The Irresistible Force

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The United States Supreme Court has left a critical area of constitutional criminal procedure in what may charitably be called a mess. That area concerns when the Constitution permits a legislature to require a defendant to bear a burden of proof on an issue to avoid a criminal conviction. The Court has left the Constitutional limits on the power to “shift the burden” of defenses (such as duress or heat of passion in a homicide case) in a remarkably ill-defined state by giving extraordinary and unjustifiable deference to the legislatures in this area. This deference has produced a methodology that treats constitutional analysis of these problems as an afterthought while the Court fixates on discerning the legislature’s intended burden assignment even when no such intent exists. The results have been confusing, contradictory and perplexing to anyone who wonders why the Constitution seems to have so little to say about a system in which burdens may readily be placed on presumptively innocent people to prove that they do not deserve to go to prison.

The mess is symptomatic of a far more serious problem. This confusion is the product of a fundamental error the Court has made in misperceiving the critical issues that underlie burden of proof jurisprudence. The Court has wrongly held that the United

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1 Associate Professor, Duquesne University School of Law. Professor Antkowiak extends his deepest thanks to Professor Jules Epstein, Sarah Johnston, and Christian Antkowiak for their helpful critique of an earlier version of this article, and to Keith Fisher, his most able research assistant. He also acknowledges the members of the Advisory Committee on Jury Instructions – Criminal of the Commonwealth of Pennsylvania for the spirited debate that led to the writing of this article. This Committee, organized under the general authority of the Pennsylvania Supreme Court, prepares suggested jury instructions for trial courts in criminal cases. The Committee recently pondered the question of burdens of proof and published § 2.10 of its Instructions as an analytical presentation of the problem. See Pennsylvania Suggested Standard Criminal Jury Instructions (2d ed. 2008).

2 The states are not immune from the effects of this confusion. In my own state of Pennsylvania, for example, there is a cacophony of statutes and court rulings that pose questions about burdens of proof without providing any sensible path to an answer. See Pennsylvania Suggested Standard Criminal Jury Instructions § 2.10.
States Constitution permits federal and state governments by mere legislative fiat and creative statute drafting to take an issue relevant to the conviction of a presumptively innocent person and compel that person to prove that issue to justify their continued freedom. In truth, the Constitution permits no such thing. It requires that whenever the government seeks the authority to take a person’s life, liberty and reputation it must prove all facts necessary to that authorization to a jury and beyond a reasonable doubt. While burden shifting was permitted under the old common law, the time of the common law has passed and its principles superseded by the mandate of the Constitution.

The irony of this is that the United States Supreme Court has already recognized the limits the Constitution places on legislative choices in defining crimes in a parallel line of cases. Since its decision in *Apprendi v. New Jersey*, the Court has understood that legislatures cannot, without offending basic constitutional principles, remove from the jury an issue necessary to the authorization to impose punishment and shift it to a category called “sentencing factor” to be decided by a judge alone after a conviction. The error in burden of proof jurisprudence can only be rectified when the Court recognizes the significance of the core truth uncovered in *Apprendi* and applies it here as well.

That core truth arises out of what I will call the “jury right.” The jury right involves not just the right to trial by jury but also the principles of the presumption of innocence and the government’s burden of proof beyond a reasonable doubt that are inextricably intertwined with it. This trinity of principles reflects that in our Republic a citizen’s freedom is the starting point for Constitutional analysis such that, when the government seeks to take that freedom away, it must obtain authorization from the citizenry by proving all matters necessary to justify the conviction. No individual need

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3 530 U.S. 466 (2000).
ever, or should ever have to, prove that he is entitled to remain un-convicted. And no burden to do so should ever be placed upon him.

Neither massive acquittals nor the wholesale dismantling of the machinery of criminal prosecution will result from recognizing this truth and the principles that flow from it. The Framers who embodied it in the Constitution were not madmen. They feared crime, but they feared the excesses of government even more. They were skeptics about the capacity of government to restrain itself and that skepticism is at the heart of the truth animating all of Constitutional interpretation. Truth of this kind is, as Thomas Paine observed, “irresistible” and “all it asks, and all it wants is the liberty of appearing.”

In Part I, I will describe the mess created by the current approach to burden of proof issues. In Part II, I will argue for the solution, discussing along the way the essentials of the jury right and the revised perspective it should give on the use of common law precedent that no longer deserves the exaggerated importance it is given.

In all respects, the orientation is practical. I am acutely aware that academic papers are susceptible to the same biting criticism a trial judge once made about courts of appeals. Trial judges, he told me, are those who battle in the valley in the heat of the day while appeals court judges are those who come down from the mountaintop in the cool of the evening to shoot the wounded. I seek no lofty perch here. This effort is meant to convince all who tread on the battlefields of criminal justice that the change this irresistible truth will bring about is one to be welcomed with confidence. The terrible wrong represented by the current state of jurisprudence in this area has taken too many real life casualties already.

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I. A NOT SO FINE MESS

A. A Rule in Search of a Principle

The current structure for analysis of when a defendant can be made to bear a burden of proof looks little like its early formulations. In *Davis v. United States*,\(^5\) the Court held that where the defendant’s sanity was reasonably at issue the burden of proving sanity was upon the government, as it “is never upon the accused to establish his innocence, or to disprove the facts necessary the crime for which he is indicted.”\(^6\) While the *Leland* decision in 1952 held that *Davis* was not a Constitutional decision binding on the states,\(^7\) the 1975 ruling in *Mullaney v. Wilbur*\(^8\) (striking down a burden placed on a defendant to prove heat of passion in a murder case) seemed to revive the notion that the simple rule of *Davis* might again prevail. But such hope lasted only until 1977 when *Patterson v. New York*\(^9\) announced the basic structure for analysis that survives today.

While I will detail *Patterson* in a moment, the overall current approach may be distilled into a two stage process a court is to undertake when the question is whether it is to charge the jury that the defendant bears the burden of proving something in a case.\(^10\)

1. Stage one involves legislative deference and discerning legislative intent. Did the legislature intend to impose the burden of proof on the defendant? If so, move on to stage two. If not, the constitutional inquiry is over.

2. Assuming the legislature did intend to impose the burden on the defendant, the constitutional rule is simple to state: under *In re Winship*\(^11\) and its progeny, a defendant cannot be made to bear a burden of proof with respect to an *element* of the offense. However, such a burden *may* be imposed on some other *component*
of the offense, that is, something obviously relevant to the issue of whether the defendant committed a crime but not an element of that crime. How is the court to know the difference? Again, it all circles back to deference to the legislature. Legislatures are free to designate some issues as elements and others as components and they blunder only if they thereafter assign a burden to a defendant of proving something they designated an element.

But what if a legislature is not explicit about its designation and a poor trial court has to find the element/component line using principles that supposedly guide this inquiry? Respected authors agree that such “principles” are as unsteady as they are inscrutable. Professor Loewy characterizes the “exact dividing line” between components and elements as “unclear at best and wavering at worst.” Professor LaFave observes that the rules for assignment “cannot be satisfactorily explained on the basis of any single principle.” He speculates that the policy may be to relieve the government of a burden of proving a negative or to assign a burden to a defendant for “defenses which are not a part of the definition of the crime,” an approach obviously begging a multitude of questions about the constitutional limits of such definitional power. But in the end, neither of these surmises, he admits, “is totally convincing.”

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12 The term “component” is as good as any to describe the larger set of conditions, facts, issues, considerations, matters, that must be shown before a jury may convict someone and authorize the government to punish them. In this regard, note that the Supreme Court in Patterson, 432 U.S. at 215, used the term “ingredient” in a context in which “element” was really what it meant.

13 This was the type of mistake made in Mullaney, 421 U.S. at 697-701, when Maine required proof of malice to sustain a murder conviction but sought to place the burden of proving heat of passion on a defendant. Wiser legislatures in New York and Ohio avoided the problem by defining murder to require simply an intentional killing, giving themselves, in the Court’s eyes, sufficient constitutional leeway to place the burden of proving self defense and heat of passion on the defendant. See Martin v. Ohio, 480 U.S. 228 (1987); Patterson, 432 U.S. 197.

Theoretically, of course, a legislature can also offend equal protection or substantive due process principles or otherwise transgress deeply rooted notions of justice in its burden enactment. Patterson, 432 U.S. at 210. But in this area of law, how they could be found to have done so is not clear.


16 Id.

17 Id.
In attempting to highlight the element/component line, the Court itself has done no more than to parade the platitudes:

The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.\(^\text{18}\)

No due process thermometer exists, however, to gauge when the state has “proved enough” to turn the tables on a defendant and make him prove he does not deserve to lose his life or liberty. And an appeals court that can do no better than to tell lower courts to “be fair and reasonable” in resolving a complex issue is announcing that no principled basis for the matter currently exists.

Worst of all, this confusing and circular approach that treats the Constitution as an afterthought is employed at a critical point when the system is about to abandon an idea that is a long-standing principle of constitutional government: that the state has to prove its case beyond a reasonable doubt.\(^\text{19}\) How did we get to this point?

**B. Patterson and the Real Villain**

The quintessential case stating the current rule is *Patterson v. New York*.\(^\text{20}\)

Decided only two years after *Mullaney*,\(^\text{21}\) *Patterson* represented an abrupt about face in burden of proof jurisprudence. While *Mullaney* had reversed a conviction where the state cast the burden of proving heat of passion on a defendant, *Patterson* affirmed the placing

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of that exact burden on a defendant in a murder case where the New York legislature had
the foresight to omit malice as an element of homicide. In doing so, it exhibited the true
villain that has led to the mess of this area of law: the Supreme Court’s virtual obsession
with deference to the legislature that essentially puts the Constitution in storage while
these issues are considered.

The Court’s analysis began with a self-admonition not to “construe the
Constitution so as to intrude upon the administration of justice by the individual states.”

Any fears that Mullaney had done this needed to be dispelled:

Mullaney surely held that a State must prove every ingredient of an offense
beyond a reasonable doubt, and that it may not shift the burden of proof to the
defendant by presuming that ingredient upon proof of the other elements of the
offense. This is true even though the State's practice, as in Maine, had been
traditionally to the contrary. Such shifting of the burden of persuasion with
respect to a fact which the State deems so important that it must be either proved
or presumed is impermissible under the Due Process Clause.

But all “ingredients” are not created equal. The old common law is the prime authority
for the notion that while some “ingredients” (read “elements”) have to be proven beyond
a reasonable doubt, “it would not necessarily follow that a State must prove beyond a
reasonable doubt every fact, the existence or nonexistence of which it is willing to
recognize as an exculpatory or mitigating circumstance affecting the degree of culpability
or the severity of the punishment.” And the decision with respect to whether something
is an “ingredient” or an exculpatory/mitigating circumstance is not in the Court’s hands:

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22 Patterson, 432 U.S. at 198-201.
23 Id. at 201. Deference to the legislature was once again extolled in Medina v. California, 505 U.S. 437, 445 (1992).
24 Patterson, 432 U.S. at 215.
25 Id. at 207.
Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch.\textsuperscript{26}

Thus, Patterson was a victim not of unconstitutionality, but of geography and bad luck. Unlike the fortunate Mullaney who killed someone in a state where malice was an element, Patterson killed someone in a state where the legislature had decided that all its prosecutors needed to do was prove “[t]he death, the intent to kill, and causation”\textsuperscript{27} before the state would be authorized “to deal with [him] as a murderer unless he demonstrates the mitigating circumstances.”\textsuperscript{28} While Maine had generously decided to take upon itself the obligation to prove a killing was not in the heat of passion, New York, while still finding heat of passion relevant to the finding of murder, declined to accept that burden, “perhaps fearing that proof would be too difficult and that too many persons deserving treatment as murderers would escape that punishment if the evidence need merely raise a reasonable doubt about the defendant's emotional state.”\textsuperscript{29} As to this choice, the Court found the Constitution to be irrelevant.

But what if, in this frenzy of legislative deference, another state, fearing that too many of its deserving murderers would escape the judgment of the law by contesting that the victim was dead or that, while their act was intentional they did not intend that it result in a death, further reduced the ingredients/elements and put burdens of these issues on the defendant? Primarily, the \textit{Patterson} majority assuaged those concerns by observing that most states simply had not done so.\textsuperscript{30} Moreover, if they tried, due process

\begin{itemize}
\item \textsuperscript{26} \textit{Id.} at 210 (emphasis added).
\item \textsuperscript{27} \textit{Id.} at 205-06.
\item \textsuperscript{28} \textit{Id.} at 206.
\item \textsuperscript{29} \textit{Id.} at 207.
\item \textsuperscript{30} \textit{Id.} at 211. Of course, it would be a true bit of legislative artistry for a state to have a murder statute that did not require proof that someone had died or that the man on trial in some way, shape or form, did it. Murder, as a genre of crime, requires at least that.
\end{itemize}
could limit state action that offended “some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” That, of course, had not happened in Patterson, since the New York practice reflected a version of the common law of Blackstone’s era and rules still in place in some jurisdictions when the 5th and 14th Amendments were ratified. Those rules placed the burden of almost all defenses to murder upon a defendant. Finally, there are “obviously constitutional limits” on the power to choose ingredients, the court said, but these really amount to prohibitions on the use of mandatory presumptions, not assignments of burdens of proof.

The dissent in Patterson declared these constitutional limits anything but “obvious” and warned that without “a conceptual framework for distinguishing abuses

31 Id. at 202 (quoting prior cases). The Medina Court would second the notion that historical practice was the key to seeing if a burden shift offended deeply rooted traditions. 505 U.S. at 446-48.
32 Patterson, 432 U.S. at 203. The Court in this passage not only invokes days of yore, but days of Commonwealth v. York, 50 Mass. 93 (1 Met. 1845), as its principal authority. The Court correctly indicates that in Professor George P. Fletcher’s article Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases, 77 YALE L.J. 880, 903-04 (1968), he observes that York was a ruling authority for some time on the point. 432 U.S. at 202 n.8. The Court fails to add, however, Professor Fletcher’s insightful critique of York that points out the serious flaws in its reasoning and the likelihood that it really was referring to matters of burden of production and not burden of proof, Fletcher, supra at 904-06, flaws the Court itself recognized in Mullaney, 421 U.S. at 696 n.20. In Mullaney, the Court correctly observed that York’s reasoning was now generally rejected by it and most of the states. Id. at 695-96.
33 This same reliance upon the common law origin for a state’s burden assignment as being sufficient to satisfy Due Process is echoed in Martin v. Ohio, 480 U.S. 228, 235-36 (1987), where Ohio’s practice of requiring a defendant to prove self-defense was used in only one other state, but was again historically rooted in the ancient common law.
34 Quoting the Court:
"[I]t is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime." McFarland v. American Sugar Rfg. Co., 241 U.S. 79, 86 (1916). The legislature cannot "validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt." Tot v. United States, 319 U.S. 463, 469 (1943). See also Speiser v. Randall, 357 U.S. at 523-525. Morrison v. California, 291 U.S. 82 (1934), also makes the point with sufficient clarity. Patterson, 432 U.S. at 210. Both citations are to principles perfectly circular: states cannot establish elements of crimes and deem them satisfied in all cases.

Professor LaFave would add to these limits constitutional considerations of whether the statute on its face violates Equal Protection, infringes on the exercise of a fundamental right such as speech (see Speiser, 319 U.S. at 526), or exceeds police powers generally in substantive due process terms. LAFAVE, supra note 15, at 135-144.
from legitimate legislative adjustments of the burden of persuasion in criminal cases,”

no meaningful limits could be imposed. The dissent, unfortunately, had problems coming up with a proposed “conceptual framework” of its own. For them, legislative deference would still occur on the element/component choice except where “the factor at issue makes a substantial difference in punishment and stigma” and if it historically has held an elevated level of importance in “the Anglo-American legal tradition.”

But given that the states were split on questions of burden assignment, few such issues would have a “deeply rooted” tradition favoring the defense. And, as later cases have shown, even when a state stands virtually alone in placing a burden on a defendant, deference to its legislature is so strong that it is protected against constitutional challenge as long as the practice was used at one time in the murky mist of common law history.

Patterson used legislative deference to render the Constitution quite the toothless tiger. While legislatures certainly cannot create offenses that require self-incrimination or that circumvent search and seizure rules, with a careful stroke of the legislative pen they could effectively negate that aspect of the jury right that requires the government to meet the reasonable doubt burden. Common law practices that pre-dated the Constitution became the form and substance of due process as if the passage of the Constitution was merely a footnote to history.

This approach extracted the teeth from the Court as well. Rather than finding out what the Constitution has to say about the process of convicting someone and the limits those principles place on the assignment of a burden, the Court’s obsession with

35 432 U.S. at 225 (Powell, J., dissenting).
36 Id. at 226.
37 Id. at 207 n.10.
38 Martin, 480 U.S. at 235-36.
legislative deference condemned it to the role of gleaner of legislative intent and proof-reader of legislative enactments. By disdaining the Constitution as a source of authority in this area, a mess on at least two levels was sadly predictable.

First, a court that sees its prime directive as gleaning legislative intent will soon find out that legislatures simply do not express their intent about the assignment of burdens very often. Faced with the deafening silence of a legislative record on an intended assignment, a court may panic, forge ahead and pretend to find one. It will do so by grafting an intent onto the statute, usually by using old common law. Panic thus induces paradox, since a court will have to admit that crimes are now creatures of statute, not the common law. Such grafting becomes a usurpation of law-making under the guise of interpretation. This is seen below in the discussion of *Dixon v. United States.*

Second, and even more troubling, the obsession with legislative deference cancels the Constitution as a source for authority and disregards its effect on the common law. This is an odd way to treat the supreme law of the land. It is also an approach entirely inconsistent with another line of cases dealing with legislative attempts to affect the jury right in which the Court correctly perceived the Constitutional danger and stopped the legislatures in their tracks without a hint of deference to their prerogatives.

Overall, perhaps it would be wise for the Court to suspect that villainy is indeed afoot whenever they apply a rule that either takes them to the brink of a separation of powers violation or invites them to discount the supremacy of the Constitution they serve.

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40 This will be explained in detail in the *Apprendi* section, *infra.*
C. What Patterson Hath Wrought: Dixon and a Rule Run Wild

Before he assumed the weight of the Presidency, Warren Harding supposedly comforted himself with the observation that government, after all, was a very simple thing. This caused Justice Frankfurter to muse that, if Harding did indeed say that, he must have done so "as a fleeting inhabitant of fairyland."\textsuperscript{41} Evidently, obsessive legislative deference can also distort reality. While the only place where solid evidence of Congress’ intent about the burden of proof in duress is in fairyland or its suburbs, all members of the Court in \textit{Dixon}\textsuperscript{42} held otherwise.

Essentially, Keshia Dixon raised the "bad boyfriend" defense. Guns she bought by falsely asserting on transfer forms that she was not under indictment were purchased under duress, she said, namely a threat by her boyfriend to kill her children if she did not act as a straw purchaser.\textsuperscript{43} Despite protesting that she should not have to prove anything to escape the punishments called for by the federal statutes charged,\textsuperscript{44} the trial judge placed the burden of proving duress on her and she failed.\textsuperscript{45} She then appealed.

\textsuperscript{41} \textit{Youngstown Sheet \\& Tube Co. v. Sawyer}, 343 U.S. 579, 593 (1952).
\textsuperscript{42} The effort to find or pretend that Congress has spoken to the issue of identifying defenses and assigning burdens of proof has a long history. Entrapment came into the federal law in 1932 when the Supreme Court recognized it in \textit{Sorrells v. United States}, 287 U.S. 435 (1932). Under the banner that “[l]iteral interpretation of statutes at the expense of the reason of the law” often produces “absurd consequences or flagrant injustice,” id. at 446, the majority read into the federal statutes the Congressional purpose to require the government to prove an un-entrapped intent in every case in which it became an issue. \textit{Id.} at 450-52. The dissenting Justices lambasted this approach, calling it an “unwarranted construction” amounting to “judicial amendment”. \textit{Id.} at 456. As an alternative to adding elements that Congress did not include, the dissenters suggested that the courts had ample power under Article III to protect the integrity of their own processes by allowing the defendant to prove that entrapment was used to gather evidence and thus violated due process principles. \textit{Id.} at 457. The majority’s view continues in federal court today while the view of the dissent is embraced by the MPC and states which have adopted that reasoning.
\textsuperscript{43} \textit{Dixon}, 548 U.S. at 4.
\textsuperscript{44} 18 U.S.C. §§ 922(a)(6), (n) (2000).
\textsuperscript{45} 548 U.S. at 5.
In summary, the four opinions in *Dixon* agreed\(^{46}\) on the following propositions, all stemming from the obsessive devotion to legislative deference *Patterson* demands:

a. Congress has the power to create a duress defense.
b. Congress has the power to assign the burden of proving the duress defense to either party.\(^{47}\)
c. Congress has expressly done neither.
d. Congress’ silence did not mean that the Court has the authority on its own to create the defense and assign the burden.
e. The Court’s task was to discern Congressional intent from a blank page of legislative history.
f. Somehow, and in some way, the common law (or some segment of it) was relevant to figuring this out.

From this starting point, four flights of fancy were cleared for take off, that is, once one very significant matter had to be effectively overlooked.

To enable use of the common law in reaching a conclusion, the fact that federal crimes are entirely creatures of statute (authorized by some provision of Article 1, Section 8) that do not spring out of the primordial soup of the common law had to be marginalized. The majority did this first in answering the question whether common law principles of duress infused meaning into the *mens rea* elements of the charged offenses, forcing the government to disprove its presence. No, the Court held, since these offenses are “solely creatures of statute” and have “no counterpart” in the common law, no common law infusion occurred regarding any elements of the crimes.\(^{48}\)

\(^{46}\) Id. at 17 (Kennedy, J., concurring).

\(^{47}\) Indeed, the *Dixon* Court recognized this early in its opinion, finding that since duress did not affect any element of the crime of being a person under indictment who sought to obtain a firearm, no real Constitutional issue about placing the burden of proving duress on the defendant was at issue. Id. at 8.

\(^{48}\) Id. at 7. The full quote is:

The fact that petitioner's crimes are statutory offenses that have no counterpart in the common law also supports our conclusion that her duress defense in no way disproves an element of those crimes. We have observed that "[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute," *Liparota v. United States*, 471 U.S. 419, 424, 105 S. Ct. 2084, 85 L. Ed. 2d 434 (1985). In *Liparota*, the Court resolved the question of whether a crime required proof of “specific intent” when the Congressional history of it was silent on the point by invoking the rule of lenity to require such proof.
But in the second instance, the common law or, at least a piece of it, was infused and proved to be dispositive. Dixon argued that if duress did not strictly affect the “elements,” it was still as an independent, general defense which the “modern common law” solidly agreed should be the government’s burden to disprove. But the Court reminded Dixon that as “federal crimes ‘are solely creatures of statute,’” a common law defenses has no independent relevance and is relevant only “as Congress ‘may have contemplated’ it in the context of these specific offenses.”

So did Congress actually not contemplate duress in this context? No, the majority recognized, there was “no evidence in the Act's structure or history that Congress actually considered the question of how the duress defense should work in this context.” Indeed, the Court acknowledged that Congress declined to pass a statute that would have codified duress and allowed the Courts to develop its particulars. So what authority could there be either to find a legislative intent to recognize a duress defense or assign its burden?

As to the first problem, the answer was simple: no one argued otherwise. The Court heard “no suggestion that the offenses at issue are incompatible with a defense of duress.” Lack of incompatibility was evidently reason enough for the Court to overlook the silence of Congress and “[assume] that a defense of duress is available to the statutory

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U.S. at 428. That rule never makes an appearance in the pages of cases on the assignment of burdens of proof.

49 Dixon, 548 U.S. at 12 (citing United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483 (2001)). In the Oakland Cannabis case, interestingly, the Court declined to find a necessity defense available under the statute there involved, saying that a more explicit statement from Congress was needed before it could be recognized. 532 U.S. at 491 n.4.

50 548 U.S. at 13 (emphasis added).

51 Id. at 14 n.8. Normally the non-passage of a statute is either a neutral event allowing no positive inference of intent or a negative implication about the matter. See Youngstown Sheet & Tube Co., 343 U.S. at 581.

52 548 U.S. at 13.
crimes at issue [requiring that the Court] determine what that defense would look like as Congress ‘may have contemplated’ it. 53

But as to authority for finding an intended assignment of burden, because the Patterson rule compelled the Dixon Court to find a legislative intent on this issue, and the statutory history yielded none, the common law seemed as good a source to turn to as any. To make that turn, the majority had to contradict what it said moments before and surmise that federal statutes have a common law origin.

While Congress’ findings in support of the Safe Streets Act show that Congress was concerned because "the ease with which any person can acquire firearms . . . is a significant factor in the prevalence of lawlessness and violent crime in the United States," § 901(a)(2), 82 Stat. 225, it would be unrealistic to read this concern with the proliferation of firearm-based violent crime as implicitly doing away with a defense as strongly rooted in history as the duress defense, see, e.g., 4 W. Blackstone, Commentaries on the Laws of England 30 (1769). 54

Justice Kennedy agreed. While acknowledging that Congress passed these statutes “without explicit instructions regarding the duress defense or its burden of proof,” 55 he assumed those statutes came liberally adorned with potent, yet invisible, context:

When issues of congressional intent with respect to the nature, extent, and definition of federal crimes arise, we assume Congress acted against certain background understandings set forth in judicial decisions in the Anglo-American legal tradition. See United States v. Bailey, 444 U.S. 394, 415, n. 11, 100 S. Ct. 624, 62 L. Ed. 2d 575 (1980). 56

His use of Bailey (and United States v. Morissette, 57 on which it relied) is too generous as those cases held that when Congress uses a “term of art” in a statute, a court may use that term’s common law definition in divining Congressional intent. 58 But here, no terms of

53 Id.
54 Id. at 13 n.6. The Court further had to assume that the trial judge had accurately set out the elements of the defense there being, of course, no statute to provide any such guidance. Id. at 4 n.2.
55 Id. at 17 (Kennedy, J., concurring).
56 Id.
57 342 U.S. 246 (1952).
58 Id. at 263.
art or science are used by Congress, as the word “duress” is not used at all. Standing alone, the common law is not an act of Congress that the Court is free to incorporate as if it was. Where Congress does intend that some issue “shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience,” it says so; here, it did not.

But the Court was undeterred. The legislative deference obsession of *Patterson* forced the court to take up the common law as a weapon of interpretation. The four opinions which ensued swung that weapon wildly in trying to read the mind of Congress.

The majority opted for the “snapshot” version of the common law, assuming that Congress adopted that version of it existing *at the time the particular statutes at issue were enacted* for the burden assignment. They disregarded the Model Penal Code’s contrary assignment as there was no evidence that Congress adopted that view, but, of course, there was no positive evidence that Congress embraced the “the long-established common law rule” they now engrafted onto the statutes.

Justices Alito and Scalia also took the snapshot approach, but surmised that Congress was much more frugal with its camera. It would make no sense, they argued, for Congress to assign different burdens depending upon the state of the common law

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59 In *Bailey*, 444 U.S. at 406, the Court itself recognized this very point. As it was about to undertake a matter of statutory interpretation, the Court asserted that it had to follow what Congress intended over any version of the common law: “Principles derived from common law as well as precepts suggested by the American Law Institute must bow to legislative mandates.”

60 Fed. R. Evid. 501.

61 This point is made explicitly by Justice Alito in his concurrence, albeit with a different purpose in mind. *Dixon*, 548 U.S. at 20 (Alito, J., concurring).

62 *Id.* at 15-17.

63 *Id.* at 15-16.

64 *Id.* at 17.
when each statute charged was enacted.\textsuperscript{65} Congress' overall silence about the burden meant only one thing: Congress intended to incorporate the common law as of 1791.

Duress was an established defense at common law. See 4 W. Blackstone, Commentaries on the Laws of England 30 (1769). When Congress began to enact federal criminal statutes, it presumptively intended for those offenses to be subject to this defense. Moreover, Congress presumptively intended for the burdens of production and persuasion to be placed, as they were at common law, on the defendant. Although Congress is certainly free to alter this pattern and place one or both burdens on the prosecution, either for all or selected federal crimes, Congress has not done so but instead has continued to revise the federal criminal laws and to create new federal crimes without addressing the issue of duress. Under these circumstances, I believe that the burdens remain where they were when Congress began enacting federal criminal statutes.\textsuperscript{66}

There was no supporting authority for this approach either, of course, and it shared with the majority a fundamental flaw about using the "common law" so selectively. Both opinions assume Congress did not intend to adopt the essential feature of the common law, that is, that it is not a snapshot but a river, constantly flowing, evolving and living a life of "experience."\textsuperscript{67} As Holmes wrote, it is at its essence a process:

\begin{quote}
The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage.\textsuperscript{68}
\end{quote}

To assume that only one moment of this process was forever imprinted upon the pages of the federal statutes misunderstands the essence of the common law. If a legislative body intended to adopt only a snapshot of something that is an ever-evolving organism, it

\textsuperscript{65} Id. at 20 (Alito, J., concurring). Indeed, two statutes could be charged with conflicting burdens under such a scenario. See id. at 22.
\textsuperscript{66} Id. at 19.
\textsuperscript{67} OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Dover 1991).
\textsuperscript{68} Id.
should have to say so specifically. Otherwise, to adopt “the common law” is to adopt a
c process that lives in the present, appreciating what it has been and where it is headed. 69

Justice Kennedy, in concurrence, and Justices Breyer and Souter in dissent chose
the “river” instead of the “snapshot” approach, but reached opposite conclusions. Justice
Kennedy concluded that absent some clear indication that Congress incorporated the “day
of enactment” status of the common law, attributing intent in that way was a “fiction.” 70
His fictional process, however, was to allow the Court to consult a variety of sources,
even ones post-dating the statutes, and by that he found that as the defendant peculiarly
possesses the knowledge to support the defense, Congress must have wanted to place the
burden on her. 71 Justice Breyer saw the predominant trend of burden assignment as
favoring placing it on the government 72 and dismissed Justice Kennedy’s concerns about
the “superior knowledge” policy argument as empirically not true. 73

The problem with the Kennedy/Breyer-Souter approach is that it too is a desperate
attempt to force a finding of legislative intent by incorporating the common law into a
statute where Congress did not indicate it was invited. But as the Court gave itself no
place to turn other than legislative intent to resolve these issues, desperation is
understandable. 74 The cacophony of views expressed in Dixon is thus the sad legacy of
the Patterson rule, a rule that tells the Court that the Constitution is largely meaningless

69 The Court had acknowledged in prior cases that the trend of burden assignment was either mixed or in
favor of placing it on the government. Mullaney, 421 U.S. at 696; Patterson, 432 U.S. at 207 n.10. If the
common law was headed anywhere, it was not running parallel with the court’s current views.
70 Dixon, 548 U.S. at 18 (Kennedy, J., concurring).
71 Id. at 18-19.
72 Id. at 21-25 (Breyer, J., dissenting).
73 Id. at 27-28.
74 I am not suggesting that the proper result in Dixon would have been to say there is no duress defense,
since doing that may well have violated a defendant’s Constitutional right to present such a defense where
appropriate. And no, I shall not launch into a digression about whether substantive due process principles
would support the necessity of allowing a duress defense in appropriate cases, although all of the opinions
in Dixon could certainly be cited for evidence that such a defense is “deeply rooted” in the American
tradition of criminal law.
as a source of authority and guidance when questions of burden assignment arise. By
default, the Court must, under the guise of statutory interpretation, make law using the
common law, considerations of separation of powers issues notwithstanding.

There is no reason for this mess.\textsuperscript{75} \textit{Patterson} was wrong. The Constitution, via the
jury right and the principles that underlie it, does control this question. Indeed, it controls
the matter regardless of whether the legislature is crystal clear about its choice to assign
the burden to a defendant on any issue, since the right invokes not simply the heart of due
process but the very bedrock of the entire Constitutional scheme itself. The \textit{Apprendi} line
of cases is the window to this insight and to the conclusion that in our Constitutional
system, the common law no longer has the force and effect it once did. The solution to
the mess has been identified; all we need do is appreciate and apply it.

\section*{II. AN IRRESISTIBLE SOLUTION}

\textit{A. Nouns, Verbs and a Matter of Process}

The quagmire of statutory construction \textit{Dixon} left behind is caused by the fatal
misconception that “elements” of an offense are nouns, things to be so-designated by the
legislature and understood by the court as different from “other issues” that, while
relevant to whether a person may be convicted, are not the same kind of “noun” as an
element. In this misconception, due process is activated only after a court finds some

\begin{footnote}
\textsuperscript{75} The situation in some states is no better. In Pennsylvania, for example, there is a cacophony of statutes
that assign burdens and some that, for no apparent reason, do not. See Pennsylvania Suggested Standard
Criminal Jury Instructions § 2.10, at 5-17. Pennsylvania uses the term “affirmative defense” but does not
define it. \textit{Id}. Nor has it adopted any version of MPC § 1.12 to set out an overall disposition regarding the
assignment of burdens. \textit{Id}. at 5. Interestingly, Pennsylvania did adopt that section of the MPC that defines
“material elements of an offense” to include matters that “negatives” an excuse or justification, 18 PA.
Cons. Stat. § 103 (2008), suggesting that an argument could be made that the Pennsylvania legislature has
not taken the court’s invitation to narrowly define “elements.” Pennsylvania also explicitly abolishes
common law crimes and states that its legislative acts are the only means through which criminal statutes
\end{footnote}
clue the legislature left behind to show that it has designated some issues “elements” that
due process requires be proved beyond a reasonable doubt by the government and others
non-elements that can be made the burden of a defendant to prove. Under this
methodology, it would seem easy enough for the Court to give us a definition of
“elements” as a noun so that we could separate them out from other non-elemental
components. But no such definition exists.

As Professor LaFave observes, *Patterson* brings to center stage the issue of what
Constitutional limits there are on the definition of crimes.76 But it has left the issue
without a conceptual framework for understanding it, rendering it incapable of
satisfactory explanation.77 The Commentary to MPC § 1.12 says politely that the
definition of an “element” is still evolving, while what it is now “remains unclear.”78 In
his oft cited article on burdens of proof in 1968, Professor Fletcher is gentle in saying that
a principle to distinguish what can be placed upon the defendant from what must be
proved by the government is “yet to be done.”79 But in their piece eleven years later,
Professors Jeffries and Stephan mince no words: the distinction between “elements” and
matters of “mitigation” or “excuse” is “essentially arbitrary.”80

The reason the distinction cannot be made is that it is the product of that fatal
misconception. For “elements” are not a “thing” to be *defined* as nouns at all since they
have no meaningful existence outside of the *process* by which the government seeks to
convict someone. That larger *process* itself reflects our fundamental view of the

76 LAFAVE, supra note 15, at 63.
77 Id. at 56.
79 Fletcher, supra note 32, at 880, 884.
relationship between government and the individual generally. What is a criminal trial after all? It is the government’s attempt to obtain authorization to impose upon an individual the highest degree of governmental intrusion possible in this Republic: to take his life, freedom and reputation. All three branches of the government play a role in this attempt. The legislature maps out a set of conditions that have to be shown to exist before such an intrusion can take place, the executive seeks to prove that those conditions exist, and the judiciary stands ready to impose the intrusion once they are established.

But the authorization does not come from the government. In a political system based upon the consent of the governed, it is the governed themselves (in the form of a committee of twelve) who must give that authorization. It is an authorization to change the assumed Constitutional status quo of individual freedom. In this Republic, citizens never have to prove that they are entitled to be free.

To get the authorization to punish, the government must demonstrate to the governed that a set of conditions now exist to such a degree of certainty that the assumed Constitutional status quo of this defendant must be altered in the name of the public good. To make sure that the authorization (a conviction) is valid, we require that it be the product of a process that enshrines the jury right. That right requires that the process presume the defendant innocent, afford him a jury to decide whether the factual/legal conditions necessary to strip him of his presumed innocence exist, and always place the burden on the government to prove any condition necessary to obtain the authorization to punish to the highest degree of certainty known to the law.

Thus, whether out of respect for a coequal branch, the legislative process generally or federalism specifically, it is fine for the Court to give legislative deference
when the question is what sorts of conduct should be made criminal. But when the
question of adherence to Constitutional process is posed, there is no occasion for
dereference, obsessive or otherwise. The Court must recognize that the Constitution defines
the process in which the question “what is an element” is wholly subsumed. Any
attempted distinction between “elements” and “non-elements” on non-process grounds is
wholly arbitrary as the Constitution is focused in another direction.

Of course, the Court has already recognized this in a context located just down the
street from the question of burdens of proof. In the Apprendi line of cases, superficially
dealing with matters of “sentencing factors,” the Court has uncovered the bedrock
constitutional principles of the “jury right:” the conjoining of trial by jury, the
presumption of innocence, and the requirement that all facts necessary for a conviction be
proved by the government beyond a reasonable doubt. Those principles deserve the
appellation “bedrock” as they are the sine qua non of a republic founded on the
philosophy of the Enlightenment by practical scholars who wanted government checked
at various structural stages to frustrate its natural tendency to tyranny. Those principles, I
will argue, must also cause a fundamental shift in how burden of proof assignment
analysis is performed.81

B. Apprendi: The Short Course

1. The First Pronouncements

In a previous article,82 I gave a detailed recitation of the cases leading to and
following upon Apprendi. For present purposes, what is important is why the Apprendi
doctrine holds the key to unraveling the burden of proof mess. In essence, it stopped

81 See, discussion at §II(C), infra.
82 Bruce A. Antkowiak, The Ascent of an Ancient Palladium: The Resurgent Importance of Trial by Jury
legislatures from using shortcuts in criminal procedure to threaten the very structural protections the Constitution builds in by the jury right. Legislative deference is in short supply in the *Apprendi* line, and where it exists, it is never obsessive.

The standard *Apprendi* situation is one in which a legislature tries to change the structure of criminal cases by shifting fact-finding that would affect the range of authorized sentencing from the trial to the sentencing hearing. The Court’s rejection of this shifting of “elements” to a category of “sentencing factors” was first suggested in *United States v. Gaudin*, in which the Court held generally that anything determined to be an “element” had to be found by the jury beyond a reasonable doubt. In *Jones v. United States*, the Court saved the car-jacking statute from unconstitutionality by construing it not to leave to the judge’s discretion at sentencing the finding of the degree of injury to a victim because such a finding would increase the maximum term of authorized incarceration, making it an “element” to be found by the jury.

The Court’s seizure of the power to recognize “elements” was not triggered by the belief that definition skills they lack when the issue is burden of proof assignment exist here; rather, a seizure was necessary to preserve the process, specifically the right to trial by jury, the sacredness of which the Court recited at length. Other pre-Apprendi cases echoed the vital importance attached to the jury trial. In *Duncan v. Louisiana*, the Court

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83 *Apprendi*, 530 U.S. at 475-76.
85 *Id.* at 512-13.
88 526 U.S. at 244-47.
89 *Id.* at 244-48; *Gaudin*, 515 U.S. at 510-12. More of this history may be found in Antkowiak, *supra* note 82, at 22-37.
recognized the right as one “fundamental to the American scheme of justice”\textsuperscript{91} with roots that went deep into the constitutional system we formed.\textsuperscript{92} And just a year before \textit{Apprendi} was decided, Justice Scalia put the jury trial in a broader constitutional framework when he dissected the body politic and found the right in a critical anatomical location:

\begin{quote}
When this Court deals with the content of this guarantee -- the only one to appear in both the body of the Constitution and the Bill of Rights -- it is operating upon the \textit{spinal column} of American democracy.\textsuperscript{93}
\end{quote}

\textit{Apprendi} itself involved New Jersey’s scheme to allow the sentencing judge alone to find that an assault was a “hate crime” significantly increasing the penalty as a result.\textsuperscript{94} Such a scheme violated the rediscovered importance of the jury trial and a practical rule that emerged from it:

\begin{quote}
Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. . . "It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt."\textsuperscript{95}
\end{quote}

This rule was to have a far greater impact than simply to adjust legislative schemes that sought an increased penalty when certain aggravating factors were present. As \textit{Apprendi} evolved its rule reflected the powerful core upon which it is constructed.

\begin{itemize}
\item\textbf{a. The \textit{Apprendi} Line Evolved}
\end{itemize}

The concurring opinions of Justices Scalia and Thomas in \textit{Apprendi} signaled that the Court recognized this was a battle of Constitutional process versus legislative

\footnotesize
\textsuperscript{91} \textit{Id.} at 150.
\textsuperscript{92} \textit{Id.} at 151-56.
\textsuperscript{93} Neder v. United States, 527 U.S. 1, 31 (1999) (emphasis added).
\textsuperscript{94} 530 U.S. at 475-76.
\textsuperscript{95} \textit{Id.} at 490 (internal citation omitted).
initiatives that envisioned a more efficient system of conviction and sentencing than the Constitution afforded. Chastising Justice Breyer (whose dissent supported schemes like New Jersey’s as “procedural compromises . . . which are themselves necessary for the fair functioning of the criminal justice system”) as calling for the entirety of the criminal justice system to be placed in the hands of the state, Justice Scalia reminded that “[t]he founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free.” While a more refined bureaucratic model for criminal justice could be devised, he said, the Constitution’s system guarantees “what it has been assumed to guarantee throughout our history -- the right to have a jury determine those facts that determine the maximum sentence the law allows.” That right protects something broader than just the right not to have aggravating circumstances shifted to a sentencing hearing. This right “has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury.”

Justice Thomas specifically concurred “to explain my view that the Constitution requires a broader rule than the Court adopts.” His broader rule addressed the critical question of “what constitutes a ‘crime.’” The answer, he argued, lies in looking at the question from the perspective of the process by which punishment is imposed:

A long line of essentially uniform authority addressing accusations, and stretching from the earliest reported cases after the founding until well into the 20th century,
establishes that the original understanding of which facts are elements was even broader than the rule that the Court adopts today. This authority establishes that a "crime" includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment).\textsuperscript{102}

The jury right does not arise only when the government wants an \textit{aggravated sentence} but it exists whenever the government seeks \textit{authorization} to impose any sentence at all. Justice Thomas makes this point explicitly, using the term “entitlement” to express it:

One need only look to the kind, degree, or range of punishment to which the prosecution is by law entitled for a given set of facts. Each fact necessary for that entitlement is an element.\textsuperscript{103}

“Elements” are not nouns to be defined outside the context of their part in the verb “to convict.” In the immediate aftermath of \textit{Apprendi},\textsuperscript{104} the Court rejected legislative attempts to defeat the jury right by designating something a “sentencing factor” by examining the effect of the thing, not its label.\textsuperscript{105} In all of this, the focus is properly on the Constitutional \textit{process} of authorization where it also should be in the burden cases.

The most significant post-\textit{Apprendi} case is \textit{Blakely v. Washington}.\textsuperscript{106} Faced with a sentencing guideline scheme that allowed a judge to find facts and increase the allowable range of sentences \textit{within} a statutory maximum, Justice Scalia (for the Court) confirmed the broadening of the rule first announced in \textit{Apprendi}. It is not just facts necessary to \textit{increase} a sentence over the statutory maximum that must be submitted to a jury but “any

\textsuperscript{102} Id. at 501 (emphasis added). He then goes on at length to supply numerous authorities in support of this principle. See id. at 503-19.
\textsuperscript{103} Id. at 502.
\textsuperscript{104} In \textit{Ring v. Arizona}, 536 U.S. 584, 605 (2002), the Court overruled death penalty procedures that did not require the jury to find “aggravating factors,” holding that whatever a legislature calls it (element or sentencing factor), if the “effect” of some fact is to authorize punishment, it is an element. In \textit{Sattazahn v. Pennsylvania}, 537 U.S. 101, 111-12 (2003), the Court found these aggravating circumstances elements for all purposes, but just sentencing issues, in applying double jeopardy analysis to them. And \textit{Harris v. United States}, 536 U.S. 545, 557-65 (2002), held that as a minimum sentence within a statutory maximum sentence does not seek any greater authorization for punishment, it can be part of a sentencing scheme.
\textsuperscript{105} \textit{Ring}, 536 U.S. at 605.
\textsuperscript{106} 542 U.S. 296 (2004).
particular fact which the law makes essential to the punishment.”\textsuperscript{107} The statutory maximum is simply the degree of authorization the government has sought and received to sentence someone:

[T]he "statutory maximum" for \textit{Apprendi} purposes is the maximum sentence a judge may impose \textit{solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.}\textsuperscript{108}

Most critically, Justice Scalia identifies the jury trial right as a \textit{structural} protection of individual liberty, emphasizing again the critical matter of \textit{process}.

Our commitment to \textit{Apprendi} in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but \textit{a fundamental reservation of power in our constitutional structure.}\textsuperscript{109}

Just as the right to vote reserves to the people the ultimate authority over the legislative and executive branches, the “jury trial is meant to ensure their control in the judiciary.”\textsuperscript{110} This process of authorization serves a key Constitutional foundation. The “judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended.”\textsuperscript{111}

If you reject this broadened rule, Justice Scalia warned, you have to trust either of two groups the Framers thought could not be trusted with an individual’s freedom. First, you could trust the legislature to label certain facts as “non-elements” regardless of whether they were essential to the authorization to punish, leaving the authorization decision to the sentencing court.\textsuperscript{112} But “if [the jury] were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary

\begin{itemize}
\item \textsuperscript{107} \textit{Id.} at 301 (quoting J. Bishop, 1 \textit{Criminal Procedure} § 87, at 55 (2d ed. 1872)).
\item \textsuperscript{108} \textit{Id.} at 304-05 (emphasis in original).
\item \textsuperscript{109} \textit{Id.} at 306.
\item \textsuperscript{110} \textit{Id.}
\item \textsuperscript{111} \textit{Id.}
\item \textsuperscript{112} \textit{Id.} at 307.
\end{itemize}
to a judicial inquisition into the facts of the crime the State \textit{actually} seeks to punish,” it could then “not function as circuit-breaker in the State's machinery of justice.”\textsuperscript{113} This would be contrary to the Framer’s decision to “not trust government to make political decisions in this area.”\textsuperscript{114}

The second alternative is to trust the judges to decide where the line between a judicial function and a jury decision lies.\textsuperscript{115} But such a subjective drawing is unprincipled and wrongly assumes that the Framers trusted judges more than they trusted legislators.

Whether the Sixth Amendment incorporates this manipulable standard rather than \textit{Apprendi}'s bright-line rule depends on the plausibility of the claim that the Framers would have left definition of the scope of jury power up to judges' intuitive sense of how far is \textit{too far}. We think that claim not plausible at all, because the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury.\textsuperscript{116}

Mistrust and skepticism in the defense of liberty thus becomes a positive civic virtue here,\textsuperscript{117} although it is absent in burden assignment cases where legislative deference is king. In the \textit{Apprendi} line, the exercise of that virtue has had a relentless impact on the system. \textit{Blakely} struck down the statutory scheme of Washington State that shifted to the sentencing judge the fact-finding essential to the authorization to punish,

\begin{flushright}
\textsuperscript{113} \textit{Id.} at 306-07.  \\
\textsuperscript{114} \textit{Id.} at 307 n.10.  \\
\textsuperscript{115} \textit{Id.} at 307.  \\
\textsuperscript{116} \textit{Id.} at 308.  \\
\textsuperscript{117} Justice Scalia’s admonition about the skeptical place the Framer’s held the courts was expanded in his dissent in \textit{Neder}, 527 U.S. at 32:  \\
Perhaps the Court is so enamoured of judges in general, and federal judges in particular, that it forgets that they (we) are officers of the Government, and hence proper objects of that healthy suspicion of the power of government which possessed the Framers and is embodied in the Constitution. Who knows? -- 20 years of appointments of federal judges by oppressive administrations might produce judges willing to enforce oppressive criminal laws, and to interpret criminal laws oppressively -- at least in the view of the citizens in some vicinages where criminal prosecutions must be brought. And so the people reserved the function of determining criminal guilt \textit{to themselves}, sitting as jurors. It is not within the power of us Justices to cancel that reservation -- neither by permitting trial judges to determine the guilt of a defendant who has not waived the jury right, nor (when a trial judge has done so anyway) by reviewing the facts ourselves and pronouncing the defendant without-a-doubt guilty.
\end{flushright}
and the Federal Sentencing Guidelines fell for the same reason in *United States v. Booker*.\(^\text{118}\) California’s guideline scheme, which allowed a judge to find a sentencing in the “aggravated” range based upon fact-finding done only at sentencing, was the next to crumble in *Apprendi*’s wake, with the rule now being stated simply as follows:

> If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied.\(^\text{119}\)

*Walton v. Arizona*,\(^\text{120}\) a case that allowed judicial fact-finding in a capital sentencing scheme (one which Justice Thomas believed could survive the *Apprendi* doctrine,\(^\text{121}\) although the dissenters in *Apprendi* did not)\(^\text{122}\) was toppled in *Ring v. Arizona*.\(^\text{123}\) Indeed, even *United States v. Harris*\(^\text{124}\) (involving mandatory minimum sentencing), which did survive *Apprendi*, is of questionable value since not only did four dissenters argue that it did not survive it,\(^\text{125}\) but Justice Breyer, concurring in the result, admitted that he could not find a logical way to distinguish it from *Apprendi*.\(^\text{126}\)

The Supreme Court has told federal and state legislatures emphatically that they cannot, with the mere stroke of a pen, remove a fact necessary to the government’s plea for authorization and place it in the safe harbor of “sentencing factor” where it need not face the jury or the beyond a reasonable doubt standard. There is no obsessive deference

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\(^{118}\) 543 U.S. 220 (2005). There, quoting *In re Winship*, the Court phrased the *Apprendi* rule in this way: "It has been settled throughout our history that the Constitution protects every criminal defendant "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970).

\(^{119}\) *Id.* at 230.

\(^{120}\) Cunningham v. California, 127 S. Ct. 856, 869 (2007).

\(^{121}\) 497 U.S. 639 (1990).

\(^{122}\) *Apprendi*, 530 U.S. at 523.

\(^{123}\) *Id.* at 536-39 (O’Connor, J., dissenting).

\(^{124}\) 536 U.S. 584 (2002).

\(^{125}\) *Id.* at 574 (Thomas, J., dissenting).

\(^{126}\) *Id.* at 570 (Breyer, J., concurring).
to the legislature on defining “elements” of a crime in this area and arguments that such
deference would lead to more efficient administration of justice are strongly rebuked.127
Legislatures cannot “manipulate” the definition of a crime to lessen the government’s
burden, the Harris court said,128 and Ring echoed this by admonishing that use of terms
like “sentencing factor” is “not determinative of the question ‘who decides,’ judge or
jury”129 in a Constitutional system ruled by due process mandates. Dissenting in Blakely,
Justice Breyer lamented the rejection of legislative deference under Apprendi in words
that one would never read in a burden assignment case:

Why does the Sixth Amendment permit a jury trial right (in respect to a particular
fact) to depend upon a legislative labeling decision, namely, the legislative
decision to label the fact a sentencing fact, instead of an element of the crime?
The answer is that the fairness and effectiveness of a sentencing system, and the
related fairness and effectiveness of the criminal justice system itself, depends
upon the legislature's possessing the constitutional authority (within due process
limits) to make that labeling decision. To restrict radically the legislature's power
in this respect, as the majority interprets the Sixth Amendment to do, prevents the
legislature from seeking sentencing systems that are consistent with, and indeed
may help to advance, the Constitution's greater fairness goals.130

Legislatures also try to find more “fair and effective” systems for imprisoning people by
re-assigning burdens of proof. But there too it is not “doctrinaire formalism”131 that

127 The Court in Jones v. United States, 526 U.S. 227, 246 (1999), identified historical evidence that
legislatures and courts have often tried to supplant the jury trial in the name of efficiency.
Blackstone warned in the 1760's, "as, if a check be not timely given, to threaten the disuse of our
admirable and truly English trial by jury." 4 Blackstone 278. Identifying trial by jury as "the grand
bulwark" of English liberties, Blackstone contended that other liberties would remain secure only
"so long as this palladium remains sacred and inviolate, not only from all open attacks, (which
none will be so hardy as to make) but also from all secret machinations, which may sap and
undermine it; by introducing new and arbitrary methods of trial, by justices of the peace,
commissioners of the revenue, and courts of conscience. And however convenient these may
appear at first, (as doubtless all arbitrary powers, well executed, are the most convenient), yet let it
be again remembered, that delays, and little inconveniences in the forms of justice, are the price
that all free nations must pay for their liberty in more substantial matters." 4 Blackstone 342-344.

128 536 U.S. at 557.
129 536 U.S. at 605.
130 542 U.S. at 345 (Breyer, J., dissenting).
131 Id. at 321.
should stop them but the profound truth that the real goal of the Constitutional system is the preservation of liberty through limited government.

The impact of the irresistible truth Apprendi unearthed transcends the sentencing process. A deeper appreciation of it will correct the error in burden assignment jurisprudence.\(^\text{132}\) That appreciation may be accessed in three ways:

- by understanding even more deeply what the right to a jury trial really means in our liberal, democratic tradition;

- by understanding that the jury trial is an inextricable part of the larger jury right that includes the presumption of innocence and the requirement of proof beyond a reasonable doubt. This right lies at the soul of the Constitution and is as offended when legislatures assign a burden of proof to a defendant as it is when legislatures tries to circumvent it by calling something a “sentencing factor”;

- by recognizing that the reason we depart from the jury right is our irrational fear that a system that honors it is too weak to combat the specter of crime that we believe surrounds us. But ancient wisdom tells us that we must have faith, for fear is the currency of the tyrant.

2. A Deeper Appreciation: The Jury Right and the Sanctity of Process

a. The Jury Trial: What Lies Beneath

Beyond being a right over which Justice Scalia and others are rightly effusive, the jury trial is an institution.\(^\text{133}\) It is an institution that exists to perform one part of an over-

\(^\text{132}\) Such an appreciation will also, I hope, provide a reasoned rejoinder to the thoughtful and contrary views of Professor Leslie Yalof Garfield in *Back to the Future: Does Apprendi Bar a Legislature’s Power to Shift The Burden of Proof Away From the Prosecutor by Labeling an Element of a Traditional Crime as An Affirmative Defense?*, 35 CONN. L. REV. 1351 (2003).

\(^\text{133}\) I have previously written:

The sacred place in which the right to trial by jury has been held in the history of western jurisprudence is impossible to dispute. Blackstone traced its origins to the "earliest Saxon colonies" and deemed it as having arisen "coeval with the first civil government of the land." He characterized it as the *sine qua non* of freedom: "The liberties of England will abide as long as this palladium remains sacred and inviolate . . . ." Story seconded this sentiment, referring to the right to jury trial in criminal cases as one that "was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties, and watched with an unceasing jealousy and solicitude."

Antkowiak, *supra* note 82, at 22.
arching constitutional process: to authorize the mechanism of government to exert its most intrusive power over the individual and strip him of his life, his freedom and his reputation. We have seen how the language of “authorization” has entered the Apprendi line 134 declaring that juries are not just to “find facts” to permit government officials to decide if a citizen should be punished. Rather, the jury, and only the jury, has the power to authorize punishment in the first place. 135

While this power of authorization is surely of great importance to the individual defendant who relies on it as a primary check against arbitrary government action against him, the authorization process reflects something deeper. It is one of several examples in the Constitutional scheme 136 of an institution erected to remind the government that its power comes from the people and that the people have not given that power in the form of a blank check:

Beyond [protecting the individual defendant], the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power -- a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. 137

Professor Amar calls it the “paradigmatic image” of the Bill of Rights, something that “summed up – indeed embodied – the ideals of populism, federalism, and civic virtue that were the essence of the original Bill of Rights.” AKHIL R. AMAR, THE BILL OF RIGHTS 96-97 (Yale University 1998). Others have pointed out that the right finds expression in every major document of our constitutional history. See id. at 83-84; Antkowiak, supra note 82, at 22-36.

134 Apprendi, 530 U.S. at 501-02; Harris, 536 U.S. at 565; Booker, 543 U.S. at 231; Cunningham, 127 S. Ct. at 869.
135 Indeed, in Gaudin, 515 U.S. at 511-13, the government argued that the jury’s role was not to find elements but only to find facts that a court would use to determine if the elements were made out. The Court found that the government’s position in this respect was without any historical support and rejected it. Id. at 512. Later, in Jones, 526 U.S. at 247-48, the Court would point out that attempts during the colonial period to limit the jury’s role to just fact-finding were ultimately rebuffed.
136 I have previously written on federalism and separation of powers in An Essay: Courts, Judicial Review and the Pursuit of Virtue, 45 DUQ. L. REV. 467 (2007), and on the role probable cause plays in the same structure, Saving Probable Cause, 40 SUFFOLK U. L. REV. 569 (2007).
The Framers knew that the thirteen colonies were just the vanguard of a nation bound to
grow in size and complexity and in need of sound structures of government rather than
mere hope for good leaders, if it was to survive as a free Republic. Since government
did not simply arise from the consent of the governed, but was sustained by it, the
structures needed to foster their growing republic would have to provide a clear channel
for that consent to flow as the primary means of keeping the government in check.

The channels were the institutions of representative government (that allowed the
citizens to choose those legislators and executives to govern in their best interest) and the
jury trial in which the people would effectively check the excesses in the judiciary. Indeed, many envisioned the jury forming part of a “bicameral judiciary,” a first line of
defense against tyranny whenever the judicial branch became involved. In those parts of
the criminal process where juries could not be used, the Constitution provided specific
means of judicial restraint (the habeas corpus, bail, search and seizure, and cruel and
unusual punishment provisions), to give the people some “security against the coercive
might of the state, [while] trial by jury remained the great institutional barrier behind
which they sheltered.”

Neither the popular assembly nor the jury trial were naturally occurring
institutions and their creation was an act of faith that if they “were left to operate in full

138 THE ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY XIV-XV (Michael
139 JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION
293-95 (Vintage Books 1996); AMAR, supra note 133, at XIII, 82-84.
140 AMAR, supra note 133, at 95, 109.
141 Id. at 87.
142 RAKOVE, supra note 139, at 294. Professor Amar argues that concern over a failure to secure the full
benefits of the jury trial that would “fatally weaken the role of the people in the administration of
government.” AMAR, supra note 133, at 94.
143 RAKOVE, supra note 139, at 293-94.
force, they would shelter nearly all the other rights and liberties of the people.” That faith understood that while government could achieve certain common good ends that no person acting alone could realize, within the psyche of any collective entity was the temptation towards tyranny. The people, and only the people, could serve as the conscience of society to curb this instinct.

Thus, when Justice Scalia reminded judges everywhere that they were among the group of government officials so mistrusted by the Framers that they reserved to the people the power to determine criminal guilt and authorize punishment for that guilt, he tapped into a primal insight about the nature of the entire system. No wonder that he worried aloud that our traditional belief in the jury trial is in “perilous decline.” It is a concern shared by “Americans of the [colonial] period [who] perfectly well understood the lesson that the jury trial right could be lost not only by gross denial, but by erosion.” The *Apprendi* line of cases opposes that erosion by revitalizing the principles that are the underpinnings of the institution.

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144 KAMMEN, *supra* note 138, at 293. Indeed, as Professor Rakove has said, they “existed first and foremost to protect the people against the abuse of power by an arbitrary Crown.” RAKOVE, *supra* note 139, at 294. William Penn saw them as the dual securities for the rights of the people, *id.* at 295, and John Adams would write that in these two institutions “consist wholly the liberty and security of the people” without which the people would have no protection against “being ridden like horses, fleeced like sheep, worked like cattle, and fed and clothed like hounds and swine.” AMAR, *supra* note 133, at 302.

145 Neder, 527 U.S. at 32.

146 Ring, 536 U.S. at 611. This is a sentiment shared by professor Amar, *supra* note 133, at 324-28.

147 Jones, 526 U.S. at 248.

148 At least one judge has roundly applauded this revitalization. In *United States v. Polizzi*, 545 F. Supp. 2d 270, 302-08, 321-28 (E.D.N.Y. 2008), Judge Jack Weinstein traced the attempts of courts to limit the power of juries but sees in the *Apprendi* line a dramatic reversal of that trend. The new line recognizes the old truth about the jury, he writes, and the invigorated doctrine is needed to “prevent the erosion of the historical function of the jury” and the substance of the Sixth Amendment. *Id.* at 328. That invigoration has been done in the face of dire predictions of system failure, *id.* at 330, and yet, the system survives. No doubt that survival may be attributed to the core ideas of the Framer’s and the timeless theory upon which it is based.
b. The Coin’s Other Side: Presumed Innocence, the Government’s Burden, and a Place at the Heart of the Constitution

Since issues about burden of proof never arose in the *Apprendi* line *per se*, *Apprendi* focused on the jury trial as the institution that motivated its doctrinal mandate.

There was never occasion for the Court to consider separately the principles inextricably bound up with the jury trial, the presumption of innocence and the burden on the government to prove guilt beyond a reasonable doubt. But they are in symbiotic relation with each other and their unity as a jury right is of profound importance.

Writing for the Court in *Sullivan v. Louisiana*, Justice Scalia said that it is self-evident... that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt. In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.149

In his concurrence in *Jones*, he put the matter bluntly:

> I am convinced that it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt... To permit anything less "with respect to a fact which the State deems so important that it must either be proved or presumed is impermissible under the Due Process Clause." This principle was firmly embedded in our jurisprudence through centuries of common law decisions.150

The *Apprendi* majority recognized that the right to have a verdict based upon proof beyond a reasonable doubt was a “companion right” to jury trial, and one “equally well founded” in constitutional jurisprudence.151 *Booker* agreed.152 But like the jury trial, the

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150 526 U.S. at 252-53 (internal citations omitted).
151 530 U.S. at 478.
presumption of innocence and the burden of proof beyond a reasonable doubt are not just
procedural rights of a defendant. They are profound judgments about the proper
relationship between the individual and government in our system. Collectively, as the
jury right, they are violated by current burden jurisprudence.

The reasonable doubt standard has long been identified as serving three broad and
somewhat overlapping functions: first, to protect the individual who stands to lose liberty
and reputation upon conviction; second, to insure that the “moral force of the criminal
law” is not “diluted by a standard of proof that leaves people in doubt whether innocent
men are being condemned;”\textsuperscript{153} and, finally, to instill general public confidence that the
government will not render the individual liable to conviction and sentence “without
convincing a proper factfinder of his guilt with utmost certainty.”\textsuperscript{154} These are all, of
course, outcomes we hope the reasonable doubt standard will achieve and to the extent
that we depart from it by either lessening the government’s burden or eliminating it
completely by shifting it to the accused we diminish our chances of achieving these
outcomes.\textsuperscript{155} But if Patterson is right that, after all, “[d]ue process does not require that
every conceivable step be taken, at whatever cost, to eliminate the possibility of

\textsuperscript{152} It has been settled throughout our history that the Constitution protects every criminal defendant
"against conviction except upon proof beyond a reasonable doubt of every fact necessary to
constitute the crime with which he is charged." \textit{In re Winship}, 397 U.S. 358, 364, 25 L. Ed. 2d
368, 90 S. Ct. 1068 (1970). It is equally clear that the "Constitution gives a criminal defendant the
right to demand that a jury find him guilty of all the elements of the crime with which he is
543 U.S. at 230.
\textsuperscript{153} \textit{In re Winship}, 397 U.S. at 364. It is interesting that the \textit{Speiser} Court made this same observation about
the assignment of the burden of proof, that is, that it helps reduce the “margin of error” in criminal
convictions. 357 U.S. at 526.
\textsuperscript{154} \textit{In re Winship}, 397 U.S. at 363-64. \textit{See also Mullaney}, 421 U.S. at 700, 703; \textit{LaFave, supra} note 15, at
57. I have also written more extensively about the nature of reasonable doubt, its history and its limitations.
Antkowiak, \textit{supra} note 19.
\textsuperscript{155} Fletcher, \textit{supra} note 32, at 882.
convicting an innocent person”\textsuperscript{156} is the degree to which we wish to achieve these outcomes just a policy choice, negotiable by our legislatures?

No, it is not. The reasonable doubt standard implements the presumption of innocence, the starting point of a criminal trial and a principle that reflects the basic legal premise upon which our Republic exists. That less people are wrongfully convicted or that society is given repose that its criminal justice system is somewhat efficient is a nice byproduct of reasonable doubt, but it is not the main point.

The main point was made in 1895 in \textit{Coffin v. United States}.\textsuperscript{157} The trial court charged the jury on proof beyond a reasonable doubt but did not charge on the presumption of innocence. The Supreme Court reversed.\textsuperscript{158} The Court held that the presumption is a given, a first principle, a recognition that the accused needs to do nothing to prove his entitlement to be free.\textsuperscript{159} The presumption is an “instrument” of proof, a doctrine that is protected by the reasonable doubt burden.\textsuperscript{160} If the proof the government offers does not overwhelm that presumption to the degree that no reasonable doubt may be entertained about the accused’s guilt, he remains in the state he holds presumptively in his relationship with his government: they are to let him alone. The jury must know about the presumption as they are the ones to enforce it.\textsuperscript{161}

Taken together, then, the process of authorization the Constitution dictates requires the satisfaction of the entire jury right. The jury right speaks to the world view the Framers embodied in the Constitution, that people are presumptively free of

\begin{footnotes}
\item[156] 432 U.S. at 208.
\item[157] 156 U.S. 432 (1895).
\item[158] Id. at 460.
\item[159] Id. at 458-59.
\item[160] Id. at 460.
\item[161] Id.
\end{footnotes}
government and that no one ever has to prove that he is entitled to be free. There are indeed times when, in the exercise of specific powers granted to it by the people, the government may take that freedom from someone, but to do so, it must traverse a landscape upon which the Framers erected institutions enforcing processes that are permanent and non-negotiable. At least until the next Constitutional Convention meets, the institution of the jury must enforce the reasonable doubt burden to protect the presumption of innocence because that process is mandated by a Republic that places the individual at the center of the political universe. Once properly convicted, that individual may have to beg for mercy; but until that time, he need prove nothing to remain free.

Seeing the criminal justice system within the larger Constitutional framework is not easy. Courses termed “Constitutional Law” generally defer to others the task of explaining the 4th, 5th, 6th and 8th Amendments, and questions of “what is criminal” are generally consigned to courses in “Criminal Law.” But the general theory of the Constitution applies with equal force whether the matter is federal highways or burdens of proof in criminal cases. And it is an American Constitutional theory, borne out of the unique forces that created our conception of republican government that infuses our criminal practice. When the Supreme Court liberally uses old English common law in the burden cases as a foundation to justify a doctrine so at odds with the jury right and the Apprendi line of reasoning, they make a key error in forgetting that the Constitution trumps the common law tradition whenever the two conflict.

When the Framers addressed the threats to liberty they saw arising in the first ten years after independence, they no longer envisioned their English heritage as the sole
repository of rights. They drew on multiple sources from which rights under our own brand name were born. The Framers certainly did not see their efforts as just an update of the English Constitution. Our Constitution was an “experiment” using “risky” institutional innovations our English forbearers would not dare. While the Framers cited Montesquieu and Blackstone, they relied more on “indigenous experience, and insisted on the need for an instrument of government suited to the character of the American people.” As it turned out, the whole concept of a “constitution” took on new meaning when Americans wrote one:

In the New World, the term, constitution, no longer referred to the actual organization of power developed through custom, prescription, and precedent. Instead it had come to mean a written frame of government setting fixed limits on the use of power. The American view was, of course, closely related to the rejection of the old conception that authority descended from the Crown to its officials. In the newer view --- that authority was derived from the consent of the governed --- the written constitution became the instrument by which the people entrusted power to their agents.

The debate over the need for a Bill of Rights further underscored the unique character of the charter they enacted. When the product of the Philadelphia Convention was assailed for failing to include a list of rights, Hamilton called a listing “unnecessary” because under our constitution, unlike the English system, “in strictness, the people surrender nothing.” A listing was “dangerous” because it could leave future generations to wonder if the list was by way of limitation of rights when, in fact, the Constitution itself was itself a bill of rights, reserving to the individual all that had not

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162 RAKOVE, supra note 139, at 289-93. The threats were seen as coming from three sources. First, power of the legislature was feared far more than the executive; second, popular majorities bent on exercising democratic processes to suppress outnumbered factions were a serious threat to minorities; and, third, local governments were at least as dangerous to individual liberties as their national counterpart. Id. at 289-90.
163 Id. at 293.
164 KAMMEN, supra note 138, at IX-X.
165 Id. at XII.
166 Id. at X (quoting OSCAR AND MARYHANDLIN, THE DIMENSIONS OF LIBERTY 55 (Belknap Press 1961)).
been specifically delegated away.\textsuperscript{168} The absence of the Bill of Rights in the original document was, by these terms, an emphatic statement of the relative positions of the individual and government under this new system. And when the Anti-Federalist arguments won out that a Bill was necessary, it was not to effect the limitation on individual liberty Hamilton feared. Rather, it was to underscore the vast area of personal liberty to be protected from governmental intrusion even in the name of popular will.\textsuperscript{169}

Thus, anytime courts invoke the ancient common law as precedent for Constitutional interpretation, a much greater degree of healthy skepticism is needed. This is particularly true when the iconic figure of William Blackstone is invoked.

While Blackstone is regularly cited in the burden cases,\textsuperscript{170} his arguments on the legitimacy of placing a burden upon a defendant proceed from his assumption that all killings are presumptively malicious and that, to avoid a finding of murder, a defendant must prove otherwise.\textsuperscript{171} His view of murder, however, has gradually been rejected.\textsuperscript{172}

Professor Fletcher has brilliantly traced Blackstone’s concept of the burden of proof, pointing out that it stemmed from a failure to distinguish civil from criminal litigation.\textsuperscript{173} Under a private law system, the defendant had to prove exceptions to rules, and Blackstone and others adopted this model for criminal cases without offering “a

\begin{footnotes}
\item[168] Id. at 513-14. Of course, he did note that the critical right to jury trial was already included in the main text. Id. at 510. James Wilson echoed these ideas, assuring that the variety of checks built into the Constitution was a bold statement that “we reserve the right to do as we please” when specific authority for government action does not exist. \textit{The Debates in the Convention of the State of Pennsylvania on the Adoption of the Federal Constitution} (1787), \url{http://www.constitution.org/re/rat_pa.htm}. See also \textsc{Rakove}, \textit{supra} note 139, at 144.
\item[169] \textsc{Kammen}, \textit{supra} note 138, at 315-17.
\item[170] \textit{See, e.g., Davis}, 160 U.S. at 484; \textit{Patterson}, 432 U.S. at 202; \textit{Dixon}, 548 U.S. at 13 n.8, 19.
\item[172] \textit{Mullaney}, 421 U.S. at 695-96. \textit{See also} Bruce A. Antkowiak, \textit{The Art of Malice}, 60 \textsc{Rutgers L. Rev.} 435 (2008).
\item[173] Fletcher, \textit{supra} note 32, at 887-99.
\end{footnotes}
convincing argument for his own view of the law.” 174 Blackstone relied on dubious authorities for this proposition and likely confused special verdict procedures with general verdict ones, rendering him unable to give a principled distinction between burden of proof and burden of production. 175 Still, being Blackstone, he was accepted by courts comfortable incorporating civil procedure into criminal cases until, by late in the 19th century, a broader and contrary concept of guilt took over that called for placing the burden on the government. 176 This remained true, of course, until the Supreme Court began to revive a part of Blackstone best left in the past.

But we should not be too hard on Blackstone. He was not a Framer, after all, and did not write with the unique perspective of the American Constitution in mind or at a time when its mandates were in place. While he expressed the Lockean ideals of consent of the governed 177 and blessed the institution of the jury, 178 he hardly had the healthy mistrust of government our Framers turned into an art form. 179 To him, it was not the people but the sovereign “in whom centres the majesty of the whole country” 180 and it was in the benevolence of that sovereign power that security is to be found. 181 Indeed, “from the excellence and perfection of the person,” the law of Blackstone supposed the sovereign incapable of doing any wrong. 182

But under our Constitution, the government is not only capable of doing wrong but always suspected of reaching for the tyrant’s crown. Blackstone must thus be read

174 Id. at 902-03.
175 Id. at 903-05.
176 Id. at 907-12.
177 BLACKSTONE, supra note 171, at 7-8.
178 Id. at 349-50.
179 He would also espouse civil laws to punish offenses against God and religion, and argued for the protection of an established church. See id. at 45.
180 Id. at 2.
181 Id. at 7.
182 Id. at 30.
and evaluated against the superseding structure of the Constitution and the Bill of Rights that stand between him and us. Indeed, perhaps Blackstone himself gave us the best advice about how to read him. Even in his beloved England where law is “supposed to be more nearly advanced to perfection,” serious errors may arise where “from too scrupulous an adherence to some rules of the ancient common law” we have failed to realize that “the reasons have ceased upon which those rules were founded.”

c. Fear and the Counsel of Old Wisdom

Of course, good rules endure when good reasons for them remain. Wisdom found in older texts is wisdom nonetheless as seen in the Supreme Court’s 1895 burden assignment for the issue of insanity in *Davis v. United States.* There, the Court clearly understood the relative positions of the individual and the government in a criminal case:

> Upon whom then must rest the burden of proving that the accused, whose life it is sought to take under the forms of law, belongs to a class capable of committing crime? On principle, it must rest upon those who affirm that he has committed the crime for which he is indicted. That burden is not fully discharged, *nor is there*

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183 *Id.* at 3.

184 *Id.* In the same spirit of re-examining suppositions and assumptions, we should also sweep away the idea that it is just or sensible to assume that a defendant has a superior knowledge about certain things that make it permissible for him to bear the burden of proving them. As *Mullaney* held, the Court has never really found this to be a Constitutional justification for assigning the burden. 421 U.S. at 702. But, in any event, as the *Tot* Court noted, the argument proves too much. 319 U.S. at 469. One could always say that as the prosecuting officer is usually not “there” when the offense happened and the defendant was, we can always assume the defendant’s superior knowledge of it. But that assumption, of course, does not work where the defendant is innocent of the crime and, after all, must we not at least pretend to adhere to a presumption of innocence for all defendants? The argument about ease of proof has resonance if the issue is burden of production, but not where the matter is the Constitutional burden of proof. Burdens cannot be shifted or matters conclusively presumed against a defendant even when the evidence of guilt is overwhelming because the jury trial/presumption/reasonable doubt guarantee is a structural matter the system is built upon. This is not a matter where errors can be forgiven because we think the ultimate result was “right.” Carella v. California, 491 U.S. 263, 268 (1989) (Scalia, J., concurring). As Justice Scalia wrote in *Neder,* 527 U.S. at 34:

> The underlying theme of the Court’s opinion is that taking the element of materiality from the jury did not render Neder's trial unfair, because the judge certainly reached the "right" result. But the same could be said of a directed verdict against the defendant -- which would be *per se* reversible *no matter how overwhelming the unfavorable evidence.* See *Rose v. Clark,* supra, at 578. The very premise of structural-error review is that even convictions reflecting the "right" result are reversed for the sake of protecting a basic right.

185 160 U.S. 469.
any legal right to take the life of the accused, until guilt is made to appear from all
the evidence in the case. The plea of not guilty is unlike a special plea in a civil
action, which, admitting the case averred, seeks to establish substantive ground of
defence by a preponderance of evidence. It is not in confession and avoidance, for
it is a plea that controverts the existence of every fact essential to constitute the
crime charged. Upon that plea the accused may stand, shielded by the
presumption of his innocence, until it appears that he is guilty; and his guilt
cannot in the very nature of things be regarded as proved, if the jury entertain a
reasonable doubt from all the evidence whether he was legally capable of
committing crime.186

Because it is the State which seeks from the jury the “legal right to take the life of the
accused” or, as I have put it, the authorization to punish him, the burden of proof must
never be “upon the accused to establish his innocence or to disprove the facts necessary
to establish the crime for which he is indicted. It is on the prosecution from the beginning
to the end of the trial and applies to every element necessary to constitute the crime.”187

The wise counsel of Davis is found again in Justice Harlan’s explanation of the
reason why we stray from this Constitutional imperative. The reason is fear:

It seems to us that undue stress is placed in some of the cases upon the fact that, in
prosecutions for murder the defence of insanity is frequently resorted to and is
sustained by the evidence of ingenious experts whose theories are difficult to be
met and overcome. Thus it is said, crimes of the most atrocious character often go
unpunished, and the public safety is thereby endangered. But the possibility of
such results must always attend any system devised to ascertain and punish crime,
and ought not to induce the courts to depart from principles fundamental in
criminal law, and the recognition and enforcement of which are demanded by
every consideration of humanity and justice. No man should be deprived of his
life under the forms of law unless the jurors who try him are able, upon their
cosciences, to say that the evidence before them, by whomsoever adduced, is
sufficient to show beyond a reasonable doubt the existence of every fact necessary
to constitute the crime charged.188

186 Id. at 485-86 (emphasis added).
187 Id. at 487.
188 Id. at 492-93.
Justice Frankfurter’s dissenting opinion in *Leland v. Oregon* also makes this point.\(^{189}\) Fear is the underlying reason why legislatures find themselves disposed to shortcut the prosecution’s burden and force the defendant to prove his innocence.\(^{190}\) In Frankfurter’s time and other epochs in American history, writers bemoaned that the administration of the criminal law at all levels in America was “a disgrace to our civilization.”\(^{191}\) When “no informed person can be other than unhappy about the serious defects of present-day American criminal justice”\(^{192}\) the reaction of legislators is expected to be, well, reactionary:

It is not unthinkable that failure to bring the guilty to book for a heinous crime which deeply stirs popular sentiment may lead the legislature of a State, in one of those emotional storms which on occasion sweep over our people, to enact that thereafter an indictment for murder, following attempted rape, should be presumptive proof of guilt and cast upon the defendant the burden of proving beyond a reasonable doubt that he did not do the killing.\(^{193}\)

But while such passions may overwhelm in the moment, Frankfurter wrote, it is crucial for those charged with enforcing the Constitution to recall its core principles. Calm, reasoned reflection and an appreciation of history will return us to a key truth.

Because from the time that the law which we have inherited has emerged from dark and barbaric times, the conception of justice which has dominated our criminal law has refused to put an accused at the hazard of punishment if he fails to remove every reasonable doubt of his innocence in the minds of jurors. It is the duty of the Government to establish his guilt beyond a reasonable doubt. This notion -- basic in our law and rightly one of the boasts of a free society -- is a requirement and a safeguard of due process of law in the historic, procedural content of "due process."\(^{194}\)

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\(^{189}\) 343 U.S. 790, 802 (1952) (Frankfurter, J., dissenting).
\(^{190}\) Id.
\(^{191}\) Id. (quoting William H. Taft, *The Administration of Criminal Law*, 15 Yale L.J. 1, 11 (1905)).
\(^{192}\) Id.
\(^{193}\) Id.
\(^{194}\) Id. at 802-03.
Whatever else we may do in the moment to enhance the prospects of more convictions, there is one line drawn in the Constitutional sand that may not be crossed:

[T]he State cannot be relieved, on a final show-down, from proving its accusation. To prove the accusation it must prove each of the items which in combination constitute the offense. And it must make such proof beyond a reasonable doubt. This duty of the State of establishing every fact of the equation which adds up to a crime, and of establishing it to the satisfaction of a jury beyond a reasonable doubt is the decisive difference between criminal culpability and civil liability.\(^{195}\)

Wisdom may also be found in dissenting opinion of Justice Wilde in *Commonwealth v. York*,\(^{196}\) the majority opinion of which is venerated in *Patterson* for upholding the shifting of the burden of disproving otherwise presumptive malice to a defendant.\(^{197}\) Wilde rejected the burden shift, arguing:

I consider the rule of law as clearly settled; and it is founded on the plainest principle of reason and justice. Most certainly, when a party is charged with the commission of any crime, all the facts constituting the crime must be proved against him; and if, on the whole evidence, the jury have a reasonable doubt as to any one of such facts, they are bound to acquit him.\(^ {198}\)

He analyzed the situation before him by asking if it could be murder if the jury concluded that while the defendant committed the act of killing beyond a reasonable doubt, the evidence that it was done with malice was unclear.\(^ {199}\) Cleary, no:

For if the burden of proof is on the prisoner, to reduce the crime from murder to manslaughter, and the jury find that he has failed so to reduce it by satisfactory evidence, but that the presumption of malice and the preponderating proof concur, the court would be authorized to sentence the prisoner as convicted of the crime of murder; which I hold clearly the court would have no authority to do.\(^ {200}\)

\(^{195}\) *Id.* at 805.

\(^{196}\) 50 Mass. 93, 125 (1 Met. 1845) (Wilde, J., dissenting).

\(^{197}\) *Patterson*, 432 U.S. at 202 n.8.

\(^{198}\) *York*, 50 Mass. at 128 (Wilde, J., dissenting).

\(^{199}\) *Id.* at 131.

\(^{200}\) *Id.* The majority opinion in *York* should be consigned to the discard pile of judicial history. The *Mullaney* Court recognized that *York* may really have been a case more about burden of production particularly based on later rulings by the same judge. Bishop’s Treatise on Criminal Procedure warns against sources that instill confusion between burden of production (which may be placed on a defendant) and a burden of proof that threatens the basic structure of proceedings that adhere to due process ideals. 1 *Joel P. Bishop, Commentaries on the Law of Criminal Procedure or Pleading, Evidence, and*
A similar view is expressed in Bishop’s *Treatise on Criminal Procedure* (a text often cited by the Court in the *Apprendi* cases)\textsuperscript{201} where the author writes:

The proposition seems too plain ever to have admitted of doubt, that, in a criminal cause, --- in every criminal cause, for whatever particular offense, --- it is for the prosecuting power to prove everything alleged against the defendant; unless the latter relieves the evidence at a given point by a record admission, or, what is the same thing, waives in some legal way his right to demand such proof.\textsuperscript{202}

And for those who rightly regard the wisdom that comes from the American frontier, one final source needs to be recognized as embracing this critical principle. In the 1889 case of *Trumble v. Territory*,\textsuperscript{203} Justice Corn of the Wyoming Supreme Court recounted the saga of a marshal in Laramie County who was charged with murder in a case filled with horse thieves, a buggy whipping, a fateful confrontation over whiskey in a saloon, and the dropping of the hammer of the marshal’s trusty revolver.\textsuperscript{204}

Finding

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\textsuperscript{201} *Apprendi*, 530 U.S. at 510-19; *Blakely*, 542 U.S. at 302.

\textsuperscript{202} Bishop, supra note 201, at 349.

\textsuperscript{203} 21 P. 1081 (1889).

\textsuperscript{204} While this is not wholly pertinent to the point of this article, these facts are too good not to state: This was an indictment for murder in the first degree, charging the plaintiff in error with the murder of a certain person, whose name was to the grand jury unknown. The evidence upon the trial tended to show that about the 7th of October, 1886, at the town of Lusk, in the county of Laramie, the plaintiff in error was acting as deputy-sheriff and marshal of the town. That he arrested the deceased upon suspicion that he, with others, had recently stolen a number of horses from parties in Johnson county. While the deceased was in his custody, Trumble claimed that the deceased told him that the parties having the horses in charge were camped about four miles from town. Trumble thereupon summoned a number of the citizens as a posse to assist him in arresting them and reclaiming the property. The deceased was put in a buggy to guide them to the spot, and Trumble rode on ahead to find the camp. Trumble returned, and, stating that the camp was not in the vicinity indicated by the deceased, procured a buggy whip, dragged the deceased from the buggy by the handcuffs which he had on, and struck him several blows with the whip to compel him to reveal where the camp was situated. The deceased appealed to the crowd for protection, and, upon their protest against such a proceeding, Trumble desisted from whipping him. The entire party returned to town, and the deceased was turned over to other parties, to be kept in custody, and was kept in custody of one person and another about the town, until the night of the 9th, when the deceased was in Whittaker’s saloon, still in custody, and handcuffed. Trumble inquired where the deceased was, and, being told, went into the saloon. He informed the deceased that he was going to release him, and took off the handcuffs. A conversation then occurred between Trumble and the deceased, which is stated with
himself on the wrong end of the law he was used to enforcing, Trumble also found himself forced to prove that his actions in shooting his unidentified prisoner\textsuperscript{205} were either justified, excusable or deserving at most of a finding of manslaughter.\textsuperscript{206} But putting the burden on him was reversible error, the Court held, for reasons that would have made the Framers quite proud:

\begin{quote}
The doctrine that the burden never falls upon the defendant does not arise in \textit{favorem vitae},[in favor of life] or out of any pity or sympathy for the prisoner, but it arises out of the nature of what the sovereign power voluntarily undertakes to do before it will ask a conviction for crime at the hands of a jury.\textsuperscript{207}
\end{quote}

The sovereign, indeed, must ask the people for permission to punish one of their own, be he a horse thief or a town marshal.

Thus, when we speak of whether there is a Constitutional \textit{limitation} on the power of government to assign a burden of proof to a criminal defendant, we are once again asking the wrong question. A question more faithful to the central idea of the Constitutional system is whether the government has the Constitutional \textit{authority} to slight differences by various witnesses; all of them, however, substantially agreeing. Trumble told the deceased he was now a free man, and asked him if he was glad of it, and deceased said he was. Trumble asked deceased if he would take a drink with him, and deceased said he would. Trumble asked him if he was a friend of his or an enemy. Deceased replied that he had treated him so that he could not be a friend to him. Some other conversation then occurred about a saddle belonging to deceased, in which others also took part. Trumble again asked deceased if he was a friend of his, and deceased said he was not. Trumble asked what he was going to do about it, and deceased replied that he did not know that he was going to do anything about it. Some other conversation then occurred, in which others took part. Trumble again repeated his question to deceased, whether he was a friend or an enemy, and deceased replied that he was not a friend. Trumble drew a revolver, and pointed it at the deceased, working the hammer back and forth, and again repeated his question, and the deceased said: "I will have to be a friend to you now." Trumble then told the deceased he was a coward, again raised his pistol, and asked if he was a friend. The deceased said: "Do you want the truth? Well, Charley, I don't like you," and Trumble immediately shot him, his death being almost instantaneous. Trumble testified that deceased had threatened him, and that he was afraid of him, and that immediately before the shooting deceased threw his hand back as if to draw a pistol. The jury returned a verdict of guilty of murder in the first degree.

\textit{Id.} at 1081-82.

\textsuperscript{205} A further delicious part of the opinion notes that the deceased was known by various names, from the pedestrian “Charles Miley,” “Pete Gilmore,” “Gilliland,” to the far more charming “Red Bill” and “Gunny Sack Bill.” \textit{Id.} at 1083. One generally does not encounter such fellows in anti-trust cases.

\textsuperscript{206} \textit{Id.} at 1082.

\textsuperscript{207} \textit{Id.} at 1083 (emphasis added).
require a presumptively innocent person to prove that they are entitled to remain un-
convicted. The jury right and the irresistible truth that underlies it say no.

Oliver Wendell Holmes once wrote that a mind “stretched by a new idea or
sensation[ ] . . . never shrinks back to its former dimensions.”208 In the Apprendi line, the
mind of the Court was stretched by an even more powerful old idea that remains vital as
long as we continue to adhere to the Constitution as our organizing document and
enshrine it as the first product of our democracy. The Court simply cannot turn back from
applying that idea in the venue of burden of proof, where the irresistible force of the truth
that underlies it is destined to take it.

C. The Incongruous World of Patterson

The first step will be to overrule Patterson. Of course, the Apprendi majority
claimed that the rule it laid down would not have that effect.209 Of course, the majority
made the same claim about Walton, but as the true import of the Apprendi doctrine sank
in, Walton had to go.210

Since no issue of burden shifting was presented per se by the case before them,
the Apprendi majority’s comments about Patterson were indirect at best.211 In referring to
the main progeny of Patterson, Martin v. Ohio,212 for example, the majority observed that
there is a difference between “facts in aggravation of punishment and facts in

208 OLIVER WENDELL HOLMES, THE AUTOCRAT OF THE BREAKFAST TABLE 368 (Oxford University 1870).
209 530 U.S. at 476, 485 n.12, 486 n.16.
210 Ring, 536 U.S. 584.
211 Most of the assurances that Patterson would survive came about in curious reasoning that responded to
a charge by the dissent that unless the majority was dealing in “meaningless formalism” a state could easily
recast its statutes to provide huge statutory maximums for everything and then guide its judges’ discretion
on sentencing. Apprendi, 530 U.S. at 486 n.16. No such concerns were proper, the majority rejoined, since
while under Patterson the states might have such power, “structural democratic restraints” would prevent
them from so unduly manipulating the underlying offense. Id. If the manipulation became undue and
improperly shifted a burden, the majority also reserved the right to say so. Id.
212 480 U.S. 228 (1987).
mitigation,” implying that, insofar as a system burdened a defendant to prove facts at sentencing that mitigated punishment, it would be outside Apprendi. But that is a point wholly irrelevant to Patterson’s rule that speaks to proof of facts for conviction.

Justice O’Connor was indeed correct in her dissent when she observed that the majority does not reason away Patterson so much as they ignore it. They ignore Patterson, she said, because Patterson stood for legislative deference on the issue of defining elements of the offense and Apprendi gives no such deference. This refusal to defer obliterates the aggravation/mitigation distinction as it is difficult to understand why the rule adopted by the Court in today's case (or the broader rule advocated by JUSTICE THOMAS) would not require the overruling of Patterson. Unless the Court is willing to defer to a legislature’s formal definition of the elements of an offense, it is clear that the fact that Patterson did not act under the influence of extreme emotional disturbance, in substance, "increased the penalty for [his] crime beyond the prescribed statutory maximum" for first-degree manslaughter.

She saw the “bright line rule” the majority established not only as wholly inconsistent with Patterson’s deferral to the state on the definition of crimes but also with the core idea of Patterson that a burden shift is only problematic when an “essential ingredient” of

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213 Apprendi, 530 U.S. at 486.  
214 This observation may be true in a very limited context but it is particularly perplexing if it is meant to support Patterson. Patterson has nothing to do with burdens after a conviction when the authorization to punish has already been given. And before a conviction, there is no such thing as a mitigating factor a defendant may be required to prove. Defendants may not plead with a jury to render a verdict based on mercy, and judges routinely admonish juries not to deal in sympathy or mitigation. See Shannon v. United States, 512 U.S. 573 (1994); Spaziano v. Florida, 468 U.S. 447 (1984); Rogers v. United States, 422 U.S. 35 (1975). When, indeed, a defendant argues that his act is, at worst, manslaughter, he is not begging for mercy anyway. He is arguing is that the government can prove no more than manslaughter beyond a reasonable doubt. This is also precisely true in capital cases. Mitigating factors come into play there only after a defendant has been convicted of first degree murder and the government has proven one or more aggravating factors beyond a reasonable doubt. See Pennsylvania Suggested Standard Criminal Jury Instructions § 15.2501E-G.1. At that point, a jury weighs a verdict much as a judge does where the death penalty is not a possible sentence.  
215 Apprendi, 530 U.S. at 530, 539 (O’Connor, J., dissenting).  
216 Id. at 531.  
217 Id.
the crime was involved.\textsuperscript{218} Indeed, in her dissent in \textit{Blakely}, Justice O'Connor charged that the “legacy” of the \textit{Apprendi} line is to removing legislative discretion in the definition of crimes by Constitutional rule and to consolidate that power in the judicial branch of government.\textsuperscript{219} While this is an overstatement, she was right that when a deeply rooted Constitutional principle conflicts with a legislative innovation, the innovation falls. More than just being in “substantial tension” with \textit{Patterson},\textsuperscript{220} the principles underlying \textit{Apprendi} overrule it.

Once the rule of \textit{Apprendi} became more fully developed to mean that all facts necessary to authorize the government to punish a person must be proven by the government beyond a reasonable doubt, \textit{Patterson} became a Constitutional aberration. When the \textit{Blakely} Court held that a “judge's authority to sentence derives wholly from the jury's verdict[]. Without that restriction, the jury would not exercise the control that the Framers intended,”\textsuperscript{221} \textit{Patterson}'s holding that it is not necessarily true that a State “must prove beyond a reasonable doubt every fact, the existence or nonexistence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree of culpability or the severity of the punishment”\textsuperscript{222} simply cannot be reconciled.

While \textit{Patterson} allowed legislatures to make a “more subtle balancing of society’s interests against those of the accused,”\textsuperscript{223} \textit{Blakely} gave no such deference lest the jury not be able to perform its “function as circuit-breaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did

\begin{footnotesize}
\textsuperscript{218} Id. at 532-34.
\textsuperscript{219} 542 U.S. at 314 (O'Connor, J., dissenting).
\textsuperscript{220} \textit{Apprendi}, 530 U.S. at 534-36.
\textsuperscript{221} 542 U.S. at 304.
\textsuperscript{222} 432 U.S. at 207.
\textsuperscript{223} Id. at 210.
\end{footnotesize}
something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State actually seeks to punish.” 224 Indeed, by the time of Blakely, the Court had properly recalled that when a “subtle balancing” of an individual’s liberty was to be made against a legislature’s desire to punish, the Framers did “not trust government to make political decisions in this area.” 225

When the Court in Cunningham 226 stated bluntly that “[i]f the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied,” 227 were they not saying that, contrary to Patterson’s marginalization of the Mullaney holding, a State may not, in fact, “permit the blameworthiness of an act or the severity of punishment authorized for its commission to depend on the presence or absence of an identified fact without assuming the burden of proving [that fact] beyond a reasonable doubt”? 228 The dissent in Patterson was certainly right that the majority there misread Mullaney and created a loophole to allow legislatures to circumvent the Constitutional burden merely by shifting factors to an “affirmative defense category,” just as the Apprendi line was right in saying that a bypass of the Constitutional jury system is not permitted merely by calling something a “sentencing factor.” 229

In all respects, Patterson must pass into history.

224 542 U.S. at 306-07.
225 Id. at 307 n.10.
226 127 S. Ct. 865.
227 Id. at 869.
228 Patterson, 432 U.S. at 214.
229 Ring, 536 U.S. at 605.
D. An Exaggerated Armageddon: The New World of Old Truth

What sort of a world will we live in when these irreconcilable inconsistencies finally overrule Patterson, the irresistible force of the jury right triumphs, and burdens of proof are no longer placed upon defendants? Is this an unrealistic construct that would result in hoards of lawless thugs being spun out of courthouses by rampant acquittals when prosecutors can no longer prove their cases? Those who would advance that fear are either deluded or engaged in willful demagoguery. The way the system already operates will readily accommodate the proper view of the law. Just as Apprendi did not empty the jails, the overruling of Patterson will leave us as safe as a free people can ever hope to be.

The operation of the system makes burden of proof issues become real at trial in the judge’s instructions to the jury. Juries, after all, are not told to simply specify the facts they have found; they are asked for a verdict. A verdict answers a mixed question of fact and law, and “the judge bears ultimate responsibility for instructing a lay jury in the law.” The facts that a jury must find to give the government the authorization it seeks are facts that are “by law” made relevant to that authorization, making the words “guilty” or “not guilty” shorthand for a judgment rich in content. The institution of the jury would not serve the jury right if a jury was a mob assembled to damn one of their own when no law was actually violated, or if it was a band of anarchists free to ignore the law passed by the legislators and enforced by the executive for whom they voted. The power they wield is not to be a two-edge sword capable of striking a blow for injustice.

230 Gaudin, 515 U.S. at 511-12.
232 Apprendi, 530 U.S. at 501 (emphasis added).
against the defendant or the government. They base their authorization decision on mixed factual/legal matters that are at issue because the law makes them the conditions precedent to the authorization to punish.

There are some matters always at issue, regardless of whether the evidence in the case puts them in dispute. In its statute, the legislature has specifically delineated some socially aberrant behavior that it designates a crime. In its charging document, the executive claims that the defendant violated that statute in particulars it must articulate. Generally, these particulars involve the allegation of an act (shooting at another person), a mental state (intent), and sometimes a result (the victim dies). These matters are always placed at issue simply because the presumption of innocence stands as an evidentiary refutation of those particulars. Thus, in every case of first degree murder in Pennsylvania, for example, the government must prove that the victim is dead and that the defendant caused the death with malice and specific intent to kill.

But the law also contains other matters that are potentially at issue in every case. These matters could also defeat the government’s effort to win its authorization unless they are resolved in the government’s favor. The law recognizes justifications (self-

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233 In Sparf v. Hanson, 156 U.S. 51, 102-03 (1895), the Court held: We must hold firmly to the doctrine that in the courts of the United States it is the duty of juries in criminal cases to take the law from the court and apply that law to the facts as they find them to be from the evidence. Upon the court rests the responsibility of declaring the law; upon the jury, the responsibility of applying the law so declared to the facts as they, upon their conscience, believe them to be. Under any other system, the courts, although established in order to declare the law, would for every practical purpose be eliminated from our system of government as instrumentalities devised for the protection equally of society and of individuals in their essential rights. When that occurs our government will cease to be a government of laws, and become a government of men. Liberty regulated by law is the underlying principle of our institutions.

234 PA. R. CRIM. P. 560.
235 Davis, 160 U.S. at 485.
236 Coffin, 156 U.S. at 459-60. Justice Scalia has twice thundered that harmless error analysis must be very different where a judge does not charge on a matter such as these, chastising the Court on one occasion by asking how many “elements” of an offense can be taken away and it not be harmless error. Neder, 527 U.S. at 33; Carella, 491 U.S. at 270.
defense), excuses (duress and entrapment), matters in mitigation (heat of passion), and exceptions (abandoned buildings cannot be burglarized) that, to the extent they exist in a given case, represent impediments to the government’s desired authorization to punish. While some of these may be fundamental components of the American scheme of justice immune from legislative repeal, most of them are matters of legislative choice. Within those “American scheme” parameters, the legislature may define these matters and circumscribe when they become legal issues in a case upon which a judge must instruct the jury.

The system requires that the judge define which factual/legal issues are before the jury and which are not. Degrees of an offense not supported by the facts may not be offered as an optional verdict and, similarly, a judge has no duty to frame an issue concerning a defense which has absolutely no support in the record.

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238 See 18 PA. CONS. STAT. § 3502 (2008) (making it a defense “that the building or structure [otherwise entered] was abandoned”).
239 See Bailey, 444 U.S. at 412-15.
240 See Clark v. Arizona, 548 U.S. 735 (2006). Also, recall the discussion, supra, regarding duress. Could Congress or a state legislature eliminate duress as a defense given what the Court has said is its long and established place in the law?
241 Pennsylvania could easily remove the abandoned building defense from its burglary statute. See note 239 above.
242 For example, duress in Pennsylvania (where the burden is on the Commonwealth to disprove its existence, Commonwealth v. Knight, 611 A. 2d 1199 (Pa. Super. 1992)) is not applicable where the defendant recklessly placed himself in a position where duress was likely to occur. 18 PA. CONS. STAT. § 309(b) (2008). And entrapment in Pennsylvania (the defendant’s burden to prove) is not available for crimes involving bodily injury to a person or threats thereof. 18 PA. CONS. STAT. § 313(c) (2008).
243 Additionally, the definition of such defenses often opens areas for the admissibility of evidence otherwise foreclosed, making the burden on the government not only palatable but arguably desirable. In federal court, once a defendant announces an entrapment defense, his predisposition and all facts (including his prior record) become arguably relevant. See, e.g., Jacobson v. United States, 503 U.S. 540, 550 (1992); United States v. Bastaniopour, 41 F.3d 1178, 1183 (7th Cir. 1994).
244 For example, in a homicide case, just as the court will not permit a first degree murder theory to be submitted to a jury when the evidence does not warrant such a finding, a defendant cannot get a lesser included offense instruction just because he asks for one; such instructions are given only where the evidence would support the finding of a particular grade of homicide. See Pennsylvania Suggested Standard Criminal Jury Instructions § 15.2501(B). See also Commonwealth v. Solano, 906 A. 2d 1180, 1190 (Pa. 2006) (stating that the Court need not charge on third degree murder where evidence would only support an intentional killing).
As a general principle, "a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." So long as the evidence presented at trial reveals a basis for the defense, a court may not refuse a defendant's request for an instruction on that defense. Conversely, a trial court need not instruct the jury on any principle that does not have a factual basis in the evidence.245

The defendant can be required to contribute to the “factual basis” for these matters (via cross examination or otherwise) in order to place them at issue without forfeiting his right to have the government prove the matter in its favor beyond a reasonable doubt.246 He may also be expected to give the court reasonable notice of the fact that he intends to raise them.247 But if he leaves the record with respect to one of these issues such that no reasonable juror could entertain a reasonable doubt based upon it, he must not expect the judge to find the matter to be an “issue” that the law requires the jury to resolve.248

Why treat these matters differently than the actus reus/mens rea issues upon which instructions must always be given? Why not, for example, always charge that the

245 Govt. of Virgin Islands v. Fonseca, 274 F.3d 760, 766 (3d. Cir. 2001) (internal citations omitted).
246 See Davis, 160 U.S. at 486; LAFEVE, supra note 15, at 57-59.
247 This procedure is already utilized. See Fed. R. Crim. P. 12.1 (alibi) and 12.2 (insanity).
248 The Court in Matthews v. United States, 485 U.S. 58, 63 (1988), put the matter positively:
  As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor.

The Pennsylvania Supreme Court summarized the rule as follows:

The Constitution guarantees to state criminal defendants "a meaningful opportunity to present a complete defense." Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 2146, 90 L. Ed. 2d 636 (1986) (internal quotation marks omitted). Hence, "[w]here a defendant requests a jury instruction on a defense, the trial court may not refuse to instruct the jury regarding the defense if it is supported by evidence in the record," DeMarco, 570 Pa. at 271, 809 A.2d at 261; it is "for the trier of fact to pass upon that evidence and improper for the trial judge to exclude such consideration by refusing the charge." Commonwealth v. Lightfoot, 538 Pa. 350, 355, 648 A.2d 761, 764 (1994) (internal quotation marks omitted); see also Commonwealth v. Borgella, 531 Pa. 139, 142, 611 A.2d 699, 700 (1992) ("A defendant is entitled to an instruction on any recognized defense which has been requested, which has been made an issue in the case, and for which there exists evidence sufficient for a reasonable jury to find in his or her favor."); Commonwealth v. Weiskerger, 520 Pa. 305, 312-13, 554 A.2d 10, 14 (1989) (same). In determining whether there is sufficient evidentiary support for a duress instruction, the trial court considers all evidence presented, whether adduced by the defendant as part of her case in chief, through cross-examination, or, "conceivably . . . in the Commonwealth's own case in chief." DeMarco, 570 Pa. at 271 n.6, 809 A.2d at 261 n.6 (internal quotation marks omitted).

government must prove that the defendant was sane? The *Davis* Court determined that the government should have to prove sanity only when it was raised, concluding that the law wisely employed a rebuttable presumption that people are sane to save unnecessary instructions that could only “seriously delay and embarrass the enforcement of the laws against crime.” Might we not do the same with duress, entrapment, and self defense?

I hope not. It is bad enough that the Supreme Court has been overly generous with *permissive inferences* that allow a trial judge to suggest the proof of a matter like malice when there is merely a rational relation between the fact allegedly established and the complex legal issue presumed. Presumptions, even rebuttable ones, are at least as bad when they assume that the fact is proven *ab initio* and that the defendant must suggest it

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*249 The full quote of the Court is worth considering:*

This view is not at all inconsistent with the presumption which the law, justified by the general experience of mankind as well as by considerations of public safety, indulges in favor of sanity. If that presumption were not indulged the government would always be under the necessity of adducing affirmative evidence of the sanity of an accused. But a requirement of that character would seriously delay and embarrass the enforcement of the laws against crime, and in most cases be unnecessary. Consequently the law presumes that every one charged with crime is sane, and thus supplies in the first instance the required proof of capacity to commit crime. It authorizes the jury to assume at the outset that the accused is criminally responsible for his acts. But that is not a conclusive presumption, which the law upon grounds of public policy forbids to be overthrown or impaired by opposing proof. It is a disputable or, as it is often designated, a rebuttable presumption resulting from the connection ordinarily existing between certain facts -- such connection not being "so intimate, nor so nearly universal, as to render it expedient that it should be absolutely and imperatively presumed to exist in every case, all evidence to the contrary being rejected; but yet it is so general, and so nearly universal, that the law itself, without the aid of a jury, infers the one fact from the proved existence of the other, in the absence of all opposing evidence." 1 Greenl. Ev. § 38. It is therefore a presumption that is liable to be overcome or to be so far impaired in a particular case that it cannot be safely or properly made the basis of action in that case, especially if the inquiry involves human life. In a certain sense it may be true that where the defence is insanity, and where the case made by the prosecution discloses nothing whatever in excuse or extenuation of the crime charged, the accused is bound to produce some evidence that will impair or weaken the force of the legal presumption in favor of sanity. But to hold that such presumption must absolutely control the jury until it is overthrown or impaired by evidence sufficient to establish the fact of insanity beyond all reasonable doubt or to the reasonable satisfaction of the jury, is in effect to require him to establish his innocence, by proving that he is not guilty of the crime charged.


is “unproven” by the evidence. While the result may be the same, I suggest there is a
different way of looking at this that is consistent with the overall methodology.

I have argued that the focus must be on the Constitutional process of gaining a
conviction. That process enshrines the jury right and acknowledges the ultimate power
the jury holds consistent with the entire theory of our Constitutional government. That
same theory anticipates a role for the court in this process, a role that is to insure that the
jury right is honored by instructing the jury on the presumption of innocence, the
government’s burden of proving its claim to authorization beyond a reasonable doubt,
and by identifying for the jury those factual/legal matters necessary to that authorization
in the case before them. It is simply no part of the jury function (and thus outside the jury
right) to require that the jury be instructed to decide matters outside that framework.

The world after the overruling of Patterson will be one where arguments about
the jury charge will be about whether the judge failed to find that a matter was
sufficiently at issue to support a charge. Such issues, however, do not nearly involve the
troubling incongruities and abdication of Constitutional principles that is the systematic
legacy of Patterson. In the new world, there will be no doubt as to which side had the
burden of proving the issues that were resolved.

The process of getting to the proper assignment of that burden will deepen our
appreciation of the principles that must always withstand the emotional storms of fear
that plague us. Once we get there, we will be in a world faithful to our Constitutional
mandate and more nearly able to enjoy the measure of freedom our charter promises. It
will be a world in which the irresistible force of the Framer’s genius has once again
worked its magic. We will have time to clean up all the other messes we have created.