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Back to the Future: Does *Apprendi* Bar a Legislature's Power to Shift the Burden of Proof Away from the Prosecution by Labeling an Element of a Traditional Crime as an Affirmative Defense?

LESLIE YALOF GARFIELD*

I. INTRODUCTION

The Supreme Court has consistently interpreted the Due Process Clause¹ of the United States Constitution to require the prosecution in a criminal trial to prove "every fact necessary to constitute the crime with which [the defendant is being] charged."² The Court's interpretation is

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¹ "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

² *In re Winship*, 397 U.S. 358, 364 (1970); *see, e.g., Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (holding that any fact which may increase the penalty of a crime beyond the statutory maximum, other than a prior conviction, must be proven beyond a reasonable doubt); *Almendarez-Torres v. United States*, 523 U.S. 224, 239 (1998) (holding that the existence of a prior conviction is appropriate to enhance the penalty of a conviction and need not be included in the criminal indictment); *Martin v. Ohio*, 480 U.S. 228, 231-32 (1987) (holding that it was not a violation of the Due Process Clause of the Fourteenth Amendment to place the burden of proving self-defense on the defendant charged with committing aggravated murder); *McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986) (holding that a sentencing enhancement which constitutes an element of the crime does not violate due process if it is considered only after the defendant has been convicted of the underlying offense); *Patterson v. New York*, 432 U.S. 197, 204 (1977) (holding that an affirmative defense that does not negate any facts of the crime which the state must prove beyond a reasonable doubt is not violative of due process, but constitutes a separate issue upon which the defendant carries the burden of persuasion); *Mullaney v. Wilbur*, 421 U.S. 684, 685 (1975) (holding that the state cannot shift to the defendant the burden of proving that he acted in the heat of passion to reduce his charge from homicide to manslaughter because it was incumbent upon the state to disprove beyond a reasonable doubt that the defendant acted in the heat of passion during the commission of the crime). In *Winship*, the Court stated: "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, 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." *Winship*, 397 U.S. at 364; *see also* Thomas V. Mulvrine, *Reasonable Doubt: How in the World Is It Defined?*, 12

fundamental to the jurisprudential principle that a defendant may not be convicted without proof beyond a reasonable doubt of each essential element of the crime. The outer limits of this principle, however, allow legislatures and courts to shift this heavy burden of proof away from the prosecution by including in its criminal statutory scheme that which may not necessarily define the corpus of the crime, but which potentially threatens a defendant's liberty.³

Consider the following scenarios:

(1) A defendant enters a building and declares: "This is a robbery and I have a gun." Congress defines bank robbery as attempting to take property from a Federal bank by force or violence.⁴ The prosecution will succeed in its case if it proves beyond a reasonable doubt that the defendant intended to enter a bank and that she threatened violence. If the prosecution is successful, the defendant may be sentenced to up to twenty years in jail.⁵ Under the Federal Sentencing Guidelines, the sentence is increased if the defendant threatens death during the perpetration of the crime.⁶ Therefore, the prosecution can increase the defendant's punishment if it can prove, by a lesser burden of proof (preponderance of the evidence), that the defen-

AM. U. J. INT'L L. & POL'Y 195 (1997) (examining the historical development of the reasonable doubt standard, problems with defining the standard, other potential definitions based on international models, and possible solutions to provide clarity to jurors).

³ See, e.g., *Martin*, 480 U.S. at 233 (holding that defendant's burden of proving by a preponderance of the evidence that she was acting in self-defense when she committed murder does not violate the Due Process Clause); *Patterson*, 432 U.S. at 205-06 (holding that defendant's due process rights were not violated by requiring him to prove by a preponderance of the evidence the affirmative defense of acting under the influence of extreme emotional distress); *United States v. Dodd*, 225 F.3d 340, 342 (3d Cir. 2000), *cert. denied*, 532 U.S. 959 (2001) (placing the burden on the defendant of proving by a preponderance of the evidence the elements of a justification defense when raised in response to a felon-in-possession charge); *United States v. Deleveaux*, 205 F.3d 1292, 1298-99 (11th Cir.), *cert. denied*, 530 U.S. 1264 (2000) (holding that a justification defense is an affirmative defense that may be raised on a felon-in-possession charge, but the burden is shifted to the defendant to prove justification by a preponderance of the evidence because the defense does not negate an element of the crime); *United States v. Gomez*, 92 F.3d 770, 775 (9th Cir. 1996) (maintaining that the defendant must establish all four elements of a justification defense by a preponderance of the evidence). But see *United States v. Talbott*, 78 F.3d 1183, 1186 (7th Cir. 1996) (allowing the defendant to merely raise a justification defense and then shifting the burden to the prosecution to prove beyond a reasonable doubt that the defendant was not justified in possessing a weapon). For a discussion on the burden of proof distinction between elements and defense, see Donald A. Dripps, *The Constitutional Status of the Reasonable Doubt Rule*, 75 CAL. L. REV. 1665 (1987):

In light of the connection between the reasonable doubt rule and the due process legality principle, the distinction between elements and affirmative defenses appears untenable; the risk of unjust conviction is no less urgent in the context of affirmative defenses. Neither deference to historical practice nor concern for legislative flexibility can justify the judicial distinction.

Dripps, *supra*, at 1667.

⁴ 18 U.S.C. § 2113 (2000).

⁵ *Id.*

⁶ U.S. SENTENCING GUIDELINES MANUAL § 2B3.1(b)(2) (2001).

dant's words "I have a gun" threatened violence of death.⁷

(2) A defendant intentionally stabs his wife after finding her with another man. The New York State Legislature defines murder as the intentional killing of another, punishable by life in prison.⁸ Under the statute, the defendant is entitled to a lesser punishment if he acted under extreme emotional disturbance.⁹ If the prosecution can prove beyond a reasonable doubt that the defendant intentionally killed his wife, then the defendant may be punished for life. However, if the defendant can show by a preponderance of the evidence that he was so distraught at the sight of his wife with another man that he acted with extreme emotional disturbance, then his punishment may be significantly reduced.¹⁰

In each instance, the duration of the defendant's punishment is determined by proof of particular elements as outlined by the legislature. Because of legislative definition, however, the prosecution need not prove each of these elements beyond a reasonable doubt.¹¹ Specifically, the legislature can define which elements are "fact[s] necessary to constitute the crime," requiring the prosecution to present proof beyond a reasonable doubt for conviction of a crime and which elements merely define the punishment boundaries of the crime, thereby allowing proof by a lesser standard.¹² With this power comes the legislature's ability to circumvent the procedural safeguards of the Due Process Clause. By designating an element as a "factor that bear[s] solely on the extent of punishment," the legislature exempts from strict scrutiny elements that directly affect the duration

⁷ See *United States v. Carbaugh*, 141 F.3d 791, 792 (7th Cir. 1998). Under the Sentencing Guidelines, if a defendant makes an express threat of death, punishment is increased by two levels. See U.S. SENTENCING GUIDELINES MANUAL § 2B3.1(b)(2) (2001).

⁸ N.Y. PENAL LAW § 125.25 (West 1998).

⁹ *Id.*

¹⁰ *Id.*

¹¹ See, e.g., N.J. STAT. ANN. §§ 2C:43-7(a), 2C:44-3(e) (West 1995) (authorizing an extended term of imprisonment for hate crime); see also *United States v. Dodd*, 225 F.3d 340, 342 (3d Cir. 2000) (concluding defendant charged with the unlawful possession of a firearm must prove all elements of an affirmative defense by a preponderance of the evidence); *United States v. Deleveaux*, 205 F.3d 1292, 1298-99 (11th Cir. 2000) (holding defendant's assertion of an affirmative defense may require the defendant to prove the defense by a preponderance of the evidence); *McMillan v. Pennsylvania*, 477 U.S. 79, 85-86 (1986) (applying 42 PA. CONS. STAT. § 9712 (1998), defendants who are convicted of felonies are subject to mandatory minimum sentences when it is found, by a preponderance of the evidence, that the defendant visibly possessed a firearm during the felony offense); *Davis v. Allsbros*, 778 F.2d 168, 172 (4th Cir. 1985) (holding that a state may shift the burden of disproving an element of a crime to the defendant so long as the presumed fact is rationally connected to a proven fact); *Patterson v. New York*, 432 U.S. 197, 205-06 (1977) (holding that N.Y. PENAL LAW § 125.25, which requires the defendant being charged with second-degree murder to prove by a preponderance of the evidence the affirmative defense of extreme emotional disturbance, does not violate the Due Process Clause).

¹² *In re Winship*, 397 U.S. 358, 364 (1970). These elements usually take the form of sentence enhancements, which aggravate the length of punishment for a particular crime or affirmative defense, which eliminate or decrease the punishment for a crime.

of a defendant's loss of liberty.¹³

The legislature's ability to define "elements that bear solely on the extent of punishment" prompted judicial concern for legislative abuse in eviscerating the Due Process Clause. In the mid-1970s, *Mullaney v. Wilbur*¹⁴ held that the Maine State Legislature could not mask an element of a substantive crime by calling that element a defense.¹⁵ However, one year later, the Court, in *Patterson v. New York*,¹⁶ reversed its decision, holding that the extreme emotional distress provision included in New York's murder statute was not an essential element of the crime.¹⁷ It was, therefore, permissible within constitutional guidelines for the New York Legislature to include in its murder statute an element that did not require proof beyond a reasonable doubt within the definition of the substantive offense.¹⁸ The *Patterson* rule seemed to control decisions in this area of the law for the next twenty years.

Most recently, however, the Court has decided a series of cases suggesting that, at least where sentence enhancements are concerned, it is interested in returning to the strict construction of *Mullaney*.¹⁹ In *Jones v.*

¹³ *Apprendi v. New Jersey*, 530 U.S. 466, 485 (2000) (quoting *Winship*, 421 U.S. at 698).

¹⁴ 421 U.S. 684 (1975).

¹⁵ *Id.* at 702. The Court held:

[P]roving that the defendant did not act in the heat of passion on sudden provocation is similar to proving any other element of intent; it may be established by adducing evidence of the factual circumstances surrounding the commission of the homicide. And although intent is typically considered a fact peculiarly within the knowledge of the defendant, this does not, as the Court has long recognized, justify shifting the burden to him.

Id. See generally Stephen Michael Everhart, *Putting a Burden of Production on the Defendant Before Admitting Evidence that Someone Else Committed the Crime Charged: Is It Constitutional?*, 76 NEB. L. REV. 272 (1997) (positing that it is unconstitutional to place the burden of proof on the defendant for the introduction of evidence relating to a third party's guilt).

¹⁶ 432 U.S. 197 (1977).

¹⁷ The Court reasoned:

This affirmative defense, which the Court of Appeals described as permitting "the defendant to show that his actions were caused by a mental infirmity not arising to the level of insanity, and that he is less culpable for having committed them," does not serve to negative any facts of the crime which the State is to prove in order to convict of murder. It constitutes a separate issue on which the defendant is required to carry the burden of persuasion.

Id. at 206-07 (citations omitted).

¹⁸ See, e.g., *Martin v. Ohio*, 480 U.S. 228, 236 (1987) (upholding an Ohio criminal statute that places upon the defendant the burden of proving by a preponderance of the evidence an affirmative defense, and stating that "*Patterson* [was] authority for our decision"); *McMillan v. Pennsylvania*, 477 U.S. 79, 83 (1986) (holding that Pennsylvania's Mandatory Minimum Sentencing Act "creates no presumption as to any essential fact and places no burden on defendant; [nor does] it . . . relieve the prosecution of its burden of proving guilt") (internal citations omitted).

¹⁹ See, e.g., *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (holding that any fact which may increase the penalty of a crime beyond the statutory maximum, other than a prior conviction, must be proven beyond a reasonable doubt); *Jones v. United States*, 527 U.S. 373, 377-79 (1999) (holding that aggravating factors in a death penalty sentencing decision must have been proven beyond a reasonable doubt in order to be applied); *Almendarez-Torres v. United States*, 523 U.S. 224, 239 (1998) (holding that the existence of a prior conviction is appropriate to enhance the penalty of a conviction and need

*United States*²⁰ and *Apprendi v. New Jersey*,²¹ the Court, relying in part on *Mullaney*, held that the legislature might not relieve the prosecution of its burden to prove beyond a reasonable doubt any fact that enhances the defendant's sentence.²² By including some items that increase penalties and must be proven by the prosecution beyond a reasonable doubt, the Court resurrected the fundamental principle of *Mullaney*. The Court concluded that a legislature may not circumvent the protections of the Due Process Clause "merely by redefin[ing] the elements that constitute different crimes, [and] characterizing them as factors that bear solely on the extent of punishment."²³

Scholars maintain that these recent decisions could portend an end to the defendant's burden to prove affirmative defenses.²⁴ This Article considers whether it would be sound to extend the *Apprendi* rule to affirmative

not be included in the criminal indictment); *McMillan*, 477 U.S. at 85 (holding that a sentencing enhancement which constitutes an element of the crime does not violate due process if it is considered only after the defendant has been convicted of the underlying offense).

While noting that we had just last year expressed serious doubt concerning the constitutionality of allowing penalty-enhancing findings to be determined by a judge by a preponderance of the evidence *Jones v. United States*, 526 U.S. 227 (1999), the court concluded that those doubts were not essential to our holding. Turning then, as the appeals court had, to *McMillan*, as well as to *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), the court undertook a multifactor inquiry and then held that the hate crime provision was valid. In the majority's view, the statute did not allow impermissible burden shifting, and did not "create a separate offense calling for a separate penalty." [State v. *Apprendi*,] 159 N.J., at 24, 731 A.2d, at 494 [(1999)]. Rather, "the Legislature simply took one factor that has always been considered by sentencing courts to bear on punishment and dictated the weight to be given that factor."

Apprendi, 530 U.S. at 472-73.

²⁰ 527 U.S. 373 (1999).

²¹ 530 U.S. 466 (2000).

²² See *Jones*, 527 U.S. at 240-52; *Apprendi*, 530 U.S. at 490. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* The Court in *Apprendi* also acknowledged Judge Stevens' concurring opinion in *Jones*, in which he stated "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." *Id.* (quoting *Jones*, 526 U.S. at 252-53 (Steven, J., concurring)).

²³ *Apprendi*, 530 U.S. at 485 (quoting *Winship*, 421 U.S. at 698) (alteration in original).

²⁴ See Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467 (2001) (discussing the *Apprendi* decision and developing a multi-factor test that courts can use to determine when a statute contains "non-elements" of a crime, as codified by a legislature, that in actuality appear to be essential elements of a crime that would otherwise necessitate the state to prove their existence beyond a reasonable doubt); Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L. J. 457 (1989) (discussing approaches taken by courts to deal with issues raised by the presumption of innocence and advocating a return to the use of a broad reasonable doubt rule); see also Andrew J. Fuchs, *The Effect of Apprendi v. New Jersey on the Federal Sentencing Guidelines: Blurring the Distinction Between Sentencing Factors and Elements of a Crime*, 69 FORDHAM L. REV. 1399 (2001) (analyzing and interpreting the *Apprendi* decision's impact). Fuchs provides two possible interpretations of the *Apprendi* decision; a broad interpretation that all sentencing guidelines are now invalidated and a narrower interpretation that the jury must decide every fact that constitutes an individual offense. Fuchs, *supra*; see also Everhart, *supra* note 15, at 286-93 (discussing the burdens of proof required for affirmative defenses as explicated by the Court).

defenses. Part II of this Article considers the historical foundation of the Due Process Clause and the evolution of the assignment of the burden of proof for affirmative defenses and sentencing factors. Part II also reviews *Mullaney* and its progeny through the most current case, *Apprendi*. Part III discusses the Court's model for determining which categories of statutory language constitute elements requiring proof beyond a reasonable doubt and which are "non-essential element[s] of an offense." Part IV evaluates whether it is appropriate to assign the defendant the burden of proving affirmative defenses to the defendant under the post-*Apprendi* construct and considers the likelihood and wisdom of returning *Mullaney* to its full constitutional vigor. Ultimately, this Article concludes that while extending the *Apprendi* rule to affirmative defenses would not be inconsistent with recent Court decisions, it would be inappropriate because the Court's reasoning for curtailing the legislature's ability to shift the burden of proof for sentence enhancements is not applicable to affirmative defenses.

II. THE JUDICIAL LIMITATIONS OF THE DUE PROCESS CLAUSE

A premier tenet of the American criminal justice system is that the prosecution has the burden of proving every element of a crime beyond a reasonable doubt.²⁵ The Constitution does not specifically require the prosecution to bear this particular burden.²⁶ However, the Supreme Court has interpreted the Fifth and Fourteenth Amendments to protect the accused "against conviction except upon proof beyond a reasonable doubt."²⁷ In *Winship*,²⁸ Justice Brennan held that the Due Process Clause requires the prosecution to offer proof beyond a reasonable doubt of "every fact necessary to constitute the crime with which [the defendant] is charged."²⁹ In-

²⁵ See, e.g., *United States v. Gaudin*, 515 U.S. 506, 510 (1995) (holding that "materiality" of statements bearing upon the crime with which the defendant is charged must be submitted to a jury for a determination of proof beyond a reasonable doubt); *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993) (holding that the use of a definition of reasonable doubt that was previously held unconstitutional cannot be considered a harmless error); *Patterson v. New York*, 432 U.S. 197, 210 (1977) (holding that a state need not "disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused"); *Leland v. Oregon*, 343 U.S. 790, 795 (1952) (holding that an Oregon statute requiring defendant to prove insanity defense beyond a reasonable doubt did not violate Due Process Clause because it did not negate the state's requirement to prove all necessary elements of the crime beyond a reasonable doubt); see also Paul A. Hemesath, *Proof Issues*, 89 GEO. L.J. 1644 (2001) (summarizing the reasonable doubt standard, affirmative defenses, and presumptions in criminal jurisprudence).

²⁶ See Note, *Reasonable Doubt: An Argument Against Definition*, 108 HARV. L. REV. 1955, 1955 (1995) (positing that courts should not attempt to define the reasonable doubt term when explaining the concept to juries).

²⁷ *In re Winship*, 397 U.S. 358, 364 (1970); see also U.S. CONST. amend. V (stating that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law"); U.S. CONST. amend. XIV, § 1 (stating that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of the law").

²⁸ 397 U.S. 358 (1970).

²⁹ *Id.* at 364.

deed, this requirement is "a pervasive, historically ingrained requirement in criminal trials."³⁰

Although *Winship* guaranteed the defendant strong constitutional safeguards, it provided courts with little guidance regarding what facts are "necessary to constitute the crime . . . charged."³¹ Legislatures and prosecutors argued that the prosecutor's new burden did not extend to those aspects of a crime that increased or decreased sentencing or provided exculpation or justification of the crime charged.³² The *Winship* decision, it has been argued, exempts the prosecution from the burden of proving every element of a crime beyond a reasonable doubt where sentencing factors and affirmative defenses are concerned.³³

The limits of the *Winship* decision first presented itself for clarification in *Mullaney v. Wilbur*. In *Mullaney*, the Supreme Court considered the boundaries of the *Winship* rule.³⁴ The prosecution charged the defendant, Stillman E. Wilbur, Jr., with first-degree murder and manslaughter under

³⁰ State v. Thomas, 806 P.2d 689, 690 (Or. 1991); see State v. Glass, 5 Or. 73 (1873).

³¹ *Winship*, 397 U.S. at 364.

³² In *Mullaney*, the state argued that *Winship* should not apply since the fact in question, sentencing, does not come into issue until the jury has already determined guilt of the defendant. Thus, the argument continued, the defendant's critical interests in liberty and reputation are no longer of paramount concern since he is likely to lose his liberty and suffer stigmatization already. See *Mullaney v. Wilbur*, 421 U.S. 684, 697 (1975).

³³ See Gerald E. Lynch, *Towards A Model Penal Code, Second (Federal?): The Challenge of the Special Part*, 2 BUFF. CRIM. L. REV. 297 (1998). For many years, it has been uncertain precisely which determinations are sentencing factors and which are elements of the crime. Basically, as Professor Lynch wrote, the legislature determined what constituted an element. See *id.* at 316-17. Once the legislature said that a fact was not an element necessary to constitute a crime, the stringent due process requirements on the prosecution ceased to exist. See *id.* at 323.

An "affirmative defense" is any defense that assumes the complaint or charges to be correct but raises other facts that, if true, would establish a valid excuse or justification or a right to engage in the conduct in question. An affirmative defense does not concern itself with the elements of the offense at all; it concedes them. In effect, an affirmative defense says, "Yes, I did it, but I had a good reason."

State v. Cohen, 568 So.2d 49, 51-52 (Fla. 1990).

Affirmative defenses are also defined by the Model Penal Code as defenses that are "peculiarly within the knowledge of the accused." It is easy to see why defenses such as insanity and self-defense constitute affirmative defenses. First, the details of the defense really are peculiarly within the knowledge of the accused. But the details of the third-party guilt defense are not "peculiarly within the knowledge of the accused." In fact, information concerning suspects other than the accused is often peculiarly within the knowledge of the police or the prosecution.

Second, a defendant in a criminal case has no constitutional right to raise an affirmative defense. Therefore, since the government has the greater right to eliminate the defense entirely, the government has the lesser right to place limitations or burdens of proof on the exercise of the gratuitously granted state right. But an accused does have a constitutional right to adduce evidence "tending to show that a third party committed the crime charged." Hence, because the state "lacks the greater power to exclude the evidence entirely," the state is also prohibited from placing limitations (i.e., burdens of proof) on the defendant's constitutional right to admit third-party guilt evidence.

Everhart; *supra* note 15, at 291-92 (citations omitted).

³⁴ *Mullaney*, 421 U.S. at 697-701.

Maine's penal code.³⁵ Although the defendant admitted to fatally assaulting the victim, at trial he claimed that he attacked the victim in a "frenzy" which was provoked by the victim's homosexual advances.³⁶

The Maine Penal Code defined murder and manslaughter as separate crimes.³⁷ The murder statute required the prosecution to prove that the defendant acted with malice.³⁸ The manslaughter statute allowed for a lesser sentence than murder if the defendant killed in the heat of passion without express or implied malice.³⁹ At trial, the judge instructed the jury that if the prosecution proved beyond a reasonable doubt that the homicide was intentional and unlawful, then it could presume that the defendant acted with malice aforethought and could find the defendant guilty of murder.⁴⁰ If, however, the defendant had proved, by a preponderance of the evidence, that he acted in the heat of passion, then the jury was required to find the defendant guilty of the lesser crime of manslaughter.⁴¹ Through his instruction, the judge presumed that the "heat of passion" language of the Maine manslaughter statute was an affirmative defense, proof of which lay with the defendant.⁴² The trial judge's instruction to the jury allowed the prosecution to rely on a presumption of implied malice, thus requiring the defendant to prove that he acted in the heat of passion on sudden provocation.⁴³ The defendant was convicted of murder and appealed.⁴⁴

On appeal to the Maine Supreme Judicial Court, the defendant argued that he had been denied due process because he was required to negate the

³⁵ *Id.* at 685-86.

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

The manslaughter statute, ME. REV. STAT. ANN., Tit. 17, § 2551 (1964), in relevant part provides:

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. at 686 n.3.

³⁶ *Mullaney*, 421 U.S. at 685. The argument continued that, at most, the defendant was guilty of manslaughter since the act occurred in the heat of passion. *Id.*

³⁷ *Id.* at 686 n.3.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 686-87.

⁴¹ *Id.*

⁴² *Id.* at 686.

⁴³ See *State v. Wilbur*, 278 A.2d 139, 143-144 (Me. 1971). The trial court judge's jury instruction was as follows:

Bearing in mind, as I have said, that there has been an unlawful killing, that is one not justified in self defense, then the killing is presumed to be with malice aforethought, and the burden is then upon the defendant, the killer, to satisfy the jury that it was not done with malice aforethought either express or implied.

Id.

⁴⁴ *Id.* at 687.

element of malice aforethought by proving that he acted in heat of passion.⁴⁵ He argued that malice aforethought was the sole element that distinguished murder from manslaughter and that by having to disprove malice aforethought, he unconstitutionally had to assume the prosecution's burden.⁴⁶ The Maine Supreme Judicial Court disagreed with the defendant and affirmed his conviction.⁴⁷ It found that murder and manslaughter were not distinct crimes but rather different degrees of the single generic offense of felonious homicide.⁴⁸ Thus, the heat of passion provision of the manslaughter statute was an affirmative defense to the greater crime of murder.⁴⁹

The defendant appealed on a writ of habeas corpus to federal district court, which disagreed with the Maine Supreme Judicial Court. It ruled that, under the Maine statute, murder and manslaughter were distinct offenses, not different degrees of the same offense.⁵⁰ The court found that, under *Winship*, the prosecution must prove malice aforethought beyond a reasonable doubt.⁵¹ The Court of Appeals for the First Circuit affirmed the district court, subscribing in general to the court's analysis and construction of the Maine law.⁵² On appeal, the United States Supreme Court vacated the opinion and remanded it to the court of appeals.⁵³ On remand, the court of appeals again held that the Maine homicide statutory scheme vio-

⁴⁵ *State v. Wilbur*, 278 A.2d 139, 143-44 (Me. 1971).

⁴⁶ *Id.* at 143-44. As early as 1727, it had been held that "once the prosecution proved that the accused had committed the homicide, it was 'incumbent upon the prisoner to make out, to the satisfaction of the court and jury' 'all . . . circumstances of justification, excuse or alleviation.'" *Mullaney*, 421 U.S. at 693-94 (quoting 4 WILLIAM BLACKSTONE COMMENTARIES 201); see also *King v. Oneby*, 92 Eng. Rep. 465 (K.B. 1727); MICHAEL FOSTER, A REPORT OF SOME PROCEEDINGS ON THE COMMISSION FOR THE TRIAL OF THE REBELS IN THE YEAR 1746, IN THE COUNTY OF SURRY, AND OTHER CROWN CASES: TO WHICH ARE ADDED DISCOURSES UPON A FEW BRANCHES OF THE CROWN LAW 296-97 (Michael Dodson ed., 3d ed. 1809). Thus, at common law, the burden of proving heat of passion lay with defendant. *Mullaney*, 421 U.S. at 694. In the 1975 *Mullaney* decision, however, the Court noted that a majority of states require the prosecution to prove heat of passion. *Id.* at 696.

⁴⁷ *Wilbur*, 278 A.2d at 149.

⁴⁸ *Id.* at 144-146. The court noted that the law over the past century has been to place the burden of proof on the defense to prove that the defendant acted in the heat of passion on sudden provocation. *Id.* The *Wilbur* court also discussed the possible application of *Winship*. *Id.* at 146.

⁴⁹ It is interesting to note that *Winship* was decided in 1970, four years after the defendant's trial. In re *Winship*, 397 U.S. at 358; *Wilbur*, 278 A.2d at 146. The Maine Supreme Judicial Court noted this fact, but "did not anticipate the application of the *Winship* principle to a factor such as the heat of passion on sudden provocation." *Mullaney*, 421 U.S. at 688.

⁵⁰ *Wilbur v. Robbins*, 349 F.Supp. 149, 152-53 (D.Me. 1972).

⁵¹ *Id.* at 153.

⁵² See *Wilbur v. Mullaney*, 473 F.2d 943 945-47 (1st Cir. 1973). The court noted that "within broad limits a state court must be the one to interpret its own laws" but held that "a totally unsupported construction which leads to an invasion of constitutional due process is a federal matter." *Id.* at 945. In the meantime, the Supreme Judicial Court of Maine decided a similar case. See *State v. Lafferty*, 309 A.2d 647 (Me. 1973). The *Lafferty* decision reaffirmed the holding in *State v. Wilbur*, and rejected the First Circuit's ruling in *Mullaney v. Wilbur*. *Id.* at 661-64. In light of the conflict, the United States Supreme Court granted certiorari. *Mullaney v. Wilbur*, 414 U.S. 1139 (1974).

⁵³ *Mullaney v. Wilbur*, 414 U.S. 1139 (1974).

lated due process.⁵⁴ The Supreme Court again granted certiorari.⁵⁵

Justice Powell, writing for the majority, declined to follow the analysis of the lower federal courts.⁵⁶ Instead, Powell held that the trial judge's instructions erroneously placed the burden to disprove malice aforethought on the defendant.⁵⁷ Interpreting the absence of malice provision in the Maine manslaughter statute as something other than a "fact necessary to constitute [an element of] the *crime*," as had the Supreme Judicial Court of Maine, was held as inconsistent with our traditional notions of homicide.⁵⁸ Such a holding threatened to grant the legislature power to circumvent the Due Process Clause.⁵⁹

In reaching its conclusion, the majority reasoned that the history of punishing homicide crimes and the potential for legislative abuse necessitated its finding.⁶⁰ Historically, only those homicides "committed in the enforcement of justice" were deemed justifiable.⁶¹ Eventually, the class of justifiable homicides was expanded.⁶² This expansion included "accidental homicides and those committed in self defense."⁶³ Still, in any other case, no affirmative defense existed to ameliorate punishment.⁶⁴ Therefore, the Court held that the Maine homicide statute was unconstitutional.⁶⁵ The Court viewed malice aforethought as an additional element that elevated voluntary manslaughter to murder.⁶⁶ In so finding, the Court rejected the

⁵⁴ *Wilbur v. Mullaney*, 496 F.2d 1303, 1307 (1st Cir. 1974).

⁵⁵ *Mullaney v. Wilbur*, 419 U.S. 823 (1974).

⁵⁶ Justice Powell wrote the majority opinion and was joined by the entire court: Burger, Douglas, Brennan, Stewart, White, Marshall, Blackmun and Rehnquist. See *Mullaney*, 421 U.S. at 684. Justice Rehnquist wrote a concurring opinion and was joined by Chief Justice Burger. *Id.* at 704. At the outset, the opinion rejected the analysis of the district court and the First Circuit, thereby accepting the Maine Supreme Judicial Court's construction of its state law. *Id.* at 690-91.

⁵⁷ *Id.* at 701. The Court conducted a historical analysis, thereby showing why such an approach is impermissible. *Id.* at 692-96.

⁵⁸ *Id.* at 696-98. The Court noted that the state impermissibly, "affirmatively shifted the burden of proof to the defendant." *Id.* at 701. It held that the "Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion . . ." *Id.* at 704.

⁵⁹ *Id.* at 698-99.

⁶⁰ *Id.* at 692-98.

⁶¹ *Id.* at 692.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ See *id.* Much of this history was set out in the Court's opinion in *McGautha v. California*, 402 U.S. 183, 197-98 (1971). See also 2 FREDERICK POLLOCK & FREDERICK WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 478-87 (2d ed., Cambridge Univ. Press 1982) (1899) (explaining that, historically, homicide that was neither justifiable nor excusable was felonious homicide); 3 JAMES F. STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 1-107 (London, MacMillan 1883) (delineating the history of the law of homicide in its two forms: murder and manslaughter).

⁶⁵ *Mullaney*, 421 U.S. at 703-04.

⁶⁶ *Id.*

petitioner's argument that the absence of malice was instead a defense to murder.⁶⁷

The greater concern raised by petitioner's argument was that, if accepted, it would allow legislatures to effectively allocate the burden of proof for different elements of a crime.⁶⁸ Petitioners argued that the Maine statute, by requiring the defendant to prove by a preponderance of the evidence that the killing was committed in the heat of passion, made the heat of passion element an affirmative defense and thus not a "fact necessary to constitute the crime" of felonious murder.⁶⁹ The Court soundly rejected this position.⁷⁰ It reasoned that acceptance of the petitioner's argument would extend *Winship* beyond its original intent.⁷¹ If legislatures were permitted to label elements as those essential to prove a crime or as those available to a defendant as affirmative defenses, they would be able to circumvent the process of proof.⁷²

In *Patterson v. New York*,⁷³ the Court refused to apply *Mullaney*, holding that the defense of extreme emotional disturbance, an expanded notion of heat of passion, did not negate an element of the crime of murder.⁷⁴ Defendant Gordon Patterson shot and killed his estranged wife's boyfriend after spotting her "in a state of semiundress" in front of the victim.⁷⁵ The defendant was charged with violating section 125.25 of the New York Penal Law which provides, in relevant part, that:

⁶⁷ *Id.* at 697-98. The Court argued that the State was not concerned "only with guilt or innocence in the abstract but also with the degree of culpability." *Id.* The law distinguishes those who kill in the heat of passion from those who do not. *Id.* at 698. Therefore, the state views the former as "less blameworthy." *Id.*

⁶⁸ *Mullaney*, 421 U.S. at 698-99.

⁶⁹ *Id.* at 697 (citing *Winship*, 397 U.S. at 364).

⁷⁰ *Id.* at 697-701.

⁷¹ *Id.* at 698 (stating that "Maine denigrates the interests found critical in *Winship*"). The Court stated that *Winship* is concerned with substance rather than formalism. *Id.* at 699. Under the *Winship* analysis, a court should look at the law as applied. *Id.*

⁷² See *Mullaney*, 421 U.S. at 698-99. The State could therefore undermine many interests the *Winship* decision sought to protect. See *id.*

⁷³ 432 U.S. 197 (1977).

⁷⁴ *Id.* at 205-10. The Court noted that extreme emotional distress is a considerably expanded version of the heat of passion defense. *Id.* at 202. With the adoption of the Model Penal Code, the American Law Institute ("ALI") departed from the heat of passion defense. See MODEL PENAL CODE § 210.3 (1962). They adopted "extreme mental or emotional disturbance" as a defense to criminal homicide that would mitigate a murder charge to manslaughter. *Patterson*, 432 U.S. at 202. The test is whether, "from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be," the homicide was committed, "under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse." *Id.* The test, therefore, includes both a subjective element and an objective element. Whereas the test looks at the situation that gave rise to the extreme emotional disturbance as the actor believed it to be, it must be reasonable that the event gave rise to the extreme emotional disturbance. See 1 MODEL PENAL CODE AND COMMENTARIES, pt 2, at 50. This new formulation of the law has created a larger class of cases that may be treated as manslaughter, which would have otherwise been murder. *Id.* at 49.

⁷⁵ *Patterson*, 432 U.S. at 198. The defendant responded to the sight by shooting the boyfriend twice in the head. *Id.*

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

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

- (a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under 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 crime⁷⁶

The defendant was convicted at trial and the Appellate Division affirmed his conviction.⁷⁷ The defendant appealed to the New York Court of Appeals arguing that the statutory requirement that he prove extreme emotional disturbance⁷⁸ violated his right to due process.⁷⁹ The New York Court of Appeals rejected the defendant's argument and held that the statute was consistent with due process.⁸⁰

The defendant appealed directly to the Supreme Court.⁸¹ The Court analyzed the New York statute and defined the extreme emotional disturbance element as a mitigating circumstance, thereby undermining the principles embodied in *Winship*.⁸² Justice White, writing for the majority, held that those elements that a legislature defines as exculpatory or mitigating do not negate an element of the substantive crime.⁸³ Therefore, such a

⁷⁶ N.Y. PENAL LAW §125.25 (1998).

⁷⁷ *Patterson*, 432 U.S. at 200.

⁷⁸ At trial, the jury was charged that the defendant had the burden of proving his affirmative defense by a preponderance of the evidence. *Id.*

⁷⁹ See *People v. Patterson*, 347 N.E.2d 898, 902 (N.Y. 1976). The court noted that while Patterson's appeal was pending, the United States Supreme Court decided *Wilbur v. Mullaney*. *Id.*

⁸⁰ *Id.* at 907. The court distinguished *Mullaney* on the ground that the New York statute did not shift the burden to the defendant to disprove any fact essential to the offense charged. *Id.* Specifically, in New York, the affirmative defense of extreme emotional disturbance bears no direct relationship to any element of murder. *Id.* at 907-08.

⁸¹ See *Patterson v. New York*, 429 U.S. 813 (1976) (noting probable jurisdiction).

⁸² See *Patterson*, 432 U.S. at 207. The Court explained that the defense allows a defendant to show mental infirmity, which demonstrates less culpability. *Id.* at 206.

⁸³ The Court declined to hold that a

[s]tate must prove beyond a reasonable doubt every fact, the existence or nonexistence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree of culpability or the severity of the punishment. Here, in revising its criminal code, New York provided the affirmative defense of extreme emo-

statute does not violate a defendant's due process rights.⁸⁴ The Court noted that the legislature had taken great pains to ensure that innocent men would not be convicted by placing a substantial burden on the prosecution.⁸⁵ However, "the risk [the prosecution] must bear is not without limits," and "due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person."⁸⁶ The majority declined to "adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused."⁸⁷

The majority distinguished *Patterson* from *Mullaney*.⁸⁸ In the Maine murder statute malice was the absence of provocation and, therefore, required the defendant to prove provocation as an element of the crime.⁸⁹ In contrast, the New York statute did not presume or imply extreme emotional disturbance,⁹⁰ a concept that did not have deep historic roots in common law.⁹¹ Thus, according to the *Patterson* Court the extreme emotional dis-

tional disturbance, a substantially expanded version of the older heat-of-passion concept; but it was willing to do so only if the facts making out the defense were established by the defendant with sufficient certainty. The State was itself unwilling to undertake to establish the absence of those facts beyond a reasonable doubt, perhaps fearing that proof would be too difficult and that too many persons deserving treatment as murderers would escape that punishment if the evidence need merely raise a reasonable doubt about the defendant's emotional state.

Id. at 207. Justice Powell wrote for the dissent, joined by Justice Brennan and Justice Marshall. *Id.* at 216. Justice Rehnquist took no part in the decision. *Id.*

⁸⁴ *Patterson*, 432 U.S. at 210 (stating that the "Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged") Since "proof of the nonexistence of all affirmative defenses has never been constitutionally required," the Court was unwilling to depart from this standard. *Id.*

⁸⁵ *Id.* at 208 (pointing out that this comes with the social cost that some guilty people will go free).

⁸⁶ *Id.*

⁸⁷ *Id.* at 210 (relying, again, on the fact that proof of the nonexistence of all affirmative defenses has never been required in the past).

⁸⁸ *Id.* at 215-16.

⁸⁹ See *id.* at 216; see also *supra* text accompanying 40-41.

⁹⁰ *Patterson*, 432 U.S. at 216.

⁹¹ At first, "the common law did not distinguish between murder and manslaughter." MODEL PENAL CODE § 210.3 cmt. 3 (1980). Later, courts began to make the distinction that murder required "malice aforethought" while manslaughter did not. *Id.* Traditionally, then, manslaughter was the absence of malice aforethought, but not a justification or excuse for the act. *Id.* The common law further defined manslaughter as an intentional killing committed in the "heat of passion." *Id.* In the Model Penal Code, extreme emotional disturbance was developed as a defense to murder from the traditional heat of passion defense. See *id.* Thus, extreme emotional disturbance is a relatively new defense. Just as heat of passion constituted manslaughter, extreme emotional disturbance mitigated a murder charge to manslaughter. When New York adopted its current criminal code, it appropriated almost word-for-word, the ALI formulation of extreme emotional disturbance in the Model Penal Code. See N.Y. PENAL LAW § 125.25 (1998).

turbance provision did not negate an element of the New York murder statute.⁹²

Justice Powell, who two years earlier had written for the overwhelming majority in *Mullaney*,⁹³ wrote the dissent in *Patterson*, joined by Brennan and Marshall.⁹⁴ According to the dissent, the majority opinion opened the door to the very threats about which Justice Powell had warned in *Mullaney*.⁹⁵ Powell wrote, "in the name of preserving legislative flexibility, the court today drains *In Re Winship* of much of its vitality" and "surrenders to the legislative branch a significant part of its responsibility to protect the presumption of innocence."⁹⁶ The Maine and New York Statutes were similar in that both provided the defendant with a less severe punishment for acting in response to emotion.⁹⁷ Powell recognized that the very reasons for its decision in *Mullaney* were vitiated in the majority's decision in *Patterson*.⁹⁸ By paying deference to the New York State Legislature and upholding its definition of extreme emotional distress as an affirmative defense to murder, the majority decision allowed "a legislature to shift, virtually at will, the burden of persuasion with respect to any factor in a criminal case, so long as it is careful not to mention the nonexistence of that factor in the statutory language that defines the crime."⁹⁹ Following *Patterson*, states could "undermine" the *Winship* decision by redefining elements to constitute different crimes.¹⁰⁰

In *McMillan v. Pennsylvania*,¹⁰¹ the Court first coined the phrase "sen-

⁹² See *Patterson*, 432 U.S. at 215-16. Justice Rehnquist took no part in the consideration or decision of the case. *Id.*

⁹³ *Mullaney*, 421 U.S. at 684.

⁹⁴ *Patterson*, 432 U.S. at 216 (Powell, J., dissenting).

⁹⁵ See *id.* at 221. Powell questioned how the Court could hold that the defendant's burden to prove the heat of passion in *Mullaney* was invalid, while upholding New York's statute which requires the defendant to prove extreme emotional distress. See *id.* at 221-22. Powell felt the difference between the statutes was "formalistic rather than substantive." *Id.*

⁹⁶ *Id.* at 216 (Powell, J., dissenting).

⁹⁷ *Id.* at 199, 212-213.

⁹⁸ See *id.* at 224-25 (Powell, J., dissenting) (stating that "[i]t would be preferable, if the Court has found reason to reject the rationale of *Winship* and *Mullaney*, simply and straightforwardly to overrule those precedents"). Powell went through a detailed analysis of why the case is similar to *Mullaney* and requires the same conclusion. *Id.*

⁹⁹ *Id.* at 223.

¹⁰⁰ *Mullaney*, 421 U.S. at 698 (stating that "if *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect . . .").

¹⁰¹ 477 U.S. 79 (1986). The petitioners, of whom there were four, were convicted of various felonies enumerated in section 9712 of the Pennsylvania Code. *Id.* at 80. Under section 9712, the petitioners were subject to a mandatory minimum five-year sentence if found by a preponderance of the evidence to have visibly possessed a firearm. *Id.* at 81. The petitioners were convicted and, on appeal, challenged the constitutionality of the statute. *Id.* at 83. The Pennsylvania Supreme Court rejected the petitioners' argument and upheld the statute. *Id.*

tencing factor”¹⁰² and considered whether proof of sentencing factor elements, like affirmative defenses, are exempt under *Winship*.¹⁰³ Specifically, the Court considered whether Pennsylvania’s Mandatory Minimum Sentencing Act (the “Pennsylvania Act”)¹⁰⁴ violated the Due Process Clause of the Fourteenth Amendment because it permitted punishment for certain enumerated felonies to a mandatory minimum sentence of five years imprisonment if the sentencing judge found by a preponderance of the evidence that the person “visibly possessed a firearm during commission of the offense.”¹⁰⁵ The legislation’s language specifically provided that “visible possession” was a sentence enhancement provision and not an element of the crime.¹⁰⁶

The issue in *McMillan* arose when four sentencing judges at separate sentencing hearings, struck down the Pennsylvania Act because it did not allow the jury to evaluate the element of “visible possession,” which leads directly to punishment.¹⁰⁷ The Commonwealth appealed and the Supreme Court of Pennsylvania reversed, concluding that the Pennsylvania Act was constitutional and consistent with due process.¹⁰⁸ Justice Rehnquist wrote

¹⁰² *Apprendi*, 530 U.S. at 485 (stating that “[i]t was in *McMillan v. Pennsylvania* [] that this Court, for the first time, coined the term ‘sentencing factor’. . . .”). Andrew Fuchs argued that *Apprendi* “should be interpreted narrowly and need not invalidate the Guidelines because [it] does not require juries to make Guidelines determinations using a reasonable doubt standard.” Fuchs, *supra* note 24, at 1400-01 (2001). Fuchs posited:

Sentencing factors are determinations impacting the length of a defendant’s sentence that a judge, rather than a jury, makes using the preponderance of the evidence standard. For example, after the jury has already convicted a defendant, judges routinely decide the existence of such sentencing factors as narcotics quantity, whether anyone was injured during the commission of the crime, the extent of victim injury, or whether a weapon was involved.

Id. at 1400 (internal citations omitted).

¹⁰³ *McMillan*, 477 U.S. at 83.

¹⁰⁴ 42 PA. CONS. STAT. § 9712 (West 1998).

¹⁰⁵ *McMillan*, 477 U.S. at 81 (quoting 42 PA. CONS. STAT. ANN. § 9712 (West 1998)).

¹⁰⁶ The Pennsylvania Legislature specifically included language to prevent the due process challenge as well as to respond to the Supreme Court’s holding in *Patterson*. See 42 PA. CONS. STAT. ANN. § 9712(b) (West 1998):

Provisions of this section shall not be an element of the crime and notice thereof to the defendant shall not be required prior to conviction, but reasonable notice of the Commonwealth’s intention to proceed under this section shall be provided after conviction and before sentencing. The applicability of this section shall be determined at sentencing. The court shall consider any evidence presented at trial and shall afford the Commonwealth and the defendant an opportunity to present any necessary additional evidence and shall determine, by a preponderance of the evidence, if this section is applicable.

Id.

¹⁰⁷ See *McMillan*, 477 U.S. at 82 (citing sentencing hearings).

¹⁰⁸ See *Commonwealth v. Wright*, 494 A.2d 354, 362-63 (Pa. 1985). The court noted that the legislature has the responsibility of defining elements of crimes. *Id.* at 357. Furthermore, per the Crimes Code, an element of an offense is conduct, attendant circumstances, or a result of conduct that is included in the description of the offense, establishes the required kind of culpability, negates an excuse or justification, negates a defense under the statute of limitations or establishes jurisdiction or venue. See *id.* Because visible possession of a firearm is not included in the definitions of the felonies

that the Constitution did not limit a state's power to define "elements" as sentencing factors, and therefore, allowed removal of such "elements" from the reasonable doubt standard.¹⁰⁹

The *McMillan* decision marked the Court's commitment to deferring to the legislature's definition of a substantive crime. Relying heavily on *Patterson*, Justice Rehnquist noted that the Due Process Clause did not require the prosecution to prove beyond a reasonable doubt any element that defines the "severity of punishment" of a particular crime.¹¹⁰ The Court held that "the State legislature's definition of the elements of an offense is usually dispositive." Therefore, the Court should limit its inquiry to whether the legislature's decision to assign the label of sentencing factor to an element of a crime violated the Due Process Clause.¹¹¹ The Court opined, "it goes without saying that preventing and dealing with crime is much more the business of the States than the Federal Government."¹¹² Here, since the State had specifically stated that the "visible possession of a weapon" element was not an element of the crime, it complied with the *Patterson* requirements and, therefore, it was fair to require proof by a preponderance of the evidence.¹¹³

Thus, following *McMillan*: (1) the legislature's decision to link the severity of the punishment to the presence or absence of an identified fact did not automatically subject that fact to the *Winship* requirements; and (2) courts should consider the state legislature's definition of the element of

enumerated in section 9712 and it does not establish culpability required under those definitions, it is clearly not an element of an offense. *Id.* Additionally, section 9712 applies only after a defendant has been convicted of one of the enumerated felonies; therefore, § 9712 applies solely to sentencing proceedings. *Id.* In concluding that section 9712 violated the Due Process Clause, the Pennsylvania Supreme Court stated:

The effect of section 9712 is merely to limit the discretion of the sentencing court in the selection of a minimum sentence where it is determined that the defendant visibly possessed a firearm during the commission of the crime. The maximum permissible term of imprisonment remains unaffected. The defendant has no cognizable right to leniency. Thus, although a finding that this particular sentencing factor is present may have serious consequences for the defendant, we do not believe that a defendant is subject to a section 9712 proceeding is in a position significantly distinguishable from that of other convicted defendants during the sentencing phase.

Id. at 362.

¹⁰⁹ *McMillan*, 477 U.S. at 86-87 (Justice Rehnquist noting that there are constitutional limits, though not precisely defined in *Patterson*, to the State's power to define elements as sentencing factors). One such example is that the Due Process Clause precludes States from discarding the presumption of innocence. *Id.* at 87.

¹¹⁰ See *McMillan*, 477 U.S. at 84.

¹¹¹ *Id.* at 85 (noting that "[w]hile 'there are obviously constitutional limits beyond which the States may not go in this regard . . . [t]he applicability of the reasonable doubt standard . . . has always been depended on how a State defines the offense that is charged in any given case.'" (quoting *Patterson*, 432 U.S. at 211 n.12)).

¹¹² *Id.* (quoting *Irvine v. California*, 347 U.S. 128, 134 (1954)).

¹¹³ See *id.* at 85-86 (stating that "the present case is controlled by *Patterson* . . . rather than *Mullaney*. . . [The] Pennsylvania Legislature has expressly provided that visible possession of a firearm is not an elements of the crime[]").

the offense as dispositive.¹¹⁴ The Court left unclear the precise constitutional limits of a legislature's power to define the elements on an offense.¹¹⁵

The Court distinguished the *Mullaney* decision by concluding that "[s]ection 9712 neither alter[ed] the maximum penalty for a crime nor creat[ed] a separate offense, calling for a separate penalty."¹¹⁶ Instead, "it operat[ed] solely to limit the sentencing court's discretion in assigning a penalty within range already available to it without the special finding of visible possession of a firearm."¹¹⁷ Therefore, following *McMillan*, courts were limited in their ability to look far behind a legislature's rationale in defining an element of a crime.¹¹⁸

Justice Stevens, in his dissent, raised concern that the *McMillan* decision did not comport with the Court's decision in *Winship*.¹¹⁹ He concluded that the factual finding of visibly possessing a firearm identified "conduct that the legislature specifically intended to prohibit and to punish by a special sanction."¹²⁰ According to Justice Stevens,

[A]ppropriate respect for the rule of *In re Winship* requires that there be some constitutional limits on the power of a State to define the elements of criminal offenses. The high standard of proof is required because of the immense importance of the individual interest in avoiding both the loss of liberty and the stigma that results from a criminal conviction . . . [I]f a State provides that a specific component of a pro-

¹¹⁴ *Id.* at 84-85.

¹¹⁵ *McMillan*, 477 U.S. at 91 (finding that "[o]ur inability to lay down any 'bright line' test may leave the constitutionality of statutes more like those in *Mullaney* . . . than is the Pennsylvania statute [,] to depend on differences of degree, but the law is full of situations in which differences of degree produce different results").

¹¹⁶ *Id.* at 87-88.

¹¹⁷ *Id.* at 88 (stating that "[t]he statute gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense"). In rejecting the petitioners' arguments, the Court noted that the statute does not expose one to greater or additional punishment. *See id.*

¹¹⁸ In his dissenting opinion, Justice Marshall stated "[w]hether a particular fact is an element of a criminal offense that . . . must be proved by the prosecution beyond a reasonable doubt is a question that must be decided by this Court and cannot be abdicated to the States." *McMillan*, 477 U.S. at 93 (Marshall, J., dissenting). He also noted that he would not rely on the distinction between aggravating and mitigating facts, stating that he "would put off until next Term, [when the court determines *Martin v. Ohio*] any discussion of how mitigating facts should be analyzed under *Winship*." *Id.* at 94. Marshall agreed with Justice Stevens' opinion which stated that "if a State provides that a specific component of a prohibited transaction shall give rise both to a special stigma and to a special punishment, that component must be treated as a 'fact necessary to constitute the crime' within the meaning of the holding in *In re Winship*." *Id.*

¹¹⁹ *McMillan*, 477 U.S. at 103 (Stevens, J., dissenting).

¹²⁰ *Id.* at 103-04. Justice Stevens wrote: "In my opinion the Constitutional significance of the special sanction cannot be avoided by the cavalier observation that it merely 'ups the ante' for the defendant. No matter how culpable petitioner Denniston may be, the difference between 11½ months and 5 years of incarceration merits a more principled justification" *Id.* at 104 (citation omitted).

hibited transaction shall give rise both to a special stigma and to a special punishment, that component must be treated as a "fact necessary to constitute the crime" within the meaning of our holding in *In re Winship*.¹²¹

In deviating from the principle of *Winship*, *Mullaney* and *Patterson*, the majority decision circumvented due process by allowing the legislature to define aspects of a crime that lead directly to punishment, but absolved the prosecution of the highest burden of proof.¹²²

In *Martin v. Ohio*,¹²³ the Supreme Court continued its policy of deferring to the legislature's decision to define which elements the prosecution must prove, and which the prosecution need not prove beyond a reasonable doubt.¹²⁴ In *Martin*, the Court considered whether the Ohio legislature's decision to label self-defense as an affirmative defense violated the Due Process Clause of the Fourteenth Amendment.¹²⁵ Ohio's aggravated murder statute made it a crime to purposely, and without prior calculation and design, cause the death of another.¹²⁶ The state's self-defense statute provided an affirmative defense to the defendant if she could prove by a preponderance of the evidence that (1) she honestly believed she was in imminent danger of death or great bodily harm; (2) that her only means of escape was to use force; and (3) that she had satisfied any duty to retreat or avoid danger.¹²⁷ The defendant, who was charged with shooting her husband, allegedly in response to a heated argument, claimed that the state unconstitutionally shifted the burden of proving self-defense to the defendant, since self-defense negates the "unlawfulness" implicit in every crime.¹²⁸ The Ohio Supreme Court rejected defendant's argument¹²⁹ and the defendant petitioned the Supreme Court for writ of certiorari.¹³⁰ The

¹²¹ *Id.* at 103.

¹²² *See id.* at 91-92.

¹²³ 480 U.S. 228 (1987).

¹²⁴ *See id.* at 232-33.

¹²⁵ *Id.* at 230 (questioning "whether the Due Process Clause . . . forbids placing the burden of proving self-defense on the defendant").

¹²⁶ OHIO REV. CODE § 2903.01 (Anderson 2002).

¹²⁷ OHIO REV. CODE § 2901.05(A) states:

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

Id.

¹²⁸ *See Martin*, 480 U.S. at 231. The defendant and her husband had fought over grocery money, during which the defendant claimed her husband hit her in the head. *Id.* at 230-31. According to the defendant, the victim came towards her as she was heading upstairs to retrieve her husband's rifle. *See id.* at 231.

¹²⁹ *State v. Martin*, 488 N.E.2d 166, 169 (Ohio 1986).

¹³⁰ *Martin v. Ohio*, 475 U.S. 1119 (1986).

Supreme Court agreed with Ohio's highest court, concluding that the decision to define self-defense as an affirmative defense "founders on State law,"¹³¹ and that since the elements of murder and self-defense do not overlap, the legislature's decision to assign the burden of proving self-defense to a defendant did not run afoul of the Constitution.¹³²

In a strongly worded dissent, Justice Powell concluded that the majority decision was flawed since it granted too much deference to the Ohio legislature.¹³³ The majority failed to look beyond the Ohio legislature's decision to shift the burden to the defendant.¹³⁴ The language of "prior calculation or design" suggests that a defendant must have premeditated the killing.¹³⁵ In contrast, under self-defense, the defendant must prove *imminent* danger of death or great bodily harm.¹³⁶ Someone in imminent danger, who is threatened with great bodily harm, does not have time to form a prior intent to kill.¹³⁷ Consequently, proof of self-defense negates the premeditation element of the Ohio murder statute.¹³⁸ Powell noted that the *Patterson* decision was predicated on the Court's conclusion that the defense of extreme emotional disturbance did not negate an element of New York's murder statute.¹³⁹ In contrast, the defense of self-defense was more analogous to the situation presented to the Court in *Mullaney*, where proof of a "heat of passion" supported a conclusion that a defendant could not act with malice aforethought.¹⁴⁰ Thus, under *Mullaney* and *Patterson*, the Court should have concluded that the Due Process clause prohibits the defendant from having the responsibility to prove this element of the crime.¹⁴¹

Powell, who was in the majority in *Mullaney* and dissented in *Patterson*, outlined what he thought would be the proper two-pronged test for evaluating whether the legislature properly relieved the defendant of the

¹³¹ *Martin*, 480 U.S. at 235.

¹³² See *id.* at 234. One example of when a state's decision would run afoul of the Constitution is "if the jury had been instructed that self-defense evidence could not be considered in determining whether there was a reasonable doubt about the State's case." *Id.* at 233. That is, if self-defense "must be put aside for all purposes unless it satisfied the preponderance standard." *Id.* at 233-34.

¹³³ *Id.* at 236, 240 (Powell, J., dissenting).

¹³⁴ See *id.* at 241. Powell argued that the Court had "significantly, and without explanation" extended the deference granted to state legislation. *Id.* at 240. Generally, Powell felt the majority ignored the real meaning of the holding in *Patterson*. *Id.* at 239.

¹³⁵ See *id.* at 238. This elements is satisfied only when the accused has engaged in a "definite process of reasoning *in advance* of the killing." *Id.*

¹³⁶ See *id.*

¹³⁷ *Id.* at 239.

¹³⁸ *Id.*

¹³⁹ *Id.* at 240.

¹⁴⁰ See *Mullaney*, 421 U.S. 684-85.

¹⁴¹ *Martin*, 480 U.S. at 239 (stating that "[i]n many cases, a defendant who finds himself in imminent danger and reacts with deadly force will have not formed a prior intent to kill").

highest burden of proof.¹⁴² His test took into account his concern that *Martin* granted the legislature too much discretion and that it ignored the historical treatment of problems of proof.¹⁴³ According to Powell, a state has discretion to decide who has the burden of proving an element of a crime if: (1) the factor does not make a difference between guilt and innocence; and (2) the factor in question has not historically held that importance.¹⁴⁴ Under this analysis, generally courts cannot grant blanket deference to the legislature in matters that trigger due process concerns and specifically, courts cannot allow a state to put the burden of self-defense on the defendant.¹⁴⁵

In *Almendarez-Torres v. United States*,¹⁴⁶ the Supreme Court applied the *Patterson/Mullaney* construct to federal legislation when it considered whether Congress could properly define a recidivist provision in an illegal immigration statute as a sentence enhancement rather than a "fact necessary to constitute the crime."¹⁴⁷ Congress had enacted 8 U.S.C. § 1326(a), which authorized a prison term of no more than two years for any person who was once deported and returns to the United States without permission.¹⁴⁸ Section 1326 created a recidivist provision, permitting a prison term of up to twenty years if the previous deportation was subsequent to a conviction for commission of an aggravated felony.¹⁴⁹ *Almendarez-Torres* was previously convicted of three aggravated felonies.¹⁵⁰ Subsequently, he was in the United States and charged and convicted under § 1326(a).¹⁵¹ At his sentencing hearing, the defendant argued that his indictment failed to identify the three previous convictions and therefore did not set forth the elements of the crime as required under § 1326(b)(2).¹⁵² He argued, there-

¹⁴² See *id.* at 242 (stating "the State's authority in this respect was elaborated in the *Patterson* dissent, where I proposed a two-part inquiry").

¹⁴³ *Id.*

¹⁴⁴ *Id.* (holding that "[i]f either branch of the test is not met, then the legislature retains its traditional authority over matters of proof") (quoting *Patterson*, 432 U.S. at 226-27).

¹⁴⁵ See *id.* at 242-43 (noting that "[u]nder this analysis, it plainly is impermissible to require the accused to prove self-defense.").

¹⁴⁶ 523 U.S. 224 (1998).

¹⁴⁷ *Id.* at 239. However, *Winship* "did not consider whether, or when, the Constitution requires the Government to treat a particular fact as an element, i.e., as a 'fact necessary to constitute the crime,' even where the crime-defining statute does not do so." *Id.* at 240. The issue before the *Almendarez-Torres* court was whether it was a violation of the defendant's due process for the trial court to treat the provisions of 8 U.S.C. § 1325(b)(2) as sentence enhancements, rather than elements of the crime. *Id.* at 226.

¹⁴⁸ 8 U.S.C. § 1326(a) (2000).

¹⁴⁹ *Id.* at § 1326(b)(2) (stating that if an alien's removal "was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both").

¹⁵⁰ See *Almendarez-Torres*, 523 U.S. at 227.

¹⁵¹ *Id.*

¹⁵² *Id.*

fore, that he could not be sentenced to more than two years in jail.¹⁵³ The district court rejected his argument, concluding that the provisions of § 1326(b)(2) were merely sentence enhancements.¹⁵⁴ On appeal, the Fifth Circuit also rejected defendant's argument, relying on decisions by seven of its sister circuits, which held that § 1326(b)(2) was merely a sentencing provision.¹⁵⁵ The Ninth Circuit, however, was in disagreement as to whether Congress had the authority to define a recidivist statute as a sentence enhancement. As such, the Supreme Court granted certiorari to resolve the split among jurisdictions.¹⁵⁶

The Court stated that, within certain limits, it was Congress's prerogative to decide which factors were relevant to defining a crime and which factors were relevant to sentencing.¹⁵⁷ Moreover, the Court interpreted Congress's intent as treating recidivism as a sentencing factor, not an element of the offense.¹⁵⁸ In addition, the Court recognized the consequences of considering the "aggravated felony" language as an element of the crime.¹⁵⁹ If such were the case, it would create undue prejudice to the defendant.¹⁶⁰ Requiring the prosecution to prove recidivism would obligate it to present evidence at trial of defendant's prior convictions.¹⁶¹ According

¹⁵³ *Id.*

¹⁵⁴ *See id.* The district court, consistent with the applicable sentencing guidelines range, imposed a sentence of 85 months' imprisonment. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (2002).

¹⁵⁵ *United States v. Almendarez-Torres*, 113 F.3d 515 (1996); *see also* *United States v. Valdez*, 103 F.3d 95 (10th Cir. 1996) (holding that reentry after deportation after conviction of a crime is a sentencing enhancement, not a separate offense); *United States v. Haggerty*, 85 F.3d 403 (8th Cir. 1996) (same); *United States v. DeLeon-Rodriguez*, 70 F.3d 764 (3d Cir. 1995) (same); *United States v. Palacios-Casquete*, 55 F.3d 557 (11th Cir. 1995) (same); *United States v. Munoz-Cerna*, 47 F.3d 207 (7th Cir. 1995) (same); *United States v. Cole*, 32 F.3d 16 (2d Cir. 1994) (same); *United States v. Crawford*, 18 F.3d 1173 (4th Cir. 1994) (same); *United States v. Forbes*, 16 F.3d 1294 (1st Cir. 1994) (same); *United States v. Vasquez-Olvera*, 999 F.2d 943 (5th Cir. 1993) (same).

¹⁵⁶ *See Almendarez-Torres*, 523 U.S. at 227-28; *United States v. Gonzalez-Medina*, 976 F.2d 570, 572 (9th Cir. 1992) (holding that subsection (b)(2) constitutes a separate crime)

¹⁵⁷ *See Almendarez-Torres*, 523 U.S. at 228. The Court considered the legislative intent of the statute to determine whether the "aggravated felony" provision of § 1326(b)(2) was merely a sentencing factor which authorized an enhanced penalty. *Id.* To decide whether this was a sentencing factor, the Court looked to the statute's "language, structure, subject matter, context, and history—factors that typically help courts determine a statute's objective and thereby illuminate its text." *Id.*

¹⁵⁸ *See id.* at 230. The Court noted that "the lower courts have almost uniformly interpreted statutes (that authorize higher sentences for recidivists) as setting forth sentencing factors, not as creating new crimes (at least where the conduct, in the absence of recidivism, is independently lawful)." *Id.*; *see, e.g., United States v. Arango-Montoya*, 61 F.3d 1331, 1339 (7th Cir. 1995) (holding that a provision "requiring a doubling of the mandatory minimum sentence . . . was intended to be a sentencing enhancement provision"); *United States v. McGatha*, 891 F.2d 1520 (11th Cir. 1990) (holding that "a statute establishing increased penalties . . . did not establish [a] new criminal offense, but was [a] mere sentence enhancement provision"); *United States v. Jackson*, 824 F.2d 21 (D.C. Cir. 1987) (holding that the Armed Career Criminal Act "is a sentencing enhancement provision, but does not create a separate indictable offense").

¹⁵⁹ *Almendarez-Torres*, 523 U.S. at 234-35.

¹⁶⁰ *Id.* at 235.

¹⁶¹ *See id.* (stating that the "introduction of evidence of a defendant's prior crimes risks significant prejudice"); *see also* *Spencer v. Texas*, 385 U.S. 554, 560-61 (1998).

to the Court, it was not Congress's intent to create such unfairness for the defendant.¹⁶²

Justice Scalia, in his dissent, wrote that the congressional scheme clearly defined two separate crimes, one for entering the country without a previous conviction and one for entering the country with a previous conviction.¹⁶³ Moreover, the legislative scheme did not label § 1326(b)(2) as a sentence enhancement. Thus, according to Scalia, the issue before the Court was not a constitutional one, but merely one of statutory interpretation.¹⁶⁴ Under this conception, the Court would have to find in favor of the defendant.¹⁶⁵

Justice Scalia felt that the majority's blanket deference to Congress "ignore[d] or distorte[d] [the analysis of] *McMillan*."¹⁶⁶ Unlike the statute in *McMillan*, where the legislature had identified the provision in question as a sentence enhancement, § 1326(b)(2) had not been labeled as such.¹⁶⁷ Moreover, *McMillan* "merely limited the sentencing judge's discretion within the range of penalty already available" unlike § 1326(b)(2), which substantially increased the defendant's potential sentence.¹⁶⁸ According to Justice Scalia, the majority's failure to sufficiently evaluate Congress' rationale and appreciate the treatment of prior convictions in which the maximum punishment is increased, as elements of the crime threatened to substantially undermine the Court's prior interpretation of the Due Process Clause.¹⁶⁹

In *Jones v. United States*,¹⁷⁰ the Court began to retreat from *Patterson* and *Almendarez-Torres*. In *Jones*, the defendants held up the victims and

¹⁶² See *Almendarez-Torres*, 523 U.S. at 235 (stating that "we do not believe, other things being equal, that Congress would have wanted to create this kind of unfairness in respect to facts that are almost never contended").

¹⁶³ See *id.* at 249 (Scalia, J., dissenting). Justices Stevens, Souter and Ginsburg also dissented. *Id.* at 248.

¹⁶⁴ *Id.* at 248 (Scalia, J., dissenting).

¹⁶⁵ *Id.*

¹⁶⁶ See *id.* at 253 (Scalia, J., dissenting).

¹⁶⁷ *Id.* at 249 (Scalia, J., dissenting).

¹⁶⁸ *Id.* at 256.

¹⁶⁹ *Id.* (noting that "many State Supreme Courts have concluded that a prior conviction which increases maximum punishment must be treated as an element of the offense under either their State Constitutions"); see, e.g., *Roberson v. State*, 362 P.2d 1115, 1118-1119 (Okla.Crim.App. 1961); *State v. McClay*, 78 A.2d 347352-54 (Me. 1951); *State v. Furth*, 104 P.2d 925, 930-933 (Wash. 1940); *State ex rel. Lockmiller v. Mayo*, 101 S.O. 228, 231 (Fla. 1924); *Tuttle v. Commonwealth*, 68 Mass. 505, 506 (1854) (prior conviction increasing maximum sentence must be set forth in indictment). As a matter of common law, see, for example, *State v. Penney*, 427 P.2d 525, 525-27 (Ariz. 1967); *State v. Waterhouse*, 307 P.2d 327, 331-33 (Or. 1957); *Robbins v. State*, 242 S.W.2d 640, 643-44 (Ark. 1951); *State v. Eichler*, 83 N.W.2d 576, 579-80 (Iowa 1957); *People v. McDonald*, 206 N.W. 516, 518-20 (Mich. 1925); *People ex rel. Cosgriff v. Craig*, 88 N.E. 38, 39-40 (N.Y. 1909); *State v. Smith*, 106 N.W. 187, 188 (Iowa 1906) ("By the uniform current of authority, the fact of the prior convictions is to be taken as part of the offense instantly charged, at least to the extent of aggravating it and authorizing an increased punishment").

¹⁷⁰ 526 U.S. 227 (1998).

struck one in the head with a gun.¹⁷¹ The defendants were charged with violating 18 U.S.C. § 2119, which provided:

Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall—

- (1) be fined under this title or imprisoned not more than 15 years, or both,
- (2) if serious bodily injury (as defined in section 1365 of this title, including any conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and
- (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death.¹⁷²

At the sentencing hearing, the prosecution asked for a sentence of twenty-five years because one of the victims had suffered serious bodily injury.¹⁷³ The defendant objected since sub-section (2) of the statute defined serious bodily injury as an element of the crime and the prosecution had not pleaded that element in the indictment.¹⁷⁴ The trial court disagreed and defined sub-section (2) as a sentencing factor. Since the judge found serious bodily injury by a preponderance of the evidence, the twenty-five year sentence was proper.¹⁷⁵ The defendant appealed to the Ninth Circuit, which agreed with the lower court and found that the serious bodily injury language did not set out an element of the offense.¹⁷⁶ The defendant then

¹⁷¹ See *id.* at 229. During the hold up, one of Jones' co-felons stuck his gun in the victim's ear and then struck him on the head with the weapon. See *id.*

¹⁷² 18 U.S.C. § 2119 (1988).

¹⁷³ *Jones*, 526 U.S. at 231. The pre-sentence report recommended a 25-year sentence because one of the victims had suffered serious bodily injury. The victim suffered a perforated eardrum, as well as permanent hearing loss. *Id.*

¹⁷⁴ See *id.*

¹⁷⁵ See *id.* at 231. In addition, Jones was given a consecutive 5-year sentence for the firearm offense. *Id.*

¹⁷⁶ See *United States v. Oliver*, 60 F.3d 547, 547, 552 (9th Cir. 1995). The Ninth Circuit reasoned that the structure of the statute, particularly the grammatical dependence of the numbered subsections on the first paragraph, demonstrated Congress's understanding that the subsections did not complete the definitions of separate crimes. See *id.* at 552-53. Additionally, the court relied on specific

appealed to the Supreme Court, which granted certiorari.¹⁷⁷

In evaluating whether the trial judge's definition of bodily harm as a sentencing factor was proper, Justice Souter, writing for the majority, articulated a loosely constructed two-pronged test.¹⁷⁸ First, Justice Souter required the Court to consider the historical treatment of the factual assessment in question. This request was based on the fair assumption that Congress is unlikely to intend any radical departures from past practice without making a point of saying so.¹⁷⁹ Second, Justice Souter required the Court must favor Congress' interpretation of a statute when a statute can be construed in two ways, one of which is constitutionally permissible and the other of which is not, "out of respect for Congress," which is assumed to legislate in the light of constitutional limitations.¹⁸⁰

The Court concluded that subsection (2) was not merely a sentence enhancement, but set forth additional elements of the offense, which could be removed from jury consideration.¹⁸¹ Subjecting the statute to Justice Souter's test, the majority first found that historically, Congress had identified "serious bodily harm" as an element of an offense in several instances.¹⁸² Justice Souter also found support in state legislation, which regularly defined "serious bodily injury" as an element of an offense.¹⁸³ In

aspects of the statute's legislative history. *See id.* First, the heading on the subtitle of the bill that created the provision was "Enhanced Penalties for Auto Theft," which the court viewed as meaning the statute's numbered sections merely defined sentencing enhancements. *See id.* Second, the court noted several references in the Committee Reports and floor debate on the bill to enhanced penalties for an apparently single carjacking offense. *Id.*

¹⁷⁷ *Jones v. United States*, 523 U.S. 227 (1998).

¹⁷⁸ *See id.* at 234, 239-40.

¹⁷⁹ *See id.* (stating that "[i]f a given statute is unclear about treating a fact as element or penalty aggravator, it makes sense to look at what other statutes have done, on the fair assumption that Congress is unlikely to intend any radical departures from past practice without making a point of saying so"). The opinion noted that the same approach was used in *Almendarez-Torres*, where the Court stressed the history of recidivism as a sentencing factor. *Id.* at 235.

¹⁸⁰ *See id.* at 239-40. This principle has "for so long been applied by this Court that it is beyond debate." *Id.* at 240.

¹⁸¹ *See id.* at 239-40.

¹⁸² *See id.* at 235; *see, e.g.*, 10 U.S.C. § 928(b)(2) (2000) (assault by a member of the armed forces); 18 U.S.C. § 37(a)(1) (violence at international airports); *id.* § 1091(a)(2) (genocide). Carjacking is like robbery, on which the statute is patterned. Serious bodily injury has traditionally been treated as an element of the offense of aggravated robbery. *See Jones*, 526 U.S. at 235.

¹⁸³ *See, e.g.*, ALA. CODE § 13A-8-41(a)(2) (1994) (robbery in the first degree defined in part by the causing of "serious physical injury"); ALASKA STAT. § 11.41.500(a)(3) (Michie 1996) (robbery in the first degree defined in part by the causing of "serious physical injury"); ARK. CODE ANN. § 5-12-103 (Michie 1997) (aggravated robbery; "[i]nflicts or attempts to inflict death or serious physical injury"); CONN. GEN. STAT. § 53a-134(a)(1) (1994) (robbery in the first degree; "[c]auses serious physical injury"); IOWA CODE § 711.2 (1993) (robbery in the first degree; "purposely inflicts or attempts to inflict serious injury"); KANS. STAT. ANN. § 21-3427 (1995) (aggravated robbery; "inflicts bodily harm"); KY. REV. STAT. ANN. § 515.020(1)(a) (Michie 1990) (robbery in the first degree; "causes physical injury"); N.H. REV. STAT. ANN. § 636:1(III)(c) (1996) (class A felony of robbery; "[i]nflicted or attempted to inflict death or serious injury"); N.Y. PENAL LAW § 160.15 (McKinney 1988) (robbery in the first degree; "[c]auses serious physical injury"); ORE. REV. STAT. § 164.415(1)(c) (1990) (robbery in the first degree; "[c]auses or attempts to cause serious physical injury"); TEX. PE-

addition, the statute could only be viewed as constitutionally permissible if the “serious bodily harm” provision were read as an element of the offense.¹⁸⁴ Interpreting the statute in a manner in which “serious bodily harm” was deemed a sentence enhancement would raise serious questions under the Due Process Clause and the Sixth Amendment’s notice and jury trial guarantees. Under the second prong of Justice Souter’s test, the Court must find in favor of defining the element as a fact necessary to constitute the crime.¹⁸⁵ To hold otherwise, the Court noted, might promote the very concerns about which the *Mullaney* Court warned; it would further allow a legislature to manipulate its way out of *Winship*.¹⁸⁶

Justice Kennedy, writing for the dissent, argued that the Court’s reliance on the so-called constitutional doubt rule is inconsistent with usual principles of stare decisis.¹⁸⁷ In *Almendarez-Torres*, the Court found that the test for deciding which factors are for sentencing and which are for guilt “is normally a matter for Congress.”¹⁸⁸ Looking beyond Congress’s label of a factor as a sentence enhancement limits *Almendarez-Torres* and

NAL CODE ANN. § 29.03(a)(1) (1994) (aggravated robbery; “causes serious bodily injury”); WASH. REV. CODE § 9A.56.200(1)(c) (1994) (robbery in the first degree; “[i]nflicts bodily injury”).

¹⁸⁴ Justice Souter wrote that:

[t]he seriousness of the due process issue is evident from *Mullaney*’s insistence that a State cannot manipulate its way out of *Winship*, and from *Patterson*’s recognition of a limit on state authority to reallocate traditional burdens of proof; the substantiality of the jury claim is evident from the practical implications of assuming Sixth Amendment indifference to treating a fact that sets the sentencing range as a sentencing factor, not an element.

Jones, 526 U.S. at 243. The Court found that from reading the statute, it is clear that “serious bodily harm” is an element, otherwise the word “death” would be an aggravating sentencing factor. *See id.* at 243.

¹⁸⁵ *See Jones*, 526 U.S. at 235-39.

¹⁸⁶ *See id.* at 243. In Justice Steven’s concurrence, he expressed his desire to revisit *McMillian*, due to Constitutional concerns. “To permit anything less with respect to a fact which the state deems so important that it must be either proved or presumed is impermissible under the Due Process Clause.” *Id.* at 253. (Stevens, J., concurring) (internal citations omitted). Likewise, Justice Scalia concurred and wrote,

[i]n dissenting in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), I suggested the possibility, and in dissenting in *Monge v. California*, 524 U.S. 721 (1998), I set forth as my considered view, that it is unconstitutional to remove from the jury the assessment of facts that alter the congressionally prescribed range of penalties to which a criminal defendant is exposed. Because I think it necessary to resolve all ambiguities in criminal statutes in such fashion as to avoid violation of this constitutional principle, I join the opinion of the Court.

Id. at 253 (Scalia, J., dissenting).

¹⁸⁷ *See id.* at 254. Justice Kennedy stressed that this rule contradicts the approach in *Almendarez-Torres*. *Id.* The majority distinguished *Almendarez-Torres* because of the traditional treatment of recidivism as a sentencing factor. Justice Stevens wrote in his concurrence that “it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It must be equally clear that such facts must be established by proof beyond a reasonable doubt.” *Id.* at 252-53.

¹⁸⁸ *Id.* at 255 (stating that the Court’s “task is to ‘look to the statute before us and ask what Congress intended’”).

contradicts the approach the Court followed in the previous term.¹⁸⁹ According to Justice Kennedy, under *Almendarez-Torres* the Court should only consider the issue if the statute is “generally susceptible to two constructions after, and not before, its complexities are unraveled.”¹⁹⁰ Here, the proper construction is even clearer than in *Almendarez-Torrez*. For that reason, the majority, according to the dissenters, was wrong in its conclusion. The majority rejected Justice Kennedy’s rallying cry and thus *Jones* set the stage for the Court to abolish its practice of deferring wholesale to the legislature on issues concerning assigning the burden of proving particular elements of a crime.

If the *Jones* Court began the retreat from the *Patterson-McMillan* doctrine of judicial deference to the legislature where defining the elements of a crime is concerned, the Court in *Apprendi v. New Jersey*¹⁹¹ completed the withdrawal. In *Apprendi*, the defendant pled guilty to possession of a firearm for unlawful purpose and unlawful possession of a prohibited weapon and was sentenced to an extended term under New Jersey’s hate crime statute.¹⁹² The statute under which the defendant was convicted provided that possession of a firearm for an unlawful purpose was punishable by imprisonment for “between five years and ten years.”¹⁹³ A separate “hate crime” law provided for an increased imprisonment if the trial judge found, “by a preponderance of the evidence, that ‘the defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.’”¹⁹⁴ The hate crime law authorized that an extended term for second-degree offenses is imprisonment for “between 10 and 20 years.”¹⁹⁵ The defendant was convicted and sentenced under both the predicate statute and the hate crime law.¹⁹⁶ He appealed to the Superior

¹⁸⁹ See *id.* at 266. Once again, Justice Kennedy stressed that the constitutional doubt methodology is incorrect in light of *Almendarez-Torres*. *Id.*

¹⁹⁰ *Id.* (quoting *Almendarez-Torres*, 523 U.S. at 238). Kennedy noted the Court found insufficient ambiguity to warrant the use of the constitutional doubt principle in *Almendarez-Torres*. See *id.*

¹⁹¹ 530 U.S. 466 (2000).

¹⁹² *Id.* at 470-71. Pursuant to the plea agreement, the prosecutor dismissed 20 other counts against Apprendi. *Id.*

¹⁹³ See *id.* at 468 (quoting N.J. STAT. ANN. § 2C:43-6(a)(2) (West 1995)).

¹⁹⁴ *Id.* at 468-69 (quoting N.J. STAT. ANN. § 2C:44-3(e) (West Supp.2000)).

¹⁹⁵ *Id.* at 469 (quoting N.J. STAT. ANN. § 2C:43-7(a)(3)).

¹⁹⁶ *Id.* at 471. As part of the plea agreement the state reserved the right to request the court to impose a higher “enhanced” sentence on the ground the offense was committed with a biased purpose. *Id.* at 470-471. At the same time, Apprendi reserved the right to challenge the hate crime sentence enhancement on the ground that it violates the U.S. Constitution. *Id.* After the trial judge accepted the three guilty pleas, the prosecutor filed a formal motion for the extended term. *Id.* The trial judge then held an evidentiary hearing to determine Apprendi’s purpose for the shooting. *Id.* Based on the evidence presented, the judge found the crime motivated by racial bias, “with a purpose to intimidate” as provided by the statute. *Id.* Thus, the hate crime enhancement applied. The judge also rejected Apprendi’s Constitutional challenge. *Id.*

Court, Appellate Division, which, relying on *McMillan*, affirmed the lower court ruling.¹⁹⁷ The defendant then appealed to the New Jersey Supreme Court, which affirmed the decision.¹⁹⁸ On appeal, the Supreme Court granted certiorari.¹⁹⁹

The Court considered whether the “hate crime” sentence enhancements as defined by the New Jersey legislature was constitutional under the Due Process Clause of the Fourteenth Amendment.²⁰⁰ The *Apprendi* Court, following the decision in *Jones*, concluded that it would look to the statute at issue, rather than its prior practice of deferring to the legislature and its label of “hate crime” as a sentence enhancement.²⁰¹ In evaluating the statute, the Court considered the effect that the legislative label has on punishment, the historical background for defining sentencing factors, and the potential for legislative abuse.²⁰²

The Court found that under the New Jersey scheme, the judicial finding by a preponderance of the evidence exposed the defendant to a greater punishment than that authorized by the jury’s verdict.²⁰³ The Court noted that, historically, it interpreted the Due Process Clause to “demand . . . a

¹⁹⁷ *State v. Apprendi*, 698 A.2d 1265, 1271 (N.J. Super. Ct. App. Div. 1997); *see also* *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). The court found the state legislature decided to make the hate crime enhancement a “sentencing factor” rather than an element of the offense. The court characterized the required finding as one of “motive” and not an element of the offense unless the legislature so provides. *Apprendi*, 698 A.2d at 1270.

¹⁹⁸ *State v. Apprendi*, 731 A.2d 485, 497 (N.J. 1999). The court explained the due process only requires the State to prove the elements of the offense beyond a reasonable doubt. The court stated: merely because the legislature has placed the hate-crime enhance within the sentencing provisions of the Code of Criminal Justice does not mean that the finding of a biased purpose to intimidate is not an essential element of the offense. Were that the case, the Legislature could just as easily allow judges, not juries to determine if a kidnapping victim has been released unharmed.

Id. at 492.

The court then undertook an inquiry, looking at many factors, to determine the hate crime provision was valid. The statute, in the court’s view, did not create a separate offense calling for separate penalties, but rather, the legislature simply took one factor that has always been considered by sentencing courts to bear on punishment and dictated the weight to be given that factor. *Id.* at 493-96.

¹⁹⁹ *Apprendi v. New Jersey*, 528 U.S. 1018 (1999).

²⁰⁰ *Apprendi v. New Jersey*, 530 U.S. 466, 468-69 (2000) (considering “whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt”).

²⁰¹ *Id.* at 476 (stating that their “answer . . . was foreshadowed by [their] opinion in *Jones v. United States* . . . [t]he Fourteenth Amendment commands the same answer in this case involving a state statute”). The Court also noted the “relevant inquiry is not one of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict?” *Id.* at 494.

²⁰² *Id.* at 476-90. The Court summarized that “our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion we expressed in *Jones*.” *Id.* at 490.

²⁰³ *Id.* at 491. For this reason, the Court held the practice under the New Jersey statute “could not stand.” *See id.* at 490-91.

higher degree of persuasion" in order to successfully prosecute a crime.²⁰⁴ Here, the New Jersey legislature threatened "certain pains" for unlawfully possessing a weapon and additional pains for intimidating his victims based on race.²⁰⁵ The Court found that, "as a matter of simple justice . . . the procedural safeguards designed to protect [the defendant] from unwarranted pains should apply equally to the two acts that New Jersey has singled out for punishment."²⁰⁶

The Court also raised concerns that accepting the New Jersey legislature's definition of a hate-crime as a sentence enhancement ran the risk of which the Court warned in *Mullaney*.²⁰⁷ Specifically, if left to stand, the New Jersey legislature would have effectively circumvented the protections of *Winship* merely by "redefining the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment."²⁰⁸

The *Apprendi* Court concluded that with the exception of facts regarding prior convictions, any fact that increases the penalty for a crime beyond the proscribed statutory maximum must be submitted to the jury and proven beyond a reasonable doubt.²⁰⁹ For the first time since *Mullaney*, the Court limited the legislature's ability to assign the burden of proof by labeling an element of a crime as a sentence enhancement. Moreover, following *Apprendi*, courts would no longer have to pay great judicial deference to legislative decisions. Instead, they could conduct their own analysis, as to whether a legislative label of a particular element ran afoul of the due process rights of the Constitution.²¹⁰

Justice O'Connor's dissent was critical of the majority's decision to "cast aside" the Court's prior practice of deferring to the legislative labeling of elements of a crime.²¹¹ She warned that the majority decision would require Courts to look into the area of the law that was delegated to the legislative branch.²¹² Her dissent also criticized the majority for relying too

²⁰⁴ *Id.* at 478 (finding that the degree of persuasion has crystallized into the formula "beyond a reasonable doubt"). This rule seems to date back to 1798. *See id.*

²⁰⁵ *Id.* at 476. Thus, merely "using the label 'sentence enhancement'" to describe the latter surely does not provide a principled basis for treating them differently. *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 494-95; *see also supra* notes 19-22 and accompanying text.

²⁰⁸ *Id.* at 485 (quoting *Mullaney*, 421 U.S. at 698).

²⁰⁹ *Id.* at 490 (confirming the holding in *Jones* regarding prior convictions).

²¹⁰ *Id.*

²¹¹ *Id.* at 525 (O'Connor, J., dissenting). Justice O'Connor felt the majority had rejected the Court's traditional cautious approach, in exchange for a new bright line rule. *Id.*

²¹² *Id.* at 550-51 (O'Connor, J., dissenting). Justice O'Connor felt the most "significant impact" of the majority's decision would be the effect it may have on sentencing conducted under the federal and state determinate sentencing guidelines. *Id.* Since she felt the Court deemed such guidelines unconstitutional, many people currently serving sentences under those guidelines would "flood" the courts seeking to invalidate their sentences. *Id.* at 551. This could equal up to one half million cases.

heavily on *Mullaney* in its analysis and decision and disregarding the post-*Mullaney* and *McMillan* decisions, which had created mounting precedent in favor of legislative deferral on matters of assigning burdens of proof.²¹³ Justice Breyer, in a separate dissent, charged that the new *Apprendi* rule created a “procedural ideal” that juries would be the sole determiners of the existence of facts upon which punishment turns.²¹⁴ Indeed, the weight of Breyer’s criticism was aimed at the likely effect of the *Apprendi* decision, in returning to the jury the role of deciding beyond a reasonable doubt those facts for which the defendant will be punished.

Justice O’Connor, in her dissent, criticized both the majority and Justice Thomas’ concurrence for their “expansive reading”²¹⁵ of *Mullaney*.²¹⁶ According to the dissent, the *Apprendi* ruling has the potential to overrule *Patterson*.²¹⁷ Justice O’Connor wrote that in *Patterson*, the defendant’s failure to prove extreme emotional disturbance would result in a conviction of murder.²¹⁸ The penalty for murder in New York State far exceeds that of manslaughter.²¹⁹ Consequently, extreme emotional disturbance could be considered a “fact” that increases the penalty for a crime beyond the statutory maximum and, therefore, must be submitted to the jury and proven beyond a reasonable doubt.²²⁰

Apprendi illustrates the Court’s retrenchment from its view that the legislature is the dispositive authority on which statutory language requires proof beyond a reasonable doubt.²²¹ The decision marks a retreat from the litany of cases, beginning with *Patterson*, which upheld the judicial princi-

Id. Also, she noted the decision leaves state and federal judges in limbo when it comes to sentencing. See *id.* at 51.

²¹³ *Id.* at 529-30 (O’Connor, J., dissenting). Justice O’Connor argued that the Court ignored the *Patterson* case, which rejected an extensive reading of *Mullaney*. *Id.* at 530. Also, the same reasoning was conducted in *Jones* and *Almendarez-Torres*. See *id.* at 532.

²¹⁴ *Id.* at 555 (Breyer, J., dissenting). Breyer noted this ideal cannot work in the “real world of criminal justice.” *Id.* (Breyer, J., dissenting). In addition, Justice Scalia, in a very brief concurrence, spent all his time criticizing the Breyer dissent. See *id.* at 498-99 (Scalia, J., concurring).

²¹⁵ *Id.* at 531 (O’Connor, J., dissenting).

²¹⁶ See *id.* (O’Connor, J., dissenting).

²¹⁷ *Id.* at 531 (O’Connor, J., dissenting).

²¹⁸ *Id.* (O’Connor, J., dissenting).

²¹⁹ See N.Y. PENAL LAW § 125.15 (West 1998) (stating that “[m]anslaughter . . . is a Class C felony”); N.Y. PENAL LAW § 125.25 (West 1998) (stating that “[m]urder . . . is a Class A-I felony”); N.Y. PENAL LAW § 70.00 (West 1998) (enumerating that sentence of imprisonment for a Class A felony “shall be life imprisonment” and that the term for a Class C felony “shall not exceed fifteen years”).

²²⁰ *Apprendi*, 530 U.S. at 531 (O’Connor, J., dissenting).

²²¹ Compare *In re Winship*, 397 U.S. 358, 364 (1969) (finding that “[l]est there remain any doubt about the constitutional stature of the reasonable-doubt standard, 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”), with *Patterson v. New York*, 432 U.S. 197, 207 (1977) (rejecting the proposition “that a State must prove beyond a reasonable doubt every fact, the existence or nonexistence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree of culpability or the severity of the punishment”).

ple that courts should pay great deference to legislatures in matters concerning their definitions of crimes.²²² The Court's renewed commitment to evaluate for itself whether a legislature's definition of a crime is appropriate sounds a call to return to the pre-*Patterson* days of *Winship* and *Mullaney*.

III. DEFINING A FRAMEWORK FOR ANALYSIS

A. A Critical Review of the Post-*Winship* Cases

It was well understood prior to *Winship* and *Mullaney* that, as a general matter, the language in a particular criminal statute defined the corpus of a crime.²²³ Following *Patterson*, however, legislatures could include in their statutes language that seemingly defined the crime, but which was exempt from the requirements of *Winship*, if it was labeled as a sentence enhancement or an affirmative defense. For the years beginning with *Patterson* and through *Almendarez-Torres*, legislatures had great discretion to label elements of a statute as they saw fit. It was not until the *Jones* and *Apprendi* cases that the Court tightened the reigns on legislatures. In these cases the Court found, similar to *Mullaney*, that, at least where sentence enhancements are concerned, the presumption in a particular statute favors interpreting its language to be comprised of "every fact necessary to constitute the crime with which [the defendant] is charged."²²⁴ Indeed, the *Apprendi* decision marks a clear return to the principles of *Mullaney*, at least where sentence enhancements are concerned.

The *Apprendi* ruling does not make clear, however, how it portends for those cases concerning affirmative defenses.²²⁵ Read literally, *Apprendi* only limits a court's review of sentence enhancements. Many critics, however, suggest that a liberal reading of *Apprendi* could close the door on the legislature's ability to shift the burden of proving affirmative defenses to the defendant.²²⁶ Should the Court extend its ruling, it would clearly mark

²²² See *McMillan* discussion, *supra* notes 101-06 and accompanying text; see also *Harmelin v. Michigan* 501 U.S. 957, 961, 996 (1991) (upholding a mandatory life sentence for possession of cocaine against an Eighth Amendment challenge). Justice Kennedy concluded in a separate opinion that fixing prison terms "is properly within the province of legislatures not courts." *Id.* at 998 (Kennedy, J., concurring in part and concurring in the judgment) (quoting *Rummel v. Estelle*, 445 U.S. 263, 275-76 (1980)).

²²³ See WAYNE R. LAFAVE, *CRIMINAL LAW* 8 (3d ed. West 2000).

²²⁴ *Apprendi*, 530 U.S. at 477 (quoting *Winship*, 397 U.S. at 364).

²²⁵ The *Mullaney-Jones-Apprendi* litany grew out of decisions that considered the constitutionality of affirmative defenses. See cases *infra* Part II.

²²⁶ See King & Klein, *supra* note 24, at 1481-82. Others argue that while the *Apprendi* issue resembles the controversy over "affirmative defenses", the legislature's likely greater willingness to push the outer limits of the formalistic approach set forth in *Apprendi* will result in a failure to provide the controversy necessary to review such a case. See also Joseph L. Hoffmann, *Apprendi v. New Jersey: Back to the Future?*, 38 AM. CRIM. L. REV. 255, 279-80 (2001); Sundby, *supra* note 24, at 46 (identifying three main schools of thought on the scope of the reasonable doubt rule).

a return to *Mullaney*, prohibiting legislatures from defining an affirmative defense in such a way that excludes it from jury consideration.²²⁷

Expansive proceduralists argue that under *Apprendi* there is sound reasoning for a return to *Mullaney*. According to this school of thought, the reasonable doubt rule attaches to every fact affecting the defendant's criminal liability.²²⁸ In his article, *The Reasonable Doubt Rule and the Meaning of Innocence*, Professor Sundby wrote that *Mullaney* represented the closest that the Supreme Court had come to adopting the expansive proceduralists' view.²²⁹ "By evincing willingness to look beyond the state's designation of who bore the burden of persuasion, the Court has raised a '*Mullaney* question' regarding any factor significantly affecting the defendant's conviction and punishment."²³⁰ Justice O'Connor's dissent in *Apprendi* supports Professor Sundby's conclusion by noting that the case concerned "the distinct question of when a fact that bears on a defendant's punishment, but which the legislature has not classified as an element of the charged offense, must nevertheless be treated as an offense element."²³¹

The *Apprendi* decision provides the Court with an opportunity to overrule *Patterson* and to return to *Mullaney*, thereby prohibiting legislatures to reallocate the burden of proving affirmative defenses.²³² However, such a suggestion begs the question of whether, twenty-five years after the *Mullaney* decision, it would be appropriate for the Court to so do. Moreover, given the decisions following *Mullaney* through *Apprendi*, is such a return truly consistent with the Court's parameters of the Due Process Clause?

B. The Mullaney/Jones/Apprendi Construct: A Two-Pronged Test

The cases taken as a whole provide a nice framework for analyzing whether *Apprendi* should extend to affirmative defenses. In reaching its decision, the *Apprendi* and *Jones* Courts relied heavily on the same reason-

²²⁷ See King & Klein, *supra* note 24, at 1481-82.

²²⁸ Sundby, *supra* note 24, at 464. In his article, Professor Sundby defines what he terms as two strains of proceduralism. *Id.* Under expansive proceduralism, the court may not distinguish between elements, sentence enhancements or affirmative defenses. *Id.* Indeed, if facts A, B, and C are each part of a crime, then the prosecution must prove each of these beyond a reasonable doubt. *Id.* at 464. Under expansive proceduralism, the reasonable doubt rule attaches to every fact affecting the defendant's criminality, including the absence of defenses. *Id.* at 465. In converse, under restrictive proceduralism, the classification of a fact is up to the state, but once classified as an element of the crime, the prosecution must prove it beyond a reasonable doubt. *Id.* at 471.

²²⁹ *Id.* at 466.

²³⁰ *Id.* at 469.

²³¹ *Apprendi v. New Jersey*, 530 U.S. 466, 527 (2000) (O'Connor J., dissenting).

²³² It is appropriate to rely on cases concerning sentence enhancements to define the law for affirmative defenses because: (1) The court uses same precedent for both; (2) in both instances the issue is whether the legislature can permissibly remove proof of an element from jury consideration and; (3) they both affect punishment.

ing that the majority articulated in *Mullaney*.²³³ Unlike the *Martin*, *McMillan*, or *Almendarez-Torres* cases, which seemed to defer, almost wholesale, to the legislatures, the *Apprendi*, *Jones* and *Mullaney* Courts considered certain factors to help themselves and lower courts evaluate the permissibility of shifting the burden of proving a non-essential element of a crime.²³⁴ Read together, *Mullaney*, *Jones*, and *Apprendi* articulate a clear two-prong test for future courts to consider when evaluating whether the legislature may permissibly shift the burden of proof in a criminal prosecution.

In almost every post-*Winship* case, the majority placed significant emphasis on the historical importance of an element when considered in the context of the Due Process Clause.²³⁵ In *Mullaney*, *Jones*, and *Apprendi*, the Court looked to legislative history prior to the Civil War to find support for its conclusion.²³⁶ In *Mullaney*, Justice Powell relied on an in-depth historical review of the murder/manslaughter distinction, concluding that the historical distinction dictated the Court's conclusion that the prosecution could not shift the burden of proof for heat of passion to the defendant.²³⁷ In *Jones*, Justice Souter relied on Congress's unlikely intention to radically depart from past practices.²³⁸ In *Apprendi*, Justice Stevens found that the Court's "reexamination" of history dictated its ruling that the legislature may not automatically designate an element of a crime as a sentence enhancement.²³⁹ The *Almendarez-Torres* Court relied on the history of treating recidivism as a sentencing factor in declaring that a prior conviction was not an element of a crime.²⁴⁰

The other common theme among these cases was the concern for potential legislative abuse.²⁴¹ In *Mullaney*, the Court found the potential for

²³³ See *supra* notes 15 and accompanying text.

²³⁴ See *supra* Part II.

²³⁵ See, e.g., *supra* Part II.

²³⁶ *Apprendi*, 530 U.S. at 501 (Thomas, J., dissenting); *Jones*, 526 U.S. at 244-48; *Mullaney*, 421 U.S. at 692-96.

²³⁷ See *Mullaney*, 421 U.S. at 696. See generally HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 136-39 (1968) (discussing the standard of proof in criminal cases); George P. Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden of Persuasion Practices in Criminal Cases*, 77 YALE L.J. 880, 903-07 (1968) (analyzing the development of burden-of-proof rules for criminal defenses).

²³⁸ *Jones*, 526 U.S. at 234 (pointing out that statutes must be viewed with the "fair assumption that Congress is unlikely to intend any radical departures from past practice without making a point of saying so").

²³⁹ *Apprendi*, 530 U.S. at 490. Note that in his dissent in *Martin*, Justice Powell said we must look to the historical importance of the element when considering whether it is a fact necessary to prove the crime. *Martin*, 480 U.S. at 242 (Powell, J., dissenting).

²⁴⁰ *Almendarez-Torres*, 523 U.S. at 243-44.

²⁴¹ See *Monge v. California*, 524 U.S. 721, 738-40 (1998) (Scalia, J., dissenting) (alerting the Court to the slippery slope of legislative denial of defendants' constitutional protections through the creation of Constitution-eluding sentence enhancements).

future legislative abuse as support for its decision.²⁴² In *Jones*, the Court expressed concern that “recognizing an unlimited legislative power to authorize determinations setting ultimate sentencing limits without a jury would invite erosion of the jury’s function to a point against which a line must necessarily be drawn.”²⁴³ The *Apprendi* Court seemed to reach its conclusion in part to curtail the legislative abuse that had grown out of the post-*Mullaney* decisions.

The *Mullaney/Apprendi/Jones* construct clearly articulates a two-pronged test for evaluating the legislature’s ability to define “factors that bear solely on the extent of punishment.”²⁴⁴ Specifically, courts must consider two questions: (1) do the historic principles of punishment demand that the burden of proof remain with the prosecution? And (2) does allowing the legislature to allocate the burden of proof pose the risk of permitting it to impermissibly overstep its boundaries?

1. *The Historic Principles of Punishing the Conduct in Question*

a. The Historic Principles of Defining Affirmative Defenses for the Purposes of Punishment

Assigning the burden of proving affirmative defenses to the defendant is well rooted in early common law. As early as the 1300s, prosecutors were charged with proving the defendant’s criminal act beyond a reasonable doubt.²⁴⁵ As a result, the defendant could not call witnesses or hire an attorney.²⁴⁶ A defendant could only present evidence of a defense to the King after conviction, as a means to mitigate punishment.²⁴⁷

The crimes for which one could be charged during this time were limited in number and in scope.²⁴⁸ Similarly, these crimes were traditionally punished by death or great bodily harm.²⁴⁹ Because of the severe punish-

²⁴² *Mullaney*, 421 U.S. at 698-99 (pointing out that a state could undermine the safeguards of due process by recharacterizing substantive elements of a crime as factors that relate to the punishment of the crime).

²⁴³ *Jones*, 526 U.S. at 244.

²⁴⁴ *Mullaney*, 421 U.S. at 698.

²⁴⁵ THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 438 (Little, Brown & Co. 5th ed. 1956) (1929).

²⁴⁶ *Id.* The theory behind such a rule was that if the Crown proved its case, that was the end of the matter. *Id.* On the other hand, if it did not, that failure would be apparent in spite of the silent defense. *Id.* Thus, the need to call witnesses or hire an attorney were “superfluous.” *Id.*

²⁴⁷ See *id.* at 445. For example, in cases of homicides involving self-defense or misadventure.

²⁴⁸ *Id.* at 442-51. The felonies included treason, murder, manslaughter, larceny, receiving stolen goods and attempt crimes. Many other crimes fit into the common law felony category. For example, blackmailing became a constructive robbery felony, before it was made expressly criminal by statute in 1722. *Id.* at 451.

²⁴⁹ J. M. BEATTIE, CRIME AND THE COURTS IN ENGLAND 1660-1800, at 451 (Princeton Univ. Press 1986). For example, in the 1660s those convicted of treason were given punishment aimed at inflicting the maximum of pain and ignominy. *Id.* The convict was to be hanged, cut down while still

ment, defendants were usually successful in their presentation of defenses on appeal to the King and were generally awarded a criminal pardon.²⁵⁰ The rise in pardons in the late 1300s led the House of Commons to adopt a statute calling for a general limit on the issuance of pardons.²⁵¹ Consequently, defendants were limited in their venues in which to argue their justification or excuse for committing a particular crime.²⁵²

In the early eighteenth century, defendants first were permitted to call witnesses in their defense at trial.²⁵³ Those charged under the Church's criminal justice system assumed the burden of proving their innocence.²⁵⁴ The prosecution at such trials assumed a passive role.²⁵⁵ Although this seemed unduly harsh, the defendant's burden necessitated the presentation of a defense on his behalf.²⁵⁶ These trials generally consisted of the defense merely presenting evidence of an excuse, justification, or wrongful prosecution.

Non-secular judicial tribunals rejected the canonical system of allocating the burden of proof to the defendant in favor of retaining the judicial safeguards inherent in proof by the prosecution.²⁵⁷ Viscount Snakey L.C. best articulated this principle, stating "[t]hroughout the web of English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to . . . the defense of insanity."²⁵⁸ This common law principle of our Due Process Clause, however, did not prohibit the judge from shifting the burden of proving certain

alive, disemboweled and castrated, beheaded and quartered. *Id.* Also, convictions for rape were often punished by mutilation. PLUCKNETT, *supra* note 245, at 451.

²⁵⁰ PLUCKNETT, *supra* note 245, at 445 (noting that "the prerogative of mercy was the only point at which . . . medieval criminal law was at all flexible"). The liberality with which pardons were granted gradually lead to the classification of different levels of homicide. *Id.*

²⁵¹ *Id.* at 445-46. An earlier statute started this movement in 1328. *Id.* at 445. The Act called for restraint in issuing pardons due to the ease with which such pardons were granted. *Id.*

²⁵² *Id.* at 446. The 1390 statute recognized certain pardons as issuing from Chancery as a matter of course, in cases such as self-defense or misadventure. *Id.* The statute contrasted pardons for murders done in "in await, assault, or malice prepense." *Id.* In these types of cases pardons were almost impossible to secure. *Id.*

²⁵³ *Id.* at 438.

²⁵⁴ *Id.* This was known as the canonical system, and was applied to eighteenth century clergy and to laymen who had been tried under the Church's criminal jurisdiction.

²⁵⁵ *Id.* In fact, the prosecution could call no witnesses. *Id.* This led to a rise in acquittals. *Id.* The procedure basically involved an exculpatory oath by the accused, twelve compurgator oaths, evidence of the accused, and a jury verdict. *Id.* at n.2.

²⁵⁶ Basically, the accused had to prove his innocence. *Id.* The assumption was made that if the accused was innocent he ought to be able to demonstrate it for the jury. *Id.* Thus, the accused took on an active role. *Id.* The idea that the accused is presumed innocent until proven guilty did not become an active principle until about 1820. BEATTIE, *supra* note 249, at 341.

²⁵⁷ GLANVILLE WILLIAMS, *CRIMINAL LAW* 882-88 (2d ed. 1961).

²⁵⁸ *Woolmington v. Director of Public Prosecutions*, 1935 A.C. 462, 481 (1935).

defenses to the defendant.²⁵⁹ The English Common Law permitted the defendant to present proof of the defense of mistake, intoxication, duress, necessity, and self-defense.²⁶⁰

Proof of these defenses remained with the defendant as America developed its own body of law. Indeed, the American Law Institute codified each defense in the Model Penal Code ("MPC").²⁶¹ Most of these defenses appear separate from the substantive crimes defined later in the MPC. For example, MPC 2.04 provides that the defendant has a mistake of fact or law defense to a substantive crime upon proof of certain conditions.²⁶² However, in some instances, the defense is defined within the context of the statute.²⁶³ MPC 210.3 Manslaughter provides that a homicide, which would otherwise be murder, is manslaughter if committed under the influence of extreme emotional disturbance.²⁶⁴ The MPC is inconsistent, however, concerning allocation of burden of proof. MPC 2.04(3) clearly allocates the burden of proof to the defendant by a preponderance of the evidence, where as MPC 210.0 is silent regarding which bears the burden of proving that the defendant acted under extreme emotional disturbance.²⁶⁵

As a general matter, legislatures and courts have failed to define or create affirmative defenses in the past century. With the exception of the defense of extreme emotional disturbance, which is really just an expan-

²⁵⁹ WILLIAMS, *supra* note 257, at 885. This idea, that the burden shifts to the defendant to make out defenses, was not confined to homicide charges, but rather was of general application in all charges under the criminal law. *Id.*

²⁶⁰ SIR JAMES FITZJAMES STEPHEN, A DIGEST OF THE CRIMINAL LAW 15-21 (McMillan & Co. 1877) (providing examples of actual statutes providing for such defenses, as well as others such as age and insanity); *see also* WILLIAMS, *supra* note 257, at 885 (stating that "it is the duty of the prosecution to prove the prisoner's guilt, subject to . . . the defence of insanity and subject to any statutory exception.") (internal citations omitted).

²⁶¹ Section 2.04 of the Model Penal Code ("MPC") defines the "Ignorance or Mistake" defense. It expressly requires a defendant prove the defense by a preponderance of the evidence. The Intoxication defense is provided for in 2.08, and Duress is explained in 2.09. Neither section expressly assigns the burden of proof. Likewise, necessity (3.02) and self-defense (3.04) also assign no express burden of proof. MODEL PENAL CODE §§ 2.04, 2.08, 2.09, 3.02, 3.04 (Official Draft 1962).

²⁶² MODEL PENAL CODE § 2.04 (Official Draft 1962)

²⁶³ *See id.* The defense is only available if the ignorance or mistake negatives the mental requirement required to establish a material element of the offense or if the law provides that the state of mind established by such ignorance or mistake constitutes a defense. *Id.*

²⁶⁴ The statute reads:

(1) Criminal Homicide constitutes manslaughter when:

(a) it is committed recklessly; or
(b) a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.

(2) Manslaughter is a felony of the second degree.

Id. § 210.3.

²⁶⁵ Interestingly, the statute at issue in the *Patterson* case, N.Y. PENAL LAW § 125.25, is patterned upon § 210.3 of the Model Penal Code. *See supra* note 91 and accompanying text.

sion of the common-law heat of passion defense, and the defense of entrapment, virtually all the defenses codified by legislatures existed at common law.²⁶⁶ For the most part, therefore, the notion of affirmative defenses and their definitions are a reflection of the American judicial system, as it existed over 200 years ago.

b. The Historic Principles of Punishing Conduct Defined as Sentence Enhancements

In contrast to affirmative defenses, sentence enhancements are a creature of the modern legislature.²⁶⁷ American criminal law, while based on common law crimes, is now predominately statutory. Over the past two centuries, legislatures have embraced their authority to define criminal conduct.²⁶⁸ As a general rule, legislatures define substantive crimes broadly in terms of the act and intent elements, typically defining the appropriate level of punishment for the broad categories of crimes in a separate part of the criminal code.²⁶⁹

While the trend leaned towards defining crimes generally, some legislatures included specific attendant circumstances in the traditional common law crimes, proof of which resulted in a greater punishment.²⁷⁰ Originally the prosecution was required to prove these attendant circumstances be-

²⁶⁶ See STEPHEN, *supra* note 260, at 15-21. Stephen's work, written in 1877, shows the prevalence of affirmative defenses at that point in time. See *id.* The author describes in detail, and provides statutory examples of, the defenses contained in the MODEL PENAL CODE, including insanity, drunkenness, compulsion, ignorance of law, and ignorance of fact (mistake). See *id.*

²⁶⁷ KATE STITH & JOSE A. CABRANES, *FEAR OF JUDGING* 9-38 (University of Chicago Press 1998). Like affirmative defenses, sentencing was historically not reviewable (discussing the history of sentencing in the United States) there were no sentence enhancements at common law.). See Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilt*, 110 YALE L.J. 1097, 1124 (2001).

²⁶⁸ STITH & CABRANES, *supra* note 267, at 22-23.

²⁶⁹ For example, the New York State Penal Code Part Two—Sentences, contains Article 55, "Classification and Designation of Offenses," N.Y. PENAL LAW § 55.00 (McKinney 1998). There, § 55.05, "Classification of felonies and misdemeanors," provides that "Felonies are classified, for the purpose of sentence, into five categories," classes A, B, C, D, and E. Likewise, this section classifies misdemeanors as classes A, B, or unclassified. N.Y. PENAL LAW § 55.05 (McKinney 1998). Article 60, "Authorized Dispositions of Offenders" and Article 70, "Imprisonment," then proscribe the punishment for each classification of felony or misdemeanor. N.Y. PENAL LAW §§ 60.00, 70.00 (McKinney 1998). For example, § 70.00, "Sentence of imprisonment for felony," sets the maximum term of sentence and minimum period of imprisonment for each class of felony. N.Y. PENAL LAW § 70.00 (McKinney 1998). § 55.10 then provides that for felonies, "the particular classification or subclassification of each felony defined in this chapter is expressly designated in the section or article defining it." For misdemeanors, "each misdemeanor defined in this chapter is either a class A misdemeanor or class B misdemeanor, as expressly designated in the section or article defining it. N.Y. PENAL LAW § 55.10 (McKinney 1998). For example, § 140.15, Criminal trespass in the second degree, provides that "[a] person is guilty of criminal trespass in the second degree when he knowingly enters or remains unlawfully in a dwelling," and states that "[c]riminal trespass in the second degree is a class A misdemeanor." Do you also want to put in federal sentencing guidelines? At the federal level, the federal sentencing guidelines are also separate from the federal criminal code.

²⁷⁰ Attendant circumstances are those conditions that must be present, in conjunction with the prohibited conduct or result in order to constitute the crime.

yond a reasonable doubt since they were part of the broader substantive crime.²⁷¹ However, following *Winship*, legislatures began to define elements in terms of "facts necessary to prove the commission of a crime," and those that merely elevate or mitigate punishment.²⁷²

The notion of an increased sentence in certain circumstances absent proof beyond a reasonable doubt existed in the early 1900s. When legislatures began to include additional requirements to a crime, the proof of which would result in a higher sentence. Instead of attendant circumstances however, the factors had no substantive relationship to a particular crime. The forerunners of sentencing factors or sentence enhancements were statute provisions generally targeted at habitual offenders.²⁷³ These

²⁷¹ For example, New York Penal Code, § 140.20 defines burglary in the third degree as knowingly entering or remaining in a building with intent to commit a crime therein, and labels it a class D felony, which under § 70.00 carries a punishment fixed by the court but which cannot exceed seven years. NEW YORK PENAL LAW §§ 140.20, 70.00 (McKinney 1998). § 140.25, burglary in the second degree, begins with the same exact definition, but includes the attendant circumstances of either being armed with explosives or a deadly weapon, causing physical injury to a non participant in the crime, using or threatening use of the dangerous instrument, displaying what appears to be a firearm, or the building being a dwelling. NEW YORK PENAL LAW § 140.25 (McKinney 1998). The additional element raises the level of the crime up to a class C felony, which under § 70.00 is also fixed by the court, but carries a prison term of up to fifteen years. NEW YORK PENAL LAW § 70.00 (McKinney 1998).

²⁷² See N.J. Rev. Stat. 2C:1-13 (2003) (defining which language of a criminal statute requires proof beyond a reasonable doubt and which language does not require such proof); Ariz. Rev. Stat. Ann. § 13-3601(L) (2003) (defining sentence enhancements for certain offenses against a pregnant victim); Cal. Penal Code § 452.1 (2003) (defining sentence enhancements for aggravated arson); Mo. Rev. Stat. § 578.425(2) (2003) (permitting sentence enhancement for criminal conduct by gang members "committed on the grounds of, or within one thousand feet of a public or private elementary, vocational, junior high or high school . . ."); see also *Apprendi v. New Jersey*, 530 U.S. 466, 486 (2000) (stating that "constitutional limits exist to States' authority to define away facts necessary to constitute a criminal offense . . .").

²⁷³ In the early 1900s, sentence enhancements in state penal codes were based on the defendant being a habitual criminal. The 1915 Missouri case of *State v. Collins* discussed the state's habitual criminal act. 180 S.W. 866, 867 (Mo. 1915). This case upheld an earlier decision which held that the section of a state statute "prescribing greater punishment for a second offense than for the first is not unconstitutional, either upon the ground of putting a person twice in jeopardy or prescribing different punishments for different persons committing the same offense." *Collins*, 180 S.W. at 867; see also *State v. Moore*, 26 S.W. 345 (Ma. 1894). A similar state statute was discussed in the 1920 Connecticut case of *State v. Riley*. 110 A. 550 (Conn. 1920). It dealt with Connecticut's Indeterminate Sentencing Act (CONN. GEN. STAT. 1918, §6660), which provided that "in the case of one or two prior convictions the penalty for the new offense on which the defendant is tried and convicted may be made severer than when there is no prior conviction." *Riley*, 110 A. at 551. The court held that prior convictions in another jurisdiction can be used to enable it to apply the statute, which provided that "when any person so sentenced shall have twice before been convicted, sentenced and imprisoned in a state prison or penitentiary, the court shall sentence said person to a maximum of thirty years." *Id.* at 552. As precedent for its decision, the court cited decisions upholding similar provisions in New York, Massachusetts, and West Virginia. *Id.* at 552-53. All three cases recognized that "the punishment is for the new crime only, but is the heavier if [the defendant] is an habitual criminal. The allegation of previous convictions is not a distinct charge of crime, but is necessary to bring the case within the statute, and goes to punishment only." *Id.* at 552. This principle was affirmed in federal court in the 1934 case of *Goodman v. Kunkle* which in analyzing the Indiana Habitual Criminal Statute, holds that "habitual criminality is a state, not a crime." 72 F.2d 334, 336 (7th Cir. 1934). Moreover, "[h]abitual criminal statutes, such as that of Indiana, do not create or define a new independent crime, but they prescribe circumstances

provisions were written by legislatures in an effort to provide additional specific and general deterrence to repeat criminals.²⁷⁴

In addition to using sentence enhancements as a means to punish habitual criminals, in the early 1900s legislatures began proscribing sentence enhancements where a certain factor existed on top of a base crime.²⁷⁵ These specific elements of the crime were indistinguishable from attendant circumstances. Unlike attendant circumstances, however, the legislature maintained that these discrete elements did not make up the corpus of the crime and therefore, the requirements of the Due Process Clause did not attach. For example, in 1935 the California State Legislature amended its penal code to increase the punishment for kidnapping in instances where the victim suffered harm. In *People v. Tanner*,²⁷⁶ the defendant challenged the amendment, which only required proof of harm after the jury convicted the defendant on the underlying crime.²⁷⁷ The California Supreme Court agreed with the legislature's assessment of "harm to the victim" as a sentence enhancement and upheld the statute as permissible and appropriate pursuant to the state's principles of punishment.²⁷⁸

wherein one found guilty of a specific crime may be more severely penalized because of his previous criminalities as they are alleged and found." *Id.*

²⁷⁴ See *Collins*, 180 S.W. at 867 (finding that "in case of a second conviction, the penalty shall be severer because by the defendant's persistence in the perpetration of crime he has evinced a depravity, which merits a greater punishment"). Early habitual offender statutes, which allowed for an increased punishment for an individual who had been previously convicted of the same crime, were challenged as violative of the Fifth Amendment prohibition against Double Jeopardy. See *id.* In *Collins*, the defendant challenged the Missouri habitual offender statute R.S. 1909, §4913, which provided that "in case of a second conviction the penalty shall be severer." *Id.* at 866. The court upheld the statute holding that a defendant's repeat defense evinces a depravity, which merits a greater punishment. *Id.* at 868.

Some states created enhancements for a second conviction for a specific crime. In *State v. McClay*, 78 A.2d 347 (1951), the Maine Supreme Court considered a challenge to a statute that provided both the substantive offense and the sentence enhancement in the same statute. That statute provided that:

Whoever shall operate or attempt to operate a motor vehicle . . . when intoxicated . . . upon conviction shall be punished by a fine of not less than \$100, nor more than \$1000, or by imprisonment for not less than 30 days, nor more than 11 months, or by both such fine and imprisonment. Any person convicted of a 2nd or subsequent offense shall be punished by imprisonment for not less than 3 or more than 11 months, and in addition thereto, the court may impose a fine as above provided.

Id. at 349.

The court held that the increased fine was a permissible sentence enhancement because "for a first offense the court *may* impose a lesser punishment than it *must* impose for a second or subsequent offense." *Id.*

²⁷⁵ See *People v. Tanner*, 44 P.2d 324, 330 (Cal. 1935).

²⁷⁶ 44 P.2d 324 (Cal. 1935).

²⁷⁷ *Id.* at 331.

²⁷⁸ *Id.* (claiming that the Supreme Court upheld the validity of an amendment to the state kidnapping law that increased a defendant's punishment if the kidnap victim suffered harm). There, "[a]n Act to Amend Section 209 of the Penal Code relating to the punishment of kidnapping," provided that upon conviction of kidnapping a defendant "shall suffer death or shall be punished by imprisonment for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person or persons subjected to kidnapping suffers or suffer bodily harm." *Id.* at 294. If the victim did not suffer bodily harm, the punishment was only imprisonment in state prison for life with possibility of

Perhaps the most significant proliferation of sentence enhancements came in 1984 when Congress adopted the Sentencing Reform Act, otherwise known as the Federal Sentencing Guidelines.²⁷⁹ "The . . . Guidelines supplement congressionally enacted [substantive criminal laws]. Within the statutory minimum and maximum set for the offense of conviction, the conduct for which a defendant will be punished is determined by the confluence of factors that the Sentencing Commission has decided are relevant as punishment."²⁸⁰ For example, 21 U.S.C. § 844 provides that no person shall possess LSD.²⁸¹ If after conviction of the crime, the prosecution can show by a preponderance of the evidence that the defendant possessed the LSD in prison, his punishment is automatically increased by six months to a year.²⁸² The sentencing guidelines permit proof of over four hundred sentence enhancements that can contribute to an increased sentence.²⁸³

Sentence enhancements allow legislatures to easily accomplish the

parole. *Id.* In this case, the defendant "challenged the procedure and questioned the motives of the members of the legislature who were pressing the passage of said amendment." *Id.* at 297. The court rejects this argument, and holds that "the suggestion that it was the result of an aroused public feeling against kidnapping is no reason why it should be condemned as invalid. Perhaps every measure adopted is the result of a public need or demand." *Id.* at 297. This is still evident today, as California has adopted provisions for enhanced sentences if a defendant intentionally inflicts injury on a pregnant woman causing termination of pregnancy, or discharges a firearm from a motor vehicle causing paralysis. CAL. PENAL CODE § 12022.9 (West 2002).

²⁷⁹ The Federal Sentencing Guidelines were promulgated to regulate sentences imposed by federal judges. The guidelines sought to promote fairness, certainty and uniformity in sentencing. See STITH & CABRANES, *supra* note 267. THE 1984 Act is most significant, Congress had adopted sentence enhancements previous to the act. The 1970 Federal Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C. § 801 contained a sentence enhancement provision, addressed in the 1974 case *United States v. Noland*. 495 F.2d 529 (5th Cir. 1974). The case approves the procedure which the prosecution must follow to establish a defendant's previous conviction for the purpose of an increased punishment. *Id.* at 531. The statute requires that the prosecution provide an information stating "in writing the previous convictions to be relied upon" before trial or entry of a guilty plea. *Id.* Besides the familiar repeat offender basis, the Comprehensive Drug Abuse and Control Act contains provisions for increased sentences based on aggravating factors, for example if a drug offense occurs near where children might be:

Any person who violates §841(a)(1) or section 856 of this title by distributing, possessing with intent to distribute, or manufacturing a controlled substance in or on, or within one thousand feet of, the real property comprising a public or private elementary, vocational or secondary school or a public or private college, junior college, or university, or a playground, or housing facility owned by a public housing authority, or within 100 ft of a public or private youth center, public swimming pool, or video arcade facility is... subject to (1) twice the maximum punishment authorized by §841(b) of this title; and (2) at least twice the term of any supervised release authorized by section 841(b) of this title

21 U.S.C. § 860 (2000).

²⁸⁰ STITH & CABRANES, *supra* note 267, at 77.

²⁸¹ 21 U.S.C. § 844 (2000).

²⁸² STITH & CABRANES, *supra* note 267, at app. D. In calculating a defendant's sentence pursuant to the Federal Sentencing Guidelines, a defendant who is convicted of possessing 20 grams of LSD would be guilty of a Level 6 Offense, which carries with it a sentence of 0-6 months. If the defendant possessed the LSD in a prison, the Sentencing Guidelines require the Offense Level to be raised to a level of 13, which carries with it a 12-18 month sentence. *Id.*

²⁸³ 18 U.S.C. §§ 3351-59, 3561-66, 3571-74, 3581-86; 28 U.S.C. §§ 991-98 (2000).

principles of punishment by increasing the duration of one's loss of liberty upon proof of a standard that is less than beyond a reasonable doubt. For this reason, they are attractive commodities to lawmakers. As legislatures began to codify traditional common law crimes in the early 1800s, the use of sentence enhancements became an effective way of ensuring legislative grading for more serious offenses, not because of the defendant's higher intent level, but instead because of an increase in the severity of the result. Consequently, in the past half-century there has been a proliferation of sentence enhancements.

Justice Scalia, dissenting in *Monge v. California*,²⁸⁴ recognized the current trend among legislatures to substitute sentence enhancements for criminal convictions.²⁸⁵ Sentence enhancements allow popularly-elected legislatures to boast of a quick response to crime in the street, and have thus become a speedy means to accomplish the goals of punishment among legislatures in this country.²⁸⁶ As a result, Constitution-eluding sentence enhancements have, in a sense, become the darling of the legislatures.

2. *The Risk of Abuse when a Legislature Is Permitted to Allocate the Burden of Proof for a Particular Element*

a. *The Risk of the Legislature Abusing its Power when Defining Affirmative Defenses*

Most jurisdictions and the Model Penal Code have adopted the affirmative defenses that existed at common law.²⁸⁷ Many criminal codes include a provision defining the standard of proof for affirmative defenses.²⁸⁸ Other than the fairly recent trend toward codification of common law defenses,²⁸⁹ legislatures have failed to exercise their muscle in a way

²⁸⁴ 397 U.S. 358 (1970). See generally Stephanos Bibas, Article, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097 (2001).

²⁸⁵ Bibas, *supra* note 284, at 1110-11.

²⁸⁶ See, e.g., Andrew Little, Comment, *Caught Red-Handed: The Peculiarities of the Federal Schoolyard Statute and Its Interpretation in the Fifth Circuit*, 31 TEX. TECH L. REV. 245, 273 (2000) (noting that "[p]opularly elected legislators are quick to respond to a vocal constituency demanding stiffer penalties for drug dealers").

²⁸⁷ MODEL PENAL CODE §§ 2.04, 2.08, 2.09, 3.02, 3.04 (Official Draft 1962).

²⁸⁸ See, e.g., *State v. Delibero*, 149 N.J. 90, 99 (App. Div. 1997) (stating that "[t]he State in a criminal prosecution is bound to prove every element of the offense charged beyond a reasonable doubt. That burden cannot be shifted to the defendant, even when a defendant is asserting an affirmative defense."). New Jersey Criminal Code would require the state to disprove this affirmative defense beyond a reasonable doubt. See N.J. STAT. ANN. § 2C:1-13b(2) (West 1995) (declaring that under this default provision, where an affirmative defense is silent as to the standard of proof, and there is any evidence to support the defense, the prosecution must disprove the affirmative defense beyond a reasonable doubt).

²⁸⁹ *State v. DeCastro*, 913 P.2d 558 (HI App. 1996) (*rev'd on other grounds*) (calling Hawaii's codification of Section 2.04 of the Model Penal Code a recent codification of a common law defense).

that would allow the defendant to avail himself of a defense.²⁹⁰

In limited circumstances, however, legislatures have defined new affirmative defenses for existing traditional common law crimes.²⁹¹ The MPC's adoption of the extreme emotional disturbance defense is the best example of a new defense that did not exist at common law.²⁹² Some jurisdictions have created an affirmative defense to felony murder upon showing, by a preponderance of the evidence, that the defendant was not individually culpable for the murder.²⁹³ The New Jersey Legislature created a new affirmative defense of being in a public place in the context of lawful conditions that can be imposed upon remaining in a gambling casino.²⁹⁴ These limited instances whereby legislatures have created new affirmative defenses seem to be the exception rather than the rule.²⁹⁵

The more common trend is to limit rather than to expand the category of affirmative defenses. The Insanity Defense Reform Act of 1984,²⁹⁶ for example, significantly limited the insanity defense and completely eradicated "diminished capacity" and "diminished responsibility" as affirmative defenses.²⁹⁷ In Hawaii, a recent attempt to make Extreme Mental or Emotional Disturbance ("EMED") an affirmative defense, which would have required defendants to establish EMED by a preponderance of the evidence, was vetoed by the governor.²⁹⁸ The absence of a proliferation of new affirmative defenses indicates little likelihood for legislative abuse.

²⁹⁰ See King & Klein, *supra* note 24, at 1546. Since the *Patterson* case, nine additional states have adopted a statute that requires the defendant prove extreme emotional disturbance in order to mitigate murder to manslaughter. In total, 12 states have such a statute.

²⁹¹ Donald Baier, *Arizona Felony Murder: Let The Punishment Fit The Crime*, 36 ARIZ. L. REV. 701, 703-04 (1994). In keeping with recent trends, the Arizona Legislature recently proposed an affirmative defense to felony murder as part of its 1992 Criminal Code Revision Bill. *Id.* at 702-3. The defense would allow a defendant to escape a first degree murder conviction by proving that he was not individually culpable for the murder. *Id.* However, the governor vetoed the bill, singling out the affirmative defense as a major stumbling block. *Id.*

²⁹² See discussion *supra* pp. 44-45.

²⁹³ See, e.g., *Gardiner v. Ducharme*, 187 F.3d 647 (9th Cir. 1999) (unpublished decision); 1999 U.S. App. LEXIS 14066, at *3 (June 22, 1999) (interpreting Section 9A.32.030(1)(c) of the Revised Code of Washington).

²⁹⁴ *Campione v. Adamar of New Jersey*, 155 N.J. 245, 267 (App. Div. 1998) (analyzing the criminal trespass statute's affirmative defense of being in a public place in the context of lawful conditions that can be imposed upon remaining in a gambling casino); see also James L. Fennessy, *New Jersey Law and Police Response to the Exclusion of Minority Patrons From Retail Stores Based on the Mere Suspicion of Shoplifting*, 9 SETON HALL CONST. L.J. 549, 550, 562-66 (1999) (analyzing "New Jersey public accommodations laws relating to our hypothetical minority customer's right to access a retail store").

²⁹⁵ Many jurisdictions that have adopted the defense of extreme emotional disturbance are now abandoning its use. Among the states that have adopted the Model Penal Code, relatively few enacted the Code version of voluntary manslaughter; moreover, a substantial number of the ones that did reverted to the common law formulation after only a short time. See SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 423 (6th ed. 1995).

²⁹⁶ 18 U.S.C. § 17 (1988).

²⁹⁷ See *id.*

²⁹⁸ Statement Of Objections To Senate Bill No. 1119, 1999 Leg. Sess., Senate J. 802-03.

The absence of legislative abuse contradicts Justice Powell's prediction in *Mullaney*. The Court's past decisions, which consistently granted legislatures great deference in assigning the burden of proof, did not lead to abuse where affirmative defenses were concerned.²⁹⁹ Instead, legislatures have remained remarkably restrained in their ability to exempt from full jury consideration elements of a crime that could mitigate a defendant's guilt.³⁰¹

b. The Risk of the Legislature Abusing its Power when Defining Sentence Enhancements

The *Apprendi* Court points squarely to the concerns Justice Powell raised in *Mullaney* regarding affirmative defenses. To uphold New Jersey's statutory scheme defining "hate crimes" as sentence enhancements will allow legislatures to abuse the system and to eviscerate the Constitutional mandate of *Winship*. Over the past quarter-century, legislatures have easily embraced the kind of freedom about which Justices Powell and Stevens warned.³⁰² Since the Court first coined the term in *McMillan*, defendants from almost all states and federal jurisdictions have waged hundreds of different claims, challenging the constitutionality of such provisions.³⁰³

Legislatures at both the state and federal level have adopted sentence enhancements as a short-cut method to increase the likelihood of punishment for more violent or potentially threatening crimes. In their article, *Essential Elements*, Professors Nancy King and Susan Klein identify a significant number of instances in which state legislatures amended their codes to include sentence enhancements following the Court's endorsement of similar statutes in other states.³⁰⁴ Perhaps this legislative freedom is most prolific in the Federal Sentencing Guidelines, which Congress adopted in 1987.³⁰⁵ Kate Stith and Jose Cabranes, in their book *Fear of*

²⁹⁹ King & Klein, *supra* note 24, at n.82 (finding that "[t]he option of creating affirmative defenses 'has not lead to such abuse or such widespread redefinition of crime and reduction of the prosecution's burden that a new constitutional rule was required'" (quoting *Patterson*, 432 U.S. at 211)).

³⁰⁰ *Id.*

³⁰¹ However, following *Mullaney*, Justice Powell's words rang somewhat true. Following *Patterson*, nine jurisdictions adopted the *Patterson* language defining extreme emotional disturbance as an affirmative defense to murder. See *id.* at 1546, Appendix A. In addition fifteen states legislatively adopted the Court's ruling in *Leland v. Ohio* that the defendant must prove insanity beyond a reasonable doubt. See *id.* (citing 343 U.S. 790 (1952)).

³⁰² See *supra* Part I (discussing recent court decisions).

³⁰³ See, e.g., *Underwood v. United States*, 15 F.3d 16 (2nd Cir. 1993) (defendant argued that his sentence should be vacated because a sentencing judge, rather than a jury, found his conduct continued past a particular date. The court upheld the sentence.).

³⁰⁴ King & Klein, *supra* note 24, at 1546, Appendix A.

³⁰⁵ 18 U.S.C. §§ 3351-59, 3561-66, 3571-74, 3581-86; 28 U.S.C. §§ 991-98. For a general discussion of the Federal Sentencing Guidelines, see STITH & CABRANES, *supra* note 267, at 3 (stating that "the sentencing guidelines are rules promulgated by the sentencing commission for the regulation of the criminal sentences imposed by federal judges").

Judging, suggest that the guidelines, which provide punishment based on proof of the amount of drugs one transports or the degree of violence involved in a particular crime, are really just an adjunct of the substantive criminal law.³⁰⁶

The post-*Winship* increase in sentence enhancements is understandable given the ease with which the legislature can pass statutes and the deference that courts pay when considering the wisdom of legislative choice. Crime is a bi-partisan issue and, as such, members of legislatures can easily join together to pass bills to ensure that those committing violent crimes are easily removed from the street. Once passed, the Court had, prior to *Jones* and *Apprendi*, adopted an almost blind-eye toward questioning the wisdom of removing from the jury those facts that could lead to an enhanced sentence.³⁰⁷ The Court's great deference arguably sent a well-heeded signal to legislatures that sentence enhancements, as part of particular criminal statutory schemes, are both appropriate and useful if the legislature deems them as such.³⁰⁸

IV. THE APPROPRIATENESS OF EXTENDING *APPRENDI* TO AFFIRMATIVE DEFENSES

The Supreme Court is likely to ignore the rally cry from strict proceduralists should it revisit the constitutionality of a legislature's decision to assign the burden of proving affirmative defenses to a defendant. Indeed, it would be appropriate to do so. Under the *Jones/Apprendi/Mullaney* construct, the Court's reasons for retreating from broad legislative deference when sentence enhancements are challenged are not necessarily present when affirmative defenses were called into question.

Since *McMillan*, when the Court first coined the phrase "sentence enhancement,"³⁰⁹ it has treated the inquiries into the constitutionality of sentence enhancements and affirmative defenses identically.³¹⁰ This is appropriate given the commonality between them. Both sentence enhancements and affirmative defenses remove from the jury the ability to decide their proof beyond a reasonable doubt;³¹¹ both directly affect the amount of pun-

³⁰⁶ See generally STITH & CABRANES, *supra* note 267, at 38-77 (discussing the invention of the sentencing guidelines). The guidelines provide 258 separate criteria by which judges must evaluate a defendant's characteristics and the characteristics of the crime, proof of any of these will increase or decrease punishment. *Id.*

³⁰⁷ See discussion *supra* Part II.

³⁰⁸ The Court's deference to legislatures where crimes are concerned is not new. See *Harmelin v. Michigan*, 501 U.S. 957, 988 (1991) (finding the only issue to be "whether the possible dissemination of drugs can be as 'grave' as the possible dissemination of heavy weapons. Who are we to say no? The members of the Michigan Legislature, and not we, know the situation on the streets of Detroit.")

³⁰⁹ *Bibas*, *supra* note 237, at 1103.

³¹⁰ See discussion *supra* Part I.

³¹¹ See discussion *supra* Part III.

ishment that a court will assign and although the derivation of each is from common law, both are current creatures of the legislature.

Although sentence enhancements and affirmative defenses share enough similarities that the Court has predicated its analysis of the constitutionality of one squarely on the evaluation of the other. An analysis of affirmative defenses under the *Mullaney/Jones/Apprendi* construct yields a result that is quite different from that of sentence enhancements. For this reason, it would be inappropriate for the Court to revive *Mullaney*.

As stated above, in order to invalidate the legislature's ability to shift the burden of proving affirmative defenses the Court must find, as it did with sentence enhancements, that (1) the historic principles of punishment demand that the burden of proof remain with the prosecution; and (2) allowing the legislature to allocate the burden of proof poses the risk of permitting it to impermissibly overstep its boundaries. The results from this inquiry yield a different result depending on the type of "factors that bear solely on the extent of punishment,"³¹² that the Court is subjecting to constitutional scrutiny.

A. *Do the Historical Principles of Punishment Demand that the Burden of Proof Remain with the Prosecution?*

Historically, statutory schemes trigger due process concerns when the legislature decreases the rigid burden of proof beyond a reasonable doubt for an element that "makes a substantial difference in punishment and stigma."³¹³ Since *Mullaney*, however, the Court has never expressed any clear due process concerns with factors that can fully exonerate a defendant or those that have the effect of extending punishment unless such punishment is extended beyond the statutory maximum for the underlying crime.³¹⁴ As a general matter, the Court has not imposed the reach of the Due Process Clause beyond those factors upon which proof would increase the defendant's loss of liberty.³¹⁵

The Court has always limited a legislatures ability to assign a lesser burden of proof to a factor in a criminal trial if it can "be shown that in the Anglo-American legal tradition, the factor in question" has historically made the difference between guilt or innocence.³¹⁶ When considering the affirmative defense of extreme emotional disturbance, the Court noted that proof of the defense had traditionally led to a lesser punishment, not to complete exoneration. Therefore, the due process guarantees did not ap-

³¹² *Apprendi v. New Jersey*, 530 U.S. 466, 485 (2000).

³¹³ *Patterson v. New York*, 432 U.S. 197, 226 (1977).

³¹⁴ See *McMillan v. Pennsylvania*, 477 U.S. 79, 93 (1986); *Almendarez-Torres v. United States*, 523 U.S. 224, 248 (1998).

³¹⁵ See discussion *supra* Part I.

³¹⁶ *Patterson*, 432 U.S. at 226.

ply. In contrast, *Mullaney* prohibited the legislature from switching the burden of proving a heat of passion defense to the defendant.³¹⁷ It reasoned that the statutory scheme defining the defense absolved the prosecution of the requirement to prove an element that was necessary for conviction.³¹⁸ The Court has only allowed the legislature to relieve the prosecution of its burden of disproving an affirmative defense where the defense has not led to a complete acquittal.

Since the *Patterson* decision was limited to consideration of a partial defense, one could argue that under current law a legislature may not shift the burden of proving an affirmative defense that would fully relieve the defendant of culpability. However, under the Court's mandate of limiting due process protection to instances where shifting the burden has not historically been permitted, it seems inappropriate to extend the law back to *Mullaney*. Affirmative defenses were originally offered by the defendant post-conviction as a means to mitigate punishment. Eventually, mitigating defenses were allowed at trial, but the burden of proving them remained with the defendant. A defense, it was reasoned, explained the defendant's justification or excuse for a substantive crime. It did not go to the corpus of the crime for which defendant was being punished. The courts, as a general matter, have not historically extended due process guarantees to affirmative defenses.

In contrast, sentence enhancements have traditionally been used solely as a means to lengthen the loss of one's liberty. Although the earliest sentence enhancements appeared in the mid-1700s, the use of elements to increase punishment, rather than to prove culpability, proliferated following the Court's decision in *Winship*. Because *Winship* required prosecutors to prove "every fact that constitutes the crime" legislators began drafting language that they deemed separate from the crime, despite the fact that it led directly to punishment. The Court sanctioned this practice in *McMillan* when it said, "the Due Process Clause did not require the prosecution to prove beyond a reasonable doubt any element that defines the severity of punishment of a particular crime."³¹⁹

To date, the Court seems more concerned with limiting due process guarantees rather than extending them. As it stated in *Patterson*, "Due Process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person."³²⁰ For the past eight centuries the burden for proving affirmative defenses has

³¹⁷ *Mullaney v. Wilbur*, 421 U.S. 684, 703 (1975).

³¹⁸ *Id.* at 702-03.

³¹⁹ *McMillan*, 477 U.S. at 84; see *McMillan* discussion, *supra* pp. 17-22.

³²⁰ *Patterson*, 432 U.S. at 208; see *Patterson* discussion, *supra* pp. 13-17.

largely remained with the defendant.³²¹ For this reason, the historical principles of punishment do not demand that the burden of proof remain with the prosecution. It is therefore unlikely that the Court would reverse the current trend and now require the prosecution to prove all affirmative defenses beyond a reasonable doubt.

B. *Does Allowing the Legislature to Allocate the Burden of Disproving an Affirmative Defense to the Defendant Pose a Risk of Permitting it to Impermissibly Overstep its Boundaries?*

Under this prong of the inquiry, the Court may not extend the *Apprendi* rule to include affirmative defenses. To be sure, the Court has repeatedly raised concerns that allowing the legislature great deference to decide which factors in a substantive crime must be proven beyond a reasonable doubt can lead to an erosion of the Due Process Clause.³²² However, the slippery slope has not extended to legislative abuse of defining affirmative defenses.

The current catalogue of available affirmative defenses almost completely reflects those available at common law. In fact, many jurisdictions have begun a retreat from one of the more recent statutorily created defenses, that of extreme emotional disturbance.³²³ In contrast, legislatures have fully embraced their ability to define sentence enhancements as a means to eviscerate the due process requirements of the Constitution.³²⁴ The *Apprendi* Court seemed to base its decision in large part on the concern that the New Jersey legislature effectively circumvented the protections of *Winship* by characterizing elements as “factors that bear solely on the extent of punishment.”³²⁵ There is no demonstrable evidence that legislatures have taken advantage of their power by reallocating the burden of proving a defense or defining new affirmative defenses. Therefore, allowing the legislature to continue defining affirmative defenses will pose a risk of permitting it to impermissibly overstep its boundaries. For this reason, the Court could not retreat to *Mullaney* under the second prong of the *Mullaney/Jones/Apprendi* construct.

The concerns of potential legislative abuse first raised by the Court in *Mullaney* and echoed through out the litany of cases that followed do not seem apparent where affirmative defenses are concerned. Ironically it was

³²¹ See *supra* Part II.A.1. The historic principles of defining affirmative defenses for the purposes of punishment.

³²² See *Mullaney*, 421 U.S. at 698 (noting that if legislatures were permitted to label elements due process may be circumvented); *Jones*, 526 U.S. at 243 (interpreting the statute in a manner in which “serious bodily harm” was deemed a sentence enhancement would raise serious questions under the Due Process Clause and the Sixth Amendment’s notice and jury trial guarantees).

³²³ See discussion *supra* notes 299-301 and accompanying text.

³²⁴ King & Klein, *supra* note 24, at 1524, app. A.

³²⁵ *State v. Apprendi*, 731 A.2d 485, 485 (N.J. 1999).

in a case that called into question the legislature's ability to define affirmative defenses as "factor[s] that bear solely on punishment," which called the potential for abuse into question. However, the abuse that Justice Powell warned of seemed to only extend to the legislature's use of sentencing factors.³²⁶ Thus, extending the *Apprendi* rule to affirmative defenses would fail under prong two of the *Mullaney/Jones/Apprendi* construct.

V. CONCLUSION

The Court should not limit the legislature's ability to assign the burden of proving affirmative defenses to the defendant. In a perfect world, the legislature would never be able to assign the burden of proof away from the prosecution. Once the legislature defines a crime, the reasonable doubt rule should attach to every fact affecting the defendant's criminality. However, the Court has not allowed for such a world. To echo Justice Rehnquist, in *Herrera v. Collins*,³²⁷ there are limits to the Court's obligation to ensure that innocent men do not get convicted.³²⁸ Consequently, the Court will only prohibit the legislature from shifting the burden of proof beyond a reasonable doubt away from the prosecution where the historic principles of punishment demand otherwise and where allowing for legislative "manipulation" poses the risk of allowing the legislature to impermissibly overstep its boundaries. The original derivation of affirmative defenses placed the burden on the defendant to show why punishment was not appropriate for his particular actions. Moreover, the legislative abuse to which the Court responded in *Jones* and *Apprendi* seems to occur in instances where legislatures are defining sentence enhancements and not when legislating affirmative defenses. Thus, the reasons for limiting the legislature where sentence enhancements are concerned are not apparent when subjecting affirmative defenses to similar scrutiny. Therefore, under the *Mullaney/Jones/Apprendi* construct, it is unwise and even unnecessary to extend *Apprendi* to affirmative defenses.

³²⁶ *Apprendi*, 731 A.2d at 485.

³²⁷ 506 U.S. 390 (1993).

³²⁸ *See id.*