The Constitutional Status of the Reasonable Doubt Rule

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The Supreme Court has held that due process forbids convicting an individual of a crime unless the government proves the elements of the charged offense beyond a reasonable doubt. The Court, however, permits the government to convict even though the defendant bears the burden to prove any affirmative defenses. The leading academic approach would require the government to prove beyond a reasonable doubt only those facts sufficient to expose the defendant to criminal liability.

In this Article, Professor Dripps argues that due process requires the government to establish every fact that under the applicable statutes gives rise to a distinct range of criminal punishments, regardless of whether a fact negates an element of the offense or establishes an affirmative defense. He contends that due process includes the principle of legality—that no person may be punished except for conduct that violates a preexisting provision of positive law. Because the Constitution establishes this guarantee against the states, federal courts are responsible for enforcing the legality principle. Federalism allows federal courts to prescribe the reasonable doubt safeguard as a method of preventing the conviction of persons whose conduct has not broken state law.

Working from this analysis, Professor Dripps argues that the Court and prior commentators have failed to focus on the federal constitutional right protected by the reasonable doubt standard. Prudential considerations concerning the need for legislative compromises in adopting progressive criminal law reforms do not justify underenforcement of this constitutional right against unlawful punishment.

INTRODUCTION

Justice Frankfurter once ranked the rule requiring proof beyond a reasonable doubt for a criminal conviction among "the boasts of a free society."[1] Today, however, judicial doctrine has hedged that boast by arbitrarily distinguishing elements of the charged offense, which the gov-

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1. Leland v. Oregon, 343 U.S. 790, 803 (1952) (Frankfurter, J., dissenting).

ernment must establish beyond a reasonable doubt, from affirmative defenses, which the legislature may require the defendant to prove by a preponderance of the evidence.[2] "Positivist" legal scholars have attacked this distinction because it severs legislative authority to define substantive grounds of criminal liability from the included power to define procedures for determining when those grounds exist.[3] My thesis is that, contrary to both the Supreme Court and its positivist critics, due process of law imposes on the government the burden of proving the defendant's guilt beyond a reasonable doubt, whether the legislature has classified, or might constitutionally classify, the exculpatory facts at issue as relating to an element of the crime or to an affirmative defense.

Part I recounts the judicial development of the distinction between elements and defenses with respect to the government's burden of proof. Part I also describes the positivist critique of current doctrine. Using these positions as points of departure, Part II argues that imposing criminal punishment absent conduct that has been clearly and prospectively declared criminal is inconsistent with due process of law. Given the imperfections of the factfinding process and the extraordinary hardship inflicted by unjust conviction, a preponderance of the evidence standard in criminal cases creates a constitutionally unjustifiable risk of unauthorized punishment. The reasonable doubt rule guards against this risk by resolving ambiguous cases in favor of the accused. Part II argues further

2. *See* Martin v. Ohio, 107 S. Ct. 1098 (1987); Patterson v. New York, 432 U.S. 197 (1977); 1 W. LAFAVE & A. SCOTT, SUBSTANTIVE CRIMINAL LAW 67-68 (1986); C. MCCORMICK, MCCORMICK ON EVIDENCE 987 (3d ed. 1984).

3. *See, e.g.*, Allen, Mullaney v. Wilbur, *the Supreme Court, and the Substantive Criminal Law—An Examination of the Limits of Legitimate Intervention*, 55 TEX. L. REV. 269 (1977) [hereinafter Allen, *Limits of Legitimate Intervention*]; Allen, *The Restoration of* In re Winship: *A Comment on Burdens of Persuasion in Criminal Cases After* Patterson v. New York, 76 MICH. L. REV. 30 (1977) [hereinafter Allen, *Burdens of Persuasion*]; Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 HARV. L. REV. 321 (1980) [hereinafter Allen, *Structuring Jury Decisionmaking*]; Allen & DeGrazia, *The Constitutional Requirement of Proof Beyond Reasonable Doubt in Criminal Cases: A Comment Upon Incipient Chaos in the Lower Courts*, 20 AM. CRIM. L. REV. 1 (1982); Christie & Pye, *Presumptions and Assumptions in the Criminal Law: Another View*, 1970 DUKE L.J. 919; Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325 (1979). These commentators are identified as "positivists" because they believe that substantive liability rules are indistinguishable from procedural rules; both matter only to the extent that they may affect the material consequences for the parties. *Cf.* Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.").

For contrary views, see Nesson, *Rationality, Presumptions, and Judicial Comment: A Response to Professor Allen*, 94 HARV. L. REV. 1574 (1981); Saltzburg, *Burdens of Persuasion in Criminal Cases: Harmonizing the Views of the Justices*, 20 AM. CRIM. L. REV. 393 (1983); Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299 (1977). For an elaboration of how the argument presented here differs in important respects from those offered by Professors Nesson, Underwood, and Saltzburg, see *infra* notes 201-17 and accompanying text.

that even when the substantive ground for exculpation claimed by the accused is not itself required by the Constitution, due process requires the government to define prospectively, and prove convincingly, the facts that give rise to criminal liability. Thus, with respect to any fact that determines criminal liability, the safeguard provided by the reasonable doubt rule against unjust conviction is constitutionally compelled.

With the constitutional status of the reasonable doubt requirement established by Part II, Part III returns to the case law and the commentary. 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. Part III also suggests that the Court's critics have failed to focus on the underlying constitutional right claimed by a defendant invoking the reasonable doubt rule. Due process requires the government to prove every element of the charged offense beyond a reasonable doubt—and also to disprove claimed affirmative defenses beyond a reasonable doubt when the evidence raises a reasonable doubt about the defendant's guilt.[4]

I
POINTS OF DEPARTURE: THE SUPREME COURT AND ITS CRITICS

The Supreme Court has held that due process requires the government to bear the burden of proving beyond reasonable doubt some of the facts necessary to establish criminal liability. But the Court also has held that other facts necessary to establish criminal liability need not be proved by the government. These latter cases permit shifting to the defendant the burden of proving facts that establish affirmative defenses.

Legal scholars have criticized the Court for inconsistently forbidding one method of allocating burdens of proof but upholding another method, when the two may have indistinguishable effects. The leading alternative approach would forbid easing the government's proof burden only with respect to facts necessary to make a conviction constitutional.

This Part describes the conflicting doctrines endorsed by the Supreme Court and the leading commentators. Subsequently, Part II proposes an alternative constitutional analysis.

4. The approach I claim to be constitutionally required was followed by the federal courts, as a matter of policy, for most of this century. *See Patterson*, 432 U.S. at 202-03; Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 YALE L.J. 880, 917-18 (1968).

A. The Supreme Court and the Reasonable Doubt Rule

The Supreme Court's decisions regarding the government's burden of proof in criminal trials fall into two basic categories. One line of cases regulates the use of presumptions in the government's proof.[5] The other line of cases regulates jury instructions that shift to the defense the burden of proof with respect to particular issues.[6]

1. Presumptions and the Burden of Proof

A presumption is simply an instruction that permits or requires the jury to conclude that direct proof of one fact (the "basic fact") also provides evidence of another fact (the "presumed fact").[7] Prior to 1979, it was unclear whether due process required that the basic fact establish the presumed fact beyond a reasonable doubt. The Court dispelled this uncertainty in *County Court v. Allen*.[8]

In *Allen*, the State of New York relied on a presumption that illegal firearms in an automobile are in the possession of each of the occupants.[9] Justice Stevens, writing for the Court, drew a distinction between mandatory and permissive presumptions. An instruction requiring the jury to infer the presumed fact from the basic fact—a mandatory presumption—is unconstitutional unless the connection between the basic and presumed facts satisfies the reasonable doubt test without reference to other evidence.[10] Otherwise, the jury might convict the defendant solely on the presumption, even though the basic fact alone does not establish the presumed fact beyond a reasonable doubt.[11]

By contrast, a permissive presumption—an instruction that merely advises the jury that the basic fact may prove the presumed fact beyond a reasonable doubt, but that the presumption is to be accorded just such weight as the jury believes is justified—may survive constitutional scrutiny even if the connection between basic and presumed facts does not satisfy the reasonable doubt test. Instead, a rational connection must

5. *See, e.g.*, County Court v. Allen, 442 U.S. 140 (1979); Sandstrom v. Montana, 442 U.S. 510 (1979); Barnes v. United States, 412 U.S. 837 (1973); Turner v. United States, 396 U.S. 398 (1970); Leary v. United States, 395 U.S. 6 (1969); United States v. Romano, 382 U.S. 136 (1965); Roviaro v. United States, 353 U.S. 53 (1957); Tot v. United States, 319 U.S. 463 (1943).

6. *See, e.g.*, Patterson v. New York, 432 U.S. 197 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975); *In re* Winship, 397 U.S. 358 (1970); Morrison v. California, 291 U.S. 82 (1934).

7. *See* C. MCCORMICK, *supra* note 2, at 965, 988. For example, the jury might be allowed to infer the defendant's intent to kill from her use of a deadly weapon.

8. 442 U.S. 140 (1979).

9. *Id.* at 143-45.

10. *Id.* at 167.

11. *Id.* at 157 ("Because this permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the 'beyond a reasonable doubt' standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference.").

exist between the basic and presumed facts, and the evidence in its totality must establish guilt beyond a reasonable doubt.[12] The legislatively or judicially noticed connection between the basic and presumed facts becomes part of the evidence. If the evidence proves the elements of the charge beyond a reasonable doubt in a particular case, the failure of the basic fact alone to prove the presumed fact beyond a reasonable doubt is irrelevant.[13]

If the reasonable doubt rule is constitutionally required, the *Allen* approach makes good sense. But the presumption cases assume, rather than announce, such a constitutional rule.[14] If the government need only prove a particular fact by a preponderance of the evidence, there is no reason to inquire whether the presumption, with or without other evidence, satisfies the reasonable doubt test.[15] The more basic question, then, is whether the reasonable doubt rule applies to a particular issue. The second line of Supreme Court cases, those involving direct attempts to assign the burden of proof to the defense, confronts this question.

2. *Shifting the Burden of Proof*

The seminal case in this line of authority is *In re Winship*.[16] Samuel Winship was a defendant in a delinquency proceeding in a New York family court. The complainant, Rae Goldman, testified that she had seen Winship run out of an employee bathroom at the store where she worked, after a co-worker had discovered Winship's presence there.[17] Mrs. Goldman then checked the employee locker room for her handbag and found that it was missing; the bag, less $112 in cash, was discovered in the employee bathroom from which Winship allegedly fled. Two days later, police arrested Winship on an unrelated charge. Mrs. Goldman, who claimed to have seen Winship sneaking about the store where she worked on several previous occasions, identified him at the police station. No one saw Winship steal the money, and the defense offered alibi testimony from Winship's mother and his uncle. When arrested, Winship

12. *Id.* at 164-67.

13. *Id.* at 167 ("There is no more reason to require a permissive statutory presumption to meet a reasonable-doubt standard before it may be permitted to play any part in a trial than there is to require that degree of probative force for other relevant evidence before it may be admitted."). Applying this analysis, the *Allen* Court upheld the defendants' convictions. Presence in the automobile, the Court concluded, was rationally connected to possession of the weapons. *Id.* at 163-65. Given the rational connection, the Court refused to disturb the lower court's holding that the evidence in its entirety, including the presumption, could have led a rational jury to find guilt beyond reasonable doubt. *Id.* at 164.

14. *See, e.g.*, Walker v. Butterworth, 599 F.2d 1074, 1079-80 (1st Cir. 1979).

15. *See id.*; Greider v. Duckworth, 701 F.2d 1228, 1235-36 (7th Cir. 1983) (Posner, J., concurring).

16. 397 U.S. 358 (1970).

17. These facts are drawn from *In re* Winship, 397 U.S. 358 app. at 3-34 (1970) (Record of the New York Family Court) (microfiche).

was in possession of several rolls of dimes. His mother could not explain his possession of the dimes, but only paper money had been stolen from Mrs. Goldman.

The family court judge overruled a defense objection to the civil preponderance of the evidence standard applied in the proceeding. The judge then found Winship guilty under the preponderance standard, but conceded that the evidence did not convince him of Winship's guilt beyond a reasonable doubt.[18] The Appellate Division affirmed the judgment, as did the Court of Appeals, over the dissent of Chief Judge Fuld.[19]

The Supreme Court reversed, holding that the juvenile court proceeding was criminal in character and that, in criminal proceedings, "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."[20] Writing for the Court, Justice Brennan based this interpretation of the due process clause on the widespread acceptance of the reasonable doubt rule in common law jurisdictions, in the history of American jurisprudence, and, at least implicitly, in Supreme Court precedents.[21]

More fundamentally, the *Winship* Court recognized two characteristics of the criminal process as supporting a constitutional reasonable doubt rule. The first is the difficulty of defending against a charge of crime, a "disadvantage" that would amount to a denial of " 'fundamental fairness, if [the defendant] could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case.' "[22] The reasonable doubt standard thus provides "a prime instrument for reducing the risk of convictions resting on factual error."[23]

The second aspect of the criminal process on which *Winship* relied is the difference in consequences attending erroneous acquittals and erroneous convictions.

> Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—[the] margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt.[24]

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18. *Id.*, app. at 28.

19. *In re* Samuel W., 30 A.D.2d 781, 291 N.Y.S.2d 1005 (1968), *aff'd*, 24 N.Y.2d 196, 247 N.E.2d 253, 299 N.Y.S.2d 414 (1969), *rev'd sub nom. In re* Winship, 397 U.S. 358 (1970).

20. *Winship*, 397 U.S. at 364.

21. *Id.* at 361-64.

22. *Id.* at 363 (quoting *Samuel W.*, 24 N.Y.2d at 205, 247 N.E.2d at 259, 299 N.Y.S.2d at 422 (Fuld, C.J., dissenting)).

23. *Id.*

24. *Id.* at 364 (quoting Speiser v. Randall, 357 U.S. 513, 525-26 (1958)).

In a concurring opinion, Justice Harlan stressed the connection between the reasonable doubt standard and "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."[25] The *Winship* holding thus appears to rest in part on the reasonable doubt rule's contribution to preventing unjust convictions, and in part on the recognition of that contribution in the Anglo-American legal tradition.

The *Winship* opinion, however, explicitly extends only to "every fact necessary to constitute the crime" charged.[26] The Court also cited *Leland v. Oregon,*[27] in which the Court had held that the state might constitutionally shift to the accused the burden of proving insanity. *Winship* thus clearly grounded the reasonable doubt rule on the due process clause but left open the precise scope of the constitutional guarantee. Since the factual issue in *Winship* was the identity of the defendant, the Court did not address the constitutionality of easing the government's burden of proof with respect to either affirmative defenses or facts that affect the grade of the offense.

In *Mullaney v. Wilbur,*[28] the Court interpreted *Winship* to bar a murder conviction based on a state procedure that placed the burden of proving provocation, which would have reduced the offense from murder to manslaughter, on the accused. The defendant, Stilman Wilbur, admitted killing one Claude Hebert, but claimed that Hebert had provoked the killing by inviting Wilbur to participate in homosexual activity.[29] The Maine trial judge instructed the jury that once the government had proved intentional killing beyond a reasonable doubt, the law would presume the presence of malice. To rebut the presumption of malice, the defense had to satisfy the jury by a preponderance of the evidence that the accused had killed in the heat of passion.[30] The jury twice requested reinstruction on the provocation issue before finding Wilbur guilty of murder.[31]

The Supreme Judicial Court of Maine rejected Wilbur's claim that

25. *Id.* at 372 (Harlan, J., concurring).

26. *Id.* at 364.

27. 343 U.S. 790 (1952), *cited at Winship,* 397 U.S. at 362.

28. 421 U.S. 684 (1975).

29. These facts are derived from the federal court proceeding for habeas corpus relief. *See* Wilbur v. Robbins, 349 F. Supp. 149, 151 (D. Me. 1972), *aff'd sub nom.* Wilbur v. Mullaney, 473 F.2d 943 (1st Cir. 1973), *vacated,* 414 U.S. 1139, *aff'd on remand,* 496 F.2d 1303 (1st Cir. 1974), *aff'd,* 421 U.S. 684 (1975).

30. *See id.* at 151 (reproducing trial judge's charge).

31. *See id.* ("The trial judge's initial charge and two supplementary charges, given when the jury returned to ask for further instructions, included repeated references to the mandatory nature of the presumption of malice and the burden on the defendant to rebut the presumption in order to 'reduce' the homicide from murder to manslaughter.").

Winship required reversal of the conviction.[32] The court based its holding in part on the theory that *Winship* did not apply retroactively, a theory subsequently rejected by the Supreme Court.[33] The state court also relied on the structure of the applicable law of homicide. For more than a century, Maine had classified murder and manslaughter as different degrees of the single offense of felonious homicide.[34] The provocation defense raised by Wilbur thus implicated the appropriate sentence rather than the adjudication of guilt or innocence. Since sentencing determinations are not subjected to the reasonable doubt test, the Maine court concluded that *Winship* did not apply. According to the Maine court, the reasonable doubt standard governs the proof required to place the defendant in a formal statutory category, but does not extend to facts affecting the scope of liability within such categories.[35]

On Wilbur's petition for federal habeas corpus relief, the district court and the First Circuit rejected the Maine court's construction of the state homicide statute.[36] The federal courts found that malice was an element of a distinct crime of murder and vacated Wilbur's conviction. While the state's petition for certiorari was pending, the Maine Supreme Judicial Court in *State v. Lafferty*[37] reaffirmed the reading it had given the homicide statute in *Wilbur*.[38] In light of the new Maine ruling, the United States Supreme Court remanded *Wilbur*.[39] The First Circuit again concluded that the writ of habeas corpus should issue; whether provocation implicated an element of the crime or affected only the applicable penalty was immaterial. The government could not shift to the defense the burden of proof on an issue with such serious consequences.[40]

A unanimous Supreme Court affirmed, in an opinion by Justice Powell.[41] In holding that due process does not permit shifting to the defense the burden of proving the absence of malice, the Court observed that a murder conviction results in a more serious deprivation of liberty and of reputation than does a manslaughter conviction. Since *Winship*

32. State v. Wilbur, 278 A.2d 139, 146 (Me. 1971).

33. *See* Ivan V. v. City of New York, 407 U.S. 203, 204-05 (1972).

34. *See, e.g.*, State v. Rollins, 295 A.2d 914, 918 (Me. 1972); State v. Knight, 43 Me. 11, 33, 137 (1857), *quoted in* Brine v. State, 264 A.2d 530, 533-34 (Me. 1970).

35. *See Wilbur*, 278 A.2d at 146; *see also* Allen, *Limits of Legitimate Intervention*, *supra* note 3, at 272-73.

36. Wilbur v. Robbins, 349 F. Supp. 149, 151 (D. Me. 1972), *aff'd sub nom.* Wilbur v. Mullaney, 473 F.2d 943 (1st Cir. 1973), *vacated*, 414 U.S. 1139, *aff'd on remand*, 496 F.2d 1303 (1st Cir. 1974), *aff'd*, 421 U.S. 684 (1975).

37. 309 A.2d 647 (Me. 1973).

38. *Id.* at 661-62.

39. 414 U.S. at 1139.

40. 496 F.2d at 1307.

41. Mullaney v. Wilbur, 421 U.S. 684 (1975).

involved these same interests, the Court rejected the state's contention that due process requires proof beyond a reasonable doubt only of the elements of a unified "felonious homicide" offense. "*Winship,*" the Court declared, "is concerned with substance rather than this kind of formalism."[42]

The Court also rejected the argument that applying *Winship* to the Maine statutory scheme would unduly interfere with the state's power to define the substantive grounds of criminal liability. Accepting this argument, Justice Powell wrote, would invite the states to circumvent *Winship* by redefining crimes in the broadest possible terms, shifting the burden of proof to the defendant with respect to a host of newly denominated "mitigating factors."[43] On the other hand, the *Wilbur* opinion recognized that inflexibly requiring proof beyond a reasonable doubt might discourage the states from establishing new defenses. To guard against this danger and to limit federal intervention to more fundamental grounds of exculpation, the reasonable doubt standard was to govern only the proof of historically established defenses or mitigating circumstances. *Wilbur* permitted the states to define crimes as they wished but forbade the states from circumventing *Winship* by recasting essential and well-understood elements of offenses carried over from the common law.[44]

The *Wilbur* approach thus involves both substantive and procedural components. As a procedural matter, the government must prove beyond a reasonable doubt every fact necessary to establish a charged offense. As a substantive matter, the facts necessary to establish an offense are not wholly subject to legislative modification. When a fact has played a central role in the historical development of a crime's definition, the burden of proving that fact or its absence cannot be shifted to the defense.

Wilbur fostered a great deal of confusion in the lower courts.[45] This confusion resulted in part from ambiguities in the Court's opinion. But the unhappy history of the *Wilbur* doctrine is in large part due to the inherent difficulties in determining when a legal concept has become sufficiently entrenched in the Anglo-American legal tradition. The deference due to history is more easily determined by a supreme court in a single case than by trial courts in hundreds of diverse cases.[46] For

42. *Id.* at 699.

43. *Id.* at 698 ("It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.").

44. *Id.* at 692-96.

45. *See* 1 W. LAFAVE & A. SCOTT, *supra* note 2, at 73; Allen, *Limits of Legitimate Intervention, supra* note 3, at 274-76.

46. As an illustration, Justice Powell's historical analysis in *Wilbur* is difficult to follow. Initially, the Court noted that "almost from the inception of the common law of homicide,"

example, the concepts of intent and insanity often, but not always, exclude each other.[47] The *Wilbur* doctrine unquestionably would preclude a state from convicting a defendant because she failed to establish absence of intent. Yet by holding that *Wilbur* did not forbid shifting to the accused the burden of proving insanity,[48] the lower courts endorsed the continued vitality of *Leland v. Oregon*.[49] When one such case reached the Supreme Court, the appeal was dismissed for failure to present a substantial federal question.[50]

The emphasis on history, moreover, ran the risk of freezing the criminal law in familiar forms.[51] *Wilbur* appeared to imply that the states could not constitutionally abolish the manslaughter classification.[52] Yet this implication was not justified by reliance on the eighth amendment's cruel and unusual punishment clause or on a substantive interpretation of the due process clause. Perhaps most disturbingly, *Wilbur* appeared to prohibit legislative compromises recognizing new

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provocation has been the "single most important factor in determining the degree of culpability attaching to an unlawful homicide." *Wilbur*, 421 U.S. at 696. But at common law, the defense bore the burden of proof with respect to provocation. *Id.* at 693. The historical support for holding the reasonable doubt rule applicable to provocation was that "the clear trend" in twentieth century state practice was toward this result. *Id.* at 696. Justice Powell did not explain why common law practice informs the constitutional inquiry as to the defenses for which the federal courts may properly formulate rules of proof, but contemporary state practice governs the content of the rules which the federal courts impose. Nor did the opinion suggest how lower courts should apply common law and modern practice in subsequent cases. Moreover, *Wilbur* presented a relatively pristine variation on *Winship*, namely, a traditional definition of substantive offenses and an aberrant allocation of proof burdens. But what of a jurisdiction with a subjective view of provocation or self-defense? The accused in such jurisdictions asserts a claim that was not cognizable at common law. Fidelity to the *Wilbur* approach would seem to require the prosecution to disprove objectively reasonable self-defense or provocation beyond a reasonable doubt, but allow the state to shift the burden with respect to parallel subjective claims—claims that might often be plausible in the same case. A trial judge forced to apply a historical constitutional analysis to a statute that shifts the burden of proof without discriminating on a historical basis among substantive claims would have to devise a jury instruction similar to a Chinese box.

47. As Judge Posner has astutely noted, if the defendant is "under the delusion that he was shooting two gerbils rather than two human beings, he could not be guilty of murder, but if his delusion took the form of thinking that he had a sacred duty to reduce the human population by two, he could be guilty of murder, at least guilty prima facie, though he might have a defense of insanity." Greider v. Duckworth, 701 F.2d 1228, 1236 (7th Cir. 1983) (Posner, J., concurring).

48. *See, e.g.*, Buzynski v. Oliver, 538 F.2d 6, 10 (1st Cir.), *cert. denied*, 429 U.S. 984 (1976); United States v. Caldwell, 543 F.2d 1333, 1368-71 (D.C. Cir. 1974), *cert. denied*, 423 U.S. 1087 (1976).

49. 343 U.S. 790 (1952); *see supra* text accompanying note 27.

50. Rivera v. Delaware, 429 U.S. 877 (1976).

51. *See* Jeffries & Stephan, *supra* note 3, at 1363-64.

52. *See* Tushnet, *Constitutional Limitation of Substantive Criminal Law: An Examination of the Meaning of* Mullaney v. Wilbur, 55 B.U.L. REV. 775, 776 (1975) (*Wilbur* "stands for the proposition that the due process clause limits governmental power to define crimes in whatever manner desired"). The Court's reliance on the central role of provocation in the historical definition of murder would be relevant only if historical importance qualifies an issue for enhanced constitutional protection.

grounds of exculpation and mitigation on which the defense would bear the burden of proof.

Notwithstanding the Court's unanimity, *Wilbur* did more to raise than to settle these difficult questions about the scope of the *Winship* doctrine. Two years later, *Patterson v. New York*[53] raised these same questions in a slightly different context and provided some very different answers.

Gordon Patterson, Jr. killed John Northrup after discovering him in the company of Patterson's partially undressed wife.[54] Patterson confessed to the killing and relied at trial on the defense of provocation. New York had recently revised its criminal code, adopting the Model Penal Code formulation of this defense. The New York statute precluded a conviction for murder, but not for manslaughter, if the defendant "acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse."[55] The state, however, provided this defense to a murder charge only when the defendant established explicable emotional disturbance by a preponderance of the evidence.[56] The trial court instructed the jury according to the statute, and Patterson was found guilty of murder.

Affirming the New York Court of Appeals, which upheld the conviction despite Patterson's reliance on *Wilbur*,[57] the Supreme Court held that due process does not forbid placing on the accused the burden of proving affirmative defenses by a preponderance of the evidence. The Court distinguished *Wilbur* as a case in which the defendant bore the burden of proving the absence of malice aforethought, an element of the crime of murder.[58] In contrast, the New York statute did not require proof of malice but defined murder as any intentional killing. Since the prosecution had proved the intentional killing beyond a reasonable doubt, the government had sustained its constitutional duty, under *Winship*, of proving " 'beyond a reasonable doubt . . . every fact necessary to constitute the crime with which [Patterson was] charged.' "[59]

The majority buttressed this formal distinction by emphasizing the primary role of the states in defining crimes,[60] and by affirming the state's authority to recognize some mitigating circumstances without assuming the burden of disproving their presence beyond a reasonable doubt.[61] As

53. 432 U.S. 197 (1977).
54. *See id.* at 198.
55. *Id.; see also id.* at 198 n.2, 199 n.3 (quoting sections of the statute).
56. *Id.* at 200.
57. *See* People v. Patterson, 39 N.Y.2d 288, 347 N.E.2d 898, 383 N.Y.S.2d 573 (1976).
58. 432 U.S. at 212-16.
59. *Id.* at 204 (quoting *In re* Winship, 397 U.S. 358, 364 (1970).
60. *See id.* at 207-08.
61. *Id.* at 210 ("We thus decline to adopt as a constitutional imperative, operative

for the risk of convicting for murder those in fact guilty only of manslaughter, the Court explained that "[d]ue process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person."[62]

Justice Powell, the author of the *Wilbur* opinion, dissented in an opinion joined by two other Justices.[63] In his view, *Wilbur* had established a substantive constraint on state power that precluded defining crimes so as to circumvent the rule of *Winship*. He urged the Court to forbid shifting the burden of proof by rearranging historically recognized fundamental concepts but not to forbid defining new crimes or defenses.[64]

Patterson suggests that the constitutionality of burden shifting turns solely on legislative form and not on the moral or legal significance of the defendant's claim.[65] The Court's most recent pronouncement on the question, *Martin v. Ohio,*[66] reaffirms, and indeed extends, the formalistic approach taken in *Patterson*. In *Martin,* the Court held that the state may shift the burden of proving self-defense to one accused of homicide.[67] Self-defense is the defense most deeply rooted in our history and shared morality. If due process or the eighth amendment requires state law to recognize any exculpatory doctrine at all, self-defense would surely rank among those required. The *Martin* holding, however, indicated that the legislature, by classifying an exculpatory doctrine as an affirmative defense, may shift the burden of proof even with respect to a constitutionally required defense firmly rooted in the Anglo-American legal tradition.

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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.").

62. *Id.* at 208.

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

64. *Id.* at 226-27 (Powell, J., dissenting) ("[A] substantial difference in punishment alone is not enough. It also must be shown that in the Anglo-American legal tradition the factor in question historically has held that level of importance. If either branch of the test is not met, then the legislature retains its traditional authority over matters of proof.") (footnotes omitted).

65. *See* Jeffries & Stephan, *supra* note 3, at 1331 ("The trouble, of course, is that the distinction is essentially arbitrary."). The authors elaborate:

> Traditionally, the only functional difference between a "crime" and a "defense" has been precisely the issue under consideration—allocation of the burden of proof. . . . To make the scope of that doctrine depend on the legislative allocation of the burden of proof is to assume the point in issue and thus to reduce *Winship* to a circularity.

Id. at 1332. Justice Rehnquist has embraced this formalistic analysis with gusto. In his view, *Winship* applies, under *Patterson,* only to elements; classification of elements and defenses depends on legislative intent, and the surest guide to legislative intent with respect to classification as an affirmative defense is a legislative directive shifting the burden of proof. *See* McElroy v. Holloway, 451 U.S. 1028, 1028-29 (1981) (Rehnquist, J., dissenting from denial of certiorari). This approach would require overruling *Wilbur* explicitly and limiting *Winship* to its facts as a substantive holding that the state must prove identity beyond a reasonable doubt in juvenile delinquency proceedings.

66. 107 S. Ct. 1098 (1987).

67. *Id.* at 1103.

Thus the *Martin* majority did not merely reject the *Wilbur* approach, which Justice Powell defended again in dissent.[68] It also rejected the possibility that the reasonable doubt rule might apply to constitutionally required defenses without regard to legislative classification.[69]

If the due process clause speaks about individual rights against the state, in individual terms, this distinction between elements of a charged offense and affirmative defenses is plainly arbitrary. But the legislative classification of exculpatory facts as elemental or defensive corresponds with one substantive factor, and that is legislative deliberation itself. The clarity with which a legislature identifies exculpatory conditions as affirmative defenses will likely vary with the legislative purpose to shift the burden of proof. The Court's rule thus has the virtue of permitting deliberate legislative compromises that balance substantive expansion of exculpatory conditions against procedural concessions to the prosecution. Put another way, the *Patterson* holding treats *Wilbur* and *Winship* as permitting the legislature to shift the burden of proof as long as it does so knowingly. Such a requirement strikes a coherent, if contestable, balance between the risk of convicting innocent individuals and the risk that broader grounds of exculpation will go unrecognized because of perceived proof problems for the prosecution.[70]

B. The Positivist Commentary

Wilbur was criticized vigorously for unduly interfering with state authority to define criminal offenses. The basic argument, made by several eminent commentators,[71] is that the legislature's power to define substantive grounds of criminal liability includes the power to specify the procedures that determine when those grounds exist. The positivists claim that if the Constitution permits the legislature to abolish a defense,

68. *Id.* at 1106 (Powell, J., dissenting).

69. Although Martin clearly pressed the eighth amendment argument, *see* Brief for Petitioner at 26-29, *id.* (No. 85-646), the Court's opinion does not address the issue, *see Martin*, 107 S. Ct. at 1106 (Powell, J., dissenting) ("Even *Patterson* . . . recognized that 'there are obviously constitutional limits beyond which the States may not go [in labeling elements of a crime as an affirmative defense].' Today, however, the Court simply asserts that Ohio law properly allocates the burdens, without giving any indication of where those limits lie.") (citation and footnote omitted). *Cf.* Moran v. Ohio, 469 U.S. 948, 953-56 (1984) (Brennan, J., dissenting from denial of certiorari) (due process and Eighth Amendment require exculpation for pure self-defense).

70. *Martin* suggests that this concern operates regardless of whether the defense is defined by legislation or adjudication, inasmuch as self-defense in Ohio is a matter of common law. *See* State v. Martin, 21 Ohio St. 3d 91, 94, 488 N.E.2d 166, 168 (1986), *aff'd*, 107 S. Ct. 1098 (1987). For my critique of the legislative compromise argument, *see infra* text accompanying notes 189-200.

71. *See* sources cited *supra* note 3. In a recent opinion, Judge Easterbrook presented a thorough defense of the positivist position. Cole v. Young, 817 F.2d 412, 428-40 (7th Cir. 1987) (Easterbrook, J., dissenting).

such as provocation or insanity, then the legislature may also take the more modest step of shifting the burden of proof.

This analysis parallels the familiar positivist position regarding procedural due process cases involving nonconstitutional entitlements.[72] The greater power of eliminating the defense is seen as including the lesser power of shifting the burden of proof. It is no surprise that Justice Holmes, author of *McAuliffe v. Mayor of New Bedford,*[73] and Justice Rehnquist, author of *Arnett v. Kennedy,*[74] have found this position attractive.

According to the positivists, federal courts properly may apply constitutional scrutiny to procedural rules only when federal law also governs the underlying substantive issue.[75] Punishing as a murderer one who killed only after extreme provocation, or in objectively reasonable self-defense, may violate substantive due process or the eighth amendment's cruel and unusual punishment clause.[76] Where the Constitution requires

72. *See, e.g.,* Goldberg v. Kelly, 397 U.S. 254, 274-79 (1970) (Black, J., dissenting); Easterbrook, *Substance and Due Process,* 1982 SUP. CT. REV. 85; Smolla, *The Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much,* 35 STAN. L. REV. 69 (1982). *Cf.* Reich, *The New Property,* 73 YALE L.J. 733 (1964); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 HARV. L. REV. 1439 (1968). It would be tempting to apply the rejection of the right-privilege distinction in the entitlement cases to the problem of proof burdeus regarding gratuitous defenses. There are, nonetheless, two reasons to avoid this approach. The first is the Court's insistence, made explicit in Gerstein v. Pugh, 420 U.S. 103, 125 n.27 (1975), on treating the criminal process differently from civil entitlements, even when that means extending "less procedural protection to an imprisoned human being than is required to test . . . the custody of a refrigerator," *id.* at 127 (Stewart, J., dissenting) (citation omitted). The second reason is that, although the Court unambiguously rejected the right-privilege distinction in Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538-41 (1985), that rejection rested more on fiat than on persuasive reasoning. The Court has neither expressly adopted a dignitary theory of due process nor explained why it rejects the right-privilege distinction. Grounding a constitutional case for the reasonable doubt rule on the procedural due process cases would therefore overcome the positivist argument only by reference to its irrational rejection in another context—scarcely an enduring foundation for a rule of constitutional law. Should the Court ever articulate a principled reason for rejecting the positivist account in the entitlement cases and look more favorably on applying the entitlement cases to the criminal context, the argnment presented here, *infra* text accompanying notes 113-25, would justify a general reasonable doubt rule under the analysis prescribed by Mathews v. Eldridge, 424 U.S. 319 (1976). *Cf.* Santosky v. Kramer, 455 U.S. 745 (1982) (applying *Eldridge* to require clear and convincing evidence in child custody termination proceedings).

73. 155 Mass. 216, 220, 29 N.E. 517, 517 (1892) ("The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."); *see also* Ferry v. Ramsey, 277 U.S. 88, 94 (1928) (Holmes, J.) ("The statute in short imposed a liability that was less than might have been imposed, and that being so, the thing to be considered is the result reached, not the possibly inartificial or clumsy way of reaching it.").

74. 416 U.S. 134, 153-54 (1974) (plurality opinion); *see also* McElroy v. Holloway, 451 U.S. 1028, 1028 (1981) (Rehnquist, J., dissenting from denial of certiorari).

75. *See* Allen, *Structuring Jury Decisionmaking, supra* note 3, at 342-48; Jeffries & Stephan, *supra* note 3, at 1365.

76. *See* Moran v. Ohio, 469 U.S. 948, 953-56 (1984) (Brennan, J., dissenting from denial of certiorari); Engle v. Isaac, 456 U.S. 107, 122 n.22 (1982); Jeffries & Stephan, *supra* note 3, at 1366-79.

the state to provide a particular defense, the positivists would also require the government to disprove the defense beyond a reasonable doubt.[77]

The positivist approach plainly conflicts with *Patterson*. Many issues defined as elements of an offense are not constitutionally compulsory, and due process or the eighth amendment may require at least some affirmative defenses.[78] The positivists make a strong claim that their approach offers a more coherent doctrine than does the Court's formalistic distinction between elements and defenses. Yet the positivists do not overcome the fundamental problem with *Patterson,* which is the inability to explain *Winship*.

Neither the *Patterson* majority nor the positivist commentators have offered a convincing reason to hold that due process *ever* requires proof of guilt beyond a reasonable doubt. Justice White was surely right in saying that the due process clause does not require every conceivable step to prevent convicting the innocent,[79] for only abolition of the criminal law could satisfy that demand. But the *Patterson* opinion did not explain why the Constitution requires one conceivable check on convicting the innocent—proof beyond a reasonable doubt for elements—but not another conceivable check—similar disproof of affirmative defenses. Nor have the positivists explained why due process requires the reasonable doubt standard when the Constitution requires the state to recognize an exculpatory condition. In analogous situations, the Constitution affirmatively and unambiguously forbids unreasonable searches and self-incrimination, but the preponderance standard is sufficient to determine whether a search was unreasonable[80] or a confession involuntary.[81]

If *Winship* was wrongly decided, the issue is far simpler than the Court and the positivists have made it. Absent *Winship,* the states would never face a constitutional requirement of proof beyond a reasonable doubt. But if *Winship* was correctly decided, then both the courts and the leading commentators have gone seriously astray.

In Part II, I offer a constitutional justification for the *Winship* holding. Part III then considers how this justification bears on the prevailing judicial and academic conceptions of the reasonable doubt rule.

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77. *See* Jeffries & Stephan, *supra* note 3, at 1365-66.

78. *See, e.g.,* Martin v. Ohio, 107 S. Ct. 1098 (1987); Adkins v. Bordenkircher, 674 F.2d 279, 282 (4th Cir.) (state must disprove alibi beyond a reasonable doubt), *cert. denied,* 459 U.S. 853 (1982).

79. Patterson v. New York, 432 U.S. 197, 210 (1977); *see supra* note 61.

80. United States v. Matlock, 415 U.S. 164, 177 n.14 (1974).

81. Colorado v. Connelly, 107 S. Ct. 515, 523 (1986); Lego v. Twomey, 404 U.S. 477 (1972).

II

WINSHIP REVISITED: THE REASONABLE DOUBT RULE AND THE LEGALITY PRINCIPLE

This Part argues in favor of a constitutional reasonable doubt rule at criminal trials. My premise is that due process incorporates a legality principle, according to which the government may not punish one for crime unless that person's conduct violates a contemporary provision of positive law. Since the Constitution provides this protection against state governments, the federal courts must determine appropriate means of enforcement. The reasonable doubt rule, in both substantive and procedural forms, serves as a legitimate safeguard against unjust conviction.

A. The Federal Right Against Unlawful State Convictions

The due process clause of the fourteenth amendment is the most controversial provision in the Constitution. The reasonable doubt rule's constitutional status does not depend, however, on any strained or open-ended reading of that amendment. Indeed, if due process has any technical content narrower than a roving judicial commission to war on injustice, that technical content has no clearer component than the legality principle. The text and history of the due process clause, the provision of other procedural safeguards in the Bill of Rights, and several long lines of Supreme Court precedents support this interpretation.

The framers of the fourteenth amendment transplanted the due process language from the fifth amendment.[82] The framers of the fifth amendment took the language from the Magua Charta's Chapter 39, as interpreted by Coke and Blackstone.[83] Whatever significance the Great

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82. The use of identical language suggests as much, and those who ratified the amendment could not have understood otherwise. *See* R. MOTT, DUE PROCESS OF LAW 163 (1926). Whether those who drafted the amendment entertained a clear idea of what "due process of law" entailed is less clear. *See* J. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT 86-87 (1956) (discussing Rep. Bingham's confusion); R. MOTT, *supra,* at 165 ("[T]he members of Congress, with the exception of a very few first-rate constitutional lawyers in that body, really had no definite conception of what the phrase meant.").

83. *See* A. HOWARD, THE ROAD FROM RUNNYMEDE 298-315 (1968); H. TAYLOR, THE ORIGIN AND GROWTH OF THE AMERICAN CONSTITUTION 236-37 (1911). Dean Pound translated Chapter 39 of Magna Charta as follows:

> No freeman shall be arrested, or detained in prison, or deprived of his freehold, or outlawed, or banished, or in any way molested; and we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and by the law of the land.

R. POUND, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY 123 (1957). One of the abuses inspiring Chapter 39 was disregard of the legality principle. *See* W. MCKECHNIE, MAGNA CHARTA 376-77 (1905); R. MOTT, *supra* note 82, at 33 ("particular abuse which the section aims to curb is that of execution before judgment").

Coke, in his Second Institute, published in 1642, equated "by the law of the land" with "due process of law." 2 E. COKE, INSTITUTES OF THE LAW OF ENGLAND *50. Habeas corpus, available at equity if the law courts were unavailable, both effected the guarantee and confirmed its nature. "By these writs it manifestly appeareth, that no man ought to be imprisoned, but for some certain

Charter had in 1215, the American colonists revered its guarantees as they were reaffirmed during the English Revolution of 1688. The contemporary meaning of Chapter 39 was that ascribed to it by Coke and Blackstone, according to which individuals could not be punished except as provided by law.[84]

The early American authorities confirm this reading. Kent[85] and Story[86] followed Blackstone in reading due process of law to forbid detention that was not authorized by law, and to permit conviction only after an indictment and trial by jury. The Supreme Court's first full-fledged due process case, *Murray's Lessee v. Hoboken Land and Improvement Co.*,[87] approved this interpretation; the legislature could not alter

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cause: and these words, *ad sujiciend. et recipiend. &c.* prove that cause must be shewed: for otherwise how can the court take order therein according to law?" *Id.* at *53. The requirement of legal cause could be satisfied by a bill of attainder (a concept repugnant to the founders, *see* U.S. CONST. art. I §§ 9-10, but not unknown in post-revolutionary America) but Coke took pains to note that no penalty could attach before the attainder. *Id.* at *48. By Blackstone's time the procedural guarantees against unjust punishment had been expanded, but the central principle that a person's liberty could be terminated only for violations of law established by regular procedures remained. *See* 1 W. BLACKSTONE, COMMENTARIES *133-34, *136.

84. *See* R. POUND, *supra* note 83, at 109-10 [arguing for open-ended interpretation]:

> But the terms "liberty" and "due process" were legal terms with well-understood meanings known to lawyers; and when one notes the names of the great lawyers who signed the original Constitution—one future Chief Justice and two future Justices of the Supreme Court of the United States, a Chief Justice of New Jersey, and many who were then accounted leaders of the profession, it is idle to assume that they did not know the significance of the words they used.

H. TAYLOR, *supra* note 83, at 79-80, 237, objected to undue emphasis on the weight accorded Coke's views by the founders, noting that Coke's Second Institute was written during the reign of James I, when the Court of Star Chamber was still unchecked. Taylor argued that the broader conception of due process articulated by Blackstoue more closely approximates the framers' vision. *Id.* But Coke and Blackstone did not disagree about the incorporation of the legality principle in Magna Charta. *See supra* note 83.

85. 2 J. KENT, COMMENTARIES ON AMERICAN LAW *12-13.

86. 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 565-67 (5th ed. Boston 1891) (1st ed. Boston 1833).

87. 59 U.S. (18 How.) 272 (1855). *Murray's Lessee* involved the constitutionality of a distress warrant for the seizure of property owned by a delinquent taxpayer. The Court, per Justice Curtis, rejected the notion that the legislature could make "any process 'due process of law,' by its mere will." *Id.* at 276. Instead, due process incorporated those procedures recognized at common law; since the distress warrant had analogues in English common law, its use did not violate due process. *Id.* at 277-80. The reasoning applied in *Murray's Lessee* could neither protect individuals from new forms of oppression nor permit benign departures from common law procedures. For this reason, the historical approach gave way to less restrictive interpretive techniques. *See* Hurtado v. California, 110 U.S. 516 (1884) (upholding for the first time an indictment on information rather than by the traditional grand jury); *see also,* Twining v. New Jersey, 211 U.S. 78, 101 (1908) ("It does not follow, however, that a procedure settled in English law at the time of the emigration . . . is an essential element of due process of law."). Departure from historical standards in favor of natural law interpretations invites the objection that the judges are indulging contemporary, idiosyncratic, political preferences rather than applying an authoritative legal text. *Cf.* Lochner v. New York, 198 U.S. 45 (1905). This choice between inherited and contemporary arbitrariness remains at the heart of most due process cases. *See generally* Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism,* 66 YALE L.J. 319 (1957). I am not here proposing a general

by statute the settled procedures of the common law. The fourteenth amendment could not have been adopted without carrying over to the states at least the legality requirement.

All of the due process safeguards against unjust conviction confirm the centrality of legality to due process of law. The undisputed, clearly intended requirements of due process are notice of the charge and protection against unjust conviction by the grand and petit jury procedures.[88] Contemporary doctrine has added counsel,[89] confrontation,[90] compulsory process,[91] identification safeguards,[92] and immunity from double jeopardy[93] to the procedures due process requires. These procedural aspects of due process, however, are entirely nugatory unless due process incorporates the legality principle. What is the point of providing notice of the charge, trial by jury, counsel, confrontation, or compulsory process, if innocence of the charge would not bar the defendant's punishment? It might make sense for a state to accept the positivist position, and provide that guilt of crime is equivalent to conviction according to specified procedures. But it does not make sense for the federal Constitution to impose procedures designed to prevent *convicting* people who have not broken state law unless the same constitution forbids *punishing* such people. The framers did not entertain a purely procedural conception of criminal liability. In their day, just as in ours, those whose conduct clearly had not broken a contemporary law could not be put on trial no matter how "fair" the procedures.[94] Guilt is a particular conjunction

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approach to due process cases; on the contrary, my thesis is that even on the narrower understanding of due process as a technical provision governing criminal prosecutions according to common law standards, legality is the central element of due process.

88. Even Judge Easterbrook admits this much. *See* Easterbrook, *supra* note 72, at 98-100.

89. Gideon v. Wainwright, 372 U.S. 335 (1963).

90. Pointer v. Texas, 380 U.S. 400 (1965).

91. Webb v. Texas, 409 U.S. 95 (1972).

92. United States v. Wade, 388 U.S. 218 (1967).

93. Benton v. Maryland, 395 U.S. 784 (1969).

94. It might be objected that the jury system of the late 18th and 19th century, whether in England or America, gave jurors power over law as well as fact. This system could be seen as concerned less with measuring conduct according to legal criteria than with assessing the defendant's moral fitness for punishment. The objection would be misplaced, however, because the jury system has never been understood as authorizing extra-legal punishment. Even the most vigorous defenders of the jury's power over questions of law understood the jurors to exercise solely the power of reducing, not of increasing, the scope and severity of criminal liability. *See* T. GREEN, VERDICT ACCORDING TO CONSCIENCE 261 (1985) (according to opponents of Stuart rule who defended the jury's power over issues of law, "Right to jury was right to judgment by two lay bodies, mainly to provide a double check on fact but also to prevent prosecutions for activity that was not truly criminal."). Blackstone, who strongly defended the legality principle, *see* 1 W. BLACKSTONE, *supra* note 83, at *92, pointed out that although the court could set aside jury verdicts of guilty, none that acquitted the prisoner had been set aside, 4 *id.* at *355. *See, e.g.*, The King & Smith, 84 Eng. Rep. 1197 (K.B. 1681) (setting aside conviction against the evidence); The King & Primate v. Fenwicke & Holt, 83 Eng. Rep. 1104 (K.B. 1663) (denying motion for new trial even though acquittal resulted when defendant's servants kidnapped witnesses); The King v. Read, 83 Eng. Rep.

of law and fact, which exists independently of the procedures employed to identify it. Due process safeguards express a commitment to regulating punishment by law rather than to providing a relatively fair government of functionaries.[95]

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271 (K.B. 1660) (forbidding new trial after acquittal); *see also* W. HAWKINS, PLEAS OF THE CROWN 442 (2d ed. London 1724). Illegal acquittals were thus distinguished from illegal convictions which were beyond the jury's power.

The court's authority to prevent an unjust guilty verdict was not, at common law, limited to insufficiency of the evidence. Before trial, on a plea of demurrer or a plea of the general issue, the judges would dismiss an indictment that charged the wrong crime or that failed to charge any crime. 4 W. BLACKSTONE, *supra* note 83, at *327-28. After a jury verdict of guilty, the defense could move in arrest of judgment on the same ground. *Id.* at *368-69 ("a defective indictment is not aided by a verdict"). If unsuccessful, review was available in the Court of King's Beuch on writs of error and certiorari. *Id.* at *262, *384.

Early American practice involved a similar refusal to permit juries to convict except according to the law. *See, e.g.*, United States v. Villato, 28 F. Cas. 377 (C.C.D. Pa. 1797) (No. 16,622) (alien cannot be guilty of treason); Commonwealth v. Hearsey, 1 Mass. *137 (1804) (plea of guilty to indictment that failed to charge crime arrested by court acting *sua sponte*); Commonwealth v. Catlin, 1 Mass. *8 (1804) (evidence of private sexual activity insufficient to support indictment for public lewdness); State v. Boon, 1 N.C. (Tay.) 191 (1801) (jury verdict of guilty set aside because statute forbidding killing slave was "too uncertain" to enforce); Respublica v. Richards, 2 Dall. 224 (Pa. 1795) (verdict of not guilty directed under statute forbidding enslavement of blacks because defendant owned slave under laws of another state); Respublica v. Roberts, 2 Dall. 124 (Pa. 1791) (unmarried man cannot be convicted of adultery, but only of fornication); State v. S.S., 1 Tyl. 180 (Vt. 1801) (indictment charging breach of the peace quashed because statute forbidding "challenging" another did not apply to a written challenge to duel). Even when the indictment charged a common law crime for conduct not previously condemned, the court retained the authority to determine the scope of the common law of crimes. *See, e.g.* Respublica v. Teischer, 1 Dall. 335 (Pa. 1788) (malicious killing of horse is criminal at common law).

Aggregate data confirm that early American juries were not authorized to convict except according to the law. Of 2718 federal indictments filed between 1801 and 1828, 902 ended in *nolle prosequi*, 661 had no recorded disposition, and 80 were abated, quashed, discharged, discontinued, or terminated by escape. Only 1075, fewer than half, ended in jury verdicts. D. HENDERSON, CONGRESS, COURTS, AND CRIMINALS 46-47 (1985). Against this background, the Bill of Rights can scarcely be seen as designed to assist the jury in a lawless inquiry about the defendant's moral fitness for punishment. Rather, it establishes a fundamental defense against unlawful punishment.

95. Professor Kadish has observed:

> The various procedural safeguards traditionally demanded in the name of due process appear to be directed to two objectives. One is the goal of insuring the reliability of the guilt-determining process—reducing to a minimum the possibility that any innocent individual will be punished. It is not of crucial importance whether the individual tried is in fact guilty or innocent, but it is of crucial concern that the integrity of the process of ascertaining guilt or innocence never be impaired. If in this effort to insure that none but those guilty be convicted, many guilty go free, the price is not too great in the long view of democratic government. If there is any consideration basic to all civilized procedures it is this, no matter how disparate the means chosen to give it effect.
>
> This consideration, often expressed in terms of "fairness," gives meaning to the great bulk of procedures that have become part of the due process of law: that the accused be put on fair notice of the nature of the prohibited acts; that he be given an adequate opportunity to present his side through counsel before a fair and impartial tribunal free from prejudicial influences; that he be entitled to be continuously present at the trial, and to confront and cross-examine his accusers; that he have the right to be free of the damaging and untrustworthy influence of coerced confessions and testimony knowingly perjured.
>
> The relation between restrictions on process directed to this objective and the ultimate values of human freedom is not obscure. . . . Due process thus serves the same end as a

All of the Supreme Court cases incorporating within the fourteenth amendment the protections of the Bill of Rights against unjust conviction recognize that due process includes the prohibition of punishment. Other cases stand for the same proposition. The void-for-vagueness doctrine is a conspicuous example.[96] In most of the vagueness cases, the defendant engaged in conduct that he or she probably thought was illegal and that the state legitimately could have criminalized.[97] But unless the state identifies the forbidden conduct with reasonable clarity, a conviction for violating the statute contravenes due process.

In part, such decisions may reflect notions of fair notice, but in most of the cases such an explanation would be attenuated to the point of fiction. Rather, the vagueness cases provide an excellent illustration of the substantive value served by the legality principle. Their underlying rationale is that in the absence of a prior definition of criminal conduct, punishment is more likely to further some ulterior discriminatory or oppressive purpose than it is to further legitimate public interests.[98]

Put another way, the legality principle ensures a degree of neutrality among persons in the administration of justice. Rules made in advance cannot as easily be directed toward despised individuals. Even absent oppressive motives, the legality principle helps to prevent punishment that is merely gratuitous and arbitrary. The legality principle expresses the judgment that punishment must be justified by some public purpose important enough to be articulated generally and prospectively. Without

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positive law, as contrasted with a law residing in the will of a ruling power—the attainment of legal security and certainty.

Kadish, *supra* note 87, at 346.

96. *See, e.g.*, Kolender v. Lawson, 461 U.S. 352 (1983) (striking down a "stop and identify" statute for vagueness because it encouraged arbitrary enforcement); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) (finding criminal vagrancy statute unconstitutionally vague); Lanzetta v. New Jersey, 306 U.S. 451, 458 (1939) ("The challenged provision . . . [is] so vague, indefinite and uncertain that it [is] repugnant to the due process clause of the Fourteenth Amendment.").

97. *See, e.g.*, Bouie v. City of Columbia, 378 U.S. 347, 355 n.5 (1964) ("We think it irrelevant that petitioners at one point testified that they had intended to be arrested."). *But see* Rose v. Locke, 423 U.S. 48 (1975) ("crime against nature" statute not unconstitutionally vague as applied to forcible cunnilingus). This pattern, involving a defendant who knows his conduct to be criminal but who is prosecuted on an unforeseeable ground, should be distinguished from that involving defendants whose conduct is clearly within a statute whose applicability to other conduct is uncertain; typically such a defendant has no vagueness claim. *See* Parker v. Levy, 417 U.S. 733 (1974).

98. Explanations of the vagneness doctrine typically supplement the fair notice rationale with the prevention of discriminatory enforcement, especially when enforcement might trench upon other constitutional rights. *See, e.g., Papachristou*, 405 U.S. at 168-71; 1 W. LAFAVE & A. SCOTT, *supra* note 2, § 2.3(c), at 132; P. LOW, J. JEFFRIES & R. BONNIE, CRIMINAL LAW 67-79 (1982). In my view this account, althongh on the right track, is somewhat incomplete. Whether prosecution nnder a vagne statute is discriminatory or simply arbitrary, it risks making individuals suffer for reasons insufficiently important to be articulated prospectively. Thus, the penalties imposed are objectionable even when not inspired by official animus; gratuitons punishment is wrong even when it is based neither on racial prejudice nor on a program of political oppression.

that declaration, the state may not argue that the general interest requires the suffering of a particular person. The chance that such an argument is meritorious is too remote, the chance that the argument is feigned too immediate, to justify its temptation in every case.

Several other arguments support the legality principle. It may prevent political oppression[99] and contribute to individual security.[100] More categorically, it may simply be wrong to punish those who have not offended an expressed rule.[101] But none of these arguments can explain why the legality principle enjoys nearly complete priority over the public interest in punishing wrongdoers—why punishment unauthorized by law is, in civilized communities, simply beyond the pale. The priority of the legality principle derives, I believe, from profound skepticism about assertions that punishing legal conduct will contribute to the public interest. In the face of the undoubted pain that accompanies any punishment, this skepticism fully justifies the priority of the legality principle over the general goals of punishment.[102]

Many other Supreme Court precedents depend on the central role of the legality principle in due process adjudication. The cases can be separated into two categories, procedural and substantive. In the first category, the Court has required state courts to follow specific procedures designed to minimize the risk of erroneous conviction. These cases include selective incorporation decisions in which the Court has read the due process clause as specifying procedures necessary to enforce the legality principle and therefore implied or incorporated by the basic guarantee of due process.[103] In other cases in this category, the Court has imposed procedures on the state courts on the basis of the due process clause's independent potency.[104]

The second category of cases involve direct, substantive efforts by

99. *See* Rawls, *Two Concepts of Rules,* 1955 PHIL. REV. 7-8.

100. *See* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 11-13, 17-24 (1968); Kadish, *supra* note 87, at 346; Raz, *The Rule of Law and Its Virtue,* 93 LAW Q. REV. 195, 202-05 (1977).

101. *See* H.L.A. HART, *supra* note 100, at 22.

102. Legality, then, is an ultimately utilitarian principle. Indeed, frugality of punishment had a prominent place in Jeremy Bentham's thought. *See* 1 J. BENTHAM, WORKS 398-99 (Edinburgh and London 1859). The notion that retribution for immoral but legal actions might justify official punishment is not implausible, but the cases in which such action might justifiably be taken are always isolated, because the community can always reform the law prospectively. Allowing punishment in one such case necessarily hazards many instances of unjustified suffering for every, albeit outrageous, instance of lawful wrongdoing.

103. *See* cases cited *supra* notes 89-93. *See generally* Kadish, *supra* note 87. In a strained attempt to avoid some unsavory implications of their theory that state power to define grounds of liability entails state power to define the applicable proeedures, the positivists argue that burden of proof rules serve different functions than other aspects of due process. On the viability of this distinction, see *infra* text accompanying notes 209-18.

104. *See, e.g.,* Betts v. Brady, 316 U.S. 455 (1942) (due process required state to provide counsel to indigents in noncapital cases only in special circumstances).

the Supreme Court to prevent erroneous convictions in particular trials. In the vagueness cases, for example, state courts have entered facially valid judgments of conviction—judgments that formally satisfied the legality principle. But simple acceptance of such formalism could completely subvert the legality principle, as the "trials" that occur in certain totalitarian countries evidence. Limiting criminal liability to specified categories of conduct would not limit state power to punish if a mere judicial announcement that an individual has violated a valid law would satisfy the legality principle. The Court has refused to accept any such procedural definition of crime, and this refusal has fostered a large body of case law.

In *Moore v. Dempsey,*[105] for example, the Court ruled that a mob-dominated show trial violated due process, even though the state appellate courts found that the prosecution had complied with state procedural requirements. In *Mooney v. Holohan,*[106] the Court held that the prosecution's knowing use of false testimony would violate due process; due process could not be satisfied by "mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured."[107] And in *Thompson v. City of Louisville,*[108] the Court—per Justice Black, no advocate of an elastic due process clause—struck down a procedurally proper conviction because it was supported by "no evidence whatever." The *Thompson* Court equated a conviction based on no evidence with a conviction for "a charge not made" at all.[109] Both practices amount to "sheer denial of due process."[110]

105. 261 U.S. 86 (1923).

106. 294 U.S. 103 (1935).

107. *Id.* at 112.

108. 362 U.S. 199, 206 (1960).

109. *Id.*

110. *Id.* In a recent decision upholding the preventive detention provisions of the Bail Reform Act of 1984, the Court recognized the constitutional role of the legality principle, but held that a "compelling" government interest justified "narrowly focuse[d]" pretrial detention. United States v. Salerno, 107 S. Ct. 2095, 2103 (1987). The majority freely conceded "the 'general rule' of substantive due process that the government may not detain a person prior to a judgment of guilt in a criminal trial." *Id.* at 2102. But the Court found that the Act "narrowly focuses on a particularly acute problem in which the government interests are overwhelming." *Id.* at 2103. Accordingly, the statute fell within the exception to the general rule recognized for such practices as arrest and civil commitment. *Id.* at 2102.

The *Salerno* majority's analysis is unconvincing because the Act authorizes detention only of indicted persons. The statute therefore anthorizes detention on the basis of an accusation that is practically *ex parte.* Detention more restrictive than necessary to adjudicate the charge (arrest and pretrial detention to ensure appearance) cannot be squared with the legality principle, unless the detention is not punitive. Limiting preventive detention to those accused of crime looks very much like punishment for offenses charged but not yet proved. *See id.* at 2112. (Stevens, J., dissenting).

The *Salerno* majority, nevertheless, does not question the centrality of the legality principle to

In re Winship[111] belongs in the procedural category because it held that a state conviction is invalid unless the trier of fact applies the reasonable doubt test to the evidence. *Winship*'s substantive counterpart is *Jackson v. Virginia,*[112] which held that a federal habeas corpus petition alleging insufficient evidence (under the *Winship* standard) to support a state conviction required the federal court to conduct an independent examination of the record. I next consider whether *Winship* and *Jackson* represent justifiable efforts to enforce the legality principle by preventing unauthorized punishment.

B. Enforcing the Legality Principle

Federal imposition of the reasonable doubt standard on state criminal trials may be justified on the grounds that federal courts have a duty to prevent violations of due process. This duty is qualified, of course, by principles of federalism, which limit the degree of federal judicial intrusion into the state criminal process. This section will demonstrate that the reasonable doubt rule offers an important safeguard against the risk of unjust conviction without derogating the constitutional value of federalism. It follows that *Winship* was decided correctly.

1. Federalism and Due Process

Whenever state litigation implicates federal rights, federal law governs the standards and procedures affecting the federal claim.[113] On

due process. "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Id.* at 2105. The decision casts no doubt on the legality principle's application to the adjudication of guilt.

111. 397 U.S. 358 (1970).

112. 443 U.S. 307 (1979).

113. When a given procedure forms an integral part of the federal right or when the absence of the procedure would render the federal right nugatory, the supremacy clause requires at least this much. *See* Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law,* 89 HARV. L. REV. 1, 22-23 (1975). The federal courts also have crafted various prophylactic rules—that is, rules designed to enforce constitutional provisions even if they override state authority in the absence of a constitutional violation. The *Miranda* rules are the classic example. *See* Miranda v. Arizona, 384 U.S. 436 (1966). In Professor Monaghan's view, rules of this type are legitimate, though subject to legislative modification. Monaghan, *supra,* at 27-30. His position has been criticized for endorsing judicial interference with political decisions in the absence of constitutional authority, *see* Shrock & Welsh, *Reconsidering the Constitutional Common Law,* 91 HARV. L. REV. 1117 (1978), and for approving constitutional adjudication in the absence of a genuine case or controversy, *see* Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy,* 80 NW. U.L. REV. 100 (1985).

At least with respect to the fourth amendment exclusionary rule and the *Miranda* warnings, Professor Monaghan's critics are wide of the mark. The problem in both situations is that the outcome of a particular case may determine the constitutional rights of persons not before the court. It is not the purpose of the fourth amendment to protect crime, but unless some criminals are protected, the lawful enjoyment of privacy might be lost. *See* Dripps, *Living with* Leon, 95 YALE L.J. 906, 918-22 (1986). Similarly, the *Miranda* rules may require exclusion of some voluntary statements, but without such rules courts would admit a great many involuntary statements

review, the federal courts may make an independent determination of facts as well as law.[114] Just as federal courts are responsible for enforcing the fourth amendment's proscription of unreasonable searches and the fifth amendment's privilege against self-incrimination against state violations, they are also responsible for enforcing the legality principle.

Enforcing the privilege against self-incrimination or the immunity from unreasonable searches, however, poses a more modest threat to state autonomy than does enforcing the legality principle. Every aspect of trial procedure is potentially subject to attack as violating the legality principle because every aspect of trial procedure can affect the likelihood of erroneous conviction.

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extracted by the police. *See* Schulhofer, *The Fifth Amendment at Justice: A Reply,* 54 U. CHI. L. REV. 950, 956 (1987). The objections to the Monaghan thesis assume that the risk of future violations of constitutional rights can never justify the reversal of a conviction that did not result from a constitutional violation. This assumption is, in my view, mistaken.

With respect to the objection that constitutional authority is lacking, the refusal to reverse a constitutionally rendered conviction, when reversal is the only way to prevent future constitutional violations, amounts to treating the Constitution, not as an authority, but as a mere "code of ethics under an honor system." Stewart, *The Road to* Mapp v. Ohio *and Beyond,* 83 COLUM. L. REV. 1365, 1383-84 (1983); *see* Dripps, *supra,* at 934-39. For illustration, consider Tennessee v. Garner, 471 U.S. 1 (1985), which holds that the fatal shooting of a nondangerous fleeing suspect amounts to an unreasonable seizure under the fourth amendment. If the substantive holding is correct, any enforcement of the suspect's fourth amendment rights would require an action by survivors — individuals not themselves victims of the constitutional violation. There is thus no doctrinal difference between the action allowed in *Garner* and the reversal of convictions under *Mapp* and *Miranda*; in all three cases, the courts strike down state action because to do otherwise would foster violations of the Constitution. In such situations, the article III objection confronts Chief Justice Marshall's commonsense observation that the Court has "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution." Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821); *see also* Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 15 (1983) ("[F]ederal courts have a 'virtually unflagging obligation to exercise the jurisdiction given them.' " (quoting Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800, 817 (1976)); Currie, *The Supreme Court and Federal Jurisdiction: 1975 Term,* 1976 SUP. CT. REV. 183, 213-15; Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function,* 94 YALE L.J. 71 (1984) (criticizing the abstention doctrine as abdication of mandatory jurisdiction).

My point is not to condemn prudential abstention doctrines, which may be defensible on other grounds. *See* Shapiro, *Jurisdiction and Discretion,* 60 N.Y.U. L. REV. 543 (1985). Rather, I suggest that the Supreme Court has at least the authority, if not the obligation, to choose constitutional overenforcement over constitutional underenforcement. *Cf.* Sosna v. Iowa, 419 U.S. 393 (1975) (expiration of claim of class representative did not moot case for the entire class). If this is so, then Professor Monaghan's characterization of *Mapp* and *Miranda* is unfortunate, for these decisions are in no way subconstitutional, although they do depend on empirical causal relationships that might be altered by legislation. Cases announcing prophylactic rules are constitutional decisions insofar as they recognize criminal defendants' standing to enforce the constitutional rights of other parties. The rules announced in *Mapp* and *Miranda,* therefore, could not be modified without infringing on the constitutional rights of individuals, albeit different individuals than those convicted as a result of the modifications.

114. *See* Norris v. Alabama, 294 U.S. 587, 589-90 (1935); Monaghan, *Constitutional Fact Review,* 85 COLUM. L. REV. 229, 271-76 (1985). Of course, federal courts may—and most frequently do—decline to review the facts independently.

Nonetheless, as the Supreme Court has consistently maintained, enforcing the legality principle does not amount to exercising supervisory power over state criminal trials. In devising procedures to enforce the guarantees of the Bill of Rights, the federal courts must acknowledge the primary role of the states in the administration of criminal justice.[115] Acknowledging the primacy of the states does not derogate a constitutional right in order to accommodate a contemporary policy preference, because the Constitution itself provides for this state responsibility.

Two arguments confirm the constitutional character of federalism as a constraint on enforcement of criminal procedure guarantees. First, the structure of the government established by the Constitution transfers to the federal government only some of the sovereiguty otherwise confided generally to the states. The fourteenth amendment's due process clause diminishes the degree of sovereignty states may exercise over individuals, but that limitation confirms the state's primary role. By limiting state power to deprive individuals of life, liberty, or property, the fourteenth amendment implicitly recognizes the continued primacy of the states in enforcing criminal laws—laws characterized by the deprivation of life or liberty. The fourteenth amendment plainly does not require, indeed cannot justify, treating the Supreme Court's certiorari jurisdiction or the federal habeas statute as authorizing trial de novo of all state criminal proseeutions.

Such an arrangement might well be outrageously wasteful or largely futile in vindicating federal rights. It is also constitutionally indefensible because the very authority relied on to justify federal review affirms the central role of the states. The fourteenth amendment would not incorporate any of the procedural protections in the Bill of Rights if trial de novo in federal courts with those safeguards were to follow in any event. The fourteenth amendment regulates state criminal prosecutions precisely because state criminal prosecutions matter—because state prosecutions can deprive individuals of life and liberty.

Federalism, then, is an important constraint on federal courts constructing rules for enforcing the due process clause. The Constitution does not, however, clearly determine the point at which the competing constitutional concerns of federalism and due process statiate. The text does no more than identify the relevant values, both of which must be honored to some degree.

The constitutional tension between the legality principle and federalism therefore defines a range of principled choices respecting enforcement of the due process clause. At the very least, the states must facially

115. *See, e.g.*, Patterson v. New York, 432 U.S. 197, 201-02 (1977) ("[W]e should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States.").

comply with the legality principle, that is, punish no one for crime without a formal adjudication of conduct made criminal by positive law.[116] If this much is legitimate, then cases like *Mooney*[117] and *Thompson*[118] are also correct in requiring that the adjudication of guilt amount to something more than a palpable sham. At the other extreme, if federalism is of any constitutional moment, then trial de novo in federal courts would usurp the state responsibility that establishes the constitutional premise of federal review.

Between preventing patently unauthorized punishment on the one hand and avoiding trial de novo on the other, the Constitution provides little guidance. Reasonable judges have endorsed at least three approaches: (1) requiring nothing more than minimal legality—that is, formal judgment, subject to federal review solely to prevent state use of show trials designed to circumvent the adjudication requirement; (2) requiring state trial courts to apply proof burdens and rules of evidence that bias the outcome against erroneous conviction and toward erroneous acquittal; and (3) requiring federal review of state judgments to ensure that the judgment rendered satisfies these proof burdens and rules of evidence, with substantial deference, in the interest of federalism, to the state court judgment. *Winship* follows the second approach, and *Jackson* the third. *Patterson* and *Martin,* in effect, apply the first approach to any issue the state chooses to classify as an affirmative defense. The choice among these competing approaches depends on the method used to derive procedures and remedies from substantive constitutional provisions.

2. *Constitutional Method*

To choose among enforcement options for protecting constitutional rights, the Court generally follows an instrumental approach, which focuses on the purpose of the constitutional provision at issue. The Court requires the states to follow procedures calculated to enforce effectively the federal right, but does not require the most effective remedy or most painstaking procedures. What procedures and remedies suffice depends on the Court's perception of both how difficult it will be to enforce the particular right in question and how costly additional procedures would be.

Gerstein v. Pugh[119] illustrates the Court's instrumental approach. The Court held that the fourth amendment right against arbitrary deten-

116. Again, even Judge Easterbrook appears to admit this much. *See* Easterbrook, *supra* note 72, at 98.

117. 294 U.S. 103 (1935); *see supra* text accompanying notes 106-07.

118. 362 U.S. 199 (1960); *see supra* text accompanying notes 108-10.

119. 420 U.S. 103 (1975).

tion requires a prompt post-arrest judicial determination of probable cause. Enforcement of this federal right does not require representation by counsel at a trial-type hearing, however, because probable cause "can be determined reliably without an adversary hearing."[120]

The Court applied this instrumental approach to the assignment of proof burdens in *Lego v. Twomey*,[121] where it held that the preponderance standard is constitutionally sufficient to establish the voluntariness of a confession. According to the Court,

> the exclusionary rules are very much aimed at deterring lawless conduct by police and prosecution and it is very doubtful that escalating the prosecution's burden of proof in Fourth and Fifth Amendment suppression hearings would be sufficiently productive in this respect to outweigh the public interest in placing probative evidence before juries for the purpose of arriving at truthful decisions about guilt or innocence.[122]

The *Lego* Court distinguished *Winship* as requiring a higher burden of proof regarding the elements of a crime "to ensure against unjust convictions by giving substance to the presumption of innocence."[123]

The Court's instrumental inquiry necessarily leaves a great deal of room for judicial maneuver. But the Court could avoid such an approach only by tolerating violations of unambiguous constitutional value judgments. As an alternative to the instrumental inquiry, the Court occasionally has invoked either historical or contemporary state practice as a limit to its discretion, but neither offers a principled guide to constitutional interpretation.

History may clarify the values underlying certain constitutional provisions, but when the core of the constitutional value judgment is unambiguous, implementation requires the judiciary to fashion measures informed by contemporary reality.[124] Just as importing extrinsic values into the document abandons constitutionalism, refusing to give effect to clear constitutional judgments would deny the Constitution's political authority.[125] The key concern is not, after all, what jury instructions were commonplace at the time of the Civil War, but rather what political value judgments are expressed by the due process clause.

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120. *Id.* at 120.

121. 404 U.S. 477 (1972).

122. *Id.* at 489.

123. *Id.* at 486-87.

124. *See infra* text accompanying notes 176-88. It is worth noting here, however, that the Framers understood the Constitution to be a public document, subject to public interpretation, *see* Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); that they vested interpretative authority in life-tenured judges, *see* THE FEDERALIST No. 78 (A. Hamilton); and that they included the due process language in the Constitution knowing that its meaning was not immutable. If to this we add more than a century of judicial interpretation which has expanded the contours of due process, the assertion in the text is surely a mild one.

125. *See* Dripps, *supra* note 113, at 934-39; Stewart, *supra* note 113, at 1383-84.

Reliance on contemporary state practice as a guide to constitutional interpretation is equally problematic. While the Court should respect the weight of arguments that have persuaded legislatures of the constitutionality of a particular statute, contemporary state practice cannot determine constitutional analysis. Indeed, process-oriented theories of judicial review[126] would suggest that unconstitutional legislation will rarely be confined to a single jurisdiction; the political pressures that produce its adoption in one place are likely to operate more broadly. Contemporary practice is therefore likely to approve the most dangerous unconstitutional trends—those posing the most sweeping threats to individual liberty and those least amenable to political remedies.[127]

That leaves the instrumental approach, whose great defect is its open-ended character. While the Court's use of history and practice reflects a laudable search for authority, authority alone may not resolve difficult constitutional questions. At that point, treating as authoritative factors whose relationship to the case is completely arbitrary confines judicial discretion at the expense of rationality. Moreover, resort to history or state practice may not confine judicial discretion at all. Rarely will a judge read history or state practice to require upholding a statute that the judge's own instrumental analysis condemns.[128]

While some sort of instrumental inquiry seems ultimately unavoidable, the Court's discretion is not entirely open-ended. That reasonable minds disagree does not mean that there are no wrong answers among the plausible options. The criteria for discriminating among the plausible options should not be wholly extrinsic to the document being interpreted.

Resolving hard cases well requires, first, fairly exhausting the direct

126. *See, e.g.*, J. ELY, DEMOCRACY AND DISTRUST 73-104 (1980) (defining and defending "representation-reinforcing" approach to constitutional interpretation which focuses on the political process). *Cf.* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (reserving question of the level of scrutiny to be applied to legislation restricting the political processes that might lead to repeal of undesirable legislation).

127. Justice Rehnquist's opinion for the Court in Schall v. Martin, 467 U.S. 253 (1984), offers an excellent example. There, the Court upheld preventive detention of juveniles, in large part because laws in every state provided for such incarceration. *Id.* at 267 n.16. Since juveniles are not allowed to vote, process-based theory suggests that they are vulnerable to political abuse. The existence of laws authorizing preventive detention of juveniles (based on predictions of future criminal conduct) offers more empirical support for the process-based argument for unconstitutionality than it offers for the reasoned-legislative-judgment argument for constitutionality. On the implications of preventive detention for the legality principle, see *supra* note 110.

The Court recently has disavowed any reliance on state practice in deciding whether due process requires proof of crime beyond reasonable doubt. *See* Martin v. Ohio, 107 S. Ct. 1098, 1102-03 (1987).

128. *See* Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 677 (1987) ("Justices Hugo Black and William Rehnquist, perhaps the two most consistent originalists in the Supreme Court's history, have been equally consistent in their claims that the founders' views coincided with their own, despite historial evidence to the contrary.").

authority of the constitutional provision and, second, approaching the problem with as constitutional an *attitude* as possible. The assumption should be that the Constitution is right as well as controlling; the judge's duty is not to make the best constitution he can, but to resolve particular ambiguities as if the rest of the Constitution were the best possible and thus a guide to value judgments required by the process of interpretation.[129]

The instrumental approach need not degenerate into unrestrained interest balancing. Interests must be balanced, but only constitutional interests count, and the weight accorded them ought to reflect constitutional rather than judicial preferences. The task is not easy, but it is necessary and capable of being done either well or poorly.

To recapitulate, the legality principle is a key element of due process of law. Federal courts therefore have a duty to enforce that principle against the states. Federalism is a constraining constitutional principle, but federalism and due process are like apples and oranges. There is no reason to suppose that they are equally important merely because they are both of constitutional stature. Resolving the competition between them requires an assessment of their purposes and the degree to which the reasonable doubt rule might protect the legality principle or infringe on legitimate state authority.

3. *The Reasonable Doubt Rule as a Procedural Safeguard for the Legality Principle*

The legality principle protects individuals against gratuitous or oppressive punishment. The effects of an erroneous conviction on an individual are potentially overwhelming. Indeed, the consequences of any conviction include damage to reputation and some form of official supervision. Incarceration, which is imposed for some offenses, is a dreadful hardship, even in our best prisons. One measure of the magnitude of this hardship is the severity with which we punish private wrongful imprisonment, also known as kidnapping.

This assessment of the legality principle's importance is not

129. *But cf.* R. DWORKIN, LAW'S EMPIRE (1986) (arguing that judges should interpret legal texts so as to make them the best possible). Dworkin's approach runs the same risk that textual indeterminism runs—namely, defeating the purpose of constitutions. Written constitutions have the purpose of organizing and limiting government according to a dispositive authority. Once political actors, including judges, have unfettered discretion to do as they please, the constitution is no longer dispositive. Professor Dworkin thinks the constitution is determinate because he thinks political morality is determinate; in other words, he thinks contemporary values will point to a right answer from among the many allowed by the constitutional text. I think the point of a constitution is to prevent contemporary values from operating politically except according to constitutional authority. His view, I believe, would have effects indistinguishable from candid indeterminism. *See* Monaghan, *Our Perfect Constitution,* 56 N.Y.U. L. REV. 353 (1981).

extraconstitutional. The framers of both the fifth and fourteenth amendments shared the common law's concern for the legality principle, expressed by an emphatic preference that the innocent not suffer even if the guilty must go free.[130] The due process clause and the panoply of procedural protections for the accused contained in the Bill of Rights reflect the intensity of that preference.

The reasonable doubt rule makes an important contribution to honoring the constitutional preference, with respect to either elements or affirmative defenses. In practical terms, defending an unfounded criminal charge can be extremely difficult. The witnesses are frequently difficult to locate, uncooperative or incompetent, or forgetful of key facts.[131] Many witnesses, and frequently the defendant, have criminal records or are for some other reason not entirely credible.[132]

A first-rate criminal defense requires a thorough investigation, but the public defenders who represent most criminal defendants have neither the time nor the funding for such an investigation.[133] In many cases, therefore, exculpatory evidence may exist, but never come to the attention of the court. The defendant's inability to present exculpatory evidence is more likely to lead to erroneous conviction if guilt can be proved by a mere preponderance of the evidence.

This is not to say that the government always enjoys an overwhelming investigative advantage. While the government can rely on professional investigators, police investigation is geared primarily toward arrests rather than convictions.[134] Thus, police investigation all too often leaves unresolved key uncertainties affecting the suspect's guilt.[135] In a major case, no stone may go unturned, but in ordinary cases, the quality of police investigation is often quite poor. Nearly half of all cases initi-

130. The common law preference was to acquit ten guilty defendants rather than to convict one innocent defendant. 4 W. BLACKSTONE, *supra* note 83, at *558. The framers clearly subscribed to this view. *See supra* notes 82-84 and accompanying text. The reasonable doubt rule apparently represented a concession to law enforcement, for its predecessor at common law demanded acquittal if there were any doubt, reasonable or otherwise. *See* Morano, *A Reexamination of the Development of the Reasonable Doubt Rule,* 55 B.U.L. REV. 507, 510-11 (1975).

131. *See* 1 A. AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 108, at 1-116 (4th ed. 1984).

132. *Id.,* § 390, at 1-525 to -527.

133. *See, e.g., How Public Defenders Deal with the Pressure of the Crowded Courts,* Wall St. J., July 5, 1985, at 1, col. 1.

134. *See, e.g.,* Terry v. Ohio, 392 U.S. 1, 14 (1968).

135. *See* B. FORST, J. LUCIANOVIC & S. COX, WHAT HAPPENS AFTER ARREST? A COURT PERSPECTIVE OF POLICE OPERATIONS IN THE DISTRICT OF COLUMBIA 64-66 (1977). One study compared samples of police reports from two jurisdictions with a list of questions proposed by an experienced prosecutor. The questions were those the prosecutor thought the police investigation should address to *facilitate* the prosecution. In one jurisdiction, each of the 39 questions was on the average covered in only 45% of the cases sampled; in the other, the figure was as low as 26%. *See* NAT'L INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, THE CRIMINAL INVESTIGATION PROCESS 20-22 (1978).

ated by arrest are dismissed, largely for evidentiary reasons.[136] To the extent police conduct an investigation, it is unlikely to focus on exculpatory details. Accordingly, even generous provisions for defense discovery would do little to bring exculpatory evidence to light.

Even if our system provided better investigation and produced more evidence, defendants would still need the protection of the reasonable doubt rule because the nature of a criminal prosecution imposes on the defense an important handicap not borne by the prosecution. The charge itself, with its enormous consequences, imposes on the defendant a powerful incentive to offer exculpatory testimony. Unlike a civil case, in which the plaintiff's gain is the defendant's loss and vice versa, the defendant who offers evidence in a criminal case does so with the unilateral taint of an obvious personal interest in the outcome of the dispute.[137] How many accused rapists, for example, would hesitate to offer perjured testimony about consent if they thought it might help them avoid conviction? Because of this incentive, the trier of fact is likely to discount any exculpatory testimony given by the accused.

In a criminal case, the unilateral consequences of a conviction therefore undercut the credibility of the defendant's testimony. The credibility problem explains why access to evidence cannot justify shifting the burden of proof to a criminal defendant. Although the privilege against self-incrimination or the risk of impeachment with prejudicial prior convictions also distinguish criminal from civil trials, the credibility problem alone provides sufficient reason to reject the access-to-evidence analysis in criminal cases. The defendant has access to evidence about intent, for example, but is the jury likely to believe it? The classic access-to-evidence scenario, in which the defendant is the sole surviving witness to a fatal encounter or the only one who can offer evidence of his mental state, is precisely the situation in which the preponderance standard poses the greatest risk of convicting the innocent.

The reasonable doubt standard also provides an important safeguard in the majority of cases that do not go to trial. The terms of plea agreements reflect the strength of the opposing cases.[138] An individual accused of homicide who in fact killed in reasonable self-defense is far more likely to plead to a manslaughter conviction if the government need not disprove the affirmative defense beyond a reasonable doubt. The reasonable doubt rule therefore contributes to preventing unjust convictions

136. *See* H. ZEISEL, THE LIMITS OF LAW ENFORCEMENT 19-21, 25-26 (1982).

137. *Cf.* A. AMSTERDAM, *supra* note 131, § 280, at 1-402 ("That a criminal defendant is presumed to be innocent until proved guilty is a canard. In reality, most criminal defendants must prove their innocence . . . .").

138. *See, e.g.*, Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 60 (1968) ("The universal rule is that the sentence differential between guilty-plea and trial defendants increases in direct proportion to the likelihood of acquittal.").

by reducing the pressures to plead to an unfounded but plausible charge.[139] Whether or not a criminal charge results in trial, the reasonable doubt rule provides an important procedural safeguard for the legality principle.

4. Impact of the Reasonable Doubt Rule on Federalism

While protecting the legality principle, the reasonable doubt standard would not infringe on the constitutional value of federalism. The federal structure established by the Constitution has the object of preventing tyranny by decentralizing political power.[140] Vigorously enforcing individual constitutional rights does not conflict with that purpose. As Justice Goldberg observed, any practices that are recognized as beyond state power because of due process requirements are necessarily beyond federal power as well.[141] Thus, requiring state courts to apply the reasonable doubt standard would not—indeed, has not—enhanced federal power at the expense of the states.

This is not to say that federalism imposes no limits on federal review of state convictions. Trial de novo in federal courts would seriously endanger the constitutional structure. The fourteenth amendment implicitly provides that the states retain primary authority to deprive individuals of life or liberty for violations of the criminal law. Reserving to the states the responsibility to define, prosecute, and adjudicate general criminal liability serves as an important hedge against the federal power a national ministry of justice would represent. While it may now be possible to visualize federal adjudication of state law prosecutions, such a vision is alien to the constitutional scheme of autonomous states.[142] Since such a scheme would likely make only a marginal or illusory contribution to enforcing the due process clause, principled constitutional interpretation cannot justify any such radical extension of federal judicial power.

The Court struck a balance between requiring the reasonable doubt safeguard at state trials and trial de novo in federal court in *Jackson v.*

139. *See* Christie & Pye, *supra* note 3, at 938-39.

140. *See* THE FEDERALIST No. 10 (J. Madison).

141. Pointer v. Texas, 380 U.S. 400, 414 (1965) (Goldberg, J., concurring) ("[T]o deny to the States the power to impair a fundamental constitutional right is not to increase federal power, but, rather, to limit the power of both federal and state governments in favor of safeguarding the fundamental rights and liberties of the individual. . . . [T]his promotes rather than undermines the basic policy of avoiding excess concentration of power in government, federal or state, which underlies our concepts of federalism.").

142. *See* Malloy v. Hogan, 378 U.S. 1, 28 (1965) (Harlan, J., dissenting) ("If the power of the States to deal with local crime is unduly restricted, the likely consequence is a shift of responsibility in this area to the Federal Government, with its vastly greater resources. Such a shift, if it occurs, may in the end serve to weaken the very liberties which the Fourteenth Amendment safeguards by bringing us closer to the monolithic society which our federalism rejects.").

Virginia,[143] requiring limited federal court review of the sufficiency of the evidence in state criminal cases. The Court has recognized that some scrutiny of the facts in particular cases is ultimately necessary to prevent states from resorting to show trials to circumvent the legality principle. *Mooney v. Holohan*[144] and *Thompson v. City of Louisville*[145] illustrate this concern. Under the *Jackson* standard, moreover, federal court review of state convictions is as deferential as their review of federal convictions. Federal courts are scarcely in the habit of reversing state convictions out of mere whim or caprice; it probably takes a case close to the *Thompson* "no evidence" standard before reversal under *Jackson* becomes appropriate. Nevertheless, *Jackson* does intrude on state authority more seriously than *In re Winship,*[146] while doing less to enforce the legality principle. In my view, *Jackson* is defensible, but scarcely compelled by the argument set out here.

C. *The Scope of the Legality Principle: Legislative and Judicial Grading Decisions*

The standards announced in *Winship* and *Jackson* apply to each of the elements of a charged offense, even when the defendant is guilty of a lesser offense if the government fails to prove a particular element.[147] Judicial sentencing decisions, however, are generally subject to far less rigorous due process safeguards. Under *Williams v. New York,*[148] constitutional rules governing proof of incriminating facts do not apply to the sentencing stage.

Positivists argue that legislative grading decisions about offenses and potential penalties are indistinguishable from judicial grading decisions of individual sentences.[149] Since both legislative and judicial grading decisions matter because they affect actual sentences, these commentators contend that similar burdens of proof should govern the determination of lesser-included offenses and sentences.

If the constitutional reasonable doubt requirement is grounded on the legality principle, however, this argument loses most of its force. First, equating judicial sentencing discretion with legislative grading of offenses justifies neither the current judicial approach nor that of the positivist commentators. Such an equation would restrict the application of

143. 443 U.S. 307 (1979); *see supra* text accompanying note 112.

144. 294 U.S. 103 (1935); *see supra* text accompanying notes 106-07.

145. 362 U.S. 199 (1960); *see supra* text accompanying notes 108-10.

146. 397 U.S. 358 (1970); *see supra* text accompanying notes 16-27.

147. *See* Jackson v. Virginia, 443 U.S. 307, 313 (1979) (notwithstanding sufficiency of evidence to establish second degree murder, issue remained whether state had proved premeditation element of first degree murder beyond a reasonable doubt).

148. 337 U.S. 241 (1949).

149. *See, e.g.,* Jeffries & Stephan, *supra* note 3, at 1352-53 & n.79.

the legality principle to facts that establish the existence, as opposed to the seriousness, of a criminal violation. Once the state established that an offense had been committed, the seriousness of the offense could be measured free from constitutional restrictions. While the government would have to establish intent and the absence of self-defense beyond a reasonable doubt, it could prove facts establishing the grade of the offense, such as provocation or the use of a weapon, by a mere preponderance of the evidence. Whether the fact at issue related to a statutory offense or defense would make no difference. The analogy to sentencing holds up only if the defendant is properly convicted of some crime.

Second, the positivist's equation of legislative and judicial grading incorrectly assumes that the legality principle's function is complete when the government justifies *some* degree of punishment for the accused—that is, when a violation of law has been proved. The legality principle, however, limits unnecessary punishment with respect to the potential seriousness, as well as the existence, of criminal liability. Prior to conviction, the accused enjoys a constitutional liberty interest terminable only by compliance with constitutional standards—including the reasonable doubt rule. A valid conviction extinguishes that interest, but only as against the punishment prescribed. Within the prescribed range of penalties the convict has no constitutional objection founded on the legality principle.[150]

The distinction between legislative and judicial grading decisions transcends constitutional formalism. Fundamental principles of criminal law support setting the boundaries of the constitutional liberty interest according to legislative grading decisions. These principles include the basic purposes of institutional punishment—what H.L.A. Hart has called the "general justifying aim" of punishment.[151] The basic framework of punishment also includes certain side constraints on the pursuit of the general justifying aim. These constraints, which Hart calls distributive principles of punishment, preclude certain punishments even though they might further the general justifying aim.[152] Terrorism, for example, might be countered by executing hostages taken from among the population on whose behalf the terrorism is committed. Such measures, however, would inflict a significant amount of pain, not only on those punished but also on all whose security is threatened and who cannot guarantee their safety even by obeying the law. This pain, moreover, falls on individuals who have not engaged in immoral conduct or

150. A convict can make a legality-based objection if the judge enhances the sentence because of the convict's lawful condnct. *See* North Carolina v. Pearce, 395 U.S. 711 (1969) (after conviction on retrial, trial judge may impose a higher sentence if the higher sentence is within the statutorily defined range and is not designed to punish the defendant for exercising a lawful right to appeal).

151. H.L.A. HART, *supra* note 100, at 8-11.

152. *Id.* at 11-13.

breached an obligation to the state. Thus, based either on utilitarian or deontological ethical premises, the contribution to the general justifying aim made by punishing the innocent does not overcome the contrary distributive principle limiting punishment to the legally and factually guilty.[153]

Recognition that the liberty protected by the due process clause includes the freedom from punishment except for conduct violative of law accords with these basic principles. The difficulty is explaining the difference between a twenty-year sentence that is the judicially imposed maximum for what a jury finds was manslaughter and a twenty-year sentence that is the judicially imposed minimum for what the jury finds was murder. The obvious formal difference is legality itself; to punish as a murderer a defendant actually guilty only of manslaughter contravenes the legislative accommodation of the general justifying aim and distributive principles. Does this formal difference correspond to any articulable value judgment?

The formal difference, I believe, corresponds precisely with the primary value served by the legality principle—the minimization of needless punishment. Sentencing discretion runs the very risks that the legality principle combats. The nearly unreviewable discretion of sentencing judges may be exercised for malicious reasons or for no reason at all. But this risk is largely unavoidable. Not only must any system rely to some extent on intelligent discretion to accommodate contending principles, but, in a given case, reasonable people will differ over what those principles require.[154] The common sense of the system is that the convict has qualified himself as a fit object of punishment within the discretionary range, and may not complain that he might have fared better before a different judge.

In contrast, legislative grading systems specify ranges of penalties from which judges may not depart. The precept that the punishment should fit the crime is surely a vaguer imperative than that some crime must precede any punishment.[155] The relative weakness of the proportionality claim helps explain why within statutory ranges judges have discretion to consider proportionality along with instrumental aspects of punishment[156] and why eighth amendment proportionality review is so

153. *See supra* notes 98-103 and accompanying text.

154. *See, e.g.*, United States v. Bergman, 416 F. Supp. 496 (S.D.N.Y. 1976) (64-year old rabbi should serve four month prison term because sentencing decision encompasses general deterrence and respect for gravity of offense as well as rehabilitation and specific deterrence).

155. *Cf.* H.L.A. HART, *supra* note 100, at 25 (discussing vagueness of proportionality principle).

156. On using instrumental considerations in sentencing, see *id.* at 24-25 (sudden increase in sentences for a particular, rapidly increasing offense are unfair to those made examples of, but may nonetheless be justifiable); *see, e.g., Bergman*, 416 F. Supp. at 501-02.

deferential to legislative judgments.[157] But when the legislature itself has concluded that punishment above the maximum for the lesser-included offense would be disproportionate, the convict's claim is stronger. Those who act in a certain way deserve punishment, and up to the maximum there might be social advantage in punishing some of them. Beyond the maximum, however, the legislature cannot foresee any community advantage that might justify more severe penalties.

The constitutional liberty interest in freedom from unauthorized punishment thus requires not only prospective definition of criminal conduct but also prospective definition of the potential punishment. Just as the state may not imprison an individual for, say, possession of a handgun unless some state law prohibits handgun possession, so too the state may not sentence the defendant to ten years in prison for handgun possession if the law provides a maximum sentence of one year for that offense. The prescription made in advance has the imprimatur of neutrality; to depart from it once the convict's identity is known risks punishing the defendant for something she didn't do.

The Supreme Court has recognized the legality principle's place in limiting the scope, as well as the existence, of criminal liability. In *Specht v. Patterson,*[158] the Court struck down a Colorado statute that permitted the sentencing court, upon a conviction for a predicate sex offense, to classify the defendant as a sexual psychopath and impose an indeterminate sentence of from one day to life in prison.[159] In effect, the statute created a separate offense—liability to a distinct range of penalties upon a finding of a specified fact—and permitted adjudication of the separate charge without the procedural safeguards of a criminal trial.[160]

The federal courts, however, have retreated from the principle, if not the explicit holding, of *Specht.* The circuit courts upheld the federal dangerous special offender statute (repealed in 1985) under which the trial court could increase the sentence of a "dangerous special offender" to a maximum of twenty-five years. Classification as a dangerous special offender was made by the trial court after a sentencing hearing governed

157. *Cf.* Rummel v. Estelle, 445 U.S. 263, 304-06 (1980) (Powell, J., dissenting) (Fourth Circuit's application of the proportionality analysis, eventually adopted by the Court in Solem v. Helm, 463 U.S. 277 (1983), resulted in reversal of only three sentences in ten years).

158. 386 U.S. 605 (1967).

159. *Id.* at 607-08.

160. The majority opinion stated:

> The Sex Offenders Act does not make the commission of a specified crime the basis for sentencing. It makes one conviction the basis for commencing another proceeding under another Act to determine whether a person constitutes a threat of bodily harm to the public, or is an habitual offender and mentally ill. That is a new finding of fact that was not an ingredient of the offense charged.

Id. at 608 (citation omitted).

by a "preponderance of the information" standard.[161]

Relying in part on this trend in the circuit courts, the Supreme Court in *McMillan v. Pennsylvania*[162] upheld a Pennsylvania statute that creates a minimum sentence for certain predicate felonies upon a showing, by a preponderance of the evidence adduced at trial and at the sentencing hearing, that the felony was accompanied by the visible possession of a firearm. The statute does not alter the maximum penalty for any of the predicate felonies, but, upon the required showing, it mandates a five-year minimum sentence, even if a lower minimum exists for the felony proved at trial. Writing for the Court, Justice Rehnquist characterized *Specht* as applying only when the statute might confront the defendant with a " 'radically different situation' from the usual sentencing proceeding."[163] Furthermore, applying *Patterson,* the Court found that Pennsylvania's use of the preponderance standard was constitutional because the Pennsylvania legislature had expressly declined to denominate the visible possession of a firearm as an element of the offense or to increase the maximum penalty for the predicate felony because of such possession.[164]

The *McMillan* analysis deprives *Specht* and *Winship* of most of their vitality. If an "element of the offense" does not denote a fact that defines

161. The special offender statute, 18 U.S.C. § 3575 (1982), was repealed in 1985. Pub. L. No. 98-473, tit. II, ch. II, § 212(a)(2), 98 Stat. 1987 (1984). For cases upholding the statute, see, e.g., United States v. Schell, 692 F.2d 672, 676-79 (10th Cir. 1982); United States v. Bowdach, 561 F.2d 1160, 1172-75 (5th Cir. 1977); United States v. Stewart, 531 F.2d 326, 332-35 (6th Cir.), *cert. denied,* 426 U.S. 922 (1976). *But see* United States v. Duardi, 384 F. Supp. 874, 882-83 (W.D. Mo. 1974), *aff'd on other grounds,* 529 F.2d 123 (8th Cir. 1975). *Specht* antedates *Winship,* and the federal courts have limited the procedural protections guaranteed by *Specht* to those constitutionally established at the time of that opinion. *Cf. Schell,* 692 F.2d at 677. The statute nonetheless created a separate offense, just as in *Specht,* for once the defendant was shown to be a dangerous special offender (defined in section 3575 (e) & (f) as a person who has committed two prior offenses of specified types and who requires additional confinement for the protection of the public), the maximum sentence for any of the predicate felonies could be increased to as much as twenty-five years. Whether the trial court actually increased the sentence depended on the sentencing judge's assessment of the defendant's dangerousness. Sentencing judges routinely make precisely this sort of determination but usually within a range predetermined by the legislature. To my mind, the government should have been required to prove the predicate felonies and dangerous proclivities beyond a reasonable doubt. Otherwise, the defendant would be exposed to a range of liability far in excess of that prescribed prior to the conduct. As Judge McKay noted in a thoughtful opinion:

> A statute that imposes an additional sentence through a separate post-conviction proceeding results in a reclassification of the defendant for the purpose of enhanced punishment. This reclassification is essentially identical to an additional criminal conviction. Consequently, the defendant's liberty interest that survived the original conviction is entitled to proceedural protections, similar to those provided at trial, in the post-conviction proceeding.

Schell, 692 F.2d at 682 n.1 (McKay, J., concurring and dissenting) (citing *Specht,* 386 U.S. at 608-10).

162. 106 S. Ct. 2411, 2420 (1986).

163. *Id.* at 2418.

164. *Id.* at 2416-18.

a range of judicial sentencing discretion, what does it mean? Both the federal special dangerous offender statute and the Pennsylvania statute upheld in *McMillan* created the same risk of unlawful punishment as any other circumvention of the reasonable doubt standard. The felon who did not in fact visibly possess a firearm or the defendant who is not in fact a dangerous recidivist is likely to be punished more severely than is justified by the prospective assessment of community purposes.

McMillan, decided by a bare majority of the Court, accordingly deserves serious reconsideration. The Court's analysis is inconsistent with any fair reading of *Specht* and is surely not essential to rational sentencing procedures. State courts, for example, have uniformly required proof beyond a reasonable doubt of prior convictions where such evidence triggers a distinct range of judicial sentencing discretion.[165] In upholding the state statutes, the Supreme Court has insisted on the defendant's right to a trial of the elements of the separate offense created by recidivist legislation.[166] This is the only approach consistent with *Specht* and *Winship*. The *McMillan* Court failed to expressly consider the legality principle's relevance to legislative grading decisions. Had the Court considered the issue, it might have recognized the fundamental inconsistency between the requirement of a formal trial of the elements of a charged offense and deference to legislative nominalism regarding the elements of the charge.

The nature of the right against unlawful punishment is thus essentially the same in the context of legislative grading decisions as in the context of defining elements of an offense. Punishment beyond the legislative maximum was thought by the community to make no foreseeable contribution to the general aims of punishment sufficient to justify the incremental suffering of those convicted. The legislative maximum

165. *See* Annotation, *Evidence of Identity for Purposes of Statute as to Enhanced Punishment in Case of Prior Conviction,* 11 A.L.R.2d 870, 879 (1950). For representative cases, see *In re* Yurko, 10 Cal. 3d 857, 519 P.2d 561, 112 Cal. Rptr. 513 (1974); People v. Casey, 399 Ill. 374, 77 N.E.2d 812 (1948); People v. Reese, 258 N.Y. 89, 179 N.E. 305 (1932) (superseded by statute). The Seventh Circuit suggested that the federal dangerous special offender statute may have been constitutionally infirm because prior convictions could be proved by a preponderance. United States v. Neary, 552 F.2d 1184, 1193-94 (7th Cir.), *cert. denied,* 434 U.S. 864 (1977). The circuit court contrasted this infirmity with the finding of dangerousness. The court found the preponderance standard adequate for the traditional sentencing determination of dangerousness because the standard provides the accused with substantially more protection than *Williams* requires. *Id.* (citing Williams v. New York, 337 U.S. 241 (1944)); *see supra* text accompanying note 148. This analysis is especially tempting because the statute defined a convict as "dangerous" whenever an enhanced sentence was required for the protection of the public—that is, when the sentencing judge, in his discretion, so concluded. 18 U.S.C. § 3575(f). Nonetheless, under the statute, prior convictions themselves did not justify a higher maximum. As indicated in the text, applying the preponderance standard to the dangerousness element risked punishing the nondangerous recidivist with gratuitous severity.

166. *See* Graham v. West Virginia, 224 U.S. 616, 625 (1912). Indeed, in Spencer v. Texas, 385 U.S. 554 (1967), the Court upheld a procedure that required the defendant to try the existence of prior convictions to the jury.

creates the same presumption that the absence of a criminal provision creates—that punishment not authorized in advance is gratuitous or oppressive. In both situations, the legality principle places a shield of neutrality between the accused and the community. In the sentencing context, however, the legislature has provided, with prospective neutrality, that in certain circumstances any punishment within the statutory range may be justified by its contribution to the general justifying aim of punishment.

Finally, if, as some suggest, the constitutional rules governing trial and sentencing are hopelessly in conflict,[167] the discrepancy need not be resolved against the accused. Consistency could be achieved by requiring the reasonable doubt standard with respect to issues of fact at the sentencing stage. This is not a terribly radical suggestion. A similar rule is apparently applied in certain Commonwealth jurisdictions.[168] The proposal is also consistent with a Supreme Court trend toward greater scrutiny of the sentencing process.[169] The Court has never suggested that trials on issues of lesser included offenses could be conducted under the free-wheeling sentencing standards allowed in *Williams*.[170] It follows that inconsistency will remain until due process makes further inroads on the sentencing process. Pending the culmination of that trend, there is no reason to impose arbitrary restrictions on the application of the reasonable doubt test at the trial stage.

III
POINTS OF DEPARTURE REVISITED

Part II explained why due process prohibits punishment not authorized by the state's positive law. The reasonable doubt rule provides a critical safeguard against the deprivation of this federal right. This Part

167. *See, e.g.*, Note, *The Constitutionality of Statutes Permitting Increased Sentences for Habitual or Dangerous Criminals*, 89 HARV. L. REV. 356, 385-86 (1975).

168. *See, e.g.*, R. v. Gardiner, 140 D.L.R.3d 612 (Can. 1983) (Supreme Court of Canada held that sentencing constitutes a part of the trial process and therefore the Crown bears the burden to prove all disputed facts); *see also* Wasik, *Rules of Evidence in the Sentencing Process*, 38 CURRENT LEGAL PROBS. 187, 194-200 (1985).

169. *See* Gardner v. Florida, 430 U.S. 349 (1977) (plurality opinion) (due process violated by death sentence imposed on the basis of information that defendant did not have opportunity to refute or explain); Weissman, *Sentencing Due Process: Evolving Constitutional Principles*, 18 WAKE FOREST L. REV. 523 (1982).

170. In rejecting the claim that the elements test would permit the states to recast traditional criteria of liability in the form of mitigating circumstances to be considered at sentencing, the *Patterson* majority stated that "there are obviously constitutional limits beyond which the States may not go in this regard." Patterson v. New York, 432 U.S. 197, 210 (1977). This appears to indicate that the *Williams* approach may not be extended to the trial of legislative grading determinations, and that the inconsistency between the procedures required at sentencing and those required at trial may be resolved only by gradually increasing the scrutiny of the sentencing process.

reexamines the case law and the commentary from the standpoint of the legality principle.

The risk of unauthorized punishment is no less urgent in the context of affirmative defenses than in the context of proving elements of the offense. Neither history nor the need to facilitate legislative reform can justify altering the constitutional protection against unauthorized punishment according to legislative classifications. The positivist commentators have rightly condemned the Court for failing to provide a neutral principle that justifies requiring the reasonable doubt standard sometimes, but not always. But the positivists have also misunderstood the nature of the constitutional right at issue. As a result, they have urged an approach that would logically entail abandoning constitutional restrictions on state criminal procedure with respect to a very large proportion of the issues raised in typical litigation. Yet ironically, the positivists have failed to offer a coherent justification for the reasonable doubt standard. Neither the positivists nor other commentators have grounded the reasonable doubt rule on a convincing constitutional warrant.

Basing the reasonable doubt rule on the legality principle therefore offers important advantages over the positions thus far advanced in the case law and the legal literature. I first consider the judicial distinction and then turn to the positivist commentary.

A. The Judicial Distinction Between Elements and Defenses

Since legislative classification of a particular factual issue as an element or as a defense is alterable by the legislature, reliance on the distinction for allocating burdens of proof is utterly arbitrary. The irrationality of this approach is evident in Justice Rehnquist's contention that, since the only difference between elements and defenses is the constitutionality of shifting the burden of proof, legislative intention to shift the burden of proof conclusively evidences an issue's status as an affirmative defense.[171] Moreover, even if legislative inertia is supposed, there is no discernible distinction between elements and defenses. Some defenses are hard to disprove, but some elements are just as hard to prove.[172] Some defenses

171. *See* McElroy v. Holloway, 451 U.S. 1028, 1028-29 (1981) (Rehnquist, J., dissenting from denial of certiorari).

172. Insanity is frequently mentioned in this regard, with some support from Addington v. Texas, 441 U.S. 418 (1979) (standard appropriate for civil commitment is clear and convincing evidence of danger to self or others). One reason for the *Addington* result is that "[g]iven the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous." *Id.* at 429. But this is surely just as true of the element of intent in cases in which intent and insanity legally exclude each other. *See supra* note 47. Indeed the only likely explanation for treating insanity differently from other exculpatory conditions with respect to the government's burden of proof is the notion that even the patently insane deserve to be punished if they intended their crimes. Since the probable consequence of an insanity aequittal is permanent commitment to a

are morally ambiguous, but so too are certain elements.[173]

The only way to justify the distinction is to assign constitutional significance to legislative classification. This might be done by one of two arguments. The first, lurking in Justice Powell's *Patterson* dissent, takes the historical classification of issues as elements or defenses as controlling the constitutional question.[174] The second, on which the *Patterson* majority explicitly relies, asserts that progressive criminal law reform depends on legislative ability to shift the burden of proof.[175] Neither argument is persuasive.

1. History and Fundamental Fairness

The reasonable doubt rule has a long history in our law, but the standard has not always been applied to affirmative defenses. At common law, the defense had the burden of proving defensive matter to the satisfaction of the jury.[176] This view prevailed in the United States until the end of the nineteenth century, when the Supreme Court's decision in *Davis v. United States*[177] initiated a major movement toward imposing on the government the burden of persuasion, beyond a reasonable doubt, for affirmative defenses whenever the defendant's evidence raised a question for the jury.[178] Thus, it is arguable that deference to tradition in inter-

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mental hospital, see Jones v. United States, 463 U.S. 354, 381 n.16 (1983) (Brennan, J., dissenting), there is far less to fear from an erroneous insanity acquittal than from an erroneous acquittal based on entrapment or absence of intent. The *bete noir* for the foes of the insanity defense is the Hinckley case, which indeed led to the passage of a federal statute shifting the burden of proof to the defense on this issue. *See* 18 U.S.C. § 20 (Supp. III 1985). Yet few would disagree with the proposition that Hinckley was insane at the time of his attack on the President. Apparently, the point of shifting the burden of proof is to reduce arbitrarily the number of snccessful assertions of the defense. If this rationale is correct, the defense should be abolished, not rationed according to the defendant's ability to hire psychiatrists and lawyers. *Cf.* N. MORRIS, MADNESS AND THE CRIMINAL LAW 53-76 (1985) (proposing abolition of special defense of insanity, returning to common law principles of actus reus and mens rea). On the other hand, since the difference between conviction and commitment is relatively slight, an erroneons rejection of an insanity claim less significantly implicates the core concern of the legality principle—minimizing useless punishment—than does the erroneous rejeetion of other defenses. If the Court believes an exception for insanity is indispensable, this distinction might rationalize such an exception. In any event, if certain issues, such as sanity, are so clearly distinct from the typical issue of historical fact that an exception to the government's burden must be recognized, the elements test remains indefensible, for it looks to legislative classification rather than to susceptibility to proof in determining the certainty required for conviction.

173. Withdrawal from conspiracy or attempt is typically an affirmative defeuse, yet the overt act element of conspiracy, and the dangerous proximity element of attempt, are typically classified as elements. These elements and defenses govern the same ambiguous issue of cnlpability, namely whether unfulfilled criminal intent deserves to be puuished.

174. *See* 432 U.S. at 226-30 (Powell, J., dissenting); *see also supra* text accompanying notes 63-64.

175. *See* 432 U.S. at 209-11 & nn.11-13; *see also supra* notes 57-62 and accompanying text.

176. *See* Fletcher, *supra* note 4, at 902-03.

177. 160 U.S. 469 (1895) (federal jury cannot convict where it has a reasonable doubt whether defendant was mentally competent at the time of the killing).

178. *See* Fletcher, *supra* note 4, at 917-18; *see also Patterson*, 432 U.S. at 202-03:

preting the due process clause could justify a distinction between elements and defenses.

Nevertheless, the constitutional values served by the reasonable doubt rule are implicated equally whether the legislature has classified a fact as an element or as a defense. Whatever else it may mean, due process of law surely means that individuals whose conduct has not violated the law may not be subjected to criminal punishment. This value judgment speaks to reality and not to procedural appearances. In terms of substantive legality, one who kills on reasonable provocation is not guilty of murder, whether state law deems provocation a defense or malice aforethought an element. Similarly, one who kills in the reasonable belief that lethal violence is immediately necessary to save her own life has committed no crime, whether self-defense constitutes an affirmative defense or negates the element of unlawfulness.[179]

Extending the reasonable doubt rule to affirmative defenses would therefore not involve an assertion of judicial values not expressed in the due process clause itself. Extending the rule would only impose a procedural safeguard to protect a constitutionally recognized value. The Court has often, and justifiably, extended contemporary procedures to protect constitutional values in the area of criminal justice.

Two well-known examples suffice to illustrate this extension process. In *Katz v. United States*,[180] the Court held that electronic surveillance that exposes private communications may yield admissible evidence only if the techniques conform with fourth amendment standards. Wiretaps and bugs were unknown to the founders; the framers, therefore, could not have intended to subject them to fourth amendment standards. The Court, however, did not depart from a principled understanding of the fourth amendment in its holding. The Court did no more than extend a familiar and accepted procedure to protect the central value judgment of the amendment.[181]

Davis . . . had wide impact on the practice in the federal courts with respect to the burden of proving various affirmative defenses, and the prosecution in a majority of jurisdictions in this country sooner or later came to shoulder the burden of proving the sanity of the accused and of disproving the facts constituting other affirmative defenses, including provocation.

179. That certain crimes depend on elements that amount to moral judgments, in addition to historical facts, is immaterial. The inclusion of such elements—recklessness, for example—expresses the judgment that absent a jury's judgment of unreasonableness, punishment is unjustified. The risk of gratuitous punishment is, as with predictions of dangerousness, at least as high in this situation as it is when guilt hinges on historical facts. Of course, defining guilt solely in terms of the jury's moral sense is a different matter entirely. *See* Giaecio v. Pennsylvania, 382 U.S. 399 (1966) (statutes that allow a jury to impose penalties on the basis of the jury's moral sense of the defendant's conduct are unconstitutional).

180. 389 U.S. 347 (1967).

181. *See* Monaghan, *supra* note 113, at 22-23.

Similarly, in *Miranda v. Arizona*[182] the Court created a set of procedural protections against uncounseled or involuntary self-incrimination. The *Miranda* rules do result in the exclusion of some voluntary confessions, but without such rules, many confessions might be coerced in the confines of the station house.[183]

The Court has not disavowed either *Katz* or *Miranda*; both decisions have become accepted constitutional precedents.[184] Like the extension of the reasonable doubt rule to affirmative defenses, both represent legitimate exercises in constitutional interpretation. In each case the Court recognized the necessity of appropriate procedural safeguards to honor an unambiguous constitutional value judgment.

The argument for subordinating formal historical concerns to effective enforcement of the substantive constitutional values is not limited to cases involving police practices. The Court has rejected traditional practices when necessary to effectuate the presumption of innocence. The retroactive application of *Winship* and *Wilbur* surely evinced the judgment that traditional practice must yield to that basic safeguard against unjust conviction.[185] Traditional practice, moreover, would permit the government to rely on presumptions regarding elements, as well as to shift the burden of proof with respect to defenses—yet the Court continues to scrutinize such presumptions on constitutional grounds. In *Sandstrom v. Montana,*[186] for example, the Court held that an instruction that the law presumes that people intend the ordinary consequences of their voluntary acts—a presumption with an impeccable common-law pedigree[187]—ran afoul of *Winship*. The Court recently reaffirmed the

182. 384 U.S. 436 (1966).

183. *See* Schulhofer, *supra* note 113, at 956.

184. On the vitality of *Katz,* see, e.g., United States v. Karo, 468 U.S. 705 (1984) (electronic beeper concealed in a metal drum containing chemicals constitutes a search when it informs government agents that the drum remains inside suspect's residence; effect is the same as physical search of premises). Although the Court has refused to expand the scope of *Miranda,* the procedures established in that case continue to be required in criminal investigations. *See* Colorado v. Connelly, 107 S. Ct. 515, 523 (1986); *see also* New York v. Quarles, 467 U.S. 649, 660 (1984) (O'Connor, J., concurring) (expressing unwillingness to overrule or extend *Miranda*); Rhode Island v. Innis, 446 U.S. 291, 305 (1980) (Burger, C.J., concurring) (same).

185. *See* Hankerson v. North Carolina, 432 U.S. 233 (1977) (applying *Wilbur* retroactively); Ivan V. v. City of New York, 407 U.S. 203 (1972) (applying *Winship* retroactively). In both cases, the Court treated the reasonable doubt standard as a device for preventing (or "reducing the number of") unjust convictions. The standard was therefore subject to retroactive application regardless of the impact on judicial administration or the reasonableness of state reliance on previous doctrine. *See Hankerson,* 432 U.S. at 241-44. These decisions provide unambiguous authority for the proposition that the legality principle animates the constitutional status of the reasonable doubt rule, and trumps prevailing state practice in cases of conflict.

186. 442 U.S. 510 (1979).

187. *See, e.g.,* R. v. Sheppard, 168 Eng. Rep. 742 (K.B. 1810) (forging a stock receipt is sufficient evidence of intent to defraud).

Sandstrom holding.[188]

Due regard for the role of history thus does not compel a distinction between elements and defenses. The Court has, in parallel contexts, found a contemporary need for new procedures to safeguard undisputed constitutional rights, and it has followed this practice with respect to elements in the context of the *Winship* rule itself.

Finally, even if history is taken both as countenancing burden-shifting and as determining the constitutional inquiry, the current distinction between elements and defenses remains arbitrary. Classification as an element is, according to the *Patterson* and *Martin* majorities, terminable at will by the legislature. Justice Powell's *Patterson* dissent offers the only reasonable basis for historically distinguishing between elements and defenses. That basis is history itself, not latter-day legislative classifications that conflict rather than conform with the Anglo-American legal tradition.

2. *The Need for Legislative Compromise*

Justice White's opinion for the Court in *Patterson* places considerable emphasis on the risk that imposing the reasonable doubt rule might stifle the process of legislative compromise.[189] New York had recently recodified its criminal law, borrowing heavily from the much-respected ALI Model Penal Code. In many instances, the legislature had broadened the statutory grounds of exculpation or mitigation, but also had shifted the burden of proof to the defense with respect to these grounds.[190] The Court reasoned that unless the legislature had the ability to compromise substance and procedure, important advances in criminal law would become politically impractical. Principled application of the reasonable doubt standard appears to conflict with encouraging the liberal reform of the substantive criminal law.

This appeal to the need for compromise should be rejected for three important reasons. First, constitutional interpretation should not be determined by the Court's perception of desirable legislative policy. Second, the value of the legislative compromise is problematic. Third, the distinction between elements and defenses is not necessary to enable progressive compromises.

First and fundamentally, judicial reaction to the wisdom of legislative choices has no legitimate place in constitutional interpretation. Nothing in the due process clause requires or forbids particular defini-

188. *See* Francis v. Franklin, 471 U.S. 307 (1985).

189. *See* Patterson v. New York, 432 U.S. 197, 207-11 (1977), especially nn.10 & 13.

190. *See* Jeffries & Stephan, *supra* note 3, at 1398-1407 (identifying states, including New York, that shift the burden of persuasion on particular issues to the defense); *see also supra* text accompanying notes 55-56.

tions of provocation or self-defense. Yet the *Patterson* majority suggests that because the Court prefers one constitutional legislative option over another, an unambiguous constitutional value—namely the legality principle—may be put at risk. The Court's critics rightly have objected to this sort of free-wheeling interest balancing. As Professor Allen astutely characterizes the appeal to compromise: "Is not the real point, in other words, that affirmative defenses are unconstitutional but that such a conclusion may result in an unfortunate legislative choice, and thus the better tack is to permit an unconstitutional choice as an expedient?"[191] Put another way, principled interpretation necessarily hazards enforcement of a constitutional rule that is unwise, and the Court has no business taking one path because it would have written a different amendment.

Certainly the Court would refuse to entertain the argument from compromise in other contexts. The regulation of the death penalty under the eighth amendment precludes a compromise that would abolish felony murder but provide a general capital penalty for premeditated murder. The fourth amendment exclusionary rule prevents the legislature from decriminalizing marijuana possession in "exchange" for allowing the use of tainted evidence in major narcotics cases.

One arguable distinction is that a burden-shifting device sometimes offers a more obvious compromise than a substantive concession on some other issue. But allowing otherwise unconstitutional legislation because of its obviousness as a bargaining chip would convert constitutional interpretation into hair splitting, and tawdry hair splitting at that. The Court would need to ask whether a particular procedural safeguard is so clearly related to an area of potential progress that the legislature would certainly perceive the connection. This type of inquiry would make the Court the judge of legislative progress and make the Court's perception of the legislature's acuity the "neutral principle" separating defendants invoking one procedural safeguard from those invoking another.

Moreover, the elimination of other constitutional restrictions on state power would offer far more obvious counections to progressive compromises. If the Court were to disincorporate the privilege against self-incrimination from the due process clause of the fourteenth amendment, subjective definitions of explicable provocation, reasonable self-defense, and entrapment, or the abolition of strict criminal liability, would become more attractive options. Does not the right to confront adverse witnesses interfere with developing a rational law of sexual assault?

But the Court has never ascribed constitutional significance to such consequences. If the privilege against self-incrimination is fundamental

191. Allen, *Burdens of Persuasion, supra* note 3, at 51.

to the Anglo-American concept of ordered liberty, then what the legislature might do absent a constitutional privilege is simply irrelevant. The compromise argument has no greater force in urging an unprincipled application of the reasonable doubt rule.

The second reason for rejecting the compromise argument is that the Court's approach does not clearly redound to the greatest good of the greatest number, even on the assumption that the Court has correctly equated broader exculpatory categories with wise policy. The new or modified defenses of concern to the *Patterson* majority tend to provide for cases that occurred with relative infrequency under the older codes.[192] The revised codes shift the burden of proof to all defendants, not just to those who would not have qualified for a jury instruction under prior law. The compromise provisions thus benefit a few defendants by bringing their cases within exculpatory categories but injure many others who now bear the burden of proof that the government previously was required to sustain.

If this argument has an abstract quality about it, consider Gordon Patterson's case itself. Patterson, a Viet Nam veteran seriously disturbed by his experience in combat, killed Northrup after discovering him in apparent adultery with Patterson's wife.[193] Patterson therefore qualified for a manslaughter instruction, even under the common law's restrictive categories of allowable provocation.[194] The jury twice sought reinstruction on provocation but could not conclude that he had met his burden on that issue.[195] As a result, Patterson was convicted of murder. The compromise position would celebrate this result because the rule that allowed Patterson's murder conviction—a conviction doubtful even on traditional principles—gives killers at the fringe of the manslaughter category a chance at mitigation. At the very least, this conclusion is highly speculative.

The third reason for rejecting the appeal to compromise is that the actual connection between legislative progress and the reasonable doubt standard is far more problematic than the Court recognizes. In some states, but not in others, adoption of the Model Penal Code approach to certain defenses was accompanied by shifting the burden of proving these defenses to the accused.[196] This fact, however, does not of itself prove that burden-shifting devices are essential to such compromises. Criminal law recodifications involve a host of issues, each of which invites a

192. A glance at the compilation in Jeffries & Stephan, *supra* note 3, at 1398-1407, proves the point.

193. *See Patterson,* app. at A-7 to A-8 (No. 75-1861) (psychiatrist's testimony) (microfiche).

194. *See* J. KAPLAN & R. WEISBERG, CRIMINAL LAW: CASES AND MATERIALS 263 (1986).

195. *Patterson,* app. at A-84 & A-92 (trial court charge).

196. *See* Jeffries & Stephan, *supra* note 3, at 1398-1407.

defense position and a prosecution position. To say that protecting individuals against unjust conviction by fully constitutionalizing the reasonable doubt standard would frustrate liberalizing compromises seems to neglect the entire prosecutorial agenda except as it pertains to defenses and proof burdens. If burden-shifting were off-limits, the legislature's law-and-order faction might be convinced to accept a new affirmative defense if offered another concession, such as a restriction of some other substantive defense that has outlived its usefulness.[197]

The logic of the compromise argument thoroughly undercuts the apparent liberality of those who proffer this rationale. If criminal law reform is an auction among legislative factions, the balance of forces in the legislature cannot be changed by judicial decision.[198] The implicit assumption is that the aggregate benefits ceded to the class of criminal defendants by the legislature are fixed; those benefits may take different forms, but the total remains unchanged over the range of issues that are subject to legislative discretion.

It follows, then, according to the auction theory, that refusing to constitutionalize burden of proof rules cannot affect the net gains for law reform. If a legislature declines to recognize an affirmative defense because it cannot shift the burden of proof to the accused, the same political currency held by the due process faction of the legislature could purchase some other benefit. If unable to broaden the provocation defense, the reform faction might insist on alternative measures, such as a subjective view of entrapment, supraconstitutional procedural safeguards in death penalty cases, or better identification procedures.

This reasoning applies to individual legislators as well as to competing factions. A lawmaker with doubts about the substantive attractiveness of a defense might be persuaded to vote for it if the burden of proof were shifted with respect to the new defense, but such a legislator might also be persuaded by rejection of some other defense entirely, by stiffer sentences for those convicted, or by anything else in the legislative agenda—including a new state office building in her district. Thus, from the standpoint of criminal defendants as a class, there is no theoretical reason to believe that a principled application of *Winship* would discourage intelligent criminal law reform. The available empirical evidence confirms this analysis.[199]

197. For example, a subjective view of provocation and self-defense might be adopted in exchange for abolition of the insanity defense.

198. *See* Easterbrook, *supra* note 72, at 112 ("There will be terms of trade between process and procedure for almost any statute.").

199. It is easy to point out new grounds of exculpation that in fact have been linked to a shift in the burden of proof, but this does not demonstrate a causal connection. If the compromise hypothesis were correct, we would expect conservative states to retain the older rules in the absence of a compromise. However, this does not appear to be the case. For example, several very

Every item in the reform agenda that is constitutionalized advances the cause of law reform. Unless, as seems unlikely, a general reasonable doubt rule would strengthen the law-and-order faction, the political capital of the reformers can buy as much as before; the reformers, however, would start out with a shorter shopping list. The compromise argument is therefore indefensible even from the standpoint of criminal defendants considered as a class.[200]

Deference to legislative compromise thus exchanges judicial enforcement of the legality principle for an illusory greasing of the democratic machinery. If the Court is serious about the primary role of state legislatures in defining substantive grounds of criminal liability, it will abandon openly favoring certain quite properly political trends. If the Court is serious about preventing the unjust convictions of individuals, it can scarcely do otherwise.

The Court cannot extricate itself from the contradictions of its present position without overruling either *Patterson* or *Winship*. *Martin* clearly indicates the Court's current refusal to reconsider *Patterson*, even in an especially attractive case for doing so. Neither has the Court overruled *Winship*, *Specht*, *Wilbur*, or *Sandstrom*. The Court would therefore not disturb its institutional commitment to stare decisis any more by reaffirming the legality principle (rejecting *Patterson*) than it would by enabling unrestrained state discretion over criminal procedure (repudiating *Winship*). The argument presented here suggests that when a new Supreme Court majority takes the opportunity to reconsider the burden of proof in criminal cases, the legality principle requires that consistency should be achieved by reaffirming *Winship* and repudiating *Patterson*.

B. The Positivist Commentary Reconsidered

Before explaining in detail my disagreement with the positivist approach, it is helpful to recall why some thoughtful commentators have found it attractive, and why those opposing them have experienced difficulty articulating a convincing rejoinder. As Professors Jeffries and Stephan explain the attraction of their position:

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conservative jurisdictions adopted the Model Penal Code definition of voluntary manslaughter without shifting the burden of proof. *See* ARK. STAT. ANN. §§ 41-110, -1504 (1981); KY. REV. STAT. ANN. §§ 500.070, 507.020 (Michie/Bobbs-Merrill 1985); MONT. CODE ANN. §§ 46-16-602, 45-5-103 (1983); N.D. CENT. CODE §§ 12.1-01-03, -16-01 (1985). Perhaps New York is indeed less susceptible to progress than Arkansas, but I suspect proponents of the compromise approach would be slow to come to that conclusion.

200. If only to confirm the cynicism of the compromise argument, it is worth pointing out that the wave of recodification is now largely spent. Reviving *Wilbur*'s recourse to historical practice therefore offers the Justices a fine opportunity to rook the state legislatures out of their conservative procedures, given that legislative inertia is likely to maintain the liberal substance of "progressive" compromises.

> The logic of the greater-power-includes-the-lesser argument seems compelling; it could be avoided only if one could identify an independent rationale for proof beyond a reasonable doubt. In other words, a purely procedural interpretation of *Winship*—one that is wholly illogical as a statement of substantive policy—must find its justification in an exclusively procedural concern that exists no matter what the content of the underlying substantive issue. The case for reading *Winship* to disallow every exception to proof beyond a reasonable doubt boils down to a search for some such exclusively procedural justification.[201]

The challenge, then, is to identify a constitutional proof requirement independent from any constitutional requirement of what is to be proved.

Previous responses have failed to meet the positivist challenge. For example, Professor Saltzburg has argued that one convicted of a greater offense because of inability to prove a constitutionally optional defense unfairly bears the stigma attached to the greater offense.[202] This argument assumes, without empirical support, that public perceptions of stigma vary with statutory categories, but that the public is not aware of the allocation of proof burdens. It seems far more likely that perceived stigma turns on public understanding of the facts of a particular case.[203] I would be surprised if potential employers or old friends think of Gordon Patterson simply as a murderer, no different from a Mafia hit man; they more likely think of him as a man who killed his wife's lover in the wake of a troubled marriage.

The more general point is that stigma is not within the government's control. Certainly stigma does not correlate precisely with statutory categories. Conviction for tax evasion or insider trading, in the current milieu, is more likely to ostracize the convict as a poltroon than as a malefactor. On the other hand, a conviction for soliciting deviate sexual intercourse, a misdemeanor unlikely to result in a sentence more serious than a fine, can stigmatize quite seriously. Arrests and indictments stigmatize routinely; they are often used for that very purpose. Even acquittals, such as those won by John DeLorean and David Hinckley, may stigmatize a defendant permanently. Yet the *Winship* rule does not apply until the trial, and the rule applies at trial whether the offense is one accompanied by public vilification or public adulation.

Professor Underwood, opposing the positivist approach, offers an alternative argument based on public perceptions.[204] In her view,

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201. Jeffries & Stephan, *supra* note 3, at 1345-46.

202. Saltzburg, *supra* note 3, at 405-08.

203. *See* Allen, *Rationality and Accuracy in the Criminal Process: A Discordant Note on the Harmonizing of the Justices' Views on Burdens of Persuasion in Criminal Cases*, 74 J. CRIM. L. & CRIMINOLOGY 1147, 1158-66 (1983) (criticizing Saltzburg's formulation of a stigma concern); *see also* Allen, *Limits of Legitimate Intervention*, *supra* note 3, at 282 (arguing that "stigmatization interest" is too indefinite to be given independent consideration).

204. Underwood, *supra* note 3, at 1324.

popular but mistaken beliefs in the applicability of the reasonable doubt test will lead individuals to engage in unprovably innocent conduct. This argument is even weaker than the claim based on stigma, for there is no support for the notion that surprise as to the procedural rules applicable to a potential trial violates any constitutional right.[205] Moreover, it is unlikely that many people, other than professional criminals, predicate their conduct on the reasonable doubt rule. Common experience is that of the naif, not the Holmesian bad man. The notion that even law students take careful note of the available defenses, and then mistakenly assume that the reasonable doubt rule applies, simply is not founded on reality.

In contrast to these somewhat strained, if ingenious, arguments, the legality principle meets the positivist challenge on its own terms. The right asserted by a defendant invoking *Winship* is not the statutory right to the exculpatory conditions recognized by state law, but the federal constitutional right to freedom from punishment except as provided by law. This federal constitutional right is inconsistent with purely procedural definitions of criminal liability.[206] Legality requires more than an official judgment of condemnation; it requires a prospective definition of forbidden conduct and the potential consequences. Due process then requires a formal adjudication designed to ensure that only those whose conduct in fact falls within the prospective definition are punished, and that the punishment does not exceed the specified limits.

We are so used to thinking of due process as a looking glass that the most likely reason for rejecting my argnment is skepticism about whether legality is "really" part of due process, in the same way that the right against coerced confessions is "really" part of due process. Yet, as I argued earlier, legality is one aspect of due process whose pedigree dates back to the original understanding.[207] Indeed, were it not for the legality principle, the government could circumvent every other aspect of due process in the criminal context. The positivist commentary makes this point graphically clear, and should dispel the impression that recognizing the constitutional role of the legality principle is either avoidable or illegitimate.

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205. In spite of Paul v. Davis, 424 U.S. 693 (1976) (reputational harm alone does not implicate liberty or property interests), authority can still be found that emphasizes the importance of stigma as an independent deprivation of constitutionally protected liberty. *See* Saltzburg, *supra* note 3, at 405.

206. Legality protects the substantive value of avoiding gratuitous or oppressive punishment, and formal legality alone may not protect that fundamental value. *See supra* text accompanying notes 98-110. *Cf.* Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories,* 89 YALE L.J. 1063 (1980) (discussing the procedural norms mandated by substantive values underlying specific constitutional provisions).

207. *See supra* notes 82-94 and accompanying text.

A defendant alleging denial of the right to trial by jury, to the assistance of counsel, or to confront adverse witnesses, is ultimately invoking the legality principle. Were it otherwise—if defendants in criminal procedure cases claimed merely a denial of state statutory entitlements—then the state could deny any due process safeguard with respect to matters of legislative grace. The eighth amendment surely does not forbid punishing larcenists and robbers to the same degree. According to the greater-includes-the-lesser approach, then, the state could try the robbery-or-larceny issue not only on the preponderance standard, but also without a jury, without defense counsel, and without the right of confrontation, and if (inconceivably) the state lost such a "trial," it could ignore the double jeopardy limitation and retry the issue, relentlessly, until a conviction resulted.[208]

Such a result would be inconsistent with every criminal procedure decision the Court has ever rendered. The fourth amendment cases, the confession cases, the right to counsel cases, the jury trial cases, the confrontation cases, the identification cases, and the exculpatory evidence cases all affirm rules that apply without regard to whether the state constitutionally could dispense with the substantive statutory rule to which the constitutionally infirm procedure relates.

The positivists have attempted to distinguish other procedural safeguards from the reasonable doubt standard on the theory that the former protect the constitutional value of "rationality" by maximizing the likelihood that the trier of fact will correctly assess the relevant facts.[209] The reasonable doubt rule, in contrast, is seen as protecting the separate constitutional value of "liberty." The purported distinction, however, is untenable for several reasons.

First, the Constitution does not affirm rationality as a value distinct from that of freedom from unauthorized punishment. The procedures incorporated by the due process clause are not animated by a scientific preference for minimizing erroneous judgments, but by a political preference for minimizing erroneous convictions. For example, the sixth amendment guarantees "the accused"—not the court—the "Assistance of Counsel for his defence."[210] Accordingly, the accused may waive counsel, although rationality may suffer as a result,[211] and a claim of ineffective assistance of counsel may prevail only on a showing of demonstrable or presumptive prejudice.[212] Similarly, the right to trial by jury in

208. *See* Saltzburg, *supra* note 3, at 400; Underwood, *supra* note 3, at 1329-30.

209. *See, e.g.*, Allen, *supra* note 203, at 1150-58; Allen, *Burdens of Persuasion*, *supra* note 3, at 45 n.60; Jeffries & Stephan, *supra* note 3, at 1351 & n.76.

210. U.S. CONST. amend. VI; *see* United States v. Cronic, 466 U.S. 648, 654-55 (1984) (sixth amendment requires not merely the formal provision of counsel but actual "assistance" of counsel).

211. Faretta v. California, 422 U.S. 806 (1975).

212. Strickland v. Washington, 466 U.S. 668, 691-96 (1984).

a criminal case includes the right to jury nullification, unchecked by court authority to direct a verdict of guilty even when the government presents overwhelming evidence.[213] Confrontation, compulsory process, speedy trial, and immunity from successive trial all are constitutionally guaranteed only to the accused.[214]

In certain contexts, the constitutional preference for erroneous acquittals rather than erroneous convictions renders the positivist's distinction between rationality and liberty functionally incoherent. Jury trial hedges against unjust conviction, but does nothing to increase or decrease the evidence before the court; it is essentially a device for allocating errors, as is the reasonable doubt rule.[215] Defense counsel has a duty to resist introduction of probative adverse evidence. In many cases, counsel's primary role is to apply professional expertise to the exploitation of the reasonable doubt rule itself.[216]

Second, even if rationality amounts to a distinct constitutional value, the positivists have not explained why the legislature enjoys greater power over liberty than over rationality. The framers imposed far more rigorous restrictions on criminal cases, which implicate both rationality and liberty, than they imposed on civil cases, which implicate rationality alone. Legislatures are not likely to undervalue rationality, but they may very well undervalue liberty. Why then do the positivists argue that the courts should show greater deference to legislative judgments that threaten liberty than to legislative judgments that threaten rationality?

Finally, it is not clear that the reasonable doubt standard serves liberty but not rationality. Indeed, Professor Nesson's defense of the reasonable doubt standard is based on the independent constitutional status of rationality.[217] Similarly, Professor Saltzburg questions why rationality is valued if not for accuracy, at least in the sense of avoiding false positives.[218]

The positivist approach depends on an arbitrary distinction to explain established standards of minimal due process with respect to gratuitous defenses.[219] Viewed from the perspective of the case law, the pos-

213. United Bhd. of Carpenters v. United States, 330 U.S. 395, 408 (1947); Sparf & Hansen v. United States, 156 U.S. 51, 105-06 (1895).

214. U.S. CONST. amends. V & VI.

215. *See* H. KALVEN & H. ZEISEL, THE AMERICAN JURY 190 (1966) ("Trial by jury is not an instrument of getting at the truth; it is a process designed to make it as sure as possible that no innocent man is convicted.") (quoting Lord Devlin, Jan. 1960).

216. *See* United States v. Cronic, 466 U.S. 648, 656 n.19 (1984).

217. Nesson, *supra* note 3, at 1582-84; Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187, 1201-02 (1979).

218. Saltzburg, *supra* note 3, at 400 n.45 ("[T]he degree of accuracy required is intimately connected to the question of who bears the burden of proof . . . .").

219. I am surprised that Professor Allen would prefer to extend the greater-includes-the-lesser

itivist approach is illogical and indeed bizarre. It is credible only because it is defended by scholars and jurists of the first rank.

Nonetheless, I cannot imagine that such astute observers would tolerate punishing an individual for, say, possessing marijuana, if the government had not made a law forbidding marijuana possession.[220] The state may surely make such a law, but until it does so individuals retain a constitutional right against criminal punishment based on lawful conduct. Thus, the reasonable doubt rule is not a safeguard against the loss of state statutory entitlements. Rather it is a safeguard against the loss of constitutionally recognized liberty except as provided by law.

CONCLUSION

Winship, as it turns out, was on the right track. The purpose of the reasonable doubt rule is to enforce the legality principle. The Supreme Court, following a simplistic analysis of how legislatures might react to a principled application of the reasonable doubt rule, has lost sight of the principles underlying *Winship.* As a result, the Court has taken the para-

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approach to counsel and jury trial rather than to abandon its application to the burden of proof. *See* Allen, *Burdens of Persuasion, supra* note 3, at 45 n.60.

The positivists might respond by noting that the right to counsel extends to sentencing proceedings, *see, e.g.,* Mempa v. Rhay, 389 U.S. 128 (1967), which I have distinguished as not implicating the legality principle. Accordingly, the argument might go, the right to counsel must serve some function independent of the legality principle.

This rejoinder, however, fails to extricate positivists from the reductionist tendency of their position. Presumably they would deny the right to counsel at sentencing precisely because a valid conviction extinguishes the constitutional liberty interest. *See* Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 7 (1979); Meachum v. Fano, 427 U.S. 215, 224 (1976). As at trial, the provision of counsel at sentencing serves the interests of the client, not any general commitment to rationality. Unless the positivists can articulate a justification for the right to counsel that applies generally at trial, and on the same constitutional basis at sentencing, the objection based on sentencing does no more than identify another line of precedents with which the positivist approach is inconsistent. Rationality in sentencing cannot explain the role of counsel at sentencing hearings because the sixth amendment does not extend to administrative proceedings that may have a more significant effect on the sentence served by the convict. *See* Gagnon v. Scarpelli, 411 U.S. 778, 787-90 (1973) (states are not constitutionally required to provide counsel for indigents in all probation or parole revocation hearings).

As for my linking the right to counsel with the legality principle, it is entirely plausible that the sixth amendment embodies a generalized solicitude for criminal defendants, at trial as well as at sentencing. At trial, however, this solicitude extends no further than protecting the legality principle, for the accused surely has no right to the assistance of counsel in urging jury nullification or in presenting perjured testimony. *See* Nix v. Whiteside, 475 U.S. 157, 173 (1986) ("right to counsel includes no right to have a lawyer who will cooperate with planned perjury"). But whatever purpose counsel at sentencing may serve, the government could circumvent that function simply by illegally imprisoning the convict for some reason other than violating the statute under which he is sentenced.

220. *See* Johnson v. United States, 805 F.2d 1284, 1288 (7th Cir. 1986) (Posner, J.) ("To punish a person criminally for an act that is not a crime would seem the quintessence of denying due process of law.").

doxical position that constitutional limits on state power depend entirely on legislative acquiescence.

The positivist commentators have mistakenly viewed the reasonable doubt standard as requiring no more than that the government prove convincingly a set of facts that might expose the defendant to criminal liability if the legislature were to draft a statute for that very purpose. The rule of law is to the contrary.

Ultimately, the reasonable doubt rule expresses a denial of formalism. Requiring proof beyond a reasonable doubt guards against condemning people for crimes they did not commit. Rearranging the words in the lawbooks does not change what the defendant did, and it ought not alter the protection against unjust conviction. The government may choose to broaden the grounds of criminal liability or to expand the range of penalties applicable to particular offenses. But having made the rules, the government must abide by them. It may not infer the judgment that one among us has broken the law from a procedure that, in light of the circumstances, is no more than a chance.