CRIMINAL LAW—DURESS—STANDARD FOR DURESS DEFENSE BASED UPON PERSON OF REASONABLE FIRMNESS WITH BURDEN OF PERSUASION BY PREPONDERANCE OF EVIDENCE UPON DEFENDANT—*State v. Toscano*, 74 N.J. 421, 378 A.2d 755 (1977).

Doctor Joseph Toscano prepared a false medical report subsequently used by others to defraud the Kemper Insurance Company.[1] Although he admitted his complicity in the fraud,[2] the doctor contended that his participation resulted from threats directed at himself and his wife.[3] Fearing for their bodily safety[4] and lacking

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[1] State v. Toscano, 74 N.J. 421, 423–25, 378 A.2d 755, 756 (1977). Doctor Toscano, without having examined anyone, prepared a medical report and bill at the direction of William Leonardo. *Id.* at 428, 378 A.2d at 758. Leonardo had developed a scheme to defraud several insurance companies by staging accidents and collecting for medical expenses and lost wages. Brief on Behalf of the State of New Jersey at 3, State v. Toscano, 74 N.J. 421, 378 A.2d 755 (1977) [hereinafter cited as Brief on Behalf of the State]. Over a period of three years, Leonardo engineered twelve such accidents in various public places. 74 N.J. at 424, 425 n.2, 378 A.2d at 756, 757 n.2. A consistent *modus operandi* was employed for each episode by which one of Leonardo's men would pretend to fall and then report to a doctor who was also part of the ruse. *Id.* at 425, 378 A.2d at 757. With the exception of the Kemper incident, Doctor Miele and/or Doctor Rigeron furnished all medical reports. Brief and Appendix for Defendant-Appellant at 5, State v. Toscano, 74 N.J. 421, 378 A.2d 755 (1977) [hereinafter cited as Brief for Defendant-Appellant]. In addition, "friendly employers" would provide verification of employment and lost wages to augment the insurance claim. 74 N.J. at 425, 378 A.2d at 757. Leonardo, after taking most of the money for himself, would divide the balance among "the 'victims,' " doctors and employers working with him. *Id.* at 425–26, 378 A.2d at 757.

During January of 1970, two accidents were staged within two days of each other—one at a discount store, the other in a movie theatre. *Id.* at 426, 378 A.2d at 757; *see* Brief on Behalf of the State, *supra* at 7. Doctor Miele verified the victim's injuries for both falls. 74 N.J. at 426, 378 A.2d at 757. When conferring with the Kemper Insurance Company, the theatre's insurer, the doctor confused the claims and informed the adjuster that he was treating the victim for injuries resulting from a fall at a discount store. *Id.* Leonardo realized he needed another doctor to allay the adjuster's suspicions and contacted Doctor Toscano. *Id.* at 426–27, 378 A.2d at 757; *see* note 3 *infra*.

[2] State v. Toscano, 74 N.J. 421, 423, 378 A.2d 755, 756 (1977).

[3] Brief for Defendant-Appellant, *supra* note 1, at 10. Doctor Toscano attempted to raise a duress defense at trial but the court granted the state's motion to exclude such testimony. State v. Toscano, 74 N.J. 421, 429, 378 A.2d 755, 758 (1977). The duress, allegedly experienced by Toscano, consisted of a series of three telephone calls by Leonardo which became progressively more threatening. *Id.* at 427–28, 378 A.2d at 758. Leonardo, demanding that the doctor prepare a false medical report, threatened—"[r]emember, you just moved into a place that has a very dark entrance . . . . You and your wife are going to jump at shadows when you leave that dark entrance." *Id.* at 428, 378 A.2d at 758.

At trial, the prosecution sought to prove that Toscano's cooperation with Leonardo was intended to discharge his gambling debt with Leonardo's brother. *Id.* at 426, 378 A.2d at 757.

[4] State v. Toscano, 74 N.J. 421, 428, 378 A.2d 755, 758 (1977). Doctor Toscano, although not personally acquainted with Leonardo, was aware of his past criminal record which indicated a propensity towards violence. *Id.* at 427, 378 A.2d at 758. *See also* Brief for Defendant-Appellant, *supra* note 1, at 22.

confidence in the police,[5] Dr. Toscano yielded to the demands made upon him.[6]

At trial, the court determined that the circumstances described by the defendant, Dr. Toscano, did not establish the defense of duress.[7] Finding the doctor's subjective fears irrelevant,[8] the judge decided that the threatened harm was not sufficiently imminent to justify a duress instruction.[9] The jury found Dr. Toscano guilty of conspiracy to obtain money by false pretenses, resulting in the court's imposition of a $500 fine.[10] The appellate division, affirming the lower court's decision, held that the defendant failed to prove that he acted because of " 'present, imminent and impending' " danger[11]—the traditional threshold condition of the duress defense.[12]

The Supreme Court of New Jersey, in *State v. Toscano*,[13] granted certification to review the status of duress as an affirmative

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[5] Brief for Defendant-Appellant, *supra* note 1, at 23 (citation omitted). At trial, Toscano stated that he did not go to the police "because it seemed like every time this fellow (Leonardo) was arrested, he was out in the streets again right away." *Id.* The doctor expressed his fear that if he did not comply with Leonardo's demand that he "was going to be afraid . . . from then on." *Id.* at 22.

[6] State v. Toscano, 74 N.J. 421, 428, 378 A.2d 755, 758 (1977). Two days after Leonardo's final telephone call, Toscano delivered the completed medical report to one of Leonardo's accomplices. *Id.* The doctor received no compensation for his services. *Id.*

[7] State v. Toscano, 74 N.J. 421, 430, 378 A.2d 755, 759 (1977). The court reiterated the common law rule that the threatened harm must have been "present, imminent and impending" for the accused to present successfully a duress defense. *Id.* at 429, 378 A.2d at 759. Furthermore, the threatened danger must consist of serious bodily injury or death. *Id.* For a detailed discussion of the common law position with respect to the duress defense, see notes 32–49 *infra* and accompanying text.

[8] State v. Toscano, 74 N.J. 421, 429, 378 A.2d 755, 759 (1977). The court emphasized that Toscano's failure to avail himself of the opportunity to seek police assistance was based entirely on "his [own] doubts that police would be willing or able to protect him." *Id.*

[9] State v. Toscano, 74 N.J. 421, 429–30, 378 A.2d 755, 759 (1977). The court noted that Toscano's "subjective estimate of the immediacy of the harm" did not meet the common law standard. *Id.* Rather, the court held that to establish successfully the defense, one must meet "an objective standard [of immediacy] which included a reasonable explanation of why he did not report the threats to the police." *Id.*

[10] State v. Toscano, 74 N.J. 421, 423–24, 378 A.2d 755, 756 (1977).

[11] State v. Toscano, 153 N.J. Super. 7, 10, 378 A.2d 777, 779 (App. Div. 1975), *rev'd*, 74 N.J. 421, 378 A.2d 755 (1977). The three judge panel emphasized Toscano's failure to obtain police assistance during the interval between Leonardo's threat and the commission of the crime. *Id.*

[12] State v. Toscano, 153 N.J. Super. 7, 10, 378 A.2d 777, 779 (App. Div. 1975), *rev'd*, 74 N.J. 421, 378 A.2d 755 (1977). The court based its decision on State v. Churchill, 105 N.J.L. 123, 143 A. 330 (Ct. Err. & App. 1928), and State v. Palmieri, 93 N.J.L. 195, 107 A. 407 (Ct. Err. & App. 1919). 153 N.J. Super. at 10, 378 A.2d at 779. For a more detailed analysis of these decisions, see notes 76–84 *infra* and accompanying text.

[13] 74 N.J. 421, 378 A.2d 755 (1977).

defense to criminal prosecution.[14] Justice Pashman, writing for the majority,[15] stated that duress constitutes a potential defense to any crime except murder.[16] The court further held that the burden of proof rests on the defendant to prove by a preponderance of the evidence[17] that he acted because of threats or actual use of unlawful force against himself or another, "which a person of reasonable firmness in his situation would have been unable to resist."[18] The supreme court reversed Doctor Toscano's conviction and mandated a new trial.[19] While concurring with the court's adoption of a new duress standard,[20] Judge Conford, in the only dissenting opinion, disagreed with the majority's allocation of the burden of persuasion as to the duress defense.[21]

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[14] *Id.* at 424, 378 A.2d at 756. Prior to *Toscano*, the New Jersey judiciary had never determined whether duress was available as a defense to prosecution. *Id.* at 430–32, 378 A.2d at 759–60; *see* notes 74–75 *infra* and accompanying text. The courts have disposed of criminal cases without reaching this fundamental question. 74 N.J. at 430–31, 378 A.2d at 759–60. The court considered *Toscano* to be "the first instance in which a defendant charged with a crime other than murder allegedly committed under the threat of serious bodily injury to himself and a near relative has raised the issue of whether such harm must be 'present, imminent and impending.' " *Id.* at 432, 378 A.2d at 760.

[15] 74 N.J. at 423, 378 A.2d at 756.

[16] *Id.* at 424, 442, 378 A.2d at 756, 765. This position accords with that taken by most jurisdictions. *See* notes 36, 98–100 *infra* and accompanying text.

[17] 74 N.J. at 442, 378 A.2d at 765. A preponderance of the evidence refers to the quantum of proof necessary to establish an issue. Professor McCormick defined it as "proof which leads the jury to find that the existence of the contested fact is more probable than its nonexistence." C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 338, at 794 (2d ed. 1972). The *Toscano* court, by imposing the full burden of proof on the defendant, utilized an affirmative defense procedure to offset its liberal formulation of duress. 74 N.J. at 443, 378 A.2d at 766. Since the burden of persuasion significantly outweighs the burden of producing evidence "[i]n terms of importance," Ashford & Risinger, *Presumptions, Assumptions and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165, 172 (1969), it should properly be called affirmative only when the defendant must carry both the initial burden of introducing evidence and the burden of persuasion as to a defense. *Id.*

The term "affirmative defense" is reserved in this Note for the critical procedure of imposing on the criminal defendant the burden of persuasion. *But see* MODEL PENAL CODE §§ 1.12, 2.09(1) (1962); New Jersey Code of Criminal Justice, N.J. STAT. ANN. §§ 2C:1-12 to :2-9 (West eff. Sept. 1, 1979) (both labelling duress an affirmative defense while only imposing burden of introducing evidence of duress on accused).

[18] 74 N.J. at 442, 378 A.2d at 765. The court employed a standard identical to that in section 2.09(1) of the Model Penal Code and the New Jersey Code of Criminal Justice, N.J. STAT. ANN. § 2C:2-9 (West eff. Sept. 1, 1979). For a complete discussion of these code sections, see notes 108–18 *infra* and accompanying text.

[19] 74 N.J. at 444, 378 A.2d at 766.

[20] *Id.* Judge Conford viewed the majority's "substantive reformulation of the defense of duress . . . [as] a progressive step in our jurisprudence" and joined in the reversal of Toscano's conviction. *Id.* at 444–45, 378 A.2d at 766–67.

[21] *Id.* at 444–46, 378 A.2d at 766–67. For a discussion of Judge Conford's dissent, see notes 147–58 *infra* and accompanying text.

Historically, two divergent approaches have existed with regard to the defense of duress. The traditional common law school of thought labels duress an exculpatory condition.[22] Since harm of greater magnitude has been avoided,[23] the accused's conduct, though violative of the criminal law,[24] will escape sanction.[25] Under this view, "volitional intent"[26] is acknowledged, but the accused's "reasonable fear of harm justifies his act."[27] The contemporary approach focuses on culpability alleviating responsibility for criminal conduct where the accused lacked sufficient criminal intent.[28] Modern jurists and commentators, employing an expanded definition of *mens rea*,[29] find the accused not guilty by reason of duress rather than guilty but excused.[30]

At common law, an act committed under duress[31] may constitute an excuse to prosecution provided certain stringent requirements are

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[22] *See, e.g.*, G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART § 181, at 592 (1953); Dubin, *Mens Rea Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility*, 18 STAN. L. REV. 322, 326–27 (1966); Perkins, *The Doctrine of Coercion*, 19 IOWA L. REV. 507, 518 (1934). *But see* 2 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 108 (1883) (duress should never excuse crime, only mitigate punishment).

[23] W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 49, at 374 (2d ed. 1972). This "choice of evils" situation has been well described as a situation where one must "in order to escape what he dislikes most . . . do something which he dislikes less, though he may dislike extremely what he determines to do." 2 J. STEPHEN, *supra* note 22, at 102. The general "principle [is] that, where one of two harms is unavoidable, it is right to choose the lesser one." J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 422 (2d ed. 1947).

[24] The existence of a criminal violation has resulted in the formulation of rigid standards in order to prove a duress defense. "It would be a most dangerous rule if a defendant could shield himself from prosecution for crime by merely setting up a fear from or because of a threat of a third person." 1 F. WHARTON, CRIMINAL LAW § 384, at 516 (12th ed. 1932) (footnote omitted). To avoid abuse of this defense which "held within it the germs of potential disorder . . . it had to be well hedged and strict of proof." Newman & Weitzer, *Duress, Free Will and the Criminal Law*, 30 S. CAL. L. REV. 313, 314 (1957). It appears, however, that such inflexibility and caution virtually precluded availability of the defense. J. HALL, *supra* note 23, at 414–15.

[25] *See* note 23 *supra*.

[26] Note, *Affirmative Defenses and Due Process: The Constitutionality of Placing a Burden of Persuasion on a Criminal Defendant*, 64 GEO. L.J. 871, 886–87 (1976).

[27] *Id.*

[28] *See, e.g., id.* at 880; Newman & Weitzer, *supra* note 24, at 313.

[29] Moore v. State, 137 Ga. App. 735, 736, 224 S.E.2d 856, 857 (Ct. App.), *rev'd on other grounds*, 237 Ga. 269, 227 S.E.2d 241 (1976); People v. Luther, 394 Mich. 619, 622, 232 N.W.2d 184, 187 (1975); *see* Note, *supra* note 26, at 880. This approach requires that "not only must the defendant act voluntarily and with knowledge of the probable consequences of his acts, but also his state of mind must be sufficiently criminal to justify punishment." *Id.*; Newman & Weitzer, *supra* note 24, at 313 (arguing that in duress situation, " 'free will' is stolen").

[30] Note, *supra* note 26, at 880. This result flows from an analysis acknowledging the impossibility of "the ready separation of elements from defenses." *Id.* at 882.

[31] The terms coercion and compulsion have historically been interchanged with the term duress although not technically synonymous. *See* Perkins, *supra* note 22, at 507; Hersey & Avins, *Compulsion as a Defense to Criminal Prosecution*, 11 OKLA. L. REV. 283, 283 (1958).

met.[32] The duress must be " 'present, imminent and impending, and of such a nature as to induce a well-grounded apprehension of death or serious bodily harm if the act is not done.' "[33] Although the courts allow duress as a defense to a wide range of crimes,[34] they routinely exclude the defense in homicide cases.[35] This exception to the general availability of duress can be explained by the extreme and irreparable nature of the crime of murder.[36]

Often the court examines the issue of immediacy before considering the other elements of the duress defense.[37] Because the threatened injury must be "present, imminent and impending," threats of future harm prove inadequate.[38] At the core of this im-

[32] Perkins, *supra* note 22, at 518; *see* Browning v. State, 31 Ala. App. 137, 140, 13 So. 2d 54, 56 (1943); Nall v. Commonwealth, 208 Ky. 700, 702, 271 S.W. 1059, 1059–60 (1925); People v. Merhige, 212 Mich. 601, 610–11, 180 N.W. 418, 422 (1920).

[33] Perkins, *supra* note 22, at 518.

[34] Defendants have raised the duress defense to crimes varying from felonies to misdemeanors. *See, e.g.*, Kawakita v. United States, 343 U.S. 717, 735 (1952) (treason); Shannon v. United States, 76 F.2d 490, 493 (10th Cir. 1935) (kidnapping); People v. Sanders, 82 Cal. App. 778, 780, 256 P. 251, 254 (1927) (forgery); Burton v. State, 51 Tex. Crim. 196, 197, 101 S.W. 226, 229 (Crim. App. 1907) (bigamy).

[35] The exclusion of duress as a defense to murder, while not universal, finds general acceptance as good law. Taylor v. State, 158 Miss. 505, 510, 130 So. 502, 504 (1930); State v. Nargashian, 26 R.I. 299, 304, 58 A. 953, 955 (1904); Arp v. State, 97 Ala. 5, 12, 12 So. 301, 303 (1893). *Contra*, Model Penal Code § 2.09 (1962); *id.*, Comments at 8 (Tent. Draft No. 10, 1960) (allowing duress as defense to murder). Some jurisdictions, under common law or statute, permit duress to mitigate the accused's punishment or the crime charged. WIS. STAT. ANN. § 939.46(1) (West 1958); New Jersey Code of Criminal Justice, N.J. STAT. ANN. § 2C:2-9(b) (West eff. Sept. 1, 1979) (mitigates murder to manslaughter). For text of the New Jersey provision, see note 108 *infra*. Duress can be used to show the absence of premeditation and intent to kill, thereby mitigating the punishment.

[36] The underlying rationale of denial of the duress defense to a murder charge is founded on the premise that one should risk or sacrifice one's own life rather than take the life of an innocent person. State v. Dissicini, 126 N.J. Super. 565, 571, 316 A.2d 12, 16 (App. Div. 1974), *aff'd*, 66 N.J. 411, 331 A.2d 618 (1975) (en banc). Since the possibility remains that the threat constituting the coercion will not be carried out, one must take the risk and refuse to kill an innocent third party. Brief for Amicus Curiae at 25, State v. Toscano, 75 N.J. 421, 378 A.2d 755 (1977).

[37] Courts often treat the immediacy element as a threshold condition for establishing the duress defense. United States v. Gordon, 526 F.2d 406, 408 (9th Cir. 1975); United States v. Stevison, 471 F.2d 143, 147 (7th Cir. 1972), *cert. denied*, 411 U.S. 950 (1973); People v. Robinson, 411 Ill. App. 3d 526, 529, 354 N.E.2d 117, 120 (1976).

[38] A defendant claiming the defense of duress must prove that at the time he actually committed the crime he was in immediate danger of harm. *See* Shannon v. United States, 76 F.2d 490, 493 (10th Cir. 1935); State v. Palmieri, 93 N.J.L. 195, 200, 107 A. 407, 409 (Ct. Err. & App. 1919); Burton v. State, 51 Tex. Crim. 196, 201, 101 S.W. 226, 229 (1907). Commentators have argued that within this immediacy requirement lies an inherent flaw, for

> [t]o say that a threat of future harm is not sufficient is to ignore the fact that the nature of a threat is to hold out a future harm. All danger to the "duressed" is in the future, for if it were in the present it would no longer be a danger or a threat but would be an accomplished harm.

Newman & Weitzer, *supra* note 24, at 328.

mediacy element rests the policy consideration that one must take advantage of any opportunity to escape[39] or seek police assistance.[40]

The quantum of fear necessary to establish duress is at minimum a fear of serious bodily harm.[41] Consequently, injury to property,[42] loss of employment,[43] economic necessity,[44] and threat of prosecution[45] fail to meet the common law standard. In addition, courts reject the defense when premised upon a general apprehension of danger unrelated to any specific threat.[46] There exists, however, no requirement that the threatened harm be directed at the accused.[47] The courts often view threats or injury to another, especially a close relative, as a sufficiently serious harm for this defense.[48] Fault or

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[39] United States v. Gordon, 526 F.2d 406, 408 (9th Cir. 1975); D'Aquino v. United States, 192 F.2d 338, 359 (9th Cir. 1951), *cert. denied*, 343 U.S. 935 (1952); R.I. Rec. Center, Inc. v. Aetna Cas. & Sur. Co., 177 F.2d 603, 606 (1st Cir. 1949).

[40] United States v. Stevison, 471 F.2d 143, 147 (7th Cir. 1972), *cert. denied*, 411 U.S. 950 (1973); Shannon v. United States, 76 F.2d 490, 493 (10th Cir. 1935); Bain v. State, 67 Miss. 557, 560, 7 So. 408, 409 (1890). Such a requirement may be potentially unfair especially where police assistance would be ineffective. *See* Commonwealth v. Reffitt, 149 Ky. 300, 301, 148 S.W. 48, 49 (1912). *See generally* Hall v. State, 136 Fla. 644, 680, 187 So. 392, 407 (1939).

[41] Pittman v. Commonwealth, 512 S.W.2d 488, 490 (Ky. 1974); State v. Crews, 17 N.C. App. 141, 193 S.E.2d 317, 318 (1972). In the very early cases where a duress defense was raised, fear of death was required. Respublica v. M'Carty, 2 U.S. (2 Dall.) 86, 87 (1781); United States v. Haskell, 26 F. Cas. 207, 210 (C.C.E.D. Pa. 1823) (No. 15,321). For a discussion of quantum of force and resistance as an individual question, see Newman & Weitzer, *supra* note 24, at 329–30.

[42] United States v. Palmer, 458 F.2d 663, 665 (9th Cir. 1972) ("grievous financial loss . . . [does] not constitute compulsion or duress which would excuse criminal conduct"). *But see* Commonwealth v. Reffitt, 149 Ky. 300, 304, 148 S.W. 48, 49–50 (1912) (allowing for injury to reputation or property). One commentator has reasoned that "[o]nce the principle is admitted of balancing the duress against the crime, it becomes obvious that a sufficiently serious threat to property must excuse a sufficiently minor crime." G. WILLIAMS, *supra* note 22, § 181, at 597.

[43] Moore v. State, 23 Ala. App. 432, 433, 127 So. 796, 796 (Crim. App. 1929); People v. Ricker, 45 Ill. 2d 562, 568, 262 N.E.2d 456, 460 (1970).

[44] State v. Gann, 244 N.W.2d 746, 752 (N.D. 1976) (defendant, charged with robbery, claimed he needed money to provide food and shelter for family).

[45] People v. Ricker, 45 Ill. 2d 562, 568, 262 N.E.2d 456, 460 (1970); State v. Patterson, 117 Or. 153, 156, 241 P. 977, 978 (1925).

[46] Rhode Island Rec. Center v. Aetna Cas. & Sur. Co., 177 F.2d 603, 605 (1st Cir. 1949); People v. Robinson, 41 Ill. App.3d 526, 529, 354 N.E.2d 117, 120 (App. Ct. 1976); *see* State v. Dissicini, 126 N.J. Super. 565, 569, 316 A.2d 12, 15 (App. Div. 1974), *aff'd*, 66 N.J. 411, 331 A.2d 618 (1975) (en banc) (evidence indicated that defendant's fears not based on specific threat but rather on fear that sign of disagreement would cause violent response from gang leader).

[47] Koontz v. State, 204 So.2d 224, 225 (Fla. Dist. Ct. App. 1967) (defendant's mother and sister threatened).

[48] The impulse of an individual to protect a close relative, especially a child "may be as strong as, or stronger than, the desire to save [one's] own life." Hersey & Avins, *supra* note 31, at 286; *see* G. WILLIAMS, *supra* note 22, at 598.

negligence by the defendant, which contributes to the coercive situation, generally precludes the defense.[49]

In addition to these substantive requirements, procedural variation exists as to the allocation of the burden of proof. In a number of courts, the defendant need only introduce evidence of duress which the prosecution must then disprove beyond a reasonable doubt.[50] This approach accords with the constitutional imposition on the state of the burden of proof as to every element of the crime charged.[51] Other courts have designated duress as an affirmative defense requiring the accused to bear the burden of persuasion.[52] These courts reason that they have only imposed a procedural burden whereby the accused must prove reasons supporting his exoneration not his innocence.[53]

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[49] State v. Patterson, 117 Or. 153, 156, 241 P. 977, 978 (1925); MODEL PENAL CODE § 2.09 (2) (1962) (excludes duress as defense where accused's recklessness created situation). However, where the accused was merely negligent, the defense is denied only if negligence suffices to establish culpability as to the particular charge. State v. Patterson, 117 Or. at 156, 241 P. at 978. The drafters of the Code drew a distinction "between inadvertence and the conscious risk creation involved in recklessness." MODEL PENAL CODE § 2.09, Comments at 8 (Tent. Draft No. 10, 1960). Professor Stephen posited the situation where a member of a secret society commits murder because he would have been assassinated if he refused. 2 J. STEPHEN, *supra* note 22, at 108.

[50] *See, e.g.*, United States v. Fleming, 7 C.M.A. 543, 556, 23 C.M.R. 7, 20 (1957); Moore v. State, 237 Ga. 269, 270, 227 S.E.2d 241, 242 (1976); People v. Luther, 394 Mich. 619, 621, 232 N.W.2d 184, 186 (1975); People v. Field, 28 Mich. App. 476, 478, 184 N.W.2d 551, 552 (1970); Stafford v. State, 104 Tex. Crim. 493, 495, 284 S.W. 581, 582 (Crim. App. 1926).

[51] *In re* Winship, 397 U.S. 358, 364 (1970). This traditional approach can be traced to the presumption of innocence which is utilized by courts of the United States, where a person is presumed innocent until proven guilty. *See* Coffin v. United States, 156 U.S. 432, 452–61 (1895). Since this presumption attaches to all criminal defendants, the prosecution logically retains the burden of proving the defendant's guilt.

[52] *See, e.g.*, Pittman v. Commonwealth, 512 S.W.2d 488, 490 (Ky. App. 1974); State v. Milan, 108 Ohio App. 254, 261, 156 N.E.2d 840, 843 (1959); Comment, *Constitutionality of Criminal Affirmative Defenses: Duress and Coercion*, 11 U.S.F. L. REV. 123, 138 (1976). This approach strongly contrasts with that found in England, the source of the United States's substantive defense of duress. The English procedure imposes upon the prosecution the burden of proving the absence of the defense beyond a reasonable doubt. *See* Regina v. Gill, [1963] 2 All E.R. 688, 691 (Crim. App.); Regina v. Bone, [1968] 2 All E.R. 644, 645 (C.A.). Under English law, the only criminal affirmative defense is insanity. Woolmington v. Director of Pub. Prosecutions, [1935] A.C. 462, 475.

[53] Some state courts have persistently relied on Leland v. Oregon, 343 U.S. 790 (1952), where the Supreme Court sanctioned a state statute imposing the burden of proving insanity upon the defendant. *See In re* Foss, 10 Cal.3d 910, 930–31, 519 P.2d 1073, 1086–87, 112 Cal. Rptr. 649, 662–66 (1974); Commonwealth v. McKennion, 235 Pa. Super. Ct. 160, 166, 340 A.2d 889, 892 (1975). The *Leland* Court and its progeny have reached this result by distinguishing between the express elements of a crime and affirmative defenses. 343 U.S. at 794. The attempt to separate analytically elements of a crime from defenses stems largely from early judicial characterization "of the criminal process as a dispute divisible into two kinds of issues: those belonging to the prosecution's case and those belonging to the defendant's case." Fletcher, *Two*

In 1970, the United States Supreme Court held in *In re Winship*[54] that the "Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[55] In 1975, the Court, in *Mullaney v. Wilbur*,[56] extended the *Winship* standard to an affirmative defense.[57] The jury was instructed in *Mullaney* that absent proof by the defendant that he had acted in the heat of passion, malice aforethought would be presumed if the state proved an unlawful and intentional homicide.[58] The Supreme Court denounced this procedure as violative of due process and held that upon presentation of the issue in a homicide case the prosecution must prove beyond a reasonable doubt the absence of heat of passion.[59]

The *Mullaney* analysis focused on "the interests of both the State and the defendant as affected by the allocation of the burden of proof."[60] These interests conflict when a defense is designated as affirmative. The Court viewed the prosecution's interest as primarily the hardship that might result from retention of the burden of proof as to an issue.[61] Against this interest, the Court weighed the accused's interest in "his liberty" and "the certainty" of "stigmatiz-[ation]" as a consequence of conviction,[62] "the societal interests in the

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Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases, 77 YALE L.J. 880, 899 (1968). This application of civil litigation principles to the criminal process arguably fails to comport with due process. *See generally* Mullaney v. Wilbur, 421 U.S. 684 (1975). *But see* Patterson v. New York, 432 U.S. 197 (1977).

[54] 397 U.S. 358 (1970).

[55] 397 U.S. at 364. The *Winship* trial court, with appellate court approval, had utilized the preponderance of the evidence standard of proof in a juvenile delinquency adjudication. *Id.* at 359–60. On appeal, the United States Supreme Court answered affirmatively the question "whether proof beyond a reasonable doubt is among the 'essentials of due process and fair treatment' required during the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an adult." *Id.* at 359, 368.

[56] 421 U.S. 684 (1975).

[57] *Id.* at 698–704.

[58] *Id.* at 686.

[59] *Id.* at 704. The Court stressed that historically heat of passion had been the primary "factor in determining the degree of culpability attaching to an unlawful homicide." *Id.* at 696. By proving heat of passion, the defendant could rebut the malice aforethought element of the murder charge. *Id.*

[60] *Id.* at 699.

[61] *Id.* at 701–02.

[62] *Id.* at 700. The *Mullaney* Court, referring to the *Winship* decision, stated that the proof beyond a reasonable doubt standard plays a vital role because the defendant in "a criminal prosecution has at stake interests of immense importance." *Id.* (quoting *Winship*, 397 U.S. at 363).

reliability of jury verdicts,"[63] and the legal tradition that the prosecution must prove the accused guilty.[64] Unable to perceive any "unique hardship" inuring to the state in carrying the burden of persuasion, the Court refused to sanction its placement upon the defendant.[65]

In the 1977 decision of *Patterson v. New York*,[66] the Supreme Court reviewed the constitutionality of a New York statute requiring the defendant to prove the affirmative defense of extreme emotional disturbance in order to reduce a murder charge to manslaughter.[67] Reasoning that this defense was a separate issue apart from the facts of the crime,[68] the Court found no deprivation of due process.[69] This case was distinguished from *Mullaney* on the basis of its murder statute. Unlike the *Mullaney* statute, the *Patterson* statute did not include malice aforethought as an element of the crime.[70] Justice Powell, the author of the *Mullaney* opinion, voiced a strong dissent joined by Justices Brennan and Marshall.[71] The dissent accused the majority of "drain[ing] *In re Winship* of much of its vitality"[72] and labelled its adjudication "indefensibly formalistic."[73]

In the last seventy-five years, the New Jersey judiciary has faced duress claims in only four reported cases, none of which proved successful.[74] In each decision, the court alluded to the common law test

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[63] 421 U.S. at 699. "It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." *Id.* at 700 (quoting *Winship*, 397 U.S. at 364); *see* 421 U.S. at 701.

[64] *Id.* at 701.

[65] *Id.* at 702. The Court discounted the possible difficulty for the prosecution attendant to proving a negative and the fact that evidence of the defense may lie peculiarly within the defendant's knowledge. *Id.*

[66] 432 U.S. 197 (1977).

[67] *Id.* at 198–200.

[68] *Id.* at 206–07.

[69] *Id.* at 207. The Court deferred to the New York legislature's right to require the defendant to prove mitigating circumstances to reduce punishment. *Id.* at 207–09.

[70] *Id.* at 210. In discussing the possibility that legislatures may shift burdens of proof by designating certain elements of crimes as affirmative defenses, the Court stated that "there are obviously constitutional limits beyond which the States may not go." *Id.* The actual extent of such limitation is unclear at this time.

[71] *Id.* at 216.

[72] *Id.*

[73] *Id.* at 224.

[74] *See* State v. Dissicini, 66 N.J. 411, 331 A.2d 618 (1975); State v. Falco, 60 N.J. 570, 292 A.2d 13 (1972); State v. Churchill, 105 N.J.L. 123, 143 A. 330 (Ct. Err. & App. 1928); State v. Palmieri, 93 N.J.L. 195, 107 A. 407 (Ct. Err. & App. 1919).

of duress but never actually ruled as to the availability of the defense.[75]

In a 1919 case, *State v. Palmieri*,[76] the first reported decision in New Jersey to address the duress defense, the court of errors and appeals found the defense inapplicable to the facts before it.[77] The court noted that those jurisdictions which allow the defense uniformly require that the duress be "present, imminent and impending."[78] Since the defendant participated in the murder "hours, if not days, after the threat," the court determined that the danger lacked immediacy and that Palmieri had considerable opportunity to escape or seek help.[79]

The court of errors and appeals, in 1928, faced a duress claim, this time in the context of a robbery prosecution.[80] In *State v. Churchill*,[81] the defendant, testifying that he was unaware of the robbery plan, claimed to have driven the getaway car only because a gun was placed at his back.[82] The court recited the common law duress standard, stressing that the defendant had sufficient time to escape and failed to take advantage of it.[83] However, the court expressly refrained from "determining that duress is a legal defense to an indictment for crime" since that issue went beyond the facts presented.[84]

Almost half a century later, a duress question again came before New Jersey's highest court in *State v. Falco*.[85] The defendant, a police detective, appealed his conviction of misconduct in office for

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[75] *See* State v. Dissicini, 66 N.J. 411, 331 A.2d 618 (1975); State v. Falco, 60 N.J. 570, 292 A.2d 13 (1972); State v. Churchill, 105 N.J.L. 123, 143 A. 330 (Ct. Err. & App. 1928); State v. Palmieri, 93 N.J.L. 195, 107 A. 407 (Ct. Err. & App. 1919).

[76] 93 N.J.L. 195, 107 A. 407 (Ct. Err. & App. 1919).

[77] *Id.* at 199–200, 107 A. at 409. Palmieri conspired with several others in New York City to rob a New Jersey farmer. Although their initial attempt was thwarted, they returned a few days later to rob and murder their victims. *Id.* at 196, 107 A. at 408.

[78] *Id.* at 200, 107 A. at 409. For a discussion of this common law immediacy requirement, see notes 26–28 *supra* and accompanying text.

[79] 93 N.J.L. at 200, 107 A. at 409.

[80] The evidence indicated that "a gang of armed bandits" " 'h[e]ld up' " a saloon while Churchill waited out front in the getaway car. *Id.* at 124, 143 A. at 330.

[81] 105 N.J.L. 123, 143 A. 330 (Ct. Err. & App. 1978).

[82] *Id.*

[83] *Id.* at 125–26, 143 A. at 331. The court believed that Churchill must have known of his companions' plans before they entered the saloon and therefore he should have left immediately instead of waiting twenty minutes for their return. *Id.* at 126, 143 A. at 331.

[84] *Id.* at 125, 143 A. at 331.

[85] 60 N.J. 570, 292 A.2d 13 (1972).

filing a false report, contending that he acted under duress.[86] Falco feared losing his job if he did not file a report, therefore, he filed a false report.[87] Emphasizing the absence of any threat of death or physical injury,[88] the court found "no semblance of a defense that the false report was the product of duress."[89] The court stated that no compulsion existed to file the false report, but rather "[t]he compulsion was to tell the truth."[90]

In a 1975 case, *State v. Dissicini*,[91] the New Jersey supreme court rejected duress as a defense to murder where the defendant had aided and abetted.[92] The court affirmed the appellate division's interpretation of the common law rule prohibiting duress as a defense to murder as embracing "all . . . offenses where an intent to kill is an essential element."[93] Dissicini's second degree murder conviction

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[86] *Id.* at 573–74, 586, 292 A.2d at 14, 21. The state contended that although Falco was present in a tavern during a serious brawl, he filed a report denying it. *Id.* at 573–74, 292 A.2d at 15.

[87] State v. Falco, 114 N.J. Super. 53, 55, 274 A.2d 828, 829 (App. Div. 1971), *rev'd*, 60 N.J. 570, 292 A.2d 13 (1972). Falco's counsel objected at trial "to the introduction in evidence of the report upon the ground that it had been wrung from [Falco] only by coercion." *Id.* The trial court admitted it because "it was a report submitted in the regular course of duty." *Id.* Relying on Garrity v. New Jersey, 385 U.S. 493 (1967), the appellate division remanded for a new trial. The appellate court interpreted *Garrity* as holding "that testimony elicited from a public employee by a threat of discharge may not thereafter be used against him in a criminal prosecution." 114 N.J. Super. at 56–57, 274 A.2d at 829. The supreme court reversed and rejected any extension of *Garrity* to the facts at bar. 60 N.J. at 575–86, 292 A.2d at 15–21.

[88] Since no threat by a third party was directed at Falco, the court reasonably assumed that he "alone decided" on his course of action. *Id.* The court analogized to a person in private employment. In that context, one could not defend against a criminal charge by contending his employer directed him to commit the crime or face dismissal. It was held to be similarly erroneous to propose that one may file a false report to avoid dismissal for prior misconduct. *Id.* at 586–87, 292 A.2d at 22.

[89] *Id.* at 587, 292 A.2d at 22. The supreme court, unable to discern any connection between the defense of duress and the crime of official misconduct for filing a false report, rejected Falco's duress claim. *Id.* at 586, 292 A.2d at 21.

[90] *Id.* at 586, 292 A.2d at 21.

[91] 66 N.J. 411, 331 A.2d 618 (1975). Justice Pashman, joined by Justice Clifford, wrote a concurring opinion. However, Justice Pashman expressly based his decision on his firm belief "that [the] defendant was not in fact coerced into participating in the brutal slaying." 66 N.J. at 412, 331 A.2d at 618. Since the evidence did not support Dissicini's claim of duress "under any formulation of the defense," Justice Pashman thought it inappropriate to "reach the issue of whether the defense is available in this State either in the criminal context generally, or specifically as a defense to a charge of murder." *Id.* at 412, 331 A.2d at 619.

[92] *Id.* at 412, 331 A.2d at 618. The defendant took part in an assassination planned by his motorcycle gang. He contended that he acted under duress because he knew the leader would kill him if he did not obey instructions. Additionally, Dissicini attempted to justify his failure to take advantage of the numerous opportunities to escape and seek police help by insisting that he feared the leader would find him. 126 N.J. Super. at 569, 316 A.2d at 15.

[93] 126 N.J. Super. at 571, 316 A.2d at 16.

indicated a jury finding of an intentional killing and the court determined that the defense had been properly disallowed.[94]

The defense of duress has been defined statutorily in twenty-eight states, including New Jersey.[95] The statutes reflect the legislatures' attempts to ameliorate the restrictive nature of the traditional common law test of duress. They generally address four major issues: the crimes to which duress affords a potential defense; the severity of the threat required; the immediacy of the threatened danger; and the nature of the threat, *i.e.*, reasonable belief of threat as opposed to actual threat.[96]

Many states which have codified the duress defense, define it as a defense to any crime.[97] Six states, however, exclude duress as a defense to any capital crime,[98] while eight expressly prohibit it in homicide cases.[99] Other states have permitted duress to serve as a mitigating factor in murder prosecutions.[100]

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[94] *Id.*

[95] ARIZ. REV. STAT. ANN. § 13-412 (West 1977); ARK. STAT. ANN. § 41-208 (1975); CAL. PENAL CODE § 26(8) (West 1970); COLO. REV. STAT. § 18-1-708 (1974); CONN. GEN. STAT. ANN. § 53a-14 (West 1972); DEL. CODE ANN. tit. 11, § 431 (1975); GA. CODE ANN. § 26-906 (1972); HAW. REV. STAT. § 702-231 (1976); IDAHO CODE § 18-201 (Cum. Supp. 1978); ILL. ANN. STAT. ch. 38, § 7-11 (Smith-Hurd 1972); IND. CODE ANN. § 35-41-3-8 (Burns Cum. Supp. 1978); KY. REV. STAT. ANN. § 501.090 (Baldwin 1975); LA. REV. STAT. ANN. § 14:18(b) (West 1974); ME. REV. STAT. tit. 17-A, § 54 (1978); MINN. STAT. ANN. § 609.08 (West 1964); MONT. REV. CODES ANN. § 94-3-110 (1977); NEV. REV. STAT. § 194.010(9) (1973); N.J. STAT. ANN. § 2C:2-9 (West eff. Sept. 1, 1979); N.Y. PENAL LAW § 40.00 (McKinney 1975); N.D. CENT. CODE § 12.1-05-10 (1976); OKLA. STAT. ANN. tit. 21, §§ 152, 155, 156 (West 1958); OR. REV. STAT. § 161.270 (1977); 18 PA. CONS. STAT. ANN. § 309 (Purdon 1973); S.D. COMPILED LAWS ANN. § 22-5-1 (Supp. 1977); TEX. PENAL CODE ANN. tit. 2, § 8.05 (Vernon 1974); UTAH CODE ANN. § 76-2-302 (1977); WASH. REV. CODE ANN. § 9A.16.060 (West 1977); WIS. STAT. ANN. § 939.46 (West 1958).

[96] MODEL PENAL CODE § 2.09, Comments at 2 (Tent. Draft No. 10, 1960).

[97] ARK. STAT. ANN. § 41-208 (1975); CONN. GEN. STAT. ANN. § 53a-14 (West 1972); DEL. CODE ANN. tit. 11, § 431 (1975); HAW. REV. STAT. § 702-231 (1976); N.Y. PENAL LAW § 40.00 (McKinney 1975); N.D. CENT. CODE § 12.1-05-10 (1976); OKLA. STAT. ANN. tit. 21, §§ 152, 155, 156 (West 1958); 18 PA. CONS. STAT. ANN. § 309 (Purdon 1973); S.D. COMPILED LAWS ANN. § 22-5-1 (Supp. 1977); TEX. PENAL CODE ANN. tit. 2, § 8.05 (Vernon 1974); UTAH CODE ANN. § 76-2-302 (1977). These states employ the same approach as the MODEL PENAL CODE. The following states allow duress to reduce a murder charge to manslaughter: *Minnesota:* MINN. STAT. ANN. § 609.08 (West 1964); *New Jersey:* N.J. STAT. ANN. § 2C:2-9 (West eff. Sept. 1, 1979); *Wisconsin:* WIS. STAT. ANN. § 939.46 (West 1958).

[98] CAL. PENAL CODE § 26(8) (West 1970); COLO. REV. STAT. § 18-1-708 (1974); IDAHO CODE § 18-210 (Cum. Supp. 1978); ILL. ANN. STAT. ch. 38, § 7-11 (Smith-Hurd 1972); MONT. REV. CODES ANN. § 94-3-110 (1977); NEV. REV. STAT. § 194.010(9) (1973).

[99] ARIZ. REV. STAT. ANN. § 13-412 (1977) (homicide or serious physical injury); GA. CODE ANN. § 26-906 (1972); IND. CODE ANN. § 35-41-3-8 (Burns Cum. Supp. 1978); KY. REV. STAT. § 501.090 (Baldwin 1975) (intentional homicide); LA. REV. STAT. ANN. § 14:18(6) (West 1974); ME. REV. STAT. tit. 17-A, § 54 (1978); OR. REV. STAT. § 161.270 (1977); WASH. REV. CODE ANN. § 9A.16.060 (West 1977) (murder or manslaughter).

[100] MINN. STAT. ANN. § 609-08 (West 1964); N.J. STAT. ANN. § 2C:2-9 (West eff. Sept. 1, 1979); WIS. STAT. ANN. § 939.46 (West 1958).

The state codes vary as to the severity of the threat necessary to substantiate the defense. Although some jurisdictions require fear of death,[101] most allow the duress defense upon an evidentiary showing of a threat or use of force.[102] A frequently proposed standard permits the defense where the threats would intimidate a person of ordinary or reasonable firmness.[103]

Another area commonly treated by legislation deals with the immediacy of the threatened danger. Approximately half of the statutes expressly require that the threat of injury be instant or imminent. Threats remote in time are generally insufficient.[104] However, a growing number of states have completely eliminated the immediacy requirement from their definition of duress.[105]

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[101] CAL. PENAL CODE § 26(8) (West 1970); IDAHO CODE § 18-201 (Cum. Supp. 1978); MINN. STAT. ANN. § 609.08 (West 1964).

[102] ARIZ. REV. STAT. ANN. § 13-412 (1977); ARK. STAT. ANN. § 41-208 (1975); COLO. REV. STAT. § 18-1-708 (1974); CONN. GEN. STAT. ANN. § 53a-14 (West 1972); DEL. CODE ANN. tit. 11, § 431 (1975); GA. CODE ANN. § 26-906 (1972); HAW. REV. STAT. § 702-231 (1976); ILL. ANN. STAT. ch. 38, § 7-11 (Smith-Hurd 1972); IND. CODE ANN. § 35-41-3-8 (Burns Cum. Supp. 1978); KY. REV. STAT. § 501.090 (Baldwin 1975); LA. REV. STAT. ANN. § 14:18(6) (West 1974); ME. REV. STAT. tit. 17-A, § 54 (1978); MONT. REV. CODES ANN. § 94-3-110 (1977); NEV. REV. STAT. § 194.010(9) (1973); N.J. STAT. ANN. § 2C:2-9 (West eff. Sept. 1, 1979); N.Y. PENAL LAW § 40.00 (McKinney 1975); N.D. CENT. CODE § 12.1-05-10 (1976); OKLA. STAT. ANN. tit. 21, §§ 152, 155, 156 (West 1958); OR. REV. STAT. § 161.270 (1977); 18 PA. CONS. STAT. ANN. § 309 (Purdon 1973); S.D. COMPILED LAWS ANN. § 22-5-1 (Supp. 1977); TEX. PENAL CODE ANN. tit. 2, § 8.05 (Vernon 1974); UTAH CODE ANN. § 76-2-302 (1977); WASH. REV. CODE ANN. § 9A.16.060 (West 1977); WIS. STAT. ANN. § 939.46 (West 1958).

[103] ARK. STAT. ANN. § 41-208 (1975); CONN. GEN. STAT. ANN. § 53a-14 (West 1972); HAW. REV. STAT. § 702-231 (1976); IND. CODE ANN. § 35-41-3-8 (Burns Cum. Supp. 1978); N.J. STAT. ANN. § 2C:2-9 (West eff. Sept. 1, 1979); N.Y. PENAL LAW § 40.00 (McKinney 1975); N.D. CENT. CODE § 12.1-05-10 (1976); 18 PA. CONS. STAT. ANN. § 309 (Purdon 1973); TEX. PENAL CODE ANN. tit. 2, § 8.05 (Vernon 1974); UTAH CODE ANN. § 76-2-302 (1977).

[104] ARIZ. REV. STAT. ANN. § 13-412 (1977); CONN. GEN. STAT. ANN. § 53a-14 (West 1972); GA. CODE ANN. § 26-906 (1972); ILL. ANN. STAT. ch. 38, § 7-11 (Smith-Hurd 1972); IND. CODE ANN. § 35-41-3-8 (Burns Cum. Supp. 1978); LA. REV. STAT. ANN. § 14:18(6) (West 1974); ME. REV. STAT. tit. 17-A, § 54 (1978); MINN. STAT. ANN. § 609.08 (West 1964); MONT. REV. CODES ANN. § 94-3-110 (1977); N.Y. PENAL LAW § 40.00 (McKinney 1975); N.D. CENT. CODE § 12.1-05-10 (1976) (felonies only); TEX. PENAL CODE ANN. tit. 2, § 8.05 (Vernon 1974) (felonies only); UTAH CODE ANN. § 76-2-302 (1977); WASH. REV. CODE ANN. § 9A.16.060 (West 1977); WIS. STAT. ANN. § 939.46 (West 1958).

[105] ARK. STAT. ANN. § 41-208 (1975); CAL. PENAL CODE § 26(8) (West 1970); COLO. REV. STAT. § 18-1-708 (1974); DEL. CODE ANN. tit. 11, § 431 (1975); HAW. REV. STAT. § 702-231 (1976); IDAHO CODE § 18-201 (Cum. Supp. 1978); KY. REV. STAT. § 501.090 (Baldwin 1975); NEV. REV. STAT. § 194.010(9) (1973); N.J. STAT. ANN. § 2C:2-9 (West eff. Sept. 1, 1979); OKLA. STAT. ANN. tit. 21, §§ 152, 155, 156 (West 1958); OR. REV. STAT. § 161.270 (1977); 18 PA. CONS. STAT. ANN. § 309 (Purdon 1973); S.D. COMPILED LAWS ANN. § 22-5-1 (Supp. 1977).

Legislatures also concern themselves with whether a reasonable belief that a threat exists suffices for a duress defense. Generally, they agree that the accused may avail himself of the defense if reasonable cause supports his belief.[106] Nevertheless, one state requires "actual compulsion" before the defense will lie.[107]

Attempting to modify the rigid constraints of the common law standard of duress, the Model Penal Code and the New Jersey Code of Criminal Justice provide that where an individual faces coercion by force or threats of force, "which a person of reasonable firmness in his situation would have been unable to resist," a duress defense maintains.[108] Both codes promulgate a standard with "which normal members of the community will be able to comply . . . ."[109] They recommend focusing on the tangible factors comprising the particular

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[106] ARIZ. REV. STAT. ANN. § 13-412 (1977); ARK. STAT. ANN. § 41-208 (1975); CAL. PENAL CODE § 26(8) (West 1970); GA. CODE ANN. § 26-906 (1972); IDAHO CODE § 18-201 (Cum. Supp. 1978); ILL. ANN. STAT. ch. 38, § 7-11 (Smith-Hurd 1972); LA. REV. STAT. ANN. § 14:18(b) (West 1974); MONT. REV. CODES ANN. § 94-3-010 (9) (1973); NEV. REV. STAT. § 194.010 (9) (1973); WIS. STAT. ANN. § 939.46 (West 1958).

[107] OKLA. STAT. ANN. tit. 21, §§ 152, 155, 156 (West 1958).

[108] The MODEL PENAL CODE provides in pertinent part:

> Section 2.09. Duress.
>
> (1) It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist.
>
> (2) The defense provided by this Section is unavailable if the actor recklessly placed himself in a situation in which it was probable that he would be subjected to duress. The defense is also unavailable if he was negligent in placing himself in such a situation, whenever negligence suffices to establish culpability for the offense charged.

MODEL PENAL CODE § 2.09 (1962). The New Jersey Code of Criminal Justice is nearly identical. It states in part:

> Section 2C:2-9. Duress.
>
> a. Subject to subsection b. of this section, it is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist.
>
> b. The defense provided by this section is unavailable if the actor recklessly placed himself in a situation in which it was probable that he would be subjected to duress. The defense is also unavailable if he was criminally negligent in placing himself in such a situation, whenever criminal negligence suffices to establish culpability for the offense charged. In a prosecution for murder, the defense is only available to reduce the degree of the crime to manslaughter.

New Jersey Code of Criminal Justice, N.J. STAT. ANN. § 2C:2-9 (West eff. Sept. 1, 1979).

[109] Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 414 & n.31 (1958). This approach contrasts sharply with the common law duress standard which required heroic resistance. *See* Newman & Weitzer, *supra* note 24, at 326. The modern definition of duress stems from an understanding

defendant's situation, such as age, strength, size and health.[110] Temperament, however, remains an improper element for consideration.[111] Under the Model Penal Code and the New Jersey Code of Criminal Justice, the identity of the person threatened, the nature and imminency of the threat, and the seriousness of the crime charged carry evidential weight.[112] The codes differ significantly in their treatment of the use of duress in homicide cases. The Model Penal Code permits duress as a complete defense to murder,[113] while the New Jersey code would only allow it to mitigate the charge to manslaughter.[114] Although labelled an affirmative defense by both penal codes,[115] each emphatically rejects placement of the burden of persuasion on the defendant.[116] Both codes require that the defend-

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> that law is ineffective in the deepest sense, indeed that it is hypocritical, if it imposes on the actor who has the misfortune to confront a dilemmatic choice, a standard that his judges are not prepared to affirm that they should and could comply with if their turn to face the problem should arise. Condemnation in such case is bound to be an ineffective threat; what is, however, more significant is that it is divorced from any moral base and is unjust. Where it would be both "personally and socially debilitating" to accept the actor's cowardice as a defense, it would be equally debilitating to demand that heroism be the standard of legality.

MODEL PENAL CODE § 2.09, Comments at 7 (Tent. Draft No. 10, 1960).

[110] MODEL PENAL CODE § 2.09, Comments at 7 (Tent. Draft No. 10, 1960); NEW JERSEY PENAL CODE § 2C:2-9, Commentary at 71 (1971).

[111] MODEL PENAL CODE § 2.09, Comments at 7 (Tent. Draft No. 10, 1960); NEW JERSEY PENAL CODE § 2C:2-9, Commentary at 71 (1971). The exclusion of individual temperament from consideration emanates from the policy decision that to allow such consideration "would be no less impractical or otherwise impolitic than to permit [liability] to depend upon such other variables as intelligence or clarity of judgment, suggestibility or moral insight." MODEL PENAL CODE § 2.09, Comments at 6 (Tent Draft No. 10, 1960).

[112] MODEL PENAL CODE § 2.09, Comments at 7-8 (Tent. Draft No. 10, 1960); NEW JERSEY PENAL CODE § 2C:2-9, Commentary at 71 (1971). This position represents a radical departure from the strict requirements of the common law defense. The drafters of the MODEL PENAL CODE suggested that the traditional factors of the common law standard, *see* notes 22–38 *supra* and accompanying text, be accorded evidential weight along "with the actor's conduct in succumbing to the pressure they exert, since men of reasonable firmness surely break at different points depending on the stakes that are involved." MODEL PENAL CODE § 2.09, Comments at 8 (Tent. Draft No. 10, 1960).

[113] MODEL PENAL CODE § 2.09 (1962). The underlying assumption is that under certain circumstances homicide may result from "coercion that is truly irresistible." *Id.*, Comments at 8 (Tent Draft No. 10, 1960).

[114] New Jersey Code of Criminal Justice, N.J. STAT. ANN. § 2C:2-9 (b) (West eff. Sept. 1, 1979). The New Jersey drafters determined that "[t]he value of human life . . . justifie[d] this higher standard" and followed the Wisconsin lead. NEW JERSEY PENAL CODE § 2C:2-9, Commentary at 71 (1971).

[115] MODEL PENAL CODE § 2.09 (1962); New Jersey Code of Criminal Justice, N.J. STAT. ANN. § 2C:2-9 (West eff. Sept. 1, 1979). For a discussion of the characterization of a defense as "affirmative," see note 17 *supra*.

[116] MODEL PENAL CODE § 1.12(2) (Tent. Draft No. 4, 1955); NEW JERSEY PENAL CODE § 2C:1-12, Commentary at 35–36 (1971). The drafters of the MODEL PENAL CODE explained

ant only carry the burden of introducing evidence of duress.[117] After this initial burden is met, the prosecutor bears the burden of persuasion to negate the defense beyond a reasonable doubt.[118]

Toscano reflects judicial cognizance of the strong "potential for injustice" inherent in the common law definition of duress.[119] The court rectified this possibility by promulgating a new standard based on the abilities of a person of reasonable firmness.[120] The promulgation of this new duress standard constituted a partial adoption of the approach of the proposed New Jersey Penal Code subsequently enacted as the New Jersey Code of Criminal Justice,[121] since the court ignored the Code's allocation of the burden of persuasion.[122]

The *Toscano* court viewed the defendant's "failure to allege a 'present, imminent and impending' danger of harm" as "the sole defect" in his defense.[123] The supreme court, in examining the propriety of this element of the duress defense,[124] traced the common law requirement of immediate danger to the early treason cases, "to the proclivities of a 'tougher-minded age' . . . or simply to judicial fears of perjury and fabrication of baseless defenses."[125] However, the court noted that a per se rule grounded on immediate injury may result in the exclusion of valid claims of duress.[126] Therefore, Justice Pashman reasoned that the immediacy of the threatened danger should be an issue properly left with the jury rather than a prerequisite to a duress instruction.[127]

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that the position of the Code is not to shift the burden of proof "except in very special circumstances," which are not presented in the context of a duress defense. MODEL PENAL CODE § 2.09, Comments at 9 (Tent. Draft No. 10, 1960). *See generally* NEW JERSEY PENAL CODE § 2C:1-12, Commentary at 35–36 (1971).

[117] MODEL PENAL CODE § 1.12(2)(a) (Tent. Draft No. 4, 1955); NEW JERSEY PENAL CODE § 2C:1-12, Commentary at 35–36 (1971).

[118] MODEL PENAL CODE § 1.12(2) (Tent. Draft No. 4, 1955); NEW JERSEY PENAL CODE § 2C:1-12, Commentary at 35–36 (1971).

[119] 74 N.J. at 436, 378 A.2d at 762. The narrow common law definition effectively eliminates availability of the duress defense to many criminal defendants.

[120] *Id.* at 442, 378 A.2d at 765.

[121] *Id.* at 442, 378 A.2d at 764–65. Since *Toscano* pre-dated the enactment of the New Jersey Code of Criminal Justice, N.J. STAT. ANN. §§ 2C:1-1 to :98-4 (West eff. Sept. 1, 1979), the court followed the proposed NEW JERSEY PENAL CODE § 2C:2-9 (1971).

[122] 74 N.J. at 442–44, 378 A.2d at 765–66.

[123] *Id.* at 430, 378 A.2d at 759. For a discussion of the common law requirement of "present, imminent and impending danger," see notes 37–40 *supra* and accompanying text.

[124] 74 N.J. at 436–40, 378 A.2d at 761–64.

[125] *Id.* at 436, 378 A.2d at 762.

[126] *Id.* at 440, 378 A.2d at 764. The court expressed that in certain cases "resistance to threats or resort to official protection [may] not [be] realistic." *Id.*

[127] *Id.* Prior to *Toscano*, when the New Jersey judiciary was presented with a duress defense, it summarily dismissed the claim if it failed to meet the immediacy requirement. *See*

Toscano replaced the common law standard of heroism[128] with a guideline it determined to be realistically attainable by the average person.[129] If a person of reasonable firmness in the defendant's situation would have been unable to resist the threats made, then the defendant may potentially offer duress as a defense.[130] In addition, *Toscano* eliminated the traditional preliminary determination by the trial court of whether the accused was threatened with "present, imminent and impending" danger.[131] Instead, the immediacy element along with such factors as the crime committed, the type of threat and opportunities for escape or resistance should be accorded evidential weight in assessing the propriety of a duress defense.[132]

Under *Toscano*, duress provides a potential defense to any crime except murder.[133] The court, reaffirming the *Dissicini*[134] and *Palmieri*[135] holdings prohibiting the defense in homicide prosecutions, deemed it inappropriate to extend or modify their prior position on this issue within the facts of *Toscano*.[136]

The supreme court declared that under both the Model Penal Code and the proposed New Jersey Penal Code, Doctor Toscano's claim of duress was properly a jury question.[137] The court found it

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State v. Palmieri, 93 N.J.L. 195, 107 A. 407 (Ct. Err. & App. 1919); State v. Churchill, 105 N.J.L. 123, 143 A. 330 (Ct. Err. & App. 1928).

[128] *See* Newman & Weitzer, *supra* note 24, at 326.

[129] *See* 74 N.J. at 439, 378 A.2d at 764.

[130] *Id.* at 442, 378 A.2d at 765. Some commentators have espoused a subjective standard which would allow for consideration of the defendant's personal attributes. Newman & Weitzer, *supra* note 24, at 329–31. For an interesting analysis of the reasonable man standard as opposed to the subjective standard, see Fletcher, *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269, 1289–93 (1974). Fletcher suggests that the "only . . . sound way to determine the traits attributed to the reasonable man . . . is with an eye to the justice of blaming the accused for having displayed weakness of character." *Id.* at 1292. With this as his basic premise, Fletcher recommends a jury instruction which would "refer to a standard of a reasonable man with the specific pathological fears of the defendant." *Id.*

[131] 74 N.J. at 442, 378 A.2d at 765. This particular aspect of the new standard will probably ensure the revitalization of the duress defense.

[132] *Id.* at 439, 442, 378 A.2d at 764, 765. The court followed the suggestion of the drafters of the MODEL PENAL CODE. For a further discussion of the factors to be considered in establishing the defense, see note 108 *supra* and accompanying text.

[133] 74 N.J. at 442, 378 A.2d at 765.

[134] 126 N.J. Super. 565, 571, 316 A.2d 12, 16 (App. Div. 1974), *aff'd*, 66 N.J. 411, 331 A.2d 618 (1975); *see* notes 91–94 *supra* and accompanying text.

[135] 93 N.J.L. 195, 107 A. 407 (Ct. Err. & App. 1919); *see* notes 76–79 *supra* and accompanying text.

[136] 74 N.J. at 440–41 n.12, 378 A.2d at 764–65 n.12. This position differs from the New Jersey Code of Criminal Justice's provision that duress can at least serve to mitigate a murder conviction to one of manslaughter. New Jersey Code of Criminal Justice, N.J. STAT. ANN. § 2C:2-9(b) (West eff. Sept. 1, 1979). For the rationale employed by the Code's drafters, see note 114 *supra*.

[137] 74 N.J. at 440, 378 A.2d at 764.

feasible that a jury might infer that the threats to the doctor and his wife created a fear of danger[138] to which a person of reasonable firmness would have succumbed.[139]

Although the *Toscano* court "deliberately followed the language of the proposed New Jersey Penal Code,"[140] it sub silentio rejected the Code's allocation of the burden of persuasion to the state with respect to disproving the duress defense.[141] Instead, Justice Pashman stated that in order to obtain an acquittal, the defendant must carry the burden of persuasion by a preponderance of the evidence as to this defense.[142] The prosecutor would retain the burden of proving all other elements of the crime and disproving any other defenses beyond a reasonable doubt.[143] The potential "for abuse and uneven treatment" latent in the new duress standard influenced this decision.[144] Consequently, the court concluded that the same approach applicable to insanity cases would be "appropriate as a matter of public policy" when a duress defense is raised.[145]

Judge Conford concurred with the majority's reversal of Doctor Toscano's conviction but dissented from the court's holding that the defendant must bear the burden of persuasion on the duress issue.[146] The dissent viewed the court's imposition of the burden of persuasion as "an unwarranted modification of the civilized concept of the Anglo-American criminal law that it is the burden of the State to prove the guilt of the criminally accused beyond a reasonable doubt in every case."[147]

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[138] *Id.* at 441, 378 A.2d at 765.

[139] *Id.* at 441–42, 378 A.2d at 765.

[140] *Id.* at 442, 378 A.2d at 765. The court also announced that it "expect[ed] trial judges [to follow the *Toscano* lead] in fram[ing] their jury charges." *Id.*

[141] *See* notes 99–102 *supra* and accompanying text.

[142] 74 N.J. at 442, 378 A.2d at 765. In other words, the court characterized duress as a true affirmative defense—not only must the criminal defendant introduce evidence of the defense but he must also bear the burden of persuasion as to the issue. *Id.*

[143] *Id.* at 443, 378 A.2d at 765–66.

[144] *Id.* The court directed the reader's attention to Note, *Justification: The Impact of the Model Penal Code on Statutory Reform*, 75 COLUM. L. REV. 914, 917 & n.9 (1975). 74 N.J. at 443, 378 A.2d at 765–66. The primary concern of the court appeared to be the fabrication of baseless claims emanating from the "open-ended nature of [the new duress] standard." *Id.*

[145] 74 N.J. at 443, 378 A.2d at 766. The court's imposition on the defendant of the burden of persuasion as to duress contrasts with the general rule that the defendant need only introduce evidence of the defense. *See, e.g.*, State v. Talbot, 71 N.J. 160, 165, 364 A.2d 9, 11 (1976) (entrapment); State v. Abbott, 36 N.J. 63, 72, 174 A.2d 881, 888 (1961) (self-defense).

[146] 74 N.J. at 444, 378 A.2d at 766.

[147] *Id.* In State v. Chiarello, 69 N.J. Super. 479, 174 A.2d 506 (App. Div. 1961), Judge Conford reasoned that

> [i]f a defendant is as a matter of law relieved of criminality where his defense is well-founded, then imposing upon him the burden of persuasion of the jury as to

Toscano departed from the general rule previously followed by New Jersey and advocated by the Model Penal Code that the defendant must bear only the initial burden of production of evidence of his defense, leaving the burden of disproving it beyond a reasonable doubt with the prosecution.[148] The dissent, unconvinced by the reasoning of the majority, argued that duress is subject to no greater likelihood of abuse than any other affirmative defense.[149] Further, Judge Conford discounted the fact that evidence of duress lies almost exclusively within the accused's knowledge.[150] "If the defense of duress is true in a particular case," the dissent noted, "the defendant is innocent as having been free from culpable intent."[151] As a rule, a defendant cannot be convicted absent a finding beyond a reasonable doubt of criminal intent.[152] However, as Judge Conford indicated, under the *Toscano* holding, a conviction may result even though the jury entertains a reasonable doubt that the defendant acted free of duress.[153]

While in the past, New Jersey's judiciary "tacitly approved" the common law standard of duress,[154] the sparse record illustrates how the stringent requirements of the common law defense effectively destroyed its viability.[155] *Toscano's* adoption of a new duress standard evinces a rational step forward as to a criminal defendant's ability to

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> the merits of the defense is necessarily destructive of the universally conceded proposition that on the whole case the State must prove him guilty beyond a reasonable doubt. Obviously the "whole case" includes the defense.

Id. at 501, 174 A.2d at 518–19.

[148] 74 N.J. at 444, 378 A.2d 767; *see* MODEL PENAL CODE § 1.12(1), (2) (1962); The New Jersey Code of Criminal Justice, N.J. STAT. ANN. § 2C:1-12(a), (b) (West eff. Sept. 1, 1979); State v. Dolce, 41 N.J. 422, 432–33, 197 A.2d 185, 190–91 (1964); State v. Chiarello, 69 N.J. Super. 479, 498, 174 A.2d 506, 517 (App. Div. 1961) (opinion by Judge Conford). *See also* C. MCCORMICK, *supra* note 17, § 341, at 802.

[149] 74 N.J. at 445, 378 A.2d at 767.

[150] *Id.* at 445–46, 378 A.2d at 767. This particular circumstance seems inherent in the nature of defenses and "explains why the standard rule imposes on the defendant the initial burden of coming forward with some evidence of the defense (unless the State's case supplies it)." *Id.* at 446, 378 A.2d at 767.

[151] *Id.* at 445, 378 A.2d at 767; *see* note 153 *infra* and accompanying text.

[152] 74 N.J. at 445, 378 A.2d at 767.

[153] *Id.* In *Toscano*, the defendant was charged with conspiracy to obtain money by false pretenses. *Id.* at 423, 378 A.2d at 756. Intent was held to be an element of conspiracy in State v. Moretti, 52 N.J. 182, 186, 244 A.2d 499, 502, *cert. denied*, 393 U.S. 952 (1968). Duress arguably negates criminal intent. *See* People v. Luther, 394 Mich. 619, 622, 232 N.W.2d 184, 187 (1975).

[154] 74 N.J. at 430, 378 A.2d at 759. In this manner, the *Toscano* court characterized the state of the law as to duress prior to its decision announcing a new standard. *Id.*

[155] *See* notes 24 & 74 *supra* and accompanying text.

raise the duress defense. The new standard portends to be both flexible and realistic by considering the particular situation of the accused faced with duress and eliminating the requirement of imminent danger.

After *Toscano*, the court's traditional threshold determination as to whether the defendant was subjected to "present, imminent and impending" danger will no longer be necessary or allowed.[156] This aspect of *Toscano* will probably have the most significant ramifications since in the past duress defenses were often defeated at this juncture.[157] Duress, as defined in *Toscano*, is available as a defense to any crime except murder.[158] In this respect, the court maintained a conservative stance and chose not to follow the position of either the Model Penal Code, which allows duress as a defense to murder, nor the proposed New Jersey Penal Code which permits duress to reduce a murder charge to manslaughter.[159] *Toscano* eliminated the traditional requirement of a threat of death or serious bodily harm to the defendant in order to claim duress.[160] Instead, the gravity of the harm threatened is only one factor in the jury's consideration of whether the defendant acted as a person of reasonable firmness in his situation. The *Toscano* court also intimated that courts will look to the quantum of force used or threatened in relation to the severity of the crime charged as a significant factor. This approach would allow duress as a potential defense to a minor crime where the defendant was subjected to a similar degree of force.[161]

It appears that the *Toscano* court deemed it necessary to qualify the liberal dimensions of the new duress standard by imposition of the burden of persuasion on whomever asserts the defense.[162] The court justified its allocation of the burden of proof solely on policy

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[156] *See* 74 N.J. at 442, 378 A.2d at 765. Defendants will no longer be required to show heroic resistance and threats of future harm may be sufficient. *See* Newman & Weitzer, *supra* note 24, at 326–29.

[157] *See* notes 37–38 *supra* and accompanying text.

[158] 74 N.J. at 442, 378 A.2d at 765.

[159] For the probable reasons underlying this position, see notes 35–36 *supra* and accompanying text. For the Codes' rationales, see notes 113–14 *supra* and accompanying text.

[160] 74 N.J. at 442, 378 A.2d at 765.

[161] *Id.* at 436–37 n.10, 378 A.2d at 762–63; *see* G. WILLIAMS, *supra* note 22, § 181, at 597. For a discussion of the merits of balancing the coercion experienced against the severity of the crime, see Newman & Weitzer, *supra* note 24, at 329–30.

[162] 74 N.J. at 442–44, 378 A.2d at 765–66. One writer suggested that this approach emanates from "a desire to provide a more even balance of procedural burdens between defendant and the prosecution." Comment, *Affirmative Defenses Under New York's New Penal Law*, 19 SYRACUSE L. REV. 44, 46 (1968).

grounds.[163] The primary concern of the majority centered on the prevention of illegitimate claims of duress.[164] By adhering to the procedure utilized in insanity cases, which requires the accused to prove his defense, the court felt that it had properly balanced the relaxed duress standard it had announced.[165] "Public policy,"[166] however, does not justify such an allocation of the burden of persuasion in a criminal prosecution where the defendant "has at stake interests of immense importance."[167]

The propriety of the *Toscano* imposition of the burden of persuasion is questionable under the mandate of *Winship*,[168] as amplified in *Mullaney*,[169] that the prosecution must prove beyond a reasonable

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[163] 74 N.J. at 443, 378 A.2d at 766. In the context of a civil case, such reasoning would barely cause a raised eyebrow since no societal interest is served by favoring one party over another. Access to the evidence becomes the primary factor in the court's allocation of the burden of proof. F. JAMES, CIVIL PROCEDURE § 7.8, at 255–59 (1965). In the criminal case, on the other hand, there exists the defendant's right to due process and society's interest in a fair criminal justice system which serves to minimize erroneous convictions. *See* notes 62–65 *supra* and accompanying text. It has long been recognized "that where the burden of proof lies may be decisive of the outcome." Speiser v. Randall, 357 U.S. 513, 525 (1958). Such a significant procedural device should not be assigned based on mere policy alone. "The interest of the government is in proving that guilty persons are guilty . . . not simply in winning cases." Ashford & Risinger, *supra* note 17, at 186.

[164] 74 N.J. at 443, 378 A.2d at 766. Judicial fears of baseless claims, however, are not sufficient to undermine the due process protections accorded to criminal defendants. *See generally* Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1336–38 (1977).

[165] 74 N.J. at 443, 378 F.2d at 733. The court failed to provide an explanation of why it determined that duress was more analogous to insanity than to self-defense of which it is a variation. In the latter defense, the defendant need only introduce evidence of the defense. *See* State v. Abbott, 36 N.J. 63, 72–73, 174 A.2d 881, 886 (1961).

[166] 74 N.J. at 443, 378 A.2d at 766.

[167] *In re* Winship, 397 U.S. at 363. The United States Supreme Court explicitly stated in *Mullaney* that under the due process clause "exacting standards" are necessary before a defendant may be required "to bear th[e] ultimate burden of persuasion." Mullaney v. Wilbur, 421 U.S. at 703 n.31. Clearly, public policy does not comport with this rule. In Tot v. United States, 319 U.S. 463 (1943), the Supreme Court determined that the defendant's superior access to information did not justify the statutory presumption. *Id.* at 469. The Court recognized that criminal defendants always have, at the very least, an equal familiarity with the facts as the prosecution. *Id.* "It might, therefore, be argued that to place upon all defendants in criminal cases the burden of going forward with the evidence would be proper. But the argument proves too much." *Id.*

Requiring the accused to bear the burden of proving duress may effectively force him to testify, particularly where he alone has information probative of the defense. The ramifications of this allocation of the burden of persuasion are especially oppressive where the defendant has a prior record and faces the difficult decision of either taking the stand to defend or remaining silent. Turner v. United States, 396 U.S. 398, 432–33 (1970) (Black, J., dissenting).

[168] 397 U.S. 358 (1970). In *Winship*, the Court enunciated the constitutional basis of the reasonable doubt standard. *Id.* at 364; *see* notes 54–55 *supra* and accompanying text.

[169] Mullaney v. Wilbur, 421 U.S. 684 (1975). For a detailed analysis of *Mullaney*, see notes 56–65 *supra* and accompanying text.

doubt "the existence of every fact necessary to constitute the crime charged."[170] The Supreme Court, however, in *Patterson*,[171] modified its earlier holdings by drawing a distinction between statutorily defined elements of a crime and defenses to a crime. Although the *Patterson* Court reaffirmed that it is constitutionally impermissible to require a defendant to disprove an element of a crime, it approved placement of the same burden on the defendant when the defense constitutes "an exculpatory or mitigating circumstance."[172]

The effect of *Patterson* on *Toscano* hinges on the determination of whether proof of duress, as a negation of intent, constitutes disproof of an element of the crime of conspiracy or whether it merely demonstrates "an exculpatory or mitigating circumstance."[173] Such a determination was not made by the *Toscano* court which based its decision on the public policy of balancing the "open-ended nature of [the new duress] standard."[174] The constitutional implications of the court's decision to impose the burden of persuasion on the defendant were not acknowledged.

If the *Toscano* court had applied *Patterson* to its holding, it probably would have characterized duress as a "gratuitious defense",[175] *i.e.*, a separate issue from proof of guilt. However, since duress indicates the absence of intent,[176] which has been held to be an element of the crime of conspiracy,[177] imposition of the burden of persuasion on the defendant regarding duress was inappropriate. The better approach would have been to require the defendant claiming duress to introduce evidence of it and then require the state to disprove it.[178]

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[170] 397 U.S. at 364.

[171] 432 U.S. 197 (1977); *see* notes 66–73 *supra* and accompanying text.

[172] 432 U.S. at 207.

[173] *Id.*

[174] 74 N.J. at 443, 378 A.2d at 766.

[175] Underwood, *supra* note 164, at 1312–13.

[176] Moore v. State, 137 Ga. App. 735, 736, 224 S.E.2d 856, 857 (Ct. App.), *rev'd on other grounds*, 237 Ga. 269, 270, 227 S.E.2d 241, 242 (1976); People v. Luther, 394 Mich. 619, 622, 232 N.W.2d 184, 187 (1975).

[177] *See* State v. Moretti, 52 N.J. 182, 186, 244 A.2d 499, 502, *cert. denied*, 393 U.S. 952 (1968).

[178] In 1976, Maryland's highest court took the position that shifting the burden of persuasion to the defendant when an affirmative defense was raised contravened fundamental due process principles. State v. Evans, 278 Md. 197, 207, 362 A.2d 629, 635 (1976). The appellate court stated that "[t]here can be no doubt as to the applicability of the *Mullaney v. Wilbur* principle to the so-called 'affirmative defenses' generally." 28 Md. App. 640, 713, 349 A.2d 300, 345 (Ct. Spec. App. 1975), *aff'd*, 278 Md. 197, 362 A.2d 629 (1976). The *Mullaney* mandate should apply

The New Jersey Code of Criminal Justice[179] codifies this approach so that as of its effective date the undesirable aspect of *Toscano* will be eliminated. It is unclear whether the court will follow *Toscano's* imposition of the burden of persuasion on the defendant or attempt to align courtroom procedure with the new Code during the interim period. After the Code's effective date, however, criminal defendants may utilize the progressive duress standard announced in *Toscano* by introducing evidence of the defense which must be disproved by the state beyond a reasonable doubt. This combination of judicial and legislative efforts creates a rational and accessible defense for criminal defendants.

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to affirmative defenses generally because the primary considerations are the same. The label attached to an issue is not determinative particularly in light of the ease with which a state can redefine the elements of a crime. Patterson v. New York, 432 U.S. 197, 222 (1977) (Powell, J., dissenting); *see* Mullaney v. Wilbur, 421 U.S. at 698. The defendant's interest in punishment and stigmatization remains whether the issue is denominated a defense or an element and "no unique hardship" on the state results from requiring it to bear the burden of persuasion as to non-duress. *See* 421 U.S. at 702.

Commentators have expressed that "an intimate relationship [exists] between the operation of a Morgan presumption and the creation of an affirmative defense." Ashford & Risinger, *supra* note 17, at 170. A Morgan presumption places both the burden of introducing evidence and the burden of persuasion on the opponent of the presumption. 1 E. MORGAN, BASIC PROBLEMS OF EVIDENCE 33–35 (1954). Thus, there is a general presumption that the defendant did not act under duress. To defend on the basis of duress, under *Toscano*, the defendant must not only introduce evidence of duress, but ultimately prove he acted because of it to obtain an acquittal. In effect, Morgan presumptions (affirmative defenses) redefine the crime by requiring the defendant to disprove an element (non-duress) assumed present by the presumption. *See* Ashford & Risinger, *supra* note 17, at 169.

By interpreting *Mullaney* to include all affirmative defenses, a Thayer presumption would be employed instead of the Morgan approach. The defendant would only have to introduce evidence of the defense, eliminating the presumption of its absence, and the burden of persuasion would shift to the prosecution. *See* J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW (1898).

[179] N.J. STAT. ANN. § 2C:2-9 (West eff. Sept. 1, 1979).