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Has the Burger Court Dealt a Death Blow to the Presumption of Malice in Virginia?

COMMENTS

HAS THE BURGER COURT DEALT A DEATH BLOW TO THE PRESUMPTION OF MALICE IN VIRGINIA?

While presumptions and burdens of proof have generally eluded effective analysis,[1] the presumption of malice has almost defied it. Notwithstanding a common law origin and the significance that instructions of the presumption of malice have played in many murder trials in Virginia, the presumption has constantly been under attack.[2] This comment will explore the meaning of the presumption of malice and determine whether Virginia's approach violates the due process clause of the fourteenth amendment in light of the recent Supreme Court decision of *Mullaney v. Wilbur*.[3]

BACKGROUND AND HISTORY

Malice as a judicial concept was initially introduced by the English common law courts in the 13th century as a proper term to distinguish a felonious homicide from a lawful one.[4] When the courts began classifying

1. *See* MCCORMICK ON EVIDENCE 802-03 (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK], wherein the authors stated: "One ventures the assertion that 'presumption' is the slipperiest member of the family of legal terms except its first cousin, 'burden of proof.'" In recent years, there has been extensive commentary on the use of presumptions in criminal prosecutions. *See* Abrams, *Statutory Criminal Presumptions: A Suggested Analysis*, 22 VAND. L. REV. 1135 (1969); Ashford & Risinger, *Presumptions, Assumptions and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165 (1969); Christie & Pye, *Presumptions and Assumptions in the Criminal Law: Another View*, 1970 DUKE L.J. 919; Holland & Chamberlin, *Statutory Criminal Presumptions: Proof Beyond a Reasonable Doubt;*, 7 VAL. U.L. REV. 147 (1973) [hereinafter cited as Holland & Chamberlin]; Hug, *Presumptions and Inferences in Criminal Law*, 56 MIL. L. REV. 81 (1972); Soules, *Presumptions in Criminal Cases*, 20 BAYLOR L. REV. 277 (1968)(Texas law); Note, *The Constitutionality of the Common Law Presumption of Malice in Maine*, 54 B.U.L. REV. 973 (1974); 38 MO. L. REV. 105 (1973); 2 ST. MARY'S L.J. 115 (1970); 24 SW. L.J. 557 (1970); Note, *The Unconstitutionality of Statutory Criminal Presumptions*, 22 STAN. L. REV. 341 (1970); Note, *Abrogation of Criminal Statutory Presumptions*, 5 SUFFOLK L. REV. 161 (1970).

2. In Dingus v. Commonwealth, 153 Va. 846, 853, 149 S.E. 414, 416 (1929), *cited with approval in* Barber v. Commonwealth, 206 Va. 241, 253, 142 S.E.2d 484, 493 (1965), the Virginia court, in addition to acknowledging the constant criticism of instructions incorporating the presumption of malice, noted that such instructions are "nearly always given upon motion of the prosecutor in every homicide case."

3. 421 U.S. 684 (1975). Justice Rehnquist filed a concurring opinion, in which Chief Justice Burger joined. *Id.* at 704.

4. The common law courts spoke of *malice prepense* as early as the 13th century. Kaye, *The Early History of Murder and Manslaughter*, Part II, 83 L.Q. REV. 569 (1967). This expression referred to little more than an intentional wrongdoing. R. MORELAND, THE LAW OF

felonious homicide into degrees, this use of the term was discarded.[5] Malice was then used to signify the factor that distinguished murder from manslaughter,[6] and was incorporated into the definitions of both crimes.[7] Under this formulation of the law, malice refers to the state of mind of the perpetrator. Express malice denotes an element of the crime of murder which requires proof that the accused acted with a premeditated intent to kill; implied malice refers to any state of mind sufficient for murder but which lacked premediation.[8] Malice, in both of these senses, refers to a state of mind which is not engendered by a sudden "heat of passion" upon adequate provocation thus distinguishing murder from the lesser crime of voluntary manslaughter.[9]

In order to facilitate proof of malice in murder prosecutions, the common law courts created a policy presumption that, absent proof to the contrary, a homicide is presumed to have occurred in the absence of "heat of passion."[10] This so-called "presumption of malice" has not been uniformly applied by the states.

HOMICIDE 10 (1952); Perkins, *A Re-examination of Malice Aforethought*, 43 YALE L.J. 537, 544 (1934) [hereinafter cited as *Perkins on Malice*].

5. *See Perkins on Malice, supra* note 4, at 544. *See also* 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW 478 (1895).

6. "[Malice aforethought] is the grand criterion which . . . distinguishes murder from other killing." 4 W. BLACKSTONE, COMMENTARIES. 198.

7. "Murder is killing with malice. . . . Manslaughter is an unlawful killing, without the circumstances of malice. . . ." Pennsylvania v. Bell, 1 Am. Dec. 298, 301-02 (1793). Traditionally in this nation, murder and manslaughter have been defined with reference to malice. PERKINS ON CRIMINAL LAW 51 (1969) [hereinafter cited as PERKINS]. *See also* People v. Morrin, 31 Mich. App. 301, 187 N.W.2d 434, 440 n.17 (1971). Virginia law is in agreement. *Compare* Stapleton v. Commonwealth, 123 Va. 825, 829, 96 S.E. 801, 802 (1918)(murder), *with* Clark v. Commonwealth, 90 Va. 360, 368, 18 S.E. 440, 443 (1893) (manslaughter).

8. W. LAFAVE & A. SCOTT, CRIMINAL LAW 528-30 (1972) [hereinafter cited as LAFAVE & SCOTT]. *See also* PERKINS, *supra* note 7, at 34-35, 47-48. Both of these treatises recommend dispensing with malice as an element of murder.

> Though murder is frequently defined as the unlawful killing of another "living human being" with "malice aforethought," in modern times the latter phrase does not even approximate its literal meaning. Hence it is preferable not to rely upon that misleading expression for an understanding of murder but rather to consider the various types of murder (typed according to the mental element) which the common law came to recognize and which exist today in most jurisdictions:
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> (1) intent-to-kill murder;
> (2) intent-to-do-serious-bodily-harm murder;
> (3) depraved-heart murder; and
> (4) felony murder.

LAFAVE & SCOTT, *supra*, at 528. Only subsection (1) above encompasses murder "with malice aforethought" as contemplated by the early definitions of murder; subsections (2) through (4) are states-of-mind involving implied malice. *Id. See also Perkins on Malice, supra* note 4, at 569; PERKINS, *supra* note 7, at 46.

9. *See* authorities cited in note 8 *supra*.

10. Mullaney v. Wilbur, 421 U.S. 684, 694 (1975).

Most modern jurisdictions employ the "presumption of malice" as a mere permissible inference rather than a true presumption, despite the retention of its traditional label.[11] In these states, if the prosecution has proven an intentional homicide and the accused has offered no evidence of "heat of passion," the jury may, but need not, conclude that malice existed. Because the inference that no malice exists is always available to the jury, an accused is entitled to a jury instruction on voluntary manslaughter as well as an instruction that he is not to be found guilty of murder unless the prosecution proves beyond a reasonable doubt the absence of "heat of passion." This is proper even if the evidence does not warrant granting these instructions.[12] Accordingly, the "presumption" benefits an accused under this view since he might escape a conviction of murder even though the evidence actually supports one.[13]

In contrast, the common law courts and a minority of modern jurisdictions accord to the presumption of malice the attributes of what is usually termed a rebuttable or mandatory presumption. Although the term "presumption" remains elusive, the concept generally refers to an evidentiary device designed to establish who has the "burden of proof" on a particular fact.[14] The presumption of malice in this context places upon an accused some type of burden regarding "heat of passion" once the prosecution has established a homicide. The nature of defendant's burden to disprove malice is the subject of some debate.

An approach adopted by many older cases,[15] which has recently gained support,[16] is to place the burden of producing evidence (going forward with

11. LAFAVE & SCOTT, *supra* note 8, at 539-40.

12. *Compare* LAFAVE & SCOTT, *supra* note 8, at 539-40 *with* MCCORMICK, *supra* note 1, at 804. *See also* 9 J. WIGMORE, EVIDENCE § 2511a, at 412 (3d ed. 1940) [hereinafter cited as WIGMORE]; Holland & Chamberlin, *Statutory Criminal Presumptions: Proof Beyond a Reasonable Doubt*, 7 VAL. L. REV. 147, 152 (1973); Note, *Reforming The Law of Homicide*, 59 VA. L. REV. 1270, 1273 (1973).

13. *See* authorities cited in notes 11 & 12 *supra*. The situation varies when an inference is used to permit the trier of fact to conclude that the prosecution has met its burden of proof with respect to the inferred fact by having satisfactorily established other facts. A permissible inference of this type, since it operates against the accused rather than in his favor, must satisfy certain due process requirements. Mullaney v. Wilbur, 421 U.S. 684, 702-03 n.31 (1975).

14. Note, *Irrebuttable Presumptions: An Illusory Analysis*, 27 STAN. L. REV. 449, 451 n.7 (1975). *See generally* Stumbo, *Presumptions—A View at Chaos*, 3 WASHBURN L.J. 182 (1964). Professor McCormick's treatise proposes an even broader definition:

> [A] presumption is a standardized practice, under which certain facts are held to call for uniform treatment with respect to their effect as proof of other facts. MCCORMICK, *supra* note 1, at 803.

15. *See* cases cited in 9 WIGMORE, *supra* note 12, § 2491.

16. MCCORMICK, *supra* note 1, at 802. According to one leading authority, an accused in

the evidence) of "heat of passion" on the accused. He meets this burden merely by demonstrating that there exists sufficient probative evidence to raise the issue of "heat of passion."[17] Once the accused has done so, he is entitled to an instruction on voluntary manslaughter and an instruction that the prosecution must prove the absence of "heat of passion" beyond a reasonable doubt.[18] Whether this burden has been satisfied is a question for the trial judge; hence, a jury instruction which refers to the burden would appear improper.[19]

This treatment of the presumption aids the prosecution in proving malice, an element of murder which often resists direct proof,[20] by requiring the prosecution to disprove "heat of passion" only if the issue is properly raised by the accused. If the presumption were not employed, the prosecution might be required to negate the existence of every conceivable circumstance which bears on whether malice existed, including "heat of passion."[21] On its face, this treatment of the presumption does not violate constitutional requirements.[22] The prosecution is never required to negate

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Virginia must satisfy the burden of producing evidence as to matters of defense including accident, self-defense and the heat of passion. M. MARSHALL, J. FITZHUGH & J. HELVIN, THE LAW OF EVIDENCE IN VIRGINIA AND WEST VIRGINIA § 201, at 359-60 n.54 (C. Nash ed. 1954) [hereinafter cited as MARSHALL, FITZHUGH & HELVIN]. In Virginia, the general rule is that a mandatory presumption merely affixes the burden of producing evidence on the party against whom the presumption might operate and leaves the burden of persuasion unaffected. *Id.* § 211, at 375.

17. PERKINS, *supra* note 7, at 50-51; 9 WIGMORE, *supra* note 12, § 2491.

18. *See* authorities cited in note 17 *supra.*

19. [The] burden of producing evidence is a matter solely for the judge. . . . There is no occasion to mention the burden of producing evidence at any place in the charge. . . . MARSHALL, FITZHUGH & HELVIN, *supra* note 16, § 200, at 356.

However, while this same treatise has asserted that the "presumption of malice" has the effect of shifting the burden of producing evidence to the accused, it has not criticized the practice in Virginia of instructing on the presumption. *Id.* § 201, at 359-60 n.54. Although this inconsistency is seemingly inexplicable, it might be explained in part by the fact that the law of presumptions was developed primarily in civil cases. Presumptions are aberrations in criminal cases. *See* authorities cited in note 1 *supra* and note 22 *infra.* In contrast, a minority of courts have taken the position that instructing on the burden of producing evidence is proper. *See* Stumbo, *Presumptions—A View at Chaos*, 3 WASHBURN L. REV. 182, 208-12 (1964).

20. *Cf.* People v. Morrin, 31 Mich. App. 301, 187 N.W.2d 434, 441 (1971). For an article discussing proof of malice in Virginia see 7 WM. & MARY L. REV. 399 (1966).

21. PERKINS, *supra* note 7, at 49-52. Other circumstances which have a bearing on malice are self-defense and accident. *Id.* Of course, by initially requiring the accused to raise the issue of "heat of passion," the prosecution is collaterally benefited since it can avoid time consuming, unnecessary and confusing proof of the absence of the issue.

22. The approach does, however, create considerable conceptual difficulty. An accused who fails to meet the burden of producing evidence is theoretically subject to a directed verdict. This problem arises primarily in reference to self-defense and accidental killing. Both of these

all potential defenses of an accused; rather, the accused must make clear his defenses. Nevertheless, a presumption which shifts the burden of producing evidence to a criminal defendant must satisfy due process requirements.[23] The traditional test for such presumptions is ". . . that where there is a 'rational connection' between the facts proved and the facts presumed . . . it is permissible to shift the burden of producing evidence to the defendant."[24] This test is clearly satisfied if the presumption meets the "reasonable doubt" standard; that is, the evidence necessary to invoke the presumption is sufficient to convince a rational jury that the presumed fact exists beyond a reasonable doubt.[25] It is submitted that when the prosecution proves a homicide beyond a reasonable doubt, and no probative evidence of "heat of passion" is offered by either the accused or the prosecution, a rational juror would find malice beyond a reasonable doubt. Hence, this treatment of the presumption of malice would appear constitutionally permissible.[26]

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defenses negate the malice necessary to sustain a murder conviction. If an accused, having relied solely on one of these two defenses, failed to offer probative evidence of the defense's existence, the court, in theory, could direct the jury to find the accused guilty of murder. A directed verdict against an accused, even to a single element of a crime, would be an unwelcomed innovation into the criminal law. But since the courts have not taken, and are not likely to take, this approach, the criticism is of more theoretical than practical significance. *Cf.* McCormick, *supra* note 1, at 804.

23. Mullaney v. Wilbur, 421 U.S. 684, 702-03 n.31 (1975).

24. Barnes v. United States, 412 U.S. 837, 846 n.11 (1973). The Court held that an inference of guilty knowledge might arise from the unexplained possession of recently stolen property and, therefore, that a statute giving effect to this inference was constitutionally permissible.

The "rational connection" test for presumptions was first introduced in a civil case, Mobile, J.&K.C.R.R. v. Turnipseed, 219 U.S. 35 (1910). The use of the test in criminal cases was later clarified in Tot v. United States, 319 U.S. 463 (1943). The Court in *Tot* was faced with a presumption which gave rise to the presumed fact that an accused illegally received a firearm in interstate commerce and that such receipt was subsequent to the statute's effective date. The presumption arose when the prosecution proved that the accused had been convicted of a crime of violence and had possession of a firearm. The Court held that the presumption did not meet constitutional requirements "because of the lack of connection between the two in common experience." *Id.* at 468. More recent cases have further explained the test. See cases cited in Comment, *The Constitutionality of the Common Law Presumption of Malice In Maine*, 54 B.U.L. Rev. 973, 980-86 (1974). *See generally* Holland & Chamberlin, *supra* note 1, at 151-67.

25. Barnes v. United States, 412 U.S. 837, 846 n.11 (1973). To date, the Supreme Court has not required that the reasonable doubt standard be met before upholding a presumption which shifts the burden of producing evidence to an accused. The test traditionally applied is the "more likely than not" standard.

> [A] criminal statutory presumption must be regarded as 'irrational' or 'arbitrary', and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. Leary v. United States, 395 U.S. 6, 36 (1969).

26. In *Mullaney*, the Court indicated that the presumption of malice in the context

The situation differs significantly when the accused is forced to establish affirmatively the existence of "heat of passion," that is, the *burden of persuasion* is placed upon the accused. Due process demands more exacting standards when the presumption of malice is interpreted as shifting this burden.[27] Once the prosecution has proven an unlawful and intentional homicide beyond a reasonable doubt, the jury would be instructed that it must conclude that malice existed unless the accused affirmatively proves by some standard of proof, such as by a preponderance, that "heat of passion" did exist.[28] For example, in criminal cases, the "presumption of sanity" has often been given the effect of shifting the burden of persuasion to an accused. To overcome this presumption in Virginia,[29] and other jurisdictions,[30] the accused must prove his insanity by a preponderance of the evidence. The jury is so instructed after all the evidence has been submitted.[31] In *Leland v. Oregon*,[32] the Supreme Court upheld as constitutionally permissible this application of the presumption of sanity. However, the Court's conclusion was based on the fact that Oregon treated insanity as an affirmative defense;[33] that is, although the state had proven beyond a reasonable doubt every essential element of the crime charged, the state would not punish an accused if he affirmatively proved that he lacked responsibility for his actions.

An affirmative defense, such as insanity, must be distinguished from the situation in which the burden of persuasion is placed upon an accused

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discussed in note 25 *supra* might be constitutionally permissible. 421 U.S. 684, 702-03 nn.30 & 31 (1975). *See* Comment, *The Constitutionality of the Common Law Presumption of Malice in Maine*, 54 B.U.L. REV. 973, 987 (1974), concluding that a presumption of malice shifting to the accused not only the burden of producing evidence but also the burden of persuasion was constitutional. Even if the reasonable doubt standard were not met, the "more-likely-than-not" standard would be.

27. Mullaney v. Wilbur, 421 U.S. 684, 704 n.31 (1975).

28. *Id.* at 688, 695-96 n.20; MCCORMICK, *supra* note 1, at 802-04; *cf.* MARSHALL, FITZHUGH & HELVIN, *supra* note 16, at 359 n.54.

29. *See* 10 MICHIE'S JURISPRUDENCE, *Insane and Other Incompetent Persons* § 49, at 170 (1950), and cases cited therein.

30. LAFAVE & SCOTT, *supra* note 8, at 313.

31. *See, e.g.*, Taylor v. Commonwealth, 208 Va. 316, 322, 157 S.E.2d 185, 189 (1967). *See also* M. DOUBLES, E. EMROCH & R. MERHIGE, VIRGINIA JURY INSTRUCTIONS § 103.02, at 552 (1964) [hereinafter cited as DOUBLES, EMROCH & MERHIGE].

32. 343 U.S. 790 (1952). The Court in *Leland* upheld an Oregon statute requiring an accused to prove his insanity beyond a reasonable doubt.

33. Mullaney v. Wilbur, 421 U.S. 684, 705-06 (1975)(Rehnquist, J., & Burger, C.J., concurring), *citing with approval* Leland v. Oregon, 343 U.S. 790, 792, 795 (1952). *See also* MICHIE'S JURISPRUDENCE *Homicide* § 58, at 399 (1950). *But see* 30 LA. L. REV. 117, 128 (1969), which concluded that a rule which forces an accused to prove his insanity beyond a reasonable doubt violates due process and that *Leland* is no longer sound.

regarding an element of the crime itself. In any criminal prosecution, due process commands that the burden of persuasion be placed "on the [state] to prove beyond a reasonable doubt every material and necessary element of the criminal offense charged. The accused has no burden to prove anything."[34] This principle, which has well-established constitutional origins,[35] was the basis of the Supreme Court's decision in *Mullaney v. Wilbur*.[36]

In *Mullaney*, the Court reviewed Maine's law of homicide. Unlike Virginia law, which uses the term malice to distinguish murder from manslaughter,[37] Maine law treats both crimes as a single offense known as criminal homicide and employs malice only to determine the appropriate punishment categories.[38] The trial judge in *Mullaney* had instructed the jury that if the prosecution established that the homicide was both intentional and unlawful, then malice was to be "conclusively implied" unless the accused proved by a "fair preponderance" that he had acted in the "heat of passion."[39] Since the accused under this scheme would be entitled to a lesser punishment only if he met his burden of persuasion, the Supreme Court concluded that the instruction could not survive a due process attack.[40] Due process required that the prosecution bear the burden

34. Jefferson v. Commonwealth, 214 Va. 432, 435, 201 S.E.2d 749, 751 (1974).

35. The Supreme Court has expressed the view in numerous opinions that proof of a criminal charge beyond a reasonable doubt is constitutionally required. *See, e.g.*, Davis v. United States, 160 U.S. 469, 488 (1895). For a compilation of cases see *In re* Winship, 397 U.S. 358 (1970), wherein the Court concluded:

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *Id.* at 364.

36. 421 U.S. 684 (1975).

37. 9 MICHIE'S JURISPRUDENCE *Homicide* § 28, at 366-67 (1950).

38. State v. Lafferty, 309 A.2d 647, 662 (Me. 1973); State v. Wilbur, 278 A.2d 139, 144-46 (Me. 1971). There is little, if any, practical difference between the Maine statutes reviewed in *Mullaney* and Virginia law. The Maine statutes defining murder were substantially the same as Virginia's common law definitions. *Compare* ME. REV. STAT. tit. 17, § 2651 (murder) and § 2551 (manslaughter) (1964) (superseded by ME. REV. STAT. tit. 17-A, §§ 201 *et seq.* (Repl. Vol. 1976)) *with* Stapleton v. Commonwealth, 123 Va. 825, 829, 96 S.E. 801, 803 (1918) (murder), *and* Clark v. Commonwealth, 90 Va. 360, 368, 18 S.E. 440, 443 (1893) (manslaughter). The punishment categories are also comparable. *Compare* ME. REV. STAT. tit. 17, § 2651 (murder—imprisonment for life) and § 2551 (manslaughter—fine of not more than $1,000 or imprisonment for not more than 20 years) (1964) *with* VA. CODE ANN. §§ 18.2-31 (capital murder—death), -32 (murder in the first degree—imprisonment from twenty years to life; second degree murder—imprisonment from five to twenty years) and -35 (voluntary manslaughter—imprisonment from one to ten years or jail for not more than twelve months and/or fine not more than $1,000) (Repl. Vol. 1975).

39. 421 U.S. at 686.

40. *Id.* at 703-04.

of persuasion on the issue of "heat of passion" if properly raised by the accused.[41] This is true whether malice is treated as an element of the crime of murder or as a vital factor in determining the appropriate punishment category, since under either approach the accused was subject to a greater punishment if there existed no "heat of passion."[42] The Court was not restrained by history; it invalidated a common law rule which had been utilized by the State of Maine for over a century.[43]

The Presumption of Malice in Virginia

The "presumption of malice" is employed in Virginia in the form of a jury instruction. The instruction is usually given in the following manner:

> (a) Every unlawful homicide is presumed to be murder in the second degree.
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> (b) In order to elevate an unlawful homicide to murder in the first degree, *the burden of proving the elements thereof is upon the Commonwealth.*
>
> (c) In order to reduce an unlawful homicide in the second degree to manslaughter or excusable homicide, the burden is upon the defendant.[44]

The historical origins of this instruction (hereinafter referred to as the malice instruction) are easily traced. In 1922, the Virginia Supreme Court upheld a comparable instruction on the ground, among others, that it was "hoary with age."[45] Having been reviewed by the Virginia court as early as 1845, this observation was justified.[46] As presently formulated, the great-

41. *Id.* at 698-704. The Court pointed out that the prosecution was required only to prove the absence of "heat of passion" when that issue was raised properly. *Id.* at 704. This language suggests that the burden of producing evidence can be shifted to an accused as long as the burden of persuasion remains on the prosecution. Further support for this conclusion can be found elsewhere. For example, one footnote stated that nothing in *Mullaney* is intended to affect the requirement in many states that shifts the burden of producing evidence to an accused. *Id.* at 701, 702 n.28. Another footnote suggested that the criteria for determining whether standards of due process have been met are different when both the burden of persuasion and the burden of producing evidence are placed upon an accused than when only the burden of producing evidence is shifted. *Id.* at 702, 703 n.31.

42. By drawing [the] distinction [between homicides committed with malice and without malice], while refusing to require the prosecution to establish [malice] beyond a reasonable doubt . . . Maine denigrates the interests found critical [to due process]. *Id.* at 698.

43. *Id.* at 695, *citing* State v. Knight, 43 Me. 11 (1857).

44. Doubles, Emroch & Merhige, *supra* note 31, § 118.20, at 627 (emphasis added).

45. Sims v. Commonwealth, 134 Va. 736, 752, 115 S.E. 382, 387 (1922).

46. Hill v. Commonwealth, 43 Va. (2 Gratt.) 595, 598 (1845). The impact of history on the Virginia court's attitude towards the presumption is well illustrated by Sims v. Commonwealth, 134 Va. 746, 115 S.E. 382 (1922):

> This statement of the law . . . has been followed without criticism or objection in this jurisdiction for nearly a century. . . . If in its practical application it has proven unfair or injurious to persons accused of homicide, it is more than probable that the fact

est problem with the malice instruction is the use of the ambiguous term "burden" in paragraph (c). This term might denote at least three separate and distinct legal concepts: (1) the burden of producing evidence; (2) the burden of persuasion; or (3) the fact that if the accused fails to point out that a reasonable doubt exists concerning malice he will be convicted of murder if the other elements of the crime have been proven.

As the Burden of Producing Evidence

Virginia, like many other jurisdictions, did not clearly distinguish between the burden of producing evidence and the burden of persuasion when the presumption of malice was initially formulated.[47] Presently, Virginia places the burden of producing evidence on the accused.[48] As noted

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would long ago have been discovered by the bar and the bench. It has proven satisfactory in the administration of justice and not hurtful to those accused of homicide, and we have no disposition to depart from it. *Id.* at 752-53, 115 S.E. at 387.

47. This problem was discussed in *Mullaney*, the Court noting that some "jurisdictions blurred the distinction between [the burden of persuasion and the burden of producing evidence] by requiring the defendant to prove 'to the satisfaction of the jury' that he acted in the heat of passion." 421 U.S. at 695-96 n.20. *See* note 60 *infra*. Virginia followed this course in McWhirt v. Commonwealth, 44 Va. (3 Gratt.) 606, 617 [46 Am. Dec. 196, 203] (1846), wherein the Virginia court relied upon Blackstone, 4 W. BLACKSTONE, *COMMENTARIES 198, and leading Pennsylvania cases in arriving at this confusing statement of the law. *See, e.g.*, Pennsylvania v. Bell, 1 Am. Dec. 298 (1793). The problem still persists. *See* 9 MICHIE'S JURISPRUDENCE *Homicide* § 55, at 394 (1950).

48. In Virginia, the cases initially appeared to adopt the view that the presumption of malice was merely a permissible inference. In Mercer v. Commonwealth, 150 Va. 588, 594, 142 S.E. 369, 371 (1928), the court concluded that the malice instruction would be disallowed only in rare cases, such as when an accused committed homicide while laboring under a reasonable apprehension of death. By negative implication, the decision suggests that an accused is always entitled to the malice instruction and to an instruction on voluntary manslaughter even though there exists no evidence of mitigating circumstances. This view was adopted by the court in Taylor v. Commonwealth, 186 Va. 587, 591, 43 S.E.2d 906, 908 (1947).

In Plymale v. Commonwealth, 195 Va. 582, 79 S.E.2d 610 (1954), the trial judge refused to give the malice instruction and an instruction on second degree murder because the only theory supported by the evidence was whether the accused was guilty of felony murder. The court reversed, stating:

> [A]ccused was entitled to have the benefit of the presumption in his favor presented to the jury [because the presumption raised matters of fact to be determined by the jury]. This was not done by any instruction, and the refusal to accord him the benefit of that presumption was not warranted. *Id.* at 597, 79 S.E.2d at 618.

Three judges filed a vigorous dissent. The view of the dissent was adopted in Thacker v. Commonwealth, 207 Va. 962, 967, 154 S.E.2d 130, 133 (1967), where the court upheld a refusal to instruct on voluntary manslaughter as no evidence supported the instruction. Finally, in Wooden v. Commonwealth, 208 Va. 629, 634-35, 159 S.E.2d 623, 627 (1968), the court expressly overruled *Plymale* and refused to grant the malice instruction and an instruction on second degree murder because the evidence did not warrant doing so. This result was followed in Wright v. Commonwealth, 213 Va. 352, 353, 192 S.E.2d 748, 749 (1972).

above, most jurisdictions require that the accused produce "some probative evidence" of "heat of passion" before he is entitled in a murder prosecution to the malice instruction or to an instruction on voluntary manslaughter. Virginia seemingly requires a lesser standard. According to the recent decision of *McClung v. Commonwealth*,[49] an accused is entitled to these instructions if they are supported by "any credible evidence." Admittedly, this may be a distinction without a difference. For many years, it was uncertain whether the Virginia court could require even this showing, a view which provoked considerable disagreement among members of the court.[50]

On its face, the Virginia approach appears permissible. The burden of producing evidence concerning malice may constitutionally rest upon a criminal defendant.[51] However, instructing the jury concerning this burden seems improper for at least two reasons. First, whether the burden of producing evidence has been met is a question of law solely for the trial judge, not a question of fact for the jury.[52] Second, instructing on this burden without distinguishing it from the burden on the prosecution to prove the absence of "heat of passion" beyond a reasonable doubt, naturally tends to confuse the jury as to who bears the ultimate burden of persuasion as to guilt.[53] Therefore, it is unlikely that the "presumption of

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The argument can be advanced that the *Plymale-Wooden* line of cases are only applicable when felony-murder is the basis of a homicide prosecution. No cases have directly addressed the situation where an accused requests the malice instruction and an instruction on voluntary manslaughter when no evidence warrants granting the instructions. However, the underlying premise of *Wooden*—that instructions in homicide cases should be based on the evidence—would appear to control.

If there is a burden of producing evidence of "heat of passion" upon the accused in a murder trial, it is not very demanding. In Taylor v. Commonwealth, 186 Va. 587, 43 S.E.2d 906 (1947) (pre-*Wooden* decision), the court summarized the law on instructing on lesser included offenses of murder as follows: "It is reversible error for the trial court to refuse to instruct the jury on lesser offenses charged in the indictment *if there is any evidence* in the record tending to prove such lesser offenses." *Id.* at 591, 43 S.E.2d at 908 (emphasis added). This statement, while tempered by *Wooden*, remains illustrative of Virginia law. *See* note 49 *infra*.

49. 215 Va. 654, 657, 212 S.E.2d 290, 293 (1975). In *McClung*, the accused, charged with the slaying of her ex-boyfriend/former employer, alleged that she killed him after he attempted to rape her. The trial judge refused to instruct on voluntary manslaughter. The supreme court reversed, reiterating in essence what *Taylor*, *supra* note 48, had stated a quarter of a century earlier: "If a proferred instruction finds any support in credible evidence, its refusal is reversible error." *Id.* at 657, 212 S.E.2d at 293. *See also* Painter v. Commonwealth, 210 Va. 360, 363, 171 S.E.2d 166, 171 (1969).

50. *See* note 48 *supra*.

51. *See* notes 24, 25, 26 & 41 and accompanying text *supra*.

52. *See* note 19 *supra*.

53. MCCORMICK, *supra* note 1, at 783-84; *cf.* 7 MICHIE'S JURISPRUDENCE *Evidence* § 29, at 363, § 32, at 366 (1949). After reviewing such a practice, now discarded in Missouri, one

malice" merely shifts the burden of producing evidence to an accused. Conversely, it is very likely that the burden of producing evidence is not the "burden" referred to in the malice instruction.

As the Burden of Persuasion

The recent decision of *Perkins v. Commonwealth*[54] summarized the law of homicide in the following manner:

> The test of murder is malice. . . . Furthermore, there is a *prima facie* presumption of malice arising from the mere fact of a homicide . . . and . . . the burden is on the accused to reduce and on the Commonwealth to elevate, the grade of the offense.

This formulation creates considerable difficulty. The operation of a prima facie presumption would seem to require an accused to prove affirmatively by some standard of proof that he acted in the heat of passion. The term has not yet been defined in any Virginia criminal case. Nevertheless, at least one equity case has suggested this interpretation.[55] This analysis is not highly persuasive considering that the words "prima facie" have given rise to numerous interpretations.[56]

A more troublesome feature of the malice instruction and the law of homicide as stated in *Perkins* is the fact that the burden of persuasion which is properly placed upon the Commonwealth is not distinguished from the burden placed upon the accused. The Virginia court itself appears

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commentator concluded: "[A]n instruction worded in this fashion can only confuse the jury and might lead them to believe that in order to rebut the presumption of malice the defendant is required to prove he did not intentionally kill the victim. Of course, this is exactly what a presumption should not do." 38 Mo. L. REV. 105, 108 (1973). *See* note 64 *infra*.

54. 215 Va. 69, 73, 205 S.E.2d 385, 387 (1974), *citing* Bradshaw v. Commonwealth, 174 Va. 391, 398, 401, 4 S.E.2d 752, 755, 759 (1939), *and* Jacobs v. Commonwealth, 132 Va. 681, 686, 111 S.E. 90, 92 (1922).

55. In Parsons v. Wysor, 180 Va. 84, 94, 21 S.E.2d 753, 757 (1942), the court addressed a factual situation where a beneficiary conveyed land by deed to the wife of the fiduciary. The court noted that:

> Equity would raise a *prima facie presumption* against its validity, and it would cast upon the party seeking to sustain the deed *the burden of proving affirmatively* its compliance with equitable requisites and overcoming the presumption. *Id.* at 94, 21 S.E.2d at 755 (emphasis added), *quoting* Waddy v. Grimes, 154 Va. 615, 647, 153 S.E. 807, 817 (1930).

56. One leading authority contends, contrary to the language of *Parsons*, that the burden of persuasion is not placed upon the fiduciary. MARSHALL, FITZHUGH & HELVIN, *supra* note 16, § 220, at 386. These authors further discuss the many interpretations of the phrase "prima facie presumption." *Id.* § 196, at 349-50, § 211, at 374-76. Similiar confusion is created when the court speaks of a "legal" presumption of malice. *See generally id.* § 201, at 359-60 n.59, § 228, at 403 n.6.

to have confused these burdens at various times.[57] For example, in *Hobson v. Yoeull*,[58] the court stated that the two burdens were "to be applied in analyzing and weighing the evidence." This would suggest that the burden on the accused is one of persuasion.

The failure of the Virginia court at various times to distinguish these two burdens may be attributed in part to the early common law instructions, which made it incumbent upon the accused to prove to the "satisfaction of the jury" that circumstances of mitigation existed.[59] Whatever the reasons, some courts have suggested that such instructions at the very least required the accused to affirmatively disprove malice by a preponderance.[60] Many courts and commentators have disapproved of such language.[61] One such attack arose in a dissent to the leading Massachusetts decision of *Commonwealth v. York*.[62] This dissent, which set forth many of the principles upon which *Mullaney* is based,[63] has been expressly re-

57. *See, e.g.*, Bryan v. Commonwealth, 131 Va. 709, 714, 109 S.E. 477, 478 (1921), wherein the court concluded, without distinguishing the two burdens, that a verdict of second degree murder meant that the prosecution had failed to meet its burden of elevating the offense and the accused had failed to meet his burden of reducing the offense. Some of the confusion was alleviated in Sims v. Commonwealth, 134 Va. 736, 115 S.E. 382 (1922), discussed in notes 65 & 66 and accompanying text *infra*.

58. 177 Va. 906, 913, 15 S.E.2d 76, 78 (1941). According to MARSHALL, FITZHUGH & HELVIN, *supra* note 16, § 228, at 403 n.6, this analysis "suggest[s] that an actual burden of persuasion to reduce the crime is on the accused."

59. *See, e.g.*, Bryan v. Commonwealth, 131 Va. 709, 714, 109 S.E. 477, 478 (1921); *cf.* McWhirt v. Commonwealth, 44 Va. (3 Gratt.) 606, 617-18 [46 Am. Dec. 196, 203] (1846). For a short discussion of the problems created by this language see authorities cited note 47 *supra*. The language in many other Virginia cases indicates that an accused has the burden of persuasion or the duty to disprove malice. *See, e.g.*, Little v. Commonwealth, 163 Va. 1020, 1023, 175 S.E. 767-68 (1934); Mundy v. Commonwealth, 144 Va. 609, 614-15, 131 S.E. 242, 244 (1926); Scott v. Commonwealth, 143 Va. 510, 523, 129 S.E. 360, 364 (1925); Hall v. Commonwealth, 89 Va. 171, 178, 15 S.E. 517, 519 (1893).

60. For example, in State v. Freeman, 275 N.C. 662, 666, 170 S.E.2d 461, 464 (1969), the North Carolina court reviewed the law of homicide in the state, which places upon an accused a burden to prove "heat of passion" to "the satisfaction of the jury." *See* note 47 *supra*. The court determined that the quantum of proof was indeed whether the jury is satisfied and this burden could equal or exceed proof by a preponderance of the evidence. *Accord,* State v. Hamilton, 23 N.C. App. 311, 208 S.E.2d 883, 885 (1974). Other states, like Maine, have placed the standard of proof of a preponderance upon the accused. *See* State v. Wilbur, 278 A.2d 139, 145-46 (Me. 1971).

61. *See, e.g.*, State v. Cuevas, 53 Haw. 110, 488 P.2d 322 (1971); People v. Morrin, 31 Mich. App. 301, 187 N.W.2d 434 (1971); Woolmington v. Director of Public Prosecutions, 1935 A.C. 462; Note, *Reforming the Law of Homicide*, 59 VA. L. REV. 1270 (1973).

62. 50 Mass. (9 Met.) 93, 125 [43 Am. Dec. 373] (1845)(Wilde, J., dissenting).

63. In *York*, the Massachusetts court held that an accused was required to rebut the presumption of malice by a preponderance. Justice Wilde filed a vigorous dissent contending that the Commonwealth had the burden of persuasion "to prove all the material allegations

jected by the Virginia court.[64]

In sum, there exists a considerable amount of dicta in Virginia case law supporting the conclusion that the presumption of malice in Virginia operates to the prejudice of the accused by requiring him to disprove the absence of malice by some unspecified standard of proof. If this view is found to be illustrative of Virginia law, the law of Virginia is patently unconstitutional.

The Burden as a Nonburden

Notwithstanding the foregoing, the Virginia court in the leading case of *Sims v. Commonwealth*[65] interpreted the term "burden" in a constitutionally permissible manner. The court, while upholding the malice instruction, concluded as follows:

> [A]ll that is meant [when it is stated that the burden is upon the prisoner] is that it is incumbent upon the prisoner to introduce evidence sufficient to raise a reasonable doubt in the minds of the jury as to whether the offense is murder in the second degree. When this amount of evidence has been introduced, the prisoner has fully carried the burden which is placed upon him by the instruction. The prisoner is entitled to the benefit of a reasonable doubt arising from the evidence of the Commonwealth as well as from his own evidence.

Since the burden of persuasion remains upon the prosecution concerning malice, the mandate of *Mullaney* is arguably not violated. However, the problems which arise when this burden is referred to in jury instructions are not obviated.

Mullaney was not concerned merely with the underlying law of homicide in the State of Maine; it was also concerned with the "operation and effect

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in the indictment," including malice. *Id.* at 134. [Am. Dec. at 395]. The underlying rationale of the dissent that the burden of persuasion, beyond a reasonable doubt, must always remain on the prosecution, is the principle espoused in *In re* Winship, 397 U.S. 358, 364 (1970), and found to be controlling in Mullaney v. Wilbur, 421 U.S. 684, 698-700 (1975).

64. [W]e are not unmindful of the strong argument advanced in the dissenting opinion of Justice Wilde . . . in *Commonwealth v. York* . . . . [H]owever, [we have] held that . . . unless the accused shows circumstances of justification, excuse, or alleviation, a verdict of murder in the second degree will be warranted. Mercer v. Commonwealth, 150 Va. 588, 594, 142 S.E. 369, 370 (1928), *quoted with approval*, Adams v. Commonwealth, 163 Va. 1053, 1061, 178 S.E. 29, 32 (1935).

In *Adams*, Justices Epes and Browning dissented on the ground that the jury instruction reviewed by the court, comparable to that quoted in the text, was not sustainable on principle and that the dissenting opinion of Justice Wilde in *York* embodied the correct analysis. *Id.* at 1063-65, 178 S.E. at 33-34 (Epes & Browning, JJ., dissenting).

65. 134 Va. 736, 753, 115 S.E. 382, 387-88 (1922).

of the law as applied and enforced by the state."[66] This approach, like previous due process cases decided by the Supreme Court,[67] takes into account the reliability of jury verdicts. To instruct a jury that an accused has a "burden," without explaining it or distinguishing it from the burden of the prosecution, is at best confusing.[68] Under these circumstances, an accused may not only feel compelled to forgo his constitutional right to remain silent in order to meet this "burden,"[69] but might also be convicted of murder simply because an uniformed jury concludes that he has not met his "burden," even though a reasonable doubt exists concerning malice. If the net result of the malice instruction is to increase significantly the likelihood of an erroneous murder conviction, it is manifestly unconstitutional under the principles enunciated in *Mullaney*,[70] and prior due process cases.[71]

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66. Mullaney v. Wilbur, 421 U.S. at 699, *quoting* St. Louis S.W.R. Co. v. Arkansas, 235 U.S. 350, 362 (1914). *Mullaney* and *In re* Winship, 397 U.S. 358 (1970), are concerned with substance rather than form. 421 U.S. at 699. In *Mullaney,* the Court rejected Maine's argument that *Winship* was inapplicable because malice only affected a punishment category and was not an element of murder. *See* note 42 and accompanying text *supra*. *Winship* invalidated the burden of persuasion of a preponderance in State juvenile proceedings even though "delinquency" was not formally considered a crime under state law. 397 U.S. at 365-66. Likewise, the malice instruction is impermissible if it has the effect of confusing the jury as to the ultimate burden of persuasion on the prosecution, in spite of the fact that the underlying law is not abhorrent to constitutional requirements.

67. *See* Mullaney v. Wilbur, 421 U.S. at 699 n.26, 700-01. *See also* Lego v. Twomey, 404 U.S. 477, 486 (1972) (upholding a statute permitting introduction into evidence of confessions provided they were shown by a preponderance to be voluntary; the Court found no effect on reliability); *In re* Winship, 397 U.S. 358, 363-64 (1970)(invalidating a "delinquency proceeding," which required proof by a preponderance on a charge that would have been a crime if committed by an adult); Speiser v. Randall, 357 U.S. 513, 525-26 (1958) (taxpayers were unconstitutionally subjected to a procedure requiring them to prove affirmatively their right to a tax exemption).

68. *See generally* authorities cited in note 53 *supra*. The confusing nature of instructions on the presumption of malice was a primary concern of the appellate court in People v. Morrin, 31 Mich. App. 301, 187 N.W.2d 434 (1971), which found such an instruction objectionable. The court added:

> [T]o instruct a jury that malice is presumed from the fact of killing is to invite confusion concerning the ultimate burden of [persuasion] in the trial. The prosecution must always prove the defendant guilty beyond a reasonable doubt; a rule of law that shifts the burden of proof with respect to "malice" tends to cloud the dimensions of the prosecution's ultimate burden. 187 N.W.2d at 442.

69. *See* note, *Reforming The Law of Homicide*, 59 VA. L. REV. 1270, 1274 (1973).

70. *Cf.* 421 U.S. at 704.

71. Any instruction which "substantially impairs the truth-finding function and so raises serious questions about the accuracy of guilty verdicts" would apparently violate the mandate of *In re* Winship, 397 U.S. 358 (1970), Ivan v. City of New York, 407 U.S. 203, 204 (1972), and necessarily *Mullaney*. *See also* State v. Cuevas, 53 Haw. 110, 488 P.2d 322 (1971)(holding an instruction on the presumption of malice unconstitutional in light of *Winship*); *accord,*

While the Virginia court has permitted an instruction which eliminated reference to a burden on the accused when the defense of accidental killing was raised,[72] it has not permitted revision of the malice instruction in other situations. The court has generally cited two reasons for upholding the variations of the present malice instruction. First, the court has concluded that if any confusion does result from referring to a "burden" on the accused, it is cured by the reasonable doubt instruction customarily given at a murder trial.[73] Secondly, the court has stated that history has proven

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Woolmington v. Director of Public Prosecutions, 1935 A. C. 462 (English case discarding the presumption).

72. In Johnson v. Commonwealth, 188 Va. 848, 51 S.E.2d 152 (1949), the court allowed an instruction which explained that an accused had no burden of persuasion concerning accident. Rather, if the jury after hearing all of the evidence had a reasonable doubt whether the killing was accidental, they were not to find the accused guilty of murder. *Id.* at 856, 51 S.E.2d at 155. Accident, like "heat of passion," negates the element of malice necessary to a murder conviction. Likewise, the finding that the homicide was accidental does not mean that an accused will escape criminal liability for his actions. For example, he might be convicted of involuntary manslaughter. VA. CODE ANN. § 18.2-36 (Repl.Vol. 1975)(annotation cites cases in agreement with proposition stated); *cf.* 9 MICHIE'S JURISPRUDENCE, *Homicide* § 33 (1950). In Lawhorne v. Commonwealth, 213 Va. 608, 610 n.1, 194 S.E.2d 747, 749 n'1 (1973), the Virginia court acknowledged that earlier instructions had placed a burden on the accused to establish an accidental killing but did not resolve the conflict as to which of the two inconsistent approaches is preferable.

73. Sims v. Commonwealth, 134 Va. 736, 754, 115 S.E. 382, 388 (1922), wherein the court explained:

> Instructions ought to be read as a whole and when the [malice] instruction is read in connection with [the reasonable doubt instruction], it is difficult to understand how the jury could have had any doubt on the subject. . . . All [an accused] has to prove in any case is such a state of facts as will raise a reasonable doubt in the minds of the jury as to the existence of the . . . facts sought to be established by the Commonwealth, and this was sufficiently stated in [the reasonable doubt instruction which] . . . is an adequate statement of law for the guidance of the jury.

The problems are not necessarily dispensed with when this analysis is adopted. Even under this approach, the jury is still not told precisely that "heat of passion," and its converse, malice, must be proven beyond a reasonable doubt. Justices Epes and Browning, in their dissent in Adams v. Commonwealth, 163 Va. 1053, 1063, 178 S.E. 29, 33 (1935)(Epes & Browning, JJ., dissenting), asserted that malice instructions

> [s]hould be accompanied by one reading substantially as follows: 'If upon a consideration of all the evidence you have a reasonable doubt whether the killing was done with malice or not, you should not find him guilty of murder.' *Id.* at 1064, 178 S.E. at 33.

It is submitted that a reasonable doubt instruction of this type is more likely to cure any misinterpretation of the term "burden" than the instruction traditionally employed. On numerous occasions, the Supreme Court has approved the doctrine that instructions are not to be judged in artificial isolation but must be viewed in the context of the overall charge. *See, e. g.*, Cupp v. Naughten, 414 U.S. 141, 147 (1973); Boyd v. United States, 271 U.S. 104, 107 (1926). This doctrine could probably be invoked to uphold the malice instruction when it is accompanied by the instruction suggested by Justice Epes. On the other hand, the typical reasonable doubt instruction is probably insufficient to alleviate the confusion created by the

that the instruction has not been unjust in its practical application.[74]

THE POSSIBLE RAMIFICATIONS OF *Mullaney*

The meaning of the term "burden" as used in the malice instruction remains unresolved, if not unresolveable. Yet, the Virginia court will probably conclude that *Sims* is illustrative of Virginia law, a conclusion to which the federal courts might defer. If this approach is adopted, the question as to the constitutionality of the "presumption of malice," as utilized in Virginia, resolves itself primarily into one of fact—whether, after all of the instructions are given in a murder prosecution, the jury fully understands that the only true burden is on the prosecution to prove every essential element of murder, including the absence of "heat of passion" beyond a reasonable doubt.

The finding that the instruction is unconstitutional in its effect is not one which will be lightly reached, because it would probably require the Commonwealth of Virginia to retry many, if not all, convicted murderers at whose trial the malice instruction was given. Of primary concern is the question of retroactivity. The Supreme Court has generally held that decisions are to be applied retroactively when the constitutional infirmity involves the reliability of jury verdicts.[75] This situation is present in

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dual use of the term "burden" in the malice instruction. *Cf.* State v. Cuevas, 53 Haw. 110, 488 P.2d 322 (1971) (holding that an impermissible instruction on the presumption of malice is not cured by a reasonable doubt instruction).

74. Sims v. Commonwealth, 134 Va. 736, 753, 115 S.E. 382, 387 (1922). The relevant language of the court in *Sims* is quoted at length in note 46 *supra*. The reasoning employed by the court is of questionable validity. Unlike the situation present in 1922, the large majority of states today have abandoned the "presumption of malice" as it was formulated and used at common law. LAFAVE & SCOTT, *supra* note 8, at 539-40. Of primary importance, however, is the fact that the Court in *Mullaney* was not restrained by tradition or history in reaching its conclusion. *See* note 43 and accompanying text *supra*. Nevertheless, the Virginia court, which has been persistent in upholding the instruction on the basis of tradition (*see, e.g.*, Barber v. Commonwealth, 206 Va. 241, 253, 142 S.E.2d 484, 493 (1965)), has never shown any inclination to discard it.

75. *Mullaney* is probably fully retroactive. First, it does not advance new constitutional doctrine but rather applies principles enunciated in prior due process cases, especially *In re* Winship, 397 U.S. 358, 362 (1970). In *Winship*, the Court invalidated a "delinquency proceeding," which required proof by a preponderance on a charge that would have been a crime if committed by an adult. The Court reasoned that a juvenile could be convicted only by proof beyond a reasonable doubt of every fact necessary to the crime with which he is charged without a violation of due process. *Id.* at 364.

The precise question presented in *Mullaney* was whether the principles of *Winship* were applicable when, instead of different elements of a crime, there were different degrees, requiring different punishments. In contrast, Virginia law is directly controlled by *Winship* without further clarification. In Virginia, malice is a required element of the separate and distinct offense of second-degree murder rather than an element that merely distinguishes

degree. The pre-*Mullaney* decision of State v. Cuevas, 53 Haw. 110, 488 P.2d 322 (1971), agrees with this analysis. In *Cuevas*, the Supreme Court of Hawaii invalidated an instruction comparable to Virginia's and employed in the same manner, relying solely on *Winship*.

Since *Winship* has been given complete retroactive effect, Ivan v. City of New York, 407 U.S. 203 (1972), likewise so should *Mullaney*. *Cf.* Burko v. State, 19 Md. App. 645, 313 A.2d 864 (1974), *vacated and remanded*, 95 S. Ct. 2624 (1975), wherein the Court remanded a case involving the presumption of malice for further consideration in light of *Mullaney* even though the facts giving rise to the alleged error arose prior to the *Mullaney* decision.

Furthermore, even if *Mullaney* is interpreted as advancing new constitutional doctrine not contained in *Winship*, or, if the Court holds that the *Ivan* decision, which held *Winship* to be fully retroactive, was arrived at only in reference to the particular facts in *Winship*, the same reasons for retroactive application of *Winship* apply to *Mullaney*. The Court appears justified in making an independent evaluation of retroactivity in spite of *Ivan*. The leading retroactivity decision of Linkletter v. Walker, 381 U.S. 618 (1965), bolsters this analysis:

> Once the premise is accepted that we are neither required to apply, nor prohibited from applying, a decision retrospectively, we must then weigh the merits and demerits in *each case*. *Id.* at 629 (emphasis added).

Nonetheless, the concerns manifested in *Ivan* dominate *Mullaney*. In *Ivan*, the Court stated that a new constitutional rule was to be given complete retroactive effect where its major purpose "is to overcome an aspect of the criminal trial which substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials." 407 U.S. at 204, *citing* Williams v. United States, 401 U.S. 646, 653 (1971). *Accord*, Woodall v. Pettibone, 465 F.2d 49, 51-52 (4th Cir. 1972). Similiarly, *Mullaney* involves principles which are instrumental in reducing the risk of convictions resting on factual error: "These interests are implicated to a greater degree in [*Mullaney*] than they were in *Winship* itself." 421 U.S. at 700.

However, an argument can be advanced that *Winship* and *Mullaney* are distinguishable when one considers the factors weighed by the Court when it considers retroactivity: (1) the purpose served by the new standards; (2) the extent of reliance by law enforcement authorities on the old standards; and (3) the effect on the administration of justice of a retroactive application of the new standards. These factors, promulgated in Linkletter v. Walker, *supra*, and utilized by the Burger Court on numerous occasions (*see, e.g.*, Williams v. United States, *supra*) favor prospective application to a greater degree in *Mullaney* than was true of *Winship*. Regarding factor (1), there seems to be no appreciable difference in purpose; both cases upheld the reasonable doubt standard. But the last two factors render the cases distinguishable. In *Winship*, the Court was faced with a juvenile offender who had been adjudicated delinquent in a family court by a relatively modern procedure of limited use which, if invalidated, would have limited effect on the over-all criminal justice system. *Mullaney*, if retroactively applied, would command overturning murder convictions in states which have relied upon a rule of law inherited from the English common law and used in most murder trials in these states. A similar approach has been adopted in three recent state court cases concluding that *Mullaney* is not retroactive. Fuentes v. State, 349 A.2d 1 (Del. 1975); People v. Belogur, 82 Misc. 2d 907, 372 N.Y.S.2d 384 (S. Ct. 1975); State v. Hankerson, 220 S.E.2d 515 (N.C. 1975). *Hankerson* was cited with approval in State v. Jensen, 221 S.E.2d 717, 720 (N.C. 1976).

The above argument appears inherently tenuous after closer examination. *Linkletter* itself recognized that retroactivity is decided on a wholly different set of criteria where the constitutional error stems from "the very integrity of the fact-finding process." 381 U.S. at 639. The argument proffered above is not unsound but merely inappropriate. The Court in *Ivan* stressed this point:

> Neither good faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed

Mullaney, since the truth-finding function of the jury is substantially impaired when the jury is confused as to who must bear the ultimate burden of persuasion concerning malice. Furthermore, it is possible, though unlikely, that the Burger Court may conclude that the error caused by giving an impermissible instruction is harmful per se[76] or the type of error which does not require a timely objection at trial to preserve it for direct or collateral relief in the federal courts.

It is submitted that the Virginia court will not be inclined to invalidate a concept of such historical significance as the "presumption of malice," as formulated and applied in Virginia.[77] The federal courts, however, are

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to require prospective application [when the truth-finding function of the jury is impaired]. 407 U.S. at 204.

76. "[T]here are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." Chapman v. California, 386 U.S. 18, 23 (1967). To date, the Court has seldom found instances where the error is necessarily harmful. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 342-43 (1963)(the sixth amendment right to counsel); Haynes v. Washington, 373 U.S. 503, 515-18 (1963)(the fifth amendment privilege against coerced confessions). *See generally* cases cited in Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988, 1002 n.42 (1973)(an analysis of the impact of *In re Winship* on the harmless error doctrine). *Mullaney* expressed no view whether the error could be deemed harmless. 421 U.S. at 705 (Rehnquist, J., & Burger, C.J., concurring). The preferable view is that the error could be found harmless when the issue of "heat of passion" was not raised in the evidence of the accused or the prosecution.

However, an argument can be fashioned that the malice instruction fosters a situation where the error is harmful per se. The constitutional error in *Mullaney* infringes upon the basic right of an accused to be presumed innocent until the state proves his guilt beyond a reasonable doubt as to every essential element of the crime charged. This right is so fundamental to our system of justice that its violation alone casts doubt upon the reliability of the conviction. No error is more prejudicial than one which unfavorably shifts the burden of persuasion to an accused. On the basis of these considerations, the Supreme Court of Hawaii held in State v. Cuevss, 53 Haw. 110, 488 P.2d 322, 325 (1971), that an instruction on the presumption of malice created error that could never be deemed harmless. The instruction before the court in *Cuevas* is similar to ones used in Virginia. *Compare Cuevas*, 488 P.2d at 325, *with* Adams v. Commonwealth, 163 Va. 1053, 1055, 178 S.E. 29, 29 (1935) *and* Mosby v. Commonwealth, 168 Va. 688, 693, 190 S.E. 151, 154 (1937). For an excellent analysis of the harmless error doctrine see R. TRAYNOR, THE RIDDLE OF HARMLESS ERROR (1970).

77. The Virginia court has generally not considered an allegation of constitutional error if it could have been objected to and cured during the course of a criminal trial. *See, e.g.*, Ford v. Commonwealth, 215 Va. 308, 315, 208 S.E.2d 921, 926 (1974)(accused could not raise question of lack of evidence for instruction for first time on appeal); Poole v. Commonwealth, 211 Va. 258, 260, 176 S.E.2d 821, 823 (1970)(identification testimony); Woodson v. Commonwealth, 211 Va. 285, 288, 176 S.E.2d 818, 821 (1970)(admissibility of confession); Manley v. Commonwealth, 211 Va. 146, 149, 176 S.E. 2d 309, 312 (1970) (evidence obtained by search and seizure).

The court, however, is empowered to notice on appeal such allegations if good cause is shown or otherwise to enable the court to attain the ends of justice. *Va. S. Ct. R.* 5:7. These exceptions have been invoked only in rare circumstances. *See, e.g.*, McKeon v.

unlikely to respect Virginia legal history as much as the Virginia court. Whatever the final result, instructing juries as to a "burden" on an accused in a criminal prosecution is likely to be relegated to the past.

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Commonwealth, 211 Va. 24, 26, 175 S.E.2d 282, 284 (1970)(sufficiency of evidence in indecent exposure case); Cooper v. Commonwealth, 205 Va. 883, 889-90, 140 S.E.2d 688, 693 (1965)(confession unlawfully obtained from an accused who had been indicted and was represented by counsel). Since no general doctrine has been developed by the court concerning these rules, it is unlikely that the court would notice an allegation that the malice instruction was unconstitutional, and objectionable, for the first time on appeal. This is especially true considering the vast effect the decision would have on the criminal justice system.

State habeas corpus would also appear unavailable. The general rule is that a constitutional right of a prisoner may not be raised by state habeas corpus

> when a prisoner has been afforded a fair and full opportunity to raise and have adjudicated the question of the admissibility of evidence in his trial and upon appeal. Slayton v. Parrigan, 215 Va. 27, 29, 205 S.E.2d 680, 682 (1974), *cert. denied*, 419 U.S. 1108 (1975)(citing considerable Virginia authority).

This rationale arguably encompasses the situation addressed here.

Despite the predicted resistence of the Virginia court to entertain such claims, a *Mullaney*-type situation is likely to be heard even though no objection was made at the trial court. The federal courts do not favor a restrictive interpretation of the scope of habeas corpus. The leading case of Fay v. Noia, 372 U.S. 391 (1963), foreclosed federal habeas corpus relief only if a State prisoner's failure to prosecute his claim in the state courts can be deemed a "deliberate by-passing of state procedures." *Id.* at 439. This standard would not appear to be invoked by a *Mullaney*-type accused. Counsel's failure to object to an instruction which has been customarily employed in Virginia should not be used as a basis for denying an accused his right to due process.

Nevertheless, a colorable argument can be advanced that *Fay v. Noia* is inapplicable to a *Mullaney* situation. In *Fay*, the Court was dealing with the failure of an accused to appeal. In *Mullaney*, the accused failed to object. The view that the two situations are distinguishable and require different results was adopted by Justice Rehnquist in his concurring opinion in *Mullaney*. 421 U.S. at 704 & n. 32 (Rehnquist, J., & Burger, C.J., concurring). This approach is consistent with that taken by a substantial minority of the Court who favor restricting the scope of federal habeas corpus relief available to state prisoners. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 249, 250 (Blackmun, J., concurring), 250, 262-63, 274-75 (Powell, J., joined by Burger, C.J., & Rehnquist, J., concurring) (1973). *See generally* Miller & Shepherd, *New Looks at an Ancient Writ: Habeas Corpus Reexamined*, 9 U. RICH. L. REV. 49, 70-76 (1974); Tushnet, *Judicial Revision of the Habeas Corpus Statutes: A Note on Schneckloth v. Bustamonte*, 1975 WIS. L. REV. 484, 484-87, 491-92.