systems now summarised, it is clear that what is needed is a way to evaluate reverse burdens in light of both the thick and thin conceptions of the PoI. Moreover, it is equally clear that the prevailing approaches in the case law of England and Wales, the US, and Canada, do not provide a blueprint for such a method. In Chapter 4, I will expand on this point, proposing a new method based on recognising the thick/thin distinction and the importance of the thick PoI in assessing whether a reverse burden coheres with the PoI. Before this, however, Chapter 3 will first consider several more approaches offered by legal scholars writing about reverse burdens and the PoI. This will ensure that a broad survey of existing approaches is conducted, in order to search for any further problems which must be remedied. It is to this task that the thesis now turns.

Chapter 3: Existing Approaches to Reverse Burdens in Legal Scholarship

3.1 – Overview

The previous chapter has examined several competing approaches which courts have taken to reconciling reverse burdens with the PoI. In Chapter 3, I continue this review of existing approaches, but turn to evaluate those which have been put forward by various legal scholars writing about the jurisdictions of England and Wales and the US. A variety of different approaches are therefore surveyed below, with a view to both explaining some of the different theories which scholars have offered, but also critiquing these to show that none is entirely adequate for the purposes of this thesis. As will be shown, though much has written about reverse burdens and the PoI, no scholar to date has fully capture what I call the thick/thin distinction, nor fully considered how the thick PoI ought to figure in determining how the burden of proof is allocated.

Previous reviews of the literature in this area of law have tended to divide scholars into two opposing camps, based on whether they subscribe to either a ‘procedural’ or ‘substantive’ understanding of the PoI.² Following this taxonomy, a ‘proceduralist’ conception of the presumption of innocence can be defined as one which ‘only concerns the proof of facts at trial’.³ Thus a purely procedural account of the PoI would simply require that every element of an offence be proved beyond a reasonable doubt in order to secure a conviction.⁴ On the issue of what constitutes an element of an offence, proceduralists can be split into two camps. First, ‘restrictive proceduralists’ contend that ‘a fact qualifies as an element of the crime if it is regarded as such by the lawmaker’.⁵ Under restrictive proceduralism, then, the scope of the presumption is determined entirely by the ‘formalistic criterion’ of whether or not Parliament has chosen to classify some fact as an element of a crime or as a defence.⁶ By contrast, ‘expansive proceduralists’ consider ‘any fact upon which the law relies for the determination of punishment’ to be an element of a crime and thus subject to the presumption’s requirement for allocating the burden of proof to the prosecution.⁷

In direct opposition to the procedural version of the PoI outlined above, a substantive conception of the presumption ‘does not merely govern the proof of facts at trial; it also has implications for criminalization’.⁸ As such, a ‘substantivist’ would consider the presumption violated whenever someone is ‘convicted of conduct that should not be subject to punishment’.⁹ Whether or not

¹ The material in this chapter draws upon an article which I have previously published on this same topic and reproduces some of its content. See, Jackson Allen, ‘Rethinking the relationship between reverse burdens and the presumption of innocence’ (2021) 25(2) *International Journal of Evidence and Proof*, 115.

² Lippke *Taming the Presumption of Innocence* (2016) 1, and Chapter 1 more generally; Federico Picinali, ‘Innocence and Burdens of Proof in English Criminal Law’ (2014) 13 *Law, Probability and Risk* 243, 245; Federico Picinali ‘The Presumption of Innocence: A Deflationary Account’ (2021) 84(4) *Modern Law Review* 708.

³ *ibid* 245.

⁴ *ibid* 246.

⁵ *ibid*.

⁶ *ibid* 247.

⁷ *ibid* 246. The main expansive proceduralist account of the PoI is that offered by Andrew Stumer in A Stumer, *The Presumption of Innocence: Evidential and Human Rights Perspectives* (Hart 2010).

⁸ Picinali (n 2) 245.

⁹ *ibid*.

some conduct should be subject to punishment is determined by reference to an external set of principles.¹⁰ The upshot of a substantive account of the presumption of innocence is that courts have the power to decide whether or not the act in question should be considered criminal, irrespective of Parliament's form of words. Understood this way, a substantive presumption of innocence 'enquires into the fundamental nature of criminality'.¹¹ It also confers considerable power on judges, which perhaps explains why substantivism has achieved 'more traction in systems incorporating substantive judicial review' of legislation.¹²

For reasons which will be fleshed out more fully in Chapter 4, I do not adopt the procedural/substantive distinction here, nor do I find it desirable to commit to *either* a procedural *or* a substantive view of the PoI in general. Rather, the better view is that the PoI has both substantive and procedural dimensions, and that the PoI is not simply one or the other. As such, I do not propose to adopt this distinction as a meaningful basis for choosing between different conceptions of the PoI. Nevertheless, and given the prevalence of these terms in the literature, I will use the labels to refer to the views of those scholars who *do* understand the PoI as either procedural or substantive.

The remainder of this chapter is divided into three further sections. Section 3.2 begins by surveying the views of several scholars, primarily writing about the PoI under English law, with regard to reverse burdens. Specifically, this section will examine the scholarship of Roberts, Picinali, Duff, Tadros and Tierney, and Stewart.¹³ These scholars have been chosen because they have written most extensively about the PoI and reverse burdens, and because they represent a wide variety of different ways in which the connection between the PoI and reverse burdens can be understood. Moreover, these scholars and their work represent an appropriate cross-section of the multitude of different approaches which can be taken to connecting the PoI to reverse burdens. By canvassing such a variety of different approaches, section 3.2 will demonstrate that none is entirely satisfactory as an answer to the overarching research question of this thesis, which seeks to reconcile reverse burdens and the PoI.

Following this survey of the scholarly literature on reverse burdens, section 3.3 then turns to consider the proposal made by the Criminal Law Revision Committee (CLRC), with regard to how to allocate the burden of proof in a way which coheres with the PoI. It will be shown that, as with the scholarship surveyed in the preceding section, this reform proposal has also failed to

¹⁰ *ibid.*

¹¹ David Hamer, 'The Presumption of Innocence and Reverse Burdens: A Balancing Act' (2007) 66 Cambridge LJ 142, 145.

¹² Roberts, 'Loss of Innocence in Common Law Presumptions' (2014) 8(2) Criminal Law and Philosophy 317.

¹³ Antony Duff 'Strict Liability, Legal Presumptions, and the Presumption of Innocence.' in AP Simester (ed), *Appraising Strict Liability* (OUP 2005); Antony Duff *Answering for Crime - Responsibility and Liability in the Criminal Law* (Hart Publishing 2007); Antony Duff 'Presuming Innocence' in Lucia Zedner and Julian Roberts, *Principles and Values in Criminal Law and Criminal Justice* (OUP 2012); Antony Duff 'Who Must Presume Whom to Be Innocent of What' (2013) 42 Neth. J. Legal. Phil. 170; Federico Picinali 'Innocence and Burdens of Proof in English Criminal Law' (2014) 13 Law, Probability and Risk 243; Federico Picinali 'The Presumption of Innocence: A Deflationary Account' (2020) 84(4) Modern Law Review 708; Paul Roberts, 'Taking the Burden of Proof Seriously' [1995] Criminal Law Review 783; Paul Roberts 'Drug Dealing and the Presumption of Innocence: The Human Rights Act (Almost) Bites' (2002) 6 The International Journal of Evidence & Proof 17; Paul Roberts 'The Presumption of Innocence Brought Home? Kebilene Deconstructed' (2002) 118 Law Quarterly Review 41; Paul Roberts 'Strict Liability and the Presumption of Innocence: An Exposé of Functionalist Assumptions' in AP Simester (ed), *Appraising Strict Liability* (OUP 2005) Hamish Stewart, 'The Right to Be Presumed Innocent' (2014) 8 Criminal Law and Philosophy 407; Victor Tadros, 'Rethinking the Presumption of Innocence' (2007) 1 Criminal Law and Philosophy 193; Victor Tadros, 'The Ideal of the Presumption of Innocence' (2014) 8 Criminal Law and Philosophy 449; Victor Tadros and Stephen Tierney, 'The Presumption of Innocence and the Human Rights Act' (2004) 67 The Modern Law Review 402.

fully take account of the thick PoI and has stopped short of the kind of detailed analysis required for the purposes of answering this thesis's overarching research question. Finally, section 3.4 concludes the chapter, noting that no existing approach can be adopted as is.

3.2 – Reverse Burdens in Legal Scholarship (I)

3.2.a – Paul Roberts: Purely Procedural

Paul Roberts argues that the PoI is a procedural right that requires the prosecution to prove every element of the offence beyond a reasonable doubt at trial. On his view, the PoI would therefore not apply to affirmative defences, which Roberts views as outside the scope of the presumption.¹⁴ Roberts' approach is notably simple and straightforward to apply. It is also virtually identical to the understanding of the PoI which is espoused in the US cases of *Winship* and *Patterson*.¹⁵ This key feature of restrictive proceduralism is widely criticised by substantivists and other scholars, who argue that it is 'mechanical'¹⁶ and overly reliant on the 'essentially formal distinction'¹⁷ between a defence and an element of an offence. As Professor Glanville Williams put it: 'What we think of as the definition of an offence and what we call a defence can only be regarded as depending largely upon the accidents of language, the convenience of legal drafting, or the unreasoning force of tradition'.¹⁸ Put differently, this argument boils down to a claim that Parliament's choice of drafting language is at best unrelated to where it wants to allocate the burden of proof in criminal cases. As a result, using the formal distinction between a defence and an element of an offence to determine whether or not the fundamental protections of the presumption are engaged is seen as unpalatable. Indeed, if this criticism is true, then restrictive proceduralists like Roberts are essentially hostages to Parliament's language in drafting statutes.

Roberts himself is aware that his approach risks 'slipping into a sterile formalism'.¹⁹ However, he forcefully disagrees with the notion that his interpretation of the PoI equates to such a mechanical formalistic process.²⁰ On the contrary, Roberts argues that the language used by Parliament in drafting legislation does not '*dictate* the outcome of statutory interpretation'.²¹ Rather, the language and structure of a particular statute should be treated as 'key indicia of parliamentary intent'.²² Thus Roberts claims not to view the formal distinction between element of an offence and defence as fully determining whether or not the presumption is engaged in any set of circumstances. Rather, he views statutory interpretation as a 'dynamic conversation between legislature and courts'.²³ Roberts' description of statutory construction, seems plausible, especially with the advent of the Human Rights Act (HRA) 1998, which has given UK courts the power to interpret legislation in a way which is compatible with certain fundamental rights, regardless of the actual wording of the statute.²⁴ However, it is doubtful whether this alone can rescue Roberts' approach from the criticism levelled at him by his critics.

¹⁴ Roberts, 'The Presumption of Innocence Brought Home? Kebilene Deconstructed' and 'Drug Dealing and the Presumption of Innocence' (n 13).

¹⁵ These were discussed in Chapter 2, sections 2.3a and 2.3c above.

¹⁶ Hamer (n 11).

¹⁷ John Calvin Jeffries, Jr. and Paul B Stephan III, 'Defences, Presumptions, and Burden of Proof in Criminal Law' (1979) 88 Yale Law Journal 1325, 1333.

¹⁸ Glanville Williams, 'Offences and Defences' (1982) 2 Legal Studies 233.

¹⁹ Roberts, 'Drug Dealing and the PoI' (n 13).

²⁰ See Roberts, 'Strict Liability and the PoI: An Exposé of Functionalist Assumptions' (n 13).

²¹ Roberts, 'Loss of Innocence in Common Law Presumptions' (n 12).

²² *ibid.*

²³ *ibid* 333.

²⁴ Human Rights Act 1998, s 3. See also, *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

To see why this is the case, one need only consider that Roberts has previously admonished senior judges' tendency to construe criminal statutes in light of their underlying aims. A particularly forceful criticism of this nature was offered in Roberts' critique of the early post-HRA reverse burden case of *Kebilene*.²⁵ Writing in this context, Roberts was highly critical of the judges in *Kebilene* for falling 'prey to a basic conceptual confusion about the nature of criminal laws' by confusing 'the *definition* of a criminal offence with the *wrong* at which it aims'.²⁶ In *Kebilene*, the Divisional Court held that in order to understand what constituted the elements of the offence of possessing articles with a terrorist purpose, one had to refer to Parliament's intent in creating this criminal offence.²⁷ However, the wording of the statute in question made no express mention of a requirement for an actual terrorist purpose, requiring only 'circumstances giving rise to a reasonable suspicion' of such a purpose.²⁸ Nevertheless, Lord Bingham, writing for a majority of the Divisional Court, held that 'the crucial ingredients of the offence are in reality possession (the *actus reus*) and the terrorist purpose (the *mens rea*)'.²⁹ Lord Bingham then held that, as the reverse burden in *Kebilene* relieved the prosecution of having to prove a terrorist purpose, the offence in question violated the PoI 'in a blatant and obvious way'.³⁰

Roberts' criticism of the court in *Kebilene* therefore raises the question: if this type of interpretation is a misuse of judicial powers of statutory construction, then how could a court ever have the type of 'dynamic conversation' with the legislature that Roberts envisions? Put differently, if judicial deference means that it is not open to a judge to interpret a criminal statute in light of its underlying aims, then how can the process be anything other than mechanical? It is not clear how Roberts would respond to such a criticism. What is clear, however, is that if Roberts' view cannot actually accommodate greater powers on the part of judges to interpret legislation in accordance with its underlying aims, then the critique of his approach to reverse burdens still stands. As such, Roberts' purely procedural understanding of the PoI must be recognised for what it is: a simple, straightforward, but extremely formalistic trial rule. In light of this, it is clear that Roberts' approach does not lend itself to answering the overarching research question of this thesis, which seeks to know how a reverse burden can be used in a way which coheres with the PoI as both a trial rule *and* a general norm. Though Roberts can answer the first part of the question, his approach restricts the PoI to its 'thin' conception only. It is therefore silent on the issue of when it will be coherent with the thick PoI to impose a reverse burden on the accused.

Despite his focus on the PoI as a trial rule, Roberts does appear to recognise the thick/thin distinction, and to acknowledge the existence of a thicker version of the PoI. This is implicit in his contention that the PoI is a 'complex doctrine of political morality from which *Woolmington*, along with a raft of other important procedural rules and principles, are derived'.³¹ In this important sense, Roberts clearly differentiates himself from other proceduralists such as Schwikkard, who contend that the presumption of innocence refers only to a trial rule regulating the burden and standard of proof.³² Indeed, Roberts unequivocally renounces this line of

²⁵ Roberts, 'Kebilene Deconstructed' (n 13); *R v DPP, ex p. Kebilene* [2000] 2 AC 326.

²⁶ Roberts, 'Kebilene Deconstructed' (n 13) 53.

²⁷ *Kebilene* (n 25) 344 (Lord Bingham) (DC).

²⁸ Prevention of Terrorism (Temporary Provisions) Act 1989, s 16A (1).

²⁹ *Kebilene* (n 25) 344 (Lord Bingham) (DC).

³⁰ *ibid.*

³¹ Roberts, 'Loss of Innocence in Common Law Presumptions' (n 12) 318.

³² See PJ Schwikkard, 'The Presumption of Innocence: What is it?' (1998) *South Africa Journal of Criminal Justice* 396.

thinking, calling it a ‘tempting fallacy’.³³ Rather, according to him, the allocation of the burden of proof to the requisite standard ‘finds its normative justification’ *in* the PoI.³⁴ Unfortunately, Roberts does not offer any more than this by way of explaining what else is required by the PoI as a moral-political doctrine. Moreover, though he implicitly recognises that the PoI is more than just a trial rule, his analysis of reverse burdens and their relationship with the PoI is still couched solely in terms of the PoI *qua* trial rule. As such, Roberts’ approach, though useful for its recognition of the thick PoI, does not go far enough in its analysis of how the thick PoI might connect to the issue of how to allocate the burden of proof.

3.2.b – Federico Picinali and the Deflated PoI

Picinali offers another avowedly procedural interpretation of the PoI, firmly rejecting any notion that the presumption is a substantive legal norm.³⁵ Instead, Picinali conceives of the PoI as a procedural norm which requires the prosecution to prove every ‘constitutive fact’ of a given offence against the accused in order to secure conviction.³⁶ Constitutive facts, on Picinali’s account, refer to those facts which are necessary to hold the accused criminally responsible for the offence in question.³⁷ Picinali goes on to note that his concept of constitutive facts ‘is not coextensive with the concept of the elements of the offence’, nor does it ‘track the formalistic divide’ between offence and defence.³⁸ Rather, the constitutive facts which the PoI requires the prosecution to prove are those which bear on the accused’s criminal responsibility. By extension, Picinali also claims that the PoI forbids imposing a reverse burden on any ‘overlapping facts’, that is to say, any facts which negative the constitutive facts.³⁹

Picinali’s deflationary view of the PoI puts an interesting and novel spin on the more traditional proceduralist vision of the PoI offered by Roberts. By rejecting formalism in favour of substance, Picinali is able to avoid the criticism that his approach to reverse burdens is too mechanical and reliant on the formal offence/defence distinction. Moreover, his conclusions about reverse burdens appear intuitively correct – the PoI should forbid the accused from having to prove that they are *not* criminally responsible, just as much as it should require the prosecution to prove that the accused *is* responsible. But there is something suspect about the process through which Picinali arrives at his conclusion.

Specifically, Picinali relies on his theory of the PoI as being a procedural norm grounded only in what he calls ‘the principle of inertia’.⁴⁰ Briefly stated, this principle provides that ‘if a party wants the status quo to change, she has to give...sufficient reasons for such a change, she has to discharge a burden of proof’.⁴¹ Extending this line of thought to the criminal process, Picinali’s central thesis is that the PoI is a manifestation of the principle of inertia, protecting the status quo, where the accused is unpunished and at liberty.⁴² Thus, Picinali reasons, the status quo for the accused should only be changed if the prosecution can discharge their burden to prove that the accused

³³ *ibid.*

³⁴ *ibid.*

³⁵ Picinali ‘Innocence and Burdens of Proof’ (n 13) and Picinali ‘The Presumption of Innocence: A Deflationary Account’ (n 13) 719-720.

³⁶ Picinali ‘The Presumption of Innocence: A Deflationary Account’ (n 13) 721.

³⁷ *ibid.*

³⁸ *ibid* 722.

³⁹ *ibid* 723.

⁴⁰ *ibid* 714.

⁴¹ *ibid.*

⁴² *ibid.*

is responsible for some criminal act, which should therefore result in their conviction and punishment for the relevant crime. To convict otherwise would be to irrationally violate the principle of inertia in argument, and, therefore, the PoI.⁴³ The problem, and the suspicious element of Picinali's argument, comes in his invocation of the status quo.

As Picinali himself concedes, the principle of inertia (and therefore his version of the PoI) says nothing about what the status quo is, should be, or what would 'constitute sufficient reasons' for changing it.⁴⁴ In the context of Picinali's conclusions about reverse burdens and the PoI, this agnosticism becomes problematic. In the simple example proposed by Picinali, that of a criminal trial for a person who is otherwise at liberty, the principle of inertia does indeed justify putting the burden of proof on the prosecution. But the reality of the criminal justice system, at least in jurisdictions like England and Wales, is more complex. For a start, Picinali's argument is toothless in the face of a status quo which includes reverse burdens, duly scrutinised and put into the law through the normal legislative process. Picinali cannot, for instance, ground his claims about reverse burdens being forbidden on constitutive or overlapping facts, in respect for the status quo, if the status quo already entails a citizen living in a legal system which imposes reverse burdens. Were this to be the case, he would also have to commit to other constraints on the substance of the criminal law imposed by the PoI and principle of inertia. But he is unwilling to admit that the PoI has *any* substantive content, so this must be ruled out.

What is needed, then, to really justify Picinali's conclusions about reverse burdens and the PoI, is some sort of good reason why the status quo should not include reverse burdens in the first place. This good reason is what I refer to as the thick PoI, a general norm presuming innocence. Without adherence to a general norm of this nature built into Picinali's status quo, his argument cannot in fact ground his claims about reverse burdens. In other words, Picinali's conclusions are only correct if the status quo being maintained by the PoI is already conditioned by the PoI. This, in turn, leads to infinite regress, where the PoI maintains the status quo whereby citizens are generally presumed innocent, and therefore at liberty, unless they are convicted of a crime. The issue here, then, is that Picinali has gone to great pains to avoid any recognition of a thick PoI. By insisting on a thin PoI but trying to expand its reach to catch all facts which pertain to the accused's criminal responsibility, Picinali has overextended the thin PoI. As a result, though he has reached the right conclusions he has done so for the wrong reasons.

Examination of Picinali's approach to reverse burdens and the PoI demonstrates the importance of recognising, and centring, the thick/thin distinction. Moreover, it also shows why the thick PoI is so vital to any meaningful analysis of how to allocate the burden of a proof in a PoI-coherent way: without recourse to some thicker notion of presuming innocence, there is simply no way to understand what the PoI requires with respect to the burden of proof. The thin PoI alone cannot fill this role, because it is only a trial rule, one contingent on the (potentially arbitrary) offence/defence distinction. Thus Picinali's novel form of proceduralism does yield some valuable insights for the present enquiry into reverse burdens. But unfortunately, it cannot be adopted wholesale, for the reasons given above.

3.2.c – Antony Duff, Victor Tadros and Stephen Tierney

Antony Duff's Civic PoI

⁴³ *ibid* 716-717.

⁴⁴ *ibid* 715.

The next approach to be examined here is offered by Antony Duff. He contends that there is not just one PoI, but rather multiple presumptions of innocence that operate at different stages of the criminal process.⁴⁵ Duff has not addressed the precise issue of when and how the burden of proof can be allocated to the accused in a way which is coherent with the PoI (or PoIs) on his account. However, certain conclusions can be drawn from his work on responsibility and from his writing on the presumptions of innocence. Taking these in turn, it will be shown that although Duff advocates for something very similar to what I call the thick PoI, his position on the issue of reverse burdens is not sufficiently clear to be adopted for the purposes of this thesis. As will be shown, the problem is that the relevant presumptions of innocence envisioned by Duff can be interpreted as either prohibiting or allowing reverse burdens, as they are not specifically aimed at addressing the issue of allocating the burden of proof. This makes them unsuitable for answering the overarching research questions of this thesis.

On Duff's account there are a variety of presumptions of innocence, two of which are of interest here. First, there is the familiar *Woolmington* conception of the presumption as a trial rule allocating the burden of proof to the prosecution to the relevant standard of proof and entitling the accused to an acquittal if guilt is not proved according to law.⁴⁶ In Duff's view, this presumption sits alongside other rights of the defence, such as the overarching right to a fair trial.⁴⁷ There is no clear difference between this view and the standard *Woolmington* rule that it is for the prosecution to prove beyond a reasonable doubt that the accused has committed the offence in question. As such, there is little to be gained from analysing this view further, as it has already been shown that the thin PoI alone will not be enough to answer the broader question of when it will be coherent with the thick PoI to impose a reverse burden.⁴⁸

The second PoI, and the one of greater interest here, is what Duff calls the 'civic PoI', a presumption of innocence 'to which we are all entitled as citizens'.⁴⁹ This civic PoI protects everyone against being subject to taking on the rights and responsibilities associated with being a defendant in a criminal trial.⁵⁰ This extremely broad conception has predictably not found favour with proceduralists.⁵¹ Indeed, the very premise of Duff's argument - the suggestion that there can be more than one PoI - has been criticised as an 'indiscriminate use of the label "PoI"' which fails to 'further[] rational analysis'.⁵² Nevertheless, Duff argues for a whole catalogue of presumptions of innocence attaching to different actors in the criminal process, and requiring different normative duties at different stages in that process.⁵³ For the civic PoI, Duff envisions a broad presumption grounded in the 'civic trust that we owe our fellow citizens'.⁵⁴ According to Duff, this 'modest' presumption 'protects citizens against being treated as if they were guilty'.⁵⁵ At the heart of Duff's PoI is the spirit of civic trust among citizens of a liberal democracy. As such, he contends that our default position in dealing with each other, and the state's default position

⁴⁵ Duff, 'Who Must Presume Whom to Be Innocent of What' (n 13).

⁴⁶ *ibid* 174.

⁴⁷ *ibid*.

⁴⁸ The limitations of the thin PoI alone were discussed above in section 1.3.b, and the inadequacy of thin PoI approaches was also illustrated in sections 2.2.a and 2.3.

⁴⁹ Duff 'Who Must Presume Whom to Be Innocent of What' (n 13) 180.

⁵⁰ *ibid*.

⁵¹ See generally, Paul Roberts, 'Strict Liability and the PoI: An Exposé of Functionalist Assumptions' (n 13)); Richard Lippke, *Taming the Presumption of Innocence* (OUP 2016).

⁵² Thomas Weigend, 'There is Only One Presumption of Innocence' (2013) 42(3) *Netherlands Journal of Legal Philosophy* 193, 193.

⁵³ Duff lists the roles of 'victim, witness, police officer, suspect, convicted offender, and "ex-offender"' as each entailing different rights and responsibilities correlating to different presumptions of innocence, see Duff (n 13) 175.

⁵⁴ *ibid* 180.

⁵⁵ *ibid* 182.

in dealing with each of us as citizens should be one of presumed innocence.

Though there is little to disagree with in Duff's proposition for a broad PoI grounded in civic trust, it is nevertheless unclear how and when this civic PoI would permit the accused to be allocated the burden of proof. The heart of the problem lies in the vagueness of reading the PoI as requiring the state to treat the accused 'as if' they were innocent. As Picinali has recently discussed, this counterfactual approach does not furnish clear guidance on what exactly the state is permitted to do.⁵⁶ On the contrary, if Duff's civic PoI requires the accused to be treated as if they are innocent, then the relevant question which must be answered is what it means to treat the accused as innocent, in the context of allocating the burden of proof. But this question cannot be answered by reference to Duff's civic PoI itself. Rather, the notion of treating the accused as if they were innocent is, in this context, question-begging. This is problematic for the present purposes, however, as the overall goal of the thesis is to determine what the PoI requires with respect to the allocation of the burden of the proof. Unfortunately, this is the very question which Duff's civic PoI, in the absence of further argument, cannot answer.

There is limited evidence that Duff would be hesitant to impose a persuasive burden on the accused in a criminal trial. This can be gleaned from Duff's discussion of reverse burdens attached to what Duff calls 'secondary responsibility'.⁵⁷ This describes the situation when the accused bears a responsibility to prove that they have complied with some sort of primary responsibility imposed on them by the law. On Duff's account, primary responsibility is the responsibility to take special precautions when participating in a regulated activity. Secondary responsibility is then used to describe an additional responsibility on the accused to 'make sure that [they] will be able to show that [they have] discharged' some primary responsibility.⁵⁸ Often this will take the form of due diligence and record keeping demonstrating compliance with a regulatory duty. Crucially, failing to fulfil this secondary responsibility may itself be proof that the accused has not discharged their *primary* responsibility.⁵⁹ As such, Duff contends that it is justifiable to impose an evidential burden on the accused to show that they have fulfilled their secondary responsibility.⁶⁰ However, Duff states that he would not extend his argument to justify imposing a persuasive burden on the accused.⁶¹

Instead, Duff would impose a requirement that the evidence adduced 'suffices to cast reasonable doubt on the charge' in question.⁶² Furthermore, he would also add a 'rider' to any such evidential burden, stating that 'normally only proof on at least the balance of probabilities will suffice to create a reasonable doubt'.⁶³ The reason for taking this approach seems to be that Duff is reluctant to transfer the risk of non-persuasion from the prosecution to the defence simply to ensure compliance with a secondary responsibility. However, it is difficult to see how this would differ significantly, if at all, in practice from simply imposing a persuasive burden on the accused.⁶⁴ Moreover, there is good reason to think that Duff's argument in fact leads to the conclusion that the existence of a regulatory duty actually justifies imposing either an evidential *or* persuasive burden on the accused.

⁵⁶ Picinali 'The Presumption of Innocence: A Deflationary Account' (n 13) 732-737.

⁵⁷ Duff, *Answering for Crime* (n 13) 242.

⁵⁸ *ibid.*

⁵⁹ *ibid* 243.

⁶⁰ *ibid* 244-245.

⁶¹ *ibid* 245.

⁶² *ibid.*

⁶³ *ibid.*

⁶⁴ In fairness, Duff appears to concede this point, saying that 'in most cases' where an accused bears an evidential burden 'she would also be able to discharge a persuasive burden.' See *ibid.*

To see how this is the case, we must first recognise that Duff's rationale for extending his argument only to evidential burdens on the accused appears to stem from a preoccupation with a hypothetical situation in which records, though studiously kept, are destroyed or otherwise unavailable.⁶⁵ As a result, he concludes that secondary responsibility should entail a type of unconventional evidential burden. Such a burden would require the accused to adduce evidence 'that suffices to create a reasonable doubt', with the caveat that this can normally only be done by proving on the balance of probabilities that the secondary responsibility was discharged. There are two very odd moves in this argument, both of which betray the fact that even a reverse persuasive burden will be justified in the context of a regulatory offence.

First, Duff's new evidential burden is unconventional in the sense that it has a standard of proof required in order for it to be met: the accused must adduce evidence which creates a reasonable doubt. It is unusual to speak of an evidential burden as entailing a standard of proof at all, as nothing is *proved* even if an evidential burden is discharged.⁶⁶ Moreover, if the defendant bears a burden which is nominally evidential, but which entails a standard of proof (however low), the result is that the risk of non-persuasion now lies with them. Despite the nomenclature adopted, it therefore appears that Duff is actually arguing in favour of a reverse persuasive burden with a lower standard of proof. This is borne out by the second unusual aspect of his argument, where Duff claims that this new evidential burden should include a 'rider' stipulating that normally a reasonable doubt can be created only by proof on the balance of probabilities.⁶⁷ Again, this simply gives the impression of imposing a persuasive burden on the accused but with an exception for unforeseeable situations such as the destruction of records in a fire.

It is now clear that the better view of Duff's argument is that reverse burdens can be justified with respect to regulatory offences. The reasoning for this, as has been shown above, is roughly as follows. Certain offences stem from regulatory duties which impose both a primary and secondary responsibility on people taking part in regulated activities. When someone voluntarily takes part in such a regulated activity, the duties imposed on them by these responsibilities will often contradict safeguards such as the PoI. Thus, the regulatory duty should trump the PoI and require the accused to prove that they have complied with their primary responsibility. This conclusion is one which I have previously endorsed, but which I now find untenable.⁶⁸ This is because, as will be shown in Chapter 6, it is not compatible with a view of the thick PoI as a prohibition on proving innocence, even if the regulatory duty is justified.

On the whole, Duff's two presumptions of innocence make some progress toward answering the question of how the burden of proof can be allocated to the accused in a way which is coherent with the thick PoI. Specifically, his reference to a thicker notion of what it means to presume innocence indicates a direction which will be helpful to follow, provided the problems identified above can be remedied. The main limitation with Duff's theory, which makes it unsuitable for simply adopting outright, is its lack of specificity about what it means to presume innocence in the context of allocating the burden of proof. The implications of Duff's civic PoI for the allocation of the burden of proof, will therefore need to be worked out.

Tadros and Tierney's 'Purpose Theory'

⁶⁵ *ibid* 245.

⁶⁶ This is one of the distinguishing features of an evidential burden. See *Jayasena v The Queen* [1970] 1 AC 618.

⁶⁷ Duff, *Answering for Crime* (n 13) 245.

⁶⁸ This was my third 'guiding principle' for reverse burdens, discussed in Jackson Allen, 'Rethinking the relationship between reverse burdens and the presumption of innocence' (n 1) 128-131.

Another conception of the presumption of innocence is the purpose theory model advanced by Victor Tadros and Stephen Tierney.⁶⁹ In developing purpose theory, Tadros and Tierney explicitly rejected existing procedural and substantive conceptions of the presumption.⁷⁰ Nevertheless, it does appear that their theory is ‘inherently substantive, in that it interferes with the choice of criminalization’.⁷¹ Still, Tadros and Tierney were highly critical of the focus of existing substantive and procedural conceptions of the presumption on the locus of the burden of proof.⁷² In this vein, they claim that reverse burdens do not necessarily infringe the presumption of innocence, but also that the prosecution proving every element of an offence beyond a reasonable doubt does not necessarily mean that the presumption has not been infringed.⁷³

Instead, Tadros has suggested that the presumption of innocence is concerned primarily with assessing the ‘conditions of liability’.⁷⁴ By this, Tadros means that any ‘considerations that are sufficient to render a person liable to public condemnation and state punishment’ could potentially infringe the presumption of innocence.⁷⁵ Thus, for purpose theory, the relevant question with respect to reverse burdens is whether or not it has the effect of allowing the accused to be convicted and punished for conduct which should not be punishable. Whether or not any given conduct should be punishable can be determined in one of two ways. The first, suggested by Tadros, is to refer to what the legislature intended to criminalise.⁷⁶ Thus, the question is whether or not the accused has done something that the legislation in question was created to criminalise. Alternatively, another reading of purpose theory is more normative, and asks whether the conduct in question *should* be punished, by reference to some other independent principle, such as a theory of criminalisation.⁷⁷

According to Tadros, this interpretation of the PoI follows from the fact that legislatures and courts are tasked with determining the conditions of liability, but are frequently ‘in error’ about them.⁷⁸ These mistakes can be explained by a variety of factors, Tadros argues, such as ‘political pressures, lack of judgment...conservatism, ignorance, elitism...and so on’.⁷⁹ As such, purpose theory expands the role of the presumption to the effect that anything from a reverse burden to the absence of mens rea in a strict liability offence could potentially infringe the presumption.⁸⁰ Ultimately, then, for purpose theory the key question is whether or not the purpose of the offence in question was to criminalise the conduct of the accused in a particular case.⁸¹ Here, the purpose of the offence is distinguished from the ‘technical definition of the offence’,⁸² with the effect that judges would not be bound by the language of the drafters of criminal legislation. Purpose theory therefore eschews the formal offence/defence distinction, instead focusing on the substantive

⁶⁹ Tadros, ‘The Ideal of the Presumption of Innocence’ (n 13); Tadros and Tierney (n 13); Victor Tadros, ‘Rethinking the Presumption of Innocence’ (n 13).

⁷⁰ Tadros and Tierney (n 13) 405.

⁷¹ Picinali (n 13) 248.

⁷² Tadros and Tierney (n 13).

⁷³ *ibid* 405-406.

⁷⁴ Tadros, ‘The Ideal of the Presumption of Innocence’ (n 13) 453.

⁷⁵ Tadros and Tierney (n 13).

⁷⁶ Tadros, ‘Rethinking the Presumption of Innocence’ (n 13) 198-200.

⁷⁷ Stumer identifies this as one way to interpret Tadros and Tierney’s theory, though Tadros himself distanced himself from such a reading. See Stumer (n 7) 77-80.

⁷⁸ Tadros, ‘The Ideal of the Presumption of Innocence’ (n 13) 453.

⁷⁹ *ibid*.

⁸⁰ Tadros and Tierney (n 13).

⁸¹ *ibid* 413.

⁸² *ibid*.

criminalisation decision and the conditions for imposing criminal liability.

From the outset, Tadros is quick to recognise that purpose theory has been unpopular with academics and in the courts.⁸³ Perhaps the most prominent criticism offered of purpose theory is that the distinction drawn between the ‘technical definition’ of an offence and its purpose appears to create a paradox in a system of parliamentary sovereignty such as English law. As Hamer puts it, ‘[H]ow can conduct that is *deliberately* encapsulated not be [its] *intended* target?’⁸⁴ Hamer’s criticism, however, misses the point. Tadros’s distinction between the definition and purpose of an offence is offered as a means of avoiding the conclusion that any conduct can be justly punished so long as Parliament has deliberately criminalised it. Instead, Tadros is appealing to a higher normative standard about what should or should not be punished. Specifically, Tadros claims that by erring in determining the conditions of liability, courts and legislatures have ‘problematically expand[ed] the scope of the criminal law, criminalizing conduct where the conditions of liability are not fulfilled’.⁸⁵ On this account, it is the PoI (in some form) which ensures that only that conduct which ought to be punished is actually criminalised in practice.

At this juncture, a more compelling criticism of purpose theory becomes apparent: this far-reaching conception of the PoI drastically exceeds the normal limits of the presumption, and confuses its role with that of other normative principles of the criminal law. To hold, as Tadros and Tierney do, that the PoI can constrain the criminalisation decision, and set a standard for what conduct is or is not punishable is to ask too much of the PoI. In effect, this would morph the PoI into a full-blown theory of criminalisation and of just punishment. Such a radical transformation of the PoI is ill-advised, however, as it blurs the distinction between very different principles. A theory of criminalisation explains what conduct should or should not be criminalised, giving a normative justification for the criminalisation decision.⁸⁶ By contrast, the PoI is a norm which prefigures the existence of *some* criminal offence, of which the accused is to be presumed innocent. As such, the criminalisation decision must be prior to the engagement of the PoI, otherwise there is nothing for which one can be presumed innocent. According to purpose theory, however, the PoI is engaged even before any conduct is criminalised and sets the standard for whether or not conduct should be criminalised. As one commentator put it, this simply asks the PoI to ‘bear too much weight’.⁸⁷

Purpose theory, then, relies on a conception of the PoI which is overbroad. In turn, the purpose theory approach to reverse burdens cannot be adopted for the purposes of this thesis, as it relies on a mistaken interpretation of the PoI. Nevertheless, there is an important lesson to be learnt from purpose theory: although a purely procedural PoI will not be sufficient to resolve the thesis’s overarching research question, a substantive reading of the PoI will fare no better unless it can maintain the conceptual clarity of the PoI as a distinct norm of the criminal law. This will be essential going forward, so that any reconciliation between reverse burdens and the PoI cannot be dismissed in the way that Tadros and Tierney’s conclusions were.

3.2.d – Hamish Stewart and the Right to Be Without Reproach

The fourth conception of the presumption of innocence to be examined here is that of Hamish

⁸³ Tadros notes that his view ‘has found little favour in the courts and is not widely accepted by academics’, see Tadros, ‘The Ideal of the Presumption of Innocence’ (n 13) 452.

⁸⁴ Hamer (n 11) 145.

⁸⁵ Tadros, ‘The Ideal of the Presumption of Innocence’ (n 13) 453.

⁸⁶ For more on criminalization, see Antony Duff, *The Realm of the Criminal Law* (OUP 2018), chs. 1-2, 5-6.

⁸⁷ Stewart, ‘The Right to Be Presumed Innocent’ (n 13), 418.

Stewart, who envisions the presumption as a ‘basic human right’.⁸⁸ This interpretation is put in its strongest terms by Hamish Stewart, whose thesis is worth restating in précis.⁸⁹ The starting point for Stewart is that ‘everyone has a right to be presumed innocent simply in virtue of being a person’.⁹⁰ This is rooted, he claims, in the innate human right to be without reproach.⁹¹ It follows from this, Stewart argues, that the presumption ‘conditions the entire criminal process’ as it is a ‘normative standard that each of us should apply when acting juridically’.⁹² In other words, anyone acting in a juridical role, for example a judge, juror, or prosecutor, is obliged by the presumption to treat the accused as if they are innocent unless and until the contrary is proved.

Stewart’s vision of the presumption of innocence amounts to far more than a procedural device governing the proof of facts at trial – though in his view it also encapsulates the procedural requirement that the prosecution prove the guilt of the accused to the appropriate standard of proof.⁹³ This follows, he argues, from the fact that the substantive presumption is part of the ‘best procedure’ to be followed at trial, rather than being ‘external’ to it.⁹⁴ Stewart goes on to argue that the presumption is also engaged before a criminal trial. Pre-trial, he reasons, the presumption requires that any coercion exercised by the state against the accused ‘not amount to punishment in advance’.⁹⁵ Unlike others, however, Stewart stops short of claiming that the presumption requires judges to enquire into whether or not the accused’s conduct should properly be considered criminal.⁹⁶ Overall, then, the thrust of Stewart’s argument is clear: the presumption is substantive in nature, and governs the treatment of the accused before and during a trial.

One issue which Stewart does not address directly is what implications the PoI *qua* right to be without reproach would have for the allocation of the burden of proof. However, it appears from his discussion of the interaction between the PoI and the definition of offences that Stewart would subscribe to the view that the PoI serves to condition the criminal process, so that no one is deprived of their liberty, and their right to be without reproach, without proof beyond reasonable doubt. Anything less would be an ‘inadequate basis’ on which to deprive the accused of their fundamental rights, including the right to be without reproach.⁹⁷ It is equally clear, however, that Stewart would view the application of the PoI as being determined, at least in part, by the construction and drafting of offences, i.e., the offence/defence distinction. This is illustrated in his discussion of three different ways of drafting a hypothetical offence.⁹⁸ The first is a traditionally drafted offence requiring both *actus reus* and *mens rea*, the second removes one of the elements and turns it into a reverse burden defence, and the third removes the defence and creates an offence of absolute liability for possessing any object that could be used as a weapon.⁹⁹ Stewart argues that none of these necessarily violates the PoI on his account, even the third option.

The reason, as Stewart explains, is that although the drafting of such an offence is unadvisable and illiberal, it does not violate the PoI because any conviction would ‘accurately reflect’ the conduct of the accused.¹⁰⁰ The problem, however, is that such an offence is ‘not suitable for a

⁸⁸ *ibid* 408.

⁸⁹ *ibid*.

⁹⁰ *ibid*.

⁹¹ *ibid* 409-12.

⁹² *ibid* 411-12, 409.

⁹³ *ibid* 410.

⁹⁴ *ibid* 412-13.

⁹⁵ *ibid* 411.

⁹⁶ *ibid* 417-419.

⁹⁷ *ibid* 411.

⁹⁸ *ibid* 417-419.

⁹⁹ *ibid*.

¹⁰⁰ *ibid* 419.

liberal state' because it is too broad and criminalises conduct which ought not to be criminalised.¹⁰¹ At this stage, it is apt to recall the main drawback of Tadros and Tierney's approach, namely, that it confused the PoI with a theory of criminalisation and just punishment. Stewart appears to be restating this critique in his discussion of the PoI, avoiding the pitfalls of purpose theory. This is a welcome development, and Stewart is correct to insist that if one is to criticise overly broad criminal legislation then 'substantive normative arguments need' to be offered, rather than simply brining such an issue under the umbrella of the PoI.¹⁰²

Stewart's approach offers a suitable jumping-off point from which a fuller account of how the PoI and reverse burdens can coexist. Unlike Roberts, Stewart is able to move beyond the purely procedural conception of the PoI and avoid the criticism of arbitrariness. Unlike Picinali's approach, Stewart can plausibly ground his conclusions by invoking a substantive right to be without reproach. And unlike Tadros and Tierney, Stewart does not overstep the mark by trying to morph the PoI into a full-blown theory of criminalisation. Rather, he preserves the conceptual clarity of the PoI by rightly conceding that it does not constrain the criminalisation decision. More is needed, however, if the overarching question of this thesis is to be answered. Specifically, the issue of what, if any, substantive requirements the PoI has for the imposition of reverse burdens will need to be addressed, and further reasons will have to be given in support of this, if the relationship between reverse burdens and the PoI is to be fully fleshed out.

3.3 – Reform Proposals

The final approach examined here is the absolute ban on persuasive burdens on the accused, proposed by the Criminal Law Revision Committee (CLRC) of England and Wales in 1972.¹⁰³ In the CLRC's 11th Report the committee considered a range of reforms to the English law of evidence, including a major change to the approach to reverse persuasive burdens. On this subject, the CLRC were 'strongly of the opinion that, both on principle and for the sake of clarity and convenience, burdens on the accused should be evidential only'.¹⁰⁴ Notably, the CLRC would have extended this to almost all burdens on the accused, including the defences of insanity and diminished responsibility, with exceptions only for 'third-party proceedings' (where an accused has a defence if they can prove that a third party was in fact responsible for their breach of a statutory regulation) and for the situation where the accused claims that another person has already been convicted for the offence in question.¹⁰⁵ Other than these two exceptions, the CLRC's recommendation is therefore an absolute prohibition on reverse persuasive burdens.

The CLRC gave several reasons for reaching their conclusion that burdens on the accused should be evidential only. The committee's reasons for favouring a flat ban on reverse burdens are broadly of two types: principled and practical. For the present purposes, only the principled reasons will be examined as they are the only ones which are relevant in terms of teasing out the underlying rationale.¹⁰⁶ The two reasons can be stated as follows:

- (i) Requiring the factfinder to convict, even if some reasonable doubt exists as to the guilt of the accused contravenes the PoI as contained in *Woolmington v DPP*.¹⁰⁷

¹⁰¹ *ibid.*

¹⁰² *ibid.*

¹⁰³ Criminal Law Revision Committee, *Evidence (General)*, (Cmnd 4991, 1972).

¹⁰⁴ *ibid* para 140.

¹⁰⁵ *ibid* paras 140-141.

¹⁰⁶ The practical reasons can be found at *ibid* para 140 (ii)-(iii) and (v).

¹⁰⁷ *ibid* para 140 (i).

- (ii) The problem which reverse persuasive burdens are meant to address can be solved just as easily by imposing only an evidential burden on the accused.¹⁰⁸

Reason (i) is immediately familiar as it is identical to the Canadian approach. Although phrased slightly differently, the essence of this first reason is that it is ‘repugnant to principle’ that reverse persuasive burdens can require conviction of someone even where the factfinder is left with reasonable doubt as to their guilt.¹⁰⁹ With this similarity in mind, however, the same criticisms that were directed at the Canadian approach can be made just as forcefully against the CLRC’s proposal.

As with the PoI under consideration in the Canadian approach, there is just no reason to read the *Woolmington* rule as precluding all reverse persuasive burdens. Indeed, as above, this misunderstands the threshold consideration of the thin PoI. There is nothing in *Woolmington* which suggests that this is what the PoI requires; on the contrary, the court in *Woolmington* described broad exceptions to this rule which include ‘any statutory exception’.¹¹⁰ It is only subsequent case law which refined this to make clear that there was any check on Parliament’s power to create statutory exceptions.¹¹¹ Reason (i) therefore cannot be sustained and must be rejected.

Reason (ii) is potentially more compelling, offering evidential burdens as an alternative to the more onerous reverse persuasive burden. On this point, it may be tempting to follow the thinking of Lord Hope, who has observed that in practice the differences between imposing an evidential or persuasive burden may be very minor.¹¹² Thus, the argument goes, we may as well replace persuasive burdens with their less onerous counterparts wholesale, and avoid the difficult question of how to reconcile reverse burdens and the PoI entirely.¹¹³ Indeed, it is perfectly plausible that this may often be true – though, it should be noted, proponents of this argument are making an appeal to intuition, rather than to any empirical evidence about case outcomes. But to make the leap from accepting this line of argument, to replacing *all* persuasive burdens on the accused with evidential burdens is potentially a bridge too far. Moreover, given that the CLRC purported to rely on *Woolmington* for their conclusions about reverse burdens, one can also level the same criticism at this proposal as was made about Picinali’s above: a thin conception of the PoI cannot ground such claims, because it has the notion of exceptions built into it. What is needed is a deeper principle, but the CLRC do not seem to be explicitly offering one.

¹⁰⁸ *ibid* para 140 (iv).

¹⁰⁹ *ibid* para 140 (i). The main terminological difference is that the CLRC couched their analysis in terms of evaluating the (moral) blameworthiness of the accused. However, the core idea and the role of the PoI in their analysis are identical to the Canadian approach: the objection is to the way reverse burdens weaken the standard of proof and, correspondingly, increase the possibility of convicting the innocent.

¹¹⁰ *Woolmington v DPP* [1935] AC 462 (House of Lords) 481 (emphasis added).

¹¹¹ In *Edwards* the Court of Appeal made it clear that this power was not unlimited, but left the door open for so-called ‘implied exceptions’ which were not expressly provided by Parliament: *R v Edwards* [1975] QB 27 (Court of Appeal); for contemporary comment on this see Adrian Zuckerman, ‘The Third Exception to the Rule in *Woolmington*’ (1976) 92 *Law Quarterly Review* 402. Then, in *R v Hunt* [1987] AC 352 (HL), the House of Lords further paved the way for implied exceptions, though the court there limited these to cases of exceptions arising by necessary implication. For eviscerating critique of this decision, see Peter Mirfield, ‘The Legacy of Hunt’ [1988] *Criminal Law Review* 19 and Glanville Williams, ‘The Logic of “Exceptions”’ (1988) 47 *The Cambridge Law Journal* 261. Crucially, this shows that *Woolmington* clearly does not lay down an exceptionless rule against reverse burdens, but rather gave Parliament extremely broad power to *create* PoI-compatible reverse burdens.

¹¹² *R v Lambert (Steven)* [2002] 2 AC 545 (HL) 588–589 (Lord Hope).

¹¹³ This argument assumes, as Lord Hope did in the earlier case of *Kebilene*, that evidential burdens are always compatible with the PoI; see *R v DPP Ex p Kebilene* [2000] 2 AC 326 (HL) 379 (Lord Hope).

On the whole, then, the CLRC's approach also has something to offer: it raises the possibility of eliminating reverse burdens entirely, and at least attempts to justify this by reference to the PoI. However, as with the other approaches examined above, more will be needed by way of justification if their conclusion is to be convincing. Specifically, what is needed is an explanation of *why* the PoI ought to be read as prohibiting reverse burdens, a reasoned account of how the PoI conditions the allocation of the burden of proof. As with the other accounts examined in this chapter, there is therefore a lesson to be learnt, but also a drawback to be avoided. As such, the CLRC's approach is also unsuitable for being adopted in its entirety for the purposes of this thesis.

3.4 – Conclusion

This chapter has examined a variety of different approaches to reconciling reverse burdens of proof with the PoI, as offered by a selection of scholars in this field. Having reviewed several different approaches, including that of the CLRC, it is clear that none of the existing theories is suitable to be adopted for the purposes of this thesis. The overarching goal of the thesis, as set out in the first chapter, is to determine when it will be coherent with the requirements of the PoI to impose a reverse burden. This means not just the PoI *qua* trial rule, but also the presumption as a general norm of the criminal law. As has now been shown, the approaches surveyed above do not answer this question.

The first approach to be examined above was the procedural PoI as espoused by Paul Roberts. Roberts' distinctly procedural vision of the PoI provides a very simple solution to the problem, which focuses only on the formal elements of an offence and ignoring defences. Roberts makes this explicit, conceding that it makes the application of the PoI's protections dependent on mostly formal considerations, but preferring this to a more expansive, and potentially less conceptually clear, version of the PoI. As was shown above, this means that in Roberts' view, the PoI has no bite whatsoever with respect to facts which have been formally labelled defences. Although courts will have some discretion in deciding whether or not a fact is a defence or an element of an offence, this approach remains perilously open to arbitrariness, with the PoI being disapplied solely on the basis of formal labels. Not only is this a questionable trade-off to make, but it also fails to engage with how reverse burdens can be reconciled with the PoI as a general principle, rather than just a trial rule. As such, Roberts' approach was discounted above.

Second, Picinali's deflationary account of the PoI and its relationship to reverse burdens was analysed. Like Roberts, Picinali is committed to a version of the PoI which is very minimalistic and purely procedural. On this account, the PoI is nothing more than a trial rule allocating the burden of proof to the prosecution. Unlike Roberts, however, Picinali attempts to distance himself from the critique of arbitrariness, which follows from relying on the purely formal offence/defence distinction. Instead, he claims that the PoI requires proof of all facts necessary to prove that the accused is criminally responsible, which he calls 'constitutive facts'.¹¹⁴ Though Picinali deserves credit for departing from the traditional formalistic understanding of the PoI, ultimately his approach could not be endorsed either. This is because, as was shown above, the thin PoI on which he relies to reach his conclusions simply cannot ground his claims. What is needed, as this problem demonstrates, is a thicker notion of what it means to presume innocence. Thus, Picinali's theory was also ultimately found wanting.

Third, this chapter considered an approach based on a substantive, rather than a purely procedural, conception of the PoI, as found in the writings of Antony Duff. Again, some progress

¹¹⁴ Picinali (n 13).

was made here, as Duff correctly engaged with both thick and thin conceptions of the PoI, as evidenced by his discussion of multiple ‘presumptions of innocence’.¹¹⁵ However, the problem identified with Duff’s theory was that it did not sufficiently connect his conception of the thick PoI (the ‘civic PoI’, in Duff’s words) to the allocation of the burden of proof. The result was that it was unclear exactly what Duff’s civic PoI required with respect to the locus of the burden of proof. The conclusion to be drawn from this analysis of Duff’s approach is that although a thicker PoI will need to be engaged in order to answer the overarching research question of the thesis, any discussion of such a thick PoI will also need to be fully fleshed out, and its implications for the burden of proof worked through, if it is to be of any use.

The fourth approach examined above was Tadros and Tierney’s ‘purpose theory’ interpretation of the PoI. This theory sought to transcend the substantive/procedural divide in discussions of the PoI, instead focusing on the purpose of the legislature and whether or not the legislature had erred in criminalising conduct which was not justly criminalisable. Purpose theory was therefore shown to require some independent theory of punishment in order to be workable. On this view, the PoI would preclude imposing a reverse burden where the result of imposing it would be to convict the accused for conduct which should not be punishable. As was shown above, the main issue with purpose theory is that it overstates the requirements of the PoI by presuming more than just innocence.

Rather, the purpose theory approach presumes that the defendant should not be punished for certain conduct, even if that conduct has been criminalised and it has been proved beyond reasonable doubt that the defendant did it. The problem is that this overstretches the PoI, turning it into something more like a proxy for protection from any unjust punishment than a presumption of innocence. Again, however, there were positive lessons to be drawn from the discussion of purpose theory. Chief among these was Tadros and Tierney’s decision to move beyond the substantive/procedural debate which had so dominated the literature. Nevertheless, this theory also proved to be unsuitable for a full endorsement, as it overtaxed the PoI, diminishing its plausibility in the process. What is needed, then, is a PoI-based approach which avoids this pitfall and maintains the conceptual clarity of the PoI.

Finally, Chapter 3 evaluated the substantive version of the PoI advocated by Stewart, who connects the presumption to what he calls the ‘right to be without reproach’.¹¹⁶ This right, which all human beings enjoy by virtue of their humanity, conditions the entire criminal process, on Stewart’s view. This approach was assessed above as being promising for the purposes of this thesis. Unlike Roberts and Picinali, Stewart does not reduce the PoI to nothing more than a trial rule. This means that his version of the PoI can plausibly ground claims like those made by Picinali, with respect to what the PoI requires in terms of allocating the burden of proof. Moreover, unlike Tadros and Tierney, Stewart’s approach does not overstretch the PoI, as was evidenced by Stewart’s rejection of the notion that the PoI could constrain the criminalisation decision (as purpose theory argued). In fact, the only defect in Stewart’s approach is that which was identified in the discussion of Duff’s theory: it is not sufficiently explicit about what would be required with respect to allocating the burden of proof. What this suggests, in turn, is that the implications of recognising a thick PoI, such as Stewart’s, will still need spelling out.

The goal of the chapter was to review the literature on reverse burdens and the PoI, with a view to demonstrating that no existing approach could be adopted wholesale to answer the overarching research question of this thesis. Having reviewed six different approaches above, representing a

¹¹⁵ Duff (n 13).

¹¹⁶ Stewart (n 13).

diversity of views about the PoI and how it should be applied to reverse burdens, the chapter's goal has now been achieved. None of the approaches surveyed above is entirely satisfactory. However, in analysing these competing theories about the PoI and reverse burdens, much ground has been gained toward discovering what exactly will be needed to find an approach which does not share the defects of those above. The key conclusion is that what will be needed is an approach which neither overstretches, nor unduly reduces, the PoI, and one which explicitly fleshes out what the PoI requires with respect to the burden of proof in a criminal trial. In the next chapter, I will set out my vision for what form such an approach should take, specifying more precise criteria for what will constitute a successful approach to reverse burdens.

Chapter 4: Distinguishing ‘Thick’ and ‘Thin’ Conceptions of the Presumption of Innocence

4.1 - Overview

The previous chapters examined existing approaches to reconciling reverse burdens of proof with the presumption of innocence (PoI) in both the courts and legal scholarship. In Chapters 2 and 3, these existing approaches were criticised for their various defects, all of which, it was argued, ultimately stemmed from a failure to appreciate the analytical distinction between ‘thick’ and ‘thin’ conceptions of the PoI. This chapter delves deeper into the nature and importance of the thick/thin distinction and provides a fuller explanation of why it should be taken into account when enquiring into how reverse burdens can be used in a way which is generally PoI-coherent. Ultimately, it will be shown that distinguishing between the thick and thin PoI allows for a more holistic evaluation of how to allocate the burden of proof. This, in turn, will facilitate answering the overarching question of this thesis, which asks how reverse burdens can be used in a way which coheres with the PoI.

In order to achieve these aims, Chapter 4 proceeds in four further sections. First, section 4.2 makes the case for departing from the existing terminology used to distinguish different interpretations of the PoI, and advocates for the labels of ‘thick’ and ‘thin’ instead. Briefly, this is because neither of the existing sets of labels (‘procedural/substantive’ and ‘wide/narrow’) fully captures the essential difference between the PoI as a trial rule and the PoI as a general norm of the criminal law. Moreover, the existing terminology tends to pit rival conceptions of the PoI against one another, giving the impression that the PoI must be *either* procedural or substantive, wide or narrow. I do not endorse this type of reasoning, and my aim in this thesis is to reject this type of binary thinking with respect to the PoI, so I eschew the existing terminology in favour of my own.

Section 4.3 fleshes out the differences between the thick and thin PoI and explains what I mean when I employ these terms. The essence of this distinction, as section 4.3 makes clear, is that the thick PoI is a general norm of the criminal law, conditioning a variety of different aspects of the criminal process, whereas the thin PoI is simply a rule allocating the burden of proof to the prosecution during a criminal trial. Next, section 4.4 turns to consider what an approach to reverse burdens which takes account of the thick/thin distinction looks like. Specifically, this section argues that the thick PoI in this context ought to be understood as a prohibition on making the accused prove their innocence. The reason for this, as section 4.4 explains, is that this gets to the core of the heart of what the PoI requires with respect to the allocation of the burden of proof in a criminal trial. Section 4.5 then distils the foregoing discussion in order to spell out a set of three success criteria which will be used to evaluate competing approaches to reconciling reverse burdens with the PoI. This section sets out what a ‘good’ approach will have to do in order to be useful as a means of reconciling reverse burdens and the PoI. Section 4.5 argues that there are three requirements: recognising the thick/thin distinction, maintaining the normative force of the PoI, and resolving the tension between the PoI and reverse burdens. These are explained in more detail below. Finally, section 4.6 concludes the chapter.

¹ This chapter partially reproduces work which I have previously published elsewhere. See Jackson Allen, ‘Rethinking the relationship between reverse burdens and the presumption of innocence’ (2021) 25(2) International Journal of Evidence and Proof 115.

4.2 - Departing from Existing Terminology

The nature of the relationship between the PoI and reverse burdens is a contentious subject among criminal lawyers. Some see the PoI as prohibiting reverse burdens only with respect to the formal elements of an offence, with anything labelled as a defence being beyond the scope of the presumption's protection.² Conversely, others interpret the PoI as prohibiting reverse burdens outright, on the grounds that they allow for an accused to be convicted in spite of reasonable doubt as to guilt.³ Between these two positions, a series of intermediate views also exists, each with different interpretations of how reverse burdens can be compatible with the PoI.⁴ Theorising on reverse burdens is therefore fairly well-trodden ground in criminal law scholarship. Unfortunately, however, the prevailing approaches to reverse burden compatibility share an important defect: none has paid sufficient attention to the subtle but crucial distinction between two different meanings to the term 'presumption of innocence', each of which has a different relationship to reverse burdens.

Instead, as was discussed above in Chapter 1, there is a tendency in the literature to discuss different conceptions of the PoI as two starkly different choices, one of which must be adopted before any further analysis can take place.⁵ This binary approach to the PoI has led to some fairly entrenched views about reverse burdens, as canvassed in Chapter 3. In order to avoid this trap, I adopt the labels of 'thick' and 'thin' in this thesis, to refer to the PoI as a general principle of the criminal process and the PoI as a trial rule, respectively. This choice reflects my contention that these two ways of understanding the PoI are not wholly different *concepts*. Rather, the distinction is relevant in the analytical sense, and the analytical task at hand is to understand how to allocate the burden of proof in a way which is coherent with the PoI. As such, I contend that both the thick *and* thin conception of the PoI are relevant to reverse burdens.

4.3 - Distinguishing 'Thick' and 'Thin'

Under the thin PoI, the presumption is nothing more than a trial rule allocating the burden of proof to the prosecution to the standard of beyond reasonable doubt, subject to certain exceptions (such as those laid out in *Woolmington*). Once courts have found that a statute imposes a persuasive burden on the accused, the thin PoI operates in roughly the following way: First, the court considers whether the burden pertains to an element of the offence or to an affirmative defence. If the reverse burden requires the accused to disprove an element of the offence, it is automatically deemed an unjustifiable breach of the thin PoI on any account. If it pertains to a defence, the approach differs between English and US law. In the US, a reverse persuasive burden on an affirmative defence will never amount to a breach of the PoI under

² See Federico Picinali, 'Innocence and burdens of proof in English criminal law' (2017) 13 *Law Probability and Risk*, 243-257; Paul Roberts, 'Taking the burden of proof seriously' [1995] *Criminal Law Review* 783; Paul Roberts, 'Drug dealing and the presumption of innocence: The Human Rights Act (almost) bites' (2002) 6(1) *International Journal of Evidence and Proof* 17; PJ Schwikkard, 'The Presumption of Innocence: What is it?' (1998) 11 *South Africa Journal of Criminal Justice* 396.

³ This is the position in Canada, where reverse burdens are virtually banned. See *R v Whyte* [1988] 2 SCR 3 (Supreme Court of Canada). The view has also been endorsed in England and Wales by the Law Commission's predecessor: Criminal Law Revision Committee, *Evidence (General)*, (Cmd 4991, 1972), para. 140, and by Glanville Williams, 'The Logic of "Exceptions"' (1988) 47 *The Cambridge Law Journal* 261.

⁴ Two examples are Stumer, who argues that the compatibility of a reverse burden depends on whether there is an actual risk of wrongful conviction, and Tadros and Tierney, who would prohibit any reverse burden which effectively criminalises behaviour which was not originally intended to be criminalised. See Stumer, *The Presumption of Innocence: Evidential and Human Rights Perspectives* (Hart Publishing 2010) and Victor Tadros and Stephen Tierney, 'The presumption of innocence and the Human Rights Act' (2004) 67(3) *Modern Law Review* 402-434.

⁵ See Chapter 1, section 1.3.b above for more.

Winship.⁶ However, in England and Wales, the question becomes one of whether or not imposing a persuasive burden is proportionate in the circumstances, with each case ultimately turning on its own facts.⁷

The conception of the PoI which has historically found the most favour with common lawyers has been the *thin* PoI. For example, in English law, the canonical reverse burden case is the oft-quoted judgment of Viscount Sankey LC in *Woolmington*, in which the Lord Chancellor memorably describes the PoI as a ‘golden thread’ running ‘[t]hroughout the web of English Criminal Law’.⁸ As such, Viscount Sankey held that the PoI required the prosecution to prove the guilt of the accused beyond reasonable doubt, subject to the exceptions of the insanity defence and any statutory exception.⁹ On this basis, the House of Lords in *Woolmington* held that the reverse burden in that case was not compatible with the accused’s PoI and quashed the conviction.¹⁰ Similarly, in the United States the Fourteenth Amendment to the US Constitution is interpreted as requiring ‘proof beyond reasonable doubt of every fact necessary to constitute the crime’ in question.¹¹ This leaves it open to individual American states (who are primarily responsible for creating and enforcing criminal law) to define crimes as they see fit, with only those facts classed by the legislature as elements of an offence being constitutionally protected by the PoI. These approaches are paradigmatic examples of what I call the ‘thin PoI’.

The difficulty with trying to analyse reverse burdens by reference only to the thin PoI is that, in the case of the US, many reverse burdens (i.e. those attached to defences) are simply beyond its very limited scope. Meanwhile, under English law, the thin PoI seems able to accommodate analysis of reverse burdens on affirmative defences by employing the notion of proportionality. Yet, upon closer examination, it is clear that this simply raises the question: what determines whether or not a reverse burden is proportionate? No satisfactory general answer to this question can be found in the case law.¹² More importantly, the thin PoI is of no help at all in answering such a question, as it gives only a rule of thumb about the default allocation of the burden of proof. Thus, relying solely on the thin PoI leaves the more difficult issue of which reverse burdens are or are not allowed both unresolved and unresolvable.

It is clear that the thin PoI alone cannot be relied upon to explain how to employ reverse burdens in a criminal trial in a way which is PoI compatible. The US version of the thin PoI gives no guidance as to how to treat reverse burden defences, and the English version proves to raise more questions than it answers. The thin PoI therefore has only a limited role to play. This is not to diminish the clearly important role of the thin PoI, which, by prohibiting reverse burdens on elements of an offence, remains a non-trivial restriction on the structure and operation of the criminal law. Nevertheless, it is insufficient to answer the broader question of how reverse burdens can be used in a way which coheres with the PoI, especially in the context of defences. Faced with this problem, some commentators have instead chosen to couch their theories about reverse burdens in terms of a thick PoI.

The *thick* PoI can be thought of as a presumption of innocence operating at the level of general principle. Unlike the thin PoI, which is restricted to the trial itself, the thick PoI is much wider, more general, and more abstract. As Duff puts it, the thick PoI is ‘an expression of deeper values

⁶ *In re Winship* 397 US 358, 364 (1970).

⁷ *Sheldrake v DPP; Attorney General’s Reference (No. 4 of 2002)* [2004] UKHL 43, [2005] 1 AC 264.

⁸ *Woolmington v DPP* [1935] AC 462, 481 (Viscount Sankey).

⁹ *ibid* 481-482 (Viscount Sankey).

¹⁰ *ibid* 481.

¹¹ *Winship* (n 19) 364.

¹² Ian Dennis, ‘Reverse onuses and the presumption of innocence: in search of principle’ [2005] Criminal Law Review 901, 936.

that should structure the state's dealings with its citizens'.¹³ Couched in these general terms, the thick PoI can then be characterised more precisely as a norm which requires the state to treat all of its citizens as innocent of any criminal wrongdoing. In my terminology, then, the thick PoI is what Roberts is referring to when he says that the presumption is properly understood as 'doctrine of political morality'.¹⁴ The thick PoI therefore has an important role to play in the overall project of the criminal law. Specifically, it entails normative claims about how the state ought to treat its citizens, or even about how citizens ought to treat one another.¹⁵ Such claims are certainly important in articulating the values of the criminal law, and even in helping to structure the criminal process.¹⁶ However, they are also very abstract compared to the relatively specific question of how to allocate the burden of proof in a criminal trial. This level of abstraction means that a further explanation of what the thick PoI requires in the context of reverse burdens is needed.

This situation leaves anyone seeking to understand how reverse burdens can be used in a way which is coherent with the PoI in a quandary, forced to choose between a thick or thin conception of the PoI before addressing the burden of proof issue at all. Faced with this problem, scholars have tended to take one of two flawed approaches. The first option, preferred by those who tend to favour 'proceduralist' interpretations of the PoI, is to simply embrace the thin PoI as the only relevant form of the presumption linked to the issue of reverse burden compatibility. Paul Roberts and Federico Picinali's scholarship both typify this approach.¹⁷ Roberts is characteristically forthright about accepting the consequences of adopting a thin or procedural PoI for the purposes of evaluating how to allocate the burden of proof. On his view, the PoI is purely procedural, and requires only that the accused not be made to bear the persuasive burden on any element of an offence, as formally defined by the legislature or common law.¹⁸ If a fact is labelled a defence, Roberts' conception of the PoI would simply not apply, no matter the consequences. He makes this concession in order to preserve the 'conceptual purity of the law of evidence'.¹⁹ Though I am sympathetic to this motivation, I do not find it persuasive for the task at hand.

In seeking to better understand how reverse burdens can be used PoI-compatibly, as is the goal of this thesis, it would be a mistake to reduce the PoI to only a (thin) trial rule, as Roberts has done. To see why, it is important to appreciate the fact that Roberts did not have this goal in mind when laying out his approach to reverse burdens. Rather, he was engaged in a kind of doctrinal-conceptualist analysis of English case law, critiquing specific reverse burden cases as they were decided.²⁰ My task here is different: I aim to answer broader questions about how the burden of proof can be allocated in a way which is PoI-compatible in the broadest sense. I do not claim to be providing a definitive theory of what *the* PoI entails, or ought to entail, under English law, and thus there is no need to restrict my analysis as Roberts did.

Another advocate of the thin PoI, Federico Picinali, has recently sought to 'deflate' the PoI,

¹³ Duff (n 10) 171.

¹⁴ Roberts, 'Loss of Innocence' (n 17) 318.

¹⁵ Antony Duff, 'Presuming Innocence' in Lucia Zedner and Julian Roberts (eds.), *Principles and Values in Criminal Law and Criminal Justice* (OUP 2012), 51-66; and Duff (n 10).

¹⁶ For example, Tomlin suggests that we use the (thick) PoI as a benchmark for deciding what conduct should or should not be criminalised. See Patrick Tomlin, 'Extending the Golden Thread? Criminalisation and the Presumption of Innocence' (2013) 21(1) *Journal of Political Philosophy* 44-66.

¹⁷ Roberts, 'Drug dealing and the presumption of innocence' (n 2); Picinali (n 2) and Federico Picinali 'The Presumption of Innocence: A Deflationary Account' (2020) 84(4) *Modern Law Review* 708-739.

¹⁸ Roberts, 'Drug dealing and the presumption of innocence' (n 2) and see Paul Roberts, 'The presumption of innocence brought home? Kebilene deconstructed' (2002) 118 *Law Quarterly Review* 41, section 4.

¹⁹ Roberts, 'Drug dealing and the presumption of innocence' (n 2) 35.

²⁰ The term 'doctrinal-conceptualist' is in fact borrowed from Roberts (2011, pp. 384-387)

reducing it only to a rule which requires the state to bear the burden of proving the defendant's guilt.²¹ Notably, Picinali does not argue that this burden requires only that the state prove the formal elements of the offence; rather he introduces the notion of 'constitutive facts' which the prosecution must always prove.²² Any fact which is not constitutive could therefore be the subject of a reverse burden on Picinali's account, just like anything labelled a formal defence is beyond the scope of Roberts' PoI. Perhaps wishing to avoid the criticisms associated with Roberts' approach, Picinali explains that these constitutive facts are 'not coextensive' with the formal elements of an offence, but rather refer to 'the facts necessary for someone to be responsible for a given crime'.²³ This allows him to maintain a commitment to a barebones conception of the thin PoI, which he holds out as the only relevant norm for assessing the PoI-compatibility of reverse burdens.

Picinali's approach, however, still raises the same issue as Roberts': it is of little use to an enquiry into how the burden of proof can be allocated in a broadly PoI-compatible way. It is no answer to say that this depends only on whether or not some fact in question is a 'constitutive' one, because this simply begs the question of which facts should be constitutive. Again, Picinali himself would be likely to simply embrace this criticism, viewing the substantive question of criminalisation as being beyond the scope of the PoI. In light of all this, I reject the view, implicit in the proceduralist approach of Roberts and explicit in that of Picinali, that the thin PoI is the only PoI relevant to reverse burdens.

I am not alone in rejecting the thin PoI as disposing of the compatibility issue entirely. Indeed, several scholars have also rejected this approach, arguing instead for a substantive human right to be presumed innocent. A prominent example of commentators who take such a view can be found in the work of Tadros and Tierney. Unfortunately, this work demonstrates the second error referred to above: collapsing the distinction between thick and thin PoI. Tadros and Tierney present an original conception of the PoI based on the 'gravamen' or purpose of an offence, and apply it to reverse burdens at some length.²⁴ They argue that reverse burdens will infringe the PoI unless the following four conditions are met:

- i) Based on the available evidence, it is known beyond a reasonable doubt that the accused falls within the gravamen of the offence in question;
- ii) Even where this is known, it may still be the case that the accused is in fact innocent;
- iii) Proof on the balance of probabilities that the accused falls within some exception will generate a reasonable doubt that they fall within the gravamen of the offence;
- iv) Anything less than proof on the balance of probabilities will not create such a reasonable doubt.²⁵

On this view, the prosecution must prove beyond reasonable doubt not just that the accused satisfies all of the elements of the offence, but also that their conduct falls within the gravamen of the offence. This would effectively reshape the process of criminalisation, leaving it to courts to infer what the gravamen of an offence is and to presume that the accused does not fall within it, rather than simply requiring the prosecution to prove the actual elements of the offence.

What is important here is the method, rather than the substance, of their argument. Specifically, the question must be asked: which PoI justifies these radical conclusions? Surprisingly, Tadros and Tierney state that they are concerned not with what would here be called the thick PoI, but

²¹ Picinali 'The Presumption of Innocence: A Deflationary Account' (n 30).

²² *ibid* 14.

²³ *ibid*.

²⁴ Tadros and Tierney (n 4) 416-422.

²⁵ *ibid* 420.

with ‘general interpretation of Article 6(2) [of the ECHR] in the context of criminal procedure’.²⁶ In other words, they are in fact offering up a very expansive conception of a PoI which is still only a trial rule. This is despite the fact that the European Court of Human Rights (ECtHR) has made it clear that Article 6(2) is only engaged when someone is charged with a criminal offence.²⁷ It is difficult to see how this could justify the stringent requirements put forward by Tadros and Tierney, given that these would constrain the process of criminalisation by reference to a PoI which is not engaged until someone has been charged with a crime.

This example is indicative of what happens when the distinction between thick and thin is collapsed. In fact, it seems likely that Tadros and Tierney were in fact appealing to a thicker, more substantive notion of the PoI than that which is encapsulated in Article 6(2) of the ECHR. There is nothing wrong in principle with such an appeal, but it is important that it is made transparently. In this regard, I do agree with Roberts’ insistence on conceptual clarity. The thick PoI is relevant to the issue of allocating the burden of proof, but if it is to plausibly ground any claims about how the burden of proof should be allocated this needs to be done explicitly. Otherwise, there is a risk of confusion about the proper ambit of both the thick and thin PoI, which risks undermining the force of both of them.

In light of all the foregoing discussion, the best option is to construct a framework which will address reverse burdens specifically, whilst also linking back to the thick PoI. The merits of this approach are twofold. First, it avoids the problems described above. Unlike relying on the thin PoI, a new framework allows for a more wide-ranging analysis of the allocation of the burden of proof in the criminal trial. Unlike appealing to the thick PoI in the abstract, this new framework *does* have a sufficiently close link to reverse burdens, but still makes reference to the deeper principle of the thick PoI. Second, the approach advocated for here ensures that the conceptual clarity of the PoI (both thick and thin) can be preserved, which is itself a desirable outcome.

4.4 - The Thick PoI as a Prohibition on Requiring the Accused to Prove Their Innocence

This section sets out a specific application of the thick PoI to the issue of how and when the accused should ever bear a reverse burden of proof in a criminal trial. As was observed in Chapter 3, Hamish Stewart offers a conception of the PoI which is most similar to what I refer to as the thick PoI. The crux of Stewart’s argument is that the PoI is best understood as a basic human right to be without reproach, and that the presumption is therefore more than just a procedural device.²⁸ However, as was noted above, though Stewart’s conception of the PoI appears sound, its precise implications for the allocation of the burden of proof are not clear. This highlights a more general problem, which is that in order for the thick PoI to be useful for the purposes of this thesis, the most relevant aspects of the presumption must be identified and applied to the issue of how to allocate the burden of proof. In this section, I work out these implications by extending the logic of the thick PoI to the case of reverse burdens. Ultimately, I conclude that the thick PoI is best conceived of as a legal prohibition on making the accused prove that they are innocent.

The starting point for connecting the thick PoI to reverse burdens is that there seems to be a gap in how exactly the thick PoI as a general principle can ground precise requirements about how to allocate the burden of proof. This gap is most likely the root cause of proceduralist scholars’ insistence that the PoI is nothing more than a trial rule relating to the formal elements of an offence: this thin conception of the PoI bridges the gap by collapsing the thick/thin distinction. For reasons discussed in the previous section, and revisited in the next chapter, I do not endorse

²⁶ *ibid* 405.

²⁷ This was confirmed in the case of *Oztürk v Germany* (1984) 6 EHRR 406.

²⁸ Hamish Stewart, ‘The Right to Be Presumed Innocent’ (2014) 8 *Criminal Law and Philosophy* 407.

this approach. In simplest terms, this is because collapsing the thick PoI into nothing more than a trial rule unjustifiably limits its scope based on the offence/defence distinction, and leaves it open to ad hoc dilution, as has happened in English law. The task, then, is to find a way to apply the thick PoI to reverse burdens without collapsing the thick/thin distinction.

In order to avoid the pitfalls of previous approaches, and to specify what the thick PoI requires with respect to allocating the burden of proof I rely on a concept which has historically underpinned scholarly thinking in this area of law: the risk of non-persuasion.²⁹ Originally coined by the 19th century American lawyer John Henry Wigmore, this phrase refers to the notion that in an adversarial trial one party or the other must prove their case to the satisfaction of the factfinder or else lose. In fact, this logic also underpins the reasoning of the Privy Council in *Jayasena* when distinguishing between evidential and persuasive burdens.³⁰ More recently, Hamer has made the argument that burdens of proof are useful tools for allocating risk to one party or another in a trial.³¹

Viewed from this perspective, a specific application of the thick PoI to reverse burdens can now be constructed. In a criminal trial, as in a civil trial, there is risk borne on both sides. However, unlike a civil trial, the criminal trial is unique in two ways. First, it is only through a criminal trial that one can be deprived of their liberty and subjected to state punishment and all of its collateral consequences. This means that, for the accused, there is potentially everything to lose in a criminal trial, with the best possible outcome being an acquittal restoring them to the pre-trial status quo.³²

This leads to the second feature of criminal trials which makes them unique: the risk borne by each party is not just of a different magnitude, but of a different type altogether. For example, in a civil trial for £20,000 of unpaid wages brought by a financially insecure individual against a multi-billion-pound corporation, there will clearly be a different magnitude of risk for each party. The £20,000 in question would be a relative fortune to the individual, but a pittance to the corporation's bottom line. In this sense, the risk is of the same type, but of a different magnitude. By contrast, in a criminal trial the risks assumed by each party are manifestly different. If convicted, the individual stands to lose their liberty, reputation, social standing, and employment, among other things. But the state, at worst, stands to lose wasted resources on a failed prosecution. If the conviction ought to have succeeded (i.e. the accused actually *is* guilty and is acquitted anyway) then another potential risk is to the public, since an offender will not get justice and will be released back into society. What is noteworthy, however, is that the individual has markedly more to lose personally.

This brings the argument back to the role of burdens of proof in allocating risk. If, as I have argued, the PoI entails a general principle of presuming innocence, then it follows that the thick PoI should inform the allocation of risk to the accused in a criminal trial. Specifically, if a system is to adhere to the thick PoI, and therefore to presume the innocence of its citizens, then the accused must not be made to bear the risk of losing the trial. As mentioned above, the risk of non-persuasion in the context of a criminal trial is much more serious for the accused than it is for the state. Moreover, it is the state which initiates the proceedings in the first place, and the

²⁹ John Henry Wigmore, *Evidence in Trials at Common Law*, vol 9 (Third edition, revised., Boston : Little, Brown 1961, para 2485

³⁰ *Jayasena v The Queen* [1970] AC 618, 624 (Lord Devlin).

³¹ David Hamer, 'Presumptions, Standards and Burdens: Managing the Cost of Error' (2014) 13 *Law, Probability and Risk* 221.

³² Picinali examines this status quo-related argument and concludes that it is the only rationale for the PoI. Though I disagree with this conclusion, his argument is still persuasive in that it identifies the importance of the PoI in maintaining the right of the accused to be at liberty. See Federico Picinali, 'The Presumption of Innocence: A Deflationary Account' (2021) 84(4) *Modern Law Review* 708.

state which has the vast resources to dedicate to a criminal trial. This is where the thick PoI becomes relevant as a protection for the accused, by requiring that the state bear the risk of failing to persuade the factfinder that the accused is guilty. If this were not the case, then the scales would be tipped in the prosecution's favour, in a situation in which there is already an imbalance of power and where the stakes for each party are materially different.

The conclusion, then, is that the thick PoI requires the burden of proof to be allocated in a way that allocates the risk of non-persuasion to the prosecution. Notably, this requirement applies irrespective of how the offence in question is structured: if a fact bears on the accused's guilt then they cannot be made to bear the risk of failing to prove or disprove it. This approach has several benefits. First, it transcends the formalism of relying solely on the thin PoI and recognises the importance of a thicker notion of presuming innocence. Second, it means that the PoI offers meaningful protection to the accused, rather than diluting it to the point of being a purely formal trial rule which is then disapplied on a case-by-case basis. Finally, it also explains how one criminal justice system can plausibly claim to adhere to the PoI while also allowing reverse burdens of proof. This seemingly paradoxical situation is resolved, so long as reverse burdens are never allowed to make the accused bear the risk of non-persuasion in their trial.

Having set out my preferred account of how the thick PoI applies to reverse burdens, it remains to consider some alternative approaches, to analyse how they compare. Chapter 5 will do this in greater detail. However, before this can be done systematically, the next section will first generalise some 'success criteria' which will allow competing approaches to be meaningfully compared to the PoI as a prohibition on any requirement to prove innocence.

4.5 - Connecting the Thick PoI to Reverse Burdens

As noted in the previous section, the precise requirements of the thick PoI with respect to imposing reverse burdens can potentially be fleshed out in a variety of ways. Chapter 5 will consider the merits of several different options, ultimately endorsing a reading of the thick PoI as prohibiting the imposition of any reverse burden with respect to the guilt or innocence of the accused. Before this can be done, however, more must be said about what qualities a thick PoI framework ought to have. If the relationship between reverse burdens and the PoI is to be assessed by reference to the thick PoI, one must specify what such an approach should look like. This section proposes three essential criteria against which any framework for evaluating the PoI-coherence of reverse burdens can be evaluated. The criteria have been chosen with the analysis of the previous two chapters in mind. In Chapters 2 and 3, the pitfalls of various approaches to reverse burdens were highlighted, both in case law and scholarship. The key problems with these approaches stemmed from three different failures.

First, almost all of the approaches failed to respect the thick/thin distinction in their analysis, opting instead to either ignore the distinction or collapse all of the PoI into a trial rule. To remedy this problem, the first criterion for a successful thick PoI framework is that it must respect the thick/thin distinction. This means that both the thick and thin PoI must have some role, and those roles must be distinct and well defined. Second, proponents of substantive conceptions of the PoI, such as Tadros and Tierney's purpose theory, fell into the trap of overburdening the PoI, and, in doing so, diminishing its normative force. By confusing the PoI with other substantive principles of the criminal law, these approaches distorted the meaning of the thick PoI beyond its proper bounds. Thus, the second success criterion is to avoid this distortion and ensure that the normative force of the PoI is maintained. Finally, purely procedural approaches such as that found in *Winship* and *Patterson* in the US, or advocated by Roberts in England and Wales, had the defect of failing to resolve the tension between reverse burdens and the PoI. By relying on

formal labels of ‘offence’ and ‘defence’ to determine how the burden of proof should be allocated, these approaches left the underlying tension between the PoI and reverse burdens intact. This yields the final criterion for success: resolving the tension between the PoI and reverse burdens.

The details of each of these criteria will now be set out in greater detail, with the goal of ultimately producing a set of requirements that can be used to evaluate different ways of connecting the thick PoI to reverse burdens. A framework which best satisfies all three of these criteria will therefore be the best possible way of understanding how to reconcile reverse burdens and the PoI, on my account.

The first criterion is that any proposed framework must take account of, and respect, the thick/thin distinction. The importance of this distinction was emphasised in the previous section, where it was shown that the existing distinctions recognised in the literature should not be adopted for the purposes of this thesis. This is one important aspect of the first success criterion: the thick/thin distinction must be respected, and this means recognising its importance rather than adopting either the procedural/substantive or wide/narrow distinctions. These other two sets of distinctions, as was shown above, simply do not capture the essential difference between the PoI as a trial rule and the PoI as a general norm. Moreover, both the procedural/substantive and wide/narrow distinctions are set up to imply at least some degree of mutual exclusivity. The PoI is either procedural *or* substantive, wide *or* narrow, but never both.³³ The thick/thin distinction avoids this implication, and so respecting the thick/thin distinction entails avoiding mutual exclusivity and recognising that the thick and thin PoI are not in opposition to each other.

A second corollary of respecting the thick/thin distinction is that any PoI framework for connecting the thick PoI and reverse burdens must not collapse the distinction. Distinguishing between the thick and thin PoI means recognising that although the two are not mutually exclusive, they are also not identical. The thin PoI is a trial rule, allocating the burden of proof to the prosecution with respect to every element of the offence charged to the standard of beyond reasonable doubt. The thick PoI, by contrast, is a much more general overarching norm of the criminal law. The importance of maintaining this distinction lies in recognising the fact that practical considerations which might justify derogating from the thin PoI should not automatically be extended to the thick PoI.

For example, the claim that a reverse burden can be justifiable as a derogation from the PoI where the burden it imposes on the accused is not too difficult to discharge is a very familiar one.³⁴ Indeed, this claim does seem to have some merit if the PoI is only a trial rule, since such a rule gives no guidance about how the burden of proof should be allocated, beyond its requirement that the prosecution prove the formal elements of the offence. However, when extended to the thick PoI this ‘ease of proof’ argument becomes problematic. More specifically, practical considerations such as this cannot justify derogating from the more general norm of presuming innocence. Yet, if the thick and thin PoI are identical, i.e., if the distinction is collapsed, there is no meaningful way to recognise this difference. As such, ad hoc arguments against derogating from the PoI *qua* trial rule will end up chipping away at the whole PoI if the distinction is collapsed.

The second success criterion, maintaining the normative force of the PoI, follows directly from the first criterion. Any framework for connecting the thick PoI to reverse burdens must maintain the normative force of the PoI, meaning it must not lead to the ‘chipping away’ of the PoI. The

³³ The one exception to this trend is Tadros and Tierney, who recognise that the procedural/substantive distinction should not be applied in this way. See Tadros and Tierney (n 4) 406-416.

³⁴ This is a key part of the reasoning in *R v Hunt*, as discussed in section 2.2.a.

basic premise underlying this second criterion is a simple one: the normative force of any given norm is diminished every time the norm is ignored, flouted, or not applied where it should be. As such, a thick PoI-based approach to connecting reverse burdens and the PoI must ensure that the conditions for when a reverse burden will be PoI-coherent are as clear as possible, to avoid it being ignored, undermined, or incorrectly applied. In turn, this means that a framework based on the thick PoI must not be susceptible to the types of *ad hoc* derogations which characterise approaches such as that found in English law or advocated by scholars such as Roberts.³⁵

As critics of the modern English approach have correctly observed, this type of *ad hoc* thinking leads to arbitrariness and legal uncertainty, neither of which is acceptable when dealing with the application (or lack thereof) of a right as fundamental as the PoI.³⁶ This method of justifying individual reverse burdens as acceptable derogations from the PoI also diminishes the normative force of the PoI, by making it unclear when and how it should apply. More broadly, however, the essential point of the second criterion is that any framework based on the thick PoI should maintain the normative force of the PoI as much as possible.

Finally, the third criterion for evaluating the viability of a thick PoI-based approach to reverse burdens is that such an approach must resolve the tension between reverse burdens and the PoI. Though seemingly obvious, it is important that this be included as a criterion, because an approach which cannot give a reasoned explanation of how reverse burdens and the PoI can coexist in one legal system will not be of any use. Here, the key is for the approach in question to offer a plausible justification for how both the PoI and reverse burdens can coexist in the criminal law without leading to the paradoxical situation where the accused is presumed innocent (by the PoI) and guilty (by a reverse burden) at the same time. This is one area where thin PoI approaches are very successful: by incorporating the language of compatibility, and the familiar method of justifying specific infringements of a given right (in this case, the PoI), thin PoI-based approaches resolve the tension between reverse burdens and the PoI. They do so by portraying the PoI as a qualified right, thereby redirecting focus onto what conditions are necessary for the PoI to be justifiably infringed.

English law is again typical of this, and the modern English authorities can be understood as an ongoing, though fruitless, search for a specific set of preconditions for derogating from the PoI. In *Sheldrake*, the House of Lords then abandoned this search, but nevertheless there is no tension between reverse burdens and the PoI *per se* under this approach. As long as the correct justification is found, then reverse burdens are understood as being compatible with the PoI, not in tension with it. As will be made clear in Chapter 5, there are still strong reasons which militate against adopting an *ad hoc* approach. Nevertheless, any thick PoI-based approach must also be able to resolve this tension satisfactorily if it is to be useful.

In summary, a new approach to reconciling reverse burdens and the PoI, one based on the thick PoI, must do three things. First, it must take account of the thick/thin distinction, rather than collapse or ignore it. Second, it must maintain the normative force of the PoI and not undermine it. And third, a thick PoI approach must resolve the tension between the PoI and reverse burdens, meaning it must give some plausible explanation for their coexistence.

4.6 - Conclusion

The goal of this chapter was to set out the need for a new approach to reconciling the PoI and

³⁵ For more on these approaches, see sections 2.2.b and 3.2.a.

³⁶ This echoes the criticism of scholars such as Ashworth; see Andrew Ashworth, 'Case Comment: *Sheldrake v DPP* [2004] UKHL 43' [2005] *Criminal Law Review* 215.

reverse burdens, one based on a distinction between the thick and thin PoI. After dispensing with the labels of 'procedural/substantive' and 'wide/narrow' PoI, the chapter went on to describe and distinguish the thick and thin PoI. The former was described as a general norm of the criminal law, requiring the state to presume its citizens innocent of any criminal wrongdoing unless they have been proven guilty. The latter, by contrast, is simply a trial rule allocating the burden of proof to the prosecution to the standard of beyond a reasonable doubt, with respect to every element of an offence.

Chapter 4 then turned to consider the significance of the thick/thin distinction, demonstrating why it is essential to the task at hand to both recognise and attend to the consequences of this distinction. Briefly, this is because both the thick and thin PoI are relevant considerations in any thorough assessment of how to use reverse burdens in a way which is coherent with the PoI in general. As such, it was recognised that for the purposes of this thesis, a framework based on the thick PoI would have to be developed. The final step of the chapter was then to set out three essential criteria for such a framework. It was argued that any proposed application of the thick PoI to reverse burdens would need to satisfy the three requirements of i) taking account of the thick/thin distinction, ii) maintaining the normative force of the PoI, and iii) resolving the tension between reverse burdens and the PoI.

Having set out these criteria, the next steps of the thesis can now be briefly stated. In Chapter 5, the thesis will consider three possible approaches to reconciling reverse burdens and the thick PoI and evaluate them against the criteria set out in this chapter. This will entail taking each in turn, assessing their ability to take account of the thick/thin distinction, uphold the PoI's normative force, and resolve the tension between the PoI and reverse burdens. As will be shown in the next chapter, however, these three alternatives all fail to fulfil at least one of the success criteria. Chapter 5 will then suggest a novel approach, to be developed in Chapter 6, which meets all three of the criteria set out above.

Chapter 5: Three Different Ways to Connect the Presumption of Innocence to Reverse Burdens

5.1 – Overview

The previous chapter made the case that a novel framework for connecting the thick PoI to reverse burdens is needed. Following on from this, Chapter 5 will examine three possible ways of construing the thick PoI's requirements with respect to allocating the burden of proof. Ultimately, it will be shown that the best view is one which interprets the thick PoI as a prohibition on making the accused prove their innocence. In the next chapter, I will offer a full explanation of what this means and what its implications are for reverse burdens. Prior to this, however, Chapter 5 will first rule out three competing alternatives to the PoI as a prohibition on proving innocence. There are three such alternatives which will be examined below, by reference to the three success criteria set out in the previous chapter.¹ For ease of reference, these criteria are: respecting the thick/thin distinction, maintaining the normative force of the PoI, and resolving the tension between reverse burdens and the PoI.

The first alternative is to characterise reverse burdens as exceptions to, or justified derogations from, the thick PoI. Under this approach, each reverse burden must be assessed on its own facts. This is usually accomplished through a proportionality test where various factors are weighed up against each other to determine whether a given reverse burden is proportionate (and therefore a justified derogation) or not. The second alternative is to read the PoI as prohibiting reverse burdens but only with respect to the elements of an offence, and never with respect to defences. Finally, there is the proposal of the Criminal Law Revision Committee (CLRC) and the approach of Canadian law, which both interpret the thick PoI as an absolute prohibition on reverse burdens. This is typically couched in terms of the standard of proof, i.e. reverse burdens are impermissible because they permit conviction in spite of reasonable doubt about whether or not the accused is guilty. As will be shown, each of these approaches fails to meet at least one of the criteria which I have set out for any new thick PoI approach, making all of them less attractive options than my proposed approach.

In order to demonstrate that the three alternative ways of connecting the thick PoI and reverse burdens are undesirable to adopt, this chapter will proceed in four further sections. Section 5.2 begins by considering whether it is appropriate to treat the compatibility of any given reverse burden and the PoI on an *ad hoc* basis, as English law does.² Under this approach, the distinction between the thick and thin PoI is blurred, and reference to the PoI becomes little more than a euphemism for a more general assessment of the fairness of imposing a reverse burden in a given set of circumstances. Section 5.2 dismisses this approach, as it disregards the thick/thin distinction and allows the PoI to be dispensed with on a case-by-case basis, leading to uncertainty and undermining the PoI's normative force.

Section 5.3 examines the plausibility of connecting the thick PoI to reverse burdens by relying solely on the offence/defence distinction. This approach effectively collapses the thick PoI into

¹ These were discussed at length in section 4.4.

² This was discussed in more detail in section 2.2.

the thin PoI, implying that the PoI is nothing more than a trial rule. However, this interpretation of the thick PoI – effectively defining it out of existence – is also rejected below, as it fails to account for the thick PoI at all. Moreover, even if this approach is modified, so that the offence/defence distinction is drawn along substantive lines, taking this approach is still undesirable because it obscures the importance of the thick PoI. Relying on the offence/defence distinction to determine when a reverse burden will be coherent with the thick PoI is therefore ruled out below.

Section 5.4 evaluates the final alternative approach, partially endorsing it. This final approach, that of the CLRC and of Canadian law, amounts to a flat ban on reverse burdens. The CLRC recommends that any burden on the accused be evidential only, and the Canadian approach understands the PoI as virtually prohibiting reverse burdens, though they can still be imposed under the ‘saving clause’ of the Canadian Charter of Rights and Freedoms.³ In section 5.4, it is conceded that these two approaches reach effectively the same conclusion as the interpretation of the PoI which this thesis proposes. However, as will be shown, these approaches do so for the wrong reasons. Specifically, the Canadian approach does not resolve the tension between reverse burdens and the PoI, and the CLRC approach collapses the thick/thin distinction. Therefore, section 5.4 will recommend that neither should be fully endorsed.

Finally, section 5.5 concludes by identifying the flaws of the approaches dismissed above, demonstrating the need for an understanding of the thick PoI which does not fall into these same pitfalls. This final concluding section therefore recommends interpreting the thick PoI as a prohibition on making the accused prove their innocence, meaning that any reverse burden which puts the risk of non-persuasion with respect to guilt onto the accused is incoherent with the thick PoI. This will succeed based on all three of the criteria set out above, unlike the three alternatives considered below.

5.2 – Rejecting the *Ad Hoc* Approach

5.2.a – Overview

The first alternative approach to be considered here is to assess reverse burdens on an *ad hoc* basis, in order to determine whether they can be justified as derogations from the PoI. If they can, they are considered unproblematic. If they cannot, then they have to be remedied in some way. In Scotland, England and Wales, this means that an incompatible reverse burden will either be ‘read down’ under the Human Rights Act (HRA) 1998 so that it imposes an evidential burden only, or, where this is not possible, it will be declared incompatible.⁴ Under an *ad hoc* approach such as this one, there is no ‘rule of thumb’ imposed by the thick PoI which can help a court to evaluate whether or not a given reverse burden is justifiably imposed.⁵ Rather, the justifiability, and therefore the PoI-compatibility, of any reverse burden will always turn on the particular facts of each case.⁶ Thus, English law typifies an *ad hoc* approach because each reverse burden is treated on a ‘one-off’ basis, rather than by reference to any general principle or rule.

This is one way of interpreting the thick PoI’s requirements. By contrast to the thin PoI, which is concerned only with the proof of the elements of an offence at trial, the *ad hoc* approach is not so confined and can be used to evaluate whether or not a reverse burden defence infringes

³ The Canadian approach was discussed and critiqued in section 2.4

⁴ *DPP v Sheldrake* [2005] 1 AC 264 (House of Lords); *Lambie v HM Advocate* 1973 JC 53.

⁵ *Sheldrake* (n 4) 297 (Lord Bingham).

⁶ *ibid.*

the PoI. In the case of the *ad hoc* approach taken in English law, the process is essentially reducible to four key steps. In *Williams*,⁷ the Court of Appeal provided a helpful summary of these steps: First, the court must consider if the statute in question imposes a probative burden on the accused.⁸ Second, if it does impose such a burden, the court must then determine whether this is ‘an encroachment’ on the presumption of innocence under Article 6(2) of the ECHR.⁹ Third, if it is an encroachment, the court must determine whether or not it is ‘justified as a necessary and proportionate’ infringement of Article 6(2).¹⁰ Finally, if it is not justified then it must either be read down or declared incompatible under the HRA.¹¹ It is at steps three and four that the *ad hoc* thick PoI framework is applied.

Under the approach in *Sheldrake*, the assessment of whether or not a reverse burden is proportionate (and therefore justified) is carried out by reference to a variety of different factors, including: the ‘maintenance of the rights of the defence’, whether or not the accused had an opportunity to ‘rebut the presumption’ against them, the ease of proof for the prosecution if the accused does not bear the burden, and ‘the importance of what is at stake’.¹² Other appellate level cases suggest that other factors, such as the seriousness of the offence and the maximum penalty on conviction, will also be relevant.¹³ Following this *ad hoc* approach, courts are required to undertake fine-grained analysis of the relevant facts, and appear to enjoy a wide discretion in how much weight to give different factors in different circumstances. Recalling the three criteria which any successful thick PoI approach to reverse burdens will need to have, it is appropriate to evaluate the *ad hoc* approach and consider whether or not it is the best means of connecting the thick PoI to reverse burdens.

5.2.b – Does it respect the thick/thin distinction?

The first question to be answered is whether or not the *ad hoc* approach respects the distinction between thick and thin PoI. Although there is no explicit reference to the thick PoI, it is nevertheless clear that an *ad hoc* approach, including that of English law, must refer to something beyond the thin PoI. This is a simple reflection of the limitations of the thin PoI, which only requires the prosecution to bear the burden of proof with respect to elements of an offence. In an *ad hoc* assessment of reverse burdens, such as the method followed by English courts, there are therefore only two logical conclusions: either courts are referring to some other norm, such as the thick PoI, or they are collapsing the thick/thin distinction, and purporting to apply the thin PoI to reach their conclusions about the justifiability of imposing a reverse burden.

If the former route is taken, such an approach will respect the thick/thin distinction, as long as it is made clear that the PoI being relied upon is more than just a trial rule. If the latter route is taken, and the distinction is collapsed, then this will obviously fall foul of this first criterion. As such, an *ad hoc* approach based on the thick PoI can be said to satisfy the first criterion, with the caveat that it must not collapse the thick/thin distinction.

5.2.c – Does it maintain the normative force of the PoI?

The second question is whether an *ad hoc* approach to reverse burdens would maintain the

⁷ *R v Williams (Orette)* [2012] EWCA Crim 2162, [2013] 1 WLR 1200.

⁸ *ibid* [24].

⁹ *ibid*.

¹⁰ *ibid*.

¹¹ *ibid*.

¹² *Sheldrake* (n 4) 297 (Lord Bingham).

¹³ *R v Johnstone* [2003] 1 WLR 1736, 1748-1751.

normative force of the PoI. It is at this point that the flaws in such an approach become clear. As was mentioned briefly in the previous chapter, the *ad hoc* process of justifying individual reverse burdens as permissible exceptions to the thick PoI is damaging to the PoI's normative force.¹⁴ Indeed, such an approach undermines the PoI, allowing exceptions to it to be rationalised on a case-by-case basis. The end result is a system which furnishes no clear principles, leading to uncertainty about when and how the PoI will apply. This, in turn, dilutes the power of the PoI to fulfil its function as a fundamental right. A prime example of this is again found in modern English criminal law.

In *Sheldrake*, the House of Lords appears to apply the (thick) PoI on an *ad hoc* basis. Indeed, in the case of *Sheldrake*, it is clear that some sort of norm is being invoked to analyse reverse burdens. However, though Lord Bingham does refer to the PoI, and appears to be appealing to the PoI in the thick sense, it is more accurate to describe the English approach as appealing to a broader norm of fairness.¹⁵ This is betrayed by Lord Bingham's insistence in *Sheldrake* that when considering whether or not a reverse burden is justifiable and proportionate, the '*overriding concern* is that a trial should be fair'.¹⁶ Under this thinking, the PoI is simply a right 'directed to that end' of overall fairness.¹⁷ Moreover, an appeal to overall fairness also provides a better explanation for the wide variety of factors relied upon under English law to assess the proportionality of reverse burdens. For example, it is difficult to see how taking account of the ease of proof for the prosecution, as Lord Bingham has suggested, has anything to do with the accused's PoI. By contrast, such a consideration may be relevant to the more general question of whether or not it is fair in the circumstances to impose a reverse burden on the accused.

By purporting to apply the PoI, but insisting on an approach which rejects any type of general principle, and then conducting a general enquiry into the fairness of imposing a reverse burden the House of Lords in *Sheldrake* demonstrates the damage that the *ad hoc* approach can do to the normative force of the PoI. Though *Sheldrake* may be an extreme case, given that it effectively invokes the PoI in name only, the point nevertheless remains that any *ad hoc* framework will undermine the normative force of the PoI. More to the point, this approach amounts to an erroneous application of the thick PoI to reverse burdens. Specifically, the error lies in the fact that the *ad hoc* approach proceeds under the false assumption that *any* reverse burden defence is potentially compatible with the thick PoI, so long as the right justification can be found. But there is no reason to assume that this is the case and insisting on an *ad hoc* approach to reverse burdens based on this assumption serves only to make it a self-fulfilling prophecy.

In response to this criticism, a defender of the *ad hoc* justified derogation approach might contend that there *is* good reason to treat the PoI like most other human rights, and to permit derogations from it when an independent justification can be offered. I reject this response for several reasons. First, the *ad hoc* approach does not entail derogation from the PoI, at least not in the sense often invoked by human rights lawyers. In this context, derogating from a right means suspending its application writ large, usually due to a national emergency or crisis.¹⁸ But what is happening in English courts post-*Sheldrake* is not this type of designated, wholesale, time-limited suspension of the PoI for some overriding reason. Rather, it is essentially derogation through the

¹⁴ See section 4.4.

¹⁵ *Sheldrake* (n 4) 297 (Lord Bingham).

¹⁶ *ibid* (emphasis added).

¹⁷ *ibid*.

¹⁸ For example, see *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68, quashing the UK's derogation from Article 5 of the ECHR under the Human Rights Act 1998 (Designated Derogation) Order 2001/3644.

back door, making case-by-case *exceptions*. As such, there is little force in the argument that the *ad hoc* approach is justifiable in the same way that designated derogations are in the context of human rights law.

The second argument against the *ad hoc* approach in this respect is that it is predicated on the notion that some reverse burdens are necessary to facilitate easier prosecution or to mitigate against the high standard of proof imposed by the PoI. But this premise does not hold up to scrutiny. In fact, the rigours of the PoI, including the difficulty of securing conviction imposed by the ‘beyond reasonable doubt’ standard is intentional – to undermine these protections on a case-by-case basis is unjustifiable. If the state wishes to dilute the protection offered by the PoI, then it is at best unfair and at worst deeply cynical to selectively disapply this protection on an *ad hoc* basis, so that some defendants benefit while others do not. More to the point, the PoI is already defeasible, rather than being absolute: it can be overcome by proof beyond a reasonable doubt that the accused committed the offence in question. Again, this is by design, so to undermine this protection for the accused would be to directly undermine the normative force of the PoI.

So, on the whole, it is clear that the *ad hoc* approach does not satisfy this second criterion of maintaining the PoI’s normative force. On the contrary, it leads to uncertainty and gives undue credence to the idea that reverse burdens are only problematic if they lack some sort of independent justification. This undermines the thick PoI, making it little more than a ‘vaporous euphemism’ for overall fairness.¹⁹

5.2.d. – Does it resolve the tension between reverse burdens and the PoI?

Finally, the last criterion for evaluating a thick PoI framework which uses an *ad hoc* approach for reverse burdens is to consider whether such a system would resolve the fundamental tension between reverse burdens and the PoI. Given the serious problems which *ad hoc* approaches pose in terms of the second criterion, it is not necessary to spend much time on this issue. Nevertheless, it is important to note that on this third criterion the *ad hoc* approach again falls short. The tension between reverse burdens and the PoI, it will be recalled, is that the former effectively presume guilt, whereas the latter presumes the accused innocent. For the tension to be resolved, the *ad hoc* approach would need to furnish some credible explanation for how the criminal law can both allow for reverse burdens and uphold the PoI without contradiction.

Unfortunately, the *ad hoc* approach can furnish no such explanation. Indeed, by eschewing any type of general principle the *ad hoc* approach precludes any explanation, instead simply *assuming* that there is no tension as long as the right justification can be found for imposing a reverse burden. As was observed above, however, there is no reason to think that this assumption is true. In fact, given the fundamental tension between reverse burdens and the PoI, it is more intuitive to think such an assumption is *false*. In any case, an approach to reverse burdens where the requirements of the thick PoI are totally fact-specific and non-generalisable does not offer a credible explanation for how the tension between reverse burdens and the PoI can be resolved.

On the whole, then, the *ad hoc* approach must be rejected. Although it potentially satisfies the first criterion of respecting the thick/thin distinction, it falls flat with respect to the other two criteria of maintaining the normative force of the PoI and resolving the tension between reverse burdens and the PoI.

5.3 – Rejecting the Offence/Defence Distinction Approach

¹⁹ Patrick Healy, ‘Proof and Policy: No Golden Threads’ [1987] *The Criminal Law Review* 355, 365.

5.3.a – Overview

The second alternative approach to reconciling the thick PoI and reverse burdens is to rely on the distinction between elements of an offence and defences (the ‘offence/defence distinction’) to determine whether or not a reverse burden can be imposed in a way which is coherent with the PoI.²⁰ On this view, the PoI-coherence of the allocation of the burden of proof is solely a function of whether or not the fact which must be proved is an element of the offence or a defence. If it is the former, then the prosecution must prove it. If it is a defence, however, then a reverse burden may be imposed. There are three different ways in which one can draw the offence/defence distinction. First, it could be drawn formally, that is, by reference to whether or not something is labelled as an element of an offence or a defence.²¹ Second, one could eschew such formal labels and instead draw the offence/defence distinction by reference to some substantive criterion (or criteria) for what counts as an element of an offence or a defence.²² Finally, a third way of distinguishing offence from defence is to classify facts based on who must prove them at trial. This is the ‘proof-based’ account of the distinction offered by Duarte d’Almeida, which classes facts which must be proved by the prosecution as elements of the offence, and those which the defendant must prove as defences.²³

The proof-based account, though it avoids both of the above problems, will not be discussed further because it offers no solution of its own. This is because, although the proof-based account is a viable means of drawing the offence/defence distinction with relative clarity, it is only helpful once the question of which party should bear the persuasive burden has already been resolved. The utility of this distinction for assessing whether or not a reverse burden is PoI-compatible is therefore nil – it leads only to a circularity: the defendant must prove defences, and defences are those facts which the defendant must prove. This offers no answer to the question which underpins the more fundamental issue in question, which is: how *should* we decide which party must prove certain facts at trial? As such, the remainder of section 5.3 will critically assess how an approach to reverse burdens based on the offence/defence distinction, whether formally or substantively drawn, performs when measured against the three success criteria set out at the beginning of the chapter.

5.3.b – Does it respect the thick/thin distinction?

The first criterion for a successful thick PoI-based approach to reverse burdens is whether or not it respects the thick/thin distinction and attends to its consequences. With respect to this

²⁰ This is the approach of the US Supreme Court. See *In re Winship* (1970) 397 US 358 (US Supreme Court); *Mullaney v Wilbur* (1975) 421 US 684 (US Supreme Court); *Patterson v New York* (1977) 432 US 197 (US Supreme Court).

²¹ This view prevails in the US *In re Winship* (1970) 397 US 358 (US Supreme Court); *Patterson v New York* (1977) 432 US 197 (US Supreme Court). It is also endorsed by ‘proceduralists’ such as Picinali, see Federico Picinali ‘The Presumption of Innocence: A Deflationary Account’ (2020) 84(4) *Modern Law Review* 708-739.

²² This interpretation briefly found favour with the US Supreme Court in the case of *Wilbur* but has not really been followed since then. See *Mullaney v Wilbur* (1975) 421 US 684 (US Supreme Court); RJ Allen, ‘Mullaney v Wilbur, the Supreme Court, and the Substantive Criminal Law - An Examination of the Limits of Legitimate Intervention’ (1977) 55 *Texas Law Review* 269; Paul Robinson, ‘Criminal Law Defenses: A Systematic Analysis’ (1982) 82(2) *Columbia Law Review* 199; *DPP v Shelldrake* [2005] 1 AC 264 (House of Lords); *R v DPP Ex p. Kebilene* [2000] 2 AC 326 (HL); Paul Roberts, ‘The Presumption of Innocence Brought Home? Kebilene Deconstructed’ (2002) 118 *Law Quarterly Review* 41.

²³ Luis Duarte d’Almeida, *Allowing for Exceptions: A Theory of Defences and Defeasibility in Law* (OUP 2015) chs 3 and 8.

criterion, the question of whether or not the thick/thin distinction is respected depends on which offence/defence distinction is adopted. If the elements of the offence and defences are distinguished based on formal labels, then the thick/thin distinction is not respected; but if offence and defence are distinguished substantively, the thick/thin distinction may be respected.

The position with respect to the formal offence/defence distinction can be dealt with quickly: if the formal offence/defence distinction is said to determine whether or not a reverse burden is compatible with the PoI, then the thick/thin distinction is collapsed. This is because it reduces the entire PoI into its thin form, a trial rule prohibiting reverse burdens with respect to the formal elements of the offence. For example, consider the offence of murder which, under English law, requires an intent to kill or cause grievous bodily harm.²⁴ If intent were removed as an element of the offence of murder and explicitly replaced by a 'lack of intent' defence, this would not change the fact that either way the issue of intent bears on the question of whether or not the accused is guilty of murder.

Reliance on the formal offence/defence distinction, however, would reach the opposite conclusion purely on the basis of formal labels. By limiting the PoI's scope in this way, an approach based on the formal offence/defence distinction therefore fails to satisfy the first criterion. More specifically, this approach commits the error of giving no weight to the thick PoI at all, excluding it from consideration entirely.²⁵ As such, an approach based on the formal offence/defence distinction does not respect the thick/thin distinction or attend to its consequences.

With regard to an offence/defence distinction which is based on something substantive, rather than on formal labels, the position is less straightforward. For example, one substantive version of the offence/defence distinction considers the elements of the offence to consist of a 'morally coherent norm' prohibiting a given conduct as *prima facie* wrongful, with any facts which render the conduct rightful (i.e. a justification or an excuse) being classed as defences.²⁶ On this account, there is substantive moral distinction between the elements of an offence and any defences. Serious difficulties exist with such a view of the offence/defence distinction, not least of which is the fact that the morality of a given behaviour can often only be assessed by reference to both a prohibition and any potential justifications or excuses.²⁷ Leaving such issues to one side, however, there is no reason to think that such a conception of the offence/defence distinction would collapse or otherwise disregard the difference between thick and thin PoI.

In fact, such a view could accommodate the thick/thin distinction by insisting that certain facts constituting the basic prohibitory (moral) norm, and therefore classified as elements of the offence, must be proved by the prosecution regardless of their formal label.²⁸ As such, an approach to reconciling reverse burdens and the PoI based on a substantive offence/defence distinction appears to satisfy the first success criterion. Nevertheless, the difficulties identified with such a substantive interpretation of the offence/defence distinction appear to militate against adopting this distinction as the sole determinant of whether or not a reverse burden can be

²⁴ This is the mens rea for murder under English law as stated in *Hyam v DPP* [1975] AC 55.

²⁵ The pitfalls of such an approach were discussed in Chapters 4.3 and 4.4. For a fuller critique of an approach based solely on the thin PoI, see Chapter 2, section 2.3.

²⁶ George Fletcher, *Rethinking Criminal Law* (Boston, 1978) 567.

²⁷ These difficulties are forcefully set out by Glanville Williams, who ultimately concludes that the offence/defence distinction is purely verbal and attributable to 'accidents of language, the convenience of legal drafting, or the unreasoning force of tradition': Glanville Williams, 'Offences and defence' (1982) 2(3) *Legal Studies* 233, 254-256.

²⁸ This is arguably what the House of Lords did in *Hunt* and *Sheldrake* by searching for the 'gravamen' of an offence, rather than limiting their consideration to the verbiage of the statutory offences in question.

imposed. It is particularly problematic to consider that under this approach the accused could be made to prove that they acted rightfully, effectively reducing the prosecution's burden to a requirement to present evidence of a *prima facie* wrong which would lead to conviction if the accused could not discharge their reverse burden.

However, for the time being the position can be summarised as follows. A purely formal offence/defence distinction does not satisfy the first success criterion, because it collapses the thick/thin distinction. A substantive offence/defence distinction does satisfy the first success criterion, by avoiding such a collapse, but appears to have other, deeper flaws.

5.3.c – Does it maintain the normative force of the PoI?

The second criterion for a successful thick PoI-based approach to reverse burdens is whether or not it maintains the normative force of the PoI, meaning it clearly sets out the conditions under which a reverse burden will be coherent with the thick PoI. Again it will be useful to consider the position of approaches based on either the formal or substantive offence/defence distinction in turn.

To begin, we can first consider the formal offence/defence distinction. This version of the distinction recognises no substantive difference between the elements of an offence and defences, regarding any differences between the two as 'purely verbal' and 'a matter of convenience in expression'.²⁹ The question is therefore whether an approach to reconciling reverse burdens and the PoI can turn on such a verbal distinction, whilst maintaining the normative force of the PoI. At first blush, the answer to this question appears to be that such a view would maintain the normative force of the PoI, in the sense of setting out with relative clarity the conditions under which a reverse burden can be imposed without breaching the PoI. Indeed, if the question is only whether or not a given fact is a formal element of the offence or a separate defence, then the process of determining whether or not a reverse burden can be imposed is reduced to a single step. But something is lost in such a reduction.

In fact, the better view is that although an approach based on the formal offence/defence distinction would be clear, it would also be clearly arbitrary, being indexed to a distinction which is only semantic. As such, and as was observed in the previous sub-section, what is actually being expressed in such an approach is a reference to the *thin* PoI. The formal offence/defence distinction therefore offers *no* clarity about the conditions under which a reverse burden will be coherent with the *thick* PoI, as the second criterion requires, because it ignores the thick PoI entirely. The result is therefore that an approach based on the formal offence/defence distinction fails to satisfy the second success criterion.

By contrast to the failure of the formal offence/defence distinction to maintain the PoI's normative force, the substantive distinction may offer more hope. In particular, an approach based on a substantive offence/defence distinction has the possibility of incorporating the thick PoI into the definition of the offence. Following the example used in the previous sub-section, one could adopt the thick PoI as the grounding norm for a substantive offence/defence distinction based on moral wrongfulness. On this view, the thick PoI would be characterised as a norm presuming that the accused did not act wrongfully. At this juncture, however, this approach breaks down.

²⁹ Williams (n 26) 234.

If the substantive offence/defence distinction determines the locus of the burden of proof, then the accused can be made to prove that they acted in a way which was not wrongful, since this would constitute a defence. However, if the thick PoI *presumes* that the accused did not act wrongfully, there would be no need for the accused to ever prove such a defence. This reveals the central difficulty with relying on only the substantive offence/defence distinction: though such a substantive distinction sets out the conditions where a reverse burden will be coherent with the thick PoI, the conditions are impossible to fulfil. Namely, a reverse burden would be PoI-coherent on this view if it did not presume that the accused acted wrongfully, since this is all the thick PoI would require. But the substantive offence/defence distinction would also dictate that the burden of proof could be allocated to the accused with respect to a defence, such as a justification, therefore negating wrongfulness. But for wrongfulness to need to be negated, it must already be presumed against the accused.

This paradoxical situation demonstrates that reliance on a substantive offence/defence distinction also fails to satisfy the second success criterion. Rather than setting out the conditions where a reverse burden can be imposed in a thick-PoI-coherent way clearly, the substantive offence/defence distinction ultimately shows itself to be contradictory. Far from maintaining the normative force of the PoI, this would result in manifest confusion about the nature of the thick PoI and its relationship with reverse burdens. One answer to this difficulty which proponents of the substantive offence/defence distinction approach might be to argue that the substantive basis for the distinction ought to be different. Specifically, instead of referring to wrongfulness, one could argue that the offence/defence distinction should simply track the distinction between facts which go to guilt and facts which do not.³⁰ I concede this would remedy the problem, however, even in that case it would still be the distinction between exculpatory and nonexculpatory facts which was relevant, albeit in a roundabout way. As will be shown in the next chapter, this is the distinction which I argue best encapsulates the requirements of the thick PoI with respect to reverse burdens. For now, however, all that needs to be said is that the substantive offence/defence distinction does not track this distinction, and, for the reasons given above, fails to satisfy the criterion of maintaining the PoI's normative force.

5.3.d – Does it resolve the tension between reverse burdens and the PoI?

In light of the failure of either the formal or substantive offence/defence distinction to satisfy the previous two criteria, there is no need for extensive consideration of how this approach fares with respect to the final criterion. However, it may be beneficial to offer some brief remarks about whether or not an approach based on the offence/defence distinction resolves the tension between reverse burdens and the PoI. This tension, it will be recalled, stems from the contradiction which results from purporting to presume both the innocence and guilt of the accused simultaneously. The former presumption is the plain meaning of the phrase 'presumption of innocence' whereas the latter is functionally equivalent to imposing a reverse burden, which effectively creates a presumption of the accused's guilt. With respect to the formal offence/defence distinction, it quickly becomes obvious that there is no resolution of this tension.

Rather than addressing how reverse burdens and the PoI can coexist, an approach based on the formal offence/defence distinction simply allows the tension to continue, denying that there is any contradiction, so long as reverse burdens are limited to defences only. The issue with this

³⁰ In fact, section 113 (9) of the American Model Penal Code goes some way toward doing this, defining as elements of an offence any fact which 'negatives an excuse or justification...or negatives a defense under the statute of limitations'. The Code is not binding law, but frequently informs the drafting and interpretation of criminal codes at the state level in the US.

reasoning is that if the formal offence/defence distinction is adopted, then the permissibility of imposing a reverse burden with respect to a given fact, e.g. intent to kill as an element of an offence, changes entirely if the same fact is expressed in different terms, e.g. lack of intent as a defence. This demonstrates that the tension between reverse burdens and the PoI is, in fact, unresolved by relying on the formal offence/defence distinction. Rather, it is simply glossed over.

A substantive reading of the offence/defence distinction does not fare much better against this third criterion. In fact, even if there is a substantive distinction between the elements of an offence and defences, the tension between reverse burdens and the PoI still persists. Even a substantive offence/defence distinction cannot explain how reverse burdens and the PoI can coexist, it can only offer a basis on which to discriminate between reverse burdens which violate the PoI and others which do not, simply because they are attached to defences. This reveals a more general truth, which is that ultimately the offence/defence distinction, no matter which interpretation is adopted, is ill-suited to determining the locus of the burden of proof by itself. The operation of the offence/defence distinction is simply too mechanistic and oversimplifies the problem too much. Moreover, the offence/defence distinction fails to fulfil most, if not all, of the success criteria for a workable thick PoI-based approach to reverse burdens. If the distinction is drawn formally it fails to fulfil any of the criteria, and if it is drawn substantively, it fulfils only one: respect for the thick/thin distinction. The result is that this approach to applying the thick PoI to the issue of reverse burdens must also be eliminated from consideration.

5.4 – The Canadian and CLRC Approach: A Partial Endorsement

5.4.a – Overview

The third alternative approach to be examined here is an absolute prohibition on reverse persuasive burdens. There are two paths forward for such an approach, each of which has been described in previous chapters. The first is the Canadian approach, whereby reverse burdens are banned as being incompatible with the PoI by virtue of the fact that they allow for conviction in spite of reasonable doubt as to guilt. The second is the longstanding recommendation of the English Criminal Law Revision Committee (CLRC) to make all burdens on the accused evidential only. The two approaches are very similar in nature and indeed, as was observed in Chapter 2, they share a common rationale: both rely heavily on the notion that the main objection to imposing a reverse burden is that it violates the standard of proof. Given this key similarity, and that both approaches lead to effectively the same outcome – a flat ban on reverse burdens – the two will be examined together, in order to determine how well they fare against the three success criteria set out in Chapter 4. Ultimately, it will be concluded that neither approach is completely correct, and that focus on the standard of proof presents only an incomplete explanation of what causes the tension between reverse burdens and the PoI

5.4.b – Does it respect the thick/thin distinction?

In Canadian law, the presumption of innocence is codified in statute in the Canadian Charter of Rights and Freedoms (the Charter). Section 11(d) of the Charter provides that ‘any person charged with an offence...has the right to be presumed innocent until proven guilty according to law’. In *Whyte*, the Supreme Court of Canada (SCC), was faced with a challenge to a statutory reverse burden, on the grounds that it contravened the PoI as characterised in s 11(d) of the Charter.³¹ In the end, the SCC ruled that the reverse burden was incompatible with the PoI. For

³¹ *R v Whyte* [1988] 2 S.C.R. 3 (SCC).

present purposes, then, the relevant question is: *which* PoI was the SCC applying in the case of *Whyte*?³² The answer will determine the extent to which the Canadian approach can be said to respect the thick/thin distinction, and therefore satisfy the first success criterion.

Initially, it appears that the SCC couched their decision in terms of the thin PoI. As noted above, s 11(d) of the Charter, under which the case in *Whyte* was brought, refers explicitly to ‘any person charged with an offence’. This terminology, and limited scope of application, would suggest a thin conception of the PoI, similar to that found in *Woolmington* or *Winship*. Yet, a closer reading of the judgment in *Whyte* reveals that this is not the case. On the contrary, it appears that despite the case being litigated under the thin PoI (as is to be expected), the SCC did not limit their understanding of s 11(d) to that of a thin trial rule. This is clear from the language used by Dickson CJ when discussing whether or not the statutory reverse burden violated the PoI under s 11(d).³³ One specific passage bears this out:

‘An interpretation of s 11(d) that would make [the PoI] subject to legislative exceptions would run directly contrary to the overall purpose of an entrenched constitutional document...The purpose of the Charter is to *entrench certain basic rights* and freedoms and *immunise them from legislative encroachment*.’³⁴

As is clear from this statement, the PoI which Dickson CJ has in mind, and which the SCC applied in *Whyte*, is more than a trial rule, and is certainly not analogous to the thin PoI found in *Woolmington* or *Winship*, both of which are rife with exceptions. Moreover, the language of the PoI as an ‘entrench[ed] basic right’ which has been ‘immunise[d]...from legislative encroachment’ suggests a deeper and more fundamental principle: the thick PoI. In essence, then, it appears that the best view of the PoI, as applied in *Whyte*, is that s 11(d) of the Charter represents a constitutionalised, entrenched version of the thick PoI under Canadian law. Nonetheless, this conclusion still does not provide an immediately obvious answer to the question of whether or not the thick/thin distinction is being respected.

In view of the above, it seems that Canadian law may be guilty of collapsing the thick/thin distinction, subsuming the thin PoI into the thick PoI. Indeed, a closer reading of the judgment bears this out too. Reviewing earlier authorities, Dickson CJ notes that the PoI under Canadian law tended to entail at least three components: i) a requirement for proof of guilt beyond reasonable doubt in order to convict someone; ii) the onus of proof resting on the Crown; and iii) a requirement that convictions be obtained ‘in accordance with lawful procedures and principle of fairness’.³⁵ Subsequently, however, Dickson CJ rejects the offence/defence distinction, the crucial consideration of the thin PoI, as having any role at all in assessing whether or not a reverse burden violates the PoI, stating ‘the distinction between elements of the offence and other aspects of the charge is irrelevant’.³⁵ Instead, the focus is solely on the standard of proof, and the only question is whether or not a reverse burden permits conviction in spite of reasonable doubt as to guilt. As such, it appears that Dickson CJ does in fact elide the thick/thin distinction, but unlike other approaches which do so, the test in *Whyte* collapses the distinction by ignoring the *thin* PoI. Rather than recognising any role for the thin PoI, then, the SCC’s approach shifts focus entirely onto the standard of proof, unnecessarily excluding any consideration of the thin PoI. Thus, the only conclusion is that the Canadian approach does not respect the thick/thin distinction.

³² *ibid* 13-18 (Dickson CJ).

³³ *ibid* 14-15 (Dickson CJ) (emphasis added).

³⁴ *ibid* 15, citing *R v Oakes* [1986] 1 S.C.R. 103 (SCC).

³⁵ *ibid* 18 (Dickson CJ).

Turning to consider the proposal of the CLRC, it is clear that both thick and thin senses of the PoI are being employed. The CLRC give five reasons on which they rely to conclude that reverse persuasive burdens should be abolished.³⁶ The most relevant of these are: i) that it is ‘repugnant to principle’ to require a judge or jury to convict someone despite reasonable doubt that they are guilty;³⁷ ii) that this would bring statutory defences in line with the common law, which only imposes a reverse burden for the insanity defence;³⁸ and iii) that the goal of preventing a guilty defendant from successfully mounting a submission of no case to answer, because the prosecution have not negated an innocent explanation for the defendant’s behaviour, is equally well-served by imposing an evidential burden only.³⁹ From these principled reasons, it is clear that the CLRC are invoking both a basic trial rule and a deeper principle of presuming innocence, such as that of the thick PoI.

This is revealed in their explanation of reason (i), where the principle they refer to is quoted from Viscount Sankey’s speech in *Woolmington*: ‘that “it is the duty of the prosecution to prove the prisoner’s guilt”’.⁴⁰ This is an explicit reference to the canonical statement of the thin PoI under English law and emphasises its role in ensuring that the prosecution bear an overarching duty of proving guilt. The second and third reasons listed above, then, appear to pertain to the thick PoI. Reason (ii), for example, is not a requirement of the thin PoI. Rather, the rule that common law defences (except insanity) impose only an evidential burden was only established definitively in the case of *Gill*, where the Court of Criminal Appeal clarified that duress – which had previously been thought to entail a persuasive burden on the accused – imposed an evidential burden only.⁴¹ The court did not explain this decision in any great depth, simply choosing to endorse Professor Glanville Williams’ position on the issue, despite its conflict with a ‘literal reading’ of the relevant authorities.⁴² Their logic, however, appears to be attributable to the overarching duty on the Crown to ‘destroy’ any defence properly raised by the accused, so as to ‘leave the jury’s minds [in] no reasonable doubt’ that the accused is guilty’.⁴³

Whereas the reference to *Woolmington* seemed to evoke the thin PoI, the reference to the prosecution’s overarching duty here suggests that the CLRC are invoking the thick PoI. This is clear from the fact that the guilt to which they are referring cannot simply mean proof of the formal elements of the offence, because this would be redundant after reason (i). Rather, the CLRC must be referring to guilt or innocence in the thicker sense of being criminally responsible and liable, otherwise, there would be no reason not to impose a persuasive burden on the accused with respect to a common law defence. As such, the most compelling explanation is that the CLRC are appealing to a thicker notion of guilt and innocence, and therefore to the thick PoI, which presumes the accused innocent of criminal wrongdoing. The third reason, which effectively restates a principle of least intervention, reasoning that an evidential burden can be just as effective as a persuasive burden and should therefore be chosen for being less of an imposition, also appears rooted in the thick PoI. At the very least, such a principle could not be justified by reference to the thin PoI alone, as it is only a trial rule.

³⁶ These are set out at para. 140 (i) – (v) of the report. See Criminal Law Revision Committee, ‘Eleventh Report: Evidence (General)’ (Cmnd 4991 1972, para 140.

³⁷ *ibid* para 140 (i). Note that this is identical to the rationale of *Whyte*.

³⁸ *ibid* para 140 (iii).

³⁹ *ibid* para 140 (v).

⁴⁰ *ibid* (i), citing *Woolmington v DPP* [1935] AC 462 (Viscount Sankey).

⁴¹ *R v Gill* (1963) 47 Cr. App. R. 167, 171-172.

⁴² *ibid*, citing Glanville Williams, *Criminal Law* (2nd edition) 762.

⁴³ *ibid*.

On the whole, then, the CLRC's approach seems to invoke both the thick and thin PoI, though not in such terms. As with Canadian law, there is an emphasis on the standard of proof to express the fundamental tension between reverse burdens and the PoI. For reasons which will be explained below, I would not endorse this focus on the standard of proof. Nevertheless, as the above analysis has demonstrated, there are distinct sense of the PoI being referred to in the report of the CLRC. As such, and unlike Canadian law, the CLRC approach can be said to respect the thick/thin distinction.

5.4.c – Does it maintain the normative force of the PoI?

With respect to the second criterion, it can be concluded fairly quickly that both the Canadian and CLRC approaches maintain the normative force of the PoI. The merit of the approach followed in Canada is that its simplicity makes it very clear when a reverse burden will or will not fall foul of the PoI. Put simply, the only time a reverse burden will *not* violate the PoI under Canadian law, is when the prosecution has already proved some other fact that 'leads inexorably to the conclusion that' some other essential element of the offence in question exists.⁴⁴ As was discussed in a previous chapter, however, the only circumstance which would permit such an inference would be where the reverse burden is attached to a fact which is the logical inverse of an element of the offence in question. As was observed in Chapter 2, this requirement would breach the thin PoI, by making the accused disprove an element of the offence with which they are charged. This,⁴⁵ in turn, makes it unlikely that any reverse burden would ever be deemed compatible with the PoI under Canadian law. The net result of all this is that Canadian law effectively imposes a flat ban on reverse burdens.

The flat ban on reverse burdens under Canadian law sets out clear criteria for how the burden of proof can be allocated in a way which is coherent with the requirements of the PoI. Admittedly, the language with which it is expressed could be clearer, especially with respect to the supposed exception to the ban discussed above. Nevertheless, the scope and application of the PoI with respect to reverse burdens in Canada is very clear, meaning that its normative force is maintained. It is, however, worth noting that although this is the position with respect to the PoI, the Canadian Charter still allows for a PoI-infringing reverse burden to be imposed, provided that certain conditions are met.⁴⁶ Namely, the reverse burden must be aimed at an issue which is 'sufficiently important' to permit overriding the PoI and must be reasonable and proportionate in the circumstances.⁴⁷

This saving provision in s 1 of the Charter applies to any and all of the rights which the Charter otherwise guarantees. As such, the unfortunate reality is that ultimately the Canadian approach may often descend into the kind of *ad hoc* approach taken in England and Wales. This clearly would diminish the normative force of the PoI, for the same reasons the *ad hoc* approach does. However, given that the existence of the saving clause is a feature of Canadian constitutional law, which does not pertain in any specific way to the PoI itself, I have chosen to focus on the position in Canada at the first stage, where the relationship between the PoI and reverse burdens is being considered.

Moving on to the CLRC's suggestion that all reverse persuasive burdens be abolished and replaced with evidential burdens, the position is simple: such a move would bolster the normative

⁴⁴ *Whyte* (n 30) 18-19 (Dickson CJ).

⁴⁵ *ibid.*

⁴⁶ Canadian Charter of Rights and Freedoms, s 1.

⁴⁷ *Whyte* (n 30) 20 (Dickson CJ), citing *Oakes* (n 33) 138-139.

force of the PoI, elevating it from a mere trial rule to a full-blown normative standard. As with the Canadian approach, this would be a flat ban on reverse burdens, meaning there could never be any doubt as to whether or not a reverse burden violated the PoI. The result would be to emphasise the PoI's prominence in the criminal law, rather than dilute it.

5.4.d – Does it resolve the tension between reverse burdens and the PoI?

The final question to be answered is whether or not the Canadian and CLRC bans on reverse burdens resolve the tension between reverse burdens and the PoI. Here, the answer to this question is a qualified 'yes'. However, the qualification is an important, albeit nuanced, point which must be treated in some detail. In simplest terms, the Canadian and CLRC approaches both resolve the tension between reverse burdens and the PoI, by recognising that the tension exists and banning reverse burdens as a result. What is problematic about each of these approaches, however, is the reasoning by which they reach this conclusion. It is their defective reasoning which means that there must be some qualification to the conclusion that both the CLRC and Canadian approaches satisfy this third criterion. With respect to the Canadian approach, the problem is that its reasoning is couched only the violation of the standard of proof, to the exclusion of other important aspects of the thick PoI. The CLRC shares this defect, though it also adduces other reasons for banning reverse burdens.

To begin, we can consider the shared rationale of both the CLRC and Canadian approaches to reverse burdens: reliance on the standard of proof. Under Canadian law, it has been explicitly clear that the dilution of the standard of proof is the key objection to imposing reverse burdens.⁴⁸ Similarly, the CLRC's first reason for recommending the abolition of reverse burdens was that they require the accused to provide an explanation for conduct which may or may not be blameworthy, and if they cannot convince the jury on the balance of probabilities that their story is true, they must be convicted – even if they succeed in creating a reasonable doubt.⁴⁹ There is, of course, nothing incorrect about this objection. However, it obscures a more fundamental problem with reverse burdens, which is that they allocate the risk of non-persuasion, whatever the standard of proof, to the accused. This is not just a semantic difference or a difference of emphasis; the logic of the Canadian approach, though used to justify a total ban on reverse burdens, could just as easily be turned on its head to permit all reverse burdens. This could be done by simply lowering the standard of proof for all reverse burdens so that they only require the accused to create a reasonable doubt.

As will be seen, on my account this would still be a violation of the thick PoI, because the accused remains the one bearing the risk of non-persuasion with respect to innocence. A more in-depth explanation of why this is problematic will be given in the next chapter. For now, it can be stated briefly as follows: any transfer of the risk of non-persuasion to the accused violates the thick PoI, because the essence of the thick PoI is to prohibit making the accused prove their innocence. This issue is therefore prior to any assessment of what the benchmark is for whether or not something is considered proved, i.e. it precedes discussion of the standard of proof. This reveals the underlying problem with the Canadian and CLRC focus on the standard of proof in reaching their conclusions about reverse burdens, which is that whether the accused has to meet a standard of beyond reasonable doubt, the balance of probabilities, or clear and convincing evidence,⁵⁰ in

⁴⁸ See section 2.4 above in Chapter 2.

⁴⁹ CLRC (n 35) para. 140 (i).

⁵⁰ This is a third, intermediate standard of proof which is sometimes used in the US. It requires the party who bears it to convince the fact-finder that the fact in issue is 'highly probable': *Colorado v New Mexico* 467 U.S. 310 (1984), 316 (US Supreme Court).

every case they are still being made to prove their innocence. Yet what is clear is that this does not resolve the tension between the PoI and reverse burdens *per se*. Rather, it simply eliminates the disparity between the standard of proof required for conviction and the standard of proof which the accused must discharge if they are saddled with a reverse burden. This is therefore an empirically contingent solution, rather than a true resolution of the tension. As such, although the Canadian and CLRC approaches do resolve some of the tension, they also leave open the possibility for the tension to re-emerge, should the standards of proof be altered.

The net result is that the Canadian approach does not fully resolve the tension between reverse burdens and the PoI, and the same is true for the CLRC, to the extent that their conclusions rest on the standard of proof argument. Thus, the answer as to whether or not these approaches fulfil the third success criterion is a qualified 'yes'. Although they do resolve some of the tension between the PoI and reverse burdens in practice, they leave the more fundamental tension unresolved and unexplained. This means that despite their other merits, these approaches still leave something to be desired. Overall, then, these approaches receive a partial endorsement. The CLRC approach respects the thick/thin distinction and maintains the normative force of the PoI, but it fails to fully resolve the underlying tension between the presumption and reverse burdens. Similarly, the Canadian approach fails to resolve the tension or respect the thick/thin distinction, though it does preserve the PoI's normative force. What is clear from the above analysis is that the merit in the CLRC and Canadian approaches comes from their willingness to take a clear stance on the conflict between reverse burdens and the PoI, even if they do not fully realise their objective of resolving the tension. This suggests that an approach which satisfies all three success criteria will have to do the same, whilst also respecting the thick/thin distinction and maintaining the PoI's normative force.

5.5 – Conclusion

The objective of this chapter was to consider a range of possible connections between the thick PoI and reverse burdens. In Chapter 4, the need for such a connection was established, accompanied by an observation that there are many ways in which one might attempt to reconcile the thick PoI and reverse burdens. Three alternatives were considered: i) an *ad hoc* approach, assessing each reverse burden on its own facts; ii) an approach based on the offence/defence distinction; and iii) the Canadian approach. The *ad hoc* approach was the first to be rejected, as it was shown not to maintain the normative force of the PoI or to resolve the tension between reverse burdens and the PoI.

Next, the offence/defence distinction was also dismissed as a basis for connecting the thick PoI and reverse burdens, as it was found to at best fulfil only the first criterion of respecting the thick/thin distinction, and at worst fail to fulfil any of the three criteria. The fundamental problem with reliance on the offence/defence distinction, as was shown above, was that it could not resolve the tension between the PoI and reverse burdens, offering at a best a gloss on the issue. Finally, the so-called Canadian approach was considered. On this view, reverse burdens are flatly banned because they allow conviction in spite of reasonable doubt as to guilt. This view was partially, but not fully endorsed. Although the Canadian approach would have the effect of maintaining the normative force of the PoI and resolving the tension between the PoI and reverse burdens, a problem with this approach was identified: by focusing on the standard of proof, the Canadian approach failed to respect the thick/thin distinction, and therefore could not be fully endorsed.

Having reviewed three alternatives and found none to be entirely suitable, there is nothing left to do but offer a fourth alternative, one which can succeed where the three approaches considered

above have failed. The next chapter will do just that, offering a novel conception of the thick PoI as a prohibition on requiring the accused to prove their innocence. As will be explained, the thick PoI is best understood and applied to reverse burdens as a prohibition on proving innocence, meaning that it does not allow the accused to be allocated the risk of non-persuasion of the fact-finder. This focus on the transfer of risk allows the true meaning of the thick PoI to come into sharp focus and demonstrates that it succeeds against all three success criteria relied upon in this chapter.

Chapter 6: The Presumption of Innocence as a Prohibition on a Requirement to Prove Innocence

6.1 – Overview

This chapter fleshes out the connection between what I call the thick presumption of innocence (PoI) and reverse burdens. It will be recalled that, when referring to the thick PoI, I mean the general norm of the criminal law which provides that the state must generally presume that its citizens are innocent of any criminal wrongdoing. Such a presumption can only be overcome upon proof of guilt to the requisite standard of beyond reasonable doubt. Commitment to this general principle, however, leaves the status of reverse burdens open to question. Reverse burdens require the accused to prove some contested fact on the balance of probabilities, otherwise, they lose on that issue. In the criminal context, this means that where the accused fails to discharge a reverse burden, they will be convicted of the offence for which they are being tried.

How can a system of criminal justice purport to respect and uphold the PoI whilst also allowing the accused to be saddled with a reverse persuasive burden, the effect of which is that they must prove their innocence?¹ In Chapter 5, three alternative answers to this question were examined. Of these three, the *ad hoc* approach and the offence/defence distinction were both rejected outright. The third alternative, a flat ban on reverse burdens, was only partially endorsed. This chapter presents a fourth way of connecting the thick PoI to reverse burdens and argues that it is superior to the three alternatives rejected in the previous chapter.¹ This fourth alternative can be stated succinctly as follows: a reverse burden will be coherent with the thick PoI if, and only if, it does not require the accused to prove their innocence. At first blush, this argument may appear to be a simple truism. Yet, as will be explored below, it provides a firm grounding for a number of important conclusions about reverse burdens and their relationship with the thick PoI. Moreover, it is better than any of the other options presented in the previous chapter, when assessed against the three success criteria for any thick PoI framework, namely: respecting the thick/thin distinction, maintaining the normative force of the PoI, and resolving the tension between reverse burdens and the PoI.

Below, I will expand on what it means to say that an accused person must prove their innocence, arguing that this is to be understood by reference to whether the defence in question is exculpatory or nonexculpatory.² As will be explained, commitment to the thick PoI forbids imposing a reverse burden with respect to any exculpatory defence. For the purposes of this chapter, I call any defence which is based in some way on the accused's innocence (e.g. by justifying their conduct or excusing it) an exculpatory defence. By contrast, a nonexculpatory defence (ND) is one which is based solely on public policy, allowing the accused to escape liability despite their culpability.³ On my account, which this chapter will aim to defend, NDs can be the

¹ The superiority of this approach is assessed against the three success criteria first described in Chapter 4, and referred to throughout Chapter 5. For reference, they are: respecting the thick/thin distinction, maintaining the normative force of the PoI, and resolving the tension between reverse burdens and the PoI.

² I refer to 'defences' and not 'facts' here because, on my account, the thin PoI already mandates that any fact which is an element of the offence must be proved by the prosecution. Thus, only defences remain.

³ I have adopted this working definition from Paul H Robinson, 'Criminal Law Defenses: A Systematic Analysis'

subject of a reverse burden because the facts at issue in such defences do not pertain to the innocence of the accused, and so the thick PoI is not engaged. In the category of NDs, I count the following defences: the various forms of immunity,⁴ time limitation, and entrapment.⁵ I also include applications by the defence for a stay of proceedings due to abuse of process, which relate not to guilt or innocence but to the fairness of conducting a trial at all.⁶ Where the accused is being asked to prove a fact which does not bear on the issue of their guilt or innocence, the thick PoI is not engaged. Exculpatory defences will therefore always bear on this issue of guilt, but NDs never will.

In order to substantiate these general claims about the thick PoI and reverse burdens, this chapter will be composed of four further sections. Section 6.2 will offer an explanation of how we should understand what it means to make the accused ‘prove their innocence’. Specifically, this section will argue that the heart of the problem with reverse burdens is that they transfer the risk of non-persuasion to the accused with respect to the issue of guilt or innocence. I will note, however, that it is not the allocation of the risk of non-persuasion to the accused *per se* which contravenes the thick PoI. Rather, a problem only arises when the accused is made to take on the risk of failing to persuade the court *of their innocence*. It is only this latter quality which contravenes the thick PoI. The implication of this is that although many existing reverse burdens will, on my account, be in violation of the thick PoI, it is also true that the thick PoI does not justify a total ban on reverse burdens.

Next, section 6.3 will set out my argument for why the thick PoI should be understood as precluding imposing reverse burdens where they have the effect of making the accused prove their innocence. This will entail assessing this view of the thick PoI against the three success criteria, with a view to demonstrating that my approach succeeds in respecting the thick/thin distinction, maintaining the PoI’s normative force, and resolving the tension between the PoI and reverse burdens. Finally, section 6.4 will conclude the chapter, and summarise why my understanding of the thick PoI and its relationship to the allocation of the burden of proof should be preferred.

6.2 – The PoI and Wigmore’s ‘Risk of Non-Persuasion’

For most commentators, the status of the (thick) PoI as a general principle of the criminal law is uncontroversial.⁷ Disagreement only arises when the implications of this principle in specific contexts, such as criminalisation, or the imposition of strict liability, are contemplated. In the case of reverse burdens, for example, some have argued that the thick PoI is irrelevant, whilst others have taken the opposite view and claimed that the thick PoI totally precludes imposing any

(1982) 82 Columbia Law Review 199, 229–231.

⁴ There are at least six different kinds of immunity which can act as defences (as barriers to prosecution): diplomatic, judicial, legislative and executive immunity, immunity following compelled testimony, and immunity arising from a plea bargain. These are explained in greater detail at *ibid* 231.

⁵ Entrapment will be a more familiar defence to American lawyers, as it is not always explicitly recognised as a defence in other common law jurisdictions. Here, I use the term to refer to a situation where the accused is induced by a government agent (e.g. an undercover police officer) to commit an offence. This is best viewed as an ND because it is not based on any lack of culpability on the accused’s part, but rather on ensuring that state agents do not act improperly to secure a conviction. For more, see *ibid* 236–239.

⁶ A stay for abuse of process is the remedy when a defendant cannot receive a fair trial, or it would be unfair to try them: *R v Beckford* [1996] 1 Cr App R 94. A defendant seeking this remedy bears the burden of proof to the standard of on the balance of probabilities: *R v Crown Court at Norwich, ex p. Belsham* (1992) Cr App R 382.

⁷ But cf Picinali, who argues that it is only a rule allocating the burden of proof to the prosecution: Federico Picinali, ‘The Presumption of Innocence: A Deflationary Account’ (2020) 84(4) *Modern Law Review* 708.

reverse persuasive burden, even with respect to the insanity defence.⁸ My contention is that the thick PoI creates a simple, yet often misconstrued, prohibition: the accused must not be made to prove their innocence. In my view, this follows logically from the notion of a general norm presuming innocent – if the accused is to be presumed innocent, then they cannot simultaneously be presumed guilty.

Yet a reverse burden is tantamount to a presumption of guilt, in that if the accused fails to discharge their burden they will be convicted. Reverse persuasive burdens, like persuasive burdens more generally, can be thought of as devices which set default outcomes for the criminal trial. In general, then, we presume the innocence of the accused, and this manifests itself in the trial through the allocation of the burden of proof. That allocation, in turn, ought to reflect the notion that the accused is presumed innocent of criminal wrongdoing. This means that the accused must not be required to prove their innocence, meaning that they cannot be made to bear what John Henry Wigmore called the ‘risk of non-persuasion’ with respect to the issue of whether or not they are guilty.⁹ Below, I defend this conception of the thick PoI’s requirements, relying on this Wigmorean notion of the risk of non-persuasion to explain what exactly is so objectionable about reverse burdens in terms of the PoI.

In the common law world, criminal trials are conducted adversarially, with fact-finding and the ultimate rendering of a verdict often left to a jury of laypersons. In England and Wales, or the United States (US), when the jury retires they must come to a verdict, usually unanimously, but sometimes by a majority, as to whether or not the accused is guilty.¹⁰ However, as one early 20th century American commentator has noted, whenever such decisions have to be made by human beings, on a rational basis, there is always the possibility that they may consider the two options equally likely, and therefore be unable to reach a decision.¹¹ As such, the criminal law has long adopted procedures which structure the decision-making of juries during criminal trials. Burdens of proof are a prime example of this phenomenon.

As has often been recognised, the allocation of the persuasive burden sets a default outcome for a trial, ensuring that the jury reach a definitive result.¹² Thus, in criminal trials, the burden of proof is on the prosecution, because it is the state who must prove that the accused is guilty. If they cannot, the accused is entitled to an acquittal.¹³ The prosecution therefore bear the risk of non-persuasion with respect to guilt: if they cannot convince the jury of the guilt of the accused, they have failed to discharge their burden of proof and thus they lose on that issue. This is the most fundamental statement of the PoI, heralded as a ‘golden thread’ and ‘the undoubted law, axiomatic and elementary’.¹⁴ In proposing that the thick PoI be understood as a prohibition on proving innocence, I am therefore only suggesting that the PoI be accorded the status it deserves, so that it can live up to this lofty rhetoric. To do so, my contention is that the thick PoI be understood as prohibiting the transfer of the risk of non-persuasion with respect to guilt or

⁸ For an example of each of these respective positions, see Federico Picinali, ‘Innocence and Burdens of Proof in English Criminal Law’ (2014) 13 *Law, Probability and Risk* 243; Criminal Law Revision Committee, ‘Eleventh Report: Evidence (General)’ (Cmnd 4991 1972) paras 138–140.

⁹ John Henry Wigmore, *Evidence in Trials at Common Law*, vol 9 (Third edition, revised., Boston : Little, Brown 1961, para 2485.

¹⁰ For example, s 17(1) of the Juries Act 1974 allows for majority verdicts in English courts under certain circumstances.

¹¹ Fleming James Jr., ‘Burdens of Proof’ (1961) 47(1) *Virginia Law Review* 51, 51-52. James refers to this situation as ‘a matter in equipoise’.

¹² On the utility of burdens of proof as devices for risk management, see David Hamer, ‘Presumptions, standards and burdens: managing the cost of error’ (2014) 13(3-4) *Law, Probability and Risk*, 221.

¹³ *Woolmington v DPP* [1935] AC 462, 481.

¹⁴ *Woolmington* (n 13) 481-482; *Coffin v United States* 156 US 432, 453 (1895) (Justice White).

innocence to the accused.

How do reverse burdens fit in with this understanding of burdens of proof more generally? The starting point is that the risk of non-persuasion must rest with the party who has something to prove. This is a matter of policy, reflecting a general preference for which party ought to bear the risk of losing, and all the consequences which come with it. In the case of a criminal trial, then, it is common ground that the prosecution bear the burden of proof with respect to guilt, because the costs of losing a criminal trial are so steeply asymmetrical: the accused stands to lose their liberty, and possibly their life, upon conviction. This is the essence of the PoI as expressed in cases like *Woolmington* and *Winship*.¹⁵ However, if the accused is to be presumed innocent, then, as a matter of logic, they cannot also be required to prove that they are innocent. This would be wholly unnecessary, as there is no need to prove something which is already presumed. And yet, reverse burdens impose precisely such a requirement. More to the point, by requiring the accused to prove some fact in issue, or else face conviction, reverse burdens effectively transfer the risk of non-persuasion with respect to guilt. This is a violation, and indeed, a complete reversal of the thick PoI.

The central claim of this thesis has now been put forward: where the accused is made to bear the risk of non-persuasion, with respect to the issue of whether or not they are guilty, the PoI is violated. This is the essence of what makes reverse burdens objectionable. There is a counterclaim to this argument, however, which merits examination here. I call this the ‘functionalist argument’. I will now address and rebut the functionalist argument, with the ultimate goal of demonstrating that there is something unique about reverse burdens with respect to the issue of guilt or innocence which makes them inherently objectionable.

The functionalist would begin by observing that reverse burdens are a type of procedural device, the effect of which is to increase the likelihood that the accused will be convicted. However, the functionalist might add, reverse burdens are not unique in this sense. On the contrary, many types of procedural devices and other factors can increase this likelihood of the accused being convicted. For example, requiring the accused to give notice if they wish to raise certain defences, imposing an evidential burden on the accused, and allowing the judge to give instructions permitting the jury to draw adverse inferences against the accused, and many other considerations may have a similar impact on the probability that the accused will be convicted (wrongfully or otherwise).

And yet, we do not claim that the thick PoI absolutely forbids imposing evidential burdens, adverse inferences, or other factors which might increase the likelihood that the accused will be convicted. Thus, the functionalist might conclude, there is nothing special or uniquely objectionable about reverse burdens, and any argument to the contrary plainly proves too much as it would forbid the imposition of evidential burdens et cetera. The superior approach, on the functionalist account, is to simply understand reverse burdens as one way of increasing the risk of wrongful conviction and to mitigate this risk on a case-by-case basis. This is the reason for the label ‘functionalist’: such an argument would reduce our understanding of reverse burdens, and indeed all procedural devices, to nothing more than their functional effect on the accused’s trial.

My reply to the functionalist critique is straightforward: the mere fact that reverse burdens are a type of procedural device which increase the likelihood of wrongful conviction does not warrant the conclusion that this is the only way to understand them. Reverse burdens do indeed have much in common with evidential burdens, requirements to give notice, and permitting the jury

¹⁵ *Woolmington* (n 13); *In re Winship* 397 US 358 (1970).

to draw adverse inferences about the accused. Notably, all of these are forms of compelled participation in the criminal process which require the accused to take a more active role in their own trial.¹⁶ And yet, it is only reverse persuasive burdens which take the additional step of allocating the ‘risk of non-persuasion’ to the jury.¹⁷ In simplest terms, this means that reverse burdens – like all persuasive burdens – can be understood as devices for allocating the risk of failing to persuade the factfinder to one party or the other in a trial. The imposition of a persuasive burden therefore sets a default outcome, precluding the possibility that a trial can ‘end in a draw’ if the factfinder remains uncertain of which party should win.

In the context of a criminal trial, we take this function of the persuasive burden as an allocator of risk very seriously. Unlike a civil trial, which entails two parties on relatively equal footing trying to settle a dispute, criminal trials pit the individual against the state, with a view to adjudicating on the guilt of the accused. The risk of error is therefore steeply asymmetrical between the two parties in a criminal trial. The individual stands to potentially lose their liberty (and possibly their life, in capital crimes in jurisdictions which retain the death penalty), whereas the state loses only its investment of resources in trying the case. As such, it is often said that it is preferable that N guilty people go free than that one innocent person goes to prison.¹⁸

This anxiety about wrongful convictions underpins the suspicion with which reverse burdens are often treated by lawyers in the common law world. My argument, and my reply to the functionalist, is therefore that this anxiety is justified. Unlike other procedural devices, only persuasive burdens alter the default outcome of a trial, and only reverse burdens skew the outcome in favour of the state to prevail over the individual. This is what makes them unique and merits treating them differently from other procedural devices. This argument is not new, and indeed it is very similar to the arguments put forward by the Criminal Law Revision Committee (CLRC) recommending that all burdens on the accused be evidential only. However, I wish to make a distinction which others, such as the CLRC, have not. Namely, it must be clarified that the imposition of the risk of non-persuasion to the accused is not problematic *per se* in terms of the thick PoI. Rather, it is only where the risk of non-persuasion relates to the guilt or innocence of the accused that the thick PoI is engaged, because this is precisely what the thick PoI forbids. In other words, the thick PoI does not prohibit making the accused prove *anything* – it only prohibits making the accused prove *innocence*.

This point may seem tedious, and maybe even trivial. However, it is anything but. In fact, this distinction between proving innocence and proving other matters is precisely reflected by the distinction between exculpatory and nonexculpatory defences. For example, requiring the accused to prove their entitlement to diplomatic immunity, or to prove that they have already been convicted of the same offence for which they are being prosecuted, do not amount to a requirement to prove innocence. This perhaps explains why NDs are so often overlooked in the literature on reverse burdens. They are glossed over because it is implicitly understood that even though they may lead to the accused being convicted, and even though the accused bears this risk if they cannot prove an ND on the balance of probabilities, this simply does not engage the PoI. As I have argued, the reason for this is that they do not reach the issue of guilt or

¹⁶ This point is developed extensively by Owusu-Bempah, who argues that these features of the criminal process form what she calls a ‘system of obligatory participation’ for the accused. See generally Abenaa Owusu-Bempah, *Defendant Participation in the Criminal Process* (Routledge 2017).

¹⁷ This term is attributed to John Henry Wigmore (n 9). For a more modern exposition of the role of persuasive burdens as devices which allocate and manage risk, see Hamer (n 12).

¹⁸ ‘N’ here stands for a number – sometimes as low as two or as high as 1,000 – of guilty people whose wrongful acquittals would be preferable to the wrongful conviction of one innocent person. See Alexander Volokh, ‘N Guilty Men’ (1997) 146 *University of Pennsylvania Law Review* 173.

innocence. This also helps explain why all of the older, common law defences such as self-defence or duress, do not entail reverse burdens: they are obviously exculpatory and therefore obviously taken to be part of the prosecution's burden of proof.¹⁹

At this stage, it is clear that some defences will pertain to the culpability of the accused, and therefore to whether or not the accused is guilty of a given offence. However, it does not necessarily follow from this that *all* defences relate to culpability. On the contrary, there is a whole category of defences which do *not* relate to culpability at all: nonexculpatory defences. As explained above, the defining characteristic of such defences is that they do not pertain to guilt or innocence at all, but rather reflect public policy decisions. For example, the ND of diplomatic immunity reflects a broader policy decision that diplomats should enjoy immunity from prosecution here, so that the UK's diplomats abroad will also enjoy it as a matter of reciprocity. This policy choice is wholly independent of, and unrelated, the actual culpability of any particular diplomat for any given crime.

It should now be clear why NDs do not engage the thick PoI in the way that exculpatory defences do. Namely, NDs simply have no bearing on the guilt or innocence of the accused. As such, there is nothing about the imposition of a reverse burden on an accused to prove an ND, such as diplomatic immunity, which contravenes the thick PoI. The distinction between exculpatory and nonexculpatory defences, then, is identical to the distinction between issues bearing on the accused's guilt and issues which do not. As such, and applying the logic of this thesis's central claim, the distinction between exculpatory and nonexculpatory defences marks the dividing line between issues which engage the thick PoI and those which do not. It must be noted that it does not automatically follow that it will *always* be justifiable to impose a reverse burden where the thick PoI does not prohibit doing so. Rather, it may be permissible to do so, and will not be prohibited by the PoI.

This may seem an underwhelming conclusion. After all, there are few advocates (if any) of requiring the prosecution to prove that the accused is not a diplomat in order to convict them of a crime, rather than simply imposing a reverse burden on this defence. In fact, many existing approaches might reach a similar conclusion to mine with respect to NDs. For example, Roberts and other proceduralists would argue that the NDs are beyond the scope of the PoI's protection simply because they are labelled as defences. Similarly, anyone following the proportionality analysis which English law requires might readily conclude that it will always be proportionate to make the accused bear the burden of proving that they are entitled to an ND. However, even if other approaches may reach the same conclusion that I have, they do so for the wrong reasons. More importantly, just because Roberts or an English judge may share my view that the PoI does not forbid imposing a reverse burden on an ND, it does not follow that they will always reach the correct decision by following their approaches. What is essential, then, is a focus on whether or not the accused is being made to bear the risk of non-persuasion.

To summarise, my contention is that reverse persuasive burdens in exculpatory defences are uniquely objectionable in terms of the thick PoI. This is because they require the accused to prove their innocence, and this requirement is reflected in the increased risk of conviction which necessarily follows from being allocated the persuasive burden. This makes reverse burdens on exculpatory defences intrinsically incompatible with the thick PoI but permits the reversal of the burden of proof with respect to nonexculpatory defences. Therefore, my position is that a reverse burden defence will be coherent with the thick PoI, meaning it will not fall foul of it, if, and only if, that defence is nonexculpatory. The concept of Wigmore's risk of non-persuasion is central

¹⁹ This appears to be the logic of cases like *Woolmington* (n 15) and *Lambie v HM Advocate* 1973 JC 53.

to this contention, as it is the transfer of this risk to the accused with respect to guilt which accounts for the fundamental tension between the PoI and reverse burdens.

6.3 – The PoI as a Prohibition on a Requirement to Prove Innocence

6.3.a – Overview

With my proposed approach now set out, it remains to assess my interpretation of the thick PoI by reference to the three success criteria which were employed to assess the alternative interpretations in the previous chapter.²⁰ The criteria are: i) respecting the thick/thin distinction; ii) maintaining the normative force of the PoI; and iii) resolving the tension between reverse burdens and the PoI.²¹ My contention is that the interpretation of the PoI set out in this chapter fulfils all three of these criteria, making it the best possible understanding of the PoI to be applied in the context of reverse burdens.

First, understanding the thick PoI as a prohibition on proving innocence respects the thick/thin distinction. On my account, the thin PoI has an important, but strictly delineated role as a trial rule requiring the prosecution to prove the formal elements of an offence beyond reasonable doubt in order to secure conviction. This also means that the accused cannot be made to disprove any of the elements, as this is a logical corollary of thin PoI. By contrast, the thick PoI is a more general norm of the criminal law which presumes that any given individual is innocent of criminal wrongdoing, unless and until they are convicted of a crime. With respect to reverse burdens, I argue that the best way of interpreting this requirement is to understand the thick PoI as a prohibition on proving innocence, meaning that the accused cannot be required to bear the risk of non-persuasion with respect to the issue of whether or not they are guilty. Together, the thick and thin PoI perform analytically distinct roles in the overall application of the PoI to reverse burdens. But the consequences which flow from each are clearly different, thus respecting the thick/thin distinction.

Next, my interpretation of the thick PoI maintains the normative force of the PoI more generally. Rather than purporting to give a definitive explanation of ‘the’ PoI, my approach is rooted in a commitment to methodological pluralism.²² As such, I do not claim to set out an entire theory of the presumption of innocence and then derive certain conclusions about reverse burdens. Instead, my more modest goal has been to focus on the aspects of the PoI which are most relevant to the issue of how to allocate the burden of proof. This more narrowly tailored approach means that the requirements of the PoI with respect to the burden of proof are very clear: the thin PoI acts as a baseline, ensuring the accused can never be made to prove an element of the offence, and the thick PoI is more overarching, ensuring that the accused never has to prove their innocence, regardless of how an offence is formally structured. This clarity minimises the possibility of misconstruing, disregarding, or diluting the PoI, because its requirements are both formal *and* substantive. The net result is a strengthening of the PoI’s normative force.

Finally, my approach fully resolves the tension between the PoI and reverse burdens, at a fundamental level. By construing the thick PoI as a prohibition on proving innocence, my approach takes a clear stance that reverse burdens which require the accused to prove their innocence are incompatible with the PoI. This recognises that the criminal law cannot plausibly claim to presume the innocence of its citizens, whilst simultaneously imposing legal requirements

²⁰ See Chapter 5. The success criteria were originally set out in Chapter 4, section 4.5.

²¹ *ibid.*

²² This was discussed in Chapter 4, section 4.2.

on them to prove that innocence. The inherent tension is then resolved in favour of the PoI, owing to its status as a fundamental right, which must outweigh the power of the legislature to ordinarily legislate in whatever way it sees fit. Were this not to be so, the PoI would be open to being blatantly undermined whenever the legislature saw fit to do so, regardless of their reasons. Thus, my approach resolves the tension, and resolves it in favour of presuming innocence.

Overall, then, my approach succeeds along each of the three dimensions which I have set out for evaluating potential applications of the PoI to reverse burdens. Moreover, it succeeds where the alternative approaches, analysed in the preceding chapter, have failed. The remainder of this section fleshes this out, explaining exactly why my interpretation of the thick PoI should be preferred to the alternatives with respect to each of the three success criteria.

6.3.b – Does it respect the thick/thin distinction?

My approach to applying the PoI to reverse burdens identifies clear roles for both the thick and thin PoI. Rather than collapsing or obscuring the distinction, my conception of the thin PoI as a trial rule and the thick PoI as a general norm recognises that these are two distinct ways of understanding the PoI. Moreover, I allow both the thick and thin PoI to play their part in a holistic assessment of whether or not a reverse burden violates the PoI. At this stage, it is worth making it absolutely clear how the thick and thin PoI differ in their effect on reverse burdens, according to my interpretation of the thick PoI.

For some commentators, the notion that the PoI is a prohibition on proving innocence is contained not within some more general norm, as I have suggested, but rather, in the thin PoI, i.e. the trial rule which holds that the elements of an offence must be proved by the prosecution to the requisite standard, otherwise the accused is entitled to an acquittal. Commentators such as Roberts or Picinali, for example, view the thin PoI as the beginning and end of the discussion of what the PoI requires with respect to allocating the burden of proof. Implicit in such a view is the thought that the accused is presumed innocent only of the elements of the offence, and so the requirement that the accused cannot be made to prove their innocence is fully met by the thin PoI alone. If this were true, it would be the case that the thin PoI completely encapsulates the requirement which I have associated with thick PoI here.²³ This view, however, is mistaken. Specifically, proponents of this approach tend to make the error of assuming that the elements of the offence are coextensive with facts which go to the guilt or innocence of the accused. This is not the case, and in fact, an assessment of the accused's culpability and responsibility for their actions, and therefore their guilt or innocence for an offence, will often turn on factors beyond the elements of the offence.

For example, if A intentionally discharges a firearm at B, killing B in the process, this *may* constitute the offence of murder under Scots law.²⁴ However, if A was an on-duty armed police officer and only shot B to stop B's imminent threat to the life of a bystander, then A could escape criminal liability on the basis that they were defending the life of another. In this case, it would be right to say that A appears to fulfil the elements of the offence of murder, namely, A has caused the death of another person with (wicked) intent to kill.²⁵ But the correctness, or not, of

²³ This perhaps explains why advocates of a 'purely procedural' PoI, such as Roberts, Picinali and Schwikkard, believe the thin PoI to be the only relevant consideration when deciding how the burden of proof can be allocated in a PoI-compatible way. In their minds, the thin PoI already exhausts the more general requirement of not making the accused prove their innocence, so there is no need for any thicker notion of the PoI.

²⁴ Per *Drury v HM Advocate* 2001 SLT 1013, murder under Scots law requires that the accused cause the death of the victim with either wicked intent to kill or wicked recklessness.

²⁵ *ibid.*

convicting A for murder can only be known once A's culpability is assessed, and this in turn, requires consideration of whether or not A was acting to protect the life of another, a separate defence not found in the elements of the offence alone. Thus, the culpability of the accused will not always be knowable by reference to the elements of an offence alone.

Rather, the absence or presence of any relevant defences will often need to be assessed as part of the overall evaluation of whether or not the accused should be convicted. As a result, it is clearly not true that the offence/defence distinction will always, or even frequently, track the distinction between facts which pertain to the accused's guilt/innocence and facts which do not. As such, I reject the view that the thin PoI can be used as a test for whether or not a reverse burden can be imposed in a way which coheres with the PoI.²⁶ The better view, then, must be that the thick PoI's prohibition on making the accused prove their innocence extends beyond the formal elements of an offence and therefore beyond the thin PoI. On this basis, the thick and thin PoI are clearly distinct: the former is concerned with the formal elements of the offence and the latter is concerned with the overarching issue of whether or not the accused is guilty.

As is now clear, my method of reconciling reverse burdens and the PoI envisions notably distinct roles for the thick and thin PoI. In this sense, it embodies the idea of respect for the thick/thin distinction. This differs sharply from both the *ad hoc* approach and the offence/defence distinction approach, both of which blur the distinction between thick and thin PoI, diminishing the conceptual clarity of the PoI as a whole. The *ad hoc* approach does this by failing to clearly distinguish between thick and thin PoI at all, instead resorting to a more general assessment of the overall fairness of imposing a reverse burden on a particular set of facts. The offence/defence distinction approach also ignores the distinction by either ignoring the thick PoI entirely (if offence and defence are distinguished formally) or by collapsing the distinction (in the case of a substantive difference between offence and defence). And unlike the Canadian approach, the thick PoI as a prohibition on proving innocence avoids committing the error of ignoring the thin PoI, a move endorsed by Dickson CJ in the Canadian case of *Whyte*.²⁷ Instead, the thick/thin distinction is an integral part of my approach to reverse burdens, and, as has been shown, the distinction is fully respected on my account.

6.3.c – Does it maintain the normative force of the PoI?

Closely connected to the requirement of respect for the thick/thin distinction is the need for any attempt to reconcile reverse burdens and the PoI to maintain the PoI's normative force. In the case of my approach, where the thick PoI is understood as a prohibition on making the accused prove their innocence, the normative force is maintained, and even strengthened. This is because both the thick and thin PoI, on my account, furnish clear rules for when a reverse burden will breach the PoI. In the former case, a reverse burden violates the thick PoI if it requires the accused to bear the risk of non-persuasion with respect to guilt or innocence; in the latter case, a reverse burden violates the thin PoI if it requires them to disprove an element of the offence with which they are charged. All of this flows from the idea that the PoI is both a trial rule and a general norm of the criminal law – in other words, it follows from a recognition of the fact that both the thick and thin PoI are relevant when considering how to allocate the burden of proof. If anything, this enhances the PoI's normative force, as it will be straightforward to determine whether or not a reverse burden breaches the PoI.

²⁶ I will address the counterargument that the solution to this problem is to simply recast the offence/defence distinction so that elements of the offence are *always* facts which pertain to guilt/innocence in greater detail below.

²⁷ See Chapter 5, section 5.4.b.

The first question is whether the reverse burden requires the accused to disprove an element of the offence – if so, the thin PoI is violated. If not, then the second question is whether or not the reverse burden would require the accused to bear the risk of non-persuasion with respect to guilt. Again, this will be simple to answer: if the reverse burden pertains to an exculpatory defence, then the answer will be yes, and the PoI will be violated. If not, then neither the thick nor thin PoI is engaged, and the reverse burden in question is coherent with the PoI. The clarity and simplicity of this approach mean that it will maintain the normative force of the PoI, by making it more difficult for the PoI to be disapplied, overridden, or ignored. Unlike the *ad hoc* approach, which balances away the PoI's protection on a case-by-case basis, my method does not permit the dilution of the PoI under the auspices of proportionality analysis. And unlike relying on the offence/defence distinction, my approach does not fall into the trap of contradiction, or reliance on legislative semantics, ultimately damaging the PoI as a norm.²⁸ On the whole, then, the normative force of the PoI is well-served by my approach, in a way which it is not if alternative interpretations of the thick PoI are adopted.

6.3.d – Does it resolve the tension between reverse burdens and the PoI?

Finally, my proposal that the thick PoI should be understood as a prohibition on proving innocence must be evaluated against the third success criterion. The essence of a reverse burden is that it requires the accused to prove some fact or else face conviction, effectively making reverse burdens presumptions of guilt. The contradiction of such a presumption of guilt with the PoI is therefore obvious: one cannot simultaneously presume that the accused is both guilty and innocent. This is the tension between reverse burdens and the PoI, and a reasoned explanation of how this tension can be resolved is the third criterion of a successful approach to reverse burdens. Against this criterion, my approach also succeeds where other alternatives have failed.

When assessing the *ad hoc* and offence/defence distinction approaches in the previous chapter, it became clear that one of the key faults of these alternative interpretations of the thick PoI was their inability to resolve the tension between reverse burdens and the PoI.²⁹ In the former case, this was because the *ad hoc* approach does not address the underlying tension at all – rather, it attempts to resolve the contradiction in any given case by reference to independent factors which bear on the proportionality or overall fairness of imposing a reverse burden. More problematically, the *ad hoc* approach also disavows the notion that there can be any general principle at all for how to reconcile reverse burdens and the PoI. This is a non-answer, effectively admitting that a problem exists but refusing to even attempt to solve it.

Similarly, approaches which rely entirely on the offence/defence distinction, however it is drawn, fail to resolve the underlying tension between reverse burdens and the PoI. If the distinction adopted is a formal one, then the offence/defence distinction serves only to distinguish reverse burdens which always violate the PoI from those which never do, by reference only to the semantics and form of the legislation in question. If the distinction is drawn substantively, the problem remains, even if though in that case offence and defence are distinguished by reference to some other norm. In either case, no principled explanation is offered for how to resolve the contradiction between reverse burdens and the PoI. Even the approaches of Canadian law and the CLRC were shown not to fully resolve this conflict.³⁰ Instead, they simply reduce the disparity between the standard of proof of a reverse burden and the standard of proof required for conviction. But, as was shown in Chapter 5, section 5.4.d, this does not explain why presuming

²⁸ See Chapter, section 5.3.c.

²⁹ See Chapter 5, sections 5.2.d and 5.3.d.

³⁰ See Chapter 5, sections 5.4.d.

the accused is guilty does not contradict with presuming them innocent, regardless of the standard of proof needed to rebut the presumption of guilt.

In contrast to all of the other alternatives, understanding the thick PoI as a prohibition on making the accused bear the risk of non-persuasion resolves the fundamental tension between reverse burdens and the PoI. The simple truth of the matter here is that presuming the accused guilty is fundamentally irreconcilable with presuming the accused innocent. This leaves anyone trying to reconcile reverse burdens and the PoI with a simple ultimatum: the tension can be resolved in favour of either the PoI, with respect to issues bearing on guilt or innocence, or in favour of the power of the legislature to legislate however it wishes. I choose the former. In so doing, my approach recognises the fundamental importance of the PoI to the criminal justice system, and the legal system as a whole.

The fact is that in any debate about how to reconcile reverse burdens and the PoI, there is always a choice to be made between individual rights and the power of the state. Though this is often unstated, it is worth observing that there is no other justification for why reverse burdens should continue to exist given their obvious conflict with the PoI, a principle which is supposedly sacrosanct in the common law world. The only explanation is that the legislature require the power to legislate as they please, even if this conflicts with a fundamental right. My approach wholeheartedly rejects this philosophy, instead choosing to affirm the importance of individual rights like the PoI. As such, it is only by adopting my interpretation of the thick PoI as a prohibition on making the accused prove their innocence that the third success criterion can be fulfilled.

6.4 – Conclusion

In this chapter, I set out my vision for the best interpretation of the thick PoI's requirements with respect to reverse burdens. The argument advanced above proceeded in several stages. The starting point was a recognition that criminal trials are adversarial in nature, and that the possible outcomes of such trials are dictated at least in part by procedural devices such as the burden of proof. From here, I argued that as the allocation of the burden of proof sets a default outcome for any given criminal trial, the best way to understand the thick PoI in this context is as a prohibition on making the accused prove their innocence. The concept of 'proving innocence', however, needed to be unpacked in order to be meaningful or useful for the present discussion.

As such, I offered an explanation of what it means to prove innocence which aligns with both common sense and the role of persuasive burdens as devices which allocate the risk of failing to persuade the jury. Drawing on Wigmore's conception of the burden of proof as a means of allocating the 'risk of non-persuasion', i.e. the risk of losing on an issue if one fails to discharge that issue's corresponding burden of proof, I argued that reverse burdens should also be understood by their effect on the risk of non-persuasion. Therefore, I suggested that the thick PoI is best understood as a prohibition on making the accused prove their innocence, meaning that the accused cannot be made to bear the risk of non-persuasion with respect to the issue of guilt or innocence. Following from this, my conclusion was that any reverse burden which bears on the issue of whether or not the accused is guilty, and therefore transfers the corresponding risk of non-persuasion to the accused, is prohibited by the thick PoI.

After setting out this argument, I then proceeded to assess my interpretation of the thick PoI against the same three success criteria which I used to evaluate three competing approaches in

the previous chapter.³¹ I concluded that my approach fulfils all three criteria, making it preferable to the three alternatives examined in Chapter 5. With regard to the first criterion of respecting the thick/thin distinction, I explained that my approach typifies respect for this distinction by putting it at the core of my approach and extrapolating what the thick and thin PoI require with respect to the burden of proof. I also argued that my approach maintains the normative force of the PoI by assessing this topic from a perspective of methodological pluralism. This means that my approach does not claim to offer a definitive and all-encompassing theory of the PoI, but rather homes in on the most salient features of the presumption as it applies to the allocation of the burden of proof. As was explained above, the result is a bolstering of the PoI's normative force, as it will always be clear under my approach whether or not a reverse burden breaches the PoI. Finally, with respect to the third criterion of resolving the tension between reverse burdens and the PoI, I concluded that my approach also fulfilled this criterion by recognising the fundamental contradiction and resolving it in favour of the PoI.

As this chapter comes to a close, two key conclusions emerge. The first is that my approach is preferable to the three alternatives examined in Chapter 5. Unlike the *ad hoc* approach, my method respects the thick/thin distinction, maintains the normative force of the PoI, and resolves the underlying tension between reverse burdens and the PoI. Unlike an approach based solely on the offence/defence distinction, understanding the thick PoI as a prohibition on proving innocence does not collapse the thick/thin distinction, and does resolve the tension between the PoI and reverse burdens. It is also worth observing that because my approach also takes account of the thin PoI it still maintains a role for the offence/defence distinction, but without overburdening the distinction by trying to make it solely determinative of how the burden of proof should be allocated. My approach therefore retains the benefits of referring to the offence/defence distinction, without the drawbacks associated with referring *exclusively* to the offence/defence distinction. And lastly, my approach improves upon the more appealing aspects of the approach taken by Canadian law and the Criminal Law Revision Committee (CLRC). By eschewing an unhelpful focus on the standard of proof, and instead centring the concept of the risk of non-persuasion, my method avoids the pitfall of being hostage to an empirical contingency, as the Canadian approach is. It also has the merit of fully resolving the tension between reverse burdens and the PoI, because it is concerned with what makes reverse burdens most objectionable: the transfer of risk to the accused.

The other key conclusion which follows from the analysis of this chapter is that, if my approach is adopted, the vast majority of reverse burdens currently present in the criminal law of the US and England and Wales are fundamentally incompatible with the thick PoI. As such, if my approach is to be workable it must give some explanation as to how the criminal law could adapt to cohere with the thick PoI as described in this chapter. The next chapter, Chapter 7, takes on this task, explaining some of the most important implications of my approach for the structure and functioning of the criminal law. As will be shown, though this task may seem gargantuan, it is nevertheless very realisable, and possibly less radical than it first appears.

³¹ See Chapter 5, sections 5.2-5.4.

Chapter 7: A ‘Post-Reverse Burden’ Future: Implications for the Structure of the Criminal Law

7.1 – Overview

The foregoing chapters have made the case for reimagining the PoI as a prohibition on requiring the accused to prove their innocence, therefore banning the imposition of any reverse burden which has the effect of saddling the accused with the risk of non-persuasion. If such a view were to be adopted, however, it would mark a radical departure from the status quo in jurisdictions like the US or England and Wales, where reverse burdens abound in the criminal law. Faced with a criminal law rife with reverse burdens, how would the criminal law have to change in order to accommodate the interpretation of the PoI advocated for in this thesis? Chapter 7 answers this question, offering a view of both an alternative past – where key reverse burden cases are revisited, with an outcome based on the PoI as described here – and a possible future, where the criminal law is restructured to eliminate reverse burdens which are incoherent with the PoI.

This chapter is divided into four further sections, each of which addresses a different aspect of how the vision of the PoI defended in the previous chapters would change the criminal law. In section 7.2, I revisit three key reverse burden authorities to show how they would be decided differently if they were based on my understanding of the PoI. This section therefore briefly revisits the cases of *Woolmington*, *Patterson*, and *Sheldrake*, to present alternative, PoI-coherent versions of these judgments.¹ This will demonstrate that the existing structure of the law could have accommodated a PoI-coherent ban on reverse burdens all along, offering a potential blueprint for reform in future cases.

Next, section 7.3 addresses some specific aspects of a criminal law where the accused is never made to prove their innocence. In this section, I sketch a vision of a ‘post-reverse burden’ criminal law, by reference to three key areas of the law where reverse burdens currently play a pivotal role. Namely, section 7.3 will address how the law could adapt in terms of providing defences to strict liability offences, and the defences of diminished responsibility and insanity without imposing a persuasive burden on the accused. As will be shown, this is more possible than critics of the abolition of reverse burdens have made out. section 7.3 also includes a discussion of the potential drawbacks of abolishing reverse burdens on the accused with respect to innocence, so that the costs of such reform can be fully appreciated. It will be argued that this price is one worth paying if it ensures that a fundamental right of the accused is no longer systematically violated. Finally, section 7.4 offers some concluding remarks.

7.2 – Revisiting Past Cases

7.2.a – *Patterson v New York* Revisited

¹ *Woolmington v DPP* [1935] AC 462; *Patterson v New York* 432 U.S. 197 (1977); *Sheldrake v DPP*; *Attorney General’s Reference (No 4 of 2002)* [2005] 1 AC 264.

In *Patterson v New York*, the US Supreme Court faced a stark choice between two conflicting readings of its earlier decision in *Winship*. It will be recalled that the holding (or ratio) of *Winship* was as follows: ‘the Due Process Clause protects the accused against conviction except upon proof beyond reasonable doubt of every fact necessary to constitute the crime with which he is charged’.² In *Winship* itself, it was not necessary to elaborate on which facts would be considered necessary to constitute a given crime, and so in *Patterson* the court had to decide how to draw this distinction.

The first alternative open to the court was to continue the trend it had established in the case of *Mullaney v Wilbur*, extending the protection of the PoI beyond the formal elements of an offence, focusing instead on whether imposing a reverse burden would put the accused at increased risk of wrongful conviction.³ As the court in *Wilbur* made explicit, the protections of the PoI, as laid out in *Winship* could not be ‘limited to a State’s definition of the elements of a crime’, because this would allow states to simply reword their criminal statutes so as to avoid the constitutional protections of the PoI.⁴ The second alternative, by contrast, was to endorse a narrower, more formalistic reading of *Winship*, whereby the PoI was limited to the state’s definition of an offence. In *Patterson*, the Supreme Court chose this latter option, deciding instead to ‘drain... *Winship* of much of its vitality’.⁵

How might the outcome have been different if the court had relied on the understanding of the thick PoI presented in this thesis? In simplest terms, if the court in *Patterson* had referred to the thick PoI in their judgment, it is highly unlikely they could have reached the conclusion that they did. The thick PoI is a general norm, prohibiting any requirement on the accused which has the effect of making them prove their innocence. In the face of a substantive norm of this nature, it would have been difficult, if not impossible, to conclude that legislative flexibility should trump the fundamental right to be presumed innocent.

Indeed, it is notable that the majority in *Patterson* chose to downplay and minimise the strength of the PoI as much as possible in the course of their judgment, emphasising its ‘basic’ and ‘procedural’ nature.⁶ The court thus deferred to the power of individual states, declining to rule that the PoI would prohibit them from imposing a reverse burden where it would be ‘too cumbersome, too expensive, and too inaccurate’ for the state bear the burden of proof.⁷ This was accomplished at least in part by some judicial sleight of hand. Whereas *Winship* referred to ‘every fact necessary to *constitute the crime*’,⁸ the majority in *Patterson* recast this as a requirement that the prosecution need only prove ‘all of the elements *included in the definition of the offense*’.⁹ This subtle shift of language meant that the court could reinterpret *Winship* and depart from *Wilbur* (where the court took the view that *Winship* was not restricted by the formal labels of offence and defence) without overruling either case. None of this would have been possible had the court applied an interpretation of the PoI as a prohibition on proving innocence, as understood in the sense of making the accused bear the risk of non-persuasion.

The thick PoI is a norm which is not constrained to the formal elements of an offence. Rather, it is concerned with the underlying substance of the criminal law and the preconditions it sets for

² *In re Winship* 397 U.S. 358, 364.

³ *Mullaney v Wilbur* 421 U.S. 684 (1975), 699-701.

⁴ *Wilbur* *ibid*, 699 fn 24.

⁵ *Patterson* (n 1) 216 (Powell, Brennan, Marshall JJ, dissenting) (citation omitted).

⁶ *ibid* 210 (White J).

⁷ *ibid* 209 (White J).

⁸ *Winship* (n 2) 364 (emphasis added).

⁹ *Patterson* (n 1) 210 (White J).

imposing criminal liability. As such, if *Patterson* had been decided with reference not just to the thin PoI – as it did by relying on a purely formalistic interpretation of *Winship* – but by considering the thick PoI, the result would have been precisely the opposite. The court would have struggled to find a plausible explanation for weighing the state’s interest in legislative flexibility more heavily than the accused’s right to be presumed innocent. Moreover, and as was recognised by the dissenting judges in *Patterson*, a focus on the substance of the New York statute under examination would have revealed that it was functionally equivalent to the statute struck down by the court in *Wilbur* for violating the PoI.¹⁰ The only difference was one of language.

In *Wilbur*, the statute required malice as part of the definition of murder and created an affirmative reverse burden defence for killings in the heat of passion, where the heat of passion negated the element of malice. Malice was therefore considered part of the definition of murder, but was effectively presumed against the accused unless they could discharge a reverse burden heat of passion defence.¹¹ By contrast, in *Patterson*, the New York statute made no mention of malice, and required only an intentional killing, with the defence of extreme emotional disturbance standing alone as a separate defence.¹² At this very superficial linguistic level, then, there does appear to be a difference between the law which was struck down as being incompatible with the PoI in *Wilbur*, and the one which was upheld as PoI-compatible in *Patterson*. But what is obscured by this focus on form is the substantive similarity between the two statutes: namely, that the rationale for the New York statute’s reverse burden defence was the same as that found in the Maine law which was struck down. In both cases, the defence served only to distinguish murder from manslaughter, because a killing in the heat of passion (i.e. resulting from provocation) was traditionally deemed to lack the malice aforethought which early US common law required for a killing to be murder.

This much was recognised by the dissenting opinion in *Patterson*, pointing to the fact that the New York statute was based on the Model Penal Code, whose drafters sought only to update and modernise the language of the common law by omitting reference to ‘malice aforethought’ and the ‘heat of sudden passion’.¹³ Moreover, the New York Court of Appeals, though divided on the issue of whether or not the reverse burden in *Patterson* violated the PoI, were unanimous in their endorsement of this reasoning.¹⁴ Thus an enquiry into the substance of the law would have revealed that the New York law upheld in *Patterson* was identical in substance to the law struck down 18 months earlier in *Wilbur*. At the very least, such an examination of the substance of the laws, and their use of reverse burdens, would have required the US Supreme Court to overrule the unanimous decision in *Wilbur* if it wanted to reach the conclusion that the statute in *Patterson* did not violate the PoI.

Instead, the court eschewed a substantive analysis, reinterpreted *Winship*, and only distinguished *Wilbur*, thereby avoiding any requirement to give a fuller account of why they preferred their formalistic interpretation of the PoI. All of this was facilitated by focusing only on the thin PoI. In fact, the outcome in *Patterson* was a direct consequence of ignoring the thick PoI, as the thin PoI’s purely procedural character precluded the court from analysing the substance of the laws in question. This regrettable outcome could have been avoided if the court had considered the PoI as a general norm and approached the issues in *Patterson* by asking whether the New York statute had the effect of making the accused prove his innocence. Had they done so and engaged

¹⁰ *ibid* 221-223 (Powell, Brennan, Marshall JJ, dissenting).

¹¹ *ibid* 215-216 (White J).

¹² *ibid* 205-206 (White J).

¹³ *ibid* 220 (Powell, Brennan, Marshall JJ, dissenting).

¹⁴ *People v Patterson* 39 N.Y. 2d 288, 347 N.E. 2d 898 (1976) (New York Court of Appeals) at 301, 312.

with the substantive similarities between *Patterson* and *Wilbur*, they would have come to the conclusion that the New York statute violated the PoI by requiring the accused to effectively prove lack of intent, where intent was the only distinguishing factor between a killing which amounts to murder and one which amounts to manslaughter. This would have been a powerful reaffirmation of the accused's right to be presumed innocent, and would have avoided the outcome of *Patterson*, which allowed states to impose reverse burdens on any defence so long as they did not employ similar language in the defence and the elements of an offence.

The overall result of revisiting *Patterson* should now be clear: analysis based on the thick PoI has the potential to lead to a fundamentally different outcome in cases where only the thin PoI is employed. One last observation is worth making here. Though the terminology of 'thick' and 'thin' versions of the PoI would not have been known to the Supreme Court at the time of deciding *Patterson*, an appreciation of the thick PoI would still have been very possible. Indeed, for decades the US Supreme Court was no stranger to enforcing at least minimal substantive requirements of due process in state criminal law by applying the Fourteenth Amendment.¹⁵ It was therefore open to the court to do exactly as has been suggested, and to recognise the PoI as a general norm of sufficient importance to be imposed on states in drafting their criminal laws, just as the court did with other aspects of due process in its early 20th century caselaw. A reversal of *Patterson* and an affirmation of the importance of the thick PoI is therefore completely possible, should the issue reach the Supreme Court again.

7.2.b – *Woolmington* Revisited

Unlike *Patterson*, the English case of *Woolmington* would not have a radically different outcome if based on the thick PoI argued for in this thesis. In fact, the outcome would be the same: *Woolmington*'s conviction would be quashed, and the reverse burden which led to his conviction would be found incompatible with the PoI. The key difference, however, would be in the grounds on which the conclusion was based, and the impact this would have for the trajectory of English case law on reverse burdens. As was argued in Chapter 2, *Woolmington* set the tone for the method of reconciling reverse burdens and the PoI which still prevails in England and Wales today. By revisiting *Woolmington* and exploring how it would be decided if the House of Lords had relied on my 'thick PoI', it is therefore possible to see how the tone set by *Woolmington* could have been markedly different.

After reviewing the relevant authorities, Viscount Sankey chose to make explicit his commitment to the PoI under English law. The particular version of the PoI he committed to, it will be recalled, was the thin PoI. Thus Viscount Sankey's pronouncement that the PoI was a 'golden thread' running '[t]hroughout the web of English Criminal Law' was little more than a statement that the prosecution must ordinarily bear the burden of proof at trial, unless Parliament chose to relieve them of that burden.¹⁶ Important though this was, especially given that the prevailing practice at the time did not prohibit presuming some elements of an offence against the accused, with the benefit of hindsight it still appears to be something of a missed opportunity. Indeed, the case of *Woolmington* provided a perfect opportunity to restate the PoI and reaffirm its centrality in English criminal law. Though Viscount Sankey was plainly trying to do this, his statement would have been all the more powerful – and offered far more protection against reverse burdens – had he emphasised the centrality of the *thick* PoI as well as its thin counterpart.

Had *Woolmington* emphasised the importance of the thick PoI, Viscount Sankey's speech

¹⁵ This was discussed in Chapter 2, section 2.3.a.

¹⁶ *Woolmington* (n 1) 481 (Lord Sankey).

would have set out the role which the thick PoI plays in English law more generally. He might have started by observing that the whole of English criminal process is (or ought to be) conditioned by a fundamental right of the accused to be presumed innocent of criminal wrongdoing, and that this right, the thick PoI, gives the state certain obligations in how it treats its citizens. Chief among these, Viscount Sankey could have noted, is that the accused can only be convicted upon proof beyond reasonable doubt that they are guilty. It follows from this that innocence of the accused is not in need of proof at a criminal trial – it is already established by the PoI. As such, Viscount Sankey could have emphasised that the PoI is a fundamental principle and a general norm, not only a trial rule.

This may seem a relatively minor difference from Viscount Sankey's actual judgment in *Woolmington*. After all, it could be argued that espousing the virtues of the PoI was Viscount Sankey's intent, and that his reference to exceptions for the insanity defence and statutory reverse burdens was simply a concession to the realities of parliamentary sovereignty in early 20th century England. It is, of course, entirely plausible to think that this is true. Nevertheless, had Viscount Sankey had the thick PoI in mind, and referred to the PoI's wider significance in his judgment, it would have been unnecessary to even mention the existence of statutory exceptions. By making this concession, and by centring the judgment on a trial rule which permits of *ad hoc* derogations, the judgment in *Woolmington* appeared to reduce the whole PoI to nothing more than a rule about the burden and standard of proof. This is a woefully reductive explanation of the role of the PoI in English criminal law. Moreover, by casting the PoI as such a thin concept, easily discarded by Parliament as needed, Viscount Sankey paved the way for future dilutions of the PoI over the remainder of the 20th century.

At this juncture, it is only appropriate to briefly consider what further consequences might have followed if *Woolmington* had not reduced the PoI to only a trial rule. To see how an endorsement of the thick PoI in *Woolmington* might have changed the law, it is only necessary to consider the two key reverse burden cases which followed *Woolmington*, before the Human Rights Act (HRA) 1998 came into force: *Edwards* and *Hunt*.¹⁷

First, the decision in *Edwards* would have had the opposite result. Recall that the rationale of *Edwards* was effectively that because the PoI admitted of statutory exceptions, and because the provision in *Edwards* had a long history, it was compatible with the PoI to require the accused to prove that they held a licence for doing something which was generally prohibited without such a licence. This type of reasoning was very much coloured by *Woolmington's* interpretation of the PoI as a trial rule which could be altered by simple legislation. As such, the Court of Appeal in *Edwards* would have struggled to find a convincing basis for its conclusion, if *Woolmington* had been based on the thick PoI instead. Faced with that situation, it seems likely that the court would have had to conclude that if Parliament intended to punish the accused for operating a pub without a licence, the Crown would have to prove the absence of a licence. It is worth noting that such a burden would have been very straightforward for the Crown to discharge, given that it would only require someone to testify that the register had been checked and no licence had been found in the accused's name. This would have reprioritised the accused's PoI over the state's convenience at trial.

The second pre-HRA reverse burden case to follow *Woolmington*, *Hunt*, would also have had a very different outcome if *Woolmington* had referred to the thick PoI. *Hunt* provided the House of Lords with an opportunity to clarify the law on reverse burdens and when the accused could be made to bear the burden of proof without violating the PoI. Unfortunately, rather than

¹⁷ *R v Edwards* [1975] QB 27 (CA); *R v Hunt* [1987] AC 352; [1987] 1 All ER 1 (HL).

restricting the situations in which a reverse burden could be imposed, the House of Lords in *Hunt* actually *expanded* the catalogue of statutory exceptions, by recognising a judicial power to infer the existence of a reverse burden from a statute, even where Parliament had not made any express provision concerning the burden of proof.¹⁸ It is difficult to imagine how this conclusion could have been reached if the importance of the thick PoI had been affirmed in *Woolmington*. Indeed, faced with the question of whether Parliament could be taken to have impliedly deprived an individual of their right to be presumed innocent, the court in *Hunt* would have had to reject the notion that a reverse burden could be imposed by implication. Rather, the approach mandated by the thick PoI would be that if Parliament wants to criminalise some conduct, then the state bears the burden of proving every fact necessary to demonstrate that the accused in fact did the criminalised conduct. By relying on a thin conception of the PoI, however, the court in *Hunt* could not reach such a conclusion.

As is now clear, introducing the thick PoI to the judgment in *Woolmington* has the potential to radically change the course of English criminal law's approach to reverse burdens and the PoI. Moreover, as with *Patterson*, the above analysis demonstrates that the existing framework of the law could accommodate an approach based on the thick PoI. Although *Woolmington* have reached the same result, the recognition of a more general norm that the accused must be presumed innocent and not made to prove their innocence would have armed judges with a more forceful argument against simply letting Parliament legislate out of its obligation to prove guilt beyond a reasonable doubt.

7.2.c – *Sheldrake* Revisited

In the case of *Sheldrake*, the House of Lords was called upon once again to give its judgment on when a reverse burden will be incompatible with the PoI. In the actual case, the House of Lords considered two offences, both of which appeared to impose reverse burdens on the accused, and found that one was compatible with the PoI, while the other was not and had to be read down as imposing only an evidential burden.¹⁹ The reasoning of the House of Lords, as explained by Lord Bingham, turned on an approach to evaluating reverse burdens on a completely *ad hoc* basis. That is to say, that each reverse burden must ultimately be evaluated on its particular facts in order to determine whether or not it amounts to an unjustifiable derogation from the PoI.

The flaws of this type of *ad hoc* thinking have already been examined in a previous chapter.²⁰ Briefly, the fundamental problem is that this approach facilitates the balancing away of a fundamental right on a case-by-case basis, leading to legal uncertainty, but also undermining the protection the PoI is intended to offer. This is particularly egregious in the case of English law post-*Sheldrake*, as this case introduced a variety of factors which might bear on the issue of whether or not a given reverse burden amounts to a justifiable derogation from the PoI. Again, the problems with this judgment were made clear in an earlier chapter.²¹ The present task, then, is to consider how *Sheldrake* might have been differently decided if the House of Lords had endorsed an approach based on the thick PoI, as espoused in this thesis.

The answer here is quite straightforward. The thick PoI prohibits any requirement on the accused to prove their innocence, meaning that the accused cannot be allocated the risk of non-

¹⁸ This was discussed in Chapter 2, section 2.3.a.

¹⁹ A fuller summary of the judgment is provided in Chapter 2, section 2.2.b under the heading Beyond *Johnstone* and *Lambert*.

²⁰ See Chapter 5, section 5.2.

²¹ See Chapter 2, section 2.2.b.

persuasion with respect to guilt. Moreover, this requirement is best understood as a fundamental right, and not one which is amenable to being balanced away on a case-by-case basis. In fact, this type of balancing exercise is anathema to the thick PoI. As such, if *Sheldrake* were based on the thick PoI, then the entire methodology proposed by Lord Bingham and endorsed by the court would have been very different. Rather than recommending an *ad hoc* evaluation of individual reverse burdens, and declining to endorse any sort of general principle, a revised version of *Sheldrake* would have seen the court reaffirm the importance of the PoI as a general principle of English criminal law.

This would begin with the task of construing the statutory provisions in *Sheldrake*, interpreting them as imposing an evidential burden only.²² This could be done by reference to the PoI, with the presumption acting as a bulwark against construing any statute as imposing a reverse persuasive burden, unless the reverse burden pertains to an issue wholly unrelated to guilt or innocence. Such a reading would have been open to them under s 3 of the HRA 1998. Indeed, in *Sheldrake* the House of Lords read down s 11(1) of the Terrorism Act 2000, despite a clear intention from Parliament that the provision should entail a full persuasive burden on the accused.²³ The House of Lords could then have gone on to explain that the thick PoI will never permit the allocation of the risk of non-persuasion to the accused with respect to guilt. Their Lordships could then have analysed the two offences under consideration to see if they did in fact transfer this risk to the accused.

With respect to the first offence, under s 5(1)(b) of the Road Traffic Act 1988, it would quickly become clear that the reverse burden operated so as to make the accused prove their innocence. The relevant wording of this offence is as follows: ‘If a person...is in charge of a motor vehicle on a road or other public place, after consuming so much alcohol that the proportion of it in his breath, blood or urine exceeds the prescribed limit he is guilty of an offence.’²⁴ Section 5(2) then provides a defence if the accused can ‘prove that at the time...the circumstances were such that there was no likelihood of his driving the vehicle’ while over the prescribed limit.

As a majority in the High Court recognised when hearing *Sheldrake*’s appeal against conviction, the essence or ‘gravamen’ of the offence in s 5(1) is the likelihood that the accused will drive while over the legal limit for blood alcohol levels.²⁵ However, the reverse burden in s 5(2) relieves the prosecution of some of their burden of proving this against the accused, instead putting the onus on the defendant to prove on the balance of probabilities that there was ‘no likelihood of his driving the vehicle’. In the House of Lords, counsel for the appellant made submissions of this nature, arguing that reading s 5(2) as imposing a persuasive burden would leave the PoI ‘seriously infringed’.²⁶ Lord Bingham nevertheless rejected the submission and went on to rationalise the imposition of a reverse burden, holding that it was ‘not...beyond reasonable limits or in any way arbitrary’.²⁷ This is a stark demonstration of the power of the *ad hoc* approach to rationalise imposing a reverse burden.

Had Lord Bingham applied the thick PoI test set out in this thesis, however, this type of

²² The relevant provisions are: Road Traffic Act 1988, ss 5(1)(b) and 5(2) and the Terrorism Act 2000 ss 11(1) and 11(2).

²³ *Sheldrake* (n 1) 314 (Lord Bingham, Lord Steyn, Lord Phillips MR). Their reasoning, as is made clear by Lord Bingham at 314C-D, is that it was the intention of Parliament in enacting s 3 of the HRA that statutes should be construed so as to give effect to rights such as the PoI.

²⁴ Road Traffic Act 1988, s 5(1)(b).

²⁵ [2004] QB 487.

²⁶ *Sheldrake* (n 1) 308 (Lord Bingham).

²⁷ *ibid* 309 (Lord Bingham).

rationalisation would not have been possible. Instead, the result would have been to recognise that the reverse burden in s 5(2) transferred the risk of non-persuasion to the accused with respect to guilt, thus requiring the accused to prove their innocence. This would have made it straightforward to hold that the provision was in breach of the PoI and had to be read down. It is also important to note that if the approach advocated in this thesis had been adopted from outset, then s 5(2) would never have imposed such a PoI-breaching reverse burden in the first place, because the legislature would have been well aware that it violated the thick PoI. The HRA requires a government minister to either certify the compatibility of a new bill with ECHR rights (including the PoI) before its second reading in either House of Parliament, or state that they are unable to make such a certification.²⁸ As such, a reverse burden like the one in s 5(2) of the Road Traffic Act 1988 would have been impossible to certify, if the interpretation of the PoI offered in this thesis had been adopted.

The second offence examined in *Sheldrake*, found in s 11(1) of the Terrorism Act 2000, also straightforwardly violates the interpretation of the PoI put forward in this thesis. In the actual *Sheldrake* judgment, the House of Lords held that the reverse burden imposed by s 11(2) had to be read down as imposing an evidential burden only. As such, the result would not be any different if the PoI had been interpreted as a prohibition on proving innocence. What would have differed, however, is the reasoning which the court would have had to engage in, in order to reach this conclusion. In *Sheldrake*, Lord Bingham applied his *ad hoc* test to the reverse burden in s 11(2) and considered the following factors relevant: i) the reverse burden allowed for the conviction of people who were ‘innocent of any blameworthy or properly criminal conduct’; ii) the reverse burden would be very difficult to discharge, given that terrorist organisations do not tend to keep formal records of their membership or minutes of their meetings; iii) the potential punishment for conviction was severe; iv) national security requirements do not absolve the state of its obligation to ensure basic procedural fairness.²⁹ In the end, Lord Bingham considered that these factors did not balance out so as to make the reverse burden justifiable.

What is striking about the analysis of s 11(2) in *Sheldrake* is the lengths to which Lord Bingham was required to go, simply to state the obvious: that the reverse burden in s 11(2) violates the PoI because it makes the accused prove that they are not guilty of an offence. In this case, s 11(1) outlawed membership of proscribed organisations, and s 11(2) required the accused to prove that they were either not a member of the organisation when it was proscribed, or were not ‘taking part in the activities at any time when it was proscribed’.³⁰ Applying the thick PoI as described in the previous chapter, the sole question becomes whether or not the reverse burden made the accused prove his innocence. With respect to this second offence in *Sheldrake*, it is clear that the reverse burden does make the accused prove their innocence.

The offence in question consists of belonging or professing to belong to a proscribed organisation. As such, a requirement on the accused to prove that they were not a member of the organisation when it was proscribed, or that they never participated in its activities at any time when it was proscribed, is blatantly no different from requiring the accused to prove that they were *not* a member of a proscribed organisation. Had the PoI been understood in *Sheldrake* as I have argued that it should be understood here, there would have been no need for Lord Bingham’s recourse to an assortment of factors, and consideration of the proportionality. Instead, my approach has the merit of simplicity, recognising the reverse burden for what it is: a breach of the PoI. The benefit, in turn, would be that future defendants would have clear protection

²⁸ Human Rights Act 1998, s 19.

²⁹ *Sheldrake* (n 1) 313 (Lord Bingham).

³⁰ Terrorism Act 2000, s 11(2)(a)-(b).

against such violations of their PoI, rather than being hostages to an assessment of the proportionality of a reverse burden in the circumstances. This is desirable from the perspective of legal certainty and reduces the scope for error (in assessing proportionality), the need for lengthy appeals, and the possibility that the accused's fundamental rights can be balanced away on a case-by-case basis. On the whole, then, adopting my view of the PoI in *Sheldrake* would have made the case much easier to decide, more straightforward to understand, and more valuable as a precedent for future cases.

7.3 – A 'Post-Reverse Burden' Criminal Law

Perhaps one of the most intuitively appealing arguments in favour of the proliferation of reverse burdens is the claim that eliminating the ability of the state to impose reverse burdens will simply lead to more offences of strict liability, without the possibility of a reverse burden defence to protect the accused. As Roberts has noted, this technique of imposing strict liability, but mitigating its harshness by allowing the accused a reverse burden defence, is a favourite of English criminal law.³¹ The argument that this should be a good reason for retaining, or even encouraging, reverse burdens was first advanced by Jeffries and Stephan in the 1970s.³² These commentators warned that eliminating reverse burdens from the criminal law could 'thwart legislative reform of the penal law' and lead to a 'reversion to older and harsher rules of penal liability'.³³

A second line of argument which might militate against the conclusions of this thesis with respect to reverse burdens has to do with the defence of insanity, which has long entailed a reverse burden on the accused in many common law jurisdictions. In England and Wales, this was first established in *McNaughten*, where it was held that the defendant was presumed to be insane unless they could prove the contrary.³⁴ Similarly, in the US at least 22 different states require the accused to prove the insanity, including Oregon, where, unusually, the standard of proof for the defence is beyond reasonable doubt.³⁵ If reverse burdens were to be abolished, or even sharply curtailed, by the PoI, as I have suggested they ought to be, then some might argue that this would have the unintuitive or undesirable effect of requiring the reverse burden in the insanity defence to be reconsidered. This objection suggests that the insanity defence should continue to entail a reverse burden on the accused, otherwise it would be for the prosecution to prove that the accused in any given case is sane, despite common sense dictating that most people are sane.

Below, I deal with these two objections, and sketch a view of a post-reverse burden criminal law. Briefly, the two arguments can be addressed as follows. The first argument that abolishing reverse burdens on any issue which goes to the guilt of the accused does indeed raise a legitimate worry that strict liability could proliferate. While I acknowledge this concern, I nevertheless resist the conclusion that such a worry justifies the continuing practice of imposing reverse burdens so frequently. To give in to this fear and continue the status quo is simply to bow to the threat of a harsher, more severe criminal law, in order to justify an unfair practice which flouts a fundamental norm. The correct response, as I will argue, is not to bow to the threat but rather own it, and

³¹ Paul Roberts, 'Strict Liability and the Presumption of Innocence: An Exposé of Functionalist Assumptions' in AP Simester (ed), *Appraising Strict Liability* (OUP 2005) 153.

³² John Calvin Jeffries, Jr. and Paul B. Stephan III, 'Defenses, Presumption and Burden of Proof in Criminal Law' (1979) 88 *Yale Law Journal* 1325.

³³ *ibid* 1353-1354.

³⁴ *R v McNaughten* 8 ER 718; (1843) 10 Cl. & Fin. 200, 210.

³⁵ The 22 states are listed in John Henry Wigmore, *Evidence in Trials at Common Law*, vol 9 (Third edition, revised., Boston : Little, Brown 1961, s 2501. See also the US Supreme Court decision upholding Oregon's practice of imposing the higher standard of proof for the insanity defence in *Leland v Oregon* 343 U.S. 790 (1952).

insist on paying the PoI its due. If this leads to a punitive response on the part of legislatures, imposing more strict liability and imprisoning more people, then it is for them to pay the political price for doing so. The second argument is dealt with more easily: the objection is correct, and the insanity defence should not entail a reverse burden. Instead, it should simply entail an evidential burden on the accused to adduce evidence that they qualify for the defence, which the prosecution should be able to negate in order to secure conviction. This could be established by a simple psychological evaluation which should be uncontroversial, especially given the prolific use of expert evidence in modern criminal trials.

7.3.a – More Strict Liability?

Strict liability is generally looked upon with disfavour. As a concept, however, an exact meaning of strict liability has proved extraordinarily difficult to pin down. Husak, for example, counts at least seven different possible meanings all in current usage.³⁶ In the context of English law, the term ‘strict liability’ is typically used to refer to a crime which has reduced mens rea requirements, or no such requirement at all.³⁷ In the most extreme case, sometimes referred to as ‘absolute liability’, the accused can be convicted solely on the basis of a guilty act, even if that act was not voluntary.³⁸ The response to such forms of criminal liability has traditionally been very hostile. As one commentator put it, ‘the dominant view appears to be that in the Anglo-American culture, the use of strict liability crimes is arbitrary and unreasonable’.³⁹ The underlying reason for this, as Husak correctly observed, is the intuition that it is unjust to allow conviction of a defendant who is ‘substantially less at fault than the paradigm perpetrator of that offence’.⁴⁰ This also reveals the central feature of strict liability which all of the different meanings of the phrase share: in cases of strict liability, ‘the accused’s legal liability exceeds [their] moral culpability’.⁴¹ Thus, strict liability is rightly seen as an aberration, or even an abomination, in the realm of the criminal law.

Against this backdrop, defenders of reverse burdens often paint reverse burdens as a solution to the problem of strict liability. The tone of such suggestions is less of a full-throated endorsement of the virtues of reverse burdens, however, and more of a veiled threat: if reverse burdens are abolished, this argument goes, lawmakers will simply have no choice but to impose strict liability more and more often. One of the most well-known versions of this argument is presented by Jeffries and Stephan, who characterise reverse burdens as ‘instances of benevolent innovation’ in the criminal law.⁴² This is so, they contend, because reverse burdens in 19 of the 33 US states they surveyed introduce some ‘new ground of exculpation’ otherwise unknown and unavailable to the accused.⁴³ As such, Jeffries and Stephan conclude that allowing legislatures to impose reverse burdens on defences is ‘often politically necessary to secure legislative reform’ and that reverse burdens should therefore be tolerated, if not encouraged, because they are still not as

³⁶ Douglas Husak, ‘Varieties of Strict Liability’ (1995) 8 Canadian Journal of Law and Jurisprudence 189, 199, 223.

³⁷ See, for example, *Sweet v Parsley* [1970] AC 132; *R v Savage and Parmenter* [1992] 1 AC 699 (HL). In the former case, the House of Lords read a requirement of mens rea into a statute which contained no express mention of any mental requirement, in order to avoid imposing strict liability. In the latter case, the accused was held liable for the offence of inflicting grievous bodily harm, contrary to s 20 of the Offences Against the Person Act 1861, despite the fact that the accused only intended to cause very minor injuries.

³⁸ This exceptional type of liability is found in the case of *R v Larsonneur* (1933) 24 Cr. App. R. 74 (CCA).

³⁹ Laurie Levenson, ‘Good Faith Defences: Reshaping Strict Liability Crimes’ (1992-1993) 78 Cornell Law Review 401, 403 fn 7.

⁴⁰ Husak (n 36) 193.

⁴¹ Roberts (n 31) 152.

⁴² Jeffries and Stephan (n 32) 1355.

⁴³ *ibid.*

problematic as strict liability.⁴⁴

The worry expressed by Jeffries and Stephan is understandable, and indeed strict liability is rightly thought of as an outcome which should be avoided wherever possible. What is doubtful, however, is that reverse burdens are really a solution to this problem. As was noted above, the drafting technique of imposing strict liability and then making a reverse burden defence available is a common one in English law. On this basis, it is tempting to conclude that if reverse burdens were not available to complement strict liability offences and mitigate their harshness, the legislature would continue to impose strict liability in its harshest form, without even giving the accused the opportunity to prove a reverse burden defence. This is the implication of Jeffries and Stephan's argument. It is, however, doubtful that this claim about how legislatures would behave is completely true.

In fact, what such arguments overlook is the possibility that strict liability is only used as frequently as it is *because* legislatures know they can add a reverse burden defence to create a structure of criminal liability which relieves the prosecution of some of its burden to prove guilt. The frequent use of the 'strict liability + reverse burden defence' formula, then, does not necessarily indicate that abolishing reverse burdens, as I have suggested, would increase the harshness of the criminal law. Rather, it suggests that the continuing availability of reverse burden defences perpetuates the status quo of increasing reliance on strict liability to secure convictions. As such, it would be a serious error to conclude that reverse burdens are an answer to the problem created by strict liability. On the contrary, reverse burden defences are *part* of this problem.

If reverse burdens are part of the problem, then it is also wrong to conclude that the lingering threat of regressive penal policy should motivate us to systematically flout the PoI by letting reverse burdens proliferate in the criminal law. In fact, what must be appreciated is that bowing to this fear in order to justify the continued use of the 'strict liability + reverse burden defence' structure of criminal liability is not without cost. Quite the opposite. The price paid is extracted from the PoI every time a reverse burden is imposed, relieving the prosecution of their duty to prove guilt. This is implicitly recognised by Jeffries and Stephan, who note that the subject matter of the reverse burden defences they surveyed tended to be facts which would be very difficult to disprove beyond a reasonable doubt.⁴⁵ However, they count this as a good reason for retaining reverse burdens.

I would flip this argument on its head: if a fact is so difficult to prove beyond a reasonable doubt that the prosecution, with all the resources of the modern state, cannot do so, then it is certainly too much to expect even the most well-resourced defendant to be able to prove it on the balance of probabilities. Shifting some of the burden onto the accused in the name of making the prosecution's task easier is therefore not a rationale that should be entertained. Indeed, this is a slippery slope, as it is always easier to secure a conviction if the prosecution has less to prove. But the PoI is not a right whose application should vary based on how difficult it makes a prosecutor's job – if the PoI is to be truly respected, then the threat of more strict liability must not be met with submission.

In a post-reverse burden criminal law, then, we must accept the threat of more strict liability offences. As was shown above, it is less probable than is frequently assumed that such a threat would materialise. But this does not mean that it is not a possibility. This therefore presents two alternatives for a post-reverse burden criminal law: one in which strict liability continues to be

⁴⁴ *ibid* 1356.

⁴⁵ *ibid* 1355.

imposed as often as it is now, but without reverse burden defences, and one in which this threat does not materialise. In my view, either alternative is preferable to the status quo if it leads to increased respect for the presumption of innocence with regard to the burden of proof.

In the first alternative, the removal of reverse burden defences from the legislative toolkit presents the legislature with a choice between continuing to follow the ‘strict liability + reverse burden defence’ formula, but substituting evidential burdens for reverse persuasive burdens, or continuing to follow the formula without making any defences available at all. Of these two options, the former is obviously more palatable, but probably less likely. After all, if the main draw of a reverse burden defence is that it relieves the prosecution of some of its burden, then an evidential burden defence would not be suitable, since it would only resurrect the prosecution’s burden once the accused adduced the necessary evidence. But even if legislatures in this alternative chose to simply enact the same amount of strict liability offences, without making any defence available, this would still be an improvement on the status quo. This is because a reaffirmation of the PoI, in the form of abolishing most reverse burdens, would be likely to cause a paradigm shift in the criminal law, such that imposing strict liability would become more difficult to justify. Thus, even if abolishing reverse burdens (on issues going to guilt) were to happen tomorrow, and strict liability were to increase as a result, then it would be for the legislature to explain how and why this is necessary. Given that strict liability can only be imposed, under English law at least, through express words to this effect or by necessary implication, this would exact a political toll on the proponents of increased strict liability.⁴⁶ In my view, then, this is a risk worth taking if it means bolstering the PoI and restoring its role in the criminal law.

The second alternative paints a more optimistic view of the post-reverse burden world, one in which the threat of increased use of strict liability does not materialise. In this alternative, the abolition of most reverse burdens leads to a renaissance in the field of criminal law and the creation of new criminal offences, rather than a proliferation of strict liability. With reverse burden defences no longer an option, the legislature is forced to rethink its approach to criminalisation, giving greater consideration to the conditions of criminal liability and the facts which should be necessary to constitute an offence, compared to this which should require the accused to bear an evidential burden. In this case, the result is a more PoI-coherent criminal law, one which gives proper weight to the presumption and does not require the accused to prove their innocence. A likely fringe benefit of this would be increased public confidence in verdicts, with a corresponding strengthening of the integrity of the criminal justice system, as people perceive it to be fairer and less capricious. Admittedly, this rather rosy view of the post-reverse burden future may not be particularly likely, especially given the renewed rise in penal populism in both the US and the United Kingdom. Nevertheless, it is a possibility, and one worth aspiring to.

7.3.b – The Post-Reverse Burden Insanity Defence

One of the oldest reverse burden defences still in existence is the common law defence of insanity, as encapsulated in the English case of *R v McNaughten* and replicated in some form in many different common law jurisdictions around the world.⁴⁷ The basic underlying premise of such a defence is that if a person is not sane then they are not criminally responsible for their actions, and therefore have a defence to what would otherwise be a crime. However, as the House of Lords observed in *McNaughten*, there is a presumption that the accused is sane, as most

⁴⁶ On the presumption of mens rea, see *Sweet v Parsley* (n 37).

⁴⁷ *McNaughten’s Case* (n 34).

people are, in fact, sane.⁴⁸ Thus, in order to benefit from the insanity defence the accused must prove that they were, at the relevant time, ‘labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act’ or that they did not know that it was wrong.⁴⁹ Ever since the time of *McNaughten* and the subsequent Trial of Lunatics Act 1883, the burden of proving insanity has rested with the accused, a fact recognised in *Woolmington* where Viscount Sankey LC identified insanity as an exception to the (thin) PoI.⁵⁰ Unlike other defences, the insanity defence may seem like a less objectionable situation in which to make the accused bear the burden of proof, especially given that the presumption of sanity is valid, as most people are sane.

At this stage, it might appear that the post-reverse burden criminal law has run into a problem, following an absurd line of thinking, whereby one must deny that most people are sane. Thus, one might conclude that the insanity defence should continue to be an anomaly among the common law defences, continuing to entail a reverse burden.⁵¹ Moreover, this potentially presents a challenge for the post-reverse burden criminal law proposed in this thesis: if the insanity defence can require the accused to prove it on the balance of probabilities, why not other defences? The answer to this objection is straightforward, and informed by the careful consideration of the Law Commission of England and Wales, who reviewed the insanity defence in 2003.⁵² In their discussion paper, the Law Commission addressed the issue of the locus of the burden of proof directly, concluding that there was no reason for the accused to bear the burden of proving insanity and that an evidential burden would serve justice just as well.⁵³ This echoes the recommendation of the Law Commission’s predecessor, the Criminal Law Revision Committee (CLRC) which recommended that the burden on the accused for the insanity defences (and, indeed, for all defences) be evidential only.⁵⁴ Moreover, this recommendation is identical to that which my approach would make: any burden on the accused should be evidential only, including the insanity defence.

Commitment to an interpretation of the thick PoI which prohibits making the accused prove their innocence requires any burden on the defence to be evidential only, unless that burden relates to an issue unconnected to the issue of guilt or innocence. The insanity defence, however, clearly does pertain directly to whether or not the accused is innocent, as it bears directly on whether or not they can be held criminally responsible for their actions at the time.⁵⁵ This does not mean that one cannot presume that most people are sane, it simply means that there is no *legal* presumption that *every* person who comes before a court is sane. I take the goal of this presumption, given effect in cases like *McNaughten* and its counterparts in other jurisdictions which make insanity a reverse burden defence, to be to prevent unscrupulous defendants from raising the insanity defence and requiring the prosecution to disprove it, wasting time and valuable resources, and raising the prospect that the accused could be wrongfully acquitted.⁵⁶

Given the importance of having speedy and efficient trials, and the public interest in not having guilty defendants wrongfully acquitted, I endorse the further suggestion of the Law Commission

⁴⁸ *ibid*, 719

⁴⁹ *ibid*.

⁵⁰ *Woolmington* (n 1) 481.

⁵¹ All other common law defences have long been held to entail only an evidential burden for the accused, per *R v Gill* [1963] 1 WLR 841.

⁵² Law Commission, *Criminal Liability: Insanity and Automatism* (Discussion Paper, July 2013).

⁵³ *ibid* paras. 8.43-8.44.

⁵⁴ Criminal Law Revision Committee, ‘Eleventh Report: Evidence (General)’ (Cmnd 4991 1972), para. 140.

⁵⁵ The Law Commission recognised this as well, see Law Com (n 52) 8.44.

⁵⁶ *McNaughten* (n 34).

to require an ‘elevated evidential burden’ for the insanity defence.⁵⁷ This means that the accused would have to adduce evidence from two medical experts in order to make the issue of their insanity a live one at trial.⁵⁸ Such an approach strikes an appropriate balance between the interest in efficient trials and the need to protect and uphold the PoI. It is worth observing that, as this elevated evidential burden puts no risk of non-persuasion on the accused, nor does it require them to disprove an element of the offence, the elevated evidential burden is perfectly compatible with the version of the PoI advocated in this thesis. In the post-reverse burden criminal law, then, the insanity defence is no different from any other defence: it too is protected by the PoI, meaning that once properly raised it must be disproved by the prosecution as part of their overall case. Rather than retaining its status as a curious anomaly, this would bring the insanity defence into line with other common law defences, as well as respecting the PoI, without realising the fear of letting guilty defendants walk free due to the defence being too easily raised. The result is a healthy balance between the state’s interest in serving justice and the individual’s fundamental right to be presumed innocent.

7.3.c – Reverse Burdens beyond the Scope of the PoI

The final aspect of describing the post-reverse burden criminal law addresses those reverse burdens which will remain in force even if my approach is adopted. As was explained in the previous chapter, the thin PoI prohibits reverse burdens on the formal elements of an offence, and the thick PoI prohibits any reverse burden which requires the accused to prove his innocence, but not all reverse burdens will be caught by these requirements.⁵⁹ In fact, there is one residual category of defence which is beyond the scope of the PoI: nonexculpatory defences. These are the defences of immunity,⁶⁰ time limitation, and entrapment⁶¹, and also the application for a stay of proceedings for abuse of process.⁶² In the post-reverse burden criminal law, however, these defences can be understood differently. Rather than being yet another example of PoI-infringing reverse burdens, nonexculpatory defences demonstrate the proper limits of the thick PoI, emphasising that innocence is not all encompassing. This will help to reinforce the power of the presumption when it is applied, and avoid overextending the PoI by trying to turn it into a more general right to due process or conflating it with the right to a fair trial.

For all other defences, the appropriate approach will be that which has long been taken for common law defences (other than insanity): an evidential burden. However, as the above discussion of the proposed reform to the insanity defence has shown, evidential burdens can be used creatively to ensure that it is not too easy for the accused to raise certain defences. The elevated evidential burden proposed above is a good starting point for more creative thinking about how evidential burdens can be used, raising the possibility that they can become more specific, and more tailored to the needs of the specific context in which certain defences operate. In the case of insanity, the required evidence had to come from a medical expert, further limiting

⁵⁷ Law Com (n 52) 8.50.

⁵⁸ *ibid.*

⁵⁹ See Chapter 6, section 6.2.

⁶⁰ There are at least six different kinds of immunity which can act as defences (as barriers to prosecution): diplomatic, judicial, legislative and executive immunity, immunity following compelled testimony, and immunity arising from a plea bargain. These are explained in greater detail in Paul Robinson ‘Criminal Law Defenses: A Systematic Analysis’ (1982) 82 *Columbia Law Review* 199.

⁶¹ Entrapment will be a more familiar defence to American lawyers, as it is not always explicitly recognised as a defence in other common law jurisdictions. Here, I use the term to refer to a situation where the accused is induced by a government agent (e.g. an undercover police officer) to commit an offence. This is best viewed as an ND because it is not based on any lack of culpability on the accused’s part, but rather on ensuring that state agents do not act improperly to secure a conviction. For more, see *ibid* 236–239.

⁶² See Chapter 6, sections 6.1 and 6.2.

the scope for abuse of the defence by undeserving defendants. In other instances, it may be the case that other limitations are placed on the type of evidence which will be required to discharge an evidential burden. This is an open question which will require further consideration, but for now the important observation is that, in a post-reverse burden world, the evidential burden has a central role to play in the criminal trial.

7.4 – Conclusion

This chapter has examined the implications of adopting my proposed view of the PoI as a prohibition on proving innocence. As was noted at the outset, the modern criminal law in jurisdictions like the US and England and Wales contains a multitude of reverse burdens. As such, serious consideration had to be given to how the criminal law in these jurisdictions would have to change, what this change would look like, and what advantages and disadvantages such change would offer, if my approach to reverse burdens were implemented in practice. The objective was to sketch a view of a criminal law largely free of reverse burdens, with most existing reverse burdens replaced by evidential burdens, unless they pertained to an issue unconnected to the issue of guilt or innocence (e.g. pertaining to the prior issue of whether or not the accused can be tried for the offence in question). In this chapter, I also aimed to allay some of the fears and worries about what a post-reverse burden criminal law would entail, whilst being forthright about the costs of such a drastic shake-up in the criminal justice system.

First, this chapter considered how some key reverse burden cases might have been decided differently, had my preferred interpretation of the PoI been adopted in their reasoning. The first case considered was the US authority of *Patterson*, where it was shown that relying on the thick PoI would have led to a very different outcome, restoring the spirit of *Winship* and rejecting the collapsing of the thick/thin distinction. Rather than embracing formalism, *Patterson* could have reasserted the importance of the thick PoI as a right which all state criminal codes must respect, an outcome which would have been a welcome contrast to the harsh reality of modern American criminal law's diminishment of the PoI's importance.

Next, the classical statement of the PoI under English law in *Woolmington* was revisited. Here, it was shown that adopting the thick PoI would have enabled the House of Lords in *Woolmington* to go further than they did, and to avoid opening the floodgates of statutory exceptions to the principle they espoused. Again, this would have been a welcome improvement compared to the realities of how reverse burdens were allowed to proliferate post-*Woolmington*. Finally, I examined the more modern English authority of *Sheldrake*, and showed how its *ad hoc* approach could have been avoided entirely if the thick PoI had been properly applied, instead of misconstrued as it was in that case. The result would have been a more robust judgment, furnishing a clear legal rule to be followed in future cases, and reaffirming respect for the central role of the thick PoI in the criminal justice system.

The second part of the chapter then moved on to outline how a post-reverse burden criminal law might be structured, heading off two potential objections along the way. The overall thrust of section 7.3 was that any burdens on the accused which would otherwise transfer the risk of non-persuasion to them would need to instead be evidential, in order to avoid falling foul of the PoI. The possibility that this would lead to an increased amount of strict liability offences, without any available reverse burden defences, was acknowledged. However, it was argued that such a fear need not discourage us from fully respecting the PoI, and that if legislators did decide to press ahead with more strict liability offences without any defences, it would be for them to answer to

the electorate as to why this was a necessity. In a similar vein, I also suggested in section 7.3 that concerns about the insanity defence should not prevent the wholesale adoption of my proposed approach to reverse burdens. On the contrary, my approach rightly extends to the insanity defence, as the issue of sanity is of fundamental importance to whether or not the accused can actually be held criminally responsible, and therefore found guilty of an offence. Thus, this second objection was rebutted.

Finally, in the previous section of this chapter, I examined the potential costs of embracing my approach to reconciling reverse burdens and the PoI. It was conceded that this *might* lead to an increase in strict liability offences, which are generally considered highly undesirable. Similarly, I also recognised that increasing the burden on the prosecution, by requiring them to negate more defences, could lead to higher rates of acquittal. I accepted this as part of the price to pay for a system which fully respects a right as important as the PoI, and questioned whether such an outcome could really be considered a ‘cost’ as such, if it simply meant that fewer people who might be innocent were not being convicted. Overall, the argument presented was that adopting a thick PoI based approach to reverse burdens might entail costs, but that these costs are worth paying.

On the whole, it is now clear that a post-reverse burden criminal law is one which is still perfectly capable of functioning, and one which entails a far less complicated and far more robust understanding of the presumption of innocence. By shifting away from either *ad hoc* evaluations of fairness, and by refusing to reduce the PoI to nothing more than a rule about the burden of proof with respect to the formal elements of an offence, the approach advocated in this chapter offers a new way forward for common law jurisdictions who are grappling with the problem of reverse burdens. As such, the main objective of this thesis has now been mostly accomplished. In the next chapter, all of the foregoing analysis will be drawn together to fully realise the main goal of determining how reverse burdens can be used in a way which coheres with the thick PoI. It is to this final task that the thesis now turns.

Chapter 8: Solving the Reverse Burden Problem

8.1 – Overview

This thesis set out to solve the reverse burden problem, to reconcile reverse burdens with the presumption of innocence (PoI). The overarching research question, and the goal at which all of the foregoing analysis was aimed, was stated as follows: when, if ever, will it be coherent with the requirements of the PoI to impose a reverse burden on the accused? In many ways, then, the goal of the thesis was to attempt to reconcile the seemingly irreconcilable. Previous attempts were found lacking, suggesting the need for a new methodology, recognising the importance of the PoI as both a trial rule and a general norm of the criminal law, and constructing a framework which respected this distinction, maintained the normative force of the PoI, and resolved the tension between the presumption and reverse burdens. Having canvassed previous approaches to reverse burdens in both the courts of England and Wales and the United States (US), and in scholarship from these jurisdictions, a solution to the reverse burden problem has finally emerged: reverse burdens cannot be reconciled with the PoI, except in the very limited case where they attach to a fact which does not bear on guilt or innocence.

This pithy answer to the thesis's overarching research question will strike some as a statement of the obvious, and others as a ludicrous oversimplification, or lofty academic position detached from the reality of the modern criminal law. In fact, it is none of those things. As this chapter aims to explain, the conclusion of this thesis is not obvious, oversimplified, or unrealistic. On the contrary, it is a reaffirmation of a commitment to a deeper kind of principled stand on how the state should treat its citizens when their liberty is at stake, a principle espoused by judges and legal systems but steadily whittled away in the jurisdictions examined here. More to the point, its conclusions could be implemented with relative ease, if there were the political will to do so. This chapter therefore aims to fully unpack the conclusions of this thesis, establish how the initial goals of the research have now been achieved, and offer a prediction of how the research can be put into practice. The following three sections focus on each of these three points.

Section 8.2 sets out how the thesis has succeeded in reconciling reverse burdens and the PoI, by understanding the thick PoI as a prohibition on making the accused prove their innocence, meaning they cannot be allocated the risk of non-persuasion with respect to guilt. Section 8.3 then addresses the subject of making the thesis's suggestions operational, offering recommendations for how the PoI can be reinterpreted in the US and England and Wales, so as to give effect to the interpretation of it advocated in this thesis. In the US, this would entail recognition of a constitutionalised right to be presumed innocent, preventing individual state legislatures from circumventing the PoI's protection against reverse burdens. In England and Wales, the proposed way forward is to overrule *Sheldrake* through legislation, reaffirming the core of the *Woolmington* principle and allowing judges to read down any existing reverse burden under s 3 of the Human Rights Act (HRA) 1998. Finally, section 8.4 concludes both the chapter and the thesis, flagging up areas of interest for future research in this field.

8.2 – Reconciling Reverse Burdens and the PoI

As its title suggests, the overall goal of the thesis was to seek reconciliation between reverse burdens and the PoI. As was explained at the outset, however, this was decidedly not intended

to be an exercise in specifying how and when a reverse burden could be thought of as a justified derogation.¹ Instead, a more complete and holistic answer was sought, one which could satisfy three specific criteria. First, any answer to the research question had to take account of and respect what I referred to as the ‘thick/thin distinction’. This meant attending to the requirements imposed by both the thin PoI (a trial rule) and the thick PoI (a general norm of the criminal law), and being clear about which requirements came from which aspect of the PoI. Next, the solution had to maintain the normative force of the PoI, making it clear when and how it applied, and when it did not, to burdens of proof on the accused. Finally, and perhaps most importantly, any answer to the main research question had to resolve the tension between reverse burdens and the PoI, rather than simply stipulating or assuming that the two could coexist in one legal system. An approach which could meet these three requirements would, on my account, reconcile reverse burdens and the PoI.

At this juncture, it is appropriate to reflect on how the approach suggested in this thesis has met the three success criteria, and therefore brought about the reconciliation which the thesis aimed to bring about. To briefly restate the core finding of the thesis, my contention is that reverse burdens and the PoI should be connected as follows: First, two dimensions to the PoI need to be recognised: the thin and the thick. The former is a trial rule, allocating the burden of proof to the prosecution, to the standard of beyond reasonable doubt, with respect to the formal elements of an offence. This means that the accused can never be made to prove any element of an offence, or disprove the negation of such an element. Next, the thick PoI then lays down a more general rule: the accused cannot be made to prove their innocence. By ‘prove their innocence’, I argued that the thick PoI refers to the Wigmorean concept of the risk of non-persuasion. Whichever party bears this risk with respect to a given issue must convince the fact-finder, by discharging a persuasive burden, of their version of events, or else lose on that issue. Thus, finally, the thick PoI is best understood as prohibiting the state from making the accused bear the risk of non-persuasion with respect to the issue of their guilt or innocence.

This new approach to reverse burdens and the PoI offers a true reconciliation between the two, as measured against the three criteria set out previously. First, it recognises the thick/thin distinction explicitly, and specifies how both the thick and thin PoI impose requirements about the locus of the burden of proof in a criminal trial. As such, it exemplifies respect for the thick/thin distinction. Second, it maintains the normative force of the PoI. Far from muddying the water, as other approaches have done, my approach provides clarity in terms of how both the thick and thin PoI relate to reverse burdens, making their normative force undeniable and decreasing the likelihood of the PoI being diluted or balanced away. Finally, the approach which this thesis sets out resolves the tension between the PoI and reverse burdens. This resolution is not of the type which denies the tension between the two, but rather embraces it. Thus the answer to the question: ‘when, if ever, will it be coherent with the requirements of the PoI to impose a reverse burden on the accused?’, is ‘almost never’. More specifically, on the view espoused in this thesis, it will only be coherent to impose a reverse burden on the accused if that burden does not pertain to the issue of guilt or innocence.

Recall that the fundamental tension between reverse burdens and the PoI was said to be that the former amounted a presumption of guilt, while the latter required presuming innocence. As such, it was clear that the two were in tension with each other, pulling in directly opposite directions. To try resolve this tension, many have offered explanations which were very simple, but incomplete, relying on formal distinctions so as to simply disregard a fact labelled a defence.

¹ See Chapter 1, section 1.4.

Others implicitly denied the existence of any tension, arguing that the apparent contradiction between reverse burdens and the PoI could be resolved on a case-by-case basis, provided the right justification was found in the circumstances. But ultimately, none of these attempts could truly resolve the tension. Those who relied on formal distinctions, for example, could offer no answer as to why formal labels should dictate the application (or not) of a right as fundamental as the PoI. Meanwhile, those in favour of the *ad hoc* approach could not explain why it should be necessary to resolve each reverse burden case on its own facts, nor why the formulation of any general principle by which to assess reverse burdens was so illusory.

In contrast to these other attempts at reconciliation, my approach recognises the truth of the matter: no coherent legal system can plausibly presume both guilt and innocence, with respect to the same offence, and the same accused, at the same time. It is an impossibility. The only question is therefore whether to resolve the tension in favour of the PoI, or to resolve it in favour of the unfettered ability of the legislature to legislate however it wishes. I have opted for the former. In doing so, I have resolved the tension entirely, simply by avoiding the manifest contradiction which the alternative would lead to. As such, my approach does reconcile reverse burdens and the PoI, observing that as long as the accused is not being made to prove their innocence, then no issue arises. Of course, very few existing reverse burdens will satisfy the test my approach sets out. But if that proves to be true it is a condemnation of the status quo in the modern criminal law, not of my explanation of what the PoI requires.

8.3 – The Future of Reverse Burdens

With a solid theoretical foundation for reverse burden reform now set out, the practical details of such reform need to be addressed. As has been recognised above, reform of this area of law is very possible, provided that the right steps are taken. Owing to their markedly different constitutional structures, the route to reform in the US and England and Wales are not identical in form. However, the underlying PoI recognised and reaffirmed through each is the same thick and thin PoI which I have set out in this thesis. Thus the substance is the same, even if the form differs. In the US, there are two possible routes to reform: judicial and constitutional. The former involves overruling *Patterson v New York*, restoring *Winship* to its central place in analysing reverse burdens but endorsing the analysis of *Wilbur*, defining the elements of an offence broadly, as encompassing any issue going to guilt.² This would give effect to the thick PoI's requirements, creating a constitutionalised standard which states would not be able to depart from in their individual criminal laws. The second option for reform in the US is more radical: a constitutional amendment to expressly amend the 14th Amendment, so as to provide that the burden of proof must remain on the prosecution with respect to all issues going to the guilt of the accused, endorsing the substantive analysis of *Wilbur*.

In England and Wales, reform is comparatively straightforward, and would simply require ordinary legislation overruling *Sheldrake* and making a similar provision to the amendment to the US constitution which was just described.³ Taking each jurisdiction in turn, I will now flesh out exactly how reform could take place.

In the US, the constitutional structure of the US federal system dictates the routes to possible reform of reverse burdens. There are two key facets of this structure which must be taken into

² *In re Winship* 397 U.S. 358 (1970); *Mullaney v Wilbur* 421 U.S. 684 (1975); *Patterson v New York* 432 U.S. 197 (1977). These cases were discussed at length in Chapter 2.

³ *DPP v Sheldrake* [2005] 1 AC 264 (HL).

account. First, in the US, the criminal law is primarily a matter for the states, and criminal codes are different (to varying degrees) in each of the 50 states and territories of the US.⁴ Given that each state has a different legislature, and will begin from a different starting point, this renders state-by-state reform both difficult and unappealing. Not only would such an approach be time-consuming and politically difficult, but it would also sow further confusion, and potentially lead to a piecemeal reform process, where some states greater protection of the PoI than others. This points in the direction of reform at the federal level being the better option. However, as the US Supreme Court has made clear, the Court will typically be reluctant to interfere in the states' remit to set up their individual criminal laws as they see fit.⁵ This leads to the second feature of the US constitutional structure which must be considered, which is that there are only two ways for broad sweeping reform to be enacted in the criminal law of all 50 states at once. Either the US Supreme Court can rule that a part of the US Constitution creates a constitutional right, applicable in all 50 states by virtue of the supremacy of the US Constitution to those of individual states, or, the Constitution can be expressly amended, with the same effect.

At present, the constitutional basis of the PoI, as applied to the states, stems from the 6th Amendment requirement for due process of law, extended to the individual states by virtue of the 14th Amendment. However, the approach of the US Supreme Court in *Patterson* has created some uncertainty as to what the authoritative interpretation of the PoI, as recognised in the 6th Amendment, actually is.⁶ This uncertainty stems from the conflict between two earlier decisions of the Supreme Court in *Winship* and *Wilbur*.⁷ The former case construed the PoI as requiring proof of 'every fact necessary to constitute the crime' with which the accused was charged, without elaborating on what this meant.⁸ The latter case, decided shortly after *Winship*, then interpreted this as transcending the formal offence/defence distinction, and instead reading the PoI as requiring proof of all facts bearing on the blameworthiness or culpability of the accused.⁹ Finally, in *Patterson*, the Supreme Court retreated from this broader interpretation of the PoI, insisting on a formalistic interpretation of *Winship*.¹⁰ Crucially, however, the court did this without overruling either *Winship* or *Wilbur*, with no cogent explanation as to how or why they refused to do so. The result is that the constitutionalised standard, binding on all states, could plausibly be either the *Wilbur* or *Patterson* approach to the PoI.

The uncertainty generated by the Supreme Court's rulings to date means that it is unclear what exactly is required of the individual states in terms of allocating the burden of proof in a way which coheres with the PoI. Although such legal uncertainty is obviously unwelcome, it also presents an opportunity for reform, either via a new Supreme Court ruling or a constitutional amendment. Each has its advantages and disadvantages, but on balance the former is a more practical route to reform. This is because the US Constitution sets an incredibly high bar for any amendments to be passed: two-thirds of both Houses of Congress must approve the amendment, or a constitutional convention can be called, where the amendment must be supported by a majority of two-thirds of all the legislatures of the individual states.¹¹ In either case, the amendment

⁴ This point was affirmed in *Irvine v California* 347 U.S. 128 (1954), 134-136.

⁵ Again, see *Irvine* *ibid*.

⁶ This was discussed in more detail in Chapter 2, section 2.3.c.

⁷ *Winship* and *Wilbur* (n 3).

⁸ *Winship* (n 3) 364.

⁹ *Wilbur* (n 3) 698-701.

¹⁰ See Chapter 2, section 2.3.c.

¹¹ US Constitution, Article V. For a helpful, and short, explanation of the process in more modern language, see the US National Archives, 'The Constitutional Amendment Process,' <https://www.archives.gov/federal-register/constitution>.

will still only be passed once it is ratified by two-thirds (38) of the 50 states.¹² It is worth observing that no amendment has ever been proposed via the constitutional convention process, and that the US Constitution has only been successfully ratified 27 times in the country's 245 year history, most recently in 1992. That amendment took over 200 years from its proposal to its ratification.¹³ The process of constitutional amendment, then, is an extraordinarily difficult one by design.

In view of the onerousness of the constitutional amendment procedure, the best way forward for reverse burden reform is through a new decision of the US Supreme Court. This would offer an opportunity to clarify the nature of the constitutionalised standard which would apply to the criminal law of all states with respect to how they allocate the burden of proof. Imposing such substantive requirements on the states is rare, and rarer still in the modern era.¹⁴ However, the benefit of previous judicial intervention in this area, via the *Winship* case and its successors, is that the precedent of imposing a constitutional PoI requirement on the states has already been established. A subsequent decision of the Supreme Court would therefore only need to re-establish that *Winship* and *Wilbur* were the correct statements of the law, and expressly overrule *Patterson*.

This would have the effect of constitutionalising the thick PoI's requirement that the accused never be made to prove their innocence, which would bind all 50 states' criminal codes to adhere to this standard and automatically invalidate any state law made which did not do so. Admittedly, there are difficulties with this approach to reform as well. Chief among them is that there are no guarantees that the US Supreme Court would reach this decision if they heard the case, and as the court's justices are wholly immune to any kind of democratic accountability, there is no clear way to *make* the court take this approach. Nevertheless, I endorse this route to reform because it still seems to be easier to accomplish than amending the US Constitution. If this should prove not to be the case, however, then the route of constitutional amendment is still open to reformers.

Turning now to the reform process in England and Wales, the path forward is much simpler: all that is required is ordinary legislation. Again, this is a result of the constitutional structure of the United Kingdom, where the legislature, rather than the judiciary, is supreme. Fortunately, this makes legal reform much easier and quicker to enact. As such, all that would be needed would be new Act of Parliament which clarified the meaning of the PoI with respect to reverse burdens. I propose a form of words for such a provision below, adapted from the original suggestion of the CLRC:

The Criminal Procedure (Amendment) Act 2021

Section 1 – Reverse Burdens of Proof

1(1) - The decision of the Appellate Committee of the House of Lords in *Sheldrake v DPP; Attorney-General's Reference (No. 4 of 2002)* [2004] UKHL 43 is overruled.

1(2) - Where by virtue of any law or enactment there falls on the accused in any criminal proceedings any burden of proof with respect to the matter of their guilt or innocence, this burden shall be construed only as requiring the accused to adduce sufficient evidence

¹² *ibid.*

¹³ See, US Constitution, Amendment XXVII, which is concerned with changing the salaries of US Congresspeople.

¹⁴ This was discussed in Chapter 2, section 2.3.c.

to raise the issue at trial.¹⁵

This proposed statutory provision would expressly overrule *Sheldrake*, clearly demonstrating that the approach in this case was wrong. Section 1(2) would then enact the CLRC's original proposal, in slightly amended form, to make all burdens on the accused evidential only. This would require only a simple majority in Parliament to become operational, at which point the recommendations of this thesis would be implemented.

8.4. – Conclusion

The above proposals for reform represent the end product of this thesis. From its outset, the mission of this thesis has been to correctly diagnose a problem, namely, the contradictory coexistence of reverse burdens and the PoI, and propose theoretically sound, practical reforms. At the close of this chapter, that mission is now complete. After initial scene-setting in Chapter 1, Chapters 2 and 3 reviewed the literature on reverse burdens and the PoI from the jurisdictions under review. The conclusions drawn from this chapter culminated in the diagnosis of a problem: reverse burdens continued to proliferate under a criminal law which was misunderstanding or misconstruing the requirements of the PoI. Next, Chapter 4 introduced new terminology to describe this problem, recognising an analytical distinction between the thin PoI, a trial rule, and the thick PoI, a general norm of the criminal law. The recognition of this distinction demonstrated that any new approach to reconciling reverse burdens and the PoI would need to take account of the thick/thin distinction and attend to its consequences. What was needed was an approach that took account of what the PoI required in both its thick and thin forms.

Chapter 5 began the task of connecting the thick PoI to reverse burdens, examining, but ultimately rejecting, three different attempts to make this connection. In Chapter 6, I then set out my proposed vision of what the thick PoI required: namely, that the accused never be made to prove their innocence. The notion of a prohibition on proving innocence, I then suggested, was best understood as meaning that the risk of non-persuasion of the jury with respect to the issue of guilt or innocence should never be transferred to the accused. As a result, the conclusion of this thesis was, and is, that the PoI prohibits reverse burdens in two ways. The thin PoI prohibits making the accused disprove any fact formally labelled an element of the offence with which they are charged. This provides a baseline of protection, but is not the end of the matter. The thick PoI then provides an overarching prohibition on making the accused prove their innocence. The result is that most reverse burdens currently in existence would need to be rethought. Chapter 7 then turned to consider what a criminal law based on my interpretation of the PoI would look like. In this vision of a 'post-reverse burden' future, I sketched a view of the criminal law where burdens on the accused were evidential only, finally resolving the tension between the PoI and reverse burdens and more fully respecting the PoI in the criminal justice system. Finally, in this chapter, I presented concrete legal reforms to give effect to the changes which would be required to bring the law into line with my recommendations.

As this thesis draws to a close, several conclusions have become clear. First, the proposal of the CLRC, long endorsed by academics like Glanville Williams, and long ignored by Parliament, has been vindicated. Though they did not have the language of 'thick' and 'thin' PoI, ultimately

¹⁵ This is a slightly changed version of the proposed wording from the CLRC's report examining reverse burdens and the PoI. See Criminal Law Revision Committee, 'Eleventh Report: Evidence (General)' (Cmnd 4991 1972), 178.

the CLRC proved to reach very similar conclusions to those which I have reached independently, several decades later. The ball is therefore firmly in Parliament's court, and pressure to act must be renewed if the law is to be reformed. Second, further research is needed into how evidential burdens can be used more creatively, and more expansively, to fill the gaps left by reverse burdens. The elevated evidential burden described in Chapter 7 is just one example of this, and it is hoped that even more uses can be found for this procedural device. More research should also be done into the structure of criminal liability under English law. Empirical data on the prevalence of strict liability, adverse presumptions, and reverse burdens are now thoroughly out of date, and predate monumental changes in the criminal law, such as the advent of a raft of new criminal laws aimed at combating terrorism, and the coming into force of the Human Rights Act 1998. If we are to properly diagnose and treat the problems facing the criminal law, we must have the data to do so.

The final conclusion of this thesis ends where the thesis began. In wading into the crowded field of scholars debating the nature and scope of the presumption of innocence, I was acutely aware of the difficulties which tackling this subject would entail. Yet, as is now clear, the solution to the problem of reverse burdens does not have to require reliance on nebulous and contestable conceptual distinctions, such as that between offence and defence, or on a potentially capricious and confusing test for overall fairness, like the *ad hoc* approach. On the contrary, the solution is simple and, in hindsight, almost obvious: true reconciliation between the PoI and reverse burdens will only come when the former is taken seriously, and the latter are consigned to the history books of the criminal law. Reverse burdens have been a problematic part of the criminal law for centuries, but, as has now been shown, they need not remain a problem in its future.

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