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Due Process and the Insanity Defense: The Supreme Court's Retreat from Winship and Mullaney

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Indiana’s state legislature recently shifted the burden of proof from the prosecution to the defendant when an insanity defense is raised in a criminal trial, thereby allying itself with a minority of the jurisdictions. Constitutional support for this measure is found in the 1977 case of Patterson v. New York. In Patterson, the United States Supreme Court upheld the constitutionality of New York’s second degree murder statute which requires a defendant to prove he acted from extreme emotional disturbance in order to reduce his crime to first degree manslaughter. The insanity defense was not at issue in Patterson; however, the Patterson Court relied strongly on Leland v. Oregon where the Supreme Court upheld the constitutionality of placing the burden of proof of insanity upon the defendant. Thus, the Patterson decision stands as a reaffirmation of Leland.

The Court’s reliance on Leland, an insanity defense case, as support for its decision in Patterson was logically correct. The extreme emotional disturbance-insanity defense analogy is valid since both defenses negate or mitigate criminal culpability and rest primarily upon subjective facts focusing on the degree to which the defendant could control his conduct.

1 IND. CODE § 35-41-4-1 (Supp. 1978).
3 The relevant portions of New York’s second degree murder statute (found in N.Y. PENAL LAW §125.25 (McKinney 1975)) are as follows:
   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 ..., 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 ..., to be determined from the viewpoint of a person in the defendant’s situation under the circumstances as the defendant believed them to be.
4 Relevant portions of New York’s first degree manslaughter statute (found in N.Y. PENAL LAW §125.20 (McKinney 1975)) are as follows:
   A person is guilty of manslaughter in the first degree when:
   2. With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in paragraph (a) of subdivision one of section 125.25 [see note 3 supra]. The fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subdivision ....
5 343 U.S. 790 (1952).
6 432 U.S. at 204-05.
7 Id. at 206 “New York [in its second degree murder statute] did no more than Leland ... permitted it to do without violating Due Process ....”
while committing the criminal act. The primary fault with the Patterson and Leland decisions lies in their very foundation, i.e., it is constitutionally permissible for the state to allocate the burden of proving criminal defenses to the defendant where the defense reduces or negates culpability and either mitigates or exculpates the defendant from criminal punishment and social stigma. This note will examine the constitutional and policy considerations underlying the Patterson decision as it applies to the defense of insanity.

ALLOCATING THE BURDEN OF PROOF IN THE INSANITY DEFENSE

All jurisdictions in the United States excuse the accused from criminal responsibility if legally insane at the time of the criminal offense. The courts employ a presumption of sanity in all criminal litigation,

* A defendant's emotions have to be stirred by conduct which in his view is so outrageous that he is provoked into reacting from extreme emotional disturbance, see note 40 infra, and is therefore incapable of reacting rationally to the outrageous act. A legally insane person does not have to be provoked by an external stimulus; he is unable to control his actions because of some internal defect in his reasoning process. See the various definitions of insanity cited in note 9 infra.

* See, e.g., COLO. REV. STAT. §16-8-105 (1973); IND. CODE §35-5-2-3 (Supp. 1978).

The traditional view of the insanity defense is that it tries to discriminate between those cases where a punitive-correctional sentence is appropriate and those where a medical-custodial sentence is a better course for the law to follow, see MODEL PENAL CODE §4.01, Comment (Tent. Draft No. 4, 1955). Others have viewed the insanity defense as a device in which those without mens rea can be singled out for commitment not as an alternative to conviction and imprisonment but as an alternative to acquittal, see GOLDSTEIN AND KATZ, Abolish the Insanity Defense—Why Not?, 72 YALE L.J. 853, 865 (1963).

The following are the better known definitions of insanity in the substantive criminal law:

M'Naughten Rule or Right-Wrong Test (from M'Naughten's Case, 8 Eng. Rep. 718, 722 (H.L. 1843)). The defendant cannot be criminally convicted if, at the time he committed the criminal act, he was laboring under such a defect of reason from a disease of the mind of sufficient magnitude as to not know the nature and quality of the act he was doing; or, if he did know the nature and quality of his criminal act, then he would be relieved of criminal responsibility if he did not know that what he was doing was wrong. This test is followed in over one half of the American jurisdictions, see W. LAFAVE & A. SCOTT JR., HANDBOOK ON CRIMINAL LAW at §37 (1972) (hereinafter cited as LAFAVE & SCOTT).

Irresistible Impulse Test. The criminal defendant cannot be criminally convicted if it is found that at the time he committed the criminal act he had a mental disease which kept him from controlling his conduct even if at the time he committed the act he knew what he was doing and that it was wrong. This test is often used to supplement the M'Naughten Rule. See, e.g., Smith v. United States, 36 F.2d 548, 549 (D.C. Cir. 1929).

Durham Rule or Product Test. The criminal defendant is not criminally responsible for his criminal act if the act was the product of a mental disease or defect. See, Durham v. United States, 214 F.2d 862, 875(D.C. Cir. 1954).

American Law Institute Test. A person is not responsible for his criminal acts if at the time of the act, as a result of a mental disease or defect, he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to act in conformity to the requirements of the law. See MODEL PENAL CODE §4.01(1), (Proposed Official Draft, 1961).

The insanity defense does not furnish a basis for extending leniency, it is a complete defense, see e.g., People v. Cordova, 14 Cal.2d 308, 311, 94 P.2d 40,42(1939); State v. Hall, Iowa, 214 N.W.2d 205,207(1974).

10 M'Naughten's Case, 8 Eng. Rep. 718, 722 (H.L. 1843), "[E]very man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to [the jury's] satisfaction ...." Accord, Davis v. United States, 160 U.S. 469, 482, 486(1896)(presumption of rule that all men are sane is justified by the
establishing a prima facie case of sanity for the prosecution,\textsuperscript{11} requiring the defendant to produce sufficient evidence to rebut the presumption;\textsuperscript{12} once the presumption is rebutted, the defendant's sanity becomes an issue to be decided by the fact finder.\textsuperscript{13} The states' decisions split on allocating the ultimate burden of persuasion on the sanity question. A bare majority of twenty-seven jurisdictions treat sanity as an essential element of the crime, requiring the prosecution to prove sanity beyond a reasonable doubt.\textsuperscript{14} The other twenty-four jurisdictions treat the insanity general experience of mankind and general considerations of public safety); Walters v. State, 183 Ind. 178, 179, 108 N.E. 583, 584(1915)(every person is presumed to be sane). For citations to the other United States jurisdictions that utilize the presumption of sanity in criminal cases, see H. WIEHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 214 n.1 (1954)(hereinafter cited as WIEHOFEN).

By treating its citizens as responsible agents under the law, the state is able to obtain a degree of socialization and respect for its laws while reflecting and encouraging the values of human dignity and virtue, see GARDNER, Criminal Responsibility and Exculpation By Medical Category- An Instance of Not Taking Hart to Heart, 27 ALABAMA L. REV. 55,77 (1976). The presumption of sanity saves time, money, prosecutorial resources and judicial resources when sanity is not an issue in the case. See, e.g., Davis v. United States, 160 U.S.469,485 (1895)(presumption of sanity prevents delay and embarrassment when sanity not at issue); Young v. State, 258 Ind. 246,249, 280 N.E.2d 595, 597 (1972)(presumption of sanity saves the state the trouble of proving sanity in the great number of cases where the question will not be raised).

11See, e.g., Walters v. State, 183 Ind. 178, 179-80, 108 N.E. 583,584(1915).

12Traditionally, the burden of proof in criminal cases has two aspects. First, the burden of production requires the prosecution to come forward with evidence that the crime was committed and was committed by the defendant. Failure to bring forward this evidence will result in a directed verdict in favor of the defendant. Secondly, the burden of persuasion, requires the prosecution to prove beyond a reasonable doubt that the crime was committed by the defendant. LAFAVE & SCOTT, supra at note 9, at 44-45. It is uniformly held that, as with most defenses, the defendant has the burden of coming forward with evidence of his insanity in order to place his sanity in issue in a criminal case. Id. at 47. E.g., State v. Allen, 27 Ariz. App.577, 581, 557 P.2d 176, 180 (1976); People v. Sutton, 48 Ill. App. 1006, 1012, 357 N.E.2d 1204, 1212 (1976); Riggemmann v. State, 33 Md. App. 344, 352, 364 A.2d 1159, 1164 (1976).

13At bottom, the determination whether a man is or is not held responsible for his conduct is not a medical but a legal, social or moral judgement. Once evidence of the defendant's mental condition is disclosed, it is society as a whole, represented by judge or jury, which decides whether a man with the characteristics described should or should not be held accountable for his acts. United States v. Freeman, 357 F. 2d 606, 619-20 (2d Cir. 1966). Accord, Gregg v. State, ___Ind.____, 356 N.E.2d 1384, 1386 (1977).

defense as a traditional affirmative defense and place the burden of proving legal insanity at the time of the criminal act on the defendant, usually by a preponderance of the evidence.16

CONSTITUTIONAL CONSIDERATIONS

This jurisdictional split stems from the Supreme Court’s surprising failure to rule in Leland and Patterson that Fourteenth Amendment Due Process requires the prosecution to bear the burden of proof on the insanity issue, even though other precedent prior to the Patterson decision demanded that the prosecution bear the burden of proof. Initially, in Davis v. United States,16 the Supreme Court recognized the interrelationship between sanity and mens rea,17 concluding that the prosecution should have the burden of proving sanity when an insanity defense is raised.18 Leland was an abrupt reversal of this position.19 Later, in In re Winship20 and Mullaney v. Wilbur,21 decided after Leland but prior to


One jurisdiction, Wisconsin, allocates the burden of proof according to which definition of insanity the defendant elects to be tried under. See State ex rel. Schopf v. Schubert, 45 Wis. 2d 644, 648, 173 N.W.2d 673, 675 (1970)(State has the burden of proof under the M’Naughten Rule and the defendant has the burden of proof under the ALI test).

16160 U.S. 469 (1895).

17Mens rea is equivalent to the guilty state of mind required by statute. See generally LAFAVE & SCOTT supra note 9, at § 27. Not all crimes require mens rea to find guilt. E.g., United States v. Dotterweich, 320 U.S. 277 (1943)(president of corporation found guilty for the mislabelling of drugs done without his knowledge); United States v. Balint, 258 U.S. 250(1922)(defendant guilty for selling drugs, not knowing their sale was illegal).

18For discussion of Davis, see notes 23-25 infra and accompanying text.

19For discussion of Leland, see notes 26-30 infra and accompanying text.


Patterson, the Supreme Court laid the constitutional groundwork for the reversal of Leland. The ensuing discussion of Davis and Leland documents the contradictory positions developed by the Supreme Court prior to Patterson.

Davis established the rule for the federal courts that once the sanity presumption is rebutted, the prosecution must prove the defendant's sanity beyond a reasonable doubt. Although the Court recognized the relation of sanity to mens rea as an essential element of the crime, the Court did not base its decision upon due process grounds. Instead, the Court's holding was prompted by a desire to adopt a federal rule consistent with the majority of the more respected state courts.

The holding in Leland made it clear that Davis was not a constitutional due process case; the Supreme Court refused to apply the Davis rule to the states. The Leland Court sustained the constitutionality of an Oregon statute, which placed the burden of proving insanity on a defendant, invoking an insanity defense, against a Fourteenth Amendment Due Process challenge. The Court saw no inconsistency between the rule requiring the defendant to prove his sanity and the rule requiring that the prosecution must prove every element of the crime appearing on the face of the statute beyond a reasonable doubt. The seemingly conflicting principles were deemed compatible because the insanity issue was not raised until the conclusion of the prosecution's case-in-chief. Thus, the Leland Court abandoned the position taken in Davis that sanity and culpability are interrelated for the position that the essential elements of the crime listed in the statute are the sole indicia of culpability.

Subsequently, the Supreme Court deviated from its Leland holding in Winship and Mullaney by demanding, as a requirement of Fourteenth Amendment Due Process, that the prosecution prove any fact relating to culpability, though the fact does not appear on the face of the statute. Therefore, prior to Patterson, one could have concluded that the Supreme Court would have required the state to prove sanity beyond a reasonable doubt when an insanity defense was invoked.

For a discussion of Winship's and Mullaney's erosion of Leland, see notes 31-40 infra and accompanying text.

160 U.S. at 485-86.
Id. at 488. The Supreme Court also believed that a desire for uniformity compelled this result. See also Patterson v. New York, 432 U.S. 197, 204 (1977) (Davis was not a constitutional ruling); Leland v. Oregon, 343 U.S. 790,797 (1952) (Davis did not set down a constitutional standard).
343 U.S. at 793.
Id. at 792. Oregon still characterizes the insanity defense as an affirmative defense, OR. REV. STAT. §161.305 (1975), placing the burden of proof on the defendant to prove his sanity by a preponderance of the evidence, OR. REV. STAT. § 161.055 (1977).
343 U.S. at 793.
Id. at 795-96. In criminal trials, where an insanity defense is employed, the prosecution must first, in his case-in-chief, attempt to prove every element of the crime beyond a reasonable doubt. After the conclusion of the prosecution's case-in-chief, the defense presents evidence of insanity. It is only after the defense rebuts the presumption of sanity that the prosecution attempts to offer evidence in rebuttal that the defendant was sane when he committed the criminal acts.

Justice Frankfurter dissented on this ground. Id. at 803-04.
In *Winship*, the Supreme Court held as a general proposition that Fourteenth Amendment Due Process mandates that the prosecution must prove criminal guilt beyond a reasonable doubt. The rationale for this holding was a desire to afford the criminally accused a high degree of protection against erroneous conviction and to stimulate public confidence in the criminal process by insuring the reliability of jury verdicts.\(^3\) However, as *Winship* indicated, the Supreme Court had long assumed "that proof of a criminal charge beyond a reasonable doubt is constitutionally required."\(^2\) Therefore, *Winship* is important for its narrow holding. Specifically, the Court held that the state must prove acts of juvenile delinquency beyond a reasonable doubt when a finding of guilt results in a loss of personal liberty and social stigma, even though juvenile delinquency was not recognized by the state as a crime.\(^3\) Thus, the *Winship* Court extended application of the reasonable doubt standard beyond the essential elements of a crime appearing on the face of a criminal statute to include all facts relevant solely to punishment and stigma. The logical application of *Winship* to *Patterson* would have resulted in requiring the prosecution to prove the nonexistence of extreme emotional disturbance, since the defense reduces second degree murder to the lesser crime of first degree manslaughter. *Winship* demands that the prosecution prove the nonexistence of criminal defenses like the extreme emotional disturbance and insanity defenses once successfully raised, if they result in an acquittal or in a mitigation of criminal punishment and social stigma.\(^4\)

\(^3\)397 U.S. 358,361-64, the *Winship* Court's exact words are worth noting; the requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction.... Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard that leaves people in doubt whether innocent men are being condemned.

*Id.* at 363-64.


Under the state law at issue in *Winship* juvenile delinquency was not a crime, but the risks of punishment for juveniles and non-juveniles were identical. See 397 U.S. at 365-67. The *Winship* court was ambiguous as to the status of the *Leland* decision since the Court quoted approvingly from Frankfurter's dissent that "[i]t is the duty of the government to establish ... guilt beyond a reasonable doubt. This notion ... is a requirement and a safeguard of due process of law ...." 397 U.S. at 362 (citing Leland v. Oregon, 343 U.S. at 802-03(dissenting opinion). At the same time the *Winship* Court has cited the majority opinion in *Leland* for the proposition that the Court always assumed that due process requires the reasonable doubt standard which the state must meet in proving the essential elements of the crime, 397 U.S. at 362 (citing Leland v. Oregon, 343 U.S. at 795).
In *Mullaney*, the Supreme Court applied the *Winship* holding to a statute analogous to the one challenged in *Patterson*. Like the second degree murder statute in *Patterson*, the Maine statute at issue in *Mullaney* permitted the defendant to mitigate murder to manslaughter. The mitigating circumstance in the Maine statute was the heat of passion on sudden provocation defense, the common law predecessor to the extreme emotional disturbance defense. The statute permitted the fact finder to infer malice aforethought, an essential element of the crime of murder appearing on the face of the statute, absent proof that defendant committed the homicide under heat of passion on sudden provocation. The Maine statute was declared unconstitutional; the Court expressly acknowledged the mutual exclusivity of malice aforethought and heat of passion on sudden provocation as concurrent states of mind, and therefore, the requirement that the defendant prove heat of passion necessarily meant he was negating malice aforethought, an essential element of the crime, in violation of his due process under *Winship*.

Thus, *Winship* mandates that the prosecution should bear the burden of proof both on the extreme emotional disturbance issue, *Patterson* notwithstanding, since extreme emotional disturbance mitigates culpability, lessening the punishment and stigma suffered upon conviction, and concommitantly, the insanity defense which eliminates a finding of criminal culpability precluding criminal punishment. The *Mullaney* Court not only supported *Winship*'s rationale for the reasonable doubt standard, but also extended *Winship* by announcing, first, that it would not permit a state to avoid the *Winship* holding by drafting statutes that redefine essential elements bearing on guilt into factors bearing on the severity of punishment, permitting the state to shift the burden of proof to the defendant without changing its substantive law, and second, its intent to scrutinize the operation and effect of statutes requiring the defendant to disprove an essential element of the crime, looking to the interests of both the state and the defendant in determining how the burden of proof should be allocated. The *Patterson* Court never reached this second stage in the *Mullaney* analysis, since the extreme emotional disturbance defense was not viewed as negating an essential element of New York’s

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35The Maine murder statute at issue in the *Mullaney* case provided: “Whoever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life.” 421 U.S. at 686 n. 3.

The relevant parts of the Maine manslaughter statute provided: “Whoever unlawfully kills a human being in the heat of passion on sudden provocation, without express or implied malice aforethought ... shall be punished by a fine of not more that $1,000 or by imprisonment for not more than twenty years....” *Id.*

30The *Patterson* Court admitted this fact. 432 U.S. at 206.

31 421 U.S. at 686-87.

32*Id.* at 696-98. See also, LAFAVE & SCOTT, supra note 9, at §§67,75 (at common law, the most important distinction between murder and manslaughter was malice aforethought, which was the same as the lack of heat of passion).

33421 U.S. at 698.

34*Id.* at 699. See notes 50-62 infra and accompanying text for a discussion of the possible state interests justifying a shift of the burden of proving insanity to the defendant.
second degree murder statute. Closer scrutiny shows that this defense does negate an essential element of second degree murder in New York in substance, if not in form.

FORM OVER SUBSTANCE: SUPREME COURT DISTINGUISHES PATTERSON FROM MULLANEY

Departing from its previous course, the Supreme Court refused to apply Winship's reasonable doubt standard to Patterson, even though the extreme emotional disturbance defense is the modern equivalent of the heat of passion defense at issue in Mullaney. Although a literal reading of the statutes at issue in Mullaney and Patterson show facial differences permitting this inconsistent result, the logic of Winship rejects such a superficial analysis. Deeper probing demonstrates the striking similarity of the statutes: the New York statute, like the unconstitutional Maine statute, required the defendant to disprove an essential element of the crime.

New York's second degree murder statute differed from Maine's murder statute primarily in one respect. In Maine, the drafters defined on the face of the statute, the state of mind which exists absent proof that the defendant killed with heat of passion on sudden provocation. Therefore, Maine permitted the jury to infer malice aforethought when the defendant failed to prove heat of passion on sudden provocation. Unlike the Maine statute, the New York statute provided no basis for a jury inference, since the New York drafters chose not to define in the statute the state of mind which extreme emotional disturbance negates.

Nevertheless, the similar origins and functions of the extreme emotional disturbance and heat of passion defenses lead to the conclusion that the New York defense, like its common law predecessor, nullifies malice aforethought by negating the state of mind common to all second degree murderers but absent in first degree manslaughterers. Also, failure to prove extreme emotional disturbance mandates a finding of malice aforethought under the New York statute, following the common

\[432\text{ U.S. at 206-07. New York's reformulation of the common law defense of heat of passion on sudden provocation into the statutory extreme emotional disturbance defense came after the common law defense was criticized as being too limited since it took into account only direct provocation of the defendant by the victim himself. See LaFave & Scott, supra note 9, at § 76. The extreme emotional disturbance defense incorporates the idea that where the defendant's emotions were stirred by other forms of outrageous conduct, including conduct by some one other than the ultimate victim, the accused should be punished for manslaughter rather than murder. In addition, the common law defense was applied with strict objectivity where the defendant had to react as a reasonable man would under the same circumstances. Under New York's extreme emotional disturbance defense, the jury is to judge the reasonableness of the defendant's actions from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be.}

\[4\text{The extreme emotional disturbance defense does not negate the element of intent because it is an essential element of manslaughter as well as second degree murder. See notes 2 and 3 supra.}\]
law rule and Maine’s statutory scheme at issue in Mullaney. In effect, New York’s second degree murder statute makes malice aforethought an essential element of the crime by requiring the defendant to prove extreme emotional disturbance to mitigate his crime. Therefore, New York’s statute is constitutional in form only; the state of mind that exists without proof of extreme emotional disturbance does not appear on the face of the statute, permitting no statutory basis for the jury inference. By analogy to Patterson and Mullaney, where the mitigating criminal defense negated an essential element of the crime, the insanity defense can negate the mens rea element of a crime. Thus, if there can be no mens rea without sanity, sanity should be an essential element of the crime to be proved beyond a reasonable doubt.

SANITY AS AN ESSENTIAL ELEMENT OF THE CRIME

Requiring a defendant to carry the burden in an insanity defense forces him to nullify an essential element of the crime. A comparison of the mens rea element of murder with the definition of legal insanity in California illustrates the negating power of the insanity defense. In California the M’Naughton Rule is recognized; a defendant is legally insane and not criminally responsible if disease or defect of the mind so impaired his reason that he could not know the nature and quality of his act, including its wrongful nature. Malice aforethought is a material element of the crime of murder in California. If a person commits a criminal act while unable to appreciate the nature or quality of his criminal act, under California law he cannot be found to have acted with malice aforethought; therefore, legal sanity is required before the requisite mens rea for murder can be found.

A California murder defendant who raises an insanity defense must prove his inability to have the requisite mens rea, and absent proof of insanity, the court employs the sanity presumption allowing the jury to infer the defendant’s ability to have the requisite mens rea without requiring the prosecution to present any evidence of sanity. This violates Four-
teenth Amendment Due Process because *Mullaney* forbids states' procedures requiring a defendant to prove his inability to have the requisite mens rea for a crime, where that element can be inferred without proof by the defendant to the contrary. No legitimate basis exists for distinguishing the *Mullaney* holding from the California situation where the insanity defense negates malice aforethought. Thus, in California, if a defendant is prosecuted for murder and evidence of insanity is sufficient to rebut the sanity presumption, then the prosecution should bear the burden of proving sanity because evidence of insanity expressly negates malice aforethought.

Moreover, even where sanity and mens rea are construed as separate and independent elements, *i.e.*, where insanity does not negate mens rea, the prosecution should still prove sanity when an insanity defense is properly raised. *Winship* and *Mullaney* require the prosecution to prove every fact bearing on punishment, protecting the defendant against unjust loss of liberty and social stigma.\(^4\) Since insanity is an exculpating defense, the societal goals of *Winship* and *Mullaney* are best realized when the prosecution is required to prove sanity beyond a reasonable doubt when an insanity defense is invoked.

**STATE INTERESTS AFFECTING THE BURDEN OF PROOF**

Whether requiring the prosecution to prove sanity is justified on the ground that the insanity defense negates mens rea or on the general policy ensuring societal faith in reliable jury verdicts and protecting the defendant against unjust punishment, *Mullaney* still permits the state to allocate the burden of proof of a criminal defense upon the defendant, if the state can show an interest of sufficient magnitude.\(^5\) The *Patterson* Court identified two state interests as partial justification for upholding the New York statute.

First, the *Patterson* Court accepted the state's argument that it would place a unique hardship on the prosecution to negate extreme emotional disturbance when prosecuting a defendant for second degree murder.\(^6\) By analogy, the *Mullaney* Court discarded this argument; the Court rejected the state's position that the prosecution was under an unique hardship to negate heat of passion on sudden provocation under Maine's murder statute, though the facts surrounding the defense were "peculiarly within the knowledge of the defendant."\(^7\) Two possible explanations exist for the *Patterson* Court's conclusion that the prosecution's burden under the New York statute was significantly greater than the prosecution's burden under the Maine statute, neither of which are persuasive.

\(^4\)See notes 31-40 *supra* and accompanying text.
\(^5\)See note 40 *supra* and accompanying text.
\(^6\)432 U.S. at 207.
\(^7\)421 U.S. at 702.
In *Mullaney*, the prosecution labored under no unique hardship because the general trend in other states is to require the prosecution to prove the absence of heat of passion.\(^5\) A similar trend requires the prosecution to bear the burden of proving sanity when an insanity defense is raised.\(^6\) By contrast, the extreme emotional disturbance defense has not been widely adopted, so current state practice provides little insight on the hardship question. Significantly, the innovator of the defense, the American Law Institute, recommended that the prosecution assume the burden of negating the defense beyond a reasonable doubt.\(^5\) Although drawing on the work of the American Law Institute, New York concluded independently that the prosecution would be severely handicapped if the reasonable doubt standard were applicable to the extreme emotional disturbance defense.\(^6\) Alternatively, the *Patterson* Court's acceptance of New York's hardship argument may stem from the fact that both the extreme emotional disturbance defense and the insanity defense involve proof of subjective facts peculiarly within the defendant's knowledge. In contrast to *Mullaney*, *Patterson* may represent the Court's decision to relieve the prosecution's difficult burden of proving subjective facts.\(^7\) This decision, however, ignores the principle that whenever the prosecution must prove the defendant's mental state as an essential element of the crime, its proof necessarily involves subjective facts peculiarly within the defendant's knowledge,\(^8\) thus no special hardship is imposed in the extreme emotional disturbance and insanity context. By shifting the burden of proving these defenses to the defendant the state simplifies the prosecution's task in proving its case, but ignores the constitutional justification for the reasonable doubt standard.

It is doubtful that the Constitution would permit a shift in the burden of proof of an essential element of the crime simply because the prosecution has difficulty in meeting its burden of proof since the requirement

\(^{5}\)421 U.S. at 696.

\(^{6}\)More than half of the jurisdictions in the United States have departed from the common law rule requiring the defendant to prove his insanity when employing an insanity defense in a criminal case. These jurisdictions have adopted a rule requiring the prosecution to prove sanity beyond a reasonable doubt when the defendant's sanity becomes an issue in the case. For citation as to how each jurisdiction allocates the burden of proof when an insanity defense is raised see notes 14 and 15 *supra* and accompanying text.

\(^{7}\)432 U.S. at 220 (Powell dissenting)(citing MODEL PENAL CODE §§ 1.12, 210.3 (Proposed Official Draft, 1962); id. § 1.13, Comment at 108-18 (Tent. Draft No.4, 1955)).


\(^{9}\)The Mullaney Court rejected the state's argument that requiring the prosecution to negate the defense of heat of passion on sudden provocation placed too difficult a burden on it. See note 52 *supra* and accompanying text.

\(^{10}\)See *Tot* v. United States, 319 U.S. 463, 469 (1943)(in all cases the defendant has greater familiarity with the facts of the crime, but this does not justify placing the burden of coming forward with evidence upon the defendant).
that the prosecution must prove every element of the crime beyond a reasonable doubt is based on the fundamental value determination that it is far worse to convict an innocent man than let a guilty man go free.9 In Davis, Justice Harlan dispelled the state's argument that because the prosecution would be unable to meet its difficult burden of proof, application of the reasonable doubt standard to the insanity defense would increase a guilty defendant's opportunity to feign insanity and gain an acquittal. Recognizing the fear of depraved criminals going free, Harlan stressed the fundamental principles of humanity and justice which underlie the criminal law:

No man should be deprived of his life under the forms of the law unless the jurors who try him are able, upon their consciences, to say that the evidence before them... is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged.60

As Justice Harlan recognized, the interests of humanity and justice which compel the due process requirement apply to the insanity defense, despite the burden it imposes on the prosecution, because of the defendant's interests against unjust loss of personal liberty and stigma which inevitably follow conviction.

A second state interest identified in Patterson as a basis for state objection to judicial reallocation of the burden of proof of the insanity and extreme emotional disturbance defenses is the state's sovereign right to adopt and enforce laws regulating the substantive criminal law of the state. The Patterson Court emphasized that the allocation of the burdens of production and persuasion in state criminal statutes are part of the overall administration of justice and regulation of criminal procedure, legitimate state functions under our federal system of government.61 Winship and Mullaney, however, do not infringe on substantive state law, but rather they establish the procedural requirements for state compliance with due process, assigning to the state the burden of proof of every element of the crime and of every element relevant to punishment and stigma.62

9See Buzynski v. Oliver, 538 F.2d 6,9 (1st Cir. 1976), cert. denied, 429 U.S. 984 (1977).

Historically, the defense of insanity has been viewed with suspicion by the courts because they felt that an accused criminal offender could feign insanity and escape punishment for atrocious crimes. See Davis v. United States, 469 U.S. at 492-93; H. WIEHOFEN, INSANITY AS A DEFENSE IN CRIMINAL LAW 155-56 (1933). Given the advancements of modern psychiatry, the fear of the successful feigning of insanity is probably unfounded since a competent psychiatrist would be able to determine if the accused is feigning insanity. See WIEHOFEN, supra note 10, at 45-49.

61432 U.S. at 201 (citing Leland v. Oregon, 343 U.S. 778 (1952))(Federal Constitution does not prohibit requiring the defendant to prove his insanity when he employs an insanity defense).

62Id. at 228 (Powell, J., dissenting). For example, a state does not have to choose malice aforethought as the distinguishing factor between murder and manslaughter. It could properly decide to punish every person guilty of an unlawful homicide in a similar fashion, without incorporating circumstances into its criminal code that bear on punishment.
The *Patterson* Court read *Winship* and *Mullaney* narrowly, failing to apply the reasonable doubt standard to the extreme emotional disturbance and insanity defenses, by ignoring their inextricable relationship with mens rea and by failing to properly consider societal and individual interests against unreliable jury verdicts and unjust criminal punishment protected by the reasonable doubt standard. The prosecution is under no unique hardship to negate extreme emotional disturbance or to prove sanity since they involve proof of facts which are no more subjective than mens rea; the *Patterson* Court misinterpreted *Winship* and *Mullaney*'s significance setting forth procedural requirements mandated by due process that do not infringe on states' substantive law.

**CONCLUSION**

Abandoning the view set forth in *Winship* and *Mullaney*, the Supreme Court in *Patterson* adopted the position that the prosecution must only prove those facts bearing on the defendant's culpability that appear on the face of the statute. *Patterson* will perpetuate the jurisdictional split regarding the burden of proof in an insanity defense; states will continue to be permitted to shift the burden of negating factors relating to culpability which do not appear on the face of the statute but still bear on punishment and stigma to the defendant.

Moreover, the Court's justification for upholding states' procedures requiring the defendant to prove the defenses of either extreme emotional disturbance or insanity is unfounded. First, the prosecution is under no unique hardship to disprove these defenses because they involve proof of facts no more subjective than are involved in proving mens rea in the most routine criminal prosecutions. Second, judicial allocation of the burden of proving sanity to the prosecution does not infringe on state substantive law but incorporates the procedural requirements of due process found in *Winship* and *Mullaney*. Thus, the reasonable doubt standard should be applied to the insanity defense due to the protection the standard provides against unreliable jury verdicts and unjust criminal convictions.

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However, if the state does decide to distinguish between defendants who commit unlawful homicides, by incorporating facts like malice aforethought into its statutes, it must bear the burden of proving those facts to convict.

Efforts to eliminate the insanity issue from criminal trials have been generally unsuccessful. For example, California has adopted a bifurcated trial system where the issue of the defendant's guilt is tried in the first trial and the issue of insanity is tried in a second trial after the defendant has been found guilty of the crime charged in the first trial. California has been unable to keep out evidence of insanity in the first guilt determining trial since it has been held that evidence of mental disease or defect is admissible on the issue of whether the defendant had the required mental state to be guilty of the crime charged. See *People v. Wells*, 33 Cal.2d 330, 343-58, 202 P.2d 53, 61-70 (1949). The few attempts to eliminate the insanity defense have been held to violate due process. See *Sinclair v. State*, 161 Miss. 142, 153, 132 So. 518, 522 (1931); *State v. Strasburg*, 60 Wash. 106,116-24, 110 P. 1020,1022-25(1910).