Liability of an Aider and Abettor for Aggravated Murder in Ohio: *State v. Lockett*

In *State v. Lockett*,[1] which dealt with the liability of an aider and abettor for a murder committed during a robbery attempt, the Ohio Supreme Court upheld the aggravated murder conviction of an accused who waited outside a pawnshop in a get-away car for the other participants of a robbery attempt. The *Lockett* opinion is ambiguous with respect to a critical issue: Is the subjective intent of a person who helped to plan a crime during which murder is committed but who was not present during the slaying essential to her liability as an aider and abettor of aggravated murder? If one interprets the Ohio Supreme Court's opinion to require a particular state of mind as an element of the crime of aiding and abetting aggravated murder, the court was equally ambiguous concerning whether sufficient evidence of defendant's intent had been produced. This Case Comment will explore alternative interpretations of the *Lockett* opinion in order to show that (1) the Ohio Supreme Court misinterpreted and misapplied Ohio statutory and case law governing aider and abettor liability for aggravated murder, and (2) the holding may have violated defendant's constitutional right to due process.

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1. 49 Ohio St. 2d 48, 358 N.E.2d 1062 (1976), *cert. granted*, 98 S. Ct. 261 (1977). The following questions were argued before the United States Supreme Court:

> (1) Did prosecutor in summation make impermissible comments on defendant's failure to testify and thereby violate her rights under Fifth and Fourteenth Amendments? (2) Do Ohio death penalty statutes place unconstitutional limits on consideration of mitigating circumstances? (3) Is death disproportionately severe and unconstitutional sentence for one who has not taken life, attempted to take life, or actually intended to take life? (4) Do Ohio death penalty statutes violate Sixth, Eighth, and Fourteenth Amendments in that they deny capitally accused [defendant's] right to judgment of his peers as to existence of mitigating circumstances and appropriateness of death penalty? (5) Do Ohio capital sentencing procedures impermissibly penalize exercise of rights to plead not guilty and to trial by jury? (6) Do Ohio capital sentencing procedures impermissibly shift to defendant convicted of capital murder with specifications burden of proving facts that distinguish those who may live from those who must die? (7) Were defendant's Sixth and Fourteenth Amendment rights violated by insufficiently examined exclusion for cause of prospective jurors with conscientious scruples against capital punishment? (8) Did Ohio Supreme Court, by giving retroactive application to new construction of Ohio Revised Code Section 2923.03(A) governing complicity, deny defendant's right to fair warning of criminal prohibition and thereby deprive her of her life in violation of Fourteenth Amendment's Due Process Clause?

46 U.S.L.W. 3269, 3269-70 (U.S. October 18, 1977) (No. 76-6997).

This Case Comment analyzes the holding of the Ohio Supreme Court as it relates to defendant's intent in terms of Ohio statutory and case law and federal constitutional standards to reach the conclusion that Lockett was inappropriately convicted of aggravated murder. This analysis remains relevant whatever the ultimate disposition of the case before the United States Supreme Court because this precise issue was not argued, but rather the issue of defendant's intent to kill was presented to the Supreme Court as a basis for holding the Ohio statutory procedure for imposition of the death penalty to be unconstitutional. This Case Comment is also relevant in pointing out the Ohio Supreme Court's misinterpretation of Ohio law, because the Ohio Supreme Court is the final arbiter of its own state law. *See, e.g.*, C. WRIGHT, LAW OF FEDERAL COURTS § 107 (3d ed. 1976); Mullaney v. Wilbur, 421 U.S. 684, 689 (1975).

I. FACTS AND HOLDING

Sandra Lockett, defendant, was actively involved in planning the commission of a robbery by initially suggesting it and by earmarking certain businesses as possible targets. None of the participants had a gun, but one had a cartridge. Defendant's brother, James Lockett, suggested that they rob a pawn shop where they could ask to see a gun, load it with the cartridge and use it to effect the robbery. According to the prearranged plan, Al Parker, James Lockett, and Nathan Dew entered the pawn shop while Sandra Lockett waited outside in a car with the engine running. Inside the shop, Parker loaded one of the guns he had asked to examine, put his finger on the trigger, and threatened the owner. Parker later testified as the State's chief witness that the gun accidentally went off when the owner grabbed it.[2]

Rejecting offers of a negotiated plea,[3] Sandra Lockett was charged with aggravated murder as an aider and abettor. The aggravated murder statute, Ohio Revised Code section 2903.01(B), prohibits individuals from purposely causing "the death of another while committing or attempting to commit . . . aggravated robbery or robbery. . . ."[4] Purpose to kill is defined by statute as a "specific intention to cause a certain result."[5] The Ohio complicity statute under which defendant was found guilty as an aider and abettor provides in part: "(A) *No person, acting with the kind of culpability required for the commission of an offense*, shall do any of the following: . . . (2) Aid or abet another in committing the offense."[6]

2. 49 Ohio St. 2d at 53, 358 N.E.2d at 1067.

3. *Id.* at 51, 358 N.E.2d at 1066.

4. OHIO REV. CODE ANN. § 2903.01 (Page 1975) provides:

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

5. OHIO REV. CODE ANN. § 2901.22 (Page 1975) provides:

(A) A person acts purposely when it is his specific intention to cause a certain result, or when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.

(B) A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

(C) A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

(D) A person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that such circumstances may exist.

6. OHIO REV. CODE ANN. § 2923.03 (Page 1975) (emphasis added).

The jury instruction given by the trial judge did not clearly state whether the jury was *required* or merely *permitted* to find that defendant had manifested an intent to kill by participating in a common plan to commit a robbery with the use of a deadly weapon.[7] In the first paragraph of the court's instruction, the judge said that "[a] person engaged in a common design . . . to rob by force . . . *is presumed* to acquiesce" and "is bound by the consequences. . . ." Yet in the second paragraph the court instructed the jury that if the manner used to accomplish the robbery would be reasonably likely to produce death, then "[a]n intent to kill by an aider and abettor may be found to exist beyond a reasonable doubt. . . . The jury found defendant guilty of aggravated murder with specifications, and upon a subsequent determination by the trial court pursuant to Ohio statutory procedure that no mitigating circumstances were present defendant was sentenced to death.[8]

On appeal to the Ohio Supreme Court, Lockett argued that the

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7. 49 Ohio St. 2d at 68, 358 N.E.2d at 1075 (emphasis added). The jury instruction read in pertinent part:

> A person engaged in a common design with others to rob by force and violence an individual or individuals of their property is presumed to acquiesce in whatever may reasonably be necessary to accomplish the object of their enterprise. And if under the circumstances it may be reasonably expected that the victim's life would be in danger by the manner and means of performing the criminal act inspired each one engaged in the common design is bound by the consequences naturally or probably arising in its furtherance.
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> If the conspired robbery and the manner of its accomplishment would be reasonably likely to produce death, each plotter is equally guilty with the principal offender as an aider and abettor in the homicide, even though the aider and abettor was not aware of the particular weapon used to accomplish the killing. An intent to kill by the aider and abettor may be found to exist beyond a reasonable doubt under such circumstances.

This jury instruction is almost identical to paragraphs one and two of the syllabus in State v. Palfy, 11 Ohio App. 2d 142, 229 N.E.2d 76 (Summit County 1967) (syllabus 1, 2).

8. 49 Ohio St. 2d at 51, 258 N.E.2d at 1066. The Ohio Supreme Court upheld the constitutionality of the Ohio statutory procedure for imposition of the death penalty in State v. Bayless, 48 Ohio St. 2d 73, 357 N.E.2d 1035 (1976). The statute that supplies the criteria for imposition of the death penalty, OHIO REV. CODE ANN. § 2929.04 (Page 1975), provides in relevant part:

> (A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:
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> . . . .
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> (3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.
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> . . . .
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> (7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.
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> (B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and history, character, and condition of the offender, one or more of the following is established by a prepondance [preponderance] of the evidence:
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> (1) The victim of the offense induced or facilitated it.
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> (2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

state had produced insufficient evidence to convict her of aggravated murder. More specifically, defendant contended that in order for her to be convicted of aiding and abetting aggravated murder, the state must prove two propositions: (1) that the principal offender, Al Parker, possessed purpose to kill, as required by the Ohio aggravated murder statute; and (2) that the defendant shared in the purpose of the principal, as required by the Ohio complicity statute. The defendant argued that the state had failed to prove both propositions beyond a reasonable doubt.[9]

The Ohio Supreme Court apparently accepted the argument that the principal's intent must be established beyond a reasonable doubt before a defendant can be convicted as an accomplice to the crime.[10] The court determined that a sufficient basis for a finding of the principal's purpose to kill existed in evidence presented by the state that Parker had engaged in a common design to commit a felony enumerated in the aggravated murder statute and that the common design included the use of an inherently dangerous weapon.[11] The opinion did not clearly indicate, however, whether the court had determined that the state had presented sufficient evidence of purpose to kill or, alternatively, had held that the jury instruction that allowed intent to be presumed was correct as a matter of law. In the body of the opinion, the court stated that "[t]he record contains sufficient evidence upon which a jury *could* find a purposeful intent to kill. . . ."[12] Yet in its syllabus, the court stated that "a homicide occurring during the commission of the felony *is* a natural and probable consequence of the common plan which *must be presumed* to have been intended. . . ."[13]

The most serious ambiguity in the *Lockett* opinion appears in the court's discussion of the intent of Sandra Lockett. The court never satisfactorily resolved the question whether the state was required to establish beyond a reasonable doubt that defendant, as well as the prin-

(3) The offense was primarily the product of the offender's psychosis or mental deficiency though such condition is insufficient to establish the defense of insanity.

For a thorough discussion of the Ohio death penalty provisions, *see* Comment, *The Constitutionality of Ohio's Death Penalty*, 38 OHIO ST. L.J. 617 (1977).

9. 49 Ohio St. 2d at 58, 358 N.E.2d at 1070.

10. *Id.* at 59, 358 N.E.2d at 1070.

11. *Id.*

12. *Id.* at 60, 358 N.E.2d at 1071 (emphasis added).

13. *Id.* at 48, 358 N.E.2d at 1065 (syllabus 3) (emphasis added). Although syllabus number three does not state that it refers to the intent of the principal alone, syllabus number four specifically mentions the intent of the aider and abettor and states that "a purposeful intent to kill by the aider and abettor *may be found* to exist beyond a reasonable doubt under such circumstances." 49 Ohio St. 2d at 49, 358 N.E.2d at 1065 (syllabus 3, 4) (emphasis added). Assuming that the court would not have addressed the same issue in two consecutive paragraphs stating antipodal rules, the court must have been referring only to the principal in syllabus number three.

According to the Ohio Supreme Court decision in State *ex rel.* Canada v. Phillips, 168 Ohio St. 191, 151 N.E.2d 722 (1958), whenever there is conflict between the syllabus and the opinion, the syllabus controls.

cipal, had purpose to kill. Lockett's attorneys had argued that although Ohio's prior aiding and abetting statute[14] made no mention of intent, the legislature created an intent requirement in 1974 when it added the phrase "acting with the kind of culpability required for the commission of an offense . . ."[15] to the criminal complicity statute. The Ohio Supreme Court explicitly rejected this argument,[16] yet went on to hold that defendant was "bound by all the consequences naturally and probably arising from the furtherance of the conspiracy to commit the robbery. The record reflects that this was the case and *establishes beyond reasonable doubt that the appellant had a purposeful intent to kill.*"[17] This holding is summarized in the syllabus by a statement that "a purposeful intent to kill by the aider and abettor *may be found* to exist beyond a reasonable doubt under such circumstances."[18] Again, it is unclear whether the court was stating that there was sufficient evidence upon which the jury could find purpose to kill, or whether the trial court's instruction creating a presumption of intent to kill was a correct rule of law based upon the evidence of "the planning and commission of the robbery and acquiesce[nce] in the use of a deadly weapon to accomplish the robbery."[19] Furthermore, the court would have had no reason to treat the insufficiency of the evidence offered to prove defendant's intent if it had meant to hold that the Ohio criminal complicity statute requires no proof of the aider and abettor's intent. The court relied heavily upon prior Ohio case law in reaching its holding, and the court's inconsistencies can best be examined in the context of this prior law.

II. THE COURT'S TREATMENT OF OHIO LAW

A. *Intent of the Principal*

At common law, liability for murder committed during the course of a robbery was based upon the felony murder rule that was so broad that its definition has been phrased: "Homicide resulting from any felony committed in a dangerous way, is murder."[20] Although criminal liability for felony murder was not predicated upon purpose to kill, the

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14. OHIO REV. CODE ANN. § 1.17 (Page 1954) (current version at OHIO REV. CODE ANN. § 2923.03 (Page 1975)): "Any person who aids, abets or procures another to commit an offense may be prosecuted and punished as if he were the principal offender."

15. 1974 OHIO LAWS 1961 (codified at OHIO REV. CODE ANN. § 2923.03 (Page 1975)). *See* text accompanying note 7 *supra*. This language was added to the aider and abettor statute when the new Ohio Criminal Code was adopted.

16. 49 Ohio St. 2d at 60, 358 N.E.2d at 1071.

17. *Id.* at 62, 358 N.E.2d at 1072 (emphasis added).

18. *Id.* at 49, 358 N.E.2d at 1065 (syllabus 4) (emphasis added).

19. *Id.* at 62, 358 N.E.2d at 1072.

20. R. PERKINS, CRIMINAL LAW 39 (2d ed. 1969); *See also* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 71 (1972).

element of malice, which was a prerequisite of liability for murder, was said to be constructively, or sometimes impliedly, satisfied by the defendant's intent to commit the underlying felony.[21] The scope of a felon's liability was usually limited to the natural and probable consequences of the felony.[22] The customary rationale for the felony murder rule was "to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit."[23] Although almost all states have codified the common law rule in their present murder statutes,[24] most courts in recent years have viewed the doctrine with disfavor and have limited it whenever possible.[25]

The Ohio statute prohibiting murder committed during a felony departs from the common law rule by requiring that the defendant possess purpose to kill.[26] The Ohio Supreme Court first interpreted an earlier version of this murder statute in *Robbins v. State*.[27] In *Robbins*, a doctor was charged with murder in the death of a young woman to whom he had administered poison in order to induce an abortion. The murder statute at that time provided:

> That if any person shall purposely, and of deliberate and premeditated malice, or in the perpetration, or attempt to perpetrate any rape, arson, robbery, or burglary, or by administering poison, or causing the same to be done, kill another; every such person shall be deemed guilty of murder in the first degree, and, upon conviction thereof, shall suffer death.[28]

The Ohio Supreme Court held that the word "purposely" modified both the phrases "of deliberate and premeditated malice" and "in the per-

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21. W. LAFAVE & A. SCOTT, *supra* note 20, § 71.

22. R. PERKINS, *supra* note 20, at 41. *Cf.* People v. Stamp, 2 Cal. App. 3d 203, 82 Cal. Rptr. 598 (1969), *cert. denied*, 400 U.S. 819 (1970) (robbers held responsible for victim's death from heart attack that occurred more than twenty minutes after robbers left scene).

The proximate causation approach has also been used by a minority of jurisdictions to define the scope of liability for a killing that occurs during a felony by one who was not an actual participant in the crime, as when the victim shoots a third party and the principal is held responsible for the crime. In State v. Chambers, 53 Ohio App. 2d 266, 373 N.E.2d 393 (Lorain County 1977), the defendant and an accomplice were discovered committing a burglary by an armed homeowner, who mortally wounded the fleeing accomplice; the court held that the principal burglar could be convicted of involuntary manslaughter. *See* Annot., 56 A.L.R. 3d 239 (1974). Many jurisdictions have expressly refused to extend the felony murder doctrine this far. *See, e.g.*, State v. Canola, 73 N.J. 206, 374 A.2d 20 (1977). California has adopted an approach under which malice on the part of the defendent is inferred if the defendant initiated the gun battle and the third party shot back in response. Taylor v. Superior Court, 3 Cal. 3d 578, 477 P.2d 131, 91 Cal. Rptr. 275 (1970).

23. People v. Washington, 62 Cal. 2d 777, 781, 402 P.2d 130, 133, 44 Cal. Rptr. 442, 445 (1965).

24. *See, e.g.*, CAL. PENAL CODE § 189 (West 1970); PA. CONS. STAT. ANN. tit. 18, § 2502 (Purdon 1973).

25. *See, e.g.*, State v. Canola, 73 N.J. 206, 374 A.2d 20 (1977).

26. OHIO REV. CODE ANN. § 2903.01 (Page 1975), *quoted at* note 4 *supra*. For a history of the felony murder rule in Ohio, see Comment, *The Felony Murder Rule in Ohio*, 17 OHIO ST. L.J. 130 (1956).

27. 8 Ohio St. 131 (1857).

28. 1 M. CURWEN, REVISED STATUTES OF OHIO 181 (1853).

petration or attempt to perpetrate any . . . robbery," so that a subjective intent to kill was an essential element of liability under the Ohio murder statute in all circumstances.[29] The court admitted that the statutory language was ambiguous and, were it not for the placement of the comma after "purposely," might have been read consistently with the common law felony murder rule.[30] The Ohio Supreme Court, however, considered the common law rule a relic of barbarism[31] and intimated that it would have read the requirement of malice into the statute even if the word "purposely" had been omitted.[32] The court was greatly influenced by policy considerations and noted that:

> If a burglar, in passing through a house he had entered in the night season, should *accidentally* and *unintentionally* upset an article of furniture, or cause something to fall upon the cradle of a sleeping infant, and thereby kill the child, he might be subjected to the highest penalties of the statute, both for manslaughter and for burglary; but to inflict upon him the extreme punishment of death, would evince a disregard of that fundamental distinction in respect to the relative guilt of human actions, dependent on the concurrence or non-concurrence of *the will* with *the act*, as well as a disregard of that humane principle of criminal justice by which punishment is graduated in proportion to the atrocity of the crime.[33]

Since *Robbins*, Ohio courts have generally considered purpose to be an essential element of the crime of aggravated murder,[34] and the *Robbins* analysis of the Ohio statute was specifically reaffirmed by the Ohio Supreme Court in 1951 in *State v. Farmer*.[35] In *Farmer*, the defendant admitted that he had intended to strike the victim with a stick, but not rob or kill him.[36] The *Farmer* court felt compelled to follow the *Robbins* interpretation because the Ohio legislature in subsequent revisions and reenactments of the murder statute had clarified its language in accordance with the *Robbins* opinion, to make intent to kill an element both of premeditated murder and of murder committed during the course of a felony.[37] Despite the express requirement of purpose, however, the Ohio Supreme Court held in *Farmer* that "one *may*

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29. 8 Ohio St. at 177.

30. *Id.* at 175-76.

31. *Id.* at 170.

32. *Id.* at 178.

33. *Id.* at 179 (emphasis in original).

34. For cases predicating liability for murder occurring during the commission of a felony upon intent to commit murder, see Comment, *supra* note 26, at 133. *Cf.* State v. Stewart, 176 Ohio St. 156, 198 N.E.2d 439 (1964) (Formation of intent may take place during the attempt, no matter how short the duration between attempt and execution); State v. Salter, 149 Ohio St. 264, 78 N.E.2d 575 (1948) (The intentional administration of poison satisfies the intent requirement for murder.).

35. 156 Ohio St. 214, 102 N.E.2d 11 (1951).

36. *Id.* at 216, 218, 102 N.E.2d at 13, 14.

37. *Id.* at 221, 102 N.E.2d at 15.

be presumed to intend results which are the natural, reasonable, and probable consequences of his voluntary act. . . ."[38]

Farmer was the basis for the court's holding in *Lockett* that the principal's intent to kill was established beyond a reasonable doubt by evidence that he had participated in a common plan to commit a robbery with the use of a deadly weapon.[39] In *Farmer*, the court dealt with the question whether the jury had sufficient evidence to infer an intent to kill from the fact that the defendant had struck the deceased with a stick.[40] The Ohio Supreme Court in *Farmer* held that if the stick were one reasonably likely to produce death, the defendant could be presumed to intend the natural and probable results of the beating.[41]

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38. *Id.* at 223, 102 N.E.2d at 16 (emphasis added). For other cases imposing this presumption of intent, see State v. Fugate, 36 Ohio App.2d 131, 303 N.E.2d 313 (1974) (Intent to kill may be presumed where the natural and probable consequences of a wrongful act are likely to produce death, and such factors as the nature of the weapon used, its tendency to destroy life, and the manner in which the wounds were inflicted are to be taken into consideration); State v. Cliff, 19 Ohio St. 2d 31, 34, 249 N.E.2d 823, 825 (1969) ("It must be presumed that Cliff intended the natural consequences of his voluntary act . . . . The natural consequences of a gun, loaded and cocked, and aimed in the direction of a man, is the discharge thereof and possible resulting death."); State v. Stewart, 176 Ohio St. 156, 198 N.E.2d 439 (1964) (Because one is presumed to intend the natural and probable consequences of voluntary acts, intent to kill can be inferred from the manner in which the killing was accomplished.) The *Farmer* rule appears in 4 OHIO JURY INSTRUCTIONS § 409.01 (Provisional Criminal 1974): "DANGEROUS WEAPON. If a wound is inflicted upon a person with a deadly weapon in a manner calculated to (destroy life) (inflict great bodily harm), the purpose to (kill) (injure) may be inferred from the use of the weapon."

Although the court in *Farmer* used the term "presumed," it was creating what most legal scholars would call a permissive inference. MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 342 (2d ed. 1972) [hereinafter cited as MCCORMICK'S]; J. THAYER, PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 317-26 (1898); 9 J. WIGMORE, EVIDENCE § 2490 (3d ed. 1940). *See* Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195, 204 (1953), in which the author identifies eight senses of the word presumption, one of which is a "permissive inference." A permissive inference arises when a judge, using common knowledge or ordinary reasoning, determines that a jury might reasonably deduce fact *B* from fact *A*, so that a party's burden of going forward with the evidence is satisfied. MCCORMICK'S, *supra* note 38, § 342. On the other hand, if a court determines that fact *A* creates a presumption of fact *B*, the establishment of fact *B* may place a secondary burden of going forward with the evidence upon the opponent, or may place the burden of persuasion upon the opponent as well. *Id.* § 342. The difference between the burden of producing evidence and the burden of persuasion (which together are encompassed by the term "burden of proof") has been explained as follows:

> The burden of producing evidence on an issue means the liability to an adverse ruling (generally a finding or directed verdict) if evidence on the issue has not been produced. . . .
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> The burden of persuasion becomes a crucial factor only if the parties have sustained their burdens of producing evidence and only when all of the evidence has been introduced. . . . The jury must be told that if the party having the burden of persuasion has failed to satisfy that burden, the issue is to be decided against him.

Id. § 336, at 784.

Presumptions that merely shift the burden of proof are called rebuttable presumptions because the party against whom the presumption operates will be able to overcome the presumption with the requisite amount of evidence. *Id.* § 342. If no evidence could possibly overcome the presumption, the presumption is said to be irrebuttable or conclusive. The authors maintain, however, that what is commonly called a conclusive or irrebuttable presumption is not really a presumption at all, but rather the expression of a rule of law. *Id.* § 342, at 804.

39. 49 Ohio St. 2d at 59, 358 N.E.2d at 1070.

40. 156 Ohio St. at 222-23, 102 N.E.2d at 20.

41. *Id.*

In effect, the jury might disbelieve the defendant's own testimony concerning his intent yet proceed to infer from the objective circumstances that the requisite intent was present.

The *Lockett* court held that if an inherently dangerous weapon were planned to be used, defendant would be liable for the probable and natural results of the robbery.[42] The court did not refer to the principal's testimony that the gun had discharged accidentally. By contrast, Farmer must have expended direct physical effort to inflict the blow; it seems highly unlikely that his act could have been accidental. The logical relation between use of bodily force and an intent to kill is intuitively clearer than the relation between use of a gun to effect a robbery and an intent to kill. Furthermore, the court in *Farmer* held that the intent to kill may be presumed, whereas the *Lockett* court held in its syllabus that the principal's intent must be presumed.[43]

The Ohio Supreme Court's treatment of the principal's intent to kill in *Lockett* suffers from an additional defect. The Ohio Revised Code explicitly defines purpose as a "specific intention to cause a certain result."[44] The Ohio Jury Instructions define purpose as "a decision of the mind to do an act with a conscious objective of (producing a specific result) (engaging in specific conduct)."[45] Yet the court in *Lockett* held that there was sufficient evidence of purpose to kill on the basis of evidence of a common plan to commit robbery with the use of a weapon likely to produce death.[46] Under the Ohio Revised Code, if a person "disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature," he satisfies the definition of recklessness.[47] The actions of Parker and the other participants in the robbery seem to evince recklessness rather than purpose to kill. Although a greater degree of culpability will satisfy the intent requirement for a crime that has a lesser requirement (for example, one who is indictable for murder may be convicted of negligent homicide)[48] if the state presents sufficient evidence of purposeful conduct,[49] a lesser degree of intent will not satisfy a statute requiring a higher degree of culpability.[50] The legislature has clearly mandated

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42. 49 Ohio St. 2d at 62, 358 N.E.2d at 1072.

43. *Id.* at 48, 358 N.E.2d at 1065 (syllabus 3).

44. OHIO REV. CODE ANN. § 2901.22(A) (Page 1975), *quoted at* note 5 *supra.*

45. 4 OHIO JURY INSTRUCTIONS § 409.01(d) (Provision Criminal 1974).

46. 49 Ohio St. 2d at 59, 358 N.E.2d at 1070.

47. OHIO REV. CODE ANN. § 2901.22(C) (Page 1975) *quoted at* note 5 *supra.*

48. *Id.* § 2903.05.

49. *Id.* § 2901.22(E).

50. *Id.* § 2901.21 provides:

(A) Except as provided in Division (B) of this section, a person is not guilty of an offense unless both of the following apply:

(1) His liability is based on conduct which includes either a voluntary act, or an omission to perform an act or duty which he is capable of performing;

the requisite state of mind for a conviction of aggravated murder. Therefore, in permitting evidence of reckless conduct to satisfy the Ohio aggravated murder statute, the Ohio Supreme Court has reduced the criteria for purpose contrary to the dictates of the Ohio Revised Code and has in effect eliminated the requirement of purpose from the statute.

B. *Intent of the Accomplice*

Accomplice liability at common law extended to the natural and probable consequences of the offense planned.[51] The rule is criticized today for its inconsistency with fundamental principles of the criminal justice system because it predicates accomplice liability upon negligent conduct despite the fact that the substantive crime for which the principal is prosecuted may require a much higher degree of intent to be proved.[52] The broad reach of accomplice liability coupled with the extensiveness of the general felony murder doctrine has enabled prosecutors to sweep all co-felons into a first-degree murder conviction for any killing in consequence of a planned felony.[53] The results in Ohio cases of aiding and abetting an aggravated murder have been consistent with the rule that an accomplice need not have the specific intent necessary to find the principal guilty of the same crime. In cases of aiding and abetting the Ohio courts have generally ignored or presumed the aider and abettor's intent, or have found the intent requirement of the aggravated murder statute to be inapplicable to the aider and abettor.

Huling v. State[54] was the first reported Ohio opinion dealing with the liability of an aider and abettor for a murder that occurred during the commission of a felony. The court in *Huling* found sufficient evidence of intent to kill in the silence of the participants to a burglary when the principal threatened the victim's life, and declined to determine whether the accomplices would be automatically held responsible for a death resulting from a felony, regardless of their intent.[55] The Ohio

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(2) He has the requisite degree of culpability for each element as to which a culpable mental state is specified by the section defining the offense.

51. W. LAFAVE & A. SCOTT, *supra* note 20, § 65. At common law, those participating in a crime were guilty in varying degrees. Thus the actual perpetrator of the crime was the principal in the first degree; a person who "aided, counseled, commanded or encouraged the commission thereof in his presence, either actual or constructive" was a principal in the second degree; one who "aided, counseled, commanded or encouraged the commission thereof, without having been present either actually or constructively at the moment of perpetration" was an accessory before the fact; and one who "with knowledge of the other's guilt, renders assistance to a felon in the effort to hinder his detention, arrest, trial or punishment" was an accessory after the fact. R. PERKINS, *supra* note 20, at 656, 658, 663, 667.

52. W. LAFAVE & A. SCOTT, *supra* note 20 § 65.

53. *Id.*

54. 17 Ohio St. 583 (1867).

55. *Id.* at 590.

Supreme Court answered this question in *Stephens v. State*[56] when it determined the liability of an accomplice who waited outside a building while others committed a robbery and deliberately shot the victim. The court in *Stephens* apparently ignored the intent requirement it had read into the Ohio aggravated murder statute in *Robbins*[57] and held the aider and abettor guilty of a killing done in the execution of a common plan to commit robbery, simply because the killing was a natural and probable result of an attempt to rob the victim.[58] The *Stephens* court was unable to cite any Ohio authority for its holding, but the court buttressed its opinion by referring to several commentators and cases in other jurisdictions that contrary to the *Robbins* decision, clearly applied the common law felony murder rule to the principal as well as to accomplices.[59] The majority of Ohio courts have approached accomplice liability in the manner of *Stephens*, by simply ignoring the question of the accused accomplice's intent.[60]

Ohio courts that have expressly considered the issue of the accomplice's intent in felony murder cases have applied two divergent theories to reach a result consistent with the *Stephens* case. In *State v. Palfy*,[61] the accused was the driver for a small group that had committed two previous robbery-assaults. During the course of a third attempt, the victim suffered a fatal stab wound. In upholding the defendant's first-degree murder conviction, the court apparently accepted the argument that intent was a requirement for the aider and abettor's conviction[62] but

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56. 42 Ohio St. 150 (1884). The aiding and abetting statute at that time was 1 M. CURWIN, REVISED STATUTES OF OHIO § 6804 (1854), which read: "Whoever aids abets or procures another to commit any offense, may be prosecuted and punished as if he were the principal offender."

57. *See* notes 27-33 and accompanying text *supra*.

58. 42 Ohio St. at 150. The court made no factual inquiry into the actual probability that a killing would occur.

59. The question of intent does not appear to have been raised in these cases; it is unknown whether the jury was instructed on the question of purpose to kill, found the defendant guilty, and then had its determination upheld on review through the appellate court's acceptance of the "natural and probable consequences" theory. *See* United States v. Ross, 27 F. Cas. 899 (C.C.D.R.I. 1859) (No. 16,196); People v. Vasquez, 49 Cal. 560 (1875); People v. Pool, 27 Cal. 573 (1865); Stipp v. State, 11 Ind. 62 (1858); State v. Shelledy, 8 Iowa 477 (1859); State v. Nash, 7 Iowa 346 (1858); 1 J. BISHOP, CRIMINAL LAW § 363 (7th ed. 1882); 2 F. WHARTON, CRIMINAL LAW § 998 (7th ed. 1874).

60. *See* State v. Doty, 94 Ohio St. 258 (1916); Conrad v. State, 75 Ohio St. 52 (1906); Goins v. State, 46 Ohio St. 457 (1889); State v. Halleck, 24 Ohio App. 2d 74 (1970); State v. Laswell, 78 Ohio App. 202 (1946); State v. Rogers, 64 Ohio App. 39, 27 N.E.2d 791 (1938); State v. Strong, 12 Ohio Dec. 701 (1902); Wilson v. State, 6 Ohio L. Abs. 478 (1928). *See also* Black v. State, 103 Ohio St. 434 (1921) (defendants found guilty of manslaughter for natural and probable results of their acts). *Cf.* Woolweaver v. State, 50 Ohio St. 277 (1893) (absent a prior conspiracy or some other overt act purposely inciting one joining in a fight, each participant liable only for his own actions).

61. 11 Ohio App. 2d 142, 229 N.E.2d 76 (Summit County 1967).

62. The *Palfy* court must have found intent to be an element of the crime for an aider and abettor because in paragraph two of the syllabus it stated that "[a]n intent to kill by the aider and abettor may be found to exist beyond a reasonable doubt under such circumstances." *Id.* at 143 (syllabus 2).

held that "[a] person engaged in a common design with others to rob by force and violence various individuals of their property *is presumed to acquiesce* in whatever may be reasonably necessary to accomplish the object of the enterprise."[63]

The court in *State v. Trocodaro*,[64] however, went further to hold the intent element of first-degree murder *inapplicable* to accomplices. In *Trocodaro*, two men abducted a woman with the intent to commit robbery. The defendant discovered that he knew the woman and protested when the other man wanted to kill her. Despite an agreement to leave the victim tied up in a nearby field, the latter participant murdered her. The *Trocodaro* court, in upholding the conviction of the defendant who protested the killing, said: "Where . . . there has been found to be criminal conspiracy, *it need not be proved* that an aider and abettor also possessed those individual elements needed to establish the crime against the perpetrator of the act."[65]

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63. *Id.* (syllabus 2) (emphasis added).

64. 36 Ohio App. 2d 1, 301 N.E.2d 898 (Franklin County 1973).

65. *Id.* at 7 (emphasis added). According to W. LAFAVE & A. SCOTT, *supra* note 20, § 65, the scope of the doctrines of complicity and conspiracy is a source of continuing confusion. Although complicity and conspiracy have been considered to be coextensive in some jurisdictions, the authors consider the better view to be that " 'aiding should mean something more than the attenuated connection resulting solely from membership in a conspiracy and the objective standard of what is reasonably foreseeable.' " *Id.* at 514 (*quoting* 1 NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, Working Papers 156 (1970)).

The Ohio Revised Code recognizes conspiracy as both an independent crime and a basis for complicity liability. According to OHIO REV. CODE ANN. § 2923.01(A) (Page 1975), the state of mind for the independent conspiracy offense is defined as: "purpose to commit or to promote or facilitate the commission of aggravated murder or . . . aggravated robbery. . . ." Section 2923.01(J)(1) states that conspiracy is "[a] felony of the first degree, when one of the objects of the conspiracy is aggravated murder or murder." As further evidence that conspiracy is an independent offense, § 2923.01(G) provides that "[w]hen a person is convicted of . . . a specific offense or of complicity . . . he shall not be convicted of conspiracy involving the same offense." Yet conspiracy may also be the underlying basis for a complicity conviction. Section 2923.03(A) provides that "[n]o person, *acting with the kind of culpability required for the commission of an offense*, shall . . . (3) Conspire with another to commit the offense in violation of section 2923.01 [aggravated murder]. . . ." (emphasis added).

In a memorandum dated November 14, 1966 from the Legislative Service Commission to the Criminal Law Technical Committee (in the possession of Professor Lawrence Herman of The Ohio State University College of Law) that initially drafted the bill revising the Ohio Criminal Code, the Commission expressed the opinion that, "It might be a better solution [to the problem of the scope of accomplice accountability] to ask whether the defendant aided, abetted or solicited the offense charged, rather than relying on the broader concept of conspiracy." The draft of the complicity section approved by the Criminal Law Technical Committee contained no provision that made conspiracy a basis for accomplice liability. Minutes of the Criminal Law Technical Committee meeting, January 30, 1967 (in the possession of Professor Lawrence Herman of The Ohio State University College of Law).

The conspiracy provision was added in the legislature. In the Comments to Proposed Section 2923.03, OHIO LEGISLATIVE SERVICE COMMISSION, PROPOSED OHIO CRIMINAL CODE, 1971, the Commission stated that:

> Courts in Ohio accept the principle that involvement in a conspiracy is sufficient to charge each conspirator with acts of the principal in furtherance of the conspiracy. See, State v. Doty . . . . The courts have often noted that "those engaged in a common enterprise are each responsible for the acts of the other in pursuance of the common enterprise."

This language, however, was not incorporated into the official committee comments. *See* OHIO REV. CODE ANN. § 2923.03 Committee Comments (Page 1975).

In its 1974 revision of the Ohio Criminal Code,[66] the legislature added the phrase "acting with the kind of culpability required for the commission of an offense" to the complicity statute. This specific statutory language would appear to avoid the anomaly of allowing the conviction of a defendant for aiding and abetting aggravated murder when the defendant did not have the intent necessary to hold a principal guilty of the same offense. However, the court in *Lockett* relied heavily upon the Legislative Service Commission's Committee Comment to the complicity statute in arriving at its holding concerning defendant's intention to commit aggravated murder. The Committee Comments are dubious authority for the *Lockett* court's interpretation of the complicity statute because they do not specifically refer to the intent element of aider and abettor liability, but rather state generally that "[t]his section essentially codifies existing case law. . . ."[67] Moreover, in view of the contradictory body of case law concerning the question of intent that was in existence before the reenactment of the current criminal code, it is entirely unclear from the Committee's cryptic statement which line of cases it may have been discussing in its comment.

The *Lockett* court was equally indiscriminate in its analysis of prior case law concerning intent as a prerequisite to aider and abettor liability. In its review of the "common law," the court quoted language from *State v. Doty*,[68] a case which, like *Stephens*, ignored intent and held a conspirator[69] responsible "if the conspired unlawful act and the manner of its performance would be reasonably likely to produce death . . . ."[70] In addition, the court in *Lockett* went on to quote language from *Palfy*, in which the accomplice's intent was presumed, and from *Trocodaro*, in which intent was not considered an element of an aider and abettor's offense.[71] Since the court in *Lockett* failed to detect the distinctions between the cases upon which it ruled, it is unclear whether *Lockett* holds that intent is not required as in *Trocodaro* or whether it is to be presumed as in *Palfy*.[72]

66. *See* note 15 *supra.*

67. 49 Ohio St. 2d at 60, 358 N.E.2d at 1071. It is possible that this language refers to the acts giving rise to complicity liability rather than to the mental element.

68. 94 Ohio St. 258, 113 N.E. 811 (1916).

69. *See* note 66 *supra.*

70. 49 Ohio St. at 60-61, 358 N.E.2d at 1071.

71. *Id.* at 61-62, 358 N.E.2d at 1071-72.

72. Although there is scant difference between ignoring intent and considering it not to be required, there is a definite distinction between ignoring intent and finding that intent as a requirement for accomplice liability will be "presumed." The distinction between ignoring and presuming intent gains significance under Patterson v. New York, 432 U.S. 197 (1977). *See* text accompanying notes 128-135 *infra.* *Patterson* holds that although a state legislature is empowered with much discretion to define the elements of a crime, each element that is required must be proved beyond a reasonable doubt. *Id.* at 205-06. When a court uses a conclusive presumption, it recognizes that the element of the crime in question is indeed a requirement, but one that need not be proved in a particular case. MCCORMICK'S, *supra* note 38,

Adding to this ambiguity is the court's statement in the syllabus that "a purposeful intent to kill by the aider and abettor may be found to exist beyond a reasonable doubt"[73] and its extensive discussion, in the opinion, of the evidence presented to prove Lockett's intention to kill. Despite the court's reliance on opinions that ignore intent or hold it inapplicable, the court must have considered purpose to kill an important determinant of accomplice liability, or it would not have devoted so much of its opinion to a discussion of Lockett's intent.[74]

The result in *Lockett* is consistent with the common law theory of accomplice liability—that liability extends to the natural and probable consequences of the offense.[75] A different result for aiders and abettors should be expected, however, under Ohio law, which provides that an aider and abettor may be charged as a principal under the terms of the principal offense and subjected to the same penalty,[76] and specifically states in the complicity statute, that an aider and abettor's liability is dependent upon the same subjective intent that would be necessary to find the principal guilty. Given the Ohio statutory language, all of the elements of that principal offense should be proved for a conviction of the accused aider and abettor. It would be an anomaly indeed if less stringent standards were applied to a complicitor than a principal.

Furthermore, as noted previously,[77] "purposely" is defined in the Ohio Revised Code as a "specific intention to cause a particular result.

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§ 342. A conclusive presumption of an express statutory requirement is directly within the aegis of *Patterson* (as is a presumption that shifts the burden of persuasion to the defendant), and is therefore unconstitutional. 432 U.S. at 215. The outcome is exactly opposite, however, if the court construes the statute not to contain the requirement in question, because statutory contents are a matter of legislative discretion according to *Patterson*. *Id.* at 210.

In view of the phrasing of the Ohio complicity statute, however, it is questionable whether the court could constitutionally hold that intent is not required. In Bovie v. City of Columbia, 378 U.S. 347 (1964), the United States Supreme Court held that the retroactive application of a new construction of a statute deprived the defendants of their right to fair warning of a criminal prohibition, in violation of due process.

73. 49 Ohio St. 2d at 49, 358 N.E.2d at 1065 (syllabus 4).

74. If the court's opinion is interpreted to require that an aider and abettor's intent to commit aggravated murder must be proved, the court did not clearly indicate whether the jury is to be *required* or merely *permitted* to find purpose to kill in the presence of a common plan to commit a felony by the use of weapon likely to produce death. *Id.* at 62, 358 N.E.2d at 1072.

75. *See* text accompanying notes 51-53 *supra*.

76. OHIO REV. CODE ANN. § 2923.03 (Page 1975) provides:

(B) It is no defense to a charge under this section that no person with whom the accused was in complicity has been convicted as a principal offender.

. . .

(F) Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense.

According to the Legislative Service Commission's Committee Comments following the statute, "[a]ccomplices are liable to prosecution and punishment as principal offenders. For example, an accomplice to aggravated murder is liable to the death penalty the same as the actual murderer."

77. *See* text accompanying notes 46-58 *supra*.

. . ."[78] Yet the *Lockett* court held that evidence of reckless conduct was sufficient to prove specific intention: "Under these circumstances a killing might be *reasonably expected.*"[79] Under the Ohio Criminal Code a person "acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to be of a certain nature."[80] Negligence is defined under the Ohio Revised Code as "a substantial lapse from due care" during which a person "failed to perceive or avoid a risk that his conduct may cause a certain result. . . ."[81] Regardless whether the Ohio Supreme Court would label a killing that may be "reasonably expected" to be reckless or negligent conduct, it is obvious that the court has reduced the intent requirement for complicity in aggravated murder below the statutory definition of "purpose." Such a broad expansion of liability based on reckless behavior for a crime to which the death penalty[82] may attach directly contravenes one of the primary goals of the criminal justice system, *i.e.*, to attach the highest penalty to the most criminally culpable conduct.[83] Reckless conduct is more appropriately penalized as involuntary manslaughter[84] than as aggravated murder.

78. OHIO REV. CODE ANN. § 2901.22(A) (Page 1975) *quoted at* note 5 *supra.*

79. 49 Ohio St. 2d at 62, 358 N.E.2d at 1072.

80. OHIO REV. CODE ANN. § 2901.22(C) (Page 1975) *quoted at* note 5 *supra.*

81. *Id.* § 2901.22(D), *quoted at* note 5 *supra.*

82. Justice Stern, in his dissenting opinion, asserted that the "imposition of the death penalty . . . is both arbitrary and grossly disproportionate to the crime." 49 Ohio St. 2d at 71, 385 N.E.2d at 1077.

Whether the United States Supreme Court would hold the death penalty unconstitutional in this situation is unclear. Mr. Justice Brennan and Mr. Justice Marshall said in Furman v. Georgia, 408 U.S. 238 (1972), that the death penalty is unconstitutional under all circumstances. In the same case, Chief Justice Burger and Mr. Justice Rehnquist took the position that since the death penalty has been adjudged constitutional in the past, it is the legislature's job to decide whether it comports with modern standards of cruel and unusual punishment. The other members of the Court have preferred to decide on a case by case basis. In the decisions after *Furman*, Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffit v. Florida, 428 U.S. 242 (1976); and Gregg v. Georgia, 428 U.S. 153 (1976), it has been established that the death penalty is not invariably cruel and unusual nor is it always disproportionate to the crime for which it is imposed. But in Coker v. Georgia, 433 U.S. 584 (1977), four members of the Court (Mr. Justice White, joined by Mr. Justice Stewart, Mr. Justice Blackmun, and Mr. Justice Stevens) concluded that the death penalty for rape is grossly disproportionate and excessive. Mr. Justice Powell felt it was disproportionate because no life had been taken and the victim did not sustain serious or lasting injury. Chief Justice Burger, Mr. Justice Rehnquist, Mr. Justice Brennan and Mr. Justice Marshall reiterated their previous positions.

Although a death did occur in *Lockett*, it was not caused by the hand of Sandra Lockett. Moreover, the statutory intent requirements for both the principal and Lockett were only constructively fulfilled. Therefore, *Lockett* is a case in which the death penalty is grossly disproportionate and excessive. For a closer examination of the issues surrounding the imposition of the death penalty, *see* Comment, *The Constitutionality of Ohio's Death Penalty*, 38 OHIO ST. L.J. 617 (1977).

83. W. LAFAVE & A. SCOTT, *supra* note 20, §§ 6, 73. *See also* State v. Robbins, 8 Ohio St. 131, 179 (1857).

84. OHIO REV. CODE ANN. § 2903.04 (Page 1975) provides:

(A) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit a felony.

III. CONSTITUTIONAL ASPECTS OF THE *Lockett* OPINION

The *Lockett* court did not make it clear whether a jury would be required or merely permitted to find that the principal had the requisite intent based upon the evidence presented at trial.[85] The court was even less clear whether the complicity statute required the aider and abettor's intent to be proved and, if intent were an essential element of the offense, whether the jury would be required or permitted to find that the accomplice shared the principal's intent to kill. Because of this ambiguity, it is necessary to consider the constitutional aspects of the court's holding in light of four possible interpretations of the court's treatment of the evidence pertaining to Lockett's intent to kill. The court may have held the evidence created (1) a permissive inference, (2) a presumption that did not shift the burden of producing evidence, (3) a presumption that shifted the burden of persuasion, or (4) a conclusive presumption.

A. *Permissive Inference of Intent and Presumption That Does Not Shift the Burden of Producing Evidence*

The *Lockett* court held in the body of its opinion, that, because the evidence "established that the participants . . . entered into a common design to rob . . . by the use of force, violence and a deadly weapon," there was "sufficient evidence upon which a jury *could* find a purposeful intent to kill"[86] on the part of the principal. As to the intent of the aider and abettor, the court stated in its syllabus that "[i]f a conspired robbery . . . would be reasonably likely to produce death, each person engaged in the common design . . . is guilty . . . , and a purposeful intent to kill by the aider and abettor may be found to exist beyond a reasonable doubt. . . ."[87] One interpretation of this language is that the court was merely allowing an inference of defendant's intent based solely on the facts and circumstances of this particular case. A court makes a permissive inference when it uses ordinary reasoning to determine that sufficient evidence has been produced to satisfy the prosecutor's burden of producing evidence on an issue;[88] constitutional limitations on the use of permissive inferences have not yet been clearly and completely developed.[89]

(B) No person shall cause the death of another as a proximate result to the offender's committing or attempting to commit a misdemeanor.

(C) Whoever violates this section is guilty of involuntary manslaughter. Violation of Division (A) of this section is a felony of the first degree. Violation of Division (B) of this section is a felony of the first degree. Violation of Division (B) of this section is a felony of the third degree.

85. *See* text accompanying notes 10-19 *supra.*

86. 49 Ohio St. 2d at 60, 358 N.E.2d at 1071.

87. *Id.* at 49, 358 N.E.2d at 1065 (syllabus 4).

88. MCCORMICK'S, *supra* note 38, § 342.

89. *Id.* § 344.

The court in *Lockett* focused on a narrow but standardized set of facts that had been relied upon in prior cases to support a finding of sufficient evidence of intent.[90] Although this focus strongly suggests that the court was employing something more than a mere inference, some commentators do not consider the use of a narrow but standardized set of facts that satisfy a party's burden of producing evidence to be a presumption, but reserve that term for a device that shifts the burden of persuasion as well.[91] The exact nature of a presumption has been the source of much confusion.[92] According to Thayer, a presumption is essentially "an act or process which aids and shortens inquiry and argument. . . ."[93] In the view of Wigmore, "[a] presumption . . . is in its characteristic feature a rule of law[94] laid down by the judge, and attaching to one evidentiary fact certain *procedural consequences* as to the duty of production of other evidence by the opponent."[95] A presumption arises, in Thayer's opinion, when:

> a certain *prima facie* effect is given to particular facts, and it is not merely given to them once, by one judge, on a single occasion, but it is imputed to them habitually, and by a rule which is followed by all judges, and recommended to juries; and even laid down to juries as the binding rule of law.[96]

Whether an evidentiary device that is used to satisfy a party's burden of producing evidence is labelled a standardized inference or a presumption,[97] there are constitutional due process requirements concerning the degree of relationship between the fact established by the prosecution and the presumed fact. The United States Supreme Court has endeavored to articulate a due process standard to govern the requisite degree of relationship for federal statutory criminal presumptions.[98] These federal statutory presumptions are analogous to the *Lockett* presumptions to the extent that the court's use of a narrow

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90. *See* text accompanying notes 11-13 *supra.*

91. *See generally* McCORMICK'S, *supra* note 38, § 342. *Cf.* Laughlin, *supra* note 38, at 203 (stating that the use of a standardized set of facts is a presumption).

92. McCORMICK'S, *supra* note 38, § 342.

93. J. THAYER, *supra* note 38, at 315.

94. "By the expedient of making the rule a *prima facie* one, the courts may have seemed to themselves to abstain from legislation, and to be keeping within the region of mere administration of existing law. And yet it is clear that this is true legislation." *Id.* at 316.

95. J. WIGMORE, *supra* note 38, § 2491 at 288.

96. J. THAYER, *supra* note 38, at 316.

97. The term "presumption" will be used in this section for the sake of convenience.

98. For a discussion of these cases, *see* McCORMICK'S, *supra* note 38, § 344; Abrams, *Statutory Presumptions and the Federal Criminal Law: A Suggested Analysis*, 22 VAND. L. REV. 1135 (1969); Ashford and Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165 (1969); Hug, *Presumptions and Inferences in Criminal Law*, 56 MIL. L. REV. 81 (1972); Comment, *The Constitutionality of Statutory Criminal Presumptions*, 34 U. CHI. L. REV. 141 (1966); Note, *Criminal Presumption and Inference Instructions*, 6 WILLAMETTE L.J. 497 (1971).

but standardized fact pattern—common design to commit a felony with the use of a deadly weapon—may be interpreted by courts in subsequent cases as a rule of law to determine when evidence of intent to kill sufficient to sustain a conviction has been presented by the prosecution.

The first modern Supreme Court opinion to address the constitutional limitations on criminal presumptions was *Tot v. United States*.[99] In *Tot*, a provision of the Federal Firearms Act provided that "the possession of a firearm . . . by any . . . person who has been convicted of a crime of violence shall be presumptive evidence that such firearm was . . . received by such person in violation of this Act.[100] The Court held this presumption to be violative of due process, explaining that "a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience."[101]

In the 1965 case of *United States v. Gainey*,[102] the Supreme Court used the *Tot* "rational connection" test to uphold the statutory rule that presence at an illegal still, in the absence of explanation, could be presumptive evidence that the accused was carrying on the business of distilling without giving bond.[103] Yet in *United States v. Romano*,[104] also decided in 1965, the Court struck down the statutory presumption that the presence of an accused at an illegal still could be sufficient to prove the defendant's possession, custody, or control of the still. The Court stated that:

> Presence tells us only that the defendant was there and very likely played a part in the illicit scheme. But presence tells us nothing about what the defendant's specified function was and carries no legitimate, rational or reasonable inference that he was engaged in one of the specialized functions connected with possession, rather than in one of the supply, delivery or operational activities having nothing to do with possession.[105]

The Court in *Leary v. United States*[106] required a degree of relationship somewhat greater than rational connection between the established fact and the presumed one. The statute in *Leary* provided that unexplained possession of marijuana was presumptive evidence that the possessor knew it was illegally imported. The Court said:

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99. 319 U.S. 463 (1943).

100. 15 U.S.C. § 902(f), *repealed* Pub. L. No. 90-351, tit. IV, 82 Stat. 234 (1968).

101. 319 U.S. at 467-68.

102. 380 U.S. 63 (1965).

103. 380 U.S. at 76. Mr. Justice Black dissented, contending that a presumption deprives the defendant of his right to remain silent since he is forced to rebut the facts that are presumed. *Id.* at 87-88 (Black, J., dissenting).

104. 382 U.S. 136 (1965).

105. *Id.* at 141.

106. 395 U.S. 6 (1969).

> The upshot of *Tot*, *Gainey*, and *Romano* is, we think, that 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.[107]

In *In re Winship*,[108] the Court held 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."[109] Although *Winship* did not deal with criminal presumptions, the Court's reasoning implies that a presumed fact comprising an element of the crime must follow beyond a reasonable doubt from the established fact, because criminal presumptions relieve the prosecution of producing evidence.[110] The Supreme Court, however, has never unequivocally applied *Winship* to presumptions. The Court seemed to grapple with the effect of *Winship* in *Turner v. United States*[111] by referring several times to a "beyond a reasonable doubt" standard for criminal presumptions.[112] In *Turner* the Court dealt with a statutory provision that from possession of heroin or cocaine the jury could presume that the possessor knew the drug was imported. After an extensive review of the literature[113] the Court, upholding the presumption that the possessor must have known that heroin was imported,[114] said, "We have no reasonable doubt that at the present time heroin is not produced in this country and that therefore the heroin Turner had was smuggled heroin."[115] Nevertheless, the Court struck down this same presumption with respect to cocaine because it could not be "sufficiently sure either that the cocaine that Turner possessed came from abroad or that Turner must have known that it did."[116] The Court referred to the "beyond a reasonable doubt" standard but declined to adopt it as the constitutional standard for all criminal presumptions.

In a subsequent case, *Barnes v. United States*,[117] the Court strongly

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107. *Id.* at 36 (emphasis added).

108. 397 U.S. 358 (1970).

109. *Id.* at 364.

110. MCCORMICK'S, *supra* note 38, § 344.

111. 396 U.S. 398 (1970).

112. *Id.* at 405, 406, 408. Christie and Pye, *Presumptions and Assumptions in the Criminal Law: Another View*, 1970 DUKE L.J. 919 (1970), contend that the court adopted the "beyond a reasonable doubt" test in *Turner*.

113. In MCCORMICK'S, *supra* note 38, § 344, the authors suggest that if there are substantial empirical data in the legislative record to support a statutory presumption, the beyond a reasonable doubt test may be satisfied, and a statutory presumption based on those data should be sustained.

114. 396 U.S. at 408.

115. *Id.* at 408.

116. *Id.* at 419.

117. 412 U.S. 837 (1973).

indicated its preference for a "beyond a reasonable doubt" standard, but still declined specifically to adopt that standard. The question in *Barnes* was whether, from possession of recently stolen property, it could be presumed that the possessor knew the property had been stolen.[118] The Court, searching for the correct standard, held:

> What has been established by the cases, however, is at least this: that if a statutory inference submitted to the jury as sufficient to support conviction satisfies the reasonable-doubt standard (that is, the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt) as well as the more-likely-than-not standard, then it clearly accords with due process.[119]

The Court went on to say that "common sense and experience tell us that petitioner must have known or been aware of the high probability that the checks were stolen."[120]

The threshold requirement for the presumptions in *Lockett* is, therefore, the "more likely than not" standard. The Ohio Supreme Court held that participation in a common design to rob with the use of a weapon *likely* to produce death was sufficient evidence of the principal's intent; there was sufficient evidence of the accomplice's intent because under these circumstances a killing might "reasonably be expected."[121] The United States Supreme Court's articulated constitutional standard for presumptions appears to require a much higher degree of relationship between established and presumed fact than "likely" and "reasonably likely." Furthermore, although the Supreme Court has failed to explicitly endorse the "beyond a reasonable doubt" standard for criminal presumptions, it seems intuitively doubtful that any standard short of "beyond a reasonable doubt" should suffice when the life of the accused is at stake.

B. *Conclusive Presumptions and Presumptions That Shift The Burden of Persuasion*

In its syllabus, the *Lockett* court held that "a homicide occurring during the commission of a felony is a natural and probable consequence of the common plan which *must be* presumed to have been intended . . ."[122] by the principal. In the body of its opinion, the court held that an accomplice "*is bound* by all the consequences naturally and probably arising from the furtherance of the conspiracy to commit the robbery."[123] The court's use of the language "must be

118. *Id.* at 838.
119. *Id.* at 843.
120. *Id.* at 845.
121. 49 Ohio St. 2d at 62, 358 N.E.2d at 1072.
122. *Id.* at 48, 358 N.E.2d at 1065 (syllabus 3) (emphasis added).
123. *Id.* at 62, 358 N.E.2d at 1072 (emphasis added).

presumed" and "is bound" implies that the jury had no choice but to find that the defendant intended to commit aggravated murder. Indeed, the dissent labelled the presumption of the aider and abettor's intent a "conclusive judicial presumption."[124] A conclusive, or irrebuttable, presumption is patently unconstitutional because it would in effect deny the accused a trial by jury.[125]

Yet even when one assumes that the court in *Lockett* could not have intended a clearly unconstitutional result, the quoted language places upon the defendant an extremely high burden of proof.[126] In order to avoid conviction, the defendant bears the burden of persuading the jury of his innocence.

Two very recent Supreme Court decisions address the constitutionality of presumptions that shift the burden of persuasion to the defendant in a criminal case: *Mullaney v. Wilbur*[127] and *Patterson v. New York.*[128] The overall effect of these two opinions is to recognize broad legislative discretion to define the elements of a crime, but to require each element that the legislature, or the courts in interpreting the statute, prescribes to be proved beyond a reasonable doubt. Furthermore, the State may not employ a presumption that shifts the burden of persuasion to the defendant to prove the nonoccurrence of one of the essential elements of the crime.

The Court in *Mullaney* held that because malice aforethought was an express requirement for a conviction of murder under the Maine statute, it was a denial of due process for the trial judge to instruct the jury that malice aforethought would be implied conclusively unless the defendant proved by a fair preponderance of the evidence that he had acted in the heat of passion on sudden provocation.[129] The Court held the shifting of the burden of persuasion to be unconstitutional. It

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124. *Id.* at 70, 358 N.E.2d at 1076 (Stern, J., dissenting).

125. U.S. CONST. amend. VI provides that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . [and] to be confronted with the witnesses in his favor . . ." *See* MCCORMICK'S *supra* note 38, § 342.

A recent West Virginia Supreme Court decision, Pinkerton v. Ferr, 220 S.E.2d 682 (W. Va. 1975), lends additional support to the argument that a conclusive presumption of an essential element of aider and abettor's liability is unconstitutional. The court in *Pinkerton*, on the basis of In re Winship, 397 U.S. 358 (1970), and Mullaney v. Wilbur, 421 U.S. 684 (1975), held that a statutory presumption that the accused is guilty of conspiracy when he is proved guilty along with others of felonious assault destroys the presumption of innocence and is violative of due process under both the West Virginia and federal constitutions. *Id.* at 685.

126. *See* note 38 *supra.*

127. 421 U.S. 684 (1975). Although the Court narrowly construed the scope of the *Mullaney* opinion in Patterson v. New York, 432 U.S. 197 (1977), it nevertheless held *Mullaney* to be retroactive and reversed the petitioner's conviction in Hankerson v. North Carolina, 432 U.S. 233, 240 (1977), based upon the North Carolina Supreme Court's determination that the trial court had shifted the burden of persuasion to the defendant, contrary to *Mullaney.*

128. 432 U.S. 197 (1977).

129. Ohio has a special statute that allocates the burden of proof. OHIO REV. CODE ANN. § 2901.05 (Page 1975) provides: "(A) Every person accused of an offense is presumed

distinguished the presumption in *Mullaney* from presumptions that merely aid the prosecution to meet its burden of producing evidence, which are subject to the due process requirements established by *Barnes* and *Turner*.[130] The Court dispelled any doubt that *Mullaney* was applicable to the issue of a defendant's intent: "[Intent] may be established by adducing evidence of the factual circumstances surrounding the commission of the homicide. And although intent is typically considered a fact peculiarly within the knowledge of the defendant, this does not, as the Court has long recognized, justify shifting the burden to him."[131]

The Court in *Patterson* upheld the New York practice of burdening the defendant in a murder trial with proving the affirmative defense of extreme emotional disturbance because the prosecution was required to prove the elements of the New York murder statute—death, intent and causation—beyond a reasonable doubt without the aid of any presumptions.[132] The Court, in an opinion that explained *Mullaney* in great depth, cautioned that *Mullaney* should not be read so broadly as to prohibit a state from allowing the "blameworthiness of an act or the severity of punishment authorized for its commission to depend on the presence or absence of an identified fact without assuming the burden of proving the presence or absence of that fact, as the case may be, beyond a reasonable doubt."[133] Although this pronouncement gives state legislatures considerable leeway, the Court observed that there are constitutional limitations: "The legislature cannot 'validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt.' "[134]

The effect of *Mullaney* and *Patterson* is unmistakable. If Ohio law

innocent until proven guilty beyond a reasonable doubt, and the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affirmative defense is on the accused."

The Ohio Supreme Court in State v. Humphries, 51 Ohio St. 2d 95, 364 N.E.2d 1354 (1977) and State v. Robinson, 47 Ohio St. 2d 103, 111-12, 351 N.E.2d 88, 94 (1976), has construed this statute to mean that in order for the defendant to raise an affirmative defense, the defendant must introduce "evidence of a nature and quality sufficient to raise the issue . . . , from whatever source the evidence may come." Once the accused has done this, it then becomes incumbent on the prosecution to disprove the affirmative defense, justification, or excuse beyond a reasonable doubt.

130. 421 U.S. at 703. *See* text accompanying notes 110-122 *supra*.

131. *Id.* at 702.

132. The dissent in *Patterson* criticized the majority for taking a formalistic approach that "allows a legislature to shift, virtually at will, the burden of persuasion with respect to any factor in a criminal case, so long as it is careful not to mention the nonexistence of that factor in the statutory language that defines the crime." 432 U.S. at 223 (Powell, J., dissenting).

133. The Court's restriction of the *Mullaney* doctrine was engendered in part by law review articles that criticized the broad ramifications of *Mullaney*. *See, e.g.*, Comment, *Unburdening the Criminal Defendant:* Mullaney v. Wilbur *and the Reasonable Doubt Standard*, 11 HARV. C.R.—C.L. L. REV. 390 (1976); Note, *Affirmative Defenses in Ohio after* Mullaney v. Wilbur, 36 OHIO ST. L.J. 828 (1975).

134. 432 U.S. at 210 (citations omitted).

requires specific intent to kill, then the state must prove that intent beyond a reasonable doubt and may not shift the burden of persuasion to the defendant. The Ohio aggravated murder statute expressly requires purpose, defined as a specific intent to kill, and the courts have held purpose to be an express requirement for conviction of the principal.[135] The Ohio complicity statute specifies "culpability required for the commission of an offense," but it is unclear whether the court in *Lockett* held specific intention to kill to be an express requirement for a complicitor.[136] If the Ohio courts interpret the complicity statute to require intent, yet at the same time permit this requirement to be satisfied by invoking the doctrine that an aider and abettor is bound by all the consequences, then the result in *Lockett* is clearly unconstitutional on the basis of *Mullaney* and *Patterson*.[137]

IV. CONCLUSION

Although intent of both principal and complicitor to kill is apparently a statutory prerequisite in Ohio to liability for aiding and abetting aggravated murder, the state was able to prove those intentions in *Lockett* only by the use of an evidentiary device. The ambiguous language of the *Lockett* opinion lends itself to four possible interpretations of the court's treatment of the evidence of intent to kill: the court might have held that the evidence created (1) a permissive inference, (2) a presumption that did not shift the burden of proof, (3) a presumption that shifted the burden of proof, or (4) a conclusive presumption. Although the use of a permissive inference is a commonplace and indispensable tool of the reasoning process, the use of presumptions in criminal cases requires extreme care, particularly when the presumption assists the prosecution to obtain conviction of a crime for which the accused is subject to the death penalty.[138] The interest of society is scarcely served by convictions that carry penalties disproportionate to the seriousness of criminal acts committed.[139] To

135. *See* section II.A *supra*.

136. *See* section II.B *supra*.

137. The United States Supreme Court could decide that the Ohio statute, as interpreted by the Ohio Supreme Court, does not really require intent. In order to reach this conclusion, however, the Court would have to ignore the plain language of the statute. Even were the Court to accept this construction, there would still be a possible violation of due process in its retroactive application. *See* Bovie v. City of Columbia, 378 U.S. 347 (1964).

138. For the statutory provision for imposition of the death penalty, see note 8 *supra*. For an interesting policy analysis of the utilization of the death penalty in *Lockett*, see Black, *The Death Penalty Now*, 51 TUL. L. REV. 430 (1977).

139. The drafters of THE MODEL PENAL CODE § 2.04(4) Comment (Tent. Draft No. 1, 1953) stated:

> If the homicidal act was a means to committing or facilitating the robbery, accomplices in the robbery are accomplices in that act under ¶ 3. If, further the intention to commit a robbery suffices to make homicide a murder, as that crime is legally defined, all accomplices in the robbery would be guilty of murder. But should the definition of murder be altered to demand intent to kill, accomplices could not be held unless they shared

discard the *Lockett* presumptions would not hinder aggravated murder convictions in cases in which the aider and abettor may indeed have shared the principal's intention to kill. Without these presumptions the prosecution could reasonably be required to produce objective, circumstantial evidence from which it may be inferred beyond a reasonable doubt that the accused had the requisite, subjective intent.

The state should try the accused for the crime requiring the state of mind that the accused did possess. The *Lockett* dissent expressed the view that Sandra Lockett might have been guilty of involuntary manslaughter under the Ohio statute. Given the striking disparity in penalties between aggravated murder and involuntary manslaughter, the courts should be extremely reluctant to use presumptions to extend liability for aggravated murder. A defendant convicted of aggravated murder with specifications may be sentenced to death unless he or she can prove by a preponderance of the evidence that there are mitigating circumstances that justify nonimposition of the death penalty.[140] By comparison, a person convicted of involuntary manslaughter may be sentenced to a maximum term of twenty-five years.[141]

Proof beyond a reasonable doubt of a specific intention to kill does indeed entail more work for the prosecution. Yet a civilized society most certainly has a duty to ensure that only persons whose conduct is clearly proscribed by the statute are convicted of a crime for which death is a possible punishment.[142]

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the purpose. Moreover, if homicidal act was not a means to the commission of the robbery—as if one party shoots an enemy in satisfaction of a merely private grudge—complicity in robbery would not imply complicity in murder, because it did not comprehend the causative behavior.

140. OHIO REV. CODE ANN. § 2929.04 (Page 1975), *quoted at* note 8 *supra.*

141. *Id.* § 2929.11(B)(1) (Page 1975). The Court in *Mullaney* noted the great disparity in sentences between murder and manslaughter. 421 U.S. at 703-04.

142. As this issue was going to press, the United States Supreme Court in Lockett v. Ohio, 46 U.S.L.W. 4981 (U.S. July 27, 1978) held Ohio's death penalty statute to be unconstitutional.