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PEOPLE v. PATTERSON: THE CONSTITUTIONALITY OF NEW YORK'S AFFIRMATIVE DEFENSE OF EXTREME EMOTIONAL DISTURBANCE

INTRODUCTION

Section 125.25(1)(a) of the New York Penal Law provides that in any prosecution for intentional murder, it is an affirmative defense, reducing the crime of murder to manslaughter in the first degree, that the accused "acted under the influence of extreme emotional disturbance" which could be reasonably explained or excused.[1] The Penal Law further provides that when an affirmative defense is raised at trial, the accused has the burden of establishing such defense by a preponderance of the evidence.[2]

Whether a state may constitutionally place the burden of persuasion[3] upon the defendant to prove the mitigating factor of extreme emotional disturbance has been questioned in the aftermath of the United States Supreme Court's ruling in *Mullaney v. Wilbur*.[4] There, the Court held that when a defendant attempts to reduce a

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[1] N.Y. Penal Law § 125.25(1)(a) (McKinney 1975). The statute provides that to establish the affirmative defense of extreme emotional disturbance it must be shown that: "The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation 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." *Id.*

[2] *Id.* § 25(2). For a general discussion of affirmative defenses in New York, see Comment, *Affirmative Defenses Under New York's New Penal Law*, 19 SYRACUSE L. REV. 44 (1967). The New York Penal Law distinguishes between ordinary and affirmative defenses. Although the prosecution has "the burden of disproving [a] defense beyond a reasonable doubt," N.Y. PENAL LAW § 25(1) (McKinney 1975), the burden of production, *see* note 3 *infra*, is on the defendant. *See* People v. Steele, 26 N.Y.2d 526, 528, 260 N.E.2d 527, 528, 311 N.Y.S.2d 889, 891 (1970).

[3] There exist two types of "burdens of proof" on a given issue in any trial, one being the burden of production, the other the burden of persuasion. The former, sometimes called the burden of going forward with the evidence, requires the party upon whom it is cast to either produce some evidence that a triable question of fact exists or face an adverse ruling by the judge, generally a directed verdict or denial of instructions to the jury. *See* C. MCCORMICK, LAW OF EVIDENCE § 336, at 783-84 (2d ed. 1972) [hereinafter cited as MCCORMICK]; Comment, *Constitutionality of Affirmative Defenses in the Texas Penal Code*, 28 BAYLOR L. REV. 120, 121 (1976). The burden of production may be satisfied either by evidence introduced by the party with that burden or by evidence contained in the adversary's case. *See* People v. Steele, 26 N.Y.2d 526, 528-29, 260 N.E.2d 527, 528, 311 N.Y.S.2d 889, 891 (1970). In contrast, the burden of persuasion requires the party on whom it is placed to convince the trier of fact that the alleged fact is true. *See* MCCORMICK, *supra*, § 336, at 783-84.

[4] 421 U.S. 684 (1975).

felonious homicide from murder to manslaughter by properly raising the issue of heat of passion on sudden provocation, it is violative of due process to place the burden of persuasion as to that issue upon the accused.[5] Since heat of passion, in both form and substance, is the common law precursor to New York's modern reductive factor of extreme emotional disturbance,[6] some New York courts, including two trial tribunals[7] and the Appellate Division, Fourth Department,[8] had concluded that section 125.25(1)(a) is void in light of *Mullaney*.[9] This issue reached the New York Court of

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[5] *Id.* at 704.

[6] *See* N.Y. PENAL LAW § 125.20, commentary at 391, 393 (McKinney 1975); Gegan, *Criminal Homicide in the Revised New York Penal Law*, 12 N.Y.L.F. 565, 569-70 (1966) [hereinafter cited as Gegan].

[7] People v. Woods, 84 Misc. 2d 301, 375 N.Y.S.2d 750 (Sup. Ct. Queens County 1975); People v. Balogun, 82 Misc. 2d 907, 372 N.Y.S.2d 384 (Sup. Ct. Kings County 1975).

[8] People v. Davis, 49 App. Div. 2d 437, 376 N.Y.S.2d 266 (4th Dep't 1975).

[9] Similarly, the Delaware affirmative defense of extreme emotional disturbance, which functioned in the same manner as New York's statute, was found unconstitutional in light of *Mullaney* by that state's supreme court. Fuentes v. State, 349 A.2d 1 (Del. 1975).

In New York, other affirmative defenses besides extreme emotional disturbance have been challenged following *Mullaney*. For example, several lower courts have entertained attacks upon the affirmative defense of entrapment contained in N.Y. PENAL LAW § 40.05 (McKinney 1975). Such challenges, however, have generally proved unsuccessful. *See, e.g.*, People v. Schwartz, 175 N.Y.L.J. 97, Nov. 19, 1975, at 10, col. 3 (Sup. Ct. Kings County); People v. Hawkins, 84 Misc. 2d 201, 374 N.Y.S.2d 1008 (Sup. Ct. Kings County 1975); People v. Long, 83 Misc. 2d 14, 372 N.Y.S.2d 389 (Sup. Ct. Bronx County 1975). *See also* Note, *The New York Penal Law's Affirmative Defenses After* Mullaney v. Wilbur, 27 SYRACUSE L. REV. 834, 861-64 (1976) [hereinafter cited as *New York Affirmative Defenses*]. Prior to *Mullaney*, the court of appeals had upheld the constitutionality of the affirmative defense of entrapment in People v. Laietta, 30 N.Y.2d 68, 281 N.E.2d 157, 330 N.Y.S.2d 351, *cert. denied*, 407 U.S. 923 (1972).

The constitutionality of N.Y. PENAL LAW § 160.15(4) (McKinney 1975), which permits an individual accused of robbery in the first degree to reduce the crime to second degree robbery if he proves by a preponderance of the evidence that any firearm used was unloaded or inoperable, has also been attacked. Three lower courts have sustained the statute, People v. McDonald, 50 App. Div. 2d 907, 377 N.Y.S.2d 988 (2d Dep't 1975) (mem.); People v. Langella, 175 N.Y.L.J. 105, June 1, 1976, at 9, col. 5 (Sup. Ct. Bronx County); People v. Archie, 85 Misc. 2d 243, 380 N.Y.S.2d 555 (Sup. Ct. Erie County 1976), while two courts have held the law unconstitutional, People v. White, 86 Misc. 2d 803, 383 N.Y.S.2d 800 (Sup. Ct. N.Y. County 1976); People v. Smith, 85 Misc. 2d 1, 380 N.Y.S.2d 569 (Sup. Ct. N.Y. County 1976). *White* and *Smith* were subsequently overruled, however, by the Appellate Division, First Department, in People v. Rodriguez, 52 App. Div. 2d 781, 383 N.Y.S.2d 17 (1st Dep't 1976), wherein the court found the assertion that § 160.15(4) was unconstitutional as a result of *Mullaney* to be without merit. In a subsequent case, the first department, without referring to *Rodriguez*, reaffirmed its view that § 160.15(4) is not unconstitutional in light of *Mullaney* and *Patterson*. *See* People v. Cwikla, 54 App. Div. 2d 80, 387 N.Y.S.2d 573 (1st Dep't 1976). Prior to *Mullaney*, this affirmative defense was sustained in People v. Player, 80 Misc. 2d 177, 362 N.Y.S.2d 773 (County Ct. Suffolk County 1974).

The affirmative defense to felony murder provided by N.Y. PENAL LAW § 125.25(3) (McKinney 1975) has also withstood an attack based on *Mullaney*. People v. Kampshoff, 53 App. Div. 2d 325, 385 N.Y.S.2d 672 (4th Dep't 1976); note 62 *infra*.

Appeals in *People v. Patterson,*[10] where the state's highest court, by a 4-3 majority, upheld the constitutionality of section 125.25(1)(a).[11] This Comment will examine *Patterson* and attempt to analyze the decision in light of *Mullaney* and other Supreme Court precedents.

Mullaney v. Wilbur: REFINEMENT OF THE REASONABLE-DOUBT STANDARD

While the requirement that the prosecution must prove the defendant's guilt beyond a reasonable doubt is deeply engrained in American criminal law,[12] it was not until the recent case of In re *Winship*[13] that this standard was given recognition as being constitutionally mandated. In *Winship,* the Supreme Court held that to place any lesser burden of proof on the prosecution would offend due process.[14] The Court noted two critical interests that require utilization of the reasonable-doubt standard in criminal cases. First, the reasonable-doubt standard effectively reduces the possibility of convictions based on factual errors. This affords the accused strong protection against the loss of liberty and social stigmatization which could result from a wrongful conviction.[15] Second, the Court found this standard to be "indispensable" in achieving "the respect and confidence of the community in applications of the criminal law."[16] Any lesser burden of persuasion would dilute the "moral force of the criminal law" and foster public suspicion as to whether an innocent person had been wrongly convicted.[17]

Against the due process backdrop of *Winship,* the Supreme

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[10] 39 N.Y.2d 288, 347 N.E.2d 898, 383 N.Y.S.2d 573, *prob. juris. noted,* 97 S. Ct. 52 (1976).

[11] 39 N.Y.2d at 304, 347 N.E.2d at 908, 383 N.Y.S.2d at 583.

[12] *See* Leland v. Oregon, 343 U.S. 790, 802-03 (1952) (Frankfurter, J., dissenting); W. LA FAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 8, at 44 (1972).

[13] 397 U.S. 358 (1970). In *Winship,* the Supreme Court was called upon to decide the constitutionality of a New York statutory provision which permitted a juvenile to be adjudged a delinquent upon facts established by a preponderance of the evidence.

[14] *Id.* at 364.

[15] *Id.* at 363-64. In Speiser v. Randall, 357 U.S. 513 (1958), the Court, in dicta, stated:

> 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—this 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 the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt.

Id. at 525-26, *quoted in In re* Winship, 397 U.S. 358, 364 (1970).

[16] 397 U.S. at 364.

[17] *Id.*

Court in *Mullaney*[18] was called upon to decide the constitutionality of a Maine penal statute that placed the burden of persuasion on the issue of heat of passion in a murder prosecution upon the defendant. The *Mullaney* trial court instructed the jury that all killings done unlawfully, *i.e.*, without justification or excuse, and intentionally,[19] constituted the crime of felonious homicide.[20] Pursuant to Maine law, the punishment accorded a person convicted of felonious homicide depended upon whether the killing was committed with malice aforethought.[21] A finding of malice aforethought was considered to mean that the homicide had not been committed in the heat of passion upon sudden provocation.[22] In such case, the

[18] In *Mullaney*, as a result of a fatal beating he administered to one Claude Hebert, Stillman E. Wilbur, Jr. was convicted of murder. At trial, Wilbur claimed that he attacked Hebert because Hebert had made homosexual advances towards him. The defense argued that Wilbur had not committed an unlawful homicide because Wilbur did not have the requisite criminal intent. In the alternative, it was contended that Wilbur was guilty of no more than manslaughter because he had killed in the heat of passion provoked by Hebert's sexual overtures. 421 U.S. at 685.

[19] The trial court defined an intentional homicide as a killing done with an intent to cause death or an intent to cause serious physical injury. *Id.* at 685 n.2.

[20] *Id.* at 691. Murder and manslaughter had been defined in separate sections of the Maine criminal code. The murder statute provided: "Whoever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life." Ch. 130, § 1, [1954] Me. Laws 127 (repealed 1975). Maine's manslaughter statute provided in relevant part: "Whoever unlawfully kills a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought . . . shall be punished by a fine of not more than $1,000 or by imprisonment for not more than 20 years . . . ." Ch. 262, § 3, [1961] Me. Laws 307 (repealed 1975).

Despite these two distinct statutory definitions of murder and manslaughter, Maine's highest court had held that each provision was merely a separate *punishment category* within the general crime of felonious homicide. *See* State v. Lafferty, 309 A.2d 647, 662-63 (Me. 1973).

[21] 421 U.S. at 686. As it developed generally at common law, malice aforethought came to consist of two separate elements, one positive and one negative. *See* Gegan, *A Case of Depraved Mind Murder*, 49 ST. JOHN'S L. REV. 417, 430 n.50 (1975). The positive factor, "man-endangering-state-of-mind," required

> either (1) an intent to kill, or (2) an intent to inflict great bodily injury, or (3) the wanton and wilful disregard of an unreasonable human risk—the wilful doing of an act under such circumstances that there is obviously a plain and strong likelihood that death or great bodily injury may result, or (4) if the person [was] engaged at the time in perpetrating or attempting a felony, or in resisting a lawful attempt to make an arrest or to suppress a riot or an affray, it [included] the wilful doing of any act which [involved] a substantial element of human risk—with the additional explanation that the common experience of men shows such a risk to be inherent in certain felonies such as arson, burglary, rape and robbery.

Perkins, *A Re-examination of Malice Aforethought*, 43 YALE L.J. 537, 568-69 (1934) (footnotes omitted). The negative aspect consisted of the absence of justification, excuse, or mitigation. *Id.* at 569. The burden or persuasion as to both the positive and negative aspects lay with the prosecution. 421 U.S. at 685.

[22] In Maine, the requisite malice aforethought could be either express or implied. *See*

homicide would be punished as murder.[23] If the accused established, however, that he acted in the heat of passion upon sudden provocation, then the homicide would be punished as voluntary manslaughter.[24] The prosecution was aided in this respect by a presumption of malice aforethought which arose once the state had proven beyond a reasonable doubt the required elements of the crime, intent and unlawfulness.[25] To rebut this presumption and reduce the crime of homicide to manslaughter, the defendant was required to establish heat of passion upon sudden provocation by a preponderance of the evidence.[26]

Justice Powell, speaking for a unanimous Court, held that "the Due Process clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case."[27] The Court determined that the interests found vital in *Winship*, namely, reduction of the threat of erroneous convictions based on factual errors and the fostering of public respect for the criminal justice system,[28] were endangered by Maine's allocation of the burden of proof on the issue of heat of passion provocation to the defendant.[29]

In its argument, Maine contended that its statute did not vio-

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note 20 *supra*. Express malice aforethought consisted of a premeditated design to cause death. *See* Mullaney v. Wilbur, 421 U.S. 684, 686 n.4 (1975). Malice aforethought was implied where the defendant did not act in the heat of passion on sudden provocation during an intentional (or criminally reckless) and unlawful killing. *Id.* at 686. As the *Mullaney* Court noted, "express malice aforethought was surplusage since if the homicide resulted from sudden provocation it was manslaughter; otherwise it was murder." *Id.* at 693 n.15. In short, at the time of *Mullaney*, the term malice aforethought in Maine indicated merely absence of an act committed in heat of passion on sudden provocation. *See* notes 63-81 and accompanying text *infra*.

[23] 421 U.S. at 686.

[24] *Id.* at 686-87. The trial court in *Mullaney* instructed the jury that heat of passion meant that at the time of the killing "[an individual's] reason is disturbed or obscured by passion to an extent which might [make] ordinary men of fair, average disposition liable to act irrationally without due deliberation or reflection, and from passion rather than judgment." *Id.* at 687 n.5. For a discussion of what constituted adequate provocation in Maine, see text accompanying notes 93-94 *infra*. For a general discussion of heat of passion on sudden provocation, see R. MORELAND, THE LAW OF HOMICIDE 65-86 (1952).

[25] 421 U.S. at 686. For a discussion of the presumption of malice aforethought, see note 67 and accompanying text *infra*.

[26] 421 U.S. at 691-92.

[27] *Id.* at 704. While the Court held that the burden of persuasion could not be shifted to the defendant on the question of heat of passion, it did assert that a state could place the burden of going forward with the evidence on that issue, *see* note 3 *supra*, on the defendant. 421 U.S. at 701-02 n.28. For a detailed discussion of this aspect of *Mullaney*, see Evans v. State, 28 Md. App. 640, ____, 349 A.2d 300, 350-54 (Ct. Spec. App. 1975).

[28] *See* notes 15-17 and accompanying text *supra*.

[29] 421 U.S. at 698.

late the dictates of *Winship* since heat of passion was not a "fact necessary to constitute" the crime of felonious homicide, but was relevant only to the punishment the accused would receive after being found guilty of the crime.[30] In support of this position, the state asserted that the presumption of malice aforethought attached only after the defendant had been adjudged guilty of committing the elements constituting the lesser crime of manslaughter. Thus, prior to the presumption becoming operative, the defendant was already subject to imprisonment and certain of having his reputation tarnished.[31]

The Supreme Court rejected this argument, however, noting that it failed to take into account the fact that American criminal law is concerned with the degree of one's criminal culpability as well as with the question of "guilt or innocence in the abstract."[32] The Court stated that the protection of an individual against an erroneous conviction for a crime of a higher degree than that which is warranted is equal in importance to the protection of an individual against a wholly wrongful conviction.[33] Justice Powell clearly expressed the Court's displeasure with the procedure in question, stating:

> Under this burden of proof a defendant can be given a life sentence when the evidence indicates that it is *as likely as not* that he deserves a significantly lesser sentence. This is an intolerable result in a society where . . . it is far worse to sentence one guilty only of manslaughter as a murderer than to sentence a murderer for the lesser crime of manslaughter.[34]

As an alternative argument, Maine asserted that *Winship* should not be applied to the defense in question because of the difficulties which the prosecution would encounter if forced to negate a defendant's contention that he had acted in the heat of passion.[35] This argument was apparently based on the so-called "comparative convenience" test enunciated many years prior to *Winship* in *Morrison v. California*.[36] In an opinion authored by Justice Cardozo, the *Morrison* Court held that the burden of proof on an issue could be shifted to a defendant in a criminal case if "upon a balanc-

[30] *Id.* at 696-97.
[31] *Id.* at 697.
[32] *Id.* at 697-98.
[33] *Id.* at 698.
[34] *Id.* at 703-04 (emphasis in original).
[35] *Id.* at 701.
[36] 291 U.S. 82 (1934).

ing of convenience or of the opportunities for knowledge the shifting of the burden" was found to be helpful to the prosecution without causing "hardship or oppression" to the defendant.[37]

In rejecting this argument, the *Mullaney* Court impliedly overruled the comparative convenience test as a rationale for shifting the burden of persuasion onto a defendant.[38] Justice Powell concluded that neither placing the burden of proof on the prosecution with respect to a "fact peculiarly within the knowledge of the defendant," such as the existence of heat of passion, nor requiring the state to undergo the great inconvenience of proving a negative, such as the absence of sudden provocation, constitutes a "unique hard-

[37] *Id.* at 89. *See generally New York Affirmative Defenses, supra* note 9, at 855-58; Osenbaugh, *The Constitutionality of Affirmative Defenses to Criminal Charges*, 29 ARK. L. REV. 429, 436-37 (1976) [hereinafter cited as Osenbaugh].

[38] In a related line of cases dealing with statutory inferences prior to *Mullaney*, the comparative convenience doctrine had been rejected. Statutory inferences, or statutory presumptions as they are sometimes mistakenly called, are legislative enactments which permit a jury to deduce the existence of one element of a crime upon proof of another element. *See* People v. Leyva, 38 N.Y.2d 160, 168-69 n.3, 341 N.E.2d 546, 551-52 n.3, 379 N.Y.S.2d 30, 37 n.3 (1975). The prosecution may thus obtain a conviction without producing any evidence concerning the inferred fact. While statutory inferences do not technically shift the burden of production to the defendant, *see* MCCORMICK, *supra* note 3, § 342, at 803-04, he is compelled to come forward with some evidence to prevent the jury from employing the inference. *See* Tot v. United States, 319 U.S. 463, 469 (1943).

Because an illogical or improbable statutory inference may unfairly relieve the prosecution of its burden of proving the defendant's guilt beyond a reasonable doubt, the Supreme Court has delineated constitutionally required guidelines for such inferences. In so doing, the Court has ruled that the comparative convenience test, standing alone, does not provide an acceptable criterion for creating a statutory inference. *Id.* The Court has held that, at the very least, the inferred fact must be "more likely than not to flow from the proved fact on which it is made to depend" for the inference to comply with due process. Leary v. United States, 395 U.S. 6, 36 (1969). *But see* Barnes v. United States, 412 U.S. 837, 843-46 (1973), where the Court strongly implied that a stricter test will be used in the future to determine the constitutionality of statutory inferences. Under this new test, the "evidence necessary to invoke the inference [must be] sufficient for a rational juror to find the inferred fact beyond a reasonable doubt." *Id.* at 843. *See generally* Note, *The Unconstitutionality of Statutory Criminal Presumptions*, 22 STAN. L. REV. 341 (1970).

While the comparative convenience doctrine has been rejected in statutory inference cases, it has been utilized by some courts, including the New York Court of Appeals, in considering the constitutionality of affirmative defenses. The court of appeals has seemingly ruled that once the prosecution has proven enough facts to support the defendant's culpability for the crime charged, it is then equitable to impose upon the defendant the burden of persuasion with respect to proof of mitigating factors, provided there is a " 'manifest disparity in convenience of proof amd opportunity for knowledge.' " People v. Bornholdt, 33 N.Y.2d 75, 84, 305 N.E.2d 461, 466, 350 N.Y.S.2d 369, 376 (1973), *cert. denied*, 416 U.S. 905 (1974), *quoting* Morrison v. California, 291 U.S. 82, 91 (1934). *See also New York Affirmative Defenses, supra* note 9, at 856.

ship"[39] that would justify casting the burden of persuasion on the defendant.[40]

People v. Patterson

Factual Background

Marital difficulties between Gordon Patterson and his wife, Roberta, led her to leave her husband, begin divorce proceedings, and resume dating a former fiancé, John Northrup.[41] Subsequently, Gordon, after arming himself with a rifle, went to the house of Roberta's father[42] and, upon seeing his wife seminude with her ex-fiancé, killed Northrup by shooting him twice in the head.[43] Gordon Patterson thereafter confessed to the homicide and was charged with second degree murder.[44]

At trial, the defense claimed that the gun had gone off accidentally.[45] In the alternative, Patterson claimed as an affirmative defense that he had killed under the influence of extreme emotional disturbance, and thus, at most, should be convicted of first degree manslaughter.[46] The jury, however, apparently did not accept either

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[39] Justice Powell noted that the difficulty in proving lack of heat of passion was eased somewhat "in Maine where the fact at issue is largely an 'objective, rather than a subjective, behavioral criterion.' " 421 U.S. at 702, *quoting* State v. Rollins, 295 A.2d 914, 920 (Me. 1972). *See* notes 93-94 and accompanying text *infra*. In addition, Justice Powell noted that establishing the absence of heat of passion is similar to "proving any other element of intent; it may be established by adducing evidence of the factual circumstances surrounding the commission of the homicide." 421 U.S. at 702. Earlier in the opinion, Justice Powell noted that the large majority of states place the burden of persuasion on the issue of heat of passion on the prosecution. *Id.* at 696. In regard to the difficulties associated with proving a negative, Justice Powell observed that Maine law required the prosecution to prove lack of self-defense when that fact was in issue at a trial. *Id.* at 702, *citing* State v. Millet, 273 A.2d 504 (Me. 1971). In the Justice's view, this burden is "in all practical effect . . . identical to the burden involved in negating the heat of passion on sudden provocation." 421 U.S. at 702.

[40] 421 U.S. at 701-02. This, of course, does not mean that the Court will not use some sort of balancing test in the future. Justice Powell stated in *Mullaney* that the rationale of *Winship* "requires an analysis that looks to the 'operation and effect of the law as 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." *Id.* at 699, *quoting* St. Louis S.W. Ry. v. Arkansas, 235 U.S. 350, 362 (1914). It would appear that in the future the Court will weigh the uniqueness of the hardship on the prosecution with respect to the burden of persuasion against the interests that *Winship* seeks to protect. *See* notes 91-98 and accompanying text *infra*.

[41] 39 N.Y.2d at 291, 347 N.E.2d at 900, 383 N.Y.S.2d at 575.

[42] *Id.*

[43] *Id.*

[44] *Id.* Patterson's confession was ruled voluntary at a pretrial hearing and was entered into evidence at trial. *Id.*

[45] *Id.* at 292, 347 N.E.2d at 900, 383 N.Y.S.2d at 575.

[46] *Id.* *See* notes 1-2 and accompanying text *supra*.

contention, and instead found the defendant guilty of intentional murder.[47] On appeal, Patterson's conviction was unanimously affirmed by the appellate division,[48] and the defendant thereafter sought review in the court of appeals. While the case was pending in that court, the Supreme Court released its decision in *Mullaney*. Patterson then advanced the argument that *Mullaney* mandated reversal of his conviction and a new trial since he had been required to prove by a preponderance of the evidence the existence of extreme emotional disturbance.[49] Finding what it believed to be significant distinctions between the homicide laws of Maine and New York, the court of appeals held that New York's affirmative defense of extreme emotional disturbance is not violative of due process, and hence, concluded that it does not fall within the prohibitions of *Mullaney*.[50]

Extreme Emotional Disturbance versus Heat of Passion: The "Collateral" Argument

The *Patterson* court, in an opinion authored by Judge Jasen, concluded that the New York murder statute does not violate the constitutionally required reasonable-doubt standard. The court

[47] 39 N.Y.2d at 294, 347 N.E.2d at 902, 383 N.Y.S.2d at 576.

[48] People v. Patterson, 41 App. Div. 2d 1028, 344 N.Y.S.2d 836 (4th Dep't 1973), *aff'd*, 39 N.Y.2d 288, 347 N.E.2d 898, 383 N.Y.S.2d 573, *prob. juris. noted*, 97 S. Ct. 52 (1976).

[49] 39 N.Y.2d at 294, 347 N.E.2d at 902, 383 N.Y.S.2d at 576.

[50] *Id.* at 297, 347 N.E.2d at 904, 383 N.Y.S.2d at 578. Prior to deciding the merits of Patterson's due process challenge, the court was confronted with two procedural issues. The first was whether by not challenging at trial the validity of imposing the burden of persuasion upon him with regard to extreme emotional disturbance, Patterson had failed to preserve a question of law for the court of appeals. As to this issue, the court observed that it generally cannot review questions of law arising from alleged trial court error unless the complaining party makes timely objection in the lower court, thus affording that court an opportunity to take corrective action. *Id.* at 294-95, 347 N.E.2d at 902, 383 N.Y.S.2d at 577. One narrow exception to this rule is presented, however, when the alleged error "would have affected the organization of the court or the mode of proceedings proscribed by law." *Id.* at 295, 347 N.E.2d at 902, 383 N.Y.S.2d at 577. The court of appeals concluded that Patterson's complaint fell within this exception since the correct allocation of the burden of persuasion in a criminal trial is a constitutional prerequisite to a properly conducted trial. *Id.* at 296, 347 N.E.2d at 903, 383 N.Y.S.2d at 578.

The second procedural issue was whether *Mullaney* should be given retroactive effect. *Id.* at 294, 347 N.E.2d at 902, 383 N.Y.S.2d at 576-77. The court reasoned that since *In re* Winship, 397 U.S. 358 (1970), *discussed in* notes 13-17 and accompanying text *supra*, was given retroactive effect in Ivan v. City of New York, 407 U.S. 203 (1972), *Mullaney* should likewise be retroactively applied. 39 N.Y.2d at 296, 347 N.E.2d at 903, 383 N.Y.S.2d at 578. In this respect, it should be noted that the jurisdictions are divided on the question of *Mullaney's* retroactivity. *Compare* Evans v. State, 28 Md. App. 640, 349 A.2d 300 (Ct. Spec. App. 1975) (*Mullaney* held to apply retroactively), *with* State v. Hankerson, 288 N.C. 632, 220 S.E.2d 575 (1975) (*Mullaney* not retroactive).

noted that to convict a defendant of murder under New York law, it is necessary for the prosecution to prove beyond a reasonable doubt that the defendant, "with intent to cause the death of another person," did cause the death of that person or a third person.[51] To prove the element of intent, the prosecution must show that it was the defendant's "conscious objective" to kill the victim.[52] Judge Jasen concluded that the mitigating circumstance of extreme emotional disturbance does not negate or diminish the intent required to be proven for a murder conviction.[53] Instead, it "explains the defendant's intentional action."[54] Thus, in the opinion of the court of appeals, the existence of extreme emotional disturbance is merely "collateral to the principal facts at issue" and in no way interferes with the requirement that the state prove the element of intent beyond a reasonable doubt.[55]

In contrast, Judge Jasen viewed Maine's mitigating fact of heat of passion as bearing a relationship to the "facts of intent" in a homicide prosecution different than that of New York's affirmative defense of "extreme emotional disturbance." In the *Patterson* court's view, Maine's requirement of malice aforethought was "reflective of the defendant's intent."[56] To prove this "fact of intent," which, pursuant to Maine law, was not a requisite element of felonious homicide, but rather was relevant only to punishment, the prosecution was permitted to rely on a presumption of law to establish malice aforethought.[57] Judge Jasen observed that to negate this "fact of intent," *i.e.*, the presumption that the defendant's "mind was possessed by malice," the defendant was required to prove that he committed the homicidal act in the heat of passion on sudden provocation.[58] Unlike New York's statutory scheme, where extreme emotional disturbance is merely "collateral" to and explanative of the defendant's intent, which must always be fully proven, Maine's reductive factor of heat of passion, according to the *Patterson* court, went directly to the question of degree of intent and made the defendant's acts less intentional.[59]

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[51] 39 N.Y.2d at 301-02, 347 N.E.2d at 907, 383 N.Y.S.2d at 581, *discussing* N.Y. PENAL LAW § 125.25(1) (McKinney 1975).

[52] 39 N.Y.2d at 302, 347 N.E.2d at 907, 383 N.Y.S.2d at 581, *discussing* N.Y. PENAL LAW § 15.05(1) (McKinney 1975).

[53] 39 N.Y.2d at 302, 347 N.E.2d at 907, 383 N.Y.S.2d at 582.

[54] *Id.*

[55] *Id.* at 302, 347 N.E.2d at 907, 383 N.Y.S.2d at 581-82.

[56] *Id.*, 347 N.E.2d at 907, 383 N.Y.S.2d at 582.

[57] *Id.*

[58] *Id.*

[59] *Id.*

In sum, the court of appeals viewed the Maine homicide statute struck down in *Mullaney* as violative of the reasonable-doubt standard because it presumed a fact of intent necessary to constitute the crime of murder and required the defendant to establish heat of passion to negate this element of intent. In contrast, the court determined that the New York statute required that all the required elements of intent necessary for a murder conviction be established by the state beyond a reasonable doubt. Judge Jasen thus concluded: "So long as the prosecution must prove, beyond a reasonable doubt, that the defendant intended to kill his victim, it is not a violation of due process to permit the defendant to establish that he formulated his intent while 'under the influence of extreme emotional disturbance.' "[60]

ANALYSIS OF *Patterson*

From the language and logic employed by Judge Jasen, it is clear that the *Patterson* court interpreted Maine's "malice aforethought" requirement as involving an additional substantive fact of intent existing apart from the essential elements of the crime of murder, *viz.*, unlawfulness and intent to kill or cause serious injury, which Maine prosecutors were required to prove beyond a reasonable doubt.[61] By presuming this additional substantive fact, and by

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[60] *Id.* at 303, 347 N.E.2d at 908, 383 N.Y.S.2d at 582.

[61] *See id.* at 302, 347 N.E.2d at 907, 383 N.Y.S.2d at 582. The foundation for the *Patterson* court's interpretation of Maine's malice aforethought requirement appears to lie in an earlier part of the opinion in which Judge Jasen, after analyzing the history of New York's murder statutes, concluded:

> [S]ince 1829, New York has refused to imply malice from the act of killing, requiring the prosecution to establish, where it seeks to prove murder, that the defendant possessed a design to effect death. Thus, in *Stokes v. People* the court held that "[m]ere proof of the killing did not as a legal implication, show" that the defendant committed the killing from a *premediated* design to effect a human death. This . . . is in contradistinction to the law of Maine struck down in *Mullaney*.

Id. at 299, 347 N.E.2d at 905, 383 N.Y.S.2d at 580 (emphasis added), *quoting* Stokes v. People, 53 N.Y. 164, 179-180 (1873). To support this position, Judge Jasen cited a footnote from *Mullaney* in which the Supreme Court noted that although the *Mullaney* trial court had explained the concept of malice aforethought to the jury as requiring a "premeditated design to kill," it had also indicated that the prosecution did not have to prove express malice to obtain a murder conviction "since malice would be implied unless the defendant proved that he acted in the heat of passion." 421 U.S. at 686 n.4. Judge Jasen also relied upon a prior opinion rendered by Maine's highest court in which it was stated that the prosecution's failure to prove premeditation was not fatal to its case in a murder prosecution. 39 N.Y.2d at 299, 347 N.E.2d at 905, 383 N.Y.S.2d at 580, *citing* State v. Lafferty, 309 A.2d 647, 665 (Me. 1973). From the foregoing, it is apparent that the *Patterson* court believed that the facts necessary to establish express malice aforethought in Maine were either presumed or implied once an

placing the burden of persuasion upon the defendant to rebut its existence by a showing of heat of passion, Maine violated the reasonable-doubt standard.

Apparently, the *Patterson* court read *Mullaney* as holding that due process prohibits shifting the burden of persuasion on an issue to the defendant only when proof of that issue controverts a statutorily prescribed element of the crime or, as in Maine, rebuts a substantive fact relevant to the degree of the defendant's intent. Under this analysis, casting the burden of persuasion upon a defendant as to a "collateral" matter—one which negatives no substantive fact or element, but is applicable only towards decreasing the degree of culpability—is constitutionally acceptable.[62]

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unlawful and intentional killing was established, thus relieving the prosecution of the burden of proving a particular fact of intent. However, this was *not* a correct evaluation of the law of Maine at the time *Mullaney* was decided. *See* notes 68-81 and accompanying text *infra*.

[62] The court of appeals' analysis is reminiscent of the "elements approach" which had previously been used to determine whether placement of the burden of persuasion on the defendant with respect to any particular issue violates due process. *See* Osenbaugh, *supra* note 37, at 437-42. The critical factor in this test is whether the affirmative defense that the accused must prove tends to negate what has been defined as an essential element of the crime or tends to establish a fact, independent of the essential elements of the crime, which justifies, excuses, or mitigates the crime. *Id.* at 439. A good example of this approach may be found in People v. Bornholdt, 33 N.Y.2d 75, 305 N.E.2d 461, 350 N.Y.S.2d 369 (1973), *cert. denied*, 416 U.S. 905 (1974). There, one of the defendants claimed, *inter alia*, that New York's affirmative defense to felony murder, N.Y. PENAL LAW § 125.25(3) (McKinney 1975), which shifted the burden of persuasion to him, was unconstitutional. As support for his contention, the defendant cited Stump v. Bennett, 398 F.2d 111 (8th Cir.), *cert. denied*, 393 U.S. 1001 (1968), wherein the Eighth Circuit found Iowa's alibi affirmative defense to be violative of due process. In rejecting this argument, the *Bornholdt* court distinguished *Stump* by noting that in *Stump* the burden was placed on the defendant to negate a basic element of the crime that the prosecution was required to prove, namely "the defendant's presence at the time and place of the crime." 33 N.Y.2d at 86, 305 N.E.2d at 467, 350 N.Y.S.2d at 377. In contrast, the court observed the felony murder affirmative defense does not tend to negate any of the elements that the prosecution is required to prove to establish the crime charged, but instead, serves to wholly excuse the defendant from the felony murder charge even where all elements of the crime are proven. *Id.*, 305 N.E.2d at 467, 350 N.Y.S.2d at 377-78. Subsequent to both *Patterson* and *Mullaney*, at least one court has held that *Bornholdt* remains valid law. People v. Kampshoff, 53 App. Div. 2d 325, 340-41, 385 N.Y.S.2d 672, 683 (4th Dep't 1976).

Controlling under the elements approach is whether the particular fact in issue was intended by the legislature (or in the case of the common law, the courts) to be an essential element of the crime. *See* Osenbaugh, *supra* note 37, at 439-40. As such, the doctrine would appear to be inapplicable subsequent to *Mullaney* since there the Supreme Court invalidated a device which shifted the burden of persuasion on a fact in issue that was not an essential element of the crime, but rather was relevant only to the punishment to be accorded the crime. 421 U.S. at 687, 690-92, 698-703. The *Patterson* court's analysis lends itself to a new type of approach, one that more properly could be called a "facts approach." In line with this approach, a shift of the burden of persuasion would be unconstitutional only where the state designates substantive facts relevant to the question of guilt or to the degree of culpability of the accused, and then creates a presumption as to the existence of those facts, requiring

"Malice Aforethought" Under Maine Law

Crucial to the court of appeals' conclusion that section 125.25(1)(a) does not come within the constitutional prohibitions of *Mullaney* was the *Patterson* court's determination that substantial differences exist between the mitigation techniques used in the Maine and New York murder statutes. However, an analysis of Maine law, as well as of *Mullaney* itself, discloses that the distinctions between the two states' laws noted by the *Patterson* court were based upon an erroneous interpretation of the Maine homicide law. In so misconstruing the Maine statute, it is submitted that the New York Court of Appeals failed to appreciate the real import of *Mullaney*.

To understand Maine's presumption of malice, as analyzed in *Mullaney*, it is necessary to first examine the Supreme Judicial Court of Maine's construction of the phrase "malice aforethought." In *State v. Rollins*,[63] the Maine high court determined that the "malice" which is presumed under Maine's homicide law did not designate "any subjective state of mind existing as a fact,"[64] nor did this presumption show "any *probative* relationship between the fact of 'intention' relating to the killing and *any further facts*—specifically, whether the fact of *intentional* killing negates, more probably than not . . . that the killing was in the heat of passion . . . ."[65] The *Rollins* court held that the presumption of malice was nothing more than a term chosen by the legislature to indicate that an unlawful and intentional homicide would incur the heaviest *punishment* possible unless mitigated by the existence of heat of passion.[66] In short, the presumption of malice in Maine was merely a policy presumption[67] that an illegal homicide was not com-

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the defendant to rebut their existence. Such an approach, however, was invalidated in *Mullaney*. *See* notes 82-90 and accompanying text *infra*.

It is interesting to note that prior to *Winship*, the Supreme Court employed the elements approach in upholding an Oregon law that required a defendant claiming insanity to prove that defense beyond a reasonable doubt. *See* Leland v. Oregon, 343 U.S. 790, 795-96, 799 (1952). The Court in *Leland* did not employ the reasonable-doubt standard in considering the constitutionality of this statute, but instead used the general due process standard of determining whether the state's practice " 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " *Id.* at 798, *quoting* Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

[63] 295 A.2d 914 (Me. 1972).

[64] *Id.* at 920.

[65] *Id.* (emphasis in original).

[66] *Id.*

[67] The theory behind Maine's presumption of malice was explained by the Supreme Judicial Court of Maine when that court had occasion to review the murder conviction

mitted in the heat of passion on sudden provocation. As such, it was relevant only insofar as determining the penalty to be imposed on a defendant; it did not supply any necessary element of the crime.

Shortly after *Rollins* was decided, the United States Court of Appeals for the First Circuit issued its first opinion in *Mullaney*.[68] In the course of its decision, the federal court analyzed the term "malice aforethought" under Maine law and articulated a definition strikingly similar to the interpretation subsequently given that expression by the *Patterson* court.[69] After reviewing past Maine cases which had defined the phrase, the First Circuit, rejecting the Maine high court's interpretation in *Rollins*,[70] determined that malice aforethought meant premeditation,[71] *i.e.*, that the homicide was considered and reflected upon with a sedate mind in advance of the act of killing[72]—a substantive fact relating to the element of intent. The federal court therefore concluded that since the crime of intentional murder in Maine required a finding of malice aforethought, which, in the court's opinion, was equivalent to premeditation, the state could not, in light of *Winship*, constitutionally shift the burden of persuasion to the defendant to rebut the existence of this essential element of the crime by a showing of heat of passion.[73]

Subsequently, the Supreme Judicial Court of Maine, in *State v. Lafferty*,[74] expressly rejected the federal court's interpretation of

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involved in *Mullaney*. The court stated:

> The presumption rests upon the foundation of sound public policy. It reflects the public interest in the administration of justice and recognizes the practical impossibility in a vast number of cases of meeting a mere suggestion of sudden provocation . . . by negating proof beyond a reasonable doubt. It stems from and accords with the sacredness of the right to life and the awful responsibility of one who has been proven beyond a reasonable doubt to have unlawfully and intentionally taken the life of another.

State v. Wilbur, 278 A.2d 139, 145 (Me. 1971) (citations omitted), *vacated sub nom.* Wilbur v. Robbins, 349 F. Supp. 149 (D. Me. 1972), *aff'd sub nom.* Wilbur v. Mullaney, 473 F.2d 943 (1st Cir. 1973), *vacated and remanded*, 414 U.S. 1139 (1974), *aff'd on rehearing*, 496 F.2d 1303 (1st Cir.), *aff'd*, 421 U.S. 684 (1975). For an in-depth discussion of Maine's presumption of malice, see Comment, *The Constitutionality of the Common Law Presumption of Malice in Maine*, 54 B.U.L. REV. 973 (1974).

[68] 473 F.2d 943 (1st Cir. 1973), *vacated and remanded*, 414 U.S. 1139 (1974), *aff'd on rehearing*, 496 F.2d 1303 (1st Cir.), *aff'd*, 421 U.S. 684 (1975).

[69] *See* notes 56-61 and accompanying text *supra*.

[70] *See* text accompanying notes 63-65 *supra*.

[71] 473 F.2d at 947.

[72] This definition was given by the Supreme Judicial Court of Maine in State v. Merry, 136 Me. 243, 8 A.2d 143, 146 (1939), the case upon which the First Circuit principally relied in determining the meaning of "malice aforethought" under Maine law. *But see* notes 75-77 and accompanying text *infra*.

[73] 473 F.2d at 947-48.

[74] 309 A.2d 647 (Me. 1973).

Maine's malice aforethought requirement. Citing language that it had used in *Rollins,* the Maine court reiterated its view that the term connoted no substantive fact of intent.[75] The *Lafferty* court held that Maine law did not rely on a presumption of premeditation to establish "an essential element of unlawful homicide punishable as murder."[76] As such, the court impliedly reasserted the view it had taken in *Rollins,* that the presumption of malice was in effect no more than a policy presumption that a criminal homicide had not been committed in the heat of passion.[77]

After *Lafferty* was decided, the United States Supreme Court granted certiorari in *Mullaney* and summarily remanded the case to the First Circuit for reconsideration in light of *Lafferty.*[78] The First Circuit, adopting on remand the Supreme Judicial Court's interpretation of Maine's homicide law, nevertheless found the law to be violative of due process.[79] When *Mullaney* reached the Supreme Court for the second time, the Court accepted "as binding the Maine Supreme Judicial Court's construction of state homicide law,"[80] including the view that "malice aforethought connotes no

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[75] *Id.* at 664. Justice Wernick, in his concurring opinion, elaborated on this aspect of the court's decision:

> In the law of Maine "malice aforethought" is . . . a fictional, metaphysical term of art. It capsulizes, as a shorthand code phrase, not any substantively real factual content but only the expression of the public policy judgment that homicides which are rendered criminal by being committed in a specific manner—either by the actor's having a specific subjective intention to have death result or by the high objective tendency of his conduct to produce death—have *attributed* to them the *highest degree* of blameworthiness for purposes of severity of punishment.

Id. at 672 (Wernick, J., concurring) (emphasis in original).

[76] *Id.* at 664. The *Lafferty* court was plainly upset that the First Circuit, despite the clear language of *Rollins,* had chosen to adopt its own interpretation of Maine law, thus making "itself . . . the final arbiter of the internal law of the State of Maine," in defiance of the general rule that federal courts do not have the power to authoritatively construe state statutes. *Id. See* Gooding v. Wilson, 405 U.S. 518, 520 (1972).

[77] Strangely, the *Patterson* court cited *Lafferty* to support its view that in Maine malice aforethought constituted a substantive fact necessary to obtain a murder conviction. *See* note 61 *supra.* Where the *Patterson* court apparently went awry on this issue was in its view of the relationship between express malice aforethought and presumed malice aforethought. The *Patterson* court apparently believed that express malice aforethought had been rendered useless in Maine because the substantive element connoted by that term, *i.e.,* premeditation, was implied in all instances of unlawful and intentional killings. As *Rollins* and *Lafferty* indicate, however, the actual reason express malice is immaterial in that premeditation is not required for a murder conviction under Maine law. *See* 309 A.2d at 664-65.

[78] 414 U.S. 1139 (1974).

[79] Wilbur v. Mullaney, 496 F.2d 1303 (1st Cir. 1974), *aff'd,* 421 U.S. 684 (1975). The First Circuit held that Maine's presumption of malice aforethought was unconstitutional for essentially the same reasons subsequently espoused by the Supreme Court. 496 F.2d at 1306-07.

[80] 421 U.S. at 691.

substantive fact (such as premeditation) but rather is solely a policy presumption."[81]

Comparison of the Maine and New York Murder Statutes

Based upon the foregoing, it is submitted that the Maine law struck down in *Mullaney* and New York's homicide statute are, as argued by the dissent in *Patterson,*[82] functionally identical. Both in Maine and in New York, all the substantive elements of murder must be established by the prosecution beyond a reasonable doubt. The sole factor that distinguishes murder from manslaughter in both states is the existence of a negative—the absence of heat of passion in Maine and the lack of extreme emotional disturbance in New York. Neither mitigating factor rebuts any of the substantive facts the prosecution is required to prove. Rather, both are "collateral" to what the state has defined as the principal facts in issue, and both are explanative of the circumstances under which the defendant's intent was formed.[83] In both instances, the defendant is required to prove the existence of this "collateral" mitigating factor by a preponderance of the evidence.

The foregoing analysis belies the *Patterson* court's belief that the burden of proof on issues "collateral" to those the prosecution is required to establish as essential elements of the crime can be placed upon the defendant without violating *Winship* principles. *Mullaney* indicates clearly that the Court in *Winship* was not concerned merely with the labels a state chooses to place upon those factors that are critical to determining guilt or innocence or the degree of criminal culpability.[84] Whether a factor is defined in the

[81] *Id.* at 689 n.9. The Court also noted that under the Maine court's interpretation of state law, the same intent is required "for both murder and manslaughter, the distinction being that in the latter case the intent results from a sudden provocation which leads the defendant to act in the heat of passion." *Id.* This construction of Maine law cannot be reconciled with the *Patterson* court's subsequent assertion that a showing of heat of passion on sudden provocation renders a felonious homicide "less intentional," 39 N.Y.2d at 302, 347 N.E.2d at 907, 383 N.Y.S.2d at 584. *See* text accompanying note 59 *supra.*

[82] *See* 39 N.Y.2d at 313, 347 N.E.2d at 914, 383 N.Y.S.2d at 589 (Cooke, J., dissenting).

[83] *See* text accompanying notes 52-55 *supra;* note 81 *supra.*

[84] Judge Cooke impliedly took note of this when, comparing the two states' laws, he observed:

> [A]s the Supreme Court pointed out in *Mullaney,* the "malice aforethought" specified in Maine's murder statute was not an element requiring objective proof but only a policy presumption of the absence of heat of passion. While New York's statutes do not mention malice as such, they make the absence of extreme emotional distress an element of murder by distinguishing manslaughter from murder only by the presence of extreme emotional distress. *Thus nothing turns on the fact*

statute as a required element of the crime or is instead considered "collateral" to liability is not determinative. Rather, the decisive inquiry under *Mullaney* is whether the state, in allocating the burden of persuasion in a criminal prosecution, offends the dual interests found critical in *Winship*—reduction of the threat of wrongful convictions based upon factual errors and the fostering of respect for the criminal justice system.[85]

It is suggested that an analysis of section 125.25(1)(a) reveals that New York's affirmative defense of extreme emotional disturbance, like Maine's defense of heat of passion, is violative of the principles espoused in *Winship*. To paraphrase *Mullaney*,[86] New York has chosen to distinguish between those who intentionally kill under the influence of extreme emotional disturbance and those who intentionally kill in its absence. Because the former are considered less blameworthy,[87] they may be convicted only of manslaughter in the first degree, a crime which carries a maximum sentence of 25 years,[88] while the latter may be convicted of murder, a crime punishable by life imprisonment.[89] Furthermore, it is apparent that a defendant branded a "murderer" by the state suffers far greater social stigmatization than one convicted of manslaughter. Consequently, by refusing to require the prosecution to prove beyond a reasonable doubt the sole fact upon which this substantial difference in potential loss of liberty and reputation turns, namely, the absence of extreme emotional disturbance, New York has violated the dictates of *Winship*. Rather than providing the defendant with

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that Maine gives this absence of the emotional factor a name and New York does not.

39 N.Y.2d at 313, 347 N.E.2d at 914, 383 N.Y.S.2d at 589 (citation omitted) (emphasis added) (Cooke, J., dissenting). *See also* Gegan, *supra* note 6, at 576, wherein the author notes that the effect of the affirmative defense of extreme emotional disturbance on New York's murder statute is the same as the effect of the presumption of malice on murder at common law.

[85] *See* notes 15-17 and accompanying text *supra*.

[86] 421 U.S. at 698.

[87] *See* People v. Patterson, 39 N.Y.2d 288, 303, 347 N.E.2d 898, 908, 383 N.Y.S.2d 573, 582, *prob. juris. noted*, 97 S. Ct. 52 (1976).

[88] Manslaughter in the first degree is a B felony under the Penal Law. *See* N.Y. PENAL LAW § 125.20 (McKinney 1975). A first-time felony offender convicted of a B felony may receive anywhere from a 3 to a 25 year maximum sentence. *Id.* § 70.00(2)(b).

[89] Murder in the second degree is an A-1 felony. *Id.* § 125.25. The minimum period of incarceration for an individual who has committed an A-1 felony is 15 years, *id.* § 70.00(3)(a)(i), while the maximum is life imprisonment, *id.* § 70.00(2)(a). In New York, murder in the first degree, which covers the intentional killing of police and corrections officers and intentional homicides committed by certain prison inmates, *id.* § 125.27, is reduced to first degree manslaughter if the defendant can establish that he acted under the influence of extreme emotional disturbance. *Id.* § 125.27(2)(a). A conviction for first degree murder carries with it a mandatory death penalty. *Id.* § 60.06.

the protection against an erroneous conviction which the constitutionally required reasonable-doubt standard is designed to ensure, New York presents a defendant in a homicide prosecution with the possibility of a conviction for murder despite the fact that it is equally likely that he is guilty only of manslaughter.[90]

THE "UNIQUE HARDSHIP" EXCEPTION

Although the court of appeals did not consider the question in *Patterson,* the *Mullaney* Court did not foreclose the possibility that a state might still employ a burden-shifting device, such as an affirmative defense, if it could show that requiring the prosecution to prove a particular fact critical to criminal culpability would constitute a "unique hardship on the prosecution that would justify requiring the defendant to carry the burden of proving [this] fact."[91] Unfortunately, the Supreme Court did not articulate what type of hardship might be sufficiently compelling to outweigh the interests voiced in *Winship.* Nevertheless, *Mullaney* does clearly indicate that in the situation where a significant difference in potential loss of liberty and social stigmatization turns on the existence of a particular fact, the burden of persuasion as to this fact cannot be shifted to the accused merely because the fact is peculiarly within the knowledge of the defendant and/or because proof of such fact by the prosecution would require it to prove a negative.[92]

Although there are some differences in the burden placed upon the prosecution by the Maine and New York provisions, it is submitted that these differences are not sufficient to justify characterization of the New York statute as falling within a unique hardship exception. The heat of passion on sudden provocation defense provided by the Maine murder statute contained two elements, one subjective and one objective. The subjective aspect required that the accused actually be acting under the influence of heat of passion at the time of the killing.[93] The objective element required that there be adequate provocation, with adequacy measured from the viewpoint of the "mind of a just and reasonable man . . . ."[94] Similarly, the New York murder statute contains both subjective and objective elements. The subjective element requires that the defendant have been in fact under the influence of extreme emotional disturbance

[90] *Cf.* text accompanying note 34 *supra.*

[91] 421 U.S. at 702.

[92] *See* note 39 and accompanying text *supra.*

[93] *See* State v. Rollins, 295 A.2d 920 (Me. 1972); note 24 *supra.*

[94] State v. Rollins, 295 A.2d 920, 920-21 (Me. 1972) (citation omitted).

when he committed the homicidal act. The objective element requires that a reasonable explanation or excuse for the emotional disturbance exist, with reasonableness "determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be."[95] Unlike the objective aspect of Maine's law, the objective element of New York's statute contains subjective factors.[96] Thus, it might be argued that this requirement places a sufficient additional strain upon the prosecution in New York to constitute a unique hardship which would justify shifting the burden of persuasion to the defendant.

This contention, however, cannot withstand scrutiny under *Mullaney,* since any increased hardship stems from the fact that the prosecution is burdened with the necessity of proving facts particularly within the knowledge of the defendant, such as the defendant's belief concerning surrounding circumstances at the time of the killing. Difficulties such as these, based upon the proof of facts peculiarly within the knowledge of the defendant, were expressly rejected in *Mullaney* as being sufficient to constitute a unique hardship.[97] It is therefore submitted that to require the prosecution to disprove the existence of extreme emotional disturbance, even with its extra subjective element, does not constitute a unique hardship which would justify casting aside the reasonable-doubt standard.[98] As a result, *Patterson* cannot be supported under the unique hardship exception noted in *Mullaney.*

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[95] N.Y. PENAL LAW § 125.25(1)(a) (McKinney 1975). For a discussion of this aspect of the affirmative defense of extreme emotional disturbance, see Gegan, *supra* note 6, at 571-75.

[96] Noting that extreme emotional disturbance is a broader term than its common law predecessor, heat of passion, Judge Jasen stated in *Patterson:*

> Traditionally, an action taken under the heat of passion meant that the defendant had been provoked to the point that his "hot blood" prevented him from reflecting upon his actions. Furthermore, the action had to be immediate . . . . An action influenced by an extreme emotional disturbance is not one that is necessarily so spontaneously undertaken. Rather, it may be that a significant mental trauma has affected a defendant's mind for a substantial period of time, simmering in the unknowing subconscious and then inexplicably coming to the fore.

39 N.Y.2d at 303, 347 N.E.2d at 907-08, 383 N.Y.S.2d at 582 (citations omitted). For further discussion of extreme emotional disturbance, see People v. Shelton, ___ Misc. 2d ___, ___, ___, 385 N.Y.S.2d 708, 712-15, 717-18 (Sup. Ct. N.Y. County 1976); Gegan, *supra* note 6, at 570.

[97] *See* notes 39-40 and accompanying text *supra.*

[98] *See New York Affirmative Defenses, supra* note 9, at 859-60.

CHIEF JUDGE BREITEL'S CONCURRING OPINION: THE MAJORITY'S RATIONALE?

In his concurring opinion in *Patterson,* Chief Judge Breitel observed that it would be an abuse of affirmative defenses if used "to unhinge the procedural presumption of innocence which historically and constitutionally shields one charged with crime."[99] The chief judge warned, however, that although such abuses should be guarded against, courts should not "be misguised [*sic*], out of excess caution, to forestall or discourage the use of affirmative defenses . . . ."[100] Chief Judge Breitel expressed apprehension that judicial restriction of the legislature's ability to shift the burden of persuasion would discourage lawmakers from providing elements of mitigation when enacting criminal statutes.[101] Moreover, the chief judge apparently feared that judicial intervention would encourage legislators to repeal existing affirmative defenses rather than permit courts to strike them down and convert them into ordinary defenses.[102]

Chief Judge Breitel's misgivings were based upon the fact that a legislature is presumably under no compulsion to include elements of mitigation in a penal statute. Instead, it may choose to define a crime as one general category of prohibited acts with the same basic elements.[103] By way of illustration, the chief judge cited the affirmative defense of extreme emotional disturbance, noting that the legislature could have chosen to define murder or manslaughter as requiring only an intent to kill, without taking into consideration, as a reductive factor, the emotional circumstances under which the intent was formed.[104]

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[99] 39 N.Y.2d at 305, 347 N.E.2d at 909, 383 N.Y.S.2d at 583-84 (Breitel, C.J., concurring).

[100] *Id.*, 347 N.E.2d at 909, 383 N.Y.S.2d at 584.

[101] *Id.* at 306, 347 N.E.2d at 910, 383 N.Y.S.2d at 584.

[102] *Id.* at 305-06, 347 N.E.2d at 909, 383 N.Y.S.2d at 584. Prior to *Patterson,* when a New York court found an affirmative defense to be violative of due process, the usual remedy was to convert it into an ordinary defense. *See, e.g.,* People v. Smith, 85 Misc. 2d 1, 4, 380 N.Y.S.2d 569, 572 (Sup. Ct. N.Y. County 1976); People v. Woods, 84 Misc. 2d 301, 305, 375 N.Y.S.2d 750, 754 (Sup. Ct. Queens County 1975).

[103] Historically, the minimum elements which the prosecution has been required to prove to establish criminal behavior are, "1. the occurrence of [a] social harm . . . 2. the defendant's causal responsibility for the harm . . . 3. the fact of the defendant's intent to inflict the social harm (or his negligent or reckless disregard . . . of that harm)." Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases,* 77 YALE L.J. 880, 883-84 (1968).

[104] 39 N.Y.2d at 305, 347 N.E.2d at 909, 383 N.Y.S.2d at 584 (Breitel, C.J., concurring). Although Chief Judge Breitel's fears concerning the fate of affirmative defenses were based upon the broad discretion a state legislature has in defining crimes, he apparently did not

Whether or not Chief Judge Breitel's apprehensions are justified, it is clear that *Mullaney* implied that the interests sought to be protected in *Winship* cannot be cast aside merely because the state could have defined a crime without providing for an element of mitigation. In *Mullaney,* the State of Maine argued that *Winship* is inapplicable once the state has proven the elements required to convict the defendant of a crime.[105] The state contended that it could thereafter cast the burden of persuasion on the issue of heat of passion onto the defendant.[106] The Supreme Court, however, expressly rejected this contention, holding that conviction of a crime does not, of itself, terminate the applicability of *Winship.*[107] The determinative factor, in the view of the *Mullaney* Court, was that Maine had *chosen* to differentiate the punishment which could be dispensed for commission of the two types of homicide defined under Maine law.[108] By making the issue of heat of passion on sudden provocation the sole fact upon which such distinctions in punishment turned, without obliging the prosecution to prove the absence of that fact, the Maine statute was violative of due process.

Mullaney, therefore, was concerned not with how a state determines the substantive elements of a crime, but rather with what the state does with the burden of persuasion after the crime has been

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believe that shifting the burden of persuasion is justifiable with regard to all mitigating factors. In discussing the affirmative defense of extreme emotional disturbance, the chief judge, in addition to citing the legislature's power to define all intentional homicides as one crime, referred to the relative fairness of placing the burden of proof on the defendant. Chief Judge Breitel contended that placing the burden of persuasion on the defendant to show extreme emotional disturbance is fair because of the accused's "knowledge or access to the evidence other than his own on the issue." *Id.* On the other hand, requiring the prosecution to disprove extreme emotional disturbance generally would be "unfair" in light of the difficulties involved in establishing the existence of a negative. *Id.* at 305-06, 347 N.E.2d at 909, 383 N.Y.S.2d at 584. The chief judge thus employed a combination of two theories that had been put forth in the past as justifications for shifting the burden of persuasion to the defendant: (1) the comparative convenience doctrine, *discussed in* notes 37-38 and accompanying text *supra;* and (2) what has been termed the "fair compromise" theory. For a discussion of the latter theory, see Osenbaugh, *supra* note 37, at 459-67. The crux of the fair compromise theory is that since the state "could, and might otherwise, punish [certain] behavior without providing any defense, it should be allowed to shift the burden [with respect to such defense] on the accused as a compromise." *Id.* at 460. In United States v. Romano, 382 U.S. 136, 144 (1965), this theory was rejected as a means of upholding statutory inferences, *discussed in* note 38 *supra.* The Supreme Court has never considered the "fair compromise" doctrine as a standard for testing the constitutionality of an affirmative defense. *See* Ashford & Risinger, *Presumptions, Assumptions and Due Process in Criminal Cases: A Theoretical Overview,* 79 YALE L.J. 165, 178 (1969).

[105] 421 U.S. at 697.

[106] *Id.*

[107] *Id.* at 697-98.

[108] *Id.* at 698.

defined.[109] If placing the burden of persuasion upon the defendant conflicts with *Winship's* dual interests, then, as in *Mullaney,* the statute must fall, unless the amorphous unique hardship exception is applicable.

Although there may be some merit to Chief Judge Breitel's fears should *Mullaney* be interpreted too broadly, it should be noted that *Mullaney* does not purport to condemn all burden-shifting devices.[110] Certain affirmative defenses dealing with critical facts in issue might still be upheld, perhaps by judicial balancing of the hardship to the prosecution with the *Winship* interests involved,[111] or perhaps on some other ground not obvious on the face of *Mullaney,* but which the Supreme Court will develop in future cases.[112]

CONCLUSION

In *Patterson,* the New York Court of Appeals considered the validity of a provision in the Penal Law which, on its face, appeared constitutionally questionable in light of the Supreme Court's decision in *Mullaney.* Although the court of appeals was presented with an opportunity to consider the interrelationship of *Mullaney* and *Winship* as they affect New York's affirmative defense of extreme emotional disturbance, the court chose instead to attempt to salvage an affirmative defense which, by all indications, is unconstitutional.

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[109] A similar conclusion was reached by Judge Moylan when, speaking for a unanimous Maryland Court of Special Appeals in Evans v. State, 28 Md. App. 640, 349 A.2d 300 (Ct. Spec. App. 1975), he struck down a homicide statute similar to the one in *Mullaney.* There he stated:

> [*Mullaney* and *Winship*] are concerned exclusively with due process, the modality or process by which we do certain things in the criminal law. They are concerned with the criminal law's procedures and not with its substance. It is, therefore not the definitions or elements of our various grades of felonious homicide that require scrutiny under *Mullaney v. Wilbur* and *Winship,* but rather our mechanical, evidentiary and procedural devices. The ultimate concern here is not with what we do but with how we do it.

Id. at ____, 349 A.2d at 323.

[110] *See* People v. Long, 83 Misc. 2d 14, 17, 372 N.Y.S.2d 389, 392 (Sup. Ct. Bronx County 1975).

[111] *See* text accompanying notes 91-98 *supra.*

[112] Even if a state may enact some affirmative defenses, *Mullaney* clearly indicates that it cannot enact them for the reasons stated by Chief Judge Breitel, *discussed in* note 103 *supra.* That a defendant has better knowledge or access to evidence on a particular issue and/or it is difficult for the prosecution to prove a negative were rejected in *Mullaney* as sufficient cause for shifting the burden of persuasion. *See* notes 38-40 and accompanying text *supra.*

It is suggested that the *Patterson* court's decision upholding the New York statute was premised in part upon a misinterpretation of Maine law and a misreading of *Mullaney*. The decision cannot be fully explained, however, merely by reference to the analysis employed by the court. Language in both the majority[113] and concurring opinions[114] leaves little doubt that the court was motivated in part by apprehensions concerning possible legislative reaction to judicial invalidation of affirmative defenses.

Although the constitutionality of utilizing burden-shifting devices in general in crimimal prosecutions is presently unresolved, the Supreme Court, having accepted the appeal in *Patterson*,[115] has the opportunity to confront the issues which have crystallized subsequent to the *Mullaney* decision. Besides passing on the narrow question of whether section 125.25(1)(a) is unconstitutional in light of *Mullaney*, it is hoped that the Court will take advantage of the occasion to define more clearly the circumstances, if any, in which the state's interest in shifting the burden of persuasion as to a critical fact in issue is sufficiently compelling to overcome the vital interests enunciated in *Winship*. Additionally, the Court should clarify the significance, if any, of the "unique hardship" exception. In so doing, the Court may dispel the vast confusion regarding affirmative defenses which has followed in the wake of *Mullaney*.

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[113] The majority cited with approval Chief Judge Breitel's concurring opinion. 39 N.Y.2d at 304, 347 N.E.2d at 908, 383 N.Y.S.2d at 583.

[114] *See* text accompanying notes 99-102 *supra*. Judge Jones, in a brief concurring opinion in *Patterson*, urged judicial restraint in considering the constitutionality of affirmative defenses. 39 N.Y.2d at 307, 347 N.E.2d at 910, 383 N.Y.S.2d at 585 (Jones, J., concurring).

[115] 97 S. Ct. 52 (1976).