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H.B. 1168: The Burden of Proving an Affirmative Defense

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H.B. 1168: THE BURDEN OF PROVING AN AFFIRMATIVE DEFENSE

I. INTRODUCTION

The burden of proof[1] for an affirmative defense[2] in a criminal prosecution was recently revised by H.B. 1168.[3] The new statute provides that:

> Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.[4]

The purpose of H.B. 1168 was to place the burden of proving an affirmative defense on the accused.[5]

This note will discuss the origin and effect of H.B. 1168. The first part will summarize the Ohio law on affirmative defenses. This will be followed by United States Supreme Court decisions and Ohio cases which have discussed the defendant's burden of proof and affirmative defenses. Finally, the constitutionality of H.B. 1168 and its impact on Ohio criminal justice will be examined.

II. ANALYSIS

A. Background of H.B. 1168

In 1974, the Ohio General Assembly codified the requirements for proving an affirmative defense in a criminal prosecution. The assembly enacted Ohio Revised Code section 2901.05(A), which stated: "Every

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1. The phrase 'burden of proof' means both the burden of persuasion and the burden of going forward with the evidence.

> In legal discussion, this phrase, "the burden of proof," is used in several ways. It marks, (1) The peculiar duty of him who has the risk of any given proposition on which parties are at issue; - who will lose the case if he does not make this proposition out, when all has been said and done . . . . (2) It stands for the duty . . . of going forward in argument or in producing evidence; whether at the beginning of a case or at any later moment throughout the trial or the discussion . . . .

J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 355 (1969).

2. In Ohio, an affirmative defense is defined as either "[a] defense expressly designated as affirmative; or [a] defense involving an excuse or justification peculiarly within the knowledge of the accused, or which he can fairly be required to adduce supporting evidence." OHIO REV. CODE ANN. §§ 2901.05(C)(1)-(2) (Page Supp. 1979).

3. Am. Sub. H.B. 1168, 112th Gen. Assembly (1978) (codified in part at OHIO REV. CODE ANN. § 2901.05(A) (Page Supp. 1979)) (effective Nov. 1, 1978).

4. *Id.*

5. Telephone interview with Ohio State Representative Harold Lehman, sponsor of H.B. 1168 (Jan. 24, 1980) [hereinafter cited as Lehman Telephone Interview].

person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affirmative defense is upon the accused."[6] This statute did not specify which party had the burden of proving an affirmative defense. The omission created a problem. Ohio courts have previously applied the common law whenever an affirmative defense was asserted.[7] Under common law, the accused had the burden of proving an affirmative defense by a preponderance of the evidence.[8] The common law tradition and the ambiguity of the statute created difficulty for the courts.

The Ohio Supreme Court reviewed the statute in *State v. Robinson*.[9] The court determined that section 2901.05(A) was intended to eliminate the defendant's common law burden of proving an affirmative defense. To support this conclusion, reference was made to the Ohio House Technical Committee's comments which described the intended effect of section 2901.05(A):[10]

> The plain import of this language is that when the burden of going forward with the evidence of an affirmative defense is placed upon the defendant, it is intended that the defendant need only raise a reasonable doubt of his guilt in order to gain acquittal, and need not prove the defense by a preponderance of the evidence, or any other standard.[11]

Robinson disregarded the common law and held that under the statute the defendant did not have the burden of proving self-defense by a preponderance of the evidence.[12]

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6. OHIO REV. CODE ANN. § 2901.05(A) (Page 1975). This provision is amended by H.B. 1168. *See* note 3 *supra*.

7. State v. Poole, 33 Ohio St. 2d 18, 19, 294 N.E.2d 888, 889 (1973); State v. Vargo, 116 Ohio St. 495, 507, 156 N.E. 600, 601 (1927). "Prior to 1974, Ohio's treatment of affirmative defenses in criminal cases followed the common law tradition, i.e., if a defendant intended to rely upon one of the recognized 'affirmative defenses,' he bore the burden of proving that defense by a preponderance of the evidence." Comment, *Affirmative Defenses in Ohio After Mullaney v. Wilbur*, 36 OHIO ST. L.J. 828, 828 (1975).

8. State v. Poole, 33 Ohio St. 2d 18, 19, 294 N.E.2d 888, 889 (1973).

9. 47 Ohio St. 2d 103, 351 N.E.2d 88 (1976). The defendant, George Robinson, Jr., was charged with aggravated murder for the shooting death of his nephew on June 29, 1974. He was convicted of voluntary manslaughter. On appeal the conviction was reversed and a motion for leave to appeal to the Ohio Supreme Court was granted. The Supreme Court affirmed the appellate decision. *Id.*

10. *Id.* at 110 n.10, 351 N.E.2d at 94 n.10.

11. *Id.* "If the General Assembly had wished to impose the burden of persuasion as well as the burden of going forward with the evidence, we may properly assume that they would have used language appropriate to do so." *Id.* at 110, 351 N.E.2d at 93.

12. "In a criminal case involving the affirmative defense of self-defense, the defendant has only the burden of going forward with evidence of a nature and quality sufficient to raise that defense, and does not have the burden of establishing such by a

H.B. 1168 was passed as a response to *Robinson*.[13] The sponsors felt that the court misinterpreted section 2901.05(A), and they hoped H.B. 1168 would clarify the assembly's intent.[14] H.B. 1168 amends section 2901.05(A) in two respects. First, it adds that the burden of proof "for all elements" of the offense is upon the prosecution who must prove guilt beyond a reasonable doubt.[15] Second, the bill places the burden of proving an affirmative defense by a preponderance of the evidence upon the accused.[16] The reason for so allocating this burden is that the facts constituting an affirmative defense are presumably within the exclusive knowledge and disposal of the accused.[17]

B. United States Supreme Court Decisions

The United States Supreme Court recently examined the burden of proof in a criminal prosecution as well as the constitutionality of state statutes which require the defendant to prove an affirmative defense.[18] From these decisions the conflict between H.B. 1168 and the federal Constitution can be seen.

In re Winship[19] concerned "whether proof beyond a reasonable doubt is among the 'essentials of due process and fair treatment' required during the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an adult."[20] *Winship* involved a twelve year old boy who stole money from a pocketbook. The petition charged him with delinquency and alleged that the act would constitute larceny if it had been done by an adult.[21] The Court stated that an innocent child is protected by the same considera-

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preponderance of the evidence. (R.C. 2901.05(A) construed)" *Id.* at 103, 351 N.E.2d at 89 (syllabus of the court). The court reaffirmed its interpretation of § 2901.05(A) that the defendant does not have the burden of establishing an affirmative defense by a preponderance in State v. Humphries, 51 Ohio St. 2d 95, 364 N.E.2d 1354 (1977).

13. *See* Lehman Telephone Interview, *supra* note 5.

14. The sponsors of H.B. 1168 wanted to restore the common law tradition of having the defendant prove an affirmative defense by a preponderance. This was supported by the Ohio Prosecutors Association which lobbied for the enactment of H.B. 1168. The association felt it was more equitable to have the defendant bear this burden because the facts constituting an affirmative defense are only known to the accused. *See* Lehman Telephone Interview, *supra* note 5.

15. *Compare* OHIO REV. CODE ANN. § 2901.05(A) (Page 1975) *with id.* § 2901.05(A) (Page Supp. 1979).

16. *Id.*

17. Lehman Telephone Interview, *supra* note 5.

18. *See* notes 19-66 and accompanying text *infra*.

19. 397 U.S. 358 (1970).

20. *Id.* at 359.

21. *Id.* at 360.

tions given to an innocent adult.[22] Due process requires that no person will lose his liberty unless the state has convinced the fact finder of the defendant's guilt.[23] The Court formally adopted the standard of proving guilt beyond a reasonable doubt because it reduces the risk of erroneous convictions,[24] provides substance for the presumption of innocence,[25] and promotes public confidence in the enforcement of criminal justice.[26] *Winship* held "that the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[27]

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22. *Id.* at 365. The Court relied on *In re* Gault, 387 U.S. 1 (1967), to decide that the reasonable doubt standard is an essential element of due process and therefore mandatory in an adjudicatory hearing for juveniles. In *Gault*, the Court determined that subjecting a delinquent minor to the loss of his liberty is comparable in seriousness to a felony prosecution. *Id.* at 36. Although the Court in *Gault* held that due process requires the essentials of due process and fair treatment to be applied during the adjudicatory hearing, the Court did not require the hearing to conform with all the requirements of a criminal trial or usual administrative hearing. *Id.* at 30 (citing Kent v. United States, 383 U.S. 541, 555 (1960)).

23. 397 U.S. at 364 (quoting Speiser v. Randall, 357 U.S. 513, 525-26 (1958)).

> There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt. *Id.*

To this extent, the *Winship* Court considered the reasonable doubt standard indispensable because it impresses on the trier of fact the need to reach a subjective state of certainty regarding the facts in issue. 397 U.S. at 364.

24. *Id.* at 363.

25. *Id.*

26. *Id.* at 364. "The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure." *Id.* at 363. The importance lies in the interests of the individual and society during a criminal prosecution. The accused may suffer a loss of liberty upon conviction and most certainly will be stigmatized by the conviction. *Id.* Therefore, a society which values the "good name and freedom of every individual should not condemn a man when there is a reasonable doubt about his guilt." *Id.* at 364. Society's interest is reflected in the respect and confidence that the community must have for the application of the criminal law. The moral force of criminal law may be diluted if the standard of proof leaves people in doubt as to whether innocent men are being condemned. *Id.* at 364. Thus, the individual and society have important interests in protecting the accused against conviction except upon proof beyond a reasonable doubt. *Id.*

The importance of these factors was also recognized by the Court in invalidating the Maine murder statute in Mullaney v. Wilbur, 421 U.S. 684 (1975). *See* notes 28-42 and accompanying text *infra*.

27. 397 U.S. at 364. The United States Constitution provides that "[N]o person shall . . . be deprived of life, liberty, or property without due process of law . . . ."

In *Mullaney v. Wilbur*,[28] the Court examined the impact of *Winship* in proving an affirmative defense. Wilbur was convicted under a Maine murder statute.[29] He admitted attacking the deceased but claimed that this action was provoked. The defendant argued that he lacked malice and criminal intent because he acted in the heat of passion. On appeal to the Maine Supreme Judicial Court, Wilbur argued that *Winship* required the state to prove malice beyond a reasonable doubt. Under the Maine murder statute, malice aforethought was an essential element of the crime, and therefore, the prosecution had the burden of proving it. The court affirmed the conviction and held that the prosecution could rest on a presumption of implied malice. This presumption places the burden on the defendant to prove he acted in the heat of passion in order to reduce the charge to manslaughter.[30]

A federal district court, upon writ of habeas corpus, reversed the conviction.[31] The First Circuit, relying on *Winship*, affirmed. It con-

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U.S. CONST. amend. V. The fourteenth amendment provides that a state shall not "deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV.

Due process analysis is characterized as either substantive or procedural. Substantive due process analyzes the constitutional limit on the content of legislative action. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 427 (1978). Procedural due process delineates the constitutional limits on judicial, executive, and administrative enforcement of the legislative dictates. *Id.* at 502.

Procedural due process has focused on the federal rights of individuals in state criminal proceedings. See G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 486 (1975). The traditional view was that fundamental rights of liberty and justice were constitutionally required in state proceedings. *Id.* at 506. The traditional approach has been challenged by those who believe that the fourteenth amendment incorporates the specific guarantees of the Bill of Rights. *Id.* (*See* Palko v. Connecticut, 302 U.S. 319 (1937) and Adamson v. California, 332 U.S. 46 (1947) for an examination of the issues raised in the incorporation controversy).

The essence of the constitutional claim in *Winship* was that due process required a criminal conviction to be proven beyond a reasonable doubt. The significance of *Winship* is that the Court found that the reasonable doubt standard reflects "a profound judgment about the way in which law should be enforced and justice administered." 397 U.S. at 362 (quoting Duncan v. Louisiana, 391 U.S. 145, 155 (1968)). The Court's holding in *Winship*, therefore, constitutionalizes the accused's fundamental right to a conviction based on a reasonable doubt standard.

28. 421 U.S. 684 (1975).

29. At the time of the *Mullaney* decision, the Maine murder statute read: "Whoever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life." ME. REV. STAT. ANN. tit. 17 § 2651 (1965).

The manslaughter statute read in part: "Whoever unlawfully kills a human being in the heat of passion, or sudden provocation, without express or implied malice aforethought . . . shall be punished by a fine of not more than $1000 or by imprisonment for not more than 20 years. . . ." ME. REV. STAT. ANN. tit. 17 § 2651 (1965).

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

31. Wilbur v. Robbins, 349 F.Supp. 149 (D. Me. 1972). The district court held that the Maine court had improperly interpreted *Winship*. The federal district court

cluded that malice is an element of murder under the Maine law, and the prosecution must prove malice beyond a reasonable doubt.[32]

Following this decision, the Maine Supreme Judicial Court decided an intervening case, *State v. Lafferty*,[33] and repudiated the First Circuit's decision in *Mullaney*. *Lafferty* held that the Maine homicide statute did not require the prosecution to prove that a defendant acted in the heat of passion. In light of *Lafferty*, the United States Supreme Court remanded *Mullaney* to the First Circuit which again found that the prosecution must prove that the accused did not act in the heat of passion.[34] The Supreme Court granted certiorari and affirmed the decision of the First Circuit.[35]

The individual's due process interest in liberty and reputation was the basis for the Court's holding the Maine statute invalid.[36] The statute invaded these interests by increasing the likelihood of imprisonment and the stigma on an individual's reputation. The presumption of malice directly affected criminal culpability.[37] The court found great

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read the Maine statute to consist of two distinct crimes distinguished by malice aforethought. As distinct crimes, the prosecution had the burden of proving an absence of malice beyond a reasonable doubt. *Id.* at 153.

32. Wilbur v. Mullaney, 473 F.2d 943 (1st Cir. 1973).

33. 309 A.2d 647 (Me. 1973).

34. Wilbur v. Mullaney, 496 F.2d 1303 (1st Cir. 1974).

35. Mullaney v. Wilbur, 421 U.S. 684 (1975). Although the Court affirmed the First Circuit, they rejected that circuit's analysis that murder and manslaughter are distinct crimes. Because the state courts are the final expositors of state law, the Supreme Court, except in extreme circumstances, is bound by state court constructions. *Id.* at 691. The Maine Supreme Judicial Court had found that murder and manslaughter were not distinct crimes, but that they were different degrees of the single generic offense of felonious homicide. State v. Wilbur, 278 A.2d 139 (Me. 1971).

36. 421 U.S. at 697-98.

37. *Id.* at 697. Petitioners argued that the defendant's interests in *Mullaney* were significantly different than the defendant's interests in *Winship*. *See* note 26 *supra*. Petitioners maintained that "the defendant's critical interests in liberty and reputation are no longer of paramount concern since, irrespective of the presence or absence of the heat of passion or sudden provocation, he is likely to lose his liberty and certain to be stigmatized." 421 U.S. at 697.

The *Mullaney* Court, however, determined that:

> In *Winship*, the ultimate burden of persuasion remained with the prosecution . . . . In this case, by contrast, the State has affirmatively shifted the burden of proof to the defendant. The result, in a case such as this one where the defendant is required to prove the *critical fact in dispute* is to increase further the likelihood of an erroneous murder conviction.

Id. at 700-01 (emphasis added).

The *Mullaney* Court further stated that "It is far worse to sentence one guilty only of manslaughter as a murderer than to sentence a murderer for the lesser crime of manslaughter." *Id.* at 703-04 (paraphrasing Justice Harlan concurring in *Winship*. *See* 397 U.S. at 372). *But see* note 119 *infra*.

disparity between convictions of murder and manslaughter.[38] This marked disparity was important due to the differing severity of sentences. The *Mullaney* Court struck down the law in order to protect the accused's interest in his liberty and reputation from this statutory invasion.

The Maine statute distinguished the culpability of those who killed in the heat of passion from those who killed in the absence of passion.[39] Once felonious homicide was proved, the accused was required to show by a preponderance that he acted in the heat of passion.[40] By meeting this burden, homicide was reduced to manslaughter.[41] If this burden was not met, the defendant was presumed to have acted maliciously, and therefore, was guilty of murder.[42] The Supreme Court held that the presumption of malice shifted the burden of proving this element to the accused.[43] Absence of provocation was a necessary element of the crime because it differentiated murder from manslaughter.[44] The Court invalidated the Maine law and held that the statute unconstitutionally relieved the prosecution of its obligation under *Winship* to prove every element of the crime.[45] Once the issue is

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38. Although the Court accepted the Maine Supreme Judicial Court's interpretation of the statute, the consequences resulting from the convictions were significantly different. 421 U.S. at 698. "Indeed, 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." *Id.*

39. *Id.* at 698.

> First, the fact at issue here—the presence or absence of the heat of passion on sudden provocation—has been, almost from the inception of the common law of homicide, the single most important factor in determining the degree of culpability attaching to an unlawful homicide. And, second, the clear trend has been toward requiring the prosecution to bear the ultimate burden of proving this fact.

Id. at 696.

40. The Court was concerned with the substance of the statute and not its formal relation to the requirements of *Winship*. *Id.* at 699. The Court evaluated the effect and implications of the statute. Viewed in its totality and in light of the interests expressed in *Winship*, the burden placed on the defendant was unconstitutional. *Id.* at 700-01.

41. *Id.* at 688.

42. *Id.*

43. *Id.* at 701. By shifting this burden to the defendant, the likelihood of an erroneous murder conviction is increased. *Id.* at 701. The interests of the individual in his liberty and reputation were also invaded by the Maine statute. *See* notes 36-38 *supra*. The interests of the individual and society were more significantly affected than in *Winship*. 421 U.S. at 700. Wilbur faced a possible sentence ranging from a nominal fine to life imprisonment. Further, "the stigma to the defendant and the community's confidence in the administration of the criminal law are also of greater consequence in this case . . . ." *Id.*

44. *Id.* at 704.

45. *Id.*

properly raised, the prosecution must prove beyond a reasonable doubt that the defendant did not act in the heat of passion.[46]

Two years after *Mullaney*, the Court again reviewed the burden of proving an affirmative defense. *Patterson v. New York*[47] involved a murder conviction. Patterson shot his wife's lover upon observing his wife semiappareled in the presence of the deceased. He was charged with second degree murder.[48] Second degree murder, in New York, consists of two elements: (1) intent to cause the death of another; and (2) causing the death of another person or a third person.[49] Unlike the statute challenged in *Mullaney*, malice aforethought is not included as an element of murder.[50] The statute reviewed in *Patterson*, however,

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46. *Id.* at 701-02. "*Mullaney* thus expanded due process requirements to include facts that mitigate the punishment as well as 'facts necessary to constitute the crime.'" Note, *Affirmative Defense After Mullaney v. Wilbur: New York's Extreme Emotional Disturbance*, 43 BROOKLYN L. REV. 171, 180 (1976). *Compare id. with* R. Allen, *The Restoration of In Re Winship: A Comment on the Burdens of Persuasion in Criminal Cases After Patterson v. New York*, 76 MICH. L. REV. 30 (1977) [hereinafter cited as Allen], in which the author states: "*Mullaney*, carried to its logical extreme, would seem to forbid the use of all affirmative defenses." 76 MICH. L. REV. at 39.

> Thus *Mullaney*, which purported to "apply" *Winship*, drastically altered that case from one that looks to traditional practice and prevailing usage by the states to aid in due process analysis to one that frees the federal courts to impose their own view about the appropriate use of the reasonable doubt standard on the states notwithstanding widely shared views to the contrary.

Id. at 40.

47. 432 U.S. 197 (1977). For an extensive analysis of *Patterson, see* 43 BROOKLYN L. REV. 171, *supra* note 46.

48. Section 125.25 of the New York penal law provides in part:

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

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

Section 125.20 of the New York penal law provides in part:

> 2. With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance. . . . The fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subdivision.

Id. § 125.20.

49. *Id.* §§ 125.25, 125.20. *See also* Patterson v. New York, 432 U.S. 197, 206 (1977).

50. *Compare* note 29 *with* text accompanying note 44 *supra*. The New York law differs from the Maine statute struck down in *Mullaney*. Under New York's law, the prosecution must prove all the elements of the crime, which are intent and causation. Patterson v. New York, 432 U.S. 197, 206 (1977). Malice is not an element of murder in New York, and proof of extreme emotional disturbance does not negate an element of the crime. *Id.* at 206-07.

permits the accused to raise an affirmative defense.[51] If the defendant proves extreme emotional disturbance, second degree murder will be mitigated to manslaughter.[52]

Patterson asserted extreme emotional disturbance but was convicted. He appealed, claiming that the New York murder statute was invalid under *Mullaney*. The New York Court of Appeals rejected the claim.[53] *Mullaney* was distinguished on the grounds that the affirmative defense of extreme emotional disturbance did not bear a direct relationship to any element of murder under the New York statute. The burden to "disprove any fact essential to the offense charged" does not shift to the defendant.[54] The Supreme Court affirmed this decision.[55] The Court stated that the affirmative defense does not negate any fact[56] of the crime which the prosecution must prove in order to convict the defendant.[57] Extreme emotional disturbance is a

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51. *See* note 44 and accompanying text *supra*.

52. The defendant must prove the affirmative defense by a preponderance. The defense, which is a mitigating circumstance, does not presume or infer any other facts which constitute the crime. 432 U.S. at 205-06. The Court also found that under the New York law, manslaughter was defined in a separate section of the statute. *Id.* In *Mullaney*, the Maine law of felonious homicide was a single offense composed of murder and manslaughter. In the Maine statute, malice was presumed and therefore became an element of the crime. 421 U.S. at 685-86.

53. People v. Patterson, 39 N.Y.2d 288, 347 N.E.2d 848, 383 N.Y.S. 573 (1976).

54. *Id.* at 301-03, 347 N.E.2d at 907-08, 383 N.Y.S. 581-82.

55. 432 U.S. at 201. The Court referred to a line of cases upholding the defendant's burden of proving insanity by a preponderance. In *Leland v. Oregon*, 343 U.S. 790 (1952), the Court held that under the due process clause, the Oregon requirement of having the defendant prove insanity beyond a reasonable doubt was not unconstitutional. The prosecution still had the burden of proving all elements of the crime beyond a reasonable doubt. *Id.* at 795. *See also* Rivera v. Delaware, 429 U.S. 877 (1976), in which the Court affirmed the constitutionality of a Delaware statute which required the defendant to prove the affirmative defense of insanity by a preponderance. *Patterson*, however, was not concerned with insanity but considered essentially the same defense which was reviewed in *Mullaney*. *See* note 67 *infra*.

56. The Court in *Mullaney* discussed the "elements" of a crime while the Court in *Patterson* discussed the "facts" of a crime. "In essence the *Patterson* Court evaded *Mullaney* by reviving the formal distinction between an element of the crime and a fact necessary for a defense to criminal liability." Jeffries and Stephan, *Defense, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1342 (1979) [hereinafter cited as Jeffries and Stephan]. Other commentators have distinguished the cases on different grounds. "Thus, one significant aspect of *Patterson* is, in short, the restoration of *Winship* to its original purpose and the concomitant refusal to permit *Winship* to be misconstrued and then employed as the basis for unjustifiable extensions of federal authority." Allen, *supra* note 46, at 40 (footnote omitted). Allen views *Patterson* as clearly overruling *Mullaney*, even though the Court did not see it this way. "My treatment of *Mullaney v. Wilbur* has been based on the conclusion that *Patterson* overruled *Mullaney*, and so indeed I think it did." *Id.* at 53-54.

57. 432 U.S. at 206-07.

separate issue for which the defendant is required to bear the burden of proof.[58]

Patterson places the burden of proof on the prosecution if an affirmative defense negates a fact of the crime.[59] If the affirmative defense does not negate a fact of the crime, then the burden may constitutionally be placed on the defendant.[60] It logically follows that a court must be concerned with two issues: (1) what are the facts of the crime for which the accused is brought to trial? and (2) does the affirmative defense raised by the accused negate any of those facts?

Justice Powell, the author of the majority opinion in *Mullaney*, dissented in *Patterson*. "The test the court today establishes allows a legislature to shift, virtually at will, the burden of persuasion with respect to any factor in a criminal case so long as it is careful not to mention the non-existence of that factor in the statutory language that defines the crime."[61] The majority in *Patterson* recognized this objection that state legislatures may reallocate the burden of proof by labeling facts of a crime as affirmative defenses.[62] Nevertheless, the Court noted that states are limited in this regard.[63] "It would be an abuse of affirmative defenses, as it would be of presumptions in the criminal law, if the purpose or effect were to unhinge the procedural presumption of innocence which historically and constitutionally shields one charged with crime."[64]

Both *Mullaney* and *Patterson* concern the burden of proving a heat of passion defense. While the statute in *Mullaney* specifically mentions

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58. *Id.* "The Due Process Clause, as we see it, does not put New York to the choice of abandoning these defenses or undertaking to disprove their existence in order to convict of a crime which otherwise is within its constitutional powers to sanction by substantial punishment." *Id.* at 207-08. The recognition of "a mitigating circumstance does not require the state to prove its non-existence in each case in which the fact is put in issue, if in its judgment this would be too cumbersome, too expensive, and too inaccurate." *Id.* at 209 (footnote omitted).

59. *Id.* at 206-07.

60. *Id.*

61. *Id.* at 223 (Powell, J., dissenting).

62. *Id.* at 210. The Court, however, refused to hold that those states which do not assume the burden of disproving an affirmative defense violate the constitution. *Id.* at 211. "We thus decline to adopt as a constitutional imperative, operative countrywide, that a state must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of the accused." *Id.* at 210.

63. *Id.* "We therefore will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all the elements included in the definition of the offense of which the defendant is charged." *Id. Compare id. with* Allen, *supra* notes 46 and 56.

64. 432 U.S. at 211 n.13 (quoting People v. Patterson, 39 N.Y.2d 288, 305-07, 347 N.E.2d 898, 909-10, 383 N.Y.S. 571, 583 (1976) (Breitel, C.J., concurring)).

heat of passion,[65] the New York law refers to extreme emotional disturbance.[66] The latter "is simply 'a new formulation' for the traditional language of heat of passion."[67] The Supreme Court does not clearly distinguish *Patterson* from the holding in *Mullaney* that "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of heat of passion or sudden provocation when the issue is properly presented in a homicide case."[68] The decisions discuss "functionally identical statutes, one striking down and the other upholding the statutory scheme."[69] This creates uncertainty as to the status of the law in proving an affirmative defense.[70]

C. *Ohio Cases*

In *State v. Frost,*[71] the Ohio Supreme Court applied the principles articulated in *Winship, Mullaney,* and *Patterson.* Frost was convicted for selling securities without a license during 1975 and 1976. Frost claimed the transaction fell within the good faith exemption of the Ohio Securities Act.[72] The Act provides that the burden of proving an exemption is on the party who claims it.[73] The trial court instructed the jury that the defendant had the burden of proving the exemption defense by a preponderance. The jury found Frost guilty.[74]

The Ohio Court of Appeals reversed and examined unamended section 2901.05(A).[75] It considered whether the defendant had the burden of proving an affirmative defense. It held that the defendant only had the burden of going forward with enough evidence to raise the exemption defense.[76] The Ohio Supreme Court reversed this deci-

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65. *See* note 29 *supra.*

66. *See* note 44 *supra.*

67. 432 U.S. at 207. "[I]n revising its criminal code, New York provided the affirmative defense of extreme emotional disturbance, a substantially expanded version of the older heat of passion concept." *Id. See also* Note, *Criminal Law: Affirmative Defense in Criminal Trials—What are the Limits After Patterson v. New York?,* 31 OKLA. L. REV. 411, 419 (1978).

68. 421 U.S. at 704.

69. Jeffries and Stephan, *supra* note 56, at 1342.

70. *Id.* The uncertainty arises because *Patterson* has not sufficiently distinguished *Mullaney* so that definitive guidelines are apparent for state legislatures to follow when drafting criminal laws on the burden of proving affirmative defenses. *See, e.g.,* Note, *The Constitutionality of Affirmative Defenses After Patterson v. New York,* 78 COLUM. L. REV. 655 (1978).

71. 57 Ohio St. 2d 121, 387 N.E.2d 235 (1979).

72. *See* OHIO REV. CODE ANN. §§ 1707.01-.99 (Page 1978).

73. *Id.* § 1707.45.

74. *See* 57 Ohio St. 2d at 122, 387 N.E.2d at 236.

75. *Id.* Section 2901.05(A) of the Ohio Revised Code was unamended in the sense that H.B. 1168 had not yet been passed. *See* note 3 *supra.*

76. *See* 57 Ohio St. 2d at 122, 387 N.E.2d at 236.

sion and upheld the conviction of the defendant.[77] The court stated that *Winship* did not directly address the constitutionality of requiring the accused to bear the burden of proving an affirmative defense.[78] *Winship* merely held that the prosecution must prove every fact of a crime beyond a reasonable doubt.[79]

The Ohio Supreme Court further noted that *Mullaney* need not be read to the prosecution to disprove an affirmative defense.[80] In fact, after *Patterson,* there is no doubt that *Mullaney* "does not stand for the proposition that the prosecution must constitutionally carry the burden of proof on affirmative defenses. . . ."[81] Indeed, the Ohio Supreme Court read *Patterson* to say that "an affirmative defense, which does not negate any facts of the crime which the state must prove in order to convict, constitutes a separate issue concerning which the defendant is required to carry the burden of proof."[82] Thus, in holding that the state does not assume the burden of disproving an affirmative defense which does not negate a fact of the crime, the *Frost* Court was attempting to be consistent with the rule of *Patterson.*[83]

In *Cherry v. Jago,*[84] a federal district court considered whether the defendant should bear the burden of proving self-defense to a murder charge. James Cherry encountered the deceased in a drinking establishment. The deceased, who was known to Cherry, asked to borrow some money. Cherry refused and an altercation ensued, wherein Cherry was knocked to the floor and dragged outside. Once outside, the deceased again approached the petitioner for money. Cherry recalled threats made on his life by the deceased during previous encounters and knew that the deceased carried a gun. Cherry, who had a gun, fired two warn-

77. *Id.* at 128, 387 N.E.2d at 239.

78. *Id.* at 126, 387 N.E.2d at 238.

79. *Id. Compare id. with* Allen, *supra* note 46. "*Winship* did not present the question whether 'every fact necessary to constitute the crime need be proven beyond a reasonable doubt' . . . . The case raised the question whether a 'conviction' could be obtained upon proof only by a preponderance of the evidence." R. Allen, *supra* note 46, at 31 n.8.

80. 57 Ohio St. 2d at 126, 387 N.E.2d at 239. "[T]o read *Mullaney v. Wilbur* as standing for the proposition that the prosecution is constitutionally required to disprove affirmative defenses beyond a reasonable doubt, is to read it too broadly." *Id.* at 126, 387 N.E.2d at 238.

81. *Id.* at 127, 387 N.E.2d at 239.

82. *Id.* This is consistent with the reasoning in *Mullaney* and *Patterson.* The Maine statute was invalidated because the defendant was required to negate the element of malice aforethought by proving he acted in the heat of passion. 421 U.S. at 687. The New York law, however, did not require the defendant to negate an element of the crime and therefore the statute was upheld. 432 U.S. at 206-07.

83. *See* 57 Ohio St. 2d at 127, 387 N.E.2d at 239.

84. No. C-77-269A (N.D. Ohio Dec. 19, 1979).

ing shots to discourage another altercation. Cherry then fired a third shot, this time at the deceased. Cherry claimed self-defense, but was convicted of murder.[85] Cherry petitioned the northern district court for habeas corpus relief. He claimed that the trial court erred by instructing the jury that the defendant was required to prove self-defense by a preponderance of the evidence.[86] At the time of Cherry's trial the unamended provision of section 2901.05(A) was in effect.[87] Cherry also argued that once the accused properly raises the affirmative defense, the burden is on the prosecution to prove the absence of self-defense.[88] Finally, Cherry contended that the Ohio Constitution requires all indictments to contain an allegation of unlawfulness. By asserting self-defense, Cherry argued that he negated an element of the crime.

The district court upheld Cherry's conviction and found that the state trial court had not placed the burden of proving self-defense upon the petitioner.[89] The record of the trial proceeding indicated that, in accord with unamended section 2901.05(A), the judge instructed the jury that Cherry had the burden of going forward with any evidence of self-defense and that the state had the burden of proving every essential element of the crime beyond a reasonable doubt.[90]

After resolving the issue of the trial court's jury instruction, the district court considered whether the absence of self-defense is an element of the crime of murder in Ohio. The relevant portion of the murder statute provides: "No person shall purposely cause the death of another."[91] The court reasoned that:

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85. Petitioner's Brief on Merits Pursuant to Remand at 3-4, Cherry v. Jago, No. C-77-269A (N.D. Ohio Dec. 19, 1979) [hereinafter referred to as Petitioner's Brief].

86. Cherry v. Jago, No. C-77-269A, slip op. at 2 (N.D. Ohio Dec. 19, 1979).

87. *Id.* at 9 n.6. Under the unamended statute, the defendant did not have the burden of proving an affirmative defense by a preponderance. *See* text accompanying notes 9-12 *supra*.

88. Petitioner's Brief, *supra* note 85, at 11-13. Cherry supported this contention by referring to a Michigan case, Berrier v. Egeler, 583 F.2d 515 (6th Cir. 1978), *cert. denied*, 439 U.S. 955 (1978). The petitioner was charged with murder. The court affirmed a finding that the petitioner's due process rights were violated as a result of the trial court's failure to place upon the state the burden of proving the absence of the petitioner's asserted self-defense. *Id.*

> Like federal law, Michigan law requires that when self-defense is injected into a trial by the introduction . . . of some evidence supporting the claim, the burden is upon the state to prove beyond a reasonable doubt not only each element of the crime charged but also that the defendant did not act in self defense.

Id. at 523 (Engel, J., dissenting). The *Cherry* court, however, found the *Berrier* decision unpersuasive. Cherry v. Jago, No. C-77-269A, slip op. at 13 (N.D. Ohio Dec. 19, 1979).

89. Cherry v. Jago, No. C-77-269A, slip op. at 5 (N.D. Ohio Dec. 19, 1979).

90. *Id.* at 5-6.

91. OHIO REV. CODE ANN. § 2903.02 (Page 1975). In full, the statute provides:

> Two sources of Ohio law support a finding that the absence of self-defense is not an element necessary to constitute the crime of murder: first, the common law principles establishing self-defense as an affirmative defense; and second, the statutory scheme defining the substantive elements of the crime of murder.[92]

Self-defense is not an element of murder. A defendant who asserts self-defense admits to the conduct that serves as the basis for the crime with which he is charged, but he atempts to avoid criminal liability by demonstrating the existence of exigent circumstances justifying his conduct.[93] The court continued:

> For any crime charged there are at least two material elements which the prosecution must prove beyond a reasonable doubt: (1) that the accused voluntarily committed a proscribed act or failed to meet a prescribed duty; and (2) that the accused has the requisite degree of culpability as specified by the section defining the offense.
>
> To convict the petitioner of murder, it was incumbent upon the prosecution to prove beyond a reasonable doubt . . . (1) that he acted in such a manner as to cause the victim's death, and (2) that he did so purposely.[94]

The district court's analysis of the Ohio murder statute concluded that the absence of self-defense is not an element of the crime and, therefore, the prosecution does not have the burden of proving its absence.[95]

While the district court correctly recognized that the absence of self-defense is not a statutory element of murder, the court did not address Cherry's third contention that the claim of self-defense negates the general allegation of unlawfulness that the Ohio Constitution requires to be contained in every indictment.[96] This contention was sup-

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"(A) No person shall purposely cause the death of another. (B) Whoever violates this section is guilty of murder, and shall be punished as provided in section 2929.02 of the Revised Code." *Id.*

92. Cherry v. Jago, No. C-77-269A, slip op. at 8 (N.D. Ohio Dec. 19, 1979).

93. *Id.* at 10. "Thus, 'a plea of self-defense is inconsistent with the claim that the defendant did not commit the homicide.' " *Id.* (quoting 27 O. JUR. 2d *Homicide* § 89 (1957)).

94. *Id.* at 10-11 (citations omitted).

95. *Id.* at 13. The court relied on the statement in *Patterson* that a state does not have to disprove beyond a reasonable doubt every fact constituting an affirmative defense related to the culpability of the accused to reach the conclusion that the prosecution does not have to prove the absence of self-defense. *Id.* (citing Patterson v. New York, 432 U.S. at 210).

96. *See* Petitioner's Brief, *supra* note 85, at 21-29. It has been held that "The Ohio Constitution requires that every indictment allege that the offense is 'against the peace and dignity of the State of Ohio.' Art. IV, Section 20, Ohio Constitution. This language has been equated to an allegation of unlawfulness." State v. Tuncle, No. 38424 (Cuyahoga County, Ohio Ct. App. Mar. 8, 1979).

ported by *State v. Tuncle,*[97] a recent Ohio court of appeals decision. Unlike *Cherry,* the *Tuncle* court did not limit its analysis of proving affirmative defenses to statutory law, but also examined the requirements of the Ohio Constitution.[98]

In *Tuncle,* the defendant borrowed money from the deceased and was derelict in repayment. The deceased, after receiving a bad check from the defendant, accosted the defendant's wife and informed her if the loan was not repaid by the following day, "there will be some blood shed."[99] The next day, Tuncle visited the deceased's home. Tuncle testified that during a conversation with the deceased, he shot the deceased while the victim was reaching for a gun. Tuncle claimed that he acted in self-defense. The defendant was convicted of voluntary manslaughter and aggravated assault. Tuncle appealed his conviction. The trial court improperly placed the burden of proving self-defense upon the accused and the appellate court remanded. At the time of the trial, unamended section 2901.05(A)[100] was in effect. Upon retrial, Tuncle was found guilty of voluntary manslaughter and acquitted of aggravated assault. The defendant appealed this conviction, claiming that the prosecution must prove the absence of self-defense beyond a reasonable doubt.[101]

Although the manslaughter was affirmed,[102] the second appellate opinion concluded "that self-defense negates the allegation of unlawfulness which is required to be proven by the State upon a charge of voluntary manslaughter."[103] The Ohio statute on voluntary

97. State v. Tuncle, No. 38424 (Cuyahoga County, Ohio Ct. App. Mar. 8, 1979).

98. *Id.* slip op. at 6-8.

99. *Id.* at 2.

100. Under the unamended statute the defendant did not have the burden of proving an affirmative defense by a preponderance. *See* text accompanying notes 9-12 *supra.*

101. State v. Tuncle, No. 38424, slip op. at 2 (Cuyahoga County, Ohio Ct. App. Mar. 8, 1979).

102. *Id.* at 8. The appellate court held that the record contained sufficient evidence on the issue of self-defense so that reasonable jurors could have disagreed as to the affirmative defense and declined to find the evidence insufficient as a matter of law. *Id.*

103. *Id.* at 7. *Compare id. with* Frazier v. Weatherholtz, 572 F.2d 994 (4th Cir. 1978), *cert. denied,* 439 U.S. 876 (1978), which involved a petition for habeas corpus by a prisoner convicted of first degree murder. The court held that an instruction given by a Virginia trial court that the defendant had to prove self-defense by raising in the minds of the jury a reasonable doubt as to whether or not he acted in the lawful exercise of self-defense did not shift the burden of persuasion to the defendant and was not unconstitutional. 572 F.2d at 995.

H.B. 1168 can be readily distinguished. In *Frazier,* the defendant only had the burden to raise in the minds of the jury a reasonable doubt that he lawfully acted in self-defense. H.B. 1168, however, shifts the burden of persuasion to the defendant to prove by a preponderance that he lawfully acted in self-defense.

manslaughter does not include unlawfulness as one of the elements of the crime.[104] The court in *Tuncle,* however, reviewed the requirements of the Ohio Constitution to find that self-defense negates the element of unlawfulness alleged in every criminal indictment. The Ohio Constitution states: "The style of all process shall be, 'The State of Ohio;' all prosecutions shall be carried on, in the name, and by the authority, of the state of Ohio; and all indictments shall conclude, 'against the peace and dignity of the state of Ohio.' "[105] *Tuncle* adopted the interpretation of this provision which was offered in *Hamilton v. Alvis.*[106] *Hamilton* involved a habeas corpus petition. *Hamilton* construed the language of the Ohio Constitution to mean that each indictment must contain an allegation that the act was unlawful.[107] *Tuncle* also found that this language required an allegation of unlawfulness.[108]

After establishing that the Ohio Constitution requires a general allegation of unlawfulness in every criminal indictment, the *Tuncle* court stated that "[u]nlawfulness is a fact to be proved by the State in a prosecution for voluntary manslaughter."[109] Interpreting both *Mullaney* and *Patterson,* the court held "it is a violation of due process to require the accused to prove an affirmative defense which negates an element of the crime charged."[110] In reviewing these

104. Ohio's voluntary manslaughter statute provides: "(A) No person, while under extreme emotional stress brought on by serious provocation reasonably sufficient to incite him into using deadly force, shall knowingly cause the death of another. (B) Whoever violates this section is guilty of voluntary manslaughter, a felony of the first degree." OHIO REV. CODE ANN. § 2903.03 (Page 1975).

105. OHIO CONST. art. IV, § 20.

106. 109 Ohio App. 298, 160 N.E.2d 372 (1959). *Hamilton* involved a petition for habeas corpus by an inmate in the Ohio Penitentiary. The defendant was convicted of larceny. He contended that the indictment was contrary to statutory form and that he was found guilty by a plea entered by the court on his behalf. His petition was denied on the grounds that the indictment was sufficient and that the record indicated the defendant entered the guilty plea himself. *Id.*

107. *Id.* at 301, 160 N.E.2d at 374. "The indictment concludes with the allegation that the criminal acts described were 'contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Ohio.' This is a clear allegation that the acts were unlawful." *Id. See also* Broyles v. Commonwealth, 267 S.W.2d 73 (Ky. 1954), where the Kentucky Court of Appeals stated "[i]n the legal sense, peace and quietude signify obedience to law, public quiet, good order and tranquility." *Id.* at 75. It is a valid legal conclusion that an act against the peace and dignity of the state is unlawful.

108. State v. Tuncle, No. 38424, slip op. at 6-7 (Cuyahoga County, Ohio Ct. App. Mar. 8, 1979).

109. *Id.* at 6.

110. *Id.* In addition to citing *Hamilton* and the indictment provision of the Ohio Constitution, the court referred to other sections of the constitution and determined that "there is a serious question as to whether the state could eliminate the element of unlawfulness or could attempt to make it a crime to kill a person in self defense." *Id.*

Supreme Court decisions, *Tuncle* found that self-defense negates the element of unlawfulness charged in the Ohio indictment process.[111] *Tuncle* stated that, in the past, courts have found that self-defense is a lawful act.[112] In *Mullaney,* the Court explained that "[a]t early common law only those homicides committed in the enforcement of justice were considered justifiable; all others were deemed unlawful . . . . Between the 13th and 16th centuries the class of justifiable homicides expanded to include . . . those committed in self-defense."[113] Self-defense is a lawful act negating the element of unlawfulness which the prosecution must prove in a criminal proceeding.[114] *Tuncle* held that because self-defense negates unlawfulness, the prosecution must prove the absence of self-defense beyond a reasonable doubt in order to convict an accused of a crime.[115]

D. The effect of H.B. 1168

H.B. 1168 requires the accused to prove an affirmative defense by a preponderance of the evidence.[116] This requirement is not easily reconcilable with the indictment procedures set forth by the Ohio Constitution which have been held to require unlawfulness to be an element of every crime.[117] Requiring the accused to prove that his act was

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To support this statement the court referred to two sections of the Ohio Constitution.

OHIO CONST. art. I, § 1 provides: "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and . . . obtaining safety."

OHIO CONST. art. I, § 4 provides: "The people have the right to bear arms for their defense and security . . . ." For the *Tuncle* court, these provisions clearly made self-defense a lawful act.

111. State v. Tuncle, No. 38424, slip op. at 6-7 (Cuyahoga County, Ohio Ct. App. Mar. 8, 1979).

112. "[A]ctions will be held justifiable upon the ground of self-defense in all cases where he [an aggressor] has withdrawn from an affray . . . in good faith. . . ." State v. Melchior, 56 Ohio St. 2d 15, 21, 381 N.E.2d 195, 199 (1978) (*quoting* WHARTON'S CRIMINAL LAW AND PROCEDURE § 232 (Anderson 1966)).

113. Mullaney v. Wilbur, 421 U.S. 684, 692 (1975).

114. State v. Tuncle, No. 38424, slip op. at 7 (Cuyahoga County, Ohio Ct. App. Mar. 8, 1979).

115. *Id.* at 8.

116. OHIO REV. CODE ANN. § 2901.05(A) (Page Supp. 1979). *See* text accompanying notes 3 and 4 *supra.*

117. Hamilton v. Alvis, 109 Ohio App. 298, 160 N.E.2d 372 (1959); State v. Tuncle, No. 38424 (Cuyahoga County, Ohio Ct. App. Mar. 8, 1979). *See* text accompanying notes 97-107 *supra.*

As previously mentioned, the court in Cherry v. Jago, No. C-77-269A (N.D. Ohio Dec. 19, 1979), did not address the petitioner's contention that unlawfulness is an element of a crime which is negated by coming forward with the evidence of self-defense. *See* note 96 and accompanying text *supra.* The *Cherry* court stated that " 'a plea of self defense is inconsistent with the claim that the defendant did not commit the homicide.' " Cherry v. Jago, No. C-77-269A, slip op. at 10 (N.D. Ohio Dec. 19, 1979)

lawful shifts the burden to the defendant to disprove an essential fact of the criminal charge. H.B. 1168 requires the defendant to negate unlawfulness by proving self-defense by a preponderance of the evidence. The burden placed upon the defendant is constitutionally infirm and inconsistent with *Mullaney* and *Patterson*.

In *Mullaney*, the statute created a presumption of implied malice when it shifted to the defendant the burden of proving that he acted in the heat of passion on sudden provocation.[118] H.B. 1168 is similar to the Maine statute in *Mullaney*. H.B. 1168 creates a presumption of implied unlawfulness by shifting to the accused the burden of proving that his actions in self-defense were lawful. By presuming unlawfulness, the burden of proving an element of a criminal charge shifts to the defendant.

Mullaney was concerned with protecting the individual's due process interest in his liberty and reputation.[119] H.B. 1168 invades these

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(quoting 27 O. JUR. 2d *Homicide* § 89 (1957)). *Compare id. with* 27 O. JUR. 2d § 2 (1957) ("Homicide means the *unlawful* killing of a human being by another person." (emphasis added). This is a common law definition of homicide and Ohio has since adopted a criminal code. Although unlawfulness is not a statutory element of murder, due process safeguards are not rendered unavailable because of a statutory scheme.

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

Mullaney v. Wilbur, 421 U.S. 684, 698 (1975). It logically follows that an element does not have to be specifically mentioned in a criminal statute before due process requires the state to prove that element beyond a reasonable doubt.

118. Mullaney v. Wilbur, 421 U.S. 684, 688-90 (1975).

119. *Id.* at 697-704.

> *Mullaney*'s holding, it is argued, is that the State may not permit the blameworthiness of an act or the severity of punishment authorized for its commission to depend on the presence or absence of an identified fact without assuming the burden of proving the presence or absence of that fact, as the case may be, beyond a reasonable doubt. In our view, the *Mullaney* holding should not be so broadly read.

Patterson v. New York, 432 U.S. 197, 214-15 (1977). In a footnote, the *Patterson* Court stated that "There is some language in *Mullaney* that has been understood as perhaps construing the Due Process Clause to require the prosecution to prove beyond a reasonable doubt any fact affecting 'the degree of criminal culpability' . . . . The Court did not intend *Mullaney* to have such far-reaching effect." *Id.* at 214-15 n.15. *Mullaney* was not expressly overruled for addressing the due process safeguards affecting criminal culpability, but rather, was only qualified in uncertain terms. *Id.*

H.B. 1168 does not merely affect *any fact* affecting the degree of criminal culpability. H.B. 1168, by requiring a defendant to prove self-defense by a preponderance, shifts the burden to the accused to negate unlawfulness which is an *integral* element of a crime under the Ohio indictment process. *See* notes 105-09 and accompanying text *supra*.

interests. The legislation requires the defendant to bear the burden of proving that he acted in a lawful manner. This has a direct effect on criminal culpability because the new law assumes the accused is to blame. The presumption that the accused acted unlawfully stigmatizes his reputation as a law-abiding citizen and increases the likelihood of imprisonment if he is unable to meet his burden of proof.

The Supreme Court in *Patterson* noted that "[i]t would be an abuse of affirmative defenses, as it would be of presumptions in the criminal law, if the purpose or effect were to unhinge the procedural presumption of innocence which historically and constitutionally shields one charged with a crime."[120] Because H.B. 1168 requires a defendant to bear the burden of proving self-defense, it presumes he acted unlawfully. This conclusive presumption of unlawfulness obviates the overriding historical and constitutional procedural presumption of innocence.

Patterson held that the defendant could constitutionally bear the burden of proving extreme emotional disturbance because the defense did not bear a direct relationship to any element of murder under the New York law.[121] Unlike the law in *Patterson,* the Ohio Constitution makes unlawfulness an element of any criminal charge. Self-defense bears a direct relationship to unlawfulness because a defendant who asserts self-defense must prove that he acted lawfully.

The Ohio Supreme Court, in *Frost*, interpreted *Patterson* to say that "an affirmative defense, which does not negate any facts of the crime which the state must prove in order to convict, constitutes a separate issue concerning which the defendant is required to carry the burden of proof."[122] Unlawfulness is not a separate issue which the accused may constitutionally bear the burden of disproving. Ohio courts have held that the Ohio Constitution integrates unlawfulness into every indictment.[123] Self-defense is a lawful act which negates the allegation of unlawfulness. Requiring a defendant to bear the burden of proof for an affirmative defense which negates an element of a crime is unconstitutional. H.B. 1168 compels a defendant to bear this burden. H.B. 1168, in its present form, would not pass a constitutional analysis.

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120. 432 U.S. at 211 n.13 (quoting People v. Patterson, 39 N.Y.2d 288, 305-07, 347 N.E.2d 898, 909-10, 383 N.Y.S. 571, 583 (1976) (Breitel, C.J., concurring)).

121. *Id.* at 210.

122. State v. Frost, 57 Ohio St. 2d 121, 127, 387 N.E.2d 235, 239 (1979).

123. Hamilton v. Alvis, 109 Ohio App. 298, 160 N.E.2d 372 (1959); State v. Tuncle, No. 38424 (Cuyahoga County, Ohio Ct. App. Mar. 8, 1979).

III. CONCLUSION

The constitutionality of H.B. 1168 is problematic because it requires a defendant to prove self-defense and negate the element of unlawfulness. The bill obviates the procedural presumption of innocence by presuming that the accused acted unlawfully. Although H.B. 1168 has not been tested, a court which integrates the Ohio Constitution with the criminal charge will find that section 2901.05(A) contravenes *Winship, Mullaney,* and *Patterson.*

Further legislative attention to this enactment is crucial. A solution for assigning this burden, however, will be difficult because *Mullaney* and *Patterson* are ambiguous with regard to when it is proper for the accused to bear the burden of proving an affirmative defense.

Randall J. Kay

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