tion 703 by permitting too many claims.[79] A cleaner opinion might have limited the realm of cases covered by section 704, but not section 703, to those that do not at all relate to the employment relationship, like a bank employer's denial of an employee's application for a loan.[80]

To the extent that the Court intended no such narrow reading of section 703, *Burlington* illustrates that granting certiorari to resolve circuit splits rather than to decide cases can complicate opinions.[81] The facts in *Burlington* did not directly raise the question of the relationship between sections 703 and 704, as Burlington retaliated against Sheila White even under a limited construction of section 704. The Court nevertheless was willing to hold that section 704 is broader than section 703 in order to resolve the circuit split. The resulting opinion's disconnection from the facts leaves unclear the Court's reading of section 703 and creates a need for future clarification of that provision's scope.

If the Court eventually adopts the narrow reading of section 703 suggested by its dicta, *Burlington* could emerge as an obstacle to Title VII's goals rather than a step toward achieving them. For now, however, the *Burlington* Court has provided employees a victory and has hauled the circuit courts back on track by defining retaliatory conduct in a way that facilitates efforts to redress workplace inequality.

B. Criminal Law

Firearms Regulation — Defense of Duress. — Herman Melville wrote that "[s]ilence is at once the most harmless and the most awful thing in all nature."[1] It is also perhaps the most versatile, mutable thing in law: courts have ascribed varying meanings to congressional silence without ever having established a coherent generalized framework for its interpretation.[2] Last Term, the Court spun silence into cacophony in *Dixon v. United States*,[3] holding that Congress, despite

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[79] Transcript of Oral Argument, *supra* note 59, at 15–16 ("I'm — I'm a little concerned that — that you're trying to persuade us to interpret 704 the same as 703 at the expense of watering down 703." (statement of Scalia, J.)).

[80] *See* White, *supra* note 71, at 1151 n.162.

[81] Commentators and judges have remarked on this practice. *See, e.g.*, United States v. Simpson, 430 F.3d 1177, 1195 (D.C. Cir. 2005) (Silberman, J., concurring) (referring to the Supreme Court as a "non-court court" for its tendency to decide issues rather than cases and controversies).

[1] HERMAN MELVILLE, PIERRE 284 (Constable & Co. 1923) (1852).

[2] *Compare, e.g.*, Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984) (holding that congressional silence in an agency's enabling statute delegates interpretive authority to the agency), *and* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 687–88 (1978) (observing that Congress's failure to define "restraint of trade" for purposes of antitrust law delegates interpretive authority to the courts), *with* Staples v. United States, 511 U.S. 600, 618–19 (1994) (adopting the substantive presumption that Congress did not intend to dispense with the mens rea requirement in a statutory crime despite the statute's silence on that issue).

[3] 126 S. Ct. 2437 (2006).

its silence on the issue, incorporated the defense of duress into the federal firearms laws and placed the burden on the defendant to prove the defense by a preponderance of the evidence.[4] In so holding, the Court both missed an opportunity to clarify its jurisprudence concerning the constitutional requirement of proof of criminal guilt beyond a reasonable doubt and elided constitutionally significant nuances in the applicable mens rea requirements.

Keshia Dixon purchased several guns at two Texas gun shows in January 2003.[5] To obtain the guns, she provided a false address to the gun dealers and falsely stated that she was not under indictment for a felony.[6] The government indicted her under the federal firearms laws[7] on one count of receiving a firearm while under indictment for a felony[8] and eight counts of making false statements in connection with the purchase of a firearm.[9]

At her trial, Dixon admitted knowing that she had committed a crime by purchasing the firearms.[10] She contended, however, that she had acted under duress, claiming that her boyfriend threatened to harm her or her daughters unless she bought the guns for him.[11] In support of her duress defense, Dixon attempted to introduce testimony by a domestic violence expert, sought to admit an out-of-court statement that her boyfriend had made to a federal agent, and requested a jury instruction that the government must prove the absence of duress beyond a reasonable doubt.[12] The district court ruled against Dixon

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[4] *Id.* at 2447–48. Traditionally, a defendant is under duress when he experiences, through no fault of his own, a reasonable fear of immediate or imminent death or serious injury. *See* 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 9.7(b), at 76–82 (2d ed. 2003). For slightly different formulations, see *Dixon*, 126 S. Ct. at 2440 n.2; and *id.* at 2449–50 (Breyer, J., dissenting). On duress generally, see Joshua Dressler, *Exegesis and the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331 (1989); John Lawrence Hill, *A Utilitarian Theory of Duress*, 84 IOWA L. REV. 275 (1999); and Lawrence Newman & Lawrence Weitzer, *Duress, Free Will and the Criminal Law*, 30 S. CAL. L. REV. 313 (1957).

[5] United States v. Dixon, 413 F.3d 520, 522 (5th Cir. 2005).

[6] *Id.*

[7] *Dixon*, 126 S. Ct. at 2440.

[8] *See* 18 U.S.C.A. § 922(n) (West 2000 & Supp. 2006). The statute provides: "It shall be unlawful for any person who is under indictment for a [felony] to . . . receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." *Id.*

[9] *See id.* § 922(a)(6). The statute provides: "It shall be unlawful — for any person in connection with the acquisition or attempted acquisition of any firearm . . . knowingly to make any false or fictitious oral or written statement . . . intended or likely to deceive [the seller] with respect to any fact material to the lawfulness of the sale . . . ." *Id.*

[10] *Dixon*, 413 F.3d at 522.

[11] *Id.* Dixon's boyfriend, as a convicted felon, could not purchase the guns himself. *Id.*; *see also* 18 U.S.C.A. § 922(g)(1) ("It shall be unlawful for any person — who has been convicted in any court of [a felony] . . . to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.").

[12] *See Dixon*, 126 S. Ct. at 2440–41 (jury instruction); *Dixon*, 413 F.3d at 522 (domestic violence expert and out-of-court statement).

on all three issues, instructing the jury that Dixon bore the burden of proving duress by a preponderance of the evidence.[13] The jury convicted Dixon of all nine counts.[14]

The Fifth Circuit unanimously affirmed all three rulings. Judge Jolly, writing for the panel,[15] first held that the district court properly excluded expert testimony regarding the effects of an abusive relationship on Dixon's state of mind: the merits of the duress defense are determined by an objective inquiry, whereas the expert's testimony would have provided subjective evidence.[16] Second, the court determined that the district court correctly ruled Dixon's boyfriend's out-of-court statement inadmissible hearsay.[17] Judge Jolly briefly disposed of the final issue, stating that the district court's jury instruction on the issue of duress was a correct application of circuit precedent.[18]

The Supreme Court granted certiorari to determine the proper allocation of the burden of proving duress[19] and affirmed. Writing for the Court, Justice Stevens[20] first determined that the jury instruction requiring Dixon to prove duress by a preponderance of the evidence was not an unconstitutional denial of due process. He acknowledged that due process requires the government to prove each element of a crime, including the mens rea, beyond a reasonable doubt.[21] But because duress would not negate the mens rea or any other element of the crimes of which Dixon was convicted, the constitutional requirement of proof

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[13] *Dixon*, 413 F.3d at 522.

[14] *Id.*

[15] Judges Reavley and Prado joined Judge Jolly's opinion.

[16] *See Dixon*, 413 F.3d at 523–25.

[17] *See id.* at 525.

[18] *Id.* at 525–26 ("Since a justification defense is an affirmative defense, the burden of proof is on the defendant. To succeed, the defendant must prove each element of the defense by a preponderance of the evidence." (quoting United States v. Willis, 38 F.3d 170, 179 (5th Cir. 1994) (citation omitted)) (internal quotation marks omitted)). The Fifth Circuit subsequently denied rehearing en banc. United States v. Dixon, 163 F. App'x 351 (5th Cir. 2005) (mem.).

[19] Dixon also requested review of the Fifth Circuit's ruling regarding the exclusion of expert testimony, Petition for Writ of Certiorari at i, *Dixon*, 126 S. Ct. 2437 (No. 05-7053), 2005 WL 3678563, but the Court did not grant certiorari on this question, *see* Dixon v. United States, 126 S. Ct. 1139 (2006).

[20] Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Ginsburg, and Alito joined Justice Stevens's opinion.

[21] *See Dixon*, 126 S. Ct. at 2441–42. The crimes for which Dixon was charged require a mens rea of knowledge. Section 922(a)(6) contains the mens rea requirement in the statutory text. *See* 18 U.S.C.A. § 922(a)(6) (West 2000 & Supp. 2006) (criminalizing "knowingly . . . mak[ing] any false or fictitious oral or written statement"). The text of § 922(n) does not include a mens rea requirement, but the applicable sentencing provision establishes a required mens rea of willfulness, which equates with knowledge of unlawfulness. *See id.* § 924(a)(1)(D) (punishing "whoever — willfully violates any . . . provision of this chapter"); Bryan v. United States, 524 U.S. 184, 193 (1998) (noting that the term "willfully" as used in § 924(a)(1)(D) requires that the defendant "acted with knowledge that his conduct was unlawful"); *see also Dixon*, 126 S. Ct. at 2441 & n.3 (explaining the mens rea required by § 922(n)).

beyond a reasonable doubt established by *In re Winship*[22] did not apply to Dixon's duress defense.[23] Justice Stevens noted that duress would, however, negate the mens rea for crimes that presume the absence of duress;[24] for these crimes, the government would assumedly bear the burden of disproving duress beyond a reasonable doubt.

Having disposed of the constitutional issue, Justice Stevens next addressed whether federal common law requires the government to disprove duress beyond a reasonable doubt. He rejected Dixon's argument that *Davis v. United States*[25] displaced the traditional common law rule that the defendant bears the burden of proof for all affirmative defenses.[26] *Davis* held that the government was charged with disproving an insanity defense to a murder charge beyond a reasonable doubt,[27] but the majority found *Davis* inapplicable for the same reason that *Winship* did not control: insanity would negate malice aforethought, the mens rea required in *Davis*, whereas duress would not negate any element of Dixon's crimes.[28] Nor did the majority find an "overwhelming consensus" that federal courts require the government to disprove duress beyond a reasonable doubt — a consensus that, if found, might have led the Court to conclude that the traditional principle had been displaced.[29] Finally, the Court determined that the 1962 Model Penal Code, under which the prosecution must disprove duress beyond a reasonable doubt, neither reflected then-established law nor was tacitly incorporated into the firearms laws when Congress enacted them a few years after the Code's adoption.[30] Thus, unable to divine Congress's intent on the issue, the ma-

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[22] 397 U.S. 358 (1970).

[23] According to *Winship*, "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." *Id.* at 364.

[24] *See Dixon*, 126 S. Ct. at 2441 n.4, 2441–42 (noting, for example, that the mens rea of malice is defined as intent without excuse and thus requires the absence of duress).

[25] 160 U.S. 469 (1895).

[26] *See* WILLIAM BLACKSTONE, 4 COMMENTARIES *201; *see also Dixon*, 126 S. Ct. at 2443 (restating the common law rule).

[27] *See Davis*, 160 U.S. at 484–85.

[28] *Dixon*, 126 S. Ct. at 2443–44. Justice Stevens also noted that "*Davis* has come to stand" for the proposition that, in federal criminal trials, "an accused is entitled to an acquittal of the specific crime charged if upon all the evidence there is reasonable doubt whether he was capable in law of committing crime," a proposition that did not support Dixon's position. *Id.* at 2444 (quoting Leland v. Oregon, 343 U.S. 790, 797 (1952)) (internal quotation mark omitted).

[29] *See id.* at 2446–47.

[30] *See id.* at 2447 (citing MODEL PENAL CODE §§ 1.12, 1.13(9)(c), 2.09 (Proposed Official Draft 1962)). Congress passed the original version of the firearm provisions at issue in *Dixon* in 1968. *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, tit. IV, 82 Stat. 197, 225 (codified as amended at 18 U.S.C.A. §§ 921–928 (West 2000 & Supp. 2006)); *see also* Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1214 (codified as amended at 18 U.S.C.A. §§ 921–928) (amending §§ 921–928).

jority held that the traditional rule requiring the defendant to prove duress by a preponderance of the evidence governed.[31]

Justice Kennedy filed a concurring opinion. He contended that the majority engaged in a misguided exercise by attempting to identify a prevailing principle of law at the time the statute was enacted. This mode of analysis, he reasoned, would unjustifiably lead "the burden of proof for duress to vary from statute to statute depending upon the date of enactment" and would ignore "the insight gained over time as the legal process continues."[32] Applying these "traditional principles," Justice Kennedy found that because the factual support for a claim of duress typically "depends upon conduct that takes place before the criminal act" and thus may leave the prosecution "without any practical means of disproving the defendant's allegations," the defendant appropriately bears the burden of proof.[33]

Justice Alito also concurred.[34] He argued that federal criminal statutes are, as a matter of congressional intent, presumptively subject to traditional common law defenses and burden-of-proof rules.[35] Justice Alito derided Justice Stevens's approach as "adopt[ing] whatever the predominant position happens to be at the time" and disagreed with the dissent's view that Congress delegated the issue to the courts, instead advocating the traditional rule, which he thought would maximize consistency across crimes.[36]

Justice Breyer dissented.[37] In contrast to the majority, which attempted to discern Congress's intent at the time the statute was enacted, Justice Breyer argued that Congress did not "freeze current practice statute-by-statute" and that the standard of proof should not

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Justice Stevens found the argument that Congress intended to adopt the Model Penal Code rules particularly unpersuasive because 18 U.S.C. § 924(a)(1) requires a mens rea of willfulness, which is not a mental state that the Model Penal Code recognizes. *See Dixon*, 126 S. Ct. at 2447 (citing MODEL PENAL CODE § 2.02(2)). At any rate, one commentator argues that this aspect of the Code did not accurately reflect the state of the law at the time. *See* Paul H. Robinson, *In Defense of the Model Penal Code: A Reply to Professor Fletcher*, 2 BUFF. CRIM. L. REV. 25, 41 (1998) (remarking that the Code's inclusion of the absence of affirmative defenses as an element of crime was a "sill[y] . . . too-clever-by-half attempt to push states to allocate the burden of persuasion to the state to disprove most defenses").

[31] *Dixon*, 126 S. Ct. at 2447–48. Justice Stevens noted that although the Court's analysis was "offense-specific," the common law rule will usually provide the proper burden of proof for the defense of duress. *Id.* at 2447.

[32] *Id.* at 2448 (Kennedy, J., concurring). That is, Justice Kennedy thought it was proper for the Court to use sources of interpretation that are more recent than the statute.

[33] *Id.* at 2448–49 (citing 2 KENNETH S. BROUN, MCCORMICK ON EVIDENCE § 337, at 475 (6th ed. 2006)).

[34] Justice Scalia joined Justice Alito's concurrence.

[35] *Dixon*, 126 S. Ct. at 2449 (Alito, J., concurring).

[36] *See id.*

[37] Justice Souter joined Justice Breyer's dissent.

change based on each statute's time of enactment.[38] Although he agreed with the majority that the Fifth Circuit's holding was not constitutionally problematic, he believed that the Court should interpret Congress's silence as delegating the responsibility for creating burden-of-proof rules to the courts.[39] He concluded that it was proper to place the burden of disproving duress, as well as other common affirmative defenses, on the government. He noted that the majority of circuits do not support the Court's rule,[40] and he also saw no reason why the burden of proof for duress should differ from the burden for other affirmative defenses, such as insanity and entrapment, for which the government bears the burden of proof.[41] In particular, he rebuked the majority's reasoning that the burden should be on the defendant because the relevant facts "lie peculiarly in the [defendant's] knowledge,"[42] observing that this state of affairs is not unique to duress.[43]

Dixon evinces obvious implementability concerns and reveals subtle instances of dubious constitutional doctrine. The majority opinion suggests that a court issuing jury instructions for affirmative defenses to federal crimes must engage in Justice Stevens's historical analysis for each defense raised and for each crime charged. But the fact that five Justices — three in concurrence and two in dissent — rejected the statute-specific approach in favor of transsubstantive rules casts immediate doubt on the vitality of the majority's opinion. In addition, the Court declined to bring clarity to the constitutional reasonable doubt rule, instead perpetuating a formalistic principle based almost solely on legislative draftsmanship. *Winship* famously stated that "the

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[38] *Dixon*, 126 S. Ct. at 2450 (Breyer, J., dissenting). A majority of the Justices appear to have agreed on this point. *Compare id.*, *with id.* at 2448 (Kennedy, J., concurring) (calling it "unlikely . . . that Congress would have wanted the burden of proof for duress to vary from statute to statute depending upon the date of enactment"), *and id.* at 2449 (Alito, J., concurring) (arguing that the burden of proof should not differ "for federal crimes enacted on different dates").

[39] *Id.* at 2450 (Breyer, J., dissenting).

[40] *See id.* at 2452–53. In conducting this circuit-by-circuit analysis, Justice Breyer presumably was not engaging in mere nose-counting but was instead implementing his belief that congressional silence is a signal to the Court to "tak[e] full account of . . . judicial practice informed by reason and experience." *Id.* at 2450; *cf. id.* at 2448 (Kennedy, J., concurring) (advocating "rel[iance] upon the insight gained over time as the legal process continues" and concluding that "Congress would not want to foreclose the courts from consulting . . . newer sources and considering innovative arguments in resolving issues not confronted in the statute").

[41] *Id.* at 2451–52 (Breyer, J., dissenting).

[42] *Id.* at 2443 (majority opinion) (quoting 2 JOHN W. STRONG, MCCORMICK ON EVIDENCE § 337, at 413 (5th ed. 1999)); *see also id.* at 2448 (Kennedy, J., concurring) ("The facts needed to prove or disprove the defense 'lie peculiarly in the knowledge of' the defendant." (quoting BROUN, *supra* note 33, § 337, at 475)).

[43] *See id.* at 2453–54 (Breyer, J., dissenting) (offering self-defense and entrapment as examples). Other cases also reject the proposition that the defendant's "peculiar knowledge" should shift the burden of proof to the defendant. *See, e.g.*, Mullaney v. Wilbur, 421 U.S. 684, 702 (1975); Tot v. United States, 319 U.S. 463, 469 (1943).

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."[44] But the *Winship* holding gives rise to an important interpretive question: when is a fact "necessary to constitute the crime"?[45] The Court's answer to this question — the same question the Court pondered before concluding that duress did not negate Dixon's mens rea — is, with little restriction, whenever the legislature desires. Not only does such an approach seem both intellectually and constitutionally unjustifiable, but it is also error prone when, as in *Dixon*, the substantive principles are unclear.

A brief hypothetical example illustrates how the Court's interpretation of the *Winship* rule may lead seemingly innocuous textual differences to yield markedly disparate constitutional outputs. Suppose that Congress contemplated passing a law to deter fraud in connection with the purchase of certain goods. One draft of the statute would criminalize "knowingly making any false statement with respect to any fact material to the lawfulness of the sale" and would provide an affirmative defense if, "at the time of the acts constituting the offense, the defendant was under duress." A second draft would criminalize "knowingly, and without influence of duress, making any false statement with respect to any fact material to the lawfulness of the sale." These two phrasings appear to criminalize the same behavior, and it is not immediately clear that they would further different policies.[46] But according to the *Winship* rule as articulated in *Dixon*, Congress or the courts would be free to require defendants to bear the burden of proving duress only under the former version of the statute. Under the latter version, the government would arguably be constitutionally required to bear the burden of proving the absence of duress — pre-

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[44] *In re* Winship, 397 U.S. 358, 364 (1970).

[45] *See* Leslie Yalof Garfield, *Back to the Future: Does* Apprendi *Bar a Legislature's Power To Shift the Burden of Proof Away from the Prosecution by Labeling an Element of a Traditional Crime as an Affirmative Defense?*, 35 CONN. L. REV. 1351, 1357 (2003) ("Although *Winship* guaranteed the defendant strong constitutional safeguards, it provided courts with little guidance regarding what facts are 'necessary to constitute the crime . . . charged.'" (omission in original) (quoting *Winship*, 397 U.S. at 364)); John Calvin Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1328 (1979) ("Absent from the *Winship* opinion . . . was any discussion of the scope of the constitutional commitment to proof beyond a reasonable doubt: What, exactly, was included by the phrase 'every fact necessary to constitute the crime . . . charged?'" (second omission in original)); Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1305 (1977) ("The Supreme Court has provided little guidance in the search for a coherent approach to the problem of allocating the burden of persuasion in criminal cases.").

[46] *See* Jeffries & Stephan, *supra* note 45, at 1343 ("The distinction between 'crime' and 'defense' remains essentially arbitrary.").

sumably after the defendant meets his burden of production — because the absence of duress is "necessary to constitute the crime."[47]

Assuming that the requirement of proof beyond a reasonable doubt stems from the classical interest-balancing approach to procedural due process,[48] this distinction in wording is difficult to justify as constitutionally significant. There is little reason to think that the defendant's liberty interest is greater under one statute than under the other,[49] so the difference must arise because the government's interest becomes weightier when the legislature labels an element as an affirmative defense. However, it seems far from sound — and certainly unsatisfying — to draw broad conclusions affecting liberty interests from relatively unconsidered choices in legislative phraseology.[50] The current jurisprudence would allow the legislature to set its own constitutional bounds, free of any discernable constraint on the scope of its role in the interest-balancing calculus.

In *Winship*'s aftermath, scholars developed two alternate elaborations of the *Winship* rule that emphasize functional over formal considerations and are accordingly more intellectually justifiable. Under one formulation, every fact on which criminal liability depends falls within the *Winship* rule's scope. Known as the procedural interpretation because of its independence from the substance of criminal law,[51] this rule would extend the government's burden of proof beyond a reasonable doubt to cover the absence of every conceivable mitigating, justifying, excusing, and exculpating fact — perhaps with the qualification that the defendant would need to meet a burden of production

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[47] *Winship*, 397 U.S. at 363 (quoting Davis v. United States, 160 U.S. 469, 493 (1895)); *cf. Dixon*, 126 S. Ct. at 2444 (holding that the reasonable doubt requirement did not apply to the issue of duress because "[t]he evidence of duress . . . does not contradict or tend to disprove any element of the statutory offenses").

[48] *See Winship*, 397 U.S. at 363–64 (weighing the interests of the accused and those of society in arriving at the constitutional rule); *see also* Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2646 (2004) (plurality opinion) (referring to the interest-balancing approach as the "ordinary mechanism" for establishing due process requirements).

[49] *See* Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457, 496–97 (1989).

[50] In the context of state crimes, the Court might indeed yield to draftsmanship out of respect for the principles of federalism. *See* Patterson v. New York, 432 U.S. 197, 201 (1977); Sundby, *supra* note 49, at 473. For federal crimes, however, this consideration vanishes. The paradox becomes magnified if, as one scholar contends, "the interests informing due process analysis of the reasonable doubt standard . . . can be reduced to the defendant's liberty interest." Ronald J. Allen, *The Restoration of* In re Winship*: A Comment on Burdens of Persuasion in Criminal Cases After* Patterson v. New York, 76 MICH. L. REV. 30, 41–42 (1977).

[51] *See* Jeffries & Stephan, *supra* note 45, at 1333–44; Sundby, *supra* note 49, at 465–69 (referring to this interpretation as "expansive proceduralism"); Underwood, *supra* note 45, at 1316–30. For a recent reconsideration of the procedural approach based on entirely different reasoning, see Garfield, *supra* note 45.

to raise a defense.[52] The Court came close to adopting this view in one of its earliest applications of *Winship*,[53] only to retreat soon after, never to return.[54] The other influential view, the substantive interpretation, holds that the reasonable doubt requirement should extend only to those facts necessary for the government to impose the prescribed punishment, whereas the legislature should have some freedom to assign the burden of proof for facts that lie outside this constitutional core of innocence, even if those facts are necessary under the statute.[55]

Commentators are quick to criticize both approaches, but typically on policy grounds rather than for their logical incoherence. The formal interpretation, however, lacks a similarly reasonable justification. According to this interpretation, the *Winship* requirement applies to facts needed to establish criminal liability under a statute,[56] and it is this formal interpretation to which the *Dixon* Court appears to have adhered most closely.[57]

Not only does *Dixon*'s constitutional holding play fast and loose with liberty interests, but given the Court's formal interpretation of *Winship*, it may also rest on shaky principles of substantive law and statutory construction. Essential to the constitutional holding was that the mens rea of willfulness — required for eight of the nine counts

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[52] *See* Jeffries & Stephan, *supra* note 45, at 1333.

[53] *See* Mullaney v. Wilbur, 421 U.S. 684 (1975); *see also* Jeffries & Stephan, *supra* note 45, at 1338–44 (describing *Mullaney* as removing formal constraints on the *Winship* rule); Sundby, *supra* note 49, at 466–69 (describing *Mullaney* as "[t]he closest the Supreme Court came to an expansive proceduralist view").

[54] *See Patterson*, 432 U.S. at 205–16; *see also* Allen, *supra* note 50, at 33–48 (arguing that *Mullaney* was an unjustified expansion of the *Winship* rule); Jeffries & Stephan, *supra* note 45, at 1344–56 (explaining why the procedural interpretation is unsatisfactory). Justice Powell, the author of the majority opinion in *Mullaney*, vigorously dissented in *Patterson* and in subsequent cases that distinguished *Mullaney*. *See Patterson*, 432 U.S. at 224 (Powell, J., dissenting) (arguing that, in distinguishing *Mullaney*, the majority's reasoning was "indefensibly formalistic"); *see also* Martin v. Ohio, 480 U.S. 228, 242 (1987) (Powell, J., dissenting) (reasserting the view set forth in the *Patterson* dissent). Had the *Dixon* Court followed the procedural interpretation, the decision to reverse the Fifth Circuit almost certainly would have been straightforward.

[55] The theory behind this constitutional core, undoubtedly difficult to define, would mirror the theory of proportionality that the Court employs in application of the Eighth Amendment. On the substantive interpretation generally, see Allen, *supra* note 50, at 42–48; Jeffries & Stephan, *supra* note 45, at 1356–65; and Sundby, *supra* note 49, at 475–87.

[56] *See* Jeffries & Stephan, *supra* note 45, at 1328–33; Sundby, *supra* note 49, at 469–74 (referring to this interpretation as "restrictive proceduralism").

[57] *See Dixon*, 126 S. Ct. at 2442 (citing *Patterson*, 432 U.S. at 211). Additionally, Professor Scott Sundby singles out *Martin* as the leading example of the formal interpretation of *Winship*, *see* Sundby, *supra* note 49, at 471–72, and indeed at oral argument, Chief Justice Roberts also singled out *Martin* as a particularly problematic case for Dixon's position on the constitutional issue, *see* Transcript of Oral Argument at 5, *Dixon*, 126 S. Ct. 2437 (No. 05-7053), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-7053.pdf. Justice Powell's dissents in *Martin* and *Patterson*, too, interpreted the majority opinions in those cases as adopting a formal interpretation of *Winship*. *See Martin*, 480 U.S. at 239–41 (Powell, J., dissenting); *Patterson*, 432 U.S. at 221–25 (Powell, J., dissenting).

with which Dixon was charged — did not presume the absence of duress. Of course, if the definition of willfulness did presume the absence of duress, duress would then "controvert the necessary mens rea for the crime," triggering the constitutional requirement of disproof beyond a reasonable doubt.[58] The Court avoided the constitutional constraint by drawing on *Bryan v. United States*,[59] which held willfulness to be satisfied when the defendant "acted with knowledge that his conduct was unlawful."[60]

The Court's definitional deftness ignores a chain of cases that should have made the answer far less clear. The substantive issue in *Bryan*, which also involved the federal firearms laws, was the particularity of knowledge required to constitute willfulness,[61] so whether willfulness presumes the absence of any affirmative defense was irrelevant to the analysis in that case. However, some of the cases on which *Bryan* relied did contemplate affirmative defenses — and even may have contemplated duress — in stating that a defendant acts willfully when he acts "with a 'bad purpose' or *without 'justifiable excuse*.'"[62] If duress is indeed a "justifiable excuse," then it would controvert the mens rea of willfulness, at least according to some of its formulations. And at the very least, *Dixon*'s cursory discussion of willfulness seems to ignore *Bryan*'s admonition that "'willfully' is . . . 'a word of many meanings' whose construction is often dependent on the context in which it appears."[63] Indeed, had the Court merely acknowledged this

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[58] *Dixon*, 126 S. Ct. at 2444.

[59] 524 U.S. 184 (1998).

[60] *Dixon*, 126 S. Ct. at 2441 (quoting *Bryan*, 524 U.S. at 193) (internal quotation marks omitted). The Model Penal Code requires even less, equating willfulness with knowledge. MODEL PENAL CODE § 2.02(8) (Proposed Official Draft 1962).

[61] *Bryan*, 524 U.S. at 186. The Court held that willfulness required that "the defendant acted with knowledge that his conduct was unlawful" but did not require knowledge of the particular law that the defendant's conduct violated. *Id.* at 192 (quoting Ratzlaf v. United States, 510 U.S. 135, 137 (1994)) (internal quotation mark omitted).

[62] Heikkinen v. United States, 355 U.S. 273, 279 (1958) (emphasis added); *see also* United States v. Murdock, 290 U.S. 389, 394 (1933) ("[W]hen used in a criminal statute ['willfully'] generally means an act done with a bad purpose *without justifiable excuse* . . . ." (emphasis added) (citations omitted)), *overruled on other grounds by* Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964); Spurr v. United States, 174 U.S. 728, 734–35 (1899) ("['Willfully'] is frequently understood . . . as signifying an evil intent *without justifiable excuse*." (emphasis added) (quoting 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 428, at 244 (Boston, Little, Brown & Co., 6th ed. 1877)) (internal quotation marks omitted)); Potter v. United States, 155 U.S. 438, 446 (1894) (same); Felton v. United States, 96 U.S. 699, 702 (1878) (same). *Bryan* cited all five of these cases. *See Bryan*, 524 U.S. at 191 & nn.12–13.

[63] *Bryan*, 524 U.S. at 191 (quoting Spies v. United States, 317 U.S. 492, 497 (1943)). An additional complication with the *Bryan-Dixon* and Model Penal Code definitions of willfulness is that both appear to create surplusage in the many crimes that require a mens rea of "knowingly and willfully." *E.g.*, Sarbanes-Oxley Act of 2002 § 802(a), 18 U.S.C. § 1520(b) (Supp. III 2003) (destruction of corporate audit records); 18 U.S.C. § 798(a) (2000) (certain acts of espionage); *id.* § 545 (smuggling), *amended by* Reducing Crime and Terrorism at America's Seaports Act of 2005, Pub.

ambiguity, it might have been led to invoke the rule of lenity — according to which the Court would construe the ambiguity in Dixon's favor — and presume that the mens rea required the absence of duress.[64]

The *Dixon* Court gave unsatisfactory treatment to two concepts — the scope of the *Winship* rule and the definition of willfulness — that bore on the constitutional component of its holding. As a result, the Court had no choice but to engage in the treacherous and imprecise task of bringing meaning to a statutory omission.[65] Had the Court paused to refine its *Winship* jurisprudence, it would have been spared some of this challenging and disagreement-provoking task.[66] It is thus unfortunate that the Court chose to dodge two constitutionally significant ambiguities and to permit the formalistic *Winship* rule to persist. It is equally unfortunate that the Court chose instead to introduce conflicting interpretations of indeterminate statutory silence in four opinions proffering four approaches for construing that silence.

C. Patent

Availability of Injunctive Relief. — Courts have traditionally issued permanent injunctions against future infringement as a matter of course upon finding that a defendant infringed a patent.[1] However,

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L. No. 109-177, tit. III, § 310, 120 Stat. 233, 242 (2006). Specifically, willfulness *includes* knowledge under the *Bryan-Dixon* definition, and willfulness *is* knowledge under the Model Penal Code definition. The Court's oft-repeated presumption against surplusage would seem to counsel against either definition. *See, e.g.*, *Ratzlaf*, 510 U.S. at 140–41 ("The trial judge . . . treated [the] 'willfulness' requirement essentially as surplusage — as words of no consequence. Judges should hesitate so to treat statutory terms in any setting, and resistance should be heightened when the words describe an element of a criminal offense." (footnote omitted)).

64 *See Bryan*, 524 U.S. at 200–01 (Scalia, J., dissenting).

65 Justice Frankfurter remarked that the Court "walk[s] on quicksand when [it] tr[ies] to find in the absence of corrective legislation a controlling legal principle," Helvering v. Hallock, 309 U.S. 106, 121 (1940), a rhetorical flourish that Professor Laurence Tribe noted in his article on the topic of legislative silence, Laurence H. Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 IND. L.J. 515, 518 (1982).

66 The procedural interpretation of *Winship* would of course obviate any requirement of statutory interpretation. Under the substantive interpretation, the precise meaning of willfulness — in particular, whether it is negated by duress — would lose its constitutional significance and therefore would become unnecessary to resolve. The subconstitutional questions regarding the allocation of the burden of proof of duress and whether the defense existed at all would remain only if their resolution would not invade the constitutionally protected sphere of innocence.

1 *See, e.g.*, Richardson v. Suzuki Motor Co., 868 F.2d 1226, 1247 (Fed. Cir. 1989) ("It is the general rule that an injunction will issue when infringement has been adjudged, absent a sound reason for denying it."); W.L. Gore & Assocs., Inc. v. Garlock, Inc., 842 F.2d 1275, 1281 (Fed. Cir. 1988) ("Although the district court's grant or denial of injunction is discretionary depending on the facts of the infringement case, injunctive relief against an adjudged infringer is usually granted." (citation omitted)); *see also* George M. Sirilla et al., *Will* eBay *Bring Down the Curtain on Automatic Injunctions in Patent Cases?*, 15 FED. CIR. B.J. 587, 598 (2006) ("After a patent is held infringed and not invalid, courts rarely refuse to issue a permanent injunction."); Note, *The*