The Court, however, summarily rejected the argument that *Mullaney* means that the prosecution must negate an insanity defense,[1117] and, later, in *Patterson v. New York*,[1118] upheld a state statute that required a defendant asserting "extreme emotional disturbance" as an affirmative defense to murder[1119] to prove such by a preponderance of the evidence. According to the Court, the constitutional deficiency in *Mullaney* was that the statute made malice an element of the offense, permitted malice to be presumed upon proof of the other elements, and then required the defendant to prove the absence of malice. In *Patterson*, by contrast, the statute obligated the state to prove each element of the offense (the death, the intent to kill, and the causation) beyond a reasonable doubt, while allowing the defendant to prove an affirmative defense by preponderance of the evidence that would reduce the degree of the offense.[1120] This distinction has been criticized as formalistic, as the legislature can shift burdens of persuasion between prosecution and defense easily through the statutory definitions of the offenses.[1121]

[1117] Rivera v. Delaware, 429 U.S. 877 (1976), dismissing as not presenting a substantial federal question an appeal from a holding that *Mullaney* did not prevent a state from placing on the defendant the burden of proving insanity by a preponderance of the evidence. *See* Patterson v. New York, 432 U.S. 197, 202–05 (1977) (explaining the import of *Rivera*). Justice Rehnquist and Chief Justice Burger concurring in *Mullaney*, 421 U.S. at 704, 705, had argued that the case did not require any reconsideration of the holding in Leland v. Oregon, 343 U.S. 790 (1952), that the defense may be required to prove insanity beyond a reasonable doubt.

[1118] 432 U.S. 197 (1977).

[1119] Proving the defense would reduce a murder offense to manslaughter.

[1120] The decisive issue, then, was whether the statute required the state to prove beyond a reasonable doubt each element of the offense. *See also* Dixon v. United States, 548 U.S. 1 (2006) (requiring defendant in a federal firearms case to prove her duress defense by a preponderance of evidence did not violate due process). In *Dixon*, the prosecution had the burden of proving all elements of two federal firearms violations, one requiring a "willful" violation (having knowledge of the facts that constitute the offense) and the other requiring a "knowing" violation (acting with knowledge that the conduct was unlawful). Although establishing other forms of *mens rea* (such as "malicious intent") might require that a prosecutor prove that a defendant's intent was without justification or excuse, the Court held that neither of the forms of *mens rea* at issue in *Dixon* contained such a requirement. Consequently, the burden of establishing the defense of duress could be placed on the defendant without violating due process.

[1121] Dissenting in *Patterson*, Justice Powell argued that the two statutes were functional equivalents that should be treated alike constitutionally. He would hold that as to those facts that historically have made a substantial difference in the punishment and stigma flowing from a criminal act the state always bears the burden of persuasion but that new affirmative defenses may be created and the burden of establishing them placed on the defendant. 432 U.S. at 216. *Patterson* was followed in Martin v. Ohio, 480 U.S. 228 (1987) (state need not disprove defendant acted in self-defense based on honest belief she was in imminent danger, when offense is aggravated murder, an element of which is "prior calculation and design"). Justice Powell, again dissenting, urged a distinction between defenses that negate an element of the crime and those that do not. Id. at 236, 240.