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Constitutional Criminal Procedure - Due Process - Burden of Proof - Affirmative Defenses

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CONSTITUTIONAL CRIMINAL PROCEDURE—DUE PROCESS—BURDEN OF PROOF—AFFIRMATIVE DEFENSES—The United States Supreme Court has held that the New York murder statute does not deprive a defendant of due process by placing on him the burden of proving the affirmative defense of extreme emotional disturbance since the defense does not serve to negate an element of the crime.

Patterson v. New York, 432 U.S. 197 (1977).

Appellant, Gordon Patterson, and his wife, Roberta, had a brief, volatile marriage. Roberta separated from the appellant and resumed dating John Northrup, her former fiance. Some months later, appellant went to the residence of his father-in-law carrying a rifle and, after observing his wife partially unclothed with Northrup, shot Northrup twice in the head, killing him.[1] Patterson confessed[2] to the homicide and was charged with second degree murder.[3]

Under New York law, the crime of second degree murder has two elements: intent to cause the death of another person, and causing the death of that person or another person.[4] The prosecution need not prove malice aforethought as an element of murder.[5] As an ameliorative element of the statute, New York permits the defendant to assert, as an affirmative defense, that he acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse.[6] Successful proof of the defense

1. Patterson v. New York, 432 U.S. 197, 198 (1977).

2. After a pretrial hearing, the confession was held to be voluntary and was admitted into evidence against Patterson at trial. *See* People v. Patterson, 39 N.Y.2d 288, 291, 347 N.E.2d 898, 900, 383 N.Y.S.2d 573, 575 (1976).

3. *See* 432 U.S. at 198.

4. N.Y. PENAL LAW § 125.25(1) (McKinney 1975). The statute is reprinted in relevant part at note 6 *infra*.

5. 432 U.S. at 198.

6. N.Y. PENAL LAW § 125.25(1)(a) (McKinney 1975) provides in relevant part:

> A person is guilty of murder in the second degree when:
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> 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 subdiyision, it is an affirmative defense that:
>
> (a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime . . . .

reduces the criminal act from murder to manslaughter.[7]

Appellant raised this defense at trial.[8] The jury was instructed, consistent with New York law,[9] that the state had the burden of proving the elements of the crime of second degree murder beyond a reasonable doubt[10] and that the defendant had the burden of proving his affirmative defense by a preponderance of the evidence.[11] The jury found appellant guilty of murder, judgment was entered on the verdict, and the appellate division affirmed.[12] While his appeal to the New York Court of Appeals was pending,[13] the United States Supreme Court decided *Mullaney v. Wilbur*,[14] declaring Maine's murder statute to be unconstitutional as violative of due process for improperly shifting the burden of persuasion on the issue of heat of passion, or lack of malice aforethought, an element

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7. 39 N.Y.2d at 293, 347 N.E.2d at 901, 383 N.Y.S.2d at 576. 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 constitute murder because he acts under the influence of extreme emotional disturbance, as defined in paragraph (a) of subdivision one of section 125.25. The fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subdivision.

8. *See* 432 U.S. at 199. Appellant also asserted that the killing was unintentional, claiming that the gun went off accidentally. *See id.* at 199 n.4. For purposes of the appeal, the Court held that it was undisputed that the prosecution proved beyond a reasonable doubt that the killing was intentional. *Id.*

9. *Id.* at 200. That the instructions were consistent with state law was not discussed further by the majority and was not contested by the dissent.

10. *See id.* at 199-200 (quoting the trial court's charge). The Supreme Court viewed the judge's instructions as emphatic and repeated as to the reasonable doubt burden of proof. *Id.* at 200 n.5. The trial court's explanation of intent is quoted in 39 N.Y.2d at 291-92, 347 N.E.2d at 901, 383 N.Y.S.2d at 575-76.

11. *See* 432 U.S. at 200. If the jury found beyond a reasonable doubt that the killing was intentional but that the appellant had proved by a preponderance of the evidence that he had acted under the influence of an extreme emotional disturbance, it was instructed to find appellant guilty of manslaughter instead of murder. *See id.*

12. 41 App. Div. 2d 1028, 344 N.Y.S.2d 836 (1973).

13. Prior to Mullaney v. Wilbur, 421 U.S. 684 (1975), Patterson had appealed on the following grounds: that communications between appellant and his wife were privileged and were erroneously admitted as evidence; that appellant was deprived of a fair trial under the fifth, sixth, and fourteenth amendments; that the evidence was insufficient as a matter of law; and that the judge erred by repeatedly referring to appellant's post-shooting statement as a confession. 39 N.Y.2d at 289-90, 347 N.E.2d at 900, 383 N.Y.S.2d at 575.

14. 421 U.S. 684 (1975).

of the crime, to the defendant.[15]

Appellant urged that the Maine and New York statutes were functionally equivalent and that his conviction should be reversed.[16] The court of appeals, however, affirmed his conviction, distinguishing *Mullaney* on the ground that under the New York statute malice aforethought was not an element of the crime. Therefore, by requiring the defendant to prove extreme emotional disturbance (*i.e.*, lack of malice aforethought), New York was not shifting the burden of proof on an element of the crime and did not offend *Mullaney*.[17]

The Supreme Court noted probable jurisdiction on Patterson's appeal[18] and, after oral argument, affirmed.[19] The majority[20] agreed with the New York Court of Appeals that the murder statute did not violate defendant's due process rights since the affirmative defense did not serve to negate an element of the crime.[21] Speaking for the majority, Justice White first noted that the state has a substantial interest in criminal prosecutions and that the regulation of criminal procedure, including allocation of the burden of persuasion, was normally within the power of the state.[22] A criminal statute, the Court said, should not be held unconstitutional unless it deeply offends traditional principles of justice.[23]

In deciding the case, the majority emphasized the difference be-

15. *Id.* at 704. Specifically, the Court held "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." *Id.*

16. *See* 432 U.S. at 201. It was not until *Mullaney* was handed down that appellant first challenged the constitutionality of the New York murder statute. Since the appellant had not objected to the charge concerning the extreme emotional disturbance defense, the court of appeals questioned whether he had preserved a question of law for review. The court noted that it was a law court and that usually a question of law could not have been preserved under the circumstances. But if the burden of proof was wrong, as alleged, then, the court said, the appellant would have been deprived of a fair trial. Such a finding would have been a "fundamental, nonwaivable defect in the mode of procedure." Therefore, the court allowed the question to be presented even though it was not formally raised below. 39 N.Y.2d at 294-95, 347 N.E.2d at 902-03, 383 N.Y.S.2d at 575. The court of appeals also decided that *Mullaney* would be given retroactive effect. *Id.* at 296, 347 N.E.2d at 903, 383 N.Y.S.2d at 578.

17. *See* 432 U.S. at 201.

18. Patterson v. New York, 429 U.S. 813 (1976).

19. 432 U.S. at 216.

20. The Court affirmed 5-3. Justice Rehnquist took no part in the decision.

21. 432 U.S. at 205-06.

22. *Id.* at 201. Justice White said, "We should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." *Id.*

23. *Id.* at 202.

tween the Maine and New York statutes.[24] In Maine, the Court said, a killing could be punished as murder when it resulted from a deliberate, cruel act committed suddenly by one person against another person without sufficient provocation.[25] New York defined murder as causing the death of another person with the intent to do so.[26] Thus, malice aforethought was not required under the New York definition, while it was under Maine's.[27] Further, the Court considered Maine's policy of presuming the element of malice, or lack of provocation, which could only be rebutted by the defendant proving that he acted under a heat of passion.[28] From this the Court concluded that Maine shifted the burden of persuasion on the very element which differentiated murder from manslaughter.[29] Nothing was presumed or implied under the New York law.[30] The Court concluded that while under the guidelines set forth in *In Re Winship*[31] Maine had improperly shifted the burden of persuasion

24. *Id.* at 205-06.

25. *Id.* at 213, 215.

26. *Id.* at 205-06. The Court noted that once an intentional killing was proved, New York intended to deal with the defendant as a murderer unless he proved the mitigating circumstances. *Id.* at 206.

27. *Id.* This analysis of Maine law, which is similar to the treatment by the New York Court of Appeals, has been criticized as a misinterpretation. *See* Note, *Affirmative Defenses After Mullaney v. Wilbur: New York's Extreme Emotional Disturbance*, 43 BROOKLYN L. REV. 171, 175-77 (1976) [hereinafter cited as *New York's Extreme Emotional Disturbance*]; Note, *People v. Patterson: the Constitutionality of New York's Affirmative Defense of Extreme Emotional Disturbance*, 51 ST. JOHN'S L. REV. 158, 170-73, 180 (1976) [hereinafter cited as *New York's Affirmative Defense*].

Indeed, the Maine Supreme Court expressly rejected this interpretation of its murder statute by a federal district court, saying, "the Federal Court was of the impression that this crime includes, in addition to an intentional and unlawful killing, the independent element of 'malice aforethought.' Such is not, and never has been, the law of Maine." State v. Lafferty, 309 A.2d 647, 664 (Me. 1973). It appears, therefore, that the Supreme Court in *Mullaney* rejected Maine's interpretation and decided that malice aforethought was a substantive element of the crime of murder. *See also* notes 69 & 77 *infra*.

28. 432 U.S. at 216.

29. *Id.* The State of New York read the Maine statute as requiring the same burden of proof for murder and manslaughter. "Having established sufficient proof of an intent to commit the crime of *manslaughter*, the State would gain a conviction for the crime of *murder*, unless the defendant proved by a preponderance of the evidence that he acted in the heat of passion on sudden provocation." Brief for Respondent at 13, Patterson v. New York, 432 U.S. 197 (1977) (emphasis in original).

30. 432 U.S. at 216.

31. 397 U.S. 358 (1970) (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). The *Winship* decision is discussed in an historical perspective in the text accompanying notes 51-53 *infra*.

regarding an element of murder to the defendant, New York had not.[32]

The majority determined that affirmative defenses are not unconstitutional per se.[33] By recognizing a mitigating circumstance, the Court said, a state should not then be required to prove its nonexistence.[34] To hold otherwise, the majority felt, would conflict with *Leland v. Oregon*,[35] which held that a state may constitutionally require a defendant who pleads insanity to establish that fact beyond a reasonable doubt.[36] Under the Oregon scheme the burden of proving the elements of the crime was upon the prosecution at all times and the jury was only to consider the question of legal insanity after the prosecution had proved its statutory case.[37] The *Leland* Court held this did not violate due process.[38]

The majority had reason to believe that *Leland* had survived the tremors of *Winship* and *Mullaney*. Chief Justice Burger and Justice Rehnquist, concurring in *Mullaney*, expressed the opinion that there was no inconsistency between *Leland* and *Mullaney*.[39] The *Patterson* majority found the procedural schemes in *Leland* and *Patterson* to be analogous and, therefore, with *Leland* still precedent and *Mullaney* distinguishable, the Court followed *Leland* and upheld the New York statute.[40]

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32. 432 U.S. at 215-16.

33. *Id.* at 208-09.

34. *Id.* at 209. On this point, the Court substantially adopted the rationale of Chief Justice Breitel, who concurred in the result of the New York Court of Appeals' decision. *See id.* at 211 n.13. Chief Justice Breitel said that when affirmative defenses are intelligently used they can provide for an ameliorating scheme of gradation of a crime and could also prevent legislative abuse. 39 N.Y.2d at 305-07, 347 N.E.2d at 909-10, 383 N.Y.S.2d at 583-85 (Breitel, C.J., concurring).

35. 343 U.S. 790 (1952).

36. *See* 432 U.S. at 204. Of the 20 states which placed the burden of proving insanity on the defendant at the time, only Oregon required proof beyond a reasonable doubt. 343 U.S. at 798.

37. *See* 432 U.S. at 204.

38. Patterson contended on appeal that the insanity defense was distinguishable from extreme emotional disturbance because the former did not bear a necessary relationship to the required mental element of the crime. Extreme emotional disturbance, on the other hand, determined the degree of culpability necessary for intent to murder. Brief for Appellant at 14, Patterson v. New York, 432 U.S. 197 (1977).

39. 421 U.S. 684, 705 (Rehnquist, J., concurring). The constitutionality of burdening the defendant with proving an insanity defense was challenged subsequent to *Mullaney* in Rivera v. Delaware, 429 U.S. 877 (1976). In that case, the Court apparently rejected the contention that *Leland* was overruled by *Winship* and *Mullaney* when it dismissed the appeal as not presenting a substantial federal question. *See* 432 U.S. at 205.

40. 432 U.S. at 206-07.

Justice Powell, who authored the *Mullaney* opinion, dissented in *Patterson*,[41] charging that the majority had ignored the clear dictates of both *Winship* and *Mullaney*.[42] The majority, Justice Powell said, had exalted form over substance by looking at the state definition of the elements of the crime.[43] He based this conclusion on language used by the majority that the only facts necessary to constitute a crime are those appearing on the face of the statute.[44] He viewed the Court's reasoning as a sharp break from *Mullaney* and as a license for legislative abuse.[45] The Court's guidelines, he said, gave a state the latitude to drop a cumbersome element of a crime and then require the defendant to disprove its existence.[46]

Justice Powell concluded that malice aforethought, or the absence of extreme emotional disturbance, was in fact a substantive element of the crime of murder in New York.[47] He reached that conclusion by applying the two-part test he espoused in *Mullaney*. First, he said, the factor at issue, *i.e.*, absence of extreme emotional disturbance, resulted in a substantial difference in punishment and stigma.[48] Second, this factor, although more historically referred to as malice aforethought, has traditionally been the single most important factor in determining the degree of culpability necessary for murder. Since the factor appeared in both the Maine and New York situations, Justice Powell reasoned that *Mullaney* should necessarily control in *Patterson*.[49]

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41. Justices Brennan and Marshall joined in this opinion.

42. 432 U.S. at 222-23 (Powell, J., dissenting).

43. *Id.* at 221. Justice Powell expressed the fear that if *Winship* were limited to the state's definition of the elements of a crime the state could, by clever draftsmanship, shift the burden of persuasion on any factor to the defendant as long as the nonexistence of such factor was not an element of the crime. *Id.* at 223. The result, he argued, would be that a state could convict a defendant for murder if it proved he was the cause in fact of another person's death and then force the defendant to disprove intent. *Id.* at 224 n.8. Justice Powell then expressed doubt, however, that his hypothetical statute would be found constitutional. *Id.* at 225 n.9.

44. Justice White said, "The Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the *definition of the offense* of which the defendant is charged." 432 U.S. at 210 (emphasis added).

45. *Id.* at 223.

46. *Id.* at 224-25. Justice Powell looked to the practical effect; the existence of heat of passion was equivalent to the absence of malice aforethought. *Id.* at 217 (citing the trial court's charge in *Mullaney* that "malice aforethought and heat of passion on sudden provocation are two inconsistent things").

47. 432 U.S. at 226-27.

48. *Id.* This requirement applied a fortiori if the factor determined the difference between guilt and innocence. *Id.* at 226.

49. *Id.* If both branches of the test were not met, then the shift in the burden of proof was constitutional. *Id.* at 227.

The *Patterson* decision is the most recent development in the Supreme Court's scrutiny of the constitutionality of placing the burden of persuasion on a defendant to prove an affirmative defense.[50] Historically, the prosecution in a criminal action has the burden of proving guilt beyond a reasonable doubt.[51] It was not until 1970, however, that the Supreme Court expressed a constitutional basis for this recognized requirement, declaring in *In re Winship* 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.[52]

Applying *Winship,* the Supreme Court in *Mullaney* found that Maine had unconstitutionally placed the burden on the defendant to prove, by a preponderance of the evidence, that the killing had occurred without malice aforethought.[53] Under Maine law, murder and manslaughter were not distinct crimes but, rather, different categories of the general crime of felonious homicide,[54] with malice

50. While the prosecution has traditionally had the burden of coming forward with the evidence and the burden of persuasion on the question of guilt, the defendant has been allowed certain excuses or justifications, *i.e.*, affirmative defenses. Insanity, self-defense, and intoxication are examples. In some jurisdictions, the defendant has the burden of proving the affirmative defense claimed, but the modern trend is to impose upon the defendant only the burden of first producing evidence and then requiring the prosecution to disprove the defense. *See* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 21, at 152-53 (1972). Professors LaFave and Scott suggest a two-part test to determine the constitutionality of affirmative defenses: (1) whether the defense is so central to the nature of the offense that the prosecution, in effect, is freed from the burden of proving conduct by the defendant that results in grave consequences; and (2) whether placing the burden on the defendant to justify his claim is called for by a need for narrowing the issues and the defendant's peculiar accessibility to the evidence. *Id.* § 21, at 154.

51. *See id.* § 8, at 44.

52. 397 U.S. 358, 364 (1970). Justice Black, dissenting, admitted that proof beyond a reasonable doubt was traditionally required in criminal trials, but he found no constitutional basis under the due process clause for such a degree of proof unless the particular jurisdiction required that standard. *Id.* at 385-86.

The Court's holding in *Winship* has been criticized as going too far. *See* Allen, *Mullaney v. Wilbur, the Supreme Court, and the Substantive Criminal Law—An Examination of the Limits of Legitimate Intervention,* 55 TEX. L. REV. 269, 269-71 (1977) [hereinafter cited as Allen]. Professor Allen suggests that to resolve the case before it, the Court had only to decide whether, as a general rule of constitutional jurisprudence, the due process clause required proof of guilt beyond a reasonable doubt. By extending the standard to "every fact necessary to constitute the crime," the Court, in effect, gave itself the power to identify what the facts ought to be, an area he regards as traditionally "the peculiar preserve of the states." *Id.* at 270.

53. 421 U.S. at 684. In *Mullaney,* the defendant had fatally assaulted the decedent while in a frenzy provoked by the decedent's homosexual assault. The defendant contended that he was guilty of no more than manslaughter because he killed in a heat of passion. *Id.* at 685.

54. *Id.* at 688. Maine's murder statute provided: "Whoever unlawfully kills a human

aforethought as the distinguishing element.[55] Once the prosecution proved that the homicide was both intentional and unlawful, malice aforethought was to be implied unless the defendant proved by a preponderance of the evidence that he had acted in a heat of passion on sudden provocation.[56] A distinction was therefore drawn between murder and manslaughter, bottomed on the existence or absence of malice aforethought.[57] The Court held that the statutory scheme, in practical effect, forced the defendant to disprove an element of the crime of murder, *i.e.*, malice aforethought.[58] The Court unanimously struck down this procedural scheme as unconstitutional, finding *Winship* controlling.[59]

Although *Mullaney* was criticized for failing to define a sufficient test to determine the constitutionality of affirmative defenses,[60] state courts immediately began to invalidate or weaken similar statutory schemes.[61] While *Mullaney* held that it was unconstitutional

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being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life." ME. REV. STAT. tit. 17, § 2651 (1954) (repealed 1975).

Maine's manslaughter statute provided 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 . . . ." *Id.* § 2551 (1961) (repealed 1975).

55. 421 U.S. at 688.

56. *Id.* at 689. *See also* State v. Lafferty, 309 A.2d 647, 670-73 (Me. 1973) (discussing the distinction between murder and manslaughter).

Jurisdictions have differed concerning the meaning of malice aforethought. Some view it as a substantive element of intent which the prosecution must prove, while other jurisdictions have taken the position that absent proof to the contrary a homicide is presumed not to have occurred in a heat of passion. 421 U.S. at 694. For a historical overview of malice aforethought, see Perkins, *A Re-Examination of Malice Aforethought*, 43 YALE L.J. 537 (1934).

57. 421 U.S. at 698. *See also* note 54 *supra* (reprinting the murder and manslaughter statutes).

58. 421 U.S. at 698. The trial court charged the jury that malice aforethought and heat of passion were two inconsistent things and that by proving the latter the defendant would negate the former. *Id.* at 686-87.

59. *Id.* at 698. The *Winship* Court cited the following reasons for the indispensable requirement of the reasonable doubt standard in criminal law: possible loss of liberty, stigmatization by society, and community confidence in the judicial system. 397 U.S. at 363-64. The *Mullaney* Court found that the Maine procedural scheme denigrated those interests. 421 U.S. at 698.

The Court's failure to explain why the *Winship* factors mandated reversal in *Mullaney* has been criticized. *See New York's Extreme Emotional Disturbance*, *supra* note 27, at 186.

60. *See* Allen, *supra* note 52, at 290-91; Tushnet, *Constitutional Limitation of Substantive Criminal Law: An Examination of the Meaning of Mullaney v. Wilbur*, 55 B.U.L. REV. 775, 802 (1975); *New York's Affirmative Defense*, *supra* note 27, at 180; Note, *The New York Penal Law's Affirmative Defenses After Mullaney v. Wilbur*, 27 SYRACUSE L. REV. 834, 864 (1976).

61. *See, e.g.*, Fuentes v. State, 349 A.2d 1 (Del. 1975) (statutory requirement that murder defendant bear burden of proving extreme emotional disturbance held unconstitutional under

to require a defendant to prove an affirmative defense which specifically negated an express element of the crime charged, it did not address the problem posed by a statutory scheme which required a defendant to raise an affirmative defense which determined blameworthiness where that defense did not serve to negate an express statutory element.[62]

The stage was thus set for consideration of New York's murder statute which did not require the prosecution to prove malice aforethought but which permitted the defendant to reduce the crime to manslaughter by proving extreme emotional disturbance.[63] Several lower state courts had concluded the section was void under *Mullaney*,[64] but the New York Court of Appeals upheld its constitutionality in *People v. Patterson*,[65] holding that the New York statute was within the constitutional boundaries set by *Mullaney*. The Supreme Court, presented with the statutory question left unanswered in *Mullaney*, agreed with the court of appeals that the New York statute did not possess the constitutional defects of the Maine statute.[66]

The Maine and New York statutes must be distinguished, if at all, by the existence or absence of malice aforethought as a substan-

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the due process clause); Evans v. State, 28 Md. App. 640, 349 A.2d 300 (1975) (jury instruction that malice might be presumed, relieving state of the burden of proving element of nonmitigation held unconstitutional); State v. Hankerson, 288 N.C. 632, 220 S.E.2d 575 (1975) (requirement that defendant in a homicide case rebut presumption of malice by proving that he killed in a heat of passion denied due process), *rev'd*, 432 U.S. 233 (1977); Pinkerton v. Farr, 220 S.E.2d 682 (W. Va. 1975) (statute requiring defendant to testify if he is proven guilty along with others of felonious assault in order to rebut presumption that he is also guilty of assault in pursuance of combination or conspiracy was unconstitutional).

62. The situation had been debated in the abstract prior to *Mullaney*. A hypothetical statute establishes a crime with elements A, B, and C, and further provides that C will be presumed unless the defendant proves the nonexistence of C (not-C) as an affirmative defense (this was the scheme in *Mullaney*). *See* Ashford & Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165, 186-93 (1969); Christie & Pye, *Presumptions and Assumptions in the Criminal Law: Another View*, 1970 DUKE L.J. 919, 933-38. If that scheme is unconstitutional, what then becomes of a statute which only requires the prosecution to prove A and B but still allows the defendant to mitigate the punishment by proving not-C? *See* Allen, *supra* note 52, at 286-91. He postulates that such a statute could be upheld but that to do so might be an exaltation of form over substance. *Id.* at 288.

63. *See* note 6 and text accompanying note 4 *supra*.

64. People v. Davis, 49 App. Div. 2d 437, 376 N.Y.S.2d 266 (1975), *rev'd*, 40 N.Y.2d 836, 356 N.E.2d 290, 387 N.Y.S.2d 837 (1976); People v. Woods, 84 Misc. 2d 301, 375 N.Y.S.2d 750 (Sup. Ct. 1975); People v. Balogun, 82 Misc. 2d 907, 372 N.Y.S.2d 384 (Sup. Ct. 1975).

65. 39 N.Y.2d 288, 291, 347 N.E.2d 898, 900, 383 N.Y.S.2d 573, 575 (1976).

66. 432 U.S. at 211-12.

tive element. Maine's statute defined murder as the unlawful killing of a human being with malice aforethought. Procedurally, the prosecution was not required to prove malice aforethought because it would be implied, unless the defendant could prove that he acted in a heat of passion.[67] The New York statute defined murder as the killing of another person with the intent to do so.[68] Therefore, while Maine expressly lists malice aforethought as an element and presumes its existence, New York does neither.

In *Mullaney,* Justice Powell applied his two-part test and found that malice aforethought was a substantive element of the crime of murder.[69] The *Patterson* majority, however, returned to the Maine statute and reconsidered it, this time ignoring the *Mullaney* test. The majority confined the *Mullaney* holding by stating that despite the Maine Supreme Court's assertion that malice aforethought was not a substantive element of murder under the Maine statute, due process did not permit shifting the burden of persuasion with respect to a fact that must be proven or *presumed.*[70]

The *Patterson* majority then considered the New York murder statute, again ignoring the *Mullaney* test, and agreed with the New York Court of Appeals' interpretation that the statute did not include malice aforethought as a substantive element of murder.[71] The majority relied heavily on the fact that malice aforethought was not presumed under New York law and was not otherwise required to be proved.[72] Thus the Court properly concluded that the affirmative defense of extreme emotional disturbance did not serve to negate an essential element of the crime.

The majority went further, however, and unnecessarily left the

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67. *See* text accompanying note 56 *supra.*

68. *See* note 26 and accompanying text *supra.*

69. *See* notes 47-49 and accompanying text *supra.* Justice Powell also said: "We accept as binding the Maine Supreme Judicial Court's construction of state homicide law." 421 U.S. at 691. However, since the Maine Supreme Judicial Court had determined that malice aforethought was not an element of murder, State v. Lafferty, 309 A.2d 647, 664 (Me. 1973), Justice Powell's conclusion that malice aforethought was an element of murder is clearly inconsistent and indicates that he, in fact, did not accept the state court interpretation. By finding that malice aforethought was an element of murder in Maine, Justice Powell would have had to rely on traditional common law notions (by using his two-part test) or on the wording of the statute. If he relied on the latter, then he, himself, was overly formalistic.

70. Justice White, speaking for the majority in *Patterson,* also observed that the trial court in *Mullaney* instructed the jury that malice aforethought was an essential and indispensable element of the crime of murder. 432 U.S. at 212-13.

71. *See* text accompanying note 17 *supra.*

72. 432 U.S. at 216.

impression that the statutory definition of a crime should be given controlling weight in determining substance.[73] This was directly contrary to the warning given by Justice Powell in *Mullaney* that the *Winship* holding was not limited to the statutory definition.[74] Since the substance of a crime must be construed in a due process challenge,[75] some test to determine substance, rather than the literal statutory elements, is essential. However, neither *Mullaney* nor *Patterson* articulated a sufficient test that could be applied generally, and in fact, when viewed together, they indicate inconsistent methods of testing. The *Patterson* majority accepted the New York Court of Appeals' definition of the substance of its murder statute, but the *Mullaney* Court had previously rejected Maine's interpretation of its murder statute and instead applied the two-part test outlined by Justice Powell.[76] Traditionally, state court interpretations of substance have been accepted by the Supreme Court[77] and there is no valid reason to take that power away since state court interpretations remain subject to Supreme Court scrutiny in light of accepted constitutional standards,[78] thus limiting potential abuses.

The fact that the *Patterson* majority did not apply Justice Powell's two-part test seems to indicate that it has rejected at least that part of the *Mullaney* approach.[79] The majority may have felt the

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73. *See* note 44 and accompanying text *supra*. Justice White could have relied solely on the state court interpretation.

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

75. *Id.* at 699.

76. *See* notes 47-49 & 69 and accompanying text *supra*. Justice Powell's test gave the Supreme Court the power to determine the substance of a crime and, in practical effect, dictated that the substance of the crime should be controlled by traditional common law standards.

77. Justice Powell conceded this point in his dissent in *Patterson*, writing: "In the usual case 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.'" 432 U.S. at 223 n.7. As authority for this proposition, he cited Winters v. New York, 333 U.S. 507, 514 (1948). Why Justice Powell made this concession is unclear since he ignored the state court interpretation in both *Mullaney* and *Patterson* and instead applied his own test.

78. Justice White said: "[T]here are obvious constitutional limits beyond which the States may not go in this regard." 432 U.S. at 210. For example, a defendant may not be presumed guilty. The judiciary could also void extreme legislative enactments on these grounds: vagueness, imposition of a cruel and unusual punishment, and violating traditional notions of fair play and substantial justice. *See generally* Comment, *Unburdening the Criminal Defendant: Mullaney v. Wilbur and the Reasonable Doubt Standard*, 11 HARV. C.R.-C.L.L. REV. 390, 394 (1976).

79. If the *Patterson* Court had applied the two-part *Mullaney* test, it would have reached

Court went too far in *Mullaney* and that, unless it affirmed Patterson's conviction, all affirmative defenses would thereafter be unconstitutional.[80]

If *Patterson* can be read as invalidating the *Mullaney* approach, then the *Patterson* decision does provide guidance to states in determining the constitutionality of other affirmative defenses. A state may eliminate a fact needed for conviction from a criminal statute if such fact is not a substantive element of the crime as determined by the state courts. It follows that where an affirmative defense does not serve to negate the remaining elements, then, as in *Patterson*, the statutory scheme should not be invalidated.

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the same result that Justice Powell reached in his dissent: malice aforethought was a substantive element of the New York murder statute. As Justice Powell pointed out, the two factors used to determine that malice aforethought was an element of the Maine statute—substantial punishment differential and a similar level of importance in common law—were also present in the New York crime of murder. 432 U.S. at 225-27.

80. Legal writers had expressed the concern that *Mullaney* had, in fact, invalidated all affirmative defenses. *See* Allen, *supra* note 52, at 275.