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When an Offense is Not an Offense: Rethinking the Supreme Court's Reasonable Doubt Jurisprudence

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INTRODUCTION

Few legal canons are as well known to the general public as the requirement that the prosecution prove the culpability of the accused beyond a reasonable doubt. The popularity of the doctrine is such that movies,[1] books,[2] record albums,[3] and even a radio show[4] have been named in its honor. Although the roots of the doctrine can be traced back to the formative years of our Nation,[5] the Supreme Court of the United States crystallized it as binding precedent in the landmark decision of *In re Winship*[6] thirty-eight years ago. Despite the fact that the Court has had various opportunities to flesh out the contours of the doctrine, the meaning and scope of the doctrine remain unclear.

This Article will argue that the doctrine's lack of clarity is due to the fact that although the Court has repeatedly held that the scope of *Winship* depends on whether the prosecution is attempting to prove an element of the offense, a defense, or a sentencing factor, the Court has failed to put forth a theory that allows it to coherently distinguish between these three elements of criminal responsibility. The Court's confusing approach to the offense/defense/sentencing factor tristinction has created a host of conceptual perplexities. Chief amongst these perplexities is the Court's conclusion that justification and excuse defenses do not trigger *Winship* protection, whereas certain sentencing factors do. The concurrence or absence of justification or excuse affects the defendant's guilt in a much more dramatic way than the presence of a mere sentencing factor. After all, proof of a justification or excuse generates a full-blown acquittal. In contrast, proof of the absence of an aggravating factor merely reduces the amount of punishment that a court may impose on the defendant.

Therefore, it was odd for the Court to conclude, as it did in *Apprendi v. New Jersey*,[7] that aggravating factors should be proved beyond a reasonable doubt because they affect the defendant's degree of culpability, while simultaneously holding that justifications such as

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1. *See* BEYOND A REASONABLE DOUBT (Bert E. Friedlob Productions 1956) *and* BEYOND A REASONABLE DOUBT (Endeavour Productions 1980).

2. *See* RABBI SHMUEL WALDMAN, BEYOND A REASONABLE DOUBT (Feldheim 2005) (discussing the principal beliefs of Judaism) *and* BEYOND A REASONABLE DOUBT (Jeffrey Archer, Play, 1986).

3. *See* JAY Z, REASONABLE DOUBT (Roc-a-Fella Records 1996) *and* LP & DAME DASH, BEYOND A REASONABLE DOUBT (Roc-a-Fella Records 2007) (recorded as a tribute to Jay Z's seminal album). *See also* CANDIRIA, BEYOND REASONABLE DOUBT (Too Damn Hype 1997).

4. *See Beyond Reasonable Doubt* (BBC television broadcast 1996) (starring Robert Kee as narrator).

5. C. MCCORMICK, EVIDENCE § 321, 681-82 (1st ed. 1954).

6. 397 U.S. 358 (1970).

7. 530 U.S. 466 (2000).

self-defense (*Martin v. Ohio*[8]) and excuses such as insanity (*Leland v. Oregon*[9]) do not have to be disproved in the same manner. In light of such conflicting statements, the Court should either abandon its post-*Apprendi* insistence that aggravating factors trigger *Winship* protections because they affect the defendant's culpability, or revisit its decision to allow the State to shift the burden of proof with regards to matters of justification and excuse. This Article contends that the Court ought to do both.

Part I tracks the confusion regarding the offense/defense/sentencing factor tristinction back to the *Mullaney v. Wilbur*[10] and *Patterson v. New York*[11] cases. More specifically, this Article argues that the Court in *Mullaney* looked beyond the statutory definition of the crime in order to define what counts as an element of the offense, whereas in *Patterson* the Court determined what amounted to an offense element by affording great deference to the way in which the legislature defined the crime. Although the tension between these two approaches is apparent, this Article contends that the weight of post-*Mullaney* authority suggests that the Court presently favors *Patterson*'s formalistic "legislative deference" approach to distinguishing offenses from defenses.

Part II explains how the Court's sentencing factor jurisprudence has contributed to further muddying the waters of the *Winship* doctrine. In *Apprendi*, the Court initially contended that sentencing factors that increase punishment beyond the statutorily prescribed maximum for the crime trigger *Winship* protections because they affect the defendant's "degree of guilt or culpability."[12] However, the Court later stated in the same opinion that the aggravating factor had to be proven by the prosecution beyond a reasonable doubt because it constituted a "core" offense element.[13] If it were true, as the Court initially suggested, that factors significantly affecting the defendant's guilt must be proven beyond a reasonable doubt, then the Court ought to re-examine its prior decisions to allow the State to shift the burdens of proving self-defense,[14] extreme emotional disturbance,[15] insanity,[16] and duress[17] to the defendant. Surely all of these claims affect the defendant's degree of culpability more than the aggravating factor in

8. 480 U.S. 228 (1987).
9. 343 U.S. 790 (1952).
10. 421 U.S. 684 (1975).
11. 432 U.S. 197 (1977).
12. Apprendi v. New Jersey, 530 U.S. 466, 494 (2000).
13. *Apprendi*, 530 U.S. at 493.
14. Martin v. Ohio, 480 U.S. 228 (1987).
15. Patterson v. New York, 432 U.S. 197 (1977).
16. Leland v. Oregon, 343 U.S. 790 (1952).
17. Dixon v. United States, 548 U.S. 1 (2006).

Apprendi. On the other hand, if aggravating factors trigger *Winship* protections merely because they constitute *de facto* elements of the offense, the Court would have no need to revisit previous jurisprudence because the pre-*Apprendi* line of cases have all been premised on the essential distinction between offense and defense. However, the Court would need to elaborate a workable conception of what elements should count as "core offense elements" that is compatible with both its pre- and post-*Apprendi* jurisprudence.

Part III contends that no coherent conception of what amounts to a "core offense element" can be surmised from the Court's "beyond a reasonable doubt" jurisprudence. The reason for this lies in the fact that the Court premised pre-*Apprendi* case law on a formalistic definition of what amounts to an offense, whereas the Court grounded post-*Apprendi* case law on a substantive approach to the concept.

The *leitmotif* of pre-*Apprendi* jurisprudence was an insistence in affording deference to legislative determinations of what factors represent "elements of an offense." The Court's assertion in *McMillan v. Pennsylvania*[18] that the "state legislature's definition of the elements of the offense is usually dispositive" illustrates this legislative deference model.[19] The position championed in such cases stands in stark contrast to the substantive approach advanced by the Court in its post-*Apprendi* "beyond a reasonable doubt" jurisprudence. According to this substantive approach, "the relevant inquiry is one not of form," but of substance.[20] Thus, as the Court stated in *Apprendi,* the fact that "the state legislature placed its . . . sentence 'enhancer' within the sentencing provisions of the criminal code does not mean that the finding of [the sentence enhancer] is not an essential element of the offense."[21]

In light of the tension between the legislative deference and substantive approaches to the offense/defense/sentencing factor tristinction, this Article argues that the Court has boxed itself into a corner, and is now unable to put forth a definition of what counts as an offense without calling into question its previous case law. There are four different ways of conceptualizing what amounts to an offense, none of which is entirely compatible with Supreme Court precedent. A formalistic conception of the offense would encompass solely the elements expressly designated by the legislature as constitutive of a criminal offense. This conflicts with the Court's assertion in *Apprendi* that "[legislative labels] do not afford an acceptable answer" to ques-

18. 477 U.S. 79 (1986).
19. McMillan v. Pennsylvania, 477 U.S. 79, 85 (1986).
20. *Apprendi*, 530 U.S. at 494.
21. *Id.* at 467.

tions about whether an aggravating factor should be deemed to be an element of the offense or a sentencing factor.[22] On the other hand, an offense can be substantively defined as a basic type of wrong that does not include an assessment of fault or blameworthiness.[23] This conception cannot be squared with *Apprendi,* for the aggravating factor at issue (crime was committed with a biased racial purpose) does not qualify the basic wrong committed by the defendant (illegal weapon possession), but rather increases the defendant's fault or blameworthiness for having engaged in the basic wrong. A third way of conceiving the offense is considering that it includes not only the prohibitory norm (do not kill!), but also the absence of a justification that affords a permission to infringe the prohibitory norm (you can kill in self-defense!). This position is at odds with the Court's conclusion in *Martin* that the absence of self-defense is not an "element of the offense." Finally, an offense can be conceived as encompassing every element relevant to criminal liability, including the infraction of the prohibitory norm and the absence of both justification and excuse. This would be incompatible with pre- and post-*Apprendi* cases in which the Court has refused to extend the *Winship* protections to issues of justification and excuse.

Part IV argues that the Court has avoided confronting the aforementioned problems by shifting its inquiry in post-*Apprendi* cases from whether the aggravating factor constitutes an "element of the offense" in accordance with *Winship*, to whether the defendant should be entitled to a jury finding the existence of the aggravating factor beyond a reasonable doubt. The problem with this shift is that there is no necessary connection between the jury trial guarantee of the Sixth Amendment[24] and the due process requirement that the offense be proven beyond a reasonable doubt. The Court has repeatedly stated that it is not necessarily unconstitutional to have the jury find the non-existence of a factor, relevant to the defendant's ultimate punishment (extreme emotional disturbance, self-defense), by a preponderance of the evidence.

Finally, Part V advances what will be called the "unlawful act" approach to the "beyond a reasonable doubt" doctrine. According to the "unlawful act" theory, courts should require the State to prove be-

22. *Id.* at 494.

23. This type of supra-statutory definition of an offense is defended by various criminal law theorists. *See, e.g.*, John Gardner, *Fletcher on Offences and Defenses,* 39 TULSA L. REV. 817, 824-25 (2004). *See also* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 562 (2000). The author recently defended a similar supra-statutory approach to defining criminal offenses in *Why is it a Crime to Stomp on a Goldfish? Harm, Victimhood and the Structure of Anti-Cruelty Offenses,* 78 MISS. L. J. 1 (2008) [hereinafter, *Why is it a Crime*].

24. U.S. CONST. *amend.* VI.

yond a reasonable doubt that the defendant engaged in an act prohibited by law. Taking a cue from H.L.A. Hart's definition of punishment, this Article contends that the imposition of punishment is incoherent without proof that the actor performed an act that is against a legal rule.[25] An act amounts to an offense against legal rules if, and only if, it satisfies the elements of an offense *and* is performed without legal justification. Take, for example, the case of a police officer who shoots and injures a fleeing felon. While he satisfied the elements of the offense of assault (intentionally injuring a human being), his conduct was not prohibited by law because he had legal justification (law enforcement authority) for engaging in the act. In such cases, the imposition of punishment would not only be unfair, but also incoherent given that one can only be punished for having engaged in conduct against legal rules. If the "beyond a reasonable doubt" requirement is to mean anything, it must at least stand for the proposition that the State is required to prove beyond a reasonable doubt that which would make the imposition of punishment logically plausible (for example, that the defendant engaged in an unlawful act). Thus, the State should have to prove beyond a reasonable doubt both the elements of the offense *and* the non-existence of legal justification.[26]

On the other hand, good reasons exist to exclude excuse defenses from the scope of the *Winship* rule. Although punishing an excused actor is unfair, it is not incoherent, for excused conduct is still considered unlawful. Thus, despite the fact that punishing an insane offender would strike many as unfair, doing so would not be logically problematic, for the offender's insanity does not negate the criminality of his act.[27] While due process surely cannot tolerate incoherence or arbitrariness, it does tolerate some amount of "unfairness" as long as the State can prove that the unfairness furthers an important interest. Consequently, courts should permit the prosecution to disprove matters of excuse by a preponderance of the evidence insofar as it is not considered *fundamentally* unfair.

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25. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 4-5 (Oxford Univ. Press 1967).

26. In the police officer's case this would require the State to prove beyond a reasonable doubt both that he injured a person (elements of the offense of assault) and that he did not act pursuant to law enforcement authority (elements of the justification). The prosecution, of course, does not have to disprove the existence of justifications unless the defendant has first put forth some evidence of justification. In other words, the defense has the burden of production with regard to justifications, but once that burden has been met, the prosecution has the burden of disproving justifications beyond a reasonable doubt.

27. This explains why some jurisdictions have adopted a "guilty but mentally ill" verdict. This might be unfair, but it is certainly not logically incoherent.

By the same token, sentencing factors should not trigger the application of the *Winship* rule. In order for sentencing factors to become relevant, the trier of fact must first find that the defendant engaged in an act prohibited by law. Consequently, such factors are, *by definition*, immaterial to establishing the unlawfulness of the act. As a result, sentencing factors would not trigger the "beyond a reasonable doubt" rule under the "unlawful act" approach to the doctrine.[28]

This, of course, does not mean that a jury should not be entitled to find the existence of an aggravating factor. Given that there is no necessary connection between the "beyond a reasonable doubt" requirement and the right to a jury trial, the values underlying the Sixth Amendment could sensibly lead a court to hold that a jury is entitled to find the existence of an aggravating factor while simultaneously holding that *Winship* does not require that such a finding be made beyond a reasonable doubt. At first glance, this approach might seem wholly incompatible with the Court's post-*Apprendi* case law. However, it would appear that the Court's main concern in such cases is the right to a jury trial and not the "beyond a reasonable doubt" doctrine. Thus, upon closer inspection, the Court might be more receptive to the position advanced here than one would originally believe.

I. THE SUPREME COURT'S CONFLATION OF THE OFFENSE/DEFENSE DISTINCTION

It is difficult to explain why the Supreme Court of the United States has been unable to fully grasp the scope and implications of the offense/defense/sentencing factor tristinction. This Part will focus on the Court's inability to coherently distinguish offenses from defenses, as illustrated by the seemingly incompatible *Mullaney v. Wilbur*[29] and *Patterson v. New York*[30] holdings. Before doing so, however, it is necessary to detail the historical evolution of the crime of homicide. Given that both *Mullaney* and *Patterson* involved a charge of murder, it is difficult to understand the issues at stake in these cases without first elucidating the nature and scope of the crime charged.

28. This is not to say, however, that due process concerns are never implicated in this context. Take, for example, an aggravating factor that increases punishment to such an extent that it would offend notions of fundamental fairness to allow it to be proved by a preponderance of the evidence (e.g., punishment without proof of aggravating factor = five years, whereas punishment with proof of aggravating factor = ninety-nine years). In such cases there would be powerful reasons in favor of concluding that the aggravating factor should be proved beyond a reasonable doubt.

29. 343 U.S. 790 (1952).

30. 432 U.S. 197 (1977).

A. The Common Law Definition of Murder From Coke to the Maine Penal Code

In the seventeenth century, Sir Edward Coke defined murder as the "kill[ing] . . . [of] any reasonable creature under the king's peace, *with* malice fore-thought, either expressed by the party or implied by law."[31] In contrast, as Sir Matthew Hale asserted in his *History of the Pleas of the Crown*, manslaughter was defined as the killing of a human being "*without* forethought malice."[32] Consequently, whether a killing amounted to murder or manslaughter at common law hinged on whether it was committed with malice (murder) or not (manslaughter).

A killing is malicious depending on whether it was committed in the "heat of passion" (not malicious) or not (malicious). The difference between murder and manslaughter, therefore, is that manslaughter "arises from the sudden heat of the passions," whereas murder stems from the "wickedness of the heart."[33] Malice and passion are thus two sides of the same coin. A malicious killing is, by definition, a killing not committed in the heat of passion. Contrarily, a killing committed in the heat of passion is, by definition, not malicious. Thus, as Joel Prentiss Bishop stated in his *Commentaries on the Criminal Law*, "'passion' and 'malice' are deemed to be inconsistent motive powers; so that if an act proceeds from the one, it does not also proceed from the other."[34]

American courts were quick to embrace the common law distinction between murder and manslaughter. In the mid-nineteenth century case of *Stokes v. State*,[35] for example, the Supreme Court of Georgia held that if the defendant could prove that he killed as a result of a "sudden, violent heat of passion," the killing "would be . . . manslaughter" rather than murder.[36] Similarly, the Supreme Court of Tennessee held in 1850 that "[t]here must be sudden passion . . . to negative the idea of malice."[37]

The common law definitions of murder and malice eventually found their way into most American penal codes. Before the publication of the Model Penal Code,[38] every single American jurisdiction had adopted a statutory definition of murder that was either identical to or

31. 3 Edward Coke, Institutes of the Laws of England *47.
32. 1 Matthew Hale, The History of the Pleas of the Crown *424 (E. and R. Nutt & R. Gosling 1736).
33. 4 William Blackstone, Commentaries on the Laws of England *190.
34. Joel Prentiss Bishop, Commentaries on the Criminal Law § 697.
35. 18 Ga. 17 (1855).
36. Stokes v. State, 18 Ga. 17 (1855).
37. Young v. State, 30 Tenn. 200 (1850).
38. Model Penal Code §§ 1.01-405.4 (1962).

built upon the common law definition of the offense.[39] Thus, the California Penal Code[40] defined murder as "the unlawful killing of a human being . . . with malice aforethought."[41] Manslaughter, on the other hand, is defined as "the unlawful killing of a human being without malice."[42] Section 192(a) of the California Penal Code also holds that a "sudden quarrel or heat of passion" negates malice.[43]

Similarly, the Maine 1964 murder statute[44] provided that "[w]hoever unlawfully kills a human being with malice aforethought . . . is guilty of murder."[45] In contrast, the statute provided that "[w]hoever unlawfully kills a human being in the heat of passion, without . . . malice aforethought" is guilty of manslaughter instead of murder.[46] This was the murder statute that provided the backdrop for the Court's landmark decision in *Mullaney v. Wilbur*.[47]

B. UNRAVELING THE *MULLANEY/PATTERSON* RIDDLE

1. The Problem

Although the substantive law of murder remained remarkably stable from the times of Sir Edward Coke and Sir Matthew Hale to the time of publication of the Model Penal Code,[48] the procedural rules governing murder prosecutions were in significant flux during this period. One particularly vexing procedural issue generating considerable disagreement amongst courts and commentators was whether courts could lawfully require the defendant to prove that the defendant acted in the heat of passion in order for the defendant to be punished for manslaughter rather than murder.[49]

A landmark case handed down by the Supreme Judicial Court of Massachusetts in 1845, *Commonwealth v. York*,[50] held that the defendant could constitutionally have the burden of proving that the defendant acted in the heat of passion by a preponderance of the evidence.[51]

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39. *See generally* the comments to MODEL PENAL CODE § 210.2, cmt (1962) (stating that "it was the pattern of this country prior to the Model Penal Code to incorporate the common law [of murder] in some jurisdictions and to build upon it in others").

40. CAL. PENAL CODE §§ I-IV.

41. CAL. PENAL CODE § 187(a).

42. *Id.* at § 192.

43. § 192(a).

44. ME. REV. STAT. ANN. tit. 17 § 2651 (1964).

45. ME. REV. STAT. ANN. tit. 17, § 2651 (1964) (repealed 1975).

46. *Id.* at § 2551 (repealed 1975).

47. 421 U.S. 684 (1975).

48. MODEL PENAL CODE §§ 1.01-405.4 (1962).

49. *See generally* George P. Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 YALE L.J. 880, 902-10 (1968).

50. 50 Mass. 93 (1845).

51. Commonwealth v. York, 50 Mass. 93, 124-25 (1845).

Several states subsequently followed suit.[52] Other courts, however, concluded that once the defendant has come forward with some evidence that the killing was perpetrated in the heat of passion, the prosecution must prove the absence of such exculpatory circumstances beyond a reasonable doubt.[53]

2. *The* Mullaney *Case*

In 1975, the Supreme Court of the United States weighed in on the issue in *Mullaney v. Wilbur*.[54] The case arose under the Maine murder statute[55] discussed in the previous subsection.[56] After the defendant presented evidence to demonstrate that he killed the victim while in the heat of passion, the trial court instructed the jury that the defendant had the burden of proving by a preponderance of the evidence that the defendant committed the offense in that manner.[57] If the defendant failed to meet that burden, the jury was to conclusively infer that he acted with malice and thus convict him of murder rather than manslaughter.[58] The jury found the defendant guilty of murder.[59]

The defendant appealed to the Maine Supreme Judicial Court, contending that his conviction violated his due process rights. Citing *In re Winship*,[60] the defendant argued that his guilty verdict could stand only if the prosecution had proved all elements of the offense charged beyond a reasonable doubt.[61] Regarding the substantive law governing his case, he claimed that malice aforethought was an essential element of a murder offense, and that under Maine law, a killing committed in the heat of passion is not malicious. Since malice and heat of passion have been joined at the hip since the early common law, the defendant reasoned that the trial court committed prejudicial error when it failed to require the prosecution to prove the absence of passion beyond a reasonable doubt.[62]

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52. Quillen v. State, 110 A.2d 445 (Del. 1955); State v. Ballou, 40 A. 861 (R.I. 1891); State v. Sappienza, 95 N.E. 381 (Ohio 1911).

53. *See generally* Territory v. Lucero, 46 P. 18, 21 (N.M. Terr. 1896) (holding that the prosecution has the ultimate burden of disproving exculpatory circumstances beyond a reasonable doubt and asserting that "courts and commentators have, especially of late, denied [*Commonwealth v. York*] as a sound legal principle, and condemned it as an excrescence upon the law").

54. 421 U.S. 684 (1975).

55. ME. REV. STAT. ANN. tit. 17 § 2651 (1964).

56. *See supra* notes 44-47 and accompanying text.

57. Mullaney v. Wilbur, 421 U.S. 684, 686 (1975).

58. *Mullaney*, 421 U.S. at 686.

59. *Id.* at 687.

60. 397 U.S. 358 (1970).

61. *Mullaney*, 421 U.S. at 687.

62. *Id.*

The Maine Supreme Judicial Court disagreed with the defendant's interpretation of the Maine murder statute. The court held that murder and manslaughter were not two distinct offenses in Maine but instead different degrees of the same crime of "felonious homicide."[63] The court also concluded that whoever unjustifiably kills a human being commits the offense of felonious homicide regardless of whether or not he acted in the heat of passion.[64] Consequently, the court noted that the only true element of the offense that the prosecution was required to prove beyond a reasonable doubt was the "unlawfulness" of the killing. On the other hand, malice and heat of passion were considered sentencing factors affecting the degree of punishment imposed on the offender rather than the nature of the offense committed. Finally, the court concluded that malice and heat of passion were not "elements of the crime charged" triggering application of the rule laid down in *Winship*.[65] As a result, the court held that the trial court did not err in instructing the jury that reducing the defendant's responsibility from murder to manslaughter required the defendant prove by a preponderance of the evidence that he killed in the heat of passion.

Subsequently, the defendant successfully petitioned for a writ of *habeas corpus* in Federal District Court. The district court agreed with defense counsel that malice was an essential element of the offense of murder and that the prosecution was constitutionally required to prove its existence beyond a reasonable doubt. Furthermore, given that passion negates malice, the district court ruled that requiring the defendant to prove that he killed in the heat of passion ran afoul of the *Winship* rule. The district court thus overturned the defendant's conviction. The United States Court of Appeals for the First Circuit affirmed.

3. *The Supreme Court's* Mullaney *Opinion and the "Impact on Punishment" Test for Determining What Counts as an Element of the Offense*

In affirming the United States Court of Appeals for the First Circuit's decision, the Supreme Court of the United States in *Mullaney v. Wilbur*[66] accepted the state interpretation of the Maine murder statute and acknowledged that, "as a formal matter the absence of the heat of passion on sudden provocation is not a 'fact necessary to con-

63. State v. Wilbur, 278 A.2d 139, 146 (Me. 1971).
64. *Wilbur*, 278 A.2d at 146.
65. *Id.*
66. 421 U.S. 684 (1975).

stitute the *crime*' of felonious homicide in Maine."[67] Nevertheless, the Court refused to afford constitutional significance to Maine's treatment of the presence or absence of "passion" as an aggravating or mitigating factor rather than as an element of the crime of homicide. According to the Court, "[*In re*] Winship[68] is concerned with substance rather than this kind of formalism."[69] The Court's insistence on substance over form in this context stemmed in part from a concern that "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" by merely "redefin[ing] the elements that constitute different crimes" and "characterizing them as factors that bear solely on the extent of punishment."[70]

In spite of the Court's laudable attempt to reject formalistic approaches to the *Winship* doctrine, the nature of the substantive test laid down in *Mullaney* is unclear. The beauty of the formalistic approach advocated by the State of Maine lay in its simplicity. Under Maine's formalistic approach, *Winship* would only require that the prosecution prove beyond a reasonable doubt the facts the legislature labeled as "elements of the offense." The substantive approach championed by the Supreme Court cannot be applied so easily. If the State's definition of the crime is not controlling for the purposes of the *Winship* doctrine, how should courts determine whether a fact not included within the statutory definition of the crime amounts in substance to an "element of the offense" that must be proved beyond a reasonable doubt?

The Supreme Court addressed this concern by advocating in favor of what this Article will call the "impact on punishment" test for determining what counts as an element of the offense for *Winship* purposes. According to the "impact on punishment" test, the arguments in favor of considering a given fact as an element of the crime become more powerful when the presence or absence of the fact has a significant bearing on the amount of punishment to be imposed on the offender.[71] This test explains why the Court intimated that because "the consequences resulting from a verdict of murder, as compared with a verdict of manslaughter, differ significantly," malice ought to be treated as an element of the offense proven by the prosecution beyond a reasonable doubt.[72] The test also explains why the Court buttressed its

67. Mullaney v. Wilbur, 421 U.S. 684, 697 (1975).
68. 397 U.S. 358 (1970).
69. *Mullaney*, 421 U.S. at 699.
70. *Id.* at 698.
71. *Id.* at 698-99.
72. *Id.* at 698.

holding by pointing out that "when viewed in terms of the potential difference in restrictions of personal liberty attendant to each conviction, the distinction established by Maine between murder and manslaughter may be of greater importance than the difference between guilt or innocence for many lesser crimes."[73] In sum, the "impact on punishment" approach coherently explains why the Court held that malice amounted to an element of the offense of homicide for *Winship* purposes and that the State of Maine could not constitutionally require that the defendant prove by a preponderance of the evidence that the defendant did not act with malice (or, that he killed in the heat of passion).

4. Mullaney *After* Patterson v. New York*: The Death of the "Impact on Punishment" Test*

Twenty-three years before *Mullaney v. Wilbur*[74] was decided, the Supreme Court of the United States held in *Leland v. Oregon*[75] that states could lawfully shift the burden of proving insanity to the defendant. *Mullaney* did not overrule *Leland,* and *Leland* continues to be good law to this day. However, an obvious tension exists between the "impact on punishment" test defended in *Mullaney* and the Court's decision in *Leland*. If whether the existence or non-existence of a fact has a significant impact on the amount of punishment a court will impose on the accused ultimately determines whether the fact is considered an element of the offense, how can the presence or absence of insanity not amount to an element of the crime? After all, the presence or absence of insanity has an even more drastic effect on punishment than the existence or non-existence of malice.

In the landmark case of *Patterson v. New York*,[76] the Supreme Court of the United States dissolved the apparent tension existing between *Leland* and *Mullaney* in 1977. The defendant in *Patterson* was charged with second degree murder. The relevant murder statute defined the offense charged as "[intentionally causing] the death of another person."[77] Malice was thus not considered an element of the crime. The New York statute also provided that killings committed while "under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse" should be punished as manslaughter rather than murder.[78] According to New York law, however, the defendant had the burden of proving by a preponderance

73. *Id.*
74. 421 U.S. 684 (1975).
75. 343 U.S. 79 (1952).
76. 432 U.S. 197 (1977).
77. N.Y. PENAL LAW § 125.25 (McKinney 1975).
78. N.Y. PENAL LAW § 125.25(1)(a) (McKinney 1975).

of the evidence that the defendant killed under an extreme emotional disturbance ("EED").

Although the defendant confessed to the killing, he contended at trial that he committed the crime while under the influence of an EED. A jury found him guilty of murder. While the defendant's appeal to the Court of Appeals of New York was pending, the Supreme Court decided *Mullaney*. The Court of Appeals affirmed the conviction, noting that the burden of proving EED could be constitutionally shifted to the defendant given that EED amounted to a free standing affirmative defense that had no direct bearing on the elements of the offense of murder. The Supreme Court granted *certiorari* to examine whether *Mullaney* barred the State from shifting the burden of proving EED to the defendant.

At first glance, the argument that the State should be required to prove the absence of EED beyond a reasonable doubt seemed compelling. After all, the partial mitigation afforded by the EED defense was the Model Penal Code[79] counterpart to the *common law* "heat of passion" excuse.[80] Furthermore, if the *In re Winship*[81] doctrine was truly concerned with substance rather than form, the State's contention that the existence or non-existence of EED had no bearing on the elements of the offense of murder rang hollow. What could be more formalistic than circumventing the *Winship* rule by merely eliminating the word "malice" from a murder statute and substituting the "heat of passion" defense with an almost identical excuse of EED? This appeared to be the kind of legislative maneuver that the Supreme Court was trying to curb by adopting the "impact on punishment" test in *Mullaney*.

Surprisingly, however, the Supreme Court held in *Patterson* that New York could shift the burden of proving EED to the defendant without running afoul of the *Winship* and *Mullaney* requirements. Citing *Leland*, the Court argued that if the State could constitutionally require the defendant to prove the full affirmative defense of insanity by a preponderance of the evidence, it could *a fortiori* demand that the defendant prove the partial defense of EED.[82] The logic of this argument is unassailable. If *Leland* is to remain good law, no reason exists for courts to require partial or full excuses to be proven by the prosecution beyond a reasonable doubt. The problem with the Court's analysis is that, as pointed out above, *Leland* is at odds with *Mullaney*.

79. MODEL PENAL CODE § 210 (1962).
80. *See generally* comments to MODEL PENAL CODE § 210.
81. 397 U.S. 358 (1970).
82. Patterson v. New York, 432 U.S. 197, 206-07 (1977).

In order to escape this contradiction, the Court contended that *Mullaney* held that a state "may not shift the burden of proof to the defendant by *presuming* [an] ingredient [of the offense] upon proof of the other elements of the offense."[83] Thus, according to the Court's reformulation of the *Mullaney* rule, Maine could not constitutionally require that the defendant prove "passion" by a preponderance of the evidence because it impermissibly presumed the existence of the essential element of malice (the absence of "passion") upon proof of the unlawful nature of the killing.

The Court's reformulation of the *Mullaney* rule both dissolved the tension between *Mullaney* and *Leland* and explained why the *Patterson* holding is compatible with *Mullaney.* In doing so, however, the Court paid short shrift to its previous assertion that *Winship* was concerned with substance rather than form. According to this revised version of the *Mullaney* holding, Maine could circumvent the *Winship* rule by merely getting rid of the presumption of malice and redefining malice in a way that makes no reference to the lack of "passion." Maine could do so *even if it continued to hold that defendants ought to be punished for murder instead of manslaughter depending on whether they killed in the heat of passion or not.* Thus, Maine may shift to the defendant the burden of proving that he should be punished for manslaughter rather than murder without effecting any change in the heat of passion doctrine. This is formalism at its best.

To its credit, the Court acknowledged that the view adopted in *Patterson* may permit state legislatures to get around the *Winship* rule by merely labeling as an affirmative defense a fact that was previously considered an element of the offense.[84] Nevertheless, the Court held that a more stringent view such as the one grounded on the "impact on punishment" test that had seemingly been championed in *Mullaney* should be rejected because the determination of whether proof of a fact has a bearing on establishing an affirmative defense as opposed to an element of the crime has traditionally "been left to the legislative branch."[85] And thus was born in one fell swoop what this Article calls the "legislative deference" approach to determining the facts triggering *Winship* rule application. Since then, the continued vitality of this approach has been reaffirmed by the Court on several occasions.

83. *Patterson*, 432 U.S. at 215 (emphasis added).
84. *Id.* at 210.
85. *Id.*

II. RESURRECTING THE "IMPACT ON PUNISHMENT" TEST: *APPRENDI V. NEW JERSEY* AND ITS PROGENY

Given that the Supreme Court of the United States had endorsed the legislative deference approach to defining criminal offenses for several decades, it came as a surprise when more than thirty years after *Patterson v. New York*[86] the Supreme Court resurrected the "impact on punishment" test in a series of cases holding that the prosecution had the burden of proving some aggravating factors beyond a reasonable doubt *even if the state legislature had expressly refused to label them as elements of the offense.* This Part will examine the cases that led to this unexpected development and explain why this approach is in tension with *Patterson* and its progeny.

A. THE BEGINNING: *Apprendi v. New Jersey*

The defendant in *Apprendi v. New Jersey*[87] was charged under New Jersey law with possessing a firearm for an unlawful purpose.[88] The offense was punishable by a term of five to ten years of imprisonment. Upon conviction, however, New Jersey's so-called "hate crime" statute authorized the trial judge to impose punishment of up to ten additional years of imprisonment if the trial judge found by a preponderance of the evidence that the defendant committed the crime "with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity."[89] The defendant pled guilty to the offense charged. After the parties filed the plea agreement, the prosecutor requested the trial judge sentence the defendant to a term in excess of the statutorily prescribed punishment for the offense charged, given that the crime was committed with a "biased purpose." Following an evidentiary hearing wherein both parties had the opportunity to present evidence to prove or disprove the presence of the aggravating factor, the trial judge found by a preponderance of the evidence that the defendant did in fact commit the crime with a hateful purpose. As a result, the court sentenced the defendant to a twelve-year term of imprisonment.

The defendant appealed, contending, among other things, that the Due Process Clause[90] as construed by the Supreme Court of the United States in *In re Winship*[91] required that the finding of bias upon which his increased sentence was based be proved beyond a reasona-

86. 432 U.S. 197 (1977).
87. 530 U.S. 466 (2000).
88. N.J. STAT. ANN. § 2C:39-4(a) (West 1995).
89. N.J. STAT. ANN. § 2C:44-3(e).
90. U.S. CONST. amend. V.
91. 397 U.S. 358 (1970).

ble doubt. The Supreme Court of New Jersey rejected the defendant's claim and held that the hate crime provision at issue amounted to an aggravating sentencing factor rather than an essential element of the offense triggering *Winship* protections.

The Supreme Court granted *certiorari* to ascertain "whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt."[92] A sharply divided Court held that it did and thus reversed the defendant's conviction. Writing for the majority, Justice John Paul Stevens began by pointing out that under New Jersey law, the defendant could be punished by up to ten years of imprisonment for unlawfully possessing a weapon, and for an additional ten years for having committed the crime with a biased purpose.[93] The Justice then claimed that "as a matter of simple justice, it seems obvious that the procedural safeguards designed to protect [defendant] from unwarranted [punishment] should apply equally to the two acts that New Jersey has singled out for punishment."[94] Therefore, Justice Stevens reasoned that "merely using the label 'sentence enhancement' to describe the latter surely does not provide a principled basis for treating them differently."[95] Ultimately, as was made clear in the latter portions of the majority opinion, "the relevant inquiry is one not of form, but of effect."[96]

The Court then turned to explain how its holding was also buttressed by the principles laid down in *Mullaney v. Wilbur*.[97] In language reminiscent of the "impact on punishment" test rejected in *Patterson v. New York*,[98] the majority argued that one of the chief principles undergirding the *Mullaney* decision was that "criminal law is concerned not only with guilt or innocence in the abstract, but also with the degree of criminal culpability."[99] Therefore, Justice Stevens contended that "because the *consequences* of a guilty verdict for murder and for manslaughter differed substantially," the State of Maine in *Mullaney* could not circumvent the *Winship* rule by merely characterizing a fact as a sentencing factor rather than as an element of the offense. Once the *Mullaney* rule was formulated in this manner, the Court easily concluded that New Jersey could not avoid triggering the

92. Apprendi v. New Jersey, 530 U.S. 466, 469 (2000).
93. *Apprendi*, 530 U.S. at 476.
94. *Id.*
95. *Id.*
96. *Id.* at 494.
97. 421 U.S. 684 (1975).
98. 432 U.S. 197 (1977).
99. *Apprendi*, 530 U.S. at 485.

due process burden of proof protections by merely labeling a fact a "sentencing factor" rather than an "element of the offense."[100]

Having fleshed out the meaning and scope of *Mullaney*, the Court then turned to examining the effect that New Jersey's hate crime statute could have on the amount of punishment imposed on the defendant. After doing so, the Court concluded that "it can hardly be [argued] that the potential doubling of one's sentence—from 10 years to 20—has no more than a nominal effect."[101] The majority then went on to hold that judged both in terms of the additional amount of jail time a defendant faces if the court finds a biased purpose, and the "more severe stigma" that attaches to an offender convicted of a hate crime, "the differential here is unquestionably of constitutional significance."[102] As a result, the Court asserted that the so-called sentencing factor at issue in *Apprendi* was "clearly" the functional equivalent of an element of the offense and ruled in favor of the defendant.

B. *APPRENDI*'S PROGENY

Four years after *Apprendi v. New Jersey*[103] was decided, the Supreme Court of the United States held in *Blakely v. Washington*[104] that a statutorily enumerated fact that served as a ground for increasing the defendant's punishment beyond the "standard range" prescribed for the commission of the offense could not constitutionally justify enhancing a sentence unless such a fact was either admitted by the defendant or found by a jury beyond a reasonable doubt. Subsequently, the Supreme Court held in *United States v. Booker*[105] that defendants have a right to have a jury find beyond a reasonable doubt the presence of aggravating factors used to calibrate the amount of punishment imposed pursuant to the United States Sentencing Guidelines[106]. Similarly, the Court ruled in *Cunningham v. California*[107] that the statutorily enumerated aggravating factors listed under California's determinate sentencing scheme could serve only as the basis for increasing a sentence if a defendant admitted these factors or a jury found their existence beyond a reasonable doubt. Thus, *Apprendi*'s substantive approach to defining criminal offenses apparently remains alive and well today.

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100. *Id.* at 496.
101. *Id.* at 495.
102. *Id.* It should be noted that there are significant jury trial issues implicated by *Apprendi* as well. These issues are discussed in more detail in Part IV, *infra*.
103. 530 U.S. 466 (2000).
104. 542 U.S. 296 (2004).
105. 543 U.S. 220 (2005).
106. U.S. SENTENCING COMM'N, FED. SENTENCING GUIDELINES MANUAL AND APPENDICES (2009), http://www.ussc.gov/2009guid/GL2009.pdf.
107. 549 U.S. 270 (2007).

C. THE *APPRENDI—PATTERSON* RIDDLE

The *Blakely v. Washington*,[108] *United States v. Booker*,[109] and *Cunningham v. California*[110] decisions did not come as a surprise, as they seemed to follow naturally from the principles put forth in *Apprendi v. New Jersey*.[111] What was surprising, however, was that the Supreme Court of the United States revived the *Mullaney v. Wilbur*[112] "impact on punishment" test in order to justify its holding in *Apprendi* that sentencing factors ought to be considered the functional equivalent of elements of the offense. After *Patterson v. New York*,[113] most courts and commentators believed that the Court would determine whether a fact should be treated as an essential element of the crime for *In re* Winship[114] purposes by affording great, if not complete, deference to the way in which legislatures decided to define the elements of the offense. It thus seemed that the "legislative deference" model had triumphed over the *Mullaney* "impact on punishment" test.

The Supreme Court's post-*Patterson* "beyond a reasonable doubt" jurisprudence corroborated this impression. In *Martin v. Ohio*,[115] for example, the Court ruled that a defendant could lawfully be required to prove by a preponderance of the evidence that he acted in justifiable self-defense, *as long as the statute at issue labeled self-defense an "affirmative defense" rather than a negation of an "element of the offense."*[116] By the same token, the Court in *Dixon v. United States*[117] recently held that it is not contrary to due process to shift the burden of proving duress to the defendant by a preponderance of the evidence, given that duress was an excuse defense that had no bearing on the elements of the offense charged.[118]

The *Martin* and *Dixon* decisions seem to be at odds with the "impact on punishment" test advanced by the Court first in *Mullaney* and later in *Apprendi*. It is problematic for the Court to hold that the prosecution must prove beyond a reasonable doubt a fact that serves as the basis for significantly increasing the length of a defendant's sentence (*Mullaney, Apprendi*), while simultaneously contending that the state may require a defendant to prove self-defense or duress by a prepon-

108. 542 U.S. 296 (2004).
109. 543 U.S. 220 (2005).
110. 549 U.S. 270 (2007).
111. 530 U.S. 466 (2000).
112. 421 U.S. 684 (1975).
113. 432 U.S. 197 (1977).
114. 397 U.S. 358 (1970).
115. 480 U.S. 228 (1987).
116. Martin v. Ohio, 480 U.S. 228, 230 (1987) (emphasis added).
117. 548 U.S. 1 (2006).
118. Dixon v. United States, 548 U.S. 1, 8 (2006).

derance of the evidence (*Martin, Dixon*). Ultimately, it is undeniable that the presence or absence of self-defense or duress has an even *greater* bearing on the defendant's punishment than the presence or absence of "passion" or aggravating factors such as the ones at issue in *Apprendi, Blakely, Booker,* and *Cunningham.*

As a result of the obvious tension between the Supreme Court's pre- and post-*Apprendi* "beyond a reasonable doubt" jurisprudence, it is worth asking whether there is a way of harmonizing these seemingly incompatible lines of cases in a coherent manner. Although the Court has never addressed this thorny problem, one potential way out of the *Apprendi / Patterson* conundrum is to maintain that the *Winship* rule only bars the state from requiring that a defendant disprove an element of the offense, whereas the rule does not prohibit a state from demanding that a defendant prove a defense that reduces or eliminates the defendant's guilt or culpability without negating the commission of the elements of the crime.

At first glance, this would seem to solve the problem, given that the Court's *Patterson, Martin,* and *Dixon* decisions all involved claims about whether the prosecution should be required to disprove a **defense** of justification or excuse beyond a reasonable doubt, rather than about whether the defendant could be required to disprove an element of the offense. Self-defense, duress, and extreme emotional disturbance ("EED") have always been treated as defenses that either partially or fully negate a defendant's guilt for having performed conduct admittedly satisfying the elements of a criminal offense.

On the other hand, both *Apprendi* and *Mullaney* could be construed as cases involving claims about whether the defendant should be required to negate an element of the offense by a preponderance of the evidence rather than about whether the prosecution ought to disprove a defense beyond a reasonable doubt. Factors such as whether the crime was committed with a "biased purpose"[119] (*Apprendi*) or "cruelty" (*Booker*)[120] are routinely treated in many jurisdictions as elements of an offense. Furthermore, as this Article's brief recount of the evolution of the definition of murder revealed, "passion" (*Mullaney*) has long been considered by courts and commentators to be inextricably linked to the central element of the offense of murder (malice). Although it could certainly be argued that the heat of passion functions more as an excuse than as a negation of an essential element of

119. *See, e.g.*, 720 ILL. COMP. STAT. 5/12-7.1 (2005) (biased purpose is an element of the Illinois hate crime statute).

120. In Georgia, for example, a person commits a first degree felony if he engages in "cruelty" to children. *See, e.g.*, GA. CODE ANN. § 16-5-70 (2009). Similarly, animal abuse statutes criminalize engaging in "cruelty" or "aggravated cruelty" to animals. *See, e.g.*, N.Y. AGRIC. & MKTS. §§ 331-79.

the crime of murder,[121] it can also be contended that "passion" constitutes the mirror image of "deliberation"—the chief element of the most common kind of first degree murder.[122]

Once the Supreme Court's precedents are recast in this manner, it is possible to make sense of pre- and post-*Apprendi* jurisprudence in an integrated and coherent way. According to this reformulation, the *Patterson* line of cases stands for the proposition that the defendant may constitutionally be required to prove the concurrence of a "defense" that partly or wholly reduces his culpability for having engaged in conduct that nevertheless satisfies the elements of the offense charged. In contrast, *Mullaney* and *Apprendi* and its progeny could be construed to hold that the state may not lawfully demand that a defendant disprove an element of the offense by a preponderance of the evidence. In sum, the *Mullaney/Apprendi/Patterson* riddle may be unraveled by conceiving the "beyond a reasonable doubt" jurisprudence as the Supreme Court's attempt to allocate burdens of proof in accordance with the fundamental offense/defense distinction.

III. DEFINING CRIMINAL OFFENSES AND THE COHERENCE OF THE SUPREME COURT'S APPROACH TO THE OFFENSE/DEFENSE/SENTENCING FACTOR TRISTINCTION

If the offense/defense distinction is going to be the touchstone of the "beyond a reasonable doubt" doctrine, the Supreme Court of the United States case law ought to at least provide a coherent framework for determining what should count as an "element of the offense." This Part argues, however, that there is no workable conception of what amounts to an element of an offense that is compatible with the Supreme Court's pre- and post-*Apprendi v. New Jersey*[123] jurisprudence. As a result, the Supreme Court's reliance on the offense/defense distinction as the cornerstone of its "beyond a reasonable doubt" jurisprudence is problematic not because it is wrong to place so much emphasis on the distinction, but rather because the Court's case law cannot be interpreted in a way that provides a coherent way of construing the distinction.

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121. This is the position cogently defended by Joshua Dressler in his seminal *Rethinking the Heat of Passion: A Defense in Search of a Rationale*, 73 J. OF CRIM. L. & CRIMINOLOGY 421 (1982).

122. For a statute that takes "deliberation" to be one of the distinguishing features of first degree murder, see CAL. PENAL CODE § 189 (West 2002).

123. 530 U.S. 466 (2000).

A. Formalistic Definition of "Offense"

1. The Approach

One obvious way of defining an offense is solely by making reference to the elements of crimes as defined by the legislature. This approach commands wide acceptance amongst many common and civil law courts and commentators. With regard to Anglo-American law, Joshua Dressler, for example, has stated that according to "many judicial opinions and treatises, a 'crime' is anything that lawmakers say is a crime."[124] Similarly, Spanish criminal law theorists Francisco Muñoz Conde and Mercedes García Arán have defined a criminal offense as "the legislator's description of prohibited conduct in a penal norm."[125]

General defenses, in contrast, represent special circumstances identified by the legislator that exculpate conduct that nevertheless satisfies the statutory definition of a criminal offense. Defenses can be of three types, namely: justifications, excuses, and non-exculpatory defenses.[126] A defense amounts to a justification when it negates the wrongfulness or unlawfulness of the act.[127] The paradigmatic justification is the choice of the lesser evils or necessity defense.[128] Excuse defenses, on the other hand, negate the defendant's blameworthiness or guilt for having engaged in what admittedly amounts to an unlawful act. Insanity is often cited as an example of an excuse defense. Obviously, insane offenders engaging in conduct satisfying the elements of a criminal offense are exculpated because their mental illness or defect precludes a finding of blameworthiness, rather than because their insanity negates the wrongfulness or unlawfulness of their act.[129]

It is important to differentiate between general defenses of the sort discussed in the preceding paragraph and absent-element defenses.[130] While general defenses relieve a defendant of criminal lia-

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124. Joshua Dressler, Understanding Criminal Law 1 (4th ed. 2006).

125. Francisco Muñoz Conde & Mercedes García Arán, Derecho Penal Parte General 252 (6th ed. 2004).

126. Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 Colum. L. Rev. 199, 203 (1982).

127. Luis E. Chiesa, *Duress, Demanding Heroism, and Proportionality*, 41 Vand. J. Transnat'l L. 741, 751-52 (2008).

128. *See* Model Penal Code § 3.02.

129. Luis E. Chiesa & George P. Fletcher, *Self-Defense and the Psychotic Aggressor*, *in* Criminal Law Conversations (Robinson, Ferzan & Garvey, eds., 2009).

130. General defenses can also be distinguished from so-called offense modification defenses. Whereas offense modification defenses alter the definition of an offense so as to not include certain conduct within the scope of the prohibition, justification defenses preclude punishment despite the fact that the conduct actually satisfies the elements of the definition of the offense. *See generally* Robinson, *supra* note 126, at 213-14. An

bility *despite* the fact that the defendant's conduct satisfied the elements of the offense charged, absent-element defenses generate an acquittal because they reveal that the defendant's conduct *did not* satisfy the elements of the crime charged.[131] An example of an absent-element defense is the victim's consent in rape. Given that the core elements of the offense of rape are "engaging in *nonconsensual* sexual intercourse with another person," proof of the victim's consent amounts to a negation of an essential element of the offense charged (the *nonconsensual* nature of the intercourse) rather than to a claim of justification or excuse.[132]

A formalistic approach to defining criminal offenses also requires distinguishing between elements of an offense *strictu sensu* and factors aggravating or mitigating the punishment imposed for engaging in conduct satisfying the elements of the crime. If what counts as an offense-element is to be determined solely by looking at the legislature's definition of the crime, it follows that the aggravating or mitigating factors that the legislature decided to list separately from the definition of the crime should not be considered "core offense elements."

Sometimes it is difficult to determine whether the legislature intended a factor that impacts punishment to be an element of the offense or an aggravating factor that ought to be taken into account only *after* the court or jury concludes that the defendant's conduct satisfied the elements of the crime. This typically happens when the legislature provides a definition of an offense and then immediately lists one or more specific circumstances that aggravate the punishment *for that specific crime.* The federal carjacking statute illustrates the problem:

> Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall—
>
> (1) Be fined under this title or imprisoned not more than 15 years, or both,
>
> (2) if serious bodily injury . . . results, be fined under this title or imprisoned not more than 25 years, or both, and

example of an offense modification defense is the "de minimis" infraction defense afforded pursuant to MODEL PENAL CODE § 2.12.

131. PAUL H. ROBINSON, STRUCTURE AND FUNCTION IN CRIMINAL LAW 69 (Oxford Univ. Press 1997).

132. Kyron Huigens, *Fletcher's Rethinking: A Memoir*, 39 TULSA L. REV. 803, 812-13 (2004).

> (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death.[133]

There are at least two plausible readings of this statute. On the one hand, some may argue that subsections (2) and (3) ought to be combined with the preceding paragraph's definition of carjacking to create the distinct and separate offenses of "taking a motor vehicle in a manner that causes serious bodily injury" and "taking a motor vehicle in a manner that causes the death of a human being." This sort of reading of criminal statutes is not an unheard of method. The California murder statute,[134] for example, defines murder as "the unlawful killing of a human being . . . with malice aforethought."[135] The California statute then lists certain circumstances that would make the killing a murder in the first degree.[136] Additionally, the California murder statute prescribes that "all other kinds of murder are of the second degree."[137] Although some may argue that there is only one offense of murder and that the list of circumstances that serve to distinguish first degree murder from second degree murder ought to be considered mere aggravating or mitigating sentencing factors, others may argue that this type of statute creates two separate and distinct offenses of "murder in the first degree" and "murder in the second degree."[138] Similarly, some may argue that the federal carjacking statute creates a single offense of "[unlawfully] taking a motor vehicle" and that the factors listed in subsections (2) and (3) merely constitute sentencing factors that impact punishment without altering the core offense elements of the crime.

In *Jones v. United States*,[139] however, the Supreme Court of the United States held that the aforementioned statute contained several distinct offenses, rather than one generic carjacking offense, with several aggravating sentencing factors. Although a close examination of the *Jones* decision is outside the purview of this Article, it is noteworthy that the sort of question presented in the case cannot be conclusively answered by invoking a formalistic test as a tool to determine what counts as an "element of the offense." In light of the way in

133. 18 U.S.C. § 2119 (1996).
134. CAL. PENAL CODE § 187 (West 1996).
135. *Id.*
136. CAL. PENAL CODE § 189 (West 1996).
137. *Id.*
138. In *Burttram v. State,* for example, the Florida court held that the factor that serves to differentiate between first and second degree murder—premeditation—ought to be proved by the prosecution beyond a reasonable doubt. 780 So. 2d 224 (Fla. Dist. Ct. App. 2001). The implication of this view is that first and second degree murder may be conceived as two different offenses, at least for the purposes of *Winship*'s beyond a reasonable doubt rule.
139. 526 U.S. 227 (1999).

which the federal carjacking statute was drafted, it is unclear whether subsections (2) and (3) were meant to be read as listing mere sentencing factors or as creating distinct offenses. Thus, the issue could only be settled by looking at factors that transcend the statutory definition of the offense.

In contrast, some statutes provide a laundry list of sentencing factors that aggravate or mitigate the punishment to be imposed for *any* offense rather than for one particular crime. In North Carolina, for example, the criminal code contains a section titled "Aggravated and mitigated sentences" that lists twenty-six aggravating factors and twenty-one mitigating factors.[140] Thus, rather than including these aggravating and mitigating elements after the definition of each offense, the North Carolina General Assembly opted for including all of them in a separate provision related to sentencing. A formalistic approach to defining criminal offenses provides an obvious answer to whether this type of laundry list of aggravating circumstances should be considered sentencing factors or elements of an offense. Given that the legislature expressly decided to define the specific offenses *without* including the aggravating factors following the definition of the base offense, it can be surmised that they should be treated as sentencing factors rather than elements of the offense.

2. *The Compatibility of the "Formalistic Approach" with Supreme Court Jurisprudence*

The formalistic approach to defining criminal offenses can explain several of the Supreme Court of the United States' "burden of proof" cases. In *Patterson v. New York*,[141] for example, the Supreme Court looked to New York's statutory definition of murder in order to determine whether "extreme emotional disturbance" ("EED") negated an element of the offense of murder or established a defense that partially excused conduct without negating the elements of the offense charged. After concluding that no reference was made to the presence or absence of EED in the statutory definition of the crime, the Court contended that EED should be considered a defense rather than an element of the offense. Similarly, the Supreme Court concluded in *Dixon v. United States*[142] that the absence of duress was not an element of the offense of certain firearm violations because the United States Congress did not define the crimes charged in a way that suggested that proof of duress would negate an element of the offense.[143]

140. N.C. GEN. STAT. § 15A-1340.16 (2009).
141. 432 U.S. 197 (1977).
142. 548 U.S. 1 (2006).
143. Dixon v. United States, 548 U.S. 1 (2006).

The formalistic approach is, however, incompatible with most, if not all, of the Supreme Court's "beyond a reasonable doubt" sentencing factor jurisprudence. As discussed in Part II of this Article, the Court held in *Apprendi v. New Jersey*[144] that a legislature's decision to label an element a "sentencing factor" does not necessarily entail that it will be treated as such for the purposes of triggering *In re* Winship[145] protections.[146] The rule put forth in *Apprendi* has been subsequently upheld in at least five occasions.[147] Consequently, the Supreme Court's post-*Apprendi* jurisprudence has focused on substance rather than form when determining whether a factor impacting a defendant's punishment should be treated as an element of the offense triggering *Winship* protections or as a sentencing factor that does not.

As a result, regardless of its merits and demerits,[148] the formalistic approach to defining criminal offenses cannot be considered the cornerstone of the Supreme Court's approach to the offense/defense distinction simply because it is at odds with numerous of the Court's precedents.

B. An Offense as a Basic Wrong

1. The Approach

Some have claimed that in order to adequately define what counts as a criminal offense, it is best to go beyond the statutory definition of the crime. According to this approach, conduct satisfying the elements of the offense is relevant to the criminal law in a way that conduct not satisfying the elements of the offense is not. Conduct amounting to an offense is legally relevant because there is something *prima facie* wrong with engaging in such acts. Furthermore, given that such conduct is objectionable, we have good legal reasons for not engaging in the act.[149]

Such approaches to defining criminal offenses have commanded support from some of the most sophisticated criminal theorists of our time. George Fletcher, for example, defended a similar approach in his

144. 530 U.S. 466 (2000).

145. 397 U.S. 358 (1970).

146. Apprendi v. New Jersey, 530 U.S. 466, 476 (2000).

147. Rita v. United States, 551 U.S. 338 (2007); Cunningham v. California, 549 U.S. 270 (2007); United States v. Booker, 543 U.S. 220 (2005); Blakely v. Washington, 542 U.S. 296 (2004); Ring v. Arizona, 536 U.S. 584 (2002).

148. The author has argued elsewhere that there are powerful reasons in favor of rejecting the formalistic approach to defining criminal offenses. *See Why is it a Crime, supra* note 23.

149. *See* Luis E. Chiesa, *Normative Gaps in the Criminal Law: A Reasons Theory of Wrongdoing*, 10 New Crim. L. Rev. 102 (2007) [hereinafter *Normative Gaps*].

much celebrated *Rethinking Criminal Law*.[150] There, Fletcher defined a criminal offense as "the minimal set of elements necessary to incriminate the actor." More specifically, Fletcher contended that:

> We may explicate . . . the definition of an offense as the violation of a prohibitory norm. Features of this violation are, first, that the violating conduct incriminates the actor in a given society at a given time; and further, that the violation is *typically* sufficient to regard the act as wrongful and to hold the violator personally accountable for his wrongdoing.[151]

Thus, according to Fletcher, conduct amounts to an offense only when engaging in such conduct both *incriminates* the actor and *typically*[152] entails a finding of wrongfulness. With regard to the incriminatory nature of an offense, it is important to note that the "minimal set of elements necessary to incriminate the actor" need not necessarily coincide with the legislative definition of an offense.

Take, for example, the statutory definition of murder put forth in the Uniform Code of Military Justice ("UCMJ"). Article 118 of the UCMJ prescribes that a person is guilty of murder if a person intentionally and "without justification or excuse, unlawfully kills a human being."[153] This definition surely includes more elements than are necessary to incriminate the actor, for the killing of a human being incriminates the actor *regardless of whether it turns out to be justified or excused.* In other words, even if later justified or excused, the killing of a human being is relevant for the criminal law. After all, as the German criminal theorist Hans Welzel stated over fifty years ago, it is not the same thing to kill a mosquito than to kill a human being in self-defense.[154] A killing in self-defense is relevant for the criminal law in at least two ways in which killing a mosquito is not. First, there are always good reasons for abstaining from killing a human being, even if the human being is an aggressor. The life of every human being, including aggressors, is of significant value to society.

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150. *See* FLETCHER, *supra* note 23, at 562.

151. FLETCHER, *supra* note 23, at 562.

152. Conduct that satisfies the elements of a criminal offense is *usually* wrongful. Such conduct might, however, turn out not to be wrongful in atypical cases, such as when an offense is committed pursuant to justifiable self-defense or law enforcement authority. This is why Fletcher states that the infraction of the elements of the offense is *typically* wrongful. The choice of the term "typically" is thus both intentional and important, for conduct that amounts to an offense it *typically,* though not necessarily, wrongful. The importance of this feature of the offense is so paramount that the term coined by Spanish criminal theorists to refer to the offense—"tipo"—is the Spanish word for "typical". *See generally* SANTIAGO MIR PUIG, DERECHO PENAL PARTE GENERAL 222 (7th ed. 2004).

153. 10 U.S.C. § 918 (2007).

154. HANS WELZEL, DERECHO PENAL ALEMÁN 97-98 (Juan Bustos Ramírez & Sergio Yáñez Pérez trans., 4th ed. 1997).

Ultimately, even if the value of the assailant's life is discounted as a result of his status as an aggressor,[155] the aggressor's life remains more valuable to society than the life of the mosquito. The second point is related to the first. Given that taking the aggressor's life is valuable, good reasons exist for society to regret that the aggressor's life had to be terminated in order to thwart the unlawful attack. Although killing the aggressor ought to be considered lawful, it would have been better yet to have thwarted the attack without killing him. This explains why a duty to retreat still exists in many jurisdictions as a prerequisite for the use of deadly force.[156] Since the life of the aggressor remains valuable in spite of his wrongful conduct, society often prefers that the attack be averted by retreating rather than by killing the aggressor. Obviously, no such duty to retreat exists before one is about to kill a mosquito. Given that killing a mosquito is not an act that society believes there is reason to regret, there is no duty to explore available alternatives before deciding to terminate the insect's life.[157]

Hopefully this discussion helps to explain why the UCMJ's definition of murder contains more elements than are necessary to incriminate the actor. Technically, justified killings do not satisfy the UCMJ's definition of the offense of murder. Thus, from a formalistic viewpoint, such justifiable killings would not even amount to an offense under the UCMJ. A more substantive approach like the one put forth at the beginning of this section would lead to a different result. Since *any* killing, regardless of its justifiable or excusable nature (think of the killing of the aggressor discussed in the previous paragraph), inculpates the actor and is relevant for the criminal law, it follows that the definition of the offense of murder is "the killing of a human being." Questions of justification and excuse are thus excluded from the definition of the offense. They are questions pertaining to the exculpatory dimension of wrongfulness, that is, to the theory of criminal defenses rather than to the theory of criminal offenses.

155. For a discussion of the way in which the aggressor's wrongful attack gives rise to a right of self-defense, see Luis E. Chiesa & George P. Fletcher, *Self-Defense and the Psychotic Aggressor*, *in* CRIMINAL LAW CONVERSATIONS (Robinson, Ferzan & Garvey, eds., 2009).

156. King v. State, 171 So. 254 (Ala. 1936); Sydnor v. State, 776 A.2d 669 (Md. 2001); State v. Austin, 332 N.W.2d 21 (Minn. 1983).

157. This assumes, of course, that killing a mosquito does not run afoul anti-cruelty statutes. This seems to be the case, given that anti-cruelty laws typically exclude insects from the class of animals that are protected by statute. A representative statute is Arizona's prohibition of animal cruelty, which defines "animal" as "a mammal, bird, reptile or amphibian". *See* ARIZ. REV. STAT. ANN. § 13-2910(H)(1) (2010).

John Gardner has recently defended a similar approach to defining criminal offenses. Following Kenneth Campbell,[158] Gardner suggests that the distinction between offenses and (justification) defenses lays in the difference between reasons in favor and reasons against engaging in conduct.[159] This leads Gardner to posit that an offense provides us with reasons *against* engaging in certain acts. Justification defenses, in contrast, provide us with reasons *in favor* of engaging in conduct satisfying the elements of the offense.[160] Thus, the offense of homicide provides us with reasons against taking human life. On the other hand, the rules allowing for the justifiable use of deadly force in self-defense provide us with reasons *in favor* of engaging in conduct that admittedly satisfied the elements of the offense of homicide. Consequently, this approach leads to the conclusion that conduct is justified when the reasons in favor of engaging in the act (for example, saving the life of the innocent victim) prevail over the reasons against doing so.[161]

A consequence of Gardner's approach is that the reasons that make engaging in certain conduct an offense do not disappear merely because the conduct is justified. Although justifications provide an actor with reasons for engaging in the conduct that outweigh the reasons against performing the act, "the offence is still committed and is still, *qua* offence, unwelcome."[162] As a result, "its commission, albeit justified, remains regrettable."[163] This leads Gardner to conclude that, "it would have been better still had there been no occasion to commit [the offense], and hence no need to ask whether its commission was justified or not."[164]

Thus, the reasons that make the conduct an offense seemingly exert a rational pull against engaging in the conduct *even in cases of justification*. Therefore, it would be perfectly rational for an actor to cite the prohibition against killing human beings (for example, the existence of the offense of homicide) as a reason to abstain from using deadly force against another in self-defense even if the law would have allowed him to use such force.

An important implication of Gardner's theory of criminal offenses is that the determination of whether conduct amounts to an offense or not need not necessarily coincide with the statutorily prescribed defi-

158. Kenneth Campbell, *Offence and Defence, in* CRIMINAL LAW AND JUSTICE: ESSAYS FROM the W.G. Hart Workshop 73 (I.H. Dennis, ed., 1987).
159. Gardner, *supra* note 23, at 819.
160. *Id.*
161. *Normative Gaps*, *supra* note 149, at 137.
162. Gardner, *supra* note 23, at 820.
163. *Id.*
164. *Id.*

nition of the offense. Therefore, under Gardner's approach, like Fletcher's, substance trumps form. Examining the exculpatory role of consent in battery illustrates this point. The victim's consent is sometimes a defense to battery.[165] But is consent a true defense to battery in the sense that it justifies conduct that admittedly satisfies the elements of the offense of battery, or is consent in such cases a way of negating the elements of the offense charged? Statutory definitions sometimes do not help to answer this question. In California, for example, battery is defined as "any willful and unlawful use of force or violence against the person."[166] Arguably, the victim's consent negates the "unlawful" nature of the force used against the victim. If so, consent would negate an element of the offense according to the statutory definition of the crime. This reading finds much support in the law of torts, given that a tortious battery is often defined as the "actual infliction of UNCONSENTED injury upon or UNCONSENTED contact with another."[167] Should it then be concluded that consent in battery cases negates an element of the offense?

Gardner would probably argue that it should not. Ultimately, disentangling the offense/defense distinction requires one to go beyond statutory formulations of an offense. In the case of battery, for example, one should ask whether there is a general reason for people not to use force or violence against others.[168] If there is a general reason to abstain from employing force or violence against the person of another—and there certainly seems to be—then the offense of battery should be defined without making reference to the victim's consent.[169] The offense of battery thus gives people good reasons for abstaining to use force or violence against others *regardless of the consensual nature of the conduct*. Consent, however, might in some cases provide the actor with reasons in favor of using force or violence that prevail over the reasons against doing so. Therefore, despite statutory appearances to the contrary, Gardner would likely claim that consent is a justification defense to battery rather than a negation of an element of the offense.

In sum, the substantive approach to defining criminal offenses advocated by Fletcher and Gardner leads to defining an offense as the most basic and stripped down description of an act that we have a general reason to abstain from performing. Any additional element that impacts our assessment of the actor's responsibility (for example, consent in battery cases or self-defense in homicide cases) is therefore

165. RESTATEMENT (SECOND) OF TORTS § 13 (2009).
166. CAL. PENAL CODE § 242 (West 2009).
167. Yoder v. Cotton, 758 N.W. 2d 630, 635 (Neb. 2008) (emphasis added).
168. Gardner, *supra* note 23, at 820.
169. *Id.*

relevant to determining the actor's fault or blameworthiness for having engaged in the conduct but not to negating the commission of the offense.[170]

2. *The Compatibility of the "Basic Wrong" Approach to Defining Criminal Offenses with Supreme Court Jurisprudence*

Although many compelling arguments in favor of adopting the "basic wrong" approach to defining criminal offenses[171] exist, the compatibility of this approach with Supreme Court of the United States jurisprudence regarding the offense/defense distinction is not one of them. As has been discussed earlier, the Supreme Court's pre-*Apprendi v. New Jersey*[172] "beyond a reasonable doubt" cases adopted (with the possible exception of *Mullaney v. Wilbur*[173]) a formalistic approach to the offense/defense distinction. Such formalistic approaches cannot be squared with the substantive inquiry that undergirds the "basic wrong" approach to the distinction.

The "basic wrong" approach is also incompatible with post-*Apprendi* case law. Even though in these cases the Supreme Court seemed to adopt a more substantive approach to determining what amounts to an element of the offense, its conclusion that certain factors that aggravate punishment ought to be considered *de facto* elements of the offense for *In re Winship*[174] purposes cannot be justified under the "basic wrong" approach to the offense/defense distinction. By definition, factors that aggravate punishment increase the actor's fault or blameworthiness for having engaged in conduct amounting to an offense, regardless of whether the aggravating factor is present. Therefore, such aggravating factors cannot be said to qualify the basic or stripped down wrong committed by the actor.

These aggravating factors do not, in other words, count as elements of the offense because they in no way help establish the "minimal set of elements necessary to incriminate the actor."[175]

C. The "Negative Elements of the Offense" Approach to Defining Offenses

1. *The Approach*

Perhaps the most intuitively appealing way of defining a criminal offense is as an act that is not permitted by the criminal law. Some

170. *Id.* at 824-27.
171. *See Why is it a Crime*, *supra* note 23.
172. 530 U.S. 466 (2000).
173. 421 U.S. 684 (1975).
174. 397 U.S. 358 (1970).
175. Fletcher, *supra* note 23, at 562.

may contend that conduct is not permitted by law when there is a law prohibiting the conduct. At first glance, this proposition would seem unassailable. After all, if the criminal law prohibits X-ing, it should follow that X-ing is not permitted by the criminal law. Nevertheless, upon closer inspection, it turns out that there is a sense in which X-ing might be permitted by the criminal law even though there is a law that prohibits X-ing. This seemingly contradictory state of affairs stems from the fact that, in addition to prohibitory norms, the criminal law also contains permissive norms.

Therefore, there are some contexts in which it is not contradictory to state that the criminal law seems to both prohibit and permit X-ing. This is exactly what happens when there is a conflict between a prohibitory norm requiring an actor to abstain from engaging in certain conduct (do not cause bodily harm to another person!) and a permissive norm allowing the actor to engage in said conduct (you may cause bodily harm in self-defense!).

Scholars on both sides of the Atlantic have devoted considerable efforts to describing the state of affairs that arises when prohibitory and permissive norms are in conflict with one another. In America, for example, Judith Jarvis Thomson has argued that there is a difference between conduct that is lawful because it does not contravene a prohibitory norm, and conduct that is lawful because a permissive norm exists allowing the actor to contravene the prohibitory norm.[176] Thomson believes that in the former case (no contravention of the prohibitory norm) there is no infringement of legal rules.[177] However, she believes that in the latter case (contravention of prohibitory norm authorized by a permissive norm) there *is* an infringement of a legal rule, but there is no violation of the rules.[178]

The following table summarizes Thomson's views:

176. Judith Jarvis Thomson, *Some Ruminations on Rights*, 19 ARIZ. L. REV. 45, 50 (1977).

177. Thomson, *supra* note 176, at 50.

178. *Id.*

Contravention of Prohibitory Norm	Concurrence of Permissive Norm Authorizing the Conduct	Example	Infringement	Violation
No	No	Killing a fly	No	No
Yes	Yes	Killing a human being in self-defense	Yes	No
Yes	No	Killing a human being without justification	Yes	Yes

Others, like George Fletcher, have proposed that we distinguish between conduct that is *prima facie* (all things being equal) wrongful and conduct that is wrongful *all things being considered.*[179] Conduct is *prima facie* wrongful when it contravenes a prohibitory norm.[180] Under this schema, the killing of a human being is *prima facie* wrongful because it runs afoul the prohibitory norm that requires people to abstain from committing homicide. It should be noted, however, that conduct that is *prima facie* wrongful can nevertheless be not wrongful when all things are considered.[181] Thus, a police officer who kills a dangerous fleeing felon posing a risk to the life or limb of third parties has engaged in conduct that is *prima facie* wrongful because the killing contravenes the prohibitory norm embodied in the crime of homicide. Nonetheless, the killing of the felon is not wrongful all things considered because a permissive norm authorizes the killing of fleeing felons by police officers when doing so is necessary to protect their lives or the lives of third parties.

Thomson's distinction between rule infringements and rule violations, and Fletcher's distinction between *prima facie* and *all things being considered* wrongfulness, leads to distinguishing between different types of lawful conduct. For Thomson, conduct that justifiably contravenes the offense (for example, taking a small amount of money from a box without the owner's consent in order to save a child's life) is not as innocuous as conduct that does not amount to an offense in the first place (for example, taking the money from the box with the owner's consent).[182] Similarly, Fletcher has argued that "there is still something untoward, something not quite right" when someone justifiably contravenes an offense (for example, kills in self-defense),

179. *See* GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 80 (1998).
180. *See generally* FLETCHER, *supra* note 23, at 562.
181. FLETCHER, *supra* note 179, at 80.
182. Thomson, *supra* note 176.

whereas there is nothing wrong at all with conduct that does not contravene an offense (for example, killing a fly).[183]

For others, the distinction between "infringements" and "violations" and between *"prima facie"* and *"all things being considered"* wrongfulness is logically plausible yet substantively unilluminating. For them, conduct authorized pursuant to a permissive norm *does not amount to an offense even if it nominally seems to contravene a prohibitory norm.*[184] According to this view, a criminal offense consists of both *positive* and *negative* elements. The elements making up the prohibitory norm comprise the positive facet of the offense.[185] On the other hand, the negative dimension of the offense consists in the absence of a permissive norm authorizing the actor to contravene the prohibitory norm.[186] So conceived, an offense would amount to conduct that satisfies the elements of the prohibition (positive facet of the offense) and that is not authorized pursuant to a justification defense such as self-defense, choice of the lesser evil, or law enforcement authority (negative dimension of the offense).[187]

Continental scholars have dubbed this approach to defining offenses as the "negative elements of the offense" theory.[188] One of Spain's leading criminal theorists—Diego Manuel Luzón Peña—is one of the most vocal defenders of this conception of criminal offenses. Luzón Peña explains the theory in the following manner:

> There is an offense only when [the actor's conduct] is without justification. This conception of the offense . . . is comprised of two parts: the positive component of the offense (*i.e.* the offense *strictu sensu*), which contains the elements . . . of crimes listed in the special part [of a criminal code] . . . and a negative component, which amounts to the absence of justification defenses.[189]

It should be noted that Luzón Peña acknowledges that statutory definitions of crimes do not typically include the absence of justification as an element of the offense.[190] He believes, however, that this has more

183. FLETCHER, *supra* note 179, at 81.

184. *See generally* EUGENIO RAÚL ZAFFARONI, DERECHO PENAL PARTE GENERAL 385 (2d ed. 2002).

185. 2 JUAN J. BUSTOS RAMÍREZ & HERNÁN HORMAZÁBAL MALARÉE, LECCIONES DE DERECHO PENAL 19 (1999).

186. *Id.*

187. CLAUS ROXIN, DERECHO PENAL PARTE GENERAL 283-84 (Luzón Peña, Díaz y García Conlledo & de Vicente Remesal trans., 1997).

188. FRANCISCO MUÑOZ CONDE & MERCEDES GARCÍA ARÁN, DERECHO PENAL PARTE GENERAL 252, 253 (6th ed. 2004).

189. I DIEGO MANUEL LUZÓN PEÑA, CURSO DE DERECHO PENAL 299 (Universitas, 1996).

190. PEÑA, *supra* note 189 (stating that the absence of justification is usually not "expressly" designated by the legislature as an element of criminal offenses).

to do with the legislature's desire to avoid repetitiveness and keep the text of criminal statutes as short and uncomplicated as possible. More specifically, Luzón Peña contends that:

> [The] negative component of the offense . . . is generally [articulated] tacitly, for it is superimposed on the precepts of the special part for reasons of legislative economy so as to avoid constantly repeating that the general prohibition of X or Y conduct is punishable unless a justification defense is present [in the given case]. [T]his is why justification defenses are prescribed in a generic fashion in the general part [of criminal codes].[191]

The so-called "negative elements of the offense" theory is by no means a European concoction. Several prominent Anglo-American scholars defend a similar approach to defining criminal offenses.[192] Kyron Huigens represents a salient example. Although Huigens does not expressly call justifications "negative elements of the offense," his writings on the subject suggest that this is exactly what he believes. In language mirroring Luzón Peña's ruminations on the subject, Huigens has contended that "justification is as much a part of the prohibition as the offense definition"[193] and that "a justification is not independent of the prohibitory norms expressed in offense definitions."[194] Huigens believes that this is the case because:

> Offense definitions are necessarily incomplete in many instances, and the justification defense is the rest of the story, so to speak, about the prohibition. It is not wrong to purposely kill a human being; it is wrong to purposely kill a human being without a sufficiently good reason to do so. It is in the nature of a justification . . . to show us that an apparent wrong is not a wrong at all, but a right action. We might express the entire prohibition in the offense definition, but for a particular practical concern: it is impossible to prove a negative unless it is very narrowly framed.[195]

As one can readily see, the theory of the "negative elements of the offense" provides an approach to defining criminal offenses that contrasts both with the formalistic approach discussed in Part III(A) and the "basic wrong" approach discussed in the Part III(B). Under the formalistic approach, a criminal offense consists of conduct that satisfies the statutorily prescribed definition of an offense. This usually

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191. *Id.*

192. *See, e.g.*, MICHAEL S. MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 31-33, 64-67 (1997).

193. Kyron Huigens, *Fletcher's Rethinking: A Memoir*, 39 TULSA L. REV. 803, 811 (2004).

194. Huigens, *supra* note 193, at 811.

195. *Id.*

precludes considering justifications as elements of the offense, given that the legislature typically fails to include the absence of justificatory circumstances as part of the definition of crimes. Under the "basic wrong" approach, a criminal offense consists of the "minimal set of elements necessary to incriminate the actor." This approach also precludes considering justifications as elements of the offense, since conduct that contravenes the prohibitory norm incriminates the actor even if it turns out to be justified.

In contrast, justification plays a central role in the negative elements of the offense theory. This theory holds that an offense consists of both positive and negative elements. That is, an offense entails not only the contravention of a prohibitory norm (do not kill!), but also the absence of a justification defense that allows the actor to contravene the prohibitory norm (you may kill in self-defense!).

2. *The Compatibility of the "Negative Elements of the Offense" Approach to Defining Criminal Offenses with Supreme Court Jurisprudence*

Despite its intuitive appeal, the "negative elements of the offense" approach to determining what counts as an element of the offense is in tension with the Supreme Court of the United States' "beyond a reasonable doubt" jurisprudence. In *Martin v. Ohio*,[196] for example, the Court had to decide whether the prosecution had the burden of disproving the justification of self-defense beyond a reasonable doubt. The Court answered the question in the negative, holding that self-defense "sought to justify [defendant's] actions" without negating the elements of the offense charged.[197] Although the Court did not directly address the theoretical issues discussed in the preceding section, its express refusal in *Martin* to treat the absence of justification as an element of the offense may be construed as a tacit rejection of the negative elements of the offense theory.

D. The "Comprehensive" Approach to Defining Criminal Offenses

1. *The Approach*

The broadest way of defining an offense would be by combining all elements that must be proven in order for defendant's conduct to be punishable. An actor may be punished only if it is proven that he engaged in conduct that satisfies the elements of the offense unjustifi-

196. 480 U.S. 228 (1987).
197. Martin v. Ohio, 480 U.S. 228, 231 (1987).

ably and inexcusably.[198] Thus, the broadest approach to defining criminal offenses would include not only the infraction of the prohibitory norm as an element of the crime, but also the absence of justification and excuse, given that the concurrence of such defenses precludes the imposition of punishment.[199] Furthermore, the absence of so-called "non-exculpatory" defenses ought also be considered an element of the offense, since the presence of such defenses also generates an acquittal.[200]

This way of defining crimes has been dubbed by some as the "comprehensive" or "complete" approach to identifying elements of the offense. Such a comprehensive approach:

> [S]uppress[es] the distinction between the ordinary and the extraordinary. [It] state[s] all the criteria that are relevant to the solution of any [criminal] case that might arise. To move . . . to a comprehensive [approach], we need an exhaustive catalogue of possible defenses. The absence of each of these possible defenses must then be stated as an element of the comprehensive rule. A comprehensive rule of criminal homicide would begin like this: You are liable for murder if (1) you act (2) intentionally (3) to bring about the death of (4) a living human being, and you are not acting in (5) self-defense or while (6) insane.[201]

The comprehensive approach to defining criminal offenses has commanded some support amongst criminal law theorists, at least in the context of determining what counts as an "offense" for the purposes of the prosecution's burden of proof.[202] The drafters of the Model Penal Code ("MPC"), for example, found the approach sufficiently appealing to base their definition of an offense upon this model. As a result, an "element of the offense" is defined in section 1.13(9) of the MPC as an element that (1) is included in the description of the forbidden conduct in the definition of the offense,[203] (2) establishes the required form of culpability,[204] (3) negates an excuse or justification for such conduct,[205] (4) negates a defense under the statute of limita-

198. MARKUS DUBBER, CRIMINAL LAW: MODEL PENAL CODE 28-31 (Foundation Press 2002).

199. DUBBER, *supra* note 198.

200. Non-exculpatory defenses preclude punishment even though they do not negate wrongful nature of the conduct or the defendant's fault or blameworthiness. Examples of non-exculpatory defenses include the statute of limitations, diplomatic immunity and, more controversially, entrapment. *See generally* Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 229-31 (1982).

201. FLETCHER, *supra* note 179, at 97.

202. *Id.* at 100.

203. MODEL PENAL CODE § 1.13(9)(a) (2002).

204. § 1.13(9)(b).

205. § 1.13(9)(c).

tions,[206] or (5) establishes jurisdiction or venue.[207] It is difficult to fathom a more comprehensive articulation of what counts as an element of an offense than this one.[208]

2. *The Compatibility of the "Comprehensive" Approach to Defining Criminal Offenses with Supreme Court Jurisprudence*

Of the four approaches to defining criminal offenses discussed in this Part of the Article, the "comprehensive" approach is perhaps the most incompatible with Supreme Court of the United States jurisprudence. While the Court's decision in *Mullaney v. Wilbur*[209] to consider the absence of provocation as an element of the offense seemed to suggest that the Court was willing to adopt a more comprehensive approach to defining an offense,[210] the Court's subsequent case law belies this contention. Ever since *Patterson v. New York*[211] was decided more than thirty years ago, the Court has repeatedly held that the elements of an offense do not include the absence of justification (*Martin v. Ohio*[212]) or excuse (*Patterson*, *Dixon v. U.S.*[213]). This, of course, amounts to an implicit rejection of the comprehensive account of criminal offenses.

E. Summary: The Supreme Court's Approach to Defining Criminal Offenses is Incoherent

Since the Supreme Court of the United States held in *In re Winship*[214] that the government had the burden of proving the elements of the offense charged beyond a reasonable doubt, the Court has struggled to come to grips with the offense/defense/sentencing factor tristinction. The Court's haphazard approach to defining criminal offenses can be broken down into three stages. During the first stage,

206. § 1.13(9)(d).
207. § 1.13(9)(e).
208. It should be noted, however, that the drafters of the MPC distinguished between "elements of the offense" and "material elements of the offense." Material elements of the offense encompass both the elements that are included in the definition of the prohibitory norm and matters of justification and excuse. *See* Model Penal Code § 1.13(10) (2002). Thus, the MPC's approach to defining what counts as a "material element of the offense" is comprehensive, given that it includes the absence of defenses within the definition of the offense. It is, however, less comprehensive than the Code's definition of what counts as an "element of the offense," since the definition of a "material element of the offense" does not include "non-exculpatory" defenses such as the statute of limitations or the absence of jurisdiction.
209. 421 U.S. 684 (1975).
210. Fletcher, *supra* note 179, at 100.
211. 432 U.S. 197 (1977).
212. 480 U.S. 228 (1987).
213. 548 U.S. 1 (2006).
214. 397 U.S. 358 (1970).

the Court flirted with adopting a substantive approach to defining criminal offenses. Under this approach, whether a factor amounted to an element of the offense mostly depended on the impact that the factor had on the defendant's punishment, rather than on whether such a factor was included within the statutory definition of the crime. This approach seemed to undergird some of the language put forth by the majority in *Mullaney v. Wilbur*.[215]

The Court moved away from substantive approaches to defining criminal offenses in its post-*Mullaney v. Wilbur* "beyond a reasonable doubt" jurisprudence.[216] The distinguishing feature of this second stage in the Court's attempt to flesh out the contours of the *Winship* doctrine was the Court's reliance on the statutory definition of crimes as the sole litmus test for determining what counts as an element of the offense. This approach provided the Court with a coherent way of explaining the offense/defense/sentencing factor tristinction. As *Patterson v. New York*,[217] *Martin v. Ohio*,[218] and *Leland v. Oregon*,[219] exemplified, a factor impacting a defendant's punishment counts as an element of the offense rather than as a defense *only if the legislature either expressly or by tacit reference to the common law definition of the crime* included such a factor in the definition of the offense. Similarly, as *McMillan v. Pennsylvania*[220] illustrated, aggravating factors count as an element of the offense for the purpose of triggering *Winship*'s "beyond a reasonable doubt" rule only if the legislature expressly included them within the definition of the offense charged. If not, courts should consider the aggravating factor as a mere sentencing factor that does implicate *Winship*.

The third and current stage has two distinctive features. First, as *Apprendi v. New Jersey*[221] illustrates, the Court has chosen to adopt a substantive approach to distinguishing between offense elements and sentencing factors. Under this approach, whether a sentencing factor ought to be treated as an element of the offense depends more on the impact that the factor has on the defendant's punishment than on the way in which the legislature has decided to label it. Second, as *Dixon v. United States*[222] reveals, the Court has continued to adopt *Patterson*'s formalistic approach to differentiating between offenses and defenses. Under this approach, legislative labels are often, if not always,

215. 421 U.S. 674 (1975).
216. Mullaney v. Wilbur, 421 U.S. 674, 684 (1975).
217. 432 U.S. 197 (1977).
218. 480 U.S. 228 (1987).
219. 343 U.S. 790 (1952).
220. 477 U.S. 79 (1986).
221. 530 U.S. 466 (2000).
222. 548 U.S. 1 (2006).

determinative of whether the absence of a defense ought to be treated as an element of an offense or not. There is no reason to accept such a schizophrenic result, unless the Court can provide a convincing explanation of why it is sensible to adopt a substantive account of what amounts to a criminal offense in the sentencing factor context and a formalistic account of what amounts to an offense in the offense/defense context. Up to this point, the Court has provided none.

The aim of this Part was to develop four different approaches to defining criminal offenses in order to make sense of the Supreme Court's current method of defining criminal offenses for the purposes of *Winship*. While divergent from each other, these four approaches at least have the virtue of being internally consistent. That is, the formalistic approach consistently defines an offense by making reference to the statutorily prescribed definition of the offense both in the sentencing factor context and the offense/defense context. Similarly, the "basic wrong" approach defines an offense as "the minimal set of elements necessary to incriminate the actor" both for the purposes of distinguishing offenses from defenses and offenses from sentencing factors. The same is true of the "negative elements of the offense" and the "comprehensive" approaches to defining offenses.

The same cannot be said of the Court's approach to the offense/defense/sentencing factor tristinction. The Court is trying to have its cake and eat it too by invoking two conflicting approaches to defining an offense depending on whether it is trying to distinguish offenses from defenses or offenses from sentencing factors. This move is illegitimate unless the Court does what it has not done to date—explain what, if anything, is gained by the internally inconsistent and conceptually perplexing approach to defining criminal offenses that it has chosen. Unless it does so, the Court should either (1) abandon the post-*Apprendi* substantive approach to defining criminal offenses in the sentencing factor context and adopt an entirely formalistic approach to defining criminal offenses or (2) abandon its formalistic attempts to distinguish offenses from defenses and adopt an entirely substantive approach to defining offenses in all contexts.

Although the latter option might require modifying some of the Court's post-*Winship* case law, Part V will contend that this is exactly what should be done. Before doing so, however, Part IV attempts to explain what led the Supreme Court to adopt this schizophrenic approach to defining criminal offenses in the first place. This will help explain why the solution that will be offered to the problem might not require a significant overhaul of post-*Winship* case law as one might be led to believe at first glance.

IV. A POSSIBLE DIAGNOSIS FOR THE SUPREME COURT'S SCHIZOPHRENIA: CONFLATING THE DUE PROCESS AND JURY TRIAL GUARANTEES

The Supreme Court of the United States' schizophrenic approach to defining criminal offenses for the purposes of *In re Winship*[223] is difficult to explain. Although several plausible explanations can account for the adoption of this haphazard approach, this Part argues that the Court's confusion in this context can be traced back to its failure to rigorously distinguish between the protections conferred to criminal defendants as a result of *Winship*'s "beyond a reasonable doubt" doctrine and the safeguards afforded to them as a result of the Sixth Amendment's jury trial guarantee.

More specifically, this Part contends that *Apprendi v. New Jersey*[224] and its progeny reveals that the Court seems to tacitly assume an essential connection between the circumstances triggering the right to a jury trial and those triggering due process *Winship* protections. The problem with this tacit assumption is that no necessary connection exists between the conditions triggering the application of these two constitutional safeguards. Both precedent and constitutional practice suggest that the elements making up a "criminal prosecution" for Sixth Amendment purposes are broader than the elements comprising an "offense" for the purposes of due process. Therefore, it is perfectly coherent and sensible for the Court to hold that an aggravating factor should be found by a jury while simultaneously holding that it can be found by a less demanding standard than "beyond a reasonable doubt."

A. CONFLATION

The infelicitous conflation of the conditions triggering jury trial protections under the Sixth Amendment and *In re Winship*[225] protections under due process is apparent from the beginning of the majority opinion in *Apprendi v. New Jersey*.[226] There, Justice John Paul Stevens asserted that due process requires that the "the jury verdict [be] based on proof beyond a reasonable doubt" and that the beyond a reasonable doubt standard "is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt."[227]

223. 397 U.S. 358 (1970).
224. 530 U.S. 466 (2000).
225. 397 U.S. 358 (1970).
226. 530 U.S. 466 (2000).
227. 530 U.S. 466, 476-77 (2000).

These propositions are misleading, for it is well known that the jury determination of guilt *must not be based in its entirety upon proof beyond a reasonable doubt.* Only the jury findings with regard to the existence of the elements of the offense need to be proven by this exacting standard. In contrast, as has been discussed at length in Part I, the combined effect of *Patterson v. New York*,[228] *Martin v. Ohio*,[229] *Leland v. Oregon*,[230] and *Dixon v. United States*[231] is that the jury does not have to be convinced beyond a reasonable doubt about the inexistence of certain elements clearly bearing on the defendant's guilt, namely, justification and excuse defenses.

The reason for the disconnect between the scope of the jury trial and due process guarantees is that the Sixth Amendment confers to defendants a constitutional right to a jury trial "in all criminal prosecutions."[232] Therefore, the right to a jury trial extends to all aspects of the trial. As a result, a defendant has a right to have a jury find not only the facts demonstrating that he has committed the elements of the offense charged, but also those that undergird any substantive defense for which he has presented sufficient evidence during the course of the prosecution.[233] Given that the jury's ultimate task is determining the innocence or guilt of the defendant, and that a defendant cannot be found guilty if he committed the elements of the offense justifiably or excusably, the jury has the responsibility of both ascertaining whether the defendant has infringed elements of the offense and, if so, whether the infraction ought to be justified or excused.

On the other hand, due process *Winship* protections currently require only that the government prove beyond a reasonable doubt the *elements of the offense* rather than every element of the criminal case that the jury must find. Thus, the triggering conditions and scope of the Sixth and Fifth Amendments differ significantly. Whereas the constitutional right to a jury extends to all facts relevant to guilt, *Winship* protection merely attaches to the facts necessary to establish the elements of the offense. Therefore, bundling together these two constitutional rights or suggesting that the Sixth Amendment's jury trial protections can shed light in some meaningful way on the scope of what amounts to an element of the offense under *Winship* is confusing at best and downright misleading at worst.

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228. 432 U.S. 197 (1977).

229. 480 U.S. 228 (1987).

230. 343 U.S. 790 (1952).

231. 548 U.S. 1 (2006).

232. U.S. CONST. *amend.* VI.

233. *See generally* WAYNE R. LAFAVE, ET AL., CRIMINAL PROCEDURE § 22.1(a) (West 2004).

The rest of the majority opinion in *Apprendi* is equally confusing. Take, for example, Justice Stevens' assertion that "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding."[234] There are two problems with this contention. First, as Professor Mitchell has argued, it is unclear whether it is actually true that at the time of the Nation's founding there was no distinction between "offense elements" and "sentencing factors."[235] It seems that many jurisdictions *did* in fact distinguish between elements of an offense and sentencing elements, especially in murder cases.[236]

Furthermore, even if one accepts the majority's contention that there was no distinction between offense elements and sentencing factors at the time of the Nation's founding, it is difficult to see why this has anything to do with whether at the time such factors had to be proven beyond a reasonable doubt. It is well known that during the Eighteenth Century, juries were not always instructed to convict defendants only upon proof beyond a reasonable doubt, as they were sometimes instructed to acquit if they "had any doubts" or if they "lacked moral certainty" about the defendant's guilt.[237] The "beyond a reasonable doubt" standard, and the rules that govern its application in concrete cases, was not fleshed out in detail until the Nineteenth Century.[238] Even then, the "reasonable doubt" standard was intertwined with the vague concept of "moral certainty," and, particularly in the realm of sentencing practices and affirmative defenses, its scope of application was far from clear.[239] Therefore, contrary to what the majority in *Apprendi* suggests, the fact that sentencing factors should be proven beyond a reasonable doubt cannot be inferred from the fact

234. Apprendi v. New Jersey, 530 U.S. 466, 478 (2000).

235. Jonathan F. Mitchell, *Apprendi's Domain*, 2006 SUP. CT. REV. 297 (2006).

236. *Id.*

237. Steve Sheppard, *The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence*, 78 NOTRE DAME L. REV. 1165, 1195 (2003).

238. *Id.*

239. Professor John Langbein, for example, has argued that the 17th and 18th century "moral certainty" standard required the jury to be "persuaded" by the evidence, rather than to be convinced to the point of "certainty" or beyond a reasonable doubt. JOHN LANGBEIN, TORTURE AND THE LAW OF PROOF 80 (1976). Others, like Sheppard, disagree. *See* Sheppard, *supra* note 237, at 1173. Regardless of this debate, it can, at the very least, be concluded that it is unclear whether at the time of the founding juries were required to convict defendants only upon proof beyond a reasonable doubt. Consequently, if it is not clear whether prosecutors at the time had to prove the offense beyond a reasonable doubt, it is *a fortiori* unclear whether they had to prove aggravating or mitigating factors in that manner.

that during the founding era there seemed to be no distinction between "offense elements" and "sentencing factors."

Apprendi's progeny also reveals the Court's failure to come to grips with the different scope of application of the Sixth Amendment jury trial protection and *Winship*'s "beyond a reasonable doubt" doctrine. In *United States v. Booker*,[240] for example, the Court framed the issue raised in the case by stating that "[t]he question presented [here] is whether an application of the Federal Sentencing Guidelines violated the Sixth Amendment."[241] This reveals that the Court's interest in examining the Fifth Amendment, due process, and *Winship* issues raised by the case are marginal at best.[242] Furthermore, and even more puzzling, is the fact that in Part IV of the opinion, the Court concluded by asserting that since a violation of the Sixth Amendment occurred, the defendant was entitled to have the sentencing factor at issue found by a jury *beyond a reasonable doubt*.[243] This conclusion is quite troubling, given that the Sixth Amendment is obviously irrelevant to determining whether the Constitution requires that a factor be proven beyond a reasonable doubt. It would seem that the *Booker* Court forgot that the "beyond a reasonable doubt" doctrine and the jury trial protections conferred as a result of the Sixth Amendment are separate safeguards and that they differ in their scope.

B. The Undesirability of the Conflation

The Supreme Court of the United States' conflation of the jury trial and *In re Winship*[244] due process protections is infelicitous because these two rights pursue different purposes. The right to a jury trial is intended to provide the people with a check against the arbi-

240. 543 U.S. 220 (2005).

241. United States v. Booker, 543 U.S. 220, 226 (2005).

242. An interesting way of looking at whether the Court believes that *Apprendi* and its progeny has more to do with ascertaining the scope of the jury trial right than with determining the boundaries of *Winship*'s "beyond a reasonable doubt" doctrine is by examining the number of times in post-*Apprendi* sentencing factor jurisprudence that the Court cited to *Winship* or the Due Process Clause of the Fifth Amendment. In *Blakely*, for example, the Court never once cited or discussed *Winship*, the Fifth Amendment, or the Due Process Clause. In contrast, the majority in *Blakely* cited the Sixth Amendment *eight* times and discussed it at length during the course of the whole opinion. This provides indirect evidence that what the Court mostly cares about in the *Apprendi* line of cases is about having juries find sentencing factors rather than having them do so beyond a reasonable doubt. The former seems to be the gist of these holdings, whereas the latter seems to be an afterthought. The same pattern can be found in *Booker v. California*, where the Court again failed to cite the Fifth Amendment and the Due Process Clause, although the right to have the government prove a fact beyond a reasonable doubt clearly stems from these constitutional provisions. *Winship* was cited only once. Contrarily, the Court cited the Sixth Amendment *twelve* times!

243. *Booker*, 543 U.S. at 243-44.

244. 397 U.S. 358 (1970).

trary enforcement of criminal laws[245] and a mechanism to prevent punishing defendants for conduct that is not wrongful according to societal standards of morality.[246] The right to have the prosecution prove the elements of the crime beyond a reasonable doubt, on the other hand, seeks to level the playing field between the government and the defense[247] and to protect the defendant against the risks of an unwarranted conviction.[248] Given their different purposes, the right to a jury trial and the "beyond a reasonable doubt" doctrine differ in their nature.

The Sixth Amendment's jury trial is a rule that should apply equally to every aspect of the criminal trial that may have an impact on the defendant's guilt. Contrarily, the "beyond a reasonable doubt" doctrine works as a rule that may, in principle, apply differently to different aspects of the criminal case in order to strike the proper balance between the risk of an innocent person being convicted and the risk of a guilty person going free.

Thus, while it may be sensible to conclude that if the prosecution has not proven beyond a reasonable doubt that the defendant's conduct satisfied the definition of the offense charged, the jury must acquit, it may also be sensible to contend that once the prosecution has proven beyond a reasonable doubt that the defendant has infringed the elements of the offense, the jury is entitled to convict unless the defendant can prove the existence of exculpating factors. This is the way in which the Court currently strikes the balance between the risks of unjust convictions and improper acquittals. While one may disagree with the way in which the Court has decided to strike this balance, it is difficult to understand how the jury trial right sheds light on this difficult problem. If the Court's sentencing factor jurisprudence is any indication, it would seem that looking to the Sixth Amendment in order to clarify the scope of the due process beyond a reasonable doubt rule serves to obfuscate these issues rather than illuminate them.

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245. Taylor v. Louisiana, 419 US 522, 530 (1975) (holding that "[t]he purpose of a jury is to guard against the exercise of arbitrary power").

246. *See generally* Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 58-59 (2003) (stating that the purpose of the jury is "to inject the common-sense views of the community into a criminal proceeding to ensure that an individual would not lose her liberty if it would be contrary to the community's sense of fundamental law and equity").

247. ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES 196 (Paul Finkelman ed., 2003). *See also* LARRY LAUDAN, TRUTH ERROR AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY 145 (Cambridge Univ. Press 2008).

248. *In re* Winship, 397 U.S. 358, 362 (1970).

V. THE "UNLAWFUL ACT" APPROACH TO THE BEYOND A REASONABLE DOUBT DOCTRINE

By this point, the Author hopes to have demonstrated that the Supreme Court of the United States' approach to defining criminal offenses for the purposes of *In re Winship*'s[249] beyond a reasonable doubt rule is plagued by a fundamental contradiction. Despite efforts to unravel the offense/defense/sentencing factor tristinction, the Court has failed to put forth a coherent and internally consistent definition of offense elements. For reasons that the Court has not fully explained, it has adopted a formalistic account of offense elements when attempting to distinguish between offenses and defenses while simultaneously adopting a substantive account of offense elements when distinguishing between offense elements and sentencing factors. This schizophrenic approach to defining criminal offenses should be rejected unless there is a compelling justification for its adoption. So far, no convincing reason has been put forth in favor of accepting this convoluted account of the offense/defense/sentencing factor tristinction. Furthermore, as Part IV illustrates, the Court's lackadaisical attempt to justify its approach to the *Winship* rule by linking the "beyond a reasonable doubt" doctrine to the Sixth Amendment is unpersuasive. A fresh start is clearly needed.

A. Rejection of the Formalistic Approach to Defining Criminal Offenses

The two basic approaches to defining criminal offenses are the formalistic and the substantive approaches. The formalistic approach holds that the elements of an offense ought to be ascertained solely by looking at the elements that the legislature decided to include in the statutory definition of the offense.[250] In contrast, substantive approaches hold that offense elements ought to be identified by making reference to considerations that transcend the statutory definition of the offense.[251] Both approaches find some support in the Supreme Court of the United States' "beyond a reasonable doubt" jurisprudence.[252] It seems, however, that powerful reasons militate in support of favoring a substantive approach to defining offense elements over a formalistic approach.

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249. 397 U.S. 358 (1970).

250. *See supra* Part III(A).

251. *See supra* Part III(B-D).

252. As was argued in detail in Parts I & II, *supra* notes 29-122, the Supreme Court seems to have adopted a formalistic approach to defining criminal offenses in *Patterson v. New York* and its progeny, whereas it appears to have adopted a substantive approach to the problem in *Apprendi v. New Jersey* and its progeny.

The main objection that can be leveled against formalistic approaches to defining criminal offenses is that it abdicates control over the scope of the "beyond a reasonable doubt" doctrine to the legislature. Given that under the formalistic approach the legislature's definition of the elements of the offense is considered controlling, application of the *In re Winship*[253] rule could easily be circumvented by statutorily redefining the elements of the offense. This, as the Court held in *Mullaney v. Wilbur*[254] and *Apprendi v. New Jersey*,[255] and as the dissenters decried in *Patterson v. New York*,[256] is unpalatable.

Furthermore, defining criminal offenses in accordance with the whims of the legislature contributes to obfuscating the communicative meaning of the different types of acts that are relevant for the criminal law. One should not lose sight of the fact that the offense/defense/sentencing factor tristinction reveals something not only about the "beyond a reasonable doubt" doctrine, but also about the nature of our practices of blaming and punishing. A person's contravention of the elements of the offense provides us with a prima facie reason to punish the person.[257] The concurrence of defenses of justification or excuse, on the other hand, provides us with reasons to forego punishment.[258] Finally, the presence of aggravating or mitigating sentencing factors provides us with reasons for gradating punishment in a way that more accurately reflects the culpability of the defendant. These critical insights are lost if one adopts a formalistic definition of criminal offenses, for legislatures frequently incorporate criteria of exculpation and sentence enhancement or mitigation into the statutory definition of the offense.[259] Therefore, the adoption of a substantive approach to defining criminal offenses ought to be encouraged if one desires to preserve these foundational distinctions and to not abdicate to the legislature the power to determine the scope of the "beyond a reasonable doubt doctrine."

253. 397 U.S. 358 (1970).
254. 421 U.S. 684 (1975).
255. 530 U.S. 466 (2000).
256. 432 U.S. 197 (1977).
257. *See supra* Part III(B).
258. *See supra* Part III(B).
259. See definition of murder according to the UCMJ and see *supra* Part III(B). According to Article 118 of the UCMJ, a person is guilty of murder if a person intentionally and "without justification or excuse, unlawfully kills a human being."

B. THE "UNLAWFUL ACT" APPROACH TO DEFINING CRIMINAL OFFENSES

There are many ways of defining criminal offenses for the purposes of *In re Winship*'s[260] "beyond a reasonable doubt" doctrine. Consonant with the comprehensive approach to defining crimes,[261] for example, an offense could be conceived as including every element that may impact the defendant's punishment, including the absence of justification and excuse-defenses, and, perhaps, the presence or absence of mitigating or aggravating factors. Contrarily, pursuant to the "basic wrong" approach to criminal offenses, an offense could also be considered to include solely the minimal amount of elements needed to inculpate the actor.[262] This would exclude from the definition of the offense both the absence of justification and excuse defenses and the presence of sentencing factors that aggravate or mitigate punishment.

While the plausibility of these two approaches is undeniable, certain objections may be leveled against each. The comprehensive approach may be objected as too harsh on the prosecution, for it requires them to prove beyond a reasonable doubt not only the contravention of the prohibitory norm and the absence of justification defenses, but also the absence of excuse defenses. This might go too far. In light of the predominantly subjective nature of most excuse defenses (for example, *insanity*, *extreme emotional disturbance, mistake of law, mistaken justification*),[263] one may argue that the defendant is usually in a much better position to argue in favor of the defendant's concurrence. Therefore, it might be sensible to impose the burden to prove such claims on the defendant.

In contrast, some may object to the "basic wrong" approach as too harsh on the defendant, for the approach would require the defendant prove not only the concurrence of excuse defenses, but also the presence of claims of justification. This is problematic for two reasons.

260. 397 U.S. 358 (1970).

261. *See supra* Part III(D).

262. *See supra* Part III(B).

263. What is meant by the claim that excuses are "predominantly" subjective in nature is that excuse defenses typically take the defendant's subjective mental state more into account than justification defenses. In other words, when examining whether the defendant ought to be excused we are allowed to inquire upon the characteristics of the defendant in a much more personal and individualized way than we are allowed to do in the realm of justifications. *See generally* George P. Fletcher, *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269 (1974). A possible exception might be the excuse of duress, which calls for the eminently objective assessment of whether a "person of reasonable firmness" would have also committed the crime. *See* MODEL PENAL CODE § 2.09 (2002).

First, justification defenses are mostly objective in nature.[264] Therefore, requiring the government to disprove the presence of justificatory circumstances does not appear to unduly burden the prosecution. Second, and more importantly, it would seem that if the "beyond a reasonable doubt" doctrine is to mean anything, it must, at a very minimum, stand for the proposition that the State ought to be required to prove the presence of the elements without which the imposition of punishment would be incoherent. That is, the state should at least have to prove beyond a reasonable doubt that the defendant's conduct amounted to a violation of legal rules.[265]

Without proof that the defendant violated a legal rule, the imposition of punishment is unintelligible. This can be inferred from H.L.A. Hart's conception of punishment, since he stressed that one of the essential features of punishment is that it must be imposed "for an offence against legal rules."[266] It follows then, that a sanction imposed for something other than the violation of legal rules is not only unjust, but also incoherent. Ultimately, the infliction of pain in the absence of a violation of legal rules amounts to a random act of violence rather than punishment.[267] If the "beyond a reasonable doubt" doctrine is meant to in some way safeguard the defendant against the unwarranted imposition of penal sanctions, it should at least protect the de-

264. What is meant by the claim that justifications are "mostly" objective is merely that subjective factors are not taken into account as much in this context as they are in the context of excuses. The Author does not wish to imply, however, that subjective considerations are *never* taken into account in the realm of justification. As Kent Greenawalt has demonstrated, justifications sometimes do encompass a subjective component, whereas excuses sometimes include objective components. Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897 (1984). The point that is being made here is a more modest and less controversial one: that most excuse defenses typically require corroborating the concurrence of more subjective elements than one would typically be required to corroborate in order to establish the existence of a justification defense.

265. Focusing solely on the difficulties of proof that negating some defenses presents might lead someone to defend a different approach than the one defended here. Under this competing approach, the question to be asked is whether X defense is very difficult for the state to disprove because it is eminently subjective in nature or for some other reason. If the defense is particularly difficult to disprove, it could be argued that the state should not have the burden of disproving its concurrence beyond a reasonable doubt *regardless of whether it is a justification or excuse*. This analysis would have to be made on a case by case basis.

Even though this approach is plausible, it might be too difficult for courts to manage on a case by case basis. Therefore, drawing the line between justifications and excuses for the purposes of burdens of proof is more sensible. After all, in light of the predominantly objective nature of justifications, these types of defenses are *usually* easier to disprove than excuses. Therefore, drawing a bright line between justifications and excuses for the purposes of the beyond a reasonable doubt doctrine comes close to achieving what the competing approach is supposed to achieve.

266. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 4-5 (1967).

267. The author has defended this claim in more detail elsewhere. *See Normative Gaps*, *supra* note 149, at 106-07.

fendant as much as possible against the prospect of being punished for engaging in conduct that does not even amount to a violation of legal rules. The contrary would amount to putting up with the arbitrary infliction of pain. This surely cannot be tolerated by our system of criminal justice.

When does conduct amount to a "violation of legal rules" so that imposing punishment for such conduct becomes logically plausible in the "Hartian" sense? Although Hart has little to say about this, it would seem that conduct can amount to a violation of legal rules in this context only if it is in contravention of a prohibitory norm *and* is not authorized pursuant to a permissive norm. Although in some contexts it may be useful to distinguish between conduct that is lawful because it does not contravene the prohibitory norm and conduct that is lawful pursuant to a permissive norm that authorizes the contravention of the prohibition,[268] the distinction is not helpful in the context of examining the elements that make the imposition of punishment logically plausible. It would be as incoherent to impose punishment on conduct that is lawful because it does not amount to a contravention of a prohibitory norm as it would be to punish conduct that is lawful because the contravention of the prohibitory norm is authorized by a permissive norm.

After all, conduct that is authorized by a permissive norm is conduct that, all things being considered, is not prohibited by law. Therefore, punishment is only coherent if it is imposed for conduct both satisfying the elements of an offense (contravenes the prohibitory norm) and not authorized pursuant to a justification defense (authorized by a permissive norm). Consequently, if the government ought to be required to prove beyond a reasonable doubt the elements that make the imposition of punishment logically plausible—as it should—it follows that the prosecution ought to demonstrate beyond a reasonable doubt that the defendant's conduct satisfied the elements of the offense and that the defendant did so without legal justification to engage in the act.

C. The Implications of the "Unlawful Act" Approach to Defining Criminal Offenses

1. *Excuse Defenses and the "Unlawful Act" Approach to Defining Criminal Offenses*

If under the "unlawful act" approach to the "beyond a reasonable doubt" doctrine the government should have the burden of proving that the defendant engaged in an act that is against legal rules, it

268. *See, e.g.*, *Why is it a Crime*, *supra* note 23.

follows that the prosecution should not have the burden of disproving excuse-defenses beyond a reasonable doubt. Excuse-defenses relieve the defendant of criminal liability by negating his guilt or culpability rather than by negating the unlawful nature of the conduct. Therefore, conduct is against legal rules regardless of whether it is excused or not.[269]

Take, for example, the case of insanity. Insane killers are not acquitted because their mental disease or defect negates the unlawful nature of the killing. Rather, insane defendants are acquitted because their mental impairment negates their blameworthiness for having engaged in what amounts to an admittedly unlawful act. The unlawful nature of crimes committed by insane assailants is highlighted by the fact that such defendants are held civilly liable for the damages caused by their conduct.[270] This, of course, is possible precisely because the wrongful or unlawful nature of the defendant's conduct is unaffected by the defendant's insanity.[271]

Once the nature of excuse defenses is grasped, it is easy to see why punishing excused offenders is not *logically* problematic. As was discussed in the previous section, punishment is coherent as long as it is imposed for the violation of legal rules. Since excused offenders have, by definition, violated a legal rule, punishing them is perfectly coherent. This is not to say, however, that punishing excused offenders is fair. In many cases, one may argue that punishing an excused offender is unjust. Nevertheless, our system of criminal justice in general, and the constitutional right to due process in particular, tolerates some degree of unfairness.[272] Some states, for example, do not afford to the mentally ill an acquittal for reason of insanity.[273] In such jurisdictions, the insane defendant will be at the most found "guilty but mentally ill."[274] Many believe that this is unfair,[275] and it very well might be. This, however, does not mean that such practices

269. *See Normative Gaps*, *supra* note 149, at 110-13.

270. This highlights an important but often overlooked difference between tort law and criminal law. Criminal liability ultimately depends on the defendant's guilt. Tort liability, on the other hand, depends on wrongdoing irrespective of guilt.

271. In the context of intentional torts, see *Colman v. Notre Dame Convalescent Home, Inc.*, 968 F. Supp. 809, 811 (D. Conn. 1997) (holding that a mentally ill patient suffering from senile dementia was liable for battery). In the context of negligent torts, see RESTATEMENT (SECOND) OF TORTS § 283 B (1981) (stating that the mentally insane are held to a standard of sanity).

272. It is hornbook law that due process only precludes practices that are *fundamentally* unfair. Therefore, due process tolerates unfair practices that do not rise to the level of *fundamental* unfairness.

273. *See, e.g.*, IDAHO CODE ANN. § 18-207 (2004); UTAH CODE ANN. § 76-2-305 (2003).

274. *See* S.C. CODE ANN. § 17-24-20 (2003); S.D. CODIFIED LAWS § 23A-26-14 (2004).

275. *See generally* Stephen Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777 (1985).

are unconstitutional. It would seem that they are not. Ultimately, due process does not prohibit "unfair" practices, but rather precludes the application of rules that produce "*fundamental*" unfairness.[276]

This might help explain why it may make sense to strike the balance between the risks of unwarranted acquittals and unwarranted convictions by requiring the prosecution to prove the absence of justification defenses without requiring it to prove the absence of excuse defenses. While it is true that lowering the prosecution's burden of proof with regard to excuse-defenses increases the risk of *unfair* convictions, the conviction of an offender who should have been excused does not produce an illogical or incoherent state of affairs. Contrarily, lowering the government's burden of proof with regard to justification defenses increases the risk not only of unfair convictions, but of *incoherent* convictions as well. Imposing punishment on a defendant who acted justifiably is tantamount to punishing someone who did not engage in conduct that is against legal rules. Punishing such actors would therefore be more than unfair—it would be arbitrary and illogical. Ultimately, punishing such actors would be as arbitrary as punishing actors who acted lawfully because their conduct did not satisfy the elements of the offense *strictu sensu*. It thus makes sense to require the prosecution to disprove justification defenses in much the same manner as the prosecution is now required to prove the contravention of the prohibitory norm.

In sum, when deciding how to strike the constitutional balance between the interests that due process seeks to protect, it could make sense to hold the prosecution to a higher standard when it comes to establishing the elements that make the imposition of punishment coherent, while holding the prosecution to a (slightly) less demanding standard when it comes to establishing additional elements that qualify the fairness of the punishment imposed rather than its coherence. That is, it may be an acceptable compromise to require the prosecution to disprove justification defenses beyond a reasonable doubt while not demanding it to disprove excuse defenses in the same manner.

It should be stressed, however, that this is the minimum level of protection that should be afforded pursuant to the "beyond a reasonable doubt" doctrine. Good reasons may exist for requiring the prosecution to prove more elements than these beyond a reasonable doubt. There are not, however, good reasons to allow the government—as it is presently allowed to do—to prove less elements than those that are necessary to establish the unlawful nature of defendant's act (for ex-

276. Courts have generally held that statutes abolishing the insanity defense are constitutional. *See, e.g.*, State v. Bethel, 66 P.3d 840, 851 (Kan. 2003); State v. Herrera, 895 P.2d 359, 366 (Utah 1995).

ample, infraction of the elements of the offense + absence of justification).

2. *Sentencing Factors and the "Unlawful Act" Approach to Defining Criminal Offenses*

Another implication of the unlawful act approach to defining criminal offenses is that the prosecution should not have the burden of proving aggravating sentencing factors beyond a reasonable doubt. The presence or absence of sentencing factors is irrelevant to establishing the unlawful nature of the defendant's act. By definition, sentence enhancements come into play only after it has been determined that the defendant engaged in a wrongful act. As a result, these factors merely qualify the defendant's guilt for having engaged in an admittedly unlawful act.

It thus seems that lowering the government's burden of proof with regard to sentencing factors merely increases the likelihood of a conviction that may not accurately reflect the degree of culpability exhibited by the defendant during the commission of the crime. While this risk is certainly not negligible, it is clearly of less significance than the risk of unfairly convicting a defendant who should have been acquitted as a result of an excuse defense. Therefore, if it is sensible to allow the prosecution to disprove excuse defenses by a lower standard than beyond a reasonable doubt, it is *a fortiori* sensible to allow the government to prove the concurrence of sentencing factors by a similar standard. In other words, if it is acceptable—as the Supreme Court of the United States has repeatedly held—to water down the government's burden of proof with regard to the presence of excuse defenses that may make the difference between full fledged punishment of the defendant and no punishment at all, it should be even more acceptable to reduce the prosecution's burden of proof regarding the presence of sentencing factors that merely condition the length of the defendant's punishment.

D. Overhauling the Supreme Court's "Beyond a Reasonable Doubt" Jurisprudence

At first glance it might seem that the unlawful act approach to defining criminal offenses is so much at odds with the Supreme Court of the United States' current approach to the "beyond a reasonable doubt" doctrine that its adoption would require a significant overhaul of the Court's jurisprudence. Upon closer inspection, however, only two relatively minor changes need to be made. First, adoption of the "unlawful act" approach should lead to overruling the Court's decision

in *Martin v. Ohio*[277] to allow the state government to shift the burden of proving self-defense to the defendant. Given that self-defense is a justification, its concurrence negates the unlawfulness of defendant's act. Therefore, inflicting suffering on a defendant who acted in self-defense entails punishing him for engaging in conduct that does not even amount to a violation of legal rules. This is not only unfair, but incoherent. If the constitutional right to have the government prove the elements of the offense beyond a reasonable doubt is to have any bite, it must at least stand for the proposition that the prosecution ought to prove beyond a reasonable doubt the elements that make the defendant's conduct a violation of a legal rule. Whether the fact at issue amounts to a positive (the elements of the offense *strictu sensu*) or negative (the absence of justification) element of the offense should be of no constitutional significance in this context.

In contrast, for the reasons discussed in the previous section, the cases holding that the prosecution does not have to disprove excuse defenses beyond a reasonable doubt are all compatible with the unlawful act approach defended in this Article. Therefore, adoption of this approach does not require modifying most of the post-*In re Winship*'s[278] burden of proof cases, including *Patterson v. New York*,[279] *Leland v. Oregon*[280] and *Dixon v. United States*.[281]

Furthermore, the Court should expressly state what it appears to be tacitly suggesting in its more recent sentencing factor case law. The jury trial right and due process *Winship* aspects of the so-called *Apprendi v. New Jersey*[282] rule ought to be disentangled. Given that the Sixth Amendment right to a jury trial applies to every aspect of a "criminal prosecution," it makes sense to hold—as the Court has done—that the defendant has a right to have a jury find the presence of aggravating factors that may have an impact on the length of his sentence. This fact, however, should have no bearing on whether the prosecution ought to prove the presence of such factors beyond a reasonable doubt. For the reasons discussed in the previous section, it makes sense to allow the government to prove the existence of aggravating factors by a lesser standard. If the prosecution is not required to disprove excuse defenses beyond a reasonable doubt, there is little reason to require them to prove sentencing factors in that manner.

277. 480 U.S. 228 (1987).
278. 397 U.S. 358 (1970).
279. 432 U.S. 197 (1977) (holding that excuse defense of extreme emotional disturbance does not trigger *Winship* protection).
280. 343 U.S. 790 (1952) (holding that excuse defense of insanity does not trigger *Winship* protection).
281. 548 U.S. 1 (2006) (holding that excuse defense of duress does not trigger *Winship* protection).
282. 530 U.S. 466 (2000).

A close reading of *Apprendi* and its progeny reveals that what the Court is truly worried about in those cases is the scope of the jury trial right afforded by the Sixth Amendment and its possible application to sentencing proceedings. This issue is of little relevance to the separate matter concerning the scope of the beyond a reasonable doubt rule. By adopting the "unlawful act" approach to defining criminal offenses for the purposes of *Winship*, the Court can coherently explain what a close reading of recent sentencing factor cases seem to hint at—that the jury should find sentencing factors, although the government need not prove these factors beyond a reasonable doubt.

CONCLUSION

The Supreme Court of the United States' approach to the "beyond a reasonable doubt" doctrine remains mired in confusion nearly forty years after *In re Winship*[283] was decided. Most of the confusion can be traced back to the Court's failure to come to grips with the offense/defense/sentencing factor tristinction. By not recognizing the interrelationship that exists between these three elements, the Court fell prey to a fundamental inconsistency. The Court defined criminal offenses in a formalistic manner for the purpose of distinguishing offenses from defenses, while simultaneously defined offenses in a nonformalistic manner when differentiating offenses from sentencing factors. Unless sound reasons are put forth in favor of adopting such a schizophrenic approach to defining criminal offenses for the purposes of the *Winship* rule, this approach should be rejected.

This Article has proposed the "unlawful act" approach as an alternative account of criminal offenses in the context of the "beyond a reasonable doubt" doctrine. According to this theory, an offense for the purposes of *Winship* should include both the elements comprising the prohibitory norm (do not kill!) and the absence of elements making up permissive norms that authorize the contravention of the prohibitory norm (you may kill in self-defense!). If—as is unanimously believed—the government ought to prove the contravention of the prohibitory norm (do not kill) beyond a reasonable doubt, it must also be demanded that it prove the absence of a permissive norm authorizing the conduct by recourse to the same standard. Ultimately, punishing a defendant without proof that his conduct contravened a prohibition and punishing him without proof that the conduct was not authorized pursuant to a permissive norm amounts to the perpetration of the same evil—punishing a human being for engaging in conduct that does not even amount to a violation of legal rules. This is unaccept-

283. 397 U.S. 358 (1970).

able. Therefore, the government ought to at the very least be required to prove beyond a reasonable doubt both the elements of the offense *strictu sensu* and the absence of justification. Contrarily, given that the presence or absence of excuse defenses and sentencing factors has no bearing on the unlawfulness of the act, it may be argued that the burden of proof with regard to these elements ought to differ from the one that should attach to elements of the offense and justification defenses.