Affimative Criminal Defenses—The Reasonable Doubt Rule in the Aftermath of *Patterson vs. New York*

I. INTRODUCTION

In *In re Winship*[1] the United States Supreme Court explicitly held that the due process clause of the fourteenth amendment[2] protects each person accused of a crime against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[3] The Court noted the importance of this reasonable doubt rule, saying:

> The reasonable doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law."[4]

Because the reasonable doubt rule specifies the allocation of the burden of persuasion[5] on the issues to which it applies, it limits the inherent sovereign power[6] of state legislatures to regulate criminal procedure in their own courts. The task has fallen to the United States Supreme Court, as a matter of constitutional interpretation, to alleviate the tension between the reasonable doubt rule and traditional concepts of state autonomy by establishing the analytical framework for determining the issues of fact to which the reasonable doubt rule applies.[7] The case of *Patterson v. New York*[8] is the Court's most recent statement of the analysis to be used in future cases.

This Case Comment will first discuss the analytical framework used by the Court in *Patterson* to determine the applicability of the reasonable

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1. 397 U.S. 358 (1970).

2. U.S. CONST. amend. XIV.

3. 397 U.S. at 364.

4. *Id.* at 363.

5. The burden of persuasion, also known as the risk of non-persuasion, is one component of what is commonly referred to as the burden of proof. The burden of persuasion comes into play only upon submission of the case to the factfinder at the close of all of the evidence. It specifies the degree of certainty the factfinder must have in order to find in favor of the burdened party. Under the burden of persuasion imposed by the reasonable doubt rule the factfinder is instructed to find in favor of the accused unless convinced beyond a reasonable doubt of the truth of the state's assertions. *See* MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE §§ 336, 341 (2d ed. 1972) [hereinafter cited as MCCORMICK'S].

6. Snyder v. Massachusetts, 291 U.S. 97 (1934). *See* text accompanying note 83 *infra.*

7. *See, e.g.*, Mullaney v. Wilbur, 421 U.S. 684 (1975); Leland v. Oregon, 343 U.S. 790 (1952).

8. 432 U.S. 197 (1977) (White, J., writing for the Court, joined by Burger, C.J., and Stewart, Blackmun, and Stevens, JJ. Powell, J., filed a dissenting opinion in which Brennan and Marshall, JJ., joined. Rehnquist, J. took no part in the decision).

doubt rule to particular issues. An examination will follow of the effects of the *Patterson* decision upon courts, legislatures, and those accused of crimes. The rationale used by the Court to justify its approach will be presented and criticized in light of prior cases and countervailing policy considerations. Finally, the outlines of a possible alternative to the *Patterson* approach will be considered.

II. THE *Patterson* DECISION: FACTS AND HOLDING

On December 27, 1970, after borrowing a rifle from an acquaintance, Gordon Patterson went to the residence of his father-in-law. Through a window he saw his estranged wife in a state of semi-undress in the presence of John Northrup, a neighbor to whom she had once been engaged and who she had resumed dating. Patterson entered the house and shot Northrup twice in the head, killing him.

Patterson was charged with second-degree murder. Under New York law a person is guilty of this offense when "with intent to cause the death of another person, he causes the death of such person or of a third person."[9] New York statutorily recognizes as an affirmative defense to this crime that the accused acted "under the influence of extreme emotional disturbance for which there was reasonable justification or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be."[10] This defense must be proved by the defendant by a preponderance of the evidence.[11] The defendant who successfully proves this defense is nevertheless subject to a conviction for manslaughter if it is shown that he intentionally killed another person "under circumstances which do not constitute murder because he acted under the influence of extreme emotional disturbance."[12]

The jury at Patterson's trial was instructed that the state bore the burden of proving beyond a reasonable doubt that the defendant had intentionally killed a human being and that the defendant bore the burden of proving by a preponderance of the evidence the facts supporting the defense of extreme emotional disturbance. Patterson failed in his attempt to prove the defense and was found guilty of murder. His conviction was affirmed by the New York Supreme Court, Appellate Division[13] and again by the Court of Appeals of New York.[14]

In *Patterson v. New York* the United States Supreme Court was asked to decide whether the New York practice of allocating to the defendant the

9. N.Y. PENAL LAW § 125.25(1) (McKinney 1975).
10. *Id.* § 125.25(1)(a).
11. *Id.* § 25.00(2).
12. *Id.* § 125.20(2).
13. People v. Patterson, 4 App. Div. 2d 1028, 344 N.Y.S.2d 836 (1973).
14. People v. Patterson, 39 N.Y.2d 288, 383 N.Y.S.2d 573 (1976).

burden of persuasion on the affirmative defense of extreme emotional disturbance violated the reasonable doubt rule embodied in the due process clause of the fourteenth amendment. The Court defined the scope of the reasonable doubt rule by holding that "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements *included in the definition of the offense* of which the defendant is charged."[15] The rule, however, does not extend to "every fact . . . which [the state] is willing to recognize as an exculpatory or mitigating circumstance affecting the degree of culpability or the severity of the punishment."[16] Since the New York legislature chose to include as elements in the statutory definition of murder only the death of a human being, causation of that death by the defendant, and an intent on the part of the defendant to kill some person, these were the only facts that the state was required to prove.[17] Contrary to the defendant's assertion, the state was not required to prove the absence of extreme emotional disturbance. Otherwise stated, the reasonable doubt rule, after *Patterson*, applies only to those facts the state legislature has deemed important enough to include in the definition of the offense.

The *Patterson* Court distinguished but did not overrule[18] its earlier holding in *Mullaney v. Wilbur*,[19] in which it had invalidated on due process grounds a Maine judicial practice that placed on a person accused of murder the burden of persuasion on the defense of heat of passion upon sudden provocation, a defense very similar to the New York defense of extreme emotional disturbance. By leaving the narrow holding of *Mullaney* intact, the *Patterson* Court provided a reference point useful in understanding the import of the *Patterson* analysis. Since Maine's "heat of passion" defense is subject to the reasonable doubt rule while New York's "extreme emotional disturbance" defense is not, comparison of the two defenses will facilitate an assessment of *Patterson's* impact and logic.

III. THE *Patterson* APPROACH AND ITS PRACTICAL EFFECTS

A. *Comparison of the Maine and New York Defenses*

The Maine defense of heat of passion and the New York defense of extreme emotional disturbance share a common ancestry. They are not distinguishable on the basis of the functions they serve, nor do they involve proof of significantly different states of mind. The two defenses differ

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15. 432 U.S. at 210 (emphasis added).

16. *Id.* at 207.

17. *Id.* at 205-06.

18. 432 U.S. at 212-16. For the manner in which the *Patterson* opinion distinguished the *Mullaney* opinion, see text accompanying notes 80-82 *infra*.

19. 421 U.S. 684 (1975).

significantly only in the textual devices by which the burden of persuasion on each is allocated.

Both defenses trace their roots to the common-law offense of felonious homicide, which was subdivided into murder and manslaughter. Murder was punishable by death but manslaughter carried a lesser penalty.[20] The distinguishing factor between murder and manslaughter was the existence of malice aforethought.[21] An unlawful killing committed with malice aforethought was murder; an unlawful killing without malice aforethought was manslaughter.

"Malice aforethought" is a term of art having little to do with the generally understood meaning of "malice" or of "forethought." A modern author has defined it as "an unjustifiable, inexcusable and unmitigated man-endangering-state-of-mind."[22] Positive and negative elements must both be proved before malice aforethought is established. The positive element is the presence of a "man-endangering-state-of-mind." The negative element is the absence of justification, excuse or mitigation. At common law, once the fact of a killing was established, malice was presumed. The burdens of production and persuasion were on the accused on the issues of justification, excuse, or mitigation.[23]

"Heat of passion" refers to a particular state of mind, the existence of which was recognized as a circumstance of mitigation. It can generally be described as a temporary mental disturbance, suddenly arising[24] due to reasonable provocation[25] that "render[s] one's mind for time being deaf to reason."[26] A person acting in the heat of passion cannot be acting with malice aforethought since proof of heat of passion disproves the requisite negative element and reduces the crime of murder to manslaughter.

Maine, at the time of Mullaney's conviction,[27] retained the common-law scheme in its law of homicide. Murder was statutorily defined as an unlawful killing of a human being "with malice aforethought, either express or implied."[28] Manslaughter included, by statutory definition, an unlawful killing "in the heat of passion upon sudden provocation, without express or implied malice aforethought."[29] The offenses of murder and

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20. 2 F. POLLACK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 484-88 (2d ed. 1898). *See also* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 67 (1972).

21. 4 W. BLACKSTONE, COMMENTARIES *198. *See also* W. LAFAVE & A. SCOTT, *supra* note 20, § 67.

22. Perkins, *A Re-examination of Malice Aforethought*, 43 YALE L.J. 537, 568-69 (1934).

23. 4 W. BLACKSTONE, *supra* note 21, at *201. *See also* W. LAFAVE & A. SCOTT, *supra* note 20, § 68.

24. People v. Ashland, 20 Cal. App. 168, 128 P. 798, 802 (1912).

25. People v. Wells, 10 Cal. 2d 610, 76 P.2d 493 (1938).

26. Balthazor v. State, 207 Wis. 172, 240 N.W. 776 (1932).

27. The Maine law of homicide has been substantially revised, effective May 1, 1977. 17-A ME. REV. STAT. ANN. §§ 201-06 (West Supp. 1977).

28. 17 ME. REV. STAT. ANN. § 2651 (1964).

29. *Id.* § 2551.

manslaughter had been judicially interpreted to be degrees of the single crime of felonious homicide rather than separate crimes.[30] Once the prosecution had proved the elements of felonious homicide, *i.e.*, intentional, unjustifiable, and inexcusable homicide, a "policy presumption" arose, and the defendant would be convicted of murder, the more serious offense, unless he could prove the existence of heat of passion.[31] This presumption of malice did not relate to the guilt or innocence of the accused, but served to allocate the burden of persuasion on the "reductive factor" of heat of passion.[32] Proof by the accused by a preponderance of the evidence that the felonious homicide occurred in the heat of passion upon sudden provocation would rebut the presumption of malice and reduce the degree of the homicide to manslaughter.[33]

The New York scheme under which Patterson was convicted distinguishes murder from manslaughter somewhat differently.[34] New York statutorily defines as second-degree murder the actions of the accused when "with intent to cause the death of another person, he causes the death of such person or of a third person."[35] The statutory text includes an affirmative defense of extreme emotional disturbance,[36] which, if proved by the defendant, reduces a charge of murder to manslaughter.[37]

The Maine and New York defenses differ in their use of the terms "heat of passion" and "extreme emotional disturbance" respectively. A look at the legislative history of the New York defense dispels any notion that the New York legislature, by adopting the phrase "extreme emotional disturbance" intended to diverge significantly from the substance of the common-law concept. New York, in an earlier version of its manslaughter statute had used the term "heat of passion" in a context foreign to the common-law crime of manslaughter.[38] The staff of the State Commission on Revision of the Penal and Criminal Code, in redrafting the existing New York offense, sought to replace it with "the traditional crime embracing the principle of mitigation."[39] In the process the Commission abandoned the term "heat of passion" in favor of the "extreme emotional disturbance" language found in the Model Penal Code[40] because it

30. State v. Wilbur, 278 A.2d 139, 144 (Me. 1971).

31. *Id.* at 146; State v. Neal, 37 Me. 468, 470 (1854).

32. State v. Wilbur, 278 A.2d 139, 146 (Me. 1971).

33. Under Maine practice, as a matter of judicial custom, the jury was instructed on manslaughter as well as murder and given the option to find the defendant guilty of the lesser offense. State v. Park, 159 Me. 328, 193 A.2d 1 (1963).

34. *See* text accompanying notes 9-12 *supra*.

35. N.Y. PENAL LAW § 125.25 (McKinney 1975).

36. *Id.* § 125.25(2).

37. *Id.* § 125.20(2).

38. *Id.* §§ 1050, 1052 (McKinney 1944).

39. N.Y. STATE COMMISSION ON REVISION OF THE PENAL AND CRIMINAL CODE, PROPOSED NEW YORK PENAL LAW, Commission Staff Notes § 130.20 (1964) [hereinafter cited as PROPOSED PENAL LAW].

40. MODEL PENAL CODE § 210.3(b) (Tent. Draft No. 9, 1959).

considered the new language superior "both in terms of logic and general fairness."[41]

The Model Penal Code concept of extreme emotional disturbance is substantively very similar to the common-law concept of heat of passion. Both terms refer to particular mitigating states of mind. The concept of extreme emotional disturbance, however, is applicable in a somewhat greater range of cases because certain restrictions that had been imposed on the common-law concept were discarded by the drafters of the Model Penal Code.[42] The common-law defense was generally available only when the actor's turbulent state of mind had been provoked by an injury, injustice, or affront perpetrated by the deceased.[43] The Model Penal Code concept is not so limited in terms of the source of the provocation.[44] Second, the common law contained rules regarding the sufficiency of particular forms of provocation; for example, the rule that words alone were never enough.[45] The Model Penal Code discards these hard and fast rules and adopts instead an approach looking to all of the circumstances of the case.[46] Finally, the common-law concept was based upon an objective standard of the reasonableness of the provocation.[47] The test was generally whether a reasonable person would have acted as the defendant did. The Model Penal Code prescribes a more subjective standard that takes into account differences in individual temperament.[48]

Thus, the Model Penal Code concept of extreme emotional disturbance, and the New York defense that embodies it, are very similar to the common-law concept of heat of passion adopted by Maine. As noted by Justice Powell in his dissent in *Patterson*, "extreme emotional disturbance is simply a 'new formulation' for the traditional language of heat of passion."[49] Inclusion of these similar defenses in the laws of Maine and of New York indicates that both states have decided to decrease the punishment imposed upon the defendant who kills while in a state of emotional turbulence. The function of both the Maine and New York defenses is to separate out those defendants whose conduct justifies greater punishment from those whose conduct justifies only a lesser punishment.

The Maine and New York defenses, identical in function and very similar in content, differ, however, in the textual devices used to allocate

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41. PROPOSED PENAL LAW, *supra* note 41.

42. MODEL PENAL CODE § 210.3, Comment (Tent. Draft No. 9, 1959).

43. *E.g.*, State v. Seaton, 106 Mo. 198, 17 S.W. 169 (1891).

44. MODEL PENAL CODE § 210.3, Comment (Tent. Draft No. 9, 1959).

45. 4 W. BLACKSTONE, *supra* note 212, at *200. *See also* W. LAFAVE & A. SCOTT, *supra* note 20, § 69.

46. MODEL PENAL CODE § 210.3, Comment (Tent. Draft No. 9, 1959).

47. *E.g.*, People v. Danielly, 33 Cal. 2d 362, 202 P.2d 18 (1949).

48. MODEL PENAL CODE § 210.3, Comment (Tent. Draft No. 9, 1959).

49. 432 U.S. at 220 (Powell, J., dissenting).

the burden of persuasion on each defense to the defendant. Maine used a presumption of malice and required the defendant to rebut that presumption by proving that he acted in the heat of passion. The words "malice aforethought" appeared in the statutory definition of murder. New York, on the other hand, allocated the burden of persuasion on the defense of extreme emotional disturbance to the defendant through the device of an affirmative defense. No term inconsistent with extreme emotional disturbance appeared in the text of the statutory definition of murder. It was this difference in the text of the statute that the *Patterson* Court found significant.[50] Maine's constitutional error consisted in "shifting the burden of persuasion with respect to a fact which the state deem[ed] so important that it must be either proved or presumed."[51]

B. *Criticism of the* Patterson *Approach: Practical Effects*

The *Patterson* opinion determines the applicability of the reasonable doubt rule on the basis of a very formalistic analysis.[52] Under the *Patterson* rationale the reasonable doubt rule applies only to "ingredients" of an offense.[53] Ingredients of crimes are whatever the state legislatures decide to include in the statutory definition. The Court's approach "requires only that the most basic procedural safeguards be observed: more subtle balancing of society's interests against those of the accused has been left to the legislative branch."[54]

State legislatures can comply with the basic procedural safeguards outlined in *Patterson* without alleviating onerous burden of persuasion allocations on particular issues. Assume, for purposes of demonstration, that two hypothetical states revise their criminal codes after *Patterson*. State *A* defines murder as an intentional killing in the absence of extreme emotional disturbance and assumes the burden of persuasion on the issue of extreme emotional disturbance. State *B* defines murder as an intentional killing and includes an affirmative defense that the defendant acted while under the influence of extreme emotional disturbance. The burden of persuasion on the affirmative defense is on the defendant in state *B*. Both states have demonstrated a willingness to mitigate the severity of punishment in cases of extreme emotional disturbance but only state *A* has committed itself to bear the risk of error in factfinding on this issue. State *B* has avoided this commitment through its choice of language. *Patterson* allows it to do so.

The *Patterson* rationale drains the reasonable doubt rule of any

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50. *Id.* at 214.

51. *Id.* at 215.

52. Justice Powell in his dissent to *Patterson* found the majority's rationale "indefensibly formalistic." *Id.* at 224 (Powell, J., dissenting).

53. *Id.* at 215.

54. *Id.* at 210.

power it had to specify which of the substantive issues of fact arising in a criminal case should be proved by the state as part of its burden. At present, the rule does not regulate the issues the defendant can be required to prove; it only regulates the textual devices by which the burden of persuasion may be allocated by the states.

The formalism of the analysis gives rise to fears that state legislatures will abuse their power by eliminating some of the traditionally recognized ingredients of crimes and requiring the defendant to negate those ingredients by means of affirmative defenses. As safeguards against this danger, the Court pointed only to the past record of legislative restraint and to a few limitations developed in prior cases dealing with the constitutionality of legislative presumptions.[55] Given that state legislatures are free to define crimes as they will, these protections against being declared "presumptively guilty of a crime" and against "presumption of all facts necessary to guilt" are reduced to mere platitudes. The *Patterson* opinion leaves a void in which the exercise of state autonomy in the area of criminal procedure is virtually unrestrained by constitutional limitations.[56]

To the person who trusts the state legislatures to shoulder the task of balancing the interest of the accused against the interests of society this void will pose no problem. The person who believes that the Constitution requires judicial supervision over this power of the state, however, will have some cause for alarm. Whether or not the legislatures can be trusted with this task is open to question. Legislators may perceive an economic benefit in reducing the number of issues the prosecution must investigate, present, and prove. Legislators are also exposed to the pressures of public opinion—the recurring outcries for reduction of crime —that are frequently characterized by a lack of concern for the rights of those accused of perpetrating crimes. These institutional considerations indicate that the courts should have the opportunity to review the balance struck in the legislature. Nevertheless, the *Patterson* Court, convinced by arguments for state autonomy, chose to leave the balancing solely in the hands of the legislatures. The adequacy of these arguments is examined in the next section.

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55. *Id.* at 211 n.12.

56. Several cases interpreting the eighth amendment prohibition against cruel and unusual punishment suggest limits to the legislatures' ability to eliminate "ingredients" of crimes. The Supreme Court has indicated that there cannot be criminal liability when the accused has not been shown to have committed an act. Robinson v. California, 370 U.S. 660 (1962). Thus, states cannot redefine crimes to allow conviction merely upon proof that the accused holds a particular status. Another case indicates that the punishment provided by a statute cannot be grossly disproportionate to the nature of the offense defined. Weems v. United States, 217 U.S. 349 (1910). Professor Ronald Allen argues that the *Patterson* Court's reasoning implicitly adopts the eighth amendment requirement of proportionality as a limit upon the power of the state legislature to eliminate traditional elements from the statutory definitions of crimes. Allen, *The Restoration of* In re Winship: *A Comment on Burdens of Persuasion in Criminal Cases after* Patterson v. New York, 76 MICH. L. REV. 30, 51-53 (1977). This interpretation is not supported by the text of the opinion. As Professor Allen admitted, *id.* at 53, neither the eighth amendment nor the concept of proportionality is mentioned in *Patterson.*

IV. THE THEORETICAL JUSTIFICATIONS FOR THE *Patterson* ANALYSIS

The *Patterson* majority used both precedent and policy to justify its decision to favor the concept of state autonomy over the reasonable doubt rule. Each of the justifications offered is vulnerable to criticism.

A. *The Argument From Precedent*

To reconcile its holding with prior decisions the Court in *Patterson* had to deal with two lines of cases. One line develops the reasonable doubt rule and indicates that the rule might limit the substantive issues on which the states could allocate the burden of persuasion to the defendant. The second line establishes and clarifies the recognized prerogative of the state legislatures, in drafting their criminal laws, to allocate to the defendant the burden of persuasion on certain issues. The *Patterson* decision purports to be consistent with both of these lines of cases.

An early application of the reasonable doubt rule is found in *Davis v. United States*,[57] a federal prosecution for murder[58] in which the defendant attempted to establish the defense of insanity. The trial court had instructed the jury that there was a presumption of sanity and that in order to prevail on his defense, the accused would have to carry the burden of persuasion on the issue of insanity. The Supreme Court held that

> [n]o man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences to say that the evidence before them, by whomsoever adduced, is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged.[59]

The Court found that the crime of murder necessarily involves the possession by the accused of such mental capacity as will render him criminally responsible for his acts.[60] Insanity, however, would negate the existence of the required mental capacity.[61] Thus, the Court said, if the evidence did not exclude beyond a reasonable doubt the hypothesis of insanity, the guilt of the accused could not be said to have been proved beyond a reasonable doubt.[62]

The *Davis* holding was not based on the Court's reading of any

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57. 160 U.S. 469 (1895).

58. The case fell within the federal criminal jurisdiction because the killing took place in Indian territory. *Id.* at 474.

59. *Id.* at 493.

60. *Id.* at 485.

61. Insanity constitutes an excusing circumstance under the law of Maine. If insanity is present, an unjustifiable, inexcusable, and unmitigated man-endangering-state-of-mind does not exist. *See* text accompanying notes 22-23 *supra*.

62. 160 U.S. at 488.

constitutional provision.[63] Not until *In re Winship*[64] was the reasonable doubt rule explicitly held to be among the essentials of due process and fair treatment required by the fourteenth amendment.

Winship discussed the important interests served by the reasonable doubt rule. The Court noted:

> The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. . . .
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> Moreover, use of the reasonable doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent people are being condemned.[65]

Winship discussed the mechanism by which the reasonable doubt rule served these interests. The Court quoted an earlier first amendment case in which it had said:

> There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—the margin of error is reduced as to him by the process of placing on the other party the burden . . . of persuading the factfinder at the conclusion of his trial of his guilt beyond a reasonable doubt.[66]

Thus, the purpose of the reasonable doubt rule, as elucidated in *Winship*, is to protect the interests of the accused by reducing the risk of an erroneous conviction. The rule is indispensable because it "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts at issue."[67]

The *Winship* opinion did not elaborate on the applicability of the reasonable doubt rule to specific factual issues.[68] The Court said simply that the rule was applicable to "every fact necessary to constitute the crime with which the accused is charged."[69]

Mullaney v. Wilbur[70] presented the question whether the reasonable doubt rule applied to the specific issue presented by the heat of passion

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63. The nonconstitutional basis of *Davis* was pointed out by the Court in Leland v. Oregon, 343 U.S. 790, 797 (1952).

64. 397 U.S. 358, 364 (1970), discussed at text accompanying notes 1-4 *supra*. *Winship* specifically held that a state must prove juvenile delinquency beyond a reasonable doubt.

65. *Id.* at 363-64.

66. *Id.* at 364 (*quoting* Speiser v. Randall, 357 U.S. 513, 525-26 (1958)).

67. 397 U.S. at 364.

68. Such elaboration was unnecessary in *Winship* because the state had, by statute, lowered the prosecution's burden of persuasion on all of the issues in the case to proof by a preponderance of the evidence rather than allocating the burden of persuasion to the defendant on a particular issue.

69. 397 U.S. at 364.

70. 421 U.S. 684 (1975).

defense.[71] In deciding the question the Court developed an analytical framework that had important and potentially wide-ranging effects. In holding that the reasonable doubt rule applied to the heat of passion defense the *Mullaney* Court indicated that it was taking a broad view of the scope of the rule. The Court accepted the statement of the Maine Supreme Judicial Court that the defense did not relate to the guilt or innocence of the accused, but only to the degree of the offense.[72] The Supreme Court refused, however, to limit the scope of the rule to "those facts which, if not proved, would wholly exonerate the defendant."[73] The rule applied, the Court indicated, to issues that determine the degree of the defendant's culpability as well as those that determine his guilt or innocence.

The analysis employed by the Court in *Mullaney* looked "to the operation and effect of the law is applied and enforced by the state . . . and to the interests of both the state and the defendant as affected by the allocation of the burden of proof."[74] The Court found that both the defendant's interests and the state's interests were substantially affected by Maine's practice on the heat of passion defense. The defendant was subjected to the risk of significantly greater punishment[75] and substantially increased stigma upon conviction. The state risked potential erosion of public confidence in the reliability of jury verdicts. Because the operation of the heat of passion defense affected these important interests, the Court found it necessary to hold the defense subject to the restrictions of the reasonable doubt rule.[76]

The implication of the *Winship* and *Mullaney* cases is that the reasonable doubt rule might be applicable to a very broad range of issues.[77] The *Mullaney* analysis contemplates an active role for the courts in reviewing the operative effects of the substantive issues arising in criminal cases. The weighing of society's interests against those of the accused is not left solely to the legislatures.

In reconciling its holding in *Patterson* with *Winship* and *Mullaney* the Court distinguished *Mullaney* in a way that severely limited *Mullaney*'s implications. *Patterson* specifically denied that *Mullaney* had held that:

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71. *See* text accompanying note 19 *supra.*

72. 421 U.S. at 691.

73. *Id.* at 697-98.

74. *Id.* at 699.

75. Manslaughter was punishable by a fine of not more than $1000 or by imprisonment for not more than 20 years. 17 ME. REV. STAT. ANN. § 2551 (1964). Murder, on the other hand, was punishable by life imprisonment. *Id.* § 2651 (1964).

76. 421 U.S. at 700-01.

77. *See* Comment, *Unburdening the Criminal Defendant:* Mullaney v. Wilbur *and the Reasonable Doubt Standard,* 11 HARV. C.R.-C.I. REV. 390 (1976); Note, *Affirmative Defenses After* Mullaney v. Wilbur: *New York's Extreme Emotional Disturbance,* 43 BROOKLYN L. REV. 171 (1976); Note, *Affirmative Defenses in Ohio After* Mullaney v. Wilbur, 36 OHIO ST. L.J. 828 (1975).

> the state may not permit 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 might be, beyond a reasonable doubt.[78]

Instead, the *Patterson* opinion interpreted *Mullaney* to hold only that "a state must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense."[79]

The *Patterson* treatment of *Mullaney* is somewhat disingenuous, as Justice Powell, the author of *Mullaney*, noted in his dissent in *Patterson*.[80] *Patterson* focuses solely on the elements the legislature has included in the definition of the crime, but *Mullaney* had specifically rejected any such formalistic interpretation of the scope of the reasonable doubt rule, stating: "*Winship* is concerned with substance rather than this kind of formalism."[81] Indeed, the Court's opinion in *Mullaney* proceeded on the assumption that malice, the fact presumed, was not an element of the crime.[82] Nowhere in *Patterson* is there any discussion of the factors, so critical in *Mullaney*, of the increased punishment and stigma Patterson would face if he could not prove extreme emotional disturbance. Little of the *Mullaney* rationale survives the interpretation given to it in *Patterson*. One suspects that had *Mullaney* not been a recent and unanimous decision, the *Patterson* Court might have proceeded more forthrightly to overrule it.

The *Patterson* analysis finds greater support in the line of cases affirming the concept of state legislative autonomy. State legislative power has long been recognized to include the power to allocate the burden of persuasion. As stated in *Speiser v. Randall*:

> It is of course within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion, "unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[83]

The concept of state autonomy also finds recognition in *Leland v. Oregon*.[84] In *Leland*, the Supreme Court was called upon to decide whether an Oregon statute that required the accused, on a plea of insanity, to establish that defense beyond a reasonable doubt violated the due process clause of the fourteenth amendment. In a seven to two decision

78. 432 U.S. at 214.

79. *Id.* at 215.

80. *Id.* at 216-25 (Powell, J., dissenting).

81. 421 U.S. 684, 699 (1975).

82. *See* text accompanying notes 72-76 *supra*.

83. 357 U.S. 513, 523 (1958) (*quoted in* Patterson v. New York, 432 U.S. at 201-02). *Accord* Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

84. 343 U.S. 790 (1952).

the Court upheld the statute, saying: "We are . . . reluctant to interfere with Oregon's determination of its policy since we cannot say that policy violates generally accepted concepts of basic standards of justice."[85] *Leland*, unlike *Winship* and *Mullaney*, specifically recognizes the power of the state to allocate to the defendant the burden of persuasion on at least some issues. As the Court realized,[86] *Leland* provides strong support for the position taken in *Patterson*.

B. *The Policy Arguments*

In addition to its argument from precedent the Court in *Patterson* offered three policy justifications for its decision to favor the concept of state autonomy over the reasonable doubt rule: (1) a "historical" argument based on the common-law allocation of the burden of persuasion on the heat of passion defense; (2) a "legislative grace" argument based on the idea that the power of the state legislatures to refuse to recognize a mitigating circumstance carries with it the "lesser" power to condition recognition upon assumption by the defendant of the burden of persuasion on the issue; and (3) a "social cost" argument based on the assumption that state legislators would be less willing to recognize mitigating circumstances if the state were forced to assume the burden of persuasion on those issues. Consideration of these justifications, however, reveals that they are less than compelling.

In upholding New York's affirmative defense, the Court found it relevant that the burden of persuasion on the heat of passion defense was upon the defendant both at common law and in American law when the fifth and fourteenth amendments were ratified.[87] Such reference to historical practices in the determination of the constitutional validity of a current practice is a recognized method of constitutional interpretation,[88] but one that should not be conclusive of the scope of constitutional protections: "Undoubtedly the range of a constitutional provision case in terms of the common law sometimes may be fixed by recourse to the applicable rules of that law. But the doctrine which justifies such recourse, like the other canons of construction must yield to more compelling reasons wherever they exist."[89]

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85. *Id.* at 799. Although *Leland* predated *Winship* and *Mullaney* the Supreme Court has since indicated that the decision remains valid. In Rivera v. Delaware, 429 U.S. 877, over the dissents of Justices Brennan and Marshall, the Court dismissed for want of a substantial federal question a challenge to a Delaware statute that required the defendant to assume the burden of persuasion by a preponderance of the evidence on the defense of insanity. As noted by the dissent in *Rivera*, 429 U.S. at 880 (Brennan and Marshall, JJ., dissenting), summary dismissal of such an appeal is a decision on the merits and has value as precedent. Hicks v. Miranda, 422 U.S. 332, 343-44 (1975).

86. The *Leland* opinion is cited extensively in *Patterson*. 432 U.S. at 202, 205-07.

87. *Id.* at 202.

88. *See, e.g.*, Ex parte Grossman, 267 U.S. 87, 109 (1925).

89. 297 U.S. 233, 248-49 (1936); *cf.* Continental Illinois Nat'l Bank and Trust Co. v. Chicago, R.I. & P. Ry, 294 U.S. 648, 668-69 (1935) (whether a clause in the Constitution is to be restricted by the rules of English law as they existed when the Constitution was adopted depends on the nature of the particular clause in question).

Changes in our understanding of the concepts surrounding the reasonable doubt rule have limited the usefulness of direct reference to historical practice in determining the scope of the rule. The common-law system of allocating the burden of persuasion developed with private litigation as its model, ignoring an essential difference between civil and criminal adjudications that contemporary legal scholars have clarified.[90] In civil litigation plaintiffs and defendants stand in exactly the same relationship to the government; as far as the state is concerned an error favoring the plaintiff is neither of greater nor of lesser significance than an error favoring the defendant. The situation is otherwise in a criminal case. The reasonable doubt rule itself reflects a policy decision that is much more serious to err in favor of the government than to err in favor of the criminal defendant.[91] A criminal prosecution is not a contest between competing litigants but rather a selection process whereby particular individuals are exposed to governmentally imposed punishments. By its recourse to the allocation of the burden of persuasion at common law, the *Patterson* Court allowed current burden of persuasion practices to be greatly influenced by practices developed before the crucial differences between civil litigation and criminal prosecution were fully understood.

A second justification offered for the affirmation of state autonomy in *Patterson* was the argument that since a state legislature has the power to refuse to recognize a given mitigating circumstance at all, it has the power to condition its recognition upon certain procedural qualifications, including the requirement that the accused assume the burden of persuading the factfinder of his position. The Court in *Patterson* said: "The Due Process Clause, as we see it, does not put New York to the choice of abandoning those defenses [of exculpation and mitigation] or undertaking to disprove their existence in order to convict for a crime which otherwise is within its power to sanction by substantial punishment."[92]

A major problem with the legislative grace argument[93] is that it allows the state legislatures to enact through procedural finesse a criminal provision that might not pass muster under normal political processes. It is a fair assumption, borne out by everyday conversation with nonlawyers,

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90. For a thorough discussion of the evolution of burden-of-persuasion practices in criminal cases, and of the difference between civil and criminal cases that affects the proper allocation of the burden of proof, see Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 YALE L.J. 880 (1968).

91. *See In re* Winship, 397 U.S. 358, 370-74 (Harlan, J., concurring).

92. 432 U.S. at 207-08.

93. The "legislative grace argument" as denominated herein has been discussed by several authors using differing terminology. Professor Underwood, in her article *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1312-30 (1977), speaks of "an exception [to the reasonable doubt rule] for the gratuitous defense." The same argument is referred to as "the greater includes the lesser" rule in Ashford & Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165 177-78 (1969).

that procedural rules are less well understood by most people than substantive laws.[94] While enactment of substantive laws must take place under relatively exhaustive public scrutiny, lack of understanding and interest in the procedural law arguably shields the public eye from observing subtle changes in criminal procedure. For example, a state legislature that desired to redefine the crime of possessing stolen property to eliminate the requirement that knowledge of the prior theft be proved would probably have difficulty gaining public support for such a change. There would be concern lest people be convicted for good faith or accidental possession of property that had been stolen. Nevertheless, the legislature could achieve its desired result in most cases by enacting a law making lack of knowledge an affirmative defense to the crime of simple possession.[95] The existence of this affirmative defense would create a substantial risk that some people would be convicted—even though they lacked knowledge that the property was stolen—because of their inability to prove lack of knowledge by a preponderance of the evidence. The burden of persuasion, manipulated in this manner, is a "subtle, low visibility tool" for adjusting the rights of criminal defendants.[96]

A second problem with the legislative grace argument is that, once recognized, its rationale is extremely difficult to contain. Judicial recognition of the argument has potential spill-over effects of two different kinds:[97] First, because it applies whenever the state could constitutionally refuse to recognize the issue in question, it potentially reaches almost every issue that could arise in a criminal case.[98] There are very few criminal defenses that are not matters of legislative grace. Second, the legislative grace rationale is not limited in application to the constitutional protections expressed in the reasonable doubt rule. The same argument

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94. The authorities disagree on the validity of this assumption. *Cf.* Underwood, *supra* note 93, at 1323-25; *and* Ashford & Risinger, *supra* note 93, at 177-78; *with* Allen, *supra* note 56, at 43-45 n. 60 (1977). On this factual premise I will leave the reader to draw his own conclusion in light of his own experience.

95. *See, e.g.*, Barnes v. United States, 412 U.S. 837 (1973), upholding a presumption of knowledge that goods were stolen when the prosecution proved possession of recently stolen goods.

96. Fletcher, *supra* note 92, at 894.

97. For a thorough discussion of the potential spill-over effects of recognition of the legislative grace argument, see Underwood, *supra* note 93, at 1325-30.

98. As noted above, there are no clear constitutional doctrines limiting the power of state legislatures to eliminate particular issues from consideration in determining criminal liability. *See* text accompanying note 56 *supra*.

99. Professor Allen disputes this contention in his article, *supra* note 56, at 43-45 n.60. In criticizing Professor Underwood's analysis of the potential spill-over effects of the legislative grace doctrine, he argues that there is a significant difference between the protections accorded defendants by the reasonable doubt rule and those accorded by other procedural guarantees. He states that the former protect only the defendant's liberty interests while the latter serve also to protect the rationality of the decision making process. In his words, "we insist on rationality in order to preserve the legitimacy of the criminal process as a means of enhancing social values." His inference that the

that would allow state legislatures to eliminate the protections of the reasonable doubt rule on a non-essential or "gratuitous" defense would also support the elimination of other procedural rights, such as the right to jury trial or the right to counsel, on that defense. To the extent that the Court is not willing to recognize the legislative grace argument in contexts other than the applicability of the reasonable doubt rule to the defense of extreme emotional disturbance, it has unleashed a powerful device that might be difficult to control.

The potential for low visibility manipulation of the rights of criminal defendants and the potential spill-over effects of the legislative grace doctrine suggest that the *Patterson* Court should have been more circumspect in deciding to use this rationale to justify its decision. In at least one case involving the constitutionality of presumptions in criminal cases the Supreme Court previously rejected the application of this argument.[100]

As a third justification for its holding in *Patterson* the Court offered an argument based on the "social costs" of recognizing mitigating circumstances in criminal prosecutions. The argument is that when the state has assumed the burden of persuasion, there is an increased risk that guilty persons will escape conviction. This increased risk is a cost that a state legislature might not be willing to bear. While the legislature might be willing to recognize a mitigating circumstance if the defendant assumed the burden of persuasion, it would be more reluctant to recognize the circumstance if it were forced to pay the cost of assuming the burden.

Legislative reluctance to recognize mitigating circumstances would have undesirable effects upon the development of the criminal law, as noted in the *Patterson* opinion. The legislatures would hesitate to recognize new defenses that involve facts that the prosecution would have difficulty proving.[101] This attitude would limit the potential for liberal legislative reforms and would lead the legislatures to define particular offenses in broad terms, leaving the adjustment between offenses of lesser and greater degree to the judge's discretion at sentencing.[102]

The *Patterson* majority sought to maintain a constitutional framework in which state legislatures would have the flexibility necessary

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reasonable doubt rule does not serve to preserve the legitimacy of the criminal process in unconvincing in light of the statement in *Winship* that one purpose of the rule is to preserve community confidence in the reliability of jury verdicts. *See* text accompanying note 65 *supra*.

100. United States v. Romano, 382 U.S. 136, 144 (1965). *See also* Ashford & Risinger, *supra* note 93, at 178-80.

101. 432 U.S. at 209 n.11.

102. *Id.* at 211 n.13. It was noted in a concurring opinion to the state court decision in *Patterson* that the gradation of offenses in the statute itself is preferable to gradation in the sentencing process because it offers the defendant the opportunity to introduce his mitigating circumstances earlier in the proceedings. People v. Patterson, 39 N.Y.2d 288, 305, 383 N.Y.S.2d 573, 584 (1976) (Breitel, C.J., concurring). The defendant is given the opportunity to present his evidence of mitigating circumstances to the jury as well as the judge. Gradation of offenses prior to the sentencing stage also promotes uniform treatment of defendants.

to the continued development of the criminal law. The Court decided not to require the state to assume the burden of persuasion on a given issue if "in its judgment this would be too cumbersome, too expensive, or too inaccurate."[103]

The social cost argument in *Patterson* is to a large extent valid. Legislatures will probably be reluctant to recognize mitigating circumstances if the risk of acquitting guilty defendants must thereby be increased. On the other hand, manipulation of the burden of persuasion is an undesirable means of reducing this risk, since, by reducing the total number of acquittals, it adversely affects innocent defendants who have poor access to evidence.

Shifting the burden of persuasion to the defendant is not the only method by which the legislatures can limit the social costs of recognizing new defenses. An alternative is to shift the burden of production.[104] Placing only the latter burden on the accused would allow him to avail himself of a defense if he could present enough evidence to raise a reasonable doubt on the issue. Once the issue had been raised, the burden of persuasion would be on the state. The state, however, would be spared the cost of proving the issue beyond a reasonable doubt in those cases in which the defendant could produce no evidence reasonably tending to establish the defense. Use of this alternative would reduce the risk that an innocent defendant would be denied the benefit of a recognized defense.

The availability of this alternative means of cutting social costs should decrease legislative reluctance to recognize mitigating circumstances as defenses to crimes. Given the alternative, legislators might be willing to assume the cost of retaining the ultimate burden of persuasion.

The three policy arguments offered by the *Patterson* Court are insufficient to justify its decision. This circumstance, coupled with the Court's somewhat disingenuous distinction of an unfavorable line of case authority, suggests that *Patterson* will not prove to be an enduring decision. The Court will probably be asked in a future case to redraw the boundaries of the reasonable doubt rule in a manner more protective of the important interests of criminal defendants and of society as recognized in *Winship*.

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103. 432 U.S. at 209.

104. The burden of production, also known as the burden of going forward with the evidence, is the second component of what is commonly referred to as the burden of proof. *See* note 5 *supra*. The burden of production comes into play in determining which of the issues of the case are to be submitted to the factfinder for decision. Failure by the party burdened to meet the burden of production will result in a directed verdict against that party. The burden of production is critical in a jury trial because failure to meet the burden will allow the judge to decide the issue without the jury's consideration. *See* MCCORMICK'S, *supra* note 5, § 336.

Both the *Mullaney* majority, 241 U.S. at 701 n.28 and the *Patterson* dissent, 432 U.S. at 230-31 (Powell, J., dissenting) indicated that it is constitutionally permissible to require a criminal defendant to assume the burden of production on certain issues.

V. ALTERNATIVES TO THE *Patterson* ANALYSIS

The *Patterson* opinion has been criticized as too formalistic, inconsistent with several prior cases, and insufficiently supported by policy considerations. The question now presented is whether there is a better way to define the limits of the reasonable doubt rule.

The Court, in a future decision on the question, might well begin by following a principle of constitutional construction set forth in earlier Supreme Court cases: "If we remember that it is a Constitution that we are expounding we cannot rightly prefer, of the possible meanings of its words, that which will defeat rather than effectuate the constitutional purpose."[105] The purpose of the reasonable doubt rule, as identified in *Winship*,[106] is to provide "concrete substance for the presumption of innocence" by "reducing the risk of convictions based upon factual error."[107]

The fundamental defect of the *Patterson* decision is that it gives no concrete substance to the presumption of innocence. The applicability of the reasonable doubt rule and thus the substance of the presumption of innocence, after *Patterson*, rests upon the shifting sands of legislative word choice.[108] In developing a more acceptable alternative to the *Patterson* decision the principal question facing a future court will be the determination of what substance the presumption of innocence was meant to have.

To say that a person is innocent is to say that imposition of a criminal sanction upon that person would be unjust. Put another way, the concept of innocence is tied to the justification for the criminal sanction. By the same token, the scope of the reasonable doubt rule—a rule designed to protect the presumption of innocence—should be determined with reference to such theories of justification.[109] The state should be required to assume the burden of persuasion on issues that relate to the justifiability of imposing the criminal sanction.

This approach would allow the state to allocate to the defendant the burden of persuasion on issues such as the admissibility of evidence obtained in a search or the defense of the statute of limitations. Such issues relate not to the justifiability of imposing criminal sanctions, but rather to institutional values in the administration of the criminal justice system. A defendant who successfully asserts the defense of the statute of limitations, for example, is spared conviction not because punishment would be

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105. United States v. Classic, 313 U.S. 299, 316 (1941); *accord*, Lichter v. United States, 334 U.S. 742 (1948); Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524 (1838).

106. 397 U.S. 358, 363 (1970).

107. *See* text accompanying notes 1-4 and 65-67 *supra*.

108. *See* text accompanying notes 53-56 *supra*.

109. A number of authors have advocated approaches to the reasonable doubt rule based upon the underlying justifications for criminal sanctions. *See* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION, 62-70, 136-39 (1968); Fletcher, *supra* note 91, at 880; Underwood, *supra* note 95, at 1338-47.

unjust, but because the legislature has made a policy decision to disallow convictions on stale charges. Since innocence is not implicated in these defenses, it would not violate the presumption of innocence to allocate to the defendant the burden of persuasion on these issues.

The proposed test presents two problems that touch the conceptual bases of the criminal law. The first is that a state might adopt a particular defense for any of several reasons, some related to the justifiability of criminalization and some not. For example, the defense of entrapment may relate to the defendant's willingness to engage in crime, and thus to his culpability,[110] or it may be merely a device for enforcing a legislative policy to discourage government officials from inducing crimes.[111] A court reviewing the applicability of the reasonable doubt rule under the proposed test would have to decide whether to accept a state's legislative or judicial statement of the purpose of the defense or to engage in an independent appraisal.

A second potential problem arises from the fact that there is no single, universally accepted theory of justification for criminalization. The theories of retribution, deterrence and rehabilitation, in various permutations, have all been urged as bases for the imposition of criminal liability.[112] These theories are divergent and frequently contradictory in their implications.[113] Nevertheless, there are certain basic premises upon which Anglo-American criminal law is founded[114] and from which at least some basic requirements of justification may be derived.[115]

It far exceeds the scope of this Case Comment to attempt to articulate the essential elements that the state should be required to prove in order to justify the imposition of criminal sanctions. The present objective is merely to point out that an approach to the reasonable doubt rule based upon the concept of justifiability would contribute much to individual freedom by providing concrete substance for the presumption of innocence.

A reconsideration of the scope of the reasonable doubt rule should also address the second part of the rule's function, to *reduce the risk* that an innocent defendant will be erroneously convicted. The analysis designed to achieve this purpose should focus upon how the placement of the burden of persuasion on a particular issue affects the probability of error. Issues vary in their difficulty of proof. For example, even if the burden of persuasion were on the defendant to prove the existence of a valid license as a defense to the charge of unlicensed operation of a tavern, it is unlikely

110. *See, e.g.*, United States v. Russel, 411 U.S. 423, 435 (1973).

111. *See, e.g.*, MODEL PENAL CODE § 2.10, Comment (Tent. Draft No. 9, 1959).

112. *See generally* H. PACKER, *supra* note 109, at 35-61.

113. *Id.* at 9-16.

114. *See generally* J. HALL: GENERAL PRINCIPLES OF CRIMINAL LAW (3d ed. 1960).

115. *See* H. PACKER *supra* note 109, at 62-135.

that he would be unable to prove his innocence if indeed he had a valid license. On the other hand, self-defense can be very difficult for an innocent defendant to prove. Placing the burden of persuasion on the tavern keeper on the license defense would be unlikely to lead to injustice, but placing the burden on the defendant on the issue of self-defense would be very likely to lead to injustice. Consideration of defendant's ease of proof would support an exception to the reasonable doubt rule for the license defense but not for the issue of self-defense.

An alternative approach to the reasonable doubt rule not based upon justifiability, was proposed by Justice Powell in his dissent in *Patterson*.[116] Powell's approach employs a two-pronged[117] test derived from *Mullaney*, but with significant differences. The first prong of the test incorporates the operative effects test of *Mullaney*;[118] the Court is directed to consider whether the fact at issue significantly affects the punishment or stigmatization of the defendant. The second prong is historical inquiry to determine whether the fact in question has historically made a substantial difference in punishment and stigma.

The effect of Justice Powell's approach is to increase the importance of historical analysis in the *Mullaney* approach. *Mullaney* used history to indicate whether an issue substantially affected the consequences to the defendant. The *Patterson* dissent makes historical significance a necessary precondition to application of the reasonable doubt rule. A given factual issue must at the time of challenge make a substantial difference in punishment and stigma and must have done so in the past in order to fall within the rule's scope.

The addition of the second prong to the "operative effects" test is an attempt to limit the overly broad implications of the *Mullaney* analysis. *Mullaney* sought to protect the innocent defendant from the risk of an erroneous conviction by protecting all defendants against the risk of serious consequences of conviction. Unlike the test proposed in this Comment, it focused neither upon innocence nor upon probability of error. As a result, the *Mullaney* test gave to the reasonable doubt rule a broader scope than was necessary to serve the rule's purpose. For example, the defendant who successfully asserts the statute of limitations is acquitted and consequently suffers substantially less punishment and stigma than he would if he had been convicted. Under the *Mullaney* text the reasonable doubt rule would apply to the statute of limitations defense, but under a test tailored to the concept of innocence the rule would not apply.

The *Patterson* dissent's approach limits the reach of the *Mullaney*

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116. 432 U.S. at 216 (Powell, J., dissenting, joined by Brennan and Marshall, JJ.).

117. *Id.* at 226-27.

118. *See* text accompanying notes 74-76 *supra*.

analysis, but in a way that freezes the scope of the reasonable doubt rule. Conceptions of the proper justification for criminal sanction change; in the past half-century the predominant theoretical justification for criminal sanctions has shifted from retribution to rehabilitation. With changes in the theory of criminality, the content of the concept of innocence changes. As our knowledge of human behavior grows, factors that might have been irrelevant to the disposition of criminal cases at common law have become important. To limit the scope of the reasonable doubt rule to those factors that have been significant in the Anglo-American legal tradition would prevent the growth and adaptation of the rule to accord with modern conceptions of the functions of the criminal law.

VI. CONCLUSION

The reasonable doubt rule, after *Patterson v. New York*, applies only to those issues that the state legislatures have chosen to include in the portion of the statutory text defining the offense charged. State autonomy in this area of criminal law has been vindicated. The delicate balancing of the interests of the accused and those of the state with respect to the burden of persuasion will take place in the legislative chambers rather than in the courts.

The approach taken by the Court in *Patterson* is not responsive to the purposes of the reasonable doubt rule. The Court failed to give concrete substance to the presumption of innocence. The *Patterson* approach does little to protect those accused of crimes against the risk of erroneous conviction. Given these shortcomings, it is likely that the Court will have the opportunity to reconsider its position.

Alternative approaches have been suggested that would better serve the rule's purposes. *Mullaney*'s "operative effects" standard would have provided a measure of judicial control over burden of persuasion practices but would have increased the burden on the states beyond the extent necessary to protect innocent defendants. Justice Powell, in his dissent to *Patterson*, proposed to modify *Mullaney*, but in a way that would have destroyed the adaptability of the rule to changing ideas about crime and criminals.

A workable alternative would be to determine the scope of the reasonable doubt rule with reference to the underlying justifications for the use of the criminal sanction. Of the facts in issue in a given criminal case, the state would be required to prove those that justify the imposition of sanctions. Such an approach would provide concrete substance for the presumption of innocence but would not unduly burden the states.

Mark R. Adams