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The Burden of Proof in Criminal Cases: A Comment on the Mullaney-Patterson Doctrine

Fernand N. Dutile*

The United States Supreme Court's recent ventures into the constitutional requirements concerning the burden of proof in criminal cases justify consideration of their prescriptions, of their consistency and of the constitutional limits of burden-shifting.

In *Mullaney v. Wilbur*,¹ the Court had under consideration the issue of provocation as it related to criminal homicide in Maine. Under Maine law, murder was criminal homicide *with* malice and manslaughter was criminal homicide *without* malice.² Additionally, however, Maine put the burden of proving adequate provocation upon the defendant.³ Since, in the Court's view, the concept of malice, required by Maine law and by the common law for generations, was negated by the existence of adequate provocation, lack of provocation was inevitably part of malice and part, therefore, of an element of the offense of murder. In *Re Winship*,⁴ which had established in 1970 that the due process clause of the fourteenth amendment required states to prove all elements of the offense beyond a reasonable doubt, mandated that Maine prove the lack of provocation, *i.e.*, malice, beyond a reasonable doubt.

The *Mullaney* lesson seemed clear: any factor in a criminal case which was an element of the crime charged, or whose presence or absence was a necessary implication of such an element, must be proven by the state beyond a reasonable doubt. Although the state could choose, in its wisdom, to require the prosecution to prove other matters as well, the Constitution would permit the burden of proof as to these matters to be put on the defendant.

Whatever certainty seemed engendered by *Mullaney* quickly dissipated when, two years later, the Court decided *Patterson v. New York*.⁵ Under review

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1 421 U.S. 684 (1975).

2 In Maine, the murder statute 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." ME. REV. STAT. ANN., tit. 17, § 2651 (1964).

The 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 than \$1,000 or by imprisonment for not more than 20 years. . . ." ME. REV. STAT. ANN., tit. 17, § 2551 (1964).

3 421 U.S. at 684-85. There is, of course, a clear distinction between the burden of proof requirement, which the *Mullaney* case involves, and requiring the defendant "to show that there is 'some evidence' indicating that he acted in the heat of passion before requiring the prosecution to negate this element by proving the absence of passion beyond a reasonable doubt," which *Mullaney* does not involve. *Id.* at 701-02 n.28 (citations omitted).

Contemporary writers divide the general notion of "burden of proof" into a burden of *producing* some probative evidence on a particular issue and a burden of *persuading* the fact finder with respect to that issue by a standard such as proof beyond a reasonable doubt or by a fair preponderance of the evidence.

Id. at 695 n.20 (emphasis in original).

4 397 U.S. 358 (1970).

5 432 U.S. 197 (1977).

in *Patterson* was a second-degree murder conviction which, under New York law, required only an "intent to cause the death of another person" and "causing the death of such person or of a third person."⁶ Malice aforethought was not an element of the crime, express or implied.⁷ Furthermore, a person accused of murder might set up the affirmative defense of "extreme emotional disturbance."⁸ When there was appropriate "extreme emotional disturbance," the correct result would be manslaughter.⁹ The issue in *Patterson* was whether the state could require the defendant to prove the existence of "extreme emotional disturbance."

The *Mullaney* analysis, to which the Court's opinion in *Patterson* proves technically true, is simple enough. The existence of "extreme emotional disturbance," unlike provocation in the Maine case, does not negate the existence of any of the required elements of the crime. Although a person in Maine could not have had both the appropriate provocation for manslaughter and the malice requisite for murder, one in New York could have "extreme emotional disturbance" without negating the stated elements of second-degree murder, intent to kill and the causation of death.

The real difficulty, however, is in reconciling *Mullaney* and *Patterson* from the point of view of the substance of the decisions as opposed to form. It should be assumed that a constitutional decision like *Mullaney* is intended to implement an important right and not merely to be a lesson in legislative drafting. Yet, as Mr. Justice Powell states in his *Patterson* dissent:

A limited but significant check on possible abuses in the criminal law now becomes an exercise in arid formalities. What *Winship* and *Mullaney* had sought to teach about the limits a free society places on its procedures to safeguard the liberty of its citizens becomes a rather simplistic lesson in statutory draftmanship.¹⁰

In Powell's view, the spirit of *Mullaney* had been wiped out by *Patterson*. His assertion can easily be understood if one considers that what Maine was doing prior to *Mullaney* could, in substance, be done, and done constitutionally, after *Patterson*. A quite simple redrafting of the Maine statute along the lines of New

6 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 crime. . . .

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

7 432 U.S. at 198.

8 N.Y. PENAL LAW § 125.25[1](a) (McKinney 1975).

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

2. With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in paragraph (a) of subdivision one of section 125.25. The fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subdivision. . . .

N.Y. PENAL LAW § 125.20 (McKinney 1975).

10 432 U.S. at 224 (Powell, J., dissenting).

York's, *i.e.*, one avoiding the direct or indirect implication of the common law concept of malice, could set out elements of the offense that would in no way necessarily suggest the presence or absence of provocation. If the statute would then go on to label provocation an "affirmative defense," the burden of proof could easily be put on the defendant. The result: instant constitutionality. Justice Powell would have the Court look at the substance of the criminal homicide construct, not its form, precisely because the form is so manipulable. As he quite forcefully points out, the basic difference between murder and manslaughter in Maine had been provocation: *Mullaney* held that the prosecution had the burden of proof on that issue as a matter of constitutional law. The basic difference between second-degree murder and manslaughter in New York was "extreme emotional disturbance": *Patterson* allowed the state to impose the burden of proof with regard to that issue on the defendant. The distinction seems ephemeral, at best.

The distinction might have been tenable if the provocation factor related to the transaction itself and the "extreme emotional disturbance" only to a particular personal characteristic of the defendant. But both concepts are tied directly to the transaction of the homicide. Under the New York statute, the "extreme emotional disturbance" must be one "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."¹¹ Clearly many, if not all, cases anticipated under this provision require consideration of circumstances in the transaction itself directly affecting the defendant's culpability.

To some extent, the *Patterson* Court seems to be deciding the issue on a very practical ground, namely, that some "affirmative defenses" or "mitigating factors" will be withheld or withdrawn entirely if the state is not free to condition them on the defendant's proof of their existence.¹² Since, presumably, New York could have constitutionally omitted the defense of "extreme emotional disturbance," the defendant is no worse off *with* such a defense, even if he has to prove it.

There is, as the Court recognizes, a strong potential for abuse in its formulation of the burden of proof issue. Theoretically, there is no language bar-

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

12 Here, in revising its criminal code, New York provided the affirmative defense of extreme emotional 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 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. It has been said that the new criminal code of New York contains some 25 affirmative defenses which exculpate or mitigate but which must be established by the defendant to be operative. The Due Process Clause, as we see it, does not put New York to the choice of abandoning those defenses or undertaking to disprove their existence in order to convict of a crime which otherwise is within its constitutional powers to sanction by substantial punishment.

432 U.S. at 207-08 (citations omitted). "In the absence of affirmative defenses the impulse to legislators, especially in periods of concern about the rise of crime, would be to define particular crimes in unqualified general terms, and leave only to sentence the adjustment between offenses of lesser and greater degree." *Id.* at 211 n.13, quoting Chief Justice Breitel in *People v. Patterson*, 39 N.Y.2d 288, 305, 347 N.E.2d 898, 909, 383 N.Y.S.2d 573, 584 (1976) (concurring opinion).

rier to putting all significant issues in the form of affirmative defenses. To use an absurd but instructive example, a statute could read:

§ 1 Whoever is present in any private or public place is guilty of a felony punishable by up to five years imprisonment.

§ 2 It shall be an affirmative defense for the defendant to prove, to a preponderance of the evidence, that he was not robbing a bank.¹³

These provisions do not violate the *Mullaney-Patterson* formulation. (Indeed, they may not even violate the prohibition against criminalizing status set out in *Robinson v. California*,¹⁴ since the "affirmative defense" would result in the criminalizing of conduct only.) It is clear, of course, that this statutory scheme puts on the defendant the burden of proof with regard to all of the essentials of the crime and, therefore, if *In Re Winship* means anything, is surely unconstitutional. What is surprising, though, is that the Court's principal elaborations on *In Re Winship*, namely, *Mullaney* and *Patterson*, do not contain the criteria or even guidelines that indicate the unconstitutionality of the suggested statutory scheme.

To be sure, the *Patterson* Court anticipated the possibility that a statutory scheme might be unconstitutional despite meeting the technical *Mullaney-Patterson* requirements:

This view [the Court's] may seem to permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes. But there are obviously constitutional limits beyond which the states may not go in this regard.¹⁵

The Court reiterated its view that a state could not declare an individual " 'guilty or presumptively guilty of a crime' " ¹⁶ or presume guilt on proof of the accused's identity alone.¹⁷ Few guidelines are presented, however, for cases not as clear as those represented in the statutory scheme hypothesized above or in the obvious cases, such as the proof of mere identity, mentioned by the Court.

It might be helpful in exploring this matter to consider a hypothetical statutory scheme which, while considerably more realistic than the one set out above, clearly suggests problems with the burden of proof standard:

Section 1. Whoever, with intent to cause the death of another person, causes the death of such person or of a third person is guilty of first-degree murder, except that in any prosecution under this provi-

13 Justice Powell, in his *Patterson* dissent, constructs his own hypothetical statute:

For example, a state statute could pass muster under the only solid standard that appears in the Court's opinion if it defined murder as mere physical contact between the defendant and the victim leading to the victim's death, but then set up an affirmative defense leaving it to the defendant to prove that he acted without culpable *mens rea*.

432 U.S. at 224 n.8.

14 370 U.S. 660 (1962).

15 432 U.S. at 210.

16 *Id.* (citing *McFarland v. American Sugar Refining Co.*, 241 U.S. 79, 96 (1916)).

17 432 U.S. at 210 (citing *Tot v. United States*, 319 U.S. 463, 469 (1943)).

sion it shall be an affirmative defense that

- (a) the victim was not a police officer or
- (b) the defendant did not premeditate or deliberate the killing or
- (c) the defendant acted under the influence of duress.

Section 2. In a prosecution under Section 1, any defendant who establishes to a preponderance of the evidence any of the specified affirmative defenses shall be guilty of second-degree murder.

Would such a statutory scheme be constitutional under *Patterson* and *Mullaney*? It seems clear that it passes the fundamental "element of the crime" criterion. The only elements of the crime required by the first-degree murder statute are (a) intent to kill, (b) a death and (c) a causal connection between the defendant's conduct and that death. None of these elements implies or precludes anything with regard to any of the three affirmative defenses. Unlike the Maine scheme, under which malice necessarily precluded the mitigation of provocation, all of the necessary elements of first-degree murder here are wholly compatible with the victim having been a police officer (or not), the defendant having premeditated and deliberated (or not), and the defendant having acted under duress (or not).

Need we conclude that the statutorily ordained burden of proof is, therefore, inevitably constitutional? Given the *Patterson* Court's concession that problems could still arise in connection with a scheme passing muster under the "element of the crime" criterion, is it enough to conclude intuitively that this scheme goes too far? It is submitted that even in such a case certain guidelines are available for the appropriate assessment of such a setup within the context of the underlying values reflected in the due process requirement that the state prove its case beyond a reasonable doubt.

1. *Is the matter one which tends to be mitigating or aggravating?* Since the basic idea behind the *Winship* requirement of proof beyond a reasonable doubt is that the state should demonstrate the defendant's blameworthy conduct, matters that aggravate the transaction should, all other things being equal, be proved by the state. Under this guideline, we would normally think of the police officer-victim question (Section 1(a) of our hypothetical statute) as one of aggravation. As bad as homicide itself is, we may wish to treat homicides of police officers as worse. Put differently, it must be recognized that whatever the linguistic form of the statute, the category generally legislated against here is that of intentional unlawful homicides, among which those having a police victim are thought to be more blameworthy; it is clear that the category generally legislated against here is not that of police-victim homicides with an intent to single out for more lenient treatment those which do not have a police victim.

The premeditation and deliberation issue (Section 1(b) of our statute), although a closer question, would seem to follow the same reasoning. It seems clear that the premeditation and deliberation formula was intended to set out as more serious certain homicides among intentional unlawful homicides rather than legislate generally against premeditated and deliberated homicides with a leniency provided for those that turn out not to be. The state should bear the burden on this issue.

The duress matter (Section 1(c) of our statute) is clearly different. It is fair to say that duress is being considered here a mitigating factor rather than that "nonduress" is aggravating. The class of homicide being generally legislated against is the "nonduress" one with leniency being provided should there be duress. Although the state, in its wisdom, might still wish to bear the burden of proof on this issue, at least once the defendant has introduced it, the state could constitutionally put the burden on the defendant.

2. *Is the state setting the defendant's conduct out as an exception or is the defendant singling himself out as an exception?* This guideline is but another aspect of that discussed above. It focuses on who is trying to single out the defendant and, in so doing, attempts to get at the substance of the statutory scheme regardless of its form. In the police-victim homicide situation, the state is clearly singling out the defendant as an exceptional case warranting greater punishment; again, the state should bear the burden of proof. The same is true for the defendant who premeditated and deliberated. In the duress case, however, it seems clear that it is the defendant who is seeking to single himself out as warranting greater leniency; surely the state is not seeking to single out the "nonduress" killer. From the constitutional point of view, the burden of proof could appropriately be put on the defendant.

3. *What antisocial factors inhere in the alleged criminal transaction?* The notion behind state proof beyond a reasonable doubt is that a suitable precondition to coercive state action through a criminal conviction is state establishment that the defendant performed antisocial conduct. Whatever factors make up that conduct should be demonstrated by the state and beyond a reasonable doubt. Perhaps the same burden is not as important when the issue is outside those factors which describe the objective antisocial conduct legislated against.¹⁸ For example, we typically do not expect background factors, such as prior criminal record, to be demonstrated during the trial by the state beyond a reasonable doubt. So, too, while the *intent* with which one allegedly acted is viewed as a component of the antisocial conduct charged, it may be appropriate that the defendant's mental responsibility, which is not a direct component of the criminal transaction, be demonstrated by the defendant or, more accurately, there may be less of a constitutional mandate that it be shown by the state. The *Mullaney-Patterson* criterion itself overlaps this inquiry to a considerable extent.

Under this guideline, it would seem that the police-victim matter is definitely part of the antisocial description of the crime (therefore a state issue). So too is the premeditation and deliberation concept. Duress, on the other hand, while not clearly a background issue, is not an inevitable part of the description of the antisocial conduct being legislated against. Its proof could appropriately be put on the defendant's shoulders.

4. *Who has best access to the evidence?* An appropriate consideration in allocating burdens of proof and one which, therefore, the constitutional mandate might accommodate is relative access to evidence.¹⁹ With regard to

18 Cf. *Mullaney v. Wilbur*, 421 U.S. at 701-02: "[T]he difficulty of meeting such an exacting burden is mitigated in Maine where the fact at issue is largely an 'objective rather than a subjective, behavioral criterion' " (citing *State v. Rollins*, 295 A.2d 914, 920 (Me. 1972)).

19 One earlier case has referred to "a balancing of convenience or of the opportunities for knowledge." *Morrison v. California*, 291 U.S. 82, 89 (1934).

evidence concerning the elements of the criminal transaction alleged in the indictment, the prosecution typically has better (or at least no worse) access than the defendant. Under our hypothetical statute, it is to be expected that the state would be in the appropriate position to prove the death, the causality, the police officer status of the victim, and perhaps even any premeditation and deliberation. On the other hand, where duress is at issue, the burden of proof might take into account the likelihood that the defendant is in a better position to prove its existence. Nothing of course would prevent a state from accommodating this factor to some extent by giving the defendant the burden of introducing the evidence whereupon the burden of persuasion would shift to the prosecution.

Other policy considerations would no doubt come into play here. Whether or not evidence of entrapment, for example, is more accessible to the state or to the defendant, a strong state interest against entrapment might suggest putting only the burden of introduction on the defendant.

5. *Who is being required to prove a negative?* It is, of course, difficult to prove a negative, *e.g.*, that Jones was never in Idaho. All other things being equal,²⁰ the burden of proof should be put on the party interested in establishing the affirmative. In our hypothetical statute, the state is interested in establishing the *affirmative* with regard to the police victim and premeditation-deliberation issues; the defendant is interested in establishing the *negative* with regard to these. This situation shifts with regard to the duress issue, the defendant pursuing the *affirmative* and the prosecution the *negative*.

6. *Has the jurisdiction recently made a significant reallocation to the defendant of the burden of proof?* Any legislative or judicial indication that the jurisdiction is attempting to exploit the *Mullaney-Patterson* doctrine to relieve the state of its traditional burden of proof in criminal cases should occasion a "strict scrutiny" of the challenged burden of proof under the guidelines here suggested. Surely the Court did not mean to cause a flood of statutory or judicial activity aimed at shifting burdens of proof to the defendant. A jurisdiction entering into any kind of dramatic activity in this area surely assumes the risk that its attempts might violate the due process clause.

7. *Is the statute creating a crime by presumption?* It has been the premise here that the fundamental requirement of the burden of proof mandate of the due process clause is that the state prove the essential antisocial transaction. To the extent that any antisocial conduct is presumed from no conduct or from conduct that is not antisocial (or that is at least less antisocial than that presumed), a burden of proof problem under the due process clause may be presented. It is likely, however, that the basic *Mullaney-Patterson* doctrine will effectively deal with this matter. In *Mullaney* the Court held that:

Wilbur's due process rights had been invaded by the presumption casting

20 Other factors may control. The *Mullaney* Court recognized, for example, situations in which the state undertakes to prove a negative: "Nor is the requirement of proving a negative unique in our system of criminal jurisprudence. Maine itself requires the prosecution to prove the absence of self-defense beyond a reasonable doubt." 421 U.S. at 702 (footnotes omitted). The holding in *Mullaney* itself requires the proof of a negative by the state, *i.e.*, lack of provocation.

upon him the burden of proving by a preponderance of the evidence that he had acted in the heat of passion upon sudden provocation.²¹

The Court has thereby indicated its vigilance with regard to this point.

8. *Does the allocation of the burden of proof undermine the Fifth Amendment privilege against self-incrimination?* Related to the "crime by presumption" consideration, this question focuses on the extent to which the burden of proof arrangement directly or indirectly compels the defendant to account for himself.²² The Maine statutory set-up with regard to homicide presumed the malice required for murder. This presumption creates pressure on the defendant to explain aspects of the situation that might constitute provocation rather than require the state to deal with the matter. The defense's traditional right to put the government to its proof and the defense's corollary right not to put on any evidence whatever are clearly implicated by such presumptions.

It is not suggested here that any or all of these guidelines will necessarily be dispositive of each case that can be hypothesized. These guidelines are just that: devices for focusing upon aspects of the scheme which jeopardize the values underlying the allocation of the burden of proof.

A further concern might be voiced concerning the extent to which some issues implicating the burden of proof can be disguised. Compare the following two schemes:

[A] Section 1. Armed robbery is punishable by up to ten years imprisonment.

Section 2. Robbery is punishable by up to five years imprisonment.

[B] Section 1. Robbery is punishable by up to ten years imprisonment.

In jurisdiction A, the *Mullaney-Patterson* doctrine would clearly require the state, in order for it to get a penalty in the five- to ten-year range, to prove beyond a reasonable doubt that the defendant was armed during the robbery. In jurisdiction B, one of the factors which might cause a convicted robber to get a sentence at the upper level of the range rather than at the lower will inevitably be whether the defendant was armed during the robbery. In jurisdiction B, however, that "fact" will not have to be proved by the state beyond a reasonable doubt.²³ However necessary and desirable it might be that certain matters such as prior convictions, educational background, family situation, employment record and the like be dealt with at the sentencing stage in a less formal structure, there is a serious problem when matters relating to the anti-

²¹ *Patterson v. New York*, 432 U.S. 197, 214 (1977).

²² Chief Justice Breitel linked the fifth amendment concern to the presumption of innocence, an underlying value of the requirement of state proof beyond a reasonable doubt:

It would be an abuse of affirmative defenses, as it would be of presumptions in the criminal law, if the purpose or effect were to unhinge the procedural presumption of innocence which historically and constitutionally shields one charged with crime. Indeed, a by-product of such abuse might well be also to undermine the privilege against self-incrimination by in effect forcing a defendant to testify in his own behalf.

People v. Patterson, 39 N.Y.2d 288, 305-06, 347 N.E.2d 898, 909, 383 N.Y.S.2d 573, 584 (1976) (concurring opinion), quoted in *Patterson v. New York*, 432 U.S. at 211 n.13.

²³ Or, for that matter, to a jury.

social nature of the alleged criminal transaction itself are not spelled out in the statute allegedly violated (which would subject them, of course, to the *In Re Winship* requirement) but are left to the sentencing process. The *Mullaney* Court anticipated the issue, though not its ultimate resolution:

[I]f *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 without effecting any substantive change in its law. It would only be necessary to redefine the elements that comprise different crimes, characterizing them as factors that bear solely on the extent of punishment.²⁴

Of course, not every aspect of the transaction for which the defendant was convicted that might be relevant to the sentencing process can or need be anticipated by the language of the substantive offense. But certain matters may so often be an issue with regard to certain crimes and therefore be so predictable in such cases that courts should be wary of allowing their resolution within the sentencing process. Whether the defendant is armed, in our hypothetical jurisdiction A or B, during a robbery may be one. Another may be presented by the not-so-hypothetical Dangerous Special Offender provision²⁵ of the Organized Crime Act of 1970. That provision states that

(e) A defendant is a special offender for purposes of this section if—

* * * *

(3) such felony was, or the defendant committed such felony in furtherance of, a conspiracy with three or more other persons to engage in a pattern of conduct criminal under applicable laws of any jurisdiction, and the defendant did, or agreed that he would, initiate, organize, plan, finance, direct, manage or supervise all or part of such conspiracy or conduct, or give or receive a bribe or use force as all or part of such conduct.²⁶

It is clear that several matters which constitute the substantive nature of the offense and should therefore be proved as part of the charged crime are hereby shifted into the sentencing process, where proof beyond a reasonable doubt tends to be a stranger. Should there be any doubt about the burden of proof under these provisions, it is specified that the statute's sentencing scheme is triggered "[i]f it appears by a *preponderance of the information* . . . that the defendant is a dangerous special offender."²⁷

Other questions are waiting in the wings. As to those matters which the state is not required to prove under *Mullaney-Patterson*, can their proof be

²⁴ 421 U.S. at 698.

²⁵ 18 U.S.C. § 3575 (1976).

²⁶ *Id.* § 3575(e)(3).

²⁷ *Id.* § 3575(b).

allocated to the defendant beyond a reasonable doubt rather than to a preponderance?²⁸ Can proof of jurisdictional or venue matters be put on the defendant and, even if they cannot, does it suffice for the state to prove them to a preponderance rather than beyond a reasonable doubt?

Mullaney and *Patterson*, therefore, mark not the end of the inquiry but rather its beginning. Although they undoubtedly resolve, whether well or badly, a large number of burden of proof situations, those resolved may be the easier and the more obvious, not the more difficult and the more subtle. In any event, however, these two landmark cases will at least have alerted us to the complex problems presented in this important constitutional area.

28 *Leland v. Oregon*, 343 U.S. 790 (1952), held constitutional a state requirement that the defendant prove legal insanity beyond a reasonable doubt. The *Patterson* Court clearly suggested that the *Leland* doctrine remains good law. 432 U.S. at 207 ("We are unwilling to reconsider *Leland*").