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Affirmative Defenses; Defendant's Burden of Proof: Defense of Extreme Emotional Disturbance; Due Process; Patteron v. New York

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because of a particular need of one branch of government, the Court has placed governmental functional needs above individual rights. This is a dangerous approach that opens the way to future encroachments on an individual's fundamental rights.

Hopefully this decision will be interpreted so as to have a positive impact on further legislation governing the distribution of papers of other constitutional officeholders. Opening the business records of all government offices (as opposed to the personal papers of such officeholders) to administrative review in order to protect the public against abuses of power at all levels would constitute one such positive impact. This legislation could be promulgated under Title II of the Act, although Congress has not yet contemplated passage of any such measures.

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EVIDENCE

Affirmative Defenses • Defendant's Burden of Proof • Defense of Extreme Emotional Disturbance • Due Process

Patterson v. New York, 97 S. Ct. 2319 (1977).

THE UNITED STATES SUPREME COURT in *Patterson v. New York*[1] upheld the constitutionality of a New York murder statute[2] which places on the defendant the burden of proving extreme emotional disturbance. The Court thereby determined that New York courts in applying the statute against defendant Gordon Patterson had not violated his right to due process of law.

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[1] 97 S. Ct. 2319, 2321 (1977).

[2] The statute 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:
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> > (a) 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. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime.
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> N.Y. PENAL LAW § 125.25 (McKinney 1975).

Gordon Patterson's short marriage was marred by frequent disagreement and pervaded by general incompatibility.[3] After Patterson became estranged from his wife, she revived a relationship with John Northrup, a man to whom she had been engaged prior to her marriage to Patterson.[4] One evening, Patterson found his wife partially undressed with Northrup in the bedroom of her home. Patterson took a rifle from his car, shot Northrup twice in the head,[5] and was subsequently charged with murder.

The main issue at Patterson's trial was whether or not he had acted under "the influence of extreme emotional disturbance"[6] as defined in the New York murder statute.[7] The trial court found Patterson guilty of murder in the second degree[8] and the Appellate Division affirmed.[9] While appeal to the New York Court of Appeals was pending, the United States Supreme Court issued its controversial[10] decision in *Mullaney v. Wilbur*,[11] which deemed unconstitutional a Maine statute shifting the burden of persuasion to the defendant asserting the affirmative defense of acting in the heat of passion.[12] The *Mullaney* Court said the unconstitutionality arose due to the fact that the prosecution was relieved of the burden of proving that the defendant had acted with malice aforethought. By placing the burden of persuasion for having acted in the heat of passion on the defendant, the defendant was deprived of due process protection as guaranteed by the Court in *In re Winship*.[13]

The New York Court of Appeals rejected the argument of the defense,

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[3] Comment, *Affirmative Defenses after Mullaney v. Wilbur: New York's Extreme Emotional Disturbance*, 43 BROOKLYN U. L. REV. 171 (1976) citing Trial Transcript, People v. Patterson, Index No. 30538 (Steuben County Ct., July 6, 1971).

[4] 97 S. Ct. at 2319.

[5] *Id.*

[6] 43 BROOKLYN U. L. REV. 171, *supra* note 3.

[7] *See* note 2 *supra.*

[8] 97 S. Ct. 2319 (1977).

[9] People v. Patterson, 41 App. Div. 2d 1028, 344 N.Y.S.2d 836 (1973).

[10] The controversy arose over the likely effect of the Court's decision that a defendant could not to be saddled with the burden of coming forward with an affirmative defense. *See* Evans v. State, 278 Md. 197, 362 A.2d 629 (1976), in which the court held that because of *Mullaney*, due process was offended by putting the burden of proof on the defendant for any theory of justification or mitigation. *But see* State v. Shepherd, 288 N.C. 346, 218 S.E.2d 176 (1975), which stated that *Mullaney* was not applicable to all affirmative defenses, and that the burden may be placed on the defendant for the defense of insanity. *See also* Hamilton v. State, 343 A.2d 594 (Del. 1975), in which the court placed only the burden of persuasion on the defendant and required the prosecution to bear the burden of proving the defense did not exist. For a prediction of the effects of *Winship* and *Mullaney* on affirmative defenses in Ohio, see Comment, *Affirmative Defenses in Ohio after Mullaney v. Wilbur*, 36 OHIO ST. L. J. 828 (1975).

[11] 421 U.S. 684 (1975).

[12] *Id.* at 704.

[13] 397 U.S. 358 (1970).

that the *Mullaney* holding applied in Patterson's case, and affirmed his conviction.[14] Patterson appealed the decision to the United States Supreme Court, which distinguished the two cases. Specifically, the Court found that although in *Mullaney* it had been unconstitutional for Defendant Wilbur to be burdened with proving the absence of one of the essential elements of the crime,[15] it was not unconstitutional for Defendant Patterson to be burdened with proof of extreme emotional disturbance. In distinguishing the cases, the *Patterson* Court relied on the difference in the criminal elements included in the definitions of murder in the respective statutes.[16]

It is a premise well-grounded in constitutional law that the prosecution in a criminal case must prove guilt beyond a reasonable doubt to obtain a conviction.[17] The Court in *In re Winship*, speaking through Mr. Justice Brennan, stated: "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."[18] The logical inference to be drawn from such strong, clear language is that a defendant may not constitutionally be burdened with disproving an element of a crime.[19] However, this inference, so easily drawn, is not always correct when applied. This problem of application confronted the Court in *Mullaney* and in *Patterson*, two cases similar in situation but seemingly diametrically opposed in outcome.[20]

The Maine statute under scrutiny in *Mullaney* retained the common law definition of murder[21] in requiring a finding of "malice aforethought,

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[14] People v. Patterson, 39 N.Y.2d 288, 347 N.E.2d 898, 383 N.Y.S.2d 573, *cert. granted*, 97 S. Ct. 52 (1976).

[15] The Court explained:

> Maine law requires a defendant to establish by a preponderance of the evidence that he acted in the heat of passion on sudden provocation in order to reduce murder to manslaughter. 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 .... We therefore hold that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion ....

Mullaney v. Wilbur, 421 U.S. 684, 703-04 (1975).

[16] In *Patterson*, the majority stated: "It is plain enough that if the intentional killing is shown, the State intends to deal with the defendant as a murderer unless he demonstrates the mitigating circumstances." 97 S. Ct. at 2325.

[17] Speiser v. Randall, 357 U.S. 513, 525-26 (1958); Leland v. Oregon, 343 U.S. 790, 802-03 (1952) (Frankfurter, J., dissenting); Coffin v. United States, 156 U.S. 432, 453 (1895). *See also* Deutch v. United States, 367 U.S. 456, 471 (1961); Glover v. United States, 147 F. 426, 431 (8th Cir. 1906).

[18] 397 U.S. at 364.

[19] 97 S. Ct. at 2325.

[20] *Id.* at 2329.

[21] 421 U.S. at 693 n.15.

either express or implied."[22] The absence of malice resulted in a reduction of the crime to manslaughter.[23] Because this element alone made such a vast difference in culpability, in fact the only difference between the two crimes,[24] the Court construed malice as an element of the crime of murder[25] in contradiction of the statutory construction by the Maine Supreme Judicial Court.[26] Thus, finding that under the statute the burden was on the defendant to prove that he acted in the heat of passion in order to rebut the presumption of malice aforethought,[27] the Court held the burden unconstitutional under the standards set out in *Winship*[28] and affirmed the holding of the Court of Appeals that the statute was unconstitutional.[29]

A possible explanation for the Maine Supreme Judicial Court's statutory construction is that the court viewed malice aforethought not as an essential element of the crime of murder, as it was in *Winship*,[30] but merely as a policy presumption which allowed a jury to find a defendant guilty of murder once the prosecution had proved an intentional and unlawful killing.[31] Taking this concept further, the Maine court found that manslaughter and murder were not separate crimes, but only different degrees of homicide which

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[22] The Maine murder statute, ME. REV. STAT. tit. 17, § 2651 (1964), provides:

> 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.

[23] Maine's manslaughter statute, ME. REV. STAT. tit. 17, § 2551 (1964), provides in pertinent 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 . . . .

[24] 421 U.S. at 698. *See also* Comment, *The Constitutionality of Criminal Affirmative Defenses: Duress and Coercion,* 11 U.S.F.L. REV. 123 (1976).

[25] 421 U.S. at 698.

[26] *Id.* at 689. Using strong, explicit language, the Maine Supreme Judicial Court concluded that according to Maine Statutes, manslaughter and murder were but two degrees of one crime of felonious homicide. The court explained its view in State v. Lafferty, 309 A.2d 647 (Me. 1973), which was decided while appeal was pending for *Mullaney* to the United States Supreme Court. Subsequently, the Supreme Court accepted the Maine court's construction and held that state courts may exclusively interpret state laws in the absence of "extreme circumstances not present here." *Id.* at 691. Likewise, in *Patterson* the Court reiterated this rule and added that it is the state's business to regulate who must bear the burden of producing evidence and the burden of persuasion. 97 S. Ct. at 2322.

For a comprehensive argument against federal intervention in the setting of *Mullaney v. Wilbur,* see Allen, *Mullaney v. Wilbur, the Supreme Court, and the Substantive Criminal Law—An Examination of the Limits of Legitimate Intervention,* 55 TEX. L. REV. 269 (1977).

[27] 421 U.S. at 701.

[28] 397 U.S. 358, 364 (1970).

[29] 421 U.S. at 704. *But see* 55 TEX. L. REV. 269, 277 (1977).

[30] 397 U.S. at 364.

[31] *See* Comment, *Due Process and Supremacy as Foundations for the Adequacy Rule: The Remains of Federalism After Wilbur v. Mullaney,* 26 ME. L. REV. 37 (1974).

related to degrees of punishment.[32] Therefore, *Winship's* requirement that the prosecution must prove every fact necessary to constitute a crime would not apply to a policy presumption which entitles the jury to impose a greater degree of punishment. The Court, in rejecting this characterization of Maine law, categorized malice aforethought as a fact and murder and manslaughter as crimes.[33] It is probable that the *Mullaney* Court was hesitant to extend the clout of *Winship* to "nonprovable facts"[34] which act only to affect the degree of punishment.

Therefore, when Patterson appealed his conviction to the Supreme Court and claimed he had been unconstitutionally burdened with proof of an affirmative defense,[35] the Court found a more modernized statute requiring only three elements for a murder conviction: intent, causation and death.[36] The New York manslaughter statute[37] provides that if the defendant acted under the "influence of extreme emotional disturbance,"[38] then the murder charge will be reduced to one for manslaughter. The burden of proving the affirmative defense of extreme emotional disturbance was thereby cast onto the defendant,[39] a burden Patterson failed to meet just as Wilbur, the defendant in *Mullaney,* had. Yet, the Court in this instance affirmed the conviction.[40] The question then arises: Did the Court in *Patterson* base its

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[32] *Id.* at 74. *Cf.* 421 U.S. at 699 wherein the Court explains:

> But under Maine law these facts of intent are not general elements of the crime of felonious homicide . . . . Instead, they bear only on the appropriate punishment category. Thus, if petitioners' argument were accepted, Maine could impose a life sentence for any felonious homicide—even one that traditionally might be considered involuntary manslaughter—unless the *defendant* was able to prove that his act was neither intentional nor criminally reckless.

[33] 26 ME. L. REV. at 74.

[34] *Id.*

[35] 97 S. Ct. at 2322.

[36] N.Y. PENAL LAW § 125.25 (McKinney 1975). *See* note 2 *supra* for text of statute.

[37] The statute provides:

> 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. The fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subdivision.

N.Y. PENAL LAW § 125.20 (2) (McKinney 1975).

[38] *Id.*

[39] The burden of proving an affirmative defense is allocated in N.Y. PENAL LAW § 25.00 (2) (McKinney 1975), as follows:

> (2) When a defense declared by statute to be an "affirmative defense" is raised at trial, the defendant has the burden of establishing such defense by a preponderance of the evidence.

[40] 97 S. Ct. at 2330.

opinion, so disparate from the opinion in *Mullaney*, solely on the differences in language used by the states in drafting their murder statutes?

As mentioned above, the Maine statute provided for a presumption of malice if heat of passion was not shown by the defendant.[41] The majority opinion in *Patterson* relies on this presumption as a basis for distinguishing the Maine statute from the New York statute.[42] Mr. Justice White reasons that "a state must prove every ingredient of an offense beyond a reasonable doubt and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense."[43] But as Mr. Justice Powell points out in his dissent:

> New York, *in form* presuming no affirmative "fact" against Patterson, and blessed with a statute drafted in leaner language of the 20th century, escapes constitutional scrutiny unscathed even though the effect on the defendant of New York's placement of the burden of persuasion is exactly the same as Maine's.[44]

The majority opinion appears to overlook the crux of the issue by basing its reasoning superficially on the language of the statute.[45] It is true that after *Winship* was decided, but before the decision in *Mullaney*, the conclusion might have been drawn that the Court meant that only the definitional elements of the crime needed to be proven.[46] But after *Mullaney*, it was clear that an interpretation of *Winship* must encompass not only consideration of a statute on its face, but also what effect the presumptions allowed by that statute will have on the defendant.[47] That is, there must be consideration of the repercussions a murder conviction will have upon the sub-

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[41] 421 U.S. at 686. *See generally* Comment, *Unburdening the Criminal Defendant: Mullaney v. Wilbur and the Reasonable Doubt Standard*, 11 HARV. C.R.-C.L.L. REV. 390 (1976).

[42] 97 S. Ct. at 2325.

[43] *Id.* at 2330.

[44] *Id.* at 2333 (Powell, J., dissenting) (emphasis added).

[45] *Id.* at 2330.

[46] The Court in *Winship* did not specify whether the substantive elements of the crime should be considered or merely the statutory language. *See* note 18 *supra*.

[47] 421 U.S. at 697-98. The Court interpreted *Winship* to include more than just those elements which if not proved would wholly exonerate the accused. It stated:

> The analysis fails to recognize that the criminal law . . . is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability. Maine has chosen to distinguish those who kill in heat of passion from those who kill in the absence of this factor . . . . By drawing this distinction, while refusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turns, Maine denigrates the interests found critical in *Winship* . . . .
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> Moreover, if *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. *Id.*

Cf. 55 TEX. L. REV. 269, 274. The author takes the position that *Mullaney's* view of *Winship* removes any limit on the elements which contribute to the degree of culpability for a crime.

stantive rights of an individual as opposed to a conviction for manslaughter.[48] The Court in *Mullaney* concluded that if the defendant failed to prove he acted in the heat of passion, that fact alone could be "of greater importance than the difference between guilt or innocence for many lesser crimes."[49] Under this view, the defendant is in danger of being deprived of due process protection if forced to bear the burden of proving that he acted without malice aforethought. However, the Court in *Patterson* counters this position by averring that Patterson's case is not a proper one on which to impose the reasoning of *Mullaney*.[50]

The majority reasons that the New York statute is more similar to the one confronted by the Court in *Leland v. Oregon*.[51] There the Court found that once the prosecution had proved each element of the crime charged, the defendant could be burdened with proving the defense of insanity beyond a reasonable doubt. In so doing, the *Leland* Court reasoned that the insanity issue was divorced from proof of any element of the crime.[52] The Court in *Patterson* adopts the *Leland* standard of due process and states that after the prosecution had proved that Patterson had the intent to kill and had effected Northrup's death,[53] the prosecution had discharged its duty and any responsibility for proof of mitigating circumstances lay with Patterson.[54]

However, Mr. Justice Rehnquist differentiates between the defenses of insanity and heat of passion, thus weakening any reliance on *Leland* by a court dealing with a mental state not as severe as insanity.[55] In his concurring opinion in *Mullaney,* Justice Rehnquist explains that *Leland* comports with the mandates of *Winship* because insanity does not necessarily have a significant bearing on the requisite mental elements of a crime.[56] Therefore, bur-

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[48] 421 U.S. at 698.

[49] *Id.*

[50] 97 S. Ct. at 2325.

[51] 343 U.S. 790. In *Leland,* the defendant challenged the constitutionality of a statute requiring the defense of insanity to be proved by the defendant beyond a reasonable doubt. The Court held the statute to be constitutional.

[52] *Id.*

[53] 97 S. Ct. at 2324.

[54] The Court explained:

> This affirmative defense, which the Court of Appeals described as permitting "the defendant to show that his actions were caused by a mental infirmity not rising to the level of insanity, and that he is less culpable for having committed them," App. Ill., does not serve to negative any facts of the crime which the State is to prove in order to convict for murder. It constitutes a separate issue on which the defendant is required to carry the burden of persuasion; and unless we are to overturn *Leland* and *Riviera,* New York has not violated the Due Process Clause, and Patterson's conviction must be sustained.

Id. at 2325.

[55] 421 U.S. at 705-06 (Rehnquist, J., concurring).

[56] *Id.*

dening the defendant with proof of insanity would not be unconstitutional as would a burden of proof of an element which is so intimately entwined with the degree of culpability as in the case of heat of passion in the Maine statute.[57] If insanity and extreme emotional disturbance are not two defenses which can be logically compared to each other, reliance on *Leland* as precedent for *Patterson*[58] is unfounded.

Such reliance seems to evidence the majority's attempt to limit the holding of *Mullaney* to that which had been decided in *Winship*.[59] The feared interpretation of *Mullaney* was that the prosecution might always be required to prove the absence of affirmative defenses.[60] However, this practice has still not been adopted by a majority of the states.[61] Therefore, it was not necessary for the Court to use *Patterson* as a device to limit any misuse of the *Mullaney* holding.[62] Even the MODEL PENAL CODE from which New York took much of its homicide statute,[63] places the burden of proving the absence of extreme emotional disturbance on the prosecution, and thus differs from New York's imposition of the burden of persuasion on the defendant.[64] Presently, twenty-two states and the District of Columbia shift the burden to the defendant to prove, by a preponderance of the evidence, the existence of an affirmative defense.[65] Twenty-eight states burden the defendant with producing an affirmative defense and the prosecution with proving the absence of that defense.[66] The evidence thus seems to indicate that the holding in *Mullaney* did not lead to abuse by the legislatures in shifting to the prosecution the burden of disproving all affirmative defenses.[67]

There still remains the possibility, however, that after the holding in *Patterson*, the defendant might be forced to bear the burden of proving elements of a crime, which although not expressly stated in a statute, affect the rights of the defendant so substantially that they become or are treated as elements of a crime.[68] States, by enacting leaner and vaguer statutes,

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[57] *Id.*

[58] 97 S. Ct. at 2325.

[59] 397 U.S. at 364.

[60] 97 S. Ct. at 2329-30.

[61] *Cf.* notes 65 & 66 *infra.*

[62] 97 S. Ct. at 2333.

[63] *Id.* at 2332.

[64] *Id.*

[65] Comment, *Constitutional Limitations on Allocating the Burden of Proof of Insanity to the Defendant in Murder Cases*, 56 B.U.L. REV. 499, 503 n.35 (1976).

[66] *Id.* at 505 n.41.

[67] *Id.*

[68] 97 S. Ct. at 2327. The Court concluded: "We therefore will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged." *Id.*

could free the prosecution from bearing the heavier burden, and instead, cast it upon the defendant, thus depriving him of due process.[69] The Court takes notice of this possibility but argues that enactment of such legislation is regulated by the Constitution.[70]

It is painfully clear, however, that exactly such lean language in a statute made a vast difference in the decision rendered by the Supreme Court in *Patterson*. If, in cases such as *Mullaney, Leland, Winship* and *Patterson*, which deal with a defendant's constitutional right to liberty,[71] the Court is going to determine where the burden lies strictly on the basis of statutory language, then the crucial question becomes whether or not a state may draft a statute which excludes elements so determinative of the defendant's culpability.[72]

For example, if a state enacted legislation which defined murder solely as the killing of a human being and an affirmative defense to this charge was a lack of intent to kill, burdening the defendant with proof of this defense would be unconstitutional.[73] However elementary this conclusion may seem, it is just this type of decision a state legislature faces when drafting criminal statutes.[74] Which circumstances of a crime can the defendant be constitutionally required to prove? At what point does an affirmative defense become so inextricably entwined with the substantive elements of a crime that the defendant may not be said to be burdened with disproving guilt which has been cast on him by a criminal statute?

The Ohio statute has aptly dealt with these questions by lifting from the defendant the burden of proving affirmative defenses.[75] In *State v. Robinson*,[76] the Ohio Supreme Court cogently interpreted the ramifications of the statute. The *Robinson* Court stated that the defendant has the burden of going forward with evidence bearing on an affirmative defense to the extent that as a matter of law, the court can find that there is sufficient evidence

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[69] *Id.* at 2336 (Powell, J., dissenting).

[70] *Id.* at 2327, citing McFarland v. American Sugar Ref. Co., 241 U.S. 79, 86 (1916), "It is not within the province of a legislature to declare an individual presumptively guilty of a crime."

[71] 421 U.S. at 698-99.

[72] *Id.*

[73] *Id.* at 698; Morrison v. California, 291 U.S. 82, 96 (1934); McFarland v. American Sugar Ref. Co., 241 U.S. 79, 86 (1916); Stump v. Bennett, 398 F.2d 111, 118 (1968).

[74] 421 U.S. at 699 n.24.

[75] OHIO REV. CODE ANN. § 2901.05 (a) (Page 1975), states in relevant part:
(a) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affirmative defense is upon the accused.

[76] 47 Ohio St. 2d 103, 351 N.E.2d 88 (1976).

to make a case for the trier of fact.[77] The state then has the burden of persuasion which is fulfilled when the lawful quantum of evidence has been introduced so as to persuade the trier of fact that the fact is true. The burden of going forward is decided as a matter of law and the burden of persuasion is a factual determination.[78] The reasoning of the court is logical. When the defendant has met the burden of going forward with evidence that is sufficient to convince the court as a matter of law that he is advancing a valid issue, the defendant has at the same time raised a reasonable doubt as to his guilt, thereby requiring the prosecution to bear the burden of proving the defendant's guilt beyond a reasonable doubt.[79] This reasoning was recently adopted in *State v. Gideons*[80] in which the Cuyahoga County Court of Appeals made it clear that the burden of proof in criminal cases never shifts from the state.[81] Thus, it appears that in Ohio the problem confronted by the Court in dealing with a statute which allows the burden of persuasion to be borne by the defendant will not arise in the case of an affirmative defense.

Because the statute in *Patterson* allowed the defendant to be burdened with such proof of affirmative defenses,[82] the constitutionality of some other state statutes may come into question.

A statute that is contested by a defendant on constitutional grounds must be examined in two steps. First, the court must distill from the statute those elements which are necessary to constitute the crime charged. Not only must the court view the face of the statute, but it must also examine its substance.[83] Second, the court must decide if the state has deleted from its statutory definition elements of the crime which are then made affirmative defenses, thereby burdening the defendant with their proof by a preponder-

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[77] *Id.* at 112.

[78] *Id.* at 113.

[79] *Id.* at 109. *But see* 36 OHIO ST. L. J. 828 (1975).

[80] 52 Ohio App. 2d 70 (1977).

[81] The court reasoned:

> The burden of proof in a criminal case is on the state and that burden remains with the state throughout the trial . . . . When an affirmative defense becomes an issue in the trial, the burden of proof does not shift from the state to the defendant . . . . All that is required of the defendant to obtain an acquittal on the basis of an affirmative defense is to point to evidence relating to the affirmative defense issue, whether introduced by the state or the defense, which is sufficient to create in the minds of the jurors a reasonable doubt as to his guilt. When this occurs, the state has failed to meet its burden of proof and the defendant should be acquitted.

Id. at 74.

[82] The *Patterson* majority stated: "We thus decline to adopt as a constitutional imperative, operative country-wide, that a State must disprove beyond reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused." 97 S. Ct. at 2327.

[83] 421 U.S. at 699-700.

ance of the evidence. Under *Patterson*,[84] the defendant is permitted to bear the burden of the preponderance of the evidence as long as the affirmative defense being proved is not one which entails a fact the existence or absence of which should be constitutionally proved by the prosecution.[85]

In order to avoid the constitutional error of making the absence of an important element of a crime an affirmative defense, a state after *Patterson* might be wise to enumerate exactly which affirmative defenses will be accepted in its courts. If it does not, and instead relies on a broad statutory definition of what constitutes an affirmative defense,[86] the result may be a time-consuming case-by-case analysis of whether a defendant's due process rights have been violated by burdening him with persuading the jury that a particular defense he advanced did in fact exist.

In states like Ohio, where the defendant currently bears only the burden of going forward with the evidence supporting an affirmative defense, the *Patterson* decision has little direct impact. That is, if the court accepts the constitutionality of giving the defendant the heavier burden of persuasion in such cases, it undoubtedly approves for him the lighter burden of going forward. If, however, state legislators in such jurisdictions view the *Patterson* decision as a green light to increase the defendant's burden to the New York standard, *Patterson* demands that the statute defining affirmative defenses be carefully drafted.

In the future the Court will use the test newly formulated in *Patterson* when viewing state statutes which allow the state to place the burden of persuasion on the defendant for an affirmative defense. In rejecting the *Mullaney/Winship* test which required an examination of a defendant's substantive rights, the Court has adopted a statutory language test.[87] The latter is a less difficult test to apply because arguably, it entails only a formalistic survey of the statutory definition of a crime.

However, remnants of the *Mullaney/Winship* test still require that certain due process rules be observed.[88] Those statutes which give a name to the absence of a certain element of a crime, as Maine did by labeling the absence of heat of passion as malice aforethought, still must fall under the new statutory language test. This rule evinces the retention of the *Mullaney*

[84] 97 S. Ct. at 2327.

[85] *Id.* at 2330.

[86] OHIO REV. CODE ANN. § 2901.05 (c) (Page 1975), provides for two categories of affirmative defenses, stating in pertinent part:

1) a defense expressly designated as affirmative;

2) a defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence.

[87] 97 S. Ct. at 2336 (dissenting opinion).

[88] *Id.* at 2330.

Court's holding that the trier of fact cannot presume an element of a crime without proof beyond a reasonable doubt.[89] By Wilbur's failure to persuade the jury that he was acting under the influence of extreme emotional disturbance, the statute allowed the jurors to presume that malice was present in Wilbur's mind before he killed his victim. *Winship, Mullaney,* and *Patterson* forbid this violation of a defendant's due process rights. In essence, that is the crux of the holding in *Mullaney.* A strict application of *Mullaney's* holding to the facts in that case will not produce a liberal rule allowing the Court to probe into every state statute looking for deprivations of a defendant's substantive rights. The Court in *Patterson* made it clear that it had intended *Mullaney* to be construed narrowly.[90] Therefore, *Patterson* did not limit *Mullaney* but instead served as an interpretive device, showing the latitude that the Court intended *Mullaney* should be given.

In the future, a statute such as Ohio's will easily pass muster before the Supreme Court because it prohibits the state from saddling the defendant with the burden of persuasion in affirmative defenses. In a New York-type jurisdiction, the only problem which might arise after *Patterson* would be deciding which defenses under an ambiguous statutory classification might constitutionally be considered affirmative defenses. For that reason, perhaps the most desirable statute would include an enumeration of affirmative defenses.

Statutes which allow the presumption of an element of a crime from the facts surrounding it unless the defendant can prove an affirmative defense by a preponderance of evidence, shall fail as unconstitutional under *Patterson* as they did under *Mullaney.*[91] Those statutes which are attacked as unconstitutional because the defendant has to prove the existence of an affirmative defense by a preponderance of evidence but where the absence of an affirmative defense is not an element of the crime, represent the gray area when trying to delineate the bounds of constitutionality. However, it

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[89] *Id.*

[90] The *Patterson* Court stated:

> *Mullaney* surely held that a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense . . . .
>
> It was unnecessary to go further in *Mullaney* . . . .
>
> As we have explained, nothing was presumed or implied against Patterson; and his conviction is not invalid under any of our prior cases.

Id.

[91] 421 U.S. at 703-04; North Carolina v. Hankerson, 97 S. Ct. 2339 (1977). *Hankerson* was decided as a companion case with *Patterson.* Elements of murder were presumed against the defendant under a statute similar to that encountered in *Mullaney,* and *Mullaney* was held to apply retroactively.

appears that in that gray area the Court will follow the direction indicated in *Patterson* and allow such a statute to stand without an exhaustive examination of the defendant's substantive rights.

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