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Burdens of Persuasion in Criminal Proceedings: The Reasonable Doubt Standard After Patterson v. New York

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trine is similarly oriented; its foundation in due process calls for permissive application.

Ultimately, liberal *Brady* disclosure in Florida will accomplish several goals of the criminal justice system. The prosecutor can fulfill his duty to the administration of justice and the advancement of the truth-finding process by disclosing information in his possession. Provided with such information, the accused can prepare a more complete and accurate defense. Finally, use of *Brady* disclosure tools in conjunction with Florida's discovery rules can reduce the investigatory inequity between state and defendant to a minimum in the interests of fundamental fairness.[249]

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BURDENS OF PERSUASION IN CRIMINAL PROCEEDINGS: THE REASONABLE DOUBT STANDARD AFTER *PATTERSON v. NEW YORK*

INTRODUCTION

At odds in every criminal proceeding are two vital but seemingly irreconcilable interests. First, the defendant faces the stigma and loss of liberty accompanying an adjudication of guilt.[1] Recognizing these risks, the courts have interpreted the due process clause of the fourteenth amendment to mandate that states accord a criminal defendant certain fundamental rights such as trial by jury, access to bail, and assistance of counsel.[2] In competition with these due process rights is each state's power to define and control criminal behavior. Federal courts have traditionally respected both the freedom of state legislatures to specify which acts merit criminal sanctions and the power of state courts to interpret these laws.[3] Because the due process rights of the criminal defendant necessarily limit this state authority, however, a tension develops when federal courts measure a state penal statute against due process standards.

One area where due process limits state power to define and control crime is the allocation of the burdens of proof. To assure the defendant the fairness

249. See note 1 *supra*.

1. "The combination of stigma and loss of liberty involved in a conditional or absolute sentence of imprisonment sets that sanction apart from anything else the law imposes." Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 151.

2. Duncan v. Louisiana, 391 U.S. 145 (1968) (sixth amendment right to trial by jury made applicable to the states by the fourteenth amendment); Gideon v. Wainwright, 372 U.S. 335 (1963) (the fundamental right to a fair trial includes effective assistance of counsel); United States *ex rel.* Siegel v. Follette, 290 F. Supp. 632 (S.D.N.Y. 1968) (weight of authority and reason favors application of bail clause of eighth amendment to the states).

3. "It is of course within the power of the State to regulate procedure under which its laws are carried out, including the burden of producing evidence and the burden of persuasion, 'unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " Speiser v. Randall, 357 U.S. 513, 523 (1958) (citing Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)). *See, e.g.*, Sandalow, Henry v. Mississippi *and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 SUP. CT. REV. 187, 188-90.

prescribed by the due process clause,[4] the law clothes him with a presumption of innocence.[5] This presumption reduces the risk of erroneous conviction by requiring that uncertainty on the issue of guilt be resolved in favor of the defendant.[6] Based on a preference for freeing the guilty rather than sacrificing the liberty and reputation of innocent defendants,[7] the presumption of innocence has been implemented by the requirement that the prosecution prove guilt beyond a reasonable doubt.[8]

The United States Supreme Court first adopted the reasonable doubt standard as a constitutional mandate in the 1970 decision of *In re Winship*.[9] Since then, however, the Court has applied the decision in a seemingly inconsistent manner. In *Mullaney v. Wilbur*,[10] the Court indicated that the reasonable doubt standard required more than proof of the basic elements of an offense as defined by state statute.[11] Courts and commentators thus concluded that a federal court could specify the facts that the state must prove beyond a reasonable doubt in order to meet due process standards, regardless of whether

4. Because error may result in significant loss to the defendant, fairness is of paramount concern in criminal proceedings. MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE §341 (2d ed. 1972); Comment, *Constitutionality of Affirmative Defenses in the Texas Penal Code*, 28 BAYLOR L. REV. 120, 122-23 (1976). *See* Morrison v. California, 291 U.S. 82, 88-89 (1934) (the limits of reason and fairness control the allocation of burdens of proof in criminal actions).

5. "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Coffin v. United States, 156 U.S. 432, 453 (1895). Although generally denominated a presumption, the presumption of innocence merely expresses the view that the prosecution must prove guilt beyond a reasonable doubt. MCCORMICK, *supra* note 4, §346. Several authors have expressed a preference for the use of the term assumption in describing the concept of innocent until proven guilty. These authors have generally noted that since there need not be proved a basic fact from which the presumed fact of innocence follows, the view that the law "assumes" innocence more accurately describes this aspect of criminal procedure. *See, e.g.*, Ashford & Risinger, *Presumptions, Assumptions and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165, 173 (1969).

6. Holland & Chamberlin, *Statutory Criminal Presumptions: Proof Beyond a Reasonable Doubt?*, 7 VAL. L. REV. 147, 148 (1973). The rule also emphasizes that guilt should not be assumed simply because the defendant has been brought to trial based on the suspicion of police and prosecutors. Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 YALE L.J. 880, 881 n.6 (1968).

7. Osenbaugh, *The Constitutionality of Affirmative Defenses to Criminal Charges*, 29 ARK. L. REV. 429, 432 (1976). *See also* May, *Some Rules of Evidence: Reasonable Doubt in Civil and Criminal Cases*, 10 AM. L. REV. 642, 651-55 (1876), where the author suggests that proof beyond a reasonable doubt and the presumption of innocence were innovations designed to decrease the risk of erroneous conviction during a period when all felonies were punished by death. *But cf.* Morano, *A Reevaluation of the Development of the Reasonable Doubt Rule*, 55 B.U.L. REV. 507, 509-13 (1975) for an argument that historically the burden had been proof beyond any doubt, and that requiring only a reasonable doubt thus diminished protection afforded defendants.

8. Osenbaugh, *supra* note 7, at 433. *See generally* Morano, *supra* note 7.

9. 397 U.S. 358 (1970). Several legal commentators have noted that because courts at all levels throughout the country had subscribed to the reasonable doubt standard long before the *Winship* decision, the Supreme Court had never had the occasion to constitutionalize that standard. *See* LAFAVE & SCOTT, HANDBOOK ON CRIMINAL LAW §8 (1972); MCCORMICK, *supra* note 4, §341; 9 WIGMORE, EVIDENCE §2497 (3d ed. 1940).

10. 421 U.S. 684 (1975).

11. *Id.* at 697-98.

those facts were included as elements in the statutory definition of the offense.[12] A few years later, however, the Court in *Patterson v. New York*[13] reappraised the role of the reasonable doubt rule and, without expressly overruling *Mullaney*, opined that the state's burden of proof extended no further than those definitional elements.[14] This note examines these Supreme Court decisions, attempts to reconcile the conflicting holdings, and determines thereby the extent to which a federal court may oversee the drafting and application of state criminal statutes.

HISTORICAL AND ANALYTICAL FRAMEWORK

References to the reasonable doubt standard appeared in the common law as early as the fourth century.[15] Although the standard was variously defined throughout history,[16] most courts have ruled that the reasonable doubt rule demands that the trier of fact be as fully convinced of his conclusion as possible,[17] short of an absolute certainty.[18] Thus, even when the evidence weighs in

12. See notes 77-99 *infra* and accompanying text.

13. 432 U.S. 197 (1977).

14. *Id.* at 205-10.

15. One author traced the reasonable doubt standard to passages in the fourth century works of CORPUS JURIS and COKE'S 3D INSTITUTE. J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW (1898). *See also* 9 WIGMORE, *supra* note 9, §2497; *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 1, 156-65 (1970). Several other commentators have pointed to the 1798 Dublin Treason Cases as the origin of the modern day rule, relying upon a comment there that "if the jury entertain a reasonable doubt upon the truth of the testimony of witness given upon the issue they are sworn well and truly to try, they are bound" to acquit. May, *supra* note 7, at 656; MCCORMICK, *supra* note 4, §341. However, even earlier origins, the 1770 Boston Massacre Trials, have been suggested as the American rule's genesis. *See* Morano, *supra* note 7, at 508.

16. In Coffin v. United States, 156 U.S. 432, 455 (1895), the Court recounted an anecdote explaining the rule's value: "Ammianus Marcellinus relates an anecdote of the Emperor Julian which illustrates the enforcement of this principle in the Roman law. Numerius . . . was on trial before the Emperor . . . . Numerius contented himself with denying his guilt, and there was not sufficient proof against him. His adversary, . . . seeing that the failure of the accusation was inevitable, could not restrain himself and exclaimed 'Oh, illustrious Caesar! If it is sufficient to deny, what hereafter will become of the guilty?' to which Julian replied, 'If it suffices to accuse, what will become of the innocent?' "

One frequently cited definition of the reasonable doubt standard appeared in a jury instruction in Commonwealth v. Webster, 59 Mass. (5 Cush.) 295, 320 (1850): "Reasonable doubt . . . is a term often used, and probably pretty well understood, but not easily defined. It is not a mere possible doubt; because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case, which after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they felt an abiding conviction to a moral certainty of the truth of the charge." Note, *Constitutional Limitations on Allocating the Burden of Proof to the Defendant in Murder Cases*, 56 B.U.L. REV. 499 (1976).

17. *See, e.g.*, Miles v. United States, 103 U.S. 304, 312 (1881) (jury charged that proof beyond a reasonable doubt is such that will produce an abiding conviction, to a moral certainty, that the claimed fact exists); Christoffel v. United States, 338 U.S. 84, 89 (1949) (to fairly inflict punishment, a procedure must require proof of all elements of the crime beyond a reasonable doubt). *See also* Speiser v. Randall, 357 U.S. 513, 525-26 (1958); Holland v. United States, 348 U.S. 121, 138 (1954); Leland v. Oregon, 343 U.S. 790, 795 (1952); Wilson v. United States, 232 U.S. 563, 569-70 (1914); Holland & Chamberlin, *supra* note 6, at 150.

18. *See The Supreme Court, 1969 Term, supra* note 15, at 156-65.

favor of conviction, the trier of fact must acquit unless that evidence is overwhelming.[19]

The burden of proof concept has two distinct components. The first, the burden of producing evidence, requires that the party allocated the burden offer evidence which if believed would be sufficient to support a jury finding of the existence or non-existence of a particular fact.[20] The second component, the burden of persuasion, controls the ultimate decision and mandates that the trier of fact be convinced of the truth of the issuable fact.[21] In a state criminal proceeding, the prosecution normally has the burden of persuading the factfinder beyond a reasonable doubt. The state's evidence must be not only clear, but also so convincing as to remove nearly all uncertainty of guilt.

Clearly, the reasonable doubt standard controls the ultimate determination of guilt or innocence. In designating the issues as to which the prosecution must persuade the trier of fact, however, a conflict arises between the state's interest in retaining independent control over its criminal justice system and the federal interest in protecting the defendant's due process rights. In effect, a federal court ruling that due process requires the state shoulder the burden of persuasion for a particular fact usurps the state's power to define crime. The extent to which federal intervention denigrates this power depends upon whether due process permits a federal court merely to determine how the persuasion burden must be allocated once a state defines a crime, or whether due process standards may be applied to permit federal court specification of minimum elements for which the state must bear the burden of persuasion.

Historically, the prosecution's persuasion burden has extended to each ele-

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19. Whether the reasonable doubt standard actually serves its intended purpose remains uncertain absent empirical data substantiating its effectiveness. It has been suggested, however, that the standard has some effect upon the decision-making process. Underwood, *The Thumb on the Scale of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1308-10 n.34 (1977). *Compare* McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242, 242 (1944) (the risk of nonpersuasion serves an important role in the decision-making process) *with* Dworkin, *Easy Cases, Bad Law, and Burdens of Proof*, 25 VAND. L. REV. 1151, 1164-67 (1972) (decision-making rarely aided by an instruction on the persuasion burden). *See generally* Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065 (1968). For a discussion of juries' understanding of instructions *see* Strawn & Buchanan, *Jury Confusion: A Threat to Justice*, 59 JUDICATURE 478 (1976).

20. Numerous commentators have lamented the use of the term "burden of proof" rather than the specific designations of "burden of persuasion" and "burden of going forward with evidence." *See, e.g.*, Underwood, *supra* note 19, at 1301 n.3. The latter burden requires the production of evidence sufficient to satisfy a judge that the issue is properly raised. *See* MCCORMICK, *supra* note 4, §336. The burden of persuasion, on the other hand, "means the burden which is discharged when the tribunal which is to determine the existence or nonexistence of the fact is persuaded by sufficient evidence to find the fact exists." MODEL CODE OF EVIDENCE, Rule 1(3) (1942); MCCORMICK, *supra* note 4, §336; Underwood, *supra* note 19, at 1301.

21. *See generally* McNaughton, *Burden of Production of Evidence: A Function of a Burden of Persuasion*, 68 HARV. L. REV. 1382 (1955); 1 HUGHES, FLORIDA EVIDENCE MANUAL (1975).

ment of the statutory definition of the offense.[22] Defendants have frequently been required to bear the burden of persuasion on issues which did not comprise an element of the prosecution's case. These non-elements, denominated affirmative defenses, admit commission of the statutorily prescribed acts, but offer some justification or excuse.[23]

The determination of which party bears the burden of persuasion for a particular issue should be based on the issue's relationship to the statutory definition of the crime. The burden should not be imposed on the defendant when the fact at issue is a definitional element of the crime or constitutes the negative of an element such that the defendant would be forced to prove the element's absence. The defense of alibi, for example, denies a basic and essential element of a crime, presence at the time and place the crime occurred. A valid alibi establishes absence and negates the essential element of presence. To require that the defendant prove the negative of a statutory element would relieve the prosecution of the duty to prove its case beyond a reasonable doubt. Therefore, requiring the state to prove the non-existence of a defense such as alibi seems proper, once the defendant has raised the issue by satisfying the burden of producing evidence.

In contrast, consider an affirmative defense[24] such as entrapment, which admits commission of the criminal act but alleges as an excuse or by way of mitigation the improper conduct of state officers. Requiring the defendant to persuade the factfinder of this affirmative defense's validity will never relieve the prosecution of proving any portion of its case, because the state must have satisfied the burden of proving guilt before consideration of this mitigating fact. Thus, imposing the burden of persuasion on a defendant pleading an affirmative defense meets due process standards.

Analyzing each fact in relation to the statutory definition thus facilitates a proper allocation of the persuasion burden. A simple defense denies the ex-

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22. *See* cases cited note 33 *infra*.

23. Courts justify burdening defendants with these so-called affirmative defenses by suggesting that they do not affect the determination of guilt, but rather provide justification or excuse. *See, e.g.*, Leland v. Oregon, 343 U.S. 790, 795-96 (1952) (insanity defense). *See* Note, *Affirmative Defenses and Due Process: The Constitutionality of Placing a Burden of Persuasion on a Criminal Defendant*, 64 GEO. L. J. 871, 879-80 (1976).

The Model Penal Code defines affirmative defenses as follows: "A ground of defense is affirmative . . . when it involves a matter of excuse or justification peculiarly within the knowledge of the defendant on which he can fairly be required to adduce supporting evidence." MODEL PENAL CODE §1.21(3) (Proposed Official Draft, 1962). Statutory and judicial use of the term has been inconsistent, however, and therefore mere designation of a particular fact as an affirmative defense should not be considered dispositive as to who bears the burden of persuasion. Underwood, *supra* note 19, at 1303 n.11.

24. Several commentators have employed the term "true affirmative defense" to specify a defense which offers an excuse or justification and stands independent of the elements of the offense. *See* Christie & Pye, *Presumptions and Assumptions in the Criminal Law: Another View*, 1970 DUKE L.J. 919, 934 (1970); Note, *supra* note 4, at 121. This term suggests that the nature of the fact in relation to the offense should determine its designation as an element, a defense or an affirmative defense, and therefore the nature of the fact limits the state's power to draft a statute. Underwood, *supra* note 19, at 1303 n.11.

istence of a definitional element and thus raises an issue which if resolved in the defendant's favor would result in a verdict of not guilty. A true affirmative defense, on the other hand, relates to justification or excuse and admits commission of the criminal act, but neither establishes nor negates an element of the offense. Proper identification of these two types of defenses controls assignment of the burden of persuasion as mandated by the due process requirement that guilt be proved beyond a reasonable doubt.

CONSTITUTIONALIZING THE REASONABLE DOUBT STANDARD — *In re Winship*

In *In re Winship*[25] the Supreme Court addressed the question of whether proof beyond a reasonable doubt constitutes one of the "essentials of due process and fair treatment"[26] required during the adjudicatory stage of a juvenile proceeding when the juvenile had been charged with an act which if committed by an adult would be a criminal offense. In answering affirmatively,[27] the Court employed a historical analysis which indicated the long existence of the reasonable doubt standard in the American criminal justice system.[28] Also influential in the *Winship* Court's decision was the near unanimity of all common law jurisdictions in requiring proof beyond a reasonable doubt in criminal actions.[29]

As explained in *Winship*, the reasonable doubt standard reduced the risk of erroneous criminal conviction, thereby implementing the presumption of innocence. The Court deemed such risk avoidence essential, primarily because of the important interests at stake.[30] These interests, defined in *Winship* as liberty and reputation,[31] prompted the Court to specify that the "Due Process Clause

25. 397 U.S. 358 (1970).

26. *Id.* at 359 (quoting *In re* Gault, 387 U.S. 1, 30 (1967)). The *Gault* decision concerned whether at a juvenile commitment proceeding the juvenile must be accorded the same rights due a criminal defendant. Although the Court found that the juvenile hearing need not mirror a criminal trial, it opined that the due process clause of the fourteenth amendment required application of "the essentials of due process and fair treatment." *Winship* considered whether proof beyond a reasonable doubt was such an essential.

27. The Court's holding was a very narrow one: " 'where a 12-year-old child is charged with an act of stealing which renders him liable to confinement for as long as six years, then, as a matter of due process . . . the case against him must be proved beyond a reasonable doubt.' " 397 U.S. at 368, citing 24 N.Y.2d at 207, 299 N.Y.S.2d at 423, 247 N.E.2d at 260.

28. 379 U.S. at 361-63. See the discussion of the historical basis of the reasonable doubt standard, *supra* notes 15 & 16.

29. 397 U.S. at 361-62. In the Court's words: "Although virtually unanimous adherence to the reasonable-doubt standard in common-law jurisdictions may not conclusively establish it as a requirement of due process, such adherence does 'reflect a profound judgment about the way in which law should be enforced and justice administered.' " *Id.*, citing Duncan v. Louisiana, 391 U.S. 145, 155 (1968).

30. 397 U.S. at 363. The Court implicitly recognized the constitutional basis of the reasonable doubt standard in commenting that the fundamental fairness required by the Constitution was implicated by the degree of proof required. Thus, it may be inferred that the reasonable doubt standard is equivalent to the traditional essentials of due process such as the right to jury trial, assistance of counsel and bail.

31. "The accused during a criminal prosecution has at stake interest of immense im-

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."[32]

The *Winship* Court's recognition of the constitutional basis of the reasonable doubt standard seemed a small step in light of the implicit acknowledgment in earlier Supreme Court decisions[33] that such a foundation existed.[34]

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portance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction." 397 U.S. at 363. The Court later reiterated the importance of the liberty interest, referring to that interest as one of "transcending value," and presumably indicating that it constitutes the paramount interest to be protected by the reasonable doubt rule. 397 U.S. at 364. The term "stigma" apparently signifies the defendant's interest in reputation. *See* Note, *Unburdening the Criminal Defendant:* Mullaney v. Wilbur *and the Reasonable Doubt Standard,* 11 HARV. C.R. -C.L. REV. 390, 396 (1976).

The desirability of maintaining the confidence of the community in the criminal justice system also influenced the Court. Protecting this interest would assure the public that criminal sanctions could not be imposed except where guilt was certain. It has been suggested that although *Winship* has been most often cited as protective of three interests — liberty, reputation and community confidence — this third interest merely restates the effect resulting from proper protection of the other two interests. *See* Allen, *The Restoration of* In re Winship: *A Comment on Burdens of Persuasion in Criminal Cases After* Patterson v. New York, 76 MICH. L. REV. 30 (1977).

32. 397 U.S. at 364. One observation may prove helpful in analyzing later Supreme Court opinions interpreting *Winship*. The Court specified that because the criminal defendant risked these vital interests, the reasonable doubt standard should apply to every *fact* necessary to constitute the crime. Subsequent opinions indicate, although incorrectly, that only those facts which affect the defendant's three due process interests should be governed by that standard. Thus, the *Winship* rationale was altered in these cases from one which specifies in which actions the reasonable doubt standard should apply to one which specifies which facts within a proceeding should be controlled by the standard.

33. On numerous occasions the Court had intimated that the reasonable doubt standard has constitutional origins. *See, e.g.,* Davis v. United States, 160 U.S. 469, 488 (1895) (burden of proof defined as duty to prove beyond a reasonable doubt every element necessary to constitute the crime); Holland v. United States, 348 U.S. 121, 138 (1954) (an essential part of any procedure which can be said fairly to inflict such punishment is that all elements of the crime charged be proved beyond a reasonable doubt). *See generally,* Holland & Chamberlin, *supra* note 6, at 150.

34. In Davis v. United States, 160 U.S. 469, 488 (1895), the Court had come closest to recognizing that due process required proof beyond a reasonable doubt in criminal actions. There, the Court opined that the defendant in a federal criminal case must be proved sane beyond a reasonable doubt. Most courts, however, interpreted *Davis* as applicable to only federal cases. *See, e.g.,* Leland v. Oregon, 343 U.S. 790, 797 (1952) (*Davis* "establish[ed] no constitutional doctrine, but only the rule to be followed in federal courts").

After *Winship* enshrined the reasonable doubt standard among those rights applied to state defendants through the fourteenth amendment, *Leland's* holding appeared to have been overturned. Several courts questioned *Leland's* force in the aftermath of *Winship. See, e.g.,* United States v. Eichberg, 439 F.2d 620, 624 (D.C. Cir. 1971); Commonwealth v. Rose, 457 Pa. 380, 386, 321 A.2d 880, 882 (1974); Commonwealth v. Vogel, 440 Pa. 1, 15, 268 A.2d 89, 90 (1970). The *Leland* decision was not expressly rejected, however, and courts generally continued to rely upon that case as authority for refusing to invalidate affirmative defenses after *Winship. See, e.g.,* United States v. Greene, 489 F.2d 1145, 1154-55 (D.C. Cir. 1973), *cert. denied,* 419 U.S. 1977 (1974); Philips v. Hocker, 473 F.2d 395, 397-98 (9th Cir. 1973), *cert. denied,* 411 U.S. 939 (1974); State v. Mytych, 292 Minn. 248, 255, 194 N.W. 2d 276, 281 (1972). *See generally* Note, *supra* note 23.

Despite the apparent ease of the Court's transition from implicit to explicit recognition, however, the failure to clarify the manner in which to implement the reasonable doubt standard left several questions unanswered.[35] Most disconcerting was the lack of guidance as to which facts within a statutory scheme the prosecution must prove beyond a reasonable doubt.[36] This failure rendered the decision susceptible of two contrasting interpretations regarding the proper manner of determining the facts that the prosecution must prove beyond a reasonable doubt.

First, the Court may have intended to prescribe federal adherence to the traditional policy of allowing each state to control interpretation of state law.[37] Under this view of *Winship*, a federal court would ascertain whether a fact constituted an element of the offense as defined by the state in order to resolve whether the burden of persuasion may be shifted to the defendant.[38] Because *Winship* applied the reasonable doubt standard to only those elements necessary to establish guilt, if confined to its facts the decision appears to ordain such an elements test.[39] Further, because the Court did not determine how the burden of persuasion should be allocated, state power to designate the facts necessary to prove a crime appears intact.[40] Thus, if interpreted to prescribe

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35. The definition of criminal behavior became extremely important following *Winship's* holding that a state must prove each fact essential to guilt beyond a reasonable doubt. Unfortunately, however, the decision failed to specify the proper manner in which to define such behavior. Also unanswered was whether the power to define was exclusively the state's or whether the Constitution demanded certain components be present in any definition of criminality. *See* Angel, *Substantive Due Process and the Criminal Law*, 9 LOY. CHI. L.J. 61, 93 (1977).

36. The absence of guidance as to how such facts should be determined compounded the dissatisfaction with the opinion. *See* Note, *Affirmative Defenses After* Mullaney v. Wilbur: *New York's Extreme Emotional Disturbance*, 43 BROOKLYN L. REV. 171, 186 (1976); Comment, *Affirmative Defenses in Ohio After* Mullaney v. Wilbur, 36 OHIO ST. L.J. 828 (1975).

37. *See, e.g.*, Irvine v. California, 347 U.S. 1128, 1134 (1954); Speiser v. Randall, 357 U.S. 513, 523 (1958).

38. Although the Court explicitly ruled that all "facts" be proven beyond a reasonable doubt, subsequent courts interpreted this to mean all elements of the offense; thus only those facts within the definition of the offense were considered necessary. *See* Morano, *supra* note 7.

39. *Winship* raised the issue of whether a juvenile could be convicted on proof by a preponderance of the evidence. However, in commenting "[l]est there remain any doubt about the constitutional stature of the reasonable doubt standard," the Court indicated an intention to establish as a constitutional doctrine the already existing practice of requiring proof of elements of an offense by that standard. The mere reference to cases so applying the reasonable doubt standard, without explicating the manner in which to implement the standard, further supports the conclusion that the *Winship* Court contemplated adherence to the mandate of those cases. 397 U.S. at 364. *See* Allen, *supra* note 31, at 31.

Arguably, because it concerned only whether the determination of guilt or innocence must be by proof beyond a reasonable doubt, *Winship* should not be extended to collateral matters such as the determination of sentence. At the point the penalty to be imposed is decided, guilt or innocence has been established and therefore, as prior Supreme Court decisions indicate, the due process clause does not restrict discretion in sentencing. *See* Williams v. New York, 337 U.S. 241 (1949); McGautha v. California, 402 U.S. 183, 199 (1971). *See also* Brief for Petitioner at 10, Mullaney v. Wilbur, 421 U.S. 684 (1975).

40. Accordingly, the state courts and legislatures would continue, unimpeded by the *Winship* decision, to designate the facts necessary to constitute a particular crime. *See* Note,

an elements analysis, the *Winship* decision requires a federal court to review a conviction solely to insure that the prosecution bore the burden of persuasion for each element that the state deems essential.[41] An elements analysis therefore leaves unrestrained the state's power to reduce the prosecution's burden by narrowly redefining a crime and thereby minimizing the elements of the state's case.[42]

An equally plausible explanation of the *Winship* Court's treatment of the reasonable doubt standard is that the Court intended that state control yield in certain situations to the federal interest in protecting a defendant's due process rights.[43] Rather than employing the term "element," the Court specified that "facts" necessary to constitute the crime must be proven, thereby indicating that the statutory definition might not limit the issues upon which the prosecution bears the persuasion burden.[44] This view implies that the state may be constitutionally obligated to prove beyond a reasonable doubt an identifiable minimum of elements for each offense.[45] Determination of the constitutional minimum would be a federal question and would justify federal court review of state statutes.[46]

After *Winship*, the Supreme Court refused to extend that decision to realize the implications of constitutionalizing the reasonable doubt standard.[47] For example, the Court deemed *Winship* inapplicable to the determination of the degree of proof necessary to establish the voluntariness of a confession.[48] Furthermore, the Court found that neither a jury instruction that every witness

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The Burden of Proof and the Insanity Defense After Mullaney v. Wilbur, 28 ME. L. REV. 435 (1977). *See also* Tate v. Powell, 325 F. Supp. 333 (E.D. Pa. 1971) (*Winship* did not usurp the power of state courts to define crime because that opinion failed to specify how the determination of necessary facts should be made). Because only the application of the reasonable doubt standard to a larceny charge generally was at issue, the Court did not have occasion to examine its applicability to each issue in the case, and the sweeping statement that "every fact necessary to constitute the crime" need be proved beyond a reasonable doubt was unnecessary. *See* Allen, *supra* note 31, at 31.

41. *See* Osenbaugh, *supra* note 7, at 437-42 for a discussion of the "elements" approach.

42. Several authors have noted this discomforting aspect of the elements analysis employed by *Winship*. Assuming the Court intended to place no limit upon state power to define crime, the *Winship* decision and the reasonable doubt standard could be easily circumvented by a legislative reassignment of former elements as mitigating factors or affirmative defenses. *See* Angel, *supra* note 35, at 94; Note, *supra* note 23, at 394.

43. It has been suggested that the *Winship* opinion's use of substantive due process analysis based solely upon the command of the due process clause of the fourteenth amendment indicates that a substantive reading of the case would be proper. *See* Angel, *supra* note 35, at 95 n.146.

44. Perhaps the Court's use of the term "fact," as opposed to "element" was designed to emphasize the substantive due process implications of the decision. Note, *Affirmative Defenses in the Washington Criminal Code—The Impact of* Mullaney v. Wilbur, 51 WASH. L. REV. 953 (1976).

45. *See* Allen, Mullaney v. Wilbur, *the Supreme Court, and the Substantive Criminal Law —An Examination of the Limits of Legitimate Intervention*, 55 TEX. L. REV. 269, 270 (1977).

46. *Id.*

47. *See* Note, *supra* note 23, at 873.

48. Lego v. Twomey, 404 U.S. 477, 486-87 (1972).

is presumed to testify truthfully,[49] nor a conviction by less than a unanimous jury verdict[50] contravened *Winship*.

Lower federal and state courts also viewed *Winship* narrowly, generally understanding the decision to mandate an elements test.[51] Accordingly, while these courts invalidated both statutory presumptions and defenses which burdened the defendant with disproving an element of the crime,[52] they were hesitant to invalidate affirmative defenses.[53] Although several courts and com-

49. Cupp v. Naughton, 414 U.S. 141 (1973). The Court in *Cupp* found that the overall instructions emphasized the presumption of innocence and that the prosecution's duty to prove guilt beyond a reasonable doubt counteracted any prejudice the objectionable instruction caused.

50. Johnson v. Louisiana, 406 U.S. 356 (1972). In *Johnson* the appellant sought to overturn his conviction by arguing that the reasonable doubt standard required unanimous jury verdicts. Denying the relief sought, the Court held that a 10 to 2 jury verdict did not necessarily mean that the state had failed to prove guilt beyond a reasonable doubt. In Apodaca v. Oregon, 406 U.S. 404 (1972), the Court opined that the right to trial by jury required neither proof of guilt beyond a reasonable doubt nor a unanimous jury verdict. *See* Morano, *Retreat from Unanimity and Reasonable Doubt in Criminal Cases*, 1 U. TOLEDO L. REV. 337 (1969), for a discussion of the relationship between the reasonable doubt standard and jury verdicts.

51. Most courts understood *Winship's* importance to be its holding regarding the proof standard at juvenile hearings. *See* Allen, *supra* note 45, at 270-71 n.10. Many courts also felt the reasonable doubt rule had implications for civil commitment proceedings, because the interests which motivated the *Winship* Court seemed present. *See, e.g., In re* Bally, 482 F.2d 648, 651 (1972) (proof of mental illness and dangerousness in involuntary civil commitment must be beyond a reasonable doubt); Lessard v. Smith, 349 F. Supp. 1078 (E.D. Wisc. 1972) (state must prove mental illness and dangerousness beyond a reasonable doubt because the individual will lose his civil rights and be stigmatized). *See* Comment, *Burden of Proof — Sexual Dangerousness Must Be Established Beyond a Reasonable Doubt*, 26 DEPAUL L. REV. 392, 394 (1977).

52. States applied *Winship* to various issues, but generally felt constrained to invalidate only those which negated some element of the offense. *See* Osenbaugh, *supra* note 7, at 440; Note, *supra* note 23, at 874. For example, certain statutory presumptions were deemed violative of *Winship*. *See, e.g.*, Commonwealth v. Simmons, 233 Pa. Super. Ct. 547, 552, 336 A.2d 624, 627 (1975) (inference of knowledge of illegality from possession of stolen goods); State v. Odom, 83 Wash.2d 541, 546, 520 P.2d 152, 155 (1974) (presumptive intent to commit crime from possession of unlicensed pistol); State v. Cuevas, 53 Haw. 110, 488 P.2d 322 (1971) (presumption of malice unconstitutional). *Winship* has also been interpreted to demand proof beyond a reasonable doubt of a mental disorder in civil commitment proceedings, People v. Pembrock, 62 Ill.2d 317, 342 N.E.2d 28 (1976); People v. Burnick, 14 Cal.3d 306, 310, 535 P.2d 352, 354, 121 Cal. Rptr. 488, 490 (1975); and to require a similar standard of proof of violation where a city ordinance involves possible imprisonment, City of St. Paul v. Whidly, 295 Minn. 129, 138-39, 203 N.W.2d 823, 828-29 (1972). In addition, states required proof that an intoxicated defendant had specific intent, State v. Buchanan, 207 N.W.2d 784 (Iowa 1973), and to disprove alibi, Smith v. Smith, 454 F.2d 572 (5th Cir. 1971); Stump v. Bennett, 398 F.2d 111 (8th Cir. 1968).

53. For example, because entrapment was a defense of "confession and avoidance" and did not negate any element of the offense, courts upheld placing the burden of persuasion upon the defendant. *See, e.g.*, People v. Laietta, 30 N.Y.2d 68, 330 N.Y.S.2d 351, *cert. denied*, 407 U.S. 923 (1972); United States v. Braver, 450 F.2d 799 (2d Cir. 1971); *In re* Foss, 10 Cal. 3d 910, 519 P.2d 1073 (1974). Other affirmative defenses also escaped invalidation after *Winship*. *See, e.g.*, Abner v. State, 233 Ga. 922, 213 S.E.2d 851 (1975) (accident); Commonwealth v. McKennion, 235 Pa. Super. Ct. 160, 340 A.2d 889 (1975) (value of property to establish lesser degree of crime); Hall v. Lockhart, 516 F.2d 910 (8th Cir. 1975); Parker v. State, 222 So.2d 457 (Fla. 1969), *cert. denied*, 401 U.S. 974 (1971) (insanity).

mentators suggested that *Winship* should apply to affirmative defenses,[54] state power to legislatively and judicially designate the elements of the prosecution's case generally remained inviolate.

EXTENDING *Winship* — *Mullaney v. Wilbur*

Following uncertain application of the *Winship* decision by lower federal and state courts,[55] the Supreme Court confronted an opportunity to clarify the scope of the reasonable doubt standard in *Mullaney v. Wilbur*.[56] Defendant Wilbur had been convicted[57] under the Maine murder statute.[58] On first appeal,[59] Wilbur argued that his due process rights had been violated by a jury instruction specifying that malice should be presumed and that the defendant must prove the presence of heat of passion on sudden provocation to reduce the charge from murder to manslaughter.[60] Because proof of heat of passion negated malice, Wilbur asserted, allocating the persuasion burden to the defendant on that issue relieved the state of its constitutional duty to prove beyond a reasonable doubt each essential element of the crime.[61]

While recognizing that *Winship* had applied the reasonable doubt standard to state criminal actions, the Maine court nevertheless ruled that Maine's statutory procedure had not improperly burdened the defendant in violation of that standard.[62] The court reasoned that because guilt would already have been established, the presumption of malice went only to the determination of the

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54. *See* Note, *Due Process and Supremacy as Foundation for the Adequacy Rule: The Remains of Federalism After* Mullaney v. Wilbur, 26 ME. L. REV. 37, 42 (1974). Note, *supra* note 36, at 836.

55. See notes 51-54 *supra* and accompanying text.

56. 421 U.S. 684 (1975).

57. Wilbur had argued at trial that he could not be convicted of an offense greater than manslaughter because the slaying had been provoked by the homosexual advances of the deceased and was thus committed without malice. *Id.* at 685.

58. ME. REV. STAT. tit. 17, §2651 (1964), provides: "Whoever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life."

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

60. The jury had been instructed: "Bearing in mind . . . that there has been an unlawful killing, that is one not justified in self defense, then the killing is presumed to be with malice aforethought, and the burden is then upon the defendant, the killer, to satisfy the jury that it was not done with malice aforethought either express or implied." *Id.* at 144.

This instruction accorded with Maine's manslaughter statute which in part provided: "Whoever unlawfully kills a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought . . . shall be punished by a fine of not more than $1,000 or by imprisonment for not more than 20 years. . . ." ME. REV. STAT. tit. 17, §2551 (1964). In practice, to establish murder the state was required to prove the killing was intentional and without legal justification or excuse. The burden then shifted to the defendant to persuade the factfinder that he acted in the heat of passion on sudden provocation in order to mitigate the charge to manslaughter. *See* Comment, *The Constitutionality of the Common Law Presumption of Malice in Maine*, 54 B.U. L. REV. 973, 976 (1974).

61. Wilbur raised his objection to the jury instruction on appeal before the Maine Court, although he had failed to object at the trial. 421 U.S. at 688 & n.7.

62. State v. Wilbur, 278 A.2d 139, 146 (Me. 1971).

degree of homicide.[63] *Winship*, concerned solely with the determination of guilt or innocence, would be inapplicable.[64]

Wilbur petitioned successfully for habeas corpus relief,[65] and after a complex series of federal appeals[66] the First Circuit Court of Appeals overturned his conviction.[67] Reasoning that the presumption of malice assigned the burden of persuasion to the defendant on a fact crucial to the assessment of punishment, the court found a violation of the reasonable doubt standard espoused in *Winship*.[68]

63. "[N]o burden is imposed upon the defendant until the State has first convinced the jury beyond a reasonable doubt that defendant is guilty of a voluntary and intentional homicide." *Id.* at 146. The court also commented that even if *Winship* were interpreted to proscribe the procedural system under the Maine murder statute, there was no reason to believe that decision would be applied retrospectively. *Id.*

64. The court construed the Maine statutes to create two distinct punishment categories of the crime of felonious homicide, murder and manslaughter. In support the court presented a historical analysis of jury charges in Maine murder cases and the development of the presumption of malice therein. Relying primarily upon State v. Knight, 43 Me. 11 (1857), and State v. Conley, 39 Me. 78 (1854), the court suggested Maine had always treated unlawful killings as felonious homicide. Quoting *Conley*, the court commented: "[T]he felony actually committed is the same, whether it has all the elements of murder . . . or whether it is wanting in the criterion of murder, and is therefore manslaughter. The two lower degrees of felonious homicide are embraced in the charge of the higher offense . . . ." 278 A.2d at 144. *See* Comment, *The Constitutionality of the Common Law Presumption of Malice in Maine*, 54 B.U.L. REV. 973 (1974).

65. Wilbur v. Robbins, 349 F. Supp. 149 (D. Me. 1972). *See generally* the discussion of the habeas corpus proceedings in Note, *supra* note 54.

66. The federal district court noted that felonious homicide had never appeared in Maine's criminal statutes, and in addition, that murder and manslaughter were separately defined, with malice aforethought the distinguishing element. 349 F. Supp. at 152-53. Therefore, the presumption of malice created by the Maine practice relieved the state of the burden of persuasion on a fact critical not only to punishment, but also to the determination of the crime committed.

In affirming, the First Circuit Court of Appeals noted that the Maine court had ignored state precedent which might have led to a construction of the statutes consistent with that of the district court. Wilbur v. Mullaney, 473 F.2d 943, 946 (1st Cir. 1973) (citing State v. Merry, 136 Me. 243, 8 A.2d 143 (1939)); Collins v. Robbins, 147 Me. 163, 84 A.2d 536 (1951); State v. Ernst, 150 Me. 449, 114 A.2d 369 (1955). Additionally, the circuit court referred to a 1963 Maine opinion, State v. Park, 159 Me. 328, 193 A.2d 1 (1963), which it felt indicated that the Maine courts construed murder and manslaughter as separate crimes. This led the circuit court to conclude that Maine's Supreme Judicial Court had altered its view of the statutes to avoid the impact of *Winship*. 473 F.2d at 945-46.

During the *Wilbur* appeals, the Maine courts had again ruled that Maine law contemplated a single crime of felonious homicide with punishment categories of murder and manslaughter. State v. Lafferty, 309 A.2d 647 (Me. 1973). In specifically reasserting the statutory construction outlined in *State v. Wilbur*, the Maine Supreme Judicial Court berated the federal courts for interfering with its construction of Maine's laws. In view of Maine's reassertion of this interpretation, the United States Supreme Court remanded Wilbur's appeal to the circuit court for reconsideration. Mullaney v. Wilbur, 421 U.S. 684 (1975).

67. Wilbur v. Mullaney, 496 F.2d 1303, 1307 (1st Cir. 1974).

68. The circuit court rejected Maine's argument that because the presence of malice became relevant only after the determination of guilt of felonious homicide, *Winship* was inapplicable. The circuit court opined that *Winship* sought to protect the defendant's interests throughout the criminal proceeding and that the sentencing portion of the proceeding implicated those interests as seriously as did the factfinding portion. *Id.* at 1307.

Viewing the Maine statutory scheme as designating a single crime with alternative punishment categories, the Supreme Court in *Mullaney*[69] addressed the narrow issue of whether requiring the defendant to provide evidence mitigating a felonious homicide from murder to manslaughter violated the due process mandate of *Winship*.[70] As a purported foundation for analysis of the Maine statute, the Court reviewed the historical allocation of the persuasion burden as to malice.[71] The Court concluded that the presence or absence of malice had traditionally been the critical determinant of the degree of culpability attaching to unlawful homicide and that the modern trend was to require the prosecution to persuade the jury of the presence of malice.[72] Without explicating the constitutional significance of its historical analysis,[73] the Court observed that although the prosecution need not establish malice to prove criminality, the presence of malice affected the extent of punishment.[74] Noting that the interests found critical in *Winship*[75] were implicated not only by the

69. Mullaney v. Wilbur, 421 U.S. 684, 704 (1975). While recognizing state court authority to interpret state law, the Court noted that in some situations, for example where a state court interpretation was obviously designed to evade a federal issue, review of that interpretation would be warranted. *Id.* at 691 n.11 (citing Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 129 (1945)); Ward v. Love County, 253 U.S. 17 (1920); Terre Haute & I.R. Co. v. Indiana *ex. rel.* Ketchum, 194 U.S. 579 (1904). However, because the due process issue had not been eliminated by Maine's interpretation of the statutes, the Court did not feel a reinterpretation was warranted. *See* Tushnet, *Constitutional Limitation of the Criminal Law: An Examination of the Meaning of* Mullaney v. Wilbur, 55 B.U. L. REV. 775, 787 (1975). *See generally* Hill, *The Inadequate State Ground*, 65 COLUM. L. REV. 943 (1965).

70. 421 U.S. at 692.

71. *Id.* at 692-96. Tracing the presence of the distinction between murder and manslaughter based on "malice propensed" as far back as the 16th century, the Court concluded that at common law the defendant shouldered the burden of proving heat of passion on sudden provocation. *Id.* at 693-94 (citing The King v. Oneby, 92 Eng. Rep. 465 (K.B. 1727) and 4 W. BLACKSTONE, COMMENTARIES 201). *But see*, Fletcher, *supra* note 5, at 904-07 (wherein the author argues reliance upon *Oneby's* case was improper and misleading).

The concept of malice aforethought in this country, the Court explained, signified a substantive element of intent in some jurisdictions, requiring proof by the prosecution; in other jurisdictions the concept remained a policy presumption, indicating that absent proof to the contrary the presence of malice was presumed. Though many courts had required the defendant to prove he acted in the heat of passion in order to negate malice, the United States Supreme Court in Davis v. United States, 160 U.S. 469 (1895), had rejected this approach, requiring in a federal case that the prosecution persuade the trier of fact that malice existed. Subsequently, however, the Court had refused to hold *Davis* applicable to the states. Leland v. Oregon, 343 U.S. 790 (1952). 421 U.S. at 692-96. *See generally* Note, *Constitutional Law: The Burden of Proof for Affirmative Defenses in Homicide Cases*, 12 WAKE FOREST L. REV. 423 (1975).

72. 421 U.S. at 696.

73. While the Court suggested that a historical review of the heat of passion defense would "illuminate" the analysis, *id.* at 692, the Court never subsequently explained the relevance of that review.

74. *Id.* at 698-99.

75. Several authors have suggested that the three interests purportedly served by *Winship's* adoption of the reasonable doubt standard may be condensed to a single concern — that persons not be deprived of their liberty without due process. As has been noted, community confidence in the state system of criminal justice lacks constitutional dimension, since citizens' perception of the function of the law implicates no federal interest. *See*, Allen, *supra* note 45, at 280; Tushnet, *supra* note 69, at 799-800.

determination of guilt or innocence but also by the assigned degree of culpability, the *Mullaney* Court suggested that to protect those interests the prosecution must prove beyond a reasonable doubt the presence of the fact upon which the higher degree of culpability turned.[76]

In ruling the Maine practice violative of due process, *Mullaney* seemingly extended the definition of "facts necessary to constitute the crime charged" to facts bearing not only upon guilt or innocence but also upon the severity of punishment or degree of culpability.[77] Theoretically this extension would prevent states from circumventing the *Winship* mandate by redefining the elements of a crime and thereby decreasing the prosecution's burden without altering the substantive law. As elucidated by *Mullaney*, therefore, *Winship* commanded that a state practice be gauged not by a due process analysis limited to the formal elements, but rather by analysis of the substance of the crime, including facts pertinent to the degree of culpability. *Mullaney* essentially prescribed an assessment of the operation and effect of the statute and a balancing of individual and state interests to decide whether shifting the persuasion burden to the defendant comported with due process.[78] Analyzing Maine procedure in this way, the Court found that the defendant's interests outweighed the state's evidentiary problems in proving the absence of provocation.[79]

Mullaney left unanswered many questions posed by the *Winship* decision. While clarifying to an extent the facts which must be proved by the prosecution beyond a reasonable doubt, the *Mullaney* Court nevertheless failed to explain how to isolate such facts.[80] Because absence of provocation was not an element of felonious homicide under Maine's formulation, *Mullaney* indicated that a strict elements approach would be improper.[81] This limited instruction regard-

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76. 421 U.S. at 698. Although *Winship* had concerned solely the determination of guilt or innocence, *Mullaney* suggested that the thrust of *Winship* was to prevent the defendant from being convicted of a more serious crime than he had actually committed. The degree of culpability, which determines the extent of punishment, affects the defendant's interests greatly. Therefore, the *Mullaney* Court decided that it was justifiable to impose the persuasion burden on the prosecution to prove those facts upon which the more severe punishment was based.

77. In rebutting Maine's argument that *Winship* should be limited to definitional elements of the crime, the Court responded that "[t]his analysis fails to recognize that the criminal law . . . is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability." 421 U.S. at 697-98.

78. *Id.* at 698-99.

79. *Id.* at 701-02.

80. It has been suggested that *Mullaney* essentially restates the *Winship* mandate, explaining that necessary "facts" actually means that the substance of the crime must be proved beyond a reasonable doubt. *See* Comment, *Affirmative Defenses in Ohio After* Mullaney v. Wilbur, 36 OHIO ST. L.J. 828, 835 (1975). The *Mullaney* Court expressed this preference for substance over form in suggesting *Winship* should not be limited to the elements of the state's case defined by the statute. 421 U.S. at 697-98.

81. In adopting Maine's construction of the statutes, the Court acknowledged that malice did not constitute an element of felonious homicide. Thus, by requiring that the prosecution bear the persuasion burden on the presence of malice, *Winship* was extended to collateral facts affecting punishment. *See* Note, *supra* note 36, at 186. Although the decision offered no clear method for specifying facts which must be proved by the state, *Mullaney* seemed to eliminate the possibility that a state could simply denominate what had formerly been an

ing the proper test seemed an admonishment that where punishment differs significantly between two crimes or degrees of the same crime, requiring the defendant to bear the burden of persuasion as to the distinguishing factors contravenes due process.[82] In other words, *Mullaney* apparently required the prosecution to bear the risk of nonpersuasion on all issues critical to culpability; that is, all issues which must be resolved prior to sentencing.[83] Thus, the prosecution must prove not only statutorily designated elements, but also facts which must be found absent prior to a resolution of the defendant's fault, or degree thereof.[84]

Left similarly unanswered was whether *Mullaney* should be interpreted as merely a procedural ruling, designating the proper allocation of the burden of persuasion once a state has defined a crime, or as a substantive holding, restricting the state's power to define criminal behavior. Support for the procedural interpretation is found in the Court's reluctance to alter Maine's construction of the murder and manslaughter statutes. Instead, the Court directed allocation of the persuasion burden for facts deemed pertinent by the state.[85]

Read as having solely a procedural effect, *Mullaney* in no way impedes state power to define crime and thus prevents federal intervention into state substantive law.[86] Once a state designates the facts bearing upon guilt or the degree

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element as an affirmative defense, thereby relieving the prosecution of the burden of persuasion on that fact.

82. *Mullaney* might be viewed as holding that where proof of a fact would reduce the offense charged to one of lesser criminal culpability, although that proof would not entirely exonerate the accused, due process demands the prosecution prove beyond a reasonable doubt the absence of this fact. *See* Appellant's Statement of Jurisdiction, Patterson v. New York, 432 U.S. 197 (1977).

Such an interpretation emphasizes the effect of the state's definition of a particular crime rather than the formal statutory designation of elements. *See* Note, *supra* note 31, at 396. This reasoning led one author to conclude that after *Mullaney*, allocating the burden of persuasion to the defendant as to insanity violates due process if in so doing the defendant must prove factual elements constituting the mens rea required for the crime. Thus, only where elements establishing insanity are not inconsistent with the mental capacity essential to the offense may the persuasion burden on those facts be shifted to the defendant. *See* Note, *supra* note 16, at 499.

83. Ashford & Risinger, *supra* note 5, at 171.

84. Comment, *supra* note 36, at 832. As otherwise expressed: "It should thus be a violation of due process to impose upon a defendant the burden of proof of any fact the establishment of which will significantly affect the degree to which his fundamental interests in liberty and reputation may be comprised." Note, *supra* note 31, at 395.

85. This narrow interpretation of *Mullaney* compromises between total state control and significant federal intervention into state substantive law. While a state may choose to exclude a fact entirely from relevance to the crime, if the state decides instead to include the fact either as an element or as a mitigating factor, the state must bear the persuasion burden. *See* Angel, *supra* note 35, at 100. As the First Circuit Court of Appeals had commented in initially assessing *Mullaney*: "So long as the Maine Statute defines murder as an intentional killing with malice aforethought, . . . the burden must be on the state to establish [malice]." Wilbur v. Mullaney, 473 F.2d 943, 948 (1st Cir. 1973).

86. *Mullaney* has elicited comment suggesting a solely procedural interpretation would be proper. *See* Note, People v. Patterson: *The Constitutionality of New York's Affirmative Defense of Extreme Emotional Disturbance*, 51 ST. JOHN'S L. REV. 158, 178 (1976). *See also* Evans v. State, 28 Md. App. 640, 349 A.2d 300 (Ct. Spec. App. 1975), where the Maryland court ex-

of punishment, due process demands that the prosecution bear the burden of persuasion as to each fact.[87] In sum, a procedural interpretation would allow a state either to include a fact relevant to guilt or punishment within the statutory scheme and to require the prosecution to shoulder the persuasion burden, or to eliminate that fact even as a mitigating circumstance.[88]

Mullaney could also be interpreted as a substantive decision[89] providing a federal inroad into the states' authority to define criminal activity.[90] Had the case concerned solely procedural issues, the only question regarding the prosecution's duty to bear the burden of persuasion should have been whether, under the state's scheme, the fact in issue affected the existence or degree of culpability. The historical basis of the fact's inclusion as an element would have been of no significance.[91] Thus, while the Court purported to accept Maine's construction of its own statutes, the concern for historical relevance may have implied that certain historically relevant facts, such as malice, must be included within the definition of a crime.[92] The reasonable doubt standard therefore may have been viewed by the Court as a limit on the state's legislative and judicial authority to designate the essentials of a crime and as a basis for fed-

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pressed the view that *Mullaney* and *Winship* were "concerned exclusively with due process, the modality or process by which we do certain things in the criminal law. They are concerned with the criminal law's procedures and not with its substance. It is, therefore, not the definitions or elements of our various grades of felonious homicide that require scrutiny under *Mullaney v. Wilbur* and *Winship,* but rather our mechanical, evidentiary and procedural devices. The ultimate concern is not . . . what we do but . . . how we do it." *Id.* at 674, 349 A.2d at 323.

87. Interpreting *Mullaney* in this fashion, it would seem that all affirmative defenses would be invalid. *See* Allen, *supra* note 31, at 39.

88. Low & Jefferies, *Dicta: Constitutionalizing the Criminal Law?* VA. L. WKLY., March 25, 1977, at 1 (1977). A procedural analysis under *Mullaney* would focus on how the state allocates the burden of persuasion after defining the crime, rather than upon which facts are included within that definition. This procedural interpretation might nevertheless limit state power to define crime, because after *Mullaney,* where the fact in consideration is one of historical relevance, the state would apparently be required to either include or exclude the fact as an element, but could not retain the fact and require the defendant bear the persuasion burden. Therefore, one disadvantage of a procedural interpretation may be its tendency to discourage states from creating new ameliorative affirmative defenses. *Id.* at 3. See note 154 *infra.*

89. There are, however, indications to the contrary. Justice Powell, author of the *Mullaney* opinion, dissented in Patterson v. New York, 432 U.S. 197 (1977), and specified that *Mullaney,* as well as *Winship,* had been concerned solely with procedural requirements of due process.

90. Such an expansive interpretation of *Mullaney,* which one commentator termed a "natural law" view, would read the decision to require that states include certain facts as relevant to the crime and that they persuade the jury as to the existence or non-existence of these facts. *See* Angel, *supra* note 35, at 101.

91. *Mullaney* may, therefore, have been intended to require that a mental element be included in the definition of the crime, thereby preventing the imposition of strict criminal liability. Arguably, had the Court conducted solely a procedural review, the Maine statute would have been upheld as creating a permissible presumption. *See* Tushnet, *supra* note 69, at 780.

92. The logical extension of this argument would be that where historically a state has distinguished between two crimes, or two degrees of the same crime, on the basis of a particular fact, the state may not constitutionally eliminate that distinction from its laws.

eral courts to determine, as a matter of due process, the constitutionally required minimum elements.[93]

Mullaney raised another question closely related to the procedural/substantive dichotomy. In rejecting Maine's contention that *Winship* had prescribed an elements analysis,[94] the Court indicated that the state's decision to distinguish between two degrees of felonious homicide dictated that the prosecution carry the persuasion burden on the distinguishing fact.[95] Although *Mullaney* involved a statutory presumption,[96] its language regarding distinctions encouraged speculation that the Court may have impliedly destroyed the justification for use of affirmative defenses.[97] Such a conclusion is understandable because affirmative defenses mitigate punishment and thus distinguish between degrees of criminal culpability.[98] Even though states have traditionally allocated the burden of persuasion to defendants on matters denominated affirmative defenses,[99] extending the *Mullaney* rationale to those issues seems justified both because the *Winship* interests are significantly affected and because the inability to reach such defenses would enable states to evade *Winship* by designating former elements as affirmative defenses.[100]

NARROWING THE *Winship/Mullaney* DOCTRINE — *Patterson v. New York*

Less than two years after *Mullaney, Patterson v. New York*[101] provided the Supreme Court with another opportunity to clarify the due process implications of imposing persuasion burdens upon criminal defendants. The defendant in *Patterson* had been convicted under a New York statute[102] which defined murder to consist of two elements: intent to cause the death of another person

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93. Reading *Mullaney* as a substantive decision admits that the reasonable doubt standard limits state power to draw and interpret homicide statutes, and presumably statutes on other crimes as well. *See* Low & Jefferies, *supra* note 88, at 3. Such an interpretation would make the determination of a crime's minimum elements a federal question, thus departing from the federal system's traditional deference to state authority in this area. See note 69 *supra*.

94. Mullaney v. Wilbur, 421 U.S. at 697.

95. *Id.* at 698.

96. *But see* Allen, *supra* note 31, at 32. (Maine employed a traditional affirmative defense).

97. *See* Note, *supra* note 23, at 875-76.

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

99. MCCORMICK, *supra* note 4, §346.

100. For a discussion of the state court application of *Mullaney see* Note, *supra* note 23, at 878-79 nn.53-59.

101. 432 U.S. 197 (1977).

102. N.Y. PENAL LAW §125.25 (McKinney 1975). Section 125.25 provides: "A person is guilty of murder in the second degree when: 1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that: (a) the defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime."

and causing the death of that person or some third person.[103] The statute provided an affirmative defense for the defendant who could prove by a preponderance of the evidence that he had acted under extreme emotional disturbance for which there existed a reasonable excuse.[104] Upon proof of extreme emotional disturbance, the modern equivalent of the heat of passion defense,[105] the defendant would be found guilty of the lesser charge of manslaughter.[106]

After the *Mullaney* decision, the constitutionality of the New York murder statute had been questioned by that state's lower courts. Although New York denominated extreme emotional disturbance an affirmative defense, these state courts on three occasions had declared the statute violative of due process.[107] Finding New York's scheme the functional equivalent of the Maine statute, these courts had reasoned that imposition of the burden of persuasion contravened the spirit of *Mullaney*.[108]

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103. 432 U.S. at 198.

104. See note 102 *supra.*

105. The common law concept of heat of passion on sudden provocation had been criticized as too inflexible and outdated. 432 U.S. at 218. Therefore, in preparing a Model Penal Code, the American Law Institute developed the slightly broader concept of extreme emotional disturbance. *Id. See* MODEL PENAL CODE §201.3, Comment (Tent. Draft No. 9 1959). *See generally* W. LAFAVE & A. SCOTT, CRIMINAL LAW (1972); Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425 (1968). New York adopted this ALI proposal as a basis for distinguishing between murder and manslaughter with only a few alterations. By far the most significant change was the New York drafters' decision to require that the defendant prove the presence of extreme emotional disturbance by designating it an affirmative defense. 432 U.S. at 218-19. *See* N.Y. PENAL LAW §§125.20(2), 125.25(1)(a) (McKinney 1975). The Model Penal Code, in contrast, had made extreme emotional disturbance a defense on which the prosecution had the persuasion burden once the defendant came forward with evidence sufficient to raise the issue. 432 U.S. at 218-21 (citing MODEL PENAL CODE §§1.12, 210.3) (Proposed Official Draft 1962). *See also* Allen, *supra* note 31, at 54.

106. The New York manslaughter statute, N.Y. PENAL LAW §125.20[2] (McKinney 1975) provides: "A person is guilty of manslaughter in the first degree when: 2. With intent to cause the death of another person he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in paragraph (a) of subdivision one of §125.25. The fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subsection." The Court instructed the jury that "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. . . . This does not mean that the emotional disturbance exonerates the killer, or renders his killing guiltless. As long as he actually intended to cause the death of another person *** the killing remains a crime, and remains a homicide, but is punishable in a less severe manner than murder." People v. Patterson 39 N.Y.2d 288, 293, 383 N.Y.S.2d 573, 576, 347 N.E.2d 898, 901 (1976).

107. People v. Davis, 49 App. Div. 2d 437, 376 N.Y.S.2d 266 (4th Dept. 1975), *rev'd*, 40 N.Y.2d 835, 837 N.Y.S.2d 837, 356 N.E.2d 290 (1976); People v. Balogun, 82 Misc. 2d 907, 372 N.Y.S.2d 384 (Sup. Ct. 1975); People v. Woods, 84 Misc. 2d 301, 375 N.Y.S.2d 750 (Sup. Ct. 1975).

108. In People v. Davis, 49 App. Div. 2d 437, 376 N.Y.S.2d 266 (4th Dept. 1975), the court noted that certain affirmative defenses had previously been upheld after *Mullaney*, but that these affirmative defenses had been unknown at common law; thus no shift of the burden of proof occurred when the defendant was assigned that burden.

Despite these lower court rulings, the New York Court of Appeals in *People v. Patterson*[109] upheld the murder statute against due process arguments. Without referring to the prior contrary New York decisions, the court noted that the statute required the prosecution to prove each fact essential to conviction, including intent.[110] Distinguishing *Mullaney*, the court suggested that the due process flaw in the Maine statute was the requirement that the defendant negate an element of the offense – malice.[111] The court therefore determined that *Mullaney* had merely applied *Winship* in finding that the reasonable doubt standard had been violated by the allocation to the defendant of the burden of negating an element necessary to the basic charge.[112] Because the New York statute did not require the defendant to negate any element of the offense, the court upheld the statute as consistent with due process.[113]

The United States Supreme Court affirmed,[114] ruling that the defendant's duty to persuade the jury of the validity of the affirmative defense of extreme emotional disturbance accorded with due process principles set out in *Winship*. The Court first explained that the New York statute obligated the prosecution to prove two essential elements beyond a reasonable doubt: intent to kill, and occurrence of death as a result of that intent.[115] As analyzed by the Court, the statute neither inferred nor presumed any facts against the defendant;[116] moreover, the defense of extreme emotional disturbance did not negate any element of the state's case.[117] This finding suggested the New York legislature had successfully avoided the problems encountered in *Mullaney* because New York had entirely eliminated malice from the definition of the crime. Thus, in the Court's view, the New York statute, both in form and substance, satisfied the *Winship* mandate that the prosecution prove beyond a reasonable doubt every fact necessary to constitute the crime charged.[118]

Comparative Analysis: The Maine and New York Statutes

The message of *Winship* and *Mullaney*, as explicated by *Patterson*, unfortunately appears to be that state legislatures can avoid due process problems through careful statutory draftsmanship. Although functionally the New York and Maine murder statutes appear nearly indentical, the *Patterson* majority

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109. 39 N.Y.2d 288, 383 N.Y.S.2d 573, 347 N.E.2d 898 (1976).
110. *Id.* at 302, 383 N.Y.S.2d at 582, 347 N.E.2d at 907.
111. *Id.*
112. This interpretation ignores the construction of the Maine statute by that state's courts which had consistently ruled that malice was not an element of murder under the Maine practice. See note 64 *supra* and accompanying text.
113. The court based its decision upon two basic findings: that Maine employed a presumption to relieve the prosecution of its burden of proving an element of intent; and that *Mullaney* had merely applied, and not extended, *Winship's* due process mandate. *See* Note, *supra* note 36, at 176.
114. Patterson v. New York, 432 U.S. 197 (1977).
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.* at 206 (citing *In re* Winship, 397 U.S. 358 (1970)).

identified a very formalistic distinction, the use of an affirmative defense rather than a presumption, as the saving feature of the New York scheme.

Maine defined murder as unlawful killing, with malice aforethought express or implied.[119] As interpreted by Maine's courts, however, murder was but one degree of the offense of felonious homicide, a crime which consisted of the elements of intent to kill and the actual killing of another person.[120] Thus, to support the initial determination of guilt of felonious homicide, the prosecution did not have to prove malice.[121] While accepting this construction of the Maine statute,[122] the *Mullaney* Court deemed the law unconstitutional because the presumption of malice, although not relevant to guilt or innocence, placed upon the defendant the burden of disproving a fact which affected the degree of stigma and the extent of loss of liberty.

In an attempt to narrow *Mullaney*, the *Patterson* majority asserted that malice had constituted an element of murder under the Maine practice;[123] therefore, the presumption of malice violated due process by relieving the prosecution of the obligation to prove its case beyond a reasonable doubt. This interpretation directly contradicted the Maine court's construction of the statute, to which the Supreme Court had subscribed in *Mullaney*.[124] Adoption of this interpretation allowed the *Patterson* majority to limit *Mullaney* to proscribe allocation of the persuasion burden to a defendant on facts the state considers so integral in the definition of a crime that they must be either proved or presumed.[125] Thus, *Patterson* misinterpreted *Mullaney*, by reading that decision to forbid requiring a defendant to disprove an element.[126] In reality, the Maine practice invalidated in *Mullaney* had required the defendant to prove a mitigating fact.

Applying what purported to be an identical method of analysis to the New York statute, the *Patterson* Court noted that death, intent, and causation were

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119. See note 59 *supra*.

120. Mullaney v. Wilbur, 421 U.S. 687, 690-92 (1975); State v. Lafferty, 309 A.2d 647 (Me. 1973); State v. Wilbur, 278 A.2d 139 (Me. 1971).

121. 421 U.S. at 690-92.

122. *Id.*

123. 432 U.S. at 213. The majority apparently reasoned that the presence of the phrase "malice aforethought" in the definition of the crime, and the designation of the negative of malice, provocation, as an affirmative defense was inconsistent and might confuse the jury as to who had the persuasion burden on the issue.

124. *See* cases cited at note 107 *supra*.

125. The *Patterson* Court construed the Maine murder statute to allow a defendant to rebut a statutory presumption that he committed the offense with malice aforethought by proving he had acted in the heat of passion. Since the Court erroneously interpreted the intent required by the statute to include malice as an element, it assumed the *Mullaney* decision was based upon a finding that the statute improperly shifted the persuasion burden on an element.

126. See note 125 *supra*. The State of New York had advanced this argument on appeal. The thrust of the argument was that the Maine practice had only required the prosecution to prove the requisite intent for manslaughter and presumed from that proof the intent required for murder. The state thus suggested the flaw in Maine's procedure was burdening the defendant with proof of the absence of an element of intent necessary to establish murder. *See* Brief for Appellee at 10; Patterson v. New York, 432 U.S. 197 (1977).

the sole elements of murder under New York law.[127] Malice comprised neither a part of the statutory definition nor an element of the prosecution's case.[128] Upholding the statute against a due process attack based upon *Mullaney*, the Court reasoned that because New York utilized an affirmative defense which shifted no persuasion burden to the defendant until after guilt had been established beyond a reasonable doubt, the New York statute avoided the flaw fatal to Maine's practice. In reaching this conclusion *Patterson* ignored *Mullaney's* acceptance of the Maine courts' construction of the murder statute, and consequently drew a formalistic distinction between the two states' practices as a basis for upholding the New York formulation.

In both Maine and New York, all substantive elements of the crime of murder had to be proven by the prosecution beyond a reasonable doubt.[129] Similarly, in each state only the existence or non-existence of a single fact — heat of passion in Maine and extreme emotional disturbance in New York — distinguished murder from manslaughter. As interpreted by the highest courts of each state, neither of these mitigating circumstances negated any substantive element of the crime.[130] Because these statutes so closely paralleled each other in practical effect, the *Patterson* Court's explanation for invalidity of the Maine formulation seems equally applicable to the New York statute. Just as the Maine statute was construed to have in effect created another substantive element of felonious homicide in the form of absence of heat of passion, absence of extreme emotional disturbance should have been similarly objectionable under the New York statute.

In addition to this practical resemblance, the statutes implemented a policy decision to treat all intentional killings as murder unless the defendant proved mitigating circumstances.[131] The sole distinction between the statutes appears to be that Maine, by defining murder to include malice aforethought, in effect placed a label upon the absence of heat of passion, thereby appearing to create a presumption of malice. New York, in contrast, excluded malice from the definition of murder by refusing to specifically label the absence of extreme emotional disturbance, thereby employing an affirmative defense rather than a presumption.[132] Because the Maine courts determined that the presence or absence of malice was unimportant in initially establishing the defendant's guilt, however, in practice the heat of passion defense negated no element of

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127. 432 U.S. at 198.

128. Interestingly, the Court stated that the New York statute had not included in the definition of murder either the term "malice" or any description of such an element of intent. This marks the Court's initial attempts at distinguishing *Mullaney*, which had included the term "malice" within the definition of murder, although not within the prosecution's case.

129. *Compare* the instructions given to the jury in *Mullaney*, 421 U.S. at 685-86, *with* the jury instructions in *Patterson*, 432 U.S. at 200 n.5.

130. *See* State v. Lafferty, 309 A.2d 647 (Me. 1973); People v. Patterson, 39 N.Y.2d 288, 383 N.Y.S.2d 573, 347 N.E.2d 898 (1976).

131. *See generally* Note, *supra* note 36.

132. New York defined murder without any reference to malice for the express reason of avoiding the problems Maine had encountered. *See* THIRD INTERIM REPORT OF THE TEMPORARY STATE COMMISSION ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, N.Y. Legis. Doc. No. 25, at 22 (1964) cited in Note, *supra* note 36, at 187 n.77.

the crime and therefore operated as an affirmative defense.[133] Thus, employing a highly formalistic analysis, the *Patterson* Court distinguished the Maine and New York statutes solely by the use of the term malice in Maine's definition of murder.

Further evidence that the *Patterson* majority relied on a technical difference between the labels of statutory presumption and affirmative defense may be gleaned from the Court's use of the decisions in *Leland v. Oregon*[134] and *Rivera v. Delaware*[135] as authority for its holding. In *Leland*, a pre-*Winship* case, a state practice requiring the defendant to prove insanity was found permissible because the prosecution retained the burden of proving each element of the offense.[136] One author interpreted *Winship* and *Mullaney* to render *Leland's* rationale obsolete, because even though insanity was not an element considered in determining guilt, it had a significant effect on the degree of culpability and extent of punishment.[137] The Supreme Court dispelled such speculation in *Rivera*, however, by dismissing for want of a federal question a challenge to Delaware's requirement that a defendant prove insanity. The Court in *Rivera* emphasized that Delaware had made insanity an affirmative defense to be considered by the jury only after the prosecution had proved beyond a reasonable doubt all elements of the offense, including mens rea.[138] *Leland* and *Rivera* appeared to suggest that once a state designates an affirmative defense, and does not include that fact or its negative as an element of the offense, the burden of persuading the jury of this affirmative defense may be placed upon the defendant. Thus, because New York had labelled extreme emotional disturbance

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133. It has been suggested that the Maine statute had not created a presumption in the traditional sense, because there was no basic fact from which could be presumed the presence of the forward fact, malice. On the contrary, the Maine practice, as in New York, was to place the persuasion burden upon the defendant from the outset. *See* Allen, *supra* note 31, at 57 nn.94-100. Thus, the Maine statute in effect created an affirmative defense, and *Mullaney* might therefore be read to have proscribed more than presumptions.

134. 343 U.S. 790 (1952).

135. 429 U.S. 877 (1976).

136. 343 U.S. at 799. At issue in *Leland* was the constitutionality, under the due process clause, of an Oregon rule requiring that the defendant prove insanity beyond a reasonable doubt.

137. *See, e.g.*, Note, *supra* note 23, at 874-76 n.31.

138. Justice Rhenquist had concurred in *Mullaney* and expressed the view that no inconsistency existed between that decision and *Leland*. Rhenquist reasoned that the Oregon procedure in *Leland* required proof of intent, but that the presence or absence of legal sanity bore no necessary relationship to this required mental element. Mullaney v. Wilbur, 421 U.S. 684, 705-06 (1952) (Rhenquist, J., concurring). *Rivera* seemingly confirmed this view. Several courts relied upon these opinions in holding that a defendant could be required to prove sanity. *See, e.g.*, Buzysnki v. Oliver, 538 F.2d 6 (1st Cir. 1976); Grace v. State, 231 Ga. 113, 200 S.E.2d 248 (1973); State v. Caddeel, 287 N.C. 266, 215 S.E.2d 348 (1975).

It is interesting to note that the *Patterson* Court in discussing *Rivera* refers to insanity as an affirmative defense, and in discussing *Leland* refers to insanity as a defense. 432 U.S. at 212. Under the analysis employed in *Patterson*, presumably the insanity defense in *Leland* would have been saved from constitutional violation because insanity did not negate any element of the offense. *Patterson* might be read, then, as permitting the imposition of the persuasion burden upon the defendant to prove not only an affirmative defense, but any defense which does not negate an element of the crime.

as an affirmative defense, the *Patterson* Court concluded that the statute passed due process scrutiny. The *Patterson* opinion indicates that the form of the statute, rather than the substance of the crime controls the due process rights accorded a defendant. This reverence for form ignores the due process mandate originated in *Winship* and extended in *Mullaney*. The latter opinion had refused to limit *Winship* to the definitional elements of the crime prescribed by statute. *Patterson's* choice to rely on cases sanctioning the use of affirmative defenses where the affirmative defense did not negate any element of the state's case[139] neglects *Mullaney's* indication that due process forbids burdening the defendant with proof of any fact having a significant effect on the degree of culpability.

Reexamining In re Winship

Although admitting an intent to narrow the *Mullaney* decision in scope and effect,[140] the *Patterson* Court purported to apply *Winship*.[141] Arguably, however, *Patterson* may have limited *Winship's* applicability. One indication that the Court has constricted the function of the reasonable doubt standard, thereby restricting the extent of federal examination of state substantive law, appears in the reformulation of the due process standard enunciated in *Winship*. Claiming adherence to established due process principles, the *Patterson* Court articulated a standard that required proof beyond a reasonable doubt of all "elements" of the offense.[142] This formulation misstates the *Winship* holding that all "facts" necessary to convict must be proved.[143] By substituting the term "element" for "fact," the *Patterson* majority presumably intended the reasonable doubt standard to obligate the prosecution to prove only legislatively or judicially designated elements and not all facts relevant to the degree of culpability.

A second indication that *Patterson* has narrowed *Winship* surfaces in the Court's discussion of the policy effectuated by the reasonable doubt standard. *Winship* had recognized the fundamental value determination "that it is far worse to convict an innocent man than to let a guilty man go free."[144] The *Patterson* Court nevertheless noted that there are limits to the risk of allowing the guilty to go free beyond which a state need not venture.[145] Thus, *Patterson* questioned the very foundation of the *Winship* decision.

Patterson's failure to use the interests specified in *Winship* for determining

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139. Mullaney v. Wilbur, 421 U.S. at 690-91.

140. Patterson v. New York, 432 U.S. at 204-05.

141. *Id.* at 211.

142. *Id.* at 214.

143. *Winship* had mandated "proof beyond a reasonable doubt of every fact necessary to constitute the crime . . . charged." 397 U.S. 358, 364 (1970).

144. 397 U.S. 358, 372 (1970).

145. "While it is clear that our society has willingly chosen to bear a substantial burden in order to protect the innocent, it is equally clear that the risk it must bear is not without limits. . . . Due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person." Patterson v. New York, 432 U.S. at 208.

whether a state practice allocates the burden of persuasion consistent with due process is a final indication that the Court intended to alter the original formulation of the reasonable doubt standard. Both *Winship* and *Mullaney* had designated the liberty and reputation of the defendant as well as the community's confidence in the criminal justice system as vital interests to be safeguarded by any statutory scheme. *Patterson,* however, referred to neither the defendant's interest in reputation nor the community's confidence in the criminal law. Although these two interests may merely restate the defendant's interest in liberty,[146] their absence from the Court's analysis further shows an emphasis on the statute's form rather than its effect.[147]

Application of the Reasonable Doubt Standard in the Lower Courts After *Patterson*

The absence of a clear constitutional rule for application of the reasonable doubt standard could have been remedied by the *Patterson* decision. By declining to specify the proper implementation of that standard, the Court left lower courts the task of balancing the state and federal interests at stake in criminal proceedings. The result has been the adoption of three distinct interpretations of *Patterson,* each according a different degree of protection to the defendant's interests of liberty and reputation.

The Elements Approach

The traditional approach to determining which facts the prosecution must prove beyond a reasonable doubt, the elements test, requires that the prosecution persuade the jury of the existence of each fact that the state's judiciary and legislature have deemed essential to a determination of guilt.[148] On all issues

146. See note 75 *supra.*

147. Because the defenses of heat of passion on sudden provocation and extreme emotional disturbance are essentially the same, see note 112 *supra,* one implication of *Patterson* may be that a particular fact's historical significance no longer has an influence upon how the persuasion burden as to that fact is allocated. Justice Powell contests such a conclusion in his dissent in *Patterson* and suggests that *Winship* and *Mullaney* contemplated a two-step analysis of any state practice assigning persuasion burdens. The prosecution must bear that burden, Powell contends, where the fact at issue has a significant effect upon stigma and punishment and also has been historically important in defining the crime. 432 U.S. at 226 (Powell, J., dissenting). Requiring that the fact have historical significance renders moot the majority's fear that innovation in the criminal law would be stifled by a broad reading of *Winship* and *Mullaney. See* Patterson v. New York, 432 U.S. at 214 n.15.

148. *See* Osenbaugh, *supra* note 7, at 39. The elements approach might appropriately be described as specifying that a court engage in statutory construction, determining which facts define the offense and which provide mitigating factors. New York had argued throughout the *Patterson* appeals that the courts were bound by the New York court's construction. *See* Appellee's Motion to Dismiss at 7, Patterson v. New York, 432 U.S. 197 (1977).

One often cited component of the elements test, the physical location rule, makes the position of a fact within the statute determinative of whether that fact is an element of the offense. As explained in United States v. Vuitch, 402 U.S. 62, 70 (1971): "[W]hen an exception is incorporated in the enacting clause of a statute, the burden is on the prosecution to plead and prove that the defendant is not within the exception." *See also* 1 Wharton, Criminal Evidence §§24-33 (13th ed. 1972). The validity of such an approach has been questioned, however. *See* J. Stone, Legal Systems and Lawyer's Reasonings 240-43 (1964).

extraneous to this definition, the defendant may be allocated the burden of persuasion.[149] In analyzing an affirmative defense under an elements approach, the crucial question historically was whether the defense negated an element of the offense or whether it was an additional matter of justification or excuse.[150] The *Winship* and *Mullaney* decisions heralded the demise of this strict test by extending the due process standard of proof beyond a reasonable doubt to matters not expressly within the elements of the prosecution's case. This extension invited federal intervention into the determination of state substantive law by allowing federal courts to specify the minimum elements required for proof of guilt. *Patterson* has apparently reversed this trend and removed the justification for federal court review of state substantive criminal law.[151] The *Patterson* majority's emphasis on the technical distinction between presumptions and affirmative defenses[152] and its willingness to restrict the scope of the reasonable doubt standard espoused in *Winship* indicate that the Court may be prescribing the traditional elements approach.

If interpreted as espousing an elements approach,[153] the *Patterson* decision acknowledges the importance of state power to define criminal behavior by

149. A second principle of statutory construction associated with the elements approach focuses upon the severability of a fact from the definition of the criminal offense without creating a vague description. Generally, where the " 'offense contains an exception, in the enacting clause, which is so incorporated with the language defining the offense that the ingredients of the offense cannot be accurately and clearly described if the exception is omitted, . . . an indictment founded upon the statute must allege enough to show that the accused is not within the exception, but if the language of the clause defining the offense is so entirely separable from the exception that the ingredients constituting the offense may be accurately and clearly defined without any reference to the exception, the pleader may safely omit any such reference, as the matter contained in the exception is a matter of defense and must be shown by the accused.' " Kirchner v. Johnstone, 454 F. Supp. 14, 17-18 (E.D. Pa. 1978), citing Commonwealth v. Neal, 78 Pa. Super. 216, 219 (1922).

150. *See* McCormick, *supra* note 4, §346.

151. See notes 89-93 *supra*.

152. In general, statutory presumptions establish the existence of a presumed fact, an element of the offense, by proof of a basic fact. McCormick, *supra* note 4, §346; Note, *supra* note 86, at 170. The constitutional limitations placed upon the use of presumptions in criminal statutes require the presence of a rational connection between the basic fact and the presumed fact. Tot v. United States, 319 U.S. 463 (1943). *See also* Leary v. United States, 395 U.S. 6, 36 (1969) (where the Court explained that a rational connection exists only if once the basic fact has been proved it is more likely than not that the presumed fact exists).

Affirmative defenses permit a defendant to exonerate himself, or at least mitigate his punishment, by showing the existence of collateral facts which justify or excuse the commission of the crime. Because affirmative defenses concern facts collateral to the definition of the crime, no rational connection between the elements of the offense and the absence of the affirmative defense need exist. McCormick, *supra* note 4, §346. *Compare* Ashford & Risinger, *supra* note 5 (rational connection test should be applied to affirmative defenses) *with* Christie & Pye, *supra* note 25 (rational connection test inappropriate for testing affirmative defenses). Requiring such a connection might discourage legislatures from including the affirmative defense within the statute. *See* 432 U.S. at 213, where the Court suggests that states may not be forced to choose between proving or excluding the affirmative defense. See also note 5 *supra*.

153. "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 of the elements included in the definition of the offense of which the defendant is charged." 432 U.S. at 210.

refusing to analyze the constitutionally required substance of the offense. The danger of such reverence for state legislative and judicial authority would be the possibility of invasion of the defendant's due process interests of liberty and freedom from stigmatization. Such a danger would exist because states could conceivably define a criminal act to consist of minimal facts, thereby reducing significantly the force and effect of the reasonable doubt standard.[154]

Exemplary of the analysis encouraged by adherence to an elements theory is the recent federal court decision in *United States ex. rel. Kirchner v. Johnstone*.[155] Defendants there were tried and convicted on a charge of possession of marijuana with intent to deliver, in violation of a Pennsylvania statute which prohibited "manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance" by a person not registered under the statute nor licensed as a practitioner by the state.[156] The statute further required that a defendant prove the applicability of any exception or exemption that he claimed.[157] In seeking habeas corpus relief[158] the defendants alleged that the state had not proved an essential element of the offense: that the defendants were neither registered, nor licensed as practitioners.[159]

On review, the federal court understood the sole issue to be whether non-registration constituted an essential element of the offense.[160] This determina-

At least one commentator has suggested that the *Patterson* Court qualified this comment by indicating that the state must prove "some but not all affirmative defenses." Allen, *supra* note 31, at 49. This author suggests that the Court has posited a proportionality test to be applied in assessing criminal statutes. Such a test would direct a court to determine whether the punishment prescribed would be justified under an eighth amendment analysis of the facts proved beyond a reasonable doubt by the prosecution. Where the court finds the maximum punisment proportional to the state's burden of proof, the presence of additional mitigating factors in the form of affirmative defenses on which the defendant bears the persuasion burden does not violate due process. Thus, the defendant's liberty and reputation interests are afforded adequate protection. *Id.* Other authors have suggested, however, that an elements analysis has been presented by the *Patterson* decision and that courts need only consult the statutory formula to determine the prosecution's burden. *See* Henderson & Klafter, *Criminal Procedure*, [1978] ANN. SURVEY AM. L. 17, 34.

154. *See* Comment, Patterson v. New York: *Defendant Must Carry Burden of Proof in Affirmative Defense*, 3 NAT. J. CRIM. DEF. 289, 301 (1977). The *Patterson* Court did suggest there were some constitutional limits beyond which states may not go in exercising authority to define the substance of a crime. "[I]t is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime. . . . The legislature cannot 'validly command that the finding of an indictment or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt.'" 432 U.S. at 210, citing McFarland v. American Sugar Refining Co., 241 U.S. 79, 86 (1916). In addition, the Court noted that while states had always had the power to create affirmative defenses and redefine crimes, no trend of saddling defendants with substantial persuasion burdens formerly imposed upon the state had been evidenced in the past. *Id.* at 211 n.12.

155. 454 F. Supp. 14 (E.D. Pa. 1978).

156. 35 PA. CONS. STAT. §780-113 (1978).

157. *Id.* §780-121.

158. Both petitioners filed for writs of habeas corpus pursuant to 28 U.S.C. §2254 (1978). 454 F. Supp. at 15 (1978).

159. *Id.*

160. The court acknowledged that if non-registration were found to be an essential element, the *Winship* and *Patterson* decisions would require the state to bear the persuasion burden on that issue. *Id.*

tion, the court opined, merely involved discerning what facts the state courts had deemed essential to a determination of guilt. Rather than analyzing the nature of the crime and deciding which facts, if proved, would warrant imposition of the statutorily prescribed punishment, the court adopted the construction of the statute offered by the state judiciary.[161] While recognition of the state's power to interpret its criminal statutes is unobjectionable in itself, refusal to do more than determine the elements deemed essential by the state increases the possibility of undermining the defendant's due process interests. Such reluctance to intrude on the powers of the state legislature and courts leaves those powers unchecked.[162] Although state assignments of the burdens of persuasion deserve a presumption of good faith, an elements analysis may leave a defendant without recourse when the state has encroached on his due process interests.[163]

In both emphasizing the importance of assessing legislative intent in determining the elements of an offense,[164] and recognizing the authority of state courts in interpretating state laws,[165] the elements approach poses a second due process problem. This problem occurs where a state legislature has prescribed the elements essential to conviction, but a judicial practice allocates the burdens of persuasion in a manner inconsistent with the legislative definition. For example, while *Patterson* seems to require consistency between the statutory definition and the burden assigned each party,[166] the Fifth Circuit Court of Appeals in *Grace v. Hopper*[167] has stated that a state court designation of essential elements may supersede the legislative formula.

In *Grace,* a defendant who had been convicted of murder attacked the constitutionality of a jury instruction[168] requiring that he establish his insanity defense.[169] Arguing that this practice relieved the state of the duty to prove the

161. *Id.*

162. Fear that unrestrained authority to define crime may adversely affect defendants has been justified in light of several recent opinions purporting to interpret *Patterson.* For example, in Graham v. Maryland, 454 F. Supp. 643, 650 (D. Md. 1978), the court suggested *Patterson* had held that a state legislature may have unlimited authority to "redefine its criminal statutes in such a manner that certain aspects of proof are characterized as affirmative defenses, the burden of proof of which is placed upon the criminal defendant." *See also* Farrell v. Cyarnetzky, 566 F.2d 381 (2d Cir. 1977), *cert. denied,* 98 S. Ct. 1268 (1978) (states may burden defendants with proving, by a preponderance, a matter not defined by the legislature as a necessary ingredient); State v. Starkey, 244 S.E.2d 219 (W. Va. S.Ct. 1978) (*Patterson* permits state to statutorily create affirmative defenses and requires the defendant to prove them by a preponderance of the evidence).

163. It is inappropriate, however, "to limit the scope of judicial review because of the expectation — however reasonable — that legislative bodies will exert appropriate restraint." Patterson v. New York, 432 U.S. 197, 224 n.8 (1977).

164. See notes 148-149 *supra* and accompanying text.

165. See note 37 *supra.*

166. See note 175 *infra.*

167. 566 F.2d 507 (5th Cir. 1978).

168. While most courts have interpreted *Patterson* as applicable to both statutes and jury instructions, there is some sentiment that the due process analysis outlined there should be employed only to measure the constitutionality of statutes. *See* Wright v. Smith, 569 F.2d 1188, 1189 (2d Cir. 1978).

169. The instruction read: "When in a criminal trial the defendant sets up as a defense

element of intent, the defendant pointed to the requirement of specific intent in the statute,[170] to Georgia case law indicating an insane person did not possess the requisite intent under the statute,[171] and to the statute's failure to designate insanity a true affirmative defense.[172] The court of appeals termed the failure to label insanity an affirmative defense insignificant and found the Georgia practice constitutional under *Rivera* and *Patterson*.[173]

Alternatively, the court suggested that even if the statute did make sanity part of the intent element, the Georgia courts had recognized a presumption of sanity which in effect removed sanity from the prosecution's case.[174] This reasoning implies the power of state courts to redefine the facts essential to conviction. However, such judicial authority seems irreconcilable with *Patterson*, which interpreted the flaw in *Mullaney* to be the inconsistency between the legislative definition of murder and the judicially assigned persuasion burdens, despite state court decisions purporting to eliminate the inconsistency. *Grace* indicates that an elements analysis requires only a determination of the facts the state courts deem essential to conviction. *Patterson* suggests, however, that a proper elements analysis also demands an examination of those elements the legislature has specified as warranting imposition of the prescribed punishment. To allow conviction on proof of less than those elements deemed essential by the legislature would relieve the prosecution of the duty to prove all elements of the offense beyond a reasonable doubt. The implication of an elements analysis, which terminates examination of a state court's burden of proof allocation, is less protection for the defendant's due process interests. Federal courts would not assess whether each element of the statutory definition had been proved, but instead would be limited to deciding whether the prosecution had proved beyond a reasonable doubt those elements the state court deems essential under the statute.

The Two-Tiered Approach

Patterson might also be read to require a two step analysis. A court would first determine which facts the state had labelled elements of the prosecution's case, and which matters had been deemed affirmative defenses. This initial examination essentially involves an elements analysis. The second level of analysis demands the determination of whether proof of the affirmative defense requires that the defendant negate any element or definitional ingredient of

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that he was insane, the burden is upon him to establish this defense, not beyond a reasonable doubt, but to the reasonable satisfaction of the jury." 566 F.2d at 508 n.1.

170. GA. CODE ANN. §26-1101(a) (1978) (murder).

171. 566 F.2d at 510 n.3 (citing Long v. State, 38 Ga. 491 (1868)); Handspike v. State, 203 Ga. 115, 45 S.E.2d 662 (1947).

172. 566 F.2d at 509. The defendant attempted to distinguish *Rivera* and *Leland*, claiming that in those cases state law specifically designated insanity an affirmative defense and burdened the defendant with the duty to persuade the factfinder. *But see* note 138 *supra*, suggesting *Leland* did not involve an affirmative defense.

173. 566 F.2d at 510.

174. *Id.* at 510 n.6.

the offense.[175] A finding that the statute forces the defendant to negate either of these would render it violative of due process as explicated in *Patterson.*

Such analysis, while recognizing the state's authority to define crime, nevertheless allows federal judicial intervention where a state in practice allocates burdens inconsistent with the statutory scheme. Thus federal courts may protect the due process rights of defendants by ensuring that the state prove all matters declared relevant to guilt by the statute, regardless of which matters the state's courts have construed to be essential elements of the crime.

Adopting this two-tiered approach, the federal district court in *Cole v. Stevenson*[176] granted habeas corpus relief to a defendant who challenged his second degree murder conviction on the ground that the trial court had improperly required that he prove self defense.[177] Second degree murder under North Carolina law included the essential elements of unlawfulness and malice.[178] In practice, however, courts had acknowledged the existence of a presumption of unlawfulness upon proof by the prosecution that the defendant had intentionally inflicted a wound with a deadly weapon.[179] The *Cole* court found that this presumption, coupled with the requirement that the defendant "satisfy the jury that he had acted in self defense," effectively relieved the state of the burden to prove beyond a reasonable doubt an essential element of the offense, unlawfulness.[180]

The flaw inherent in North Carolina's practice was the inconsistency in establishing an element of the offense and then requiring the defendant to prove an affirmative defense which constituted absence of the element.[181] The

175. Distinguishing the Maine statute in *Mullaney, Patterson* noted that the statute defined murder in terms of malice, employed a presumption of malice, and then required the defendant to persuade the jury of the absence of malice. Although recognizing that Maine's courts had expressly ruled that malice was not an element of the offense, the *Patterson* majority nevertheless found the scheme violative of due process, because "malice, in the sense of absence of provocation, was part of the definition of that crime." 432 U.S. at 216. Thus, *Patterson* may stand for the proposition that requiring the defendant to negate not only elements, but also facts which define the offense and thus "are so important [they] must be either proved or presumed," renders any state practice violative of due process. 432 U.S. at 215. *Accord,* State v. Dault, 19 Wash. App. 709, 712, 578 P.2d 43, 46 (1978).

176. 447 F. Supp. 1268 (E.D.N.C. 1978).

177. Defendant Cole pleaded not guilty to a murder charge, was convicted of second degree murder by the jury, and was sentenced to 20 to 30 years imprisonment. In addition to challenging the self-defense instruction, Cole asserted that burdening him with proof of absence of malice similarly violated due process.

178. N.C. GEN. STAT. §14-17 (1977). The North Carolina state courts had specified that second degree murder consisted of the essential elements of malice and unlawfulness. *See, e.g.,* State v. Drake, 8 N.C. App. 214, 219, 174 S.E.2d 132, 135 (1970).

179. *See, e.g.,* State v. Bush, 289 N.C. 159, 221 S.E.2d 333, *vacated,* 429 U.S. 809 (1976).

180. "By employing the presumption of unlawfulness, the state does far more than 'create an inference that procedurally shifts the burden of going forward with proof' . . .; instead, the accused must prove by a 'preponderance' that he acted in self-defense. The state, therefore, does not bear the burden to first prove unlawfulness but can merely rest upon the presumption." 447 F. Supp. at 1277, quoting State v. Hankerson, 288 N.C. 632, 647-48, 220 S.E.2d 575, 586 (1977).

181. Other courts have subscribed to a similar analysis. In U.T. Inc. v. Brown, slip opinion No. C-C-77-282 (W.D.N.C. Aug. 3, 1978), the court, in examining a city ordinance noted that although certain matters had been denominated affirmative defenses, because these particular

Cole court thus worked no alteration of North Carolina law. Rather, the court merely sought to protect the defendant's due process rights by insuring that the prosecution prove beyond a reasonable doubt each fact the establishment of which, under the state formulated statutory scheme, warranted infringement upon those interests.[182]

A similar line of reasoning prompted a federal district court in *Wallace v. McKenzie*[183] to set aside a conviction under a West Virginia murder statute which provided that any willful, deliberate and premeditated killing constituted murder in the first degree.[184] West Virginia courts had created, by jury instruction, a presumption of willfulness, deliberation and premeditation upon proof beyond a reasonable doubt that the defendant had killed the decedent.[185] Ruling this practice constitutionally infirm in view of *Mullaney* and *Patterson*, the *Wallace* court reasoned that the presumption relieved the prosecution of the persuasion burden on issues which had been statutorily included in the state's case,[186] thereby allowing conviction without proof beyond a reasonable doubt of all facts relevant to a determination of guilt.[187]

Although *Cole* and *Wallace* suggest a greater concern for the defendant's due process interests,[188] the analysis employed may nevertheless have an adverse effect on those interests by discouraging legislative innovation in drafting criminal law. If state legislators find that statutory inclusion of a new mitigating factor may render the scheme invalid because the new defense negates some element of the offense, they may be hesitant to attempt revision. Because strict adherence to the two-tiered analysis may forestall innovation beneficial to criminal defendants, creation of an exception which allows allocating the burden of persuasion to defendants on new ameliorative defenses may be warranted. This exception would allow a slight inconsistency between an affirmative defense and an element of the crime where the defense permits the

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affirmative defenses went beyond mitigating the offense and negated an essential element, the prosecution must bear the burden of proof.

182. The Federal District Court for the Western District of North Carolina has also considered this presumption of malice and found it violative of *Mullaney* and *Patterson*. Mills v. Shepherd, 445 F. Supp. 1231, 1237 (W.D.N.C. 1978).

183. 449 F. Supp. 802 (S.D.W.Va. 1978).

184. W. VA. CODE §61-2-1 (1977).

185. 449 F. Supp. at 804.

186. *Id.* at 805.

187. The *Wallace* court went on to consider the remaining instructions given the jury, and determined that these additional instructions were general and failed to cure the shifting of burdens accomplished by the self defense instruction. *Id.* at 806-07. On several occasions courts have found instructions accomplished an improper shifting or assignment of burdens, and yet have failed to reverse since the overall emphasis upon the state's burden of proving guilt beyond a reasonable doubt cured the error. *See* Warlitner v. Weatherholtz, 447 F. Supp. 82, 87 (W.D.Va. 1977) (instruction that defendant must raise reasonable doubt as to existence of malice violates due process, but state's burden of proving every element effectively conveyed by overall charge).

188. Several other courts have expressed the opinion that there must be consistency between the statutorily prescribed elements and the burdens assigned the prosecution at trial. *See, e.g.*, Hughes v. Mathews, 576 F.2d 1250 (7th Cir. 1978); Tucker v. Wolff, 581 F.2d 235 (9th Cir. 1978).

defendant to mitigate the seriousness of his offense.[189] For example, an armed robber in New York may reduce his punishment by showing that the firearm used in the crime was not a loaded weapon capable of producing serious bodily harm or death.[190] While the statute creates a presumption that the weapon can inflict such damage,[191] this affirmative defense, an innovation in the criminal law beneficial to the defendant, should not be invalidated because it requires the defendant to carry the persuasion burden.[192] Because the defense has no historical significance,[193] no actual shifting of burdens has occurred. Because of its benefit to the defendant, this additional burden often may be warranted.

Minimum Substantive Elements Approach

The defendant's interests of liberty and freedom from stigma receive significant protection when a court employs a two-tiered analysis, assessing both the statutory formula and the relationship between the designated elements and affirmative defenses. At the same time, a state's power to define criminal behavior remains essentially free of restraint, subject only to the requirement that the allocation of persuasion burdens be consistent with the statutory formulation. While this arrangement may appear a fair compromise between state and federal interests, state legislatures retain an unrestricted authority to determine the substantive content of each crime as well as the relative burdens imposed upon the prosecution and the defendant. Unless a federal court has the power to measure state statutes against some minimum substantive criteria, the authority to oversee the allocation of persuasion burdens may actually provide insignificant due process protection, because the legislature may draw a statute narrowly to allow a finding of guilt on proof of a few basic elements.

Presumably, the Constitution limits the state's power to define crime. The *Patterson* court acknowledged as much[194] but failed to provide a rational framework for determining where those limits should be drawn.[195] At least one lower federal court has attempted to fill that void, however, by suggesting that the constitutionally required minimum elements may be established by an assess-

189. Perhaps the *Patterson* Court recognized the value of new ameliorative defenses and therefore felt it "relevant" to note that extreme emotional disturbance was a modern version of heat of passion. 432 U.S. at 202. The *Patterson* Court was at least cognizant of the arguments regarding the adverse effect on legislation favorable to the defendant, whether it intended an exception or not. *Id.* at 214 n.15.

190. N.Y. PENAL LAW (Consol.) §160.15 (1977).

191. Farrell v. Czarnetzky, 566 F.2d 381, 383 (2d Cir. 1977) (Oakes, J., concurring), *cert. denied*, 434 U.S. 1077 (1978). The potential to cause physical harm is in this sense an element of the offense, and to require that the defendant rebut this issue would violate *Patterson*.

192. Patterson v. New York, 432 U. S. 197, 229 nn.14 & 15 (Powell, J., dissenting); State v. Steward, 573 P.2d 1138 (Mont. S. Ct. 1977) (*Patterson* ruled that where a fact neither by tradition nor by statute is a necessary element of the offense, a defendant may be assigned the persuasion burden).

193. See the extensive historical section in *Winship*, *Mullaney* and *Patterson*, where the Court assessed the traditional importance of each defense involved. See notes 28, 72 & 73 *supra* and accompanying text.

194. 432 U.S. at 210. See note 164 *supra*.

195. The lone limitation which the *Patterson* Court specified was that an intent element must be proved. See the Court's discussion of *Leland* and *Rivera* at 432 U.S. at 206.

ment of the nature of the offense charged and its relation to the defense asserted.

In *Rodgers v. Redman*,[196] the defendant was convicted of robbery, attempted rape, and assault.[197] On appeal, he alleged that a jury instruction imposing upon him the burden of proving his defense of alibi by a preponderance of evidence violated due process of law. Acknowledging that *Patterson* and its predecessors imposed upon the prosecution the burden of proving each essential element of the crime beyond a reasonable doubt, the *Rodgers* court analyzed the nature of each of the crimes charged. The court suggested that commission of each crime necessarily required the defendant's presence, and therefore that presence constituted an essential element. Because alibi denies presence, the court reasoned, burdening the defendant with proof of alibi would be fundamentally inconsistent with the reasonable doubt standard espoused in *Winship* and would thus be constitutionally impermissible.[198]

The substantive analysis employed in *Rodgers* offers the greatest protection for the defendant's due process interests of any of the three suggested interpretations of *Patterson*. A federal court utilizing the method of analysis suggested in *Rodgers* would not be limited to assessing whether the state had allocated the persuasion burden consistent with the legislatively or judicially prescribed elements. Rather, the federal court could legitimately determine whether the state had met due process requirements in drafting criminal statutes.[199]

CONCLUSION

Patterson v. New York was an opportunity for the Supreme Court to resolve

196. Slip opinion no. 78-69 (D. Del. Sept. 1978).

197. *Id.*

198. *Id.* at 932. While the court did not dispute the state's authority to burden the defendant with proof of an affirmative defense, it did suggest that the power to designate a fact as an affirmative defense was controlled by the nature of that fact in relation to the crime. Only matters which justify or excuse the admitted act could be deemed affirmative defenses. A defense which denies the existence of an element of the crime may not be designated affirmative.

199. This substantive analysis has been favorably referred to by several other courts. *See* Porter v. Leeke, 457 F. Supp. 253 (D.S.C. 1978) (self-defense may negate unlawfulness); Reeves v. Reed, 452 F. Supp. 783 (W.D.N.C. 1978) (unlawfulness an element of voluntary manslaughter so instruction on implied unlawfulness violates due process); State v. Rice, 379 A.2d 140 (Me. 1977) (intoxication negates intent of any kind so state must prove absence of involuntary intoxication).

The Sixth Circuit Court of Appeals has also employed a method of analysis seemingly in line with the substantive approach in assessing the allocation of the burdens of persuasion. In United States v. Jackson, No. 78-5043 (6th Cir. Dec. 5, 1978), defendant had been convicted of assaulting federal officers while engaged in their official duties, in violation of 18 U.S.C. §111 (1970). At trial, the federal district court instructed the jury that the defendant had the burden of proof on his affirmative defense of temporary insanity. In reversing on the grounds that the instruction constituted plain error, the court of appeals commented that because the defense of temporary insanity negates criminal intent, which is an essential element of the crime, the burden of proof is necessarily on the prosecution. *Id.* Since intent did not constitute a statutory element, the court has in effect held that the state's burden of proof extends beyond those definitional elements to substantive elements which, though unspecified by statute, are essential to the crime.

the uncertainty generated by the *Mullaney* decision's extension of *Winship's* reasonable doubt standard to matters collateral to the guilt determination in criminal actions. Rather than enunciate a clear rule for applying the reasonable doubt standard, however, the Court attempted to distinguish *Mullaney* by contrasting Maine's utilization of a presumption to allocate a persuasion burden to the defendant with New York's allocation of the same burden by employing an affirmative defense. Unfortunately, justifying the assignment of burdens to the defendant on the basis of the form employed by the statutory scheme provides no useful guidance in properly balancing the federal interest in protecting the defendant's due process rights with the state's interest in defining and controlling criminal behavior. Thus, *Patterson* leaves the tension between these interests unresolved and forces lower courts to determine on a case-by-case basis the weight to be accorded to each.

The danger inherent in a case-by-case analysis of federal and state interests lies in the possibility that as lower courts struggle to interpret *Patterson's* mandate, the criminal defendant's fundamental right to have guilt proved beyond a reasonable doubt may be compromised. A lower court opting for an elements test will examine the statute only to determine which facts the state requires the prosecution to prove beyond a reasonable doubt. This interpretation of *Patterson* favors exclusively the state's interest in defining criminal behavior. In contrast, although interpreting *Patterson* to require an assessment of the minimum substantive elements emphasizes the federal interest in protecting the defendant's due process rights, such an interpretation may result in excessive federal intrusion into state lawmaking. Consequently, it seems likely that most courts will adhere to a compromise, the two-tiered approach, thereby reading *Patterson* to prescribe an analysis of how the state statute allocates the persuasion burdens, and of whether state courts assign those burdens in a manner consistent with the statute.

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