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**THE RESTORATION OF *IN RE WINSHIP*: A
COMMENT ON BURDENS OF PERSUASION
IN CRIMINAL CASES AFTER
*PATTERSON v. NEW YORK***

*Ronald J. Allen**

I. FROM *Winship* TO *Patterson*

At the conclusion of its last term, the Supreme Court rendered what should have been a most unremarkable decision. In *Patterson v. New York*,¹ the Court upheld New York's affirmative defense of extreme emotional disturbance,² which requires a defendant who seeks to reduce his offense from murder to manslaughter to prove by a preponderance of the evidence that he acted under extreme emotional disturbance.³ Had the case come before the Court seven years earlier, it could have been swiftly dispatched with a brief opinion upholding the New York statute on the grounds that the issue of extreme emotional disturbance does not arise until the state proves beyond a reasonable doubt the "essential elements" of the crime—intent and causation⁴—and that "extreme emotional disturbance" is but a slightly modified version of the defense of provocation, for which many states had long placed the burden of proof upon the defendant.⁵

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1. 432 U.S. 197 (1977).

2. N.Y. PENAL LAW § 125.15(1)(a) (McKinney 1975). In New York, when an "affirmative defense" is raised at trial, the defendant has the burden of establishing it by a preponderance of the evidence. N.Y. PENAL LAW § 25.00(2) (McKinney 1975).

3. In this Article, the phrase "affirmative defense" refers to a fact for which the defendant bears the burden of persuasion and that, if proved, reduces the severity of an offense. Similarly, the phrase "burden of proof" and its derivatives will refer solely to the burden of persuasion. For the distinction between the burden of persuasion and the burden of production, see MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 336 (2d ed. E. Cleary 1972).

4. N.Y. PENAL LAW § 125.25(1) (McKinney 1975).

5. See *Rhay v. Browder*, 342 F.2d 345, 349 (1965) ("We know of no case that holds that a defendant is deprived of due process by a rule . . . that shifts to a defendant either the burden of going forward or the burden of proof as to an issue brought into the case as an element of the defense when the state has made out a *prima facie* case.").

New York adopted its affirmative defense of extreme emotional disturbance from

Unfortunately, two intervening Supreme Court opinions precluded such summary treatment and made what should have been a most unremarkable decision quite remarkable indeed. The first is Justice Brennan's opinion for the Court in *In re Winship*,⁶ which held that adjudications of juvenile delinquency must employ the reasonable doubt standard. Justice Brennan could have reached this result without disturbing the conventional understanding of affirmative defenses. Instead, he provided the impetus for the Court's foray into this area by enthusiastically embracing at the conclusion of the first part of his opinion the reasonable doubt standard as a constitutional requirement: "Lest there remain any doubt," Justice Brennan wrote, "we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."⁷

Clearly, this assertion did not express the holding of *Winship*, at least not according to any traditional meaning of "holding."⁸ Indeed, *Winship* was largely viewed as confirming the existing state of affairs⁹—a state of affairs in which every jurisdiction employed the reasonable doubt standard in criminal adjudications, with only those exceptions explicitly provided for by statute or the common law.¹⁰ Yet that understanding of *Winship* was seemingly disap-

the MODEL PENAL CODE § 201.3(b). The Code drafters conceived of extreme emotional disturbance as broader than the traditional concept of provocation. MODEL PENAL CODE § 201.3(b), Comment 1 (Tent. Draft No. 9, 1959). The Code, however, does not put the burden of persuasion on the defendant.

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

7. 397 U.S. at 364. Earlier in the opinion, 397 U.S. at 363, Brennan quoted a similar assertion from *Davis v. United States*, 160 U.S. 469, 493 (1895): "No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them . . . is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged." Later courts, however, interpreted *Davis* as not establishing a constitutional rule. See note 36 *infra*.

8. *Winship* did not present the question whether "every fact necessary to constitute the crime" need be proven beyond reasonable doubt, and resolution of this issue was not essential to the Court's decision. The case raised the question whether a "conviction" could be obtained upon proof only by a preponderance of the evidence. See 397 U.S. at 359. *Winship* and the distinction between these two questions are discussed in section II *infra*.

I am assuming that Justice Brennan's statement did not mean to endorse the "elements test." See text at notes 70-74 *infra*.

9. See Allen, *Mullaney v. Wilbur, the Supreme Court, and the Substantive Criminal Law—An Examination of the Limits of Legitimate Intervention*, 55 TEXAS L. REV. 269, 270 n.10 (1977).

10. Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U.L. REV. 507, 519-27 (1975). See also Fletcher, *Two Kinds of Legal*

proved in *Mullaney v. Wilbur*,¹¹ the second case that preceded the surprising decision in *Patterson*.

In *Mullaney*, the Court, speaking through Justice Powell, invoked *Winship* to strike down Maine's affirmative defense of provocation¹² on the ground that requiring the defendant to prove provocation by a preponderance of the evidence violated *Winship*'s requirement that the state prove beyond a reasonable doubt "every fact necessary to constitute the crime." Since Maine had chosen to distinguish murder from manslaughter on the basis of provocation, said Justice Powell, absence of provocation is a necessary element of murder, and, consequently, the state must prove it beyond reasonable doubt once the issue is properly raised.¹³

The most striking aspect of Justice Powell's opinion in *Mullaney* was its rejection of Maine's statutory classifications, a rejection all the more remarkable since it involved a traditional affirmative defense. By looking beyond the "form" of a statutory scheme and concentrating on its "substance" to determine what facts constituted the crime,¹⁴ Justice Powell's opinion seemed to provide the lower federal courts with yet another portal for intervening into areas generally thought to be the primary concern of the states. To make matters worse, Justice Powell provided no easily recognizable limits to this newly discovered power to meddle with the burden of proof in state criminal cases, for although the holding of the case was clear enough

Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases, 77 YALE L.J. 880 (1968).

11. 421 U.S. 684 (1975). The history of the *Mullaney* litigation is detailed in Comment, *The Constitutionality of the Common Law Presumption of Malice in Maine*, 54 B.U.L. REV. 973 (1974).

12. Maine courts have not referred to provocation as an affirmative defense, but there is little doubt about its nature. See text at notes 94-100 *infra*.

In *Mullaney*, the defendant Wilbur claimed to have been provoked by the victim's homosexual advance upon him. 421 U.S. at 685.

13. 421 U.S. at 703-04. The penultimate sentence in the Court's opinion intimates that the state may require the defendant to raise the issue of provocation. 421 U.S. at 704.

14. 421 U.S. at 698-99. Reference to Maine's statutory treatment of homicide or provocation refers to the Maine statutes as interpreted by the Maine courts. The defendant in *Mullaney* was convicted under ME. REV. STAT. tit. 17, § 2651 (1965), which provided: "Whoever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life." The manslaughter statute, ME. REV. STAT. tit. 17, § 2551 (1965), read in relevant part: "Whoever unlawfully kills a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought . . . shall be punished by a fine of not more than \$1,000 or by imprisonment for not more than 20 years . . ."

The Maine cases construing these statutes are discussed in Comment, *Due Process and Supremacy as Foundations for the Adequacy Rule: The Remains of Federalism After Wilbur v. Mullaney*, 26 ME. L. REV. 37 (1974).

—"the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case"¹⁵—just how Justice Powell reached that conclusion was not.¹⁶

At first blush Justice Powell's theory does seem clear enough: placing the burden of proof of an affirmative defense on the defendant undermines the interests protected by *Winship*'s requirement of proof of guilt beyond reasonable doubt.¹⁷ But Justice Powell failed to explain why *Winship* is not satisfied if the prosecution proves beyond reasonable doubt the factual issues raised by the relevant statute or case law where these facts alone sustain a conviction for the more serious offense. He failed, in short, to construct a bridge from the interests noted in *Winship* to the issue presented by *Mullaney*. Similarly, the significance of his brief overview of the history of provocation in the law of homicide is elusive.¹⁸ One can read this portion of the opinion, as he later did read it in his dissenting opinion in *Patterson*, as an effort to qualify the *Winship* rule by limiting it to those factors that historically have "made a substantial difference in punishment of the offender and in the stigma associated with the conviction."¹⁹ Yet, just why history is so crucial to the constitutionality of an affirmative defense is left unsaid.²⁰

15. 421 U.S. at 704.

16. For example, compare Allen, *supra* note 9, with Tushnet, *Constitutional Limitation of Substantive Criminal Law: An Examination of the Meaning of Mullaney v. Wilbur*, 55 B.U.L. REV. 775 (1975), and Comment, *Unburdening the Criminal Defendant: Mullaney v. Wilbur and the Reasonable Doubt Standard*, 11 HARV. C.R.-C.L.L. REV. 390 (1976).

17. 421 U.S. at 698.

18. Justice Powell asserted that "[o]ur analysis may be illuminated if this issue [whether the Maine rule requiring the defendant to prove that he was provoked accords with due process] is placed in historical context." 421 U.S. at 692. According to Justice Powell, review of the treatment of provocation in the law of homicide "establishes two important points":

First, . . . the presence or absence of the heat of passion on sudden provocation . . . has been, almost from the inception of the common law of homicide, the single most important factor in determining the degree of culpability attaching to an unlawful homicide. And, second, the clear trend has been toward requiring the prosecution to bear the ultimate burden of proving this fact. 421 U.S. at 696. Yet, Justice Powell does not return to this review later in the opinion.

19. 432 U.S. at 226.

20. Justice Powell's position—set forth clearly in his dissenting opinion in *Patterson*, see 432 U.S. at 216-32—that states should be required to prove beyond reasonable doubt only those factors that make, and have historically made, a significant difference in punishment and stigma is difficult to justify. Even if his first proposition is accepted, what is there that makes historical analysis—his second proposition—assume such importance? If a state could constitutionally disregard a factor that long has made "a substantial difference in punishment and stigma," as he apparently assumes it could, then why is the middle ground—shifting the burden—im-

Notwithstanding Justice Powell's belated attempt in his dissent in *Patterson* to remedy some of the inadequacies of his opinion in *Mullaney*, the earlier case had clearly appeared to herald the end of affirmative defenses in the criminal law. For all its ambiguous reasoning, *Mullaney* did suggest that the basic constitutional defect of Maine's statutory scheme was that it drew a distinction between murder and manslaughter "while refusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turns."²¹ And if *Mullaney* rested on the principle that the state may not distinguish between offenses without requiring the prosecution to "establish beyond a reasonable doubt the fact upon which [the distinction] turns," then it is difficult to see how any affirmative defense could survive *Mullaney*. If the defendant could not be required to "establish" the "distinction" between murder and manslaughter, how could the state require him, for example, to establish the equally important distinction between an act done with or without justification,²² or the distinction between armed robbery with or without a loaded gun,²³ or the distinction between an act done while legally sane or insane?²⁴

permissible? Moreover, why does the Constitution, as Justice Powell suggested, distinguish between factors substantially affecting punishment of ancient and recent origin? Why is a defendant treated unfairly if a state provides for the affirmative defense of provocation, which may significantly mitigate punishment, but is treated fairly if a state provides for the affirmative defense of ignorance of fact to a rape prosecution, *see, e.g.*, N.Y. PENAL LAW §§ 130.10, .35 (McKinney 1975); WASH. REV. CODE ANN. § 9.79.160(2) (1977), that may have just as great an impact? Justice Powell provided no answers to these questions.

In fact, I have barely scratched the surface of the problems found in Justice Powell's dissenting opinion in *Patterson*. One could reasonably inquire, for example, why the dissenters would rely on history to determine those factors that are within their analysis but not look to history to see where the burden of proof for those factors has traditionally been placed. One could also point out possible inconsistencies—such as the assertion that *Winship* and *Mullaney* involved only procedure and not substance, which is followed by the statement that those cases forbid a state "to mask substantive policy choices by shifts in the burden of persuasion." 432 U.S. at 228 n.13. One might also ask what difference it makes to the Supreme Court how a state makes those policy choices it is permitted to make, and what evidence Justice Powell can marshal to support his unadorned assertion that "[t]he political check on potentially harsh legislative action is . . . more likely to operate" if his view is embraced. 432 U.S. at 228 n.13. Finally, one might decry the willingness to misread cases in order to support the argument. *See* the discussion of *United States v. Romano*, 382 U.S. 136 (1965), in 432 U.S. at 228 n.13 (Powell, J., dissenting).

21. 421 U.S. at 698.

22. *See, e.g.*, N.Y. PENAL LAW § 40.00(1) (McKinney 1975).

23. *See, e.g.*, N.Y. PENAL LAW § 160.15 (McKinney 1975), *upheld in* *People v. Felder*, 39 App. Div. 2d 373, 334 N.Y.S.2d 992 (1972), *affd.*, 32 N.Y.2d 747, 297 N.E.2d 522, 344 N.Y.S.2d 643, *appeal dismissed*, 414 U.S. 948 (1973).

24. *See, e.g.*, DEL. CODE tit. 11, §§ 304, 401 (1975), *upheld in* *Rivera v. State*, — Del. —, 351 A.2d 561, *appeal dismissed*, 429 U.S. 877 (1976).

The wide-ranging potential of *Mullaney's* reading of *Winship* was quickly seen by commentators²⁵ and courts.²⁶ The commentators generally had difficulty seeing how *Mullaney* could, or why it should, be contained,²⁷ and the courts, although commendably more cautious in their applications of *Mullaney* to the specific facts before them, began to invalidate various allocations of burdens of persuasion to defendants.²⁸ The stage seemed set, in short, for the eventual elimination of affirmative defenses from the criminal law.²⁹ But then came *Patterson v. New York*.³⁰

Patterson involved the constitutionality of New York's homicide scheme, which is functionally equivalent to the Maine provisions at issue in *Mullaney*.³¹ In light of the decisions in *Mullaney* and, to

25. *Mullaney* quickly generated an extensive commentary. In addition to the works already cited in notes 9, 11, 14 & 16 *supra*, see Osenbaugh, *The Constitutionality of Affirmative Defenses to Criminal Charges*, 29 ARK. L. REV. 429 (1976); Comment, *Constitutionality of Affirmative Defenses in the Texas Penal Code*, 28 BAYLOR L. REV. 120 (1976); Comment, *The Burden of Proof and the Insanity Defense After Mullaney v. Wilbur*, 28 ME. L. REV. 435 (1977); Comment, *Affirmative Defenses in Ohio After Mullaney v. Wilbur*, 36 OHIO ST. L.J. 828 (1975); Note, *The New York Penal Law's Affirmative Defenses After Mullaney v. Wilbur*, 27 SYRACUSE L. REV. 834 (1976); Note, *State v. Evans—A Frontal Attack on the Common Law of Murder*, 6 U. BALT. L. REV. 95 (1976); Note, *Buzynski v. Oliver: Allocation of the Burden of Persuasion for the Insanity Defense*, 63 VA. L. REV. 147 (1977). See also Note, *The Constitutionality of Statutes Permitting Increased Sentences for Habitual or Dangerous Criminals*, 89 HARV. L. REV. 356 (1975), an excellent piece.

26. See, e.g., *Grace v. Hopper*, 425 F. Supp. 1355 (M.D. Ga. 1977); *State v. Roberts*, 88 Wash. 2d 337, 562 P.2d 1259 (1977); cases cited in Allen, *supra* note 9, at 275 n.13.

27. But see Allen, *supra* note 9; Tushnet, *supra* note 16.

28. For decisions invalidating affirmative defenses, see cases cited in note 26 *supra*. For examples of commendable caution, see *Buzynski v. Oliver*, 538 F.2d 6 (1st Cir.), cert. denied, 429 U.S. 984 (1976) (upholding affirmative defense of insanity); *Rodriguez v. Smith*, 428 F. Supp. 892 (S.D.N.Y. 1977) (upholding affirmative defense of renunciation of attempted crime). For two recent burden of persuasion cases written after *Patterson* that rest on statutory or common-law grounds, see *Batson v. State*, 568 P.2d 973 (Alaska 1977); *State v. Humphries*, 51 Ohio St. 2d 95, 364 N.E.2d 1354 (1977).

29. With the possible exception of insanity. See *Mullaney*, 421 U.S. at 704-06 (Rehnquist, J., concurring).

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

31. *Patterson* was convicted under N.Y. PENAL LAW § 125.25 (McKinney 1975), which provides in relevant part:

A person is guilty of murder in the second degree when:

1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:

(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse

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

A person is guilty of manslaughter in the first degree when:

2. With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not con-

a lesser extent, in *Winship*, *Patterson* should have been a simple per curiam reversal of the New York Court of Appeals' decision sustaining the statute. Instead, the Supreme Court upheld the New York statute, with Justice White writing an opinion for the majority that reads, for the most part, as though *Mullaney* had never occurred. To confuse matters further, when Justice White finally turned his attention to *Mullaney* he attempted to distinguish rather than overrule it, even though the earlier portions of his opinion point quite clearly in the opposite direction.³²

Thus, we are now in the rather interesting position of having two Supreme Court decisions written within two years of one another on functionally identical statutes, one striking down and the other upholding the statutory scheme. Needless to say, this creates some uncertainty as to what "the law" is in this area. In this Article I intend to analyze that uncertainty and provide a coherent theory that justifies as well as limits the federal interest in the reasonable doubt standard.³³ In support of this effort I will also examine *Patterson's* attempt to distinguish *Mullaney*, for I think that attempt may yield some insights into the Court's view of the relationship between affirmative defenses and presumptions in the criminal law.³⁴

II. THE FEDERAL INTEREST IN THE REASONABLE DOUBT STANDARD: THE "RESTORATION" OF *Winship*

In his dissent in *Patterson*, Justice Powell accused the Court of "drain[ing] *In re Winship* . . . of much of its vitality."³⁵ Justice Powell was wrong. *Patterson* did not "drain *Winship* of its vitality";

stitute murder because he acts under the influence of extreme emotional disturbance, as defined in paragraph (a) of subdivision one of section 125.25. The fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subdivision.

Patterson claimed to have been provoked upon seeing his estranged wife in a "state of semiundress" in the presence of the victim. 432 U.S. at 198.

The congruence between the Maine and New York statutes is noted in *Patterson*, 432 U.S. at 220, 227, and Osenbaugh, *supra* note 25, at 447-48.

32. See section III *infra*. The New York Court of Appeals' distinction between *Mullaney* and *Patterson* rested on a misunderstanding of Maine law. The New York court believed that Maine, unlike New York, did not require the state to prove intent. *People v. Patterson*, 39 N.Y.2d 288, 313, 347 N.E.2d 898, 907, 383 N.Y.S.2d 573, 582 (1976). See Allen, *supra* note 9, at 300 n.145.

33. See section II *infra*. I will not discuss burdens of proof of preliminary questions of fact. For such a discussion, see generally Saltzburg, *Standards of Proof and Preliminary Questions of Fact*, 27 STAN. L. REV. 271 (1975).

34. See section III *infra*.

35. 432 U.S. at 216.

rather, it rejected *Mullaney's* extension of *Winship* beyond the latter's legitimate boundaries, and thus it restored *Winship* to its original purpose. Careful examination of these three cases shows not only that *Patterson* rightly rejected the due process analysis employed in *Mullaney*, but also indicates the proper scope of the federal interest in the reasonable doubt standard.

Winship was the first Supreme Court decision to hold explicitly that the reasonable doubt standard possesses constitutional dimensions.³⁶ Since no state had ever allowed criminal conviction on less than proof beyond reasonable doubt,³⁷ with a qualified exception for affirmative defenses,³⁸ the Court had never been called upon to impose the reasonable doubt standard as a constitutional mandate.³⁹ Indeed, *Winship* itself was not a criminal case but a juvenile delinquency proceeding, and the Court's discussion of the role of the reasonable doubt standard in criminal cases was simply preliminary to its application of the ruling of *In re Gault*,⁴⁰ which provided that the states must observe in juvenile delinquency proceedings certain elements of due process associated with criminal trials. The Court concluded that the reasonable doubt standard was one of the procedures required in both settings, and thus New York's blanket use of a lesser standard of proof could not stand.⁴¹

The Court reached its conclusion in *Winship* concerning the due

36. On several occasions, the Court has expressed in dictum that the Constitution requires proof beyond a reasonable doubt in criminal cases. See cases cited in *Winship*, 397 U.S. at 362. The one case prior to *Winship* that might have been read as holding that the Constitution requires proof beyond a reasonable doubt is *Davis v. United States*, 160 U.S. 469 (1895), in which the Court stated that the prosecution in a criminal case must prove beyond a reasonable doubt that the defendant was sane when he committed the offense. *Davis* involved a federal prosecution, and the decision was generally regarded as applying only to federal criminal procedure. See, e.g., *People v. Allender*, 117 Cal. 81, 48 P. 1014 (1897). In *Leland v. Oregon*, 343 U.S. 790, 797 (1952), the Supreme Court peremptorily concluded that *Davis* "obviously establishes no constitutional doctrine, but only the rule to be followed in federal courts," and upheld the constitutionality of state statutes requiring the defendant to prove insanity beyond a reasonable doubt.

The Court in *Davis* cited no constitutional or statutory authority for its position, but did draw sustenance from the practice of seven states and the District of Columbia. 160 U.S. at 488-92. The Court appears to have reasoned that, as a matter of general principle, mental capacity is an element of murder, if not all criminal offenses, and the prosecution must prove beyond a reasonable doubt "the existence of every fact necessary to constitute the crime charged." 160 U.S. at 488, 493. Presumably, *Davis* is now to be regarded as an exercise of the Court's supervisory authority over federal courts. See *Leland*, 343 U.S. at 798-99.

37. See generally *Morano*, *supra* note 10.

38. *Fletcher*, *supra* note 10, at 882-83.

39. 397 U.S. at 372 (Harlan, J., concurring).

40. 387 U.S. 1 (1967).

41. 397 U.S. at 368.

process attributes of the reasonable doubt standard by noting that the universal acceptance of that standard⁴² strongly implied its fundamental nature or, to put the matter more precisely, strongly implied the necessity of employing the reasonable doubt standard to protect a fundamental value. The value protected, as Justice Harlan so cogently demonstrated in his concurrence, is the policy of preferring errors benefiting the accused over those favoring the prosecution. The Court then supplemented its analysis by articulating the interests that this value preference protects—principally the accused's interest in liberty and his good name—in order to demonstrate that they were of sufficient magnitude to justify including the procedure safeguarding them among the elements of due process.⁴³ In the second part of its opinion, the Court dealt with the state's argument that juvenile proceedings are civil rather than criminal in nature. The Court rejected this contention, and its reasoning is critical to a proper understanding of *Winship*. The Court simply was not convinced that juvenile delinquency proceedings could be distinguished meaningfully from criminal proceedings, at least not in any way relevant to burdens of proof,⁴⁴ and thus it quite sensibly refused to allow due process adjudication to be controlled by labels. Accordingly, the states were forbidden from withdrawing a procedure that admittedly served values and interests of constitutional dimension from a hearing in which those interests were at stake in a fashion hardly distinguishable from a criminal trial, even though New York was not the only state where juvenile delinquency trials masqueraded as "civil proceedings."⁴⁵

42. 397 U.S. at 361-63.

43. 397 U.S. at 372 (Harlan, J., concurring). The majority did recognize that the reasonable doubt standard implements the policy of minimizing the risk of erroneous convictions. 397 U.S. at 362-63.

Obviously, the extent of the historical or the present-day commitment to a practice does not necessarily control due process analysis. Some procedures, such as seating the prosecution at the table farthest from the jury during trial, may be nearly universal, but are hardly matters of due process. Conversely, some widespread procedures, such as use of a preponderance standard in juvenile delinquency proceedings, violate due process. The paramount issues in due process analysis are the importance of the value preserved by the procedure in the system of criminal justice and whether the state has adequately protected the interests at stake. History and the practices of other jurisdictions are, of course, quite relevant to these determinations and indeed may often be the most influential criteria, as *Patterson* strongly suggests. One should be cautious about inferring too much concerning due process adjudication from one case, however. The discussion in the text, at any rate, is descriptive rather than evaluative.

44. Cf. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (jury trial not constitutionally required in juvenile proceedings).

45. See *In re Gault*, 387 U.S. 1, 17 n.22 (1967).

The important point to note about the *Winship* Court's treatment of burdens of proof in criminal cases is that the Court's due process analysis relied heavily on the common practice in the states and only supported the implications of that practice by reference to the interests protected. The Court attempted no thorough examination of those interests and did not purport to consider fully the states' burden-of-persuasion practices. Indeed, affirmative defenses were never even mentioned by the Court. In *Mullaney*, by contrast, the Court reversed its order of reasoning, concentrating first on the interests protected by the reasonable doubt standard rather than on whether Maine's statute "offends some principle of justice so deeply rooted in the traditions and conscience of our people as to be ranked as fundamental."⁴⁶ This reversal of the analysis in *Mullaney* was the cause of *Patterson*'s subsequent disavowal of *Mullaney*, for it had implications far beyond what *Winship* could support.

In *Mullaney*, the Court noted that the interests protected by the reasonable doubt standard are implicated when a state chooses to distinguish murder from manslaughter. That is true enough, but what the Court failed to note was that these interests are implicated *every time* a state draws a distinction between offenses by the use of an affirmative defense.⁴⁷ Thus *Mullaney*, carried to its logical extreme, would seem to forbid the use of all affirmative defenses. Yet, consider once again the genesis of this analysis in *Winship*. There the Court relied heavily on the existing state of the law in order to demonstrate the constitutional interest in the reasonable doubt standard. The existing state of the law, however, included affirmative defenses. Thus, on the basis of *Winship*, states should indeed be forbidden generally from employing the preponderance standard in criminal cases, but, in light of the Court's analysis, *should they be allowed to employ affirmative defenses in that setting?* The answer is obviously yes; or if that is not so obvious, the analytical structure of *Winship*, as distinguished from Justice Brennan's dicta, unmistakably provides no basis for the contrary conclusion.

One can now see more clearly the shift of analysis in *Mullaney* that permitted it to accomplish a result that *Winship* could not sustain. *Mullaney* invoked *Winship* not to invalidate a burden-of-proof practice demonstrably inconsistent with the "traditions and conscience of our people," but instead used that case in a fashion that

46. This is the standard *Patterson* purports to apply. See 432 U.S. at 201-02 (quoting *Speiser v. Randall*, 357 U.S. 513, 523 (1958)).

47. Consider 18 U.S.C. § 3575 (1970) (habitual offender status provable by preponderance of the evidence).

would provide the means to invalidate a practice long accepted throughout the country. Thus *Mullaney*, which purported to "apply" *Winship*, drastically altered that case from one that looks to traditional practice and prevailing usage by the states to aid in due process analysis to one that frees the federal courts to impose their own view about the appropriate use of the reasonable doubt standard on the states notwithstanding widely shared views to the contrary. Moreover, this result was apparently to be allowed even though two crucial aspects of *Winship* were absent—the states had not eviscerated the prosecution's burden such that "innocents" were not protected against erroneous convictions, and there had been no attempt to subjugate analysis to the facade of a labeling process. It is this overextension of *Winship* by *Mullaney* that the Court clearly wished to condemn in *Patterson*:

Long before *Winship*, the universal rule in this country was that the prosecution must prove guilt beyond reasonable doubt. At the same time, the long-accepted rule was that it was constitutionally permissible to provide that various affirmative defenses were to be proved by the defendant. This did not lead to such abuses or to such widespread redefinition of crime and reduction of the prosecution's burden that a new constitutional rule was required. This was not the problem to which *Winship* was addressed.⁴⁸

Thus, one significant aspect of *Patterson* is, in short, the restoration of *Winship* to its original purpose and the concomitant refusal to permit *Winship* to be misconstrued and then employed as the basis for unjustifiable extensions of federal authority.⁴⁹

Merely noting the effect of *Patterson* is inadequate for my purposes, however, for quite possibly the erroneous decision is *Patterson* rather than *Mullaney*. This possibility is made evident by reconsidering what it means to protect "innocent" defendants by the reasonable doubt standard. I asserted above that affirmative defenses do not enhance the likelihood of erroneous convictions since the prosecution must meet its burden for the designated elements of the crime before an affirmative defense ever becomes relevant. Yet what does it mean to protect against "erroneous convictions"? If it means simply that the prosecution must establish enough to justify

48. 432 U.S. at 211 (footnote omitted).

49. Interestingly, the trend in the states has been toward making lack of provocation an element of the prosecution's case. 432 U.S. at 211. The Court could have emphasized this fact in order to uphold the result in *Mullaney*. That it did not do so indicates to me that the Court's primary concern was disavowing *Mullaney*'s general thrust.

a conviction, then my assertion is indisputable. If, on the other hand, it means that the prosecution must establish each fact that bears on an accused's culpability or sentence, then my assertion is in error. Whenever a defendant fails to establish an affirmative defense, the possibility is presented that, had the prosecution been required to disprove the defense beyond reasonable doubt, the trier of fact would have either convicted the defendant of a lesser offense or acquitted altogether. This would result, of course, in exposing the defendant to a lesser punishment or no punishment at all. Affirmative defenses, in short, undeniably affect the interests articulated in *Winship*. Thus, to determine which case—*Patterson* or *Mullaney*—was decided correctly, the analysis must proceed to an examination of the interests thought to be protected by the reasonable doubt standard. That examination will demonstrate, I think, that the interests articulated in *Winship* and employed in *Mullaney* cannot reasonably justify the implications of the latter case, although those interests, as implicitly accommodated in *Patterson*, do indicate the extent of the federal interest in the reasonable doubt standard.

Winship articulated three interests that the reasonable doubt standard tends to protect—the community's confidence in the criminal law, the defendant's interest in avoiding unwarranted stigmatization, and his interest in being free from unjustified loss of liberty.⁵⁰ This list has apparently been considerably shortened by *Patterson*. Neither the majority nor the dissent in *Patterson* made any reference to the community confidence notion, presumably because the Court now recognizes that insofar as this interest does more than reiterate the defendant's interest in avoiding undeserved punishment, it is a concern of the states, not the federal government.⁵¹ The matter of stigmatization, also omitted from the majority's analysis, parallels the deprivation of liberty and hence does not require separate treatment.⁵² In short, the interests informing due

50. 397 U.S. at 363-64. The Court mentioned that the reasonable doubt standard also protects against erroneous convictions, but the concern with error is due to the presence of the interests mentioned in the text. It has no independent analytical significance.

51. See Allen, *supra* note 9, at 279-81.

52. *Id.* at 281-83. In his dissent in *Patterson*, Justice Powell referred three times to the defendant's interest in avoiding undeserved stigmatization, 432 U.S. at 226, 228, for the purpose of asserting that *Mullaney* proscribed only affirmative defenses that result in a major difference in loss of liberty and stigmatization. Given the uncertainties in measuring stigmatization, it is questionable whether, in Justice Powell's view, a difference in this variable alone would invalidate an affirmative defense. Presumably, the stigma he had in mind is an intuitive notion of how much obloquy

process analysis of the reasonable doubt standard under the Constitution can be reduced to the defendant's liberty interest.⁵³

Mullaney insisted that the determination of which of two related offenses the defendant has committed affects his constitutional liberty interest no less than the judgment of guilt or innocence.⁵⁴ Undeniably, the presence or absence of the mitigating factor may have a substantial impact on the severity of the punishment a convicted defendant receives. As *Mullaney* pointed out, the added punishment may be more burdensome than the whole punishment imposed for some lesser offenses.⁵⁵ Yet, one cannot jump from this fact to the conclusion that requiring the prosecutor to prove the distinguishing factor beyond a reasonable doubt serves the due process interest. Assuming that the punishment for the higher offense is valid, given what the prosecution must prove beyond a reasonable doubt, the allocation of the persuasion burden of the mitigating factor has no bearing on whether the defendant suffers what the Constitution considers undeserved punishment. Thus, the interest served by the due process requirement of proof beyond reasonable doubt is unaffected by the outcome of cases like *Mullaney*.

An example may help to clarify this argument. Consider a state with an intentional homicide statute that punishes every intentional homicide with thirty-years' imprisonment; if the state proves that the defendant intentionally killed the victim, then a flat sentence of thirty years is imposed regardless of the presence of any mitigating factor. Assume that such a statute is constitutional. Now, consider the effect on the constitutionality of that statute of simply adding to it a provision that no more than twenty years of imprisonment may be imposed if the defendant proves by a preponderance of the evidence that he acted under the influence of extreme emotional disturbance. If the constitutional interest in the reasonable doubt standard centers on liberty deprivation, how can the addition of a chance to mitigate a constitutional punishment invalidate the statute? Or, to put it another way, if a state may constitutionally imprison all intentional murderers for thirty years by proving beyond reasonable doubt only intent and causation, then whatever liberty interest

is associated with different offenses. See Allen, *supra* note 9, at 281-83; note 53 *infra*.

53. I am excluding the unlikely case where the only purpose of a criminal trial is to stigmatize. Cf. *Paul v. Davis*, 424 U.S. 693 (1976) (reputation alone is not "liberty" or "property" within the due process clause).

54. 421 U.S. at 698.

55. 421 U.S. at 698.

the defendant constitutionally possesses in the context of homicide prosecutions surely is fully accommodated by such a statute. How, then, can the addition of a mitigating circumstance in the form of an affirmative defense—a factor that reduces punishment—possibly violate the already fully accommodated interest?⁵⁶

Patterson appears on close inspection to have adopted this line of reasoning, although how the Court in *Patterson* treated an accused's liberty interest is not, to say the least, without ambiguity. Justice White's opinion alludes to several different arguments that conceivably could be used to articulate the federal interest in the reasonable doubt standard, but the opinion fails to elaborate upon any of them. Only one of the Court's allusions makes sense, however.⁵⁷ It is contained in the following passage of the opinion:

The Due Process Clause, as we see it, does not put New York to the choice of abandoning [affirmative] defenses or undertaking to disprove their existence in order to convict of a crime which otherwise is within its constitutional powers to sanction by substantial punishment.⁵⁸

The key to this passage is the word "otherwise." What the Court is saying, I think, is that if a state may "otherwise" impose a particular sentence on the basis of what the state has proven beyond a reasonable doubt, then permitting a defendant to reduce the sentence he receives below the permissible level through proof of an affirmative defense is constitutional.⁵⁹

If the Court now subscribes to this theory—sometimes referred to as the theory that "the greater includes the lesser"⁶⁰—the analysis

56. See generally Christie & Pye, *Presumptions and Assumptions in the Criminal Law: Another View*, 1970 DUKE L.J. 919. Note that if the thirty-year sentence were changed to life, this hypothetical would represent the statutes at issue in *Mullaney* and *Patterson*.

57. Alternative conceptions of the constitutional standards applicable to affirmative defenses are discussed in text at notes 68-80 *infra*.

58. 432 U.S. at 207-08.

59. For a related discussion, see Allen, *supra* note 9, at 284-301.

60. One author has recently disputed the implications of "the greater includes the lesser" notion. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299 (1977). Professor Underwood does not attempt to rebut the force of "the greater includes the lesser" with respect to punishment and stigma, perhaps in recognition of the difficulty of the task. Rather, her Article attempts to articulate constitutional interests that override "the greater includes the lesser" thesis. See generally Allen, *supra* note 9, at 290.

Professor Underwood's argument is flawed in a number of respects. She maintains, for example, that an undifferentiated reasonable doubt rule is needed to offset jury bias against defendants. Underwood, *supra* at 1306-07. Unfortunately, she presents no evidence that juries are biased, and the only authority she cites for that proposition is Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1149-53 (1960), who does not even mention the

possibility. In fact, Professor Goldstein points out that juries, "[b]y refusing to . . . find defendants guilty, . . . succeeded in considerable part in forcing a redress of the imbalance in favor of the state." *Id.* at 1152. That is hardly a ringing affirmation of the point Professor Underwood was attempting to support. Professor Underwood also ignores the many expressions of faith, apparently as well grounded as her lack of faith, in the attempt by most juries to do their duty as instructed by the judge. See, e.g., R. LEMPERT & S. SALTZBURG, *A MODERN APPROACH TO EVIDENCE* 1148 (1977). This is not to say, of course, that jurors are unaware of the very significant probability that the accused before them is guilty. But it is to say that there is little evidence to support Professor Underwood's position that juries do not generally decide cases on the basis of the evidence adduced by objectively evaluating the evidence and employing the relevant standard of proof as they understand it. Professor Underwood's reliance on jury bias is, in short, clearly inadequate to justify the constitutional doctrine she espouses.

Professor Underwood's remaining argument on behalf of *Mullaney* suffers from serious infirmities as well, for not only does she rely on unfounded empirical assertions, but also she fails to present a tenable rationale for her conclusion. In essence, Professor Underwood argues that affirmative defenses are unconstitutional because they "ten[d] to deny citizens the fair notice that is constitutionally required of the criminal law." Underwood, *supra* at 1324. This purported obscurity of a shift in the persuasion burden, Underwood argues, is dangerous on two accounts. First, an unwary individual may engage in certain conduct, rightfully thinking it is legal, only to discover that he cannot sustain a burden of persuasion on a factual issue distinguishing his conduct from related, illegal conduct. Had he known of the allocation of the burden of proof, the argument runs, he might not have engaged in the conduct notwithstanding its legality. *Id.* at 1324. Second, the affirmative defense may enable the legislature to deceive the public about its substantive policy choices and thereby avoid public scrutiny of its actions. *Id.* at 1318.

This position contains several questionable assumptions. For one, Underwood assumes that the public is generally less informed about procedural, as opposed to substantive, law. There may be some intuitive truth to this proposition. Cf. Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 *YALE L.J.* 880, 880-94 (1968) ("[t]he burden of persuasion has proved to be a subtle, low-visibility tool for adjusting the interest of competing classes of litigants"). Still, Underwood fails to document the crucial point—that there is a significant differential in the public's understanding of substantive and procedural rules—and she even acknowledges that "popular understanding of the substantive law is notoriously deficient." Underwood, *supra* at 1324. Similarly, Professor Underwood's apparent belief that the citizenry would substantially modify its behavior to accommodate burden of proof rules is, to say the least, hardly a self-evident proposition.

Professor Underwood further assumes that legislatures commonly employ affirmative defenses in order to "repeal" substantive rules inconspicuously. *Id.* at 1319. She refers to no empirical support for this assumption; indeed, it is hard to imagine how there could be such evidence. She downgrades the possibility that the legislature's adoption of an affirmative defense may reflect a compromise of legitimate differences of opinion about the wisdom of the defense or a willingness to extend a benefit to the defendant without burdening the prosecutor.

Professor Underwood's unadorned empirical assertions are troubling, for nowhere does she point to a specific constitutional provision or doctrine as the source of a prohibition against affirmative defenses. Thus, her argument must stand or fall on the strength of the assertion that affirmative defenses tend to deny citizens fair notice of the criminal law. The public may take little note of procedural developments, but in the absence of persuasive evidence that the public has a much sounder grasp of substantive law, how can one claim that a constitutional prohibition of affirmative defenses is justified in order to preserve public oversight of the criminal law and to protect the populace from being misled concerning the content of the criminal law? Such a demonstration, I might add, would be difficult to make. Professor Underwood's position is based primarily on her view that the substantive criminal law is

of the constitutionality of an affirmative defense must proceed to another level. One must ask whether the greater punishment—the punishment authorized in the event the defendant fails to establish

less subtle than burden of proof analysis and thus it is reasonable to assume that the public will better understand the substantive criminal law. *Id.* at 1324. Although she is surely correct in some instances, I venture to say that the “subtleties of rules of proof” are a whole lot *less* “subtle” than the law of theft in most jurisdictions, and even less subtle still than such arcane areas as mistake of law and fact or causation. At any rate, due process provides some protection against deceptive criminal legislation by requiring clarity in the definition of offenses. In the absence of proved abuses, it is unclear why the Constitution should demand more.

Professor Underwood’s concluding defensive argument against the “greater includes the lesser” principle—a parade of horrors—is no more persuasive than her effort to derive a constitutional doctrine that affirmatively overrides the principle. She contends that, if the states can exempt certain defenses from the reasonable doubt rule, they can eliminate other procedural protections, such as the right to counsel, for that defense. *Id.* at 1329-30. This argument fundamentally misconceives the “greater includes the lesser” principle in the context of affirmative defenses. This principle maintains simply that if the purpose of the reasonable doubt rule is to protect a defendant’s constitutional interest in liberty, the rule is satisfied if the basic statute fully protects that constitutional interest. Accordingly, states should then be permitted to allocate burdens of proof to defendants on factors that will mitigate punishment because the impact of the proof of the factor on the defendant’s liberty is not of constitutional magnitude—the constitutional interest has already been secured. *See also Schick v. Reed*, 419 U.S. 256 (1974).

Other procedural protections, such as the right to counsel, involve constitutional interests other than liberty, however. The inability of the uninitiated to investigate, to marshal and adduce evidence, to make effective presentations, and to work within a complex procedural system give rise to a concern for rationality in the decision-making process that is independent of the accused’s interests in liberty. Without the aid of a trained advocate, the defendant may be unable to present his case in an effective manner. Consequently, the jury may be unable to appreciate the strength of the defendant’s case or the weakness of the prosecution’s and the rationality of its decision-making process may suffer accordingly. *See, e.g., Johnson v. Zerbst*, 304 U.S. 458, 465 (1938); *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

Admittedly, we desire rational decisionmaking in part because the defendant’s liberty interests are at stake. Nonetheless, we also insist on rationality in order to preserve the legitimacy of the criminal process as a means of enforcing social values. Thus, we have a distinct interest in rationality, and procedures designed to further that goal can easily be distinguished from burden-of-proof requirements. More important, however, even if we value rationality in a criminal proceeding solely for the benefit of the defendant, we can distinguish the burden of proof from other procedural safeguards. Burdens of proof do not enhance the rationality of the decision-making process. Rather, they simply allocate the risk of errors to one party or the other. Thus, even if liberty interests underlie both the right to counsel and the reasonable doubt rule, the two protections are not necessarily coextensive. The right to counsel can be seen as furthering a rational determination of whatever factual elements are present in a case, and the reasonable doubt standard can be seen as protecting an individual’s eighth amendment liberty interests by placing the risk of error on the prosecution for those factors necessary to justify the potential sentence. Analogous arguments can be constructed for each of the procedural protections guaranteed by the Constitution.

Finally, if we do not wish to view the Constitution’s procedural protections as serving independent concerns from burdens of proof, then Professor Underwood is correct—states could limit those procedural protections to elements of the offense made necessary by the eighth amendment.

the affirmative defense—is constitutional. To answer that question, one must turn to the eighth amendment.

Through most of the nineteenth century, the eighth amendment was thought to forbid only rather hideous punishments,⁶¹ but within the last century the cruel and unusual punishment clause has been interpreted to require a rough proportionality between the culpability of an offense and the punishment that is imposed.⁶² This requirement of proportionality provides the method of testing the accuracy of the assumption found in my hypothetical, and it also provides the means of delineating the extent of the federal interest in the reasonable doubt standard. If the courts conclude that a given punishment is not disproportional to what the state has proved beyond reasonable doubt⁶³ notwithstanding the presence or absence of any mitigating factors, then a defendant's liberty interest would obviously be satisfied by a statute that required proof of only those elements and that imposed that particular punishment. Accordingly, the mere addition to that statute of an affirmative defense, which after all could constitutionally be ignored, should be equally satisfactory. The import of the proportionality principle is, then, that the state should be required to prove enough to justify the imposition of the maximum sentence permissible under the statute.⁶⁴ Once that is accomplished, the accused has been fully protected against an unwarranted deprivation of liberty, and the state should be permitted to elaborate on the basic statute as it sees fit.

61. See Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838, 838-45 (1972).

62. *Weems v. United States*, 217 U.S. 349 (1910). So far, *Weems* is the only case in which the Supreme Court has applied the proportionality doctrine. Wheeler, *supra* note 61, at 857-58. The doctrine has been applied by several lower federal and state courts. See cases cited in Comment, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 BUFFALO L. REV. 783, 832-33 (1975). See also *Griffin v. Warden*, 517 F.2d 756 (4th Cir. 1975).

63. For example, in *Mullaney* the Court could have ruled that life imprisonment is too harsh a sentence for an intentional homicide when provocation is present. Thus, the states would have had a choice between reducing the sentence for intentional homicide and proving beyond a reasonable doubt the absence of provocation. Alternatively, the Court could have ruled, as in the death penalty cases, that life imprisonment for intentional homicide is too severe without consideration of some aggravating and mitigating factors, whether or not provocation has constitutional status. See *Gregg v. Georgia*, 428 U.S. 153 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976). The administration of the proportionality doctrine is discussed in some detail in Allen, *supra* note 9, at 297-300.

64. In light of the *Patterson* decision, I suspect that federal courts will look at the particular sentence given in a case rather than at the maximum sentence allowed by the statute. This approach would result in fewer decisions invalidating a sentence. Nevertheless, from a systemic perspective, it makes more sense to consider the maximum sentence. See Allen, *supra* note 9, at 299 n.143.

The thesis that due process requires proof beyond a reasonable doubt only with respect to those elements of the offense that are "essential" by virtue of the eighth amendment concretely expresses the role of the reasonable doubt standard.⁶⁵ It thus clarifies the dimensions of the Constitution's solicitude for the "transcendent value" of liberty—the ambiguous phrase often invoked in constitutional burden-of-proof adjudication as though it explained the result.⁶⁶ Together, due process and the eighth amendment protect criminal defendants from unwarranted deprivations of liberty by requiring the state to establish sufficient factual elements to justify the allotted punishment and by requiring the state, in establishing those elements, to minimize the risk of error adverse to the defendant. Once the overriding constitutional command is satisfied, however, the need for the protective procedure is likewise satisfied, and the traditional state power should be able to reassert itself, permitting the states to allocate burdens of proof as they desire.

In addition to failing to provide cognizable constitutional standards, the unadorned rhetoric of "transcendent values" provides little assurance that the results reached in cases invoking it are constitutionally required. One of the compelling attributes of the proportionality theory is that it cures this deficiency by tying the federal constitutional mandate to a relatively unambiguous constitutional command that has the further advantage of leaving the states substantially free to fashion their own policies.⁶⁷ Moreover,

65. There is widespread belief that employing the reasonable doubt standard makes it more difficult to convict the factually innocent at the expense of making it more difficult to convict the factually guilty. See *In re Winship*, 397 U.S. 358, 368-72 (1970) (Harlan, J., concurring); Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065 (1968). Whether the reasonable doubt standard actually has this effect, however, is as of yet unproven. See the jury studies cited in Underwood, *supra* note 60, at 1308-11; see also C. McCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* 686 (1954). If, for example, there were no factually innocent defendants who, after all the evidence had been presented, would be within the gap between the preponderance and the reasonable doubt standard, then requiring the prosecution to meet the higher standard would serve solely to "protect" factually guilty people. Even if my extreme example is not an accurate reflection of reality, which I doubt it is, the basic point is nonetheless true. Without knowing the distribution of guilt probabilities of factually innocent and guilty defendants, we cannot know the actual effect of choosing one standard of proof over another. The problem is compounded, of course, by our inability to make accurate estimates of the probability of guilt, which explains the futility of attempting to define what a "reasonable doubt" is.

66. See, e.g., *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958).

67. In this regard the proportionality theory can profitably be compared to the theory espoused in Underwood, *supra* note 60, which does not distinguish policy from constitutional command and which permits—indeed, invites—the federal courts to impose their view of wise policy on the states. This view of constitutional inter-

it does so in such a way as to reconcile *Winship* and *Patterson* while concomitantly demonstrating the errors of *Mullaney*. *Winship*, it is now clear, merely articulated what a state must do if a factor is a necessary element of the offense as defined by law. *Patterson*, by contrast, provides the method to determine whether a state's definition of a crime is constitutionally permissible. *Mullaney* erred in failing to inquire whether there are limits to the federal concern in the accused's liberty and reputational interests and whether the markedly different setting of *Mullaney*, as compared to *Winship*, was of any constitutional significance. *Patterson* rectified these errors, if it is viewed as embracing the proportionality concept, by making clear that although the interests articulated in *Winship* are of great importance, standing alone they are inadequate to prohibit a state's allocation of the burden of proof that otherwise is constitutional. *Patterson* makes clear, in other words, to what extent the factors present in *Winship* but absent in *Mullaney* are relevant to due process adjudication in this area and to what extent the accused's liberty and reputational interests are independently significant.

Relating crime to its punishment and viewing the relationship from the perspective of the eighth amendment provides, in sum, a coherent theory that both justifies and delimits the federal interest in the reasonable doubt standard. Moreover, it does so in a way far superior to other theories for federal intervention.

As *Patterson* indicated, there are two other principal theories of the constitutional standards applicable to affirmative defenses that compete with the proportionality theory—the “elements” theory and the “political compromise” theory.⁶⁸ The “elements” theory stipulates that the state must prove beyond reasonable doubt whatever factual issues it labels an element of the offense. A component of this theory is the “physical location” rule, a rule of statutory construction providing that a particular factual issue is an element of an offense only if it is incorporated into the text of the basic statute describing the offense.⁶⁹

pretation probably explains Professor Underwood's failure to examine carefully whether an analysis that ties the burden of persuasion to the Constitution's relevant substantive command—the eighth amendment—is more acceptable than concluding that the federal courts are justified in imposing an undifferentiated reasonable doubt requirement on the states in the absence of an explicit constitutional provision mandating that result.

68. For a consideration of possible explanations of *Mullaney v. Wilbur* that are independent of *Patterson*, see Allen, *supra* note 9, and authorities cited therein.

69. See Osenbaugh, *supra* note 25, at 437-42. Occasionally a court would em-

At various points throughout the *Patterson* opinion the Court alluded to the elements test, most explicitly in the statement that the Court "will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged."⁷⁰ Both examples given by the Court of unconstitutional burden shifts also tend to support this view. They are situations in which *no* elements are included within the definition of the "crime,"⁷¹ which may suggest that any affirmative defense will be sustained so long as the legislature does not drain all substantive content from a crime's definition.

Nevertheless, I doubt that the Court meant to embrace the elements test as its criterion of constitutionality. In the first place, the sentence quoted above that alluded to the elements test was followed by another that implicitly rejected the test: "Proof of the non-existence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here."⁷² The juxtaposition of these two sentences would have been unnecessary if the elements test were to control decisionmaking. Thus, the necessary inference is that there may be "some affirmative defenses," but not "all," whose nonexistence the state will constitutionally be required to prove.

More fundamentally, however, it is difficult to see just what con-

bellish the physical location rule in the following manner:

In the absence of a statute, the general rule is that the burden is upon the state in a criminal case to negative any exception or proviso appearing in that part of the statute which defines the crime if the exception is "so incorporated with the language describing and defining the offense that the ingredients of the offense cannot be accurately and clearly described if the exception is omitted" 41 Am. Jur. 2d, *Indictments and Informations*, § 98, pp. 940-941.

State v. Segovia, 93 Idaho 208, 210, 457 P.2d 905, 907 (1969). The embellishment is of no analytical value, however. Consider a circle divided into three parts. If one of the parts is removed, can the circle "be accurately and clearly described" without reference to the missing part? It depends on how you look at it, obviously. The embellishment, in short, is just another means of expressing the conclusion that a particular factual requirement is or is not an element of an offense.

Julius Stone has effectively disposed of any lingering questions concerning the logical significance of the physical location rule. See J. STONE, *LEGAL SYSTEM AND LAWYERS' REASONINGS* 241-43 (1964).

70. 432 U.S. at 210. See 432 U.S. at 205-06, 211 n.12, 215.

71. The Court noted that the legislature cannot declare an individual guilty or presumptively guilty, nor can it declare that the finding of an indictment or proof of the identity of the accused shall create a presumption of the existence of all the facts essential to guilt. 432 U.S. at 210.

72. 432 U.S. at 210.

stitutional interest is served by the elements theory. The physical location rule is obviously an arbitrary means of determining the "definition" of an offense. The legislature may wish to "define" an offense in one way but define the elements of the prosecution's case in another, and either could be considered the "definition" of the crime. Why should the validity of a state statute placing the burden of proving provocation on the defendant depend on whether the state "defines" murder as intent, causation, and no provocation or simply as intent and causation?⁷³ Surely *Patterson's* references to the elements theory were intended simply to indicate that the elements as defined in the statute under review permitted the state to provide for the affirmative defense of extreme emotional disturbance.⁷⁴

The second alternative standard that has been proposed for judging the validity of an affirmative defense, while somewhat more sophisticated than the elements theory, is no more persuasive. This is the "political compromise" test, which permits affirmative defenses that result from the compromise of competing forces in the legislature.⁷⁵ This test responds to the fear that states may be unwilling to provide certain affirmative defenses if they cannot place on the defendant the burden of proof for the factual issue created. Commentators have often pointed out that a decision like *Mullaney*, if followed, would be likely to inhibit experimentation with new af-

73. The analysis would, of course, be the same if the burden were allocated by judicial decision.

The existence of an explicit state statute placing the burden of persuasion on the defendant would end the question in most states—the statute would be followed. *See, e.g., State v. Segovia*, 93 Idaho 208, 457 P.2d 905 (1969).

74. The application of the elements theory must be distinguished from statutory construction. A federal court may construe a federal statute as expressing Congress' desire to require the prosecutor to bear the burden of persuasion on a particular factual issue. Thus, the court could invalidate a shift or reduction in the burden on statutory grounds. *Cf. Tot v. United States*, 319 U.S. 463 (1943), rejecting the Government's contention that a criminal conviction obtained with the use of an invalid statutory presumption could be sustained on the ground that Congress had the power to broaden the definition of the crime, thereby eliminating the need for the presumption. The Court ruled that Congress had plainly chosen to condition a violation of the statute on the existence of the inferred fact. For a similar exercise of statutory construction, see *United States v. Romano*, 382 U.S. 136 (1965).

75. *See* MODEL PENAL CODE § 1.13, Comments (Tent. Draft No. 4, 1955) at 113; 1 NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 19-24 (1970); W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 49 (1972).

The Court's language in *Patterson* did not rely directly on the political compromise idea. Given the great scrutiny to which *Patterson* surely will soon be subjected, however, I think it useful to read bits and snatches of the opinion for all they are worth. In this regard, note the Court's discussion of the possible policy decisions made by the New York legislature regarding the recognition and burden of proof of the affirmative defense of extreme emotional disturbance. *See* 432 U.S. at 207.

firmative defenses.⁷⁶ To avoid that harsh irony, the political compromise test looks to whether the legislature would have refused to adopt the defense but for the provision imposing the burden of proof on the defendant.

Of this theory's many problems, the most disturbing is its paradoxical quality. It is paradoxical in the sense that if the only justification for allowing affirmative defenses is that otherwise the legislature will be forced to choose between two diametrically opposed but constitutional alternatives, then the argument implicitly assumes the unconstitutionality of affirmative defenses. Is not the real point, in other words, that affirmative defenses are unconstitutional but that such a conclusion may result in an unfortunate legislative choice, and thus the better tack is to permit an unconstitutional choice as an expedient? Moreover, the only escape from this logical trap is either to assert that political compromise is merely a general consideration supporting the validity of affirmative defenses, in which case it provides no means of distinguishing the permissible from the impermissible defense, or to fashion criteria distinguishing permissible from impermissible grounds of compromise. The latter course presents significant difficulties, the most serious of which is that it would require that the constitutional basis be articulated for whatever ground of compromise is thought to be impermissible, and unfortunately none of the reasons thought adequate to justify entering the murky waters of legislative motivation are present in this context.⁷⁷

The difficulty of constructing from the elements or the political compromise theory a coherent basis for constitutional analysis of affirmative defenses bolsters the conclusion that the Court has adopted the eighth amendment proportionality doctrine.⁷⁸ Further evidence that *Patterson* achieves this result may lie in the observation that the proportionality doctrine can be administered consistently with the practice of the Court in recent years of limiting intrusion by the federal judiciary into policy areas traditionally reserved for the states. Consider once again the passage quoted at the beginning of this section:

76. See the sources cited in note 75 *supra*. Each of these authorities incorporates, to varying degrees, considerations of comparative convenience. See note 78 *infra*.

77. See generally Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95; Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y. U.L. REV. 36 (1977); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

78. The Court in *Patterson* did not invoke considerations of comparative convenience—i.e., whether the state or the defendant could more conveniently bear the

The Due Process Clause, as we see it, does not put New York to the choice of abandoning [affirmative] defenses or undertaking to disprove their existence in order to convict of a crime which otherwise is within its constitutional powers to sanction by substantial punishment.⁷⁹

Perhaps the last phrase of this quote is a signal to the lower courts that they are not to accomplish through applications of the proportionality principle what they were beginning to accomplish through applications of *Mullaney v. Wilbur*. Having quite curtly disavowed the far-flung implications of *Mullaney*, the Court surely did not mean to substitute an equally wide-ranging eighth amendment analysis. Thus, another import of this passage probably is that the lower courts are not to engage in a greatly expanded proportionality analysis, and, concomitantly, the passage indicates that affirmative defenses in the context of serious criminality will not be disturbed except where a statute removes from the definition of a crime those elements that make it serious in the first place.⁸⁰ With respect to crimes of lesser significance where the power to punish the offender severely is not so clear, the Court may allow, as lower courts have done on their own initiative in regard to disproportionality of sentence,⁸¹ a more intensive judicial scrutiny of allocations of burdens.

Whether my interpretation of *Patterson* is correct is uncertain,

burden of proof—to support its position, but it did acknowledge that such concerns may influence a state's decision to allocate burdens. See 432 U.S. at 207. This is consistent with the Court's uniform refusal to allow comparative convenience notions to influence its judgment on constitutional issues ever since the doctrine was first articulated in *Morrison v. California*, 291 U.S. 82 (1934). Justice White in *Patterson* makes explicit reference to *Morrison* in a lengthy footnote, 432 U.S. at 203 n.9, but apparently only for the purpose of presenting authority permitting burdens of proof to be placed on defendants. That he had no intention to rely on the comparative convenience aspects of *Morrison* to influence the decision in *Patterson* is evident from the concluding sentence of the footnote: "Of course, if the *Morrison* cases are understood as approving shifting to the defendant the burden of disproving a fact necessary to constitute the crime, the result in the first *Morrison* case [upholding a burden shift to defendants] could not coexist with *Winship* and *Mullaney*."

The Court's avoidance of comparative convenience is well justified, for it is not possible to discriminate between those circumstances that are encompassed by it and those that are not. Compare, for example, proof of insanity to proof of provocation, and compare both of those to proof of intent. Finally, compare those three to proof of renunciation or withdrawal. Thus, comparative convenience is one of those theories that sounds good but cannot be rationally implemented.

79. 432 U.S. at 207-08.

80. As would be the case, for example, if the defense of entrapment or insanity were viewed as negating intent. I also have serious difficulty with self-defense as an affirmative defense, at least as an affirmative defense to a murder prosecution. Compare *Commonwealth v. Carbonetto*, 455 Pa. 93, 314 A.2d 304 (1974), with *State v. Millett*, 273 A.2d 504 (Me. 1971), and *State v. Robinson*, 47 Ohio St. 2d 103, 351 N.E.2d 88 (1976).

81. See, e.g., *Downey v. Perini*, 518 F.2d 1288 (6th Cir.), vacated and remanded,

of course. I realize that my argument may appear to give undue weight to a small excerpt from the majority's opinion—after all, *Patterson* makes no explicit reference to the eighth amendment or to the proportionality doctrine.⁸² But the Court's apparent reluctance to clarify its position in this area makes speculation necessary, and the proportionality doctrine is the most sensible explanation of the federal interest in the reasonable doubt standard, especially given the result in *Patterson*. Relating crime to its punishment and viewing it from the perspective of the eighth amendment has a compelling logical force. In addition, the doctrine justifies federal intervention in an area long dominated by the states on the basis of a clear constitutional command with relatively determinable limits that adequately respect the states' traditional role in fashioning criminal law policy. Finally, no other explanation of federal intervention can be maintained unless the Court meant to forbid federal court intervention almost entirely. The Court is unmistakably disenchanted with *Mullaney v. Wilbur* and quite possibly means to limit to egregious cases the involvement of federal courts in allocating burdens under state law. This result, would, in effect, restore the state of affairs that existed prior to the decision in *Mullaney*. Only time will tell whether the Court meant to restore the status quo ante or whether it intended to stimulate development of more rigorous eighth amendment standards.

III. VIEWING *Patterson* AS DISTINGUISHING, RATHER THAN OVERRULING, *Mullaney*

My treatment of *Mullaney v. Wilbur* has been based on the

423 U.S. 993 (1975); *Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1973); *Davis v. Zahradnick*, 432 F. Supp. 444 (W.D. Va. 1977).

82. The Court's failure to embrace the proportionality doctrine openly and enthusiastically is not surprising. Historically the Court has shown an inclination to rely on the eighth amendment in only the extreme case. Thus, if the Court does mean to tie the reasonable doubt standard to the eighth amendment, it will be entering largely uncharted waters. Accordingly, the Court may have chosen to proceed cautiously and let the lower courts discover and chart the shoals that lie ahead. This will allow an eighth amendment jurisprudence to develop with the Supreme Court intervening when it feels it appropriate to do so. For an interesting discussion of how the Court has allowed the lower courts to develop the jurisprudence in other areas, see Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977).

The proportionality doctrine has already undergone substantial development. See Allen, *supra* note 9, at 297-300. See also *Carmona v. Ward*, 436 F. Supp. 1153 (S.D. N.Y. 1977); *People v. Stewart*, 400 Mich. 540, 256 N.W.2d 31 (1977). There is also a related area that may yield insights for proportionality analysis; a number

conclusion that *Patterson* overruled *Mullaney*, and so indeed I think it did.⁸³ A majority of the Court purported to see it otherwise, however, and Justice White's opinion attempting to distinguish *Mullaney* raises a number of questions about the motives of the Court. As I see it, the answers to those questions make it clear that the purported distinction yields no insights into the federal interest in the reasonable doubt standard. However, the attempt to distinguish *Mullaney* is not without interest for reasons quite removed from the burden-of-proof analysis of *Patterson*. In this section I shall first demonstrate that the Maine statute struck down in *Mullaney* is in no significant way different from the one upheld in *Patterson*, thus indicating that the Court's distinction of *Mullaney* is untenable. I shall then speculate on why the court acted as it did and conclude with a brief discussion of the implications of the Court's treatment of *Mullaney*.

In *Mullaney*, the Court invalidated a Maine statute placing the burden on the defendant to prove heat of passion as a result of adequate provocation. In *Patterson*, the Court sustained a New York statute placing the burden on the defendant to prove extreme emotional disturbance. *Patterson* must surely reject *Mullaney*'s holding,⁸⁴ regardless of what the Court is willing to admit, unless there is some distinction of constitutional magnitude between the two statutory schemes. One potential ground for differentiating the two laws is the substantive character of the defenses they allow. New York's concept of "extreme emotional disturbance," adopted from the Model Penal Code,⁸⁵ is arguably broader than Maine's concept

of states permit review of the severity of a sentence. See, e.g., N.Y. CRIM. PROC. LAW §§ 450.10, .30 (McKinney 1971); *Huff v. State*, 568 P.2d 1014 (Alaska 1977).

83. See, e.g., *Farrell v. Czarnetzky*, No. 76-2131 (2d Cir. Sept. 30, 1977), especially Oakes, J., concurring.

84. The Court in *Mullaney* stated: "We therefore hold that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." 421 U.S. at 704.

85. MODEL PENAL CODE § 210.3(1)(b) (Proposed Official Draft, 1962). The Code does not place the burden of proof on the defendant, however.

One of the reasons prompting the draftsmen of the Code to forgo common-law terminology was the belief that the common law of provocation had become too narrow and too rigid and did not easily accommodate changing perceptions of what should serve to mitigate the harshness of a murder prosecution. By reformulating the test for mitigation, the draftsmen hoped to avoid arbitrary limitations on the principle and to "[sweep] away the rigid rules that have developed with respect to the sufficiency of particular types of provocation." MODEL PENAL CODE § 201.3, Commentary (Tent. Draft No. 9, 1959) at 46-47. For a discussion of the rigidity of the common-law rules, see W. LAFAVE & A. SCOTT, *supra* note 75, at 472-82. The view

of "heat of passion," and the New York law may provide better notice of its provisions. Neither of these distinguishing features supports a constitutional distinction, however.

Even if the New York courts interpret their statute broadly,⁸⁶ that hardly distinguishes it for constitutional purposes from the Maine statute. The only effect of embracing a broader view is that juries will be permitted to hear as evidence regarding mitigation a number of provoking circumstances, viewed from the peculiar perspective of the defendant, that trial judges would not have permitted juries to consider under the old provocation rubric.⁸⁷ But we have long had great diversity in the administration of the various standards of provocation that have developed in the various states,⁸⁸ and the scope of the defense has always been thought to raise only questions of policy. More particularly, there is no relationship, at least that I can see, between the scope of the defense and who should bear its burden of proof. The former goes to a state's view of what acts under what conditions should be treated with leniency, and the latter goes to how certain the state wishes to be of the existence of the mitigating factors. The two are independent concerns,⁸⁹ which

of the draftsmen of the New York statute is found in N.Y. PENAL LAW § 125.20, Commentary at 393 (McKinney 1975).

Similarly, the draftsmen sought to "qualify the rigorous objectivity of the prevailing law insofar as it judges the sufficiency of provocation by its effect on the reasonable man," MODEL PENAL CODE § 201.3 Commentary (Tent. Draft No. 9, 1959) at 47; *see id.* at 41, 48, by permitting an expanded inquiry into the peculiar attributes of the man in the dock. Whereas before individual circumstances had been ignored, the Code anticipated that they would be considered.

86. There are no thorough analyses of the issue in the New York cases. For a general discussion, *see* *People v. Patterson*, 39 N.Y.2d 288, 300-01, 347 N.E.2d 898, 906-07, 383 N.Y.S.2d 573, 581 (1976), *affd.*, 432 U.S. 197 (1977).

87. As, for example, the old rule that words alone are never sufficient. *See* MODEL PENAL CODE § 201.3, Commentary (Tent. Draft No. 9, 1959) at 46-47.

88. *See* W. LAFAVE & A. SCOTT, *supra* note 75, at 574-79.

89. Placing the burden of production on the defendant would satisfy comparative convenience considerations based on the possibly enhanced difficulty of administering a broader statute. Apparently those considerations are not to aid constitutional analysis, however, *see* note 78 *supra*, and this area is another example of the good sense of that conclusion. Even if the "extreme emotional disturbance" formulation has the potential to be the broadest form of provocation, at what point does it become so broad that it permits the burden of persuasion to be shifted to the defendant? Bear in mind that the states have long administered defenses of varying scope, *see* W. LAFAVE & A. SCOTT, *supra* note 75, at 574-79, and, if comparative convenience were to be a factor, a difficult—if not impossible—question of degree would have to be resolved.

Moreover, the breadth of New York's statute is not altogether clear. The same common-law process that resulted in the rigidification of the common law of provocation may result in a similar rigidification of New York's statutory defense, although the dearth of cases on the subject may indicate that trial judges are letting about everything "go to the jury." In this regard *compare* *State v. Corbin*, 15 Ore. App.

probably explains the absence in *Patterson* of any reliance on the scope of New York's defense to distinguish it from Maine's.

The other suggested distinction is more cogent than the issue of scope, and it has some oblique support in certain language in *Patterson*.⁹⁰ The Court might have distinguished the laws of the two states on the ground that New York's provided better notice of its provisions because the affirmative defense was spelled out in the statute, whereas Maine's affirmative defense was a judicial gloss on the homicide statute, which did not mention provocation at all. The Supreme Court, however, has never ruled that the due process vagueness doctrine requires the state to prescribe in a statute the contours of a criminal offense, and the doctrine that a narrowing construction may save an otherwise unconstitutionally vague law is authority to the contrary.⁹¹ One does not look, in short, to unadorned statutes but to statutes as construed, and the cases construing Maine's law—at least the recent cases—left no doubt about the meaning of the relevant provision.⁹² Thus, the clarity of the statute and the requirement of notice do not distinguish *Mullaney* from *Patterson* unless the Court was disavowing well-established principles of statutory construction of state law, and doing so in the most obscure fashion.⁹³

The other potential ground for distinguishing between the New York and Maine laws is the procedural effect of the defense. Justice White stood on this ground in arguing that *Patterson* differed from *Mullaney* in that the Maine law created a statutory presumption

536, 516 P.2d 1314 (1973), with *Zebrowski v. State*, 50 Wis. 2d 715, 185 N.W.2d 545 (1971).

90. See 432 U.S. at 206-07.

91. *Wainwright v. Stone*, 414 U.S. 21 (1973).

It should also be noted that, in determining the meaning of a statute, "it is well-established that an authoritative construction by the State's highest court 'puts (appropriate) words in the statute as definitely as if it had been so amended by the legislature.'" *Patterson*, 432 U.S. at 223 n.7 (Powell, J., dissenting) (quoting *Winters v. New York*, 333 U.S. 507, 514 (1948)). For a recent—and extreme—example of this doctrine, see *Rose v. Locke*, 423 U.S. 48 (1975).

92. The Maine statute did not mention provocation at all; rather, that defense had resulted from a line of cases construing the statute. See Comment, *supra* note 11, at 989-99.

93. Another factor that corroborates the small likelihood that the Court would rely on the notice differential of the two statutes is that the "notice requirement" is less a requirement of notice and more a means of reducing the risk of official abuse created by a vague statute. See, e.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). The ideal of actual notice is an appealing standard by which the risk of discriminatory enforcement can be tested. A similar dynamic explains why cases construing a statute are referred to in a vagueness inquiry even though no one, to my knowledge, expects the man on the street to research—or be able to research—the precedents.

whereas New York's involved a true affirmative defense. Thus, Justice White read Maine's homicide statute as making the absence of provocation an element of murder,⁹⁴ and he reaffirmed the holding of *Mullaney* that due process does not allow a state to shift "the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed."⁹⁵ In contrast, under the New York statute, "nothing was presumed or implied against Patterson."⁹⁶ Consequently, in Justice White's view, New York had proved beyond a reasonable doubt every element of its definition of murder.

Unfortunately the purported distinctions between presumptions and affirmative defenses fail to sustain the contrasting outcomes of *Mullaney* and *Patterson*. First, the Maine statute, as construed by the Maine courts, did not set up a statutory presumption in the traditional sense. Justice White depicted Maine law as directing the trial judge to instruct the jury that fact *C*, a necessary element of the offense, could be inferred from proof of facts *A* and *B*.⁹⁷ That, of course, is not the case. Maine had not provided a rule of evidence concerning inferential relationships; instead, it had placed the burden of proving provocation on the defendant,⁹⁸ precisely as New York had done with extreme emotional disturbance. Indeed, if a few words are changed, the description of Maine's statute fits New York's perfectly. The absence of extreme emotional disturbance is just as much a "part of the definition of" murder in New York as provocation was in Maine. Moreover, New York "presumes" lack of extreme emotional disturbance to the same extent as did Maine. All it meant in Maine to presume lack of provocation until the "presumption" was "rebutted" by the defendant was that the defendant had the burden of proving that he had been provoked.⁹⁹ That is precisely the situation in New York. Still, by characterizing *Mullaney* as a statutory

94. 432 U.S. at 215. The Maine statute defining murder, *see* note 14 *supra*, did not refer to provocation. However, the instructions given by the Maine trial court emphasized that "malice aforethought," which is mentioned in the Maine statute, is inconsistent with the "heat of passion on sudden provocation." *Mullaney*, 421 U.S. at 686-87; *Patterson*, 432 U.S. at 213. It was for this reason that the majority in *Patterson* asserted that lack of provocation was an element of murder under the statute.

95. 432 U.S. at 215.

96. 432 U.S. at 216.

97. *See* 432 U.S. at 215-16.

98. *See* 432 U.S. at 212-16.

99. *State v. Lafferty*, 309 A.2d 647 (Me. 1973); *State v. Rollins*, 295 A.2d 914 (Me. 1972); *State v. Wilbur*, 278 A.2d 139 (Me. 1971).

presumption case, the Court could assert that it had no impact on garden-variety affirmative defenses where no inferential process is involved. This analysis allowed the Court to reach the opposite conclusion in *Patterson* than it reached in *Mullaney* without having to overrule the earlier case.¹⁰⁰

But even apart from this skewed interpretation of Maine law, the distinction between a true affirmative defense and a presumption lacks constitutional significance. "Presumption" means many different things in our legal system,¹⁰¹ but for purposes of the issues under

100. It is inconceivable that Justice White did not know exactly what he was doing. A year before he wrote for the Court in *Patterson*, Justice White wrote for a unanimous Court in *Lavine v. Milne*, 424 U.S. 577 (1976), a case that has striking similarities to the common problem of *Mullaney* and *Patterson*. In *Lavine*, the Court considered the constitutionality of a statute that "deemed" a person applying for welfare within 75 days after voluntarily terminating his employment or reducing his earning capacity to have done so "for the purpose of qualifying for such assistance or a larger amount thereof, in the absence of evidence to the contrary supplied by such person." N.Y. Soc. SERV. LAW § 131(11) (McKinney Supp. 1975). Consider the following portion of Justice White's opinion:

Although the District Court found this [provision] to be an unconstitutional "rebuttable presumption," the sole purpose of the provision is to indicate that, as with other eligibility requirements, the applicant rather than the State must establish that he did not leave employment for the purpose of qualifying for benefits. The provision carries with it no procedural consequence; it shifts to the applicant neither the burden of going forward nor the burden of proof, for he appears to carry the burden from the outset.

The offending sentence could be interpreted as a rather circumlocutory direction to welfare authorities to employ a standardized inference that if the Home Relief applicant supplies no information on the issue, he will be presumed to have quit his job to obtain welfare benefits. However, such an instruction would be superfluous for the obvious reason that the failure of an applicant to prove an essential element of eligibility will always result in the denial of benefits, much as the failure of a tort or contract plaintiff to prove an essential element of his case will always result in a nonsuit. The only "rebuttable presumption"—if, indeed, it can be so called—at work here is the normal assumption that an applicant is not entitled to benefits unless and until he proves his eligibility.

Despite the rebuttable presumption aura that the second sentence of § 131(11) radiates, it merely makes absolutely clear the fact that the applicant bears the burden of proof on this issue, as he does on all others. And since appellees do not object to the substantive requirement that Home Relief applicants must be free of the impermissible benefit-seeking motive, their underlying complaint may be that the burden of proof on this issue has been unfairly placed on welfare applicants rather than on the State.

424 U.S. at 583-85 (footnote omitted).

However "circumlocutory" the Maine statute and cases involved in *Mullaney*, they "merely [made] absolutely clear the fact that the [defendant] bears the burden of proof on [the] issue" of provocation. By demonstrating the Court's competence to see through the form of a statute to its substance, *Lavine* seems to force the conclusion that the only explanation of *Patterson* is that the Court wished to reject the principle of *Mullaney*. In fact, *Lavine* is not an aberration; the Court has long recognized that states have often used the word "presumption" and its derivatives in a very loose way. See *Casey v. United States*, 276 U.S. 413, 418 (1928), recognizing that "there are presumptions that are not evidence in a proper sense but simply regulations of the burden of proof."

101. See generally D. LOUISELL, J. KAPLAN & J. WALTZ, *CASES AND MATERIALS ON EVIDENCE* 950-1009 (3d ed. 1976); Soules, *Presumptions in Criminal Cases*, 20 BAYLOR L. REV. 277 (1968).

consideration in *Mullaney* and *Patterson* it refers to an evidentiary rule directing the court to instruct the factfinder that it may infer the establishment of one fact from the establishment of another.¹⁰² The presumption rests on a determination by the courts or the legislature that experience demonstrates the validity of the inference even though a jury of laymen is unlikely to be aware of it. Thus, the presumption cures a gap in the jury's knowledge that otherwise could be remedied only by presenting in every case the evidence for the validity of the inference.

Presumptions were originally devised by judges through the common law, but in the past century legislatures have displaced the courts in this area, and statutory presumptions designed to serve the same instructional needs have proliferated.¹⁰³ The Supreme Court has wrestled with the constitutional problems of statutory presumptions in a long line of cases.¹⁰⁴ What has proved troublesome to the Court is that Congress has on occasion created statutory presumptions providing for the inference of a necessary element even though the evidence of a significant correlation between the proved facts and the fact inferred is inconclusive.¹⁰⁵ The Court has struck down these inadequately founded presumptions as violative of due process.¹⁰⁶

102. One example is the ancient rule that unexplained possession of stolen goods justifies the inference that the person in possession knew the property had been stolen. In prosecutions for knowing possession of stolen goods, juries are often informed of this permissible inference through an instruction. See, e.g., *Barnes v. United States*, 412 U.S. 837 (1973).

103. As the government stated in its brief in *United States v. Gainey*: "All that Congress has done, in effect, is to substitute for judge-made law its statutory views of what inferences are normally permissible." Brief for Appellant at 15, *United States v. Gainey*, 380 U.S. 63 (1965). There may be a question whether judges, at least federal judges, will be permitted to engage in this lawmaking process in the future. Cf. *Barnes v. United States*, 412 U.S. 837, 846 n.11 (1973) ("[w]e do not decide today whether a judge-formulated inference of less antiquity may properly be emphasized by a jury instruction"). The Supreme Court recently dismissed for want of a substantial federal question a state case upholding a statutory inference. *Hamilton v. Florida*, 329 So. 2d 283 (Fla.), *appeal dismissed*, 429 U.S. 909 (1976).

104. See *Turner v. United States*, 396 U.S. 398 (1970); *United States v. Gainey*, 380 U.S. 63 (1965); *Tot v. United States*, 319 U.S. 463 (1943); *Ferry v. Ramsey*, 277 U.S. 88 (1928).

Somewhat similar problems have arisen with respect to mandatory presumptions in civil cases, see, e.g., *Heiner v. Donnan*, 385 U.S. 312 (1967), although such presumptions are now viewed as problems distinct from presumptions in criminal cases. See generally Ackerman, *The Conclusive Presumption Shuffle*, 125 U. PA. L. REV. 761 (1977); Gordon & Tenenbaum, *Conclusive Presumption Analysis: The Principle of Individual Opportunity*, 71 NW. U.L. REV. 579 (1976).

105. Relying on the legislature's superior factfinding powers is not inconsistent with recognizing that the legislature may occasionally err and that courts should rectify the errors.

106. See, e.g., *Turner v. United States*, 396 U.S. 398 (1970). The Court has

Statutory presumptions and affirmative defenses operate in a similar fashion, as *Patterson* and *Mullaney* (as misconstrued by the Court) make clear. A state could, as New York did, define murder as intent and causation and further provide for the affirmative defense of provocation.¹⁰⁷ A state could just as easily conclude, as the Court did in misinterpreting Maine's law, that lack of provocation should be an element of murder but further conclude that lack of provocation can be inferred from intent and causation. Justice White apparently feels that presumptions and affirmative defenses require different constitutional treatment and that a presumption may be invalid where the comparable affirmative defense is permitted. But, if anything, presumptions should receive lesser scrutiny, for they are more favorable to the defendant than are affirmative defenses since the former shift only the burden of production whereas the latter shift the burden of persuasion. With a statutory presumption, all the defendant must do to rebut it is create a reasonable doubt about the issue. Were the state to replace the presumption with an affirmative defense, the defendant would have to prove the affirmative defense by a preponderance of the evidence. Even where the defendant can offer no evidence on his behalf, he is better off under a presumption, since the jury may simply decline to draw the inference.¹⁰⁸ When this defendant must establish an affirmative de-

never resolved what the relationship must be between the proven and the inferred fact. W. LAFAYE & A. SCOTT, *supra* note 75, at 149. As LaFave and Scott point out, however, "it now appears that the Court is testing statutory presumptions by the . . . beyond-a-reasonable-doubt test." *Id.* There is language in *Hankerson v. North Carolina*, 432 U.S. 233 (1977), which suggests that the Court has reached this conclusion: "In *Mullaney v. Wilbur*, as in *In re Winship*, the Court held that due process requires the States in some circumstances to apply the reasonable-doubt standard of proof rather than some lesser standard." 432 U.S. at 242. The Court would not have reached the issue of standard of proof demanded of statutory presumptions in *Mullaney* even if the Court had treated it as a statutory presumption case since Maine placed the persuasion burden on the defendant and this fact alone would invalidate the Maine law.

Not every inference used by the prosecutor in a criminal trial need satisfy the reasonable doubt standard, as proof by circumstantial evidence demonstrates. The reason advanced for requiring such a high standard when the prosecutor relies on a statutory presumption is that the jury will be instructed on the inference, and the instruction may have a very great impact on the jury. *See, e.g., Bailey v. Alabama*, 219 U.S. 219, 237 (1911); Comment, *Statutory Criminal Presumptions: Reconciling the Practical with the Sacrosanct*, 18 U.C.L.A. L. REV. 157, 160 (1970). *See also* Ashford & Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165, 198-99 (1969).

107. I am here using "provocation" as synonymous with "extreme emotional disturbance."

108. The traditional instruction for informing the jury of a statutory presumption tells the jury that it may, but is not compelled, to draw the inference. W. LAFAYE & A. SCOTT, *supra* note 75, at 147-48.

fense, however, the jury can bail him out only by taking the more drastic measure of jury nullification.¹⁰⁹ Thus, by requiring a higher standard of proof, affirmative defenses leave a defendant materially worse off than do presumptions. Accordingly, presumptions should be given less rather than more intense scrutiny by the courts.¹¹⁰

Furthermore, the proportionality doctrine should apply to presumptions as well as to affirmative defenses. If the punishment provided is not disproportionate in light of the facts established by the state beyond a reasonable doubt, the use of an inference, however tenuous, to "establish" an additional fact should not impair the constitutionality of the statute defining the offense.¹¹¹ Of course, if the inferred fact is essential to justify the prescribed punishment, the presumption must satisfy the due process test developed in the statutory presumption cases. The point is that this test is called for only if a prior eighth amendment analysis concludes that the fact in issue is a necessary part of the prosecution's case.

The attempt to distinguish between the procedural practice of the Maine and New York law on provocation thus fails on a number of counts. First, it is entirely inapposite, since Maine law did not create a presumption. But, beyond that, it is analytically defective. As *Patterson* shows, the distinction is constitutionally significant only if one accepts the elements theory;¹¹² Justice White contended, in essence, that the distinction between the Maine and New York laws was that absence of provocation was an element of one but not the other.¹¹³ In addition, the distinction creates the anomalous result that the state can, in certain instances, shift to the defendant the persuasion burden with respect to a "nonessential" element but cannot take the less drastic course of shifting the production burden.¹¹⁴

109. In contrast to the prerogative to decline an inference, juries are traditionally not alerted to their power to nullify. See, e.g., *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972).

110. Scrutiny of presumptions is also required where improper instructions may confuse the jury by giving the impression that the presumption shifts the burden of persuasion. Where this occurs, the court need only review the instructions in light of the underlying statute and determine whether they meet the minimum standard of clarity. Poorly worded instructions should not be grounds for invalidating an otherwise constitutional statute.

111. This treatment of statutory presumptions is compatible with the concern for rationality in the criminal process. See note 60 *infra*. I am suggesting simply that for purposes of constitutional analysis statutory presumptions should be viewed as modified affirmative defenses.

112. For a discussion of the shortcomings of the elements test, see text at notes 68-74 *supra*.

113. See text at notes 94-96 *supra*.

114. Perhaps the *Mullaney-Patterson* distinction can be rationalized on the ground

One wonders why the Court struggled to construct such a spurious distinction. The most plausible explanation of the Court's behavior is that the Court recognized that it had erred in *Mullaney* and wished to rectify its mistake. Unfortunately, *Mullaney* was only two years old, and, to complicate matters, the decision was unanimous. These factors, plus a natural reluctance to confess error, no doubt sent the Court down the path it took. The only way the Court could simultaneously reject the reasoning of *Mullaney* without overruling it was to write a revisionist history of the case and adopt an insupportable distinction between affirmative defenses and presumptions.

It is unfortunate, in any event, that the Court lacked the candor to overrule *Mullaney* explicitly. It is unfortunate because *Mullaney* will likely linger on rather than die the quiet death it deserves. Although I doubt that *Mullaney* will now be employed to invalidate affirmative defenses,¹¹⁵ the case may come to stand for a rule of statutory construction that not only has little to commend it but also has a significant potential for misapplication. The rule might emerge that if a criminal statute speaks in terms either of an implied element or of a presumption that must be rebutted, the courts will be warranted in concluding that the fact "implied" or "presumed" is an "essential element" of the crime, and thus part of the state's case.¹¹⁶ Consequently, the statute will be analyzed from the perspective of

that the intention of a legislature to impose a burden of persuasion on the defendant must be clearly articulated. This would require the states to employ the correct language in their statutes, which, I suppose, would be no great hardship. Cf. Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957) (the Supreme Court is sometimes justified in "remanding" a statute to Congress to ensure that Congress meant what the statute seems to be saying).

115. Ironically, on the same day it decided *Patterson*, the Court ruled that *Mullaney* had retroactive application. *Hankerson v. North Carolina*, 432 U.S. 233 (1977). Significantly, the Court in *Hankerson* reserved the question whether due process allows the state to make self-defense an affirmative defense to murder. 432 U.S. at 245.

116. It is likely, but not certain, that the Court will persevere in imposing upon the states the distinction between statutory presumptions and affirmative defenses. Except for *Mullaney*, as interpreted by *Patterson*, the Court has never applied its more recent statutory presumption analysis to the states. While *Patterson* may herald a shift in this policy, quite possibly the Court will announce at some later date that *Patterson* overruled *Mullaney*, thereby aborting further development in this direction. See Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 SUP. CT. REV. 211. Such an announcement would, by the way, be consistent with other Supreme Court forays into the states' substantive criminal law. The Court has on occasion made overtures to the effect that it would begin to consider various aspects of the substantive criminal law and then failed to come forth with serious development. In this regard *Mullaney* and *Patterson* resemble the journey from *Robinson v. California*, 370 U.S. 660 (1962), to *Powell v. Texas*, 392 U.S. 514 (1968). For

statutory presumptions rather than affirmative defenses.¹¹⁷ Not only might such a rule induce a court to repeat *Patterson's* erroneous construction of state law, but, by resurrecting the elements theory, it would make the constitutionality of a statute turn on semantics, and "[t]he reason for attaching constitutional significance to a semantic difference is [as] difficult to discern" in this area as it is in others.¹¹⁸

IV. A FINAL THOUGHT

The Supreme Court's treatment of burdens of proof in the last seven years has been, in many respects, a disturbing chapter in constitutional jurisprudence. *Winship*, *Mullaney*, and *Patterson* are characterized by misguided or misleading analysis, and although the Court reached correct results in the first and last cases, its modus operandi reflects poorly on the Court. *Mullaney* extended *Winship's* due process theory further than careful analysis could sustain, in no small part because of some incautious language in *Winship*. *Patterson* restored *Winship* to its proper station by tacitly acknowledging, at least if my reading is correct, that the validity of an affirmative defense is governed by the eighth amendment's proportionality doctrine rather than by the due process analysis proposed in *Winship*. *Patterson* did, however, leave open the possibility of further confusion by suggesting that *Mullaney* was correctly decided insofar as it differentiated between affirmative defenses and statutory presumptions. The irony of such an outcome is unmistakable, as *Mullaney* avowedly repudiated the concept that the validity of an affirmative defense rested on how the state chose to define an offense. One may hope that the Court will have an opportunity in the near future to resolve the remaining doubts about its position.

a related point that also raises doubts as to whether statutory presumption analysis will be imposed on the states, see Allen, *supra* note 9, at 287 n.97.

The states have generally felt bound by the Court's statutory presumption analysis. See, e.g., *People v. McClendon*, 188 Colo. 140, 533 P.2d 923 (1975); *State v. Searle*, — La. —, 339 So. 2d 1194 (1976).

117. In a situation where it is not clear whether a state meant to create an affirmative defense, where the eighth amendment analysis may be very difficult, and where statutory presumption analysis may be much simpler to apply, a court would be justified in resolving doubts in favor of statutory presumption analysis, assuming that the *Mullaney-Patterson* distinction is maintained. This approach would permit the court to postpone the more difficult constitutional question and would not prohibit the state from replacing the presumption with an affirmative defense, should it choose to do so.

118. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 285 (1977).