Journal of Criminal Law and Criminology

Volume 77 | Issue 3 Article 5

1987

Due Process Rights at Sentencing--Fifth Amendment: McMillan v. Pennsylvania, 106 S. Ct. 2411 (1986)

Anthony J. Dennis

0091-4169/86/7703-646
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY Vol. 77, No. 3

Printed in U.S.A.

FIFTH AMENDMENT—DUE PROCESS RIGHTS AT SENTENCING

McMillan v. Pennsylvania, 106 S. Ct. 2411 (1986).

I. INTRODUCTION

In *McMillan v. Pennsylvania*,[1] the Supreme Court held that Pennsylvania was not constitutionally required to prove beyond a reasonable doubt a fact[2] that would affect the length of the sentences the defendants would receive upon conviction. In deciding this question, the Supreme Court upheld Pennsylvania's Mandatory Minimum Sentencing Act.[3] That Act[4] provides that a person convicted of certain enumerated felonies is subject to a mandatory minimum sentence of five years imprisonment if the sentencing judge, when considering the evidence, finds, by a preponderance of the evidence, that the defendant "visibly possessed a firearm" during the commission of the felony. The Pennsylvania court convicted each of the defendants in *McMillan* of various felonies covered by the Act.[5]

This Note examines judicial and academic constructions of the due process clause of the fifth amendment in order to highlight the due process issues presented in *McMillan*. This Note then examines recent due process cases, finding that *McMillan* is part of a broader effort on the part of the Supreme Court[6] to limit the scope of its decisions in *In re Winship*[7] and *Mullaney v. Wilbur*[8] and, consequently, the applicability of the due process clause to the criminal law.

II. BACKGROUND

The fifth and fourteenth amendments state that no person shall be deprived of life, liberty or property without due process of law.[9]

---

1 106 S. Ct. 2411 (1986).

2 The fact to be proved in this case was visible possession of a firearm. *McMillan*, 106 S. Ct. at 2416.

3 *Id.* at 2414-20.

4 42 PA. CONS. STAT. § 9712 (1982).

5 *McMillan*, 106 S. Ct. at 2414-15.

6 *See infra* notes 126-53 and accompanying text.

7 397 U.S. 358 (1970); *see infra* notes 102-12 and accompanying text.

8 421 U.S. 684 (1975); *see infra* notes 113-25 and accompanying text.

9 The fifth amendment states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless

Thus, proceedings which threaten any of these interests must comply with certain procedures embodied in the term due process of law. This potentially straightforward analysis has been complicated in a number of ways.

The process that is due under the fifth amendment due process clause differs with the type of proceeding involved.[10] Certain requirements imposed on criminal trials by the Constitution may not extend to other kinds of proceedings. Furthermore, the requirements of due process vary not only with the kind of proceeding but also with the particular situation.[11] Accordingly, although "in many respects [a state's capital sentencing hearing] resembles a trial on the issue of guilt or innocence," [it] need not comply with the sixth and fourteenth amendments regarding jury requirements.[12] Similarly, the juvenile justice system must follow some, but not all, of the procedures prescribed by the due process clause.[13] Finally, the es-

---

on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V. Section one of the fourteenth amendment states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, cl. 1.

10 *See infra* notes 12-14 and accompanying text.

11 " '[D]ue process is flexible and calls for such procedural protections as the particular situation demands.' " Schweiker v. McClure, 456 U.S. 188, 200 (1982)(quoting Morrisey v. Brewer, 408 U.S. 471, 481 (1972)).

12 Spaziano v. Florida, 468 U.S. 447, 458-59 (1984).

13 The Supreme Court has made it clear that there is a constitutional distinction between a criminal trial and a juvenile proceeding:

We do not mean . . . to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment.

In re Gault, 387 U.S. 1, 30 (1967)(quoting Kent v. United States, 383 U.S. 541, 562 (1966)). The Supreme Court has held that juveniles may avail themselves of a number of constitutional protections. *See* Breed v. Jones, 421 U.S. 519 (1975)(holding that double jeopardy protections apply to criminal proceedings subsequent to adjudicatory hearings in juvenile courts); *In re* Winship, 397 U.S. 358 (1970)(holding that standard of proof in delinquency hearings must meet the reasonable doubt standard which is a requirement of due process); *In re* Gault, 387 U.S. 1 (1967)(holding that delinquency hearings must guarantee such due process rights as timely notice, right to counsel, right to confront and cross-examine witnesses, and protection against self-incrimination); Kent v. United States, 383 U.S. 541 (1966)(holding that decision to transfer a juvenile to adult court is a critical phase of processing at which right to due process attaches). However,

sentials of due process in the context of an agency rulemaking proceeding differ from those required in an adjudicatory context.[14]

There is also some indication that the three protected interests (life, liberty and property) are not necessarily coequal. The Court has characterized a citizen's liberty interest as "an interest of transcending value."[15] This statement indicates that the due process clause demands a great deal of procedural protection when a defendant's liberty interest is at stake.[16]

In addition to the above distinctions, which are constitutionally significant, the Supreme Court has considered a number of other approaches in determining what process is due. The positivist position[17] on procedural due process continues to receive the support of some academics[18] and members of the judiciary.[19] The positivists

---

in McKeiver v. Pennsylvania, 403 U.S. 528 (1971), the Court held that the due process rights of juveniles charged with unlawful conduct do not include the right to trial by jury. A number of recent decisions make it clear that the Court is withdrawing or declining to extend constitutional guarantees to those subject to the juvenile justice system. *See* New Jersey v. T.L.O., 105 S. Ct. 733 (1985)(holding that school officials need not seek a warrant and need not have probable cause to believe that any rule or law has been violated in order to search students); Schall v. Martin, 104 S. Ct. 2403 (1984)(upholding a provision of the New York Family Act that provides for the pre-trial detention of juveniles if it were the opinion of the juvenile court that such juveniles would present a risk to themselves or others were they not detained); Parham v. J.R., 442 U.S. 584 (1979)(upholding a Georgia statute which provides for the commitment of juveniles to state mental hospitals without the requirement of any adversary hearing); Fare v. Michael C., 442 U.S. 707 (1979)(holding that fifth amendment protections against self-incrimination did not apply to a juvenile taken into police custody).

[14] *See* Londoner v. Denver, 210 U.S. 373, 386 (1908)("Many requirements essential in strictly judicial proceedings may be dispensed with [in the administrative forum].").

[15] Speiser v. Randall, 357 U.S. 513, 525 (1958).

[16] In at least two dissenting opinions, Justice Stevens has stated his belief that qualitative differences exist between the three protected interests. *See* Spaziano v. Florida, 468 U.S. at 468 (Stevens, J., concurring in part and dissenting in part)("a deprivation of liberty is qualitatively different from a deprivation of property"); Lassiter v. Department of Social Servs., 452 U.S. 18, 59-60 (1981)(Stevens, J., dissenting)(arguing that the Court should not apply the *Mathews v. Eldridge* cost-benefit analysis when a person's liberty interest is at stake).

[17] For a discussion of the positivist position in the due process context as compared with the legal philosophy of positivism, see Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1071 n.141 (1984).

[18] Professor Easterbrook analyzes the historic antecedents of the due process clause, the structure of the Constitution, and early due process cases and concludes that the legislature's determination concerning what procedures are to be followed constitutes due process of law. As a result, there is nothing for the judiciary to review. *See* Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85. *See also* R. BERGER, GOVERNMENT BY JUDICIARY 193-214 (1977). For an extensive critique of Easterbrook and the work of the positivists, see Redish & Marshall, *Adjudicatory Independence and the Values of Due Process*, 95 YALE L.J. 455 (1986).

[19] Based on his review of historical sources, Justice Black believed that due process of law means law of the land. Therefore, any legislative enactment which does not offend other sections of the Constitution meets the requirements of due process because it

believe that due process of law mandates no more than compliance with whatever procedures the legislature has mandated shall be followed.[20] Therefore, no basis exists for judicial review.[21] The Court in *Murray's Lessee v. Hoboken Land & Improvement Co.*[22] considered and rejected this reading of the due process clause. The Supreme Court also rejected the positivists' reading of the due process clause of the fourteenth amendment in *Kennard v. Louisiana ex rel. Morgan*[23].

In *Murray's Lessee*, the Supreme Court used an historical test for determining the procedures required by due process.[24] Thus, the Court looked "to those settled usages and modes of proceeding existing in the common and statue [sic] law of England"[25] in order to ascertain what process was due in that case.

The Court's due process approach has also contained the notion that the due process clause requires all procedures necessary to secure a fair and just result. A number of cases[26] have held that the proceeding in question must comply with the due process requirement of fundamental fairness.

Most recently, the Supreme Court has employed a balancing test which weighs private and governmental interests in order to determine the process due in each case. The Court first used this ap-

---

represents part of the law of the land. *See In re* Winship, 397 U.S. at 377-86 (Black, J., dissenting). Chief Justice Rehnquist currently is the strongest supporter of this position on the Court. *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 105 S. Ct. 1487, 1503 (1985)(Rehnquist, J., dissenting)(the court "ought to recognize the totality of the State's definition of the property right"); Arnett v. Kennedy, 416 U.S. 134 (1974)(Rehnquist, J., writing for three Justice plurality)("[P]roperty interest which appellee had in his employment was itself conditioned by the procedural limitations which had accompanied the grant of that interest.").

20 *See* Easterbrook, *supra* note 18, at 94-109.

21 *See supra* note 19; Redish & Marshall, *supra* note 18, at 457 n.12.

22 59 U.S. 272 (1855).

> It is manifest that it was not left to the legislative power to enact any process which might be devised. The [due process clause] is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process "due process of law", by its mere will.

Murray's Lessee, 59 U.S. at 276.

23 92 U.S. 480 (1875)(The court implicitly acknowledged that the due process clause of the fourteenth amendment imposes normative limits on state procedure); *see also* Davidson v. New Orleans, 96 U.S. 97 (1877)(same).

24 *Murray's Lessee*, 59 U.S. at 277.

25 *Id.*

26 *See, e.g., In re* Winship, 397 U.S. at 372 (1970)(due process embodies the notion of "fundamental procedural fairness"); Snyder v. Massachusetts, 291 U.S. 97, 116 (1934)("due process of law requires that the proceedings shall be fair"); Twining v. New Jersey, 211 U.S. 78, 106 (1908)(in deciding whether states could compel self-incrimination in criminal cases, the Supreme Court questioned whether the freedom from self-incrimination was a "fundamental principle of liberty and justice").

proach in 1976 in *Mathews v. Eldridge*.[27] The test[28] is based on considerations of economic efficiency and does not even mention the idea of fairness.

As recent cases illustrate, tests favored by the Supreme Court in the past have not been conclusively discarded nor are any of the approaches described above mutually exclusive.[29] Although the positivist construction of due process was rejected by the Court long ago,[30] Justice Black[31] recently advocated this interpretative approach, and Justice Rehnquist[32] presently holds this view. Moreover, the Supreme Court has combined the historical and fundamental fairness tests in its due process analysis. Stating that due process contains the notion of "fundamental procedural fairness,"[33] the Court has drawn its ideas of fairness in part from the "historically grounded rights of our system" embodied in "the com-

---

27 424 U.S. 319 (1976).

28

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335. Redish and Marshall state their belief that the test was a response to "the burgeoning administrative state of the late 1960s" which "demonstrated that the implementation of [all of the procedures mandated by due process in the adjudicatory context] across the board was not possible." Redish & Marshall, *supra* note 18, at 471 (footnote omitted). The test has been criticized for leaving dignitary values out of the balance. *See* Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 51-52 (1976).

In reality the *Mathews* test and the positivist approach are often functionally equivalent. Presumably, in enacting the legislation under review the legislature has already undertaken a cost-benefit analysis similar, if not identical to, the approach described in *Mathews*. Furthermore, it has done so while having within its possession superior amounts of information and data concerning the likely effects upon individuals, society, and the judicial system as a whole of various procedural schemes. Therefore, in the absence of an obvious miscalculation or blatant disregard of relevant data, the Court is likely to respect the legislature's decision.

29 *See infra* notes 80-84 and accompanying text. Redish & Marshall's exposition of the various due process tests is inaccurate to the extent that their article implies that past tests have been conclusively discarded or that the Court currently regards these various approaches as mutually exclusive.

30 *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272 (1855); Kennard v. Louisiana ex rel. Morgan, 92 U.S. 480 (1875); *see also supra* notes 22 & 23 and accompanying text.

31 *See In re* Winship, 397 U.S. 358, 377-86 (1970)(Black, J., dissenting).

32 *See* Cleveland Bd. of Educ. v. Loudermill, 105 S. Ct. 1487, 1503 (1985)(Rehnquist, J., dissenting).

33 *See Winship*, 397 U.S. at 372.

mon-law tradition."[34]

Delivered in the midst of a complex and ever-changing due process analysis, *McMillan v. Pennsylvania*[35] represents the Supreme Court's response to three recent due process cases *(In re Winship*,[36] *Mullaney v. Wilbur*[37] and *Patterson v. New York*[38]) that have shaped due process analysis in recent years. In *In re Winship*, the Supreme Court decided that the due process clause required proof beyond a reasonable doubt in an adjudication to determine juvenile delinquency.[39] The Court's broad statement that due process required "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the defendant] is charged"[40] was interpreted in the latter two cases. In *Mullaney v. Wilbur*, the Supreme Court determined that the reasonable doubt standard applied to all factors that, if present, could affect the defendant's interests in liberty and reputation.[41] Nonetheless, the Court subsequently decided in *Patterson v. New York* that the rule of *In re Winship* applied only to those factors defined by statute as elements of a crime.[42]

III. The Procedural History of *McMillan*

Pennsylvania's Mandatory Minimum Sentencing Act provides that a person convicted of certain enumerated felonies is subject to a mandatory minimum sentence of five years imprisonment if the sentencing judge finds, by a preponderance of the evidence, that the defendant "visibly possessed a firearm" during the commission of the felony.[43] In *McMillan* the Pennsylvania court convicted the de-

---

34 Brinegar v. United States, 338 U.S. 160, 174 (1949).

35 106 S. Ct. 2411 (1986).

36 *In re* Winship, 397 U.S. 358 (1970).

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

38 Patterson v. New York, 432 U.S. 197 (1977).

39 397 U.S. at 367.

40 *Id.* at 364.

41 421 U.S. at 696-701.

42 *Patterson*, 432 U.S. at 210.

43 *See* 42 Pa. Cons. Stat. § 9712 (1982). Section 9712 provides in relevant part:

(a) Mandatory sentence—Any person who is convicted in any court of this Commonwealth of murder of the third degree, voluntary manslaughter, rape, involuntary deviate sexual intercourse, robbery. . . aggravated assault. . . kidnapping, or who is convicted of attempt to commit any of these crimes, shall, if the person visibly possessed a firearm during the commission of the offense, be sentenced to a minimum sentence of at least five years of total confinement notwithstanding any other provision of this title or other statute to the contrary.

(b) Proof at sentencing—Provisions of this section shall not be an element of the crime. . . . The applicability of this section shall be determined at sentencing. The court shall consider any evidence presented at trial and shall afford the Commonwealth and the defendant an opportunity to present any necessary additional evidence and shall determine, by a preponderance of the evidence, if this section is applicable.

fendants of various felonies covered by the Act.[44] Following the defendants' conviction, the Commonwealth of Pennsylvania gave notice that it would seek to proceed under the Act[45] at sentencing. In each case, however, the sentencing judges found the Act unconstitutional and imposed lesser sentences than those required by the statute.[46] All four cases were appealed to the Supreme Court of Pennsylvania, which consolidated the Commonwealth's appeals.[47] The appellees advanced two principal arguments. First, they contended that visible possession of a firearm was "an element of the crimes for which they were being sentenced and thus must be proved beyond a reasonable doubt under *In re Winship* . . . and *Mullaney v. Wilbur*."[48] The Supreme Court of Pennsylvania noted that the legislature had expressly stated that visible possession "shall not be an element of the crime"[49] and that according to *Patterson v. New York*[50] the applicability of the reasonable doubt standard was a function of how the state defined the offense.

Appellees also asserted that even if visible possession is not an element of the offense, due process still requires more than proof by a preponderance of the evidence.[51] Rejecting the appellant's contention, the Pennsylvania Supreme Court found that the Act did not create a series of upgraded felonies of which visible possession was an element because the Act became operative only after conviction and served merely to limit the sentencing judge's discretion.[52] The Pennsylvania Supreme Court stated that the Act was consistent with *In re Winship*, *Mullaney* and *Patterson* in that it did not create a presumption with respect to any fact constituting an element of the crimes in question.[53] The Supreme Court of Pennsylvania found that the state had a compelling interest in deterring the illegal use of firearms and that the defendants' liberty interest had been substantially diminished by the guilty verdicts.[54] Therefore, the court held

(c) Authority of court in sentencing—There shall be no authority in any court to impose on an offender to which this section is applicable any lesser sentence than provided for in subsection (a) or to place such offender on probation or to suspend sentence.

44 *McMillan*, 106 S. Ct. at 2414-15.

45 *Id.* at 2415.

46 *Id.*

47 *Id.*

48 *Id.*

49 *Id.* (quoting 42 PA. CONS. STAT. § 9712(b)).

50 *Id.*

51 *See McMillan*, 106 S. Ct. at 2414.

52 *Id.*

53 *Id.*

54 *Id.*

that the preponderance standard satisfied due process.[55] The court then vacated appellees' sentences and remanded for sentencing pursuant to the Act.[56] The United States Supreme Court granted a writ of certiorari and affirmed the opinion of the Supreme Court of Pennsylvania.[57]

IV. THE SUPREME COURT DECISION

A. THE PLURALITY OPINION

Justice Rehnquist, writing for a plurality of the Court, affirmed and expanded the reasoning set forth by the Supreme Court of Pennsylvania. The Court stated that its holding was "controlled by *Patterson*. . . rather than *Mullaney*"[58] and found Pennsylvania's statute to be constitutional since visible possession of a firearm was not an element of the crimes for which the petitioners were convicted.[59] The Court deferred to the states' preeminent interest in defining and controlling crime.[60] The plurality relied on *Patterson*[61] for the proposition that there were constitutional limits beyond which the states could not go in this regard.[62] Although the plurality concluded that Pennsylvania's Mandatory Minimum Sentencing Act did not exceed those limits, the Court declined to specifically define them.[63] Rather, the majority advanced as an example of unconstitutionality the *Patterson* Court's rather "unremarkable proposition that the due process clause precludes states from discarding the presumption of innocence."[64] The Court observed that Pennsylvania's statute did not create this type of presumption, nor did it in any way "relieve the prosecution of its burden of proving guilt."[65]

The plurality distinguished its holding from *Mullaney*[66] and *Specht v. Patterson*[67] on the basis of the difference between the Pennsylvania statute and the statutes at issue in those cases. The defendant in *Mullaney*, depending on the presence or absence of the mitigating or aggravating factor at issue, faced " 'a differential in

55 *Id.*
56 *Id.*
57 *Id.*
58 *Id.* at 2416.
59 *Id.* at 2416-17.
60 *See* Patterson v. New York, 432 U.S. 197 (1977).
61 *McMillan*, 106 S. Ct. at 2417.
62 *Id.*
63 *Id.*
64 *Id.*
65 *Id.*
66 421 U.S. 684 (1975).
67 386 U.S. 605 (1967).

sentencing ranging from a nominal fine to a mandatory life sentence.' "[68] The defendants in *McMillan*, the Court observed, were subjected to the same maximum length of incarceration regardless of sentencing pursuant to the Act.[69] According to the majority, *Specht* was similarly distinguishable. The Colorado statute in that case was held to violate due process because it provided that a person convicted of a sexual offense, carrying a maximum penalty of ten years imprisonment, could be exposed to an indefinite or life sentence if a sentencing judge found that the defendant posed a threat to society.[70] The majority also dismissed the petitioners' assertion "that had *Winship* already been decided at the time of *Specht*, the Court would have also required that the burden of proof as to the post-trial findings be beyond a reasonable doubt."[71]

In response to the petitioners' concern that states might restructure their criminal codes to evade the rule of *In re Winship*, requiring proof beyond a reasonable doubt for all elements of a crime, the Court remarked that "[t]he Pennsylvania legislature did not change the definition of any existing offense."[72] The Court also observed that the fact that a number of the state legislatures have made possession of a weapon an element of certain criminal offenses does not render Pennsylvania's approach to weapons possession unconstitutional.[73]

The Court held that Pennsylvania could "treat 'visible possession of a firearm' as a sentencing consideration rather than an element of a particular offense." The Court concluded that the use of the preponderance standard at sentencing satisfied due process since "[s]entencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all."[74]

B. DISSENTING OPINIONS

Justice Marshall, joined by Justices Brennan and Blackmun, dissented on the ground that the Court, and not the states, must decide "[w]hether a particular fact is an element of a criminal offense."[75] Furthermore, according to *In re Winship*, these elements "must be proved by the prosecution beyond a reasonable doubt."[76] Citing

---

68 *McMillan*, 106 S. Ct. at 2417.
69 *McMillan*, 106 S. Ct. at 2417-18 (quoting *Mullaney*, 421 U.S. at 700).
70 *See McMillan*, 106 S. Ct. at 2418 (citing *Specht*, 386 U.S. at 607).
71 *McMillan*, 106 S. Ct. at 2418.
72 *Id.* at 2418-19.
73 *Id.* at 2419.
74 *Id.* at 2420.
75 *Id.* at 2421 (Marshall, J., dissenting).
76 *Id.*

Mullaney,[77] Justice Marshall stated that to hold otherwise would give a state the opportunity to redefine which facts are elements of a crime by allowing the state to "undermine many of the interests [*In re Winship*] sought to protect."[78] Justice Marshall concluded his dissent by agreeing with Justice Stevens, who dissented separately, that " 'if a state provides that a specific component of a prohibited transaction shall give rise both to a special stigma and to a special punishment, that component must be treated as a "fact necessary to constitute the crime" within the meaning of . . . *In re Winship*.' "[79]

In his separate dissent, Justice Stevens analyzed *Patterson* and *In re Winship* and reviewed the purposes behind the reasonable doubt standard, showing that the majority incorrectly relied on Pennsylvania's definition of the elements of prohibited conduct. Beginning with a brief recitation of the facts, he noted that the trial judges, as well as the superior court judges, who heard the appeals "all concluded that visible possession of a firearm was an element of the offense[s]" for which the defendants were being punished and thus, required proof beyond a reasonable doubt.[80] Justice Stevens noted that while agreeing "that visible possession of a firearm is conduct that the Pennsylvania General Assembly intended to prohibit,"[81] the Pennsylvania Supreme Court nevertheless held that this factor was not an element of the offenses. The court's holding was grounded in its conclusion that the Pennsylvania General Assembly stated in the Mandatory Minimum Sentencing Act that provisions of that Act "shall not be an element of the crime."[82]

Justice Stevens stated that the plurality, in affirming the Pennsylvania Supreme Court, improperly relied upon *Patterson v. New York* to hold that Pennsylvania's definition of the offenses in question were dispositive for purposes of due process. He noted that "nothing in *Patterson* or any of its predecessors authorizes a State to decide for itself which of the ingredients of the prohibited transaction are 'elements' that it must prove beyond a reasonable doubt at trial."[83] On the contrary, Justice Stevens stated that *Patterson* merely permits a state, "subject . . . to constitutional limits, to attach criminal penalties to a wide variety of objectionable transactions."[84]

Drawing upon the Court's discussion of the interests protected

---

77 421 U.S. 684 (1975).
78 *McMillan*, 106 S. Ct. at 2421 (Marshall, J., dissenting).
79 *Id.* (quoting *McMillan*, 106 S. Ct. at 2426 (Stevens, J., dissenting)).
80 *Id.* at 2422 (Stevens, J., dissenting).
81 *Id.*
82 *Id.* (quoting PA. CONS. STAT. 9712 (b)).
83 *Id.* at 2423.
84 *Id.*

by the reasonable doubt standard in *In re Winship*, Justice Stevens concluded that the applicability of the due process clause depends upon whether individuals engaged in a course of conduct are subject to "criminal penalties" which give "rise to both a special stigma and a special punishment."[85] Furthermore, "[a]s [the Court] held in *Mullaney*, '[t]he safeguards of due process are not rendered unavailable simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty.' "[86] Since, under the statute, visible possession of a firearm subjects a defendant to a longer sentence than the trial judge would otherwise have imposed, thereby leading to increased stigmatization and punishment, proof of that factor should be required beyond a reasonable doubt.[87]

Justice Stevens concluded his dissent with a discussion of aggravating and mitigating facts and the methods by which a state may criminalize certain types of conduct.[88] Justice Stevens hypothesized a number of statutes which would criminalize seemingly innocent forms of conduct and allow a number of affirmative defenses.[89] The due process requirement of proof beyond a reasonable doubt would not apply to proof of the affirmative defenses, because the interests protected by the due process clause are safeguarded by "the continued functioning of the democratic process."[90] Such legislation would never "command a majority of the electorate."[91]

Justice Stevens stated, however, that "[i]t is not at all inconceivable . . . to fear that a State might subject those individuals convicted of engaging in antisocial conduct to further punishment for aggravating conduct not proved beyond a reasonable doubt."[92] By impinging upon the individual's "interest in avoiding both the loss of liberty and the stigma that results from a criminal conviction," the presence of these aggravating factors must be proved beyond a reasonable doubt.[93] Accordingly, Justice Stevens found that proof of visible possession of a firearm under Pennsylvania's Mandatory Minimum Sentencing Act must meet the reasonable doubt standard of due process.

---

85 *Id.* at 2422.
86 *Id.* at 2424 n.3.
87 *Id.* at 2426.
88 *Id.* at 2424-26.
89 *Id.* at 2424-25.
90 *Id.* at 2424.
91 *Id.* at 2425.
92 *Id.*
93 *Id.* at 2425-26.

V. ANALYSIS

Although the range and complexity of due process analysis served to guide the Court in its decisionmaking, the Supreme Court decided *McMillan v. Pennsylvania*[94] within the analytical framework provided by a trio[95] of recent due process cases. Taken together, these cases illustrate the Supreme Court's changing attitude toward fifth amendment criminal law analysis. During the Warren Court, the Supreme Court extended the application of the due process clause to various components of the criminal justice system.[96] *In re Winship*'s[97] formal constitutionalization of the standard of proof used in criminal proceedings represented a continuation of this trend. The Supreme Court's decision in *Mullaney v. Wilbur*[98] represents the furthest extension of due process protections within the criminal context. In *Mullaney* the Court indicated that a state must prove beyond a reasonable doubt all elements of the crime, including all factors which, if proven, would have an effect upon the defendant's interests in liberty and reputation.[99] Fearful of the effects on the use of presumptions and affirmative defenses, the possibilities for legislative reform and the criminal justice system as a whole, the Supreme Court upheld a state statute in *Patterson v. New York*.[100] The statute involved in that case required the defendant to prove the affirmative defense of extreme emotional disturbance by a preponderance of the evidence in order to reduce second-degree murder to manslaughter. The *Patterson* Court also presented a revisionist history of *Mullaney* in an attempt to limit some of the implications arising from this earlier decision.[101]

Like *Patterson*, *McMillan* represents a continuation of the Court's movement away from *Mullaney* and the interpretation of *In re Winship* that *Mullaney* presented. *McMillan* reflects the Supreme Court's efforts to prevent the application of the due process clause, and consequently the reasonable doubt standard, to all aspects of the

---

94 106 S. Ct. 2411 (1986).

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

96 *See, e.g.*, Thomas & Bilchik, *Prosecuting Juveniles in Criminal Courts: A Legal and Empirical Analysis*, 76 J. CRIM. L. & CRIMINOLOGY 439, 453 (1985). For cases illustrating the application of due process to the juvenile justice system, see Breed v. Jones, 421 U.S. 519 (1975); *In re* Winship, 397 U.S. 358 (1970); *In re* Gault, 387 U.S. 1 (1967); Kent v. United States, 383 U.S. 541 (1966); *see also supra* note 13.

97 397 U.S. 358 (1970); *see also infra* notes 102-10 and accompanying text.

98 421 U.S. 684 (1975).

99 *Id.* at 697-706; *see also infra* notes 113-22 and accompanying text.

100 432 U.S. 197 (1977).

101 *Id.* at 214-16; *see also infra* notes 126-33 and accompanying text.

criminal law. An analysis of the significance of *McMillan* requires close consideration of those three earlier cases.

In *In re Winship*, the Supreme Court determined the burden of proof constitutionally required in an adjudication determining juvenile delinquency.[102] In deciding *In re Winship*, the Court relied on *In re Gault*,[103] a juvenile delinquency case decided three years earlier. In *In re Gault*, the Court stated that although the requirements imposed by the fourteenth amendment vary depending on the type of proceeding involved, the due process clause requires that an adjudicatory hearing to determine juvenile delinquency must comport with " 'the essentials of due process and fair treatment.' "[104] The Court, in *In re Winship*, held that the reasonable doubt standard of proof was one of the essentials of due process. The Court stated its holding in broad terms:

> Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.[105]

In one respect, *In re Winship* was a rather unremarkable decision. In granting constitutional protection to the reasonable doubt standard, *In re Winship* merely confirmed the existing state of affairs regarding the degree of proof required in criminal cases.[106] At the same time, however, the language used and the circumstances of the case indicate a more general holding. *In re Winship* dealt specifically with the burden of proof required in a juvenile delinquency hearing. Yet the Supreme Court presented its decision in the form of a rule that was not limited to the facts of that case. Furthermore, the Court in *Winship* applied a rule used within the context of a criminal trial to a juvenile delinquency proceeding. As a result, such words as "conviction," "fact," and "crime" were left open to creative definition.

There are two major interpretations[107] of the Supreme Court's

---

102 397 U.S. 358, 359 (1970).

103 387 U.S. 1 (1967).

104 *Id.* at 30 (quoting Kent v. United States, 383 U.S. 541, 562 (1966)).

105 *Winship*, 397 U.S. at 364.

106 The Court described the historical prevalence of the reasonable doubt standard in criminal trials and cited many of its earlier opinions where it had assumed that this burden of proof was constitutionally mandated with respect to a criminal charge. *See Winship*, 397 U.S. at 361-64. *See also id.* at 372 (Harlan, J., concurring)("It is only because of the nearly complete and long-standing acceptance of the reasonable-doubt standard by the States in criminal trials that the Court has not before today had to hold explicitly that due process . . . requires [this] standard.").

107 For a discussion and critique of the procedural interpretation and the formalist interpretation of *In re Winship*, see Jeffries & Stephan, *Defenses, Presumptions, and Burden of*

holding in *In re Winship*. The procedural interpretation[108] views *In re Winship* as requiring a state to prove beyond a reasonable doubt the presence or absence of every factor, including the definitional elements of the offense, having an impact on penal liability. The formalistic interpretation[109] of *In re Winship* requires a state to prove beyond a reasonable doubt only those elements included in the state's definition of the offense.[110] The Supreme Court's decisions in *Mullaney*[111] and *Patterson*[112] help to clarify the parameters of the holding in *In re Winship*.

In *Mullaney*, the Supreme Court of the United States held unconstitutional a Maine homicide statute[113] that placed upon the defendant the burden of proving by a preponderance of the evidence that he acted "in the heat of passion, on sudden provocation" in order to secure a manslaughter conviction.[114] The Court accepted the Maine Supreme Judicial Court's construction that under the law of Maine murder and manslaughter are not distinct crimes, but rather, different degrees of the single generic offense of felonious

---

Proof in the Criminal Law, 88 YALE L.J. 1325, 1328-38 (1979). In addition to acknowledging the two above-mentioned theories, Professor Allen also presents the political compromise and proportionality interpretations of *In re Winship*. *See* 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, 46-53 (1977). Allen presents these two approaches by way of a discussion of *Patterson v. New York*, a case which he sees as "restor[ing] *Winship* to its original purpose." *Id.* at 37. The political compromise theory would permit placing the burden of persuasion on the defendant when the legislature would have refused to adopt the defense except for the fact that the burden of proof has been placed on the defendant. The proportionality theory states that there must be proportionality between the maximum punishment authorized by statute for the commission of the offense and the seriousness of the offense. The eighth amendment's prohibition against cruel and unusual punishment provides the constitutional basis for the proportionality principle. *See id.* at 46-53. This Note declines to classify as 'major' these two interpretations because of the absence of language in *In re Winship*, *Patterson* or *Mullaney* which would indicate that the Court had adopted either of these approaches. Professor Allen himself admits that the *Patterson* Court neither mentions the eighth amendment nor the proportionality doctrine. *See id.* at 53.

108 *See* Jeffries & Stephan, *supra* note 107, at 1333-38.

109 *See* Jeffries & Stephan, *supra* note 107, at 1328-33.

110 *See* Jeffries & Stephan, *supra* note 107.

111 *See* Mullaney v. Wilbur, 421 U.S. 684 (1975).

112 *See* Patterson v. New York, 432 U.S. 197 (1977).

113 The Maine murder statute, ME. REV. STAT. ANN., Tit. 17, § 2651 (1964), 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." The Maine manslaughter statute, ME. REV. STAT. ANN., Tit. 17, § 2551 (1964), in relevant part provides: "Whoever unlawfully kills a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought . . . shall be punished by a fine of not more than $1,000 or by imprisonment for not more than 20 years. . . ."

114 *Mullaney*, 421 U.S. at 704.

homicide.[115] Advancing a formalist interpretation of the holding in *In re Winship*, the State of Maine asserted that absence of "heat of passion, on sudden provocation,"[116] is not a fact necessary to constitute the crime of felonious homicide and, therefore, need not be proved beyond a reasonable doubt in accordance with the holding in *In re Winship*.[117] Viewing the issue "in terms of the potential differences in the restrictions of personal liberty attendant to each conviction,"[118] the Supreme Court demolished the formalistic view[119] of *In re Winship*:

> [I]f *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.[120]

Looking at "substance" over "form" with respect to Maine's statutory scheme, the Court rested its decision on the fact that the presence or absence of sudden provocation affected the degree of criminal culpability[121] and, consequently, the defendant's interests in liberty and reputation.[122]

Mullaney's requirement that the state prove beyond a reasonable doubt the presence or absence of all factors affecting penal liability, promised to revolutionize the criminal justice system. The Court's procedural approach to due process in *Mullaney* threatened to strip American criminal law of its sophistication by prohibiting the use of all presumptions and affirmative defenses.[123] Rather than bear the burden of proving the absence of these mitigating circumstances, the states would probably return to a set of offenses without grade or differentiation.[124] As a result, state criminal codes would become more severe.[125] Ironically, in attempting to afford the de-

---

115 *Id.* at 691-92.

116 ME. REV. STAT. ANN., Tit. 17, § 2551 (1964).

117 421 U.S. at 697.

118 *Id.* at 698.

119 *See supra* notes 107-10 and accompanying text.

120 421 U.S. at 698.

121 In Maine a finding that the defendant committed murder leads to life imprisonment, a manslaughter finding leads to a maximum 20 year sentence and maximum possible fine of $1,000. *See* ME. REV. STAT. ANN., Tit. 17, §§ 2551, 2651 (1964).

122 *Mullaney*, 421 U.S. at 696-701.

123 The academic and judicial response to *Mullaney v. Wilbur* ranged from a belief that *Mullaney* disallowed all affirmative defenses to a belief that that decision may be safely confined to its facts. *See* Jeffries & Stephan, *supra* note 107 at 1340-41 and accompanying footnotes.

124 *See id.* at 1353-56.

125 *See id.*

fendant the most procedural protection possible, the Supreme Court in *Mullaney* rendered a decision which promised to serve poorly the interests of future defendants.

In *Patterson*,[126] the Supreme Court moved to limit the scope of its decision in *Mullaney* and to stop what it regarded as the overconstitutionalization of the criminal process.[127] The decision also reflected the Court's concern with the administrative costs associated with the requirements of due process.[128] The *Patterson* Court upheld a New York statute[129] requiring a defendant charged with second-degree murder to prove extreme emotional disturbance by a preponderance of the evidence in order to be convicted of manslaughter.[130] The Court distinguished *Mullaney* on the ground that sudden provocation and malice aforethought were mutually exclusive.[131] Consequently, Maine's requirement that the defendant bear the burden of proving the former by a preponderance of the evidence was the same as requiring the defendant to prove the absence of the latter. Therefore, according to the *Patterson* Court, the statute in *Mullaney* was declared unconstitutional because its presumption concerning a mitigating factor was, in effect, a presumption concerning an element of the crime.[132] The Court stated that, on the contrary, the affirmative defense of extreme emotional disturbance "does not serve to negative any facts of the crime which the State is to prove in order to convict of murder."[133]

Having presented a revisionist history of its holding in *Mullaney*,

---

126 432 U.S. 197 (1977).

127 *See Patterson*, 432 U.S. at 214-15 n.15. Justice Rehnquist's concurrence provides the only indication that the Court in *Mullaney* was concerned with the impact of its holding upon the use of affirmative defenses. Justice Rehnquist stated his belief that the holding in *Mullaney* did not overrule the Court's decision in Leland v. Oregon, 343 U.S. 790 (1952), which sustained a requirement that the defendant bear the burden of proving insanity. *See Mullaney*, 421 U.S. at 705-06.

128 *See infra* notes 132-36 and accompanying text.

129 N.Y. PENAL LAW § 125.25 (McKinney 1975) provides in relevant part:

> A person is guilty of murder in the second degree when: 1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that: (a) The defendant acted under the influence of extreme emotional disturbance . . . .

N.Y. PENAL LAW § 125.20(2) (McKinney 1975) provides in relevant part:

> A person is guilty of manslaughter in the first degree when: . . . . 2. With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in paragraph (a) of subdivision one of section 125.25. . . .

130 *Patterson*, 432 U.S. at 201.

131 *Id.* at 213, 215-16.

132 *Id.* at 215-16.

133 *Id.* at 207.

which allowed the Court to avoid overruling that case, the Supreme Court proceeded in *Patterson* to adopt a formalist approach[134] to the due process requirement of proof beyond a reasonable doubt. The Court stated 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."[135] Acknowledging the possibility that states would exploit the decision by reclassifying as affirmative defenses some elements of the crime in question, the Court stated that there were "constitutional limits beyond which the States may not go in this regard."[136]

A number of concerns motivated the Court in *Patterson.* The Court knew that *Mullaney*, taken to its logical conclusion, would have the effect of abolishing all affirmative defenses, including the twenty-five affirmative defenses contained in New York's criminal code.[137] Consequently, the Supreme Court stated that the "Due Process Clause . . . does not put New York to the choice of abandoning those defenses or undertaking to disprove their existence in order to convict of a crime. . . ."[138]

The Supreme Court was also concerned with economic efficiency and the administrative costs associated with the requirements of due process.[139] The Court acknowledged Justice Harlan's statement in *In re Winship* that the reasonable doubt standard is based on a fundamental value determination that it is worse to convict an innocent person than let a guilty one go free.[140] However, "[D]ue process does not require that every conceivable step be taken, at whatever *cost*, to eliminate [this] possibility."[141] Without mentioning *Mathews v. Eldridge*[142] by name, the Supreme Court nevertheless adopted a balancing approach roughly similar to the one presented in that case.[143]

---

134 *See supra* note 107 and accompanying text.

135 *Patterson*, 432 U.S. at 210 (emphasis added).

136 *Id.*

137 *See Patterson*, 432 U.S. at 207, 211 n.13; *see also supra* notes 116-18.

138 *Patterson*, 432 U.S. at 207-08.

139 The Supreme Court's concern with economic efficiency was manifested in Mathews v. Eldridge, 424 U.S. 319 (1976), an administrative law case which the Court decided one year before *Patterson*. *See supra* notes 27 & 28 and accompanying text.

140 *Patterson*, 432 U.S. at 208 (quoting *Winship*, 397 U.S. at 372 (Harlan, J., concurring)).

141 *Id.* (emphasis added).

142 *See* Mathews v. Eldridge, 424 U.S. 319 (1976).

143

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and

> To recognize at all a mitigating circumstance does not require the State to prove its nonexistence in each case in which the fact is put in issue, if in its judgment this would be too cumbersome, too expensive, and too inaccurate.[144]

In constructing its criminal code, the state legislature must weigh the costs associated with the placement of these burdens upon the state against the magnitude of the individual interests at stake.

The Supreme Court may have omitted mentioning *Mathews* for a number of reasons. The *Mathews* decision concerned an administrative procedure and, therefore, may be of limited applicability to the criminal law. The Court also may have been dissuaded from employing a strictly economic approach in determining what process is due in criminal cases because of the transcendent value placed upon life and liberty. A cost/benefit analysis would serve only to denigrate those interests.

Following the formalist approach laid down in *Patterson*,[145] the Supreme Court in *McMillan* declined to hold that due process required the use of the reasonable doubt standard of proof with regard to the issue of visible possession of a firearm.[146] The Court rested its decision on the fact that "the Pennsylvania legislature has expressly provided that visible possession of a firearm is not an element of the crimes enumerated in the mandatory sentencing statute."[147]

Although it dismissed *Mullaney* in favor of its "most recent pronouncement on this subject"[148]— *Patterson v. New York* — the majority nonetheless applied the interests analysis of *Mullaney* in its opinion. Depending on the presence or absence of the factor at issue in *Mullaney*, the defendant in that case faced " 'a differential in sentencing ranging from a nominal fine to a mandatory life sentence,' "[149] whereas, the defendants in *McMillan*, the Court explained, were subjected to the same maximum lengths of incarceration with or without being sentenced pursuant to the Act.[150] Thus, without actually using the language of *Mullaney*, the Court implied that the Act was acceptable under due process because it does not compel the defendants to forfeit their liberty inter-

---

administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

144 *Patterson*, 432 U.S. at 209 (footnote omitted).

145 *See McMillan*, 106 S. Ct. at 2416-17.

146 *Id.* at 2419.

147 *Id.* at 2416.

148 *Id.*

149 *Id.* at 2417 (quoting *Mullaney*, 421 U.S. at 700).

150 *Id.* at 2417-18.

est to any greater degree than that which had already occurred upon conviction.

The Court had applied this approach to the facts within its earlier decision in *Specht v. Patterson*.[151] According to the majority, *Specht* was similarly distinguishable because the Colorado statute which was held to violate due process in that case stated that a person convicted of a sexual offense, otherwise carrying a maximum penalty of ten years imprisonment, would be exposed to an indefinite or a possible life sentence if the sentencing judge found that the defendant posed a threat to society.[152] The Court's subtle use of the interests test of *Mullaney* helps explain Justice Rehnquist's rather sudden concession to *Mullaney* contained in his statement that "in certain limited circumstances *Winship*'s reasonable doubt requirement applies to facts not formally identified as elements of the offense charged."[153] The Court thus left open the possibility of applying the reasonable doubt standard to factors not included in the state's definition of the offense. In justifying its conclusion under both *Mullaney* and *Patterson*, the Court made its decision virtually unassailable.

VI. Conclusion

The Supreme Court rendered its decision in *McMillan v. Pennsylvania* against the background of a complex and ever-changing due process analysis.[154] The requirements of due process vary depending on the type of proceeding involved.[155] Furthermore, the three protected interests, life, liberty and property, are not necessarily equal.[156] Finally, the Supreme Court has employed various methods to determine what process is due. These methods have ranged from an application of procedures in existence at the time of the American Revolution, to those procedures deemed to be "fair," to a test which balances the relative burdens a given procedure would place upon the state or individual.[157]

The Court decided *McMillan* more narrowly within the conceptual framework provided by three recent due process cases. The Court in *In re Winship* stated that every fact which is an element of

---

151 386 U.S. 605 (1967).

152 *See McMillan*, 106 S. Ct. at 2418; *see also Specht*, 386 U.S. at 607.

153 *McMillan*, 106 S. Ct. at 2417.

154 *See* notes 9-38 and accompanying text.

155 *See* notes 10-14 and accompanying text.

156 *See* notes 15-16 and accompanying text.

157 *See* notes 25-28 and accompanying text.

the crime must be proved beyond a reasonable doubt.[158] The Court later handed down two cases[159] which presented two different interpretations of the *In re Winship* decision. *Mullaney*[160] adopted the proceduralist view, holding that all factors having an impact on the defendant's liberty or reputational interests must be proved beyond a reasonable doubt. Adopting a formalist approach, the Supreme Court in *Patterson*[161] later stated that due process required proof beyond a reasonable doubt of all elements included in the definition of an offense.[162]

The *McMillan* Court adopted the concerns of *Patterson* and enforced that decision. Such concerns included the fear that the application of the due process requirement of proof beyond a reasonable doubt of all factors having an effect on the defendant's interests in liberty and reputation would cause the state to remove from its laws all such mitigating or aggravating factors.[163] The Court also showed concern about economic efficiency and the need to weigh the burdens upon the state to prove a mitigating circumstance.[164] *McMillan v. Pennsylvania* is thus part of the Burger Court's broad effort to limit the applicability of the due process requirement of proof beyond a reasonable doubt in the criminal context.

ANTHONY J. DENNIS

158 *See also* note 99 and accompanying text.
159 Mullaney v. Wilbur, 421 U.S. 684 (1975); Patterson v. New York, 432 U.S 197 (1977).
160 421 U.S. 684 (1975).
161 432 U.S. 197 (1977).
162 *Id.* at 210; *see also* note 137 and accompanying text.
163 *See* notes 137-38 and accompanying text.
164 *See* notes 139-43 and accompanying text.